FIRE
Foundation for Individual Rights in Education

September 7, 2018

President Donald Birx
Office of the President
Plymouth State University
17 High Street, MSC 1
Plymouth, NH 03264

Sent via U.S. Mail and Electronic Mail (dlbirx@plymouth.edu)

Dear President Birx:

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 state of freedom of expression at Plymouth State University (PSU) following adverse actions taken by PSU's administration against faculty members as a result of their involvement in the criminal trial of Kristie Torbick. These actions include PSU's non-renewal of the contract of Adjunct Professor Dr. Nancy Strapko for writing a letter to the court, and requiring Title IX training and suspending the teaching responsibilities of Professor Emeritus Michael Fischler for sending a letter of support for Torbick. In accordance with PSU's legal obligations as a public institution bound by the First Amendment, it must rescind these penalties and restore these faculty member to their positions.

I. Facts

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

On July 9, 2018, former Exeter High School guidance counselor Kristie Torbick pleaded guilty to four felonies arising from her sexual assault of a 14-year-old student. In advance, Torbick's attorney solicited letters of support from former colleagues for use in her sentencing, as "a

sentencing judge has broad discretion to choose the sources and types of evidence upon which to rely in imposing [the] sentence[.]" *State v. Lambert*, 147 N.H. 295, 295–96 (2001). In rendering its sentence, trial courts are required by New Hampshire's constitution to weigh "whether the sentence imposed will meet the traditional goals of sentencing -- punishment, deterrence and rehabilitation." *Duquette v. Warden, N.H. State Prison*, 154 N.H. 737, 746 (2007). At least twenty-three people provided letters in support of Torbick.[1]

On June 27, 2018, PSU Professor Emeritus Michael Fischler sent a letter of support for Torbick, his former student and graduate assistant, to the criminal court.[2] Prior to sending the letter, PSU public relations officials asked him not the send the letter, as it would cause controversy for the university. Another PSU professor, Dr. Nancy Strapko, served as a paid expert witness in the case and sent a letter to Torbick's attorney attesting to Torbick's remorse and progress in therapy.[3]

The publication of these letters caused many to express anger toward PSU and these professors, with one PSU alumnus stating "[s]ince graduating in 2015, this is the first time I have been ashamed of Plymouth State University. To have members of my community speak out so vocally and publicly in support of an abuser and predator is absolutely heartbreaking."[4] In a similar vein, a local police chief lamented how "[i]t's absolutely unbelievable that so many so-called 'professionals' can be this blind to victim blaming and the impact their statements have on victims of sexual assault."[5] Others condemned PSU and the professors via public forums, statements to local newspapers, and letter writing campaigns.[6]

On July 31, Provost and Vice President of Academic Affairs Robin Dorff informed Strapko via email that "based on the current situation surrounding the letter you submitted to the court in the Kristie Torbick case, you will not be hired again at Plymouth State University." The next day, PSU issued a statement condemning the professors who supported Torbick and announcing that Strapko would not be rehired because "[i]n PSU's opinion, portraying a 14-

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[1] Jason Schreiber, *23 wrote glowing letters of support for guidance counselor who sexually assaulted student,* NEW HAMPSHIRE UNION LEADER (July 24, 2018), unionleader.com/crime/23-wrote-glowing-letters-of-support-for-guidance-counselor-who-sexually-assaulted-student-20180723.
[2] Michael Fischler, *Letter of Support for Kristie (Kim) Torbick*, (June 27, 2018) (on file with author).
[3] Nancy Strapko, *Letter to attorney Mark Sisti* (May 15, 2018) (on file with author).
[4] Jason Schreiber, *PSU under fire for faculty's support of guidance counselor convicted of sexual assault of student*, NEW HAMPSHIRE UNION LEADER (July 26, 2018), unionleader.com/education/psu-under-fire-for-facultys-support-of-guidance-counselor-convicted-of-sexual-assault-of-student-20180726.
[5] *Id.*
[6] Alyssa Dandrea, *Support for ex-counselor convicted of child rape shakes judicial system to its core,* CONCORD MONITOR (Aug. 12,2018), concordmonitor.com/Backlash-after-counselor-convicted-sexual-assault-19200727.

year-old sexual assault victim as a 'pursuer' is legally wrong and morally reprehensible."[7] PSU also stated that Fischler has agreed to complete Title IX training prior to teaching in the upcoming fall semester. However, as of the date of this letter, Fischler has yet to agree to complete Title IX training, and PSU public relations officials informed him that he will not be teaching classes this fall.

II. The First Amendment Prohibits PSU From Penalizing Faculty Members' Statements as Private Citizens to a Court of Law

By penalizing faculty members for their participation in proceedings before a criminal court, PSU is at odds with its nonnegotiable obligations under the First Amendment, its own policies, and fundamental principles of public policy.

It has long been settled law that the First Amendment is fully binding on public colleges like PSU. *Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) ("[O]ur cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities."); *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).

Employees of government institutions like PSU do not lose their First Amendment right to speak as private citizens on matters of public concern by virtue of their employment. Recognizing that "a citizen who works for the government is nonetheless a citizen," the Supreme Court has made clear that "[t]he First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006).

Public employees like Professors Strapko and Fischler may not face discipline or retaliation for constitutionally protected expression unless the government employer demonstrates that the expression hindered "the effective and efficient fulfillment of its responsibilities to the public." *Connick v. Myers*, 461 U.S. 138, 150 (1983). "So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are *necessary* for their employers to operate efficiently and effectively." *Garcetti*, 547 U.S. at

[7] Jason Schreiber, PSU takes action on faculty who supported counselor in sex assault case, NEW HAMPSHIRE UNION LEADER (Aug. 2, 2018), unionleader.com/education/plymouth-state-univ-takes-action-against-faculty-who-supported-guidance-counselor-who-molested-student-20180802.

419 (emphasis added). Disapproval of the speech at issue is insufficient grounds for punishment. *Rankin v. McPherson*, 483 U.S. 378, 384 (1987) ("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.").

In accordance with Supreme Court precedent, the United States Court of Appeals for the First Circuit—the decisions of which are fully binding on PSU—conducts a three-pronged analysis to determine whether the First Amendment protects a public employee's speech. "To prove that a public employer violated the First Amendment rights of a public employee by subjecting him to an adverse employment action in retaliation for engaging in protected speech, the employee first must show that he spoke as a citizen, and [second] that the speech was on a matter of public concern." *Delaney v. Town of Abington*, 890 F.3d 1, 5 (1st Cir. 2018) (internal quotations and citations omitted). Finally, if the employee establishes as much, the employer must show that it "had an adequate justification for treating the employee differently from any other member of the general public." *Id.*

i. ***Professors Strapko and Fischler spoke as private citizens***

The letters sent by Professors Strapko and Fischler are indisputably the expression of private citizens, not employees speaking on behalf of PSU. The university does not employ them for the purpose of providing analysis to trial court judges, nor did the university direct or solicit their commentary to the court. To the contrary, PSU explicitly stated that the opinions of its professors on this matter are completely separate from that of the university, and it sought to prevent Fischler from sending a letter in the first place. [8]

Nor would a recipient of the letters—here, a sophisticated jurist well acquainted with the practice of sending letters opining as to a defendant's character—believe the letters to have been sent on behalf of the university, as opposed to bearing the opinions of their individual authors. The letters were not sent on PSU letterhead and are largely indistinguishable, in purpose or form, from the other twenty-one letters sent to the court in this matter. They are comparable to the letter to the editor in *Pickering v. Board of Education*, 391 U.S. 563 (1968), held to be an expression of a private citizen, in that they "had no official significance and bore similarities to letters submitted by numerous citizens every day." *Garcetti*, 547 U.S. at 422.

[8] Jason Schreiber, *PSU under fire for faculty's support of guidance counselor convicted of sexual assault of student*, NEW HAMPSHIRE UNION LEADER (July 26, 2018), unionleader.com/education/psu-under-fire-for-facultys-support-of-guidance-counselor-convicted-of-sexual-assault-of-student-20180726.

ii. The letters addressed a court's sentencing of a former public employee, indisputably a matter of public concern

The second inquiry in a *Garcetti* analysis is whether the employee's speech was on a matter of public concern. This step evaluates whether "the employee's expression can fairly be considered to relate to 'any matter of political, social, or other concern to the community.'" *Davignon v. Hodgson*, 524 F.3d 91, 101 (1st Cir. 2008) (quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983). There is no doubt that criminal proceedings against a former public employee are inherently matters of public concern. So, too, are matters involving the rights of schoolchildren to be free from sexual abuse, particularly from educators and other public actors, matters of grave public concern. Indeed, the allegations, charges, and conviction of Torbick generated substantial media coverage.

iii. Public anger over the views expressed is insufficient to override faculty members' freedom of expression

The third step in a *Garcetti* analysis is balancing "the significance of the interests served by the public-employee speech . . . against the governmental employer's legitimate interests in preventing unnecessary disruptions and inefficiencies in carrying out its public service mission." *O'Connor v. Steeves*, 994 F.2d 905, 915 (1st Cir. 1993). The public employer must demonstrate that the speech "impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Rankin*, 483 U.S. at 388.

Courts have repeatedly and squarely rejected the notion that speech may be curtailed on the basis that others find it offensive, disagreeable, or upsetting. *See 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.'"); *Cohen v. California*, 403 U.S. 15, 25 (1971) ("Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us . . . [I]t is nevertheless often true that one man's vulgarity is another's lyric.").

This binding precedent is bolstered by PSU's own promises to protect the free speech rights of its faculty. PSU's faculty handbook provides, in pertinent part:

> The University believes that faculty members are entitled to pursue knowledge wherever it lies, to freedom of discussion in their areas of academic competency, and to their rights and responsibilities as citizens. . . . College or university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free of institutional censorship or discipline.[9]

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 offensive writings on race and intelligence, announcing an *ad hoc* committee to review whether the professor's expression—which administrators stated "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.

Likewise, the United States Court of Appeals for the Ninth Circuit has made clear that offense taken to a faculty member's expression does not constitute injury to government interests sufficient to override a professor's First Amendment rights:

> 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); *see also Peacock v. Duval*, 694 F.2d 644, 647 (9th Cir. 1982) ("Although we

[9] Plymouth State University, *Faculty Handbook* (Revised May 2018), *available at* campus.plymouth.edu/academic-affairs/wp-content/uploads/sites/28/2014/10/Teaching-Faculty-Faculty-Handbook-revisions-5-2-2018.pdf.

recognize the necessity for the efficient functioning of a public university, such efficiency cannot be purchased at the expense of stifling free and unhindered debate on fundamental educational issues. Merely because Peacock's speech may have had the effect of irritating or even harassing the University's administration does not mean that such speech is stripped of its [F]irst [A]mendment protection.") (internal citations and quotation marks omitted). Other federal courts have similarly rejected the argument that a public institution can discipline a faculty member because her expression caused anger, alarm, or concern. In a case involving the use of gendered and racial slurs as part of a classroom discussion on how language is used to marginalize minorities and other oppressed groups in society, the United States Court of Appeals for the Sixth Circuit rejected a college's argument that intervention by a local civil rights activist posed an actionable risk of disruption to the school's operations. *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671 (6th Cir. 2001). The Sixth Circuit wrote:

> Only after Reverend Coleman voiced his opposition to the classroom discussion did Green and Besser become interested in the subject matter of Hardy's lecture. Just like the school officials in *Tinker*, Green and Besser were concerned with "avoiding the discomfort and unpleasantness that always accompany" a controversial subject. On balance, Hardy's rights to free speech and academic freedom outweigh the College's interest in limiting that speech.

Id. at 682 (internal citation omitted).

Even in cases related to expression about campus administrators themselves, federal appellate courts have steadfastly protected faculty expression. In *Bauer v. Sampson*, a faculty member published in a campus newspaper several writings and illustrations sharply critical of Irvine Valley College's president and board of trustees, some of which contained "violent behavior overtones." 261 F.3d 775, 780 (9th Cir. 2001). Holding that the professor's First Amendment rights outweighed the interests of the college, the Ninth Circuit noted that there was no evidence that the expression interfered with the performance of his duties, that any disharmony caused by his expression was incidental, and:

> [G]iven the nature of academic life, especially at the college level, it was not necessary that Bauer and the administration enjoy a close working relationship requiring trust and respect — indeed anyone who has spent time on college campuses knows that the vigorous exchange of ideas and resulting tension between an administration and its faculty is as much a part of college life as homecoming and final exams.

Id. at 784.

In other words, "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." *Rodriguez v. Maricopa Cty. Cmty. Coll. Dist.*, 605 F.3d 703, 708–09 (9th Cir. 2010) (internal citation omitted).

By constructively firing Strapko and imposing a suspension and mandatory training on Fischler, PSU betrays its legal and moral obligations to uphold and defend the free speech rights of its faculty. Both Dorff's email to Strapko and Fischler's conversations with PSU administrators make clear that their punishments are a direct result of their involvement in Torbick's sentencing. This conclusion is bolstered by PSU's public statements regarding the fallout from Torbick's conviction, which plainly ties PSU's actions to the protected expression of these professors.

iv. Strapko's lack of tenure does not obliviate her First Amendment rights against PSU

Despite Strapko's status as a former adjunct professor, the nonrenewal of her employment contract on basis of her constitutionally protected expression constitutes an adverse employment action under the First Amendment. *See 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); *Kazar v. Slippery Rock Univ. of Pa.*, No. 16-2161, 2017 WL 587984 (3d Cir. Feb. 14, 2017) (acknowledging that a nontenured professor could state a First Amendment claim if the non-renewal of her contract was based on her protected expression); *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671 (6th Cir. 2001) (holding that an untenured professor's in-class speech constituted expression on a matter of public concern, and that the college's non-renewal of his appointment violated the First Amendment); *Lewis v. Spencer*, 468 F.2d 553 (5th Cir. 1972) (holding that "lack of tenure is immaterial" to a First Amendment retaliation claim when a contract is not renewed); *Kahan v. Slippery Rock Univ. of Pa.*, 50 F. Supp. 3d 667, 687 (W.D. Pa. 2014), aff'd 664 F. App'x 170 (3d Cir. 2016) ("There can be no reasonable dispute that the non-renewal of [Plaintiff]'s one-year, probationary contract qualifies as an adverse employment action.").

As a result, PSU cannot claim that Strapko's lack of tenure excuses its refusal to review her contract on the basis of her protected expression.

III. PSU's punishment of these professors unduly chills faculty participation in judicial proceedings

In sanctioning these professors, PSU exhibits an unwillingness to defend the rights of its faculty, and citizens as a whole, to assist courts in adjudicating civil and criminal matters. One need not be a trial attorney to understand the profound civic importance of ensuring that those with relevant information come forward when called to testify. Solemn participation in criminal trials forms the backbone of any functional system of justice—a responsibility that necessarily includes expression that may offend or cast disrepute on educational institutions. In this instance, PSU would be equally wrong to punish a professor calling for harsher punishment for Torbick.

Criminal defendants, particularly those convicted of serious felonies, are rarely sympathetic in the eyes of the public, nor in the eyes of the sentencing judge. Yet, New Hampshire's constitution has for centuries recognized that not all criminal acts, nor the defendants who commit them, are deserving of the same penalty, lest all convictions result in lengthy imprisonment:

> All penalties ought to be proportioned to the nature of the offense. No wise Legislature will affix the same punishment to the crimes of theft, forgery, and the like, which they do to those of murder and treason. Where the same undistinguishing severity is exerted against all offenses, the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do the lightest offenses. For the same reason a multitude of sanguinary laws is both impolitic and unjust. The true design of all punishments being to reform, not to exterminate mankind.[10]

Members of the public are undoubtedly free to conclude, and to express their conclusion, that a faculty member's opinions—whether they concern a criminal defendant, the justice system, or any number of subjects—are unwise or unfounded. If, however, the court of opinion is permitted to dictate whether those who share their opinions with a court of law are to remain employed, it will cast a chilling effect that will ultimately inure to the detriment of defendants in the criminal justice system.

[10] N.H. CONST. pt. 1, art. 18 (amended 1792).

States, including New Hampshire, endeavor to shield those who participate in judicial proceedings from unlawful retaliation, underscoring the strong public policy favoring the protection of those who participate in the process. The State of New Hampshire, for example, makes it a felony to "commit[] any unlawful act in retaliation for anything done by another in his capacity as witness or informant."[11] The presence of this provision in the New Hampshire criminal code, as well that of every other state and the federal government,[12] reflects the paramount societal interest in ensuring that communication to criminal courts remains unchilled by retaliatory conduct.

IV. Conclusion

We appreciate PSU's institutional commitment to freedom of expression, as evident by its "green light" rating from FIRE for crafting policies that protect its students' and faculty members' freedom of expression.[13] An institution's commitment in policy, however, is lost if its letter and spirit are not embodied in its conduct. We ask PSU to adhere to this commitment by rescinding Fischler's suspension and Title IX training requirement, and by restoring Strapko to her adjunct professorship. We also ask PSU to make clear that its faculty will not face punishment for speaking on behalf of the accused, whether they be innocent or guilty.

We request a response to this letter by September 21, 2018.

Sincerely,

Zach Greenberg
Program Officer, Individual Rights Defense Program

cc:
Provost and Vice President for Academic Affairs Robin Dorff
PSU General Counsel Ronald Rogers, Esq.

[11] N.H. Rev. Stat. Ann. § 641:5.
[12] *See, e.g.*, 18 U.S.C. § 1512 (federal witness tampering statute); 18 Pa. C.S. § 4952 (Pennsylvania witness intimidation statute); John F. Decker, *Putting Forfeiture to Work*, 43 U.C. DAVIS L. REV. 1295 (2004) (appendix listing every state's witness tampering, witness intimidation, and obstruction statutes as of 2009).
[13] Press Release, FIRE, Plymouth State University Earns FIRE's Highest Rating for Free Speech (Sept. 12, 2014), *available at* thefire.org/plymouth-state-university-earns-fires-highest-rating-free-speech/.