



December 3, 2020

Justin Gordon
Chief, Open Records Division
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

Sent via the Public Information Act Electronic Filing System

Re: Public Information Request to Collin College
Request: October 13, 2020
Requestor: Adam Steinbaugh /
Foundation for Individual Rights in Education (FIRE)

Dear Mr. Gordon:

FIRE submits this third public comment pursuant to Texas Government Code section 552.304 concerning FIRE's October 13, 2020, request for records.

On November 20, 2020, FIRE issued a records request to the Office of the Attorney General ("OAG") seeking copies of certain exhibits submitted by Collin College in connection with the above-entitled request but which had not been provided to FIRE. On October 28, FIRE asked the College to share these exhibits but received no response.¹ FIRE obtained the exhibits—enclosed as **Exhibit O**—yesterday, only through our November 20 OAG request.

Those exhibits bring into stark relief the College's failure to comply with section 552.301(e-1). The exhibits are saturated with annotations—that is, written comments—discussing each exhibit and setting forth the College's arguments about their relevance. Section 552.301(e-1) required the College to provide FIRE with its "written comments" by November 3, 2020. By failing to do so and ignoring an opportunity to cure, the College withheld more information than the statute permits.²

¹ See **Exhibit N**.

² See also, e.g., OR2011-14407 (governmental body failed to comply with section 552.301(e-1) when it failed to produce an exhibit which "d[id] not disclose or contain the substance of the information requested").

This omission has meaningful ramifications because it frustrated FIRE’s ability to address the College’s contentions. For example, the College provided the OAG with a tweet from Prof. Burnett stating that she was “all lawyered up.”³ The College did not, however, include a tweet in the same thread in which Burnett *disclaimed* her intent to file a lawsuit, saying that she was “not litigious” but had hired a lawyer in order to be “ready to protect my rights[.]” See **Exhibit P**. Had the College complied with its obligations under section 552.301’s transparency functions, this omission might have been avoided or corrected. Public records requestors should not have to issue new records requests to determine whether governmental bodies are being forthcoming in their submission to the OAG.

Pursuant to section 552.302 of the Government Code, failure to comply with the procedural requirements of section 552.301(e-1) results in the presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information.⁴ A compelling reason exists when third-party interests are at stake or when information is confidential under other law.⁵ Section 552.103—the exception invoked by the College—is a discretionary exception to disclosure that protects a governmental body’s interests and may be waived.⁶

In failing to comply with the procedural requirements of section 552.301, the College has waived its claims under section 552.103, and there is no compelling reason to withhold the information.

Sincerely,



Adam Steinbaugh
Director, Individual Rights Defense Program

Cc: Pete Thompson, via email

Encl.

³ Exhibit D.

⁴ See Gov’t Code § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381–82 (Tex. App.—Austin 1990, no writ); Open Records Decision No. 319 (1982).

⁵ Open Records Decision No. 150 (1977).

⁶ See Open Record Decision No. 665 at 2 n.5 (discretionary exceptions generally); *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475, 476 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive litigation exception, section 552.103).

EXHIBIT N



Adam Steinbaugh <adam@thefire.org>

Response to PIA Request (Collin College - Oct. 13th)

4 messages

Thompson, Pete <PThompson@clarkhill.com>
To: "adam@thefire.org" <adam@thefire.org>

Tue, Oct 27, 2020 at 6:16 PM

Mr. Steinbaugh,

Attached is a letter filed with the Attorney General today in response to your request submitted under the Public Information Act to Collin College on October 13, 2020. The AG will determine whether responsive information may be released. Portions of the letter have been redacted in accordance with the Public Information Act handbook. Thank you.

Pete

Pete Thompson • Clark Hill Strasburger

901 Main Street, Suite 6000, Dallas, TX 75202

214.651.2033 • Fax 214.659.4021

PThompson@ClarkHill.com

This email message and any attachments are confidential and may be privileged. If you are not the intended recipient, please notify us immediately by reply email and destroy all copies of this message and any attachments. Please do not copy, forward, or disclose the contents to any other person. Thank you.

**Letter to AG (Collin College - Steinbaugh PIA) Requestor_Redacted.pdf**

109K

Adam Steinbaugh <adam@thefire.org>
To: "Thompson, Pete" <PThompson@clarkhill.com>

Wed, Oct 28, 2020 at 9:49 AM

Mr. Thompson --

Can you provide me with copies of Exhibits D, E and F?

Thank you in advance,

Adam B. Steinbaugh
Director, Individual Rights Defense Program*

Foundation for Individual Rights in Education
510 Walnut Street
Suite 1250
Philadelphia, PA 19106
(215) 717-3473
adam@thefire.org

This communication may contain information that is confidential or privileged. Unless you are the addressee (or authorized to receive this message by the addressee), you may not use, copy, or disclose the contents of this message or information contained in this message to anyone. If you believe that you have received this message in error, please advise the sender and delete this message.

** Admitted in California and Pennsylvania*

[Quoted text hidden]

Adam Steinbaugh <adam@thefire.org>
To: "Thompson, Pete" <PThompson@clarkhill.com>

Tue, Nov 10, 2020 at 8:00 AM

Mr. Thompson --

Please find attached FIRE's comments with respect to this request, which we submitted to the Office of the Attorney General yesterday evening.

Best,

Adam B. Steinbaugh
Director, Individual Rights Defense Program*
Foundation for Individual Rights in Education
510 Walnut Street
Suite 1250
Philadelphia, PA 19106
(215) 717-3473
adam@thefire.org

This communication may contain information that is confidential or privileged. Unless you are the addressee (or authorized to receive this message by the addressee), you may not use, copy, or disclose the contents of this message or information contained in this message to anyone. If you believe that you have received this message in error, please advise the sender and delete this message.

** Admitted in California and Pennsylvania*

[Quoted text hidden]

 **FIRE Public Comments to Texas Office of the Attorney General, Open Records Division, November 9, 2020.pdf**
813K

Adam Steinbaugh <adam@thefire.org>
To: "Thompson, Pete" <PThompson@clarkhill.com>

Wed, Dec 2, 2020 at 10:21 PM

Mr. Thompson --

EXHIBIT O

EXHIBIT D

Social Media Posts

These are social media posts made by the College employee at issue. In these posts, she indicates that she has hired a lawyer in response to a situation involving comments she made on social media and complaints received by the college shortly thereafter. Based on these comments (and other information noted in our letter), the College reasonably anticipated litigation in this matter.



Tweet



L.D. Burnett

@LDBurnett



I am watching as well. All lawyered up.



Cathy Williamson @toby1977 · Oct 10

@collincollege You actually employ this pathetic excuse for a teacher—LD Burnett? Collin College is all over social media and, I hope, will be all over the news for your decision to expose young minds to this filthy-minded woman. You must do better. We are waiting and watching.

11:40 AM · Oct 10, 2020 · Twitter for iPhone



Thread

Collin College



L.D. Burnett

@LDBurnett



Replying to [@LDBurnett](#)

The college President replied to this email (only to me), but I'll spare you all reading that one. It will go to my lawyers.

This is why you get professional insurance and join [@AAUP](#), even if you're not in a collective bargaining state.

12:04 PM · Oct 12, 2020 · Twitter Web App

EXHIBIT E

Email from

Employee

This is an email where the College employee indicates that she wishes to have her attorney present at a meeting with the College. She makes multiple reference to her attorney throughout the email. This communication (along with other information noted in our letter) demonstrates the College reasonably anticipated litigation.

From: Lora Burnett
Sent: Tuesday, October 13, 2020 1:17 PM
To: Daphne H. Babcock <dbabcock@collin.edu>
Subject: Re: Quick Zoom today

Hi Daphne,

Honestly, I very much wish I could speak with you today as well—I don't like to think of you going on vacation when you have something still left on your to-do list, and I don't like things hanging over my head either. Additionally, my collegial instincts are such that I think keeping things informal and conversational is always best, and I enjoy talking to you. I know this would be a good conversation. My email to you at the end of September about the modus operandi of Campus Reform and right-wing social media outrage was pretty accurate, but I guess I was off by a week!

However, because this conversation would involve a document I am expected to sign, a document that includes fairly broad statements about general practices, I can't sign it or discuss it with you without first consulting my attorney.

Though this is not a disciplinary matter, the document does indicate that it may lay the groundwork for future disciplinary action. So I will either need my counsel present or I will need to provide them with specific examples of the issues referenced in paragraphs two and three of this document.

The wording of paragraph two is of particular concern, as I am contacted regularly on my Collin College email account by editors, colleagues from other institutions, contributors to the website that I edit as a service to the profession, prospective graduate students, bloggers, and so forth.

Without even having shown this document to my attorney, I can tell you now that I cannot sign off on any document that states that I am not allowed to reply to an email sent to my Collin College account. Perhaps you could provide some examples of problematic replies from me that warrant this warning.

I would have the same concern about paragraph three. Please provide some examples where I have copied personal or private messages to others via their Collin.edu email accounts.

So, regretfully, I will need to keep our appointment on the 19th. I sincerely hope that my counsel will be able to look over this document and whatever examples you provide and happily sign off on what should be a congenial conversation. But I must not take any steps without a sign off from legal counsel, and I still haven't heard back from them about your first message of the day.

I am so sorry to leave this unfinished business for you and I hope to be able to talk to you informally on the 19th.

Thanks so much for your understanding, and I do wish you rest and relaxation on your vacation.

Dr. Lora Burnett
Professor of History
Collin College

EXHIBIT F

Demand Letter



Demand letter - includes three demands on final page

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.

EXHIBIT J

Social Media Posts

These are social media posts made by the College employee at issue. In these posts, she indicates that she has hired a lawyer in response to a situation involving comments she made on social media and complaints received by the college shortly thereafter. Based on these comments (and other information noted in our letter), the College reasonably anticipated litigation in this matter.



Tweet



L.D. Burnett

@LDBurnett



I am watching as well. All lawyered up.



Cathy Williamson @toby1977 · Oct 10

@collincollege You actually employ this pathetic excuse for a teacher—LD Burnett? Collin College is all over social media and, I hope, will be all over the news for your decision to expose young minds to this filthy-minded woman. You must do better. We are waiting and watching.

11:40 AM · Oct 10, 2020 · Twitter for iPhone



Thread



L.D. Burnett @LDBurnett · Oct 12
 LOL. @CollinCollege is publicly throwing me under the bus, while the college president sends out an email saying that personnel decisions will not be played out in public.

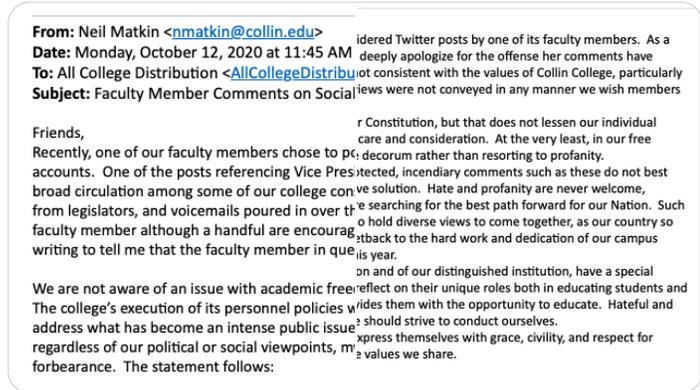
Wanna bet?
[#highered](#)
[#twitterstorians](#)
 cc @AAUP

p.s. The all-college email is the first I heard about it.

86 189 761



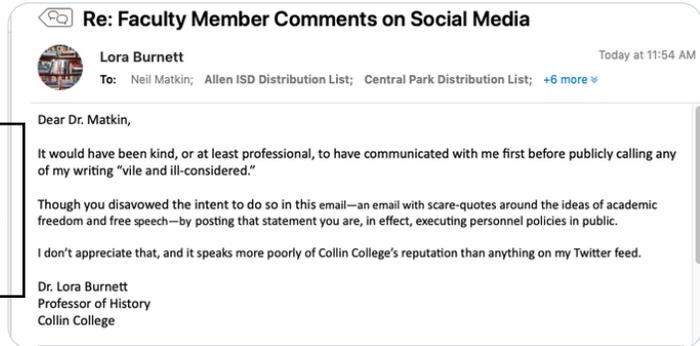
L.D. Burnett @LDBurnett · Oct 12
 Here is the President's email to all faculty in the entire college -- the first notice or acknowledgment I received from my college about any of this.



77 112 405



L.D. Burnett @LDBurnett · Oct 12
 And here is my reply, which also went to all faculty in the entire college.



15 71 883



L.D. Burnett @LDBurnett · Oct 12
 The college President replied to this email (only to me), but I'll spare you all reading that one. It will go to my lawyers.

This is why you get professional insurance and join @AAUP, even if you're not in a collective bargaining state.

35 58 972

Replies



Bob Ramsey @BRamseyJr · Oct 12
 Replying to @LDBurnett and @AAUP

Search Twitter

New to Twitter?

Sign up now to get your own personalized timeline!

Sign up

Relevant people



L.D. Burnett @LDBurnett [Follow](#)
 Columnist @ArcDigi. Editor @ideas_history. Bylines: @slate @chroniclereview @chronicle @publicseminar Book under contract: UNC Press. Tweets don't rep employer



AAUP @AAUP [Follow](#)
 We champion #academicfreedom, advance shared governance, and organize all faculty to promote economic security and quality education.

What's happening

Entertainment · 4 hours ago
Britney Spears loses court appeal to remove her father from conservatorship

US elections · Last night
Pennsylvania postal worker recants allegations of ballot tampering, Washington Post, Washington Examiner and NYT report

US elections · LIVE
Pennsylvania: Get local updates about the elections

US elections · Yesterday
Thousands of dead people did not cast votes in Michigan or Pennsylvania, CNN and FactCheck.org report

US elections · LIVE
Texas: Get local updates about the elections

Show more

Terms of Service Privacy Policy Cookie Policy

Ad info More

Don't miss what's happening

People on Twitter are the first to know.

Log in

Sign up



1 ↻ 6 ↗



Jenna Magnuski (she/her/hers) @JennaMagnuski · Oct 12 ⋮

Replying to @LDBurnett and @AAUP
Found the CR article. Let's talk about the college prez' own failed professionalism and modeling, eh?

💬 ↻ 2 ↗



Duane Larson @larsondh1 · Oct 12 ⋮

Replying to @LDBurnett and @AAUP
Wow. So sorry this is happening to you. Glad you're lawyering!

💬 ↻ 3 ↗

[View more replies](#)

More Tweets



L.D. Burnett @LDBurnett · Nov 9 ⋮

I am pleased to report that I am now not the only Dr. Burnett in our family, and I'm quite sure that I'm not the smartest Dr. Burnett in our family either. Props to my brilliant kid, who just defended his dissertation in mathematics.

 **L.D. Burnett** @LDBurnett · Nov 9

I thought MY dissertation defense was intense. Holy shit. Tuned in to my kid's defense via Zoom and the whole damn department is tuned in. Kid can barely get through a slide without fielding multiple questions. I would die.

[Show this thread](#)

💬 91 ↻ 9 1.1K ↗

🔍 Search Twitter

Don't miss what's happening

People on Twitter are the first to know.

Log in

Sign up

EXHIBIT K

Email Exchange

From: Lora Burnett
Sent: Tuesday, October 13, 2020 11:12 AM
To: Daphne H. Babcock <dbabcock@collin.edu>
Subject: Re: Quick Zoom today

Dear Daphne,

What an interesting topic.

I should be available on the date and time that you've identified, but I will need to have counsel on the call with me. I will share the Zoom link with my attorney.

Thank you.

Dr. Lora Burnett
Professor of History
Collin College

From: "Daphne H. Babcock" <dbabcock@collin.edu>
Date: Tuesday, October 13, 2020 at 10:44 AM
To: Lora Burnett <lburnett@collin.edu>
Subject: RE: Quick Zoom today

Lora:

My request for a zoom is not in regards to your academic freedom or Dr. Matkin's email. It does relate to your using Collin's Technology Resources to engage in private or personal conversations.

My day has gotten busy since I first emailed you since I will be out on vacation beginning tomorrow. I see from your Outlook Calendar that you are available at 2:00 pm on Monday, October 19th. Does that work for you? If it does I will send you a Zoom Link for that time. Please let me know of your availability.

Regards,

Daphne

Daphne Babcock
Associate Dean, Academic Affairs
Collin College Wylie Campus
Student Center 331 E
391 Country Club Road
Wylie, Texas
972-378-8835

EXHIBIT L
Highlighted
Request

From: Adam Steinbaugh <adam@thefire.org>
Sent: Tuesday, October 13, 2020 1:26 PM
To: Public Info <publicinfo@collin.edu>
Subject: FIRE Public Records Request

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you validate the sender and know the content is safe.

To whom it may concern:

This is a request for the following records pursuant to the Texas Public Information Act (Gov't Code § 552.001, *et seq.*)

Records Requested:

From October 7, 2020, to the present date:

1. Any email, voicemail, text message, social media message, or other communication, or any document reflecting such communication, constituting the "calls and contacts from legislators" referred to in Neil Matkin's October 12, 2020 email to the "All College Distribution" email list.

Fee waiver request: This request is made on behalf of the Foundation for Individual Rights in Education, a nonprofit and nonpartisan organization that works to preserve civil liberties on college campuses. We request a waiver of any fees or costs associated with this request.

This request concerns a matter of public interest. The records are not sought for a commercial or personal interest, but rather for the purpose of providing the public with information concerning civil liberties in higher education.

Pursuant to Gov't Code § 552.275 (l), FIRE may not be required to pay costs for public records requests. Further, FIRE qualifies under Gov't Code § 552.275(j)(3)-(4), as FIRE's website is a news medium engaged in the dissemination of news and information to the general public.

Request for expedited processing: The records pertain to a matter of public importance and current debate. Providing expedited production of the records will facilitate the public understanding of these matters before they are fully resolved. Any undue delay in production will undermine the purpose of the public records laws, which serve to allow public input and oversight of government affairs.

Request for Privilege Log: If any otherwise responsive documents are withheld on the basis that they are privileged or fall within a statutory exemption, please provide a privilege log setting forth (1) the subject matter of the document; (2) the person(s) who sent and received the document; (3) the date the document was created or sent; and (4) the basis on which it is the document is withheld.

Please note that this request does not seek a search of faculty or student email accounts or

records. These requests should in no way be construed to include a review or search of email accounts, websites, or other forms of data or document retention which are controlled by students, alumni, or faculty members, nor by governmental or advisory bodies controlled by the same. Any search should be limited to documents held by the administration and/or its staff members, including records created or maintained by persons acting in the capacity of administrators or staff members.

If I can be of assistance in interpreting or narrowing this request, please don't hesitate to ask.

Best,

Adam B. Steinbaugh

Director, Individual Rights Defense Program*
Foundation for Individual Rights in Education
510 Walnut Street
Suite 1250
Philadelphia, PA 19106
(215) 717-3473
adam@thefire.org

This communication may contain information that is confidential or privileged. Unless you are the addressee (or authorized to receive this message by the addressee), you may not use, copy, or disclose the contents of this message or information contained in this message to anyone. If you believe that you have received this message in error, please advise the sender and delete this message.

** Admitted in California and Pennsylvania*

EXHIBIT P

← Tweet



L.D. Burnett
@LDBurnett

I am watching as well. All lawyered up.

Cathy Williamson @toby1977 · Oct 10
@collincollege You actually employ this pathetic excuse for a teacher—LD Burnett? Collin College is all over social media and, I hope, will be all over the news for your decision to expose young minds to this filthy-minded woman. You must do better. We are waiting and watching.

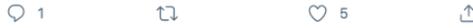
12:40 PM · Oct 10, 2020 · Twitter for iPhone

5 Retweets 1 Quote Tweet 167 Likes

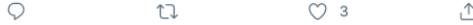


Catherine *Aristocrat* Campbell @CampCat953 · Oct 10

Replying to @LDBurnett
Reason 8 million or so I don't miss Plano.



L.D. Burnett @LDBurnett · Oct 10



Drew Morton @thecinemadoctor · Oct 10

Replying to @LDBurnett
Defamation lawsuits are gonna be a hell of a drug. Get 'Em!



L.D. Burnett @LDBurnett · Oct 10

No. I'm not litigious. Just ready to protect my rights as both a private citizen and a public employee. But I do recommend that everyone get professional insurance. This is what it's for.



Drew Morton @thecinemadoctor · Oct 10

Is there a specific broker you'd recommend?



L.D. Burnett @LDBurnett · Oct 10

The @The_OAH has a member benefit that includes discounted professional insurance. That's what I used. Whatever academic orgs you belong to will have similar benefits. Coverage starts on the first day of the month after you purchase it.



Drew Morton @thecinemadoctor · Oct 10

Gracias!



Surf City Writer 歴史 @SurfCityWriter · Oct 10

Replying to @LDBurnett
Have been reporting and blocking yesterday and today. Hang in there!





L.D. Burnett @LDBurnett · Oct 10

🗨️ 🔄 ❤️ 1 📤



Parmesan & Pinot - GA Needs 2 Democratic Senators @.. · Oct 10

Replying to @LDBurnett

I had to Google why people were angry at you and found this Fox News article.

Why is it newsworthy that college professors reacted like everyone else watching Pence at the debate?



College professors let loose profane criticism of Pence during VP deb...
College professors targeted Mike Pence with a torrent of criticism on social media during Wednesday's vice presidential debate with Sen. ...
[foxnews.com](https://www.foxnews.com)

🗨️ 3 🔄 4 ❤️ 42 📤



Marite Rodriguez @MariteRodz · Oct 10

Thanks for linking that. From the article -

"Throughout the entire time I have been on Twitter, my conservative students and liberal students, my Christian fundamentalist and Islamic fundamentalist students, my liberal Christian and liberal Islamic students, my Hindu students of various political perspectives, and my atheist or agnostic or pagan students have always been comfortable in my classes, as my teaching evaluations from my past and current employers can attest," she told Fox News. "If I disappoint any students, it is probably my Leftist / Marxist students, since I tend to disagree

🗨️ 🔄 ❤️ 📤



Marcia Carrillo @MCarrilloEDU · Oct 10

Replying to @LDBurnett

I got your back sis. Collin college is fortunate to have a 1st rate, true historian that is an advocate for equity and passionate in helping all. #blessed

🗨️ 🔄 ❤️ 10 📤



Ian Garner @irgarner · Oct 10

Replying to @LDBurnett

I've been seeing these tweets pop up and, for what it's worth, you're

awesome. keep up the good fight 🙌



Kevin Mitchell Mercer @KevinIsHistory · Oct 10

...

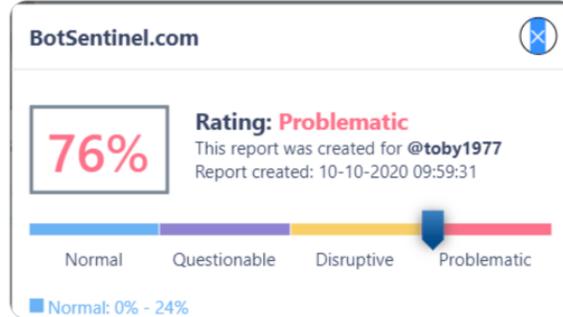
Replying to @LDBurnett
botsentinel.com/profile/338113...



Wendy Trakes @WendyTrakes · Oct 10

...

Replying to @LDBurnett



chelsea g. summers @chelseagsummers · Oct 10

...

Replying to @LDBurnett
"Shuts his little demon mouth up" is a gorgeous, apt, heart-warming turn of phrase



Marite Rodriguez @MariteRodz · Oct 10

...

Replying to @LDBurnett
Wait, she snitch-tagged your boss but didn't tag you?



Richard Birdsall @rbirds12 · Oct 10

...

Replying to @LDBurnett
I was wondering where all this was coming from. I spotted the FoxNews (sic) piece naming you and including your perfectly rational responses. Comments highlighted in the story are pretty mild when compared to our prez's daily utterances.

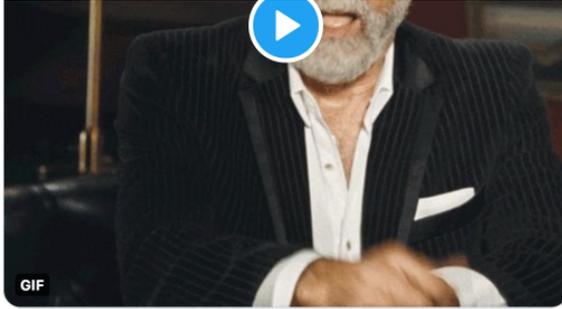


Stentorian Historian @AdroitlyAbsurd · Oct 10

...

Replying to @LDBurnett
Hoping you don't need to call your lawyer but well aware that you're MORE than capable of taking these people on if it comes to that





🗨️ ↻ ❤️ 1 📤



Paula Smith-Hawkins @PaulaSmithHawk · Oct 10

⋮

Replying to @LDBurnett

Reported and blocked.

🗨️ ↻ ❤️ 📤



Destiny Renee @_Destiny_Renee · Nov 20

⋮

Replying to @LDBurnett

So glad I'll be graduating from Collin soon. It's disgusting how they've handled not only your personal tweets on your personal social media, people's response to them and the way they shamed you on the school website by apologizing for you tweeting, but also the COVID situation

🗨️ ↻ ❤️ 📤

More replies



Alan May @AlanMay14708298 · Oct 10

⋮

Replying to @LDBurnett



🗨️ ↻ ❤️ 📤



Stephen @Demi40Stephen · Oct 10

⋮

Replying to @LDBurnett

Aww after profanity from a liberal she lawyers up ? Confused 🤔😂

🗨️ 1 ↻ ❤️ 📤



Stephen @Demi40Stephen · Oct 10

⋮

Imagine if a professor insults Biden with the same sentence 😂 just watch ! It's so funny 😂 I can't wait when liberals will squirm at trumps victory 🙌 This Professor should be fired 🙌 what does her school want to display , diversity of thought 🗨️

🗨️ ↻ ❤️ 📤



Cathy Williamson @toby1977 · Oct 10

...

Replying to @LDBurnett

Good for you. Why do you want to be this way? Have your opinions. Fine. But true to form to hate-filled libs, you have checked all the boxes of the extremism you want for America. Disgusting

9

2

2



Allan Lane @AllanCLane · Oct 10

...

You say you're a Christian but you support the guy who doesn't go to church, has 5 kids by 3 wives, slept with a porn star while his wife nursed his child, supports racist neo-Nazis, incites violence, and constantly lies. Disgusting. God is watching you.



2



Massive Dumps, PhD @AmandaAnnKlein · Oct 10

...

Replying to @LDBurnett

Jesus L.D., what happened??? Is this because you tweeted about the VP debates? I'm sorry these assholes are up your ass.

1



5



L.D. Burnett @LDBurnett · Oct 10

...

Yes, it was a tweet about Mike Pence's demon mouth. Truth hurts.

1



7



Massive Dumps, PhD @AmandaAnnKlein · Oct 10

...

I'm so sorry. I know you are a strong lady but this is still so stressful. Sending good vibes.

1



3



L.D. Burnett @LDBurnett · Oct 10

...

thank you!

1



1



Dr. Catherine Prendergast @cjp_still · Oct 10

...

UGH. Feel free to DM for any support. This is outrageous.



3

