FIRE
Foundation for Individual Rights in Education

October 7, 2020

Jerome A. Gilbert, Ph.D.
Office of the President
Marshall University
Old Main 216
One John Marshall Drive
Huntington, West Virginia 25755

URGENT

Sent via Electronic Mail (president@marshall.edu)

Dear President Gilbert:

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 by Marshall University's proposed termination of Dr. Jennifer Mosher over comments made during her classes on microbiology and COVID-19. These comments are protected by the First Amendment, which embraces the academic freedom rights of faculty members at public universities. In terminating Mosher for comments relevant to her courses, however offensive others may find those remarks, Marshall University will violate well-established First Amendment rights, imperil its eligibility for federal funding, and betray its commitment to academic freedom.

I. Marshall University Moves to Terminate Mosher Following Public Anger and Legislators' Threats

The following is our abbreviated understanding of the pertinent facts, drawn from Marshall University's personnel investigation report except where noted. We appreciate that you may have additional information to offer.[1] However, even accepting as true the allegations in the university's report, Mosher's comments are protected by the First Amendment.

[1] To these ends, please find enclosed a waiver executed by Jennifer Mosher authorizing Marshall University to share information with FIRE.

Dr. Jennifer Mosher is a tenured professor in the Department of Biological Sciences at Marshall University, where she has received consistently positive student evaluations during her six years of employment.

On September 15, 2020, Mosher went to Marshall University's campus to deliver two lectures to students, who were attending the classes virtually. Mosher had not recently been present on campus due to health concerns.

Mosher's first class, "Principles of Microbiology," was scheduled to last 75 minutes. In the first ten seconds of the class—presumably as students were logging in—Mosher mentioned seeing others on campus wearing masks improperly ("as a chin strap") and noting that others' non-compliance was "one of the reasons I have been staying home." Responding to a student's chat-based remark in response ("thinning the gene pool? I am a horrible person"), Mosher remarked:

> Oh, I think the same thing about, um, thinning the gene pool. Um, without getting into politics, all the large gatherings of certain groups of people holding rallies, um, I'm, I'm like yeah, let Darwin take, do its job, or Darwinism. Um, and hopefully they'll all be dead by the election. [laughing] I'm sorry, that's horrible . . . .

Mosher went on to compare the United States' response to that of Brazil. This exchange took approximately two minutes and twenty seconds of the 75-minute class.

During her second course of the day, "Biology of [COVID]-19," Mosher was to discuss molecular evolution, transmission, and preventative measures. The course is intended to "focus[] on the facts behind the news, how to distinguish science from pseudoscience or misinformation, and how to make sense of the rapid flow of information relating to this emerging disease."[2] Mosher exhibited an eight-minute TED Talk recorded by Bill Gates in 2015.[3] Mosher responded to a number of student questions and comments about the video, then remarked:

> Alright, I'll be honest with you. I can't hold back anymore. Trump took all that money to build his wall. He gutted the pandemic team. Any response we would have had, we were completely unprepared for because we had to build that damn wall, sorry.

The report then cites, with no additional context, Mosher's remarks concerning the American healthcare system, the effect of the pandemic on wealth disparity, her frustration with the state of political discourse on social media, and her renewed frustration with Marshall

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[2] MARSHALL UNIV., *Syllabus for BSC 482/582 – The Biology of Covid-19* (Fall 2020) (on file with author).
[3] Bill Gates, *The next outbreak? We're not ready*, TED TALKS, Mar. 2015, https://www.ted.com/talks/bill_gates_the_next_outbreak_we_re_not_ready.

University students and faculty who were not complying with the university's mask policies. Mosher then added, during the COVID-19 class:

> So, wearing a mask is serious . . . and I'm kind of, you know, like a certain person is holding rallies, you know, I think yesterday he held one inside – nobody wore a mask and I've become the type of person where I hope they all get it and die [laughing] I'm sorry, but that, I am so frustrated and, just, I don't know what else to do. I – you can't argue with them. You can't talk sense into them. Um. I, I said to somebody yesterday I hope they all die before the election. That's the only, that's the only saving hope I have right now. . . .

Clips of this remark were shared on Twitter by a Marshall alumnus who wanted to "show[] how INTOLERANT the left can be."[4] The clip went viral, spawning coverage by a number of conservative media outlets and leading the university to suspend Mosher.[5] The university's report cites public anger, characterizing the public "sentiment" as "extremely negative," citing a "large outcry of support for discipline, up to and including termination" and comparing it to the "minimal number of public statements" supporting Mosher.

The viral clip also received a harsh rebuke from 17 members of the West Virginia Senate, representing exactly half of that body's membership, who sent a letter to West Virginia University (in which the Senate members wrote football players had "promote[d] a domestic terrorist group" by wearing helmets with stickers supporting the Black Lives Matter movement) and Marshall University.[6] That letter lamented that university "resources are being used to promote . . . hate speech" resulting in the "denigration of our Republic," citing Mosher's "inherently disgusting" comments and threatening to cut Marshall University's funding.[7]

The university's report does not allege that Mosher directed her remarks at any particular student, nor does it assert that her remarks amount to harassment on the basis of a protected characteristic. The report instead alleges that her remarks "may have caused a controversial environment where at least some of the students felt uncomfortable or offended."[8]

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[4] Eric Kutcher, (@herdanesthesia), TWITTER (Sept. 19, 2020, 2:21PM), https://twitter.com/herdanesthesia/status/1307384342243676160.

[5] *See, e.g.*, Ben Zeisloft, *Prof on leave after saying in class she hopes Trump supporters 'die before the election'*, CAMPUS REFORM, Sept. 18, 2020, https://www.campusreform.org/?ID=15726.

[6] Letter from Sen. Eric J. Tarr, Vice Chairman of the Senate Committees on Finance and Health and Human Resources, to President Jerome A. Gilbert, Marshall Univ. (Sept. 20, 2020) (on file with author).

[7] *Id.*

[8] The report also cites comments made by Mosher the preceding year. Because the university's notice of its intent to terminate Mosher does not purport to be predicated on these comments, they are not addressed in this letter. To forestall any confusion: those comments are likewise protected speech.

On October 1, Provost and Senior Vice President for Academic Affairs Jaime R. Taylor, PhD, issued a letter to Mosher notifying her of the university's intent to dismiss her on the basis that her comments amount to conduct "which directly and substantially impairs [Mosher's] fulfillment of institutional responsibilities, including but not limited to verified instances of sexual harassment, or of racial, gender-related, or other discriminatory practices."[9]

II. The First Amendment Bars Marshall University from Terminating Mosher for Her In-Class Comments

This letter may be added to the "minimal number" of statements supporting Mosher's rights. The First Amendment exists not to protect popular sentiments, but to protect those whose views attract the "extremely negative" public "outcry" cited by the university's report.

A. The First Amendment Binds Marshall University

It has long been settled law that the First Amendment is binding on public colleges like Marshall University.[10] Accordingly, the decisions and actions of a public university—including the pursuit of disciplinary sanctions,[11] recognition and funding of student organizations,[12] interactions with student journalists,[13] conduct of police officers,[14] and maintenance of policies implicating student and faculty expression[15]—must be consistent with the First Amendment.

B. The First Amendment Protects Faculty Members' Academic Freedom

Courts have long recognized that the First Amendment's protection of freedom of speech is closely intertwined with academic freedom. Universities "occupy a special niche in our constitutional tradition,"[16] and "academic freedom" is an area "in which government should be extremely reticent to tread."[17] As the Supreme Court has explained:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special

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[9] Letter from Jaime R. Taylor, PhD, Provost and Senior Vice Pres. for Academic Affairs, Marshall Univ., to Dr. Jennifer Mosher (Oct. 1, 2020) (on file with author).

[10] *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).

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

[12] *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 221 (2000).

[13] *Stanley v. Magrath*, 719 F.2d 279, 282 (8th Cir. 1983); *see also Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829–30 (1995).

[14] *Glik v. Cunniffe*, 655 F.3d 78, 79 (1st Cir. 2011).

[15] *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).

[16] *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003).

[17] *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

> concern to the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.[18]

To be sure, in *Garcetti v. Ceballos*, the Supreme Court upheld the power of non-academic government employers to regulate their employees' speech when that speech is pursuant to their employment duties.[19] The *Garcetti* court, however, reserved the question of "whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching."[20] As Justice Souter's opinion stressed, that ruling should not be read to "imperil First Amendment protection of academic freedom in public colleges and universities," which freedom encompasses "the teaching of a public university professor."[21]

Confronting this question, the United States Court of Appeals for the Fourth Circuit—the decisions of which are binding on Marshall University—held that *Garcetti* does "not apply in the academic context of a public university" to the "work of a public university faculty member," including "scholarship or teaching."[22] Doing so would "place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment," a result inconsistent with *Garcetti*'s intent.[23] Other courts addressing this questions have reached the same conclusion.[24]

Accordingly, classroom discussion that, "however repugnant," is "germane to the classroom subject matter" remains "protected by the First Amendment."[25]

C. Mosher's Comments are Protected by the First Amendment

However offensive others may find Mosher's asides, they do not amount to unprotected harassment or discriminatory conduct and arise in the context of conversations that the university acknowledges are germane to the topics of her courses. As a result, her remarks remain protected by the First Amendment.

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[18] *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).
[19] *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).
[20] *Id.* at 425.
[21] *Id.* at 438 (Souter, J., dissenting).
[22] *Adams v. Trs. of the Univ. of N. Carolina Wilmington*, 640 F.3d 550, 562–564 (4th Cir. 2011).
[23] *Id.*
[24] *See, e.g.*, *Demers v. Austin*, 746 F.3d 402, 406 (9th Cir. 2014) (expression "related to scholarship or teaching" falls outside of *Garcetti*); *Buchanan v. Alexander*, 919 F.3d 847, 853 (5th Cir. 2019) (applying the *Pickering-Connick* balancing test to a public university professor's in-class speech); *Van Heerden v. Bd. of Supervisors of La. State Univ.*, No. 3:10-cv-155, 2011 U.S. Dist. LEXIS 121414, at *19–20 (M.D. La. Oct. 20, 2011) (sharing "concern that wholesale application of the *Garcetti* analysis . . . could lead to a whittling-away of academics' ability to delve into issues or express opinions that are unpopular, uncomfortable or unorthodox"); *Sheldon v. Dhillon*, No. C-08-03438, 2009 U.S. Dist. LEXIS 110275, at *14 (N.D. Cal. Nov. 25, 2009) (terminated community college instructor's lecture on heredity and homosexuality was protected by the First Amendment if it was "within the parameters of the approved curriculum and within academic norms" and the punishment "not reasonably related to legitimate pedagogical concerns.").
[25] *Hardy v. Jefferson Cmty. College*, 260 F.3d 671, 683 (6th Cir. 2001).

i. Mosher's remarks were germane to her class material or class discussions.

The university's report proceeds from a flawed framework for evaluating whether comments are relevant to a particular class. Even under this narrow construction, the report concedes that many of Mosher's statements are related to the class but makes no effort to explain which comments are not related or why they are irrelevant.

First, the report takes a conscripted view of the baseline against which classroom comments are evaluated to determine whether they are relevant to the class. For example, in evaluating Mosher's statements during the COVID-19 class, the report weighs whether the remarks are "related to the content of the classroom materials" and whether the content is "unnecessary to support the classroom content." Yet classroom discussion may relate to the *subject* of the course even if it is not present in the content of "materials" reviewed on that particular day.

Similarly, remarks may not be strictly *necessary* to "support" course content, but they may still *relate* to the subject. This narrow construction is meaningful to the outcome, given that the report's consideration of the Microbiology class comments expressly turned on whether the remarks were "unnecessary" even though they had some "relationship" to the materials at the outset.

In evaluating the COVID-19 class, the report applied a second filter, focusing on the syllabus' six-word description of Mosher's lecture ("(1) molecular evolution, (2) transmission, and (3) preventative measures"). Notably, the report does not allege that Mosher did *not* discuss these topics, only that she made comments with an attenuated relationship to these particular issues. However, that construction ignores—and the report conspicuously fails to address—the course description contained in the same syllabus, which explained that the course would "focus[] on the facts behind the news, how to distinguish science from pseudoscience or misinformation, and how to make sense of the rapid flow of information relating to this emerging disease." Discussion of the political posture of the United States at the outset of the pandemic, as well as the public politicization of the response to the pandemic, is well within the scope of the course, even if others find Mosher's viewpoints wrong or offensive.

Second, although the report concedes that a number of Mosher's remarks were relevant, it argues that the discussion went on to "veer[] off-course from the assigned classroom content[.]" This ignores the nature of engaging students in classroom discussions, as students will sometimes lead conversations astray, leaving it to the faculty member to help bring that conversation back from the tangential discussion. Indeed, review of the transcripts here reveals that a number of the allegedly irrelevant "unnecessary" remarks were responses to student questions or comments.

Third, even if isolated remarks could reasonably be characterized as irrelevant to the subject matter, these remarks were fleeting or do not amount to a substantial disruption of the class. For example, Mosher's remark during the Microbiology course occurred during the first two

minutes of the scheduled class. Even if it had *no* relevance to the class[26] (the report characterizes it as having a "very limited" relationship), it is unsurprising that a faculty member and students might make small talk about current events or the weather while students file into the classroom—or, in the current context, while students log on. That is precisely what happened here: Mosher, in opening the class, responded to a student's message about the "glorious" weather and commented on her experience on campus. Far from being a disruption of the university's educational interests, momentary small talk helps students feel connected to the institution and prepares them to engage in discussion during the class itself.

Further, the video and transcripts of Mosher's two classes span several hours, amounting to roughly the length of a feature film. Classroom discussions, unlike films, are not scripted affairs, with all dialogue trimmed to support the plot. To the contrary, open discussion will sometimes engender tangents or remarks about personal views. Selecting isolated remarks from several hours of video in order to terminate a tenured professor presents a risk to the academic freedom of every faculty member whose views or expression might spark public anger.

ii. Speech remains protected even if it is subjectively offensive to others.

The First Amendment, distilled to its most fundamental concepts, is intended to protect expression when it is controversial or upsetting to others. The Supreme Court has repeatedly, consistently, and clearly held that expression may not be restricted merely because some, many, or even most find it to be offensive or disrespectful. This core First Amendment principle is why the authorities cannot ban the burning of the American flag,[27] prohibit the wearing of a jacket emblazoned with the words "Fuck the Draft,"[28] penalize cartoons depicting a pastor losing his virginity to his mother in an outhouse,[29] or disperse civil rights marchers out of fear that "muttering" and "grumbling" white onlookers might lead to violence.[30] In ruling that the First Amendment protects protesters holding signs outside of soldiers' funerals (including signs that read "Thank God for Dead Soldiers," "Thank God for IEDs," and "Fags Doom Nations"), the Court reiterated this fundamental principle, remarking that "[a]s a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate."[31]

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[26] Although the report attempts to downplay this exchange as having a "very limited" relationship to the class, a "very limited" relationship means that the comments are not *irrelevant*. Instead, they remain germane to the course.

[27] *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (burning the American flag was protected by the First Amendment, the "bedrock principle underlying" the holding being that government actors "may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable").

[28] *Cohen v. California*, 403 U.S. 15, 25 (1971).

[29] *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988).

[30] *Cox v. Louisiana*, 379 U.S. 536, 557 (1965).

[31] *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011).

This includes expression hoping that harm might come to others. For example, in *Rankin v. McPherson*, the United States Supreme Court held that the First Amendment protected a police department employee who, upon hearing that President Reagan had been shot, expressed her contempt for his policies on welfare and remarked: "if they go for him again, I hope they get him."[32] The court explained that even if others find the statements to be of an "inappropriate or controversial character," that is "irrelevant" to whether the statement addresses matters of public concern.[33] Expressing the view that harmful consequences could—or morally should—follow from risky behavior may offend others, but it does not amount to an unprotected threat or harassment.

This principle does not lose its salience in the context of the public university. To the contrary, expressive rights should be robust and uncompromising if students and faculty are to be free to engage in debate and discussion about the issues of the day in pursuit of advanced knowledge and understanding. This dialogue may encompass speech that offends. For example, the Supreme Court unanimously upheld as protected speech a student newspaper's front-page use of a vulgar headline ("Motherfucker Acquitted") and a "political cartoon . . . depicting policemen raping the Statue of Liberty and the Goddess of Justice."[34] These images were no doubt deeply offensive to many at a time of political polarization and civil unrest, yet "the 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.'"[35]

iii. That students, members of the public, or state legislators found the remarks offensive does not void the First Amendment's protection.

The report is ambiguous on the purported disruption caused by Mosher's remarks. However, none of the possible sources of disruption is sufficient to establish disruption justifying formal sanctions, much less termination.

First, the report asserts that Mosher's remarks resulted in students feeling "uncomfortable or offended," suggesting that the "educational process" at the university may have been disrupted as a result. These, however, are not in tension. Academic freedom allows for the possibility that students might be offended by a faculty member's remarks, views, or materials. If it did not, students aggrieved by a faculty member's views would hold a subjective veto over his or her employment.

Second, the report makes no effort to hide the university's focus on the public's response. The report includes among its exhibits a report generated by the university, laying out a bar graph of public "Sentiment"—a phrase echoed in the report's conclusions—as measured by the "tonality" of keywords in media coverage, concluding that 62% of the public "sentiment" was

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[32] *Rankin v. McPherson*, 483 U.S. 378, 381 (1987).
[33] *Id.* at 387.
[34] *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).
[35] *Id.*

negative.[36] Public "sentiment" about faculty members' views cannot justify restriction of their First Amendment rights. As a federal court recently observed in evaluating the expressive rights of a municipal utility employee whose racist remarks attracted public furor on social media, "[p]ublic perception alone cannot justify a restriction on free speech. . ." and "concern" about "brand or reputation is not sufficient to outweigh" First Amendment rights:

> Voters cannot use the ballot box to make the government silence their opponents; the public cannot use social media to do so either. The idea that the government should be permitted to censor speech in order to avoid public outcry was raised and dismissed in the Civil Rights era. . . . The fear of "going viral," by itself, does not appear to be a reasonable justification for a restriction on an employee's speech. To hold otherwise would permit the government to censor certain viewpoints based on the whims of the public. . . .[37]

Third, the report conspicuously ignores the significant pressure imposed on the university by state legislators. This pressure yields an inference that the university's action is motivated by viewpoint discrimination. In *Gerlich v. Leath*, for example, the United States Court of Appeals for the Eighth Circuit observed that a public university's use of an "unusual" process in denying a student group's request to use the university's trademarks followed "pressure from Iowa politicians" opposed to the group's views on the legalization of marijuana.[38]

Similarly, in *Gay & Lesbian Students Association v. Gohn*, "pressure from state legislators" was an instrumental factor in finding that a public university violated the First Amendment rights of its students in denying funding to a gay and lesbian student organization.[39] In that matter, the legislators' resolutions merely urging the university not to assist the student organization did not have sufficient support to pass a committee vote, but the Vice Chancellor was "aware of the resolutions" and "kept copies of them in the same file" associated with the student organization. Here, your correspondence with state legislators was included among records sent to the university's investigator. Moreover, half of the state senate has signed on to an effort tying the university's state funding to its response to Mosher's remarks—a significant contrast to resolutions that failed to garner the support of even a majority of a committee in *Gohn*, inviting an even stronger inference of viewpoint discrimination.

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[36] Investigative Report Appendix B at 294 (on file with author).
[37] *Goza v. Memphis Light, Gas & Water Div.*, No. 2:17-cv-2873, 2019 U.S. Dist. LEXIS 100057, at *2, 29–31 (W.D. Tenn. June 14, 2019).
[38] *Gerlich v. Leath*, 861 F.3d 697, 707 (8th Cir. 2017).
[39] *Gay & Lesbian Students Ass'n v. Gohn*, 850 F.2d 361, 367 (8th Cir. 1988).

D. Marshall University is obligated by contract and federal law to uphold its commitments to academic freedom

Even if the First Amendment did not require Marshall University to recognize and protect academic freedom rights, the university's public promises that it *does* protect those rights creates legal obligations independent of those imposed by the First Amendment. For example, West Virginia enshrines as policy for its universities the principles of academic freedom, separate from the First Amendment's protection of these rights.[40]

Having made these commitments, Marshall University is morally—and legally—bound to keep them.

i. Marshall is contractually bound to protect academic freedom.

These promises represent contractually-binding legal commitments.

The Wisconsin Supreme Court's recent meditation on the obligations attendant with a promise of academic freedom is illustrative.[41] In *McAdams v. Marquette University*, Marquette, a private Catholic university, had adopted the 1940 American Association of University Professors' Statement of Principles on Academic Freedom.[42] A member of the university's faculty, aggrieved by a graduate student instructor's exchange with a student about whether LGBTQ rights were an "appropriate" topic of class discussion, criticized the instructor on his personal blog, providing a link to the instructor's contact information and assailing her attitude as "totalitarian."[43] Marquette punished the professor, citing the post as falling short of the university's "standards of personal and professional excellence… ."[44] However, Wisconsin's Supreme Court overturned Marquette's imposition of discipline, holding that the private university's commitment to academic freedom rendered the blog post "a contractually-disqualified basis for discipline,"[45] as even extramural speech was protected by academic freedom.[46]

ii. Departing from its commitments will amount to a substantial misrepresentation, jeopardizing Marshall's federal funding.

Marshall University's departure from its public commitments to academic freedom also imperils the university's eligibility for federal funding.

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[40] W.V. HIGHER ED. POLICY COMM'N, TITLE 133, SERIES 9, *available at* http://www.wvhepc.edu/wp-content/uploads/2020/02/133-9final.pdf.
[41] *McAdams v. Marquette University*, 914 N.W.2d 708 (Wis. 2018) ("*Marquette*").
[42] *Id.* at 730.
[43] *Id.* at 713–14.
[44] *Id.* at 714.
[45] *Id.* at 737.
[46] *Id.* at 731–32.; AAUP, POLICY DOCUMENTS AND REPORTS, COMMITTEE A STATEMENT ON EXTRAMURAL UTTERANCES 31 (11th ed. 2014)).

In June, the Department of Education initiated an investigation into the University of California, Los Angeles arising from a lecturer's reading of Martin Luther King, Jr.'s "Letter from a Birmingham Jail," in which King recounted the slurs that had been directed toward him and his family.[47] After the lecturer did not censor himself in reading from the letter, despite students' requests that he do so, and exhibited a documentary containing graphic discussions of lynching, the university reportedly initiated an investigation.[48] The Department has alleged that in investigating the lecturer, UCLA's public commitments to academic freedom have been rendered substantial misrepresentations about the nature of its academic program, violating 20 U.S.C. § 1094(c)(3) and 34 CFR 668.71(c).[49] The Department has requested that UCLA—which faces civil penalties and the loss of its eligibility for federal funding[50]—produce documents and make its senior leadership available for interviews.[51]

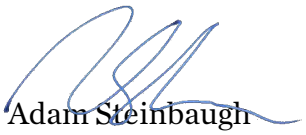
Accordingly, Marshall University has moral, constitutional, contract, and regulatory obligations prohibiting it from terminating Mosher for her remarks, however controversial.

III. Conclusion

However unpopular or offensive her views may be to others, the First Amendment protects the right of faculty members to engage in classroom discussions that others—inside or outside of the classroom—may find offensive, unwise, immoral, or wrong-headed.

We request receipt of a response to this letter by the close of business on October 16, 2020.

Sincerely,



Adam Steinbaugh
Director, Individual Rights Defense Program

Cc: Jaime R. Taylor, PhD, Senior Vice President of Academic Affairs & Provost
F. Layton Cottrill, Jr., Vice President of Executive Affairs and General Counsel
Dean Charles Somerville
Bruce Felder, Director of Human Resources

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[47] Peter Bonilla, *FIRE again calls on UCLA to defend academic freedom — this time for professor under fire from reading from MLK*, FIRE, July 7, 2020, https://www.thefire.org/fire-again-calls-on-ucla-to-defend-academic-freedom-this-time-for-professor-under-fire-for-reading-from-mlk.
[48] *Id.*
[49] Letter from Robert L. King, Asst. Sec., Office of Postsecondary Ed. U.S. Dep't. of Educ., to Gene Block, Chancellor, Univ. of Cal., Los Angeles (June 23, 2020), *available at* https://thefire.org/doe-letter-to-ucla-june-23-2020; U.S. Dep't of Educ., Notice of Proposed Rulemaking, 85 Fed. Reg. 3190, 3213 n.137 (Jan. 17, 2020) (noting that "public and private institutions also may be held accountable . . . for any substantial misrepresentation under the Department's borrower defense to repayment regulations").
[50] 20 U.S.C. § 1094(c)(3).
[51] Letter from King, *supra* note 49.