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November 19, 2021

VIA EMAIL

Ms. Amillia Heredia
President
University of Wisconsin-Milwaukee Student Association
amillia@uwm.edu

Re: Campus Free Speech Policies

Dear Ms. Heredia:

We are writing to you on behalf of concerned students regarding recent events at the University of Wisconsin-Milwaukee (UWM). The students are aware that, as a result of a pro-life display in a public area of campus, the UWM Student Association is reviewing campus free speech policies to close “free speech loopholes.” The students are concerned that UWM will pass legislation that will directly infringe on their First Amendment rights, and they demand reassurance that the Student Association will protect freedom of expression to its fullest extent.

Even though the First Amendment shouldn’t be complicated, students often question the extent of their rights on college campuses. They wonder where they can gather for free speech activities. They want to know whether they need permission to bring a “controversial” speaker to campus. And they wonder whether even the most offensive ideas can be shared among peers.

Fortunately, the law provides resounding answers to these questions. The First Amendment protects and encourages expression of all kinds. State and federal courts consistently reject campus censorship. And most importantly, the First Amendment prohibits viewpoint- and content-based discrimination—even against the most hateful views.

Southeastern Legal Foundation is a national, nonprofit legal organization dedicated to defending liberty and Rebuilding the American Republic®. Since 1976, SLF has advocated for limited government, individual liberties, and the free enterprise system in the courts of law and public opinion. Through our 1A Project, we educate the public about students’ First Amendment rights on college campuses through trainings, webinars, legislative testimony, and litigation. This letter seeks to inform UWM about the state of the law regarding the freedom of expression and to offer guidance as the Student Association familiarizes itself with the First Amendment.

Background

It is well-settled that a college campus is the “marketplace of ideas” where students are exposed “to that robust exchange of ideas which discovers truth.”¹ Freedom of speech and

¹ *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

academic inquiry are “vital” on college campuses because only through thoughtful debate and discourse can real education occur.² Fortunately, UWM maintains a Freedom of Expression policy on its website, where the University recognizes that freedom of expression “is indispensable to a free society.”³

However, it has come to our attention that an organization recently erected a pro-life display in a public area of campus. Among the viewpoints it shared, the group compared abortion to the Holocaust. When some UWM students learned of this, they approached the Student Association and demanded a call to action to close “free speech loopholes” on campus and to stop these speakers from engaging in similar activities in the future.

Since then, the Student Association has held several meetings and plans to form a committee to address students’ concerns with so-called free speech loopholes. SLF writes this letter to remind UWM that the First Amendment does not allow the government to silence ideas with which it disagrees.

Legal Analysis

As the Student Association educates itself about the First Amendment, SLF offers several key principles to keep in mind. First, with the exception of a few narrow categories, most forms of speech are protected by the Constitution. Universities can *only* regulate true threats of physical violence, defamation, incitement to lawlessness, and obscenity.

Contrary to popular belief, there is no hate speech exception to the First Amendment. Ideas that might be offensive, or downright hateful, are entirely protected. In fact, any effort by the University to silence hate speech would be a form of viewpoint and content discrimination. That is because when a university labels an idea “hateful” or “offensive,” it is taking a position on the speech itself and assigning certain values to it. This is *never* constitutional.

As our Supreme Court has stated time and time again, “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”⁴ At the cornerstone of the First Amendment lies the understanding that the government—including universities—cannot determine which speech is acceptable or unacceptable. Instead, to root out hateful ideology, “the remedy to be applied is more speech, not enforced silence.”⁵

Next, in any public area of campus, a university may *only* restrict the time, place, and manner—the when, where, and how—of speech. These restrictions must be reasonable, and a university cannot apply the restrictions unequally based on who is speaking. A university also must

² *Healy v. James*, 408 U.S. 169, 180 (1972).

³ <https://uwm.edu/studentorganizationmanual/what-are-our-rights-responsibilities-and-obligations/behaviorconduct/freedom-and-responsibility-of-organizations/freedom-of-expression/>.

⁴ *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

⁵ *Whitney v. California*, 274 US. 357, 377 (1927) (Brandeis, J., concurring).

provide alternatives if a particular time or location is not available, such that a speaker can still reach his or her intended audience. This applies to students and to members of the public at large.

A university can never censor speech by requiring speakers to get approval before speaking. This is called a prior restraint, and it is unconstitutional because it paves the way for university officials to silence speakers based on their views.

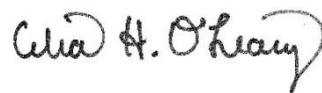
Finally, universities cannot impose policies that are vague, broad, or difficult to understand. Students must know what their campus policies say and where to find them so that they understand the extent of their rights on campus. We are encouraged to see that UWM publicizes its Freedom of Expression policy online, and we urge the University to continue to remind students of their right to engage in free and open discourse.

Any threats by the University—including the Student Association—to shut down expression will be taken seriously and could result in legal action if they infringe on the First Amendment rights of students or members of the public. UWM must protect the rights of *all* students and visiting speakers. It is only through open, thoughtful debate that our nation can truly progress toward higher ideals. Nowhere is that principle more absolute than on a college campus, where ideas are meant to be exchanged. SLF stands ready to ensure that principle is upheld.

Conclusion

Given the diverse range of views and experiences on a college campus, it is inevitable that students may be offended at some point during their college career. However, the First Amendment demands that even the most hateful ideas be protected. We encourage the Student Association to use this opportunity to develop a deeper understanding of the First Amendment and the Student Association's duty to uphold freedom of speech. However, we advise the Student Association that it cannot take any action that will limit the expression of fellow students or members of the public.

Yours in Freedom,



Celia H. O'Leary
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CC: Dean of Students (jussel@uwm.edu)

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