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President Judith Ramaly
Winona State University
Office of the President
Somsen Hall 201
Winona, Minnesota 55987

URGENT

Sent via U.S. Mail and Facsimile (507-457-2415)

Dear President Ramaly:

As you can see from the list of our Directors and Board of Advisors, the Foundation for Individual Rights in Education (FIRE) unites leaders in the fields of civil rights and civil liberties, scholars, journalists, and public intellectuals from across the political and ideological spectrum on behalf of liberty, legal equality, academic freedom, due process, freedom of speech, and freedom of conscience on America's college campuses. Our website, thefire.org, will give you a greater sense of our identity and activities.

FIRE is concerned about the threat to free speech presented by Winona State University's (WSU's) recent decision to restrict student expression. This is our understanding of the facts. Please inform us if you believe we are in error.

The GLBTA Partnership, a recognized WSU student group, seeks to engage in symbolic expression on campus. Specifically, GLBTA seeks to hold a "Day of Silence" event by positioning mannequins bearing various epithets and slurs in certain locations on campus. GLBTA requested official permission to engage in such activity. While the group is allowed to display the mannequins in certain locations, on April 13 GLBTA was informed by Lori J. Mikl, WSU Affirmative Action Officer/Legal Analyst, that the mannequins would not be permitted in or near an outdoor gazebo because of concerns that children might encounter the language. Specifically, Mikl wrote:

> The University declines to have the torsos displayed in the green space near the gazebo as the campus frequently has pre-school, elementary, and middle-school aged children on campus during the week and it would not be appropriate to expose children to the

> language written on the torsos as they are too young to understand the purpose behind your activity.

To be clear: Winona State University may not justify content-based restrictions on student expression by reference to the sensibilities of children who might happen to encounter it. WSU is a public institution of higher education, and its students enjoy the full complement of rights to which any other adult American is entitled. WSU therefore may not restrict the parameters of campus discourse to permit only that speech which is acceptable to the ears and eyes of children. Doing so would unequivocally impoverish the dialogue that students, faculty, and the general public expect to occur at our nation's public universities, the campuses of which the Supreme Court has memorably identified as being "peculiarly the 'marketplace of ideas.'" *Healy v. James*, 408 U.S. 169, 180 (1972) (internal citation omitted).

That the First Amendment's protections fully extend to public institutions such as Winona State University has long been settled law. 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"); *Healy*, 408 U.S. at 180 (citation omitted) ("[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'"). Courts have consistently noted that college students are not minors, and they enjoy the First Amendment rights afforded adult citizens. See *Healy*, 408 U.S. at 197 (Douglas, J., concurring) ("[s]tudents—who, by reason of the Twenty-sixth Amendment, become eligible to vote when 18 years of age—are adults who are members of the college or university community"). See also *Kincaid v. Gibson*, 236 F.3d 342, 346 (6th Cir. 2001) (holding that the Supreme Court's decision in *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988), did not apply to the college setting because college students are "young adults"); *Bystrom v. Fridley High Sch.*, 822 F.2d 747, 750 (8th Cir. 1987) ("few college students are minors, and colleges are traditionally places of virtually unlimited free expression"); *Bradshaw v. Rawlings*, 612 F.2d 135, 139 (3d Cir. 1979) ("[c]ollege students today are no longer minors; they are now regarded as adults in almost every phase of community life"); *Beach v. Univ. of Utah*, 726 P.2d 413, 418 (Utah 1986) ("[we] do not believe that [a college student] should be viewed as fragile and in need of protection simply because she had the luxury of attending an institution of higher education"); *Mazart v. State,* 109 Misc. 2d 1092, 1102, 441 N.Y.S.2d 600, 606–607 (N.Y. Ct. Cl. 1981) ("[i]t is clear from a reading of the published cases dealing with the rights of college students that the courts uniformly regard them as young adults and not children").

No matter how offensive it may be to some, many, or even all viewers, the speech which WSU seeks to forbid is protected by the First Amendment. See *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.'"). See also *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) ("[A] function of free speech under

our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.").

The Supreme Court of the United States has made clear that a government actor such as WSU may only impose a content-based burden or ban on protected expression if it does so in the service of a compelling state interest. *United States v. Playboy Entertainment Group*, 529 U.S. 803, 813 (2000). Even then, content-based burdens or bans are only permissible in the absence of a less restrictive alternative, and any such restriction must be narrowly tailored. *Id*. The Court has held that protecting those who might encounter speech they find objectionable is an insufficiently compelling governmental interest to justify a content-based ban on speech:

> Where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists. We are expected to protect our own sensibilities "simply by averting [our] eyes."….
> *Id.* at 813–14.

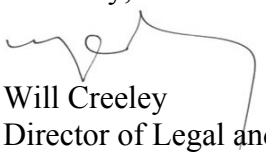
With regard to protecting children, the Court has held that in certain limited circumstances, government actors may impose narrowly targeted content-based restrictions in the interest of preventing children from viewing indecent or patently offensive sexual programming, as the Court has recognized "protecting children from exposure to patently offensive depictions of sex" as a sufficiently compelling governmental interest to justify such restrictions. *Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. 727, 743 (1996).

But "[e]ven where the protection of children is the object, the constitutional limits on governmental action apply." *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729, 2741 (2011). Although a government actor "possesses legitimate power to protect children from harm, [] that does not include a free-floating power to restrict the ideas to which children may be exposed." *Id*. at 2736 (internal citations omitted). Specifically, the Court has held that "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Erznoznik v. Jacksonville*, 422 U.S. 205, 213–14 (1975). "[T]he government may not 'reduce the adult population … to reading only what is fit for children.'" *Bolger v. Youngs Drug Products Corporation*, 463 U.S. 60, 73–74 (1983) (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)).

Here, WSU is imposing an explicitly content-based burden on student expression in service of an insufficiently compelling interest—protecting the sensibilities of children who may happen to view GLBTA's protected expression. Accordingly, WSU's restriction does not pass First Amendment muster. The fact that WSU's restriction is less than a blanket ban does not remedy the First Amendment violation: "When the purpose and design of a statute is to regulate speech by reason of its content, special consideration or latitude is not accorded to the Government merely because the law can somehow be described as a burden rather than outright suppression." *Playboy Entertainment Group*, 529 U.S. at 826.

Given the clarity of the relevant precedent, I trust that Winona State University will honor its binding legal obligation to permit students to exercise their First Amendment rights on campus. However, FIRE is committed to using our resources to ensure that freedom of expression is respected at WSU. Because GLBTA intends to engage in the expression discussed herein, we request an immediate response on this matter. I thank you for your time and attention to our concerns.

Sincerely,



Will Creeley
Director of Legal and Public Advocacy

cc:
Lori J. Mikl, Affirmative Action Officer/Legal Analyst
Connie Gores, Vice President for Student Life and Development
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