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President Nancy L. Zimpher
Office of the President
University of Cincinnati
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Cincinnati, Ohio 45221-0063

Sent by U.S. Mail and Facsimile (513-556-3010)

Dear President Zimpher:

As you can see from the list of our Directors and Board of Advisors, the Foundation for Individual Rights in Education (FIRE) unites leaders in the fields of civil rights and civil liberties, scholars, journalists, and public intellectuals across the political and ideological spectrum on behalf of liberty, legal equality, freedom of religion, academic freedom, due process, and, as in this case, freedom of speech and expression on America's college campuses. Our website, www.thefire.org, will give you a greater sense of our identity and activities.

FIRE is concerned about the threat to free speech posed by the Free Speech Area policy at the University of Cincinnati. The policy—which designates only one small area of campus for "free speech" activities—chills expression on Cincinnati's campus and ignores constitutional guarantees of freedom of speech that Cincinnati, as a state-supported institution, is obligated to protect. Cincinnati's implementation of a "free speech zone" violates the First Amendment to the United States Constitution and has no place at an institution presumptively committed to intellectual rigor, robust debate, and a free and vibrant community. It is for these reasons that FIRE named Cincinnati's Free Speech Area policy our "Speech Code of the Month" for December 2007.

This is our understanding of the facts. Please inform us if you believe we are in error. The Free Speech Area policy in the *University of Cincinnati Use of Facilities Policy Manual* designates just one area as a "Free Speech Area": the "northwest section…of McMicken Commons immediately east of McMicken Hall on the West Campus." In addition to restricting expressive activity to this small area, the policy also requires students to reserve the area in advance. Moreover, the policy appears to *threaten legal action* against students who exercise their free speech rights elsewhere on campus, providing that "anyone violating this policy may be charged with trespassing."

Cincinnati's Free Speech Area raises numerous constitutional concerns. First, on its face, the policy limits all expressive activities to the northwest section of McMicken Commons. A map of the university's West Campus reveals both that this is a very small area of campus and that there are numerous other greens, commons, lawn areas, and sidewalks where students should be able to exercise their expressive rights. The only possible defense of Cincinnati's policy is that it is a "reasonable time, place and manner" restriction as allowed by cases like *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). There is nothing "reasonable," however, about transforming the vast majority of the university's property—indeed, *public* property—into a "censorship area," and in maintaining a system of onerous requirements by which students must abide in order to exercise their fundamental rights. Federal case law regarding freedom of expression simply does not support the transformation of public institutions of higher education into places where constitutional protections are the exception rather than the rule. Time and again, courts have determined that to be considered legal, "time, place and manner" restrictions must be "narrowly tailored" to serve substantial governmental interests. The generalized concern for order that underlies the establishment of free speech zone policies is neither specific enough nor substantial enough to justify such restrictions.

Second, Cincinnati's regulations regarding facilities use are impermissibly vague. The Free Speech Area policy threatens anyone who exercises their expressive rights outside of the Free Speech Area with a charge of trespassing. However, the next policy, on amplified sound, appears to permit sound amplification on other areas of campus. Since the Free Speech Area policy explicitly limits expressive activities to the northwest section of McMicken Commons, does this mean that the amplified sound activities that may be scheduled for other facilities must be non-expressive in nature? Or do the policies simply contradict one another? As an attorney with expertise in constitutional law, I cannot understand precisely when and where assembly and speech are permitted on Cincinnati's campus. How, then, are Cincinnati students supposed to figure out what is permitted?

As a federal judge recently wrote in striking down a university's speech code:

> We must assess regulatory language in the real world context in which the persons being regulated will encounter that language. The persons being regulated here are college students, not scholars of First Amendment law…. What path is a college student who faces this regulatory situation most likely to follow? Is she more likely to feel that she should heed the relatively specific proscriptions of the Code that are set forth in words she thinks she understands, or is she more likely to feel that she can engage in conduct that violates those proscriptions (and thus is risky and likely controversial) in the hope that the powers-that-be will agree, after the fact, that the course of action she chose was protected by the First Amendment?

College Republicans at San Francisco State University v. Reed, 523 F. Supp. 2d 1005 (N.D. Cal. 2007).

Based on the plain language of the policy, students reading Cincinnati's Free Speech Area policy may reasonably believe that all assemblies and demonstrations may take place only in the Free Speech Area, and that they may be charged with trespassing for demonstrating elsewhere on

campus. Thus, even if the policy was not intended to restrict all assembly in this manner, it likely is having precisely such a chilling effect on campus expression. This result is unacceptable.

FIRE has challenged the establishment of free speech zones at universities across the nation, including at Citrus College in California, Colorado State University, Seminole Community College in Florida, Texas Tech University, University of Nevada–Reno, University of North Carolina–Greensboro, Valdosta State University, West Virginia University, and Winston Salem State University. In all of these cases the institutions challenged have either decided on their own to open up their campuses to expressive activities or have been forced by a court to do so. For instance, in FIRE's case at Texas Tech, a federal court determined that Texas Tech's policy must be interpreted to allow free speech for students on "park areas, sidewalks, streets, or other similar common areas…irrespective of whether the University has so designated them or not." *See Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004). Cincinnati would be well advised to take this into account in considering its own policy.

Moreover, Cincinnati's strict regulations on speech are tragic in light of the fact that the special function of the university as a whole, in any free society, is to serve as the ultimate "free speech area." Cincinnati affirms this sentiment in its Code of Student Conduct, which provides that "[a]s members of society, students have the same responsibilities as other members of society and enjoy the same freedom of speech and peaceful assembly, and the right of petition that other members of society enjoy." Cincinnati's Free Speech Area policy runs afoul of both the First Amendment and Cincinnati's own commitments to free speech by restricting speech and assembly to just one small area of its large campus.

It is imperative that Cincinnati immediately revise its illegal and immoral "Free Speech Area" policy. We offer you the following guidelines to help you revise your speech policies:

1. The default position of any policy should be that free speech is the norm all over the campus. In general, policies should describe what a university *cannot* do in specific language and, to a lesser extent, what restrictions are permissible and when. A truly progressive policy would mirror the Bill of Rights.

2. Schools cannot restrict speech to a small portion of campus, nor to inaccessible or sparsely used/populated areas of the campus only. The speech must be generally accessible to the population at large—and especially to the target audience.

3. Speech may not be unduly restricted by pre-registration regulations, onerous monetary deposit requirements, or expensive insurance requirements. No rule that allows the school substantial discretion to impose conditions on speech for groups or individuals is allowable. Discretionary decisions must be "content and viewpoint neutral," meaning they involve factors such as noise or interference with traffic flow but nothing relating to the substance of the speech.

4. Speech activities should not be unduly restricted by "neatness" and "cleanliness" considerations. A school may require that students clean up after a rally or a leafleting. A school may not prohibit leafleting because of a general fear that students might not clean up afterwards. Of course, if a particular group has a demonstrated history of not cleaning up its own mess, then modest restrictions might be in order—such as a monetary bond to cover the

cost of a clean-up service. Only in light of past failures should a group be saddled with such preconditions.

5. Demonstrative activities should not be restricted in the name of aesthetics. It is reasonable to ask students to restore the campus area to its original condition after a large demonstration or leafleting (beyond normal wear and tear, which is a normal cost of operations for a university), but it is unreasonable to prohibit an expressive activity in advance for fear that it will make a mess or be unaesthetic. (This is related to No. 4, above.)

6. Virtually all universities already have the power, through existing rules, to prevent the type of disruptive conduct they might fear would take place. They can stop demonstrations that substantially impede the function of the university, block traffic flow, or prevent students from sleeping or studying. They can punish students who engage in vandalism or violence. The university also has increased power to regulate the presence of those speakers who have not been invited to campus and who are otherwise unaffiliated with the university. The university should not simply assume before the fact that student or faculty expression will be impermissibly disruptive. Rather, the university should accept its role as the ultimate free speech zone.

Please spare the University of Cincinnati the embarrassment of fighting against the Bill of Rights—a statement of both law and principle by which the university is legally and morally bound. We urge Cincinnati to undo this unjust policy, thus making clear that free speech at Cincinnati is celebrated, honored, and embraced—not feared, restrained, and hidden. Let your students exercise their basic legal, moral, and human rights; let them speak, assemble, and protest as their consciences dictate.

FIRE is committed to using all of its resources to abolish the unconstitutional limits on freedom of expression at the University of Cincinnati. We request a response on this matter by December 22, 2008.

Sincerely,

Samantha K. Harris
Director, Spotlight: The Campus Freedom Resource

cc:
Anthony J. Perzigian, Senior Vice President for Academic Affairs and Provost, University of Cincinnati
Mitchel D. Livingston, Vice President for Student Affairs and Chief Diversity Officer, University of Cincinnati
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