



June 21, 2019

Dr. Houston Davis
University of Central Arkansas
Office of the President, Wingo Hall 207
201 Donaghey Avenue
Conway, Arkansas 72035

URGENT

Sent via U.S. Mail and Electronic Mail (hdavis@uca.edu)

Dear President Davis:

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 by the threat to freedom of expression at the University of Central Arkansas (UCA) posed by the administration's removal of text from an outdoor sign maintained by librarians at the university. While the university's administration may doubtlessly limit its own speech, the sign is an expressive display promoting an event, curated by librarians, celebrating Pride Month. Librarians, as faculty members of the university, are entitled to the full spectrum of expressive and academic freedom attendant with that status. Accordingly, FIRE calls on UCA's administration to immediately reassure its librarians that they may resume display of the sign's text.

I. UCA Removes a Lady Gaga Quote from a Sign Promoting Library Events

The following is our understanding of the pertinent facts, based on public reporting. We appreciate that you may have additional information to offer and invite you to share it with us.

Outside of the entrance to UCA's Torreyson Library is a sandwich board sign. One side displays the library's hours and other pertinent information; the other side typically announces special events at the library, commemorative months, or holidays.¹ The text on the

¹ Scott Jaschik, *The Quote That Dare Not Speak Its Name*, INSIDE HIGHER ED, June 20, 2019, <https://www.insidehighered.com/news/2019/06/20/university-central-arkansas-president-orders-removal-lady-gaga-quote-library-sign>.

latter side is chosen by the university’s librarians, who are members of the university’s faculty.²

LGBTQ Pride Month is “currently celebrated each year in the month of June to honor the 1969 Stonewall Uprising in Manhattan. . . .”³ Each year during June, the library curates an exhibit displaying books related to Pride Month.⁴

In connection with Pride Month and the library’s exhibit, the library’s sign featured a quote from Lady Gaga, an entertainer widely known for her LGBTQ advocacy whose Super Bowl halftime show featured “Born This Way,” the “unofficial anthem of the LGBTQ community.”⁵ The library posted a photo of the sign to its Facebook page⁶ with a link to its LGBTQ+ resources page, which provides “resources for multiple communities,” including information on transgender and gender identity, sexual orientation, sexual assault, and domestic violence.⁷

This is the photo of the sign displaying the Lady Gaga quote:



² UNIV. OF CENTRAL ARK., FACULTY HANDBOOK 18 (rev. May 2019), available at <https://uca.edu/academicaffairs/files/2019/06/fhb-current.pdf>.

³ Library of Congress, *LGBT Pride Month*, <https://www.loc.gov/lgbt-pride-month/about> (last visited June 20, 2019).

⁴ UCA Torreyson Library, FACEBOOK (June 19, 2019), available at <https://bit.ly/31OXPEP>. For last year’s exhibit, see UCA Torreyson Library, FACEBOOK (June 5, 2018), available at <https://bit.ly/2KvrU6U>.

⁵ Noel King, *LGBT Anthem: Lady Gaga’s ‘Born This Way,’* NPR, May 20, 2019, <https://www.npr.org/2019/05/20/724921431/lgbt-anthem-lady-gagas-born-this-way>.

⁶ UCA Torreyson Library, FACEBOOK (June 11, 2019), available at <https://bit.ly/2ItdrGk>.

⁷ UCA Library, *Gender, Sex, and Sexuality Community Resources*, <http://uca.libguides.com/lgbtq> (last visited June 20, 2019).

One day after the Lady Gaga text was added to the sign, you directed its removal.⁸ You sent an email to the campus community on June 18, explaining that while it was “very important” to advocate for the LGBTQ community, “it was not OK or the university sign to be used to make a personal statement or advocate for a personal viewpoint.”⁹ There was, you said, a “fine line between individual freedom of speech and institutional voice,” as the “library is an official arm of” the university, and when the university “speaks’ on that sign . . . it speaks officially.”¹⁰ The next day, you explained that you viewed the sign as “a university platform. . . .”¹¹ In an interview with the *Log Cabin Democrat*, you cited both university and library policy, which a spokesperson subsequently identified as an “oral” library policy and a UCA policy concerning the use of university equipment.¹²

Your first email also justified the removal of the sign on the “[t]iming of the sign” and the need to be “very mindful of the hundreds of minors that are on campus during the summer,” which “complicates an environment that is normally programmed for adults. . . .”¹³

II. Censoring the Librarians’ Sign Amounts to Viewpoint Discrimination Prohibited by the First Amendment and Principles of Academic Freedom

A. *As a public institution, the University of Central Arkansas is bound by the First Amendment.*

It has long been settled law that the First Amendment is binding on public colleges like UCA. *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”).

Because it is bound by the First Amendment, UCA’s administration may not curtail faculty members’ speech due to its viewpoint or the possibility others might find it inappropriate. *Gay & Lesbian Students Ass’n. v. Gohn*, 850 F.2d 361, 362 (8th Cir. 1988) (finding that as a public

⁸ Jaschik, *supra* note 1.

⁹ Email from Houston Davis, President, Univ. of Central Ark., to university community, June 18, 2019 (on file with author).

¹⁰ *Id.*

¹¹ Jaschik, *supra* note 1.

¹² Hilary Andrews, *UCA denies sign content basis of removal; cites policy, procedures*, LOG CABIN DEMOCRAT, June 20, 2019, <https://www.thecabin.net/news/20190620/uca-denies-sign-content-basis-of-removal-cites-policy-procedures> (citing UNIV. OF CENTRAL ARK., BOARD POLICY NO. 413 (“University Equipment”), *available at* <https://uca.edu/board/files/2010/11/413.pdf>).

¹³ Email from Davis, *supra* note 9.

university, University of Arkansas at Fayetteville “is bound by the First Amendment to act without regard to the content of the ideas being expressed”).

B. The expression is that of the librarians or the library, not the university as an institution.

The university’s rationale—that as sovereign, it can direct the content of outdoor displays because the public might attribute the expression to the university—is incorrect for at least two reasons: (1) because it elides the autonomy of faculty members in contributing to campus expression; and (2) because speech on a small sign cannot reasonably be attributed to the institution as a whole.

i. Librarians are faculty members entitled to academic freedom and expressive autonomy.

First, the university’s rationale inappropriately erodes the relationship between faculty members, academic units within the university, and the university’s administration, to the detriment of academic freedom. Stated differently, the university’s position glosses over a thornier question: Who, within the university, makes the decision about what may be displayed on the sign?

Principles of the First Amendment and academic freedom, together with Arkansas’ recently enacted statutes recognizing faculty members’ expressive rights in the outdoor areas of campus,¹⁴ compel deference to the librarians’ choices in presenting and promoting their exhibits. As faculty members at UCA,¹⁵ librarians are afforded “the same rights and responsibilities as . . . other members of the faculty.”¹⁶ Their role in facilitating and engaging in teaching, research, and publication demands that they be free from institutional censorship in order to preserve the library’s central function within the university.

A librarian at UCA is afforded academic freedom both by virtue of their faculty appointment and their role within the academic community. Librarians facilitate the information-gathering and research functions of the university community, and often participate in the pursuits of academia themselves, including through teaching, research, and publication. These roles necessarily require freedom from institutional censorship in order to safeguard the library’s central function within the university. A university cannot censor a sign created and maintained by (or at the direction of) faculty members on the basis that it’s a university

¹⁴ Ark. Code Ann. §§ 6-60-1005(a) (an “outdoor area of campus . . . shall be deemed a public forum for members of the campus community”), 6-60-1003(2)(A)(iii) (defining “campus community” to include faculty).

¹⁵ FACULTY HANDBOOK, *supra* note 2, at 18.

¹⁶ Joint Committee on College Library Problems, *Joint Statement on Faculty Status of College and University Librarians* (rev. June 2012), available at <https://www.aaup.org/sites/default/files/files/2013%20Bulletin/librarians.pdf>. The Joint Committee was composed of the Association of College and Research Libraries (a division the American Library Association), the Association of American Colleges and Universities, and the American Association of University Professors.

“platform” any more than the university could censor a librarian’s words on the library’s website (a university platform itself) or order a book removed from the library’s shelves.

ii. Expression on a small sign adjacent to a library cannot reasonably be attributed to the university as a collective enterprise.

Second, it is unlikely that any reasonable viewer of the sign would understand it to be a statement universally endorsed by, and accurately attributed to, the institution itself. Universities are collectives of diverse and competing views; as the Supreme Court of the United States has observed, a public college campus “is peculiarly the ‘marketplace of ideas.’” *Healy v. James*, 408 U.S. 169, 180 (1972) (internal citation and quotation omitted). Accordingly, the university’s failure to censor a particular expression cannot reasonably be seen as an endorsement of its content or viewpoint. A small sign displaying information relating to the library and located in the public space outside of the library is likely to be seen as an extension of the library—itsself a public space for the exchange and examination of diverse views—and its exhibits. By contrast, a sign placed outside of the university’s administrative offices, depending on its circumstances, might more reasonably be interpreted as an expression of the university as an institution. The location of the sign conveys important information to the viewer about who is responsible for its content.¹⁷

Not every sign on campus may reasonably be seen as carrying the endorsement of the entire campus. Universities rely on and traffic in the exchange of diverse viewpoints, and reasonable visitors to a college campus can expect to encounter divergent views, diminishing the likelihood that they will perceive that expression to be an official statement by the university as a whole. Plainly, no reasonable person can expect that a public university has announced its view on a LGBTQ issues—a set of complex social, political, legal, and scientific matters of widespread public debate—through a Lady Gaga quote on a modest sandwich board.

C. The expression takes place in a designated public forum, triggering strict scrutiny.

In February, Gov. Hutchinson signed S.B. 156,¹⁸ establishing the Forming Open and Robust University Minds (FORUM) Act.¹⁹ The FORUM Act provides, in pertinent part, that the “generally accessible outside areas” of a public university campus, including walkways and common areas, are “deemed a public forum for members of the campus community,” including faculty.²⁰ Because a content-based regulation of expression in a public forum is subjected to strict scrutiny, UCA must show that it is “necessary to serve a compelling state

¹⁷ “Precisely because of their location, . . . signs provide information about the identity of the ‘speaker.’ . . . An espousal of socialism may carry different implications when displayed on the grounds of a stately mansion than when pasted on a factory wall or an ambulatory sandwich board.” *City of Ladue v. Gilleo*, 512 U.S. 43, 56–57 (1994).

¹⁸ Tyler Coward, *State of Arkansas passes law to protect student free speech rights*, FOUND. FOR INDIV. RIGHTS IN EDUC., Feb. 28, 2019, <https://www.thefire.org/state-of-arkansas-passes-law-to-protect-student-free-speech-rights>.

¹⁹ Ark. Code Ann. § 6-60-1001 *et seq.*

²⁰ Ark. Code Ann. §§ 6-60-1003(7)(A), 6-60-1005(a).

interest and that it is narrowly drawn to achieve that end.” *Gralike v. Cook*, 191 F.3d 911, 920–21 (8th Cir. 1999) (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983)).

As discussed below, because UCA’s restriction amounts to viewpoint discrimination and is not reasonable in light of the purpose of the forum, it would fail under “even the most lenient forum test.” *Burnham v. Ianni*, 119 F.3d 668, 675 n.12 (8th Cir. 1997); *Davison v. Randall*, 912 F.3d 666, 687 (4th Cir. 2019) (“viewpoint discrimination” is “prohibited in all forums”). Accordingly, it would necessarily fail strict scrutiny.

D. Even if the library sign constitutes a nonpublic forum, UCA’s censorship is both viewpoint discrimination and unreasonable.

Even assuming the relevant forum is not the display of the sign in a public forum, but instead the space within the four corners of one side of the sign, the university’s censorship of the sign would still infringe on the First Amendment. Even in a nonpublic forum, in which government actors have the greatest leeway to regulate speech, viewpoint discrimination is unlawful, and any regulation must be reasonable in light of the purpose of the forum. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985); *see also Am. Freedom Def. Initiative v. King Cty.*, 904 F.3d 1126, 1132 (9th Cir. 2018) (a restriction premised on whether viewers would be offended is viewpoint-discriminatory).

i. UCA’s restriction is viewpoint-discriminatory.

Viewpoint discrimination is an “egregious form of content discrimination,” and government actors—including public universities—must “abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker” motivates the restriction. *Rosenberger v. Rectors & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). A restriction imposed in anticipation of a hostile response from viewers “is precisely that type of odious viewpoint discrimination.” *Bible Believers v. Wayne Cty.*, 805 F.3d 228, 248 (6th Cir. 2015); *see also, e.g., Mattia v. City of Ctr. Line*, No. 17-11169, 2017 U.S. Dist. LEXIS 207611, at *25 (E.D. Mich. Dec. 18, 2017) (complaints to police about “shocking content” of anti-abortion sign, resulting in police enforcement of a breach-of-peace ordinance).

The mandate that the Lady Gaga quote be removed was expressly premised on its status as a “personal viewpoint.”²¹ Further justifications proffered for its removal, including the possibility that others might view it as inappropriate, turn on the administration’s anticipation that viewers may have a hostile response to the sign’s message. This restriction is not predicated on the subject-matter of the statement, but its message; surely your administration would not object to a library sign that read “LGBTQ Pride Month exhibit inside.”

²¹ Email from Davis, *supra* note 9.

ii. UCA’s restriction is not reasonable in light of the purpose of the forum.

Even were the restriction viewpoint-neutral, the university’s suppression of speech relating to an event at the library—on a sign intended for use of speech relating to the library—is not reasonable.

The analysis of the United States Court of Appeals for the Eighth Circuit—the decisions of which are binding on UCA—in *Burnham v. Ianni* is instructive. 119 F.3d 668, 671 (8th Cir. 1997).²² There, the court found “unreasonable” a university’s suppression of professors’ photographs in a public display case reserved for use by the university’s history department. *Id.* at 671. The photographs—seen by a university administrator as “totally inappropriate,” “insensitive,” and tantamount to sexual harassment—depicted professors bearing weapons related to their academic interests. *Id.* at 670–71. The university’s administration, following anonymous complaints, removed the photographs at the direction of the university’s chancellor, who was denied qualified immunity because the First Amendment prohibits “unreasonable discrimination among ‘types of expression’ within a specific forum. . . .” *Id.* at 672, 677.

As in *Burnham*, the library sign has been “designated for precisely the type of activity for which” it was used: “to inform students, faculty and community members of events in and interests of” the library. *Id.* at 676. The sign was relevant to the library’s exhibition of books concerning Pride Month.²³ Accordingly, regulation of its message on the basis that others might find it objectionable is patently unreasonable.

The possibility that minors might encounter the sign is not a defensible basis to suppress it. This argument’s underlying premise—that minors do not have their own First Amendment rights to receive information about LGBTQ issues—not only is false,²⁴ but also would not suffice to justify limitations on the expressive rights of adults on the campus of a public university. To the contrary, Arkansas’ legislature recently declared that “it is not the proper role of state-supported institutions of higher education to shield individuals from speech that is protected by the First Amendment . . . including without limitation ideas and opinions the individuals may find unwelcome, uncollegial, disagreeable, or even deeply offensive.” Ark. Code Ann. § 6-60-1002(7).

While the Supreme Court has—in certain limited circumstances—permitted government actors to impose narrowly targeted content-based restrictions in the interest of preventing

²² Notably, the court observed that “[u]nderlying [its] holding” was a “recognition of the professors’ academic freedom,” which was a “special concern of the First Amendment.” *Id.* at 680 n.19 (quoting, in part, *Univ. of Calif. Regents v. Bakke*, 438 U.S. 265, 312 (1978)).

²³ For this reason, the university’s policy concerning use of equipment *reinforces* the librarians’ right to use the sign to promote a library event.

²⁴ *Parents, Families, & Friends of Lesbians & Gays, Inc. v. Camdenton R-III Sch. Dist.*, 853 F. Supp. 2d 888, 898 (W.D. Mo. 2012) (high school student’s “First Amendment interest to receive information” prohibits school from filtering websites that express LGBT-positive viewpoints).

children from viewing indecent or patently offensive sexual programming, that interest does not create a “free-floating power to restrict the ideas to which children may be exposed.” *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 794 (2011). Specifically, the Court has held that “[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.” *Erznoznik v. Jacksonville*, 422 U.S. 205, 213–14 (1975). “[T]he government may not ‘reduce the adult population . . . to reading only what is fit for children.’” *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73–74 (1983) (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)).

Nor does the possibility that others will be offended by speech authorize censorship. The Supreme Court has repeatedly, consistently, and clearly held that expression may not be restricted merely because some or even many find it to be offensive or disrespectful. For example, in holding that burning the American flag was expression protected by the First Amendment, the Supreme Court urged 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.” *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Decades earlier, the Court observed that it was “a function of free speech under our system of government . . . 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.” *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

This is particularly so on the campus of a public university. For example, the Supreme Court unanimously upheld as protected speech a student newspaper’s front-page use of a vulgar headline (“Motherfucker Acquitted”) and a “political cartoon . . . depicting policemen raping the Statue of Liberty and the Goddess of Justice.” *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973). While the university could regulate the time, place, or manner of speech, its response to the newspaper article was a result of the “disapproved *content* of the newspaper rather than the time, place, or manner of its distribution.” *Id.* at 670 (emphasis in original.) The *Papish* Court unanimously rejected the view that a public university could regulate speech falling short of unlawful obscenity: “[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.’” *Id.* Expressive rights, in short, may not be curtailed on the basis that others find them offensive or outrageous.

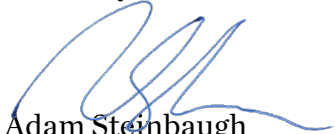
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III. Conclusion

Given that LGBTQ Pride Month is drawing to a close, FIRE calls on UCA to rescind its directive as soon as possible. We respectfully request receipt of a response to this letter no later than the close of business on June 26, 2019.

Sincerely,



Adam Steinbaugh
Director, Individual Rights Defense Program

Cc:

Dean Covington, Director of the Library

Tina Murdock, Library Faculty, Assistant Director of the Library