FIRE
Foundation for Individual Rights in Education

December 3, 2018

Richard M. Englert
Office of the President
Temple University
Second Floor, Sullivan Hall
1330 Polett Walk
Philadelphia, Pennsylvania 19122

**URGENT**

*Sent via Priority Mail and Electronic Mail (richard.englert@temple.edu)*

Dear President Englert:

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 the expressive rights of Temple University faculty members posed by the directive issued by Patrick O'Connor, chair of the university's board of trustees, that the university initiate an investigation into a public speech by Professor Marc Lamont Hill. As a public institution of higher education, Temple bears moral and legal obligations to honor the First Amendment rights of its faculty members. Although the university had already concluded that the First Amendment protects Hill's speech, its most senior leadership has suggested that it reach another conclusion. O'Connor's directive alone is an affront to the university's legal and moral obligations under the First Amendment.

## I. FACTS

The following is our understanding of the facts; please inform us if you believe we are in error.

Marc Lamont Hill is a tenured professor and endowed chair in Temple's Klein College of Media and Communications. On November 28, 2018, Hill spoke at a special meeting of the Committee on the Exercise of the Inalienable Rights of the Palestinian People, a committee

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charged by the General Assembly of the United Nations with organizing an "International Day of Solidarity with the Palestinian People" each November.[1]

During his speech, Hill discussed boycotting Israel and said, "We have an opportunity to not just offer solidarity in words but to commit to political action, grass-roots action, local action and international action that will give us what justice requires and that is a free Palestine from the river to the sea."[2]

Hill's comments were met with swift criticism on social media and by a number of advocacy groups calling on Hill's employers, including both CNN and Temple University, to terminate his employment.[3]

On November 29, a CNN spokesperson issued a statement announcing Hill's termination.[4] Temple University, through spokesperson Brandon Lausch, provided a statement that same day, averring that Hill's views were his own and that he did not speak on behalf of the university, and acknowledging that Hill "has a constitutionally protected right to express his opinion as a private citizen."[5] Temple's statement was quickly rebuked by, among others, the Zionist Organization of America, which issued a press release praising CNN for firing Hill and calling on Temple to "fire Hill immediately or at least suspend him and remove him from the prestigious Steve Charles Chair that he holds."[6]

That afternoon, Hill used his personal Twitter account to respond to the reaction to his speech, writing, "I support Palestinian freedom. I support Palestinian self-determination. I am deeply critical of Israeli policy and practice. I do not support anti-Semitism, killing Jewish people, or any of the other things attributed to my speech. I have spent my life fighting these things."[7] Hill also tweeted, "My reference to 'river to the sea' was not a call to destroy anything or anyone. It was a call for justice, both in Israel and in the West Bank/Gaza. The speech very

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[1] G.A. Res. 32/40 B (Dec. 2, 1977); G.A. Res. 60/37, at 2 (Dec. 1, 2005).
[2] Oona Goodin-Smith, *CNN drops Temple professor Marc Lamont Hill after comments on Israel*, PHILLY.COM, Nov. 29, 2018, http://www2.philly.com/philly/news/marc-lamont-hill-cnn-israel-speech-temple-20181129.html.
[3] *See, e.g.,* the National Council of Young Israel, which tweeted, "The #NCYI is calling on @cnn @templeuniv to fire Marc Lamont Hill following his highly offensive & virulent anti-Semitism remarks. They're abhorrent, & his senseless promotion of violence against Israel is repugnant. He can't be given a platform to serve as a pundit or professor!" National Council of Young Israel (@NCYIYoungIsrael), TWITTER (Nov. 28, 2018, 7:28 PM), https://twitter.com/NCYIYoungIsrael/status/1067938412295069696.
[4] Aidan McLaughlin, *EXCLUSIVE: CNN Fires Marc Lamont Hill Following Israel Comments*, MEDIAITE, Nov. 29, 2018, https://www.mediaite.com/tv/exclusive-cnn-fires-marc-lamont-hill-following-israel-comments.
[5] Jackson Richman, *Marc Lamont Hill fired by CNN for blasting Israel, still retained by Temple University*, JEWISH NEWS SYNDICATE, Nov. 29, 2018, https://www.jns.org/marc-lamont-hill-under-fire-for-blasting-israel-prompts-calls-for-his-firing-from-cnn-temple-u.
[6] Zionist Organization of America, *ZOA Praises CNN for Firing Antisemite Marc Hill for Demanding Israel's Violent Destruction*, Nov. 29, 2018, https://zoa.org/2018/11/10379262-zoa-praises-cnn-for-firing-antisemite-marc-hill-for-demanding-israels-violent-destruction.
[7] Marc Lamont Hill (@marclamonthill), TWITTER (Nov. 29, 2018, 3:14 PM), https://twitter.com/marclamonthill/status/1068236842640789504.

clearly and specifically said those things. No amount of debate will change what I actually said or what I meant."[8]

On November 30, you issued a "Statement on Temple's Values" in reference to the controversy surrounding Hill's speech.[9] Your statement condemned "in the strongest possible terms all anti-Semitic, racist or incendiary language, hate speech, calls to violence, and the disparagement of any person or persons based on religion, nationality, race, gender, sexual orientation or identity." You also again recognized that Hill's "views are his own" and that he had a "right to express his opinion" which was "protected by the Constitution to the same extent as any other private citizen," and that Temple "will always be a place where divergent points of view will find a home."

That evening, *Philly.com* reported that Patrick O'Connor, chairman of Temple's board of trustees, was angered by Hill's speech, stating that it "blackens our name unnecessarily."[10] O'Connor said that the board and administration were "not happy," that unidentified people "wanted to fire [Hill] right away," and that Temple was "going to look at what remedies we have." *Philly.com* reported that O'Connor had "instructed Temple's legal staff to explore" the options available to the university. "Free speech is one thing," O'Connor, an attorney, stated, but "[h]ate speech is entirely different."

## II. ANALYSIS

The First Amendment protects Marc Lamont Hill's speech. Temple University may not initiate a formal investigation into it, nor punish him for it, without abandoning its obligations under the First Amendment.

### A. The First Amendment binds Temple University from retaliating against a faculty member's speech on matters of public concern

It has long been settled law that the First Amendment is binding on public colleges, placing limitations on what consequences a public institution may impose on its students or faculty members for their expression. *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, 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).

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[8] Marc Lamont Hill (@marclamonthill), TWITTER (Nov. 29, 2018, 3:19 PM), https://twitter.com/marclamonthill/status/1068238076252745728.

[9] Richard M. Englert, *Statement on Temple's Values*, TEMPLE UNIV., Nov. 30, 2018, https://news.temple.edu/announcements/2018-11-30/statement-temple-values.

[10] Craig R. McCoy, *U.N. speech by Temple prof draws fire from university's board chair*, PHILLY.COM, Nov. 30, 2018, http://www2.philly.com/philly/news/breaking/marc-lamont-hill-temple-israel-anti-semitic-20181130.html.

This includes Temple University. Although Temple was once a private institution, its relationship with the Commonwealth of Pennsylvania[11] has long since established it as a state actor. *Krynicky v. Univ. of Pittsburgh*, 742 F.2d 94, 103 (3d Cir. 1984) (Temple "not only receive[s] funding and [is] subject to routine state regulations, but [is an] instrumentalit[y] of the state, both in name and in fact.") Temple now holds itself out as a public university.[12] Accordingly, courts have recognized that Temple is fully bound by the First Amendment. For example, the United States Court of Appeals for the Third Circuit struck down Temple's former sexual harassment policy on First Amendment grounds, observing that on public campuses, "free speech is of critical importance because it is the lifeblood of academic freedom." *DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008).

Because Temple is a public institution, the First Amendment sharply limits its ability to discipline faculty members for exercising their First Amendment right to speak as private citizens on matters of public concern. "Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech." *Rankin v. McPherson*, 483 U.S. 378, 384 (1987).

In accordance with Supreme Court precedent, the U.S. Court of Appeals for the Third Circuit—the decisions of which are fully binding on Temple—conducts a three-pronged analysis to determine whether the First Amendment protects a public employee's speech. "[F]irst, the employee must speak as a citizen, not as an employee . . . ; second, the speech must involve a matter of public concern . . . ; and third, the government must lack an 'adequate justification' for treating the employee differently than the general public based on its needs as an employer under the *Pickering* balancing test." *Dougherty v. Sch. Dist. of Phila.*, 772 F.3d 979, 987 (3d Cir. 2014).

### B. Hill spoke as a private citizen at a United Nations event concerning Israel and Palestine, matters of public concern

Expression by university employees is "constitutionally protected when the employee is speaking as a citizen, not as an employee, and when the speech involves a matter of public concern." *Bradley v. W. Chester Univ.*, 880 F.3d 643, 650–51 (3d Cir. 2018) (internal quotation marks omitted). As Temple University has readily acknowledged, Professor Hill's speech was

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[11] Temple's Board of Trustees is now composed of thirty-six voting members, including twelve members appointed by officials of the Commonwealth of Pennsylvania, and a non-voting contingent that includes the Governor, the Commonwealth's Secretary of Education, and the Mayor of Philadelphia. 24 PA. STAT. ANN. § 2510-4 (LexisNexis 2018). Additionally, the Commonwealth provides a substantial portion of Temple's operating budget, including an appropriation of $155.1 million in June, 2018. Will Bleier & Alyssa Biederman, *State budget passes sending Temple $155.1 million in state funds*, TEMPLE NEWS, June 24, 2018, https://temple-news.com/state-budget-passes-sending-temple-155-1-million-in-state-funds.

[12] Temple University, *Tuition and Fees*, https://www.temple.edu/admissions/tuition-fees (last visited Dec. 2, 2018).

made in his capacity as a private citizen,[13] rather than as a representative of Temple. Indeed, your November 30 statement explicitly recognized that "Professor Hill does not represent Temple University, and his views are his own."[14] Neither Hill's relationship with Temple University nor his status as a professor changes the fact that his speech is protected. Individuals within a university system are employed for the very purpose of sharing their own views, and not those of the institution itself; that is the point of academic freedom.[15]

It is indisputable that Hill's comments touched upon matters of public concern. "The Supreme Court has explained that speech implicates a matter of public concern when it can be fairly considered as relating to any matter of political, social or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 467 (3d Cir. 2015) (internal quotation marks and citations omitted). That others believe a statement to be of an "inappropriate or controversial character . . . is irrelevant to the question of whether it deals with a matter of public concern." *Rankin*, 483 U.S. at 387 (holding that the expression of hope that President Ronald Reagan might be assassinated was protected against retaliation). In reviewing public employee speech, the Third Circuit "do[es] not consider whether a statement is inappropriate or controversial, because humor, satire, and even personal invective can make a point about a matter of public concern." *De Ritis v. McGarrigle*, 861 F.3d 444, 455 (3d Cir. 2017) (internal quotations and citation omitted).

Hill's speech before a body established by the United Nations concerned questions about a geopolitical ally of the government of the United States. These issues have vexed international and domestic politics, leading the two major political parties of the United States to address the issues in their platform statements.[16] Debate about the relationship between the United States and Israel has culminated in boycotts, legislatures and politicians seeking to curb boycotts, and litigation over the boycott regulations.[17] The debate is so contentious that legislators have sought to regulate the debate.[18] To say that these matters are of public concern is an understatement.

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[13] For this reason, the expression in question falls outside of the Supreme Court's holding in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), as it was plainly not made pursuant to Hill's official duties. *See also id.* at 425 ("We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.").

[14] Englert, *supra* note 9.

[15] As Justice Jackson opined in striking down a requirement that students salute the flag, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . ." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

[16] *See, e.g.,* DEMOCRATIC PLATFORM COMMITTEE, 2016 DEMOCRATIC PARTY PLATFORM 44 (2016), https://democrats.org/wp-content/uploads/2018/10/2016_DNC_Platform.pdf, REPUBLICAN NATIONAL CONVENTION, REPUBLICAN PLATFORM 2016 47 (2016), https://prod-cdn-static.gop.com/static/home/data/platform.pdf.

[17] *See, e.g.,* Brynne Madway, *Court strikes down Kansas BDS law*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., Feb. 13, 2018, https://www.thefire.org/court-strikes-down-kansas-bds-law.

[18] *See, e.g.,* Adam Steinbaugh, *N.Y. Senate revives wildly unconstitutional bill barring funding of student organizations involved in 'hate speech,' 'intolerance,' or promotion of boycotts of Israel or U.S. allies*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., March 2, 2018 (discussing New York bill that would bar university funding of any

### C. Hill's speech is political expression afforded the most robust protection under the First Amendment

Because Hill spoke as a private citizen on a matter of public concern, the question turns to whether the content of his speech is protected by the First Amendment. Hill's speech falls far short of any of the recognized categorical exceptions to the First Amendment, including incitement, and O'Connor's invocation of a "hate speech" exception is at odds with every American court to confront the question, including the Supreme Court of the United States.

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. 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.*, *Papish v. Bd. of Curators of the Univ. of Mo.*, 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.'"). The freedom to offend some listeners is the same freedom to move or excite others. As the Supreme Court observed in *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949), speech "may indeed best serve its high purpose when it induces a condition of unrest . . . or even stirs people to anger.

In *Cohen v. California*, the Court aptly observed that although "the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance," that people will encounter offensive expression is "in truth [a] necessary side effect[] of the broader enduring values which the process of open debate permits us to achieve." 403 U.S. 15, 24–25 (1971). "That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength," because "governmental officials cannot make principled distinctions" between offensive and inoffensive speech, and the "state has no right to cleanse public debate to the point where it is . . . palatable to the most squeamish among us." *Id.* at 25.

Certain well-defined categories of speech are excluded from the protection of the First Amendment, including speech intended to, and likely to cause, imminent unlawful conduct. Yet even assuming for the sake of argument that Hill's invocation of the "from the river to the sea" refrain was intended as advocacy of violence, the incitement exception requires both that the language "specifically advocate for listeners to take unlawful action" *and* that it be "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action." *Nwanguma v. Trump*, 903 F.3d 604, 609–10 (6th Cir. 2018) (then-candidate Donald Trump's repeated "get 'em out of here" statements to a crowd at a rally, concerning

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group that "indirectly promotes" boycotts of Israel and certain other allies), https://www.thefire.org/n-y-senate-revives-wildly-unconstitutional-bill-barring-funding-of-student-organizations-involved-in-hate-speech-intolerance-or-promotion-of-boycotts-of-israel-o.

protesters, could not be read as specific advocacy of violence, even if it would be understood as encouraging violence) (quoting, in part, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)). Advocacy not directed toward any specific person or group concerning action "at some indefinite future time" does not satisfy the "imminent lawless action" test necessary to penalize incitement. *Hess v. Indiana*, 414 U.S. 105, 107–08 (1973).

Despite O'Connor's statement that "[f]ree speech is one thing" but "[h]ate speech is entirely different," there is no "hate speech" exception to the First Amendment's protection of expression. In contrast to O'Connor's invocation of "hate speech" stands decades of precedent making clear that the First Amendment protects expression viewed as hateful. *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (striking down an ordinance that prohibited placing on any property symbols that "arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender"). The Supreme Court reiterated this fundamental principle in *Snyder v. Phelps*, 562 U.S. 443, 461 (2011), proclaiming:

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. . . . [W]e cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.

Last year, the Court once again reaffirmed this principle in *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017), holding unanimously that the perception that expression is "hateful" or that it "demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground" is not a sufficient basis on which to remove speech from the protection of the First Amendment.

Hill's remarks are political speech, which is afforded the highest protection under the First Amendment. *See Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 186–87 (1999) (First Amendment's protection is "at its zenith" when political speech is at issue) (quoting *Meyer v. Grant*, 486 U.S. 414, 425 (1988)). Our system grants robust protection even to language which invokes themes of violence 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."). Courts approach "with extreme care" claims that "highly charged political rhetoric lying at the core of the First Amendment" amounts to unlawful threats or incitement. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 926–27 (1982). Hill's expression is precisely the type of speech that the First Amendment was intended to protect. *See Whitney v. California*, 274 U.S. 357, 375 ("Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government.").

### D. Public anger cannot justify restricting a faculty member's First Amendment rights

The United States Court of Appeals for the Third Circuit has made clear that in order to overcome a faculty member's First Amendment right to speak as a private citizen on a matter

of public concern, a public university must show more than mere speculation that the expression might substantially disrupt the operations of the institution:

> It is particularly important that in cases dealing with academia, the standard applied in evaluating the employer's justification should be the one applicable to the rights of teachers and students in light of the special characteristics of the school environment, and not that applicable to military personnel who must meet the overriding demands of discipline and duty. In an academic environment, suppression of speech or opinion cannot be justified by an undifferentiated fear or apprehension of disturbance, nor by a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Instead, restraint on such protected activity can be sustained only upon a showing that such activity would materially and substantially interfere with the requirement of appropriate discipline in the operation of the school.

*Trotman v. Bd. of Tr.*, 635 F.2d 216, 230 (3d Cir. 1980) (internal citations and quotation marks omitted).

Courts across the nation have consistently ruled that offense taken to a faculty member's expression does not constitute adequate injury to government interests sufficient to override a professor's First Amendment rights. For instance, the United States Court of Appeals for the Ninth Circuit has observed:

> The desire to maintain a sedate academic environment, to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint, is not an interest sufficiently compelling, however, to justify limitations on a teacher's freedom to express himself on political issues in vigorous, argumentative, unmeasured, and even distinctly unpleasant terms. Only where expressive behavior involves substantial disorder or invasion of the rights of others may it be regulated by the state. Self-restraint and respect for all shades of opinions, however desirable and necessary in strictly scholarly writing and discussion, cannot be demanded on pain of dismissal once the professor crosses the concededly fine line from academic instruction as a teacher to political agitation as a citizen—even on the campus itself.

*Adamian v. Jacobsen*, 523 F.2d 929, 934 (9th Cir. 1975) (internal citations and quotation marks omitted).

While many may have been offended by Hill's "river to the sea" reference before the United Nations, the law is clear: A faculty member may not be disciplined simply because expression attributed to him was disagreeable or offensive unless there is *also* a substantial interference with the performance of job duties. It is exceedingly unlikely that Temple can make such a showing, and we are unaware of any facts that would substantiate any concern on this basis.

### E. Investigating Professor Hill would unacceptably chill faculty expression

Temple University cannot abide by O'Connor's directive that its legal staff explore avenues to penalize his expression. In his comments to the media, O'Connor indicated that Temple was looking into both Hill's speech and the recourses available to the university to punish him for it. Investigation of constitutionally protected speech may violate the First Amendment. When "an official's act would chill or silence a person of ordinary firmness from future First Amendment activities," that act violates the First Amendment. *Mendocino Envtl. Ctr. v. Mendocino Cty.*, 192 F.3d 1283, 1300 (9th Cir. 1999). Initiating an investigation into clearly protected expression is itself an affront to the university's legal obligations to protect faculty expression.

In *Sweezy v. New Hampshire*, 354 U.S. 234, 245–48 (1957), the Supreme Court noted that government investigations "are capable of encroaching upon the constitutional liberties of individuals" and have an "inhibiting effect in the flow of democratic expression." Similarly, the Court later observed that when issued by a public institution like Temple, "the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation" may violate the First Amendment. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963). Accordingly, several appellate courts have held that government investigations into protected expression violate the First Amendment. *See White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000) (holding that a government investigation into clearly protected expression chilled speech and therefore violated the First Amendment); *Rakovich v. Wade*, 850 F.2d 1180, 1189 (7th Cir. 1988) ("[A]n investigation conducted in retaliation for comments protected by the first amendment could be actionable . . . .").

Federal courts have consistently protected public university faculty expression targeted for censorship or punishment due to subjective offense. In *Levin v. Harleston*, for example, The City College of the City University of New York launched an investigation into a tenured faculty member's writings on race and intelligence that were perceived as offensive, announcing an *ad hoc* committee to review whether the professor's expression—which the president of the university announced "ha[d] no place at [the college]"—constituted "conduct unbecoming of a member of the faculty." 966 F.2d 85, 89 (2d Cir. 1992). The United States Court of Appeals for the Second Circuit upheld the district court's finding that the investigation constituted an implicit threat of discipline and that the resulting chilling effect constituted a cognizable First Amendment harm.

## III. CONCLUSION

Temple University must honor its obligation to uphold the First Amendment and to uphold the fundamental ideals of a university: that ideas and beliefs, no matter how disagreeable, are to be discussed and debated, rather than prohibited and punished. We are hopeful, in light of your initial statement recognizing Hill's constitutional rights, that you will resolve this incident appropriately and expediently.

We request receipt of a response to this letter by the close of business on December 7, 2018, reaffirming Temple University's recognition that Professor Hill's speech is protected by the First Amendment and confirming that no steps will be taken to penalize or investigate his expression.

Sincerely,

Sarah McLaughlin
Senior Program Officer, Legal and Public Advocacy

cc:
Michael B. Gebhardt, University Counsel
Patrick O'Connor, Chairman, Board of Trustees