



October 25, 2021

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

Sent via U.S. and 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 by a report from a student that an official at Montana State University (MSU) requested that the student take down a Black Lives Matter (BLM) flag that was displayed in the window of his dorm room. While the university may properly regulate certain displays, this display does not violate any such regulation, and the university has no defensible interest in shielding students from offense, or in stripping students of privacy in their own residences.

I. Two MSU Students are Told to Take Down BLM Flag Because It Assertedly Poses a Fire Hazard and Others May Find It Offensive

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. To these ends, please find enclosed an executed privacy waiver authorizing you to share information about this matter.

Stefan Klaer is an undergraduate student at MSU. At the beginning of the fall 2021 semester, Klaer and his roommates hung in their residence hall window a flag displaying the phrase "Black Lives Matter." The flag was displayed in the window of their room and visible from the outside to passersby.¹ The flag was fixed to the blinds, not the wall or window, and caused no more obstruction than did the blinds themselves.

¹ Photo of Black Lives Matter flag displayed in Klaer's residence hall window (on file with author).

During the week of September 5, 2021, a notice was posted on Klaer’s door requesting that the flag be removed because it could be a potential fire hazard. On September 13, Klaer and his roommates received a text from their Resident Advisor stating:

I just wanted to reach out about the note I left on your door last week. So unfortunately not only is the flag a potential fire hazard, my boss also said that hanging things in public view can be offensive. No one has reported to take offense to your flag, but this would be unfair to other students if they were asked to take down theirs as well. You can hang any decorations absolutely anywhere, except for in windows, and on the outside of your door.²

Klaer removed the flag on September 20, but put it back up on October 4 and have not received any further requests to remove it.

II. The First Amendment Bars MSU From Forcing the Students to Remove the Flag

It is well-established that the First Amendment constrains public universities in penalizing student expression. The Black Lives Matter flag does not fall into any exception to the First Amendment.

A. The First Amendment Applies to MSU as a Public University

It has long been settled law that the First Amendment is binding on public universities like MSU.³ Accordingly, the decisions and actions of a public university—including the pursuit of disciplinary sanctions⁴ and maintenance of policies implicating student and faculty expression⁵—must be consistent with the First Amendment.

B. The Display Does Not Violate the Enforceable Provisions of MSU Policy on Window Displays

MSU may impose “reasonable restrictions on the time, place, or manner of protected speech” where they are content-neutral, narrowly tailored to advance a significant interest, and “leave open ample alternative channels” for expression.⁶ But the First Amendment does not permit MSU to regulate displays on the bases that they block administrators’ visual access to rooms or that others might find the messages offensive. Klaer’s display complies with all enforceable provisions of MSU policy.

² Text message from Resident Advisor to Klaer, et al., (Sept. 13, 2021, 6:47 PM) (on file with author).

³ *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).

⁴ *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

⁵ *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).

⁶ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

i. The display conforms to provisions of MSU policy governing safety interests.

The MSU Residence Hall Community Standards set forth the limitations on what students may place in their residence halls windows due to “potential safety concerns and fire hazards.”⁷ That policy provides that “posters and/or decorations cannot be placed on the window.”⁸ The policy adds, under the “Fire Safety” section, that decorative materials are prohibited if they “block[] access to the room[.]”⁹

These provisions of MSU policy are a content-neutral limit on where displays may be placed, prohibiting placement “on” a window that blocks physical access to the room. The prohibition on blocking physical access serves the university’s interest in maintaining student safety, in that it prevents obstructions that might present a hazard during an emergency.

Klaer’s flag conforms to these provisions. It is affixed to the blinds, not to the window, and does not physically block access to the room. Provided that a flag is not fixed to the bottom of the window, as the policy stipulates, it would not block physical access to a room, as a flag could be easily moved aside or moved along with the blinds. The flag is therefore in line with these provisions of the policy.

ii. Prohibiting students from limiting visual access to their residences does not advance cognizable university interests.

The policy’s limits on “visually restrict[ing] . . . access”¹⁰ to a room, on the other hand, do not advance a defensible university purpose. A limit on messages placed on blinds, on the basis that it frustrates an outside view into the room, is not a *reasonable* time, place, and manner restriction because the university’s safety interests do not justify such a sweeping invasion of student privacy.

As MSU policy correctly observes, students have a “reasonable expectation of privacy” in “individual dormitory rooms” against “unwarranted intrusion” by others, including university officials.¹¹ There is “no doubt,” the United States Court of Appeals for the Ninth Circuit has held, that a student’s expectation of privacy in their dorm room is “legitimate and objectively reasonable.”¹² And for good reason: Dormitories offer students one of few areas on campus to which they can retreat for seclusion or privacy. We would be surprised if MSU believed that a safety interest would justify the ability to peek into students’ dorm rooms at any time.

⁷ *Residence Hall Community Standards*, University Student Housing, MONTANA STATE UNIV. <https://www.montana.edu/housing/halls/handbook.html> (last visited Oct. 12, 2021).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ MONT. STATE UNIV., VIDEO SURVEILLANCE POLICY (rev. Nov. 14, 2015), *available at* https://www.montana.edu/policy/video_surveillance.

¹² *United States v. Heckenkamp*, 482 F.3d 1142, 1146 (9th Cir. 2007).

Further, a limitation applicable to a flag affixed to blinds has no practical effect, as the flag would pose no more of a hindrance to public safety than that the blinds already pose. There is no functional difference between displaying the flag, effectively blocking sight into the room, and simply lowering the blinds, which also blocks sight into the room. Like a flag, blinds could be moved aside or lifted in the case of an emergency. As MSU agrees that students have a reasonable expectation of privacy in their rooms, we do not understand it to intend that its students cannot effectuate that interest by having some measure of visual privacy, whether by use of the blinds, or something movable affixed to them.

iii. Limits may not be imposed based on objections to the content of the displays.

The text from the Resident Advisor to the students suggests that MSU may deem this display, through its use of the phrase “Black Lives Matter,” to be offensive, or that some may object to other displays. However, the university does not have a cognizable interest in shielding students from the possibility that they may encounter upsetting or offensive messages, and no such interest can justify curtailing students’ limited avenues for expression.

To its credit, MSU’s website recognizes that students may display messages in their own windows, even as it anticipates that some might find those displays offensive. The Frequently Asked Questions page of MSU’s free speech guidelines includes a hypothetical situation in which a student sees a residence hall window that “has a visible political message posted in it.”¹³ The policy recognizes that the display is protected by the First Amendment, and suggests that those who disagree or take offense can “rebut the message with a sign in your own window.”¹⁴

The First Amendment abhors limitations intended to squelch speech on the basis that others find it offensive—a proposition the United States Supreme Court has repeatedly, consistently, and clearly rejected. This core First Amendment principle is why the authorities cannot outlaw burning the American flag,¹⁵ punish the wearing of a jacket emblazoned with the words “Fuck the Draft,”¹⁶ penalize cartoons depicting a pastor losing his virginity to his mother in an outhouse,¹⁷ or disperse civil rights marchers out of fear that “muttering” and “grumbling” white onlookers might resort to violence.¹⁸

¹³ *Frequently Asked Questions*, Free Speech at Montana State, MONTANA STATE UNIV. <https://www.montana.edu/freespeech/faq.html> (last visited Oct. 12, 2021).

¹⁴ *Id.*

¹⁵ *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (burning the American flag was protected by the First Amendment, the “bedrock principle underlying” the holding being that government actors “may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”).

¹⁶ *Cohen v. California*, 403 U.S. 15, 25 (1971).

¹⁷ *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988).

¹⁸ *Cox v. Louisiana*, 379 U.S. 536, 557 (1965).

This principle applies with particular force to universities, which are dedicated to open debate and discussion. Take, for example, a student newspaper’s front-page uses of a vulgar headline (“Motherfucker Acquitted”) and a “political cartoon . . . depicting policemen raping the Statue of Liberty and the Goddess of Justice.”¹⁹ These words and images—published at the height of the Vietnam War—were no doubt deeply offensive to many at a time of deep polarization and unrest. Yet, “the 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.’”²⁰

The Resident Advisor’s assertion that “my boss also said that hanging things in public can be offensive” is adequately addressed by MSU’s free speech guidelines. Should a passerby find the students’ flag offensive, MSU’s free expression policy provides the solution: more speech, including through other displays “in your own window.”²¹ This provision is commendable, and should be supported by a policy that clearly permits the display of speech in windows. Additionally, enforcing the safety policy against the BLM flag, or other flags university officials may deem “offensive,” but not against window displays generally, when none of them affect safety, would be impermissible content and viewpoint discrimination.²² Addressing this apparent contradiction is vital to MSU upholding its obligation to promote and protect freedom of expression.

III. Conclusion

Even if MSU could limit window displays, it *shouldn’t* do so. Students residing on campus have limited opportunities to engage in expressive displays. Outward displays are a traditional and commonplace form of expression on college campuses. It is one of the few avenues by which students can express themselves on matters of political, social, or personal concern. As our Supreme Court has recognized, signs “[o]ften placed . . . in windows . . . play an important part” in political expression and are a “venerable means of communication that is both unique and important.”²³ Preserving the “unique and important” channel of communication will inevitably result in display of some expression that others find unwelcome, disagreeable, or offensive—a possibility that MSU policy already anticipates. However, curtailing displays entirely would frustrate students’ ability to contribute to a vibrant intellectual community, and targeting just “offensive” or BLM displays is unconstitutional viewpoint- and content-discrimination.

Accordingly, we call on MSU to confirm that this display is permitted, to clarify its policies to facilitate student displays in windows of their residences if they do not pose a safety risk, and to reaffirm that students have an expectation of visual privacy in their dorm rooms.

¹⁹ *Papish*, 410 U.S. at 667–68.

²⁰ *Id.* at 670.

²¹ *Residence Hall Community Standards*, *supra* note 7.

²² *See, e.g., Matal v. Tam*, 137 U.S. 1744 (2017).

²³ *City of Ladue v. Gilleo*, 512 U.S. 43, 54–55 (1994).

We request receipt of a response to this letter by Monday, November 8, 2021.

Sincerely,

A handwritten signature in black ink, appearing to read "Graham Piro". The signature is fluid and cursive, with the first name "Graham" and last name "Piro" clearly distinguishable.

Graham Piro
Program Officer, Individual Rights Defense Program

Cc: Jeff Bondy, Director of Residence Life, jbondy@montana.edu

Encl.

Authorization and Waiver for Release of Personal Information


I, Stefan Klaer, born on , do hereby authorize Montana State University (the "Institution") to release to the Foundation for Individual Rights in Education ("FIRE") any and all information concerning my current status, disciplinary records, or other student records maintained by the Institution, including records which are otherwise protected from disclosure under the Family Educational Rights and Privacy Act of 1974. I further authorize the Institution to engage FIRE's staff members in a full discussion of all matters pertaining to my status as a student, disciplinary records, records maintained by the Institution, or my relationship with the Institution, and, in so doing, to fully disclose all relevant information. The purpose of this waiver is to provide information concerning a dispute in which I am involved.

I have reached or passed 18 years of age or I am attending an institution of postsecondary education.

In waiving such protections, I am complying with the instructions to specify the records that may be disclosed, state the purpose of the disclosure, and identify the party or class of parties to whom disclosure may be made, as provided by 34 CFR 99.30(b)(3) under the authority of 20 U.S.C. § 1232g(b)(2)(A).

This authorization and waiver does not extend to or authorize the release of any information or records to any entity or person other than the Foundation for Individual Rights in Education, and I understand that I may withdraw this authorization in writing at any time. I further understand that my execution of this waiver and release does not, on its own or in connection with any other communications or activity, serve to establish an attorney-client relationship with FIRE.

I also hereby consent that FIRE may disclose information obtained as a result of this authorization and waiver, but only the information that I authorize.

DocuSigned by:

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Student's Signature

10/19/2021
Date