



FIRE

Foundation for Individual
Rights and Expression

October 4, 2022

Lynn Perry Wooten
Office of the President
Simmons University
300 The Fenway
Boston, Massachusetts 02115

URGENT

Sent via U.S. Mail and Electronic Mail (president@simmons.edu)

Dear President Wooten:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,¹ is concerned by Simmons University's decision to terminate its relationship with Professor David Kane after current Simmons students objected to comments he allegedly made years ago when employed by a different institution. While some may have taken offense to Kane's comments, they remain protected by Simmons' free expression promises. Therefore, Simmons' adverse actions against Kane are impermissible.

David Kane taught an introductory statistics course at Simmons.² Students complained to the administration after learning Kane faced criticism when he previously worked at Harvard University for blog posts that some have attributed to him.³ Specifically, in 2020, Kane was accused of writing multiple blog posts under the pseudonym David Dudley Field '25, claiming, among other things, that most black students at Williams College wouldn't have been admitted if not for Williams' use of affirmative action in admissions and that Williams would be wrong

¹ For more than 20 years, FIRE has defended freedom of expression, conscience, and religion, and other individual rights on America's college campuses. You can learn more about our recently expanded mission and activities at thefire.org.

² 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. Colleen Flaherty, *Prof's Class Canceled at Simmons After Harvard Controversy*, INSIDE HIGHER ED (Sept. 28, 2022), <https://www.insidehighered.com/quicktakes/2022/09/28/prof%E2%80%99s-class-canceled-simmons-after-harvard-controversy>.

³ Isabelle Indelicato and Megan Sutherland, *Controversial former Harvard professor David Kane hired as Simmons adjunct*, SIMMONS VOICE (Sept. 14, 2022), <https://simmonsvoice.com/12598/news/controversial-former-harvard-professor-david-kane-hired-as-simmons-adjunct>.

to punish students for political speech, even if that speech were in support of subjectively offensive groups like Identity Evropa.⁴ It remains unclear whether Kane posted these blogs.

Based on students' criticism, Simmons opened a concurrent section of Kane's introductory statistics course, taught by a different professor, and allowed Kane's students to transfer mid-semester without penalty.⁵ Simmons then cancelled Kane's class after a large number of students transferred to the concurrent section and announced it would not renew Kane's contract.⁶

Given Simmons' clear commitments to faculty free expression, it may not non-renew faculty members like Kane for expressing their views, regardless of the speech's content or students' reactions. Although the comments attributed to Kane offended some students, Simmons has enshrined in its policies the laudable commitment that "[a]cademic freedom is fundamental to the central values and purposes of universities, which must in turn protect freedom of inquiry and speech[.]"⁷ The university commits that "when speaking or writing outside the class as an individual, the teacher must be free from institutional censorship or discipline."⁸ Based on this strong commitment, faculty would reasonably believe that they have expressive rights commensurate with those guaranteed by the First Amendment.

The "bedrock principle underlying" freedom of expression is that speech may not be limited "simply because society finds the idea itself offensive or disagreeable[.]"⁹ It is this counter-majoritarian principle that protects "insulting, and even outrageous, speech in order to provide adequate breathing space" to public debate,¹⁰ recognizing that those with authority "cannot make principled distinctions" in determining what speech is sufficiently offensive to suppress.¹¹

This principle of abstention is particularly important in higher education, where the exchange of views may sometimes be caustic, provocative, or inflammatory. Consider, for example, 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

⁴ *Id.*

⁵ Flaherty, *supra* note 2.

⁶ *Id.*

⁷ *Academic Freedom*, SIMMONS UNIV., <https://www.simmons.edu/academics/academic-freedom> [<https://perma.cc/HWT2-E3HT>]. This commitment obligates Simmons to refrain from imposing "institutional censorship or discipline" on faculty when they speak "as citizens." See *Mayberry v. Dees*, 663 F.2d 502, 520 (4th Cir. 1981) (treating faculty manual as contract between professor and university); see also *McAdams v. Marquette Univ.*, 914 N.W.2d 708, 737 (Wis. 2018) (private Jesuit university breached its contract with a professor over a personal blog post because, by virtue of its adoption of the 1940 Statement of Principles on Academic Freedom and Tenure, the blog post was "a contractually-disqualified basis for discipline").

⁸ *Academic Freedom*, *supra* note 7.

⁹ *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (citing *Texas v. Johnson*, 491 U.S. 397, 414 (1989)).

¹⁰ *Boos v. Barry*, 485 U.S. 312, 322 (1988) (cleaned up).

¹¹ *Cohen v. California*, 403 U.S. 15, 25 (1971).

Justice.”¹² These words and images—published at the height of the Vietnam War—were no doubt deeply offensive to many at a time of deep polarization and unrest. Yet, as the Supreme Court held, “the mere dissemination of ideas,” however “offensive” to others, “may not be shut off in the name alone of ‘conventions of decency.’”¹³ That is particularly important where, as here, the speech involves opinions on politics and race—core political speech at the very heart of expressive freedom, where its protection is “at its zenith.”¹⁴

This calculus does not change when some or many express deep disagreement with the speech at issue. Freedom of expression “embraces [the] heated exchange of views” in this context, and the “desire to maintain a sedate academic environment does not justify limitations on a teacher’s freedom to express himself on political issues in vigorous, argumentative, unmeasured, and even distinctly unpleasant terms.”¹⁵ Freedom of expression thus protects both the blog posts attributed to Kane and the criticism that followed. Academic freedom relies on this exchange of ideas, however sharp and uncomfortable the exchange may sometimes become. That process of criticism and debate is one of “more speech”¹⁶ and open discussion, the remedy preferred over the “authoritative selection” of views in academia.¹⁷

Simmons’ actions—creating a concurrent class¹⁸ and non-renewing Kane based on expression attributed to him¹⁹—constitute adverse actions against Kane for his protected expression. This is a clear violation of Simmons’ promises of academic freedom and free expression—policies to which the university is contractually bound. As such, Simmons must immediately restore Kane to teaching his statistics course and reaffirm to faculty that Simmons will honor its commitments to free expression and academic freedom.

Given the urgent nature of this matter, we request receipt of a response to this letter no later than the close of business on Tuesday, October 11, 2022.

Sincerely,



Sabrina Conza
Program Officer, Campus Rights Advocacy

¹² *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

¹³ *Id.*

¹⁴ *Buckley v. Am. Const. Law Found.*, 525 U.S. 182, 186–87 (1999) (quoting *Meyer v. Grant*, 486 U.S. 414 (1988)).

¹⁵ *Rodriguez v. Maricopa Cnty. Cmty. Coll. Dist.*, 605 F.3d 703, 708–09 (9th Cir. 2009).

¹⁶ *Whitney v. California*, 274 U.S. 357, 377 (1927).

¹⁷ *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

¹⁸ *See Coszalter v. City of Salem*, 320 F.3d 968, 976 (9th Cir. 2003); *see also Levin v. Harleston*, 966 F.2d 85, 88–89 (2d Cir. 1992).

¹⁹ *See Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (a government employer cannot penalize an employee for speaking as a private citizen 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”).