



August 4, 2017

Chancellor Gene Block
UCLA Chancellor's Office
Box 951405, 2147 Murphy Hall
Los Angeles, California 90095-1405

Sent via U.S. Mail and Electronic Mail (chancellor@ucla.edu)

Dear Chancellor Block:

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 and academic freedom at the University of California, Los Angeles (UCLA) following the non-renewal of lecturer Keith Fink's contract after a teaching evaluation noted his criticism of UCLA administrators. UCLA must reaffirm that freedom of expression and academic freedom are not threatened on campus and that criticism of the university will not be used to justify non-renewal of faculty contracts.

I. FACTS

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

UCLA lecturers undergo an "Excellence Review"—a review by members of their departments to determine whether the lecturer meets the university's standards—after 18 quarters of teaching. On June 27, 2017, Interim Dean of Social Sciences Laura Gómez notified Fink that the university had "determined that [Fink's] teaching does not meet the standard of excellence" and that his "appointment as a Continuing Lecturer, effective January 1, 2018, was not approved." Fink's employment at UCLA ended on June 30, 2017.

Prior to and since his firing, Fink has contested the fairness of UCLA's "Excellence Review."¹ Fink has argued that he was forced out of his teaching position partially on the basis that he

¹ See, e.g., Aaron Bandler, *EXCLUSIVE: UCLA May Be Attempting To Push Out This Conservative Professor*, THE DAILY WIRE (Apr. 17, 2017), <http://www.dailywire.com/news/15316/ucla-may-be-attempting-push-out-conservative-aaron-bandler>.

criticized UCLA administrators in his “Sex, Politics, and Race: Free Speech on Campus” class.² Gómez’s letter notifying Fink that he would not retain his position did not provide specific reasons why Fink did not meet the “standard of excellence.” However, Associate Professor and Vice Chair Greg Bryant’s evaluation of Fink suggests that Fink’s in-class comments about UCLA’s administration were viewed unfavorably by department members conducting Fink’s review.

On March 8, Bryant observed Fink’s “Free Speech on Campus” class and completed his teaching evaluation on March 19, which was “intended to assess teaching excellence.” The review stated, in relevant part:

I observed lecturer Keith Fink in his Communication Studies course CS 167 – Sex, Politics, and Race: Free Speech on Campus, on Wednesday, March 8, 2017. My overall assessment is that Mr. Fink’s teaching is of average quality, with certain aspects being quite good, and other aspects quite lacking. Below I describe my observations in detail.

The lecture I observed was essentially a review, and was the last lecture before an exam the following week. Mr. Fink began by reviewing current events which I thought should be an effective technique for a class like this. He immediately launched into an analysis of a letter written to the UCLA community by Jerry Kang, the Vice Chancellor for Equity, Diversity and Inclusion. The letter is a note about recent Title IX investigations, and a report of new developments. Mr. Fink had a rather combative and provocative tone, and throughout the lecture mentioned “Dean Kang” many times, all rather unfavorably. He was highly critical of specific aspects of the letter and the Title IX officers, telling the students that they were not qualified to be in their positions. While the connections to course content were not always clear, he took particular issue with the SVSH mandatory reporting policy. This is the first instance of many throughout the class where he seemed to be using his lecturer role as a means to espouse his personal legal views. I felt like this aspect reduced his credibility, even when I agree with his specific legal points (which in this lecture overall was often). The course is political in nature, but I could imagine his treatment of the issues being much more balanced, which I believe would greatly enhance his teaching effectiveness.

[...]

Mr. Fink went on to another example of a recent event, and began the repeated exercise that filled the entire class time: present a relevant free speech event, and then ask the students to identify which court case applies that was

² See, e.g., Sarah Brown, *Why Did a UCLA Instructor With a Popular Free-Speech Course Lose His Job?*, THE CHRONICLE OF HIGHER EDUCATION (July 1, 2017), <http://www.chronicle.com/article/Why-Did-a-UCLA-Instructor-With/240521>.

presumably covered in earlier classes. He examines recent cases of high schoolers giving a Nazi salute, anti-LGBT signs, and protests at Middlebury College regarding a scheduled speech by Charles Murray. Again, the most salient element in these examples to my mind was Fink arguing for his side of the case, and his attempts to relate them to his own issues with UCLA administration, including “Dean Kang.” In my opinion, this took a back seat to substantive legal content that could allow students to better make up their own mind. Again, he would occasionally solicit students’ comments, but there was very little class discussion. The current event portion of the lecture ended about one hour into the class.

The lecture continued with various free speech instances, all interesting and provocative, that afforded opportunities for Mr. Fink to ask students to identify the relevant legal cases, but also argue his specific opinion. In particular, I found his examples of art compelling, and I appreciated his defense of artists’ rights to free speech. But overall, his tone continued to feel unnecessarily hostile, especially regarding UCLA administrators and policies which he constantly returned to. At one point, he quipped how he was surprised that the current class got approved in the first place, and repeatedly attacked UCLA as not supportive of free speech rights. I believe Mr. Fink clearly has a right to express these views, especially in a class on the topic of free speech, but as a teaching technique, I feel the more he belabors his points about UCLA in particular, the more he undermines his credibility and objectivity as an instructor.

Fink contested Bryant’s evaluation in an April 24 response to the Departmental Dossier. Fink noted:³

Bryant opines that I mention “Dean Kang” rather unfavorably throughout the lecture, again in an attempt to cast me in a negative light. During the lecture, I actually praised Jerry Kang several times, commenting on his impressive academic credentials and his extensive knowledge of the law. Decl. Litt at ¶ 13.

Bryant again takes issue with the fact that I was highly critical of Kang’s letter – and in particular, Kang’s reference to the SVSH mandatory reporting policy. Bryant’s comment bears no relevance to my excellence in teaching. What Bryant fails to note is that Kang himself – in the same letter I was referring to – admitted that the mandatory reporting policy was highly controversial. A true and correct copy of Kang’s email letter is attached hereto as **Exhibit I**. Why is Bryant criticizing me for being “critical” of material that is admittedly controversial?

[...]

³ Letter from Keith Fink to Excellence Review Panel, UCLA Communications Department (Apr. 24, 2017) (on file with author).

Bryant criticizes me for attempting to relate these topics to “[my] own issues with UCLA administration, including “Dean Kang.” None of these issues are connected in any way to the UCLA administration. Bryant’s letter portrays me as someone who has personal problems with the UCLA administration and uses class as a venue to discuss them. This not only is disingenuous but it is also largely untrue.[] This is irrelevant to any of the criteria set forth for evaluating “excellence.”

[...]

Bryant criticized me for “repeatedly attacking UCLA as not supportive of free speech rights.” There is some truth to this: UCLA says it supports free speech, but there are numerous instances where their actions are inconsistent with their verbiage.

Fink did not receive a reply to the concerns he raised in response to Bryant’s evaluation.

In subsequent comments to the media, Bryant implied that Fink should have voiced fewer criticisms of UCLA in class. In a July 1 article in *The Chronicle of Higher Education* about Fink’s non-renewal, journalist Sarah Brown wrote, “Mr. Fink also criticized specific UCLA administrators by name, Mr. Bryant said, and ‘he was pushing his own views harder than I think he should.’”⁴

II. ANALYSIS

It is well-settled law that the First Amendment applies with full force on public university campuses such as UCLA. *See, e.g., Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) (“With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities.”); *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.’”); *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 and quotation marks omitted).

i. Fink’s in-class comments are protected by academic freedom

The Supreme Court has also made clear that academic freedom is a “special concern of the First Amendment,” stating 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.” *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). Accordingly, the U.S. Court of Appeals

⁴ Gómez chose not to comment to Brown on the matter, but Bryant stated that Fink’s case was “handled by the book.” Brown, *supra* note 2.

for the Ninth Circuit has extended robust protection to expression “related to scholarship or teaching” by faculty members at public colleges and universities even when made pursuant to their official job duties. *See Demers v. Austin*, 746 F.3d 402, 412 (9th Cir. 2014) (“We conclude that Garcetti does not — indeed, consistent with the First Amendment, cannot — apply to teaching and academic writing that are performed “pursuant to the official duties” of a teacher and professor.”).

After a 2009 panel held at UCLA focusing on human rights in Gaza elicited controversy, you wrote the following statement stressing the importance of academic freedom:⁵

UCLA is a public institution with core values of academic freedom and the free exchange of ideas on its campus. These principles have always been the pillars of university life, though adhering to them has not been without occasional controversy.

[...]

I believe that the university must always give wide latitude to individual expression and to our entire faculty, whose job it is to educate and enlighten. Importantly, we are training students to think critically and to be responsible citizens. Our students must hear diverse viewpoints, if only to sharpen their own thought processes and strengthen their arguments. I also believe that this kind of learning occurs best when views and debates are conducted with decorum. Civil discourse is essential to the intellectual climate at UCLA, and we all should strive for respectful discussions.

We have a responsibility to protect the freedom of expression. We also all have a responsibility to listen and engage — respectfully — even as we must understand that not every campus forum on a controversial topic will satisfy passionate and concerned members of the campus and broader communities.

You rightfully praise academic freedom and the free exchange of ideas as “the pillars of university life” and note the importance of allowing students to hear diverse and sometimes controversial viewpoints. Fink’s criticism of UCLA administrators’ dealings with free speech in a class dedicated to discussing and analyzing the pivotal role of free speech in campus life, while perhaps ill-received by UCLA’s administration, can hardly be said to fall outside the wide swath of speech protected under any meaningful conception of academic freedom, or Fink’s First Amendment rights. Your stated commitment to academic freedom is admirable—but it is only credible if it also applies to in-class speech, like Fink’s, that possesses the potential to upset administrators. UCLA may not retaliate against Fink for exercising the rights to which he is morally and legally entitled.

⁵ *Academic Freedom at UCLA*, UNIVERSITY OF CALIFORNIA, LOS ANGELES, <https://www.chancellor.ucla.edu/updates/academic-freedom-ucla> (last visited July 30, 2017).

ii. UCLA cannot punish Fink for criticizing administrators

The impact of Bryant’s evaluation on Fink’s non-renewal is unclear. But considering Gómez’s scant explanation for Fink’s firing, it is possible—and alarming—that Fink’s criticism of administrators may have played a role in UCLA’s decision. This is impermissible at a university bound by the First Amendment.

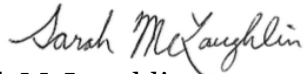
Courts have consistently held that a core purpose of the First Amendment is to shield criticism of governmental bodies and public officials from official threat or retribution. *See Ariz. Free Enter. Club’s Freedom Fund PAC v. Bennett*, 564 U.S. 721, 755 (2011) (“[T]here is practically universal agreement that a major purpose of the First Amendment was to protect the free discussion of governmental affairs.”) (internal citation and quotation marks omitted); *New York Times Co. v. Sullivan*, 376 U.S. 254, 296–97 (1964) (Black, J., concurring) (“[F]reedom to discuss public affairs and public officials is unquestionably, as the court today holds, the kind of speech the First Amendment was primarily designed to keep within the area of free discussion.”). This is particularly true in the university context. *Rodriguez v. Maricopa County Cmty. College Dist.*, 605 F.3d 703, 708–09 (9th Cir. 2010) (“[T]he 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.”) (internal citation omitted).

As a public university, the operations of UCLA and its administration’s treatment of students’ rights are inescapably matters of significant importance to both the UCLA community and the taxpaying public. Simply put, UCLA administrators may not—consistent with their obligations under the First Amendment—make employment decisions based on employees’ criticism of them. *See Demers*, 746 F.3d 402 (holding that a professor’s proposals for restructuring an academic department were protected by the First Amendment).

Bryant’s review of Fink, coupled with his comments to *The Chronicle of Higher Education* and the lack of explanation offered in Gómez’s firing letter, suggest that Fink’s criticism of UCLA administrators played a role in the non-renewal of his contract. Accordingly, FIRE asks UCLA to immediately explain what role Fink’s criticisms played in his teaching evaluation and UCLA’s ultimate decision not to renew Fink’s contract.

We request a response to this letter by August 18, 2017.

Sincerely,



Sarah McLaughlin
Senior Program Officer, Individual Rights Defense Program

cc:

Greg Bryant, Associate Professor and Vice Chair
Laura Gómez, Interim Dean of Social Sciences