



FIRE

Foundation for Individual
Rights and Expression

March 1, 2023

Robin Capehart
Office of the President
Bluefield State University
Conley Hall - C200
219 Rock St.
Bluefield, West Virginia 24701

URGENT

Sent via Electronic Mail (capehart@bluefieldstate.edu)

Dear President Capehart,

The Foundation for Individual Rights and Expression (FIRE)¹ is deeply concerned by your reported efforts to silence Bluefield State faculty during an ongoing controversy over shared governance after the professors publicly criticized your leadership and filed a complaint with the university's accreditor.² Your recent statement that these professors' expression constituted "academic dishonesty" warranting "disciplinary action"³ has no basis in law or Bluefield policy. Their speech is wholly protected by the First Amendment,⁴ which enshrines public university faculty's right to speak broadly on matters of public concern and bars public university officials from using state power to infringe those rights.⁵

¹ FIRE is a nonpartisan nonprofit dedicated to defending free expression and academic freedom on America's college campuses and beyond. Read more about our newly-expanded mission and activities online at www.thefire.org.

² Ryan Quinn, *A University Ends Its Faculty Senate, and Dissent Could Be Punished*, INSIDE HIGHER ED, Feb. 22, 2023, <https://www.insidehighered.com/news/2023/02/22/president-mulls-firing-complainers-after-end-faculty-senate>.

³ Robin Capehart, *Bullet proof: When should campus leadership respond to lies.*, THE CAMPUS MAVERICK, Feb. 7, 2023, <https://robincapohart.substack.com/p/bullet-proof> [<https://perma.cc/T79K-NJWQ>].

⁴ It has long been settled law that the First Amendment is binding on public colleges like Bluefield State. *See, e.g., 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)).

⁵ The decisions and actions of a public university—including the pursuit of disciplinary sanctions (*Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973)), or maintenance of policies impacting student

The functioning of a public university is a matter of substantial public concern,⁶ and government employees like Bluefield State faculty do not “relinquish [their] First Amendment rights to comment on matters of public interest by virtue of government employment.”⁷ Accordingly, a government employer cannot penalize an employee for speaking as a private citizen on a matter of public concern unless the employer demonstrates that its interests “as an employer, in promoting the efficiency of the public services it performs through its employees” outweighs the interest of the employee, “as a citizen, in commenting upon matters of public concern[.]”⁸ And when a “public employee takes [their] concerns to persons outside the work place in addition to raising them up the chain of command at [the] work place, then those external communications are ordinarily not made as an employee, but as a citizen.”⁹

Nor is it plausible that this kind of extramural commentary would constitute “academic dishonesty,” which has no legal definition. Academic freedom, however, has been found to encompass extramural faculty criticism. Courts have held that “the doctrine of academic freedom comprises three elements: teaching; research; and extramural comments”¹⁰ and extramural remarks—like those at issue here—are protected by academic freedom unless the remark “clearly demonstrates the faculty member’s unfitness for his or her position” in light of their “entire record as a teacher and scholar.”¹¹ This “stringent standard” is “[s]o strict, in fact, that extramural utterances rarely bear upon the faculty member’s fitness for the position.”¹²

Conversely, courts across the country have held that “retaliatory speech” by public university administrators violates the First Amendment where it “intimat[es] that some form of punishment or adverse regulatory action”¹³ may follow, and the “mere *threat* of harm can be an adverse action, regardless of whether it is carried out because the threat itself can have a chilling effect.”¹⁴

So, while the university is free to respond to the faculty members’ commentary with criticisms of the college’s own, it cannot take adverse action against faculty members for their protected speech. Because you have already promised to retaliate against these faculty members, you

or faculty expression (*Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995))—must be consistent with the First Amendment.

⁶ *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (“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[.]”).

⁷ *Connick v. Myers*, 461 U.S. 138, 140 (1983).

⁸ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

⁹ *Davis v. McKinney*, 518 F.3d 304, 313 (5th Cir. 2008).

¹⁰ *McAdams v. Marquette University*, 914 N.W.2d 708, 730-731 (Wis. 2018).

¹¹ *Id.* at 731–32, citing AAUP, Policy Documents and Reports, Committee A Statement on Extramural Utterances 31 (11th ed. 2014).

¹² *Id.* at 732 (cleaned up).

¹³ *Greisan v. Hanken*, 925 F.3d 1097, 1114 (9th Cir. 2019); *see also, Robles v. Aransas Cnty.*, No. 2:15-CV-495, 2016 U.S. Dist. LEXIS 103119, at *19 (S.D. Tex. Aug 5, 2016) (the “question is whether . . . the defendant made statements that could be interpreted as intimating that some form of punishment or adverse regulatory action would follow. . .”).

¹⁴ *Brodheim v. Cry*, 584 F.3d 1262, 1970 (9th Cir. 2009) (emphasis in original). Notably, the United States Court of Appeals for the Fifth Circuit recently held that even a “formal reprimand” may violate the First Amendment. *Wilson v. Houston Cmty. Coll. Sys.*, 955 F.3d 490, 498 (5th Cir. 2020).

must publicly retract your statement and ensure Bluefield State meets its constitutional obligations to respect faculty's expressive rights.

We remind you that a public college administrator who violates clearly established law will not retain qualified immunity and can be held personally responsible for monetary damages for violating others' First Amendment rights.¹⁵

Given the urgent nature of this request, FIRE requests a substantive response no later than the close of business this Friday, March 3, 2023.

Sincerely,



Alex Morey
Director, Campus Rights Advocacy

Cc: Brent Benjamin, Executive Vice President & General Counsel
Charlie Cole, Chairman, Board of Governors

¹⁵ See *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Gerlich v. Leath*, 861 F.3d 697, 709 (8th Cir. 2017) (upholding denial of qualified immunity to defendants—public university administrators—because plaintiffs' First Amendment right was clearly established).