



February 4, 2020

President Andrew Feinstein
University of Northern Colorado
Office of the President
Carter Hall 4000
Campus Box 59
Greeley, Colorado 80639

Sent via U.S. Mail and Electronic Mail (andrew.feinstein@unco.edu)

Dear President Feinstein:

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 the freedoms of expression and association at the University of Northern Colorado (UNC) posed by restrictions enacted against numerous fraternities. By restricting these student groups from conducting a wide range of associational activities, UNC has exceeded the lawful scope of its authority under the First Amendment. We call upon UNC to rescind these restrictions immediately.

I. **UNC Restricts Numerous Fraternities From Conducting an Array of Fraternal Activities**

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

On January 7, UNC Fraternity and Sorority Life Program Coordinator Lacey Staehs sent a letter to all fraternities in the UNC Interfraternity Council (IFC)¹ banning a range of specific activities of these student organizations (the “Fraternities”) for the spring 2020 semester.²

The prohibited activities include:

- IFC recruitment and initiation
- Greek Week and Greek Awards
- FSL/Chapter Intramurals
- Socials, parties, formal, and tailgating
- Brotherhoods³
- Alumni events (other than Founder’s Day)⁴

Staehs added that the Fraternities may partake in the following activities:

- Registered philanthropy and/or community services events⁵
- Greek Educations
- Council meetings
- Chapter meetings
- Spring Officer Retreat⁶

Staehs’s letter provides that UNC imposed these restrictions “[d]ue to the frequency and nature of the reports received by the Office of Institutional Equity and Inclusion (Title IX) and Office of Community Standards and Conflict Resolution (student conduct),” and because UNC “is concerned for the health and safety of the Fraternity and Sorority Life community, as well as others who interact with them.”⁷ Staehs’s letter also requested that the Fraternities “complete a Safety and Success Plan during the spring 2020 semester.”⁸

II. UNC’s Restrictions on the Fraternities Cannot Be Reconciled with UNC’s First Amendment Obligations

¹ The UNC IFC chapters are: Alpha Kappa Lambda, Delta Chi, Delta Sigma Phi, Kappa Sigma, Lambda Chi Alpha, Pi Kappa Alpha, and Pi Kappa Phi. UNIV. OF N. COLORADO, INTERFRATERNITY COUNCIL (updated Jan. 22, 2020), <https://www.unco.edu/fraternity-sorority/councils/interfraternity-council.aspx>.

² Letter from Lacey Staehs, UNC Fraternity and Sorority Life Program Coordinator, to UNC Pi Kappa Alpha Fraternity Chapter (Jan. 6, 2020) (on file with author).

³ This term was not defined by Staehs in her letter.

⁴ *Id.*

⁵ Staehs added: “Philanthropy events are limited to food functions at the chapter facility, tabling in the UC, and restaurant fundraisers. As an example, events like War of the Roses or Big Man on Campus are not permitted. I am happy to discuss your events with you to make sure they are allowed.” *Id.* “War of the Roses” and “Big Man on Campus” are a series of large-scale philanthropic events conducted by several UNC fraternities and sororities.

⁶ Staehs added: “The retreat must be local, an advisor must be present, an agenda with time/date/location must be submitted to FSL Program Coordinator, and the advisor must confirm in writing they are attending.” *Id.*

⁷ *Id.*

⁸ *Id.* Staehs’s letter does not provide an explanation of what this entails.

We appreciate that UNC has an interest in protecting student safety. However, that interest does not grant the authority to take any and every action, and university actions intended to advance that specific interest must be consistent with UNC's obligations as a state institution bound by the United States Constitution. Under the First Amendment, regulations burdening students' freedom of association are permissible only when narrowly tailored to effectuate a compelling interest. A number of UNC's restrictions here do not survive this test.

A. UNC is bound by the First Amendment.

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

B. UNC's restrictions on fraternal activities violate the Fraternities' freedom of association.

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 expressive activity, the limitation imposing that 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 associational rights “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 UNC's restrictions were imposed in response to student misconduct allegations, courts have analyzed restrictions on student groups' associational rights without consideration 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) ("*Gay Students Org.*")), 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 restrictions on associational freedoms of student social groups imposed by 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 UNC's restrictions, it is clear that the university's prohibitions burden the Fraternities' associational freedoms and cannot withstand constitutional scrutiny.

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

The Fraternities' 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 Org.*, 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 Chapter*, 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 Fraternities have established regular meeting times and activities, mission statements, and leadership structures, evidencing the importance of their association to their members. Additionally, several of the Greek letter organizations congregate at off-campus

dwellings, conduct new member initiation programs, and practice the specific fraternal rituals of their national organizations. The Fraternities' selective recruitment processes, unique meeting structures, and adherence to specific sets of principles and bylaws distinguish these student organizations from one another, from other special interest organizations, and from the general student body. The Fraternities' 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. UNC's restrictions substantially interfere with the Fraternities' associational interests.

The burden on the Fraternities' associational freedoms is substantial. By prohibiting the Fraternities from all activities involving "recruitment and initiation," "Greek Week and Greek Awards," "FSL / Chapter Intramurals," "Socials, parties, formal, and tailgating," "Brotherhoods," and "Alumni events," UNC bans a vast array of core fraternal functions and threatens the Fraternities' existence as viable student organizations.

Courts have correctly viewed less onerous restrictions as impermissibly burdening associational freedoms. *See, e.g., NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 462–63 (1958) (enforcement of a statute compelling disclosure of membership lists was "a substantial restraint upon the exercise by [NAACP chapter] members of their right to freedom of association"). For example, in *Gay Students Org.*, the court considered "the important role that social events can play in individuals' efforts to associate to further their common beliefs," concluding that the university's "prohibition of all social events must be taken to be a substantial abridgment of associational rights, even if assumed to be an indirect one." 509 F.2d at 659–60.

Accordingly, the restrictions imposed by UNC are a serious and substantial form of interference with the Fraternities' associational freedoms and may be justified only if they are narrowly tailored as required under the First Amendment.

iii. UNC's restrictions are not narrowly tailored to further the university's compelling interest in student safety.

There is no doubt that a university has a strong, if not compelling, interest in maintaining a safe learning environment free from substantial disruption or lawless action. *See, e.g., Gay Students Org.*, 509 F.2d at 663. Yet the university's interest in student safety is not directly advanced by UNC's severe prohibitions on the Fraternities' 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 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 less restrictive 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 Fraternities restricts peaceful, lawful action that is only tangentially related to—if not wholly divorced from—student safety concerns.

For example, the wholesale prohibition of “[s]ocials, parties, formal, and tailgating” restricts associational activities that have little to nothing to do with UNC’s interest in protecting students. It is difficult to imagine how this ban on a vast array of social events—regardless of how small, brief, innocuous, or unrelated to university affairs—is at all tailored, much less narrowly tailored, to address the university’s cognizable interests. Likewise, it strains credulity to see how UNC’s interests justify prohibiting alumni events nowhere near UNC or even within the state of Colorado, intramural sports presumably under the direction of UNC’s Intramural Sports program, and the host of activities falling within the nebulous category of “Brotherhoods.” Such wide-ranging restrictions cover a virtually unlimited scope of student activity bearing no reasonable relationship to maintaining a safe educational community.

The attenuated relationship between UNC’s interests and the restrictions here is further demonstrated by the specific activities UNC allows the Fraternities to conduct during the spring semester. Banning numerous social activities and all alumni events, but not Founders’ Day—one of the largest fraternity events of the year—advances UNC’s interest in student safety minimally, if at all. Further, UNC’s ban on “FSL / Chapter intramurals” such as laser tag, frisbee golf, and tennis,⁹ but not certain philanthropy and community services events, Greek educational events, council meetings, chapter meetings, and spring officer retreats appears to have no rational relationship to student safety concerns.

The restrictions imposed here represent a substantial overstep of UNC’s authority under applicable legal precedent, and must be rescinded.

iv. UNC cannot meet its burden of demonstrating that its restrictions, imposed without due process, advance student safety concerns.

Even assuming that UNC’s restrictions were narrowly tailored to advance cognizable safety concerns, the university’s proffered justification—that there has been an increase in reports of misconduct—falls short of the university’s burden to demonstrate that its regulations advance more than a theoretical harm. In short, UNC’s posture puts the cart before the horse: Mere

⁹ UNIV. OF N. COLORADO, INTRAMURAL SPORTS AT UNC (updated Oct. 30, 2019), <https://www.unco.edu/campus-recreation/intramural-sports> (listing intramural sports at UNC).

allegations alone are not sufficient to justify broad restrictions on whole classes of student organizations.

As a state entity bound by the Fourteenth Amendment to the Constitution of the United States of America, UNC must afford student groups fundamental due process before restricting their rights and privileges as recognized student organizations. *See, e.g., Iota Xi Chapter*, 538 F. Supp. 2d at 924–25, *aff'd on other grounds*, 566 F.3d at 149; *Sigma Chi Fraternity v. Regents of Univ. of Colo.*, 258 F. Supp. 515, 528 (D. Colo. 1966) (requiring university to provide fraternity with “adequate notice of opposing claims, reasonable opportunity to prepare and meet them in an orderly hearing adapted to the nature of the case and finally, a fair and impartial decision”); *Alpha Eta Chapter of Pi Kappa Alpha Fraternity v. Univ. of Fla.*, 982 So. 2d 55, 56–57 (Fla. Dist. Ct. App. 2008) (ordering university to reinstate fraternity due to numerous due process violations during disciplinary hearing).

Basic due process entails “notice and . . . a fair and impartial hearing” where “the parties must be given a fair opportunity to present their positions.” *Sigma Chi Fraternity*, 258 F. Supp. at 528; *e.g., Iota Xi Chapter*, 538 F. Supp. 2d at 924–25 (“In the university disciplinary setting, due process requires only that [students groups] be afforded a meaningful hearing. A meaningful hearing requires notice and a meaningful opportunity to be heard.”) (internal citations and quotations omitted), *affirmed on other grounds*, 566 F.3d at 149.

The restrictions UNC imposed upon the Fraternities—which UNC classifies as disciplinary sanctions under its Code of Student Conduct¹⁰—curtail the rights and privileges of these registered student organizations without any modicum of due process. UNC’s interest in student safety is ill-served by its failure to afford the Fraternities an opportunity to contest the misconduct allegations through its disciplinary process—a process designed to determine whether such accusations render a university response appropriate. By bypassing the disciplinary procedures UNC is required to provide prior to punishing the Fraternities, the university deprives itself of facts and information that can only aid its efforts to ensure a safe educational environment.

UNC and the Fraternities have a shared interest in upholding the Student Code of Conduct and creating a safe and secure learning environment. But this goal is best accomplished by working together to investigate and address threats to student safety. UNC can further this interest, and uphold its obligation to protect students’ rights, by rescinding its overbroad restrictions on the Fraternities.

¹⁰ Under “Sanctions for Misconduct” reserved for “violations of University standards by individuals or recognized student groups,” the UNC Code of Student Conduct lists: “Loss of Privileges—Denial of specified privileges for a designated period of time.” UNIV. OF N. COLORADO, CODE OF STUDENT CONDUCT (revised May 5, 2020), <https://www.unco.edu/dean-of-students/pdf/Student-Code-of-Conduct.pdf>.

III. UNC Must Rescind the Restrictions Imposed on the Fraternities

UNC must rescind its restrictions on fraternal activities 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 February 18.

Sincerely,

A handwritten signature in black ink, appearing to read "Zach", with a long, sweeping flourish extending to the right.

Zachary Greenberg
Program Officer, Individual Rights Defense Program

Cc:

Logan Reneau, Interfraternity Council President
Lacey Staehs, Fraternity and Sorority Life Program Coordinator
Gardiner Tucker, Dean of Students
Dan Satriana, Vice President and General Counsel