



13 March 2017

Via U.S. Mail & Electronic Mail
at hawkinson@kutztown.edu

Dr. Kenneth Hawkinson
Office of the President
Kutztown University of Pennsylvania
303B Stratton Administration Center
P.O. Box 730
Kutztown, Pennsylvania 19530

Re: Unconstitutional Censorship of Students for Life

Dear President Hawkinson,

As you know, Kutztown University at Pennsylvania (KUP) officials recently erased pro-life messages Students for Life had chalked onto various sidewalks and other uncovered walkways on campus. In doing so, they enforced KUP's *Posting and Chalking Guidelines*,¹ a policy that explicitly regulates the content and viewpoint of student speech. Both this policy and the actions of KUP officials violate clearly established law, and we insist that you take immediate action to revise these *Guidelines* and rectify this violation of our clients' freedoms.

By way of introduction, Alliance Defending Freedom is an alliance-building, non-profit legal organization that advocates for the right of people to live out their faith freely. And the ADF Center for Academic Freedom is dedicated to ensuring that religious, conservative, and pro-life students and faculty enjoy rights to speak, associate, and learn on campus on an equal basis as those of other perspectives so that everyone can freely participate in the marketplace of ideas.

FACTUAL BACKGROUND

On March 1, 2017, Students for Life used sidewalk chalk to write positive, life-affirming messages onto various sidewalks and other uncovered walkways on campus. This effort was part of National Pro-Life Chalk Day and part of Students for Life's efforts to promote a culture of life on campus.

The next morning, Students for Life's president, Jackie Foran, noticed that some of the group's messages had vanished. As the day went on, more vanished. She later

¹ Kutztown Univ. of Penn., *Policy STU-018, Posting and Chalking Guidelines*, Feb. 8, 2010, available at <http://app.kutztown.edu/policyregister/policy.aspx?policy=STU-018> (last visited Mar. 13, 2017).

learned that KUP officials had erased all of these messages. The employees who did the erasing said they were just following orders. Students for Life tried to duplicate its messages, but several of these pro-life messages were erased a second time.

Under KUP's *Posting and Chalking Guidelines*, "[c]halking is permitted only on sidewalks and other uncovered walkways,"² and Students for Life complied with this.³ But they also mandate that the "content of the chalking must be consistent with the items listed under the Content section of this policy."⁴ Under the conveniently bold-faced "Content" heading, students are allowed to post (and presumably chalk) only messages that are "educational or informative in nature" and are prohibited from advocating the "infraction of any . . . University policy or regulation," even if it violates the Constitution.⁵ They are also prohibited from "advertis[ing] activities, events, or groups" that are "incompatible with the University's Statement on Non-Discrimination," and they are required to identify to provide the "names of the sponsoring organization . . . on each . . . sidewalk chalking in a legible and easily readable manner."⁶ Violating any of these rules "constitutes grounds for removal of the material," and KUP reserves the right to charge students for its censorship.⁷

LEGAL ANALYSIS

KUP's *Guidelines* violate a myriad of clearly established constitutional doctrines, thereby exposing you and all other officials involved to personal liability. First, the *Guidelines* could not be more explicitly content-based. As the Supreme Court recently reaffirmed, "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves they are narrowly tailored to serve compelling state interests."⁸ A policy is content-based if it "applies to particular speech because of the topic discussed or the idea or message expressed."⁹ And it does not matter if KUP officials acted out of good motives because a policy "that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus towards the ideas contained in the regulated speech."¹⁰ From man-

² *Id.* at 3.

³ KUP's *Guidelines* are internally inconsistent later stating that "[n]o material may be displayed on . . . sidewalks." *Id.* This obviously leaves students guessing as to whether sidewalk chalking is permitted or not. But in the past, other groups have chalked in these same areas, and KUP has not erased their messages. So despite the possibly erroneous inconsistency, it is clear that KUP has opened these sidewalks and walkways to chalking. See also Kutztown Univ. of Penn., *Publicizing Events*, available at <https://www.kutztown.edu/about-ku/administrative-offices/student-involvement/student-organization-support/publicizing-events.htm> (last visited Mar. 13, 2017) ("Chalking is a quick and inexpensive high impact strategy for promoting. General guidelines state that chalking is only permitted on sidewalks and other uncovered walkways.").

⁴ Kutztown Univ. of Penn., *Policy STU-018, Posting and Chalking Guidelines*, *supra* note 1, at 3.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 4.

⁸ *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

⁹ *Id.*

¹⁰ *Id.* at 2228 (internal quotations and citations omitted).

dating that the “content of the chalking must be consistent” with its content restrictions to placing those restrictions in a bulleted list under a boldfaced “Content” heading, KUP could not possibly make it more clear that it engages in the very content discrimination that has been prohibited on campus since at least 1981.¹¹

Second, for more than twenty years, it has been clearly established that public universities violate the First Amendment when they discriminate based on viewpoint.¹² “When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.”¹³ After all, the First Amendment protects the right of student to “express any viewpoint they wish—including a discriminatory one.”¹⁴ Of course, Students for Life’s positive, life-affirming messages steer far clear of this territory. But KUP’s *Guidelines* prohibit students from expressing anything officials deem to be “incompatible with the University’s Statement on Non-Discrimination.” So some viewpoints (*i.e.*, those the University likes) are allowed; others are banned. This is clearly unconstitutional.

Third, the First Amendment has long protected anonymous speech.¹⁵ While universities can require students to identify themselves to a specific official, the First Amendment prohibits them from requiring students to identify themselves to the entire campus community.¹⁶ But KUP’s *Guidelines* ignore this clearly established protection, requiring every chalked message to identify the student group behind it.

Last, the Fourteenth Amendment prohibits universities from imposing policies that are “so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.”¹⁷ As KUP’s *Guidelines* both permit and prohibit chalking on sidewalks, even its exceptionally intelligent students will find it hard to know what is allowed. On top of that, they must guess as to what groups, activities, or events are “incompatible with the University’s Statement on Non-Discrimination.” A wrong guess means possibly paying for their own censorship.

DEMAND

Despite KUP’s unconstitutional *Guidelines* and censorship by scrub brush, Students for Life desires to resolve this matter amicably. Based on the fact that you met with our clients and assured them that you would take action, we trust that you share

¹¹ See *Widmar v. Vincent*, 454 U.S. 263, 269–70 (1981).

¹² See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828–37 (1995).

¹³ *Id.* at 829.

¹⁴ *Christian Legal Soc’y v. Martinez*, 561 U.S. 661, 697 n.26 (2010).

¹⁵ See, e.g., *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342–43 (1995).

¹⁶ See *Justice for All v. Faulkner*, 410 F.3d 760, 765 (5th Cir. 2005) (“Public universities can and typically do restrict access to campus facilities. Identifying oneself as a student to a designated university official will often serve as one’s admission ticket to use those facilities for various purposes, including speech. . . . What remains of a student’s anonymity after he has identified himself to university officials, however, is significant. He may, if he chooses, remain anonymous in relation to other students, as well as most faculty and staff.”); *id.* at 771 (striking the policy because it “requires that the speaker identify himself, not just to certain University officials, but to every person who receives the literature being distributed” (emphasis original)).

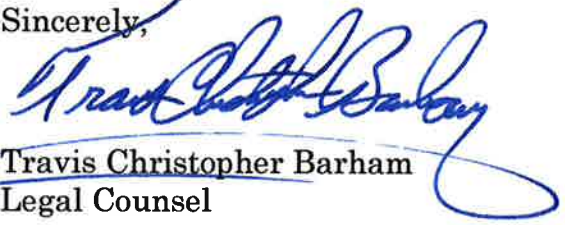
¹⁷ *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

this desire and will take the necessary steps to protect the constitutional rights of all your students. To do this, we suggest the following course of action:

1. You should issue a campus-wide statement condemning the erasing of Students for Life's chalked messages;
2. KUP must immediately revise its *Guidelines* to remove all content- and view-point-based restrictions, to protect anonymous speech, and to remove the internal contradictions.
3. All departments, offices, and personnel associated with censoring Students for Life's speech should be required to attend a seminar—conducted at our direction—on the fundamental First Amendment principles that apply in the higher education context so that this sort of violation does not happen to any other student group ever again.

By the close of business on March 27, 2017, please inform me whether this course of action is amenable to you. Otherwise, our clients will be forced to consider other alternatives for protecting their rights. Meanwhile, please place a litigation hold on all e-mail accounts, document collections, and other sources of information (including electronically stored information) that reference in any way Students for Life or the subject policies.

Sincerely,



Travis Christopher Barham
Legal Counsel

ALLIANCE DEFENDING FREEDOM

Cc:

- Mr. Jeremy Samek, Senior Counsel, INDEPENDENCE LAW CENTER