



January 23, 2020

Larry Y. Chan
Office of General Counsel
Wright State University
282 University Hall
3640 Colonel Glenn Highway
Dayton, Ohio 45435-0001

Sent via U.S. Mail and Electronic Mail (larry.chan@wright.edu)

Dear Mr. Chan:

As you may recall from prior correspondence, 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 freedom of expression at Wright State University ("WSU"). Specifically, WSU maintains social media guidelines that discriminate based upon viewpoint by restricting language that it deems to be, among other things, "propaganda," "foul," "trolling," "offensive," or "inflammatory." FIRE has reviewed WSU's implementation of these guidelines and found that WSU has engaged in viewpoint discrimination—most egregiously by censoring students and faculty who supported a January 2019 faculty strike by the WSU branch of the American Association of University Professors ("AAUP-WSU"), which has now been resolved. We write today on the anniversary of the faculty strike to bring public attention to WSU's censorship and request that WSU rescind its unconstitutional social media guidelines.

I. WSU's Facebook Page Invites Commentary from Students, Faculty, and the Public

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.

WSU maintains a Facebook page, which it has described as “intended to be a positive, welcoming community for Wright State-related news, events, and general discussions.”¹ Over 35,000 people “like” or “follow” the page.² WSU can publish posts, and Facebook users can add comments to the interactive space below each post. Facebook also allows the administrator of a page to manually hide individual comments.³ WSU currently articulates its policy on deleting posts and blocking users under its “Moderation Guidelines” on the “About Wright State University” section of WSU’s Facebook page as follows:⁴

Reminder >> In order to keep this Facebook page a welcoming and peaceful space for our community, the university reserves the right to delete the following, or to block users who post the following:

- * Advertising, spam, and other solicitations not related to [WSU]
- * Foul or vulgar language or images
- * Personal attacks
- * Erroneous information
- * Propaganda
- * Anything perceived to be trolling, racist, sexist, or otherwise intended to be offensive or inflammatory
- * Duplicate or repetitive posts/comments
- * Off-topic posts and comments not related to the original post
- * Posts with personal information, including personal phone numbers, UID’s, or other sensitive information

The decisions to delete content and/or ban users are made at the sole discretion of the acting page admin.

Similar versions of this policy have been posted on WSU’s Facebook page since 2013.⁵ As the post states, WSU imposes these restrictions in order to ensure a “welcoming and peaceful space for our community.” Despite this stated purpose, WSU has used its unfettered

¹ Wright State Univ., FACEBOOK (June 24, 2014), <https://www.facebook.com/WrightStateUniversity/posts/10152263543897736>.

² Wright State Univ., *Community*, FACEBOOK, https://www.facebook.com/pg/WrightStateUniversity/community/?ref=page_internal (last visited July 26, 2019).

³ A hidden or deleted comment cannot be seen by Facebook users, but users can see how many comments were posted. For example, the January 14, 2019 post indicates that there are “26 comments,” but none can be seen.

⁴ Wright State Univ., *About Wright State University*, FACEBOOK (Nov. 7, 2017), <https://www.facebook.com/notes/wright-state-university/about-wright-state-university/10155108211657736>.

⁵ See, e.g., Wright State Univ., FACEBOOK (Aug. 7, 2013, 3:46 PM), <https://www.facebook.com/WrightStateUniversity/posts/10151615674682736>.

discretion under these “guidelines” to delete posts in order to censor speech critical of the university.

On February 7, 2019, FIRE issued a public records request to WSU that sought HTML source code for particular posts relating to the AAUP-WSU strike. In reviewing WSU’s activities in the hundreds of pages of source code that we received, FIRE discovered that WSU censored posts during the 2019 AAUP-WSU faculty strike that were unfavorable to WSU. For example, one comment permitted to remain visible thanked WSU for its “neutral reporting” about the strike and explained that “most of [us] are uncomfortably caught in the middle.”⁶ The next reply was hidden: “How can you call this neutral reporting when they hide comments that do not support their narrative?”⁷

On another occasion, WSU removed comments disclosing the \$425,000 salary of (and \$260,000 in benefits for) WSU’s president,⁸ but WSU did not delete a comment from a user who admonished the striking professors to “[q]uit complaining and get back to work” because that user “looked at the [professors’] health insurance and all things considered, it doesn’t look that shabby for this day and age.”⁹ Moreover, one post shared that WSU’s trustees were “ask[ing] the AAUP-WSU negotiating team to put the contract offer to a vote,” characterizing the offer as involving “significant concessions to union demands.”¹⁰ The comments thread following the post is stripped of almost every negative comment.¹¹ The visible comments are largely neutral (15), with some negative comments (4), and a number of comments supporting the administration or its proposal (3). While a few neutral comments are hidden (4), a stunning number of negative comments—82—are hidden. No positive comments are hidden.

Finally, and perhaps most brazenly, WSU censored Dr. Noeleen McIlvenna, who is now the President of the AAUP-WSU, on multiple occasions. On one occasion, WSU hid the following post by Dr. McIlvenna: “All the reporting about salaries is the usual admin spin--- because this is not a strike for more pay. ‘Workload’ is about teaching. Teaching more students so each gets less individual attention.”¹² On another occasion, WSU hid a post that invited users to visit the AAUP-WSU’s Facebook page to learn about why the union decided to strike.¹³ Indeed, Dr. McIlvenna noticed that WSU was actively hiding posts that appeared to support the union,

⁶ Records produced by Wright State University at p. 405.

⁷ *Id.*

⁸ *See, e.g.*, Records produced by Wright State University at p. 397. This information is available on WSU’s website. Max Filby, *Bonus potential for new WSU president part of growing trend*, DAYTON DAILY NEWS, Mar. 9, 2017, <https://www.daytondailynews.com/news/bonus-potential-for-new-wsu-president-part-growing-trend/j606M0LdPETqPgRI2X6dXJ>, available at <https://www.wright.edu/retirees-association/news/article/ddn-bonus-potential-for-new-wsu-president-part-of-growing-trend>.

⁹ Records produced by Wright State University at p. 383.

¹⁰ Records produced by Wright State University at p. 190.

¹¹ *Id.* at pp. 190–228.

¹² Records produced by Wright State University at p. 407.

¹³ Records produced by Wright State University at p. 408.

commenting that “58 comments are shown out of 154. Tells you all you need to know about this social media team’s Admin propaganda.”¹⁴ WSU hid this comment as well.

The examples above are representative of the hundreds of comments that WSU hid throughout the strike. Although WSU may point to some critical comments that it did not hide, those are outliers. It is clear that WSU used its unrestricted discretion to hide comments that it perceived as critical of the university during the AAUP-WSU strike under the guise that these comments violated WSU’s “Moderation Guidelines.”

II. WSU’s Policy and Practice of Restricting Facebook Comments Violates the First Amendment

A. *WSU’s Facebook Page is a Public Forum Where Viewpoint Discrimination is Impermissible.*

The First Amendment is binding on public universities. *See Healy v. James*, 408 U.S. 169, 180 (1972). Moreover, the First Amendment applies to speech within physical forums and online forums. *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 237 (2d Cir. 2019) (“[S]ocial media is entitled to the same First Amendment protections as other forms of media.”); *see also Rodriguez v. Maricopa Cty. Cmty. Coll. Dist.*, 605 F.3d 703, 710 (9th Cir. 2009) (characterizing professor’s emails to email list maintained by public college as “pure speech; they were the effective equivalent of standing on a soap box in a campus quadrangle and speaking to all within earshot.”).

The comments sections of Facebook pages operated by government officials are public forums. In *Davison v. Randall*, for example, the Fourth Circuit held that “aspects of” a Facebook page “bear the hallmarks of a public forum,” as the comment section was compatible with expressive activity and had been opened by the defendant-official for public discourse. 912 F.3d 666, 682 (4th Cir. 2019). Specifically, the court found that the “interactive component” of the Facebook page consisted of the portion “in which the public can post comments, reply to posts,” and “like” comments and posts. *Id.* at 686–87. Although the court declined to reach the issue of whether the Facebook page amounted to a “traditional public forum or designated or limited public forum,” it held that the defendant-official’s act of blocking her constituent because of his critical views expressed on Facebook was unconstitutional because it was viewpoint discrimination, which is “prohibited in all forums.” *Id.* at 687–88 (citation omitted).

WSU’s Facebook page is a public forum. Like the Facebook page in *Davison*, which was run by a government official and invited users to engage in a dialogue, WSU posts content on its page and permits users to post comments, reply to posts, and like comments and posts. Moreover, WSU has intentionally designated these interactive components as a public forum by instituting a policy to further “general discussions” about news and events concerning the

¹⁴ *Id.*

university community. Because WSU has administrative control of its Facebook page and invites the public to comment on its content, it is a public forum subject to the restrictions of the First Amendment.

As the *Davison* court notes, the First Amendment forbids suppressing speech based on the viewpoint expressed in any government forum. *Id.* “Discrimination against speech because of its message is presumed to be unconstitutional. . . . The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.” *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 829–830 (1995); *see also Rodriguez*, 605 F.3d at 710 (even assuming that public college’s “email list and servers were limited or nonpublic forums . . . state actors may not suppress speech because of its point of view.”) Thus, as *Davison* held, government officials may not suppress disfavored views when moderating public commentary on social media.

WSU engages in viewpoint discrimination in moderating its Facebook page. Viewpoint bias is built into the text of its Moderation Guidelines—which include categories prohibiting disfavored viewpoints—and evident in WSU’s record of hiding comments critical of university actions.

B. WSU’s “guidelines” discriminate on the basis of viewpoint.

Government restrictions on speech based upon subjective terms require administrators to engage in viewpoint discrimination. The Supreme Court recently provided guidance on this topic in *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019), and *Matal v. Tam*, 137 S. Ct. 1744 (2017). In *Iancu*, the plaintiff challenged a federal prohibition on registering trademarks that “[c]onsist[] of or comprise[] immoral[] or scandalous matter.” 139 S. Ct. at 2298. After the plaintiff’s trademark was denied registration by the U.S. Patent and Trademark Office, he challenged the prohibition on immoral or scandalous trademarks on grounds that these restrictions demonstrated viewpoint bias on their face. The Court agreed, reasoning that an official who denies a trademark because it is “immoral or scandalous” must engage in viewpoint discrimination because those terms require a government official to decide what is “immoral” or “scandalous.” *Id.* at 2299. As the Court explained, these definitions inherently require moral judgments because officials must distinguish “between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation. The statute favors the former, and disfavors the latter.” *Id.* at 2300.

Two years earlier, in *Matal*, the Court similarly found that a prohibition on registering trademarks that “‘disparage’ any ‘person[], living or dead’” constituted viewpoint discrimination because it “denies registration to any mark that is offensive to a substantial percentage of the members of any group.” 137 S. Ct. at 1748. As the Court explained, “[t]hat is viewpoint discrimination in the sense relevant here: Giving offense is a viewpoint.” *Id.*

WSU’s Moderation Guidelines include a number of restrictions on public Facebook comments that similarly require administrators to engage in viewpoint discrimination, such as prohibitions on language deemed to be “propaganda,” “foul,” “trolling,” “offensive,” or “inflammatory.” Like the prohibitions on registering trademarks that “disparage” a person or are “immoral or scandalous,” WSU’s restrictions require administrators to make subjective judgments to determine whether language may be prohibited. When making this determination, administrators must necessarily ask themselves whether the language in question is “aligned with conventional moral standards . . . [or] hostile to them.” *Id.* at 2300. Like the statute in *Iancu* that unconstitutionally favored trademarks that were “aligned with conventional moral standards,” WSU’s guidelines require administrators to engage in viewpoint discrimination by favoring the non-offensive and disfavoring the offensive, or even merely non-mainstream. How can WSU decide what is “propaganda,” for example, without defining the acceptable body of ideas, opinions, or information that may be propagated on its Facebook page? Because WSU’s restrictions are undefined and require a moral judgment, they are facially unconstitutional.

In addition to being facially unconstitutional, WSU’s implementation of its Facebook restrictions clearly shows that the school has been engaging in blatant viewpoint discrimination in moderating comments on its page.

C. WSU violated the First Amendment by removing posts pursuant to its “guidelines.”

As noted above, WSU engaged in viewpoint discrimination during the 2019 faculty strike by hiding comments that criticized WSU or supported the union. WSU’s hiding of comments created a skewed debate—or at least the appearance of one. The comments left visible by the university on its Facebook page are predominantly neutral or supportive of the administration. The resulting, visible conversation was a lopsided portrayal of what had actually been posted; while the university conceded that the strike had its supporters, the supporters’ ability to reach the public—and the media¹⁵—was burdened, while the strike’s detractors were amplified. This is the textbook definition of viewpoint discrimination forbidden by the Constitution. *Knight*, 928 F.3d at 238 n.8 (government actors are “not permitted to ‘amplify’ favored speech by banning *or burdening* viewpoints with which it disagrees.”) (emphasis added). Because WSU selectively hid comments that criticized the university or supported the union, WSU violated the First Amendment.

III. Conclusion

Nothing in the law requires a public university to set up a Facebook page, but the law does impose obligations when public institutions choose to do so. Government actors who seek to

¹⁵ Journalists looked to Facebook posts in reporting on the strike. *See, e.g.*, Emma Pettit, *‘Talking is Over’: Hundreds of Professors Strike at Wright State U.*, CHRON. OF HIGHER ED., Jan. 22, 2019, <https://www.chronicle.com/article/Talking-Is-Over-/245528>.

influence public discourse by establishing a presence on social media cannot burden expression in a manner that would be unconstitutional offline.

Wright State University's creation of inherently vague social media "guidelines," and the implementation of those guidelines to restrict speech concerning a faculty union strike, each abridge the First Amendment. Accordingly, FIRE calls on WSU to rescind its guidelines, restore any deleted posts or comments, and publicly reaffirm that it will not undermine the First Amendment rights of its students, faculty members, and critics.

We request receipt of a response to this letter no later than the close of business on February 11, 2020.

Sincerely,

A handwritten signature in blue ink, appearing to read "Greg H Greubel".

Greg Harold Greubel
Staff Attorney, Stand Up For Speech Litigation Project

Cc:

Mark D. Anderson, Director of Marketing
Katie Halberg, Director of Social Media