



December 18, 2020

Chancellor Glenn Boyce
Chancellor's Office
The University of Mississippi
Lyceum 123
University, Mississippi 38677

Sent via Electronic Mail (chancellor@olemiss.edu)

Dear Chancellor Boyce:

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 appreciates that the University of Mississippi is one of the few institutions in the country whose policies earn a "green light" rating from FIRE. We are, however, concerned by the circumstances of the University's nonrenewal of Professor Garrett Felber. Your acceptance of the recommendation for his nonrenewal appears to have been predicated on an incomplete accounting of these circumstances, which suggest that the nonrenewal was motivated in part by Felber's criticism of the institution on social media. Accordingly, we join calls for a full and transparent account of the University's response to Felber's criticism¹ and urge you to reevaluate his nonrenewal.

I. Felber's Non-Renewal Follows Criticism of the University and Donors

Our understanding of the pertinent facts follows, and we invite the University to share any information that might modify our analysis. To that end, please find enclosed an executed privacy waiver authorizing you to share information about this matter.

¹ Letter from Walter Johnson, Professor, Harvard Univ., et al., to Glenn Boyce, Chancellor, Univ. of Miss., et al. (Dec. 16, 2020), *available at* <https://academeblog.org/2020/12/16/open-letter-to-university-of-mississippi-chancellor-boyce-in-support-of-garrett-felber>.

Garrett Felber is an assistant professor of history on contract renewable in or about May 2021. In August of 2020, the University announced that Felber was taking a one-year fellowship at Harvard University.² As a result, Felber is “on leave during the 2020-2021 academic year[.]”³

In announcing his leave of absence, Felber’s supervisor, Professor Noell Wilson, lauded Felber as an “indefatigable researcher and community builder,” citing his “knowledge of the carceral state” and “his volunteer engagement with prisons as a teacher.”⁴ Felber is involved in the Study and Struggle program, an extramural program in which faculty, students, and others offer critical study and advocacy against incarceration and criminalization in Mississippi.⁵

On October 28, Felber criticized Wilson on his personal Twitter account for rejecting a grant relating to the Study and Struggle program.⁶ Felber explained the purpose of the program, placing both the program and the rejection of the grant in the context of systemic racism, arguing that the University “prioritizes racist donors over all else,” as “racism is the brand” and “in the name” of the University, referring to the University’s “Ole Miss Rebels” brand.⁷

On November 4 and 9, Wilson and Felber exchanged emails in which Wilson offered to answer questions concerning the grant denial and, per Wilson, set forth “our expectations for communication between faculty and the Chair moving forward.”⁸ After Felber demurred, indicating that he had no questions and asking that communications concerning the grant be in writing, Wilson shared her “surprise,” noting that Felber had “expressed [his] displeasure with me, to other colleagues, and on social media[.]”⁹ Felber responded on November 9 that he had no desire to “meet further about *this*”—referring to the grant denial—until Wilson was willing to address the academic freedom implications of the denial of the grant.¹⁰

On December 10, Wilson notified Felber via email that she had recommended nonrenewal of his contract, terminating his employment as of December 31, 2021.¹¹ Wilson’s letter urged that she would have “advised you of the nonrenewal” by phone or video, but “[s]ince October 27, 2020, however, you have refused to speak to me.”¹²

² Press Release, *History Professor Granted Fellowship at Harvard*, UNIV. OF MISS., Aug. 14, 2020, <https://news.olemiss.edu/history-professor-granted-fellowship-at-harvard>.

³ UNIV. OF MISS., *Garret Felber*, <https://history.olemiss.edu/garrett-felber> (last visited Dec. 17, 2020).

⁴ Press Release, *supra* note 2.

⁵ STUDY & STRUGGLE, *About Mississippi Freedom Winter* (last visited Dec. 17, 2020), <https://www.studyandstruggle.com/about>.

⁶ Garrett Felber (@garrett_felber), TWITTER (Oct. 28, 2020, 6:42 AM), https://twitter.com/garrett_felber/status/1321417101790171136.

⁷ *Id.*

⁸ Email from Noell Wilson, Chair, Dept. of History, Univ. of Miss., to Felber (Nov. 4, 2020, 4:23 PM) (on file with author).

⁹ Email from Wilson to Felber, et al. (Nov. 5, 2020, 4:37 PM) (on file with author).

¹⁰ Email from Felber to Wilson, et al. (Nov. 9, 2020, 6:03 PM) (on file with author) (emphasis added).

¹¹ Letter from Wilson to Felber (Dec. 10, 2021) (on file with author).

¹² *Id.* Felber later received a letter from you, dated the same day, accepting the recommendation. Letter from Glenn F. Boyce, Chancellor, Univ. of Miss., to Felber (Dec. 10, 2021) (on file with author).

II. Felber’s Termination Exceeds the University’s Authority Under the First Amendment and University Policy

It has long been settled law that the First Amendment is binding on public universities like the University of Mississippi.¹³ Accordingly, the University’s decisions and actions—including the pursuit of disciplinary sanctions¹⁴ or response to faculty members’ protected speech¹⁵—must be consistent with the First Amendment.

A. *Felber’s public criticism of the University is protected expression.*

Faculty members at public universities do not “relinquish First Amendment rights to comment on matters of public interest by virtue of government employment”¹⁶ but instead retain a right to speak as private citizens on matters of public concern.¹⁷

Felber’s tweets are speech as a private citizen, not on behalf of the University. The “critical question” in determining whether the speech was that of an employee or private citizen is “whether the speech at issue is itself ordinarily within the scope of an employee’s duties, not whether it merely concerns those duties.”¹⁸ Colleges ordinarily do not employ their faculty to post on their personal social media pages,¹⁹ and public complaints directed to a public audience—as opposed to his “chain of command”²⁰—are indicia of speech as a private citizen.

Similarly, Felber’s tweets address matters of public concern.²¹ Both the subject matter of the Study and Struggle program—that is, the criminal justice system and its relationship with America’s history of racism—and Felber’s criticism of the University’s refusal to accept the grant²² address matters of fundamental public concern. It is of no moment that his personal interest in grant funding is aligned with the public interest, as Felber’s comments were intended to “bring wrongdoing to light,” not “merely . . . further some purely private interest.”²³

¹³ *Healy v. James*, 408 U.S. 169, 180 (1972).

¹⁴ *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

¹⁵ *Lindsey v. Bd. of Regents*, 607 F.2d 672, 674 (5th Cir. 1979).

¹⁶ *Connick v. Myers*, 461 U.S. 138, 140 (1983).

¹⁷ *Bradley v. James*, 479 F.3d 536, 538 (8th Cir. 2007).

¹⁸ *Lane v. Franks*, 573 U.S. 228, 240 (2014).

¹⁹ *See, e.g., Higbee v. Eastern Michigan Univ.*, No. 18-13761, 2019 U.S. Dist. LEXIS 109394, at *14 (E.D. Mich. July 1, 2019) (commenting on Facebook about the university’s response to racial incidents “would not appear to be within a history professor’s official duties”).

²⁰ *Buddenberg v. Weisdack*, 939 F.3d 732, 740 (6th Cir. 2019).

²¹ “Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community[.]” *Snyder v. Phelps*, 562 U.S. 443, 453 (2011).

²² FIRE does not presently offer a view on whether the University’s denial of the grant request comports with its obligations to protect academic freedom.

²³ *Havekost v. U.S. Dep’t of Navy*, 925 F.2d 316, 318 (9th Cir. 1991).

B. Felber’s nonrenewal cannot be premised on a retaliatory purpose.

While a public university might lawfully decline to renew a contract for no reason at all, it cannot decline to renew an untenured faculty member’s contract for a retaliatory purpose, including for speech protected by the First Amendment.²⁴ This principle is of fundamental importance to all faculty and of particular concern to contingent faculty members, who—unlike tenured faculty—do not have the protection of tenure. As institutions become more heavily reliant on contingent faculty,²⁵ it is all the more critical that they avoid even the appearance that decisions on contractual renewals may adversely weigh speech protected by academic freedom or expression protected by the First Amendment. Lecturers, librarians, researchers, and other contingent faculty members’ expressive rights depend on their institutions’ commitments to refrain from using contract renewals as a vehicle to respond to criticism or unpopular speech.

Here, Felber’s nonrenewal arose in the context of his public criticism. Indeed, his supervisor cited that public criticism as a basis for seeking to have a meeting with him. Accordingly, the University’s nonrenewal decision necessarily arises from his protected expression, and the University bears the “burden of proof . . . to demonstrate that it would have reached the same decision even if the [professor] had not engaged in the protected” expression.²⁶

C. Felber’s email exchange with Wilson falls short of “contumacious conduct.”

We are skeptical that the University could untether its response to Felber’s criticism from its nonrenewal of Felber’s contract.

First, University policies require that contracts of untenured faculty members be terminated only for “malfeasance, inefficiency, or contumacious conduct or for cause[.]”²⁷ Felber did not refuse to communicate with his supervisor but instead sought to channel communications on a particular subject to a written medium. His disinclination to “meet further about *this*”—that is, the grant refusal—was interpreted by his supervisor as a refusal to meet *at all*. In other words, the two were talking past one another—a conflict that would be better addressed through, if anything, a clarification, not termination. Moreover, whatever interests the

²⁴ *Perry v. Sindermann*, 408 U.S. 593, 598 (1972) (“[T]he nonrenewal of a nontenured public school teacher’s one-year contract may not be predicated on his exercise of First and Fourteenth Amendment rights”) (internal citations omitted); see also *Lindsey v. Bd. of Regents*, 607 F.2d 672, 674 (5th Cir. 1979).

²⁵ Between 1995 and 2011 inclusive, contingent faculty position doubled; full-time tenure-track positions grew by 10%. By 2017, about 70% of instructional positions were filled with contingent workers. Contingent Workforce: Size, Characteristics, Compensation, and Work Experiences of Adjunct and Other Non-Tenure-Track Faculty. U.S. GOV’T ACCOUNTABILITY OFFICE. GAO-18-49 at 8. Oct. 19, 2017. <https://www.gao.gov/assets/690/687871.pdf>.

²⁶ *Lindsey*, 607 F.2d at 676.

²⁷ UNIV. OF MISS., TERMINATION OF UNTENURED FACULTY (Apr. 15, 2019) (on file with author). To the extent the University would assert that this standard applies only to the early termination of a contract, that appears to be the case here, as there is every indication that the University intended to renew his current contract beyond its current May 2021 conclusion. For example, the University’s nonrenewal notice indicates that his employment will terminate in December of 2021. As a result, the University is terminating a contract of undefined duration, not simply letting an existing contract expire.

University has in maintaining a harmonious relationship between supervisor and employee is minimal, as Felber was—and is—on leave from the University, and it is not reasonable to expect a faculty member on a leave of absence to be at the beck and call of a supervisor.

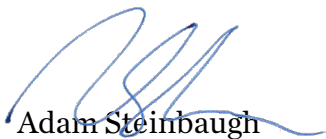
Second, the recommendation of nonrenewal, initiated by a supervisor publicly criticized by Felber, stands in stark contrast to her public praise of Felber less than four months earlier. As one federal appellate court has observed, “conflict is not unknown in the university setting given the . . . academic freedom” enjoyed by faculty.²⁸ As Felber’s alleged misconduct amounts to little more than insisting that discussion on a contentious issue be conducted in writing, the excessive penalty imposed for this conflict, coupled with the supervisor’s reference to the public criticism, strongly suggests that the termination is motivated by Felber’s criticism, not his performance.

III. Conclusion

We echo the calls on the University to transparently assess the institution’s response to Felber’s grant request and his criticism of the institution. We likewise urge you to reassess your acceptance of the recommendation that his contract be nonrenewed, as it is not clear whether you were fully apprised of the origin of the recommendation.²⁹

We request receipt of a response to this letter by the close of business on December 30, 2020.

Sincerely,



Adam Steinbaugh
Director, Individual Rights Defense Program

Encl.

²⁸ *Hulen v. Yates*, 322 F.3d 1229, 1239 (10th Cir. 2003).

²⁹ In particular, the notice of nonrenewal does not disclose the circumstances of Felber’s public criticism of Wilson or the University, nor does it reveal that Wilson’s rationale for meeting with Felber involved his public criticism of her. Further, the acceptance of the recommendation came the same day as the recommendation was made, suggesting its acceptance was a ministerial function.

Authorization and Waiver for Release of Personal Information

I, Garrett Felber, do hereby authorize the University of Mississippi (the "Institution") to release to the Foundation for Individual Rights in Education ("FIRE") any and all information concerning my employment, status, or relationship with the Institution. This authorization and waiver extends to the release of any personnel files, investigative records, disciplinary history, or other records that would otherwise be protected by privacy rights of any source, including those arising from contract, statute, or regulation. I also authorize the Institution to engage FIRE and its staff members in a full discussion of all information pertaining to my employment and performance, and, in so doing, to disclose to FIRE all relevant information and documentation.

This authorization and waiver does not extend to or authorize the release of any information or records to any entity or person other than the Foundation for Individual Rights in Education, and I understand that I may withdraw this authorization in writing at any time. I further understand that my execution of this waiver and release does not, on its own or in connection with any other communications or activity, serve to establish an attorney-client relationship with FIRE.

If the Institution is located in the State of California, I request access to and a copy of all documents defined as my "personnel records" under Cal. Ed. Code § 87031 or Cal. Lab. Code § 1198.5, including without limitation: (1) a complete copy of any files kept in my name in any and all Institution or District offices; (2) any emails, notes, memoranda, video, audio, or other material maintained by any school employee in which I am personally identifiable; and (3) any and all phone, medical or other records in which I am personally identifiable.

This authorization and waiver does not extend to or authorize the release of any information or records to any entity or person other than the Foundation for Individual Rights in Education, and I understand that I may withdraw this authorization in writing at any time. I further understand that my execution of this waiver and release does not, on its own or in connection with any other communications or activity, serve to establish an attorney-client relationship with FIRE.

I also hereby consent that FIRE may disclose information obtained as a result of this authorization and waiver, but only the information that I authorize.

DocuSigned by:

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12/17/2020

Date