



Mr. John Biancamano
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[REDACTED]

October 20, 2017

Re: Unconstitutionality of Ohio University Policies 24.014 and 24.016

Dear Mr. Biancamano:

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It has come to our attention that your office is considering the adoption of two policies that regulate First Amendment activity on the Ohio University campus: proposed Policies 24.014 (Freedom of Expression) and 24.016 (Use of Outdoor Space). Because the University is a public institution, whatever regulation of protected expression it may have justification to impose must be tailored to allow maximum opportunities for the members of the campus community to speak freely.¹ We have reviewed drafts of the proposed policies. Both contain provisions that are unconstitutional restraints on the freedom of speech, and we urge you not to adopt them.

I. Unconstitutional restrictions in the proposed "Freedom of Expression" Policy

The proposed Freedom of Expression policy contains a provision regarding "[f]reedom of expression in university buildings."² This provision is a blanket prohibition on expressive activities, explicitly barring "[d]emonstrations, rallies, public speech-making, picketing, sit-ins, marches, protests, and similar assemblies,"³ in every indoor space on campus. These types of conduct, which aim to communicate a message to a wide audience, are at the core of what the First Amendment protects.⁴ Courts recognize that this protection is at its most potent in public gathering areas,⁵ including those on college campuses.⁶

¹ The "danger" of "chilling of individual thought and expression" is "especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 835 (1995).

² Proposed policy 24.014(C).

³ *Id.* at (C)(4).

⁴ *E.g.*, *F.C.C. v. League of Women Voters of California*, 468 U.S. 364, 376-77 (1984) (modes of expressing "editorial opinion on matters of public interest" are "entitled to the most exacting degree of First Amendment protection."); *Snyder v. Phelps*, 131 S. Ct. 1207, 1213-14 (2011).

⁵ *McCullen v. Coakley*, 134 S.Ct. 2518, 2529 (2014).

⁶ *See Bowman v. White*, 444 F.3d 967, 981-82 (5th Cir. 2006); *Univ. of Cincinnati Chapter of Young Americans for Liberty v. Williams*, No. 1:12 cv-155, 2012 U.S. Dist. LEXIS 80967 at *17 (S.D. Ohio June 12, 2012); *State v. Mayberry*, No. 2017CRB00275, slip op. at 4 (Athens County Mun. Ct. March 27, 2017).

Simply put, Ohio University may not enact a flat prohibition on all expressive conduct in every indoor campus space. While public universities may promulgate reasonable restrictions on the time, place, or manner of such activities, the proposed total ban is unconstitutionally broad because it would chill expressive activity beyond what can be justified as necessary. As such, this provision is facially unconstitutional.

II. Unconstitutional restrictions in the proposed "Use of Outdoor Space" Policy

The proposed policy regulating the use of outdoor space⁷ also impinges on the campus community's First Amendment rights. Specifically, the policy imposes overly-restrictive provisions for groups to reserve areas of the campus for expressive conduct.

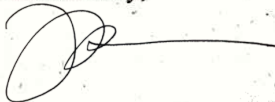
As one example, the proposed policy permits the display of banners near the campus gate, but provides that "[b]anners identifying a particular political candidate, party, or side of a ballot issue may not be displayed" there.⁸ Any policy barring certain categories of speech in an arena where other speech is permitted is facially unconstitutional.⁹ By singling out certain classes of speech for restraint, this provision is an unlawful content-based restriction on expression.¹⁰

Similarly, the proposed policy provides that "...no reservation [of any part of the College Green] can be made Monday-Friday between the hours of 8am and 5pm."¹¹ By prohibiting the use of a central public space on campus at any time during the entire school day, this provision is unconstitutionally overbroad. Any policy regulating the time, place, or manner of speech in public spaces must be reasonable, allowing speakers an opportunity for their message to actually reach their intended audience.¹²

The Supreme Court has long upheld the principle that the buildings and grounds of colleges and universities, as open marketplaces of ideas, deserve the First Amendment's highest protection.¹³ The proposed policies contravene this principle, and if enacted, would violate the law. We strongly recommend that Ohio University reject the two proposed policies, and replace them, if at all, with policies that permit free expression consistent with the Constitution.

If you wish to discuss any of the above, please feel free to contact us.

Yours truly,



Freda J. Levenson
Legal Director
ACLU of Ohio

and



Elizabeth Bonham
Staff Attorney
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⁷ Proposed policy 24.016.

⁸ *Id.* at 24.016(D)(2).

⁹ *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015).

¹⁰ *Id.*

¹¹ Proposed policy 24.016(D)(7).

¹² *E.g., Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. Of Boston*, 515 U.S. 577, 568 (1995); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992).

¹³ *Healy v. James*, 408 U.S. 169, 180-81 (1972); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234, 249-50 (1957); *see also Bowman*, 444 F.3d at 979.