



September 23, 2020

President Todd Diacon  
Kent State University  
Office of the President  
PO Box 5190  
Kent, Ohio 44242-0001

*Sent via Electronic Mail (president@kent.edu)*

Dear President Diacon:

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses.

FIRE is concerned about the potential threat to students' First Amendment rights at Kent State University (KSU) in light of proposed rules governing use of a forum for free expression known as its front-campus rock (the "Rock"). The proposed restrictions would exceed the lawful scope of KSU's authority under the First Amendment. Accordingly, we call on Kent State to reject this unconstitutional proposal.

**I. KSU Seeks to Impose Restriction on Use of the Rock**

The following is our understanding of the pertinent facts, which is based on public information. We appreciate that you may have additional information to offer and invite you to share it with us.

For decades, a large boulder on KSU's Hilltop Drive, known as the Rock, has served as an outlet for student expression.<sup>1</sup> Located in an open, outdoor area of campus, the Rock has been continually painted by students supporting political causes, mourning fellow community members, and celebrating campus events.<sup>2</sup>

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<sup>1</sup> THE ROCK, KENT STATE UNIVERSITY LIBRARIES. SPECIAL COLLECTIONS AND ARCHIVES (last accessed September 14, 2020), <https://omeka.library.kent.edu/special-collections/items/show/756>.

<sup>2</sup> *E.g.*, Troy Pierson, 'White Lives Matter' painted on front campus' rock; students and university react, KENTWIRED (Updated Sept. 7, 2020), [http://www.kentwired.com/latest\\_updates/article\\_1768a5e2-ed55-11ea-9900-](http://www.kentwired.com/latest_updates/article_1768a5e2-ed55-11ea-9900-)

KSU has no specific policies regulating expression on the Rock. Messages are constantly painted and painted over on the Rock, with no involvement from the KSU administration.

On August 24, “Black Lives Matter,” “Say their names,” and other slogans commemorating the lives of those lost to police brutality were painted on the Rock.<sup>3</sup> Consistent with previous practice, no university action was taken in response to this expression.

On August 28, “White Lives Matter” was painted on the Rock over “Say their names.” Later that day, KSU issued a statement reading, in pertinent part:

Today, we became aware of a message painted on the KSU rock that was offensive and insulting to many, specifically to members of our Black community. Messages that are intended to be upsetting and hurtful are unconstructive and do not reflect our core values as a university.<sup>4</sup>

Over the next several days, KSU students painted “Black Lives Matter” on the Rock and organized protests in response to “White Lives Matter” being painted on the Rock.<sup>5</sup>

On September 7, in response to additional messages painted on the Rock, KSU stated:

We are appalled that some continue to use the Rock to convey vile, hurtful messages that are threatening to our Kent State community, specifically our Black community, and against our core values. Because of the repeated nature of these messages, we are investigating several potential actions, including fencing off the Rock, installing security cameras and even the Rock’s removal. Now more than ever we commit to inclusion, respect and kindness as the most authentic expressions of who we are as a university and who we are as a family.<sup>6</sup>

The precise content of these additional messages has not been publicly disclosed.

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136a7ef97d51.html; Emily Mills, *Football team paints rock in honor of Jason Bitsko*, KENTWIRED (Aug. 20, 2015), [http://www.kentwired.com/latest\\_updates/article\\_62389d9c-4775-11e5-beb5-af29a9507577.html](http://www.kentwired.com/latest_updates/article_62389d9c-4775-11e5-beb5-af29a9507577.html).

<sup>3</sup> Pierson, *supra* note 2.

<sup>4</sup> Kent State Univ., *University Statement About Recent Painting of the Rock* (updated Aug. 28, 2020 8: 28 PM), <https://www.kent.edu/kent/news/university-statement-about-recent-painting-rock>.

<sup>5</sup> Pierson, *supra* note 2.

<sup>6</sup> Kent State Univ., *University Statement About Recent Painting of the Rock* (updated Sept. 7, 2020 7:54 PM), <https://www.kent.edu/kent/news/university-statement-response-recent-painting-rock> (emphasis removed).

## II. KSU's Proposed Policies Regarding the Rock Must Comport with its First Amendment Obligations

KSU's drive to create rules governing use of the Rock may not come at the expense of its students' First Amendment rights.

### A. *The Rock is a public forum subject to the First Amendment.*

It has long been settled law that the First Amendment is binding on public colleges like KSU. *Healy v. James*, 408 U.S. 169, 180 (1972) (“[T]he 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.’”) (internal citation omitted).

The Supreme Court of the United States “has recognized that the campus of a public university, at least for its students, possesses many of the characteristics of a public forum.” *Widmar v. Vincent*, 454 U.S. 263, 267 (1981). Accordingly, the publicly accessible areas of a public college campus are public fora.<sup>7</sup>

The Rock itself is a designated public forum, which is a forum that the government “create[s] . . . by its designation of ‘a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects.’” *United Food & Commer. Workers Local 1099 v. City of Sidney*, 364 F.3d 738, 746 (6th Cir. 2004) (quoting *Cornelius*, 473 U.S. at 802). “[A] government entity may create a designated public forum if government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose.” *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 469 (2009) (internal quotations omitted); see also *United Food & Commer. Workers Local 1099 v. City of Sidney*, 364 F.3d 738, 749 (6th Cir. 2004) (“In determining whether the government has intended to open up its property for use as a designated public forum, . . . we must look to

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<sup>7</sup> *McGlone v. Bell*, Nos. 10-6055, 10-6169, 2012 U.S. App. LEXIS 8266, at \*33 (6th Cir. Apr. 23, 2012) (finding that the open, outdoor areas of the Tennessee Technological University's campus are public fora); *Gilles v. Garland*, 281 F. App'x 501, 508-11 (6th Cir. 2008) (holding that the “Academic Quad,” an open, outdoor area of campus of Miami University in Oxford, Ohio, is a public forum); see also, e.g., *OSU Student All. v. Ray*, 699 F.3d 1053, 1063 (9th Cir. 2012) (finding that the Oregon State University campus is a public forum); *Justice for All v. Faulkner*, 410 F.3d 760, 768-69 (5th Cir. 2005) (open outdoor areas of University of Texas at Austin found to be designated public fora as to students); *ACLU v. Mote*, 423 F.3d 438, 444 (4th Cir. 2005) (finding that an open, outdoor area of the University of Maryland is a public forum); *Shaw v. Burke*, No. 17-cv-2386, 2018 U.S. Dist. LEXIS 7584, at \*22 (C.D. Cal. Jan. 17, 2018) (“open, outdoor areas of universities . . . are public fora[.]” regardless of a college's regulations to the contrary); *Univ. of Cincinnati Chapter of Young Ams. for Liberty v. Williams*, Civ. No. 12-155, 2012 U.S. Dist. LEXIS 80967, at \*29-30 (S.D. Ohio June 12, 2012) (open, outdoor areas of campus are designated public fora for students); *Roberts v. Haragan*, 346 F. Supp. 2d 853, 862-63 (N.D. Tex. 2004) (“[T]o the extent [Texas Tech University] has park areas, sidewalks, streets, or other similar common areas, these areas are public forums, at least for the University's students, irrespective of whether the University has so designated them or not. These areas comprise the irreducible public forums on the campus.”).

the policy and practice of the government, as well as to the nature of the property and its compatibility with expressive activity.”) (internal citations omitted).

The Rock possesses the physical characteristics of a traditional public forum, as it is located in an area that is used “for a variety of expressive purposes . . . invites visitors [and] is accessible by sidewalk.” *Satawa v. Macomb Cty. Rd. Comm’n*, 689 F.3d 506, 520 (6th Cir. 2012) (finding that an open, outdoor median next to a highway with a gazebo possesses the physical qualities of a traditional public forum). Like the gazebo in *Satawa*, the Rock’s “presence demonstrates that the . . . [area] is, like a public park, a place that welcomes visitors.” *Satawa v. Macomb Cty. Rd. Comm’n*, 689 F.3d 506, 522 (6th Cir. 2012). The Rock has also been continuously held open by KSU for the purpose of student expression without any rules or restrictions on student expressive use, indicating that KSU “intentionally . . . [via] policy and practice . . . designate[d] [it as] a place not traditionally open to assembly and debate as a public forum.” See *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985); see also *Kincaid v. Gibson*, 236 F.3d 342, 350 (6th Cir. 2001) (finding that lack of state university policies on student yearbook content demonstrated “intent to . . . cede authority over the yearbook’s content to the students who published it” and that “[s]uch self-imposed restraint is strong evidence of . . . intent to create a limited public forum”). Finally, the Rock—a traditional locus of student expression on college campuses across the United States<sup>8</sup>—is undoubtedly a place “which by long tradition . . . [has] been devoted to assembly and debate,” see *Cornelius*, 473 U.S. at 817 (internal quotations omitted), and has served this purpose for its entire existence.

**B. Restrictions on student expression on the Rock must meet First Amendment scrutiny.**

While KSU may establish “reasonable time, place, and manner” restrictions on speech and expressive activity in a public forum, such as the Rock, such restrictions must be “justified without reference to the content of the regulated speech, . . . narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information.” *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (internal citations and quotations omitted); *Kincaid v. Gibson*, 236 F.3d 342, 354 (6th Cir. 2001) (same). A restriction is narrowly tailored when it does not “burden substantially more speech than is necessary to further the government’s legitimate interests.” *Ward*, 491 U.S. at 798–99; see also *Ross*, 746 F.3d at 552–53. Additionally, viewpoint discrimination that “targets not subject matter, but particular views taken by speakers on a subject” is prohibited in a

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<sup>8</sup> See, e.g., Laura McDonough and Marah Morrison, *Tradition Rock*, JAMBAR (Jan. 11, 2018), <https://www.thejambar.com/tradition-rock> (Youngstown State University’s “Tradition Rock,” dating to 1968); NORTHWESTERN UNIV., *Traditions*, <https://www.northwestern.edu/studentaffairs/community/students/traditions.html> (last visited Sept. 10, 2020) (Northwestern University’s “Rock has become a frequently used location for student activism, performance and philanthropy” since it was first painted in the 1940s); WHITTIER COLL., *Whittier College Traditions*, <https://www.whittier.edu/about/traditions> (Whittier’s “Rock” has been used to “mark milestones, express solidarity, or memorialize beloved” classmates since it was installed in 1912).

designated public forum. *Hartman v. Thompson*, 931 F.3d 471, 488 (6th Cir. 2019) (internal quotations and citations omitted).<sup>9</sup>

As KSU seeks to impose rules for use of the Rock, FIRE encourages the university to be mindful of these limits on authority to restrict expression under the First Amendment. For example, KSU may impose time, place, and manner restrictions on expressive use of the Rock but may not impose any restrictions on the viewpoints communicated by students who paint it. KSU's proposed rules should reflect not only its First Amendment obligations but also the Rock's historical purpose as an outlet for student expression.<sup>10</sup>

**C. *KSU may not investigate or punish offensive expression on the Rock.***

Although KSU may punish students for engaging in acts of vandalism, destruction of university property, and other violations of its student code of conduct, it may not seek to discipline students solely for painting, painting over, or removing offensive messages on the Rock, as such expression is protected by the First Amendment.

**i. *Painting and repainting the Rock is expressive.***

Freedom of expression “does not end at the spoken or written word.” *Texas v. Johnson*, 491 U.S. 397, 404 (1989). To the contrary, conduct “intend[ed] to convey a particularized message” that is likely to “be understood by those who viewed it” is expressive conduct. And while authorities may enforce content-neutral regulations that may incidentally impact expressive conduct, they cannot restrict the expressive conduct “because it has expressive elements.” *Id.* at 404, 406.

Conduct is also considered expressive when it falls within a traditionally-protected genre—such as music, paintings, and parades—even if it does not convey a “narrow, succinctly articulable message.” *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 569 (1995). This is what protects the act of saluting or refusing to salute a flag (*West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 633–34 (1943)), wearing black armbands to protest war (*Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 505–06 (1969)), raising a “seditious” red flag (*Stromberg v. California*, 283 U.S. 359, 369 (1931)), burning an American flag (*Johnson*, 491 U.S. at 414), picketing or leafletting (*U.S. v. Grace*, 461 U.S. 171, 176 (1983)), and participating in a sit-in (*Brown v. Louisiana*, 383 U.S. 131, 383 (1966)).

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<sup>9</sup> If KSU removes the Rock in response to offensive messages, that would also violate the prohibition against viewpoint discrimination in a public forum. See *Koala v. Khosla*, 931 F.3d 887, 903–04 (9th Cir. 2019) (suggesting that a university's viewpoint-discriminatory closure of a forum for student expression, even under the guise of viewpoint neutrality, would violate the First Amendment).

<sup>10</sup> See Katlyn Ayn Patton, Note, *Trumping the First Amendment: Student-Driven Calls for Speech Restrictions on Public College Campuses*, 68 CASE W. RES. L. REV. 186, 206–11 (2017), <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=4739&context=caselrev> (describing ways public universities can impose restrictions on public fora without violating students' First Amendment rights).

The act of painting and repainting the Rock, even if it covers up or alters a prior message, is expression protected by the First Amendment and may not be stifled by government actors like KSU.

**ii. The First Amendment does not permit the regulation of expression solely on the basis that it is subjectively offensive to others.**

The principle of freedom of speech does not exist to protect only non-controversial expression; it exists precisely to protect speech that some members of a community may find controversial or offensive. Decades of legal precedent make clear that the First Amendment protects even intentionally insensitive speech. For example, in *Snyder v. Phelps*, 562 U.S. 443, 461 (2011), the Supreme Court held as protected expression picketers' signs, reading "Thank God for dead soldiers" that were directed at the funeral of a fallen soldier, proclaiming:

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. . . . [W]e cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.

Recently, the Court unanimously reaffirmed this vital principle in *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017), holding that the perception that expression is "hateful" or that it "demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground" is not a sufficient basis to remove speech from the protection of the First Amendment. Thus, speech that is "insensitive, offensive, and even bigoted" may yet be protected expression. *Goza v. Memphis Light, Gas & Water Div.*, No. 2:17-cv-2873, 2019 U.S. Dist. LEXIS 100057, at \*2 (W.D. Tenn. June 14, 2019).

As a public institution bound by the First Amendment, KSU may not punish students solely because their messages are offensive to others.

**iii. Installing surveillance cameras on the Rock would violate the First Amendment's protection of anonymous speech.**

KSU's proposed installation of surveillance cameras directed at The Rock would violate students' expressive rights.

The First Amendment protects not only the right to speak but to do so anonymously. *Watchtower Bible & Tract Soc. of New York v. Village of Stratton*, 536 U.S. 150, 166–67 (2002) (striking down ordinance that, among other things, required canvassers to identify themselves to mayor's office); *Justice for All v. Faulkner*, 410 F.3d 760, 764–65 (5th Cir. 2005) (striking down college policy requiring leaflets distributed on campus to identify their authors).

The Supreme Court explained that anonymous speakers may have a variety of motivations for maintaining their anonymity:

[A]n author generally is free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible.

*McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341–42 (1995). Anonymous communication, the Court explained, “is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.” *Id.* at 357. Students may have any number of reasons to remain anonymous when they add their messages to the Rock. Some may fear retaliation by administrators if their message denounces university leaders, such as students who criticized their university’s refusal to rename a building—named after a governor responsible for the Sand Creek Massacre—by painting “Fuck John Evans” and “THIS LAND IS COLONIZED” on their institution’s rock.<sup>11</sup> Other students may be chilled from painting messages criticizing law enforcement or in support of the Black Lives Matter movement if they must do so in front of a security camera. Still others might fear repercussions from painting messages dissenting from movements popular among the student body, like the Black Lives Matter movement.

While the university undoubtedly has an interest in preventing damage to the Rock, the installation of a surveillance camera is more likely to chill student expression than to prevent significant damage to a boulder that has remained in the same location for decades. Moreover, there do not appear to be any policies concerning who may review surveillance footage, how long the footage is kept, or the purposes for which footage may be used. That raises the distinct possibility that the footage will be used not to identify vandals but to identify those who exercise their right to share expression unpopular with administrators or other students. This is not an idle risk: FIRE has seen surveillance footage used in this manner to identify critics of college administrators.<sup>12</sup>

### **III. KSU Must Ensure that the Rock Remains an Outlet for Free Expression**

As the KSU educational community approaches the upcoming presidential election, when students will undoubtedly seek to express themselves on a host of controversial political issues, FIRE encourages KSU to ensure that the Rock remains an interactive space for student expression.

<sup>11</sup> See David Gleisner, “*FUCK JOHN EVANS*”—*The background behind the Rock’s weekend paint job*, NORTH BY NORTHWESTERN (Oct. 31, 2019), <https://www.northbynorthwestern.com/john-evans-explained>.

<sup>12</sup> Adam Steinbaugh, *Troy Police Department videotaped student demonstrators at Rensselaer Polytechnic Institute, a private institution*, FIRE (Mar. 27, 2018), <https://www.thefire.org/troy-police-department-videotaped-student-demonstrators-at-rensselaer-polytechnic-institute-a-private-institution>.

As KSU seeks to impose rules regarding the Rock, FIRE calls on the university to promise to refrain from imposing restrictions on its students' expressive rights.

We request receipt of a response to this letter no later than the close of business on October 6.

Sincerely,

A handwritten signature in black ink, appearing to read "Zach", with a long, sweeping flourish extending to the right.

Zachary Greenberg  
Program Officer, Individual Rights Defense Program