



October 16, 2017

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VIA EMAIL AND U.S. MAIL

Re: Unconstitutional Speech Policies

Dear Sid,

There's an elephant in the room. It's almost the Third Saturday in October. But while no one born since the advent of the iPhone can remember a Tennessee victory over Alabama on the gridiron, Tennessee's free speech winning streak over Alabama is alive and well.

As you'll see, we're hoping this communication counts as a "casual" expression under University of Alabama's *Facilities and Grounds Use Policy*, since we don't have prior permission from the University to engage in formal expression. If we were writing the University of Tennessee, we could be more formal because they don't require advance permission for either kind of expression.

We're writing on behalf of students at Alabama who want to speak on campus, including passing out literature, but found out that, unlike at Tennessee, they can't formally do so—only "casual" speech is allowed at Alabama without permission, and our clients cannot hand out literature (even just copies of the United States Constitution) without a permit that has to be obtained at least three to ten days in advance.

By way of introduction, **Young America's Foundation** (YAF) is the principal outreach organization of the Conservative Movement, inspiring thousands of American youth by the ideas of individual freedom, a strong national defense, free enterprise, and traditional values. YAF's chapter affiliates are found on hundreds of campuses nationwide, including the University of Alabama. ADF's **Center for Academic Freedom**, is a non-profit legal organization dedicated to ensuring freedom of speech and association for students and faculty so that everyone can freely participate in the marketplace of ideas without fear of government censorship.¹

¹ Alliance Defending Freedom has achieved successful results for its clients before the United States Supreme Court, including six victories before the highest court in the last six years. See e.g. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, No. 15-577, 2017 WL 2722410 (U.S. June 26, 2017) (striking down state burden's on ADF's client's

As you know, it is a bedrock principle of constitutional law that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”² These rights, well established for high school students are, if anything, augmented for *university* students on your campus, despite the lack of an actual campus gate. Unfortunately, Alabama employs multiple policies that essentially leave students who wish to engage in non-casual expression locked out of the schoolyard, where they must wait to receive a permit to speak. Under the Constitution, the only permit students need to speak in publicly accessible outdoor areas is the First Amendment. Not only does the Constitution protect students’ right to speak without permission, other SEC schools have successfully allowed both “casual” and “other than casual” speech on their campuses. Alabama students – especially during the football season – have a lot to talk about and deserve no less freedom.

The Grounds Use Permit Policy is an Unconstitutional Prior Restraint on Students’ Speech.

The public spaces of campus must be open to free speech for all students. Not only is the “college classroom with its surrounding environs . . . peculiarly the ‘marketplace of ideas,’”³ but the Supreme Court also “has recognized that the campus of a public university, at least for its students, possesses many of the characteristics of a public forum.”⁴

So, “to the extent the campus has park areas, sidewalks, streets, or other similar common areas, these areas are public forums, at least for the University’s students, irrespective of whether the University has so designated them or not. These areas comprise the irreducible public forums on the campus.”⁵ Thus, they must be open to free debate and expression for all students at your school.

free-exercise rights); *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (per curiam) (successful result for religious colleges’ free exercise rights); *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015) (unanimously upholding ADF’s client’s free-speech rights); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (striking down federal burden’s on ADF’s client’s free-exercise rights); *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811 (2014) (upholding a legislative prayer policy promulgated by a town represented by ADF); *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011) (upholding a state’s tuition tax credit program defended by a faith-based tuition organization represented by ADF).

² *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

³ *Healy v. James*, 408 U.S. 169, 180 (1972).

⁴ *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981).

⁵ *Roberts v. Haragan*, 346 F. Supp. 2d 853, 861-62 (N.D. Tex. 2004); *accord Justice for All v. Faulkner*, 410 F.3d 760, 766-69 (5th Cir. 2005); *Smith v. Tarrant Cnty. Coll. Dist.*, 694 F. Supp. 2d 610, 625 (N.D. Tex. 2010) (“Typically, at least for the students of a college or university, the school’s campus is a designated public forum.”); *Univ. & Cmty. Coll. Sys. of Nev. v. Nevadans for Sound Gov’t*, 100 P.3d 179, 190 (Nev. 2004) (“Typically, when reviewing restrictions placed on students’ speech activities, courts have found university campuses to be designated public forums.”); *Univ. of Cincinnati Chapter of Young Ams. for Liberty v. Williams*, 2012 WL 2160969, at *4 (S.D. Ohio June 12, 2012) (noting that the Sixth Circuit found such campus locations to be designated public fora (citing *McGlone v. Bell*, 681 F.3d 718, 732 (6th Cir. 2012); *Hays Cnty. Guardian v. Supple*, 969 F.2d 111, 116 (5th Cir. 1992)); *Pro-Life Cougars v. Univ. of Hous.*, 259 F. Supp. 2d 575, 681-82 (S.D. Tex. 2003).

The university may open up more of the residual campus as public forums for its students, but it may not designate less.

Public colleges may establish reasonable “time, place and manner” restrictions on expressive activity in order to limit disruptions to college activities. However, these restrictions must be content neutral and “narrowly tailored” to “serve a significant governmental interest,” and they must “leave open ample alternative channels for communication.”⁶ Alabama’s policies fail this test.

At Alabama, far from recognizing the public areas of campus as a public forum or even a designated public forum for students, university policies forbid any expression deemed to be “other than” “casual” expression unless a Ground Use Permit (GUP) is obtained in advance.⁷ Furthermore, Alabama’s policies are not reasonable or content and viewpoint neutral, because they examine whether expression is related to recent national news events,⁸ prohibit anonymous speech because they require a GUP and agreement,⁹ prohibit spontaneous speech because they require one to ten days advance approval,¹⁰ and grant unbridled discretion to administrators who may approve or disapprove of the speech based on its content or viewpoint because university officials may determine without guidelines what counts as “casual” communication and what is “other than” casual; in addition, officials may determine what content or viewpoint counts as a new newsworthy event that is permissible within one day instead of the normal three to ten day permit process.¹¹ Each of these restrictions and grants of discretion violates the First Amendment.

First, a blanket ban on speech and literature distribution absent pre-approval is not a reasonable time, place, and manner restriction, nor is it narrowly tailored to any significant interest.¹² “[A] law requiring a permit to engage in such speech constitutes a dramatic departure from our national heritage and constitutional tradition.”¹³ Such restrictions have been struck down even in the high school context, and may even be subject to strict scrutiny.¹⁴ Second, even under intermediate scrutiny, granting administrators discretion to determine whether expression is on a topic “that is

⁶ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

⁷ Division of Financial Affairs, Policy for the use of University Space, Facilities and Grounds, §B, University of Alabama, Feb. 10, 2016 [hereinafter “Grounds Use Policy”].

⁸ Grounds Use Policy, §E6.

⁹ Grounds Use Policy, §§B, E3.

¹⁰ Grounds Use Policy, §§E4-6.

¹¹ Grounds Use Policy, §§B, E4-6.

¹² *Watchtower Bible & Tract Soc’y of N.Y. v. Vill. of Stratton*, 536 U.S. 150, 165-67 (2002).

¹³ *Id.* at 166.

¹⁴ *Westfield High Sch. L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98, 123 (D. Mass. 2003) (citation omitted) (“[W]hile there lawfully, [students] enjoy the right to free personal intercommunication with other students, so long as their communication does not substantially or materially disrupt the operation of the classroom or impinge upon the rights of others. Accordingly, any school policy which infringes upon a students’ protected speech by failing to adhere to these principles must, therefore, survive strict scrutiny.”).

occasioned by news or issues coming into public knowledge with the preceding two (2) calendar days”¹⁵ is per-se content discrimination prohibited by the First Amendment in this context.¹⁶ Third, requiring students to apply for a GUP effectively bans anonymous expression. However, the United States Supreme Court has repeatedly made clear that bans on anonymous publications violate the First Amendment.¹⁷ Fourth, requiring a permit for all literature distribution or non-casual expression¹⁸ effectively bans spontaneous speech or demonstration and operates as a prior restraint. Such spontaneous speech is protected by the First Amendment,¹⁹ and “[a]ny system of prior restraints of expression comes to [the Supreme] Court bearing a heavy presumption against its constitutional validity.”²⁰ Lastly, the policy grants unbridled discretion to administrators because it fails to limit with “*narrow, objective, and reasonable standards* by which the material will be judged,” their discretion to determine whether a speaker is speaking “casually” or “other than” “casually” or whether a speaker’s topic is a new newsworthy event, thus permitting viewpoint discrimination.²¹

The good news is, as every comeback king knows (though Alabama isn’t used to coming from behind), there’s always time to right the ship. We are happy to discuss further details if you are interested in revising your policies to conform to the First Amendment. We know they may not be perfect, but we’ve found the University of Tennessee’s free speech record to exceed their football record by leaps and bounds²², so we’ve attached excerpts of those policies for your convenience. Tennessee’s policies, as well as those at several other SEC schools seem to work well for large universities without requiring a permit for student speech.

Alabama has the opportunity to up its ground use policy game to match its ground game on the gridiron. Coach Saban demands nothing short of perfection on the field, and Alabama’s students deserve nothing less than adherence to the First Amendment on their campus.

¹⁵ Grounds Use Policy, §E6.

¹⁶ *Westfield*, 249 F. Supp. 2d at 104, 123-24 (holding high school policy limiting distribution to “curriculum or activity related literature” was a “facially unconstitutional subject-matter-based restriction[.]”).

¹⁷ See e.g. *Talley v. California*, 362 U.S. 60, 64 (1960); *Watchtower Bible & Tract Soc’y of N.Y.*, 536 U.S. at 166; *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 341-42 (1995) (“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[. . .] Accordingly, an author’s decision to remain anonymous [. . .] is an aspect of freedom of speech protected by the First Amendment.”).

¹⁸ Grounds Use Policy, §§B, IIB(1)(h).

¹⁹ *Watchtower Bible & Tract Soc’y of N.Y.*, 536 U.S. at 167-68.

²⁰ *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). See also *Westfield*, 249 F. Supp. 2d at 127 (holding that high school’s prior restraint on literature distribution as unconstitutional).

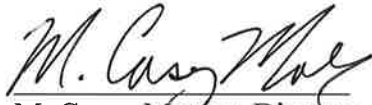
²¹ See *Westfield*, 249 F. Supp. 2d at 125; *Forsyth Cty., Ga. v. Nationalist Movement*, 505 U.S. 123, 133 (1992) (“The First Amendment prohibits the vesting of such unbridled discretion” to discriminate between viewpoints “in a government official.”).

²² To be honest, Tennessee has a pretty storied history on the gridiron as well; they (like everyone else) just haven’t had any luck against Alabama lately.

Sid J. Trant, Esq.
October 16, 2017
Page 5 of 6

With Tennessee slated for Bryant-Denny this weekend, it is our hope that you can quickly confirm that Alabama will review its policies and correct them to comply with the First Amendment before the big game. But in any case, we look forward to hearing back from you by October 30th. Otherwise we may be forced to consider “other than casual” relief from the court system.

Sincerely,



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Campus Policies & Procedures²³

Freedom of Assembly and Demonstration

Because free inquiry and free expression are indispensable to the attainment of the goals of a university, the University of Tennessee encourages students to develop the capacity for critical judgment and to engage in an independent search for truth. The institution supports the rights of students and other members of the University of Tennessee community to express freely their views for or against actions and opinions with which they agree or disagree.

The University of Tennessee also recognizes a concurrent obligation to develop policies and procedures which safeguard this freedom of expression but which, at the same time, will maintain an atmosphere on the campus conducive to academic work, and will preserve the dignity and seriousness of university ceremonies and public exercises, and will respect the private rights of all individuals. The right of peaceable assembly is a guaranteed constitutional right and one which this institution does not intend to abrogate. Students, faculty, and staff are encouraged to report violations of policies associated with freedom of assembly and/or expression to the Office of Student Conduct and Community Standards or the Office of the Dean of Students. The following regulations are intended to enumerate the essential provisions necessary to reconcile freedom of assembly with responsibility in any campus meeting conducted for the purpose of expressing opinions of the participants.

1. Student gatherings may be conducted in areas which are generally available to the public, provided such gatherings:

- A. Are conducted in an orderly and peaceful manner.
- B. In no way obstruct vehicular or pedestrian traffic.
- C. Do not interfere with classes, scheduled meetings, events, and ceremonies or with other essential processes of the university.
- D. If inside a building, are held in an assigned meeting room.

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Literature Distribution

The following policy applies to literature distribution by University of Tennessee students inside and outside campus buildings. The distribution of leaflets and handbills and the circulation of petitions on campus shall be free and unhindered. Any material to be distributed should be in accordance with the applicable local, state, and federal laws. Special racks and bulletin boards are provided at numerous places on the campus and may be used by members of the university community. Litter produced by an individual or group as a result of distributing information is the responsibility of the individual or group. Continued littering will result in appropriate judicial action. Traffic and specialized usage of certain facilities dictate the following specialized guidelines:

²³ University of Tennessee Campus Policies and Procedures, <https://hilltopics.utk.edu/campus-policies-procedures/> (last visited Oct. 10, 2017).