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Amy Shoemaker  
Vice President and General Counsel  
Miami University of Ohio  
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Re: Unconstitutional First Amendment Policies on Campus: Facilities Use Policies

Dear Ms. Shoemaker:

We are writing to you regarding Miami University's facilities use policies related to tabling and other forms of expression on campus. We are concerned that the policies infringe on students' First Amendment rights because they are vague and impose unreasonable restrictions on the time, place, and manner of speech. Such restrictions create a prior restraint on freedom of expression and open the door to viewpoint and content discrimination. As such, we demand that the University revise these policies.

Southeastern Legal Foundation is a national, nonprofit legal organization dedicated to defending liberty and Rebuilding the American Republic<sup>®</sup>. 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 Miami University that its policies stifle free expression and violate longstanding precedent.

### **Factual Background**

On its website, Miami University maintains a policy called "Use of University Property."<sup>1</sup> The policy provides guidelines for students who want to reserve a table, create a display, or book space to engage in speech activities on campus. The policy requires students to reserve a space or table "at least fifteen class days in advance of the reserved date," meaning three weeks before the planned speech activity.<sup>2</sup> Likewise, students who want to erect a display must submit a drawing of the display to the Facilities Department at least seven business days in advance.<sup>3</sup> The University

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<sup>1</sup> <https://miamioh.edu/policy-library/administration-operations/university-property/use-of-university-property.html>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

also maintains a policy called “On-Campus Events.”<sup>4</sup> According to this policy, any events open to the public must be approved by the Office of Student Activities fourteen days before the event.<sup>5</sup> The University does not specify whether it means fourteen class days or fourteen consecutive days.

Additionally, the University maintains a policy called “Public Speaking, Leaflet Distribution, and Demonstrations.”<sup>6</sup> According to the University, “demonstrations” include “picketing, petition circulation, public speech making, rallies, the appearance of public speakers in outdoor areas, mass protest meetings to display group feelings or sentiments.”<sup>7</sup> The policy states that students may distribute flyers and leaflets in outdoor areas of campus.<sup>8</sup> It also states that demonstrations “do *not* include University sponsored Campus Events,” and that “[a]ny public speaking, leafletting or demonstration that meets the definition of a Campus Event must also comply with the Campus Event Policy.”<sup>9</sup> The University defines a Campus Event as a larger event with crowds of 100 or more students, and it urges students to submit requests for such events four weeks in advance.<sup>10</sup>

### **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.”<sup>11</sup> Indeed, freedom of speech and academic inquiry are “vital” on college campuses, because only through thoughtful debate and discourse can real education occur.<sup>12</sup> The facilities use policies undermine this bedrock principle and raise serious First Amendment concerns because they are vague and impose unreasonable restrictions on the time, place, and manner of speech on campus.

#### **I. Miami University’s facilities use policies are 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[.]”<sup>13</sup> 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.

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<sup>4</sup> <https://miamioh.edu/student-life/student-activities/student-org-resources/event-planning-resources/locations/on-campus-events/index.html>.

<sup>5</sup> *Id.*

<sup>6</sup> [https://miamioh.edu/policy-library/administration-operations/university-property/public-speaking-leaflet-distribution-and-demonstrations.html?\\_ga=2.134606833.1280065593.1662123452-1340412181.1662123452](https://miamioh.edu/policy-library/administration-operations/university-property/public-speaking-leaflet-distribution-and-demonstrations.html?_ga=2.134606833.1280065593.1662123452-1340412181.1662123452).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* (emphasis added).

<sup>10</sup> [https://miamioh.edu/policy-library/administration-operations/university-property/campus-events.html?\\_ga=2.136126385.1258843736.1664039542-1340412181.1662123452](https://miamioh.edu/policy-library/administration-operations/university-property/campus-events.html?_ga=2.136126385.1258843736.1664039542-1340412181.1662123452).

<sup>11</sup> *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

<sup>12</sup> *Healy v. James*, 408 U.S. 169, 180 (1972).

<sup>13</sup> *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

First, the policies described above are inconsistent. Whereas the Use of University Property policy requires students to obtain approval to table fifteen class days in advance, the On-Campus Events policy only requires approval fourteen days in advance, without clarifying if that means fourteen cumulative days or fourteen class days. Either way, if a student organization wants to reserve a classroom space to host a speaker, it is unclear whether it must submit that request two weeks or three weeks before the event, or if it must submit multiple requests to multiple departments on campus before it can engage in speech activities.

The University also fails to provide any guidelines regarding whether and how a reservation will be approved. It does not clarify that reservations will only be approved or denied based on availability or other reasonable time, place, and manner restrictions. Likewise, the University does not provide guidelines for approving or denying a display; it merely requires student organizations to submit a drawing of the display to the Facilities Department “for review and approval.”<sup>14</sup>

More importantly, it is unclear whether every speech activity must be scheduled in advance or just some activities. Under Ohio state law, a university *must* allow students to gather spontaneously in outdoor areas of campus to engage in expressive activities, including demonstrations and leafleting.<sup>15</sup> The University appears to acknowledge that in the Frequently Asked Questions section of its Freedom of Expression policy, but *only* there.<sup>16</sup> It fails to clarify in its facilities use policies that students have a right to engage in spontaneous expression in public areas of campus. Students would therefore need to know to visit the University’s Freedom of Expression FAQs to make themselves aware of this requirement. Because the University does not make students’ rights clear on its website, it forces students to hazard guesses about whether they must receive advance approval for their speech activities, how far in advance they must receive the approval, and which departments must approve it. In these ways, the University’s facilities use policies are too vague, paving the way for administrators to censor student speech.

## II. Miami University’s facilities use policies impose unreasonable restrictions on the time, place, and manner of student speech.

As the University recognizes on its Freedom of Expression webpage,<sup>17</sup> a university may restrict a few very narrow categories of speech—including obscenity,<sup>18</sup> inciting others to imminent

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<sup>14</sup> <https://miamioh.edu/policy-library/administration-operations/university-property/use-of-university-property.html>.

<sup>15</sup> See Ohio Rev. Code § 3345.0213(A)(3).

<sup>16</sup> <https://miamioh.edu/expression/faqs/index.html>.

<sup>17</sup> [https://miamioh.edu/expression/faqs/index.html?\\_ga=2.94655516.1258843736.1664039542-1340412181.1662123452](https://miamioh.edu/expression/faqs/index.html?_ga=2.94655516.1258843736.1664039542-1340412181.1662123452).

<sup>18</sup> Obscene material is lewd, sexual, and serves no artistic, educational, scientific or literary value to the public. *Paris Adult Theater v. Slaton* (1973). Indecent speech does *not* amount to obscenity. *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667 (1973).

lawless action,<sup>19</sup> true threats of physical violence,<sup>20</sup> and defamation.<sup>21</sup> It also may place reasonable limits on the time, place, and manner of expression, so long as those restrictions “are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.”<sup>22</sup>

By requiring students to reserve a table anywhere from two to three weeks in advance of speech activities, and by requiring students to submit a drawing of any planned display seven business days in advance, the University fails to meet the standard for reasonable time, place, and manner restrictions. Such restrictions are hardly reasonable, especially because the news cycle and current affairs are constantly evolving. If students want to gather in a classroom to talk about current affairs, or if they want to table or erect a display to convey their views on social issues to their peers, they must wait anywhere from one to three weeks to do so. By that point, the opportunity may have passed to talk about those issues.

Additionally, requiring such advanced notice is not narrowly tailored to serve a significant government interest. A significant government interest generally refers to concerns related to nuisance, such as excessive noise or traffic.<sup>23</sup> A restriction must therefore be narrowly drawn to cut down on nuisance. The University cannot show that requiring three weeks’ notice before a student organization tables or reserves a classroom is narrowly tailored. Instead, a more narrowly tailored option would be to grant reservations on a first-come, first-serve basis. Likewise, requiring students to submit a drawing seven days before erecting a display is not narrowly tailored to serve a significant government interest. A university may be allowed to examine a public display or flyer before it is posted to ensure that students are not misusing University trademarks and that they are complying with poster size and height requirements. But beyond that, a university may not examine a flyer in advance to approve or deny the message it contains or the views expressed therein. Seven days is hardly a reasonable, narrowly tailored amount of time to simply ensure that a poster will meet size and trademark requirements.

### III. Miami University’s facilities use policies are a prior restraint.

Since 1724, freedom of speech has famously been called the “great Bulwark of liberty,”<sup>24</sup> intended as “a response to the repression of speech and the press that had existed in England.”<sup>25</sup>

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<sup>19</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>20</sup> True threats are words or conduct that intentionally put others in fear for their physical safety. This is *not* the same as hate speech. *Koepfel v. Romano*, 252 F. Supp. 3d 1310 (M.D. Fla. 2017), *aff’d sub nom. Doe v. Valencia Coll.*, No. 17-12562, 2018 WL 4354223 (11th Cir. Sept. 13, 2018).

<sup>21</sup> Spreading false rumors about someone can amount to defamation and subject an offender to legal action. *Gertz v. Welch*, 418 U.S. 323 (1974).

<sup>22</sup> *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989).

<sup>23</sup> See *Grayned v. City of Rockford*, 408 U.S. 104, 115–16 (1972) (“A demonstration or parade on a large street during rush hour might put an intolerable burden on the essential flow of traffic, and for that reason could be prohibited. If overamplified loudspeakers assault the citizenry, government may turn them down.”).

<sup>24</sup> 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).

<sup>25</sup> *Citizens United v. FEC*, 558 U.S. 310, 353 (2010).

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.”<sup>26</sup>

The U.S. Supreme Court has long embraced the Framers’ hatred of censorship.<sup>27</sup> 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.<sup>28</sup> “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.”<sup>29</sup> This principle applies just as strongly to university officials, particularly when only one department has unbridled authority to approve or deny expressive activities.<sup>30</sup>

The facilities use policies are a prior restraint because they unduly burden student expression. Given their vague and inconsistent nature, the policies leave students wondering how far in advance they must submit a request to reserve a classroom, table, or display. The policies also leave students wondering where to send those requests, and how many requests to send. Although students may be allowed to gather spontaneously to hand out flyers, that is not the same as conveying a message through a table or display. Tabling is one of the most popular methods of communication on college campuses. But if student organizations fail to predict where the news cycle will be weeks in advance, they are deprived of the opportunity to engage in that preferred form of speech. And for those students who do want to gather spontaneously and distribute leaflets, they may not even be aware that they can do so; the University keeps this right hidden on its Freedom of Expression FAQs webpage. A lack of knowledge about their freedoms on campus will deter students from speaking out altogether.

#### IV. Miami University’s facilities use policies open the door to viewpoint and content discrimination.

The facilities use policies also open the door to viewpoint and content 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.<sup>31</sup> Viewpoint-based restrictions are never constitutional.<sup>32</sup> When a public university bans discussion of certain topics, the restriction is considered content-based.<sup>33</sup> 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.<sup>34</sup>

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<sup>26</sup> *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

<sup>27</sup> *See Meyer v. Grant*, 486 U.S. 414, 421 (1988).

<sup>28</sup> *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).

<sup>29</sup> *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988).

<sup>30</sup> *Healy*, 408 U.S. at 180; *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1982).

<sup>31</sup> *Rosenberger v. Rector & Visitors of U. of Va.*, 515 U.S. 819, 820 (1995).

<sup>32</sup> *Id.*

<sup>33</sup> *See Perry Educ. Ass’n*, 460 U.S. at 45; *Boos v. Barry*, 485 U.S. 312, 319 (1988).

<sup>34</sup> *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.<sup>35</sup> The facilities policies here fail to include any guidelines for the Facilities Department to follow when assessing reservation requests. They also lack any guidelines for the Department to follow when reviewing a drawing of a planned display. This allows members of the Department to approve or deny reservation and display requests based on the content of the planned speech activities or the views that students want to convey. In this way, the policies are unconstitutional.

### **Demand**

“[C]olleges and universities are not enclaves immune from the sweep of the First Amendment.”<sup>36</sup> It is the duty of college officials to protect and defend the voices of every student on campus. But through its facilities use policies, the University effectively silences students by burdening their speech, failing to impose reasonable time, place, and manner restrictions, and failing to make clear students’ freedom to gather spontaneously in public areas of campus.

The University must therefore revise its Use of University Property policy and its On-Campus Events policy to allow facilities reservations at any time, with the caveat that space is only available on a first-come, first-served basis. The University must clarify that it will not assess content or viewpoint when approving a reservation, but that it will only grant or deny a request based on availability. Likewise, the University must clarify that it will not review displays in advance for content or viewpoint, but that it will only review displays to ensure that they comply with height, size, and other time, place, and manner requirements. Such review need only take a day or two at most, rather than a full week. Finally, the University must explain in its Use of University Property policy, its On-Campus Events policy, and its Public Speaking, Leaflet Distribution, and Demonstrations policy that students are allowed to spontaneously gather at any time to hand out flyers and otherwise engage in speech activities. In each of those policies, the University must link to its Freedom of Expression policy so that students understand the full extent of their rights on campus.

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. Miami University must do its part to ensure this freedom for *all* its students.

Yours in Freedom,

s/ Cece O’Leary  
Cece O’Leary

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<sup>35</sup> See *Lakewood*, 486 U.S. at 757.

<sup>36</sup> *Healy*, 408 U.S. at 180.

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