



FIRE

Foundation for Individual
Rights and Expression

July 26, 2022

President Michael Rao
Virginia Commonwealth University
Office of the President
910 West Franklin Street
Box 842512
Richmond, Virginia 23284-2512

Sent via U.S. and Electronic Mail (president@vcu.edu)

Dear President Rao:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech, expression, and conscience, and other individual rights on campus, is concerned by Virginia Commonwealth University's deferred recruitment policy that bans first-semester students from joining Greek organizations. Specifically, effective August 1, 2022, VCU will ban students without at least 12 credit hours completed at the university from joining any social fraternity or sorority.¹ This deferred recruitment policy prevents first-semester students from joining Greek organizations and prevents Greek organizations from recruiting these students.² VCU imposes no similar restrictions on first-semester students who elect to join university athletic teams,³ seek employment at the university or elsewhere,⁴ or associate with any other type of student group.⁵

This policy impermissibly restricts students' First Amendment rights and fails to meaningfully advance any compelling university interests. FIRE therefore calls on VCU to rescind the policy

¹ VA. COMMONWEALTH UNIV., *New Policies for Fraternities & Sororities at VCU* (effective Aug. 1, 2022) (on file with author). This is our understanding of the pertinent facts, though we appreciate that you may have additional information to offer and invite you to share it with us.

² *Id.*

³ VA. COMMONWEALTH UNIV., *Student-Athlete Support Services* (last visited July 13, 2022), <https://sass.vcu.edu/academics/academic-overview/Academic%20Overview> [<https://perma.cc/DYB6-ZZ88>] (listing no credit hour requirement for first-semester student-athletes).

⁴ VA. COMMONWEALTH UNIV., *Career Services* (last visited July 13, 2022), <https://careers.vcu.edu/experience/full-time-jobs> [<https://perma.cc/3LWD-SVX4>] (listing no credit hour requirement or limit for university employment or outside employment).

⁵ VA. COMMONWEALTH UNIV., *Get Involved* (last visited July 13, 2022), <https://www.vcu.edu/life-at-vcu/get-involved> [<https://perma.cc/ZC6N-32M2>] (listing no credit hour requirement imposed by the university on joining non-Greek student groups).

and afford all students, on equal terms, the right to associate with the full array of campus groups.

I. VCU’s Deferred Recruitment Policy Restricts Students’ Freedom of Association

The First Amendment guarantees freedom of association, which “has, for centuries, been at the heart of the American system of government and individual rights,”⁶ and protects the “right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”⁷ This freedom of association extends to students enrolled in public universities, protecting their right to join student groups, such as Greek and other social organizations.⁸

Accordingly, when a public university burdens a student’s right to join a student organization, including Greek organizations, that restriction must withstand First Amendment scrutiny.⁹ This analysis applies regardless of the source of the restriction, whether it be a university policy,¹⁰ a university president’s decision to refuse recognition to a student group,¹¹ a university’s directive banning student group social functions,¹² or a university’s discipline for student group misconduct.¹³

Burdens on campus groups recruiting student members, and on students joining campus groups, implicate freedom of association. In *Gay Alliance of Students v. Matthews*, the United States Court of Appeals for the Fourth Circuit—the federal circuit in which VCU sits—held that a university’s recruitment restriction imposed on a single student group is an improper denial of First Amendment rights absent justification.¹⁴ The court rejected the university’s argument that a ban on recruitment, resulting from a denial of university recognition, would not burden students’ constitutional rights, explaining how the “very essence” of the First Amendment “is that each individual makes his own decision as to whether joining an organization would be harmful to him, and whether any countervailing benefits outweigh the potential harm.”¹⁵

⁶ *6th Cong. Dist. Republican Comm. v. Alcorn*, 913 F.3d 393, 401 (4th Cir. 2019).

⁷ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984); *see also, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 888 (1982) (“[T]he First Amendment restricts the ability of the State to impose liability on an individual solely because of his association with another.”).

⁸ *See, e.g., Healy v. James*, 408 U.S. 169, 183 (1972) (establishing that students and student groups at public universities possess associational freedoms); *Evans v. Newton*, 382 U.S. 296, 298 (1966) (discussing “the right of the individual to pick his own associates so as to express his preferences and dislikes, and to fashion his private life by joining such clubs and groups as he chooses”); *Iota Xi Chapter v. Patterson*, 566 F.3d 138, 146 (4th Cir. 2009) (analyzing state college fraternity’s freedom of association claims); *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136, 143 (2d Cir. 2007) (same).

⁹ *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008) (government restrictions on freedom of association “are subject to strict scrutiny” and are only upheld “if they are narrowly tailored to serve a compelling state interest”) (internal quotations omitted).

¹⁰ *Chi Iota Colony*, 502 F.3d at 139–40.

¹¹ *Healy*, 408 U.S. at 174.

¹² *Gay Students Org. of Univ. of N.H. v. Bonner*, 509 F.2d 652, 654 (1st Cir. 1974).

¹³ *Iota Xi Chapter*, 566 F.3d at 141.

¹⁴ 544 F.2d 162, 165 (4th Cir. 1976).

¹⁵ *Id.* at 165–66.

Citing the Supreme Court’s seminal case establishing student associational freedoms on college campuses, *Healy v. James*, the court added that “the state and its agents are forbidden from usurping the students’ right to choose. In this respect, the governing bodies of schools have no greater authority than do other state officials.”¹⁶

A restriction on associational freedoms “cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.”¹⁷ Even when limits on First Amendment activity are enacted to further an important government interest, “they must be pursued by means that are neither seriously underinclusive nor seriously overinclusive.”¹⁸ “In considering whether a government regulation is narrowly tailored, it is not enough that the regulation achieves its ostensible purpose, it must do so without unnecessarily infringing upon constitutionally protected rights.”¹⁹

VCU does not publicly state its rationale for uniquely requiring recognized Greek organizations to maintain deferred recruitment. It is thus unclear whether this policy serves any university interest, let alone a sufficiently compelling one, justifying intrusions on students’ First Amendment rights. But even if VCU were to argue the policy furthers its interest in allowing first-semester students an opportunity to, for example, adjust to the university’s academic demands before joining Greek life, and even if such a rationale were deemed compelling (rather than paternalistic), VCU’s policy would not be narrowly tailored to furthering this interest, because the policy is both over- and under-inclusive even on that rationale.

First, it is overinclusive because it burdens far more associational activity than necessary to advance the university’s interest in promoting first-semester students’ academic success.²⁰ The policy restricts students from joining groups based solely on their VCU credit hours, regardless of the student’s age, maturity level, course load, employment status, relevant experience associating with similar organizations, or other factors affecting the student’s capacity to balance the time commitment of joining Greek life with succeeding academically. Further, the policy provides no exception for transfer students who attain 12 credit hours at another institution, resulting in a bizarre distinction where VCU recognizes such credits

¹⁶ *Id.* at 166 (citing *Healy*, 408 U.S. at 193–94).

¹⁷ *Chi Iota Colony*, 502 F.3d at 143 (citing *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978)) (internal quotations omitted).

¹⁸ *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, 879 F.3d 101, 112 (4th Cir. 2018) (quoting *Brown v. Entm’t Merchants Ass’n*, 564 U.S. 786, 805 (2011)) (cleaned up); *see also Am. Ass’n of Political Consultants, Inc. v. FCC*, 923 F.3d 159, 167 (4th Cir. 2019) (explaining how, in the First Amendment free speech context, “an ‘underinclusive’ restriction is one that covers too little speech, thereby leaving appreciable damage to the government’s interest unprohibited.”) (cleaned up), *aff’d sub nom., Barr v. Am. Ass’n of Political Consultants*, 591 U.S. ___, 140 S. Ct. 2335 (2020), and *Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015) (“Moreover, the restriction cannot be overinclusive by unnecessarily circumscribing protected expression.”) (cleaned up); *cf. Johnson v. City of Cincinnati*, 310 F.3d 484, 504 (6th Cir. 2002) (citing First Amendment free speech cases in applying narrow tailoring analysis to burden on associational freedoms).

¹⁹ *Johnson*, 310 F.3d at 504 (law excluding drug felons from “drug-exclusion zones” was not narrowly tailored to the city’s interest in reducing crime because it burdened far greater associational freedoms than necessary and failed to consider lesser restrictions on travel).

²⁰ *See Johnson*, 310 F.3d at 503 (law excluding drug felons from “drug-exclusion zones” was overinclusive because it banned individuals “from engaging in an array of not only wholly innocent conduct, but socially beneficial action like caring for . . . grandchildren and walking them to school.”).

toward fulfilling an academic degree, but not toward a student's right to join Greek life.²¹ Additionally, this blanket ban prevents first-semester students from joining *all* Greek organizations, regardless of the varying time commitments required by each chapter and the extent of the student's association with that group.

Second, the policy is underinclusive because it ignores the host of permissible activities available to first-semester students that are potentially far more time-consuming than joining Greek life. While barred from Greek life, new students may maintain rigorous schedules as Division I student-athletes, full-time employees for outside entities, or leaders of the nearly 500 other social, political, and academic student groups at VCU—regardless of the required time commitment.²² VCU thus affords first-semester students the First Amendment freedom to associate with these various groups yet bans them from making the oftentimes smaller time commitment of joining a Greek organization. This arbitrary distinction “leav[es] appreciable damage to the government's interest unprohibited,”²³ rendering the policy not narrowly tailored to advancing any purported university interest in safeguarding the academic success and well-being of first-semester students.

Finally, the policy is not narrowly tailored because it disregards alternative measures that are less restrictive of students' First Amendment right to associate with campus groups, such as providing university education or counseling for potentially overburdened first-semester students.²⁴ VCU can offer first-semester students a variety of resources to help them manage their commitments without burdening their fundamental First Amendment rights.

II. VCU's Deferred Recruitment Policy Restricts Students' Expressive Association

Preventing students from joining the many VCU Greek organizations that engage in expressive association also violates students' fundamental right to gather and add their voices together for common causes.²⁵ The right of expressive association is a natural complement to freedom of expression because, as the Supreme Court observed, “the right to speak is often exercised most effectively by combining one's voice with the voices of others.”²⁶

²¹ The policy's failure to include transfer credits demonstrates its incongruity toward any stated interests in student well-being, as even an academically successful second-semester transfer senior who has presumably mastered time management skills would be banned from joining Greek life, yet a second-semester student would be allowed to join these groups merely because the student's credits were completed at VCU.

²² *See supra* notes 3-5.

²³ *Cahaly*, 796 F.3d at 405 (4th Cir. 2015).

²⁴ *See id.* at 406 (ban on automatic phone calls “of a political nature” was overinclusive because it fails to consider less restrictive alternatives such as limits on robocall timing or caller identity).

²⁵ *Iota Xi Chapter v. Patterson*, 538 F. Supp. 2d 915, 923 (E.D. Va. 2008) (finding that a college fraternity that “adequately described its institutional mission to inculcate its members with certain leadership skills and community values” has expressive associational rights under the First Amendment), *aff'd on other grounds*, 566 F.3d at 146; *see also Boy Scouts of Am. v. Dale*, 530 U.S. 640, 649–50 (2000) (recognizing expressive associational right of Boy Scout members because the group has a “general mission” of “instill[ing] values in young people” by “instructing and engaging them in activities like camping, archery, and fishing”).

²⁶ *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 68 (2006).

According to VCU, “a social Greek-letter organization is an organization that exists to promote fraternal relationships and personal development.”²⁷ This includes a wide array of groups that instill a defined set of values within their members through professional development, expressive events, selective recruitment processes, and philanthropic activities.²⁸ VCU burdens the expressive associational rights of first-semester students seeking to join these groups but imposes no similar restrictions on those students joining the Young Democrats, African Student Union, Christian Student Fellowship, or any other values-based organization, nor does VCU restrict those students from taking very time-intensive or leadership roles within those organizations.²⁹ In fact, VCU *encourages* first-semester students, for example, to join the Symphonic Wind Ensemble, a rigorous band program requiring at least four hours of practice per week in addition to performances twice a semester.³⁰ Preventing students from joining only those values-based social groups that use the Greek alphabet is unconstitutional viewpoint discrimination, “an egregious form” of censorship antithetical to the First Amendment.³¹

III. VCU Must Rescind Its Deferred Recruitment Policy

VCU boasts that the “fraternity and sorority community at VCU has enhanced the lives of thousands of men and women over the last 50 years.”³² Far from burdening students’ academic performance, associating with Greek groups has been shown to increase academic engagement, campus involvement, and satisfaction with university life.³³ These benefits are

²⁷ VCU Student Affairs, *Fraternity and Sorority Life Handbook* (effective Jan. 2022) <https://students.vcu.edu/departments/leadership-and-involvement/fraternity-and-sorority-life> [https://perma.cc/ETA8-D6RS].

²⁸ For example, Alpha Gamma Delta “promotes academic excellence, philanthropic giving, ongoing leadership and personal development and above all, a spirit of loving sisterhood;” Gamma Rho Lambda “is an all-inclusive social sorority exemplifying the qualities of tolerance, diversity, unity, and trust;” and Omega Psi Phi Fraternity seeks to “occupy a progressive, helpful and constructive place in political life of the community and nation” and “foster the humanity, freedom, and dignity of the individual; and aid downtrodden humanity in its efforts to achieve higher economic and intellectual status.” Va. Commonwealth Univ., *Rams Connect*, (last visited July 13, 2022), https://vcu.campusgroups.com/club_signup?group_type=9999 [https://perma.cc/V8SC-3SES] (listing group mission statements on each individual group page).

²⁹ *Id.*

³⁰ VCU Arts, *Bands* (last visited July 13, 2022), <https://arts.vcu.edu/academics/departments/music/ensembles/bands> [https://perma.cc/R2EN-78UN] (describing the band’s rehearsal and performance schedule).

³¹ *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

³² VCU Division of Student Affairs, *Fraternity and Sorority Life* (last visited July 13, 2022), <https://students.vcu.edu/departments/leadership-and-involvement/fraternity-and-sorority-life> [https://perma.cc/C4BZ-FWGH].

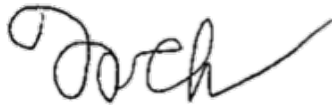
³³ See Gary R. Pike, *The Greek Experience Revisited: The Relationships between Fraternity/Sorority Membership and Student Engagement, Learning Outcomes, Grades, and Satisfaction with College*, N. AM. INTERFRATERNITY CONF. (Mar. 2020), <https://www.phigam.org/file/communications/Dr.-Pike-Report---The-Greek-Experience-Revisited.pdf> (survey demonstrating the positive effects of Greek group membership on learning outcomes, campus engagement, and satisfaction with college); Paul Kittle, *A Review of Deferred Recruitment*, AUBURN UNIV. DIV. OF STUDENT AFFS. (Jan. 28, 2011), http://greeklife.auburn.edu/wp-content/uploads/2018/07/Deferred_Recruitment_Report_II.pdf (recommendation against Auburn

particularly important for first-semester students as they acclimate to campus life and seek to build connections within the university community.³⁴

FIRE accordingly calls on VCU to allow all students to associate with the full array of campus groups—and afford them enjoyment of the full extent of their First Amendment rights—by rescinding the ban on first-semester students joining Greek organizations at VCU.

We request receipt of a response to this letter no later than the close of business on August 9, 2022.

Sincerely,



Zachary Greenberg
Senior Program Officer, Student Organizations, Campus Rights Advocacy

Cc: M. Elizabeth Griffin, Associate University Counsel
Jake A. Belue, Interim University Counsel
Charles Klink, Senior Vice Provost for Student Affairs
Joe Wheelless, Director of Fraternity and Sorority Life

University adopting a deferred recruitment policy because it would fail to address the underlying issues affecting Greek life).

³⁴ For example, as a condition of continued recognition by VCU, the university requires Greek groups to certify that their current members and new member classes have met or exceeded a 2.7 grade point average every semester. *Fraternity and Sorority Life Handbook*, *supra* note 27. This is a strong incentive for chapters to focus on enhancing their members' academic performance.