



May 16, 2024

Jennifer L. Mnookin
Office of the Chancellor
163 Bascom Hall
500 Lincoln Drive
Madison, Wisconsin 53706

Sent via U.S. Mail and Electronic Mail (chancellor@wisc.edu)

Dear Chancellor Mnookin:

FIRE¹ is deeply concerned that UW-Madison has suspended two registered student organizations—Anticolonial Scientists and Mecha de UW Madison²—amid criticism of chalk messages some group members allegedly wrote at an off-campus event earlier this month.³ Some of the messages expressed support for terrorist groups like Hezbollah and Hamas’s Al-Qassam Brigades, and advocated the use of violence against Israelis and Zionists in the Middle East.⁴ The student groups are currently under interim suspensions, pending investigation, with UW stating that, because “[s]ome chalkings endorsed violence, supported terrorist organizations and/or contained antisemitic comments,”⁵ they could qualify as prohibited

¹ For more than 20 years, FIRE has defended freedom of expression, conscience, and religion, and other individual rights on America’s university campuses. You can learn more about our expanded mission and activities at thefire.org.

² *Investigations initiated for two student organizations*, UNIV. OF WIS.-MADISON NEWS (May 6, 2024), <https://news.wisc.edu/investigations-initiated-for-two-student-organizations/> [<https://perma.cc/28W8-JRVF>]. Note that our factual recitation in the text reflects our understanding of the pertinent facts and that we appreciate you may have additional information. If that is the case, we invite you to share it with us.

³ Jasper Bernstein et al., *Antisemitic chalkings promoting Hamas, Hezbollah, Houthis found at Dane County Farmers Market alongside rhetoric endorsing violence*, THE DAILY CARDINAL (May 4, 2024, 8:18 PM), <https://www.dailycardinal.com/article/2024/05/antisemitic-chalkings-promoting-hamas-hezbollah-houthis-found-at-dane-county-farmers-market-alongside-rhetoric-endorsing-violence>. The messages chalked near the Wisconsin Capitol, located about a mile east of campus, included: “Power to Hezbollah,” “Power to Al-Qassam,” “Al-Qassam show us how, kill another soldier now,” “Power to Ansrallah [Houthis] Seize them All,” “Down with ‘Israel’ down with ‘USA,’” “All cops are Zionists,” and “Al-Qassam you make us proud, kill another soldier now!”

⁴ *Id.*

⁵ *Investigations initiated for two student organizations*, *supra* note 2.

discriminatory harassment under the university’s RSO Code of Conduct.⁶ But that conclusion cannot constitutionally stand. The off-campus chalk messages constitute political speech wholly protected by the First Amendment, which requires UW, as a public institution, to respect the groups’ expressive and associational rights—even if some, many, or most people dislike their message.⁷

There is, more specifically, no First Amendment exception that would remove protection from speech simply because it is deemed “anti-Semitic” or otherwise bigoted based on race or religion. Regardless of the viewpoint expressed, the rule is the same: Government officials cannot circumscribe expression on the basis that others find the ideas offensive or hateful.⁸ This is particularly true at public colleges, where “conflict is not unknown,”⁹ and “dissent is expected and, accordingly, so is at least some disharmony.”¹⁰ The First Amendment instead “embraces such heated exchange[s] of views.”¹¹

The Supreme Court has long recognized the public’s interest “in having free and unhindered debate on matters of public importance” as “the core value of the Free Speech Clause of the First Amendment.”¹² And there is simply no question that chalking support for any participants in the Israel/Hamas war—the reverberations of which have been felt globally for many months—constitutes expression on a matter of public concern, which is defined broadly as speech “relating to any matter of political, social, or other concern to the community.”¹³

Nor is there evidence (despite UW’s suggestion) that the students’ political messages, written in chalk at a farmers’ market nearly a mile from campus, would approach the legal bars for either material support for terrorism or discriminatory harassment—even if those same words had been written on UW’s own sidewalks.

⁶ *UW–Madison Registered Student Organization Code of Conduct*, UNIV. WIS.—MADISON (Revised Jan. 1, 2022), <https://policy.wisc.edu/library/UW-2002> [<https://perma.cc/HL5V-XMYS>].

⁷ *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); *see also, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (invalidating ordinance that prohibited placing on any property symbols that “arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender”).

⁸ *Matal v. Tam*, 582 U.S. 218, 245–46 (2017) (refusing to allow a limitation on speech viewed as “hateful” or demeaning “on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground”); *see Snyder v. Phelps*, 562 U.S. 443, 461 (2011) (“As a Nation we have chosen ... to protect even hurtful speech on public issues to ensure that we do not stifle public debate.”).

⁹ *Hulen v. Yates*, 322 F.3d 1229, 1239 (10th Cir. 2003).

¹⁰ *Highbee v. E. Mich. Univ.*, 399 F.Supp.3d 694, 704 (E.D. Mich. 2019).

¹¹ *Rodriguez v. Maricopa Comm. Coll. Dist.*, 605 F.3d 703, 708 (9th Cir. 2010).

¹² *Pickering v. Bd. of Educ.*, 391 U.S. 563, 573 (1968); *see also, e.g., Snyder*, 562 U.S. at 451–52 (“Speech on matters of public concern is at the heart of the First Amendment’s protection.”) (cleaned up).

¹³ *Connick v. Myers*, 461 U.S. 138, 146 (1983).

The Supreme Court defines discriminatory harassment in the educational context as only those statements which are unwelcome, discriminatory on the basis of protected status, and “so severe, pervasive, and objectively offensive that it can be said to deprive the victim[] of access to the educational opportunities or benefits provided by the school.”¹⁴ The U.S. Department of Education’s Office for Civil Rights has likewise clarified that discriminatory harassment “must include something beyond the mere expression of views, words, symbols, or thoughts that some person finds offensive.”¹⁵

Current events do not change this analysis. Earlier this month, OCR reiterated that “offensiveness of a particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a hostile environment under Title VI,” and that “[n]othing in Title VI or regulations implementing it requires or authorizes a school to restrict any rights otherwise protected by the First Amendment to the U.S. Constitution.”¹⁶ OCR’s letter also emphasized that campuses have options for addressing the impact of hostile speech that avoid offending the First Amendment, including by offering a variety of support services to affected students.

UW’s own discriminatory harassment policies and RSO rules reflect these appropriate limits on its ability to punish core political speech, with the RSO rules clearly stating they “will not be used to impose discipline for the lawful expression of ideas” and that “[t]he right of all students to seek knowledge, debate, and freely express their ideas is fully recognized by the University.”¹⁷ This is surely because, as you know, free expression is a “longstanding priority” at UW-Madison, which has a dedicated mission and a values statement focused on “Free Expression at UW-Madison.”¹⁸ That statement describes “the need for the free exchange of ideas through open dialogue, free inquiry, and healthy and robust debate,” as “inherent” to the university’s educational mission, “captured by our now-famous language about the importance of ‘that fearless sifting and winnowing by which alone truth can be found.’”¹⁹

Student organizations play an important role in the healthy speech ecosystem that UW’s mission and values seek to foster. In turn, the First Amendment protects these groups’ expressive and associational rights, fostering their ability to organize around causes and to

¹⁴ *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999).

¹⁵ U.S. Dep’t of Educ., Dear Colleague Letter from Gerald A. Reynolds, Assistant Sec’y for Civil Rights (July 28, 2003), <https://www2.ed.gov/about/offices/list/ocr/firstamend.html> [<https://perma.cc/9DCA-XMFD>].

¹⁶ U.S. Dep’t of Educ., Dear Colleague Letter from Catherine E. Lhamon, Assistant Sec’y for Civil Rights (May 7, 2024), <http://t1.info.ed.gov/r/?id=h8dbd2e,bc9934,bd7c84>.

¹⁷ *UW–Madison Registered Student Organization Code of Conduct*, *supra* note 6.

¹⁸ *Free Expression at UW–Madison*, Values Statement: University’s Mission, UNIV. WIS.–MADISON, <https://free-expression.wisc.edu/> [<https://perma.cc/LUQ7-VDFM>]. *See also* Kári Knutson, *Sifting and winnowing turns 125: The tumultuous story of three little words*, UNIV. OF WIS.–MADISON NEWS (Sept. 17, 2019), <https://news.wisc.edu/sifting-and-winnowing-turns-125> [<https://perma.cc/A6PN-ZWJH>].

¹⁹ *Id.*

attempt to influence our institutions, communities, and country.²⁰ Nor can universities subject the speech of students in RSOs to additional, viewpoint-based scrutiny.²¹

Instead, student groups' speech rights are broad, and they extend to expressing philosophical support for the use of force or violence.²² As the Supreme Court has held: "What is a threat must be distinguished from what is constitutionally protected speech," including "political hyperbole," given our country's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."²³

Government actors may prohibit non-expressive conduct intended to provide material support, like property or services, to designated foreign terrorist organizations.²⁴ But the First Amendment's protection of robust debate prohibits government actors from limiting mere expressive activity or rhetorical support for such groups. That is so even where the net effect of the advocacy is to sway public opinion.

Despite what may be good intentions, UW does its community no service by censoring these controversial messages. Like many universities, UW is a community of people with sharply divergent views on a wide variety of issues. To the extent the chalked messages have informed UW students, faculty, and staff members of the presence of individuals with these views on campus, this should be seen as an opportunity for those who disagree either to engage with them in good faith—or, if they wish, to avoid such engagement. Censoring them will do nothing to change their minds, and will deny all parties the opportunity to learn from one another.

The First Amendment, and UW's longstanding commitment to its attendant norms, are most relevant on campus at precisely the moments like these, when social and political unrest triggers high emotions, deep divisions, and the temptation to turn to censorship. When a university departs from its core principles at these key moments and resorts to silencing views it deems odious, it sends the message that the university has subordinated both the rights of its students and its mission of liberal education to the political demands of the day.

We therefore urge you in the strongest possible terms, in this difficult season for campus discourse, to stand by the university's legal and moral obligations to respect students' core

²⁰ *E.g.*, *Healy*, 408 U.S. at 181 ("Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs."); *Gay Students Org. of Univ. of N.H. v. Bonner*, 509 F.2d 652, 660 (1st Cir. 1974) (student group's "efforts to organize the homosexual minority, educate the public as to its plight, and obtain for it better treatment from individuals and from the government ... [is] associational activity unequivocally singled out for protection in the very core of association cases decided by the Supreme Court.") (internal quotations omitted).

²¹ *Id.*

²² *Watts v. United States*, 394 U.S. 705, 708 (1969) (man's statement, after being drafted to serve in the Vietnam War—"If they ever make me carry a rifle the first man I want to get in my sights is L. B. J."—was rhetorical hyperbole protected by the First Amendment, not a true threat to kill the president). *See also*, *Noto v. United States*, 367 U.S. 290, 297–98 (1961).

²³ *Watts*, 394 U.S. at 707-08.

²⁴ *Holder v. Humanitarian Law Project*, 561 U.S. 1, 8–9 (2010) (providing a guide to protests and messaging to a student chapter is not material support "to" a foreign terrorist organization).

expressive freedoms. This requires promptly reinstating the Anticolonial Scientists and Mecha de UW Madison student organizations, and publicly disavowing any ongoing investigation into their clearly protected political speech.

Given the urgent nature of this matter, we request a substantive response to our inquiry no later than close of business Thursday, May 23, 2024.

Sincerely,

A handwritten signature in black ink that reads "Alex Morey". The signature is written in a cursive style with a large initial "A" and "M".

Alex Morey
Vice President of Campus Advocacy
University of Wisconsin Law School, '13

Cc: Quinn Williams, General Counsel
Lori Reesor, Vice Chancellor for Student Affairs