



September 18, 2015

President Scott L. Scarborough
University of Akron
Office of the President
Buchtel Hall 114
Akron, Ohio 44325

Sent via U.S. Mail and Electronic Mail (sscarborough@uakron.edu)

Dear President Scarborough:

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 free speech presented by the University of Akron's (UA's) censorship of a student group prohibited from handing out flyers and threatened with arrest for "trespassing" because the group did not first obtain a permit for "solicitation." This unconstitutional restriction of UA students' expressive rights cannot stand at a public university legally and morally bound by the First Amendment. UA must promptly rectify the errors of this case and make clear to students that their First Amendment rights will not be unduly burdened.

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

On August 30, UA law student Anthony Palumbo, accompanied by two non-students, stationed himself outside an entrance to UA's Student Union. Palumbo, who was attempting to distribute information and sign up members for a prospective chapter of the student organization Young Americans for Liberty, was stopped after roughly five minutes by a UA administrator. The administrator informed the group that it was not allowed to conduct its activity in that area at that time because it had not applied for and obtained a permit to engage in "solicitation." The UA administrator directed Palumbo to the office of Laura Miller-Francis, Senior Executive Administrative Assistant in UA's Office of Finance

& Administration, to complete the permit request. When Palumbo asked if he would be able to receive the permit and continue his activity that day, the administrator informed him that it would not be possible and that the request would take up to three days to receive approval.

The administrator additionally informed Palumbo that if group members continued to distribute materials without obtaining a permit for solicitation, they could be subject to arrest by campus police under UA's trespassing policy.

Palumbo met with Scott M. Campbell, Associate General Counsel and Records Compliance Officer, on September 9 to discuss the incident and receive clarification on the UA policies governing his activity in the campus' public spaces. In a follow-up email to Palumbo following their discussion, Campbell confirmed that students were required to obtain permission prior to distributing materials and other related activities on campus grounds. In his September 10 email to Palumbo, Campbell wrote in part:

You are free to pass out materials or have clip board signups for members etc., but if you are doing this on campus you need to complete the paperwork. If this was not clear I apologize. You are able to go to just about any open space on campus, but you just need to note the space that you want to use on the form when you fill it out. It [sic] you are going to be walking around campus getting signatures then you would just note that on the form. Please let me know if you have any questions.

For future activities, Campbell directed Palumbo to submit a designated "Request for Use of Buchtel, Coleman, and/or Corbin Common (and other reservable outdoor space)" form. The form's accompanying guidelines specify that "[r]egistered student organizations must request use of the **Commons** through the [Student Organization Resource Center] (330/972-2483) **no later than three (3) working days before the scheduled event.**" (Emphasis in original.)

By preventing students from distributing materials in the public outdoor spaces of its campus under threat of arrest, UA violates its students' First Amendment rights. Requiring students to obtain a permit prior to engaging in any on-campus expression is likewise an impermissible burden on student First Amendment rights. UA must address and rectify these problems immediately.

It has long been settled law that the First Amendment is binding on public universities such as UA. *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).

On a college campus, there is hardly a more fundamental exercise of First Amendment rights than the act of peacefully distributing literature to fellow students in public, open spaces. Students and student organizations must be able to engage in such expression without prior restraint. As the Supreme Court of the United States has declared, “It is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so.” *Watchtower Bible and Tract Society of NY, Inc. v. Village of Stratton*, 536 U.S. 150, 165–66 (2002). *See also Martin v. City of Struthers*, 319 U.S. 141, 146–47 (1939) (“Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations . . . it must be fully preserved.”).

While public universities such as UA may establish reasonable “time, place and manner” restrictions on expression, they must be viewpoint neutral and “narrowly tailored” to “serve a significant governmental interest,” and they must “leave open ample alternative channels for communication.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

UA’s policy fails to meet these requirements. It is unreasonable to require students or student organizations to wait three days for the university to grant permission for expression so simple and non-disruptive as distributing flyers or signing up members to a prospective student organization, as Palumbo sought to do. A generalized concern for order at UA is neither specific enough nor significant enough to justify such a broad restriction of student speech. Indeed, a permit requirement for a small group of leafleters and petitioners in a public space is not “narrowly tailored” to serve any interest in order, safety, or campus access. Further, this requirement denies students’ ability to use the public outdoor areas of the entire UA campus to communicate their messages, failing to provide the “ample alternative channels” required for a reasonable time, place, and manner restriction to pass constitutional muster.

In enjoining the University of Cincinnati from enforcing a similar prior notification policy for “solicitation,” the United States District Court for the Southern District of Ohio noted:

Mere speculation that speech would disrupt campus activities is insufficient because “undifferentiated fear or apprehension of a disturbance is not enough to overcome the right to freedom of expression on a college campus.” *Healy*, 408 U.S. at 191.

The University asserts that it maintains the notice requirements to enable it to do what is necessary for activities to take place under peaceful and safe conditions. (Doc. 42 at 25). Indeed there may be some speech, such as particularly large protests or rallies, that requires the University to take

security or logistical steps to ensure the safety and order of campus. But here the University does not restrict its regulation to large demonstrations, or those using sound amplification, or any number of potentially justifiable criteria. Rather, the University paints with a broad brush to encompass all speech that may be classified as a “demonstration, picket, or rally” and has failed to narrowly tailor its policy. Such a restriction simply cannot be justified on the basis the University asserts.

Univ. of Cincinnati Chapter of Young Americans for Liberty v. Williams, 2012 U.S. Dist. LEXIS 80967 at 21–22 (S.D. Ohio, June 12, 2012).

Universities may, in some instances, have a legitimate interest in placing narrow constraints and prior notice and approval requirements on some forms of campus expression, such as sizeable demonstrations involving large displays, temporary structures, or the use of amplified sound. But they may not, under similar rationales, require that individual students or student organizations obtain a permit for such basic acts of expression as that in which Palumbo attempted to engage. There is simply no reasonable justification for a complete ban on spontaneous, non-disruptive expression. *See Williams*, 2012 U.S. Dist. LEXIS 80967 at 20–21 (noting the constitutional concerns raised by policies that “essentially ban spontaneous speech”).

In addition to the unconstitutional practices evidenced in this case, FIRE also notes that the accompanying guidelines to the Commons request form conflict with other UA policy, to the potential confusion of both students and university officials. The Commons request form, firstly, makes provisions only for “[r]egistered student organizations” as well as “[a]cademic and administrative departments,” and none for individual students or groups of students that do not have recognized status. UA policy 3359-44-01 (“The establishment of assembly procedures”), on the other hand, refers to “[t]he sponsoring group or person,” a broader term that appropriately reflects the rights of individual students, loosely-organized student collectives, and registered student organizations alike to express themselves freely at UA.

Additionally, while the Commons request form requires organizations to submit their requests “no later than three (3) working days in advance,” the assembly policy (which directs students to register with the Student Organization Resource Center) states, “Registration must be made at least forty-eight hours prior to the event, except that the president of the university or the president’s authorized designee may waive the forty-eight-hour requirement when unusual conditions exist.” While the assembly policy contains its own restrictions on student expression, its notice requirement is shorter and it at least contemplates that some expressive activity will not be subject to the prior notice requirement.

Still, the assembly policy raises concerns for potential unconstitutional application against student expression. The policy defines an “assembly” as “any mass meeting, parade, demonstration, assembly, rally **or other form of expression consistent with the civil**

liberties expressed in the first amendment of the United States Constitution”

(emphasis added). This could be read so broadly as to encompass nearly any form of expression protected by the First Amendment. If this is not the assembly policy’s intent, then it fails to make clear what activities (such as an individual or small group distributing leaflets or gathering petition signatures) should be exempt from any and all permitting requirements, and which activities (such as large rallies or concerts) may in certain circumstances be subject to such requirements. This gives UA officials impermissibly broad discretion over how activities are to be categorized, and which are subject to permitting requirements.

Elsewhere, the assembly policy likewise gives UA officials (“the president of the university or the president’s authorized designee”) unfettered discretion to determine when the 48-hour notice requirement may be waived and what should constitute the “unusual conditions” that would result in a waiver. This too is impermissible. As the Supreme Court has stated, “a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.” *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150–51 (1969) (emphasis added). While a mechanism for waiving the requirement of advance notice is preferable to none, UA’s assembly policy nonetheless makes it too easy to unconstitutionally restrict students’ First Amendment rights.

The overall lack of clarity regarding what speakers and what types of speech are subject to this policy, as well as the apparent conflicts between various promulgated policies, render UA’s notice and permit scheme unconstitutionally vague. A policy or regulation is said to be unconstitutionally vague when it does not “give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.” *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972). Again, the constitutional deficiencies in these policies are directly analogous to those struck down by the Southern District of Ohio in *Williams*:

Because the original policy fails to provide criteria regarding what constitutes a “demonstration, rally, or picket” or an event “requiring security,” imposes seemingly contradictory notice requirements, and presents university officials with the opportunity for arbitrary or discriminatory enforcement, the Court would be compelled to find the policy unconstitutionally vague on its face.

Williams, 2012 U.S. Dist. LEXIS 80967 at 28.

The Commons request form and guidelines also impermissibly apply their permitting requirement to all expressive activity. In addition to making no provisions at all for the waiver of waiting periods for expressive activity, all events that the guidelines term “appropriate special events”—a term left undefined—are by default subject to a three-day permitting requirement. As with the assembly policy, it makes no differentiation between small and large events, except to subject “[s]ponsoring organizations expecting large (75+)

crowds” to the potential additional requirements of meeting with the University Police or Department of Environmental & Occupational Health and Safety.

All UA policies governing the use of outdoor space by students and student organizations must make clear that except in narrow circumstances involving large events, expressive activity by individuals or small groups will not be subject to any permitting requirements, in keeping with UA’s First Amendment obligations.¹ Further, UA must make clear in all policies and forms that any waiting periods for permitting requirements will be waived to allow for spontaneous expression in those circumstances where it is reasonable. Finally, UA policies should clearly state that the rights outlined in its policies extend to all UA students, including individual students and unregistered student groups.

FIRE is happy to work with UA in making any modifications to its policies to better protect its students’ First Amendment rights. In addition to making such modifications, we ask that UA communicate to Anthony Palumbo that his gathering of signatures and distribution of flyers will not be unconstitutionally burdened with permitting requirements, and make clear such activity will not be censored or interfered with in the future.

We request a response to this letter by October 2, 2015.

Sincerely,



Peter Bonilla

Director, Individual Rights Defense Program



Ari Z. Cohn

Senior Program Officer, Legal and Public Advocacy

cc:

Scott M. Campbell, Associate General Counsel and Records Compliance Officer

Anne F. Bruno, Executive Director, Student Union

Laura Miller-Francis, Senior Executive Administrative Assistant, Office of Finance & Administration

¹ For an example of an assembly policy fulfilling these objectives, see Mississippi State University’s “Free Speech and Assembly Policy.” Available at https://www.thefire.org/fire_speech-codes/ms-state-free-speech-15-16/.