



February 18, 2019

Donnell Tanksley
Chief of Police
Campus Public Safety
Portland State University
633 SW Montgomery Street
Portland, Oregon 97201

Sent via U.S. Mail and Electronic Mail (tanksley@pdx.edu)

Dear Chief Tanksley:

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 the freedoms of assembly and expression at Portland State University ("PSU") in light of law enforcement's cancellation of a meeting of the Portland State International Socialist Organization. This cancellation, made against the wishes of the student organizers, contravenes the First Amendment and invites future threats to the expressive rights of PSU students. Accordingly, FIRE calls on PSU to explain in detail the circumstances of the cancellation and the steps PSU will take to protect its students' First Amendment rights.

I. Statement of Facts

The following is our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share any information that might change the analysis below. However, if the facts here are substantially accurate, PSU has violated its students' First Amendment rights.

On Thursday, January 24, 2019, the Portland State International Socialist Organization ("ISO"), a recognized student organization at PSU, was scheduled to host a meeting to discuss

capitalism, climate change, and socialism.¹ The event, to be held in a room of the PSU student union building, was scheduled to begin at 6:30 p.m.²

At 1:09 p.m., Joey Gibson, founder of conservative group Patriot Prayer, posted on the Facebook event page that he would “be there to ask questions,” asking the group to “be mature and respectful for [he would] do the same,” and asking them “not to coordinate an attack on [him.]”³ Gibson is not a student or faculty member at PSU and had not been invited to the meeting. At 1:10 p.m., Gibson told his followers that if they were “near PSU today,” they should “stop by” and “respectfully ask questions.”⁴

At 3:35 p.m., Gibson posted a screenshot depicting a PSU student sharing the Facebook event with the comment, “Who wants to Fuck up Joey Gibson, leader of the fascist hate group patriot prayer? He’ll be here tonight.”⁵ Fifteen minutes later, at 3:50 p.m., ISO commented on Gibson’s 1:09 p.m. post to the ISO event page, asking ISO supporters to “[p]lease not engage with Joey Gibson.”⁶ ISO blocked the PSU student, who is reportedly not affiliated with the organization, and deleted his post.⁷ Another prospective attendee said Gibson sought “to create tension and disrupt the event,” and encouraged ISO supporters not to “play their game” and instead use “deescalation tactics” to avoid disruption.⁸

At 5:31 p.m., ISO posted an update on the event page “to address any concerns attendees have about potential harassment by Joey Gibson.”⁹ ISO explained that its members have “a right to freedom of assembly” and discouraged “any sort of violence.”¹⁰

At 5:39 p.m., Gibson posted a video again announcing that he would be attending the ISO meeting.¹¹ Gibson shared his hope that his presence would provoke disruption because it would lead to pressure on ISO:

¹ Portland State International Socialist Organization, *Capitalism v Climate: Ecosocialist Alternatives to Climate Chaos*, FACEBOOK, <https://www.facebook.com/events/2117104881645847>.

² *Id.*

³ Joey Gibson, FACEBOOK (Jan. 24, 2019, 1:09 PM), <https://www.facebook.com/events/2117104881645847/permalink/2127511337271868>.

⁴ Joey Gibson, *If you are near PSU today please stop by . . .*, FACEBOOK (Jan. 24, 2019, 1:10 PM), https://www.facebook.com/permalink.php?story_fbid=597869664011699&id=100013660111371.

⁵ Joey Gibson, *Calls Patriot Prayer a hate group but then . . .*, FACEBOOK (Jan. 24, 2019, 3:35 PM), <https://www.facebook.com/photo.php?fbid=597913944007271>.

⁶ Gibson, *supra* note 3.

⁷ Nikki Williams, *Portland socialists won't be silenced*, SOCIALISTWORKER.ORG, Jan. 30, 2019, <https://socialistworker.org/2019/01/30/portland-socialists-wont-be-silenced>.

⁸ Jordan Lybeck, FACEBOOK (Jan. 24, 4:14 PM), <https://www.facebook.com/events/2117104881645847/permalink/2127661887256813>.

⁹ Portland State International Socialist Organization, FACEBOOK (Jan. 24, 2019, 5:31 PM), <https://www.facebook.com/events/2117104881645847/permalink/2127728527250149>.

¹⁰ *Id.*

¹¹ Joey Gibson, *A message to all socialists, Democrats, and . . .*, FACEBOOK (Jan. 24, 2019, 5:39 PM), <https://www.facebook.com/100013660111371/videos/597949580670374>.

You don't have nice Joey anymore. So all you socialists who refused to speak out, we're going to keep going to your meetings, and I'm not going to cause any problems. I'm not there to disrupt, but I will be there. And you know who else is gonna be there, because I'm there? . . . Antifa. So everywhere I go, they're gonna come, too, and they're gonna be your problem even more so than they were before until you guys do something about it. You have 'em stop harassing our people, have 'em stop harassing the locals, have 'em stop passing out lies about innocent citizens in Portland. You have them do that and then they won't be your problem anymore because we'll stop coming to your meetings. But until then, we're going to show up to all the meetings.¹²

At 6:10 p.m., ISO posted on its Facebook page an “[u]rgent announcement,” in pertinent part: “Portland State campus security has forced us to cancel tonight’s meeting.”¹³ ISO explained in a comment: “Patriot Prayer targeted the event and campus security shut our event down.”¹⁴

At 6:38 p.m., Gibson live-streamed a video of himself driving and explaining that he was “gonna double check and make sure” because it “looks like they cancelled their meeting.”¹⁵ Gibson said, “everybody’s slandered our name to made [*sic*] us to be like we’re some Nazi gang,” and pledged: “So now we’ll just use that, and we’ll just go wherever we can, everywhere—every single meeting they have, we’ll just keep going and they can either cancel or they can try to be violent if they want, I guess . . . or they can start disavowing antifa.”¹⁶ At 7:20 p.m., Gibson posted a photograph of a sign reading “ISO Meeting Cancelled January 24, 2019” taped to a door.¹⁷

On January 27, ISO posted a statement on its Facebook page concerning the cancellation.¹⁸ ISO said campus security officers “cancelled our public meeting . . . against our wishes, citing concerns of potential violence” following Gibson’s announcement that he would try to attend the meeting.¹⁹ ISO attributed the decision to cancel the event to the Campus Public Safety Office and said the decision to “preemptively cancel” the event was made “without consulting

¹² *Id.*

¹³ Portland State International Socialist Organization, *Urgent announcement: Portland State . . .*, FACEBOOK (Jan. 24, 2019, 6:10 PM), <https://www.facebook.com/PortlandISO/posts/10158244912974251>.

¹⁴ *Id.*

¹⁵ Joey Gibson, FACEBOOK (Jan. 24, 2019, 6:38 PM), <https://www.facebook.com/100013660111371/videos/597974270667905>.

¹⁶ *Id.*

¹⁷ Joey Gibson, FACEBOOK (Jan. 24, 2019, 7:20 PM), <https://www.facebook.com/photo.php?fbid=597988910666441>.

¹⁸ Portland State International Socialist Organization, *This past Thursday night Portland State . . .*, FACEBOOK (Jan. 27, 2019, 1:45 PM), <https://www.facebook.com/PortlandISO/posts/10158253661194251>.

¹⁹ *Id.*

any members of” ISO, who were informed of the decision half an hour before the event was set to begin.²⁰

ISO condemned the cancellation, arguing that officers were “doing the right’s dirty work for them, stifling our free speech and adding to an atmosphere of fearfulness,” and that the response “emboldens right-wing groups to use harassment and intimidation as a tactic for trying to silence anyone they disagree with.”²¹

Shortly after the cancellation of the ISO meeting, Gibson posted a video on Facebook with a messages for “you socialists,” promising that “we’re going to go to every single event, . . . everything that is established, . . . everybody that has an attachment to antifa, you’re going to see us and we’re going to keep going until you disavow antifa and you separate yourselves.”²² Gibson went on to address the ISO meeting:

These socialists tonight, their meeting got cancelled because I said I was going to show up. What’d you think was gonna happen? You sit around, we get harassed at every single one of our meetings. . . . And you think we’re just gonna sit around? It’s not gonna happen anymore. We’re gonna keep going. We’re gonna keep harassing. And we’re going to expose each and every one of you.²³

On January 25, Portland Community College’s security officials cancelled a discussion concerning “economic rights and climate justice” after Patriot Prayer members suggested they might show up.²⁴

II. The First Amendment Forbids Law Enforcement from Canceling Student Organizations’ Meetings Based on Mere Possibility of Disruption

A. Portland State University’s police officers are bound by the First Amendment, which protects student organizations’ right to associate

It has long been settled law that the First Amendment is binding on public colleges like Portland State University. *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

²⁰ *Id.*

²¹ *Id.*

²² Joey Gibson, *Reporting from the socialist antifa house*, FACEBOOK (Jan. 24, 2019, 7:26 PM), <https://www.facebook.com/100013660111371/videos/597991310666201>.

²³ *Id.*

²⁴ Portland Democratic Socialists of America, FACEBOOK (Jan. 25, 2019, 3:29 PM), <https://www.facebook.com/PortlandDSA/posts/1004470789742220>.

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 First Amendment protects a student organization’s right to use a public university’s facilities for expressive purposes. *See, e.g., Widmar v. Vincent*, 454 U.S. 263, 269 (1981) (in denying a religious student group the use of campus facilities for meetings, a public university violated the group’s right to free exercise of religion and freedom of speech and association); *Truth v. Kent Sch. Dist.*, 542 F.3d 634, 651 (9th Cir. 2008) (Raymond, J., concurring) (“When the use of school facilities is part of a general public forum, denying access to those facilities may also implicate the right to associate freely.”).

Law enforcement officers employed by a state university are government actors bound by the First Amendment. *See, e.g., Laizure v. Washington County*, No. 3:17-cv-01254-SB, 2018 U.S. Dist. LEXIS 128951, at *10 (D. Or. July 13, 2018) (“law enforcement orders prohibiting or restricting protected expression are subject to the First Amendment,” citing *Bible Believers v. Wayne County*, 805 F.3d 228, 259–60 (6th Cir. 2018)). Law enforcement officers’ acts to restrict a student organization’s ability to meet on the campus of a public university implicate the First Amendment rights of the organization and its members.

B. Police restrictions on speech to facilitate public safety must meet strict scrutiny, requiring bona fide efforts short of silencing a speaker

Recognized student organizations have a First Amendment right to hold meetings in university facilities. Efforts by university personnel to restrict or cancel those meetings must comply with the First Amendment, particularly where the possibility of disruption arises from persons opposed to the speaker. In such events, law enforcement must make “bona fide efforts” to protect the expressive rights “by other, less restrictive means” short of cancelling the expressive activity. *Bible Believers*, 805 F.3d at 255. As the United States Court of Appeals for the Ninth Circuit has explained:

It is clearly established federal . . . law that protests or assemblies cannot be dispersed on the ground that they are unlawful unless they are violent or . . . pose a clear and present danger of imminent violence, or they are violating some other law in the process. . . . Enjoining or preventing First Amendment activities before demonstrators have acted illegally or before the demonstration poses a clear and present danger is presumptively a First Amendment violation. . . . The generally accepted way of dealing with unlawful conduct that may be intertwined with First Amendment activity is to punish it after it occurs, rather than to prevent the First Amendment activity from occurring in order to obviate the possible unlawful conduct. . . . The proper response to potential and actual violence is for the government to ensure an adequate police presence . . . and to arrest those who actually

engage in such conduct, rather than to suppress legitimate First Amendment conduct as a prophylactic measure.

Collins v. Jordan, 110 F.3d 1363, 1371–72 (9th Cir. 1996).

The need for security is not a talismanic incantation that suspends the First Amendment. “In a balance between two important interests—free speech on one hand, and the state’s power to maintain the peace on the other—the scale is heavily weighted in favor of the First Amendment.” *Bible Believers*, 805 F.3d at 228.

The weight tilts this scale no differently on the campuses of public universities. Following the tumultuous campus climate of the late 1960s, characterized by “widespread civil disobedience,” including “the seizure of buildings, vandalism, and arson,” leading to the shuttering of some campuses altogether, the Supreme Court of the United States steadfastly defended students’ rights to meet on campus, notwithstanding fear that they would engage in disruptive conduct. *Healy*, 408 U.S. at 171–74. “[T]he wide latitude accorded by the Constitution to the freedoms of expression and association is not without its costs in terms of the risk to the maintenance of civility and an ordered society,” and it is true that “this latitude often has resulted, on the campus and elsewhere, in the infringement of the rights of others.” *Healy*, 408 U.S. at 194. However, “state colleges and universities are not enclaves immune from the sweep of the First Amendment.” *Id.* at 180.

Broadly speaking, the public shows deference to law enforcement officials who invoke a need for public safety; this trust must be safeguarded against potential abuse. As the United States Court of Appeals for the Sixth Circuit cautioned, a “heckler’s veto effectuated by the [authorities] will nearly always be susceptible to being reimagined and repackaged as a means for protecting the public, or the speaker himself, from actual or impending harm.” *Bible Believers*, 805 F.3d at 255. As the Supreme Court explained, law enforcement’s ability to curb expressive activity is not unlimited, as “lodging of such broad discretion in a public official allows him to determine which expressions of view will be permitted and which will not[, which] thus sanctions a device for the suppression of . . . ideas and permits the official to act as a censor.” *Cox v. Louisiana*, 379 U.S. 536, 557 (1965).²⁵ When authorities assert that public safety supersedes constitutional rights at the core of democratic society, skepticism on the part of the public is warranted and transparency on the part of law enforcement is mandatory.

Accordingly, any “police action that hinders the speaker’s freedom of speech” is not “deemed legitimate in the eyes of the Constitution unless it satisfies strict scrutiny, which requires the police to achieve their ends using only those means that are the least restrictive with respect to the speaker’s First Amendment rights.” *Bible Believers*, 805 F.3d at 253. While law enforcement is not required to “go down with the speaker” in the face of a hostile mob, police

²⁵ In *Cox*, the Supreme Court reversed the conviction of the leader of civil rights demonstrators, notwithstanding the judgment of on-the-ground judgment law enforcement officials who feared that “violence was about to erupt” between several thousand civil rights demonstrators and “muttering” and “grumbling” white onlookers. *Id.* at 548 n.12.

may not cancel expressive activity “as an expedient alternative to containing or snuffing out” the possibility of violence. *Bible Believers*, 805 F.3d at 252–53. Instead, they must demonstrate that they have made “bona fide efforts” to ward against the possibility of violence. In *Bible Believers*, the Sixth Circuit explained that these efforts must be substantial:

The police may go against the hecklers, cordon off the speakers, or attempt to disperse the entire crowd if that becomes necessary. Moreover, they may take any appropriate action to maintain law and order that does not destroy the right to free speech by indefinitely silencing the speaker. Fundamentally, no police action that hinders the speaker’s freedom of speech should be deemed legitimate in the eyes of the Constitution unless it satisfies strict scrutiny, which requires the police to achieve their ends by using only those means that are the least restrictive with respect to the speaker’s First Amendment rights.

Id. at 253.

As discussed below, the burden is on PSU Campus Public Safety to demonstrate that it made such bona fide efforts, or that there was no action short of cancelling the event that would have ameliorated any security concerns.

C. *The Facebook post asking if people want to “fuck up” a demonstrator cannot justify foreclosing the First Amendment rights of ISO*

If, instead, PSU’s law enforcement’s actions were premised on a third party’s Facebook post asking “[w]ho wants to Fuck up Joey Gibson[?],” the cancellation would still abridge the First Amendment for at least two reasons.

First, the post did not amount to unprotected incitement under the First Amendment. “[M]ere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment.” *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982) (emphasis in original). To amount to “incitement,” the speech must have been “directed to inciting or producing *imminent* lawless action and . . . likely to incite or produce such action.” *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (emphasis added).

The imminence of the violence is critical. *See, e.g., Hess v. Indiana*, 414 U.S. 105, 107–09 (1973) (statement during an antiwar demonstration, “[w]e’ll take the fucking street later,” was “nothing more than advocacy of illegal action at some indefinite future time.”). If others may still dissuade the speaker or listeners, the disorder is not imminent. “If there be time to . . . through discussion . . . avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.” *Whitney v. California*, 274 U.S. 357, 377 (1927).

That is precisely what transpired here: The student organization itself acted to mitigate the possibility of disruption. Its leadership deleted the offending post, blocked its author, and

encouraged others not to engage with Gibson. It is difficult to imagine what more the group could have done, and there is no indication that their efforts were ineffective. While law enforcement should not be faulted for taking *some* action to prepare for the possibility of violence, neither the post’s author nor the group he presumably supports can be penalized for a post that is otherwise protected speech.

Second, even if the third party post did amount to incitement, that student is reportedly not a member of ISO. It is not clear how an organization should be expected to prevent or penalize the expression of someone who is not a member, and the organization’s First Amendment rights cannot be infringed solely on the basis of another’s words. The First Amendment “restricts the ability of [state actors] to impose liability . . . solely because of . . . association with another.” *Claiborne Hardware Co.*, 458 U.S. at 918–19.ⁱ As the United States Court of Appeals for the Ninth Circuit has explained, the government may not restrict one person’s “expressive activity in conjunction with another person simply because the second person’s behavior crossed the line into actions that may be unprotected and unlawful.” *Santopietro v. Howell*, 857 F.3d 980, 989–90 (9th Cir. 2017).

III. Portland State University Must Provide a Transparent Explanation for Canceling the Meeting and Commit to Protecting Its Students’ Rights

In canceling the meeting of the Portland State International Socialist Organization, PSU’s Campus Public Safety prevented a student organization from meeting on campus, a right protected by the First Amendment. Campus Public Safety therefore bears the burden of demonstrating that it made bona fide efforts or that such efforts would have been futile.

FIRE calls upon PSU Campus Public Safety to publicly explain the circumstances of this cancellation. In particular, PSU Campus Public Safety should answer the following questions:

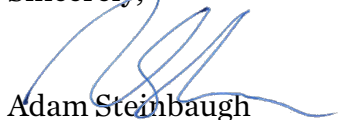
1. Which threats or security risks were considered in the decision to cancel the meeting?
2. Who made the decision to cancel the meeting?
3. Who was consulted before (or about) the decision to cancel the meeting?
4. How did PSU Campus Public Safety learn of Gibson’s intent to attend the meeting?
5. What options to preserve public safety, short of canceling the meeting, were considered? Why, in particular, was each option unsuccessful or not taken?
6. Did PSU Campus Public Safety contact any other agency concerning these events?²⁶ If so, what agency? When were they contacted? What was their response?
7. Was any effort made to bar Gibson from attending the meeting?²⁷

²⁶ The officers of the City of Portland’s police department “often work with Campus Public Safety Officers, and are frequently called to complete tasks that Campus Public Safety Officers often encounter, but lack the authority to remedy,” including criminal investigations. Letter from Robert H. Day, Commander, Central Precinct, City of Portland, Oregon, Bureau of Police, to Dr. Jackie Blazer, Campus Safety Task Force, Portland State University, Oct. 1, 2013, *available at* <https://www.pdx.edu/insidepsu/sites/www.pdx.edu.insidepsu/files/safety-task-force-january-2014.pdf#page=28>.

In furtherance of transparency, please find enclosed a request for public records.

We request receipt of a response to this letter no later than the close of business on March 4, 2019.

Sincerely,



Adam Steinbaugh
Director, Individual Rights Defense Program

Cc:

Dr. Rahmat Shoureshi, President, Portland State University
University Public Safety Oversight Committee, c/o Co-Chairs Marcy Hunt and Michael Alexander (via email only)

Encl.

²⁷ “Members of the general public do not have a protected right to be on a state university’s campus.” *Elansari v. United States*, No. 3:15-CV-01461, 2018 U.S. Dist. LEXIS 184848, at *22 (M.D. Pa. Oct. 26, 2018); *see also Univ. of Cincinnati Chapter of Young Americans for Liberty v. Williams*, No. 1:12-cv-155, 2012 U.S. Dist. LEXIS 80967, at *17 (S.D. Ohio June 12, 2012) (distinguishing First Amendment rights between a university’s “internal constituents,” such as students and student organizations, and external constituents seeking access to university resources.)

Request for Records

This is a request for the following records pursuant to the Public Records Act (RCW 42.56).

Records Requested:

1. Any blotter, incident report, after-action report, or other document reflecting the actions of Portland State University Campus Public Safety officials or officers on January 24, 2019, as those actions pertain to the meeting of the Portland State International Socialist Organization.
2. Any document, including any email, letter, memorandum, text message, or fax, sent by Portland State University Campus Public Safety to any person, agency, department, or other entity concerning the aforementioned events of January 24, 2019.

Fee waiver request: This request is made on behalf of the Foundation for Individual Rights in Education, a nonprofit and nonpartisan organization that works to preserve civil liberties on college campuses. We request a waiver of any fees or costs associated with this request.

This request concerns a matter of public interest, namely the cancellation of a student organization's meeting because of the possibility of disruption. The records are not sought for a commercial or personal interest, but rather for the purpose of providing the public with information concerning civil liberties in higher education.

Request for expedited processing: The records pertain to a matter of public importance and current debate. Providing expedited production of the records will facilitate the public understanding of these matters before they are fully resolved. Any undue delay in production will undermine the purpose of the public records laws, which serve to allow public input and oversight of government affairs. As you may be aware, the Public Records Act requires a response as soon as practicable, but no longer than five days. (RCW 42.56.520).

Request for Privilege Log: If any otherwise responsive documents are withheld on the basis that they are privileged or fall within a statutory exemption, please provide a privilege log setting forth (1) the subject matter of the document, (2) the person(s) who sent and received the document, (3) the date the document was created or sent, and (4) the basis on which it is the document is withheld.

Please note that this request does not seek a search of faculty or student email accounts or records. These requests should in no way be construed to include a review or search of email accounts, websites, or other forms of data or document retention that are controlled by students, alumni, or faculty members, nor by governmental or advisory bodies controlled by the same. Any search should be limited to documents held by the administration and/or its staff members, including records created or maintained by persons acting in the capacity of administrators or staff members.

If I can be of assistance in interpreting or narrowing this request, please don't hesitate to ask.