



November 16, 2017

Mauri Ditzler
Office of the President
Albion College
611 E. Porter St.
Albion, Michigan 49224

URGENT

Sent via U.S. Mail and Electronic Mail (mditzler@albion.edu)

Dear President Ditzler:

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 about the state of freedom of expression at Albion College following the college's investigation of student Alexander Tokie over an email that he sent to his fellow College Republicans. Albion's investigation of Tokie runs contrary to the college's stated commitments to freedom of expression and must be immediately ended.

The following is our understanding of the facts; please inform us if you believe we are in error.

On September 21, 2017, Tokie sent an email to fellow members of Albion's College Republicans to offer his ideas on how to combat arguments about "white privilege." The email contained talking points related to "Financials," "Workplace," "Education," "Crime," and "Poverty," and advice on "[d]estroying leftist bullshit evidence." The email concluded with the following:

Take the liberal tears from the idiot you just destroyed in your debate, disassemble your American made Springfield M1911 .45 caliber handgun and apply the tears in order to clean the mechanism, reassemble and proceed to purchase ANTIFA and ISIS hunting permits and max out on tags[.]

Tokie's email was shared with the broader campus community. On November 8, Tokie received a letter from Vice President for Student Affairs and Dean of Students Sally J. Walker and Vice President of Finance and Administration Jerry L. White informing him that he was charged with violating Albion's code of conduct. The letter stated, in part:

We have written documentation that suggests your involvement in an incident that occurred on September 21, 2017 on campus. This incident includes you allegedly distributing a document that included a threat of physical violence toward others. Based on this information, you are charged with violating that College policy listed below.

IRRESPONSIBLE STUDENT ACTION #3b – Use of, or threatened use of, physical force or violence. This includes fighting or violent acts of a sexual nature. . . .

Please note that the second sentence of the policy cited above lists two examples of types of behavior that are violations of this College policy. However, this list is not inclusive, and the written documentation for this incident does not include any allegations that you were involved in a fight, or that you committed a violent act of a sexual nature.

The letter went on to inform Tokie that his administrative hearing will be held tomorrow, November 17.

While Albion is a private college and thus not legally bound by the First Amendment, it is both morally and contractually bound to honor the promises it has made to its students. For example, the "Open Expression" policy found in Albion's 2017–18 Student Handbook unequivocally states the university's commitment to free expression:¹

Albion College recognizes an individual's rights to freedom of thought, inquiry, and expression specifically as they extend to the electronic information environment. The College does not monitor, review, or endorse the creation of personal World Wide Web pages and is not responsible for their contents; the views and opinions expressed in such pages or in electronic mail are strictly those of the authors.

The Albion College Diversity Statement, also found in the Student Handbook, restates the college's commitment to free expression:²

¹ *2017-18 Student Handbook*, ALBION COLLEGE (Oct. 15, 2015), <https://www.albion.edu/student-life/student-affairs/current-students/student-handbook/policies-and-expectations>.

² *Id.*

A liberal arts education, by definition, should liberate minds. This process is enhanced in a community that is committed to educational equity, diversity, and unrestricted inquiry. We seek therefore to foster an environment of mutual respect, acceptance, appreciation, and caring for all members of our community. To this end, Albion College condemns all forms of discrimination and harassment, while reaffirming our commitment to academic free speech.

Albion’s punitive response to Tokie’s email expressing mockery of his political opponents is at odds with its stated principles and unacceptably chills the expressive rights of Albion students, which the college has pledged to protect. In order to uphold the principles to which the university commits itself, Albion must immediately end its investigation and acknowledge that Tokie’s email cannot reasonably be the basis of an investigation under Albion’s policy against the “[u]se of, or threatened use of, physical force or violence.”

The Supreme Court has repeatedly held that speech may not be punished merely because many may find it to be offensive or disrespectful. *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”); *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.’”); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (“[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”).

The Supreme Court has defined “true threats,” which are not protected by the First Amendment, as “those statements 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). The Court further elaborated that speech may lose protection as “intimidation,” a form of “true threat,” when “a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.” *Id.* at 360. Tokie’s email, which suggests that his fellow College Republicans use “liberal tears” to clean their handguns and then purchase “ANTIFA”³ and “ISIS” hunting permits, is clearly hyperbolic in nature and does not come close to meeting this standard. If the hyperbolic nature of Tokie’s email is not immediately apparent to Albion’s administration, FIRE suggests that the college conduct further research on whether hunting permits can be purchased for ISIS or Antifa in the state of Michigan.

³ Antifa is an anti-fascist political movement in the United States. Mark Bray, *Who are the antifa?*, WASHINGTON POST (Aug. 16, 2017), https://www.washingtonpost.com/news/made-by-history/wp/2017/08/16/who-are-the-antifa/?utm_term=.e7bcba30bef3.

Moreover, while true threats may be punished, rhetorical hyperbole is protected political speech. In *Rankin v. McPherson*, for example, the Supreme Court was confronted with a comment by a police department employee who, upon hearing a news report that President Reagan had been shot, criticized Reagan’s welfare policies and said, “shoot, if they go for him again, I hope they get him.” 483 U.S. 378, 381 (1987). The Supreme Court observed:

While a statement that amounted to a threat to kill the President would not be protected by the First Amendment . . . McPherson’s statement did not amount to a threat . . . that could properly be criminalized at all. See [*McPherson v. Rankin*, 786 F. 2d 1233, 1235 (5th Cir. 1986)] (“A state would . . . face considerable constitutional obstacles if it sought to criminalize the words that were uttered by McPherson on the day the President was shot”)[.] The inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.

Id. at 386–87.

Likewise, in *Watts v. United States*, an investigator for the Army Counter Intelligence Corps heard the defendant remark:

“They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L. B. J.” “They are not going to make me kill my black brothers.”

394 U.S. 705, 706 (1969).

The Court held that the speech was protected by the First Amendment because it did not amount to an unprotected true threat. The Court acknowledged that the government “undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence.” *Id.* at 707. However, the Court warned that “[w]hat is a threat must be distinguished from what is constitutionally protected speech,” including “political hyperbole” like that “indulged” in by the speaker, because of the country’s “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *Id.* at 707–08. Thus, the defendant’s “very crude offensive method of stating a political opposition to the President” did not amount to a true threat, and it remained protected speech. *Id.* at 708.

The First Amendment sets the baseline for the rights a prospective student would reasonably expect to enjoy when Albion promises that it will respect freedom of expression—and Tokie’s

email undoubtedly constitutes rhetorical, political hyperbole, not a serious expression of intent to do harm. Albion cannot in good faith claim that it “recognizes an individual’s rights to freedom of thought, inquiry, and expression specifically as they extend to the electronic information environment” while investigating a student who used hyperbolic language that is endemic to often rough-and-tumble political debate. We urge Albion College to halt its investigation immediately and reaffirm its commitment to protecting student expression.

FIRE is committed to using all of the resources at its disposal to see this matter through to a just conclusion. We have enclosed with this letter a signed FERPA waiver from Alexander Tokie permitting you to freely discuss his case with FIRE.

We request a response to this letter by the close of business tomorrow, November 17, 2017.

Sincerely,

A handwritten signature in cursive script that reads "Sarah McLaughlin". The signature is written in black ink and is positioned above the typed name.

Sarah McLaughlin
Senior Program Officer, Individual Rights Defense Program

cc:

Sally J. Walker, Vice President for Student Affairs and Dean of Students
Jerry L. White, Vice President of Finance and Administration