FIRE
Foundation for Individual Rights in Education

November 12, 2019
President Marvin Duane Nellis
Ohio University
Office of the President
Cutler Hall 108
Athens, Ohio 45701

Sent via U.S. Mail and Electronic Mail (president@ohio.edu)

Dear President Nellis:

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 and freedom of association at Ohio University (OU) posed by cease and desist letters issued to several student groups accused of hazing. By restricting these groups from meeting in any capacity or engaging in communication through social media platforms, OU has exceeded the lawful scope of its authority under the First Amendment. We call upon OU to rescind these restrictions immediately.

I. OU Issued Cease and Desist Letter to Numerous Student Groups

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.

Between September 30 and October 17, 2019, Assistant Dean of Students and Director of Community Standards and Student Responsibility Taylor J. Tackett emailed cease and desist letters to the student leaders of the following OU student groups ("Groups"):

- Acacia Fraternity
- Alpha Epsilon Pi Fraternity
- Beta Theta Pi Fraternity
- Delta Tau Delta Fraternity
- Lambda Chi Alpha Fraternity
- Phi Kappa Psi Fraternity

- Sigma Chi Fraternity
- Theta Chi Fraternity
- Beta Theta Pi Fraternity
- Delta Zeta Sorority
- Chi Omega Sorority
- Pi Beta Phi Sorority
- Zeta Phi Beta Sorority
- Ohio University Men's Rugby Team[1]

Tackett accused the Groups of engaging in conduct that put the "health and safety of your members at risk and is not in compliance with the behavioral expectations set out in the Student Code of Conduct."[2] Tacket directed the Groups to "immediately cease and desist all organizational activities," and imposed the following restrictions:

> The conditions of this directive mean that the group is not to meet in any capacity, officially or unofficially. This includes organizational meetings, meetings of the executive board, organizational programming, social events, philanthropic events, and any trip or travel. This also includes communication with and among the group via any social media platform or application. To reiterate, I expect there to be no other communication with your members, unless it is pre-approved by me.

The letter informed the Groups that OU has initiated an investigation into their alleged misconduct, and that a violation of these restrictions would be considered a violation of the OU Student Code of Conduct.

On or about October 18, the OU administration sent a "Frequently Asked Questions" letter

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[1] Conor Morris, *OU posts statuses of suspended fraternity and other groups online*, ATHENS NEWS (updated Oct. 17, 2019), https://www.athensnews.com/news/campus/ou-posts-statuses-of-suspended-fraternity-and-other-groups-online/article_1a377e6e-f040-11e9-a349-f77b2be00490.html; Conor Morris, *Men's rugby club, two more fraternity chapters at Ohio University under investigation over hazing allegations*, COLUMBUS DISPATCH (updated Oct. 18, 2019), https://www.dispatch.com/news/20191017/mens-rugby-club-two-more-fraternity-chapters-at-ohio-university-under-investigation-over-hazing-allegations; Sarah Brookbank, *Ohio University suspends sororities, professional fraternity after more hazing allegations*, CINCINNATI ENQUIRER (Oct. 10, 2019), https://www.cincinnati.com/story/news/2019/10/10/ohio-university-suspends-sororities-after-more-hazing-allegations/3928986002.

[2] *See, e.g.*, Letter from Taylor J. Tackett, OU Assistant Dean of Students and Director of Community Standards and Student Responsibility, to Colin Dedrick, OU Acacia Chapter President (Sept. 30, 2019) (on file with author); *see also, e.g.*, Letter from Taylor J. Tackett, OU Assistant Dean of Students and Director of Community Standards and Student Responsibility, to Molly Matejka, OU Pi Beta Phi Chapter President (Sept. 9, 2019) (on file with author).

("FAQ") to all the Groups except the Rugby Team, elaborating on some of the restrictions.[3] The FAQ clarified that students may not "congregate at their house" and that "[o]nly those members living in the chapter facility may continue to reside in the house." The FAQ also explained that students are allowed to "communicate all the letters and information provided to you by the University (Office of Sorority and Fraternity Life, Office of Community Standards and Student Responsibility, etc.)" and "communicate with your friends on a 1:1 basis but should reduce conversations to personal topics as opposed to sorority/fraternity operations and updates."

Regarding what constitutes a chapter event, the FAQ states:

> Unfortunately, there is no magic number. We need you to use your best judgement. If it looks like a chapter event and people could associate it with your organization, then it probably is a chapter event. It would be best to refrain from engaging in it.

The FAQ additionally clarified that these organizations are prohibited from "holding new member events, council or chapter meetings, chapter events such as socials, formals or mixers, philanthropy, retreats, intramurals, or organized participation in homecoming."

Around the end of October, OU modified or lifted some of the restrictions with respect to several of the Groups.[4] However, as of the date of this letter, a number of the Groups remain subject to the bulk of the restrictions detailed in the cease and desist letter and the FAQ.

II. OU's Restrictions on the Groups Cannot be Reconciled with OU's First Amendment Obligations

While OU may impose temporary restrictions on student groups accused of violating its rules, those rules must be consistent with OU's obligations as a state institution bound by the United States Constitution. Under the First Amendment, the university may not restrict its students' freedom of association or general right to communicate via social media in the absence of a compelling state interest, and may only do so where the regulation is narrowly tailored to effectuate that interest. OU's regulations do not survive this First Amendment test.

A. OU's restrictions on meetings violate the Groups' freedom of association.

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[3] OHIO UNIVERSITY, Fraternity and Sorority Life, *Frequently Asked Questions* (Oct. 18. 2019) (on file with author),

[4] *Ohio University lifts, modifies punishments for majority of suspended fraternities*, 10TV NEWS (updated Oct. 25, 2019), https://www.10tv.com/article/ohio-university-lifts-modifies-punishments-majority-suspended-fraternities-2019-oct; Letter from Taylor J. Tackett, OU Assistant Dean of Students and Director of Community Standards and Student Responsibility, to Molly Matejka, OU Pi Beta Phi Chapter President (Oct. 30, 2019) (on file with author) (lifting restrictions on OU's Pi Beta Phi Chapter).

It has long been settled law that the First Amendment is fully binding on public colleges like OU. *Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) ("[O]ur 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 citations omitted).

The First Amendment guarantees freedom of association, which protects the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984); *see also, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 888 (1982) ("[T]he First Amendment restricts the ability of the State to impose liability on an individual solely because of his association with another.")

The right to association extends to students enrolled in public universities, protecting their right to form student groups, such as Greek letter organizations and other social organizations. Accordingly, when a public university burdens the ability of a student organization to engage in this kind of expressive activity, the burden must withstand First Amendment scrutiny. *Healy*, 408 U.S. at 181*; see also, e.g.*, *Iota Xi Chapter v. Patterson*, 566 F.3d 138, 146 (4th Cir. 2009) (analyzing state college fraternity's freedom of association claims). Government rules that restrict this right "are subject to strict scrutiny" and are only upheld "if they are narrowly tailored to serve a compelling state interest." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008) (internal quotations omitted).

Although OU's restrictions on the Groups were imposed in the context of an investigation into hazing, courts have analyzed restrictions on student groups' associational rights regardless of the origin of the restriction, whether it be a university policy (*Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 139–140 (2d Cir. 2007)), a university president's decision to refuse recognition to a student group (*Healy*, 408 U.S. at 174), a university's directive banning student group social functions (*Gay Students Org. of Univ. of N.H. v. Bonner*, 509 F.2d 652, 654 (1st Cir. 1974)), or university discipline for student group misconduct (*Iota Xi Chapter*, 566 F.3d 138 at 141).

In *Chi Iota Colony*, the United States Court of Appeals for the Second Circuit put forth the prevailing standard when analyzing the associational freedoms of student social groups at state universities:

> To determine whether a governmental rule unconstitutionally infringes on an associational freedom, courts balance the strength of the associational interest in resisting governmental interference with the state's justification for the interference. This will require an assessment of: (1) the strength of the associational interests asserted and their importance to the plaintiff; (2) the

> degree to which the rule interferes with those interests; (3) the public interests or policies served by the rule imposed; and (4) the tailoring of the rule to effectuate those interests or policies. The more important the associational interest asserted, and the more the challenged governmental rule burdens the associational freedom, the more persuasive must be the state's reasons for the intrusion, and the more precisely tailored the state's policy must be.

502 F.3d at 143.

Applying this assessment to OU's restrictions, it is clear that the university's prohibitions burden the Groups' associational freedoms and cannot withstand constitutional scrutiny.

i. The Groups have a strong interest in their associational freedoms.

The Groups' interest in their associational freedoms as student social organizations is strong. Although social groups generally have weaker associational interests than expressive groups, *compare Gay Students*, 509 F.2d at 662 (student gay rights advocacy group has strong associational freedom interests) *with Chi Iota Colony*, 502 F.3d at 144–47 (college fraternity, as a purely social group, has a weaker associational freedom interest than expressive groups), courts have recognized social groups' associational interests. *Iota Xi*, 538 F. Supp. 2d at 923 (recognizing importance of fraternity bonds as an associational freedom under the First Amendment), *affirmed on other grounds*, 566 F.3d at 146.

Here, the Groups have established regular meeting times and activities, mission statements, and leadership structures, evidencing the importance of their association to its members. Additionally, several of the Greek letter organizations congregate at off-campus dwellings, conduct new member initiation programs, and practice the specific fraternal or sororal rituals of their national organizations. Indeed, it is the Groups' selective recruitment processes, unique meeting structures, and adherence to a specific set of principles and bylaws that distinguish these student organizations from one another, from other special interest organizations, and from the general student body. The Groups' interest in their ability to freely associate is at least as strong as the student groups recognized by the *Iota Xi Chapter* and *Chi Iota Colony* courts.

ii. OU's restrictions substantially interfere with the Groups' associational interests.

The burden on the Groups' associational freedoms is substantial. By prohibiting students from "meet[ing] in any capacity, officially or unofficially . . . include[ing] organizational meetings, meetings of the executive board, organizational programming, social events, philanthropic events, and any trip or travel," OU effectively bans any communication whatsoever among Group members and thereby threatens their existence as viable student organizations. Courts have correctly viewed less onerous restrictions as impermissibly

burdening associational freedoms. *Gay Students*, 509 F.2d at 659–60 ("Considering the important role that social events can play in individuals' efforts to associate to further their common beliefs, the prohibition of all social events must be taken to be a substantial abridgment of associational rights, even if assumed to be an indirect one."); *see also, e.g., NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 462–63 (1958) (compelling disclosure of membership lists was "a substantial restraint upon the exercise by [NAACP chapter] members of their right to freedom of association"). Thus, these sanctions can only be considered a serious and substantial form of inference with the Groups' associational freedoms.

iii. OU's restrictions are not narrowly tailored to further the university's compelling interest in addressing unlawful hazing.

There is no doubt that a university has a strong, if not compelling, interest in maintaining a safe learning environment free from substantial disruption and lawless action, including hazing. *See, e.g., Gay Students*, 509 F.2d at 663. Yet the university's strong interest in maintaining a safe learning environment is not directly advanced by OU's wide prohibitions on the Groups' expressive and associational rights, nor are the restrictions sufficiently tailored to achieve such an objective in a constitutional manner.

"In considering whether a government regulation is narrowly tailored, it is not enough that the regulation achieves its ostensible purpose, it must do so without unnecessarily infringing upon constitutionally protected rights." *Johnson v. City of Cincinnati*, 310 F.3d 484, 504 (6th Cir. 2002). In *Johnson*, the United States Court of Appeals for the Sixth Circuit—the decisions of which are binding on OU—held that a city ordinance excluding those convicted of drug offenses from "drug-exclusion zones" was not narrowly tailored to the city's interest in reducing drug abuse and crime. *Id.* The court found that the ordinance burdened far greater associational freedoms than necessary to achieve the city's interest. *Id.* at 504–05. Due to the city's failure to consider alternatives imposing lesser restrictions on an individual's right to freely travel on public thoroughfares, the court struck down the rule under the First Amendment. *Id.* at 505.

Here, as in *Johnson*, the restrictions burden far more constitutionally-protected conduct than necessary to achieve the university's proffered interest. A significant range of the restrictions imposed on the Groups restricts peaceful, lawful action wholly divorced from unlawful hazing.

For example, the ban on unofficial meetings, "social events[,] . . . and any trip or travel" restricts associational activities that have little to nothing to do with OU's interest protecting students. It is difficult to imagine how prohibiting all unofficial meetings—regardless of how brief, innocuous, or unrelated to pledging or university affairs—is at all tailored, much less narrowly tailored, to address the university's cognizable interests. Likewise, it strains credulity to see how OU's interests justify banning attendance at national or regional conferences nowhere near OU or even within the state of Ohio, hosting group dinners and library student sessions, participating in intermural sporting events, attending OU football games, and countless other social activities. Such wide-ranging restrictions cover a virtually

unlimited array of student activity bearing no reasonable relationship to maintaining a safe educational community.

While OU may impose restrictions on student groups accused of violating campus policy, such rules must be consistent with the First Amendment. The restrictions imposed here represent a substantial overstep of OU's authority under applicable legal precedent, and must be rescinded.

B. OU's prohibitions on the Groups' activities are unconstitutionally vague.

In addition to representing an impermissible burden on associational freedom, OU's prohibition on Groups' official and unofficial meetings is also an unconstitutionally vague restriction because it fails to adequately warn students about what activities are prohibited.

Government rules must "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly," or else they are unconstitutionally vague. *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972). "These concerns apply with particular force where the challenged statute affects First Amendment rights." *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1178 (E.D. Wis. 1991). State university rules that do not give "adequate warning of the conduct which is to be prohibited" fail to comport with due process. *Id.*; *see also Dambrot v. Central Mich. Univ.*, 55 F.3d 1177, 1184 (6th Cir. 1995) (finding university racial harassment policy prohibiting "negative" and "offensive" speech unconstitutionally vague and overbroad); *Booher v. Bd. of Regents, N. Kentucky Univ.*, No. 2:96-CV-135, 1998 WL 35867183, at *9 (E.D. Ky. July 22, 1998) (finding university sexual harassment policy unconstitutionally vague because subjective language failed to give students notice of what was prohibited).

The ban on official and unofficial meetings and trips, described in the cease and desist letter and FAQ, suffers from a lack of clarity as to what activities are prohibited. What threshold must be reached for a gathering of Group members to violate the ban? Is an incidental encounter with a fellow Group member (or the member of another Group) a meeting? Do the restrictions encompass students meeting for class, carpooling to campus, or dining together? Is there any geographical limit to the university's reach, or do the restrictions include international travel? Students cannot reasonably be expected to ascertain what social, informal, or educational encounter will subject them or their organization to disciplinary action when the university itself cannot identify the threshold, explaining only that "there is no magic number." The lack of answers to these questions renders the restrictions unconstitutionally vague.

C. OU's social media restrictions violate the First Amendment.

OU's ban on the Groups communicating over social media also significantly oversteps its constitutional authority.

i. Speech online is protected by the First Amendment.

As the Supreme Court has observed, "in the past there may have been difficulty in identifying the most important places . . . for the exchange of views," but the answer today is "clear": "It is cyberspace . . . and social media in particular." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017).[5] Thus, "social media is entitled to the same First Amendment protections as other forms of media." *Knight First Amendment Inst. at Columbia Univ. v. Trump*, No. 18-1691-cv, 2019 U.S. App. LEXIS 20265, at *21 (2d Cir. July 9, 2019).

Online freedom of expression is particularly important for college students, for whom these new communication tools are ubiquitous.[6] Accordingly, the confluence between higher education and social media, with their mutually-reinforcing interests in academic and expressive freedom, should be where speech protections are at their height.[7]

ii. OU may not require the Groups to seek prior approval by the university before communicating on social media.

OU's cease and desist letter bans all social media communications unless pre-approved by OU, and therefore amounts to a prior restraint on speech, "the most serious and the least tolerable infringement on" freedom of expression. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

A requirement that one inform authorities of their desire to speak, and obtain permission to do so, is "offensive—not only to the values protected by the First Amendment, but to the very notion of a free society." *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 165–66 (2002). A prior restraint's incompatibility with expressive rights is not diminished in the educational context—even in high schools, where administrators have a

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[5] In *Packingham*, the United States Supreme Court refused to uphold a state law banning registered sex offenders from accessing "commercial social networking Web site[s] where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages," holding that "to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights. It is unsettling to suggest that only a limited set of websites can be used even by persons who have completed their sentences." 137 S.Ct. at 1731, 1737. Considering that OU's blanket ban on social media platforms to communicate is arguably more restrictive than the law in *Packingham*, and the university's interests in policing student expression is markedly diminished in contrast to the important interests in warding against convicted sex offenders' use of the internet to contact children, OU's restrictions stand on significantly weaker constitutional footing than the law struck down by the *Packingham* Court.

[6] *See generally* Kenneth W. Moffet & Laurie L. Rice, *College Students and Online Political Expression During the 2016 Election*, SOC. SCI. COMPUT. REV. (July 2017), https://pdfs.semanticscholar.org/39d8/b5a149c01a754cb7fa57f1670963a62621e6.pdf.

[7] *See generally* Will Creeley & Greg Lukianoff, *New Media, Old Principles: Digital Communication and Free Speech on Campus*, 5 CHARLESTON L. REV. 333, 334 (2011), https://www.thefire.org/presentation/pdfs/e674c6c95dec401e5a62c9bbc409112c.pdf.

freer hand in regulating student expression. *See, e.g., Burch v. Barker*, 861 F.2d 1149, 1155–57 (9th Cir. 1988) (striking down mandatory prior review of student newspaper at a high school).

Mandating that adult students at a public university obtain prior approval for online speech is particularly troubling. The utility of online expression is that the exchange of ideas can take place in real time. A student organization might, for example, express its views on rapidly-unfolding events, on campus or off, or engage other campus organizations in discussion. If each post, tweet, or snap must be approved in advance by a campus bureaucrat, the immediacy of online discussion is impermissibly hobbled.

Moreover, a policy requiring speech to gain the approval of a college administrator will have a profound chilling effect. Even if all posts are ultimately approved, students will turn to self-censorship before risking the possibility that an administrator will deny their proposed post. The policy here is particularly breathtaking in that it does not set forth any objective criteria for approval, leaving administrators with unfettered, subjective discretion to deny or approve a post. The chilling effect from such a policy will be most pronounced with respect to students who might criticize OU's administration; to do so online, they would have to win OU's approval first. Finally, even if OU approves every post submitted for review, freedom of expression does not depend on "the mercy of the *noblesse oblige*" or a promise to use such a power responsibly. *U.S. v. Stevens*, 559 U.S. 460, 480 (2010).

III. Conclusion

OU must rescind its restrictions on the Groups' ability to meet in person and communicate over social media to meet its obligations under the First Amendment. Additionally, the university must make clear that it will not impose such unconstitutionally restrictive measures on any other student organization.

We request receipt of a response to this letter no later than the close of business on November 22.

Sincerely,

Zachary Greenberg
Program Officer, Individual Rights Defense Program

Cc:
Taylor J. Tackett, Assistant Dean of Students and Director of Community Standards and Student Responsibility

Jenny Hall-Jones, Senior Associate Vice President for Student Affairs and Dean of Students
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