June 12, 2019

Elizabeth L. Duvall
General Counsel
Western Illinois University
1 University Circle SH 208
Macomb, Illinois 61455

Sent via U.S. Mail and Electronic Mail (EL-Duvall@wiu.edu)

Dear Ms. Duvall:

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 enforcement of a "free speech zone" at Western Illinois University (WIU), contrary to the university's obligations under the First Amendment and WIU's past assurances that the policy had been rescinded. WIU must take steps to ensure that the policy has in fact been rescinded and that its law enforcement officers do not continue to enforce it.

I. WIU's Policies and Enforcement of a Free Speech Zone

The following is our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us. Please find enclosed an executed waiver authorizing you to share information with FIRE.

A. WIU's conflicting public-facing policies on a "Free Speech Area."

In 2003, WIU issued a press release to announce that it was abandoning a "long-standing free speech area policy," quoting WIU's then-president as explaining that "[o]ur university represents the ideal of freedom of expression" and WIU "would [never] want to restrict free speech to a specific area on the campus."[1]

[1] Press release, *Western Campus Considered Free Speech Area*, WESTERN ILL. UNIV., May 5, 2003, http://www.wiu.edu/news/newsrelease.php?release_id=1860.

WIU maintains a University Union, which WIU holds out as a place in which students can come to "meet friends for lunch, meet with a student organization to plan the next great event, meet with your study group, meet with a faculty member or colleague."[2] The Union's website explains that, as "a public institution, all of [WIU] is a 'free speech area,' including and especially the University Union," which welcomes "[a]ny demonstrations" that do not "disrupt the academic experience or threaten the safety of students and staff."[3] Student organizations may "reserve" tables in the Union concourse.[4]

WIU's website also includes a policy entitled "Policy on Use of University Facilities; Distribution of Printed Materials and Collection of Signatures Policy" ("Distribution Policy.")[5] That policy restricts "[d]istribution of printed materials or solicitation of signatures on sidewalks" to specific "areas," namely the "walkways and open area traditionally known as the 'free speech area' directly north of the University Union" and the "south campus area adjacent to the University Union and covering the open spaces between Seal, Sallee, Browne, and Memorial Halls."[6] These areas do not include the University Union. Violations of the policy may result in a "withdrawal of permission" to distribute written material altogether, and persistence in distributing materials following a command to stop may result in student disciplinary charges or "arrest and prosecution."[7]

WIU's policy concerning speaker invitations also references a "Free Speech Area," in which students and faculty are not required to submit "requests for speakers" to the Office of the Assistant Vice-President for Student Services.[8]

B. Dylan Crowl and Young Americans for Liberty seek to clarify WIU's policies.

Dylan Crowl is a member of WIU Young Americans for Liberty (YAL), a recognized student organization at WIU, where he is enrolled as an undergraduate student. Crowl has previously engaged in political expression at WIU, including distributing flyers and handouts in multiple locations on campus, including in the University Union, on dozens of occasions without incident.

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[2] WESTERN ILL. UNIV., *The University Union*, http://www.wiu.edu/student_services/university_union (last visited May 31, 2019).
[3] WESTERN ILL. UNIV., UNIVERSITY UNION POLICY MANUAL 15, http://www.wiu.edu/student_services/university_union/pdf/UUPolicyManual.pdf. (last visited May 31, 2019).
[4] *Id.* at 30.
[5] WESTERN ILL. UNIV., POLICY ON USE OF UNIVERSITY FACILITIES; DISTRIBUTION OF PRINTED MATERIALS AND COLLECTION OF SIGNATURES POLICY, http://www.wiu.edu/vpas/policies/printmat.php (last visited May 31, 2019) ("Distribution Policy").
[6] *Id.*
[7] *Id.*
[8] WESTERN ILL. UNIV., POLICY ON APPEARANCE OF OFF-CAMPUS SPEAKERS INVITED BY RECOGNIZED STUDENT AND FACULTY GROUPS AT WESTERN ILLINOIS UNIVERSITY, http://www.wiu.edu/vpas/policies/ocampspk.php (last visited May 31, 2019).

On February 12, Crowl emailed Nick Katz, Associate Director of WIU's Office of Student Activities, to share his intent to solicit signatures on a petition, talk to students, and distribute literature outside of the designated areas.[9] That expressive activity took place on February 14, again without incident.

On February 13, you emailed Crowl a link to the 2003 press release concerning the rescinded free speech area policy.[10] The following day, Crowl responded to your email, pointing out that WIU's website still listed a policy referencing the free speech area,[11] and asking that the policy be removed.[12] Crowl asked, rhetorically, what might happen if a "new [WIU] administration comes in and abuses [a] policy" still on the website.[13] Crowl did not receive a response to this email.

On March 5, Crowl emailed you expressing an interest in setting up a meeting to "discuss removing this policy from the website, and our official rulebook" to show that "WIU is a real champion of free speech. . . ."[14] Crowl did not receive a response.

On March 19, Crowl emailed you and a number of WIU administrators, again seeking a meeting in order to discuss the possibility of rescinding the distribution policy.[15] After you asked him to suggest a day to meet,[16] Crowl recommended Friday, March 29, 2019,[17] but did not receive a response to this proposal.

C. Crowl and YAL are stopped by police during a "free 'pot' brownies" event.

On March 29, Crowl and other YAL members gathered in an open area in the University Union. They had a sign encouraging students to "Join YAL" and advertising "Free 'Pot' Brownies." As the use of quotation marks around the word "pot" implies, the students were engaged in a play on words intended to draw attention. They were not distributing brownies containing marijuana, but instead distributing brownies from a literal pot and using the interaction with students as an opportunity to discuss their views[18] on the decriminalization and legalization of marijuana. At the time, the Illinois legislature was weighing such a

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[9] E-mail from Dylan Crowl to Nick Katz, Associate Director, Office of Student Activities, Western Ill. Univ. (Feb. 12, 2019, 10:12 AM) (on file with author).
[10] E-mail from Elizabeth Duvall, General Counsel, Western Ill. Univ., to Dylan Crowl (Feb. 13, 2019, 1:56 PM) (on file with author); Press release, *supra* note 1.
[11] Distribution Policy, *supra* note 5.
[12] E-mail from Crowl to Duvall (Feb. 14, 2019, 11:04 AM) (on file with author).
[13] *Id.*
[14] E-mail from Crowl to Duvall (Mar. 5, 2019, 10:12 PM) (on file with author).
[15] E-mail from Crowl to Duvall, *et al.* (Mar. 19, 2019, 11:23 AM) (on file with author).
[16] E-mail from Duvall to Crowl (Mar. 19, 2019, 1:09 PM) (on file with author).
[17] E-mail from Crowl to Duvall (Mar. 19, 2019, 1:14 PM) (on file with author).
[18] Crowl also sought signatures on a petition for WIU to change its free speech area policy.

measure, which was subsequently passed and will be signed by Gov. J.B. Pritzker, legalizing recreational marijuana sales in Illinois.[19]

Approximately fifteen minutes after beginning the expressive activity, Crowl and the other YAL members were stopped by WIU Police Corporal James Van Vlymen and Officer Jerel Jones. Officer Jones told Crowl that the officers were "going to give [Crowl] an education." Jones explained the "ramifications" of what would have resulted if the brownies contained marijuana, as "here at this school, if you're caught with marijuana, it could lead to severe ramifications, even expulsion." When Crowl explained that the brownies did not contain marijuana, the officers asked Crowl to remove the word "pot" from the sign. Crowl refused. The officers explained that they "came out here because people thought you were handing out actual THC brownies and, anyways, you're outside of the free speech zone right behind the Union."

II. WIU's Practice of Enforcing a Free Speech Area Violates the First Amendment

WIU appears to have long since recognized that its written "Free Speech Area" policy was unconstitutional. However, surviving policies appear to reanimate the "Free Speech Area," leading law enforcement officers to enforce it. Whether this amounts to enforcement of a written policy or a practice of enforcing an abandoned policy, it violates the First Amendment rights of WIU's students.

A. As a public institution, WIU is bound by the First Amendment.

It has long been settled law that the First Amendment is binding on public colleges like WIU. *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); *see also Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 778–82 (7th Cir. 2010) (applying *Widmar* and *Healy*).

B. WIU's continued maintenance of a "Free Speech Area" and Distribution Policy are unconstitutional.

If the Distribution Policy controls expressive activity at WIU, as opposed to the university's description of the University Union as an area open to expressive activity, that policy infringes the First Amendment. A government entity like WIU may establish "reasonable time, place

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[19] Robert McCoppin, *Here's when marijuana will be legal in Illinois, and answers to other burning questions about recreational weed*, CHICAGO TRIBUNE, June 3, 2019, https://www.chicagotribune.com/news/breaking/ct-met-cb-legal-marijuana-illinois-20190531-story.html.

and manner" restrictions on speech and expressive activity in publicly accessible areas of its property, but any such restrictions must be viewpoint- and content-neutral, must be narrowly tailored to serve a significant government interest, and must leave open ample alternative channels for communication. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *see also OSU Student All. v. Ray*, 699 F.3d 1053, 1062–63 (9th Cir. 2012) (applying forum analysis to public college campus).

Quarantining student expressive activity into a small "area" impermissibly restricts protected student expression, does not serve a significant government interest, and does not allow ample alternative channels for communication of students' messages.

Indeed, courts have repeatedly held that similar restrictions on student expression cannot withstand constitutional scrutiny. In *University of Cincinnati Chapter of Young Americans for Liberty v. Williams*, No. 1:12-cv-155, 2012 U.S. Dist. LEXIS 80967, at *29–30 (S.D. Ohio June 12, 2012), a federal district court enjoined the University of Cincinnati from, *inter alia*, limiting all "demonstrations, picketing, or rallies" to a small "free speech area." The court noted that the university could not identify a sufficient interest for "restricting all demonstrations, rallies, and protests from all but one designated public forum on campus." *Id.* at *19–25. Moreover, in assessing the proffered government interest purportedly advanced by the university's policies, the court reasoned that "[m]ere speculation that speech would disrupt campus activities is insufficient because 'undifferentiated fear or apprehension of a disturbance is not enough to overcome the right to freedom of expression on a college campus.'" *Id.* (quoting *Healy*, 408 U.S. at 191); *see also Roberts v. Haragan*, 346 F. Supp. 2d 853, 861 (N.D. Tex. 2004) (finding that "common areas" are public forums for students, and that Texas Tech University's requirement that students obtain permission before conducting expressive activities outside designated free speech areas was not narrowly tailored to serve the university's interests).

More recently, a federal district court in California held that restricting student expression to a small free speech zone was not narrowly tailored because it did not achieve the defendant administrators' asserted interests of avoiding disruption and maintaining the attractiveness of campus "without unnecessarily impeding students' First Amendment rights." *Shaw v. Burke*, No. 17-cv-2386, 2018 U.S. Dist. LEXIS 7584, at *26 (C.D. Cal. Jan. 17, 2018). Free speech zones fail to leave open ample alternative channels of communication because, as the *Shaw* court explained, that students are able to express themselves in one area does not remedy the fact that they are unable to express themselves in other areas. *Id.* at *27.

WIU's Distribution Policy, which invokes the "traditionally known . . . free speech area," fails this analysis. Under the Distribution Policy, students may not distribute printed materials outside of two small areas on campus. If it furthers any defensible purpose, it is not apparent on the face of the policy, which says it is enacted in order "[t]o promote the free exchange of ideas. . . ."[20] Barring students from engaging in non-disruptive expressive activity anywhere

[20] Distribution Policy, *supra* note 5.

else on campus does not further this goal. Nor is it narrowly tailored to serve an interest in preventing disruption, which would be more readily addressed by regulations barring disruptive conduct. As the *Shaw* court observed, a public college has "ample ways" to achieve goals in avoiding disruption "without precluding so much protected speech," including narrower time or place limitations. *Shaw*, 2018 U.S. Dist. LEXIS 7584, at *26. Moreover, that the University Union authorizes distribution—outside of the areas authorized by the Distribution Policy—demonstrates that the Distribution Policy's spatial limits do not serve a cognizable interest.

Because the Distribution Policy and the "Free Speech Area" are not narrowly tailored to advance a significant government interest, and do not leave open ample alternative channels of communication, they must be rescinded.

C. Police intervention over a "free 'pot' brownies" event violated the students' First Amendment rights to engage in political expression.

Leaving aside the issue of whether WIU maintains policies that are facially infirm, the acts of law enforcement officers to intervene in the marijuana-legalization activity violated the students' First Amendment rights.

The First Amendment is not a prohibition only on the application of formal discipline, but also applies to steps that fall short of discipline but would nevertheless deter a person of ordinary firmness from continuing to engage in protected expression. A government actor, such as a law enforcement officer, violates the First Amendment in taking an "adverse action that would likely deter First Amendment activity in the future" in response to "activity protected by the First Amendment," where the expression was "at least a motivating factor" in the decision to take the adverse action. *Lamon v. Brown*, No. 12-CV-1176-NJR-DGW, 2014 U.S. Dist. LEXIS 176663, at *12 (S.D. Ill. Dec. 23, 2014) (citing *Bridges v. Gilbert*, 557 F.3d 541, 546 (7th Cir. 2009)).

i. Distributing "pot" brownies to advocate for marijuana policy reform is political expression protected by the First Amendment.

Crowl and YAL were engaged in protected expression. Their goal was to engage fellow students in conversation about marijuana policy in Illinois, which was then a contentious matter pending before the state legislature. Accordingly, the speech was "core political speech," where First Amendment protection is "'at its zenith.'" *Buckley v. Am. Const. Law. Found.*, 525 U.S. 182, 186–87 (1999) (quoting *Meyer v. Grant*, 486 U.S. 414, 425 (1988)).

So, too, was the act of distributing brownies expressive. While the "First Amendment literally forbids the abridgment only of 'speech,'" the Supreme Court has "long recognized that its protection does not end at the spoken or written word." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). Conduct "intend[ed] to convey a particularized message" which is likely to "be understood by those who viewed it" is expressive conduct falling within the ambit of the First Amendment. *Id.* (quoting *Spence v. Washington*, 418 U.S. 405, 410–11 (1974)). So, too, is

conduct which falls within a traditionally-protected genre—such as music, paintings, and parades—expressive conduct, even if it does not convey a "narrow, succinctly articulable message." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group* 515 U.S. 557, 569 (1995). This is what protects the act of saluting a flag (or refusing to do so) (*West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 633–34 (1943)), wearing black armbands to protest war (*Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 505–506 (1969)), raising a "seditious" red flag (*Stromberg v. California*, 283 U.S. 359, 369 (1931)), burning an American flag (*Johnson*, 491 U.S. at 414), picketing or leafletting (*U.S. v. Grace*, 461 U.S. 171, 176 (1983)), and sit-ins (*Brown v. Louisiana*, 383 U.S. 131, 383 (1966)).

In evaluating expressive conduct, "context . . . is important, for the context may give meaning to" the symbolic expression, and "[c]ontext separates the physical activity of walking from the expressive conduct associated with a picket line or a parade." *Ft. Lauderdale Food Not Bombs v. Ft. Lauderdale*, 901 F.3d 1235, 1241 (11th Cir. 2018). In *Food Not Bombs*, a federal appellate court addressed a city ordinance restricting food sharing, which had been applied to a group that distributes food to protest military funding at the expense of hunger and poverty. *Id.* at 1238. The court found that the distribution of food was expressive conduct, explaining that the group "sets up tables and banners . . . and distributes literature at its events," which "distinguishes its sharing of food with the public from relatives or friends simply eating together in the park." *Id.* at 1242.

Here, and similarly, Crowl and YAL's distribution of "pot" brownies was tethered to its political expression. The students' distribution of the brownies was promoted by a sign conveying the subject and the students used the resulting interactions as an opportunity to explain their views. While it is possible that some who viewed the sign might not immediately grasp the political message, no reasonable person would believe that students were openly advertising the free distribution of baked goods containing illicit drugs.

ii. Police officers' enforcement of a nonexistent or unenforceable policy in response to objectionable views chills protected speech.

As the speech at issue was protected political expression and the policy cited by police is either nonexistent or unconstitutional, their response to the "free 'pot' brownies" event violated the students' First Amendment rights.

When "an official's act would chill or silence a person of ordinary firmness from future First Amendment activities," that act violates the First Amendment. *Mendocino Envtl. Ctr. v. Mendocino Cty.*, 192 F.3d 1283, 1300 (9th Cir. 1999); *see also Surita v. Hyde*, 665 F.3d 860, 878 (7th Cir. 2011) ("objective test" applies: "whether the alleged conduct . . . would likely deter a person of ordinary firmness from continuing to engage in protected activity."). This standard applies to police officers. "A retaliatory police action such as an arrest or search and seizure would chill a person of ordinary firmness from engaging in future First Amendment activity." *Ford v. City of Yakima*, 706 F.3d 1188, 1193 (9th Cir. 2013) (overruled on other grounds by *Nieves v. Bartlett*, No. 17-1174, 2019 U.S. LEXIS 3557, at *10 (May 28, 2019)); *see also, e.g.*,

Cruise-Gulyas v. Minard, 918 F.3d 494, 496–98 (6th Cir. 2019) (qualified immunity denied where a police officer stopped a driver for displaying middle finger, unlawfully seizing her in violation of the First and Fourth Amendments).

The response by WIU police officers to Crowl and YAL would unquestionably deter an ordinary student from engaging in future expressive activity. The officers stopped Crowl and the YAL students, required them to provide identification, and cited a policy which is either nonexistent (according to WIU) or unconstitutional under the First Amendment. In doing so, at least one officer cited his disagreement with the policy positions advocated by the students and asked them to remove the word "pot" from their sign. Further, that students have often engaged in flyering and expression in this area without police intervention indicates not only that regular expressive activity there is not disruptive, but also suggests that officers enforced the policy in this instance due to their subjective opposition to the students' views. Disparate treatment of a student organization based on its political expression violates the First Amendment. *See, e.g., Healy,* 484 U.S. at 187–88 (First Amendment violated where college denied recognition to proposed chapter of Students for a Democratic Society based, in part, on the college president's view that the group's "philosophies . . . were counter to the official policy of the college").

This is an unacceptable result at an institution of higher education. *See, e.g., Papish v. Bd of Curators of the Univ. 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.'"). It is particularly unacceptable at an institution that publicly abandoned its "free speech zone" policy over a decade ago—and, in so doing, proclaimed itself an institution that "represents the ideal of freedom of expression."

III. Conclusion

We trust that WIU's inconsistent policies are the result of websites or policies that have since fallen into disrepair. Even if the institution does not intend to restrict student expression, negligence in maintaining unconstitutional policies or in failing to adequately address constitutional infringements by employees not only imperils students' First Amendment rights, but exposes the institution to liability.[21]

FIRE would be pleased to work with WIU to address these policies, and any others that threaten the First Amendment rights of students or faculty. As Crowl has urged, addressing these constitutional issues will not only advance civil liberties, but may also burnish WIU's reputation.

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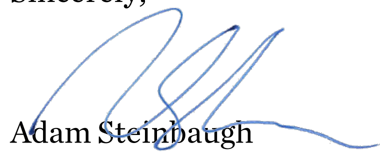
[21] Where officials exhibit "indifference to constitutional deprivations caused by" the institution's employees, that "acquiescence may be properly thought of as a . . . policy or custom that is actionable under § 1983." *Amnesty Am. v. Town of W. Hartford,* 361 F.3d 113, 126 (2d Cir. 2004) (cleaned up).

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

Encl.

Authorization and Waiver for Release of Personal Information

I, Dylan Crowl, born on 08/26/99, do hereby authorize Western Illinois University (the "Institution") to release to the Foundation for Individual Rights in Education ("FIRE") any and all information concerning my current status, disciplinary records, or other student records maintained by the Institution, including records which are otherwise protected from disclosure under the Family Educational Rights and Privacy Act of 1974. I further authorize the Institution to engage FIRE's staff members in a full discussion of all matters pertaining to my status as a student, disciplinary records, records maintained by the Institution, or my relationship with the Institution, and, in so doing, to fully disclose all relevant information. The purpose of this waiver is to provide information concerning a dispute in which I am involved.

I have reached or passed 18 years of age or I am attending an institution of postsecondary education.

In waiving such protections, I am complying with the instructions to specify the records that may be disclosed, state the purpose of the disclosure, and identify the party or class of parties to whom disclosure may be made, as provided by 34 CFR 99.30(b)(3) under the authority of 20 U.S.C. § 1232g(b)(2)(A).

This authorization and waiver does not extend to or authorize the release of any information or records to any entity or person other than the Foundation for Individual Rights in Education, and I understand that I may withdraw this authorization in writing at any time. I further understand that my execution of this waiver and release does not, on its own or in connection with any other communications or activity, serve to establish an attorney-client relationship with FIRE.

I also hereby consent that FIRE may disclose information obtained as a result of this authorization and waiver, but only the information that I authorize.

2019-Jun-12 02:07

Student's Signature

06/12/2019

Date