



April 7, 2017

President John Bardo  
Wichita State University  
Office of the President  
1845 Fairmount Street  
Box 1  
Wichita, Kansas 67260-0001

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

Dear President Bardo:

As you know, the Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses.

FIRE is in receipt of Assistant General Counsel Molly Gordon's response to our November 16, 2016, letter. That letter did not adequately respond to our serious concerns. Gordon's November 28, 2016, letter failed to acknowledge that Wichita State University's (WSU's) policies do not meet the legal standard for constitutionally permissible time, place, and manner restrictions. FIRE remains concerned that WSU maintains policies that unconstitutionally restrict its students First Amendment rights. For your reference, a copy of FIRE's previous correspondence is enclosed with this letter. In light of recent lawsuits against institutions maintaining similarly unconstitutional restrictions and increasing attention from federal and state lawmakers to these First Amendment violations, we urge you to substantively address our concerns.<sup>1</sup> We look forward to your response.

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<sup>1</sup> See, e.g., Tyler Coward, *Students Arrested for Handing Out Constitutions File First Amendment Lawsuit Against College*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (FIRE) (Jan. 20, 2017), <https://www.thefire.org/students-arrested-for-handing-out-constitutions-file-first-amendment-lawsuit-against-college/>; Ty Hicks, *Campus free speech quashed*, DETROIT NEWS, Jan. 22, 2017, <http://www.detroitnews.com/story/opinion/2017/01/22/hicks-campus/96928572/>; *Don't squeeze free speech on college campuses*, LA TIMES (April 5, 2017), <http://www.latimes.com/opinion/editorials/la-ed-college-freespeech-20170405-story.html>; Perry Chiamonte, *LA college sued by student for allegedly curbing his free speech rights*, FOX NEWS (Mar. 29, 2017), <http://www.foxnews.com/us/2017/03/29/la-college-sued-by-student-for-allegedly-curbing-his-free-speech-rights.html>; *Victory: Animal Rights Activist Restores Free Speech Rights of Cal Poly Pomona Students with Lawsuit Settlement*, FIRE (July 23, 2015), <https://www.thefire.org/victory-animal-rights-activist-restores-free-speech-rights-of-cal-poly-pomona-students-with-lawsuit-settlement/>; Carla Rivera, *Cal Poly Pomona reaches settlement with student over free*

Unfortunately, FIRE has learned of an additional threat to freedom of expression at WSU posed by the Student Government Association's (SGA's) denial of recognition to a prospective chapter of Young Americans for Liberty (YAL). The SGA is refusing to recognize YAL due to SGA members' disagreement with the political views and expression of the prospective organization, the national YAL organization, and YAL chapters at other institutions. This viewpoint-based refusal violates the First Amendment. Because WSU has delegated its authority to officially recognize student organizations to the SGA, it is obligated to ensure that the SGA does not infringe on students' First Amendment rights. FIRE urges you to swiftly reverse the SGA's unconstitutional decision.

## I. FACTS

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

On March 4, 2017, WSU student Maria Church submitted an application to form a recognized YAL chapter at WSU, following the guidelines and process mandated by the university's chartering process for recognized student organizations (RSOs).<sup>2</sup> The final step in the chartering process requires approval by a vote of the SGA Senate.<sup>3</sup>

The SGA Senate scheduled consideration of Church's application for its meeting on April 5, 2017. Before the meeting, SGA Senator Walter Wright—who is also a member of YAL—requested that Church attend the meeting in her capacity as president of YAL to answer questions regarding the prospective organization. Upon her arrival, Wright informed Church that he believed the SGA's questions arose from a perception that the purpose statement contained in YAL's constitution was “militant.”

YAL's purpose statement reads:

It shall be the purpose of the Young Americans for Liberty to train, educate, and mobilize youth activists committed to “winning on principle.” Our goal is

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*speech rights*, LA TIMES (July 23, 2015), <http://www.latimes.com/local/lanow/la-me-ln-pomona-speech-20150723-story.html>; *Colorado passes bipartisan bill to strike down speech restrictions on campus*, FIRE (April 5, 2017), <https://www.thefire.org/colorado-passes-bipartisan-bill-to-strike-down-speech-restrictions-on-campus/>; Monte Whaley, *Free speech zones abolished on Colorado public college campuses*, DENVER POST (April 4, 2017), <http://www.denverpost.com/2017/04/04/free-speech-zones-abolished-on-colorado-campuses/>; Greg Lukianoff, *My Testimony Before The House Judiciary Committee On Free Speech On Campus*, HUFFINGTON POST (April 4, 2017), <http://www.huffingtonpost.com/entry/58e3a966e4b02ef7e0e6e0ba>; Tim Ryan, *Advocates Seek Protection of Campus Speech*, COURTHOUSE NEWS SERVICE (April 4, 2017), <https://www.courthousenews.com/advocates-push-greater-protections-campus-free-speech/>.

<sup>2</sup> WICHITA STATE UNIVERSITY, *RSO Chartering Process*, available at [http://webs.wichita.edu/?u=involvement&p=/student\\_organizations/rsoregistration](http://webs.wichita.edu/?u=involvement&p=/student_organizations/rsoregistration) (last visited Apr. 6, 2017).

<sup>3</sup> *Id.*

to cast the leaders of tomorrow and reclaim the policies, candidates, and direction of our government.

During the meeting, members of the SGA Senate questioned Church about the prospective organization's political positions, the issues on which it would focus, its affiliations with YAL chapters on other campuses, and the group's views on the First Amendment.<sup>4</sup>

One senator asked Church to describe YAL's position on "safe spaces." Church responded: "Do we need a stance on safe spaces? We believe in free speech, if that is what you are asking."

Several senators also questioned Church about what speech YAL believes is censored on campus, and about YAL's opposition to "free speech zones." Finally, two senators asked Church to explain YAL's position on "hate speech":

**SGA Senator:** For the group, is there the belief that free speech is completely unregulated, or is there any threshold where it has gone too far?

**Church:** Anything that is covered by the First Amendment, so anything that is not, like, libel or true threats . . . should be protected on college campuses.

**SGA Senator:** Does your group have a specific stance concerning the limits of hate speech, beyond the exact verbiage of the First Amendment, what does your group say about that? I say this not to cast aspersions, I just want to know where you guys stand on that.

**Church:** While hate speech is deplorable and certainly unkind, it's typically still protected by the First Amendment, so we believe that the best way to fight hate speech is with speech.

After questioning Church, the SGA Senate turned to other matters. Approximately one hour into the meeting, after Church left, the SGA again turned its attention to YAL's application, and debated the issue of granting recognition.

Over the course of the debate, several senators advocated strenuously against recognizing YAL, alleging that YAL chapters at other schools have engaged in "hate speech" by inviting speakers such as former *Breitbart* editor Milo Yiannopoulos; that the national YAL organization has not condemned this alleged "hate speech"; and that YAL's presence on campus would be "dangerous" to other students.

One SGA Senator began the debate by urging the Senate to vote against recognizing YAL:

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<sup>4</sup> All quotes from the SGA Senate meeting have been transcribed from the official recording of the meeting posted by the SGA at <https://www.facebook.com/WichitaStateSGA/videos/1406978819323464>.

**SGA Senator:** This organization . . . is a national organization and then they have chapters at different schools. At different schools we've seen them host things in the name of "free speech," such as the "Dangerous Faggot Tour," all kinds of things that are anti-LGBTQ, anti- really any religions that maybe aren't necessarily western. We've seen very dangerous statements being said in the name of "free speech," and although I'm someone who absolutely believes in free speech and activism and being able to speak up, what we have seen from this organization is dangerous. . . .

I know the argument is that this has happened at other schools, like you can't necessarily hold us accountable for their organization. There hasn't been any sort of condemnation from the national organization against these things that are happening, that are hate speech. It passes the line. So I will not be able to support this on WSU's campus and I really urge everyone to evaluate what it is that we're allowing, and the culture that we're providing to our students.

When another senator questioned whether the SGA could give these particular students a chance, the first senator responded:

My issue is that the national organization that they are chartered out of has not spoke out against these things. They protect it under free speech, and I think we're all pretty aware there's a fine line.

I mean, even when [Church] came up and spoke today, when questioned about where that line is, where free speech stops and hate speech begins, they still defended that hate speech is included in free speech, and that's past just a constitutional right, and especially as a member of Diversity Task Force, I have to stand up and speak against allowing something like that on campus.

When two senators spoke in favor of recognizing YAL, albeit couched in language suggesting that they merely wanted to give the chapter a "chance to prove that they are above" the conduct of other YAL chapters, several senators suggested that the YAL members instead form a different organization. Some senators additionally suggested that if YAL were approved, it should be placed on probationary status and not re-approved for the following year if there is "backlash" to their activities.

Expressing his opposition to recognizing YAL, another senator stated:

I don't have anything against Libertarians. . . . But in terms of this actual organization at the national level, I don't think that what's been happening has been OK. A tour that was brought up by a previous senator, specifically on 26 different colleges, using this group, that specifically was against "bad

ideas,” like progressive justice, feminism, Black Lives Matter, calling those things toxic and saying members of the LGBTQA community continuously lie about hate crimes.

If you want to talk about having free speech, their definition of free speech seems highly skewed, based on the empirics of this. It says that free speech shouldn't include things like having these toxic expressions of things like Black Lives Matter and feminism, however it does include whenever you're going to be attacking religious organizations that aren't western, when you're going to be attacking people who aren't cisgendered, when you're going to be attacking people who don't have heteronormative gender identities, and that simply isn't OK.

I think that if you want to have a libertarian organization on campus, there are other ways to do that. However, this is not the national organization to go towards, and honestly with all that once you have them getting into universities that can clearly have backlash because of these speakers . . . 26 universities here all had backlash, none of this was accepted once. There are better ways to do this. We can have a libertarian organization on campus that isn't linked to this national organization. And with that, I honestly cannot approve this organization in my right mind.

Several other senators expressed similar feelings:

**SGA Senator:** I'm voting no. It has nothing to do with opinions. I'm tired of using politics to excuse hateful behavior. For example, I don't think name-calling is a good idea, I don't think making of fun of people who want a safe space is a good idea. I think that it's wrong, it creates a toxicity in campus culture. And I have nothing against libertarians, I used to be a libertarian. So I understand. They could be a libertarian group, that is fine with me. I have nothing against a political position. But I am against hate groups. And I am against people who make fun of other people who have PTSD, that need triggers, that need safe spaces.

[...]

**SGA Senator:** I personally don't think we should allow this group to be on campus because it is our responsibility to put the students first. So why put a potential threat to their mental health, to their feeling of safety on this campus. Even though we say that we should give them a chance, why not give them a chance with another Students for Liberty kind of group. I also want to protect these students who want to start this group, because, you know, what if they start getting into legal issues with, like, possible hate speech, crimes. I would rather protect them, too, from their own actions.

Following the debate, the SGA Senate voted against recognizing YAL.

## **II. ANALYSIS**

The SGA’s denial of recognition to YAL based on its views and its association with the national YAL organization violates decades of First Amendment jurisprudence.

### **A. The First Amendment**

It has long been settled law that the First Amendment is binding on public institutions of higher education such as Wichita State University. *See 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); *see also DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008) (on public campuses, “free speech is of critical importance because it is the lifeblood of academic freedom”).

The principle of freedom of speech does not exist to protect only non-controversial speech; it exists *precisely* to protect speech that some members of a community may find controversial, offensive, or disrespectful. The Supreme Court has explicitly held, in rulings spanning decades, that speech cannot be restricted simply because it offends some, or even many, listeners. *See, e.g., Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (“[F]ree speech . . . may indeed best serve its high purpose when it induces a condition of unrest . . . or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.”); *see also Papish v. Board of Curators of the Univ. of Mo.*, 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.’”).

### **B. The SGA’s Denial of Recognition to YAL is Unconstitutional Viewpoint Discrimination**

The Supreme Court has made clear that the disparate treatment of a student organization based on its political, religious, or other expression is unconstitutional viewpoint discrimination. *See Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 829–31 (1995) (holding that denial of financial support for a student religious group violated the First Amendment and observing that “[d]iscrimination against speech because of its message is presumed to be unconstitutional. . . . It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint.”). Rather, a university must grant political, religious, and other expressive organizations equal access—on a viewpoint-neutral basis—

to student fee funding available to other student organizations. *See Board of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 233 (2000) (“When a university requires its students to pay fees to support the extracurricular speech of other students, all in the interest of open discussion, it may not prefer some viewpoints to others.”); *Rosenberger*, 515 U.S. at 836 (“For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation’s intellectual life, its college and university campuses.”).

The recording of the SGA Senate’s meeting makes abundantly clear that the SGA Senate refused to grant RSO status to YAL based on disagreements with the group’s perceived views. In fact, the meeting recording reveals that the *only* topic discussed with respect to YAL’s recognition was the prospective group’s views, real or perceived. Several senators announced that they would vote against granting YAL recognition because they perceived that it was engaged in, would engage in, or somehow condoned “hate speech,” despite the fact the vast majority of such speech is protected by the First Amendment. *See R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (holding unconstitutional an ordinance prohibiting certain expression that “arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender”). The senators made this determination even though Church characterized “hate speech” as “deplorable” and explained that YAL simply believed that such speech must be answered with more speech, not censorship. Other senators cited the “toxicity” they feared that YAL would bring to campus because of its beliefs and expressive activity, and the negative reactions that other students might have to the group’s expression.

This is precisely the type of viewpoint discrimination that the First Amendment forbids. In *Healy v. James*, Central Connecticut State College (CCSC) denied recognition to a proposed chapter of Students for a Democratic Society (SDS) based, in part, on the college president’s view that the group’s “philosophies . . . were counter to the official policy of the college.” 408 U.S. at 187 (internal quotation marks omitted). Holding that the college’s denial of recognition to the student organization violated the First Amendment, the Court stated:

*The mere disagreement of the President with the group’s philosophy affords no reason to deny it recognition. As repugnant as these views may have been, especially to one with President James’ responsibility, the mere expression of them would not justify the denial of First Amendment rights. . . . The College, acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent.*

*Id.* at 187–88 (emphasis added).

To be clear: YAL’s views on hate speech, trigger warnings, safe spaces, or any other topic cannot justify restricting the group’s access to the forum created by WSU for students to associate and express themselves.<sup>5</sup>

### **C. The SGA May Not Deny Recognition to YAL Based on its Affiliations**

Nor may the SGA deny recognition to YAL based on its affiliation with the national YAL organization or chapters at other institutions. Several SGA senators expressed opposition to recognizing YAL because chapters at other institutions have invited controversial speaker Milo Yiannopoulos to campus, and because the national YAL organization has not condemned those events.

That other YAL chapters invited a speaker with whom some SGA senators may disagree is an improper basis on which to deny YAL recognition. The right of those chapters to invite speakers of their choosing to campus is equally protected by the First Amendment, and the SGA may not deny WSU students their expressive rights on the grounds that other students elsewhere have lawfully exercised their own.

Moreover, the SGA may not deny recognition to YAL due to the actions of other chapters even if the other chapters had engaged in some sort of misconduct. The Supreme Court’s decision in *Healy* is clear on this point. In *Healy*, the college president denied recognition to the campus chapter of SDS based in part on his apprehension regarding the chapter’s affiliation with the national organization. Dismissing the president’s justification for denying SDS recognition, the Supreme Court wrote:

[I]t has been established that “guilt by association alone, without [establishing] that an individual’s association poses the threat feared . . .” is an impermissible basis upon which to deny First Amendment rights.

[. . .]

Students for a Democratic Society, as conceded by the College and the lower courts, is loosely organized, having various factions and promoting a number of diverse social and political views, only some of which call for unlawful

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<sup>5</sup> Indeed, the SGA’s own rules setting forth the process for recognizing student organizations require only that a proposed organization present organizational documents, contact information, a list of those members who consent to having their names released, and other administrative information. WICHITA STATE UNIV. STUDENT GOV’T ASS’N, Association Journal Vol. 1, S002, Sec. 2 (“Requirements for Recognition”), *available at* <http://webs.wichita.edu/depttools/depttoolsmemberfiles/sga/59th%20Session/Legislative%20Journal/59th%20Association%20Journal%20Working%20Document%202-1-17.pdf>. There is no dispute that YAL met these requirements. The provisions do not provide the SGA with authority to weigh the views of the organization or its members. The SGA’s own Student Bill of Rights militates *against* any authority to conduct a review of a proposed organization’s viewpoints, recognizing that students are “free to organize and join associations to promote their common interests,” and that affiliation with outside organizations is insufficient to disqualify an organization from recognition. Student Bill of Rights, Art. III, Sec. 1.



action. Not only did petitioners proclaim their complete independence from this organization, but they also indicated that they shared only some of the beliefs its leaders have expressed. On this record it is clear that the relationship was not an adequate ground for the denial of recognition.

408 U.S. at 186–87 (internal citation omitted). Having noted that guilt by association is an illegitimate ground upon which to restrict students’ right to expressive association, the *Healy* Court rejected CCSC’s argument that it could deny recognition to SDS based on speculative fears that it would be disruptive on campus:

The record, however, offers no substantial basis for that conclusion. The only support for the view expressed by the President, other than the reputed affiliation with National SDS, is to be found in the ambivalent responses offered by the group’s representatives at the Student Affairs Committee hearing, during which they stated that they did not know whether they might respond to “issues of violence” in the same manner that other SDS chapters had on other campuses.

[ . . . ]

[T]here was no substantial evidence that *these particular individuals acting together* would constitute a disruptive force on campus. Therefore, insofar as nonrecognition flowed from such fears, it constituted little more than the sort of “undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression.”

*Id.* at 190–91 (emphasis added) (internal citation omitted).

The denial of recognition to YAL based on its affiliation with the national organization or other chapters is fundamentally at odds with the Supreme Court’s decision in *Healy*. There has been no credible evidence that the prospective YAL chapter at WSU would commit any misconduct. Indeed, every concern raised during the meeting referenced expressive conduct protected by the First Amendment. It is not the place of the SGA to tell any student organization whom to associate with and what form their organization should take.


### III. CONCLUSION

Wichita State University cannot delegate to its student government the authority to grant or deny recognition to student organizations and then stand idly by when that authority is exercised in a viewpoint-discriminatory fashion. The university’s duty to preserve the First Amendment rights of its students is non-delegable. If the SGA is unwilling to comply with its constitutional obligations as an agent of WSU, the university is obligated to intervene. The SGA’s denial of recognition to the prospective Young Americans for Liberty chapter

must be reversed, and the university must instruct the SGA to consider all applications for recognition in a viewpoint-neutral manner.

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 no later than April 21, 2017.

Sincerely,

A handwritten signature in blue ink, reading "Ari Z. Cohn", with a long horizontal flourish extending to the right.

Ari Z. Cohn  
Director, Individual Rights Defense Program

cc:  
Nancy Loosle, Director of Student Involvement  
David H. Moses, General Counsel  
Molly Gordon, Assistant General Counsel