



January 9, 2020

Dr. Stephen Spinelli Jr.
Office of the President
Babson College
231 Forest Street
Babson Park, Massachusetts 02457

URGENT

Sent via Electronic Mail (officeofthepresident@babson.edu)

Dear President Spinelli:

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 the threat to freedom of expression posed by the suspension and investigation of a Babson College instructor over extramural political expression critical of President Trump's threats to bomb Iranian cultural sites. The response by Babson contradicts its commitments to freedom of expression and academic freedom and must be immediately rescinded.

I. **Phansey's Response to President Trump's Tweet Draws Criticism and a Suspension by Babson College**

The following is our understanding, based on public reports, of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us.

On January 4, 2020, following American military action resulting in the death of Iranian military commander Qassem Soleimani, President Donald Trump tweeted a "WARNING that if Iran strikes any Americans, or American assets, we have [...] targeted 52 Iranian sites

(representing the 52 American hostages taken by Iran many years ago) some at a very high level & important to Iran & the Iranian culture[.]”¹

Following Trump’s tweet, Asheen Phansey, who serves as an adjunct faculty member at Babson,² posted on his personal, private Facebook page:

In retaliation, Ayatollah Khomeini should tweet a list of 52 sites of beloved American cultural heritage that he would bomb.

Um... Mall of America? ...Kardashian residence?

On January 7, TurtleBoy News, a “hybrid of blog, news website and tabloid,”³ published an article criticizing Phansey’s post,⁴ prompting Twitter users to call for his termination.⁵

The following morning, Babson posted this statement on its website:

Babson College condemns any type of threatening words and/or actions condoning violence and/or hate. This particular post from a staff member on his personal Facebook page clearly does not represent the values and culture of Babson College. While we understand he has deleted the posts, we have immediately suspended him, with pay, pending the completion of our investigation. In addition, we are cooperating with local, state and federal authorities.⁶

Phansey is slated to teach an undergraduate marketing course in the Spring 2020 semester, which begins on January 21, 2020.⁷

¹ Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 4, 2020, 5:52 PM), <https://twitter.com/realdonaldtrump/status/1213593975732527112>. Trump later appeared to rescind this threat, following criticism that it would be a war crime to strike cultural sites with no military value. Ben Gittleson, *President Trump backs off threat to hit Iranian cultural sites*, ABC NEWS, Jan. 7, 2020, <https://abcnews.go.com/Politics/president-trump-wavers-threat-hit-iranian-cultural-sites/story?id=68123577>.

² We note that Phansey is also a Babson staff member. However, FIRE’s mission is limited to defending the rights of students and faculty, not staff. We write only with respect to Phansey’s role as a faculty member, which is directly impacted by Babson’s suspension and investigation.

³ Alban Murtishi, *Ties to controversial blog Turtleboy Sports may have prevented Margaret Melican from being appointed to Worcester’s Zoning Board*, MASSLIVE, June 14, 2017, https://www.masslive.com/news/worcester/2017/06/ties_to_turtleboy_sports_may_h.html.

⁴ Uncle Turtleboy, *Babson Professor Urges Iran To Bomb 52 American Cultural Sites To Own The Trumpsters*, TB DAILY NEWS, Jan. 7, 2020, <http://tbdailynews.com/babson-professor-urges-iran-to-bomb-52-american-cultural-sites-to-own-the-trumpsters>.

⁵ See, e.g., Rick Shaftan (@Shaftan), TWITTER (Jan. 8, 2020, 6:55 AM), <https://twitter.com/Shaftan/status/1214878227531010048> (retweeted by approximately 1,200 users and asking why Babson had “an America-hating terrorist supporter on their payroll”).

⁶ BABSON COLL., STATEMENT FROM BABSON COLLEGE, <https://babson.edu/statement> (last visited Jan. 8, 2020).

⁷ BABSON COLL., *CourseListing Application*, <https://bit.ly/2QAgtwl> (last visited Jan. 9, 2020).

II. Penalizing Phansey’s Political Expression Cannot be Reconciled with Babson’s Commitment to Freedom of Expression

While Babson is a private college not bound by the First Amendment, it has committed itself to its students’ and faculty members’ freedom of expression. Its investigation and suspension of Phansey for his personal political expression violates that commitment.

A. *Babson is legally bound to uphold its commitments to freedom of expression.*

Babson makes express commitments to its students’ and faculty members’ freedom of expression and academic freedom. Babson has adopted, in its faculty handbook, the 1940 American Association of University Professors (AAUP) statement on academic freedom, which provides that faculty members will be “free from institutional censorship or discipline” when they “speak[] or write[] as a citizen[.]”⁸ Babson’s bias incident policy reiterates this commitment, explaining that its response to “all instances” of “bias” will be “in a manner consistent with our commitment to freedom of expression and academic freedom[.]”⁹

Babson is legally and morally bound to uphold the commitments it has made. This principle extends to private institutions’ commitments to academic freedom and freedom of expression. *See, e.g., McAdams v. Marquette Univ.*, 2018 WI 88, ¶84 (2018) (private university breached its contract with a professor over a personal blog post because, by virtue of its adoption of the 1940 AAUP *Statement of Principles on Academic Freedom*, the post was “a contractually-disqualified basis for discipline”). In interpreting college handbooks, the focus is on “what meaning the party making the manifestation, the university, should reasonably expect the other party to give it.” *Cloud v. Trs. of Boston Univ.*, 720 F.2d 721, 724 (1st Cir. 1983).

Given that Babson has made robust, affirmative commitments to the expressive rights of its community, and considering the traditional role of academic institutions as unique spaces for discussion and debate, a faculty member would quite reasonably believe her or his rights to freedom of expression would be protected at Babson. This is particularly so with respect to private, personal expression in light of Babson’s adoption of the 1940 *Statement of Principles*,

⁸ BABSON COLL., FULL-TIME FACULTY HANDBOOK 2010 – 2011, 153, *available at* <https://bit.ly/2R26ChI>. Although the handbook is intended for full-time faculty, it notes that part-time faculty members may not be removed to effectuate a restraint on academic freedom. *Id.* at 143. This commitment is likewise important to Babson’s accreditation, which requires it to be “committed to the free pursuit and dissemination of knowledge” and to “protect[] and foster[] academic freedom for all faculty regardless of rank or term of appointment.” NEW ENGLAND COMM’N OF HIGHER ED., STANDARDS FOR ACCREDITATION, <https://www.neche.org/resources/standards-for-accreditation> (effective July 1, 2016).

⁹ BABSON COLL., BIAS INCIDENT RESPONSE, <https://www.babson.edu/about/diversity--inclusion/bias-incident-response> (last visited Jan. 8, 2020).

under which “[e]xtramural utterances rarely bear upon [a] faculty member’s fitness for continuing service.”¹⁰

B. *Phansey’s suspension for extramural political expression, not amounting to a “true threat” or “incitement,” violates Babson’s commitments.*

Babson’s response to Phansey’s private Facebook post is a marked and unacceptable departure from its laudable commitment to freedom of expression and academic freedom. Phansey’s post cannot reasonably be interpreted as either a “true threat” or “incitement,” as it is obviously rhetorical hyperbole *criticizing*, not endorsing, the use of violence.

i. “True threats” and “incitement” are not protected, but have longstanding, precise definitions to protect political expression.

Certain well-defined categories of speech are excluded from the protection of the First Amendment, including “true threats” and “incitement.”

A “true threat” is a statement through which “the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Virginia v. Black*, 538 U.S. 343, 359 (2003). Incitement, a separate category of unprotected speech, encompasses speech “directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action.” *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). (As discussed below, Phansey’s post does not approach either of these exceptions, even under the strained reading advanced by his critics.)

Political speech is afforded the highest protection under the First Amendment, and our system grants considerable deference to even threatening language posed in a political context. *See Watts v. United States*, 394 U.S. 705, 708 (1969) (“The language of the political arena . . . is often vituperative, abusive, and inexact. . .”). This is not a new development. Political discourse has long been steeped in themes of violence. Perhaps most famously, Thomas Jefferson—a principal author of what ultimately became the First Amendment¹¹—predicted that revolution and violence would be necessary to preserve liberty, writing: “The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants. It is [its] natural manure.”¹²

Expansive interpretations of these exceptions would chill political expression, which embraces “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.”

¹⁰ AMERICAN ASS’N OF UNIV. PROFESSORS, COMMITTEE A STATEMENT ON EXTRAMURAL UTTERANCES (approved Oct. 1964), available at <https://www.aaup.org/report/committee-statement-extramural-utterances>.

¹¹ *Everson v. Bd. of Educ.*, 330 U.S. 1, 11 (1947).

¹² Letter from Thomas Jefferson to William Stephens Smith, Nov. 13, 1787, available at <https://founders.archives.gov/documents/Jefferson/01-12-02-0348>. *See also, e.g.*, the license plate and state motto of New Hampshire, pledging that residents will “live free or die” in defense of liberty. *Wooley v. Maynard*, 430 U.S. 705, 722, 97 S. Ct. 1428, 1439 (1977).

Baumgartner v. United States, 322 U.S. 665, 673–74 (1944). Because rhetoric tinged with violent themes often intersects with charged political expression, “extreme care” must be taken to ensure that an exacting standard be met, lest “highly charged political rhetoric lying at the core” of freedom of expression unreasonably be interpreted as unprotected “true threats” or “incitement.” *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 926–27 (1982).

ii. Phanseý’s post is rhetorical hyperbole, not a true threat or incitement.

Even if one adopts the unreasonably uncharitable reading of Phanseý’s critics, who claim Phanseý’s post sincerely urges Iran to bomb the Kardashians’ residence, Phanseý’s Facebook posts would not fall into either of these categories of unprotected expression.

First, because the statement does not purport to commit Phanseý to any action, it cannot amount to “a serious expression of an intent to commit an act of unlawful violence[.]” *Virginia v. Black*, 538 U.S. at 359. Second, the “particular . . . group of individuals” identified in Phanseý’s post—the Kardashians and Mall of America—reveal the sardonic tone, depriving the post of the “serious” nature necessary to remove it from its default status as protected speech.

Second, Phanseý’s post is better analyzed under the incitement standard, as it (if read literally, and deprived of its context) purports to call upon Iran to issue a threat to attack particular American cultural institutions in response to President Trump’s threat. Yet even if the post had sincerely encouraged Iran to attack the United States, “mere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment.” *Claiborne Hardware Co.*, 458 U.S. at 927 (emphasis in original). To amount to incitement, the speech would not only advocate unlawful force, but must also be “likely to incite or produce” *imminent* lawless action. *Brandenburg*, 395 U.S. at 447. Simply put, there is no reasonable likelihood that Phanseý’s private post to his Facebook friends would lead to Iran threatening to bomb the Kardashians’ residence.

A plain reading of Phanseý’s post, however, makes clear that it is simple rhetorical hyperbole. Phanseý is not endorsing the use of violence; he is appropriating the president’s rhetoric as a means of criticizing it. In other words, he is not endorsing violence against America’s cultural institutions, but criticizing the threat to Iran’s cultural sites. Under any reasonable reading, Phanseý’s post is political hyperbole and figurative language.

The Supreme Court has repeatedly held such language to be protected by the First Amendment. In *Watts*, for example, an investigator for the Army Counter Intelligence Corps heard the defendant, likely facing involuntary military service in the Vietnam War, remark:

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

394 U.S. at 706. The Supreme Court held the speech remained protected by the First Amendment because it did not amount to a true threat. The Court acknowledged that the government “undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive” against “threats of physical violence.” *Id.* at 707. However, the Court warned that “[w]hat is a threat must be distinguished from what is constitutionally protected speech,” including “political hyperbole,” because of the country’s “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *Id.* at 707–08.

Likewise, 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.”).

We remind you that the principle of freedom of speech 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. Babson has promised faculty the right to freedom of expression. For that promise to be meaningful, Babson must not renege on its promise at the first sign of controversy.

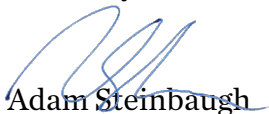
III. Babson Must End Its Investigation of Phansey and Rescind His Suspension

We understand that Babson would greatly prefer not to manage the distraction caused by public anger at a faculty member’s private political views, and that the college may view a suspension and investigation as an expedient answer to quell a growing controversy. But the institution has pledged to be committed to its constituents’ freedom of expression. Abandoning that commitment threatens to do more harm to Babson’s reputation than the momentary inconvenience posed by criticism on social media.

We are confident you will agree that the open exchange of views, central to the missions of academic institutions, requires vigilant defense. It is most critical to defend these rights when they touch upon matters of national political importance. If every academic institution responded to personal political expression with suspensions and investigations, freedom of expression would scarcely exist on, or off, campus.

Given the urgency imposed by the nature of Babson’s suspension and investigation, we request receipt of a response to this letter by the close of business on January 17, 2020.

Sincerely,



Adam Steinbaugh
Director, Individual Rights Defense Program