

July 16, 2018

Chancellor Douglas A. Girod
Office of the Chancellor
University of Kansas
Strong Hall
1450 Jayhawk Boulevard, Room 230
Lawrence, Kansas 66045

Sent via U.S. Mail and Electronic Mail (chancellor@ku.edu)

Dear Chancellor Girod:

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses. The American Civil Liberties Union of Kansas is a nonprofit organization dedicated to protecting the civil rights and liberties of all people living in Kansas. The National Coalition Against Censorship (NCAC) promotes freedom of thought, inquiry and expression on behalf of 56 national nonprofit organizations, including literary, artistic, religious, educational, professional, labor, and civil liberties groups.

We write today with grave concern for expressive rights at the University of Kansas (KU) following your decision last week to remove and relocate an art installation after demands for its censorship.

I. FACTS

The following is our understanding of the facts; please inform us if you believe we are in error.

Since June 14, 2017—Flag Day—the nonprofit arts organization Creative Time has coordinated a national public art series titled “Pledges of Allegiance.”¹ The series involves the flying of a rotating collection of flags created by artists at sites across the country. The University of Kansas has participated since November 2017, first flying “IMAGINE PEACE,” a flag designed by artist Yoko Ono, outside The Commons at Spooner Hall and in cooperation

¹ *Pledges of Allegiance*, CREATIVE TIME, <http://creativetime.org/projects/pledgesofallegiance> (last visited July 15, 2018).

with the Spencer Museum of Art.² In a press release announcing the series, Joey Orr, the Spencer Museum’s Andrew W. Mellon Curator for Research, said that The Commons and the museum “saw bringing these flags to Lawrence as a unique opportunity to model support for democratic exchange, allowing the community to come together over a range of topics.”³

Since July 3, 2018, artist Josephine Meckseper’s “Untitled (Flag 2)” has flown as the current flag in the Pledges of Allegiance series. Meckseper describes the work as “a collage of an American flag and one of my dripped paintings which resembles the contours of the United States.”⁴ The flag is being flown at more than a dozen participating sites—including locations at Cornell University, Rutgers University, the University of South Florida, and the Rhode Island School of Design—until July 31.

Meckseper’s flag drew criticism from conservative commentator Todd Starnes. In a July 11 article published by Fox News on the network’s website, Starnes said the “defaced and desecrated flag” was “a cheap shot at President Trump,” and argued that “[i]t is unfortunate the University of Kansas has chosen to associate itself with an artist who despises the very nature of what it means to be an American.”⁵

State government leaders echoed Starnes’ criticism. In a statement posted on Twitter on July 11, Kansas Governor Jeff Colyer demanded the immediate removal of Meckseper’s flag:

The disrespectful display of a desecrated American flag on the KU campus is absolutely unacceptable. Men and women have fought and died for that flag and to use it in this manner is beyond disrespectful. I spoke to leadership to demand that it be taken down immediately.⁶

Kansas Secretary of State Kris Kobach, who is running against Governor Colyer in the August 7 Republican gubernatorial primary election, demanded the same:

It’s outrageous that you would see a public university displaying a desecrated flag. The fact that they call it art does not make it any less of a desecration of our flag. I call upon the university to take down that flag right away.⁷

² Rebekah Lodos, *Yoko Ono’s ‘Imagine Peace’ flag kicks off new art installation at KU*, UNIV. DAILY KANSAN, Nov. 13, 2017, http://www.kansan.com/arts_and_culture/yoko-ono-s-imagine-peace-flag-kicks-off-new-art/article_1e741242-c669-11e7-b8cc-7b4ecb81cd6f.html.

³ Spencer Museum, *The Commons raise flags for ‘Pledges of Allegiance’ project*, UNIV. OF KAN., Nov. 8, 2017, <https://news.ku.edu/2017/11/08/spencer-museum-commons-raise-flags-pledges-allegiance-project>.

⁴ *Untitled (Flag 2), 2017 by Josephine Meckseper*, CREATIVE TIME, <http://creativetime.org/projects/pledgesofallegiance/josephine-meckseper> (last visited July 15, 2018).

⁵ Todd Starnes, *University of Kansas flies defaced American flag on campus (on purpose!)*, FOX NEWS, July 11, 2017, <http://www.foxnews.com/opinion/2018/07/11/todd-starnes-university-kansas-flies-defaced-american-flag-on-campus-on-purpose.html>.

⁶ Governor Jeff Colyer (@GovJeffColyer), TWITTER (July 11, 2018, 3:40 PM), <https://twitter.com/GovJeffColyer/status/1017131630744530944>.

⁷ Kris W. Kobach (@KrisKobach1787), TWITTER (July 11, 2018, 2:29 PM), <https://twitter.com/KrisKobach1787/status/1017113549129310208>.

That evening, you announced in a statement that the flag was being relocated to Spencer Museum because “the conversation around this display has generated public safety concerns for [the] campus community.”⁸ Campus police records indicate that a campus community member reported a threatening phone call that afternoon.⁹ However, KU police Deputy Chief James Anguiano told the *Lawrence Journal-World* that the single phone call was “more harassing than threatening.”¹⁰

The flag’s relocation did not mollify Governor Colyer. In a July 12 interview on Starnes’ radio show, Colyer suggested that the flag should be destroyed by the American Legion or the Boy Scouts.¹¹ As of this writing, the flag remains in Spencer Museum.

II. ANALYSIS

As an initial matter, we remind you of two primary points of well-established constitutional law.

First, the University of Kansas is a government actor, fully bound by the First Amendment. *See, e.g., Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) (“With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities.”). As a public institution of higher education, KU must honor and protect the First Amendment rights of its students, faculty, and campus community members to properly fulfill its crucial societal role as “the ‘marketplace of ideas.’” *Keyishian v. Bd. of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 603 (1967). Indeed, the Supreme Court of the United States has made clear in rulings dating back decades that the “vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.” *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *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.”) As Chancellor, it is ultimately your obligation to ensure that the expressive rights of those on your campus are not abridged, compromised, or violated, even and especially when political pressure demands otherwise.

Second, the First Amendment protects the expressive “desecration” of the American flag. *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First

⁸ Douglas A. Girod, *Message: Conversation Surrounding Public Art on Our Campus*, UNIV. OF KAN., July 11, 2018, <https://chancellor.ku.edu/news/2018/jul11>.

⁹ Joanna Hlavacek, *Regents president ‘thankful’ to see flag artwork removed at KU; project creators stand by artist*, LAWRENCE JOURNAL-WORLD, July 12, 2018, <http://www2.ljworld.com/news/2018/jul/12/board-of-regents-president-thankful-to-see-controversial-flag-artwork-removed-from-ku-campus-project-creators-stand-by-artist>.

¹⁰ Sara Shepherd, *KU police investigating phone threat to museum amid flag art controversy*, LAWRENCE JOURNAL-WORLD, July 13, 2018, <http://www2.ljworld.com/news/2018/jul/13/ku-police-investigating-phone-threat-to-museum-amid-flag-art-controversy>.

¹¹ Joanna Hlavacek, *Governor suggests calling on Boy Scouts, American Legion to ‘dispose’ of KU’s flag art*, LAWRENCE JOURNAL-WORLD, July 13, 2018, <http://www2.ljworld.com/news/2018/jul/13/governor-suggests-calling-on-boy-scouts-american-legion-to-dispose-of-kus-flag-art>; *see also Unserviceable Flags Ceremony*, AM. LEGION, <https://www.legion.org/flag/ceremony> (last visited July 15, 2018); Bryan Wendell, *Four options for retiring worn-out American flags*, BRYAN ON SCOUTING, Sept. 8, 2014, <https://blog.scoutingmagazine.org/2014/09/08/retiring-worn-out-american-flags>.

Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. We have not recognized an exception to this principle even where our flag has been involved.”) Precisely because the flag is such a potent symbol of our nation, the First Amendment protects the right to criticize, alter, burn, or otherwise “deface” it. “We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.” *Id.* at 397.

Because KU is a government actor and Meckseper’s “Untitled (Flag 2)” constitutes protected expression, KU’s decision to remove the flag from its location outside The Commons raises serious First Amendment concerns.

“[T]he campus of a public university, at least for its students, possesses many of the characteristics of a public forum.” *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981); *see also McGlone v. Bell*, 681 F.3d 718, 732 (6th Cir. 2012) (finding that “perimeter sidewalks along [a public university] campus are traditional public fora and all other open areas are designated public fora”). In the open areas of a public campus, there is a “significant interest in the widest latitude for free expression and debate consonant with the maintenance of order.” *Healy*, 408 U.S. at 171; *see also DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008) (on public university campuses, “free speech is of critical importance because it is the lifeblood of academic freedom”).

As one federal court observed, “to the extent [the public university] 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.” *Roberts v. Haragan*, 346 F. Supp. 2d 853, 861 (N.D. Tex. 2004); *see also Justice For All v. Faulkner*, 410 F.3d 760, 769 (5th Cir. 2005) (“[O]utdoor areas of [a public university’s] campus generally accessible to students such as plazas and sidewalks” are “public forums for student speech.”); *Shaw v. Burke*, No. 17-cv-2386, 2018 U.S. Dist. LEXIS 7584, at *22 (C.D. Cal. Jan. 17, 2018) (“open, outdoor areas of universities . . . are public fora[.]” regardless of a college’s regulations to the contrary); *Univ. of Cincinnati Chapter of Young Ams. for Liberty v. Williams*, No. 12-cv-155, 2012 U.S. Dist. LEXIS 80967, at *18 (S.D. Ohio June 12, 2012) (“[O]therwise undesignated University streets, sidewalks, and open areas are also designated public fora as to students.”). Public fora on campus may include the area around flagpoles. *See Mason v. Wolf*, 356 F. Supp. 2d 1147, 1159 (D. Colo. 2005) (finding “flagpole area” on public university campus to be designated public forum).

Given its central location on campus, the area outside The Commons by Spooner Hall, KU’s oldest continuously-used academic building, is unquestionably a public forum with regard to students and campus community members—precisely the intended audience for the “Pledges of Allegiance” art installation.

When seeking to regulate speech in a traditional or designated public forum, it is long-settled law that the government may not impose content- or viewpoint-based restrictions. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (holding that “government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech . . .”). “The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in

particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.” *Id.*

Here, there can be no doubt that the restriction on the outdoor display of Meckseper’s artwork was due to government disagreement with its perceived message. Governor Colyer and Secretary Kobach demanded that you enforce precisely the type of viewpoint-based restriction on “Untitled (Flag 2)” that the First Amendment prohibits because they deemed the work “disrespectful” and “outrageous.” In contravention of your obligation to honor the First Amendment, and to KU’s shame, you acquiesced to their brazen demands for censorship. By so doing, you have sent a clear message to the KU community and would-be censors that the institution will capitulate to complaints regarding the content and viewpoint of expression on campus. Successful tactics will be repeated. This is an unacceptable result at a public university legally bound to uphold the First Amendment.

We are also concerned that the “public safety concerns” referenced in your July 11 statement may be a pretext for censorship, permitting you to accede to the demands of outraged members of the government and of the general public while still ostensibly maintaining the university’s commitment to freedom of expression. But if expressive freedoms are to have meaning, attempts to interfere with them must be strongly resisted, especially when such attempts come from high-ranking government officials.

Your statement asserted the existence of “public safety concerns.” It did not address the severity of such concerns, the existence of any actual threats, nor the credibility of any such threats. These omissions, together with the proximity of your announcement following demands made by government officials, raise suspicion that KU’s course of action was aimed to quell outrage over the exhibit rather than address credible threats in an effective and speech-protective manner. If KU possesses information that would rebut this suspicion, we request that you provide it to the maximum extent allowed by law. In the event that we do not receive such information in response to this letter, FIRE has submitted four requests under the Kansas Open Records Act to various agencies, seeking information relevant to assessing your claims of public safety concerns.

We recognize the artwork was not to everyone’s liking. No artwork is. As the Supreme Court has sagely observed, “one man’s vulgarity is another’s lyric.” *Cohen v. California*, 403 U.S. 15, 25 (1971). This may be particularly true of art intended to spark discussion, as this installation explicitly sought to do. But “[t]here is no federal constitutional issue more grave than the effort by government officials to censor works of expression and to threaten the vitality of a major cultural institution, as punishment for failing to abide by governmental demands for orthodoxy.” *Brooklyn Inst. of Arts & Scis. v. City of N.Y. & Rudolph W. Giuliani*, 64 F. Supp. 2d 184, 193 (E.D.N.Y. 1999). We further remind you that “the 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.’” *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 670 (1973).

The successful demands for censorship at issue here are all the more noxious and corrosive because they strike at the heart of the First Amendment’s vital protection of pluralism, tolerance, and individual autonomy. “If there is any fixed star in our constitutional

constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” *Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Exercising executive power to determine what art may be viewed on a public university campus is an ugly and arrogant betrayal of First Amendment freedoms. “Indeed, the notion that government officials can stifle expression in order to protect the public good reverses our most basic principles.” *Brooklyn Inst. of Arts & Scis.*, 64 F. Supp. 2d at 201.

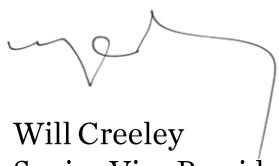
III. CONCLUSION

In reversing, on First Amendment grounds, the conviction of a college student arrested for hanging an American flag with a “large peace symbol fashioned of removable tape” from his window, the Supreme Court observed that “[i]t might be said that we all draw something from our national symbol, for it is capable of conveying simultaneously a spectrum of meanings.” *Spence v. Washington*, 418 U.S. 405, 413 (1974). This remains as true in 2018 as it was in 1974. Government actors cannot restrict expressive activity involving the flag simply because they disagree with the speaker’s message.

In recognition of the necessity of freedom of expression at public institutions like the University of Kansas, we ask that you immediately restore “Untitled (Flag 2)” to its initial location and clarify to the campus community that defending the expressive rights guaranteed by the First Amendment is of paramount importance to your administration.

We request a response to this letter by July 30, 2018.

Sincerely,



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Foundation for Individual Rights in Education



Lauren Bonds
Legal Director
American Civil Liberties Union of Kansas



Chris Finan
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