



April 18, 2018

President Harvey G. Stenger  
Binghamton University  
State University of New York  
4400 Vestal Parkway East  
Binghamton, NY 13902

*Sent via U.S. Mail and Electronic Mail (hstenger@binghamton.edu)*

Dear President Stenger:

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 concerned about the state of freedom of expression at Binghamton University, State University of New York (SUNY Binghamton) due to an investigation by the New York State University Police Department (UPD) into flyers posted by students and an officer's threat to hold students accountable for flyers littered by third parties. SUNY Binghamton must end this investigation immediately and ensure that its police officers receive proper training on students' right to distribute expressive materials on campus.

## **I. FACTS**

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

On the morning of March 28, 2018, Dominic Davy and a small group of other students posted approximately 200 flyers in the Binghamton University Downtown Center. The flyers criticized the university's response to recent incidents of perceived racist expression on campus, including a professor's email and an article published in the *Binghamton Review*, a campus conservative publication.<sup>1</sup> After about an hour, a UPD officer stopped Davy and questioned him about the flyers and the other students involved in posting them.

The officer warned Davy that his posting of flyers violated both university policy and state law. In a comment to student newspaper *Pipe Dream*, UPD Investigator Patrick Reilly reaffirmed

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<sup>1</sup> Copies of the flyers are enclosed with this letter.

UPD's belief that Davy and the students assisting him violated both state law and SUNY Binghamton policy:<sup>2</sup>

“University rules say that you cannot post in certain places, so they were in violation of University rules of posting,” Reilly said. “There’s certain places you can post stuff, but when you post over 200 flyers to get your word across and they are all over the bathrooms and in the hallways, then you violate laws for unlawful posting. One individual was talked to, and it was explained that whatever he was trying to put out, whatever his message is, that’s not our concern. What we care about is that they are posting all over the place, and that’s a violation of the law and of the student handbook.”

UPD also confirmed to *Pipe Dream* that, while no arrests have been made, an investigation into the flyers is ongoing.

After being warned by UPD that they could not continue posting flyers indoors, the students began handing out flyers directly to other students outside the Downtown Center. Shortly after they began, the same UPD officer again stopped the students. He explained that “people came to [him] and were offended by” their flyers and that, while he “respect[s]” their point of view, when “it alarms other people then [he has] to interject and [he has] to do something about it.”

Multiple times throughout their conversation, the officer stated that the students could distribute flyers outdoors, and reminded them that they could not post flyers on the walls inside the Downtown Center.

The officer warned the students, however, that they would be asked to stop distributing flyers if others discarded them in an inappropriate way. The officer informed them: “if you’re handing them out and people go in [the Downtown Center] and [start] throwing them on the ground” then he will tell them to stop “because it’s gonna come back to you.” The students explained that they were asking recipients of the flyers not to litter them. One student asked the officer why they would be held accountable for third parties’ act of littering. The officer replied, “it’s because its being generated by you guys . . . they would not be doing that if you guys didn’t generate the papers.” This exchange was recorded by Davy.<sup>3</sup>

According to Davy, the students were interrupted by campus police twice that day while distributing flyers outdoors, and once the next day.

## II. ANALYSIS

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<sup>2</sup> Sasha Hupka, *Student could be arrested after hanging posters criticizing BU administration, police say*, PIPE DREAM (Mar. 28, 2018), <https://www.bupipedream.com/news/93559/student-could-be-arrested-after-hanging-posters-in-udc-police-say>.

<sup>3</sup> A copy of this video has been sent by email for your reference.

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

Additionally, the Supreme Court has repeatedly held that speech may not be punished merely because it may offend others. *See 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.”); *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.’”); *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.”); *see also Village of Skokie v. National Socialist Party of America*, 373 N.E.2d 21 (Ill. 1978) (holding that public “use of the swastika is a symbolic form of free speech entitled to first amendment protections”).

**i. SUNY Binghamton should not investigate students for violating New York State Penal Law 145.30**

In stating that the flyers placed inside the Downtown Center constituted “a violation of the law and of the student handbook,” UPD was presumably referring to SUNY Binghamton’s “General Advertising Policies.” Those policies assert that “[i]ndividual students will be subject to campus disciplinary action and/or arrest,” citing “New York State Penal Law 145.30, Unlawfully Posting Advertisements.”<sup>4</sup> Section 145.30 of the Penal Law establishes that one may commit the crime of unlawfully posting advertisements if one has “no reasonable ground to believe” that her or she has the right to post the advertisements:

A person is guilty of unlawfully posting advertisements when, having no right to do so nor any reasonable ground to believe that he has such right, he posts, paints or otherwise affixes to the property of another person any advertisement, poster, notice or other matter designed to benefit a person other than the owner of the property. . . .

Section 145.30 of the Penal Law is inapplicable to the activities of Davy and the other

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<sup>4</sup> *Advertising On Campus*, BINGHAMTON UNIVERSITY, STATE UNIVERSITY OF NEW YORK, (Oct. 10, 2016), <https://www.binghamton.edu/student-handbook/other-university-policies/advertising-on-campus.html>.

students involved. The posting and distribution of flyers is a central and time-honored tradition of campus life. Accordingly, the students had—before they were intercepted by the UPD officer—a “reasonable ground to believe that [they have the] right” to post flyers within the Downtown Center. Students, upon seeing flyers posted within a building, have reasonable grounds to believe that they too are free to post flyers. Once the UPD officer informed the students that they could not post flyers inside the Downtown Center, they immediately complied.

Once the students ceased posting flyers indoors, the officer’s legitimate purpose in intercepting the students terminated. In the absence of reports that students were committing an unlawful act, the officer had no continuing law enforcement purpose in stopping the students. Instead, the UPD officer alleged that he had received complaints of *lawful* expression, utilizing those alleged complaints as a basis to again stop the students.

**ii. Students’ expressive activity cannot be limited because others might litter**

In the March 28 video filmed by Davy, the UPD officer warned students distributing flyers outdoors that he would prevent them from distributing flyers if others threw them on the ground. Although they were not required to do so, the students reassured the officer that they were asking those accepting flyers to recycle them, and reminded the officer that they could not be held responsible for the independent actions of others. Nevertheless, the officer persisted in asserting that the students could be held responsible for others’ litter, remarking, “it’s because its being generated by you guys . . . they would not be doing that if you guys didn’t generate the papers.”

The free distribution of noncommercial handbills is a quintessentially American tradition:

The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion. What we have had recent occasion to say with respect to the vital importance of protecting this essential liberty from every sort of infringement need not be repeated.

*Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (internal citations omitted).

An interest in reducing litter is not a sufficient basis to restrict the distribution of flyers. To the contrary, the Supreme Court has repeatedly “explained that cities could adequately protect the aesthetic interest in avoiding litter without abridging protected expression merely by penalizing those who actually litter.” *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808–09 (1984). The United States Court of Appeals for the Second Circuit, the decisions of which are binding on SUNY Binghamton, has recognized this longstanding precedent. *See Vincenty v. Bloomberg*, 476 F.3d 74, 84–85 (2d Cir. 2007)

(citing with approval *Taxpayers for Vincent* in upholding a district court ruling enjoining the City of New York from enforcing an ordinance prohibiting the possession of aerosol spray paint containers in public places against individuals between the ages of 18 and 21).

Several other appellate courts have likewise ruled that literature distribution may not be banned based on a desire to prevent litter. The Ninth Circuit has held that “[t]he right to distribute literature may not be withdrawn even if it creates the minor nuisance for a community of cleaning litter from its streets.” *Klein v. City of San Clemente*, 584 F.3d 1196, 1199 (9th Cir. 2009). In 2008, the Seventh Circuit upheld a district court ruling that a municipal ordinance regulating handbilling violated the First Amendment in part because the city could combat litter by other methods:

[T]he City has not explained to us how the prevention of litter, intrusion, trespass, or harassment is achieved less effectively without the Ordinance, and has thus waived the argument. And even if the City had raised the point, it still would not have prevailed. As we alluded to earlier, the City already proscribes in some form litter, intrusion, trespass, or harassment . . . leading us to believe that the City can currently combat those problems very effectively without resorting to a broad prohibition on handbilling.

*Horina v. City of Granite City, Ill.*, 538 F.3d 624, 634–635 (7th Cir. 2008) (internal citations omitted). The Eighth Circuit has similarly held that an ordinance prohibiting the placement of handbills on car windshields could not withstand First Amendment scrutiny:

Even if we were to assume that a logical connection exists between plaintiffs’ handbilling activities and the actual or potential presence of litter on defendants’ streets, that correlation does not necessarily mean the ordinances are narrowly tailored to serve the purpose of preventing litter. Although a governmental restriction does not have to be the least restrictive or least intrusive means of regulation, it may not, under well-established constitutional standards, curtail substantially more speech than is necessary to accomplish its purpose, which is precisely what the ordinances do.

*Krantz v. City of Fort Smith*, 160 F.3d 1214, 1222 (8th Cir. 1998).

In short, SUNY Binghamton’s interest in preventing litter is an insufficient basis to restrict or burden the distribution of flyers.

Moreover, it is a fundamental principle of law that one may be held legally responsible only for his own acts, or for his failure to act, where the law has imposed a duty on him to act. We are not aware of any law or regulation imposing on students, or any member of the public, the duty to prevent another person from littering. We doubt we could find such a law littered among New York’s statutes.

**iii. It is inappropriate for officers to surveil students for engaging in expressive activity protected by the First Amendment**

Davy also reports that, in addition to being warned that he and the group of students would be held responsible for littered flyers, UPD officers followed him and other students as they distributed flyers on March 28 and March 29, and that UPD officers approached them at least three times. In the first interaction, which the students filmed, a UPD officer alleged that “people came to [him] and were offended by” their flyers and that when “it alarms other people then [he has] to interject and [he has] to do something about it.”

While the possibility that third parties will litter is an insufficient basis to stop the students, a stop motivated by others’ offense at the content of the flyers is equally indefensible. That some campus community members may have been offended by the flyers Davy and other students handed out is not a justification for their policing. Such speech remains protected by the First Amendment. As the Supreme Court noted in overturning the conviction of a man who wore a jacket emblazoned with the words “Fuck the Draft” in a courthouse hallway, “one man’s vulgarity is another’s lyric.” *Cohen v. California*, 403 U.S. 15, 25 (1971). If viewers find the students’ flyers upsetting or offensive, they are free to look away and refuse to accept them, just as the occupants of the Los Angeles Superior Court were free to avert their eyes from Paul Robert Cohen’s jacket and its colorful language. This, rather than surveillance, is the appropriate result.


By interrupting and following students engaging in the distribution of flyers, UPD officers risk chilling the speech of those students *and* their peers. By surveilling students attempting to engage in the marketplace of ideas—which college campuses are uniquely suited to facilitate—UPD sent the intimidating signal that students were engaging in prohibited conduct rather than protected expression, and might therefore face punishment for doing so. This response is likely not only to suggest to students that they should fear engaging in protected expression on campus, but to suggest the same to their peers as well.

**III. CONCLUSION**

FIRE urges SUNY Binghamton to publicly abandon its investigation into students’ flyers, and remind UPD both that student expression cannot be limited on the basis that it could produce litter and that surveillance of student expression could have a chilling effect on freedom of speech in the SUNY Binghamton community.

We further urge the university to treat students’ unpermitted posting of flyers within the Downtown Center as a teachable moment and remind students to review SUNY Binghamton’s General Advertising Policies, rather than as a justification to launch an investigation and surveil expressive activity that is protected by the First Amendment. We request a response to this letter no later than May 2, 2018.

Sincerely,

A handwritten signature in cursive script that reads "Sarah McLaughlin". The signature is written in black ink and is positioned above the typed name.

Sarah McLaughlin  
Senior Program Officer, Individual Rights Defense Program

Encls.

cc:

Barbara Westbrook Scarlett, Associate University Counsel  
Patrick Reilly, UPD Investigator