



August 26, 2020

Dr. Waded Cruzado
Office of the President
Montana State University
P.O. Box 172420
Bozeman, Montana 59717-2420

Sent via Electronic Mail (president_cruzado@montana.edu)

Dear President Cruzado:

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 posed to freedom of expression and freedom of association at Montana State University (“MSU”) by a new university policy requiring student organizations to record and report the names of all attendees at any student events. While the university may understandably require organizations to take steps reasonably designed to address the COVID-19 pandemic, MSU’s policy—which requires student organizations to report attendee lists to administrators even in the absence of a suspected case of COVID-19—presents unnecessary risks to students’ First Amendment rights to speak and associate anonymously. We write to ask that MSU rescind the mandatory attendance reporting policy and choose better-tailored means to protect public health on campus.

I. MSU Adopts Overly-Restrictive Attendance Reporting Policy in Response to COVID-19

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.

On July 29, student organization leaders received an email from MSU Student Organizations Program Manager Randi Maiers informing them that, as part of MSU’s COVID-19 protocol, “[a]ll Clubs and Organizations are required to track attendance at events, including closed

meetings.”¹ The email explained that this mandatory attendance would be taken via two apps maintained by MSU, Campus Labs Event Check-In (“Campus Labs”) and Corq.² Under the policy, when hosting events, student organizations will need to register their events—including regular meetings—with the MSU Office of Student Engagement using the Campus Labs app.³ At the event, event organizers will scan student attendees’ “Event Passes,” generated on the Corq app.⁴

An FAQ document was later circulated to student organization leaders, explaining that, while the attendance records created using the Campus Labs and Corq applications will not be publicly available, the Office of Student Engagement (“OSE”) will have access to the records.⁵ This information will additionally be shared with the Gallatin County Health Department upon request.⁶

The FAQ does not disclose the existence of any policy limiting the purposes for which OSE may access the lists, nor does the FAQ indicate how long lists will be kept. To the contrary, the FAQ indicates that student organizers may “go back in the past event and download” attendee lists.

II. MSU’s Policy Infringes Students’ First Amendment Rights to Anonymously Speak and Associate

The right to anonymity in one’s expression and association is protected by the First Amendment. This includes the right to remain anonymous from government actors, such as employees of MSU’s Office of Student Engagement and other MSU administrators.

A. The First Amendment binds Montana State University.

It has long been settled law that the First Amendment is binding on public colleges like MSU. *See, e.g., Doe v. Univ. of Mich.*, 721 F.Supp. 852, 862–63 (E.D. Mich. 1989) (University of Michigan could not regulate “pure speech” through an “anti-discrimination policy which had the effect of prohibiting certain speech because it disagreed with ideas or messages sought to be conveyed”). As the Supreme Court explained, “the 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.” *Healy v. James*, 408 U.S. 169, 180 (1972). “Quite to the contrary, the vigilant protection of

¹ Email from Randi Maiers, Student Organizations Program Manager (July 29, 2020, 1:29 PM) (on file with author).

² *Id.*

³ *Mobile Event Pass & Creating Events*, Montana State U., <http://www.montana.edu/catsconnect/mobileeventpass.html> (last visited Aug. 25, 2020).

⁴ *Id.*

⁵ *Fall Semester Check-In Survey FAQ*, Montana State U. (on file with author).

⁶ *Id.*

constitutional freedoms is nowhere more vital than in the community of American schools.” *Id.* (cleaned up).

B. *The First Amendment protects the right to anonymity and against compelled disclosure of associations.*

The First Amendment protects not only the right to speak, but to do so anonymously. *Watchtower Bible & Tract Soc. of New York v. Village of Stratton*, 536 U.S. 150, 166–67 (2002) (striking down ordinance that, among other things, required canvassers to identify themselves to mayor’s office); *Justice for All v. Faulkner*, 410 F.3d 760, 764–65 (5th Cir. 2005) (striking down college policy requiring leaflets distributed on campus to identify their authors).

The Supreme Court explained that anonymous speakers may have a variety of motivations for maintaining their anonymity:

[A]n author generally is free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one’s privacy as possible.

McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 341–42 (1995). Anonymous communication, the Court explained, “is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.” *Id.* at 357.⁷ The roots of this tradition date back to colonial America, during which Thomas Paine, fearing prosecution for seditious libel against King George III, published “Common Sense” anonymously in 1776. *State v. North Dakota Educ. Ass’n*, 262 N.W.2d 731, 735 (N.D. 1978). In the same era, Federalists James Madison, Alexander Hamilton, and John Jay jointly published *The Federalist Papers* under the pseudonym “Publius,” and Anti-Federalists published competing pamphlets under pseudonyms such as “Brutus,” “Centinel,” and “The Federalist Farmer.” *Id.* at 344 n.6.

Also seen by the association of Federalists under the pseudonym “Publius” is our tradition of anonymous association, which is closely related to the right to anonymous and pseudonymous speech. The Supreme Court has, at various times, “recognized the vital relationship between freedom to associate and privacy in one’s association.” *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958). The right to privately and anonymously associate is essential because “compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as” clearer forms of censorship. *Id.* This concern is especially salient for political student organizations, such as the Marx Forum or the

⁷ See also *Talley v. California*, 362 U.S. 60, 64 (1960); *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965); *Tattered Cover v. City of Thornton*, 44 P.3d 1044, 1051 (Colo. 2002).

Young Americans for Liberty, that espouse viewpoints that others may find controversial.⁸ A university would doubtlessly abridge the First Amendment right to anonymity if it stationed staff members to identify the attendees of each event; it follows that drafting students to do so implicates these same First Amendment concerns.

Where government action—including action by state university administrators attempting to deal with a public health crisis—“collides with First Amendment rights,” the state must meet “strict scrutiny” or “exacting scrutiny.” *Tattered Cover*, 44 P.3d at 1056–57 (citing *In re Grand Jury Subpoena to Kramerbooks & Afterwords, Inc.*, 26 Med. L. Rptr. 1599 (D.D.C. 1998)). Specifically, the right to associational privacy “will yield only to a subordinating interest of the State that is compelling and then only if there is a substantial relation between the information sought and an overriding and compelling state interest.” *Brown v. Socialist Workers ’74 Campaign Comm.*, 459 U.S. 87, 91–92 (1982) (internal quotations, citations, and brackets omitted). In other words, under the doctrine of “strict scrutiny,” the government must employ “the least restrictive means” to achieve its interests, “not chill[ing] the exercise of fundamental expressive rights any more than absolutely necessary.” *Tattered Cover*, 44 P.3d at 1057–58 (citing *Buckley v. Valeo*, 424 U.S. 1, 68 (1976)).

As discussed below, while there is undoubtedly a compelling interest in protecting student health, that interest does not justify requiring students to *disclose* attendance records from all student organization-sponsored events, nor to maintain such records longer than necessary to meet the needs of contract-tracers. Consequently, this policy has no “substantial relation” to that interest, and is certainly not “the least restrictive means” for MSU to achieve its interests regarding COVID-19.

C. MSU’s events attendance recording policy bears insufficient relation to concerns with COVID-19.

The COVID-19 pandemic has created an unprecedented time in higher education, and, to be sure, colleges and universities may well be justified in taking steps to prevent and track the

⁸ Indeed, surveillance of meeting attendance could be a source of concern for students worried about violating the National Security Law recently imposed upon Hong Kong or China’s censorship laws if the student groups discussed topics like Hong Kong independence or political events related to China. This is not an unfounded concern. Faculty at schools like Princeton University and Amherst College are so concerned about students facing legal repercussions from discussions about China that they are working to anonymize their class contributions. Lucy Craymer, *China’s National-Security Law Reaches into Harvard, Princeton Classrooms*, WALL ST. J., Aug. 19, 2020, <https://www.wsj.com/articles/chinas-national-security-law-reaches-into-harvard-princeton-classrooms-11597829402>. And last year, some attendees at a campus event about Uighurs at Canada’s McMaster University filmed their fellow students’ attendance and reported it to the local Chinese consulate, sparking concerns that students could face consequences for their presence at the campus event. Lee Jeong-ho, *Beijing backs ‘patriotic actions’ of Chinese students who reported Uyghur activist in Canada*, SOUTH CHINA MORNING POST, Feb. 16, 2019, <https://www.scmp.com/news/china/diplomacy/article/2186446/beijing-backs-patriotic-actions-chinese-students-who-reported>.

spread of disease on campus. However, when these steps infringe upon student and faculty rights, they must bear *a substantial relation* to, and be the *least restrictive means* to achieve compelling public health goals.

Simply put, the current reporting requirement—unbound by any time limit related to COVID-19’s incubation or infectious periods, nor any disclosed limits on the purpose for which the records may be used—is not the least restrictive means to serve MSU’s purported goals of tracking the spread of COVID-19. The health department—and, by extension, MSU—has no need for attendance records from any and all events taking place on campus in order to cope with the current pandemic. Any number of student organization events are likely to occur at which all participants are healthy, and MSU has no need for attendance records from such events. To the extent that MSU can demonstrate a need for attendance records, it will certainly be a need only for records of events attended by a student later discovered to be positive for COVID-19. Thus, MSU must adopt a less restrictive policy that recognizes this distinction.

For example, MSU could instead require student organizations to maintain their own attendance records for a short period of time, only requiring remission to university officials or the health department if contact tracing efforts demonstrate a person positive for COVID-19 attended a specific event or meeting.⁹ This would satisfy MSU’s compelling interest in thorough contact tracing efforts to prevent further spread of disease while limiting the risk posed to students’ right to associational privacy up until the point of demonstrated need.

III. MSU Must Revise Its Mandatory Attendance Reporting Policy

Demonstrating the suspect nature of policies like MSU’s, jurisdictions across the country have rescinded or made voluntary similar over-intrusive policies aimed at promoting contact tracing efforts.¹⁰ For example, Washington State put into place a requirement that restaurants maintain a daily log of customers, including contact information, to support contact tracing.¹¹ Notably, the mandate required restaurants to retain these records, and only required them to be turned over to health officials when and if a patron tested positive for COVID-19.¹² However, the state quickly rescinded this requirement after civil liberties advocates raised concerns about its constitutionality.¹³ Similar regulations have been rescinded over constitutionality concerns in New Orleans, Austin, and Kansas City.¹⁴

⁹ We see no constitutional problem with health officials inquiring about events attended by COVID-19 positive individuals and those in close contact with them during contact tracing interviews.

¹⁰ Aaron Wise, *Is Contact Tracing Required at Restaurants? Laws Change by the Day*, RESTAURANT ENGINE, May 16, 2020, <https://restaurantengine.com/is-contact-tracing-required-at-restaurants-laws-change-by-the-day>.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* Washington has replaced the mandatory customer log mandate with a voluntary customer log system.

¹⁴ *Id.*

MSU's mandatory attendance reporting policy must similarly be rescinded and replaced with a protocol that is both substantially related to and the least restrictive means of promoting COVID-19 prevention and tracking on campus.

We request receipt of a response to this letter no later than the close of business on Tuesday, September 1, confirming that MSU will no longer require student organizations report event attendance to MSU or health department officials on an ongoing basis.

Sincerely,

A handwritten signature in black ink, appearing to read "Lindsey Rank". The signature is fluid and cursive, with the first name "Lindsey" written in a larger, more prominent script than the last name "Rank".

Lindsey Rank

Program Officer, Individual Rights Defense Program