FIRE
Foundation for Individual Rights and Expression

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Sent via U.S. Mail and Electronic Mail (board@wisconsin.edu)

Dear President Bogost:

FIRE, a nonpartisan nonprofit dedicated to defending freedom of speech,[1] urges the University of Wisconsin System (UWS) Board of Regents to honor its constitutional obligations and protect tenure for all faculty by ensuring Professor Joe Gow keeps his faculty appointment, despite controversy over revelations that he writes about and appears in adult-oriented content in his private time. The First Amendment protects faculty when they speak as private citizens on matters of public concern, as Gow has done with his books and videos promoting the impact of a plant-based diet on healthy sexual relationships. To uphold the fundamental First Amendment rights of faculty, the Board must reject the UW-La Crosse (UWL) Faculty Senate Hearing Committee's recommendation that UWS terminate Gow.

UWL based its termination recommendation on Gow's alleged "[u]nethical and potentially illegal conduct," finding he "appeared in and posted numerous pornographic videos on publicly accessible websites" as the "clearly identifiable" UWL Chancellor and pseudonymously published the books "Monogamy with Benefits" and "Married with Benefits."[2] Though UWL considered several other charges, it found that "Gow's most serious misconduct was *how he responded* to the discovery of his pornographic content," accusing him of "exploiting his role as a UWL faculty member (and former UWL chancellor) to generate additional interest in, views of, and revenue from his pornographic content for his own benefit."[3] But as Gow produced the

[1] For more than 20 years, the Foundation for Individual Rights and Expression (FIRE) has defended freedom of expression, conscience, and religion, and other individual rights on America's university campuses. You can learn more about our mission and activities at thefire.org.

[2] Letter from UWL Faculty Senate Hearing Committee to James Beeby, UWL Chancellor, et al., 2, 8-9 (July 11, 2024), *available at* https://www.thefire.org/research-learn/uw-la-crosse-faculty-hearing-committee-decision-july-11-2024.

[3] *Id.* at 2 (emphasis in original).

videos and books in his personal capacity and they concerned public issues, the First Amendment limits UWL's power to terminate his faculty role.[4]

UWL mistakenly relies on *City of San Diego v. Roe* to find that Gow's videos, like those made by the police officer in *Roe*, did not concern public issues because they did not comment on government affairs.[5] Speaking directly on this issue, the United States Court of Appeals for the Seventh Circuit, whose decisions are binding on UWS, rejected the contention that *Roe* held that "sexually explicit speech 'is generally not considered of public concern[.]'"[6] This accords with the Supreme Court's explanation that expression "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" or "a subject of general interest and of value and concern to the public."[7] The speech need not "relate to an issue of exceptional significance," "address a topic of great societal importance, or even pique the interest of a large segment of the public."[8] On the other hand, speech is considered not on public issues when it relates only to a "personalized grievance"[9] or "dispute over internal office affairs."[10] Importantly, a statement's "controversial character ... is irrelevant to the question of whether it deals with a matter of public concern."[11]

UWL is therefore incorrect in its assertion that "nothing about Gow's activities at issue in this matter" raise an issue of public concern.[12] As the Supreme Court has stated, "Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern."[13] The First Amendment has long protected non-obscene sexually explicit works and

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[4] *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006).

[5] 543 U.S. 77, 84 (2004); Brief of the University of Wisconsin-La Crosse in the matter of Professor Joe Gow, 18-20 (Aug. 14, 2024) (on file with author) ("Gow's activities did nothing to inform the public about any aspect of the [university's] functioning or operation and do not implicate the First Amendment."); *id*. at 419 (internal quotations omitted).

[6] *Harnishfeger v. United States,* 943 F.3d 1105, 1121 (7th Cir. 2019) (citation omitted)

[7] *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (cleaned up, emphasis added).

[8] *Craig v. Rich Twp. High Sch. Dist*., 736 F.3d 1110, 1116 (7th Cir. 2013).

[9] *Kristofek v. Vill. Of Orland Hills*, 712 F.3d 979, 986 (7th Cir. 2013).

[10] *Miller v. Jones*, 444 F.3d 929, 935 (7th Cir. 2006).

[11] *Rankin v. McPherson*, 483 U.S. 378, 387 (1987) (expression of hope that President Ronald Reagan might be assassinated was protected against retaliation). This inquiry "does not involve a determination of how interesting or important the subject of an employee's speech is." *Urofsky v. Gilmore*, 216 F.3d 401, 407 (4th Cir. 2000); *see Dishnow v. Sch. Dist. of Rib Lake*, 77 F.3d 194, 197 (7th Cir. 1996) ("That the public was not large, that the [local high school] issues were not of global significance, and that Dishnow's participation was not (we mean no disrespect) vital to the survival of Western civilization did not place his speech outside the orbit of protection.").

[12] Brief of the University of Wisconsin-La Crosse, *supra* note 5, at 19.

[13] *Roth v. United States*, 354 U.S. 476, 487 (1957).

their distribution[14] because they contain "serious literary, artistic, political, or scientific value."[15]

In holding that a book on adult relationships featuring "provocative themes," "sexually explicit terminology," "hypersexualized content," and the employee's "own sexual exploits" discussed matters of public concern, the Seventh Circuit determined this topic was "a subject of general interest to the public."[16] Likewise, the "content, form, and context" of Gow's expression demonstrates its public character.[17] Gow's videos and books promote vegan cooking, a sex-positive lifestyle, and the salience of the adult entertainment industry—all of which are undoubtedly political and social issues of concern to at least some community members.[18] These subjects provoke intense societal debate[19] and are far beyond a private and personal internal dispute between Gow and UWL.[20] Further, Gow created his publicly accessible[21] videos and books "for a general audience"[22] on "matters in which the public might be interested,"[23] demonstrating his intent to inform and entertain a public online audience.[24]

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[14] *Flanagan v. Munger*, 890 F.2d 1557, 1565 (10th Cir. 1989).

[15] *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 246 (2002).

[16] *Craig*, 736 F.3d at 1113 (a guidance counselor's self-published book on adult relationship advice featuring sexually explicit material was on a matter of public concern because of public interest in this topic); *see Harnishfeger*, 943 F.3d at 1109 (a national guardswoman's pseudonymously published book about her time as a phone-sex operator was on a matter of public concern because of "public interest in her work and life.").

[17] *Kristofek*, 712 F.3d at 984 (citing *Connick v. Myers*, 461 U.S. 138, 147–48 (1983) ("Whether a statement rises to the level of public concern is a question of law, and in answering this question we look to the 'content, form, and context' of the statement.").

[18] *Miller*, 444 F.3d at 935 ("Of these three [factors], content is the most important."); *Craig*, 736 F.3d at 1117 (citing the "proliferation of advice columns dealing with precisely this topic" of adult dating as "a testament to its newsworthiness" and thus public concern.").

[19] *E.g.*, Lexi Inks, *What It Really Means To Be Sex Positive, And Why It Matters*, WOMEN'S HEALTH (Jan. 27, 2023), https://www.womenshealthmag.com/sex-and-love/a42624993/sex-positive-meaning; Jennifer Schuessler, *The Woman Who Tried to Make Porn Safe for Feminism*, N.Y. TIMES (Mar. 11, 2024), https://www.nytimes.com/2024/03/11/arts/candida-royalle-jane-kamensky.html; Virginia Postrel, *Synthetic Meat Will Change the Ethics of Eating*, WALL STREET JOURNAL (Dec. 23, 2022), https://www.wsj.com/articles/synthetic-meat-will-change-the-ethics-of-eating-11671805446.

[20] *Cf. Button v. Kibby-Brown*, 146 F.3d 526, 530 (7th Cir. 1998) (a "personal disagreement" expressed in a "private, informal setting" in the context of an interdepartmental dispute between several police officers was not on matters of public concerns).

[21] Joe Gow Investigation from Hayley Hanson and Ann Maher, Husch Blackwell LLP, to Betsy Morgan, Interim Chancellor of University of Wisconsin-La Crosse, 24 (Mar. 14, 2024) (on file with author).

[22] *Harnishfeger*, 943 F.3d at 1115 (a pseudonymously written novel was on matters of public concern despite the state having "to canvass many dozens, if not hundreds of Harnishfeger's Facebook posts to find ... [its] publication announcement" because it was written for a general audience on the relevant social topic of phone sex workers) (internal quotations omitted).

[23] *Dishnow,* 77 F.3d at 197.

[24] *Eberhardt v. O'Malley*, 17 F.3d 1023, 1026-27 (7th Cir. 1994) (fictitious novel about criminal justice system was on a matter of public concern "regardless of its subject matter or its relation to the author's employment" because "protected speech" encompasses "entertainment" "whether or not it alleges wrongdoing or addresses matters of public import in some world-important sense.").

Because Gow spoke as a private citizen on matters of public concern,[25] UWS may not terminate his faculty role for his expression unless UWS's interest "in promoting the efficiency of the public services it performs through its employees" outweighs Gow's interest in exercising his fundamental First Amendment rights.[26] UWS must provide "evidence of actual disruption, or at least the articulation of a reasonable belief in future disruption plus evidence of its reasonableness at the time."[27] Even a police department, "a paramilitary organization built on relationships of trust and loyalty" where minor disruptions can greatly impact operations,[28] must show the expression "interfere[d] with their staffing duties,"[29] "*actually* undermined department efficiency," or "interfered with the actual operations" of the department in a "concrete way."[30]

And a public university, which is not remotely like a paramilitary organization, but rather is traditionally the "marketplace of ideas"[31] where "conflict is not unknown … given the inherent autonomy of tenured professors and the academic freedom they enjoy,"[32] requires a higher showing of disruption. UWS must show more than that the expression "upset [administrators] and members of the community," "cast the [university] in a negative public light,"[33] caused "serious discipline problems, undermined employee morale," or "impaired harmony among co-workers."[34] Importantly, the university "must offer particularly convincing reasons to suppress" speech that "touched upon a matter of strong public concern."[35]

UWS has not cleared this bar. Expression retains protection even if it "erode[s] the public's respect and confidence" in the university or disrupts operations for reasons that "some

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[25] Though UWL asserts that some of Gow's activities "took place on work time and using work equipment" and that he "linked his name, image, and likeness to his pornographic content," Brief of the University of Wisconsin-La Crosse, *supra* note 5, at 19–20, Gow undoubtedly spoke as a private citizen, as public universities do not ordinarily employ professors to create sexually explicitly works, and the mere knowledge of a speaker's employment does not render their speech pursuant to their official duties. *See, e.g., Pickering v. Bd. of Educ.*, 391 U.S. 563, 576–78 (1968) (a teacher spoke as a private citizen when writing a letter to a local newspaper criticizing his employer, despite explaining that he teaches at the high school).

[26] *Pickering*, 391 U.S. at 568.

[27] *Harnishfeger*, 943 F.3d at 1121.

[28] *Gustafson v. Jones*, 290 F.3d 895, 910 (7th Cir. 2002).

[29] *Graber v. Clarke*, 763 F.3d 888, 896 (7th Cir. 2014).

[30] *Kristofek*, 832 F.3d at 796 (emphasis in original).

[31] *Keen v. Penson*, 970 F.2d 252, 257 (7th Cir. 1992) (quoting *Keyishian v. Bd. of Regents,* 385 U.S. 589, 603 (1967)).

[32] *Hulen v. Yates*, 322 F.3d 1229, 1239 (10th Cir. 2003).

[33] *Salge v. Edna Indep. Sch. Dist.*, 411 F.3d 178, 195 (5th Cir. 2005).

[34] *Hulen*, 322 F.3d at 1239; *see Piggee v. Carl Sandburg Coll.*, 464 F.3d 667, 671 (7th Cir. 2006) ("[T]he First Amendment protects the right of faculty members to engage in academic debates, pursuits, and inquiries and to discuss ideas.") (internal quotations and citation omitted); *Grimes v. E. Ill. Univ.*, 710 F.2d 386, 388 (7th Cir. 1983) ("The purpose of tenure is to protect academic freedom—the freedom to teach and write without fear of retribution for expressing heterodox ideas—and it is faculty who engage in teaching and writing.").

[35] *Kristofek*, 832 F.3d at 796 (internal quotations and citations omitted).

members of the public find [the] speech offensive."[36] Allowing otherwise would only endorse a "heckler's veto" by allowing the reactions of third parties to dictate what UWS faculty may say.[37] The First Amendment's robust protection for offensive speech bars UWS from justifying its punishment on the "perceived threat of disruption … caused not by the speech itself but by threatened reaction to it by offended segments of the public,"[38] as "apprehension of disturbance is not enough to overcome the right to freedom of expression."[39]

UWL's termination recommendation improperly rests on reputational concerns from the perceived subjective offensiveness of Gow's expression. UWS leaders were "alarmed" and "disgusted"[40] by Gow's "provocative content,"[41] which they claimed brought "dishonor" and "personal embarrassment" to UWL.[42] Put differently, they objected to the viewpoint of Gow's speech.[43] UWL's allegations are short on evidence of actual internal disruption but replete with how Gow's works "reflect poorly on the institution" and "harmed the university's reputation,"[44] citing "concerns about Gow expressed by community members, donors, students, or families," and criticism from state lawmakers.[45] UWL could not even put forth a reasonable belief in future disruption, stating that *if* Gow continues to teach then his extramural expression "*could* negatively affect" unspecified university funding.[46] These "feelings of embarrassment and disgust" at Gow's expression are precisely what the Seventh Circuit held insufficient to overcome a public employee's First Amendment rights.[47]

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[36] *See Flanagan*, 890 F.2d at 1566. That the court rejected the reputational concerns of a police department—an institution with a far greater interest in fostering public cooperation than a public university system—should caution UWS's reliance on similar concerns.

[37] *See Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992) ("Listeners' reaction to speech" is not a permissible basis for punishment because expression "cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob."); *see Zamecnik v. Indian Prairie Sch. Dist. No. 204*, 636 F.3d 874, 879 (7th Cir. 2011) (First Amendment "heckler's veto" doctrine bars school district from punishing student for wearing t-shirts and buttons stating 'Be Happy, Not Gay' because of the reactions of offended students).

[38] *See Berger v. Battaglia*, 779 F.2d 992, 1001 (4th Cir. 1985).

[39] *Flanagan*, 890 F.2d at 1566–67; (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506–07 (1969)) (internal quotations omitted).

[40] Nicholas Bogel-Burroughs & Dan Simmons, *University Chancellor Fired After Making Pornographic Videos With His Wife*, N.Y. TIMES (Dec. 28, 2023), https://www.nytimes.com/2023/12/28/us/wisconsin-la-crosse-joe-gow-porn.html.

[41] Letter from UWL Faculty Senate Hearing Committee, *supra* note 2, at 2.

[42] *Id.*

[43] *Matal v. Tam*, 582 U.S. 218, 220 (2017) ("Giving offense is a viewpoint.").

[44] Letter from UWL Faculty Senate Hearing Committee, *supra* note 2,at 2, 9.

[45] Brief of the University of Wisconsin-La Crosse, *supra* note 5, at 7.

[46] *Id.* at 14 (emphasis added); *see Josephson v. Ganzel*, No. 23-5293, 2024 WL 4132233, at *8 (6th Cir. 2024) (medical university's evidence of disruption was insufficient where professor's controversial speech didn't affect patient care, academic accreditation, supervisors' authority, or employee retention or recruitment).

[47] *Harnishfeger*, 943 F.3d at 1119 (holding that it is a "misuse of authority" for the government to invoke "feelings of embarrassment and disgust" to punish public employee's "sexually explicit" book about her time

Terminating a tenured professor is a drastic sanction reserved only for severe misconduct not present here. And FIRE agrees with UWL that the other disciplinary allegations, standing alone, do not merit this sanction. We therefore call on UWS to refrain from terminating Gow for his protected expression.

Sincerely,

Zachary Greenberg
Faculty Legal Defense Counsel

Cc: Wade Harrison, Senior Legal Counsel, University of Wisconsin System
Jennifer Lattis, Deputy General Counsel, University of Wisconsin System
Megan Wasley, Executive Director and Corporate Secretary, Board of Regents

as phone-sex operator "simply because superiors disagree with the content of employees' speech.") (internal quotations and citations omitted).