



December 8, 2017

Dr. Ronnie Green
Chancellor
University of Nebraska–Lincoln
201 ADMS
Lincoln, Nebraska 68583-0708

Sent via U.S. Mail and Electronic Mail (rgreen@unl.edu)

Dear Chancellor Green:

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 freedom of expression at the University of Nebraska-Lincoln (UNL) posed by the university's response to faculty who protested against a tabling event promoting student group Turning Point USA.

Our understanding of the facts of this matter is derived from public reports and correspondence, including letters sent by the national and UNL chapters of the American Association of University Professors on September 13, September 15, and November 28, 2017. Because the facts appear to be well-known and undisputed, this letter incorporates by reference the facts recounted in those letters.

For the sake of orienting a reader unfamiliar with this matter, a basic synopsis follows. We appreciate that UNL may have facts to which we are not privy; if so, we invite UNL to share them with us. If, however, the facts as we understand them are substantially accurate, UNL is in breach of its legal obligations under the First Amendment, and its moral obligations as an institution of higher education.

I. FACTS

On August 26, 2017, a UNL student set up a table to recruit for Turning Point USA (TPUSA), a conservative nonprofit organization. TPUSA maintains a controversial "Professor Watchlist"

website, intended to “expose and document college professors who discriminate against conservative students and advance leftist propaganda in the classroom.”¹

While the student tabled on behalf of TPUSA, two distinct events transpired.

First, a UNL employee approached the student and told her to “move this to the free speech zone” or police would be called, and that the student could “‘free speech’ all [she] want[s] but [she] cannot hand out propaganda.”² A video recording of this exchange has been retweeted over 7,000 times.³ The university later explained that the “employee’s use of the term ‘free speech area’ or ‘free speech zone’ was perhaps awkward, but reflective of how [some] staff sometimes informally refer to” a particular area adjacent to where the student was tabling.⁴

The second event was that, after several hours of tabling and discussions with passersby, several members of the UNL community held a counter-demonstration criticizing TPUSA.⁵ The demonstrators included a tenured professor as well as a lecturer, Courtney Lawton. The professor held a sign reading, “Turning Point: Please put me on your watchlist.” Lawton held a sign reading “just say no! to neo-fascism.” When the student recorded video of Lawton demonstrating, Lawton displayed her middle finger to the camera and said, “Neo-fascist Becky right here . . . wants to destroy public schools, public universities, hates DACA kids.” Demonstrators were also recorded saying, “No KKK, no neo-fascist USA. . . . Fight nationalism, fight white supremacy.” There was no physical altercation or threat of violence made during the demonstration.

There is no indication that the student was enrolled in any class taught by Lawton nor any of the other professors involved. Lawton taught two sections of English 150.

On September 5, Lawton met with Dr. Donde Plowman, executive vice chancellor and chief academic officer, who informed Lawton that she was being relieved of her teaching responsibilities for “security reasons.” In a public statement, UNL stated that “because of safety concerns raised by this incident,” Lawton had been reassigned to non-teaching duties.⁶

¹ Turning Point USA, *About Us*, PROFESSOR WATCHLIST, <http://www.professorwatchlist.org/index.php/about-us> (last visited Dec. 8, 2017); see also, Zach Greenberg, *Professor Watchlist Draws Criticism from Free Speech Groups*, FIRE NEWSDESK, Nov. 29, 2016, <https://www.thefire.org/professor-watchlist-draws-criticism-from-free-speech-groups>.

² Charlie Kirk (@charliekirk11), TWITTER (Aug. 28, 2017, 11:44 AM), <https://twitter.com/charliekirk11/status/902195108224872448/video/1>.

³ *Id.*

⁴ Jessica Larkins, *University clarifies confusion surrounding ‘free speech zone’*, DAILY NEBRASKAN, Sept. 18, 2017, http://www.dailynbraskan.com/news/university-clarifies-confusion-surrounding-free-speech-zone/article_20c182cc-9ce4-11e7-9028-dfa99cdbe970.html.

⁵ Hannah Scherlacher, *VIDEO: Profs bully TPUSA prez while she recruits on campus*, CAMPUS REFORM, Aug. 25, 2017, <https://www.campusreform.org/?ID=9649>.

⁶ Chris Dunker, *UNL lecturer filmed confronting conservative student removed from teaching duties*, LINCOLN JOURNAL-STAR, Sept. 7, 2017, http://journalstar.com/news/local/education/unl-lecturer-filmed-confronting-conservative-student-removed-from-teaching-duties/article_41fd9dd4-c63a-5006-ae6c-

After the meeting with Plowman, Lawton received a written warning in a letter from Plowman stating, in relevant part, that Lawton’s “conduct was outside the bounds of what [the university] expect[s] for classroom instructors” and that “[t]he way [she] chose to express [her] views was disrespectful, and it was in fact experienced by the student as ‘silencing.’” Plowman’s letter explicitly warned that Lawton’s “employment relationship with the university” would be “jeopardized” if there were “further incidents in which [the university] determine[s] that [her] conduct fails to meet the duties of academic responsibility.”

Plowman’s September 5 letter specifically referenced the University of Nebraska Board of Regents Bylaws on “Academic Responsibility,” which provide that “when political activities interfere with the fulfillment of professional and contractual obligations, judgments must be made and appropriate action taken.”⁷ That policy proceeds to state that each member of the community “should be treated with respect and dignity,” but it sets forth no criteria identifying what expression falls short of “respect.”⁸

The matter also drew the attention of state legislators. Sen. Tom Brewer emailed the president of the University of Nebraska, remarking that “[t]his event is being watched very closely by the Unicameral” and forwarding an email from Sen. Laura Ebke.⁹ Sen. Ebke, a member of the Nebraska legislature’s Education Committee,¹⁰ shared that she was “concerned about University employees/instructors being actively engaged in counter-protests against University students on campus,” which she felt “violates some ethical codes of conduct.”¹¹ In an op-ed published in the *Scottsbluff Star-Herald*, state Sen. Steve Erdman, another member of the legislature’s Education Committee¹², complained that the demonstration against the TPUSA tabling was “pre-meditated,” opines that the student had been “verbally assaulted” and labeled a “neo-fascist,” and said that he “expect[ed UNL] to terminate the employment” of the demonstrators “immediately.”¹³ An October 30 op-ed published in the *Hastings Tribune* by three state legislators queried whether professors at UNL were “hostile toward

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⁷ University of Nebraska Board of Regents Policies, RP-4.1 (“Political Activity”), *available at* <https://www.nebraska.edu/docs/board/RegentPolicies.pdf>.

⁸ *Id.*

⁹ Email from Senator Tom Brewer, 43rd District, to Hank M. Bounds, President, Univ. of Neb. (Aug. 29, 2017, 8:38 AM), *available at*

<https://bloximages.chicago2.vip.townnews.com/journalstar.com/content/tncms/assets/v3/editorial/7/92/792c8ed5-5512-5ede-9a0f-3c941443d9a0/59b1c1df0b935.pdf.pdf>.

¹⁰ Nebraska Legislature, *Education Committee*, *available at* <http://news.legislature.ne.gov/edu> (last visited Dec. 1, 2017).

¹¹ E-mail from Senator Laura Ebke, 32nd District, to Anna Wishart *et al.* (Aug. 29, 2017, 9:01 AM), *available at* <https://bloximages.chicago2.vip.townnews.com/journalstar.com/content/tncms/assets/v3/editorial/7/92/792c8ed5-5512-5ede-9a0f-3c941443d9a0/59b1c1df0b935.pdf.pdf>.

¹² Nebraska Legislature, *Education Committee*, *available at* <http://news.legislature.ne.gov/edu/> (last visited Dec. 1, 2017).

¹³ Sen. Steve Erdman, *ERDMAN: UNL professor, teaching assistant need to be terminated*, SCOTTSBLUFF STAR-HERALD, Sept. 7, 2017, http://www.starherald.com/opinion/erdman-unl-professor-teaching-assistant-need-to-be-terminated/article_b42d7185-12a6-50a0-811c-1f2112f31300.html.

conservative students,” again characterizing speech as “verbally assaulting” the TPUSA organizer.¹⁴

In an op-ed responding to this criticism, you wrote that the August 25 exchange “led many Nebraskans to ask whether their university is a welcoming place for conservatives,” and announced that UNL “communicated today to the grad student that she will not teach at [the] university going forward because of this inappropriate behavior.”¹⁵ You were quoted by the *Daily Nebraskan* saying, “This is the time that we order those courses and lecturers and teachers into those classes,” referring to the decisions made about future courses and who will teach them, and “it was clear that based on the fact that this is a continuing issue, we could not put [Lawton] back in the class without it being disruptive to the university, and that was the decision.”¹⁶

On August 28, University of Nebraska President Hank M. Bounds issued a statement in which he remarked, in relevant part, that he is “a vigorous defender of free speech” and that he “stand[s] by the rights of all employees and students to express their opinions, no matter how provocative.”¹⁷

President Bounds’ statement cannot be squared with UNL’s termination of Courtney Lawton.

II. ANALYSIS

As an initial matter, FIRE echoes and reiterates the concerns raised by each of the AAUP letters cited above. The facts recited there, and in public records and reports, raise serious questions about the university’s commitment to freedom of expression. Punishing a faculty member for public political expression on the basis that it lacks civility is unconstitutional. The First Amendment does not permit the government, including public universities, to require its constituents to respond only *politely* to views they find offensive.

It has long been settled law that the First Amendment is binding on public institutions of higher education such as UNL. *See 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,

¹⁴ Steve Halloran *et al.*, *5 questions for UNL*, HASTINGS TRIBUNE, Oct. 30, 2017, http://www.hastingstribune.com/opinion/questions-for-unl/article_cd11a126-bd85-11e7-a565-87fb4d9dd3cb.html.

¹⁵ Ronnie Green, *Chancellor: With hard work, Nebraska can lead on free speech issues*, UNIV. OF NEB., Nov. 20, 2017, <https://news.unl.edu/newsrooms/today/article/chancellor-with-hard-work-nebraska-can-lead-on-free-speech-issues>.

¹⁶ John Grinvalds and Collin Spilinek, *UNL administrators address possible political bias on campus*, DAILY NEBRASKAN, Nov. 18, 2017, http://www.dailynebraskan.com/news/unl-administrators-address-possible-political-bias-on-campus/article_6e0abb0c-cc2d-11e7-9c4a-efbe16f60f71.html.

¹⁷ *President Bounds’ statement on Turning Point USA incident*, Aug. 28, 2017, <https://www.nebraska.edu/president/speeches-and-communications/president-bounds-statement-on-turning-point-usa-incident.html>.

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”).

These rights extend to faculty members who engage in political speech. The Eighth Circuit, whose rulings are binding upon the university, has held university officials liable for censoring faculty members’ speech, remarking that “the idea that a faculty member could be compelled to relinquish First Amendment rights in connection with employment at a public school” was “unequivocally rejected” by the Supreme Court. *Burnham v. Ianni*, 119 F.3d 668, 677 (8th Cir. 1997) (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)).

These rights cannot be foreclosed by operation of non-renewal of a contract in lieu of termination. In the higher education context, courts have repeatedly held that the non-renewal of an untenured faculty member’s contract on the basis of constitutionally protected expression constitutes impermissible retaliation. *Perry v. Sindermann*, 408 U.S. 593, 598 (1972) (“[T]his Court has specifically held 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 We reaffirm those holdings here.”) (internal citations omitted); *Kazar v. Slippery Rock Univ. of Pa.*, No. 16-2161, 2017 WL 587984 (3d Cir. Feb. 14, 2017) (acknowledging that a nontenured professor could state a First Amendment claim if the non-renewal of her contract was based on her protected expression); *Lewis v. Spencer*, 468 F.2d 553 (5th Cir. 1972) (holding that “lack of tenure is immaterial” to a First Amendment retaliation claim when a contract is not renewed); *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671 (6th Cir. 2001) (holding that an untenured professor’s in-class speech constituted expression on a matter of public concern, and that the college’s non-renewal of his appointment violated the First Amendment); *Kahan v. Slippery Rock Univ. of Pennsylvania*, 50 F. Supp. 3d 667, 687 (W.D. Pa. 2014), *aff’d* 664 F. App’x 170 (3d Cir. 2016) (“There can be no reasonable dispute that the non-renewal of [Plaintiff]’s one-year, probationary contract qualifies as an adverse employment action.”).

A university may impose professionalism standards on its faculty members’ conduct in an educational setting. A university could penalize a lecturer or professor who engaged in this behavior during a class. In these situations, the university’s interests in maintaining classroom decorum must be afforded considerable deference.

But those interests wane considerably outside of the classroom, and a university’s power to penalize is circumscribed by the First Amendment rights of both students and faculty. This is particularly so where the lecturer and student do not otherwise have any professional relationship. When engaged in political speech on the quad, or off campus, students and faculty engaged in political expression are properly regarded as equals, afforded the same First Amendment rights as one another and all citizens. If a university could punish a student or lecturer for a flippant flip-off over a political dispute because they *might* one day have a

class together, then the university's ability to punish speech it deems unprofessional is almost limitless.¹⁸ The First Amendment does not tolerate broad, unfettered discretion to penalize students or faculty for political speech that officials view as offensive, unprofessional, or uncivil.

The need to narrowly tailor a university's policies as they apply to faculty members' speech is particularly critical when it concerns the speech of lecturers,¹⁹ who lack the formal protection offered under a tenure system. As universities become more reliant upon untenured faculty members and lecturers, a failure to vigorously defend the First Amendment freedoms of these members of the community will undermine the academic freedom of the institution as a whole.

Separate from the question of whether the university's *policy* is not narrowly tailored to its interests, one might ask whether *this particular instance* is speech protected under the First Amendment. It is. Lawton's expressive conduct is wholly protected by the First Amendment, does not arise to unlawful fighting words or harassment, and cannot be restricted on the basis that it is offensive.

As a threshold matter, the display of the middle finger is expressive conduct within the ambit of the First Amendment. Although the "First Amendment literally forbids the abridgment only of 'speech,'" the Supreme Court has "long recognized that its protection does not end at the spoken or written word." *Texas v. Johnson*, 491 U.S. at 404 (holding that burning the American flag is expressive conduct protected by the First Amendment). "Nonverbal conduct constitutes speech if it is intended to convey a particularized message and the likelihood is great that the message will be understood by those who view it, regardless of whether it is actually understood in a particular instance in such a way." *Burnham*, 119 F.3d at 674. Displaying the middle finger is expressive, with "a long, if not illustrious, history dating back to ancient Greece." *O'Brien v. Borowski*, 461 Mass. 415, 428–29 (2012). "[T]he middle finger gesture serves as a nonverbal expression of anger, rage, frustration, disdain, protest, defiance, comfort, or even excitement at finding a perfect pair of shoes." Ira P. Robbins, *Digitus Impudicus: The Middle Finger and the Law*, 41 U.C. DAVIS L. REV. 1403, 1407–08 (2008).

Courts have broadly held that display of the middle finger is protected by the First Amendment. "Like its verbal counterpart, when it is used to express contempt, anger, or protest, it is a form of expression protected by the First Amendment." *O'Brien*, 461 Mass. at 428–29. The Second Circuit has, for example, held that New York's "expansive definition of disorderly conduct" could not encompass "giving the finger" because, although perhaps "properly considered an obscene gesture," it was an act of "pure speech." *Swartz v. Insogna*,

¹⁸ Indeed, it is not clear that Lawton even recognized that the person recording her was, in fact, a UNL student. Open areas on campus are often utilized by non-students to engage with campus constituents.

¹⁹ See, e.g., Noah Smith, *Too Many People Dream of a Charmed Life in Academia*, BLOOMBERG VIEW, Oct. 4, 2017, <https://www.bloomberg.com/view/articles/2017-10-04/too-many-people-dream-of-a-charmed-life-in-academia> (citing statistics from the AAUP and explaining that universities have been "shifting toward adjuncts and away from the tenure track").

704 F.3d 105, 111 (2d Cir. 2013). Indeed, the display of the middle finger is so clearly protected by the First Amendment that officials who penalize its display can be held personally liable for constitutional violations. *See, e.g., Brown v. Wilson*, No. 1:12-CV-1122, 2015 U.S. Dist. LEXIS 88871, at *12-14 (W.D. Tex. July 9, 2015) (qualified immunity denied where the plaintiff “firmly gave . . . the middle finger, the bird, whatever you want to call it”). The display is protected from punishment by the government even when, as Georgia’s Supreme Court recently held, it takes place “from the back of [a] church during the church service.” *Freeman v. State*, No. S17A1040, 2017 Ga. LEXIS 829, at *8-11 (Ga. Oct. 2, 2017). If the one-finger salute is protected in a church, it is certainly protected on a college campus.

This approach is consistent with decades of case law holding that the state cannot censor speech simply because it is offensive or vulgar. *See 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. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 670 (1973) (Expression, “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.’”). As the Supreme Court has held, “because governmental officials cannot make principled decisions” concerning distasteful or impolite speech, “the Constitution leaves matters of taste and style . . . largely to the individual,” and “one man’s vulgarity is another’s lyric.” *Cohen v. California*, 403 U.S. 15, 25 (1971) (overturning conviction for wearing jacket emblazoned with “Fuck the Draft” in a public courthouse).

Moreover, “words are often chosen as much for their emotive as their cognitive force.” *Id.* at 26. The university can ask, but it cannot *require*, students and faculty to be polite when confronted with expression they find to be morally repugnant. For example, the university could not punish a pro-life student for responding with the middle finger upon encountering pro-choice advocates. For the same reasons, it cannot penalize a constituent for responding strongly to advocacy she perceives to be in support of fascism. “One of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation.” *Id.* (quoting *Baumgartner v. United States*, 322 U.S. 665, 673–74 (1944)). The United States District Court for the Northern District of California reached precisely this conclusion in enjoining San Francisco State University from enforcing a civility requirement:

[A] regulation that mandates civility easily could be understood as permitting only those forms of interaction that produce as little friction as possible, forms that are thoroughly lubricated by restraint, moderation, respect, social convention, and reason. The First Amendment difficulty with this kind of mandate should be obvious: the requirement “to be civil to one another” and the directive to eschew behaviors that are not consistent with “good citizenship” reasonably can be understood as prohibiting the kind of communication that it is necessary to use to convey the full emotional power with which a speaker embraces her ideas or the intensity and richness of the feelings that attach her to her cause. Similarly, mandating civility could deprive speakers of the tools

they most need to connect emotionally with their audience, to move their audience to share their passion.

In sum, there is a substantial risk that the civility requirement will inhibit or deter use of the forms and means of communication that, to many speakers in circumstances of the greatest First Amendment sensitivity, will be the most valued and the most effective. To use our spheres metaphor, the expressive conduct that is found only in the outer of the two spheres is quite substantial — not only in likely incidence, but also in centrality to First Amendment values and theory.

Coll. Republicans at San Francisco State Univ. v. Reed, 523 F. Supp. 2d 1005, 1019 (N.D. Cal. 2007).

Certainly, a university can call upon its constituents, faculty and students alike, to conduct themselves in a professional and courteous manner when they debate and argue over their political views. However, penalizing students or faculty for falling short of this laudable goal grants administrators unfettered discretion to censor speech that offends others, or offends administrators, legislators, or distant internet commentators. The chilling effect that accompanies vague standards puts at risk political speech of all perspectives, even if many might view a particular instance of expression as unbecoming.

Finally, it is troubling that the decision to terminate Lawton was premised on her employment being “disruptive to the university.”²⁰ It is far from clear how an isolated gesture would represent a continuing disruption of university functions. However, in light of your appeal that “[we] not let falsehoods and internet trolls disrupt” the university,²¹ it is apparent that the university views external criticism itself as disruptive, and saw Lawton’s termination as an expedient route to ending that flow of criticism. In doing so, UNL defers to those “internet trolls” the decision about who may teach at the university. In addition to granting a heckler’s veto to critics who may have a partisan or ideological ax to grind, this decision incentivizes the very threats and “troll” behavior the university seeks to move past. Behavior that is rewarded will be repeated.

III. CONCLUSION

FIRE is aware that your administration faces significant pressure from, among others, legislators with oversight of the university’s funding. But that pressure cannot and must not lead to the subordination of UNL faculty members’ expressive rights or the principles of free speech essential to a public university’s mission.

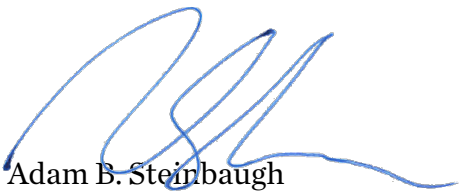
²⁰ Grinvalds, *supra* note 16.

²¹ Cassandra Kostal and Meg Rice, *UNL Chancellor Ronnie Green responds to ‘hostile’ environment claims*, DAILY NEBRASKAN, Nov. 1, 2017, http://www.dailynebraskan.com/news/unl-chancellor-ronnie-green-responds-to-hostile-environment-claims/article_56880a96-bf5f-11e7-bad8-5f15bale07e8.html.

UNL must immediately reverse its unwise error by rescinding its decision to terminate Courtney Lawton. We ask that you clarify to the entire campus community that constitutionally protected speech will never be subjected to disciplinary action in the future and that expressive activity will not be curtailed to a “free speech zone.” While a university may call upon its constituents to be polite and courteous in their political discourse, a public university is prohibited by the First Amendment from punishing protected political expression that administrators, legislators, or media find subjectively offensive.

We request a response to this letter by December 22, 2017.

Sincerely,



Adam B. Steinbaugh
Senior Program Officer, Individual Rights Defense Program

cc:

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Donde Plowman, Executive Vice Chancellor and Chief Academic Officer
Sarah Purcell, President, Faculty Senate
Julia Schleck, President, AAUP Nebraska State Conference
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Courtney Lawton