FIRE
Foundation for Individual Rights in Education

May 16, 2019

President Renu Khator
Office of the President
212 E. Cullen Building
University of Houston
Houston, Texas 77204-2018

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

Dear President Khator,

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 writing to the University of Houston (UH) to share our concern about the threat to free speech posed by your institution's act of shutting down the Coogs for Israel student group event in Butler Plaza. UH's misapplication of its policy on student free speech violates the group's First Amendment rights. We call upon UH to respect its students' free speech rights by clarifying its free speech policy.

I. FACTS

The following is our understanding of the pertinent facts, based on our discussions with involved students and review of applicable documents and video recordings. We appreciate that you may have additional information to offer and invite you to share it with us.

On the morning of April 2, 2019, UH student organization Coogs for Israel hosted an event on Butler Plaza, an open outdoor space traditionally used for student expression on UH's campus. The event featured a small table, a canvas, and an easel, which the group used to pass out white T-shirts to students who could draw on the shirts. Their goal was to start a dialogue with the campus community about Israel.

UT's Manual of Administrative Policies and Procedures (MAPP) 13.01.01(V) governs students' expressive activity in Butler Plaza. Under this policy, Butler Plaza is designated as an area students can use **without a reservation,** although "an individual or group with a reservation will have exclusive use and priority over other individuals or groups."[1] (emphasis added). However, on UH's website, it claims that MAPP 13.01.01(V) designates Butler Plaza as one of five "outdoor free expression areas that **require a reservation**" for expressive activity.[2] (emphasis added).[3]

Coogs for Israel did not have a reservation for Butler Plaza that day. Two other student groups were engaged in expressive activity in Butler Plaza at the time, one with a reservation and the other without a reservation. Neither of these groups disrupted each other's activities, as the area was large enough to accommodate all three groups.

At the beginning of the event, two campus police officers approached the Coogs for Israel table and amicably chatted with the students about their event. The officers did not indicate to the students that their activities presented a problem or conflicted with UH policy in any way. The police remained nearby throughout the event, which continued without incident for about two hours.

After two hours, however, members of another student organization, Students for Justice in Palestine (SJP), started talking to Coogs for Israel. After SJP members began yelling at Coogs for Israel members, the officers again approached the table and the SJP students left the area.

Shortly thereafter, the officers asked Coogs for Israel to take down their table, citing the group's lack of a reservation for the space. The event continued for around ten minutes without a table. The officers then directed the group to end the event, asserting that Associate Vice President for Student Affairs Daniel Maxwell received complaints about the group violating UH policy on free expression in Butler Plaza. The officers said they were directed by Associate Dean of Students Kamran Riaz to stop the event because another group had reserved Butler Plaza, and Coogs for Israel did not have a reservation.

According to Coogs for Israel, as the group was being escorted off Butler Plaza, a police officer told the group: "We were getting a lot of calls. I'm almost 100 percent sure that it was the same

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[1] UNIV. OF HOUSTON, MANUAL OF ADMINISTRATIVE POLICIES AND PROCEDURES: FREEDOM OF EXPRESSION (rev. Dec. 8, 2015), *available at* http://www.uh.edu/af/universityservices/policies/mapp/13/130101.pdf.

[2] UNIV. OF HOUSTON (2019), FREEDOM OF EXPRESSION POLICY, https://www.uh.edu/dos/resources/freedom-of-expression.

[3] UNIV. OF HOUSTON (2019), FREEDOM OF EXPRESSION POLICY, https://www.uh.edu/dos/resources/freedom-of-expression.

students that were yelling at you guys." The officers also said they had received calls from students stating that the group made them feel "unsafe."

After the event, the officers escorted several Coogs for Israel members to meet with Riaz in his office. Riaz explained to the group that they could not table, distribute literature, or conduct any expressive activity in Butler Plaza because they did not have a reservation. The group asked Riaz if he received any complaints about the event, to which he responded that he did not know and that this was the first time he had heard about it.[4] When the group mentioned that the officers told them that students complained about the group's event, Riaz responded that he had "no knowledge" of any complaints about the group.[5] Coogs for Israel later inquired with Maxwell about this issue, and he told the group that he was unaware of any complaints concerning the group.[6]

II. ANALYSIS

A. UH is bound by the First Amendment.

It has long been settled law that the First Amendment is binding on public universities, including the University of Houston. *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); *see also DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008) (on public campuses, "free speech is of critical importance because it is the lifeblood of academic freedom"); *Pro-Life Cougars v. Univ. of Houston,* 259 F.Supp.2d 575, 582–85 (S.D.Tex. 2003) (applying strict scrutiny to strike down UH policy requiring reservations for expressive activity in Butler Plaza).

B. UH's erroneous application of MAPP 13.01.01(V) creates an unconstitutionally vague restriction on UH student expression.

Under MAPP 13.01.01(V), Coogs for Israel did not need a reservation to engage in expressive activity in Butler Plaza. However, the UH police officers cited this policy in shutting down

[4] Audio recording: Coogs for Israel meeting with Associate Dean of Students Kamran Riaz (Apr. 2, 2019) (on file with author).
[5] *Id.*
[6] Letter from StandWithUs Chief Executive Officer Roz Rothstein to UH President Renu Khator and UH Vice President Richard Walker (Apr. 5, 2019) (on file with author).

their event, and Riaz explained to the group that this policy requires groups to have a reservation to hold an event in Butler Plaza. These misapplications of this policy, together with the conflicting online description of this policy, obstruct students' ability to ascertain whether their expression in Butler Plaza will require advance approval. This confusion will have a chilling effect. The potential consequences that await a student who mistakenly believes the less-restrictive policy to apply would cause a reasonably cautious student to rely, instead, on the more restrictive description and enforcement of the policy. These university discrepancies render its free speech policy unconstitutionally vague.

A policy is unconstitutionally vague when it does not "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). As a federal judge 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?

Coll. Republicans v. Reed, 523 F. Supp. 2d 1005 (N.D. Cal. 2007).

Based on UH's application of MAPP 13.01.01(V) to Coogs for Israel, and its erroneous description of the policy on its website, students cannot reasonably ascertain whether a reservation is required to use Butler Plaza for expressive activity. Further, the maintenance of conflicting interpretations of university policy grants administrators the unfettered choice to enforce one or the other at will, introducing the possibility of discriminatory or arbitrary enforcement. *See FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 253 (2012) (those subject to regulation "should know what is required of them so they may act accordingly," and "precision and guidance are necessary so that those enforcing" regulations "do not act in an arbitrary or discriminatory way").

This confusion was on full display during Coogs for Israel's conversations with campus police officers and Riaz, where the students believed they could use Butler Plaza without a

reservation, only to be told the complete opposite by Riaz. Even if this policy is not intended to restrict expressive activity in this manner, it has a chilling effect on campus expression—an unacceptable result at an institution bound by the First Amendment.

C. UH's apparent requirement that students register in advance to use Butler Plaza for expressive activity fails strict scrutiny.

If the interpretation of MAPP 13.01.01(V) asserted by Riaz and UH's website governs expressive activity in Butler Plaza, the reservation requirement cannot survive a strict scrutiny analysis, which a federal court has already determined applies to restrictions on student expression in Butler Plaza. *Pro-Life Cougars*, 259 F.Supp.2d at 582.

According to UH's website and Riaz, UH designates five open, outdoor areas that can only be used with a reservation from the UH administration.[7] In order to engage in expressive activity in these areas, students must submit a request to the UH administration at least five business days in advance of the activity.[8] Students must also receive approval from the Dean of Students Office, which requires the students to submit a completed "Expressive Activity Description Form" to the Dean at least seven business days in advance of the proposed activity.[9]

The requirements that students reserve Butler Plaza at least five days in advance, and submit a completed "Expressive Activity Description Form" to the Dean at least seven business days in advance, violate the First Amendment rights of UH students.

Administrative procedures requiring a speaker to obtain a license, permit, or to register before engaging in expression are highly disfavored under long-established law and difficult to justify. *See N.Y. Times v. United States*, 403 U.S. 713, 714 (1971) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.") (internal quotation marks omitted). The First Amendment does not allow—and courts will not uphold—broad permitting schemes that place a significant burden on speech and are not sufficiently tailored to serve an important government interest. The United States District Court Southern District of Texas, Houston Division, has already decided that this standard applies to UH's Butler Plaza, stating:

> This uncontroverted evidence compels the conclusion that both the University, and in particular Butler Plaza, are public fora designated for student speech. . . .

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[7] *Freedom of Expression Policy*, *supra* note 1.
[8] *Id.*
[9] *Id.*; *Freedom of Expression Expressive Activity Description Form*, UNIV. OF HOUSTON (2015), https://www.uh.edu/dos/_files/freedom-of-expression-form.pdf.

> Any restriction imposed by the University on student expressive activity on Butler Plaza must therefore be analyzed under the strict scrutiny standard as opposed to the reasonableness standard suggested by Defendants.

Pro-Life Cougars, 259 F.Supp.2d at 582.

A federal district court has already declared that UT may not require its students to register in advance to use Butler Plaza for expressive activity. *Pro-Life Cougars,* 259 F.Supp.2d at 283 (striking down UT registration requirement as an unconstitutional prior restraint under the First Amendment); *see also Shaw v. Burke*, No. 2:17-CV-02386-ODW, 2018 U.S. Dist. LEXIS 7584, at 19-20* (C.D. Cal. Jan. 17, 2018) (striking down university permit requirement for student expression because it "impermissibly restricts speech" and is "not legitimately tied to the government's interests."); *Univ. of Cin. Chapter of Young Americans for Liberty v. Williams*, No. 1:12-cv-155, 2012 U.S. Dist. LEXIS 80967, at *20 (S.D. Ohio June 12, 2012) (declaring that similar policy "violates the First Amendment and cannot stand" and noting that "the mere fact that the notice requirement applies to all student speech raises constitutional concerns");[10] *Roberts v. Haragan*, 346 F. Supp. 2d 853, 861 (N.D. Tex. 2004) (holding Texas Tech University's "park areas, sidewalks, streets, or other similar common areas" are public forums for students and university's requirement that students obtain permission before conducting expressive activities outside designated free speech areas was not narrowly tailored).

Furthermore, courts have consistently invalidated permitting requirements that are not appropriately tailored to an important government interest. In *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002), the Court struck down a village ordinance prohibiting all door-to-door canvassing without a permit, reasoning that the ordinance was not sufficiently tailored to meet the government's interests in preventing fraud and crime and protecting privacy. *Id.* at 168–69; *see also Weinberg v. City of Chi.*, 310 F.3d 1029, 1039–40 (7th Cir. 2002) (citing *Watchtower* and finding that permit requirement for peddling on public sidewalk did not further significant government interest). At the same time, the village's permitting scheme placed a substantial burden on citizens' First Amendment rights by entirely preventing anonymous and spontaneous speech and by deterring speakers who do not wish to seek a license. *Watchtower*, 536 U.S. at 166–68. As the *Watchtower* Court observed:

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[10] In *Williams*, the court rejected the university's asserted interest in preventing disruption of its operations, stating that "[m]ere speculation that speech would disrupt campus activities is insufficient because 'undifferentiated fear or apprehension of a disturbance is not enough to overcome the right to freedom of expression on a college campus.'" 2012 U.S. Dist. LEXIS 80967, at *19–25 (quoting *Healy*, 408 U.S. at 191).

> 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.

Id. at 165–66.

Moreover, courts will strike down permitting systems "without narrow, objective, and definite standards to guide the licensing authority." *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969); *see also City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 (1988) (permit requirements must have clearly delineated standards). The *Shuttlesworth* Court struck down an ordinance requiring a permit for parades and demonstrations where it vested "virtually unbridled" authority on government actors to decide what permits to grant or deny. 394 U.S. at 150; *see also Weinberg*, 310 F.3d at 1045–46 (peddling permit requirement granting unbridled discretions held to be unconstitutional prior restraint).

UH's practice of restricting expressive activity in Butler Plaza is an unconstitutional prior restraint on speech. Like Texas Tech's requirement that students obtain permission before conducting expressive activities in the open, outdoors areas of its campus, UH's imposed restriction is similarly constitutionally deficient, as such a broad restriction on student expression is not narrowly tailored to serve the university's interests. Like the *Watchtower* ordinance, UH's restriction prevents students from engaging in spontaneous speech on campus, and as the *Watchtower* court noted, "[t]he mere fact that the [government rule] covers so much speech raises constitutional concerns." 536 U.S. at 165. Moreover, UH's restriction contains no "narrow, objective, and definite standards" to guide the Dean of Students in his decision-making authority. *See Shuttlesworth*, 394 U.S. at 150. Instead, it permits students to exercise their First Amendment rights only at the discretion of an administrator possessing broad discretion, not guided by narrow and objective criteria, to authorize or refuse student expression in a designated public forum. The maintenance of this prior restraint violates not only the rights of Coogs for Israel, but all UH students who wish to engage in expressive activity.

III. Conclusion

UH cannot, consistent with its moral and legal obligations under the First Amendment, continue imposing contradictory rules regarding students' expressive rights. FIRE asks that UH clarify its policy in order to bring it in compliance with the First Amendment and applicable legal precedent. UH must also clarify that will not restrict the ability of Coogs for

Israel or other UH student groups to engage in expressive activities in open, outdoor areas of UH's campus.

We request receipt of a response to this letter by the close of business on May 30, 2019.

Sincerely,

Zach Greenberg
Program Officer, Individual Rights Defense Program

cc:
Kamran Riaz, Associate Dean of Students
Daniel Maxwell, Associate Vice President for Student Affairs