



April 10, 2020

Dr. Jonathan Reed  
Provost and Vice President for Academic Affairs  
University of La Verne  
1950 Third Street  
La Verne, California 91750

*Sent via Electronic Mail (jreed@laverne.edu)*

Dear Provost Reed:

FIRE<sup>1</sup> was disappointed not to receive a response to our letter of February 13, 2020. We remain concerned about the decision to strip Professor Diane Klein of tenure as a result of a single sarcastic comment concerning another faculty member.

**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. Again, please find enclosed an executed waiver authorizing you to share information with FIRE. However, if the facts here are substantially accurate, ULV must reject the College of Law Faculty Committee's recommendation to involuntarily revoke Klein's tenure.

**A. *Professor Klein has been a faculty leader at ULV.***

Professor Diane Klein is a law professor and has been a member of the ULV College of Law faculty since 2004. She primarily teaches Real Property, a mandatory first-year course, as well as Wills and Trusts. She also teaches Professional Responsibility. These three courses are bar-tested courses in California.<sup>2</sup> Klein also teaches civil rights and antidiscrimination law.<sup>3</sup> Over

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<sup>1</sup> As you know from previous correspondence, 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.

<sup>2</sup> *Scope of the California Bar Examination*, STATE BAR OF CALIFORNIA, <http://www.calbar.ca.gov/Admissions/Examinations/California-Bar-Examination/California-Bar-Examination-Scope> (last visited Apr. 2, 2020).

<sup>3</sup> *Diane Klein*, UNIV. OF LA VERNE, <https://laverne.edu/directory/person/diane-julia-klein> (last visited Apr. 6, 2020).

the last four semesters,<sup>4</sup> Klein has received overwhelmingly positive student reviews, including commendation of her mastery of the class material and comments that she was “respectful of the class” and “always a pleasure to have as a professor,” and that students had “nothing bad to say!”<sup>5</sup>

Klein has also been an active participant in faculty governance at ULV over the last several years. She serves on the Faculty Senate and the ULV chapter of the American Association of University Professors (AAUP), of which she was elected president in February 2019. She was a leading proponent of revisions to the ULV Faculty Handbook in 2017, which were approved by the ULV Board of Trustees in 2018.

***B. Professor Klein and her colleagues criticized the ULV College of Law bar preparation program.***

ULV’s concerning course of action began on December 17, 2019, when Klein was notified that she was under investigation for an allegedly threatening remark she made after a Faculty Ad Hoc Committee meeting that had occurred three weeks earlier.

The allegations arose out of a comment Klein made at the conclusion of a November 26, 2019, meeting of the Faculty Ad Hoc Committee of the Faculty Senate. The committee was initially formed in October 2019 to address the potential closure of the College of Law at ULV. The committee had been considering whether to include a section in its report concerning the failures of ULV’s Center for Academic & Bar Readiness (CABR) and its director, Assistant Dean Jendayi Saada. Professor Klein drafted that section of the report, which the committee ultimately decided not to include. At the end of the meeting, Klein made a comment to a colleague, Professor Charles Duskow, to the effect of: “We have to decide whether we are willing to assassinate Jendayi—and if so, I’m willing to do it.” The report Klein received from ULV, based on the secondhand account of someone who overheard Klein, quotes Klein slightly differently: “If we are to survive, we have to be willing to assassinate Jendayi, and I for one am willing to assassinate her.” Klein denies making this specific statement.<sup>6</sup>

Tension between the traditional law faculty and Saada, the Assistant Dean of CABR, had been building over the last several years. In January 2018, Klein requested CABR data concerning ULV law students after the previous class had low California bar passage rates. Saada did not provide the data, but reported Klein to the ULV Department of Human Resources for harassment and accused Klein of “attempting to assassinate her character,” presumably by questioning the efficacy of the program Saada runs.

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<sup>4</sup> Professor Klein received negative reviews from a substantial number of students enrolled in her Fall 2017 Professional Responsibility course, but course evaluations for all subsequent semesters indicate this was an anomalous semester.

<sup>5</sup> Student Evaluations of Professor Diane Klein, Fall 2019 Wills & Trusts.

<sup>6</sup> As discussed below, neither version of the statement at issue amounts to unprotected speech.

*C. Professor Klein is placed on leave following her comments about Saada.*

On December 20, 2019, Klein met with an outside investigator hired by ULV to discuss the allegation that she threatened Saada. Klein explained the context in which she made the remark, and expressed that it was intended as institutional criticism, not as a threat to Saada's personal safety. That day, Klein received a "Notice of Administrative Leave with Pay" from the interim dean of the ULV College of Law, Kevin Marshall. Klein remained on paid leave through the end of 2019 with little to no communication from ULV.<sup>7</sup> Klein submitted a request for her personnel records, including disciplinary and performance records, pursuant to California Labor Code sections 226, 1198.5, and 432 on December 24. As of the date of this letter, ULV has produced almost 200 pages of payroll records and one record related to an unrelated 2011 incident, but has not produced Klein's full personnel file or records of any other complaints made against Klein in response to this request.

At a January 6 meeting of the Faculty Senate—at which Klein was not present because, per the December 20 decision, she was physically banned from campus and subject to a total communications ban—ULV General Counsel Doajo Hicks announced that the investigation into Professor Klein was "complete." Saada also appeared before the Faculty Senate that day to publicly address her claims against Klein. At the meeting, Saada read a prepared statement concerning the history of tension between the tenured faculty and CABR faculty at ULV, including a statement that tenure "should never be used as a tool for terror, harassment, bullying, or to chill the academic freedom of others," and arguing that Klein's comment should be considered in the context of broader concerns about "hurtful" treatment of nontenured faculty and the prevalence of workplace violence nationally.<sup>8</sup> At a later Faculty Senate Executive Committee meeting on February 10, Hicks reportedly publicly characterized Klein's comment as "criminal."

Around the same time as the January 6 Faculty Senate meeting—which occurred several weeks after Saada learned of Klein's comment—Saada filed a complaint against Klein with the Ontario Police Department, claiming Klein had threatened her. Klein was notified of the complaint on January 9, when the police called her to investigate the report and determine whether it was, in fact, a threat. On January 10, forty-five days after the "assassination" remark, Saada petitioned the San Bernardino Superior Court for a civil harassment restraining order, complaining about the remark and that "Klein has sent emails to the Faculty Senate disparaging me."<sup>9</sup> Saada sought a temporary restraining order, claiming that she "was in fear for her life because of the threat."<sup>10</sup>

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<sup>7</sup> It is FIRE's understanding that the ULV Human Resources department was not in contact with Professor Klein during this process because the Vice President of that department was terminated as of January 10, 2020, and has not been replaced.

<sup>8</sup> Statement of Jendayi Saada, ULV Faculty Senate (Jan. 6, 2020) (on file with author).

<sup>9</sup> Request for Civil Harassment Restraining Orders, filed with the Superior Court of California, County of San Bernardino, San Bernardino District (Jan. 10, 2020) (on file with author).

<sup>10</sup> Declaration of Jendayi D. Saada, filed with the Superior Court of California County of San Bernardino, San Bernardino District (Jan. 10, 2020) (on file with author).

Klein never heard anything further from the Ontario Police Department concerning its investigation of her comments. Saada's civil harassment petition notes that the police did not provide her with an Emergency Protective Order. The court dismissed the petition after Saada did not appear at the January 14 hearing on her petition. The petition has not been renewed.

***D. ULV moves to involuntarily terminate Professor Klein's tenure.***

On January 8, Klein received a letter from Interim Dean Marshall notifying her that she was being placed on unpaid administrative leave and that ULV intended to terminate her tenure and dismiss her from her position.<sup>11</sup> The letter continued the communications ban instituted at the end of December, but allowed Klein to communicate with faculty and staff for the limited purpose of rebutting evidence or arguments against her, or to present evidence or arguments on her own behalf.

At the beginning of February, Klein received binders containing ULV's evidence supporting the decision to involuntarily remove her tenure. The binders included hundreds of unorganized pages included references to HR investigations, which had not been previously provided to Klein despite her December request that ULV produce her personnel records pursuant to California state law. Klein was asked to deliver a physical copy of any evidence she planned to present to the committee two weeks prior to the hearing. She did so on March 4, when she was temporarily permitted on campus to gather items from her office. She left her materials there, and informed Professor Doskow, Interim Dean Marshall, and Hicks via email on March 6 that she had done so. The ULV administration has access to her office.

The ULV College of Law Faculty & Personnel Committee held a hearing concerning the involuntary termination of Klein's tenure on March 20. Despite repeated requests by Klein, her counsel, and the national AAUP, Klein was not permitted to have an AAUP observer present at the hearing, and her counsel was not permitted to speak. Her request to record the meeting, which was conducted virtually via WebEx, was refused. Those present included the committee members, Hicks, and ULV's outside counsel. ULV presented no evidence outside of the binder previously provided to Klein, and she essentially spoke on her own behalf for the entire meeting, which lasted roughly four hours. The committee members did not ask her a single question concerning Saada or her comments, but did ask a few narrow questions concerning Klein's interactions with students, some records of which were included in the binders. Neither the committee nor Hicks indicated what the next steps would be at the conclusion of the meeting.

On April 3, Klein received notice from Marshall that the committee had voted in favor of the involuntary removal of her tenure.<sup>12</sup> The letter, dated April 1, attached the report of the College of Law Faculty & Personnel Committee, finding that "Professor Klein has engaged in both sustained and severe affirmative misconduct of a kind that jeopardizes the University's

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<sup>11</sup> Letter from Kevin Marshall, Interim Dean of the College of Law, University of La Verne, to Professor Diane Klein (Jan. 8, 2020) (on file with author).

<sup>12</sup> Letter from Marshall to Klein (Apr. 1, 2020) (on file with author).

ability to carry out its mission,” and recommending that her tenure be involuntarily surrendered.<sup>13</sup> The recommendation was signed by the committee’s chair, Professor Doskow.

## II. ULV Cannot Dismiss Professor Klein and Strip Her of Tenure for Protected Expression

### A. *ULV promises its faculty academic freedom and freedom of expression.*

As a private institution, ULV is not compelled by the First Amendment to protect the academic freedom and freedom of expression rights of its faculty. It is, however, morally and legally bound to adhere to the promises it makes to faculty.

ULV promises faculty academic freedom, including freedom of expression, in its Faculty Handbook. “The right to academic freedom includes the right to free inquiry, the free exchange of ideas . . . [ULV] is committed to providing to its faculty members the protections of academic freedom.”<sup>14</sup> The university has also adopted a significant portion of the American Association of University Professors 1940 Statement of Principles.<sup>15</sup> The AAUP’s definition of academic freedom includes the protection of institutional criticism:

The academic freedom of faculty members includes the freedom to express their views (1) on academic matters in the classroom and in the conduct of research, (2) **on matters having to do with their institution and its policies**, and (3) on issues of public interest generally, and to do so even if their views are in conflict with one or another received wisdom.<sup>16</sup>

In addition, ULV’s commitment to academic freedom and due process are conditions of the university’s accreditation. ULV is accredited by the Western Association of Schools and Colleges, which requires that, as a precondition for accreditation, each institution make a public “commitment to academic freedom for faculty, staff, and students . . . [which] affirms that those in the academy are free to share their convictions and responsible conclusions with their colleagues and students.”<sup>17</sup> This is a laudable commitment to defend, rather than abrogate, the expressive freedom of members of the faculty like Klein. ULV must uphold it here.

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<sup>13</sup> Finding of the University of La Verne College of Law Faculty & Personnel Committee (Mar. 31, 2020) (on file with author).

<sup>14</sup> *Faculty Handbook 2019–2020*, UNIV. OF LA VERNE, at 18 (July 15, 2019), <https://drive.google.com/file/d/1f4UaYPDJcrYQTFL7XYPcaOhuYxPO7JgZ/view>.

<sup>15</sup> *Id.* at 19.

<sup>16</sup> *On the Relationship of Faculty Governance to Academic Freedom*, AAUP (1994), <https://www.aaup.org/report/relationship-faculty-governance-academic-freedom>.

<sup>17</sup> *Handbook of Accreditation*, W. ASSOC. SCHS. & COLLS., at 1.3 (2013), <https://www.wscuc.org/book/export/html/924>.

***B. Professor Klein’s comment concerning an institutional dispute was not a true threat.***

Certain well-defined categories of speech are excluded from the protection of the First Amendment, including “true threats” and speech intended to, and likely to cause, imminent unlawful conduct. Klein’s statement does not fall into either category.

Although the First Amendment does not bind private institutions like ULV, First Amendment jurisprudence provides a reasonable baseline for students and faculty to determine what is protected expression. First Amendment standards therefore reasonably inform faculty members’ expectations of ULV’s promises as a private employer.

Political speech is afforded the highest protection under the First Amendment, and our system grants considerable deference to even threatening or offensive language posed in a political context. *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.”). While true threats may be punished, rhetorical hyperbole remains protected political speech. In *Rankin v. McPherson*, for example, the Court found that a police department employee’s remark implying he hoped the president would be shot was protected expression. 483 U.S. 378 (1987). “The inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.” *Id.* at 386–87.<sup>18</sup> Although Klein’s remark was not criticism of a public political figure, it was made in the context of institutional criticism of Saada and CABR in the context of the Faculty Ad Hoc Committee’s important consideration of the ULV College of Law’s future and financial status.

A “true threat” is a statement through which “the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Virginia v. Black*, 538 U.S. 343, 359 (2003). The United States Court of Appeals for the Ninth Circuit—in which ULV sits—has entertained an even more narrow definition of a true threat. In *United States v. Cassel*, the Ninth Circuit considered whether the First Amendment permitted the government to punish speech without proving that the speaker intended to threaten another. 408 F.3d 622, 624 (9th Cir. 2005). The court, applying its interpretation of *Black*, found itself “bound to conclude that speech may be deemed unprotected by the First Amendment as a ‘true threat’ only upon proof that the speaker subjectively intended the speech as a threat.” *Id.* at 633.<sup>19</sup> This is a subjective test considering

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<sup>18</sup> *See also Watts v. United States*, 394 U.S. 705, 706 (1969) (holding that a man’s remark that “[t]hey always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L. B. J. . . . They are not going to make me kill my black brothers,” at which the crowd around him laughed, was protected expression and not a true threat to the life of the president).

<sup>19</sup> Although the Ninth Circuit applied the subjective standard in *Cassel*, the court has also declined to affirmatively adopt either the objective, reasonable speaker standard or the subjective standard in some cases where the expression at issue constituted a true threat under either standard. *See Fogel v. Collins*, 531 F.3d 824, 831 (9th Cir. 2008); *United States v. Stewart*, 420 F.3d 1007, 1015 (9th Cir. 2005).

the specific speaker at issue, not just the reasonable speaker. Here, Klein's clear intent was to express institutional criticism of the internal flaws at the ULV College of Law and the CBR program, and her opinion that to do so would also require criticism of Saada herself. There is no evidence that Klein ever considered or intended to assassinate Saada. Saada herself has used the word "assassinate" in the context of previous criticism of her program by tenured faculty, claiming that they were attempting to "assassinate" her character. Either an objective or subjective evaluation of Klein's intent in making her remark to Professor Duskow inexorably leads to the conclusion that she did not intend to threaten Saada's life or physical wellbeing.

Klein's comment was not a serious expression of an intent to commit unlawful violence. It was intended, and was understood to be, a metaphorical and hyperbolic expression concerning Saada's leadership and the efficacy of her program in the context of broader criticism of the ULV College of Law, its bar passage rates, and current position of financial exigency. As noted in well-settled cases spanning decades, the First Amendment and any reasonable understanding of freedom of speech plainly protects such expression, even when it obliquely, hyperbolically, rhetorically, or sarcastically implies physical harm to another. Such speech, like Klein's comment, remains protected expression and cannot reasonably be considered a true threat to physically harm another.

Finally, Saada's own response to Klein's remarks are not those of an individual who is in genuine fear for their life. Klein initially made this remark at the end of November. Saada was informed of the remark on or around December 17. Although at least one person who overheard or heard about Klein's comment felt it warranted mention to Saada, it's clear that nobody within earshot treated it as a threat worth reporting to ULV security or law enforcement authorities, much like the laughing crowd in *Watts*. Further, even Saada's first step was to assume the ULV administration could address her concerns, rather than immediately reporting the alleged threat to the police. It would be reasonable to expect an individual in fear for their life to first report such danger to law enforcement authorities, not rely on human resources. Here, Saada instead waited at least three weeks to report it to the local police department. She also waited over forty days to file for a civil restraining order, and even then, she failed to attend the hearing to determine whether a restraining order was necessary and the court ultimately did not grant one. Likewise, the Ontario Police Department's investigation does not appear to have led them to conclude that Klein's remarks were a threat, as there has been no criminal action against her. The amount of time that passed between Saada's cognizance of the alleged threat and decision to report it to the authorities, as well as her failure to diligently follow up concerning the legal proceeding, do not indicate that she was truly in fear for her life or wellbeing.

**C. *ULV's treatment of Professor Klein exhibits a lack of procedural protections.***

ULV's decision not only reflects substantive error, but it was also reached through a frustration of Klein's ability to prepare a meaningful defense. These burdens represent a significant departure from basic principles of due process and the procedural protections afforded to faculty members.

Section 4.3.3 of the ULV Faculty Handbook concerning the procedures for the loss of tenure provides:

The affected faculty member must be provided with a full and fair opportunity to rebut any evidence and arguments presented, to present evidence on that member's own behalf, and to defend that member's right to retain their tenured status, at every stage of this process. A fair and reasonable schedule for presentation of contrary evidence by the affected faculty member shall be set by the Promotion and Tenure Committee.<sup>20</sup>

ULV failed to effectively communicate with Professor Klein regarding the allegations against her for over a month after she was initially placed on leave. There was no functioning human resources department for the majority of the process as the Vice President of Human Resources was terminated by Hicks in January. ULV failed to respond to Professor Klein's request for her own records, depriving her of notice of the contents of the human resources investigative reports referenced in the binder of materials presented against her.

ULV's actions indicated a disinclination to allow Klein a sufficient opportunity to be heard. ULV's insistence that Klein provide the committee with a physical copy of the materials she wished to present—despite the fact that she was still banned from campus—created a substantial hurdle in her ability to disseminate that information to members of the committee. The communications ban against her, although modified to allow her to gather evidence on her own behalf at the beginning of January, also prevented her both from gathering evidence for several weeks and from defending herself following public censure of her remarks by Saada and Hicks.

We remind you that “[t]he tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.” *Cleveland Bd. of Educ. v. Loudermil*, 470 U.S. 532, 546 (1985). This obligation is echoed in the AAUP's 1940 Statement: “In all cases [involving termination for cause of a continuous appointment] where the facts are in dispute, the accused teacher should be informed before the hearing in writing of the charges and should have the opportunity to be heard in his or her own defense by all bodies that pass judgment upon the case.”<sup>21</sup> Although

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<sup>20</sup> *Faculty Handbook*, *supra* note 12, at 71.

<sup>21</sup> *1940 Statement of Principles on Academic Freedom and Tenure*, AAUP (1940), <https://www.aaup.org/file/1940%20Statement.pdf>.



Klein was provided with a haphazardly compiled binder of the rationale for ULV's decision, ULV has not provided a summary or explanation of how this amounts to appropriate grounds to involuntarily remove her tenure.

### III. Conclusion

Professor Klein is a successful law professor who has received positive student reviews over the last four semesters. ULV's decision to place her on paid administrative leave—which then became unpaid leave—and ultimately strip her of tenure for engaging in protected expression disregards ULV's promises to its faculty and its obligations as an institution of higher learning. We call on you to reverse this decision.

We respectfully request a response to this letter by April 23, 2020.

Sincerely,

A handwritten signature in black ink that reads "Katlyn A. Patton". The signature is written in a cursive, flowing style.

Katlyn A. Patton

Program Officer, Individual Rights Defense Program and Public Records

Cc:

Dr. Devorah Lieberman, President  
Interim Dean Kevin Marshall, College of Law  
Mr. Doajo Hicks, General Counsel

Encl.

FIRE Letter to the University of LaVerne, February 13, 2020  
Authorization and Waiver for Release of Personal Information