



Foundation for Individual Rights in Education

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December 13, 2011

President E. Gordon Gee
The Ohio State University
Office of the President
205 Bricker Hall
190 North Oval Mall
Columbus, Ohio 43210

Sent via U.S. Mail and Facsimile (614-292-1231)

Dear President Gee:

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 from across the political and ideological spectrum on behalf of liberty, legal equality, academic freedom, due process, freedom of speech, 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 free speech posed by The Ohio State University's (OSU's) repeated actions to stop OSU students from peacefully distributing fliers inside OSU's Ohio Union. OSU officials have twice invoked the Ohio Union's "green zone" designation to prohibit students from exercising their free speech rights. This is impermissible at OSU, a public university legally bound to uphold the First Amendment.

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

On November 30, 2011, OSU student Mike Newbern and his guest, Michael Pataky, peacefully distributed fliers promoting the OSU student group Buckeyes for Concealed Carry on Campus on the first floor of the Ohio Union. According to Pataky, after a few minutes Ohio Union Shipping, Receiving, and Security Manager Adrienne Gladish required Newbern and Pataky to stop their pamphleteering. Gladish stated that OSU's "green zone" policy prohibited pamphleteering in the Union. In response, Newbern and Pataky ceased distributing their fliers.

On December 6, OSU students Nigel Pence and Ron Grayson Burns, with Pataky as their guest, began pamphleteering in the Ohio Union. These fliers promoted the OSU Young America's Foundation student group and protested OSU's apparent "green zone" policy. After about 30 minutes, as a video of the events shows, Gladish again intervened, arguing that OSU's "green zone" policy prohibited pamphleteering in the Union, and she again ordered that this expressive activity cease. Gladish cited the Union's Leadership in Energy and Environmental Design (LEED) certification as part of her argument. Gladish added that if she acknowledged the right to distribute fliers in the Union, she would have to grant this right to OSU's "1,000-plus" student organizations as well. Burns then asked Gladish to produce the apparent anti-pamphleteering policy. Gladish promised to do so, but she left and did not return. Shortly afterward, the students left the Union.

That the First Amendment protects students at public universities such as OSU is settled law. The Supreme Court of the United States has repeatedly emphasized the primacy of the First Amendment on public college campuses, noting that "the 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.'" *Healy v. James*, 408 U.S. 169, 180 (1972) (internal citation omitted).

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. While a college may establish 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" about the broad prohibition of pamphleteering, an exercise of free speech long recognized as a hallmark right under the First Amendment. Time and again, courts have determined that to be considered legal, "time, place and manner" restrictions also must be "narrowly tailored" to serve a significant governmental interest, while leaving open ample alternative channels for communication. OSU's significant interest in preventing students from peacefully distributing fliers in the Ohio Union is very difficult to discern.

Further, no such formal restriction exists. Gladish's repeated invocation of a "green zone" policy is, at best, a clear misreading of OSU's policies. First, the Union's "green zone" designation, while recognized by OSU, is not a policy. The designation merely signifies a program sponsored by OSU student group Students for Recycling, whose website states that "Through the green zone program, collection boxes are placed in each residence hall as a dump site for ink cartridges, cell phones, batteries, bottle caps, and plastic bags." Similarly, OSU's "Sustainability" website (available at <http://sustainability.osu.edu/recyclemania>) explains that "A Green Zone collects toner cartridges, cell phones, bottle caps, and batteries. You can find a Green Zone in the lobby of just about every residence hall, the Ohio Union (information desk) and RPAC (equipment rental)." **The "green zone" designation establishes no restrictions on student expression, nor does it constitute university policy.**

Second, although Gladish stated that the Ohio Union's "administration does not permit fliering," no such written policy exists. The Ohio Union Building Policies & Procedures Policy T, Section

R.2 (titled “Fliers”), states merely that “The Ohio Union provides a Virtual Bulletin Board service to eliminate paper flier posting in the building. . . . The Ohio Union does not intend the bulletin board to serve as a public forum, and it reserves the right to reject or remove any posting deemed to be antithetical to the educational mission of the university.” This policy restricts only *posted* fliers and makes no mention of any ban on fliering more generally. The “Fliers” policy, moreover, offers no alternative means of disseminating information to serve as an equivalent to pamphleteering.

Further, this policy is impermissible under *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150–51 (1969), in which the Supreme Court announced that “subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.” The extremely vague pronouncement that the Ohio Union might reject “any posting deemed to be antithetical to the educational mission of the university” does not meet the requirements of narrowness, objectivity, and definiteness required under *Shuttlesworth*.

We urge The Ohio State University to permit students to engage peacefully in pamphleteering in the Ohio Union. We also urge OSU to revise its unconstitutional “Fliers” policy. Please spare OSU 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. As a public institution of higher learning, OSU has a duty to ensure that truly free expression is celebrated, honored, and broadened—not feared, restrained, and hidden. Let your students exercise their basic legal, moral, and human rights; let them express their views as their consciences dictate.

FIRE hopes to solve this matter amicably and swiftly, but we are committed to using all of our resources to abolish the unconstitutional limits on freedom of expression at OSU.

We request a response to our letter by December 29, 2011.

Sincerely,



Peter Bonilla

Assistant Director, Individual Rights Defense Program

cc:

Javaune Adams-Gaston, Vice President for Student Life, The Ohio State University

Tracy Stuck, Assistant Vice President for Student Life, The Ohio State University

Matt Couch, Director of Student Activities and Orientation, The Ohio State University

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Adrienne Gladish, Shipping, Receiving, and Security Manager, Ohio Union, The Ohio State University

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