



November 4, 2019

Dr. Robert Wilmouth  
President, Rocky Mountain College  
1511 Poly Drive, Prescott Hall 204  
Billings, Montana 59102-1796

*Sent via Electronic Mail (bob.wilmouth@rocky.edu)*

Dear President Wilmouth:

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 threat to freedom of expression at Rocky Mountain College (RMC) posed by the college's rejection of displays and postings from campus groups, including RMC's chapter of Young Americans for Freedom (YAF), that express views on potentially controversial topics. Because of the promises it has made to its students, RMC must permit student groups to engage in speech on matters of public concern, even when controversial.

## **I. Statement of Facts**

The following is our understanding of the pertinent facts. We appreciate that RMC may have additional information to offer and invite you to share it with us. However, if the facts here are substantially accurate, RMC is actively violating the promises it has made to its students.

### **A. *RMC rejects YAF's display of crosses as "divisive."***

In both 2018 and 2019, RMC approved YAF's display of small American flags planted along campus walkways near the Student Union Building as a 9/11 memorial.

On August 18, 2019, Emily Kokot, the YAF-RMC chapter secretary and treasurer, e-mailed the Dean of Students, Brad Nason, to request permission to "get some crosses to put in the ground

(like we do with the flags for 9/11) to act as a memorial for abortion victims.”<sup>1</sup> Kokot explained, “It would essentially be the same as the 9/11 memorial but with crosses, and we would put up signs that explain what they are for and that our group put them up.”

On August 22, Nason replied:

I’m sorry Emily but that is not a program that would be allowed at RMC. The College has no objection to discourse and dialog about/around the prolife movement, but we draw the line at public displays of divisive topics. A physical “memorial for abortion victims” falls into that category. . . .

For the record, the President’s Cabinet recently rejected a similar request for an on-campus marketing campaign, that would have included what most would interpret as liberal messaging, around the topics of immigrant rights, climate change, science, and racism. We considered that program unnecessarily and inappropriately confrontational.<sup>2</sup>

Nason clarified that RMC would permit student groups to engage in “alternative programming, dialog, lecturers, etc.” but would not permit a public display.

Later that day, Kokot responded seeking clarification as to why public displays were censored more actively than other forms of speech.<sup>3</sup> Kokot wrote:

I also just wanted to point out that I have read through the Student Code of Conduct many times and it states that RMC supports students challenging each other to develop intellectually and ethically. It additionally states that RMC encourages students to consider and seek to understand different ideas and points of view. These statements are partially upheld in terms of allowing tabling and everything else you previously mentioned; however, they are not being fully upheld in terms of allowing all forms of free speech.

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<sup>1</sup> Email from Emily Kokot, Chapter Secretary and Treasurer, YAF-RMC, to Brad Nason, Dean of Students, RMC (Aug. 18, 2019, 1:09 PM) (on file with author).

<sup>2</sup> Email from Brad Nason, Dean of Students, RMC, to Emily Kokot, Chapter Secretary and Treasurer, YAF-RMC (Aug. 22, 2019, 11:59 AM) (on file with author).

<sup>3</sup> Email from Emily Kokot, Chapter Secretary and Treasurer, YAF-RMC, to Brad Nason, Dean of Students, RMC (Aug. 22, 2019, 6:16 PM) (on file with author).

Two days later, Nason responded to explain RMC's rationale:

If we allow a public display, we have effectively eliminated every student's ability to choose to engage or not engage with that issue. The pro-life/pro-choice debate is incredibly divisive and in the College [sic] view, a public display is confrontational. We believe the College community has a right to choose to either engage in a program or not. . . .

Secondarily, allowing public displays of issues implies direct or tacit endorsement of that particular issue by the College. . . . We believe that divisive topics such as the "Pro-life/Choice" debate require open and thoughtful discussion. Confrontational displays have a tendency to retard rather than foster thoughtful discourse.

In closing, I would simply add that RMC has a responsibility to create a safe, comfortable and respectful environment where students live and learn.<sup>4</sup>

On September 16, YAF-RMC Chair Rayna Laakso and Kokot met with Nason in person to discuss the issue, but did not reach any agreement. At that meeting, Nason again stated that RMC was prohibiting displays from liberal student groups as well as conservative groups.

***B. RMC rejects "Unborn Lives Matter" posters.***

On September 23, Nason told Kokot that YAF-RMC could not put up posters that say "Unborn Lives Matter." According to Kokot, she had been told previously that the posters would be permitted provided that they included YAF meeting times so that they could initiate dialogue on the topic. However, even with the meeting times stated, the posters were rejected. Nason said he did not allow a "liberal group" to put up a similar poster, but did not identify the group.

A copy of the rejected poster is enclosed.

**II. RMC's Ban on "Controversial" Public Displays Cannot Be Reconciled With the Rights It Promises Its Students**

***A. RMC promises students expressive rights.***

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<sup>4</sup> Email from Brad Nason, Dean of Students, RMC, to Emily Kokot, Chapter Secretary and Treasurer, YAF-RMC (Aug. 24, 2019, 12:01 PM) (on file with author).

As a private institution, RMC is not required to protect freedom of expression by virtue of the First Amendment. However, an institution that makes affirmative promises to grant freedom of expression to its students is morally and legally obligated to keep those promises, and can be contractually held to the commitments it makes. *See, e.g., Peretti v. Montana*, 464 F. Supp. 784, 786 (D. Mont. 1979) (there is “almost no dissent from the proposition that the relationship” between student and university “is contractual in nature,” based on publications, custom, and usages) (overturned on other grounds by *Montana v. Peretti*, 661 F.2d 756, 758 (9th Cir. 1981)).

In its handbooks and other public statements, RMC has repeatedly bound itself to provide students with freedom of speech and freedom of thought on campus. For example, the Student Code of Conduct states:

Rocky Mountain College is a community of scholars in which the ideals of freedom of inquiry, freedom of thought, freedom of expression, and freedom of the individual are sustained. However, the exercise and preservation of these freedoms and rights require a respect for the rights of all in the community to enjoy them to the same extent. It is clear that in a community of learning, willful disruption of the educational process, destruction of property, and interference with the orderly process of the College cannot be tolerated.<sup>5</sup>

As Kokot indicated, the Student Code of Conduct also calls on RMC students to “[c]hallenge each other to develop intellectually and ethically.”<sup>6</sup>

RMC’s current course catalog makes additional representations as to what students should reasonably expect from their institution.<sup>7</sup> For example, the school’s mission is to, among other things, “educate[] future leaders through liberal arts and professional programs that cultivate critical thinking, creative expression,” and “informed citizenship[.]”<sup>8</sup>

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<sup>5</sup> STUDENT CODE OF CONDUCT, ROCKY MOUNTAIN COLLEGE, <https://www.rocky.edu/campus-life/student-life-offices/student-conduct-policies/student-code-conduct> (last visited Nov. 4, 2019).

<sup>6</sup> *Id.*

<sup>7</sup> ROCKY MOUNTAIN COLLEGE, CATALOG 2019-2020, <https://www.rocky.edu/sites/default/files/catalog-1920.pdf> (last visited Nov. 4, 2019).

<sup>8</sup> *Id.* at 8.

In its description of its history, RMC states it has “a commitment to excellence and an openness to all points of view.”<sup>9</sup> It continues:

The early influence of three distinct religious denominations has resulted in a learning community distinguished by thoughtful inquiry, ethical decision-making, and active citizenship. All faith traditions are welcome at Rocky Mountain College, and the spirituality, convictions, and questions of all are respected.

This commitment is important not only to establishing the college’s relationship with its students, but to maintaining its status as an accredited institution of higher education. RMC is accredited by the Northwest Commission on Colleges and Universities.<sup>10</sup> The Commission requires its members to protect the freedom of thought and expression of students and faculty members in its accreditation standards:

2.A.28 Within the context of its mission, core themes, and values, the institution defines and actively promotes an environment that supports independent thought in the pursuit and dissemination of knowledge. It affirms the freedom of faculty, staff, administrators, and students to share their scholarship and reasoned conclusions with others. While the institution and individuals within the institution may hold to a particular personal, social, or religious philosophy, its constituencies are intellectually free to examine thought, reason, and perspectives of truth. Moreover, they allow others the freedom to do the same.<sup>11</sup>

Having promised its students free expression rights, RMC is contractually obligated to respect those rights. *See, e.g., McAdams v. Marquette Univ.*, 2018 WI 88, ¶184 (2018) (holding that private Catholic university breached its contract with a professor over a blog post because, by virtue of its adoption of the 1940 AAUP Statement of Principles on Academic Freedom, the blog post was “a contractually-disqualified basis for discipline”).

***B. RMC’s prohibition of controversial public displays violates the free expression promises it makes to its students.***

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<sup>9</sup> *Id.*

<sup>10</sup> ACCREDITATION, ROCKY MOUNTAIN COLLEGE, <https://www.rocky.edu/academics/accreditation> (last visited Nov. 4, 2019).

<sup>11</sup> NWCCU STANDARDS, NORTHWEST COMMISSION ON COLLEGES AND UNIVERSITIES, <https://www.nwccu.org/accreditation/standards-policies/standards/> (last visited Nov. 4, 2019).

The principle of freedom of speech exists precisely to protect controversial (or “divisive”) speech. *See, e.g., Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (“[Free speech] may indeed best serve its high purpose when it induces a condition of unrest . . . or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.”). Noncontroversial speech has no opponents and requires no protection. *Any* promise of freedom of expression inherently presupposes that the speech in question would be, in someone’s estimation, divisive or offensive.

Assuming that RMC does intend to protect the free expression of its students—as it promises—it must recognize that the proposed cross display falls squarely within that protection. Even if others were to find the display offensive or divisive, this possibility is not a basis on which an institution committed to freedom of expression may rely to justify suppression of speech.

Dean Nason’s view that a public display is “confrontational” fails to create an exception to RMC’s free speech promises. As the Supreme Court has observed, “the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense.” *Cohen v. California*, 403 U.S. 15, 21 (1971) (holding an anti-draft expletive on a jacket is protected by the First Amendment). That, after all, is just a rationalization for a “heckler’s veto”—silencing speech based on the actual or anticipated reaction to it. Even if there was an exception to freedom of expression that permitted banning “confrontational” speech, the description of the planned display as “confrontational” is not especially accurate. Generally speaking, confrontations with ankle-high inanimate lawn decorations tend to be brief, one-sided, and easily resolved.

Even if we assume that a promise of free expression somehow did not reach public art displays (which it does), the subsequent censorship of the “Unborn Lives Matter” posters, which included a meeting time, represents a separate and distinct form of censorship. Nason’s email singled out displays as an inappropriate way of raising the abortion issue because the debate “require[s] open and thoughtful discussion.”<sup>12</sup> But RMC then prohibited YAF-RMC from advertising a time and place to have an “open and thoughtful discussion.” If students are encouraged to “choose” to engage in the topic, but cannot raise the topic in a posting to announce their choice, then precisely how, where, and when do the “open and thoughtful discussions” take place?

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<sup>12</sup> Email from Brad Nason, Dean of Students, RMC, to Emily Kokot, Chapter Secretary and Treasurer, YAF-RMC (Aug. 24, 2019, 12:01 PM) (on file with author).

RMC also cannot fulfill its promise of free expression by censoring groups on multiple sides of controversial debates. While that may illustrate that the decision is not rooted in any personal hostility to YAF-RMC's viewpoint, two instances of censorship are not better than one. RMC cannot uphold its promise of free expression by listing all of the other students it has censored any more than a student accused of cheating could justify her actions by listing all the other tests she's cheated on.

### **III. Conclusion**

RMC makes commendable promises of free expression to its students and, in some cases, has lived up to those promises. But it must continue to do so. RMC must affirm that YAF-RMC (and other student groups that have sought or will seek similar permission) may engage in on-campus displays and postings on matters of controversy. Dialogue and understanding are not the opposite of controversial campus speech; in many cases, they are the result.

We request receipt of a response to this letter no later than the close of business on Friday, November 18, 2019.

Sincerely,



Adam Goldstein  
Program Officer, Individual Rights Defense Program

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