



November 4, 2019

Susan Lamb
President's Office
Diablo Valley College
Administration Building
321 Golf Club Road
Pleasant Hill, California 94523

Sent via U.S. Mail and Electronic Mail (slamb@dvc.edu)

Dear President Lamb:

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.

We are concerned for the state of freedom of expression and freedom of the press at Diablo Valley College (DVC) following the college's dismissal of Fernando Gallo, adviser to student newspaper *The Inquirer*. Gallo was dismissed after the newspaper published articles critical of the college and Gallo defended those editorial decisions. Declining to rehire a student newspaper adviser because of editorial decisions violates the First Amendment and California Education Code sections 66301 (The "Leonard Law") and 76120, as well as DVC's own stated commitment to free expression.

I. Statement of Facts

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. However, if the facts here are substantially accurate, DVC's decision to dismiss Gallo from service just 11 days before the beginning of the fall semester is inconsistent with DVC's obligations under state and federal law, including the First Amendment.

Gallo had been teaching media and communications classes at DVC on an adjunct basis since 2015. In January, he commenced his position as associate professor of journalism, as well as adviser to *The Inquirer* and *Ink Magazine*.¹

During the spring 2019 semester, Gallo's first term as an associate professor, the journalism department was understaffed.² According to former DVC journalism chair Mary Mazzocco, the department's news writing class had consistently full enrollment.³

In March, *The Inquirer* reported about racist graffiti found on campus.⁴ The newspaper criticized the college administration in an editorial for leaving "students in the dark" by not informing students about the racist graffiti for multiple days after the incident.⁵ According to *Inside Higher Ed*, you then wrote in an email to all faculty describing the editorial as "misinformation."⁶ After *The Inquirer's* coverage of the incident and student reactions, local news outlets began to report on the story.⁷

Racist graffiti on campus recurred throughout the 2018–19 school year, and *The Inquirer* continued to cover the college's handling of these incidents.⁸ In one story, *The Inquirer* noted that administrative response to student feedback about the graffiti incidents had disappointed some students, observing for example that students were upset that Dean of Student Services "[Emily] Stone was rolling her eyes at points, and continued to text even after she was asked to put her phone away" during a listening circle event designed to allow students to voice concerns with staff and administrators.⁹

¹ Greta Anderson, *Student Newspaper Adviser Punished for Critical Coverage*, INSIDE HIGHER ED, Oct. 22, 2019, <https://www.insidehighered.com/news/2019/10/22/college-newspaper-adviser-loses-job-students-claim-retaliation>.

² *Id.*

³ *Id.*

⁴ Samantha Laurey, Edwin Chen, and Ethan Anderson, *More details about racist graffiti revealed, students remained unnotified*, INQUIRER (Diablo Valley College), Mar. 7, 2019, <https://www.dvcinquirer.com/news/2019/03/07/more-details-about-racist-graffiti-revealed-students-remain-unnotified/>.

⁵ Editorial Board, *DVC left students in dark about racist graffiti*, INQUIRER (Diablo Valley College), Mar. 11, 2019, <https://www.dvcinquirer.com/opinion/2019/03/11/dvc-left-students-in-dark-about-racist-graffiti/>.

⁶ Anderson, *supra* note 1.

⁷ See, e.g., Melissa Colorado, *Diablo Valley College Students Feel Unsafe After Racist Graffiti Found on Campus*, NBC Bay Area, Mar. 13, 2019, <https://www.nbcbayarea.com/news/local/Diablo-Valley-College-Students-Feel-Unsafe-After-Racist-Graffiti-Found-on-Campus-507118721.html>; *Racist Graffiti Discovered Again At College*, KCBS Radio, Mar. 27, 2019, <https://kpbsradio.radio.com/blogs/kpbs-radio-midday-news/diablo-valley-college-investigates-racist-graffiti>.

⁸ See, e.g., Pavlina Markova, *Concerns voiced at DVC listening circle*, INQUIRER (Diablo Valley College), Mar. 14, 2019, <https://www.dvcinquirer.com/news/2019/03/14/students-voice-concerns-in-dvc-listening-circle/>; Emma Hall, *DVC community gathers in solidarity against hateful graffiti*, INQUIRER (Diablo Valley College), Mar. 27, 2019, <https://www.dvcinquirer.com/news/2019/03/27/dvc-community-gathers-in-solidarity-against-hateful-graffiti/>; Emma Hall, *Racist graffiti found once again*, INQUIRER (Diablo Valley College), May 21, 2019, <https://www.dvcinquirer.com/news/2019/05/21/racist-graffiti-found-once-again/>.

⁹ Markova, *supra* note 8.

This criticism resulted in backlash against *The Inquirer*, with five faculty members and administrators submitting critical letters to the editor.¹⁰ The paper decided to print only two letters due to stark similarities in wording among the letters, which conveyed the appearance of a coordinated effort.¹¹ This led to a professor who had penned one of the letters, Michael Powell, showing up at the newsroom to confront Gallo, resulting in a human resources complaint, according to *Inquirer* editor Emma Hall.

In June, Gallo met with Obed Vazquez, dean of the English and Social Sciences Division, which houses the journalism department.¹² The purpose of this meeting was to discuss the fall 2019 plan for the journalism department.¹³ At that meeting, Vazquez and Gallo agreed to a plan under which Gallo would teach three courses and serve as a “lab assistant” for the *Inquirer*, rather than its formal adviser, to avoid Gallo carrying an overburdened course load, as he had in the spring semester.¹⁴

After hearing no updates about the upcoming fall semester, Gallo reached out to Vazquez on August 15 to inquire about a finalized course load.¹⁵ Vazquez responded noting that “there [had] been changes to the plan.”¹⁶ Gallo immediately responded—one minute after receiving Vazquez’s email—asking for more details so he could prepare for his classes.¹⁷ When Gallo had not heard back from Vazquez two days later, on August 17, Gallo again emailed inquiring about his course schedule.¹⁸ Vazquez responded simply: “With the new schedule there are no classes for you.”¹⁹

However, it appears that at least one class Gallo was originally intended to teach, JRNAL 120, was *not* staffed for the fall 2019 semester. Less than a week before the semester began, after DVC had informed Gallo he would not be teaching, DVC sent a message to the Journalism Association of Community Colleges listserv announcing DVC needed an instructor for this course.

DVC has struggled to keep its story straight, offering a variety of discordant reasons for Gallo’s dismissal, according to Hall.

¹⁰ Anderson, *supra* note 1.

¹¹ *Id.*

¹² Appeal Statement from Fernando Gallo (Sept. 14, 2019) (on file with author).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Email from Fernando Gallo to Obed Vazquez, Dean, English and Social Science Divisions (Aug. 15, 2019, 2:17 p.m.) (on file with author).

¹⁶ Email from Obed Vazquez, Dean, English and Social Sciences Divisions, to Fernando Gallo (Aug. 15, 2019, 2:51 p.m.) (on file with author).

¹⁷ Email from Fernando Gallo to Obed Vazquez, Dean, English and Social Science Divisions (Aug. 15, 2019, 2:52 p.m.) (on file with author).

¹⁸ Email from Fernando Gallo to Obed Vazquez, Dean, English and Social Science Divisions (Aug. 17, 2019, 10:04 a.m.) (on file with author).

¹⁹ Email from Obed Vazquez, Dean, English and Social Sciences Divisions, to Fernando Gallo (Aug. 17, 2019, 12:40 p.m.) (on file with author).

On September 14, Gallo appealed the decision to dismiss him to his faculty union, United Faculty.²⁰ The union determined that the way in which Gallo was dismissed was irregular, and the timing of the decision was inappropriate.²¹

II. Dismissing a Student Media Adviser Under Pretext in Retaliation for Student Journalism Critical of the College Violates the First Amendment, California Law, and DVC’s Own Free Expression Promises

A. *Student media adviser removal runs afoul of the First Amendment.*

It has long been settled law that the First Amendment is binding on public colleges like Diablo Valley College. *Healy v. James*, 408 U.S. 169, 180 (1972) (“[T]he precedents of this Court leave no room for the view that . . . 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”).

Further, courts have long held adverse administrative actions taken against student media in response to content violate the First Amendment. *See, e.g., Trujillo v. Love*, 322 F. Supp. 1266, 1271 (D. Colo. 1971) (holding that “[h]aving established a particular forum for expression, officials may not then place limitations upon the use of that forum which interfere with protected speech”); *Schiff v. Williams*, 519 F.2d 247, 260–61 (5th Cir. 1975) (finding that dismissing editors due to alleged inaccuracies in a student newspaper violated the First Amendment); *Joyner v. Whiting*, 477 F.2d 456, 462 (4th Cir. 1973) (“[i]t may well be that a college need not establish a campus newspaper But if a college has a student newspaper, its publication cannot be suppressed because college officials dislike editorial comment”); *Stanley v. Magrath*, 719 F.2d 279, 282 (8th Cir. 1983) (“[a] public university may not constitutionally take adverse action against a student newspaper . . . because it disapproves of the content of the paper”); *Antonelli v. Hammond*, 308 F. Supp. 1329, 1337 (D. Mass. 1970) (holding that freezing a university newspaper’s funding because administrators deemed its content “garbage” was a violation of student journalists’ First Amendment rights).

The unwavering agreement of federal circuits regarding the free press rights of collegiate journalists led the U.S. Court of Appeals for the Second Circuit to note that “*all* the circuits that have considered the issue have determined that, at the very least, when a public university creates or subsidizes a student newspaper and imposes no *ex ante* restrictions on the content that the newspaper may contain, neither the school nor its officials may interfere

²⁰ Appeal Statement, *supra* note 12.

²¹ Email from Jason Mayfield, chair of the United Faculty appeals committee, to Fernando Gallo (Sept. 24, 2019, 12:28 p.m.) (on file with author).

with the viewpoints expressed in the publication without running afoul of the First Amendment.” *Husain v. Springer*, 494 F.3d 108, 124 (2d Cir. 2007) (emphasis in original).

Accordingly, courts have found the dismissal of advisers to be an adverse administrative action that injures the First Amendment rights of student journalists. In *Coppola v. Larson*, for example, the U.S. District Court for the District of New Jersey determined that “[r]emoval of a student advisor to a school newspaper can indeed be a ‘particularized, actual injury’ to the Paper’s student editors” and that removal of an adviser due to student newspaper content “would undoubtedly have an impermissibly chilling effect on the Paper’s student editors and their willingness to produce articles critical of the [college] administration in the future.” Civ. No. 06-2138, 2006 U.S. Dist. LEXIS 51205, *25 (D.N.J. July 25, 2006).²²

The First Amendment does not exist to protect only non-controversial expression. Rather, 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., *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”); *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670 (1973) (“[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of ‘conventions of decency.’”).

By dismissing Gallo not two weeks before the start of the fall 2019 semester, and shortly after administrative and faculty objections to *The Inquirer’s* critical coverage, DVC has run afoul of the First Amendment. Gallo’s dismissal, in apparent retaliation for greenlighting critical coverage, would cause a reasonable student journalist to abstain from producing coverage critical of the college in order to prevent further adverse action. Even absent a realized chilling

²² See also *Lane v. Simon*, No. 04-4079-JAR, 2005 U.S. Dist. LEXIS 11330, *13 (D. Kan. June 2, 2005) (holding that “non-reappointment” of a student media adviser is “a particularized, actual injury to . . . editors of the paper”), *vac’d on other grounds*, 495 U.S. 1182 (10th Cir. 2007); *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). Many public institutions have settled cases regarding dismissal of student media advisers outside of court. See, e.g., Adam Kissel, *Free Speech Victory at East Carolina University: \$31,200 Settlement for Newspaper Adviser*, FIRE, April 23, 2012, <https://www.thefire.org/free-speech-victory-at-east-carolina-university-31200-settlement-for-newspaper-advisor/>. In 2002, a student newspaper adviser at Fort Valley State University in Georgia brought suit against the university and several university administrators following his firing, which followed newspaper reporting on the questionable financial dealings of university officials. *Fired adviser settles claim with Fort Valley State U. for \$192,000*, STUDENT PRESS LAW CENTER, Apr. 25, 2002, <https://splc.org/2002/04/fired-adviser-settles-claim-with-fort-valley-state-u-for-192000/>. The adviser’s claim was eventually settled outside of court for \$192,000 and for the adoption of a new university policy explicitly protecting the student press. *Id.* In 2005, a high school newspaper adviser in Indiana was awarded \$74,000 to settle his federal lawsuit after he was fired over the publication of a story about a student arrested for murder. *High school newspaper adviser to get thousands after settling lawsuit*, MICHIGAN DAILY, Oct. 13, 2005, <https://www.michigandaily.com/content/high-school-newspaper-adviser-get-thousands-after-settling-lawsuit>.

effect, Gallo's dismissal caused an unconstitutional injury to *Inquirer* journalists. Because the action would cause a *reasonable* student journalist to soften content about DVC, even if *Inquirer* journalists happen to be an especially hearty breed of journalist—willing to ignore the chill and risk further retaliation in order to report the truth—Gallo's dismissal still constitutes impermissible retaliation for First Amendment-protected press activity.

B. California's "Leonard Law" also prohibits retaliatory removal of a student media adviser.

In addition to the First Amendment, California Education Code § 66301 provides an independent source of student rights with a specific bar on the type of retaliation in which Diablo Valley College appears to have engaged.

Calif. Educ. Code, § 66301, frequently called the "Leonard Law" after its legislative sponsor, prohibits public colleges in California (including "the governing board of a community college district" and "an administrator of any campus of those institutions") from making or enforcing any rule that would subject a student to discipline for "conduct that is speech or other communication that, when engaged in outside a campus of those institutions, is protected from governmental restriction by" the First Amendment to the U.S. Constitution or Art. I, Sec. II of the California Constitution. Calif. Educ. Code § 66301(a).

The cited portions of the California Constitution, although not specifically at issue in this case, are noteworthy in that they underscore the legislature's intent to protect student media. Art. I, Sec. II(a) is California's broad guarantee of freedom of speech and the press; Art. I, Sec. II(b) is the state's constitutional reporter's privilege, providing an absolute right for a journalist to refuse to disclose to any investigatory body documentary materials obtained in the process of newsgathering.

What *is* specifically at issue in the present case, however, is section (f) of the Leonard Law itself. This section prohibits covered colleges, like Diablo Valley, from dismissing state employees "for acting to protect a student engaged in conduct authorized under this section, or refusing to infringe upon conduct that is protected by this section, the First Amendment to the United States Constitution, or Section 2 of Article I of the California Constitution." Calif. Educ. Code § 66301(f).

In supporting *The Inquirer*, Gallo did precisely this: acting "to protect [] student[s] engaged" in free expression conduct protected by § 66301 and by the First Amendment.

A separate section of California's Education Code, 76120, additionally requires DVC to put forth a policy making clear that student expression will be protected on campus. §76120. DVC has answered this call in its "Freedom of Expression Policy," which clarifies that "[s]tudents

have the right to exercise free expression” on campus.²³ But by retaliating against Gallo and student journalists by dismissing Gallo, DVC has betrayed this promise of free expression.

III. Conclusion

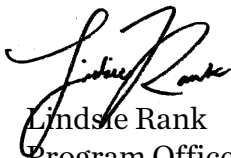
Student journalists must not be made to fear retaliation against themselves or their advisers when they fulfill their intended function as a watchdog on college campuses. It is settled First Amendment and California state law that administrators may not take actions that threaten the student press, including any action that would lead a reasonable student journalist to abstain from or “tone down” critical coverage of the college administration in the future.

Non-renewal of a student media adviser’s contract in response to such critical coverage is retaliation against the student press. Here, DVC has retaliated against *The Inquirer* by dismissing Gallo. DVC must cure this violation by immediately reinstating Gallo. FIRE is committed to using all of the resources at its disposal to see this matter through to a just conclusion.

A public college administrator who violates clearly established law will not retain qualified immunity and can be held personally responsible for monetary damages for violating First Amendment rights under 42 U.S.C. § 1983. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Gerlich v. Leath*, 861 F.3d 697, 709 (8th Cir. 2017) (upholding denial of qualified immunity to defendants—public university administrators—because plaintiffs’ First Amendment right was clearly established).

We request receipt of a response to this letter no later than the close of business on November 18, 2019.

Sincerely,



Lindsie Rank
Program Officer, Individual Rights Defense Program



Kenna Griffin
President, College Media Association

Cc: Obed Vazquez (ovazquez@dvc.edu)

²³ Freedom of Expression Policy, DIABLO VALLEY COLLEGE, <https://www.dvc.edu/communication/policies/student-rights/freedom-expression.html> (last visited Oct. 28, 2019).