



February 19, 2021

Ray L. Watts, M.D.
President's Office
University of Alabama at Birmingham
1720 2nd Avenue South
Birmingham, Alabama 35294

URGENT

Sent via Electronic Mail (president@uab.edu)

Dear President Watts:

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 your statement that the University of Alabama at Birmingham (UAB) is "reviewing" Professor Sarah Parcak's social media comment about the death of Rush Limbaugh. While Parcak's speech may be deeply offensive to many, it is unquestionably protected by the First Amendment, Alabama law, and UAB's own policies, which bar UAB from punishing a faculty member's extramural expression on matters of public concern. Accordingly, while the university may criticize—and has criticized—Parcak, there is nothing for the university to review or investigate.

We write to invite UAB's clarification that it will not investigate or discipline Parcak for her constitutionally protected speech, but instead will respect and defend the well-established expressive rights of its faculty and students.

I. Parcak Takes to Twitter to React to the Death of Rush Limbaugh

The following is our understanding of the pertinent facts, which is based on public information. We appreciate that you may have additional information to offer and invite you to share it with us.

On February 17, 2021, Rush Limbaugh, a highly influential and provocative radio talk show host, died from complications of lung cancer.¹ His death spurred a flurry of reactions, both positive and negative, mournful and caustic, from political figures, media commentators, college professors, and others throughout the country.²

Sarah Parcak, a professor in the Department of Anthropology in the College of Arts and Sciences at UAB, was among those who reacted to Limbaugh's passing with contempt. On the day Limbaugh died, Parcak said in a now-deleted tweet sent via her personal Twitter account: "When a terrible piece of scum who caused immeasurable harm to millions dies, there is no sympathy. Only a desire that they suffered until their last breath."³ Parcak's tweet was included among media reports rounding up faculty members' "disparaging" comments about Limbaugh's passing.⁴

Later that day, UAB tweeted the following statement attributed to you:

UAB is disgusted and extremely troubled that Sarah Parcak would tweet something so unprofessional and blindly inhumane and cruel. Her poor judgment is completely counter to our shared values as an institution that include integrity and respect. She absolutely does not speak for our university, and we are reviewing the matter.⁵

The next day, a spokesperson confirmed that the university is "continuing to review the matter."⁶ That confirmation came as others have called for more aggressive action, including the Chair of the Alabama Republican Party's call for unidentified "consequences" and a state senator's radio comments that Parcak "ought to be fired" and that it was "repugnant that we have somebody like that . . . getting money via the state budgets for their salary."⁷

¹ Zoe Christen Jones, *Rush Limbaugh, conservative radio host, dies at 70*, CBS NEWS (Feb. 17, 2021), <https://www.cbsnews.com/news/rush-limbaugh-death-age-70-lung-cancer>.

² See, e.g., Chrissy Clark, *Here Are The Professors Disparaging Rush Limbaugh's Passing* (Feb. 17, 2021), DAILY WIRE <https://www.dailywire.com/news/here-are-the-professors-disparaging-rush-limbaughs-passing>; Allan Smith, *The political world reacts to Rush Limbaugh's death*, CBS NEWS (Feb. 17, 2021), <https://www.nbcnews.com/politics/politics-news/political-world-reacts-rush-limbaugh-s-death-n1258145>.

³ Clark, *supra* note 2.

⁴ *Id.*

⁵ UAB (@UABNews), TWITTER (Feb. 17, 2021, 9:37 PM), <https://twitter.com/UABNews/status/1362229784034607117>. Responses by UAB to Parcak's prior comments did not suggest it was "reviewing" Parcak's personal social media comments. This letter does not endeavor to explain at length the First Amendment's application to those comments. It is sufficient to say that they are likewise protected speech and First Amendment rights are not worn out because of repeated exercise.

⁶ Leada Gore, *Sarah Parcak Rush Limbaugh controversy: Alabama GOP chief calls out UAB professor's 'antics'* (Feb. 18, 2021), AL.COM, <https://www.al.com/news/2021/02/sarah-parcak-rush-limbaugh-controversy-alabama-gop-chief-calls-out-uab-professors-antics.html>.

⁷ *The Dale Jackson Show* (WVNN radio broadcast Feb. 19, 2021) (audio on file with author).

II. The First Amendment Bars UAB from Punishing or Investigating Parcak for her Extramural Expression

Parcak’s extramural remarks are protected by the First Amendment, state law, and UAB policy, each of which recognize the rights of faculty members at public institutions to comment as citizens on matters of public concern, including expression others may find cruel or offensive.

A. *The First Amendment, Alabama Law, and UAB Policy Apply to UAB.*

It has long been settled law that the First Amendment is binding on public universities like UAB.⁸ Accordingly, the decisions and actions of a public university—including the pursuit of disciplinary sanctions⁹—must be consistent with the First Amendment. Faculty at public universities do not “relinquish First Amendment rights to comment on matters of public interest by virtue of government employment.”¹⁰

State law likewise establishes that students and faculty at Alabama’s public universities “are free to take positions on public controversies,” and that it is “not the proper role of the institution to shield individuals from speech protected by the First Amendment,” including “ideas and opinions they find unwelcome, disagreeable, or offensive.”¹¹

In addition, UAB’s own policies protect the rights of faculty to speak as citizens on matters of public concern. The UAB Faculty Handbook’s policy on academic freedom adopts the American Association of University Professors (AAUP) 1940 Statement of Principles on Academic Freedom and Tenure, which provides that when faculty members “speak or write as citizens, they should be free from institutional censorship or discipline.”¹²

B. *Parcak Spoke as a Private Citizen, not as a UAB Employee.*

As UAB acknowledges, Parcak “absolutely does not speak for our university.” When Parcak communicates through her personal Twitter account, she is speaking in her capacity as a private citizen, not as an employee of UAB, even if others understand that she is also a professor there. The “critical question” in determining whether the speech is that of an employee or private citizen is “whether the speech at issue is itself ordinarily within the scope

⁸ *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).

⁹ *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

¹⁰ *Connick v. Myers*, 461 U.S. 138, 140 (1983).

¹¹ CODE OF ALA. § 16-68-3(a). This law effectuates the legislature’s recognition that “all public institutions of higher education should strive to ensure the fullest degree of intellectual and academic freedom and free expression.” CODE OF ALA. § 16-68-1(5).

¹² UNIV. OF ALABAMA AT BIRMINGHAM, FACULTY HANDBOOK AND POLICIES 37 (2020), https://www.uab.edu/policies/Documents/FINAL_UAB%20Faculty%20Handbook%202020-2021_2020-Sep-3.pdf.

of an employee’s duties, not whether it merely concerns those duties.”¹³ Parcak’s posts on her personal social media pages are not part of her job duties as a professor at UAB. Further, UAB is mentioned nowhere in Parcak’s Twitter bio.¹⁴ Even if readers of Parcak’s tweets were able to identify her as a UAB professor, the mere knowledge of her affiliation with the university does not transform her private speech into employee speech.¹⁵ No reader of Parcak’s Twitter feed could reasonably conclude that she is purporting to speak on behalf of UAB.

C. *Parcak Spoke on a Matter of Significant Public Concern*

Parcak’s speech undoubtedly addressed a matter of public concern, which encompasses any speech that “can be fairly considered as relating to any matter of political, social, or other concern to the community[.]”¹⁶

Rush Limbaugh’s talk radio show—broadcast to millions of listeners on hundreds of radio stations—made him a household name.¹⁷ He has been called “one of the most influential media figures in American history.”¹⁸ Limbaugh emerged “in the 1980s as one of the first broadcasters to take charge of a national political call-in show” and “became a singular figure in the American media.”¹⁹ His influence is credited with “helping shape the modern-day Republican Party.”²⁰ During his long career on the radio, Limbaugh’s controversial remarks frequently made headlines, sparking outrage and accusations of racism, sexism, and amplification of conspiracy theories.²¹

There is no question that Limbaugh’s life, death, and legacy are matters of substantial public interest. Major media outlets published lengthy obituaries, and both fans and critics, of whom Parcak is just one of many, took to social media to react to the news.²²

That some find Parcak’s speech offensive or repugnant does not affect this analysis. 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

¹³ *Lane v. Franks*, 573 U.S. 228, 240 (2014).

¹⁴ Dr. Sarah Parcak (@indyfromspace), TWITTER, <https://twitter.com/indyfromspace> (last visited Feb. 18, 2021).

¹⁵ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 571-73, 576-78 (1968) (First Amendment protected a teacher’s letter to the editor, identifying himself as a teacher at a public high school, criticizing his employer’s policies).

¹⁶ *Snyder v. Phelps*, 562 U.S. 443, 453 (2011).

¹⁷ Paul Farhi, *Limbaugh’s Audience Size? It’s Largely Up in the Air*, WASH. POST (March 7, 2009), <https://www.washingtonpost.com/wp-dyn/content/article/2009/03/06/AR2009030603435.html>.

¹⁸ Brian Flood, *Rush Limbaugh, conservative talk radio pioneer, dead at 70*, FOX NEWS (Feb. 17, 2021), <https://www.foxnews.com/media/rush-limbaugh-dead-talk-radio-conservative-icon>.

¹⁹ Robert D. McFadden and Michael M. Grynbaum, *Rush Limbaugh Dies at 70; Turned Talk Radio Into a Right-Wing Attack Machine*, N.Y. TIMES, <https://www.nytimes.com/2021/02/17/business/media/rush-limbaugh-dead.html>.

²⁰ Flood, *supra* note 20.

²¹ Jones, *supra* note 1; McFadden & Grynbaum, *supra* note 21.

²² Flood, *supra* note 20; McFadden & Grynbaum, *supra* note 21; Results of Search for “Rush Limbaugh,” TWITTER, https://twitter.com/search?q=Rush%20Limbaugh&src=typed_query (last visited Feb. 19, 2021).

they go for him again, I hope they get him.”²³ 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.²⁴

D. The Subjective Offensiveness of Parcak’s Speech Does Not Strip it of First Amendment Protection.

As is evident from the vociferous reaction to Parcak’s tweet, many were offended by her extramural utterance. However, the subjectively offensive nature of speech does not remove it from the First Amendment’s protection, which involves “a legal, not moral, analysis.”²⁵ Likewise, it is immaterial whether Parcak’s remarks are inconsistent with UAB’s aspirational values of “integrity and respect,” which do not supersede the First Amendment.

The Supreme Court has repeatedly, consistently, and clearly held that expression may not be restricted on the basis that others find it to be offensive or disrespectful. While some ideas may be expressed through “relatively precise, detached explication,” some words “are often chosen as much for their emotive as their cognitive force.”²⁶ Because “officials cannot make principled distinctions” between offensive or inoffensive speech, the First Amendment deprives government actors of that authority.²⁷ This core First Amendment principle is why the government cannot outlaw burning the American flag,²⁸ punish the wearing of a jacket emblazoned with the words “Fuck the Draft,”²⁹ penalize cartoons depicting a pastor losing his virginity to his mother in an outhouse,³⁰ or disperse civil rights marchers out of fear that “muttering” and “grumbling” white onlookers might resort to violence.³¹

While some may find the timing or substance of speech about the deceased to be offensive, the First Amendment’s protection of speech does not observe a mourning period and does not turn on whether speech about the recently-departed takes the form of a venerating eulogy, scorn, or something in between. 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.”³²

²³ *Rankin v. McPherson*, 483 U.S. 378, 381 (1987).

²⁴ *Id.* at 387.

²⁵ *Animal Legal Def. Fund v. Reynolds*, 353 F. Supp. 3d 812, 821 (S.D. Iowa 2019).

²⁶ *Cohen v. California*, 403 U.S. 15, 25 (1971).

²⁷ *Id.*

²⁸ *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”).

²⁹ *Cohen v. California*, 403 U.S. 15, 25 (1971).

³⁰ *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988).

³¹ *Cox v. Louisiana*, 379 U.S. 536, 557 (1965).

³² *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011).

This principle applies with particular strength to universities, dedicated to open debate and discussion. Take, for example, a student newspaper’s front-page uses of a vulgar headline (“Motherfucker Acquitted”) and a “political cartoon . . . depicting policemen raping the Statue of Liberty and the Goddess of Justice.”³³ These words and images—published at the height of the Vietnam War—were no doubt deeply offensive to many at a time of deep polarization and unrest. Yet, the Supreme Court held that the disciplinary sanctions against the newspaper’s editor violated the First Amendment, as “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.’”³⁴ If the First Amendment protects vulgar and insulting language on campus, it certainly protects such language off campus, including Parcak’s tweet. The answer to offensive or disagreeable speech is “more speech, not enforced silence.”³⁵

III. Conclusion

The speech here is clearly protected. The First Amendment does not shield Parcak’s speech from every consequence, including sharp, even scathing criticism. It also does not prohibit UAB from reminding the public that Parcak’s views do not represent those of the university.

UAB’s statement begins with that exercise of its own right to criticize Parcak, but concludes by adding that it is “reviewing” the matter, suggesting it will conduct an investigation. The question is not whether formal punishment is meted out, but whether the institution’s actions in response “would chill or silence a person of ordinary firmness from future First Amendment activities[.]”³⁶ Investigations into protected expression may meet this standard, even if no formal punishment is ultimately imposed.³⁷

Accordingly, we invite UAB to clarify that it will not investigate or punish Parcak for her protected extramural expression and to reaffirm its commitments to free expression. Given the urgent nature of this matter, we respectfully request receipt of a response to this letter by the close of business on Wednesday, February 24, 2021.

³³ *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

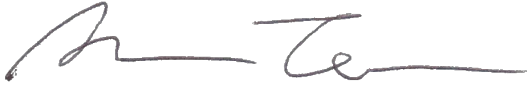
³⁴ *Id.* at 670.

³⁵ *Whitney v. California*, 274 U.S. 357, 377 (1927). In this regard, we are disappointed that UAB has also been “enforcing silence” in the comment sections of its Facebook and Twitter accounts. This censorship reflects an unfortunate trend among public universities across the country. *See* FOUND. FOR INDIV. RIGHTS IN EDUC., NO COMMENT: PUBLIC UNIVERSITIES’ SOCIAL MEDIA USE AND THE FIRST AMENDMENT (Apr. 2020), *available at* <https://www.thefire.org/research/publications/miscellaneous-publications/social-media-use-and-the-first-amendment>. By creating an interactive space for users to comment on its social media pages, UAB has opened an online public forum that is no less bound by the First Amendment than its physical counterparts. *See, e.g., Knight First Amendment Inst. at Columbia Univ. v. Trump*, No. 18-1691-cv, 2019 U.S. App. LEXIS 20265, at *22 (2d Cir. July 9, 2019). UAB’s purge of comments both critical and supportive of Parcak and your administration squelches public discussion and forecloses our society’s lawful remedy to speech that is offensive or disfavored: more speech. Much of our public discourse has moved online, making it especially vital that government actors such as UAB respect the expressive rights of students, faculty, and the public in this context.

³⁶ *Mendocino Envtl. Ctr. v. Mendocino Cty.*, 192 F.3d 1283, 1300 (9th Cir. 1999).

³⁷ *See, e.g., White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000).

Sincerely,

A handwritten signature in black ink, appearing to read "A. Terr". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Aaron Terr

Program Officer, Individual Rights Defense Program and Public Records