



October 10, 2014

Interim President Nagi Naganathan
University of Toledo
University Hall
Room #3300, Mail Stop 946
Toledo, Ohio 43606

Sent via U.S. Mail and Facsimile (419-530-4984)

Dear President Naganathan:

The Foundation for Individual Rights in Education (FIRE) unites leaders in the fields of civil rights and civil liberties, scholars, journalists, and public intellectuals 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 by the threat to free expression at the University of Toledo (UT) evidenced by the recent censorship of peaceful protest at a campus lecture featuring political strategist and former presidential advisor Karl Rove. Officers with the University of Toledo Police Department (UTPD) refused to admit several students to the event due to the fact that they were carrying signs as part of their protest. The officers also suggested that students who disobeyed their orders could be arrested. These actions, recorded on video, are without basis in UT policy, effectively constituting unwritten policy allowing police unfettered discretion to prohibit signs and posters at whichever campus events they choose.

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

Karl Rove spoke at UT on September 15, 2014, as a featured speaker in UT's Jesup Scott Honors College Distinguished Lecture Series. Rove's lecture was held in UT's Doermann Theater, and tickets were free to the public, with UT students given priority. Before the lecture began, roughly 10 or 15 UT students and community members, some holding

posters criticizing Rove's invitation and his previous work as an advisor to President George W. Bush, stood in the lobby engaging the attendees as they arrived and distributing flyers.

Video recordings taken by the protesters also show that two UTPD officers (one male, one female) present at the time refused to allow the protesters into the event with their posters. One recording shows a male student explaining to the male UTPD officer that they would not be obstructing anyone's view of the lecture if they stood at the back of the theater with their signs. The officer interrupts the student, saying, "You wouldn't be able to stand anywhere. You'd have to have a seat, wherever you're at." The student then asks if they would be able to sit in some of the empty seats inside the theater holding their signs at chest level. The officer refuses this request as well, telling the student, "You couldn't have your signs." In another exchange, the same student asks whether the protesters could be arrested for having their signs inside the lecture, to which the officer responds, "I don't have a choice. . . . We've got our rules. You cannot have signs in there."

The students repeatedly pressed the officer to explain to them which UT policies gave the police authority to prevent them from being at the event with their signs. The officer never at any point provided a specific response, only going so far as to vaguely assert on several occasions that allowing the protesters inside the event with their posters was against UT policy. The same male student in the above exchange is shown on video providing the UTPD officer with a printout of the Student Code of Conduct, which the officer reviewed for nearly two minutes, evidently unable to find justification for preventing the students' peaceful protest. The officer then told the students that he would need to return to the police station to locate the correct policy, and he departed. However, the officer never returned with an answer to the students' question. Since they had been threatened with arrest if they went into the event and the threat of arrest was never rescinded, the students chose not to enter the event .

This arbitrary and discretionary censorship of student expression is unconstitutional and unjustified by UT's policies. Further, it is an affront to the Supreme Court's longstanding conception of the American university as being "peculiarly the 'marketplace of ideas.'" *Healy v. James*, 408 U.S. 169, 180 (1972) (internal citation omitted). Indeed, in *Healy*, the Court eloquently opined 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.'" *Id.* (internal citation omitted).

It is settled law that the First Amendment is fully binding on public universities such as UT. *See Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) ("With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities."). It is further settled that speech may not be censored on the ground that some might find it offensive. *See Texas v.*

Johnson, 491 U.S. 397, 414 (1989) (“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.”); *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670 (1973) (“[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of ‘conventions of decency.’”); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (“[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”).

University police or other university authorities may and should regulate protest activity if it is necessary to ensure that the rights of others to their expression, and of their audiences to hear their expression, are protected. In doing so, however, university authorities are bound by the Supreme Court’s ruling in *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), that any reasonable “time, place, and manner” restrictions on freedom of expression must be “narrowly tailored” to “serve a significant governmental interest” and must “leave open ample alternative channels for communication” (internal quotation marks omitted). UTPD’s censorship of the students’ protest activity manifestly fails to abide by these criteria.

While UT may use its discretion in certain instances to regulate expression in service of significant government interests, it may not arbitrarily cut off methods of expression, such as the posters the protesters offered to peacefully and unobtrusively display at Rove’s lecture. The Supreme Court made clear in *Healy* that the “undifferentiated fear or apprehension of disturbance □ is not enough to overcome the right to freedom of expression” on a public college campus. *Healy*, 408 U.S. at 191 (quoting *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 508 (1969)). That the university may not preemptively prohibit such expression in no way lessens its ability to regulate the expression if it becomes truly disruptive. Indeed, UT’s Student Code of Conduct repeatedly makes clear the prohibitions of such conduct:

Any student or student organization found to have committed or to have attempted to commit any of the following is subject to the disciplinary sanctions described in this Code:

[. . .]

(3) Disruption or Obstruction of Education includes but is not limited to disruption or obstruction of teaching, research, administration, disciplinary proceedings or other university activities Disruption is an action or combination of actions by an individual or a group, which unreasonably interferes with, hinders, obstructs, or prevents the right of others to freely participate in its programs, services, or academic settings.

[. . .]

(14) Participating in an on-campus or off-campus demonstration, riot, or activity that disrupts the normal operations of the University or infringes on the rights of other members of the University community; leading or inciting others to disrupt scheduled or normal activities on University premises.

For such policies to be enforceable, of course, a material disruption must occur that would necessitate their use. This was wholly absent in the present case, as was any policy justification to support the police's actions. UTPD's actions were based on nothing more than speculation that the students would disrupt the event despite the students' assurances that they would not—an impermissible basis for preventing speech on campus.

In effect, UT seems to be enforcing an unwritten policy against signs and posters at certain campus events, which is both unwise and unconstitutional. It is all too easy for such unwritten policies to be inconsistently and unevenly applied, subjecting particular messages to viewpoint-based discrimination.

FIRE calls to UT's attention a similar case that transpired at Dayton's Sinclair Community College (SCC). In that June 2012 case, student demonstrators assembled on campus as part of a "Stand Up for Religious Freedom" rally against certain healthcare mandates from the U.S. Department of Health and Human Services. Police prohibited demonstrators from holding signs at the event and forced them to place their signs on the ground. This violation of the demonstrators' First Amendment rights was carried out by SCC police in spite of a lack of any support for their actions in SCC policy.

SCC's police department, it turned out, had been expansively interpreting SCC policy for the purpose of prohibiting signage at campus events for more than 20 years. The department freely admitted to this behavior in an article in SCC's newspaper, which also described an incident inside a campus building in which the police enforced SCC's unwritten sign ban against two students attempting to silently protest an invited speaker's conservative views on homosexuality.

Several of the demonstrators censored at the June 2012 rally sued SCC for its violations of their First Amendment rights, and the college ultimately agreed to a settlement in which it agreed to revise its Campus Access Policy, in addition to paying fees to the plaintiffs and their attorneys.¹

¹ Collected case documents, including FIRE's letter to SCC and materials related to the ensuing lawsuit, are available online at <http://www.thefire.org/cases/sinclair-community-college-police-ban-signs-at-religious-freedom-rally/>.

There is no need for the University of Toledo to go down a similar path. We urge UT to affirm its students' right to peaceful and non-disruptive protest and commit itself to staying within the boundaries of its authority in regulating the time, place, and manner of such expression. We hope to work productively with UT to ensure a just conclusion to this unfortunate case.

We request a response to this letter by October 31, 2014.

Sincerely,



Peter Bonilla

Director, Individual Rights Defense Program

cc:

Kaye Patten Wallace, Senior Vice President for the Student Experience

Tamika Mitchell, Dean of Students

Jeff Newton, Director of Public Safety/Chief of Police