



November 17, 2021

Brian O. Hemphill, Ph.D
Office of the President
Old Dominion University
1 Old Dominion University
Norfolk, Virginia 23529

URGENT

Sent via Electronic Mail (bhempill@odu.edu)

Dear President Hemphill:

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 reports that Old Dominion University (ODU) has painted over student expression—on the “Dominion Rock”—critical of a university faculty member whose public comments about “Minor Attracted Persons” have been widely condemned.¹ Students’ criticism of the professor and their comments constitute expression protected by the First Amendment, which sharply constrains the limits that a public university may place on student expression.

I. ODU’s Reported Erasure of Messages on the Dominion 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.

Students at Old Dominion University, a public institution, have called on the university to take action against Professor Allyn Walker due to their research and public comments. Some have done so by painting messages on the “Dominion Rock,” a ten-ton rock installed on ODU’s campus for the purpose of student expression.² Dominion Rock is open to being painted by “[a]ll ODU Students and student organizations” at “any time,” cannot be “reserved” to the

¹ See, e.g., Victoria Tillinghast, *Dr. Allyn Walker on Administrative Leave After Campus Protest*, MACE & CROWN (Nov. 16, 2021), <https://www.maceandcrown.com/post/dr-allyn-walker-on-administrative-leave-after-campus-protest>.

² Deborah Bouseman, *SGA Welcomes Dominion Rock*, OLD DOMINION UNIV. (Jan. 31, 2017), https://www.odu.edu/announcements/student/2017/1/31/sga_welcomes_dominio.iframe.html.

exclusion of others, and can be “painted at any time” according to the “different meaning” of each student.³ The policy governing Dominion Rock only prohibits “messages or words that are deemed derogatory as well as any profane words or messages[.]”⁴

Messages painted by students in recent days have included “Get Allyn Walker OFF Campus,” “GET LOST PEDO,” “BYE Allyn,” and “MAPS belong in Jail.”⁵ Students, however, report that the university has “cover[ed]” and “painted over” these messages.⁶

II. The First Amendment Bars ODU from Censoring Student Expression on the Dominion Rock

It is well-established that the First Amendment constrains public universities in how they may regulate student expression. If, as reported, ODU painted over student condemnation of Dr. Walker, that act violates the First Amendment, notwithstanding a policy purporting to allow the university to erase “derogatory” or “profane” words.

A. *The First Amendment Applies to ODU as a Public University*

It has long been settled law that the First Amendment is binding on public universities like ODU.⁷ Accordingly, the actions of a public university—including the maintenance of policies implicating student and faculty expression⁸—must be consistent with the First Amendment.

B. *The Dominion Rock Is a Public Forum Subject to the First Amendment*

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.”⁹ Accordingly, the publicly accessible areas of a public college campus are public fora.¹⁰

The Dominion 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

³ *Id.*

⁴ *Id.*

⁵ Kimbo 🍌 (@kimbreadly), TWITTER (Nov. 16, 2021, 9:54 AM), <https://twitter.com/kimbreadly/status/1460622359438807048>; Libs of Tik Tok (@libsoftiktok), TWITTER (Nov. 16, 2021, 2:30 PM), <https://twitter.com/libsoftiktok/status/1460691770312835073>.

⁶ *See, e.g.*, Kimbo 🍌, *supra* note 5; Genipiatko (@Genipiatko1), TWITTER (Nov. 16, 2021, 1:14 PM), <https://twitter.com/Genipiatko1/status/1460672748439674882>.

⁷ *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).

⁸ *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).

⁹ *Widmar v. Vincent*, 454 U.S. 263, 267 (1981).

¹⁰ *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).

segment of the public, for expressive activity.”¹¹ A public “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.”¹²

First, the Dominion 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.”¹³ Second, the Dominion Rock has been held open by ODU for the purpose of student expression and has continuously been used “as an outlet for free expression,” indicating that ODU “intentionally . . . [via] policy and practice . . . designate[d] a place not traditionally open to assembly and debate as a public forum.”¹⁴ Finally, the Dominion Rock—one of many such landmarks that serve as a traditional locus of student expression on college campuses across the United States¹⁵—is undoubtedly a place “which by long tradition . . . [has] been devoted to assembly and debate,”¹⁶ and has served this purpose for its entire existence.

C. *ODU’s Limits on Student Expression on Dominion Rock Violate the First Amendment*

While ODU may establish “reasonable time, place, and manner” restrictions on speech and expressive activity in a public forum, such restrictions must, at least, be “justified without reference to the content of the regulated speech” and “narrowly tailored to serve a significant governmental interest[.]”¹⁷ Additionally, restrictions that effectuate viewpoint discrimination—that is, those that target “not subject matter, but particular views taken by speakers on a subject”—are prohibited in all types of public fora.¹⁸

¹¹ *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).

¹² *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009) (internal quotations omitted).

¹³ *Warren v. Fairfax Cnty.*, 196 F.3d 186, 189 (4th Cir. 1999) (finding the open, outdoor, publicly-accessible area of the Fairfax County Government Center Complex possesses the physical qualities of a public forum).

¹⁴ *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985).

¹⁵ *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://bit.ly/3cnNwhc> (last visited Nov. 17, 2021) (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> (last visited Nov. 17, 2021) (Whittier’s “Rock” has been used to “mark milestones, express solidarity, or memorialize beloved” classmates since it was installed in 1912); James Madison Univ., *The Madison Society: Painting The Spirit Rock*, <https://www.jmu.edu/madisonsociety/painting-spirit-rock/index.shtml> (last visited Nov. 17, 2021) (painting the James Madison University “Spirit Rock” is a “time-honored tradition for the free expression of ideas and opinions”).

¹⁶ *Cornelius*, 473 U.S. at 817 (internal quotations omitted).

¹⁷ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (internal citations and quotations omitted); *Ross v. Early*, 746 F.3d 546, 552 (4th Cir. 2014) (same).

¹⁸ *Davison v. Randall*, 912 F.3d 666, 687 (4th Cir. 2019) (internal quotations and citations omitted).

i. Limits on ‘derogatory’ or ‘profane’ speech on the Dominion Rock violate the First Amendment.

ODU’s prohibitions on “messages or words” on the Dominion Rock “that are deemed derogatory” or “profane” will not survive First Amendment scrutiny and cannot justify removal of these messages.

First, there is no First Amendment exception for “profane” speech. The Supreme Court has repeatedly, consistently, and clearly held that expression may not be restricted on the basis that others find it to be offensive. It pointedly did so, for example, in holding that the First Amendment protected a jacket emblazoned with the words “Fuck the Draft” worn in a courthouse, as the authorities have “no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us.”¹⁹

Second, and similarly, there is no exception for “derogatory” speech, particularly in the context of a public university. 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.”²⁰ 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.’”²¹

ii. The messages on the Dominion Rock are otherwise protected speech.

Painted messages are speech governed by the First Amendment, as freedom of expression “does not end at the spoken or written word.”²² 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.

The words painted on the Dominion Rock convey understandable messages, expressing students’ objection to Dr. Walker’s speech and demanding that the university take action against them. If these demands were granted, ODU would violate the First Amendment, as Dr. Walker’s speech is itself protected by the First Amendment against retaliation by the public university.²³ While the university may not *grant* those demands, it may not restrict students’ rights to *make* the demands. While those demands are illiberal, they are criticism—a form of “more speech,” the remedy to offensive expression that the First Amendment prefers to

¹⁹ *Cohen v. California*, 403 U.S. 15, 25 (1971).

²⁰ *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

²¹ *Id.*

²² *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

²³ While Dr. Walker’s comments were—judging by the vociferous public response—widely viewed as offensive, they are likewise protected by the First Amendment, which protects the academic freedom of faculty members at public universities, as well as their right to comment as private citizens on matters of public concern. *Connick v. Myers*, 461 U.S. 138, 140 (1983); *see also Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 563–564 (4th Cir. 2011) (First Amendment protected a public university professor’s speech involving scholarship and teaching “directed at a national or international audience on issues of public importance. . .”).

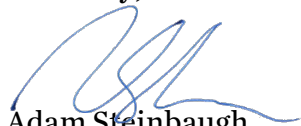
censorship.²⁴ And while the university has asserted that it has “become the target of threats and other unacceptable disruption,”²⁵ the messages painted on the Dominion Rock do not amount to true threats of violence and do not otherwise disrupt the university’s operations.

III. Conclusion

The messages painted on the Dominion Rock are protected by the First Amendment, and ODU’s policy purporting to limit that speech exceeds the university’s constitutional authority. Accordingly, we call on ODU to discontinue removing such speech from the Rock and to bring its policies governing the Rock into compliance with the First Amendment.

Given the urgent nature of this matter, we request receipt of a response to this letter no later than the close of business on Friday, November 19, 2021.

Sincerely,



Adam Steinbaugh
Director, Individual Rights Defense Program

Cc: Danielle Carter, President, Old Dominion University Student Government Association

²⁴ *Whitney v. California*, 274 U.S. 357, 377 (1927).

²⁵ Brian O. Hemphill, Ph.D., *A Challenging Time for Our Campus and Our Community*, OLD DOMINION UNIV. (Nov. 16, 2021), https://www.odu.edu/about/president/outreach/campus-messages/2021/11/a_challenging_time_.