



May 8, 2015

James P. Tressel
Office of the President
Youngstown State University
Tod Hall 214
One University Plaza
Youngstown, Ohio 44555

Sent via U.S. Mail and Electronic Mail (jptressel@ysu.edu)

Dear President Tressel:

The Foundation for Individual Rights in Education (FIRE) unites leaders in the fields of civil rights and civil liberties, scholars, journalists, and public intellectuals 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 by the threat to freedom of expression at Youngstown State University (YSU) presented by the censorship of flyers advertising "Straight Pride Weekend" from campus on the basis that they offended some campus community members, as well as YSU's public statement that it is contemplating disciplinary action against those responsible for the flyers. YSU's actions are deeply chilling, and are contrary to the university's legal and moral obligation to uphold its students' First Amendment rights.

The following is our understanding of the facts; please inform us if you believe we are in error.

On Tuesday, April 21, YSU students and faculty discovered flyers posted on campus advertising a "Straight Pride Week" to occur May 1-8. The flyers appear to have been satirical in nature, parodying other flyers advertising for an event in support of same-sex marriage, and read, in part:

Join us in celebrating straight pride week at YSU by not annoying the shit out of everyone about your sexual orientation!

It's easy to join too! Just come to YSU, then go about your day without telling everyone about how "different" you are.

Brought to you by the students that are sick of hearing about your LGBT pride. Nobody cares about what you think you are, or what you want to have sex with. We have nothing against your sexual orientation. We just don't give a fuck.

After receiving complaints about the flyers, YSU Student Government Association (SGA) President-Elect Ashley Orr contacted YSU Vice President for Student Affairs Jack Fahey to discuss the matter. According to Orr, the SGA and YSU administrators “felt—especially considering the English Festival is about to start—that the poster’s language was obscene and should be taken down.”¹

In statements made to the press, YSU Director of University Communications Ronald Cole described the flyers as “completely bogus” and explained that YSU enlisted students to aid in speedily removing the flyers from campus:

With the help of a bunch of students, we quickly went out to take them all down . . . Reaction has ranged from concern to outrage. While we recognize the right to free speech, this is counter to our mission of being a diverse and accepting campus.²

Cole further stated to the press that YSU is investigating whether the flyers violated the student code, and that disciplinary action may follow.³

Additionally, SGA Vice President Jacob Schriener-Briggs issued a statement on behalf of the SGA Executive Committee, which stated in part:

It has been brought to the attention of several SGA Executive Board members that “Straight Pride” posters have been hung across campus, seemingly in response to LGBTQIA efforts to promote diversity and foster a culture of acceptance on campus. Though SGA respects the free speech of all YSU students, these postings were not authorized, contained vulgar language, and, unfortunately, miss the point of minority activism.⁴

¹ Graig Graziosi, *Reaction to ‘Straight Pride Week’ Fliers Raises Constitutional Questions*, THE JAMBAR, Apr. 23, 2015, available at <http://www.thejambar.com/reaction-to-straight-pride-week-fliers-raises-constitutional-questions>.

² Nick Visser, *‘Straight Pride’ Posters Appear On Ohio’s Youngstown State University Campus*, THE HUFFINGTON POST, Apr. 23, 2015, available at http://www.huffingtonpost.com/2015/04/23/straight-pride-posters-youngstown-state-university_n_7120038.html.

³ Associated Press, *Youngstown State removes posters for ‘straight pride’ week*, THE COLUMBUS DISPATCH, Apr. 24, 2015, available at <http://www.dispatch.com/content/stories/local/2015/04/24/0424-youngstown-state-straight-pride.html>.

⁴ <https://www.facebook.com/ysusga/posts/10153771623993222>.

To be clear: The flyers at issue are indisputably protected by the First Amendment. YSU’s censorship of the flyers and threats of potential disciplinary action, admittedly based on offense taken to their message, are wholly incompatible with the free speech rights guaranteed to YSU students by the United States Constitution.

It is settled law that the First Amendment is fully binding on public colleges like YSU. *See 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 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).

The principle of freedom of speech does not exist to protect only tame or agreeable speech; indeed, it exists precisely to protect speech that some members of a community may find controversial or offensive. The Supreme Court stated in *Texas v. Johnson*, 491 U.S. 397, 414 (1989), that “[i]f 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.” Similarly, the Court wrote in *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670 (1973) that “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.’” *See also Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011) (“As a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate.”). That some members of the YSU community reacted to the flyers with “concern” and “outrage” is insufficient to strip them of their First Amendment protection.

Similarly, the university may not justify its actions based on the use of profanity on the flyers. The landmark Supreme Court decisions in *Cohen v. California*, 403 U.S. 15 (1971) and *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) protect shocking or deeply offensive material, farce, profanity, and exaggeration, and they confirm the essential role of parody and satire precisely because these forms of expression effectively challenge readers’ deepest assumptions and beliefs. Moreover, to the extent that YSU agreed with SGA’s assessment that the flyers were “obscene,” that assessment is inconsistent with the narrow definition of proscribable obscenity established by decades of Supreme Court jurisprudence. To constitute unprotected obscenity, expression must, among other things, “appeal to the prurient interest in sex” and “portray sexual conduct in a patently offensive way[.]” *Miller v. California*, 413 U.S. 15, 24 (1973). The flyers in this case clearly do neither. Again, no public institution—nor any institution that claims to take seriously the free speech rights of students—may censor or retaliate against students because others on campus felt offended by fully protected speech.

Nor may YSU justify its censorship with the subjective assessment that the flyers were “completely bogus.” Put simply, there is no exception to the First Amendment for “bogus” speech. Indeed, the very purpose of the First Amendment is to strip government of the power to enforce such determinations. *See United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 818 (2000) (“The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed. What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.”). *See also West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion[.]”). Censorship of the flyers on the basis that administrators disagreed with their message is *precisely* the type of action that the First Amendment prohibits.

With respect to YSU’s asserted desire to foster a “diverse and accepting campus,” it plainly may not do so by infringing on its students’ constitutionally guaranteed rights. In this respect, guidance from the Department of Education’s Office for Civil Rights (OCR), the federal agency responsible for implementing and enforcing federal anti-discrimination laws on our nation’s campuses, is instructive. In a July 28, 2003, “Dear Colleague” letter sent to the presidents of public and private universities nationwide, former OCR Assistant Secretary Gerald S. Reynolds made clear to colleges that “in addressing harassment allegations, OCR has recognized that the offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment under the statutes enforced by OCR.” Reynolds further cautioned:

Some colleges and universities have interpreted OCR’s prohibition of “harassment” as encompassing all offensive speech regarding sex, disability, race or other classifications. Harassment, however, to be prohibited by the statutes within OCR’s jurisdiction, must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive. Under OCR’s standard, the conduct must also be considered sufficiently serious to deny or limit a student’s ability to participate in or benefit from the educational program.

A 2010 “Dear Colleague” letter regarding bullying from former OCR Assistant Secretary Russlynn H. Ali explicitly reaffirmed the 2003 “Dear Colleague” letter’s understanding of the relationship between the First Amendment and harassment. And on April 29, 2014, current Assistant Secretary Catherine E. Lhamon issued guidance again clarifying that “the laws and regulations [OCR] enforces protect students from prohibited discrimination and do not restrict the exercise of any expressive activities or speech protected under the U.S. Constitution.” Lhamon explained that “when a school works to prevent and redress discrimination, it must respect the free-speech rights of students, faculty, and other speakers.”


These admonitions, along with decades of unambiguous Supreme Court precedent, make perfectly clear that a public university's desire to maintain a "welcoming" atmosphere cannot and does not override students' First Amendment rights.

Finally, because these flyers are entitled to full constitutional protection, FIRE is gravely concerned by reports that YSU is contemplating disciplinary action against any student found to be responsible for posting them. This threat is deeply chilling to campus discourse, sending a clear message to YSU students that they may face disciplinary investigation if the exercise of their First Amendment rights offends others. As a result, students will undoubtedly choose to censor themselves rather than risk punishment—an impermissible and unacceptable result, both legally and morally, at a public institution such as YSU.

Youngstown State University must immediately rectify its serious errors in this matter. FIRE urges you to reaffirm YSU's commitment to upholding the United States Constitution, to clarify to the campus community that the university will not censor expression simply because it offends some individuals, and to immediately and publicly withdraw the threat of disciplinary action against students engaged in this—and similar—constitutionally protected expression.

FIRE is committed to using all of the resources at our disposal to see this matter through to a just conclusion. We request a response to this letter by May 22, 2015.

Sincerely,



Ari Z. Cohn

Senior Program Officer, Legal and Public Advocacy

cc:

Jack Fahey, Vice President for Student Affairs

Ronald Cole, Director of University Communications

Jonelle Beatrice, Executive Director, Student Life

Youngstown State University Student Government Association Executive Committee