



November 7, 2024

Jonathan G.S. Koppell
Office of the President
Montclair State University
1 Normal Avenue
Montclair, New Jersey 07043

Sent via U.S. Mail and Electronic Mail (koppellj@montclair.edu)

Dear President Koppell:

FIRE¹ is disappointed not to have received a response to our enclosed September 26 letter detailing concerns with Montclair’s limitation of student and faculty expressive activity to the Amphitheater. We write again with concern about the latest version of the university’s Expressive Activity Policy, which infringes on students’ and faculty members’ First Amendment rights by establishing free speech zones, narrow time restrictions, and pre-approval for virtually all expressive activities. Additionally, the Policy’s reaffirmation of the 2020 “Posting Policy and Regulation” hampers students’ and faculty members’ free speech rights to post materials anonymously and without approval.

FIRE urges Montclair to reinstate its 2021 Expressive Activity Policy, which fully protected the campus community’s First Amendment rights, and to revise its Posting Policy to allow for anonymous posting and postings without administrative approval.

I. The Expressive Activity Policy Limits Expressive Freedoms

On October 29, Montclair issued the latest version of its Expressive Activity Policy. The updated Policy allows for expressive conduct on university property so long as the conduct takes place between 8:30 A.M. and 6:00 P.M. and remains in a designated location.² The designated location for students, RSOs, employees, and university-recognized groups is “any outdoor space on the Montclair or Bloomfield campus that ... [i]s at least approximately 100 feet away from any academic building” and “not within approximately 100 feet of the

¹ As you will recall from previous correspondence, the Foundation for Individual Rights and Expression is a nonpartisan nonprofit dedicated to defending freedom of speech. You can learn more about our mission and activities at thefire.org.

² *Expressive Activity*, Rules and Regulations Governing Expressive Activities, MONTCLAIR STATE UNIV. (updated Oct. 29, 2024), <https://www.montclair.edu/policies/all-policies/expressive-activity/> [<https://perma.cc/3TJA-8FS4>].

entrance of any building[.]”³ The designated location for the public is “the Amphitheater on the Montclair campus and the Back Quad on the Bloomfield campus.”⁴ If a student, RSO, employee, or recognized group collaborates or co-sponsors with the public in any way, they will be required to use the Amphitheater.⁵

The Expressive Activity Policy also requires “advanced reservation of space ... for any Expressive Activity, silent or otherwise, that is planned in advance and gathers individuals together.” This is paired with a requirement that reservations be made “no less than five (5) business days prior to the requested reservation date,” a requirement applying to students, RSOs, employees, university-recognized groups, and the public.⁶ However, the Policy also states, “Silent Expressive Activity by an individual [and not a group], such as wearing a certain article of clothing or head covering, does not fall within the scope of this Policy.”⁷

Montclair’s Posting Policy requires that “posting of printed literature, posters, placards, flyers, and banners on campus (except in the residence halls) must be stamped and approved by the Center for Student Involvement” and that posting “in the residence hall must be approved by the appropriate Residence Hall Director.”⁸ The Policy also notes that the “name of the sponsoring department, group, or organization must be printed legibly on all materials.”⁹

II. Montclair’s Expressive Activity and Posting Policies Violate its First Amendment Obligations

FIRE appreciates that Montclair has a compelling interest in “preserv[ing] and protect[ing] the health, safety and welfare” of community members and members of the public.¹⁰ However, these priorities cannot come at the expense of student and faculty First Amendment rights. It has long been settled law that the First Amendment binds public universities,¹¹ like Montclair, such that its actions and decisions—including the

³ *Id.* at Definitions.

⁴ *Id.* (Public refers to any individual or entity not currently enrolled in or currently employed by the University. This includes local, state, national, or international organizations with subsidiaries or chapters at the University.).

⁵ *Id.*

⁶ *Id.* at Procedures.

⁷ *Id.* at Rules and Regulations Governing Expressive Activity.

⁸ *Posting Policy and Regulation*, MONTCLAIR STATE UNIV. (updated Jan. 3, 2020), <https://www.montclair.edu/policies/all-policies/posting-policy-and-regulation/> [<https://perma.cc/2RJW-6KJW>].

⁹ *Id.*

¹⁰ *Expressive Activity*, *supra* note 2 at Policy Statement.

¹¹ *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).

maintenance of policies implicating student expression¹²—must not restrict student expressive freedoms.

Montclair may establish “reasonable time, place, and manner” restrictions on expressive activity,¹³ but its rules must be content- and viewpoint-neutral, narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication.¹⁴

Montclair’s “time” and “place” restrictions are neither reasonable nor narrowly tailored to serve a significant governmental interest. Montclair also impermissibly imposes prior restraints on organizing events on campus and posting materials on campus without citing anything resembling a sufficiently significant government rationale. Finally, Montclair’s posting policy impermissibly forbids protected anonymous speech.

A. Montclair’s “Designated Location” rules that create a de facto “free speech zone” are not valid time, place, and manner restrictions, as they are neither reasonable nor narrowly tailored

On its face, the prohibitions against expressive activities within 100 feet of any building entrance and within 100 feet of any academic building ban most outdoor expressive activity. Virtually all green spaces on Montclair’s main campus, including the Student Center Quad, Science Quad, Alumni Green, and the Chapin Hall Quad, are surrounded by buildings, and are within “approximately 100 feet of the entrance of any building.”¹⁵ Through this overly restrictive scheme, Montclair is creating an exceedingly small allowable “zone” of places where community members are allowed to express themselves. The “100 feet” requirement leaves only small sections of the Alumni Green and Student Center Quad available for expressive activity.

Courts have repeatedly held that policies confining student expression to small areas around campus cannot withstand Constitutional scrutiny. For example, the University of Cincinnati was prohibited from limiting all “demonstrations, picketing, or rallies” to a small “free speech area.”¹⁶ Likewise, Los Angeles Pierce College’s free speech zone was invalidated because it did not further the college’s interests in avoiding disruption and maintaining the attractiveness of campus “without unnecessarily impeding students’ First Amendment rights.”¹⁷

While Montclair has an interest in “ensur[ing] the safety of all involved and the University community” and “prevent[ing] disruption to the Functions of the University,”¹⁸ the

¹² *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).

¹³ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

¹⁴ *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

¹⁵ *Campus Map*, MONTCLAIR STATE UNIV., <https://www.montclair.edu/campus-map/> [<https://perma.cc/D5PE-DLPN>].

¹⁶ *Univ. of Cincinnati Chapter of Young Ams. for Liberty v. Williams*, 2012 U.S. Dist. LEXIS 80967, at *29–30 (S.D. Ohio June 12, 2012).

¹⁷ *Shaw v. Burke*, 2018 U.S. Dist. LEXIS 7584, at *26 (C.D. Cal. Jan. 17, 2018).

¹⁸ *Expressive Activity*, *supra* note 2 at Policy Statement.

university does not offer a reason why preventing interruptions or disruptions requires cordoning off virtually the entire campus to expressive activities.

Moreover, the policy is not narrowly tailored. If the university wishes to safeguard access to campus buildings, it may simply use language from its 2021 Expressive Activity Policy forbidding protestors from “block[ing] access to campus buildings.”¹⁹ Rutgers has a similar policy that uses more tailored language: “[i]ndividuals may not block or prevent others from entering and exiting university buildings.”²⁰ If students show they are unable to enter or exit buildings, Montclair could intervene and disperse demonstrators who were blocking doors. Unlike the current policy, this would be sufficiently tailored to protect demonstrators’ free speech rights while ensuring normal campus operations are not disrupted.

The university could also follow a more tailored approach for its policy provision barring expressive activity within 100 feet of any *academic* building. If the university seeks to prevent protests from disrupting classroom activities, it could limit its prohibition to activities above a designated noise level occurring immediately adjacent to academic buildings. Unlike the current, sweeping policy language, this approach would be sufficiently tailored to serve the significant governmental interest of ensuring an environment conducive to learning and instruction.

Montclair’s regulation that outdoor expressive activities of the public can only occur at the Amphitheater is also problematic in that the university’s definition of “the Public” extends to students who “collaborate” on or “co-sponsor” an event in any way with external individuals or organizations who are also considered “the Public.”²¹ According to this broad language, a student who asks a parent for help designing an event flyer or practices a speech in front of a friend would be considered “the Public” and confined to the Amphitheater. Even students who distribute flyers advertising an off-campus food bank volunteering event as part of a “collaboration” with that food bank would be considered “the Public.”

Coupled with the “100 feet” restrictions, this all-encompassing definition of “the Public” reinforces the idea that virtually all expression on campus will be confined to a small area. The university fails to give a rationale as to why this definition must be so broad, instead of being limited to external individuals not affiliated with the university. Similarly, Montclair fails to explain why its “100 feet” rules are necessary to prevent disruptions to campus or academic life. Absent any rationale related to a significant governmental interest, Montclair’s onerous place-based restrictions cannot pass constitutional muster.

B. Montclair’s time restriction on expressive activity is neither reasonable nor narrowly tailored

¹⁹ *Expressive Activity*, MONTCLAIR STATE UNIV. (updated July 21, 2021), <https://www.montclair.edu/policies/all-policies/expressive-activity/> [<https://perma.cc/NX6L-7GPY>].

²⁰ *Rutgers University Guidelines for Free Expression on Campus*, Operating Procedures for All Demonstrations, RUTGERS UNIV., <https://free-expression.rutgers.edu/sites/default/files/2024-08/Rutgers-University-Free-Expression-Guidelines.pdf> [<https://perma.cc/3JRK-PPEU>].

²¹ *Expressive Activity*, *supra* note 2 at Definitions.

Montclair’s Expressive Activity Policy requirement that demonstrations “take ... place between the hours of 8:30 A.M. and 6:00 P.M.” is similarly unreasonable and not narrowly tailored.²² While the university has stated an interest in avoiding disruption to campus life, most classes have presumably concluded by 6:00 P.M. The restriction also presumably applies on the weekend, when there are few to no classes. As a result of these restrictive limits on expression, students or faculty looking to demonstrate or have a political conversation outdoors in the evening hours will be prevented from doing so.

There are easy ways to maintain narrowly tailored time restrictions of expressive activities while balancing Montclair’s interest in minimizing campus disruptions. For example, the University of Virginia’s recently updated rules on demonstrations only prohibit outdoor events on Grounds between 2:00 a.m. and 6:00 a.m.²³

There’s little reason to believe that confining expressive activity to business hours will “prevent interference with or disruption to the educational, clinical, research, business or related functions of the University”²⁴ in a way that more narrowly tailored restrictions will not.

C. Montclair’s event pre-approval and posting policies impose prior restraints

Montclair’s requirement of five business days’ advanced notice “for any Expressive Activity, silent or otherwise, that is planned in advance and gathers individuals together”²⁵ is an unconstitutional “prior restraint,” defined as government action which prohibits expression absent administrative permission.²⁶ In the words of the Supreme Court, prior restraints are “the most serious and least tolerable infringement” of free speech.²⁷ Courts have long held that prior restraints are permissible only in the most severe circumstances, such as in the event of a demonstrated threat to national security.²⁸ Specifically, courts have made clear that broad restrictions on spontaneous expression—like requiring students to obtain permits for outdoor protests—violate the First Amendment due to “the significant burden that [advance notice and permitting requirements] place on free speech.”²⁹

²² *Id.*

²³ *Duties Toward Speakers and Use of University Facilities or Property*, Policy Statement General Access to Outdoor University Property, Access by Affiliated Persons, UNIV. OF VA. (revised Aug. 26, 2024), <https://uvapolicy.virginia.edu/policy/PRM-017>.

²⁴ *Expressive Activity*, *supra* note 2.

²⁵ Because the university considers any event-related social media or listserv post to constitute advanced planning and organizing, a large majority of impromptu demonstrations pertaining to current events are also likely subject to the pre-approval requirement. *See Expressive Activity*, *supra* note 2 at Definitions.

²⁶ *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 556 (1976).

²⁷ *Id.* at 559.

²⁸ *See N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971); *Near v. Minnesota*, 283 U.S. 697 (1931).

²⁹ *Berger v. City of Seattle*, 569 F.3d 1029, 1037 (9th Cir. 2009) (advance notice and permitting requirements are presumptively invalid) (citing *Watchtower Bible*, 536 U.S. at 166); *see also Roberts v. Haragan*, 346 F. Supp.2d 853, 870 (N.D. Tex. 2004) (invalidating two-day advance notice requirement for students to speak in designated campus areas as “sweep[ing] too broadly in imposing a burden on a substantial amount of expression that does not interfere with any significant interests of the University”).

Montclair has failed to meet its “heavy burden”³⁰ of providing a reason why students must obtain pre-approval for virtually all events, without exception for small demonstrations, silent protests, or most activities responding to unfolding current events. Students and faculty members may wish to express themselves spontaneously to respond to the latest unfolding current events, only to be preempted without reason by this sweeping pre-approval provision. This prior restraint therefore cannot survive Constitutional scrutiny.

The university’s 2020 “Posting Policy and Regulation requiring all “printed literature, posters, placards, flyers, and banners” to “be stamped and approved by the Center for Student Involvement”³¹ is a further prior restraint on student and faculty expression. Under this policy provision, students seeking to freely express themselves through postings—whether for political purposes, supportive platitudes, or birthday wishes—are unable to do so absent university permission. There is no conceivable rationale, let alone a compelling one, for this broad-based preemption of speech. It is impermissible for Montclair to subject its students to prior review of all posted expression.

D. Montclair’s posting policy impermissibly forbids anonymous speech

Montclair’s requirement that “[t]he name of the sponsoring department, group, or organization must be printed legibly on all materials”³² contravenes the First Amendment’s protection of anonymous speech.³³

The Supreme Court has explained that a speaker is “free to decide whether ... 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.”³⁴ Anonymous communication “is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.”³⁵ Thus, Montclair’s blanket ban on anonymous postings cannot stand.

III. Conclusion

Montclair’s “Expressive Activity Policy” and “Posting Policy and Regulation” are stark illustrations of what the Supreme Court has labeled a “reckless or callous indifference to the federally protected rights of others.”³⁶

³⁰ *N. Y. Times Co.*, 403 U.S. at 714.

³¹ *Posting Policy and Regulation*, *supra* note 8.

³² *Id.*

³³ See, e.g., *Watchtower Bible & Tract Soc. of N. Y. v. Vill. 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).

³⁴ *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 341–42 (1995).

³⁵ *Id.* at 357; see also *Talley v. California*, 362 U.S. 60, 64 (1960); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 307 (1965); *Tattered Cover v. City of Thornton*, 44 P.3d 1044, 1051 (Colo. 2002).

³⁶ *Smith v. Wade*, 461 U.S. 30, 56 (1983).

Montclair should rescind the 2024 Expressive Activity Policy and return to its 2021 version,³⁷ which fully protected the expressive rights of students and faculty members. It should also revise its 2020 Posting Policy to comply with First Amendment requirements.

FIRE would be pleased to assist Montclair in revising its policies free of charge—in accordance with our charitable mission. We respectfully request a substantive response to this letter no later than close of business on November 18, 2024.

Sincerely,

A handwritten signature in black ink, appearing to read "Ross Marchand", written over a horizontal line.

Ross Marchand
Program Officer, Policy Reform and Campus Rights Advocacy

Encl.

³⁷ *Expressive Activity*, *supra* note 19.



September 26, 2024

Jonathan G.S. Koppell
Office of the President
Montclair State University
1 Normal Avenue
Montclair, New Jersey 07043

Sent via U.S. Mail and Electronic Mail (koppellj@montclair.edu)

Dear President Koppell:

FIRE, a nonpartisan nonprofit dedicated to defending freedom of speech,¹ is concerned by Montclair State University's restrictions on students demonstrating in outdoor spaces. The university has limited outdoor demonstrations to one small area of campus, creating a restrictive "free speech zone" and violating students' First Amendment rights to peaceably express themselves. We call on Montclair to reverse this policy and allow community members to freely express themselves outdoors subject to reasonable "time, place, and manner" restrictions permitted under the First Amendment.²

I. Background Facts

Montclair's 2021 Expressive Activity policy explains that "students, student organizations, and their sponsored guests may freely engage in spontaneous Expressive Activities [in outdoor campus facilities and areas] provided that such activities are in compliance with all other provisions of this policy."³

This policy was replaced by your November 6, 2023, communication limiting outdoor expression to one area of campus. You stated that, because "the volume [of protests] has become disruptive to teaching and learning," all "rallies and vigils" must be relocated to the Amphitheater "to allow safe expression in an area that is accessible but lessens the

¹ For 25 years, the Foundation for Individual Rights and Expression (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 *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

³ *Expressive Activity*, Outdoor Locations, MONTCLAIR STATE UNIV. (updated July 21, 2021), <https://www.montclair.edu/policies/all-policies/expressive-activity/> [<https://perma.cc/NX6L-7GPY>]. The following is our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us.

impact on instruction, especially during this critical time in the semester.”⁴ Despite justifying this restriction by citing the “volume” of protests during a specific period of time in the fall 2023 semester, the restriction continues to be in effect almost a year later. As a result, the 2023 guidance has effectively superseded the 2021 policy.

Since November 2023, administrators have instructed students and faculty members demonstrating outside of the Amphitheater to relocate to this space. For example, last winter, administrators verbally reprimanded students and faculty members affiliated with Students for Justice in Palestine after the group members silently marched across campus.⁵ In another instance, on September 5, 2024, Professor Adam Rzepka and three of his faculty colleagues held a silent protest in the main quad. Such a protest could not have caused a disturbance, yet multiple university officials told the demonstrators that they needed to move to the Amphitheater if they wished to continue protesting.⁶

On September 12, Professor Rzepka attended a meeting with Associate Provost Kenneth Sumner, Assistant Vice President Mary Colon, University Senate President Shannon Bellum, Professor Fawzia Afzal-Khan, and Professor Alan Chorun regarding the school’s Expressive Activity policy.⁷ When asked by Professor Rzepka during that meeting whether he, his colleagues, and students could protest outside the Amphitheater, Associate Provost Sumner replied, “you can do whatever you want.”⁸

Sumner’s assurance to Rzepka would quickly prove untrue. Following the meeting, Professor Rzepka, two faculty colleagues, and one student engaged in another silent protest outside of the Amphitheater.⁹ After they protested for a few minutes on the main quad, Associate Provost Sumner, Assistant Vice President Colon, and Associate Vice President and Dean of Students Margaree Coleman-Carter told the demonstrators that they would have to relocate to the Amphitheater or disperse.¹⁰ The administrators claimed that the demonstrators had not reserved the space and were therefore not allowed to protest there, even though neither the 2021 Expressive Activity policy nor your 2023 communication requires reservations for outdoor demonstrations.

On September 17, Rzepka, three faculty colleagues, and four students repeated their silent protest activity on the quad.¹¹ Rzepka reserved the space in advance for this protest. This

⁴ *Respecting and Caring for Each Other During Challenging Times*, MONTCLAIR STATE UNIV. (Nov. 6, 2023), <https://www.montclair.edu/president/2023/11/06/respecting-and-caring-for-each-other-during-challenging-times/>.

⁵ Email from Adam Rzepka to Ross Marchand (Sept. 11, 2024, 1:50 PM) (on file with author).

⁶ *Id.*

⁷ Email from Adam Rzepka to Ross Marchand (Sept. 12, 2024, 3:32 PM) (on file with author).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Email from Adam Rzepka to Ross Marchand (Sept. 17, 2024, 5:46 PM) (on file with author).

time, administrators gathered at the protest site but did not speak to the demonstrators or attempt to break up the protest.¹²

II. Montclair’s Establishment of a Free Speech Zone Violates Students’ Free Speech Rights

As a public university bound by the First Amendment,¹³ Montclair may establish “reasonable time, place, and manner” restrictions on expressive activity,¹⁴ but its rules must be content- and viewpoint-neutral, narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication.¹⁵

Montclair’s policy is not narrowly tailored to the university’s stated interest in noise reduction, as it bans speech regardless of its noise level. Furthermore, restricting all speech, regardless of noise level, to one small area of campus is not a reasonable restriction and fails to leave open alternative avenues for expression, with the rest of the open outdoor areas of campus remaining closed to all expression.¹⁶

Courts have repeatedly held that similar restrictions on student expression cannot withstand constitutional scrutiny. A federal district court in Ohio enjoined the University of Cincinnati from limiting all “demonstrations, picketing, or rallies” to a small “free speech area.”¹⁷ Likewise, a federal district court in California invalidated Los Angeles Pierce College’s free speech zone because it did not further the college’s interests in avoiding disruption and maintaining the attractiveness of campus “without unnecessarily impeding students’ First Amendment rights.”¹⁸

Montclair’s free speech zone similarly fails to pass constitutional muster. While you cited easing the noise-related burdens on instructors during a critical time of the semester as a rationale for setting up this free speech zone,¹⁹ the university could have set noise limits for demonstrations or required pre-approval for demonstrations exceeding a threshold number of students. Such provisions could have helped further the university’s goal of making sure that protests were not too loud or distracting during a stressful time of the year, while stopping far short of relegating all expression to one free speech zone on campus.

¹² *Id.*

¹³ *Healy v. James*, 408 U.S. 169, 180 (1972).

¹⁴ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

¹⁵ *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

¹⁶ *Respecting and Caring for Each Other During Challenging Times*, *supra* note 4.

¹⁷ *University of Cincinnati Chapter of Young Americans for Liberty v. Williams*, 2012 U.S. Dist. LEXIS 80967, at *29–30 (S.D. Ohio June 12, 2012).

¹⁸ *Shaw v. Burke*, 2018 U.S. Dist. LEXIS 7584, at *26 (C.D. Cal. Jan. 17, 2018).

¹⁹ *Respecting and Caring for Each Other During Challenging Times*, *supra* note 4.

III. Montclair’s Inconsistent Application of a Free Speech Zone Fails to Give Students Reasonable Notice of Prohibited Activities

Any university-imposed restrictions on student speech must give students reasonable notice and a fair opportunity to know what is prohibited.²⁰ Montclair’s constantly shifting speech restrictions and uneven enforcement of its 2021 Expressive Activity policy fail to provide this reasonable notice.

Your directive confusingly stated that Montclair “continue[s] to follow our [2021] Expressive Activity policy,”—the policy that allows for spontaneous protests in all outdoor areas of campus—only to parenthetically state immediately thereafter that events such as rallies and vigils will be relocated to the Amphitheater.²¹ This irreconcilable conflict of logic means that recipients of this communication had no way to know what Montclair’s policy actually was, despite the fact that the 2021 Expressive Activity policy remains on the books.²²

Montclair faculty and students are also left to wonder whether they need a reservation to demonstrate in outdoor areas of campus outside of the Amphitheater. After telling Rzepka that he could do whatever he wanted, administrators immediately used Rzepka’s lack of reservation to break up the September 12 protest. Yet they declined to break up the September 17 protest after Rzepka reserved quad space²³—a reservation that is not required by either the 2021 Expressive Activity policy²⁴ or your directive.²⁵ While the administrators’ conduct toward Rzepka and his fellow demonstrators implies that reserving space in advance is now a requirement for protesting outside the Amphitheater, this appears to have been deliberately left unstated by written policy.

A conflicting array of directives, policies, and enforcement provides insufficient notice of university rules that Montclair has every reason to know will chill speech and result in self-censorship. Indeed, such an outcome is *so* inevitable that a desire to silence constitutionally protected speech is the only possible motivation behind Montclair’s behavior.

IV. Conclusion

Montclair’s establishment and inconsistent enforcement of a free speech zone is a stark illustration of a “reckless or callous indifference to the federally protected rights of others,”²⁶ Accordingly, we remind you that a public college administrator who violates

²⁰ See *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

²¹ *Id.*

²² *Expressive Activity*, *supra* note 3.

²³ Email from Adam Rzepka to Ross Marchand (Sept. 12, 2024, 3:32 PM); Email from Adam Rzepka to Ross Marchand (Sept. 17, 2024, 5:46 PM) (on file with author).

²⁴ *Id.*

²⁵ *Respecting and Caring for Each Other During Challenging Times*, *supra* note 4.

²⁶ *Smith v. Wade*, 461 U.S. 30, 56 (1983).

clearly established law will not retain qualified immunity and can be held personally responsible for monetary damages for violating First Amendment rights.²⁷

Montclair must make clear that the 2021 Expressive Activity policy currently published on its website is still binding, that reservations are not required for every single instance of free expression, and that the Amphitheater is not the sole venue for free expression. FIRE would be pleased to assist Montclair in training its administrators to implement the 2021 Expressive Activity policy, which protects students' and faculty's First Amendment rights.

Sincerely,



Ross Marchand
Program Officer, Policy Reform and Campus Rights Advocacy

Cc: Kenneth Sumner, Associate Provost for Academic Personnel, Graduate School
Mary Colon, Assistant Vice President for Academic Personnel Services
Shannon Bellum, University Senate President
Margaree Coleman-Carter, Associate Vice President and Dean of Students

²⁷ See *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Gerlich v. Leath*, 861 F.3d 697, 709 (8th Cir. 2017) (upholding denial of qualified immunity to defendants—public university administrators—because plaintiffs' First Amendment right was clearly established).