



September 11, 2020

President Jonathan R. Alger
James Madison University
Office of the President
91 Alumnae Drive, Suite 208
Harrisonburg, Virginia 22807

Sent via Electronic Mail (president@jmu.edu)

Dear President Alger:

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 students' expressive rights at James Madison University (JMU) in light of the installation of surveillance cameras on the "Spirit Rock," a forum for freedom of expression, and JMU's promise to implement new restrictions on use of the Rock. The proposed restrictions would exceed the lawful scope of JMU's authority under the First Amendment, and the use of a surveillance camera presently threatens the ability of students to exercise their First Amendment right to engage in anonymous expression.

I. JMU Seeks to Impose Restrictions on Use of Its Spirit Rock

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

Since 2010, the JMU Spirit Rock has served "as an outlet for free expression" for the JMU community.¹ Located on the Festival Lawn—an open, outdoor area of campus—the Rock is "frequently painted in loud and vibrant colors and is a place where people and organizations

¹ James Madison Univ., *University statement on Spirit Rock*, JAMES MADISON UNIV. NEWS (updated Jan. 4, 2018), <https://www.jmu.edu/news/2016/04/02-JMU-Spirit-Rock.shtml>.

can converge to spread their messages and inform others of important things going on around campus.”² Over the years, students have painted the Rock to support political causes, mourn fellow community members, and celebrate campus events.³

JMU has no specific policy regulating expression on the Rock. Messages are continually painted and painted over on the Rock, with no involvement from JMU’s administration.

During a June 12 rally at JMU in response to the death of George Floyd, students painted the phrases “No Justice No Peace,” “Black Lives Matter,” and “Abolish ICE” on the Rock.⁴ In early August, one or more unidentified people painted over, chipped away, and peeled off parts of these phrases.⁵

On August 19, JMU published a statement on its Instagram page stating that “the university has looked into it and at this point has not identified the person or people responsible for chiseling the paint off the rock, forcibly removing the word ‘Black’ from a ‘Black Lives Matter’ message.”⁶ The statement added that JMU would be “installing cameras focused on” the Rock and developing “guidelines for painting the rock, which is a space intended for free expression.”⁷ JMU added on August 21: “This kind of vandalism does not constitute protected speech and will not be tolerated, and cameras have been installed that are aimed at the rock.”⁸

II. JMU’s Proposed Policies Regarding the Spirit Rock Must Comport with its First Amendment Obligations

FIRE appreciates that JMU seeks to preserve the Rock as a place for free expression, and that it has a compelling interest in preventing and addressing vandalism and damage to university property. However, JMU’s drive to create guidelines for the Rock may not come at the expense of its students’ First Amendment rights.

² Tyler Rich and Troy Fultz, *The Spirit Rock Tradition*, JAMES MADISON UNIV. NEWS (updated Mar. 28, 2019), <https://www.jmu.edu/stories/ods/2014/03-07-the-spirit-rock.shtml>.

³ *Id.*; Staff Report, *University releases official statement on Spirit Rock repainting*, THE BREEZE (Apr. 2, 2016), https://www.breezejmu.org/news/university-releases-official-statement-on-spirit-rock-repainting/article_f76edc86-f941-11e5-95c8-7f16ec3e114e.html; Megan Medeiros, *How JMU students felt about the Spirit Rock fiasco*, THE TAB (Apr. 3, 2016), <https://thetab.com/us/jmu/2016/04/03/jmu-students-felt-spirit-rock-fiasco-2468>.

⁴ Connor Murphy and Carley Welch, *JMU community reacts to defaced ‘Black Lives Matter’ spirit rock*, THE BREEZE (Aug. 22, 2020), https://www.breezejmu.org/news/jmu-community-reacts-to-defaced-black-lives-matter-spirit-rock/article_6ebcbab8-e495-11ea-afda-cb4f792d1850.html; Stephanie Penn, “*Spirit Rock*” at *James Madison University sees damage*, WHSV (Aug. 17, 2020), <https://www.wHSV.com/2020/08/18/spirit-rock-at-james-madison-university-sees-damage>.

⁵ Penn, *supra* note 4.

⁶ James Madison Univ., INSTAGRAM (Aug. 19, 2020), <https://www.instagram.com/p/CEE9lO8hSxO>.

⁷ *Id.*

⁸ James Madison Univ., *University Response to the Defacement of Spirit Rock*, JAMES MADISON UNIV. NEWS (Aug. 21, 2020), <https://www.jmu.edu/news/2020/08/21-statement-spirit-rock.shtml>.

A. *The Spirit Rock is a public forum subject to the First Amendment.*

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

The Supreme Court of the United States “has recognized that the campus of a public university, at least for its students, possesses many of the characteristics of a public forum.” *Widmar v. Vincent*, 454 U.S. 263, 267 (1981). Accordingly, the publicly accessible areas of a public college campus are public fora. *ACLU v. Mote*, 423 F.3d 438, 444 (4th Cir. 2005) (finding that an open, outdoor area of the University of Maryland is a public forum).⁹

The Rock itself is a designated public forum, which is a forum that “is not traditionally public, but the government has purposefully opened to the public, or some segment of the public, for expressive activity.” *Id.* at 443; *see also Widmar*, 454 U.S. at 267-68 (finding that a state university created a public forum in facilities by routinely opening its building for meetings by registered student groups). “[A] government entity may create a designated public forum if government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose.” *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009) (internal quotations omitted).

First, the Rock possesses the physical characteristics of a traditional public forum, as it is located in an area that “is outdoors, unenclosed, publicly accessible, and in fact open to the public” that is also “an open public thoroughfare best characterized as a park or mall.” *See Warren v. Fairfax Cty.*, 196 F.3d 186, 189 (4th Cir. 1999) (finding that the open, outdoor, publicly-accessible area of the Fairfax County Government Center Complex possesses the physical qualities of a public forum). Second, the Rock has been held open by JMU for the purpose of student expression and has continuously been used “as an outlet for free

⁹ *See also, e.g., OSU Student All. v. Ray*, 699 F.3d 1053, 1063 (9th Cir. 2012) (finding that the Oregon State University campus is a public forum); *Justice for All v. Faulkner*, 410 F.3d 760, 768-69 (5th Cir. 2005) (open outdoor areas of University of Texas at Austin found to be designated public fora as to students); *Shaw v. Burke*, No. 17-cv-2386, 2018 U.S. Dist. LEXIS 7584, at *22 (C.D. Cal. Jan. 17, 2018) (“open, outdoor areas of universities . . . are public fora[.]” regardless of a college’s regulations to the contrary); *Univ. of Cincinnati Chapter of Young Ams. for Liberty v. Williams*, Civ. No. 12-155, 2012 U.S. Dist. LEXIS 80967, at *29-30 (S.D. Ohio June 12, 2012) (open, outdoor areas of campus are designated public fora for students); *Roberts v. Haragan*, 346 F. Supp. 2d 853, 862-63 (N.D. Tex. 2004) (“[T]o the extent [Texas Tech University] has park areas, sidewalks, streets, or other similar common areas, these areas are public forums, at least for the University’s students, irrespective of whether the University has so designated them or not. These areas comprise the irreducible public forums on the campus.”).

expression,”¹⁰ without any rules or restrictions on student expressive use, indicating that JMU “intentionally . . . [via] policy and practice . . . designate[d] a place not traditionally open to assembly and debate as a public forum.” See *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985). Finally, the Rock—a traditional locus of student expression on college campuses across the United States¹¹—is undoubtedly a place “which by long tradition . . . [has] been devoted to assembly and debate,” see *Cornelius*, 473 U.S. at 817 (internal quotations omitted), and has served this purpose for its entire existence.

B. Restrictions on student expression on the Rock must meet First Amendment scrutiny.

While JMU may establish “reasonable time, place, and manner” restrictions on speech and expressive activity in a public forum, such restrictions must be “justified without reference to the content of the regulated speech, . . . narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information.” *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (internal citations and quotations omitted); *Ross v. Early*, 746 F.3d 546, 552 (4th Cir. 2014) (same). A restriction is narrowly tailored when it does not “burden substantially more speech than is necessary to further the government’s legitimate interests.” *Ward*, 491 U.S. at 798–99; see also *Ross*, 746 F.3d at 552–53. Additionally, viewpoint discrimination that “targets not subject matter, but particular views taken by speakers on a subject” is prohibited in all types of public fora. *Davison v. Randall*, 912 F.3d 666, 687 (4th Cir. 2019) (internal quotations and citations omitted).¹²

As JMU seeks to impose “guidelines for painting the rock,” FIRE encourages the university to be mindful of these limits on authority to restrict expression under the First Amendment. For example, JMU may impose time, place, and manner restrictions on expressive use of the Rock, but may not impose any restrictions on the viewpoints communicated by students who paint

¹⁰ *University statement on Spirit Rock*, *supra* note 1.

¹¹ See, e.g., Laura McDonough and Marah Morrison, *Tradition Rock*, JAMBAR (Jan. 11, 2018), <https://www.thejambar.com/tradition-rock> (Youngstown State University’s “Tradition Rock,” dating to 1968), NORTHWESTERN UNIV., *Traditions*, <https://www.northwestern.edu/studentaffairs/community/students/traditions.html> (last visited Sept. 10, 2020) (Northwestern University’s “Rock has become a frequently used location for student activism, performance and philanthropy” since it was first painted in the 1940s); WHITTIER COLL., *Whittier College Traditions*, <https://www.whittier.edu/about/traditions> (Whittier’s “Rock” has been used to “mark milestones, express solidarity, or memorialize beloved” classmates since it was installed in 1912).

¹² If JMU seeks to close the Rock in response to offensive messages, that would also violate the prohibition against viewpoint discrimination in a public forum. See *Koala v. Khosla*, 931 F.3d 887, 903–04 (9th Cir. 2019) (suggesting that a university’s viewpoint-discriminatory closure of a forum for student expression, even under the guise of viewpoint neutrality, would violate the First Amendment).

it. JMU’s proposed rules should reflect not only its First Amendment obligations, but also the Rock’s essential purpose “as an outlet for free expression.”¹³

C. JMU may not investigate or punish offensive expression on the Spirit Rock.

Although JMU may punish students for engaging in acts of vandalism, destruction of university property, and other violations of its student code of conduct, it may not seek to discipline students solely for painting, painting over, or removing offensive messages on its Spirit Rock, as such expression is protected by the First Amendment.

i. Painting and repainting the Spirit Rock is expressive.

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 “intend[ed] to convey a particularized message” that is likely to “be understood by those who viewed it” is expressive conduct. And 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.* at 404, 406.

Conduct is also considered expressive when it falls within a traditionally-protected genre—such as music, paintings, and parades—even if it does not convey a “narrow, succinctly articulable message.” *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 569 (1995). This is what protects the act of saluting or refusing to salute a flag (*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)), raising a “seditious” red flag (*Stromberg v. California*, 283 U.S. 359, 369 (1931)), burning an American flag (*Johnson*, 491 U.S. at 414), picketing or leafletting (*U.S. v. Grace*, 461 U.S. 171, 176 (1983)), and participating in a sit-in (*Brown v. Louisiana*, 383 U.S. 131, 383 (1966)).

The act of painting and repainting the Rock, even if it covers up or alters a prior message, is expression protected by the First Amendment and may not be stifled by government actors like JMU.

ii. Offensive expression is protected by the First Amendment.

The principle of freedom of speech does not exist to protect only non-controversial expression; it exists precisely to protect speech that some members of a community may find controversial or offensive. Decades of legal precedent make clear that the First Amendment

¹³ See Katlyn Ayn Patton, Note, *Trumping the First Amendment: Student-Driven Calls for Speech Restrictions on Public College Campuses*, 68 CASE W. RES. L. REV. 186, 206-11 (2017), <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=4739&context=caselrev> (describing ways public universities can impose restrictions on public fora without violating students’ First Amendment rights).

protects even intentionally insensitive speech. For example, in *Snyder v. Phelps*, 562 U.S. 443, 461 (2011), the Supreme Court held as protected expression picketers' signs, reading "Thank God for dead soldiers" and directed at the funeral of a fallen soldier, proclaiming:

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. . . . [W]e cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.

Recently, the Court unanimously reaffirmed this vital principle in *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017), holding that the perception that expression is "hateful" or that it "demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground" is not a sufficient basis to remove speech from the protection of the First Amendment. Thus, speech that is "insensitive, offensive, and even bigoted" may yet be protected expression. *Goza v. Memphis Light, Gas & Water Div.*, No. 2:17-cv-2873, 2019 U.S. Dist. LEXIS 100057, at *2 (W.D. Tenn. June 14, 2019).

As a public institution bound by the First Amendment, JMU may not punish students for writing offensive messages on its Spirit Rock.

iii. Installing surveillance cameras on a 'space intended for free expression' violates the First Amendment's protection of anonymous speech.

While the evaluation of proposals to restrict expression on the Rock raises possible future threats to the First Amendment, the installation of surveillance cameras represents an immediate threat to students' expressive rights.

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. Students may have any number of reasons to remain anonymous when they add their messages to the Rock. Some may fear retaliation by administrators if their message denounces university leaders, such as students who criticized their university’s refusal to rename a building—named after a governor responsible for the Sand Creek Massacre—by painting “Fuck John Evans” and “THIS LAND IS COLONIZED” on their institution’s rock.¹⁴ Other students may be chilled from painting messages criticizing law enforcement or in support of the Black Lives Matter movement if they must do so in front of a security camera. Still others might fear repercussions from painting messages dissenting from movements popular among the student body, like the Black Lives Matter movement.

While the university undoubtedly has an interest in preventing damage to the Rock, the installation of a surveillance camera is more likely to chill student expression than to prevent significant damage to a rock. Moreover, there do not appear to be any policies concerning who may review surveillance footage, how long the footage is kept, or the purposes for which footage may be used. That raises the distinct possibility that the footage will be used not to identify vandals, but to identify those who exercise their right to share expression unpopular with administrators or other students. This is not an idle risk: FIRE has seen surveillance footage similarly used to identify critics of college administrators.¹⁵

III. JMU Must Ensure that Its Spirit Rock Remains an Outlet for Free Expression

As the JMU educational community approaches the upcoming presidential election, where students will undoubtedly seek to express themselves on a host of controversial political issues, FIRE encourages JMU to ensure that its Rock remains an interactive space for student expression.

As it seeks to impose guidelines on its Rock, FIRE calls on JMU to promise to refrain from imposing restrictions on its students’ expressive rights.

We request receipt of a response to this letter no later than the close of business on September 25.

¹⁴ See David Gleisner, “*FUCK JOHN EVANS*”—*The background behind the Rock’s weekend paint job*, NORTH BY NORTHWESTERN (Oct. 31, 2019), <https://www.northbynorthwestern.com/john-evans-explained>.

¹⁵ Adam Steinbaugh, *Troy Police Department videotaped student demonstrators at Rensselaer Polytechnic Institute, a private institution*, FIRE (Mar. 27, 2018), <https://www.thefire.org/troy-police-department-videotaped-student-demonstrators-at-rensselaer-polytechnic-institute-a-private-institution>.

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: John F. Knight, Senior Assistant Attorney General