



August 15, 2024

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University of Dayton
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300 College Park
Dayton, Ohio 45469 – 1624

Savalas Kidd
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University of Dayton
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Sent via U.S. Mail and Electronic Mail (president@udayton.edu, pub.safety@udayton.edu)

Dear President Spina and Chief Kidd:

FIRE, a nonpartisan nonprofit dedicated to defending freedom of speech,¹ is concerned by the University of Dayton's efforts to discipline a student for criticizing the police. Regardless of whether this speech offended officers, it remains fully protected by the First Amendment. As a state actor bound by the First Amendment, UDPD is required to uphold citizens' expressive rights in its law enforcement activities. And as an institution that makes strong free expression promises, UD must not punish students for protected expression.

On September 2, 2023, University of Dayton Police Sergeants Pullin and Oldham and Officer Siegwarth arrived at an off-campus residence to arrest a breaking-and-entering suspect in the area.² While filling out paperwork after detaining the suspect, the officers heard a voice yell "Fuck 12" twice.³ The officers initially did not respond, but when indistinct yelling continued, Officer Weber yelled "Shut up," and Sergeants Oldham and Pullin began walking to the house from which the voice appeared to originate and knocked on the door.⁴ They demanded the resident who answered produce her student ID and told her they would be referring her for

¹ For more than 20 years, The Foundation for Individual Rights and Expression has defended freedom of expression, conscience, religion, and other individual rights on America's university campuses. You can learn more about our mission and activities at thefire.org.

² Digital Video: 23-01022_-_Off_Weber_-_Redacted_.mp4 (Univ. of Dayton Police Dep't. 2024) (on file with author). The recitation of facts 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. While the situation eventually escalated and resulted in a student's detainment after a physical confrontation with an officer, FIRE is concerned by the officers' initial reason for stopping at the house: the student's protected expression.

³ *Id.* "Fuck 12" is a phrase used to protest police officers, with "12" being used as a slang term for police. Wiktionary, *fuck 12*, https://en.wiktionary.org/wiki/fuck_12 (last modified Apr. 21, 2024). The officers found the terms disrespectful.

⁴ Video: 23-01023_-_Redacted_-_Sgt_Oldham (Univ. of Dayton Police Dep't. 2024) (on file with author).

student discipline.⁵ While the student went upstairs to get her ID, Sergeants Pullin and Oldham agreed among themselves to refer her for interfering with the officers' investigation, disorderly conduct, a noise violation, and non-compliance—all based solely on the alleged shouting at police.⁶ Sergeant Oldham told the student: “Everything you guys were yelling up there is on our bodycams. Every time we turned around, we could see your faces.”⁷ Sergeant Pullin elaborated: “‘Fuck 12’ and all that ... you’ve been up there talking shit,” to which Sergeant Oldham added: “Telling us we have too many cop cars; telling us we’re in the way of your pizza.”⁸

I. The First Amendment Bars the Police Department from Punishing or Investigating the Students for the Speech at Issue

While the University of Dayton is a private institution, its police officers are vested with *state* authority on and around campus—including the area of this incident—as is made clear in a mutual aid agreement with the City of Dayton Police Department.⁹ This grant of authority means the university police officers are state actors bound by the First Amendment when engaging in law enforcement activities.¹⁰

Sergeants Oldham and Pullin made clear the initial disciplinary referrals and the interaction at the students' house were a direct response to the students' speech, which was and is clearly protected by the First Amendment. Even “obscene or opprobrious language” directed at an officer investigating a crime is protected by the First Amendment.¹¹ The Supreme Court has also held that “[a]s a general matter, the First Amendment prohibits subjecting an individual to retaliatory actions ... for speaking out.”¹² Officers, therefore, may not initiate an investigation that “would chill or silence a person of ordinary firmness from future expressive activities.”¹³ Even the threat of an official investigation or a disciplinary referral can chill expression,¹⁴ and the officers' conduct was designed specifically to punish the students'

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* Officers spoke mostly with the student who answered the door, but there were others present in the house. The officers asserted all the students present would receive referrals, and two other students are shown leaving the house on the bodycam footage.

⁸ *Id.* While Sergeant Oldham alleged the student said the officers were “in the way of [their] pizza,” the bodycam audio did not capture the students yelling that or a similar phrase.

⁹ *Concurrent Jurisdiction and Mutual Aid*, University of Dayton, Central State University, and Sinclair Community College, DAYTON POLICE DEP'T., 4–5 (revised June 2022), <https://public.powerdms.com/DAYTONOH/tree/documents/908392>.

¹⁰ See *Romanski v. Detroit Entm't, L.L.C.*, 428 F.3d 629, 637 (6th Cir. 2005) (“Where private security guards are endowed by law with plenary powers such that they are the *de facto* police officers, they may qualify as state actors under the public function test”); *Henderson v. Fisher*, 631 F.2d 1115 (3rd Cir. 1980) (campus police at a private university acted “under color of state authority”).

¹¹ *Lewis v. City of New Orleans*, 415 U.S. 130, 133 (1974); See also *Houston v. Hill*, 482 U.S. 451, 462 (1987).

¹² *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (citing *Crawford-El v. Britton*, 523 U.S. 574, 592 (1998)).

¹³ *Mendocino Env't. Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1300 (9th Cir. 1999).

¹⁴ *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963).

expression and stop future criticism. Such conduct violates officers' First Amendment obligations and the promises UD makes its students.

II. UD's Free Speech Promises Mean it May Not Punish the Students' Expression

UD explicitly guarantees its students the right to freedom of expression. According to UD's Freedom of Expression policy:¹⁵

Students of the University of Dayton enjoy the full expression of their thoughts, positions and opinions on all contemporary and intellectual issues while at the University. This expression includes, but is not limited to, the freedom to communicate, dissent, assemble, demonstrate and distribute literature in support of particular positions. The University upholds this freedom of expression and inquiry as a primary support for the education of its students. It recognizes that at times such expression may be controversial and may provoke criticism from academic, civic and religious communities.

UD's strong commitment represents not only a moral but a contractual obligation.¹⁶ And based on this strong commitment, students would reasonably believe they have expressive rights commensurate with those guaranteed by the First Amendment.¹⁷ Thus, the university may not punish students for "disorderly behavior," "interference," or lack of "compliance" based solely on exclamations towards police officers.

The Supreme Court has repeatedly, consistently, and clearly held that free speech principles protect expression others find offensive or even hateful.¹⁸ In holding that free speech principles protect 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."¹⁹ This principle applies with particular force to colleges and universities, which by their nature are dedicated to open debate and discussion. UD's own policies bar it from punishing the

¹⁵ *Freedom of Expression*, UNIV. OF DAYTON (last visited July 30, 2024), https://udayton.edu/studev/_resources/files/dean_resource/Freedom%20of%20Expression.pdf/.

¹⁶ *Doe v. Coll. of Wooster*, 243 F.Supp.3d 875 (N.D. Ohio 2017) ("The relationship between a university and its students [is] contractual in nature").

¹⁷ While UD, as a private university, is not bound by the First Amendment, courts' interpretations of free speech principles should inform its commitment to upholding faculty free speech rights and its faculty's reasonable expectation of what those rights encompass.

¹⁸ *See, e.g., Texas v. Johnson*, 491 U.S. 397, 414 (1989) (burning the American flag was protected by the First Amendment, the "bedrock principle underlying" the holding being that government actors "may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (striking down an 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"); the Court has refused to a limitation on speech viewed as "hateful" or demeaning "on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground;" *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017).

¹⁹ *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011).

students for their expression of distaste towards law enforcement, however offensive it may have been to the officers.

UD police approached the students' house solely because of their protected expression and with the purpose of retaliating against them for that expression. The First Amendment prevents police officers from engaging in such retaliation while enforcing the law, and UD cannot, consistent with its free speech promises, punish students for offenses only uncovered through that investigation.²⁰

We request a response no later than August 29, 2024 confirming UD will not punish the students for those offenses deriving from their speech. We also ask UDPD to recommit to protecting citizens' First Amendment rights.

Sincerely,



Dominic Coletti
Program Officer, Campus Rights Advocacy

²⁰ While FIRE does not take a position on any punishment the university administers for non-expressive conduct that occurred, including the male student who allegedly made physical contact with an officer, we object to all sanctions imposed as a direct result of the students' protected speech.