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October 3, 2022

Terri Goss Kinzy
President
Illinois State University
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Re: Unconstitutional First Amendment Policy on Campus: Facilities Use Policy

Dear President Kinzy:

We are writing to you regarding Illinois State University's policy titled, "University Facility and Space Use." We are concerned that the policy infringes on students' First Amendment rights because it allows officials to consider the content and viewpoint of their speech before approving or denying their flyers. Such unfettered discretion is a prior restraint, opens the door to discrimination, and unconstitutionally chills freedom of expression. As such, we demand that the University revise this unconstitutional policy.

Southeastern Legal Foundation is a national, nonprofit legal organization dedicated to defending liberty and Rebuilding the American Republic[®]. Through our 1A Project, we educate the public about students' First Amendment rights on college campuses and take legal action on behalf of students whose rights are violated. This letter seeks to inform Illinois State University that this policy stifles free expression and violates longstanding precedent.

Factual Background

On its website, Illinois State University maintains a facilities use policy called "University Facility and Space Use."¹ The policy states:

The right of freedom of expression and the open exchange of ideas stimulate debate, promote creativity, and are essential to a rich learning environment. The University is committed to protecting the rights of expression, assembly, protest, and dissent and to making University facilities and spaces available for these activities.

¹ <https://policy.illinoisstate.edu/facilities/6-1-1.shtml>.

Illinois State University has established policies and procedures to reasonably regulate the time, place, and manner for use of University facilities and spaces.²

However, the policy goes on to state that student organizations must receive approval from University Marketing and Communications and/or Facilities Management before hanging a temporary sign.³ To obtain approval, a sign “must conform to University standards for type of sign structure, locations, method of messaging, and message content.”⁴

Analysis

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.”⁵ Indeed, freedom of speech and academic inquiry are “vital” on college campuses, because only through thoughtful debate and discourse can real education occur.⁶ The facilities use policy undermines this bedrock principle and raises serious First Amendment concerns because it allows university officials to review “message content” before approving flyers and signs.

I. Illinois State University’s facilities use policy is a prior restraint.

Since 1724, freedom of speech has famously been called the “great Bulwark of liberty,”⁷ intended as “a response to the repression of speech and the press that had existed in England.”⁸ Our Founding Fathers intended to protect the unfettered discussion on matters of public concern. “Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form.”⁹

The U.S. Supreme Court has long embraced the Framers’ hatred of censorship.¹⁰ Thus, courts consistently strike down any action that allows the government to stop a citizen’s expression before the citizen is even able to speak.¹¹ “At the root of this long line of precedent is the time-tested knowledge that in the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship.”¹² This principle applies just as strongly to university officials attempting to stop students from speaking, particularly when only one official or department has unbridled authority to approve or deny expressive activities.¹³

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

⁶ *Healy v. James*, 408 U.S. 169, 180 (1972).

⁷ 1 John Trenchard & William Gordon, *Cato’s Letters: Essays on Liberty, Civil and Religious* 99 (1724), reprinted in Jeffrey A. Smith, *Printers and Press Freedom* 25 (Oxford Univ. Press 1988).

⁸ *Citizens United v. FEC*, 558 U.S. 310, 353 (2010).

⁹ *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

¹⁰ *See Meyer v. Grant*, 486 U.S. 414, 421 (1988).

¹¹ *Near v. Minn.*, 283 U.S. 697 (1931); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Superior Films v. Dep’t of Educ.*, 246 U.S. 587 (1954), *Carroll v. President and Comm’rs of Princess Anne*, 393 U.S. 175 (1968).

¹² *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988).

¹³ *Healy*, 408 U.S. at 180; *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1982).

The facilities use policy is a prior restraint because it grants university officials the authority to review, then approve or deny, the “message content” of a sign before students can even begin speaking. This gives only a few officials unbridled discretion to assess planned speech activities and publications, which opens the door to unconstitutional content and viewpoint discrimination.

II. Illinois State University’s facilities use policy is unconstitutionally vague and overbroad.

A policy violates the Constitution when it is so broad that it infringes on constitutionally protected speech. Similarly, a law or policy is unconstitutionally vague when “men of common intelligence must necessarily guess at its meaning[.]”¹⁴ Vague and overbroad policies are especially dangerous when students must hazard guesses as to what conduct or speech is punishable; students cannot be expected to comply with a vague school policy when they have no way of knowing exactly what is required or prohibited.

The facilities use policy requires students to obtain approval for the “message content” of their flyers.¹⁵ The policy does not provide a definition or specify what it means by “message content,” but it does provide a link to “messaging and message content online forms.”¹⁶ That link merely sends students to another list of policies, procedures, and forms, some of the which include information about copyrights and using the university trademark. It is possible that when the University requires approval for “message content,” it simply means ensuring that students are using trademarks and copyrighted information properly. However, that is not clear from its facilities use policy. By failing to clearly define and limit “message content,” the University forces students to guess what messages will be approved or denied by campus administrators. And even more dangerously, the policy lacks any guidelines for those administrators to follow when approving or denying posters. This paves the way for administrators to discriminate against speakers based on viewpoint and content.

III. Illinois State University’s policy opens the door to viewpoint and content discrimination.

The facilities use policy allows university officials to engage in viewpoint and content-based discrimination. When a university promotes or discourages speech based on “the speaker’s specific motivating ideology, opinion, or perspective,” it has engaged in viewpoint discrimination.¹⁷ Viewpoint-based restrictions are never constitutional.¹⁸ When a public university bans discussion of certain topics, the restriction is considered content-based.¹⁹ Unless a university can demonstrate a compelling government interest, and that its policy is narrowly tailored to achieve that interest, content-based restrictions cannot survive judicial review.²⁰

¹⁴ *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

¹⁵ <https://policy.illinoisstate.edu/facilities/6-1-1.shtml>.

¹⁶ <https://deanofstudents.illinoisstate.edu/involvement/organizations/forms/>.

¹⁷ *Rosenberger v. Rector & Visitors of U. of Va.*, 515 U.S. 819, 820 (1995).

¹⁸ *Id.*

¹⁹ *See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983); *Boos v. Barry*, 485 U.S. 312, 319 (1988).

²⁰ *See, e.g., Papish v. Board of Curators of Univ. of Mo.*, 410 U.S. 667, 670 (1973).

Policies that give university administrators unfettered discretion to approve or deny speech activities are presumptively unconstitutional because they pave the way for viewpoint and content discrimination. When a few individuals have authority to assess speech activities, there is a real risk that they will rely on their own views and biases to determine whether to approve an event.²¹

Here, the facilities use policy explicitly gives campus administrators authority to approve or deny signs based on their “message content.” This automatically renders it a content-based restriction. But as described above, the policy also opens the door to viewpoint-based discrimination because it does not provide officials with any guidelines to follow when assessing posters. There is nothing in place to stop an administrator from rejecting a poster because the poster does not comply with what *she* believes to be appropriate message content. The policy thus goes beyond reasonable time, place, and manner restrictions by allowing officials to assess the message content and the views expressed therein. This is a blatant violation of the First Amendment.

IV. Illinois State University’s facilities use policy imposes an unconstitutional chilling effect on student speech.

The vagueness and overbreadth of the policy’s terms, together with university officials’ unbridled discretion to discriminate against viewpoint and content, also impose an unconstitutional chilling effect on students wishing to engage in speech activities.

Speech is “chilled” when a speaker objectively fears that speaking will result in discipline, and as a result censors her speech altogether. The Supreme Court repeatedly writes that the danger of chilling speech “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.”²² Any action taken by university authorities that has a chilling effect on students is unconstitutional.²³ And even when a member of a university does not have the actual authority to impose discipline, the mere appearance of authority is enough to objectively chill and censor speech.²⁴

It is undeniable that the facilities use policy can chill student expression. As described above, students are expected to hazard guesses about whether their posters will be approved or denied based on the views of the reviewing authorities. Rather than risk drafting a poster or flyer that may be rejected, students will be forced hide their true opinions and only draft flyers they believe university officials will approve. This is censorship, and it is unconstitutional.

Demand

“[C]olleges and universities are not enclaves immune from the sweep of the First Amendment.”²⁵ It is the duty of college officials to protect and defend the voices of every student on campus. But through this facilities use policy, officials are emboldened to discriminate against

²¹ See *Lakewood*, 486 U.S. at 757.

²² *Rosenberger*, 515 U.S. at 835.

²³ *Id.*

²⁴ *Speech First, Inc. v. Fenves*, 979 F.3d 319, 333 (2020).

²⁵ *Healy*, 408 U.S. at 180.

students based on the content of their speech and the views they express. The door is open to censorship and prior restraint, particularly because the policy offers no limits to curb administrators' discretion. As a result, students will be deterred from speaking out altogether.

The University can only impose reasonable, content-neutral restrictions on the time, place, and manner of speech, including limits on flyer size, weight, height, or material. The University must therefore revise its facilities use policy to eliminate "message content" as a condition for approval.

Open discourse is critical to both a functioning democracy and a well-rounded college experience. College students are in the unique position of being surrounded by true diversity: diversity of thought, race, religion, and culture. For many, this is the first—and perhaps only—time they will be exposed to a "marketplace of ideas" that differ from their own. The college experience can have a significant impact on the leaders of tomorrow. Illinois State University must do its part to ensure this freedom for *all* its students.

Yours in Freedom,

s/ Cece O'Leary

Cece O'Leary

Director of 1A Project

Southeastern Legal Foundation

CC: Katy Killian (kakilli@IllinoisState.edu)