ALLIANCE DEFENDING
FREEDOM
FOR FAITH FOR JUSTICE

May 30, 2017

URGENT

Via U.S. Postal Service and Facsimile

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Re: BHCC Unconstitutional Speech Policies

Dear Mr. Tashjy:

Young Americans for Liberty at Bunker Hill ("YAL"), chapter affiliate of the national organization Young Americans for Liberty, is an association of students seeking to form a registered student organization at Bunker Hill Community College ("BHCC"). YAL contacted Alliance Defending Freedom's Center for Academic Freedom about the ongoing violation of its constitutional rights based on BHCC campus speech and student organization policies, including a May 3, 2017 incident in which YAL members were ordered by campus police to cease and desist from passing out copies of the United States Constitution on BHCC's campus. To avoid litigation, we ask that you immediately revise BHCC's speech and student organization codes to conform with the First Amendment.

By way of introduction, ADF's Center for Academic Freedom is 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] The Foundation for Individual Rights in Education ("FIRE"), and Massachusetts attorney Andrew Beckwith are co-signatories to this letter. FIRE is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom

[1] Alliance Defending Freedom has achieved successful results for its clients before the United States Supreme Court, including four victories before the highest court in the last six years. *See e.g. 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, 2759 (2014) (striking down federal burden's on ADF's client's free-exercise rights); *Town of Greece 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).

of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses. ADF has contacted BHCC in the past regarding its unconstitutional speech codes.[2] We are now contacting you on behalf of our client, YAL.

YAL is comprised of students at BHCC who associate together to promote the natural rights of life, liberty, and property set forth by the Founding Fathers. It recognizes that government was created to protect the freedoms of the individual, and that freedom requires individual responsibility. Its members associate together to learn about and promote these ideals. BHCC's registered student organization policies permit administrators to exercise unbridled discretion to discriminate against disfavored viewpoints, and its expressive activity policies operate as an unconstitutional prior restraint on YAL and its members' speech.

FACTUAL BACKGROUND

On March 23, 2017, YAL president Jeffery Lyons requested permission from the Student Activities office to set up a table to distribute literature and invite the Political Director of the Libertarian Party of Massachusetts to speak to the group on campus. BHCC administrators denied the request to distribute literature and invite a speaker citing BHCC policies that prohibit non-recognized clubs from such activities.

YAL scheduled a meeting with Student Activities to discuss the process to obtain official recognition as a club, but the meeting was postponed by Student Activities until April 11. On April 11, YAL submitted a proposed club constitution and application for student club status, but despite multiple meetings and discussions since, has not received recognition or even a copy of procedures on how to obtain recognition.

On May 3, in furtherance of their mission, YAL members handed out free copies of the United States Constitution on campus in an open outdoor area were there was no impediment to the free flow of traffic. After a brief time, the students were approached by campus police, ordered to stop, and informed they were violating BHCC policy because they did not have permission to pass out literature. The officers took their identification information and notified them they were being reported for violations of the student code of conduct.

BHCC's policies prohibit expressive activity on campus without advance permission and approval,[3] restrict the content of printed materials that may be distributed,[4] and grant unbridled discretion to restrict the viewpoint of expression or student associations,[5] while forbidding students from meeting without official recognition.[6]

ANALYSIS

As you are well aware, "state colleges and universities are not enclaves immune from the sweep of the First Amendment."[7] In fact, "the vigilant protection of constitutional freedoms is

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[2] Letter from Travis Barham to Dr. Pam Y Eddinger, Feb. 4, 2014 (copy enclosed with this letter).
[3] BHCC 2016-2017 Student Handbook at 69, 75, *available at* bhcc.mass.edu/handbook (hereinafter "Handbook").
[4] *Id.*
[5] *Id.*
[6] *Id.* at 18.
[7] *Healy v. James*, 408 U.S. 169, 180 (1972).

nowhere more vital than in the community of American schools,"[8] because "the core principles of the First Amendment 'acquire a special significance in the university setting, where the free and unfettered interplay of competing views is essential to the institution's educational mission.'"[9] BHCC's speech and student club policies are unconstitutional because they act as a prior restraint on speech, grant administrators unbridled discretion to disfavor speakers due to their viewpoint or due to the perceived controversial nature of their viewpoints, restrict the content of student expression, and infringe students' First Amendment right of association.

I. BHCC's speech policies are unconstitutional because they operate as a prior restraint, and are content and viewpoint discriminatory.

Limiting student free speech to a select location on campus is unreasonable and violates the free speech rights of every student.[10] 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,'"[11] 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."[12]

Thus, "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."[13] Thus, they must be open to free debate and expression for all students at your school. The university may "open up more of the residual campus as public forums for its students, but it may not designate less."[14]

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."[15]

Here, far from recognizing the public areas of campus as a public forum or even a designated public forum for students, BHCC policies forbid the distribution of literature unless it is pre-approved and the speakers assigned a specific location.[16] Furthermore, BHCC policies

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[8] *Id.* (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).
[9] *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1016 (N.D. Cal. 2007) (quoting *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 863 (E.D. Mich. 1989)).
[10] *See, e.g., Roberts v. Haragan*, 346 F. Supp. 2d 853, 863 (N.D. Tex. 2004).
[11] *Healy*, 408 U.S. at 180.
[12] *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981).
[13] *Roberts*, 346 F. Supp. 2d at 861; *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*, 969 F.2d at 116); *Pro-Life Cougars v. Univ. of Hous.*, 259 F. Supp. 2d 575, 681-82 (S.D. Tex. 2003).
[14] *Healy*, 408 U.S. at 180.
[15] *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).
[16] Handbook, at 69, 75.

restrict the content of literature distributed,[17] prohibit anonymous speech,[18] prohibit spontaneous speech,[19] and grant unbridled discretion to administrators who may approve or disapprove of the speech based on its content or viewpoint.[20] Each of these restrictions 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.[21] "[A] law requiring a permit to engage in such speech constitutes a dramatic departure from our national heritage and constitutional tradition."[22] The Federal District Court for the District of Massachusetts struck down a similar ban in the high school context.[23] Second, limiting literature to that which administrators deem to "relate directly to on-campus information and events sponsored by the club or College"[24] is per-se content discrimination prohibited by the First Amendment.[25] Third, the policy provides that all "promotional materials" must include the name of the "sponsoring organization." However, the United States Supreme Court has repeatedly made clear that bans on anonymous publications violate the First Amendment.[26] Fourth, requiring pre-approval for literature distribution effectively bans spontaneous speech or demonstration and operates as a prior restraint. Such spontaneous speech is protected by the First Amendment,[27] and "[a]ny system of prior restraints of expression comes to [the Supreme] Court bearing a heavy presumption against its constitutional validity."[28] Lastly, the policy grants unbridled discretion to administrators because it fails to limit their discretion with "*narrow, objective, and reasonable standards* by which the material will be judged," permitting viewpoint discrimination.[29]

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[17] Handbook, at 69 ("Items distributed by clubs must relate directly to on-campus information and events sponsored by the club or College.").
[18] Handbook, at 69, 75 (requiring the name of the sponsor to be on all distributed literature).
[19] Handbook, at 75 (requiring pre-approval for speech without proscribing a time limit for the approval process).
[20] Handbook, at 69, 75 (failing to list exhaustive, neutral criteria to guide administrators decisions).
[21] *Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton*, 536 U.S. 150, 167 (2002).
[22] *Id.*
[23] *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.").
[24] Handbook, at 69.
[25] *Westfield*, 249 F. Supp. at 104, 123-24 (holding high school policy limiting distribution to "curriculum or activity related literature" was unconstitutional).
[26] *See e.g. Talley v. California*, 362 U.S. 60, 64 (1960); *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 166 (2002).
[27] *Watchtower Bible & Tract Soc'y of N.Y.*, 536 U.S. at 167-68.
[28] *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).
[29] *See Westfield*, 249 F. Supp. 2d at 125.

II. BHCC's student club recognition policies are unconstitutional because they restrict the right of association, and grant unbridled discretion to administrators to restrict speech.

"Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs."[30] "There can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that associational right."[31] Here, BHCC's policy violates the Constitution and YAL's associational rights.

As written, the policy violates the Constitution by granting unbridled discretion to discriminate against minority viewpoints. As the Supreme Court has held, "[i]f the permit scheme 'involves appraisal of facts, the exercise of judgment, and the formation of an opinion,' by the licensing authority, 'the danger of censorship and of abridgment of our precious First Amendment freedoms is too great' to be permitted."[32] BHCC's policies fail to provide these safeguards because there are almost no written criteria available and those that are available do not provide "'narrow, objective, and definite standards to guide the licensing authority.'"[33] The Handbook provides a few non-exhaustive criteria for student group approval, but directs students to the Student Activities Office for a "complete description of the policies and procedures for forming a student club."[34] However, after contacting the Student Activities Office, per the above policy, YAL members discovered there are no such written approval policies and procedures. The above-referenced policy and practices impermissibly grant the Student Activities Office and the Student Government Association overly broad discretion over the recognition of student groups. The apparent lack of specific written policies and procedures underscores the discretion available to administrators. Furthermore, the policy on its face subjects groups such as YAL to "disciplinary action" for "meeting outside of this policy."[35] There is no valid state interest that justifies such a ban on student association.

As applied, the broad discretion granted to administrators has resulted in a significant delay in the YAL chapter's recognition—which they are still awaiting with no recourse. Particularly for community college students who may only be students at the school for a limited time, being required to wait for months to receive recognition—with no justification, and with the college's ban in place on "meeting outside of this policy"—infringes the First Amendment right of association.

CONCLUSION AND DEMAND

BHCC's speech and student organization policies impermissible violate the First Amendment rights to speech and association.[36] Thus, on behalf of our client we ask that you notify

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[30] *Healy*, 408 U.S. at 181.
[31] *Id.*
[32] *Forsyth Cty., Ga. v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (citations omitted).
[33] *Id.* (citations omitted).
[34] Handbook, at 18.
[35] Handbook, at 18.
[36] As a courtesy, although our clients are not currently challenging this provision, we would like to make you aware that the "Publications Policy" at page 73 of the Handbook also violates clearly established law by subjecting student publications to editorial board review. The Federal District Court for the District of Massachusetts struck down a similar policy in 1970. *See Antonelli v. Hammond*, 308 F. Supp. 1329, 1337–38 (D. Mass. 1970) ("[T]he court holds

us in writing—no later than two weeks from the date of this letter—that BHCC will revise its speech and student organization policies to remove prior restraints on speech, limit the discretion of administrators to restrict speech by requiring any constraints to be limited to reasonable time place and manner restrictions that are narrowly tailored to significant government interests, and guide administrators with exhaustive, content and viewpoint neutral criteria whenever restrictions are imposed on student speech or association. Furthermore, any restriction on speech much be supported by a written decision, justified by clear criteria, with the ability to appeal in order to "render [the government's decisions] subject to effective judicial review."[37] Absent such assurances, our clients will be forced to consider litigation to vindicate their rights. If BHCC is committed to revising its policies, we would be pleased to work with you during that process. We have collaborated successfully with administrators at colleges and universities nationwide to amicably and efficiently revise unconstitutional policies.

Sincerely,

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Enclosure: Letter from Travis Barham to Dr. Pam Y Eddinger, Feb. 4, 2014.

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and declares that the prior submission to the advisory board of material intended to be published in The Cycle, in order that the board may decide whether it complies with 'responsible freedom of the press' or is obscene, may not be constitutionally required either by means of withholding funds derived from student activity fees or otherwise.").

[37] *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 323 (2002).

ALLIANCE DEFENDING FREEDOM

4 February 2014

Via U.S. Mail & Facsimile at (617) 228-2050

Dr. Pam Y. Eddinger
Office of the President
Bunker Hill Community College
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Boston, Massachusetts 02129

Re: Protecting Students' First Amendment Rights at Bunker Hill Community College

Dear President Eddinger,

It recently came to our attention that Bunker Hill Community College (BHCC) maintains several speech zone policies that violate your students' First Amendment freedoms. First, BHCC's policies on *Distribution of Printed Materials* and *Student Action* limit students' freedom to distribute literature on campus. Second, its *Guest Speakers Policy* subjects student organizations to a broad and unconstitutional prior restraint. Last, its policy on *Religious Services* subjects religious students and their organizations to unique restrictions that conflict with numerous provisions of the First Amendment. We write to inform you that these policies violate the First Amendment and to urge you to rectify them and thus respect the constitutional freedoms of all your students.

By way of introduction, Alliance Defending Freedom is an alliance-building legal ministry that defends and advocates for religious freedom and other fundamental rights. We are dedicated to ensuring that religious and conservative students and faculty may exercise their rights to speak, associate, and learn on an equal basis with all other students and faculty.

SPEECH ZONES & THE FIRST AMENDMENT

I. Universities may not prevent students from using the outdoor areas of campus for free speech activities, including leafleting.

Limiting student free speech to a select location on campus is unreasonable and violates the free speech rights of every student.[1] The public spaces of your 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,'"[2] 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."[3] "The cam-

1 *See, e.g.*, *Roberts v. Haragan*, 346 F. Supp. 2d 853, 863 (N.D. Tex. 2004).
2 *Healy v. James*, 408 U.S. 169, 180 (1972).
3 *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981).

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pus's function as the site of a community of full-time residents makes it 'a place where people may enjoy the open air or the company of friends and neighbors in a relaxed environment,' and suggests an intended role more akin to a public street or park than a non-public forum."[4]

Thus, "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] These public spaces "are not enclaves immune from the sweep of the First Amendment."[6] They must be open to free debate and expression for all students at your university. The university may "open up more of the residual campus as public forums for its students, but it can not designate less."[7]

"[A]ny restriction of the content of student speech in these areas is subject to . . . strict scrutiny" and may only be justified by showing a "compelling state interest."[8] And even "content-neutral restrictions are permissible only if they are reasonable time, place, and manner regulations that are narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication."[9] But a mere "interest in an orderly administration of its campus and facilities in order to implement its educational mission does not trump the interest of its students, for whom the University is a community, in having adequate opportunities and venues available for free expression."[10] In addition, "[m]ere speculation that speech would disrupt campus activities is insufficient because 'undifferentiated fear or apprehension of a disturbance is not enough to overcome the right to freedom of expression on a college campus.'"[11]

II. Universities may not subject student speech to prior restraints that do not contain objective guidelines and procedures for officials to follow.

Speech zones are unconstitutional prior restraints if they give university officials

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[4] *Hays Cnty. Guardian v. Supple*, 969 F.2d 111, 117 (5th Cir. 1992) (quoting *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 651 (1981) (internal citation omitted)).

[5] *Roberts*, 346 F. Supp. 2d at 861; *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*, 969 F.2d at 116); *Pro-Life Cougars v. Univ. of Hous.*, 259 F. Supp. 2d 575, 581–82 (S.D. Tex. 2003).

[6] *Healy*, 408 U.S. at 180.

[7] *Roberts*, 346 F. Supp. 2d at 862.

[8] *Id.*; *accord Williams*, 2012 WL 2160969, at *6; *Smith*, 694 F. Supp. 2d at 625 (concluding that "regulations of student speech in [designated public fora] is [sic] subject to strict scrutiny"); *Pro-Life Cougars*, 259 F. Supp. 2d at 582–83.

[9] *Roberts*, 346 F. Supp. 2d at 862; *accord Williams*, 2012 WL 2160969, at *6; *Faulkner*, 410 F.3d at 769 & n.14; *Pro-Life Cougars*, 259 F. Supp. 2d at 582–83.

[10] *Roberts*, 346 F. Supp. 2d at 863.

[11] *Williams*, 2012 WL 2160969, at *6 (quoting *Healy*, 408 U.S. at 191).

unfettered discretion to deny speech and lack guidelines and procedures for the officials to follow when approving or denying student expression. Prior restraints allow the government to censor or limit speech before it occurs and are presumptively unconstitutional.[12] They "are the most serious and the least tolerable infringement on First Amendment rights."[13] Indeed, "[i]t is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors."[14] Universities bear a "heavy burden" in justifying the appropriateness of a prior restraint on campus.[15] To survive constitutional scrutiny, a regulation or scheme amounting to a prior restraint must not delegate overly broad discretion to a government official.[16] That is, limits on speech must contain "narrowly drawn, reasonable, and definite standards" to guide official discretion.[17]

Recently the University of Cincinnati's requirement that students "give a minimum of five working days . . . notice for any speech that is a demonstration, picketing, or rally" was struck down as an unconstitutional prior restraint.[18] "[R]equiring [proper notice] as a prior condition on the exercise of the right to speak imposes an objective burden on some speech," and is otherwise unconstitutional because "there is a significant amount of spontaneous speech that is effectively banned."[19]

III. Universities may neither target religious expression with unique rules nor limit religious expression to state-recognized groups.

For well over three decades, the Supreme Court has made it clear that public universities may not subject religious speech to different rules than secular speech. When the University of Missouri at Kansas City prohibited students from using its buildings for "religious worship or religious teaching,"[20] the Supreme Court struck down the policy as content discrimination. The students sought "to engage in religious worship and discussion," two "forms of speech and association protected by the First Amendment."[21] Any effort to exclude speech from a forum "based on [its] religious content" must satisfy strict scrutiny.[22] The Court reaffirmed this principle when it found that the University of Virginia's attempt to prevent student activity fee funds from going to religious and political activities constituted viewpoint discrimination,[23] and lower courts have ruled likewise when universities have subjected events involving "prayer, worship, and proselytizing" to unique restrictions.[24]

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12 *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963).
13 *Grossman v. City of Portland*, 33 F.3d 1200, 1204 (9th Cir. 1994) (internal quotations & citation omitted).
14 *Watchtower Bible & Tract Soc'y of NY, Inc. v. Vill. of Stratton*, 536 U.S. 150, 165–66 (2002).
15 *Healy*, 408 U.S. at 184.
16 *Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992).
17 *Id.* at 133.
18 *Williams*, 2012 WL 2160969, at *6 (internal quotations omitted).
19 *Watchtower*, 536 U.S. at 167.
20 *Widmar*, 454 U.S. at 265 n.3.
21 *Id.* at 268–69.
22 *Id.*
23 *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830–31 (1995).
24 *See Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 778–79 (7th Cir. 2010) (finding such restrictions to be content or viewpoint discrimination).

Even outside the university context, the Court has repeatedly ruled that the government must treat religious and secular speech the same[25] and that failure to do so constitutes content and viewpoint discrimination.[26]

Similarly, for over three decades, the Supreme Court has made it clear that the government must treat all religious denominations the same. Indeed, "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."[27] Not only is this the vision of the Founders, such as James Madison, who "assumed that every denomination would be equally at liberty to exercise and propagate its beliefs,"[28] but it is also a principle that the Supreme Court has articulated repeatedly.[29]

SPEECH ZONES AT BUNKER HILL COMMUNITY COLLEGE

Unfortunately, BHCC maintains three sets of speech zone policies that run afoul of these well-established First Amendment principles. We urge you to revise or repeal them, thereby protecting the free speech rights of all your students.

For one thing, two of BHCC's policies—entitled *Distribution of Printed Materials* and *Student Action*, respectively—restrict students' freedom to distribute literature on campus. The former limits how much literature students may distribute (*i.e.*, "up to one hundred letter-size copies . . . of a printed item may be distributed"), and even then only allows them to do so "when appropriate."[30] It also requires that student organizations identify themselves on the literature[31] and limits the topics that the literature may address.[32] The latter requires students to "present a signed, written notice of their intent [to distribute literature] to the Coordinator of Student Activities," who will then decide the "appropriate location" the students may use.[33]

These policies contravene the First Amendment principles outlined earlier. First, they limit student speech to areas that the Coordinator of Student Activities deems "appropriate," but the First Amendment specifies that the "free speech zone" for students must consist of all open and public outdoor areas of campus, those "irreducible public forums."[34] Hence, the right of students to engage in speech cannot be restricted to a few, discrete areas of campus, nor can universities give officials unfettered discretion to decide what areas of campus are "appropriate" for student

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[25] *See, e.g.*, *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) ("Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression.").

[26] *See generally Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226 (1990).

[27] *Larson v. Valente*, 456 U.S. 228, 244 (1982).

[28] *Id.* at 245.

[29] *Id.* at 246 (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963)).

[30] BUNKER HILL CMTY. COLL., 2013–2014 STUDENT HANDBOOK 49, *available at* http://www.bhcc.mass.edu/media/01-collegepublications/studenthandbooks/BHCC-Student-Handbook-2013-2014.pdf (last visited Feb. 3, 2014).

[31] *Id.* ("All distributed promotional materials must bear the name of the sponsoring organization. . . .").

[32] *Id.* ("Items distributed by clubs must relate directly to on-campus information and events sponsored by the club or College.")

[33] *Id.* at 52.

[34] *See supra* notes 1–11 and accompanying text.

expression. Instead, students have the right to gather, speak, and distribute literature in the park areas, sidewalks, streets, and other common areas on campus.

Second, by requiring students to get approval from the Coordinator of Student Activities before they exercise their First Amendment rights on campus, these policies impose a broad and overreaching prior restraint. Not only is this restraint not "narrowly tailored to serve a significant governmental interest" as the Supreme Court requires,[35] but it also contains no criteria—let alone the narrowly drawn ones the First Amendment requires—to limit the Coordinator's discretion. As a result, "there is a significant amount of spontaneous speech that is effectively banned."[36] Besides, it is simply offensive to require that your students "must first inform the [Coordinator] of [their] desire to speak to [their] neighbors."[37]

Third, the First Amendment protects anonymous speech, which these policies prohibit.[38] After all, seeking prior approval requires students to identify themselves, as does requiring all literature to identify the distributing organization. The First Amendment also mandates that if BHCC wishes to stop littering, it must punish the students who do the littering, not those exercising their First Amendment right to leaflet.[39]

For another thing, under BHCC's *Guest Speakers Policy*, if a student organization wishes to sponsor a speaker, it must submit a "request" to "the Coordinator of Student Activities at least two weeks prior to the scheduled event and prior to inviting the speaker to appear on campus."[40] The Coordinator will then decide whether to approve the request based on, among other things, whether he concludes that the speaker will "present views relative to [his] area of expertise."[41] If approved, the event can occur "only during the scheduled club activity hours on Thursdays from 1–2:15 p.m.," unless the Coordinator approves an alternate day and time.[42]

Once again, this policy subjects students to a broad and unconstitutional prior restraint,[43] by prohibiting students from holding events unless they request permission from BHCC officials two weeks in advance. It gives the Coordinator unfettered discretion both on whether to approve a guest speaker event and then on when and where it may occur. In the process, the Coordinator must make an inherently subjective and content-based determination of whether the speaker has the necessary expertise to be allowed to speak. And BHCC has no compelling interest in limiting this type of student speech just to one hour and fifteen minutes on one day per week. Given these flaws, BHCC simply cannot carry the "heavy burden" required to

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35 *Ward*, 491 U.S. at 791

36 *Watchtower*, 536 U.S. at 167.

37 *See id.* at 166–67.

38 *Watchtower*, 536 U.S. at 166–67; *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 341–42, 356 (1995).

39 *See, e.g., Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (noting that in a designated public forum, the government must "target[] and eliminate[] no more than the exact source of the evil it seeks to remedy").

40 BUNKER HILL CMTY COLL., 2013–2014 STUDENT HANDBOOK, *supra* note 30, at 49.

41 *Id.* at 50.

42 *Id.*

43 *See supra* notes 12–19 and accompanying notes.

justify this policy.[44]

Last, under BHCC's *Religious Services* policy student organizations seeking to hold religious events must "formally petition the Associate Vice President of Student Services and Dean of Students for permission to hold the religious service on campus."[45] The Dean of Students must then assess the "legitimacy of the request," meaning in part that it must "involve an organized religious group recognized by the Secretary of State of the Commonwealth of Massachusetts."[46]

This policy explicitly subjects religious speech to unique restrictions. Only if a group is seeking to hold a religious service must it "formally petition the Associate Vice President of Student Services and Dean of Students."[47] A clearer example of discrimination based on the religious content and viewpoint of student speech is hard to imagine.

In addition, this policy blatantly sets forth an unconstitutional denominational preference. Indeed, the "legitimacy" of a request to hold services on campus depends on whether the requesting group is registered with the Commonwealth of Massachusetts. But under the First Amendment, a religious group possesses free exercise, free association, and free speech rights—all of which apply on campus[48]—regardless of whether it is "government-registered" or "government-approved."

CONCLUSION

As you know, "state colleges and universities are not enclaves immune from the sweep of the First Amendment."[49] Indeed, it is at our universities where "free speech is of critical importance because it is the lifeblood of academic freedom."[50] While we are gravely concerned at the threat BHCC's speech zone policies pose to the rights of your students, we are sending this letter in a spirit of cooperation. It is our hope that BHCC would promptly correct these policies by repealing or revising them to comply with the First Amendment. In fact, we would happily work with you in this process. If you are serious about reforming these policies and avoiding litigation, please contact us within the next two weeks. Otherwise, we will seek other avenues for vindicating these freedoms.

Sincerely,

Travis Christopher Barham
Litigation Staff Counsel
ALLIANCE DEFENDING FREEDOM

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44 *Healy*, 408 U.S. at 184.
45 BUNKER HILL CMTY. COLL., 2013–2014 STUDENT HANDBOOK, *supra* note 30, at 50.
46 *Id.*.
47 *Id.*
48 *See, e.g.*, *Widmar*, 454 U.S. at 268–69 (noting that free speech and free association rights, which encompass "religious worship and discussion," extend to a student organization at a public university)
49 *Healy*, 408 U.S. at 180.
50 *DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008).