



November 16, 2016

President John Bardo
Wichita State University
Office of the President
1845 Fairmount Street
Box 1
Wichita, Kansas 67260-0001

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

Dear President Bardo:

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. Our website, thefire.org, will give you a greater sense of our identity and activities.

FIRE is concerned about the threat to freedom of expression at Wichita State University (WSU) posed by certain policies and practices related to demonstration on campus, as highlighted by recent interactions between members of the unrecognized student group Young Americans for Liberty (YAL), campus administrators, and police officers. The group was repeatedly told to register their outdoor signature-gathering events with campus police 72 hours in advance and, during one event, was warned against allowing "hate speech" to be written on a "free speech ball" the members rolled along with them. These limitations on their expressive activity infringe on the students' First Amendment rights, which WSU, a public university, is bound to honor.

The following is our understanding of the facts. Please inform us if you believe we are in error.

On September 27, 2016, YAL chapter president Maria Church wrote to Dean of Students Christine Schneikart-Luebbe to alert her to the group's upcoming plans to gather signatures for a petition in outdoor areas of campus on an ongoing basis throughout the semester. Her email read as follows:

Dear Dean Schneikart-Luebbe,

Our student group, Young Americans for Liberty (YAL), would like to gather signatures for a petition to promote Free Speech on campus and specifically for Wichita State University to adopt the Chicago Principles on Free Speech.

We will need to gather signatures, talk to fellow students, and express our support for adopting the Chicago Principles, both inside the Free Speech Area, known as the “Limited Public Forum,” and also on sidewalks and open outdoor spaces beyond the Free Speech Area. We plan on doing this continuously, on a weekly basis, in order to help meet the signature requirements set by our Chapter.

We will not block access to Wichita State University buildings or sidewalks, use amplified sound, impede vehicular or pedestrian traffic, or in any way disrupt the operations of campus or Wichita State University educational functions.

Our signature-gathering is protected by the First Amendment. We plan to start on October 3rd in the places described above, as well as other areas on campus where we can engage in thoughtful dialogue with our fellow students.

On September 29, 2016, Director of Student Involvement Nancy Loosle responded with the following email:

Hi, your message about the petition drive you would like to conduct was passed along. Given Young Americans for Liberty is not a recognized student organization your event would fall under the Policy 11.12 / Use of University Campus by Non-University Groups for First Amendment Activities. This policy states you must contact the University Police 72 hours before you would like to conduct your event.

Policy 11.12 states, in relevant part:

1. Subject to the regulations and requirements of this policy, non-University groups may use the campus of the University for first amendment activities.
2. Notification of intent to be on campus to engage in first amendment activities (hereinafter “the Event”) shall be provided to the University Police Department no later than seventy-two (72) hours prior to the Event along with the following information:
 - a. The name, address and telephone number of the individual, group, entity or organization sponsoring the Event (hereinafter “the Sponsoring Organization”); and

- b. The name, address and telephone number of a contact person for the Sponsoring Organization; and
- c. The date, time and requested location of the Event; and
- d. The nature and purpose of the Event; and
- e. The type of sound amplification devices to be used in connection with the Event, if any; and
- f. The estimated number of people expected to participate in the Event.

(Internal footnotes omitted.)^{1 2}

YAL did not contact the university police prior to their planned signature-gathering activity on October 3, 2016. That day, Church, two other WSU students, and two non-students moved around the outdoor areas of campus collecting petition signatures and rolling a large, inflated “free speech ball,” on which they invited students to write messages. They began this activity around 11:15 a.m. and were stopped by two university police officers at about 1:30 p.m. in an open, grassy area on campus between the student union and library.³

One of the officers inquired about the YAL members’ activities, prompting Church to explain the premise of the free speech ball. The officer asked if there was any “hate speech” on the ball. Church replied that they were allowing students to write whatever they wanted, leading the officer to examine the ball for several moments. The officer then asked to see identification from someone in the group and Church provided her student ID. The officer wrote down her information and asked for their organization’s name, which he likewise

¹ Policy 11.12 defines a “non-university group” as “individuals, or combinations of individuals, who are not currently enrolled students or current employees of Wichita State University or who are not officially affiliated or associated with a recognized student organization or a recognized employee group of the University.” It is not clear from the face of the policy why it would apply to a currently enrolled student such as Church in an unrecognized student group. However, Policy 11.13 on “Use of University Campus by University Groups for First Amendment Activities” defines “university groups” as “individuals who are currently enrolled students or current employees of Wichita State University or who are affiliated with a recognized student organization or a recognized employee group of the University.” This policy contains identical language to that quoted above in Policy 11.12 with respect to notice and registration of expression or demonstration with university police. Thus, for purposes of discussing these requirements, it is irrelevant which policy applies to individual students in an unrecognized student group.

² Policies 11.12 and 11.13 both give the following examples of “first amendment activities”: “Examples would include, but not necessarily be limited to, informational picketing, petition circulation, the distribution of information leaflets or pamphlets, speech-making, demonstrations, rallies, appearances of speakers in outdoor areas, mass protests, meetings to display group feelings or sentiments and/or other types of constitutionally protected assemblies to share information, perspective or viewpoints.”

³ FIRE has on file a video of the exchange, which we are happy to provide to WSU upon request.

recorded. He then said they were not doing anything wrong as far as he could see and allowed them to continue their expressive activities. They did so until about 2:15 p.m., at which point they had gathered nearly 100 petition signatures.

On October 11, Church sent Schneikart-Luebbe a nearly identical email to her September 27 message, but stated that the group's next outing to gather signatures would take place that same day. She did not receive a response, but proceeded with the event, again rolling a free speech ball around the outside areas of campus while petitioning with three other WSU students and one non-student. The event occurred without incident.

On October 30, Church sent Schneikart-Luebbe another nearly identical email, but included the date of October 31 for the group's next outing to gather signatures. This event did not take place because Church fell ill. However, Loosle responded to Church's October 30 email on November 1, including a copy of her September 29 email and writing:

Hi, I was passed along another email you sent to the Dean of Students about your Free Speech petition drive. If you reference my email to you below from September 29, you need to obtain approval from the University Police prior to your event. If you have questions about this process please contact Sgt. [sic] Garret Moyer in the University Police, 978-3450 or Garret.Moyer@wichita.edu [sic].

Finally, On November 10, Church sent another iteration of her previous messages to Loosle, but included the date of November 14 for YAL's next signature-gathering event. She did not receive a response and conducted a similar event to those described above on November 14, accompanied by one non-student, without interruption.

The above-described interactions between Church, WSU administrators, and university police—though they did not have the effect of preventing YAL's expressive activities—highlight several constitutional deficiencies in the university's policies and practices respecting expressive activity on campus grounds.

It has long been settled law that the First Amendment is binding on public universities such as WSU. *See Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) (“With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities.”); *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).

72-hour Preregistration Requirement

First, the policy requirement that a student must provide 72 hours notice to university

police before engaging in any and all types of expressive activity—including the registration of the speaker’s identity and purpose—cannot withstand constitutional scrutiny. Not only is the breadth of the limitation on protected speech unjustifiable, but it also fails to allow for any anonymous or spontaneous expression.

While public universities such as WSU may establish reasonable “time, place, and manner” restrictions on expression, these restrictions must be “narrowly tailored” to “serve a significant governmental interest” and must “leave open ample alternative channels for communication.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

It is difficult to discern what government interest is served by requiring prior notice and approval for any petitioning on a public university campus, or for every protest or demonstration regardless of its size, noise level, and other relevant factors. WSU would be hard-pressed to demonstrate that this across-the-board restriction on expression is “narrowly tailored” to “serve a significant governmental interest,” particularly in the circumstances presented here, namely, several individuals peacefully moving around the open, outdoor areas of campus to collect signatures and invite students to write messages on a large beach ball.

The Supreme Court has shown particular disfavor toward broad preregistration requirements impacting expression, like petitioning, at the core of our First Amendment traditions. As the Supreme Court has declared, “It is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so.” *Watchtower Bible and Tract Society of NY, Inc. v. Village of Stratton*, 536 U.S. 150, 165–66 (2002).

In striking down a municipality’s blanket permit requirement for all door-to-door canvassing, the *Watchtower* Court noted that such a rule prevented all anonymous speech, the speech of those who refuse to register with the government on principle, and spontaneous speech. As to anonymous speech, and the Court reasoned:

First, as our cases involving distribution of unsigned handbills demonstrate, there are a significant number of persons who support causes anonymously. “The decision to favor 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.” . . . The requirement that a canvasser must be identified in a permit application filed in the mayor’s office and available for public inspection necessarily results in a surrender of that anonymity.

Id. at 166 (quoting *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 341–342 (1995)).

The Court further noted that requiring speech to be licensed in the first instance would deter some from speaking at all for political or religious reasons:

As our World War II-era cases dramatically demonstrate, there are a significant number of persons whose religious scruples will prevent them from applying for such a license. There are no doubt other patriotic citizens, who have such firm convictions about their constitutional right to engage in uninhibited debate in the context of door-to-door advocacy, that they would prefer silence to speech licensed by a petty official.

Id. at 167.

Finally, the Court was concerned that a “significant amount of spontaneous speech” was “effectively banned” by the municipal ordinance. In an apt example for the recent election season, the Court noted that the town’s licensing requirement would prevent “a spontaneous decision to go across the street and urge a neighbor to vote against the mayor.” *Id.* Likewise here, WSU’s demonstration policies leave no room to engage in even the most basic public exchange of ideas on or reaction to current events without triggering the 72-hour notice and registration requirements, as they cover all “first amendment activities,”⁴ from the distribution of literature to “speech-making” to “meetings to display group feelings or sentiments.”

While public universities like WSU may, in some instances, have a legitimate interest in placing narrow constraints and prior approval requirements on some forms of campus expression—such as sizeable demonstrations involving large displays or equipment, temporary structures, or the use of amplified sound—they may not require by default that individual students or student organizations preregister or seek license in order to peacefully gather signatures in open, public areas of campus. WSU must amend its policies accordingly.

Campus Officer’s Comment on “Hate Speech”

The university police officer’s suggestion that the YAL members could not permit “hate speech” to be written on their free speech ball—while it did not result in any suppression of student speech at the time—also raises serious concerns. It is unclear whether the officer referred to any written WSU policy when questioning and examining whether the free speech ball contained “hate speech,” but whether by written rule or unwritten practice, campus police officers may not suppress or punish student speech on the basis of its message. To do so is to engage in constitutionally suspect viewpoint discrimination.

The First Amendment speech rights enjoyed by all WSU students apply equally to expression some may find offensive, insensitive, or even hateful. As the Supreme Court

⁴ As explained, *supra* notes 1 and 2, Policies 11.12 and 11.13 have identical definitions of “first amendment activities” and the 72-hour notice requirement to university police.

declared in *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949), “[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”

“Hate speech” is not a category of speech unprotected by the First Amendment, and our legal system has time and time again rejected efforts to carve out such an exception. Unless the expression deemed as “hate speech” falls within the narrowly-drawn categories of speech recognized as unprotected—such as incitement to violence or true threats—a policy or practice officially prohibiting such expression is incompatible with our constitutional commitment to freedom of speech. *See, e.g., Snyder v. Phelps*, 562 U.S. 443, 461 (2011) (“As a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate.”).

We ask WSU to clarify to FIRE and to its police force that university policy does not require or condone the suppression of student speech based on the content of the message expressed unless it falls into a category of unprotected speech. We further ask WSU to provide to police clear definitions of unprotected speech that are narrowly drawn to avoid unconstitutional applications to protected speech.

FIRE is happy to work with WSU to reform its policies on expressive activity on campus to better protect its students’ First Amendment rights and to assist in providing guidance on the scope of protected speech to university police. In addition, we ask that WSU communicate to Church that she and other students in her group may engage in peaceful core expressive activity such as signature-gathering in public areas of campus without having to preregister with police or monitor the messages on a free speech ball based on their content.

We thank you for your attention to our concerns and request a response to this letter by November 30, 2016.

Sincerely,



Marieke Tuthill Beck-Coon
Senior Program Officer, Individual Rights Defense Program

cc:

Christine Schneikart-Luebbe, Dean of Students
Nancy Loosle, Director of Student Involvement

David H. Moses, General Counsel