



July 12, 2010

Via U.S. Mail & Facsimile
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Dr. Robert McKim
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Re: First Amendment Violations in Relieving Dr. Kenneth J. Howell

Dear President Hogan, Chancellor Easter, Vice Chancellor Wheeler, Dean Watkins, and Dr. McKim:

Dr. Kenneth J. Howell recently contacted us after the University of Illinois, Urbana-Champaign relieved him of his teaching responsibilities in the Department of Religion because his explanation of Catholic moral teachings in his Introduction to Catholicism class generated controversy on campus. We are gravely disappointed that the University would succumb to such a “heckler’s veto,” jettison principles of academic freedom, and violate Dr. Howell’s First Amendment freedoms. And we insist that he be reinstated to his teaching position immediately.

By way of introduction, the Alliance Defense Fund (ADF) is a not-for-profit legal alliance that defends America’s first liberty—religious freedom. The ADF Center for

Academic Freedom is dedicated to ensuring that religious and conservative faculty enjoy rights to speak, associate, and teach on an equal basis as all other faculty.

FACTUAL BACKGROUND

As you know, Dr. Howell has taught in the Department of Religion (“Department”) at the University of Illinois, Urbana-Champaign (“University”) since 2001. He did so as an adjunct associate professor pursuant to the Department’s agreement with St. John’s Catholic Newman Center in 2000. During the ensuing years, he regularly taught Introduction to Catholicism, consistently earning excellent—and even outstanding—marks on his student evaluations.

In the spring 2010 semester, Dr. Howell again taught Introduction to Catholicism. Frequently throughout the semester, Dr. Howell emphasized to his class that they did not need to adopt Catholic beliefs in order to succeed in the class. His goal was for them to understand and critically analyze Catholic thought.

Dr. Howell’s semester proceeded without incident until May 3, 2010 when he delivered a lecture entitled “The Question of Homosexuality in Catholic Thought.” In this lecture, he explained how the Catholic Church distinguishes between same-sex attraction and homosexual conduct. And he outlined how the Catholic Church teaches that homosexual conduct is morally wrong, framing the issue in the context of natural moral law. Thus, he taught the Catholic belief that homosexual conduct violates the inherent meaning of human sexuality (*i.e.*, to unite husbands and wives), disregards the complementary structure of men and women, and ignores the procreative purpose for sexuality.

Dr. Howell regularly covered this material in Introduction to Catholicism, and frequently, students would respectfully disagree with the Catholic Church’s teaching on homosexual conduct. This semester, however, the students in his class reacted vociferously to his lecture, something that was unprecedented. To help his students understand the issue better within the context of competing moral systems, Dr. Howell sent his students an e-mail on May 4th contrasting how utilitarianism and natural moral law would determine whether homosexual conduct was moral.

In the ensuing weeks, Dr. Howell’s May 4th e-mail was circulated to various students, offices, and organizations at the University. For example, one student, who was not even in Dr. Howell’s class, forwarded the May 4th e-mail to Dr. McKim, the director of the LGBT Resource Center, the *Daily Illini*, and the founder of the “queer studies major,” complaining that it contained “hate speech.”¹

¹ *E-mail Complaint from Student about UI Religion Instructor* (July 9, 2010), available at <http://www.news-gazette.com/news/religion/2010-07-09/e-mail-complaint-student-about-ui-religion-instructor.html>.

On May 28, 2010, Dr. McKim called Dr. Howell to his office for a meeting. During that meeting, Dr. McKim informed Dr. Howell that his May 4th e-mail had prompted a series of complaints and that many offices within the University had seen the e-mail. Thus, a “higher official” within the University had instructed Dr. McKim that Dr. Howell would no longer be able to teach classes at the University. Dr. Howell offered to eliminate all references to homosexual conduct from Introduction to Catholicism, but this did not satisfy Dr. McKim, who indicated that Dr. Howell’s e-mail would hurt the Department and the University. At one point, Dr. Howell finally asked: “Don’t I get to defend myself?” But Dr. McKim gave no response.

The next day, Dr. Howell e-mailed Dr. McKim, thanking him for the discussion and expressing his desire to work out a peaceful resolution. Dr. McKim responded on June 2, 2010, stating in part: “However, I want to reiterate that the decision has already been made to have someone else teach our courses on Catholicism. This is the decision of the department, of the college, and of the university. We are currently in the process of finding someone else to teach . . . Introduction to Catholicism[] in the Fall.” And since then, Associate Dean Ann Mester has explained that the University discontinued Dr. Howell’s teaching because his e-mail “violate[s] university standards of inclusivity.”²

LEGAL ANALYSIS

In relieving Dr. Howell of his teaching responsibilities, the University is firing him for teaching Catholic doctrine in a class about Catholic doctrine. Yet the First Amendment affords broad protection for a professor’s speech in the classroom. And the University’s only reason for removing Dr. Howell is that other students, faculty, and staff disliked his speech. Such a “heckler’s veto” has no place in the “marketplace of ideas,”³ particularly since the First Amendment exists precisely to protect controversial ideas from being silenced.

I. The First Amendment broadly protects faculty speech in the classroom.

Public university professors retain free speech and academic freedom rights in the classroom and on campus. Over forty years ago, the Supreme Court determined that “[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned.”⁴ In fact, those freedoms are “a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. “The vigilant protection of constitutional freedoms is nowhere more vital than in the community of

² Associated Press, *University of Illinois Instructor Fired Over Catholic Beliefs* (July 9, 2010), available at <http://www.foxnews.com/us/2010/07/09/university-illinois-instructor-fired-catholic-beliefs/>.

³ *Healy v. James*, 408 U.S. 169, 180 (1972).

⁴ *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967).

American schools.”⁵ Thus, the Supreme Court gives high priority to the liberty of faculty to expound on ideas, challenge students, and ask and answer questions. “The classroom is peculiarly the ‘market-place of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, (rather) than through any kind of authoritative selection.’”⁶ In light of this, “the argument that teachers have no First Amendment rights when teaching, or that the government can censor teacher speech without restriction, is *totally unpersuasive*.”⁷

The United States Court of Appeals for the Seventh Circuit, which has jurisdiction over Illinois, provides broad First Amendment protection for university faculty. “[B]ecause of our mistrust of ‘laws that cast a pall of orthodoxy’ over educational institutions, the First Amendment protects the right of faculty members to engage in academic debates, pursuits, and inquiries and to discuss ‘ideas, narratives, concepts, imagery, [and] opinions—scientific, political or aesthetic—[with] an audience whom the speaker seeks to inform, edify, or entertain.’”⁸ And federal courts across the country agree. *See, e.g., Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1050–52 (6th Cir. 2001) (recognizing that classroom speech touching on a matter of public concern is constitutionally protected); *Hardy*, 260 F.3d at 679–82 (noting college instructor’s in-class speech relating to matters of public concern is constitutionally protected); *Dube v. State Univ. of N.Y.*, 900 F.2d 587, 598 (2d Cir. 1990) (finding college officials not entitled to qualified immunity because punishment of professor based on classroom discourse would violate the First Amendment). In fact, not even a public high school can fire a teacher for in-class comments discussing curriculum-related topics.⁹

These clearly established First Amendment principles easily encompass Dr. Howell’s lectures and e-mail. In a class on Catholic thought, he explained Catholic teaching on sexual morality and answered students’ questions and responded to their objections. These statements easily qualify as protected speech because “the Supreme Court has never removed in-class speech from its presumptive place within the ambit of the First Amendment.”¹⁰

⁵ *Id.* (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

⁶ *Id.* (citation omitted).

⁷ *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 680 (6th Cir. 2001) (emphasis added); *see also Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 428 F.3d 223, 229–30 (6th Cir. 2005).

⁸ *Trejo v. Shoben*, 319 F.3d 878, 884 (7th Cir. 2003) (quoting *Keyishian*, 385 U.S. at 603; *Swank v. Smart*, 898 F.2d 1247, 1251 (7th Cir. 1990)).

⁹ *Zykan v. Warsaw Cmty. Sch. Corp.*, 631 F.2d 1300, 1305–06 (7th Cir. 1980) (“School boards are for example not free to fire teachers for every random comment in the classroom. . . .” or “from placing a flat prohibition on the mention of certain relevant topics in the classroom” as that would constitute a “pall of orthodoxy. . . .”).

¹⁰ *Evans-Marshall*, 428 F.3d at 229.

II. The First Amendment prohibits the University from relieving Dr. Howell simply because his speech was controversial.

According to decades of Supreme Court precedent, the University simply cannot relieve Dr. Howell of his teaching post based on how third parties respond to his speech.¹¹ Put simply, “[l]isteners’ reaction to speech is not a content-neutral basis for regulation.”¹² In fact, the First Amendment exists *precisely* to *protect* speech that offends, angers, and provokes the hearer because free speech often “best serve[s] its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”¹³ The “verbal tumult”¹⁴ inherent in the “marketplace of ideas”¹⁵ signifies our nation’s strength.¹⁶ The University simply “has no right to cleanse public debate to the point where it is . . . palatable to the most squeamish,”¹⁷ or to restrict viewpoints that it or others find abhorrent.¹⁸ After all, the “bedrock principle” of the First Amendment is that “[the University] may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”¹⁹ And seeing as it cannot burden speech “because it might offend a hostile mob,”²⁰ the University certainly cannot fire a professor for speech that simply hurts a few feelings.

DEMAND

For decades, the Supreme Court has consistently held that university campuses are “not enclaves immune from the sweep of the First Amendment.”²¹ Indeed, its precedents “leave no room for the view that . . . First Amendment protections should apply with less force on college campuses than in the community at large.”²² If the University is to serve as “one of the vital centers for the Nation’s intellectual life,”²³ it must invite—not squelch—robust debate and dialogue from a wide array of perspectives, which is the very definition academic freedom.

¹¹ See, e.g., *Boos v. Barry*, 485 U.S. 312, 321–22 (1988); *Texas v. Johnson*, 491 U.S. 397, 408–09 (1989).

¹² *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992).

¹³ *Terminiello v. City of Chi.*, 337 U.S. 1, 4 (1949).

¹⁴ *Cohen v. California*, 403 U.S. 15, 24–25 (1971).

¹⁵ *Healy*, 408 U.S. at 180.

¹⁶ *Cohen*, 403 U.S. at 24–25; see also *Terminiello*, 337 U.S. at 4 (“The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.”).

¹⁷ *Id.* at 25; see also *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 669–70 (1973).

¹⁸ *Healy*, 408 U.S. at 187–88 (“The College . . . may not restrict speech or association simply because it finds the views expressed . . . to be abhorrent.”).

¹⁹ *Johnson*, 491 U.S. at 414.

²⁰ *Forsyth County*, 505 U.S. at 134–35.

²¹ *Healy*, 408 U.S. at 180.

²² *Id.*; see also *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 671 (1973).

²³ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 836 (1995).

University of Illinois, Urbana-Champaign

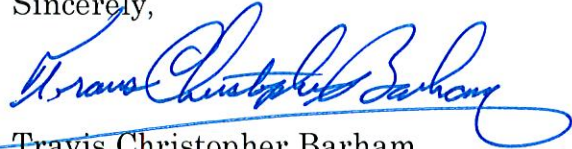
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By relieving Dr. Howell, the University has violated his clearly established right to free speech, a right that is of "critical importance" on a public university campus "because it is the lifeblood of academic freedom."²⁴ It has punished him for the content and viewpoint of his in-class speech, without even allowing him to defend himself or explain his remarks. And it has done so simply because some people were offended, thus succumbing to an unconstitutional "heckler's veto."

In light of these clear constitutional violations, we demand that you immediately reinstate Dr. Howell and restore to him the teaching responsibilities he has discharged so excellently for almost a decade. Please inform us in writing by the close of business on July 16, 2010 whether you will respect his First Amendment freedoms by doing so. Otherwise, we will advise our client to vindicate his constitutional rights in federal court.

Sincerely,



Travis Christopher Barham

Litigation Staff Counsel

ADF CENTER FOR ACADEMIC FREEDOM

Cc: Dr. Kenneth Howell

²⁴ *DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008); see also *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury.").