



FIRE

Foundation for Individual
Rights and Expression

February 9, 2024

Sylvia M. Burwell
Office of the President
American University
President's Office Building, Room 1
4400 Massachusetts Avenue NW
Washington, DC 20016-8060

Sent via U.S. mail and Electronic Mail (president@american.edu)

Dear President Burwell:

FIRE¹ is concerned by American University's adoption of new regulations that impermissibly chill expression by barring protest inside university buildings, restricting student groups' free association, and limiting the content of campus posters. As these provisions unduly burden student speech in contravention of AU's strong promises of free expression,² FIRE urges AU to honor its commitments by immediately reforming the new provisions.

Our request arises from your recent announcement that AU is implementing three new policies to address safety concerns of Jewish students on campus.³ The first prohibits "protests" in all "university buildings, residence halls, dining facilities, or other indoor spaces used for educational activities, events, or university operations."⁴ The second obligates student clubs and organizations to be "welcoming" to all by requiring them to base membership on criteria "germane, relevant, and directly connected to the group's purpose."⁵ The third limits the content of posters, signs, notices, and flyers at university-sponsored events to information involving "an event's purpose, the sponsoring organization's purpose, or logistical details for an event," in order to "promote inclusivity."⁶

¹ As you may recall from recent correspondence, the Foundation for Individual Rights and Expression is a nonpartisan nonprofit dedicated to defending freedom of speech, expression, and conscience, and other individual rights on campus and beyond. You can read more about our mission and activities at thefire.org.

² The recitation here reflects our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us.

³ Presidential Announcement, AMER. UNIV. (Jan. 25, 2024), <https://www.american.edu/president/announcements/january-25-2024.cfm> [<https://perma.cc/7U4Z-9KJP>].

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

These requirements are in tension with AU policies that commit it to “protecting free expression for all members of its community,” which it says “play an essential role in creating space for individuals to practice the ethos of inquiry... fundamental to the mission of a university.”⁷ That includes the right of students to engage in dissent, including “non-disruptive counter-speech or protest.”⁸ AU’s commitment to freedom of expression is also vital to its accreditation, as the Middle States Commission on Higher Education requires accredited institutions to respect “academic freedom, intellectual freedom, [and] freedom of expression.”⁹ Thus, while AU is a private institution, its clear invocation of, and obligation to, free speech principles leads students and faculty to reasonably interpret those promises as concomitant with First Amendment protections. Having made these promises, AU is legally and morally required to honor them,¹⁰ and is thus limited in how it can regulate student and faculty speech.

A. *Banning All Indoor Protests is Overly Broad and Vague*

The new AU policy banning “protests” in any university building is overly broad and impermissibly vague. Overbreadth occurs when speech regulations sweep within their ambit a substantial amount of protected expression along with what they may legitimately regulate.¹¹ A speech-related regulation is impermissibly vague when it fails to give persons of ordinary intelligence the reasonable opportunity to know what is prohibited so they may act accordingly.¹² The new policy’s failure to define “protest” chills student expression both by sweeping in a great deal of potential student speech AU is duty-bound to protect, and in failing to give students sufficient notice of what speech may constitute a “protest.” Any such chilling is incompatible with robust protection for free expression. Even uncivil, offensive, hateful, or outrage-provoking speech must be protected at universities dedicated to open debate and discussion.¹³

⁷ Policy Statement, *University Policy: Freedom of Expression and Expressive Conduct*, AMER. UNIV. (Aug. 29, 2022), <https://www.american.edu/policies/au-community/upload/university-policy-freedom-of-expression-and-expressive-conduct-final.pdf> [<https://perma.cc/X28C-2XEY>].

⁸ *Id.*

⁹ *Standards for Accreditation and Requirements of Affiliation*, MIDDLE STATES COMM. ON HIGHER EDUC. (14th ed. 2023), <https://www.msche.org/standards/fourteenth-edition/> [<https://perma.cc/E7HB-DGXN>]. MSCHE was a signatory of a March 2022 coalition statement highlighting the importance of free inquiry and debate on university campuses, which said “Colleges and universities exist to examine complex issues, challenges, and ideas, and to provide a forum in which issues and opinions can be explored and openly debated.” Community Letter, *Free and Open Academic Inquiry and Debate on Our Campuses is Essential to Our Democracy and National Well-being* (Mar. 3, 2022), <https://www.acenet.edu/Documents/Community-Statement-on-Free-and-Open-Academic-Inquiry-030322.pdf>.

¹⁰ Courts both in Washington, D.C. and across the country have held that a university’s policies form a contractual relationship with students and faculty. *See, e.g., Bain v. Howard Univ.*, 968 F. Supp. 2d 294, 299 (D.D.C. 2013) (“It is beyond dispute that there is a contractual relationship between a university and its student.”); *McAdams v. Marquette Univ.*, 2018 WI 88 (2018) (a private university breached its contract with a professor over a personal blog post because, by virtue of its adoption of the 1940 AAUP Statement of Principles on Academic Freedom, the post was “a contractually-disqualified basis for discipline”).

¹¹ *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

¹² *Grayned v. Cty. of Rockford*, 408 U.S. 104, 108–09 (1972).

¹³ *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (burning American flag was protected by the First Amendment, the “bedrock principle underlying” the holding being that government actors “may not prohibit the

For example, if a student walked into a university building with the phrase “Black Lives Matter” displayed on their shirt, or “Build the Wall,” would they be subject to sanction under this policy? What about donning a shirt or saying the phrases “From the River to the Sea” or “Am Ysrael Chai”? What if a student, without causing disruption, walks out of a class, or even simply declines to answer a faculty member’s question because they disagree with its premise? The new policy, untethered to any specific definitions, could be abused to punish this speech, and therefore sweeps within its ambit protected expression. This far exceeds any legitimate regulatory interest of universities dedicated to free speech principles to prevent “material and substantial interference” with institutional events or operations while protecting student speech, including protests.¹⁴ By barring *any* form of protest—as subjectively defined by administrators, apparently on an *ad hoc* basis—AU excessively burdens student speech.

The new indoor-protest policy’s overbreadth is further underscored by the fact that AU already has rules in place barring forms of protest that disrupt university proceedings or constitute safety risks.¹⁵ This new policy only serves to confuse students regarding the scope of their rights on campus because, among the problems with vague speech regulations is the unfettered discretion it grants administrators to wield when determining what constitutes a policy violation. Without knowing *what* university administrators define as a protest, students will reasonably self-censor to avoid the possibility of investigatory or disciplinary action. The lack of clarity also enables selective enforcement.

B. Regulating Student Organizations’ Membership Decisions Violates Their Associational Rights

The second policy violates students’ associational rights because the inherently vague standard requiring student organizations to predicate membership only on criteria “germane, relevant, and directly connected to the group’s purpose” does not give students guidance regarding what constitutes a policy violation.¹⁶ Indeed, this change is apparently significant enough that the university anticipates hiring an administrator in Student Affairs to assist students in complying with the policy.¹⁷

expression of an idea simply because society finds the idea itself offensive or disagreeable”). In ruling that the First Amendment protects protesters holding insulting signs outside of soldiers’ funerals, the Court reiterated this fundamental principle, remarking that “[a]s a Nation we have chosen ... to protect even hurtful speech on public issues to ensure that we do not stifle public debate.” *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011). As the Supreme Court has held, even profane forms of protest, if non-disruptive, are protected. See *Cohen v. California*, 403 U.S. 15, 25 (1971) (punishment for wearing a jacket emblazoned with the words “Fuck the Draft” at a courthouse was unconstitutional).

¹⁴ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)). In college contexts, the protections *Tinker* established set the floor for student expressive rights—not the ceiling.

¹⁵ *University Policy: Freedom of Expression and Expressive Conduct*, *supra* note 7 at Free Expression, Dissent, and Campus Protest, and Responsibilities related to Counter-Speech and Protest.

¹⁶ Presidential Announcement, *supra* note 3.

¹⁷ *Id.*

This unduly burdens students' right to freely associate with—or dissociate from—others, an important corollary of free speech principles,¹⁸ that extends to students in university settings¹⁹ and includes the right of student groups to determine the conditions of group membership.²⁰ AU's policy serves no discernable university interest and impermissibly prevents students from exercising independent judgment over group membership decisions.

C. Restricting Event Advertisements Raises Content Discrimination Concerns

The final new problematic policy prohibits all event posters, signs, notices, and flyers from containing content unrelated to “an event’s purpose, the sponsoring organization’s purpose, or logistical details for an event.”²¹ This directive is an impermissible content-based regulation and leaves ample room for viewpoint discrimination as well. While reasonable limits on the time, place, or manner of speaking do not violate free speech principles, such restrictions must be content neutral and narrowly tailored to achieve a compelling university interest.²² Yet AU’s policy allows for content discrimination because whether posted material is in violation turns on whether administrators view the content of the speech as insufficiently relevant to the purpose or logistics of a university-sponsored event.²³ This restriction, untethered to any compelling university interest, can too easily be used to silence disfavored views and must be rescinded.

Given the pitfalls outlined above, FIRE calls on AU to reform its new policies by clarifying that only substantially disruptive speech in university buildings is subject to punishment, that student organizations retain the right to set their own membership criteria, and that campus postings regulations will operate on a content-neutral basis. FIRE would be happy to assist AU in this endeavor. We request a substantive response to this letter no later than February 23 2024.

Sincerely,



Leslie Corbly
Program Officer, Campus Rights Advocacy

¹⁸ *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) (holding that the First Amendment implicitly guarantees a right to associate, or not to associate, with others in pursuit of an array of ends).

¹⁹ *Healy v. James*, 408 U.S. 169, 180 (1971) (“[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.”).

²⁰ *Christian Legal Soc’y v. Walker*, 453 F.3d 853, 862 (7th Cir. 2006) (exclusion of homosexuals from voting membership did not merit derecognition for alleged violation of university policy).

²¹ Presidential Announcement, *supra* note 3.

²² *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

²³ Presidential Announcement, *supra* note 3.

Cc: Bronté Burleigh-Jones, CFO, Vice President, and Treasurer
Nkenge Friday, Vice President of Inclusive Excellence
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