



MEMORANDUM

1-800-835-5233

DATE: October 2013

RE: University Students & the Pro-Life Day of Silent Solidarity

Alliance Defending Freedom is an alliance-building legal ministry that advocates for the right of people to live out their faith freely. We seek to resolve disputes by educating public officials about the constitutional rights of our clients. When necessary, we litigate to secure these rights. We have participated in many of the recent court decisions governing students' religious and free speech rights in public schools, including *Good News Club v. Milford Central School*, 533 U.S. 98 (2001) (recognizing that the First Amendment protects students' religious speech).

On Tuesday, October 15, 2013, thousands of students in public colleges and universities across America will take a stand for life by participating in the [Pro-Life Day of Silent Solidarity](#). They will do so by remaining silent throughout the day and wearing red duct tape, a red armband, or a pro-life t-shirt. When asked by their classmates why they refuse to speak, these students will hand them flyers explaining how over **4,000** innocent babies are permanently silenced in abortion mills every day.

This brief memo sets out public university students' First Amendment rights to participate in the Pro-Life Day of Silent Solidarity. It is our hope that this information will clarify this important area of the law and allow university officials to avoid needless litigation. But as each legal situation differs, this information should only be used as a general reference and should not be considered legal advice.¹ If you think that your rights have been violated, please contact us so that we may review your situation and possibly assist you.

Introduction

College and university students retain their First Amendment liberties while on campus. The Supreme Court has rightfully pointed out that "state colleges and universities are not enclaves immune from the sweep of the First Amendment."² Its decisions "leave no room for the view that . . . First Amendment protections should apply with less force on college campuses than in the community at large," in part because "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."³ As the Third Circuit Court of Appeals recently recognized, on campus "free speech is of critical importance because it is the lifeblood of academic freedom."⁴ As a result, while public school students have broad free speech rights, university students have even more because university "administrators are granted *less leeway* in

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² *Healy v. James*, 408 U.S. 169, 180 (1972).

³ *Id.* (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

⁴ *DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008).

regulating student speech than are public elementary or high school administrators.”⁵

Students have the right to wear armbands, remain silent, share their beliefs, pray, read Scripture, and invite fellow students to participate in such activities so long as they are voluntary, student-initiated activities that do not interfere with university operations.

Importantly, the Supreme Court recently held that not even public schools can restrict speech simply because it may be perceived by some as “offensive” or “controversial” because “much political and religious speech might be perceived as offensive to some.”⁶ Nor may universities.⁷ As the Third Circuit succinctly summarized: “The Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it.”⁸

Your Rights

1. *Can I wear a red armband on campus?*

Yes. Students have the right to express themselves on campus by wearing colored armbands so long as the expression does not interfere with classes or other university activities.

2. *Can I remain silent on campus?*

You have the right to remain silent as long as it does not interfere with classes. If your professor requires you to participate, you should obey so that there is no interference. If students at your university are allowed to participate in the “other” Day of Silence, you should be allowed to participate to the same extent in the “Pro-Life Day of Silent Solidarity.”

3. *Can I pass out flyers about the “Pro-Life Day of Silent Solidarity” at school?*

Yes. Indoors, you may distribute flyers to the same extent that other students are permitted to do so. If your activities substantially interfere with the operation of the university, then the university may impose some restrictions. But it may not completely ban the distribution of religious or pro-life materials because not even elementary schools can do this,⁹ and universities have far “less leeway in regulating student speech.”¹⁰

Outdoors, you have considerably more latitude in distributing literature as long as you are not blocking entrances to buildings or disrupting the flow of traffic, despite what your university may say. Many universities try to limit students to a “free speech zone” on campus, a “zone” that is often so small or so far removed from the heart of campus that it is an ineffective area for sharing your message. Other campuses dramatically limit free speech to certain times of the day or days of the week, and still others give administrators a right to review and approve materials before you can distribute them.

⁵ *Id.* at 316 (emphasis original).

⁶ *Morse v. Frederick*, 551 U.S. 393, 409 (2007).

⁷ *See, e.g., Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 670 (1973) (“[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of ‘conventions of decency.’”).

⁸ *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 215 (3d Cir. 2001).

⁹ *See, e.g., J.S. ex rel. Smith v. Holly Area Schs.*, 749 F. Supp. 2d 614, 623 (E.D. Mich. 2010) (issuing preliminary injunction against “school district’s outright prohibition upon [elementary school student’s] distribution of religious flyers to his classmates”); *M.B. ex rel. Martin v. Liverpool Cent. Sch. Dist.*, 487 F. Supp. 2d 117, 142 (N.D.N.Y. 2007) (striking down a school policy that banned all literature distribution that was not related to the school’s “pedagogical concerns”); *Westfield High Sch. L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98, 114 (D. Mass. 2003) (finding that “[i]t is now textbook law” that students carry rights of expression, including the right to distribute literature, to school).

¹⁰ *DeJobn*, 537 F.3d at 316 (emphasis original).

But the outdoor areas of a university campus qualify as public fora, areas where people—and especially students—may freely express themselves. The Supreme Court has described universities as “voluntary and spontaneous assemblages . . . for students to speak and to write and to learn,”¹¹ and it has noted that the “campus of a public university, at least for its students, possesses many of the characteristics of a public forum.”¹² Other federal courts across the nation have ruled likewise.¹³ For example, one court ruled that to the extent a university “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.”¹⁴ Because these areas were the “irreducible public forums on campus,” the university was free to designate more areas for student expression, but it could not designate less.¹⁵

Thus, if your university allows you to distribute literature only in a certain area, or if it limits you to just a narrow window of time, it is probably violating the First Amendment. Similarly, if it requires you to get authorization from a university official before passing out flyers, it is probably imposing a prior restraint, which is presumptively unconstitutional.¹⁶ If you face any of these problems, please contact us for assistance.

4. *Can I pray, carry my Bible, and wear religious or pro-life clothing or jewelry on campus?*

Yes. You may pray anytime you wish during non-instructional time. During class, you should always pay attention, but it is all right to pray silently so long as you are completing your class work and not obstructing university operations. You have the same right to carry your Bible on campus as you do to carry other personal items.¹⁷ And your university may not single out religious or pro-life clothing for unfavorable treatment.¹⁸ If it allows students to wear t-shirts with messages on them, it cannot prevent a student from wearing a t-shirt with a pro-life message.

5. *Can I pass out flyers on campus even if university officials fear those flyers will offend students?*

Yes. The First Amendment protects your right to express ideas no matter how unpopular,

¹¹ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 836 (1995).

¹² *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981).

¹³ See *OSU Student Alliance v. Ray*, 699 F.3d 1053, 1062–63 (9th Cir. 2012) (holding Oregon State University campus is at least a designated public forum for students); *Flint v. Dennison*, 488 F.3d 816, 831 (9th Cir. 2007) (noting campus is a public forum); *Bonman v. White*, 444 F.3d 967, 979 (8th Cir. 2006) (finding outdoor areas of University of Arkansas are designated public forums); *Justice for All v. Faulkner*, 410 F.3d 760, 768–69 (5th Cir. 2005) (finding University of Texas is a designated forum for students); *Univ. of Cincinnati Chapter of Young Ams. for Liberty v. Williams*, 2012 WL 3636932, *1 (S.D. Ohio Aug. 22, 2012) (finding outdoor areas of University of Cincinnati are designated public fora); *Roberts v. Haragan*, 346 F. Supp. 2d 853, 861 (N.D. Tex. 2004) (holding park areas, sidewalks, streets, and common areas of Texas Tech University are traditional public forums for students); *Pro-Life Cougars v. Univ. of Houston*, 259 F. Supp. 2d 575, 582 (S.D. Tex. 2003) (finding campus is a public forum for students); *Khademi v. S. Orange Cnty. Cmty. Coll. Dist.*, 194 F. Supp. 2d 1011, 1024 (C.D. Cal. 2002) (finding the generally available areas of a community college campus are public fora because they are open to the public); *Burbridge v. Sampson*, 74 F. Supp. 2d 940, 947–48 (C.D. Cal. 1999) (finding a community college campus to be a public forum because it is open to the public); *Hays Cnty. Guardian v. Supple*, 969 F.2d 111, 117 (5th Cir. 1992) (“The [Southwest Texas State University] campus’s function as the site of a community of full-time residents . . . suggests an intended role more akin to a public street or park than a non-public forum.”); *Putnam v. Keller*, 332 F.3d 541, 549 (8th Cir. 2003) (finding that a Nebraska community college campus is a designated public forum).

¹⁴ *Roberts*, 346 F. Supp. 2d at 861.

¹⁵ *Id.* at 862.

¹⁶ See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *Grossman v. City of Portland*, 33 F.3d 1200, 1204 (9th Cir. 1994) (quoting *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1975)).

¹⁷ Excluding otherwise acceptable materials or activities based solely on the religious viewpoint is unconstitutional. *Good News Club*, 533 U.S. at 109–12; *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393–94 (1993).

¹⁸ See *Good News Club*, 533 U.S. at 109–12; *Lamb’s Chapel*, 508 U.S. at 393–94.

controversial, or disagreeable they may be to others.¹⁹ Indeed, the “point of all speech protection . . . is to shield just those choices of content that in someone’s eyes are misguided, or even hurtful.”²⁰ This is particularly true at a public university—the “marketplace of ideas”—where students are not insulated from certain viewpoints but instead are “trained through wide exposure to [a] robust exchange of ideas.”²¹ Thus, university officials may not prohibit speech (including flyers) simply because they (or other students) consider the opinions expressed to be hateful, harassing, offensive, intimidating, or provocative or because they fear those opinions might provoke an outraged (or even violent) response from listeners.²²

Unfortunately, most universities have ignored these basic constitutional principles and imposed policies that prohibit speech that the Constitution protects. These “speech codes”—which are present at universities from coast to coast—try to prohibit speech that some people find “offensive” or “harassing.” Not only do they deter students from speaking freely on critical issues of race, gender, sexuality, and religion, but they are also arbitrarily enforced against individuals who express disfavored viewpoints. But ever since the speech code movement began in the 1980s, federal courts have uniformly rejected them because they violate a variety of constitutional principles.²³

While universities may legitimately punish true harassment—harassment that is “severe, pervasive, and objectively offensive”²⁴—they may not prevent you from advocating pro-life viewpoints simply because administrators or students would prefer not to hear them.

6. Can I talk to people at school about abortion or share my faith?

Yes. Though the “Pro-Life Day of Silent Solidarity” is about remaining silent, if you have the opportunity to talk to someone, you certainly have the right to, provided it is not during instructional time and does not impede university activities.

7. Can I reserve rooms on campus so my student organization can plan for the Pro-Life Day of Silent Solidarity?

Yes. Public universities must give all recognized student organizations the same access to campus facilities. So if other student groups reserve rooms for their meetings, your group must be allowed to do the same. The university cannot refuse your reservation requests because you advocate a pro-life or religious perspective.²⁵

¹⁹ See, e.g., *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”); *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011) (“Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and . . . inflict great pain. . . . [W]e cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.”).

²⁰ *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 574 (1995).

²¹ *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 603 (1967).

²² See, e.g., *Papish*, 410 U.S. at 670 (“[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of ‘conventions of decency.’”); *DeJohn*, 537 F.3d at 314 (“‘Harassing’ or discriminatory speech, although evil and offensive, may be used to communicate ideas or emotions that nevertheless implicate First Amendment protections.” (quoting *Saxe*, 240 F.3d at 209)).

²³ See, e.g., *McCanley v. Univ. of the V.I.*, 618 F.3d 232 (3d Cir. 2010); *DeJohn*, 537 F.3d 301; *Saxe*, 240 F.3d at 217 (Alito, J.); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1185 (6th Cir. 1995); *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1021 (N.D. Cal. 2007); *Roberts*, 346 F. Supp. 2d at 872; *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003); *Pro-Life Cougars*, 259 F. Supp. 2d at 584; *Boober v. Bd. of Regents, N. Ky. Univ.*, No. 96-135, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 22, 1998); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989).

²⁴ *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999).

²⁵ See, e.g., *Widmar*, 454 U.S. at 269–70 (holding that a university may not exclude religious groups from meeting in

8. *Can I get student activity fee funding to help my student organization participate in Pro-Life Day of Silent Solidarity?*

Yes. If your university collects a mandatory student activity fee and then allocates a portion of the collected fees to fund student organization activities, then it must distribute the fees in a viewpoint neutral manner.²⁶ That is, it must give all student organizations an equal opportunity to receive those funds, and it cannot deny funding to a group because of the viewpoints it advocates. So, for example, it cannot deny funding to student groups that may use the funding for religious activities or to advocate religious ideas.²⁷

9. *What should I do if I get in trouble, or university officials tell me to stop distributing literature or to take the armband/tape off?*

If a professor, administrator, or someone else in authority asks you to stop, stop immediately but politely request that they immediately check with a supervisor to see if you can continue your activity. If they continue to insist that you stop, or if the supervisor affirms their decision, stop immediately. But ask them why you must stop. Then write down what happened, who told you to stop, and the reasons they gave so that you can give us these important details. Afterwards, please call 1–800–835–5233, so that we can help resolve the situation quickly. Please be prepared to give your name, the name of your university, and the names of the officials who required you to stop.

Conclusion

We hope this information is helpful to you in understanding the rights of university students to participate in the Pro-Life Day of Silent Solidarity. If you think that your rights have been violated as a result of participating in the Pro-Life Day of Silent Solidarity, please contact our Legal Intake Department so that we may review your situation and possibly assist you. You can reach us at 1–800–835–5233, or visit our website at www.AllianceDefendingFreedom.org and select the “Get Legal Help” button to submit a request for legal assistance.

university owned buildings made available to other student groups).

²⁶ *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 233 (2000).

²⁷ *See, e.g., Rosenberger*, 515 U.S. at 834–37; *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 780–81 (7th Cir. 2010).