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January 17, 2006

Mr. Robert L. Shibley, Program Manager
Foundation for Individual Rights in Education
601 Walnut Street, Suite 510
Philadelphia, PA 19106

Re: Your letter of January 12, 2006

Dear Mr. Shibley:

Thank you for faxing me a copy of your letter to Leslie Winner. I appreciate your willingness to share your analysis of *ACLU v. Mote*, albeit indirectly. I was beginning to think you would not accept our invitation to have input into the study process we put into motion on November 14, 2005 as I had no response from you to my December 5th letter until receiving your fax yesterday. My hope is that we can all work together to develop a free speech and assembly policy that preserves the rights we all hold dear while recognizing the legitimate needs of the University to adopt "reasonable regulations compatible with" the University's educational mission. *Widmar v. Vincent*, 454 U.S. 263, 268 (1981).

I do not think that you and I are very far apart in our analysis of the law. My reading of the relevant case law is that different constitutional standards apply to the regulation of speech activities conducted on campus by "outsiders" (those unaffiliated with the University) and by students. This is the concern I mentioned in my letter to you of December 5, 2005 and was the impetus for Chancellor Sullivan's directive of November 14. However, the inquiry does not end there. As you point out, even *Roberts v Haragan*, 346 F.Supp.2d 853 (N.D. Tex. 2004) does not require that the entire campus be opened for unregulated assembly and speech activities. *Haragan* (which is not controlling law in North Carolina) speaks only to park areas, sidewalks, streets, or other similar common areas. The judge in *Haragan* said, "This Court begins its analysis of the facts of this case by recognizing one axiom: the entire University campus is not a public forum subject to strict scrutiny." *Id* at 860. He went on to quote the U.S. Supreme Court in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983), a case you also cite in your letter, where the Court said, "Nowhere [have we] suggested that students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs for ... unlimited expressive purposes."

Even in an area considered to be public forum (whether traditional or designated), where strict scrutiny applies, reasonable time, place, and manner regulations are permitted so long as they are content neutral, drawn to serve a significant state interest, and leave open ample channels of communication of the information. *Warren v. Fairfax County*, 196 F.3d 186 (4th Cir. 1999). Associational activities need not be tolerated where they infringe reasonable

campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education. *Healy v. James*, 408 U.S. 169, 189 (1972).

Thus, the difficult task before us is to determine, first, which areas of the campus must be open for expressive activities by students, second, are there other areas that should be opened, i.e., "designated" as public fora, and third, what time, place and manner regulations do we need in order to ensure that speakers are protected and that University operations are not disrupted? As responsible administrators, I do not believe we have the option to simply throw our hands in the air and say that "anything goes," and I cannot believe that would be your position either. Again, we invite and welcome your input on these questions.

Sincerely,

Lucien Capone III
University Counsel

LCIII/rws

c: Erskine B. Bowles
Chancellor Sullivan
Vice Chancellor Disque
Leslie Winner