March 8, 2019

Chancellor Gary S. May
Fifth Floor, Mrak Hall
University of California, Davis
One Shields Avenue
Davis, CA 95616

URGENT

Sent via Priority Mail and Electronic Mail (chancellor@ucdavis.edu)

Dear Chancellor May:

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 threat to the expressive rights of University of California, Davis (UC Davis) faculty members posed by a report that the university is currently investigating Professor Joshua Clover for his protected speech, despite previous acknowledgment of Clover's First Amendment rights. As a public institution of higher education, UC Davis bears moral and legal obligations to honor the First Amendment rights of its faculty members.

I. FACTS

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

On February 25, 2019, UC Davis student Nick Irvin published a piece in student newspaper *The California Aggie* titled "A UC Davis professor thinks cops 'need to be killed.'"[1] Irvin wrote that, starting in Fall 2018, he heard rumors that a UC Davis faculty member "advocated for violence against law enforcement" and sought to learn more about the rumors after the murder of Davis police officer Natalie Corona in January 2019.

[1] Nick Irvin, *A UC Davis professor thinks cops "need to be killed,"* CALIFORNIA AGGIE, Feb. 25, 2019, https://theaggie.org/2019/02/25/a-uc-davis-professor-thinks-cops-need-to-be-killed/.

Irvin reported finding multiple comments made on Twitter and in an interview by UC Davis professor Joshua Clover that Irvin believed should be known to the campus community:

> "I am thankful that every living cop will one day be dead, some by their own hand, some by others, too many of old age #letsnotmakemore" — tweeted on Nov. 27, 2014.
>
> "I mean, it's easier to shoot cops when their backs are turned, no?" — tweeted on Dec. 27, 2014.
>
> "People think that cops need to be reformed. They need to be killed." — published in an interview on Jan. 31, 2016. [2]

Clover's Twitter account has now been made private and his posts are no longer accessible to the public, but Irvin reproduced the texts of Clover's tweets in his article.

Irvin wrote that he sought to meet with Clover to discuss his commentary and that Clover replied, "I think we can all agree that the most effective way to end any violence against officers is the complete and immediate abolition of the police." Clover further suggested that Irvin "direct any further questions to the family of Michael Brown."[3]

In a comment emailed to Irvin, Chief Marketing and Communications Officer Dana Topousis wrote:

> The UC Davis administration condemns the statement of Professor Clover to which you refer. It does not reflect our institutional values, and we find it unconscionable that anyone would condone much less appear to advocate murder. A young police officer has been killed serving the City of Davis. We mourn her loss and express our gratitude to all who risk their lives protecting us. We support law enforcement, and the UC Davis Police Department and Chief Joe Farrow have been and remain critical partners to our community. [4]

Irvin further reported that, in reference to Clover's comments, Provost Ralph Hexter told him that "[t]he basis for academic freedom is to make sure that the university is a place where unpopular and different views are heard." Irvin's article ended with the statement: "It doesn't matter that his comments came years ago; there can be no statute of limitations on violent

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[2] *Id.*
[3] *Id.*
[4] *Id.*

speech when the offender in question refuses to apologize or make amends. When professors advocate murder, we all lose."[5]

Topousis further told *The Sacramento Bee* on February 26 that UC Davis found that Clover's statements were protected under the First Amendment and not punishable by the university, writing that "[p]ublic statements like those made by Professor Clover are accorded a high level of protection under the First Amendment."[6] Clover also gave a statement to *The Sacramento Bee*: "On the day that police have as much to fear from literature professors as Black kids do from police, I will definitely have a statement."[7]

However, on March 5, news station ABC10 reported that, despite its previous statement affirming Clover's First Amendment rights, UC Davis was investigating his speech:

> Currently, Chancellor Gary S. May has the campus legal team reviewing Clover's conduct and is waiting for their advice so he can better consult the University of California President Janet Napolitano. Napolitano would also need to seek consultation from the Academic Senate which could hold a hearing for Clover.
>
> If Napolitano decided to recommend to the Board of Regents to dismiss the professor, then the Board of Regents would vote on whether to dismiss Clover or not to dismiss him.[8]

FIRE's understanding is that Clover is currently on medical leave and that UC Davis has not issued any clarification about if and when the university's legal team plans to conduct its review. Accordingly, Clover still faces the prospect of investigation and punishment for his speech.

II. ANALYSIS

The First Amendment and the California Constitution's liberty of speech clause protect Joshua Clover's expression, and UC Davis may neither investigate nor punish him for it.

A. The First Amendment binds UC Davis

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[5] *Id.*
[6] Sawsan Morrar, *UC Davis professor reportedly said cops 'need to be killed.' Officials condemn his comments.,* SACRAMENTO BEE, Feb. 26, 2019, https://www.sacbee.com/news/local/education/article226810084.html.
[7] *Id.*
[8] Chelsea Shannon, *Why UC Davis hasn't fired English professor over tweets that cops should be killed*, ABC 10, Mar. 5, 2019, https://www.abc10.com/article/news/local/davis/why-uc-davis-hasnt-fired-english-professor-over-tweets-that-cops-should-be-killed/103-639b5517-38ec-48d4-8221-22d8032b80f0.

It has long been settled law that the First Amendment is binding on public colleges like UC Davis. *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"): *see also Griset v. Fair Political Practices Comm'n*, 8 Cal.4th 851, 866 n. 5 (1994) ("As a general matter, the liberty of speech clause in the California Constitution is more protective of speech than its federal counterpart.").

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. Bd. of Curators of the Univ. of Mo.*, 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." The Court reiterated this fundamental principle in *Snyder v. Phelps*, 562 U.S. 443, 461 (2011), proclaiming 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."

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 sufficiently inoffensive. Ultimately, 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.

B. The First Amendment protects the private speech of government employees like Clover

Employees of government institutions like UC Davis retain a First Amendment right to speak as private citizens on matters of public concern. They 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). As Topousis correctly noted to *The Sacramento Bee*, "[p]ublic statements like those made by Professor Clover are accorded a high level of protection under the First Amendment."[9]

It is indisputable that Clover's Twitter commentary and statements he made in interviews were squarely related to matters of public concern. *See Johnson v. Multnomah Cty., Or.*, 48 F.3d 420, 422 (9th Cir. 1995) ("Speech involves a matter of public concern when it can fairly be considered to relate to any matter of political, social, or other concern to the community.") (internal quotation marks and citation omitted). Clover's expression is precisely the type of speech that the First Amendment was intended to protect. In voicing opposition or hostility toward police officers, who are tasked with acting on behalf of the state to enforce its laws, Clover engaged in "core political speech" where First Amendment protection is 'at its zenith.'" *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 186–87 (1999) (quoting *Meyer v. Grant*, 486 U.S. 414, 425 (1988)). That the statements are of an "inappropriate or controversial character . . . is irrelevant to the question of whether it deals with a matter of public concern." *Rankin v. McPherson*, 483 U.S. 378, 387 (1987) (holding that the expression of hope that President Reagan might be assassinated was protected against retaliation.)

The U.S. Court of Appeals for the Ninth Circuit—the decisions of which are binding on UC Davis—has made clear that offense taken to a faculty member's expression does not constitute adequate injury to government interests sufficient to override a professor's First Amendment rights:

> 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.

[9] Morrar, *supra* note 6.

Adamian v. Jacobsen, 523 F.2d 929, 934 (9th Cir. 1975) (internal citations and quotation marks omitted); *see also Peacock v. Duval*, 694 U.S. 644, 647 (9th Cir. 1982) ("Although we recognize the necessity for the efficient functioning of a public university, such efficiency cannot be purchased at the expense of stifling free and unhindered debate on fundamental educational issues. Merely because [professor's] speech may have had the effect of irritating or even harassing the University's administration does not mean that such speech is stripped of its first amendment protection.") (internal citations and quotation marks omitted).

Similarly, courts in other jurisdictions have rejected the argument that a public institution can discipline a faculty member because his expression caused anger, alarm, or concern. In a case involving the use of gendered and racial slurs as part of a classroom discussion on how language is used to marginalize minorities and other oppressed groups in society, the U.S. Court of Appeals for the Sixth Circuit adhered to the principles set forth in *Terminiello* and rejected a college's argument that intervention by a local civil rights activist posed an actionable risk of disruption to the school's operations. The Court wrote:

> Only after Reverend Coleman voiced his opposition to the classroom discussion did Green and Besser become interested in the subject matter of Hardy's lecture. Just like the school officials in *Tinker*, Green and Besser were concerned with "avoiding the discomfort and unpleasantness that always accompany" a controversial subject. On balance, Hardy's rights to free speech and academic freedom outweigh the College's interest in limiting that speech.

Hardy v. Jefferson Cmty. College, 260 F.3d 671, 682 (6th Cir. 2001) (internal citation omitted).

Indeed, even in cases related to expression about campus administrators themselves, the Ninth Circuit has steadfastly protected faculty expression. In *Bauer v. Sampson*, a faculty member published in a campus newspaper several writings and illustrations sharply critical of Irvine Valley 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 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:

> [G]iven 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.

If the First Amendment protects a faculty member's caustic public comments about administrators on campus, it protects a faculty member's commentary about police, no matter how offensive it may have been to some, many, or even most.

C. Clover's commentary did not constitute a true threat and remains protected by the First Amendment

Certain well-defined categories of speech are excluded from the protection of the First Amendment, including "true threats." These exceptions are exceedingly narrow, and the First Amendment requires government actors to meet an exacting standard before a statement can be said to be an unlawful "true threat."

A "true threat" is a statement through which "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 federal courts of appeal differ widely on whether the First Amendment requires proof of subjective intent to threaten or merely that the statement be objectively threatening. *Commonwealth v. Knox*, 190 A.3d 1146, 1155–57 (Pa. 2018) (surveying the standards adopted by federal courts and adopting a subjective intent standard, as "an objective, reasonable-listener standard . . . is no longer viable"). The Ninth Circuit has analyzed true threats "under both an objective and a subjective standard." *Fogel v. Collins*, 531 F.3d 824, 831 (9th Cir. 2008).

Whether the standard applied is objective or subjective, Clover's comments from 2014 and 2016 do not amount to a true threat. Under a subjective analysis, there is no evidence whatsoever that Clover intended to threaten any police officers. Nor would the statements amount to unprotected true threats under an objective standard, which queries "whether a reasonable person in the defendant's place would foresee that in context the listener would interpret the statement as a serious threat or a joke." *State v. Kilburn*, 151 Wash. 2d 36, 46 (2004). Clover's comments cannot be read to convey "serious" expression of an intent to do harm, and even UC Davis Police Chief Joe Farrow, although he claimed that Clover's words were "disappointing" and conveyed "vile hatred," did not suggest he perceived them in a threatening manner.[10]

The Supreme Court has repeatedly held that while true threats may be punished, rhetorical hyperbole remains protected speech. In *Watts v. United States*, the seminal case addressing true threats versus political hyperbole, an investigator for the Army Counter Intelligence Corps heard the defendant remark:

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[10] *Id.*

> 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. . . .

394 U.S. 705, 706 (1969). 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 "hyperbole" like that "indulged" in by the speaker. *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 remained protected by the First Amendment. *Id.* at 708. Clover's comments about law enforcement, though they may have proved offensive to some or many readers, do not constitute true threats and retain First Amendment protection.

D. An investigation of Clover's speech would unacceptably chill faculty expression

Finally, we remind you that an investigation of constitutionally protected speech can itself violate the First Amendment. 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 Envtl. 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 UC Davis, "the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation" might violate the First Amendment. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963).

Accordingly, several appellate courts, including the Ninth Circuit, 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 . . . .").

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 offensive writings on race and intelligence, announcing an *ad hoc* committee to review whether the professor's expression—which he stated "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 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.

UC Davis presently finds itself in a similar position. According to ABC 10, UC Davis has announced its intent to investigate protected First Amendment activity. The threat of eventual discipline as a result is no less present than it was in *Harleston*, as is the unconstitutional chilling effect on Clover's speech. Indeed, similar to the professor in *Harleston*, Clover has already self-censored, making his Twitter page private and withdrawing from public discussion. *See Harleston,* 966 F.2d at 89 (noting that the professor declined speaking and writing invitations for fear that he would be fired).

III. CONCLUSION

If reports that UC Davis has launched an investigation into Clover's plainly protected speech are accurate, the university places itself at odds with the First Amendment and the very principles of higher education. In keeping with its legal and moral obligations to the First Amendment, and the university's initial statements recognizing Clover's First Amendment rights, UC Davis must abandon any investigation into Clover's speech.

We request receipt of a response to this letter by the close of business on March 15, 2019, reaffirming UC Davis' recognition that Professor Clover's speech is protected by the First Amendment and confirming that no steps will be taken to penalize or investigate his expression.

Sincerely,

Sarah McLaughlin
Senior Program Officer, Legal and Public Advocacy

cc:
Michael F. Sweeney, Chief Campus Counsel