



February 15, 2022

Cilla Shindell
Executive Director, News and Communications
University of Dayton
300 College Park
Dayton, Ohio 45469-1624

URGENT

Sent via Electronic Mail (pshindell1@udayton.edu)

Dear Ms. Shindell:

We are in receipt of your February 10 response to FIRE's February 9 letter¹ in which we contested the University of Dayton's unilateral revocation of a speaking invitation issued by its faculty to Dr. Tlaleng Mofokeng. Your response quibbles with our characterization of reasons why UD disinvented Dr. Mofokeng while missing the larger academic freedom issues we identified, and in doing so deepens rather than alleviates FIRE's concerns about free expression at UD.

You contend Dr. Mofokeng was disinvented from campus due to her work as an abortion provider rather than her views regarding abortion. But UD plainly believes that Dr. Mofokeng's "background and work related to reproduction" implies a certain viewpoint regarding abortion; were Dr. Mofokeng visiting campus to renounce her past work, we cannot imagine that UD would find grounds to cancel her appearance.

Indeed, Jason Pierce, Dean of the College of Arts and Sciences, explained that Dr. Mofokeng was disinvented because UD was concerned about what she might say, citing the institution's worry that her "participation" *in the conference* "would prompt considerable negative reactions" and emphasizing that UD must be "sensitive to . . . engaging in those important topics of the day, whatever they might be, and to engage in those discussions in a way that

¹ Enclosed. 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.

respects our Catholic and Marianist identity and mission.”² Accordingly, we characterized the decision as being made on account of Dr. Mofokeng’s views.

In the university’s statement regarding the revocation of Dr. Mofokeng’s invitation, UD stated that she was disinvited due to her “background and work.” Based on common parlance, and given the information detailed above, summarizing this as her “views,” as we did in our blog, is not inaccurate. In any event, our blog also quotes your statement, stating: “The administration issued a statement that it had unilaterally disinvited Mofokeng from the conference, because Mofokeng’s ‘background and work related to reproduction is inconsistent with the University’s Catholic, Marianist mission and identity.’”³ This further undermines any claim that the blog misstated anything. Accordingly, we do not believe a correction to our blog entry discussing the matter is warranted.

Whatever the institution’s rationale, the important point is that UD unilaterally canceled a faculty-planned speaking appearance simply because it objected to the choice of speaker. Dr. Mofokeng was invited to UD to *speak*, not to perform work as an abortion provider—or even to discuss abortion. (While Dr. Mofokeng’s planned topic ultimately is irrelevant to the matter, given the faculty invitation, Dr. Mofokeng in point of fact was invited to discuss COVID-related issues). UD’s decision had the intention and result of restricting the speech of a faculty-invited speaker, violating UD’s clear commitments to its faculty of freedom of expression and academic freedom.

You further assert that “out of respect for our Catholic mission and identity, and for the University’s sponsorship by the Society of Mary, the University expects advance consultation and thoughtful consideration about high-profile external speakers before they are invited[.]”⁴ To the extent this statement suggests Dr. Mofokeng was disinvited because faculty did not consult with the administration concerning their choice of speaker, it only amplifies our concerns. As an institution that promises students and faculty expressive rights, UD may not exercise prior review of speaker invitations to ensure that speakers’ views are in lockstep with those of the administration. This practice deprives UD of a wide variety of diverse speakers and cannot be squared with the university’s legally binding commitment to foster the open exchange of ideas.

It is true that as a religious institution, UD has the right to place its religious commitments over the principles of free expression. (FIRE labels schools that expressly prioritize other values above free speech as “Warning” schools.)⁵ However, UD has instead chosen to make clear promises to students and faculty that they enjoy robust expressive and academic

² Laura Durham, *UD administration disinvites UN Special Rapporteur, women’s reproductive rights advocate*, FLYER NEWS (Jan. 26, 2022), <https://flyernews.com/campus/ud-administration-disinvites-un-special-rapporteur-womens-reproductive-rights-advocate/01/26/2022>.

³ Sabrina Conza, *University of Dayton administration canceled UN special rapporteur’s COVID-19 speech over views on reproductive health*, FIRE (Feb. 10, 2022), <https://www.thefire.org/university-of-dayton-administration-canceled-un-special-rapporteurs-covid-19-speech-over-views-on-reproductive-health>.

⁴ Email from Cilla Shindell, Executive Director, News and Communications, University of Dayton, to Sabrina Conza, Program Analyst, FIRE (Feb. 10, 2022, 7:45 PM) (on file with author).

⁵ See Mary Griffin, *What does a school with a “Warning” rating look like? BYU-Idaho demonstrates.*, FIRE (Dec. 5, 2019), <https://www.thefire.org/what-does-a-school-with-a-warning-rating-look-like-byu-idaho-demonstrates>.

freedom rights.⁶ When private institutions make these kinds of promises, they are contractually obligated to uphold them.⁷ UD may not renege on its free speech or academic freedom promises whenever it finds it expedient to do so.

We again call on UD to reaffirm and recommit to its promises of free expression and academic freedom by making clear that it will not disinvite or exercise prior review of student- or faculty-invited speakers.

We look forward to hearing back by the close of business on Monday, February 28, 2022.

Sincerely,



Sabrina Conza
Program Analyst, Individual Rights Defense Program

Cc: Tom Weckesser, Executive Director, Office of the President

Encl.

⁶ See UNIV. OF DAYTON, FACULTY POLICY & GOVERNANCE HANDBOOK (July 2021), https://udayton.edu/provost/_resources/facadminaffairs/documents/2021-ud-faculty-handbook.pdf; UNIV. OF DAYTON, NONDISCRIMINATION AND ANTI-HARASSMENT POLICY, Art. VI (rev. Aug. 11, 2021), <https://udayton.edu/policies/finance/nondiscrimination-policypage.php#freedom>; UNIV. OF DAYTON, FREEDOM OF EXPRESSION, *available at* https://udayton.edu/studev/_resources/files/dean_resource/Freedom%20of%20Expression.pdf.

⁷ *Chan v. Miami Univ.*, 73 Ohio St. 3d 52, 61 (1995) (private university's commitment to academic freedom established a contractual right of faculty members "to teach, to think and to speak in accordance with [their] conscience[.]").



February 9, 2022

Eric F. Spina
Office of the President
University of Dayton
St. Mary's Hall
300 College Park
Dayton, Ohio 45469-1624

Sent via U.S. Mail and Electronic Mail (president@udayton.edu)

Dear President Spina:

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 that the University of Dayton's administration canceled a speaking appearance by Dr. Tlaleng Mofokeng, who had been invited to speak at the biennial conference organized by the university's Human Rights Center. That cancellation, apparently motivated by the administration's objections to Mofokeng's separate "work related to reproduction,"¹ is inconsistent with the affirmative promises UD makes to its faculty that they enjoy rights to freedom of expression and academic freedom. These rights encompass a right to listen to and engage with the speech and ideas of others. Thus, UD may not disinvite faculty-invited speakers due to their viewpoints. It is now incumbent on UD to reaffirm to faculty that the university's promises are not moot and that the university respects faculty's expressive rights.

I. UD Disinvited UN Special Rapporteur from Faculty-Run Event Based on Her Viewpoint

The following is our understanding of the pertinent facts, which is based on public information.² We appreciate that you may have additional information to offer and invite you to share it with us.

¹ Kaitlin Lewis, *UD administration disinvites UN Special Rapporteur, women's reproductive rights advocate*, FLYER NEWS (Jan. 26, 2022), <https://flyernews.com/campus/ud-administration-disinvites-un-special-rapporteur-womens-reproductive-rights-advocate/01/26/2022>.

² *Id.*

The Human Rights Center at UD works to “lead the global human rights community in the search for transformative solutions to systemic patterns of injustice that will affect real change in the lives of the poor and the persecuted.”³ HRC is primarily run by faculty.⁴

HRC hosted its biennial conference December 2-4, 2021.⁵ One of the event’s scheduled keynote speakers was Dr. Tlaleng Mofokeng,⁶ who serves as the United Nations Special Rapporteur on the right to health.⁷ Mofokeng was to speak about “Covid’s impact on human rights.”⁸ Mofokeng was added to the conference’s website as a keynote speaker, alongside Erica Chenoweth, who was to speak about civil resistance and social movements, and Nathan Law, a dissident from Hong Kong.⁹

Several weeks later, on October 11, your administration reportedly told Miranda Hallett, a UD professor and associate director of HRC, that the administration was considering canceling Mofokeng’s appearance and HRC should “stand by and wait to hear” the administration’s decision.¹⁰

On October 28, at least a month after Mofokeng’s keynote speech was publicly announced, the administration told HRC that Mofokeng had been disinvited from the conference.¹¹ The university released the following statement:

The Human Rights Center at the University of Dayton invited [Dr. Mofokeng] to speak in her capacity as the UN Special Rapporteur on the Right to Health, specifically ‘on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’ in the context of the COVID-19 pandemic. As a Catholic, Marianist university, we welcome serious meaningful dialogue on critical issues of the day. However, the University has concluded that Dr. Mofokeng’s background and work related to reproduction is inconsistent with the University’s Catholic, Marianist mission and identity. For this reason, the university has withdrawn the invitation.¹²

³ Mission, Human Rights Center, UNIV. OF DAYTON, <https://udayton.edu/artssciences/ctr/hrc/about/index.php> (last visited Jan. 28, 2022).

⁴ The Team, Human Rights Center, UNIV. OF DAYTON, <https://udayton.edu/artssciences/ctr/hrc/about/meet-us.php> (last visited Jan. 28, 2022).

⁵ Lewis, *supra* note 1.

⁶ *Id.*

⁷ Tlaleng-Mofokeng, Special Rapporteur on the right to health, UNITED NATIONS HUM. RIGHTS OFF. OF THE HIGH COMM’R, <https://www.ohchr.org/EN/Issues/Health/Pages/Tlaleng-Mofokeng.aspx> (last visited Feb. 1, 2022).

⁸ Univ. of Dayton Hum. Rights Ctr., FACEBOOK (Oct. 1, 2021), <https://www.facebook.com/UDHumanRights/posts/4576806602341167>.

⁹ UNIV. OF DAYTON, *SPHR 2021 Conference: Welcome, archived at* <https://bit.ly/3IXzZeI> (archived Sept. 22, 2021).

¹⁰ Lewis, *supra* note 1.

¹¹ *Id.*

¹² *Id.*

II. The Viewpoint-Based Disinvitation of Mofokeng Cannot Be Reconciled with UD’s Commitment to Freedom of Expression

The university administration’s reversal—predicated on ideological objections to Mofokeng’s viewpoints and advocacy—of the academic decision to host Mofokeng is plainly inconsistent with the university’s policy commitments to freedom of expression and academic freedom. Administrators at institutions that have promised freedom of expression do not have the authority to overrule academic decisions on who may speak or what may be said.

A. UD promises faculty academic freedom and free expression

Though UD is a private university and is not bound by the First Amendment, it has made institutional commitments to free speech and academic freedom through its official policies.

For example, UD has adopted the 1940 Statement of Principles on Academic Freedom and Tenure of the American Association of University Professors, which guarantees UD faculty full freedom in teaching, research, and extramural expression.¹³ UD likewise recognizes that the discussion of “[c]ontroversial or sensitive subject matter,” provided it is “germane to academic endeavor,” is “protected by academic freedom,” including when it addresses “sexually-related” or “potentially provocative topics.”¹⁴ So, too, do UD’s policies recognize that the right to “full expression” of “thoughts, positions and opinions on all contemporary and intellectual issues” is a “primary support for the education of [UD’s] students,” even when such expression “may be controversial” or “provoke criticism from . . . religious communities.”¹⁵

UD’s commitment to freedom of expression is not merely aspirational; this commitment is also important to its status as an accredited institution of higher education. UD is accredited by the Higher Learning Commission, whose standards require that accredited institutions be “committed to freedom of expression and the pursuit of truth in teaching and learning.”¹⁶

Having made these commitments to freedom of expression and academic freedom, UD is both morally and contractually bound to uphold these commitments, even when its administration objects to the content or viewpoint of speech.¹⁷

¹³ UNIV. OF DAYTON, FACULTY POLICY & GOVERNANCE HANDBOOK (July 2021), https://udayton.edu/provost/_resources/facadminaffairs/documents/2021-ud-faculty-handbook.pdf.

¹⁴ UNIV. OF DAYTON, NONDISCRIMINATION AND ANTI-HARASSMENT POLICY, Art. VI (rev. Aug. 11, 2021), <https://udayton.edu/policies/finance/nondiscrimination-policypage.php#freedom>.

¹⁵ UNIV. OF DAYTON, FREEDOM OF EXPRESSION, *available at* https://udayton.edu/studev/_resources/files/dean_resource/Freedom%20of%20Expression.pdf.

¹⁶ HIGHER LEARNING COMM’N, CRITERIA FOR ACCREDITATION (rev. June 2014), *available at* <https://www.hlcommission.org/Policies/criteria-and-core-components.html>. Notably, the Higher Learning Commission has augmented this standard by expressly referencing academic freedom and adopting, in its glossary, a comment explaining that academic freedom entails more than just “freedom from constraint.” *See* HIGHER LEARNING COMM’N, CRITERIA FOR ACCREDITATION ADOPTED REVISIONS EFFECTIVE SEPTEMBER 2020, *available at* http://download.hlcommission.org/policy/updates/AdoptedCriteriaRevision_2019_INF.pdf.

¹⁷ *Chan v. Miami Univ.*, 73 Ohio St. 3d 52, 61 (1995) (private university’s commitment to academic freedom established a contractual right of faculty members “to teach, to think and to speak in accordance with [their] conscience[.]”).

B. In disinventing Mofokeng, UD’s administration violated university policy committing it to freedom of expression.

An institution committed to freedom of expression, and which permits its faculty or students to invite speakers of their choice to campus, may not limit invitations on the basis of “orthodoxy or popularity of their political or social views[.]”¹⁸ When a college “opens the lecture halls” to outside speakers, “it must do so nondiscriminatorily.”¹⁹ Subjecting invitations to a “philosophical” litmus test constitutes “censorship in its rawest form.”²⁰

These principles have protected the right to invite speakers who offer dissenting, unorthodox, or controversial views, including religious speakers,²¹ conservative commentators,²² civil rights activists,²³ anti-war activists,²⁴ those who refused to testify about suspected “Communist or subversive connections,”²⁵ those convicted of felonies or crimes of moral turpitude,²⁶ advocates of the overthrow of the government,²⁷ advocates of the “Occupy” movement,²⁸ and, perhaps most controversially, candidates for public office.²⁹

While we appreciate that the university’s administration might object to any number of these speakers, it is against this backdrop that UD’s decision to protect freedom of expression must be understood. That commitment obligates the administration to abstain from making decisions about who may speak based on the viewpoints of students, faculty, or speakers, precisely to provide the “breathing space” that freedom of expression requires.³⁰

¹⁸ *Brooks v. Auburn Univ.*, 296 F.Supp. 188, 192–95 (M.D. Ala. 1969).

¹⁹ *Stacy v. Williams*, 306 F. Supp. 963, 971 (N.D. Miss. 1969).

²⁰ *Brooks*, 296 F.Supp. at 192–95.

²¹ *Id.*

²² *Young America’s Found. v. Kaler*, 370 F. Supp. 3d. 967, 974 (D. Minn. 2019) (Ben Shapiro, “political commentator, nationally syndicated columnist, author, radio talk show host, and attorney.”).

²³ *Pickings v. Bruce*, 430 F.2d 595, 597–600 (8th Cir. 1970) (representatives of the Southern Students Organizing Committee invited to show and discuss a film); *see also, Smith v. Univ. of Tenn.*, 300 F.Supp. 777, 779 (E.D. Tenn. 1969) (Dick Gregory, a comedian, civil rights activist, and presidential candidate).

²⁴ *Brooks*, 296 F.Supp. at 190–91.

²⁵ *Dickson v. Sitterson*, 280 F.Supp. 486, 488 (M.D.N.C. 1968). There, students challenged a statute prohibiting invitations to members of the Communist Party after students, in a demonstration of the law’s absurdity, sat in a grassy area on the perimeter of campus to listen to a critic of the House Un-American Activities Committee speak from “behind a stone wall which separated the public street from the University campus.” *Id.* at 494. The absurd spectacle—students on campus, listening to the banned speaker steps away—was memorably photographed. *See* N.C. Dep’t of Natural & Cultural Resources, *Speaker Ban Roiled UNC-Chapel Hill Campus*, <https://www.ncdcr.gov/blog/2014/06/25/speaker-ban-roiled-unc-chapel-hill-campus> (last visited Feb. 8, 2022).

²⁶ *Id.*

²⁷ *Id.*

²⁸ Ari Cohn, *Western Michigan University Bans Rapper, Burdens Free Expression*, FIRE, Apr. 18, 2014, <https://www.thefire.org/western-michigan-university-bans-rapper-burdens-free-expression> (discussing lawsuit over university’s veto of student group’s invitation to Boots Riley).

²⁹ *Stacy*, 306 F.Supp. at 971.

³⁰ *New York Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964) (“free debate” requires tolerance of false statements, in order to provide “breathing space” for speech); *Rosenberger v. Rector & Visitors of the Univ. of*

These expressive freedoms also provide UD’s administration with the right to articulate its own vision and to react to the speech of others—criticism is a form of “more speech,” the remedy to objectionable speech preferred to censorship³¹—but it must do so through speech, not censorship.

III. Conclusion

UD’s disinvasion of Mofokeng transgressed these principles, as it was based solely on her “background and work related to reproduction.”³² That Mofokeng may hold viewpoints that some, including administrators, find objectionable is not a principled basis to bar faculty from hearing her speak. This is pointedly so where the anticipated topic of her speech appears unrelated to the views that administrators find objectionable. In blocking Mofokeng from speaking about COVID-19-related health issues because of opposition to her stances on other issues, UD restricted its faculty members’ rights to contribute to free and open dialogue on campus.

FIRE calls on UD to publicly reaffirm its laudable commitments to free expression and make clear that it will not disinvite speakers based on their viewpoints.

We request a response to this letter no later than the close of business on Wednesday, February 23, 2022.

Sincerely,



Sabrina Conza
Program Analyst, Individual Rights Defense Program

Va., 515 U.S. 819, 829, 836 (1995) (recognizing viewpoint discrimination in higher education as “an egregious form of content discrimination” incompatible with freedom of speech).

³¹ *Whitney v. California*, 274 U.S. 357, 377 (1927).

³² Lewis, *supra* note 1.