



November 20, 2024

Ken Hush
President's Office
Emporia State University
1 Kellogg Circle
Campus Box 4001
Emporia, Kansas 66801

Sent via U.S. Mail and Electronic Mail (khush@emporia.edu)

Dear President Hush:

FIRE¹ is disappointed not to have received a *substantive* response to our enclosed October 15 letter regarding ESU's overbroad and vague "Free Expression" policy, which states: "No free expression activities may occur inside any University building, arena, or stadium."² The policy's failure to define "free expression activities" chills student expression both by sweeping in a great deal of potential student speech ESU is legally bound to protect,³ and by failing to give students sufficient notice of what expression may be prohibited.⁴ While ESU has an interest in preventing "material and substantial" disruptions, this policy impermissibly bars *all* expressive activity in indoor areas,⁵ regardless of their disruptive effect, and is therefore unconstitutional.⁶

¹ As you may recall from prior correspondence, FIRE is a nonpartisan nonprofit that defends the freedom of expression, conscience, and religion, and other individual rights on America's university campuses.

² *Free Expression*, Location, EMPORIA STATE UNIV. (approved Aug. 6, 2019), <https://sites.google.com/g.emporia.edu/student-handbook/free-expression> [<https://perma.cc/JE2R-Q35X>].

³ *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (regulations are unconstitutionally overbroad when they sweep within their ambit a substantial amount of protected expression). As a public institution, ESU is bound to abide by the First Amendment. *Healy v. James*, 408 U.S. 169, 180 (1972).

⁴ *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972) (a policy 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).

⁵ For instance, this policy effectively bars students from wearing shirt with political slogans, having a casual debate with a friend, and writing a poem while in the library.

⁶ *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 university contexts, the protections *Tinker* established set the floor for student expressive rights—not the ceiling.

ESU must promptly revise this policy by clarifying that only substantially disruptive speech in university buildings, arenas, and stadiums is prohibited. FIRE would be happy to assist ESU in this endeavor free of charge in accordance with our charitable mission, and we request a substantive response to this letter no later than December 4, 2024.

Sincerely,

A handwritten signature in black ink, appearing to read "Haley Gluhanich". The signature is written in a cursive, flowing style.

Haley Gluhanich
Senior Program Officer, Campus Rights Advocacy

Encl.



October 15, 2024

Ken Hush
President's Office
Emporia State University
1 Kellogg Circle
Campus Box 4001
Emporia, Kansas 66801

Sent via U.S. Mail and Electronic Mail (khush@emporia.edu)

Dear President Hush:

FIRE¹ is concerned by Emporia State University's "Free Expression" policy, which states: "No free expression activities may occur inside any University building, arena, or stadium."² Maintaining this overbroad and vague policy unduly burdens student speech and contravenes ESU's obligation as a public university to abide by the First Amendment.³ FIRE urges ESU to immediately revise this policy to ensure students can freely express themselves in a non-disruptive manner in all areas on campus.

Speech regulations are unconstitutionally overbroad when they sweep within their ambit not only speech they may legitimately regulate but also a substantial amount of protected expression.⁴ Such a policy 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.⁵ Here, the policy's failure to define "free expression activities" chills student

¹ As you may recall from prior correspondence, the Foundation for Individual Rights and Expression defends freedom of expression, conscience, and other individual rights on America's university campuses. You can learn more about our mission at thefire.org.

² *Free Expression*, Location, EMPORIA STATE UNIV. (approved Aug. 6, 2019), <https://sites.google.com/g.emporia.edu/student-handbook/free-expression> [<https://perma.cc/JE2R-Q35X>].

³ *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).

⁴ *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

⁵ *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

expression both by sweeping in a great deal of potential student speech ESU is legally bound to protect, and by failing to give students sufficient notice of what expression may be prohibited.

For example, if a student walked into a university building wearing a T-shirt with the phrase “Black Lives Matter”—or, instead, “Build the Wall”—would they be subject to sanction under this policy? Wearing such a shirt is certainly an expressive exercise. What about having a casual debate with a friend at a university football game about whether athletes should kneel for the National Anthem? What if a student were to write a poem while in the library, or sketch a picture while in the dining center? Untethered to any definition, this policy can be used to punish this kind of clearly protected expression.

While ESU has a legitimate interest in preventing “material and substantial interference” with institutional events or operations, this policy impermissibly bars *all* free expression in indoor areas, regardless of its disruptive effect, and is therefore unconstitutional.⁶

To meet its First Amendment obligations, ESU must promptly revise this policy by clarifying that only substantially disruptive speech in university buildings, arenas, and stadiums is prohibited. For example, the policy could say:

Activities and events in university buildings, arenas, and stadiums may not:

- Impede academic, administrative, or commercial operations;
- Obstruct building entrances or exits or otherwise impede vehicular or pedestrian traffic on campus; or
- Occupy reserved spaces, classrooms, offices, or other areas in a manner that materially and substantially disrupts or prohibits university academic, administrative, or business functions.

There are a variety of ways to permissibly regulate expressive activities in these areas, and FIRE would be happy to assist ESU in this endeavor free of charge in accordance with our charitable mission. We request a response to this letter no later than October 29, 2024.

Sincerely,



Haley Gluhanich
Senior Program Officer, Campus Rights Advocacy

⁶ *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 university contexts, the protections *Tinker* established set the floor for student expressive rights—not the ceiling.