

September 26, 2024

Jonathan G.S. Koppell
Office of the President
Montclair State University
1 Normal Avenue
Montclair, New Jersey 07043

Sent via U.S. Mail and Electronic Mail (koppellj@montclair.edu)

Dear President Koppell:

FIRE, a nonpartisan nonprofit dedicated to defending freedom of speech,¹ is concerned by Montclair State University's restrictions on students demonstrating in outdoor spaces. The university has limited outdoor demonstrations to one small area of campus, creating a restrictive "free speech zone" and violating students' First Amendment rights to peaceably express themselves. We call on Montclair to reverse this policy and allow community members to freely express themselves outdoors subject to reasonable "time, place, and manner" restrictions permitted under the First Amendment.²

I. Background Facts

Montclair's 2021 Expressive Activity policy explains that "students, student organizations, and their sponsored guests may freely engage in spontaneous Expressive Activities [in outdoor campus facilities and areas] provided that such activities are in compliance with all other provisions of this policy."³

This policy was replaced by your November 6, 2023, communication limiting outdoor expression to one area of campus. You stated that, because "the volume [of protests] has become disruptive to teaching and learning," all "rallies and vigils" must be relocated to the Amphitheater "to allow safe expression in an area that is accessible but lessens the

¹ For 25 years, the Foundation for Individual Rights and Expression (FIRE) has defended freedom of expression, conscience, and religion, and other individual rights on America's university campuses. You can learn more about our expanded mission and activities at thefire.org.

² *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

³ *Expressive Activity*, Outdoor Locations, MONTCLAIR STATE UNIV. (updated July 21, 2021), <https://www.montclair.edu/policies/all-policies/expressive-activity/> [<https://perma.cc/NX6L-7GPY>]. The following is our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us.

impact on instruction, especially during this critical time in the semester.”⁴ Despite justifying this restriction by citing the “volume” of protests during a specific period of time in the fall 2023 semester, the restriction continues to be in effect almost a year later. As a result, the 2023 guidance has effectively superseded the 2021 policy.

Since November 2023, administrators have instructed students and faculty members demonstrating outside of the Amphitheater to relocate to this space. For example, last winter, administrators verbally reprimanded students and faculty members affiliated with Students for Justice in Palestine after the group members silently marched across campus.⁵ In another instance, on September 5, 2024, Professor Adam Rzepka and three of his faculty colleagues held a silent protest in the main quad. Such a protest could not have caused a disturbance, yet multiple university officials told the demonstrators that they needed to move to the Amphitheater if they wished to continue protesting.⁶

On September 12, Professor Rzepka attended a meeting with Associate Provost Kenneth Sumner, Assistant Vice President Mary Colon, University Senate President Shannon Bellum, Professor Fawzia Afzal-Khan, and Professor Alan Chorun regarding the school’s Expressive Activity policy.⁷ When asked by Professor Rzepka during that meeting whether he, his colleagues, and students could protest outside the Amphitheater, Associate Provost Sumner replied, “you can do whatever you want.”⁸

Sumner’s assurance to Rzepka would quickly prove untrue. Following the meeting, Professor Rzepka, two faculty colleagues, and one student engaged in another silent protest outside of the Amphitheater.⁹ After they protested for a few minutes on the main quad, Associate Provost Sumner, Assistant Vice President Colon, and Associate Vice President and Dean of Students Margaree Coleman-Carter told the demonstrators that they would have to relocate to the Amphitheater or disperse.¹⁰ The administrators claimed that the demonstrators had not reserved the space and were therefore not allowed to protest there, even though neither the 2021 Expressive Activity policy nor your 2023 communication requires reservations for outdoor demonstrations.

On September 17, Rzepka, three faculty colleagues, and four students repeated their silent protest activity on the quad.¹¹ Rzepka reserved the space in advance for this protest. This

⁴ *Respecting and Caring for Each Other During Challenging Times*, MONTCLAIR STATE UNIV. (Nov. 6, 2023), <https://www.montclair.edu/president/2023/11/06/respecting-and-caring-for-each-other-during-challenging-times/>.

⁵ Email from Adam Rzepka to Ross Marchand (Sept. 11, 2024, 1:50 PM) (on file with author).

⁶ *Id.*

⁷ Email from Adam Rzepka to Ross Marchand (Sept. 12, 2024, 3:32 PM) (on file with author).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Email from Adam Rzepka to Ross Marchand (Sept. 17, 2024, 5:46 PM) (on file with author).

time, administrators gathered at the protest site but did not speak to the demonstrators or attempt to break up the protest.¹²

II. Montclair’s Establishment of a Free Speech Zone Violates Students’ Free Speech Rights

As a public university bound by the First Amendment,¹³ Montclair may establish “reasonable time, place, and manner” restrictions on expressive activity,¹⁴ but its rules must be content- and viewpoint-neutral, narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication.¹⁵

Montclair’s policy is not narrowly tailored to the university’s stated interest in noise reduction, as it bans speech regardless of its noise level. Furthermore, restricting all speech, regardless of noise level, to one small area of campus is not a reasonable restriction and fails to leave open alternative avenues for expression, with the rest of the open outdoor areas of campus remaining closed to all expression.¹⁶

Courts have repeatedly held that similar restrictions on student expression cannot withstand constitutional scrutiny. A federal district court in Ohio enjoined the University of Cincinnati from limiting all “demonstrations, picketing, or rallies” to a small “free speech area.”¹⁷ Likewise, a federal district court in California invalidated Los Angeles Pierce College’s free speech zone because it did not further the college’s interests in avoiding disruption and maintaining the attractiveness of campus “without unnecessarily impeding students’ First Amendment rights.”¹⁸

Montclair’s free speech zone similarly fails to pass constitutional muster. While you cited easing the noise-related burdens on instructors during a critical time of the semester as a rationale for setting up this free speech zone,¹⁹ the university could have set noise limits for demonstrations or required pre-approval for demonstrations exceeding a threshold number of students. Such provisions could have helped further the university’s goal of making sure that protests were not too loud or distracting during a stressful time of the year, while stopping far short of relegating all expression to one free speech zone on campus.

¹² *Id.*

¹³ *Healy v. James*, 408 U.S. 169, 180 (1972).

¹⁴ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

¹⁵ *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

¹⁶ *Respecting and Caring for Each Other During Challenging Times*, *supra* note 4.

¹⁷ *University of Cincinnati Chapter of Young Americans for Liberty v. Williams*, 2012 U.S. Dist. LEXIS 80967, at *29–30 (S.D. Ohio June 12, 2012).

¹⁸ *Shaw v. Burke*, 2018 U.S. Dist. LEXIS 7584, at *26 (C.D. Cal. Jan. 17, 2018).

¹⁹ *Respecting and Caring for Each Other During Challenging Times*, *supra* note 4.

III. Montclair’s Inconsistent Application of a Free Speech Zone Fails to Give Students Reasonable Notice of Prohibited Activities

Any university-imposed restrictions on student speech must give students reasonable notice and a fair opportunity to know what is prohibited.²⁰ Montclair’s constantly shifting speech restrictions and uneven enforcement of its 2021 Expressive Activity policy fail to provide this reasonable notice.

Your directive confusingly stated that Montclair “continue[s] to follow our [2021] Expressive Activity policy,”—the policy that allows for spontaneous protests in all outdoor areas of campus—only to parenthetically state immediately thereafter that events such as rallies and vigils will be relocated to the Amphitheater.²¹ This irreconcilable conflict of logic means that recipients of this communication had no way to know what Montclair’s policy actually was, despite the fact that the 2021 Expressive Activity policy remains on the books.²²

Montclair faculty and students are also left to wonder whether they need a reservation to demonstrate in outdoor areas of campus outside of the Amphitheater. After telling Rzepka that he could do whatever he wanted, administrators immediately used Rzepka’s lack of reservation to break up the September 12 protest. Yet they declined to break up the September 17 protest after Rzepka reserved quad space²³—a reservation that is not required by either the 2021 Expressive Activity policy²⁴ or your directive.²⁵ While the administrators’ conduct toward Rzepka and his fellow demonstrators implies that reserving space in advance is now a requirement for protesting outside the Amphitheater, this appears to have been deliberately left unstated by written policy.

A conflicting array of directives, policies, and enforcement provides insufficient notice of university rules that Montclair has every reason to know will chill speech and result in self-censorship. Indeed, such an outcome is *so* inevitable that a desire to silence constitutionally protected speech is the only possible motivation behind Montclair’s behavior.

IV. Conclusion

Montclair’s establishment and inconsistent enforcement of a free speech zone is a stark illustration of a “reckless or callous indifference to the federally protected rights of others,”²⁶ Accordingly, we remind you that a public college administrator who violates

²⁰ See *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

²¹ *Id.*

²² *Expressive Activity*, *supra* note 3.

²³ Email from Adam Rzepka to Ross Marchand (Sept. 12, 2024, 3:32 PM); Email from Adam Rzepka to Ross Marchand (Sept. 17, 2024, 5:46 PM) (on file with author).

²⁴ *Id.*

²⁵ *Respecting and Caring for Each Other During Challenging Times*, *supra* note 4.

²⁶ *Smith v. Wade*, 461 U.S. 30, 56 (1983).

clearly established law will not retain qualified immunity and can be held personally responsible for monetary damages for violating First Amendment rights.²⁷

Montclair must make clear that the 2021 Expressive Activity policy currently published on its website is still binding, that reservations are not required for every single instance of free expression, and that the Amphitheater is not the sole venue for free expression. FIRE would be pleased to assist Montclair in training its administrators to implement the 2021 Expressive Activity policy, which protects students' and faculty's First Amendment rights.

Sincerely,



Ross Marchand
Program Officer, Policy Reform and Campus Rights Advocacy

Cc: Kenneth Sumner, Associate Provost for Academic Personnel, Graduate School
Mary Colon, Assistant Vice President for Academic Personnel Services
Shannon Bellum, University Senate President
Margaree Coleman-Carter, Associate Vice President and Dean of Students

²⁷ See *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Gerlich v. Leath*, 861 F.3d 697, 709 (8th Cir. 2017) (upholding denial of qualified immunity to defendants—public university administrators—because plaintiffs' First Amendment right was clearly established).