



February 13, 2020

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Sent via U.S. Mail and Electronic Mail (provost@indiana.edu)

Dear Provost Robel:

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 cancellation of the final day of the Indiana University-Bloomington's (IUB) annual "SexFest," co-sponsored and organized by a recognized student organization, the Sexual Health Advocacy Group (SHAG). The administration's unilateral cancellation of the student-organized event violates its responsibilities under the First Amendment. IUB must publicly reaffirm its commitment to the First Amendment and avoid future censorship of student-organized events.

I. Statement of Facts

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. However, if the facts here are substantially accurate, the cancellation of the final day of SexFest infringes upon students' First Amendment rights in contradiction with IUB's legal obligations.

Now in its fifth year, SexFest aims to “provid[e] information about and promot[e] safe sexual practice[.]”¹ The three-day event, organized by recognized student groups,² including SHAG,³ in conjunction with the Health Center,⁴ began February 4, and was slated to end February 6.

This year’s festival focused on BDSM⁵ and “kink,”⁶ “[o]ne of the topics most requested by students,” according to IUB spokesperson Chuck Carney.⁷ Planned events for this year’s SexFest included a “Kick-Off to Kink,” a “Kink Workshop,” and a “BDSM Safety Panel.”⁸

On February 6, IUB Student Government Student Body Congress member Matt Ahmann shared a video, apparently taken during the Kink Workshop, of a demonstration in which a man paddles a woman’s buttocks while saying, “You kind of start gauging where you’re at.”⁹ Both of the participants in the demonstration were from Bloomington Kink, an off-campus community group, and were not students. There is no indication that any of the participants did not consent to the activity.¹⁰ Conservative media outlets quickly picked up on Ahmann’s tweet and reported on SexFest.¹¹ The event also included displays of sex toys, contraception, and consent worksheets.¹²

Following this publicity, the university cancelled the final day of SexFest, when the BDSM Safety Panel was planned to take place.¹³ In justifying this decision, Carney indicated the

¹ Lauren Robel, *On SexFest20*, Provost and Executive Vice President Statements (Feb. 7, 2020), <https://provost.indiana.edu/statements/index.html>.

² *Id.*

³ The Sexual Health Advocacy Group at Indiana University, a recognized student organization, “aims to promote sex positive behaviors and attitudes among [IU] students through engaging events such as Cupcakes & Condoms at IU and Get Yourself Tested.” INDIANA UNIV. BEINVOLVED, *Sexual Health Advocacy Group at Indiana University*, https://beinvolved.indiana.edu/organization/shag_indianauniversity (last visited Feb. 11, 2020).

⁴ Claire Peters, *IU SexFest BDSM event canceled after videos posted to conservative websites*, INDIANA DAILY STUDENT, Feb. 9, 2020, <https://www.idsnews.com/article/2020/02/iu-sexfest-bdsm-event-canceled-after-videos-posted-to-conservative-websites>.

⁵ BDSM is an acronym for “bondage and discipline (B&D), dominance and submission (D&S), and sadism and masochism (S&M). *bdsm*, Dictionary.com, <https://www.dictionary.com/e/acronyms/bdsm> (last visited Feb. 11, 2020).

⁶ For an explainer on kink, see Ritch C. Savin-Williams, *What is Kink?*, PSYCHOLOGY TODAY, Jan. 22, 2019, <https://www.psychologytoday.com/us/blog/sex-sexuality-and-romance/201901/what-is-kink>.

⁷ Hank Berrien, *Indiana University Offers Sex Fest, Includes Woman Being Whipped*, THE DAILY WIRE, Feb. 6, 2020, <https://www.dailywire.com/news/indiana-university-offers-sex-fest-includes-woman-being-whipped>.

⁸ IU SexFest, 5th year! Join us! (Feb. 4, 2020), FACEBOOK, <https://www.facebook.com/iusexfest/photos/rpp.1481743031922589/3025742380855972/?type=3&theater>.

⁹ Matt Ahmann, TWITTER (Feb. 6, 2020, 1:03 PM), <https://twitter.com/realmattahmann/status/1225480218242113539>.

¹⁰ Peters, *supra* note 4.

¹¹ See, e.g., Blair Nelson, *Exclusive: Indiana U defends, then cancels, ‘Sex Fest’ featuring BDSM demos, ‘kink’ and ‘sex toys’*, CAMPUS REFORM, Feb. 6, 2020, 12 PM, <https://www.campusreform.org/?ID=14332>; Alana Mastrangelo, *Indiana University Hosts ‘Sex Fest’ Event Featuring BDSM Demonstration*, BREITBART, Feb. 7, 2020, <https://www.breitbart.com/tech/2020/02/07/indiana-university-hosts-sex-fest-event-featuring-bdsm-demonstration>; Berrien, *supra* note 7.

¹² Nelson, *supra* note 11.

¹³ Berrien, *supra* note 7.

university had “received credible information about a planned disruption,” and had chosen to cancel the event “in the interest of safety.”¹⁴ No information about the alleged planned disruption has been made public.

The university’s claim that it canceled the BDSM Safety Panel to preserve student safety contradicts your own official statement of February 7 in which you announced an investigation into the Kink Workshop and SexFest, calling the event “inappropriate, disturbing, and offensive” and explaining that “we” would not “have approved” the event “had anyone known the community group was planning it.”¹⁵ Your statement also committed the university to working “to exercise better oversight of outside groups participating in events held on our campus in the future.”¹⁶

II. IUB’s Cancellation of the Final Day of SexFest Defies the University’s Constitutional Obligations to Preserve Student Free Expression

It has long been settled law that the First Amendment is binding on public colleges like University of Indiana Bloomington. *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 DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008) (on public campuses, “free speech is of critical importance because it is the lifeblood of academic freedom”). Further, Supreme Court has repeatedly and consistently held that speech cannot be restricted simply because it offends others, on or off campus. *See, e.g., Papish v. Bd. of Curators of the Univ. of Mo.*, 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.’”).

A. *SexFest events are student expression protected by the First Amendment.*

The First Amendment “generally prevents government from proscribing speech . . . or even expressive conduct,” unless such speech falls within certain well-defined categories such as obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *United States v. Stevens*, 559 U.S. 460, 468–69 (2010). SexFest does not fall within any of these categories. Outside of these categories, “[c]ontent-based regulations are presumptively invalid.” *R.A.V.*, 505 U.S. at 382.

¹⁴ Greg Piper, *Students learn how to spank women at Indiana University-Bloomington*, COLLEGE FIX, Feb. 7, 2020, <https://www.thecollegefix.com/students-learn-how-to-spank-women-at-indiana-university-bloomington>.

¹⁵ Robel, *supra* note 1.

¹⁶ *Id.*

i. SexFest, including demonstrations, is expressive conduct.

Discussing sexual safety and demonstrating certain sexual safety concepts constitutes expressive conduct encompassed and protected by the First Amendment.

Freedom of expression “does not end at the spoken or written word.” *Texas v. Johnson*, 491 U.S. 397, 404 (1989). To the contrary, conduct which “intend[s] to convey a particularized message” that is likely to “be understood by those who view[] it[.]” such as demonstrations on sexual safety, is expressive conduct. While authorities may enforce content-neutral regulations that may incidentally impact expressive conduct, they cannot restrict the expressive conduct “because it has expressive elements.” *Id.* (emphasis in original). 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, 505–06 (1969); burning an American flag, *Johnson*, 491 U.S. at 414; and picketing or leafleting, *U.S. v. Grace*, 461 U.S. 171, 176 (1983). The First Amendment likewise protects a sex education teacher putting a condom on a banana, for example, or SHAG inviting Bloomington Kink to demonstrate how to paddle a consenting adult without causing accidental injury.

ii. SexFest does not meet the exacting legal standard for “obscenity.”

While SexFest events necessarily contemplate material of a sexual nature, they do not fall into the narrow category that is legal “obscenity.”

In order to fall within the “limited” scope of legal “obscenity,” which is devoid of First Amendment protection, the speech must meet the exacting three-prong *Miller* test: (1) The speech must, “taken as a whole, appeal to the prurient interest in sex;” (2) it must portray sexual conduct in a patently offensive way; and (3) when “taken as a whole,” it must “lack[] serious literary, artistic, political, or scientific value.” *Miller v. California*, 413 U.S. 15, 24 (1973). The *Miller* Court emphasized the narrow construction of this test, urging that speech must not be restricted “unless th[e] materials depict or describe patently offensive ‘hard core’ sexual conduct specifically defined by the regulating state law[.]” *Id.* at 27.

SexFest does not, taken as a whole, “appeal to the prurient interest in sex.” *Id.* at 24. Despite your personal admonitions, the subject matter of SexFest is also not “patently offensive” within the meaning of the *Miller* test. *Id.* This is buttressed by the long-settled principle that even “[n]ot all pornography is legally obscene.”¹⁷ As the United States Appellate Court for the Seventh Circuit—decisions of which are binding on IUB—has discussed, while “pornography

¹⁷ United States Attorney General’s Commission on Pornography, Final Report of the Attorney General’s Commission on Pornography, xii (1986), available at <https://archive.org/details/finalreportofatt00unit/mode/2up/search/legally+obscene>. The report goes on to explain that legal obscenity is limited “to ‘hard core’ material devoid of anything except the most explicit and offensive representations of sex[.]” further clarifying that “the most thoroughly explicit materials, overwhelmingly devoted to patently offensive and explicit representations and unmitigated by any significant amount of anything else, can be and are in fact determined to be legally obscene.” *Id.* at 18, 316.

and obscenity have sex in common[.]” but “‘pornography’ is not low value speech” that can be regulated, while obscenity is. *American Booksellers Ass’n v. Hudnut*, 771 F.2d 323, 331 (7th Cir. 1985).

Sex education, and the discussion of what does arouse people—including kinks and BDSM—does not amount to the “patently offensive ‘hard core’ sexual conduct” unprotected by the First Amendment. This is plainly illustrated by the fact that the paddling presentation at the Kink Workshop, which did not include nudity, is not as explicit as much commonly-available, legal pornography.

Further, no serious claim may be made that SexFest is *without* “literary, artistic, political, or scientific value,” as required under the *Miller* obscenity test. 413 U.S. at 24. This fact is, in a “deliberate choice” by the Supreme Court, not evaluated “in terms of contemporary community standards,” and does not require that members of the community accept the material as a serious contribution. *Pope v. Illinois*, 481 U.S. 497, 500 (1987). In other words, the relevant inquiry is not whether administrators or even an objecting subset of those on campus found SexFest offensive, but whether a reasonable person would find that SexFest, taken as a whole, is of *no* literary, political, or scientific value.

SexFest, however, includes many events weighing political, social, scientific, and cultural issues attendant with sex on college campuses. Students this year heard from scientists and health practitioners, had the chance to be tested for HIV, learned about contraception options, and discussed the recently politically-charged issue of sexual consent.¹⁸ For example, the “Kick-Off to Kink” event featured noted research scientist and sex educator Dr. Debby Herbenick and marriage and family therapist Dr. Lexx Brown-James discussing intimacy and communication. The “Kink Workshop,” which you declared offensive, included free HIV testing and information about consent and safe sex practices. Even the paddling demonstration was aimed at teaching safe techniques.

B. Expression does not lose First Amendment protection because it is subjectively offensive.

The principle of freedom of speech does not exist to protect only non-controversial expression. Rather, it exists precisely to protect speech that some or even most members of a community may find controversial or offensive.

The Supreme Court has made clear that sharing offensive ideas on campus is protected by the First Amendment. *See, Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 670 (1973). The freedom to offend some listeners is the same freedom to move others. As the Court observed in holding that burning the American flag was protected expression, the “bedrock principle underlying the First Amendment” is the notion that authorities “may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Texas v. Johnson*, 491 U.S. 397, 414 (1989). And in *Cohen v. California* (holding

¹⁸ IU SexFest, 5th year! Join us!, *supra* note 8.

that wearing a jacket reading “Fuck the Draft” was protected expression), the Court aptly observed that although “the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive” expression, that people will encounter offensive expression is “in truth [a] necessary side effect[] of the broader enduring values which the process of open debate permits us to achieve.” 403 U.S. 15, 24–25 (1971).

While your statement makes clear that you and IUB’s administration found SexFest, or at least elements of SexFest, subjectively offensive, this is not enough to strip student organizers of the First Amendment rights, and it is not a legal justification for cancellation of the event.

C. *Safety concerns presented by public anger cannot justify suppression of students’ First Amendment rights without effectuating a heckler’s veto.*

Indiana University Bloomington states that the final day of SexFest was canceled because of “credible information about a planned disruption” and its choice to cancel the event was “in the interest of safety.” Because “a heckler’s veto . . . will nearly always be susceptible to being reimagined and repackaged as a means for protecting the public, or the speaker himself, from actual impending harm,” authorities must not restrict the First Amendment rights of a speaker merely because of potential disruption or public backlash. *Bible Believers v. Wayne County*, 805 F.3d 228, 255 (6th Cir. 2015).

IUB, a public institution bound by the First Amendment, cannot cite a potential “disruption” as a justification to penalize SHAG or other students for their protected speech through SexFest. To do so would permit a heckler’s veto: If authorities can silence the speaker in deference to the reaction of his critics, “the law in effect acknowledges a veto power in hecklers who can, by being hostile enough, get [authorities] to silence any speaker of whom they do not approve.” *Bible Believers*, 805 F.3d at 234 n.1 (quoting HARRY KLAIVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* 140 (Ohio St. Univ. Press 1965)).

The heckler’s veto cannot be effectuated by institutions bound by the First Amendment, such as IUB. *See, e.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992) (speech cannot be burdened or punished “simply because it might offend a hostile mob” as “[l]isteners’ reaction to speech is not a content-neutral basis for regulation”). Where an institution encounters serious, credible threats to public safety, it must be transparent in addressing those threats, lest safety concerns lull the public into accepting censorship in the name of public safety. Neither IUB nor law enforcement has made any public showing of serious, credible threats necessitating SexFest’s cancellation.

Further, IUB’s argument that cancellation of the final day of SexFest was necessary to preserve public safety is undercut by your own subsequent public comments. Your statement that the event would not have been approved if IUB had known that Bloomington Kink was involved, combined with your characterization of the event as “inappropriate” and “offensive,” indicates that spokesperson Carney’s appeal to public safety was merely pretense for cancellation of an event IUB found to be in poor taste. To those ends, please find enclosed a

public records request seeking the “credible information about a planned disruption” and the efforts taken by the university to address that possibility.¹⁹

III. Conclusion

As an institution bound by the First Amendment, IUB must abstain from regulating student-sponsored events on the basis of their expressive content. SexFest remains a popular event offering serious political, social, and scientific commentary. That some or all of its offerings might deeply offend others—including campus administrators, some Twitter users, or voices in the national media—is not a sufficient basis to infringe upon the First Amendment rights of its students or student groups.

IUB must rectify this misstep by publicly reaffirming its commitment to upholding its First Amendment obligations and by avoiding similar censorial acts in the future.

We request receipt of a response to this letter no later than the close of business on February 27, 2020.

Sincerely,



Lindsay Rank

Program Officer, Individual Rights Defense Program

Cc:

Michael McRobbie, President, Indiana University, iupres@iu.edu

¹⁹ A records request was submitted through IU’s web form, and a courtesy copy is attached hereto.