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Re: Revising the University of Michigan's Trespass Policy

Dear President Coleman and Ms. Scarnecchia:

We write to you to applaud your agreement to review the University of Michigan's trespass policy and to encourage you to adopt a new policy that will comport with the law and protect individual rights. The current trespass policy is unconstitutionally broad both because it gives officers of the Department of Public Safety (DPS) unbridled discretion to perpetually ban individuals from any land owned or leased by the University and because there is no neutral process through which an individual can appeal a ban.

In addition to significant due process concerns, we are especially alarmed by the manner in which the broad policy can be used to infringe an individual's free speech rights. There is "no doubt that the First Amendment rights of speech and association extend to the campuses of state universities."¹ As the Supreme Court has held, "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."² This directive is particularly important with respect to the numerous public forums on the University of Michigan's campus where the constitutional protection for political speech and expression is at its zenith. In order to ban participation in these areas, any regulation must be narrowly tailored to advance a compelling government interest.³ The current policy does not meet this demanding standard.

To assist your decision making process, and to address these due process and free speech concerns, we suggest three improvements to the current trespass policy: (1) narrow DPS officer discretion, (2) require greater specificity with respect to the duration and geographic scope of trespass warnings and (3) establish a neutral, objective and robust appeals process. These amendments will preserve DPS' ability to maintain campus safety while protecting the free speech and due process rights of individuals issued trespass warnings.

¹ *Kincade v. Gibson*, 236 F.3d 342, 347 (6th Cir. 2001) (en banc) quoting *Widmar v. Vincent*, 454 U.S. 263, 268-69 n.5 (1981).

² *Healy v. James*, 408 U.S. 169, 180 (1972) (internal quotation marks omitted).

³ *Perry Educators Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45 (1983).

DPS Officer Discretion Should Be Narrowed

Currently, Section III(B)(1) of the Trespass Policy gives DPS officers the discretion to issue a trespass warning (TW) to anyone on campus who they believe has:

- (a) Committed a crime while on campus or is suspected of committing crimes against persons or property;
- (b) Refuses or fails to comply with established University rules;
- (c) Disrupts the operations and lawful functions of the University; or
- (d) Demonstrates a risk of physical harm or injury to others or property.⁴

We are concerned that this expansive authorization creates a risk of abuse and overbroad or discriminatory application. Moreover, this sweeping, amorphous language provides very little notice regarding prohibited behavior, thereby making it very difficult for an individual to know whether his or her behavior will violate the trespass policy. This lack of guidance and overly broad power is neither necessary nor effective for maintaining safety on campus.

A more clearly defined and narrower construction of DPS officers' discretion would allow the University to maintain campus safety while guarding against the risk of indiscriminate application or biased enforcement. To achieve this goal, the University should both limit the bases for issuance of a TW and establish a standard of suspicion that must be met before a TW is issued. We encourage the University to consider the following recommendations.

First, the University should remove the section of the policy that authorizes officers to issue TWs to anyone who "refuses or fails to comply with established University rules." Given the breadth of the University's rules, this provision of the current policy is much too broad. The University's Policies for Students regulates an extremely broad range of issues, including student parking,⁵ smoking on campus,⁶ and curfews for dance parties.⁷ Maintaining campus safety does not require issuing TWs for violations of many of these rules, for instance, parking in a University parking lot without a valid permit or smoking within close proximity to a building entrance. At the same time, violations of those rules that *do* touch upon campus safety can be adequately addressed under *other* provisions of the policy (e.g., "demonstrates a risk of physical harm or injury to others or property"). This section of the policy is therefore overbroad and/or redundant and it should be removed.

Second, we are concerned that the section of the policy that authorizes officers to issue a TW to anyone who "disrupts the operations and lawful functions of the University" will be applied in an unconstitutional manner that would prevent protected speech. For example, an officer might believe that an individual who is holding a counter-protest sign in the midst of a rally that is occurring on the Diag is "disrupting" the rally simply because she is expressing her displeasure with the message of the speaker. Although the organizers of the rally or the officer may disagree with, or even be offended by, the message conveyed by the sign, the Supreme Court reaffirmed on Wednesday that

⁴ The University of Michigan Department of Public Safety Policy and Procedural Order, 5.55 Trespass § III(B)(1)(a)-(d) (2009).

⁵ See <http://studentpolicies.umich.edu/parkpolicy.html>.

⁶ See <http://studentpolicies.umich.edu/smokepolicy.html>.

⁷ See <http://studentpolicies.umich.edu/dance.html>.

such speech may not be prevented for that reason.⁸ To the contrary, “[a]s 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.”⁹ Given the danger that this section would be unconstitutionally applied, we urge the University to add a provision specifically banning an officer from issuing a TW based solely on an individual’s expression of ideas, even if the ideas are considered controversial or offensive to the officer or others.¹⁰

Third, while the University has a compelling interest to prevent *actual* crimes or *real* risks of physical harm or injury to persons or property, the current policy does not provide an appropriate standard of suspicion to ensure that officers only issue TWs where there is a sufficient likelihood that such a danger exists. Instead, it is left to the individual officer’s discretion to determine whether he or she has enough evidence that an individual has either “committed a crime while on campus or is suspected of committing crimes against persons or property” or “demonstrates a risk of physical harm or injury to others or property.” This blanket authorization violates constitutional protections because it is “so standardless that it authorizes or encourages seriously discriminatory enforcement.”¹¹ In light of the substantial degree to which a TW infringes upon an individual’s liberty and privacy interests, it is most appropriate to impose the probable cause standard of suspicion here. As the Supreme Court has explained,

The central importance of the probable-cause requirement to the protection of a citizen’s privacy afforded by the Fourth Amendment’s guarantees cannot be compromised. . . .The requirement of probable cause has roots that are deep in our history. Hostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment, and decisions immediately after it’s adoption affirmed that common rumor or report, suspicion or even strong reason to suspect was not adequate to support a warrant for arrest. The familiar threshold standard of probable cause for Fourth Amendment seizures reflects the benefit of extensive experience accommodating the factors relevant to the reasonableness requirement of the Fourth Amendment, and provides the relative simplicity and clarity necessary to the implementation of a workable rule.¹²

We therefore encourage the University to incorporate a probable cause standard of suspicion into its trespass policy. Under this standard, a DPS officer would only be able to issue a TW if he or she had knowledge of articulable facts that would lead a reasonable person to believe, under the totality of circumstances, that the trespass policy is being violated.¹³

⁸ See *Snyder v. Phelps*, ___ S.Ct. ___, 2011 WL 709517, Slip Op. No. 09-751 (March 2, 2011).

⁹ *Id.* at *15.

¹⁰ It is important to note that the Supreme Court has imposed a high bar with respect to what actually constitutes disruptive speech that may be regulated by the government. See, e.g., *Snyder*, at *15 (stating that Westboro Baptist Church’s peaceful picketing, which included signs that stated “Thank G-d for Dead Soldiers” and “You’re Going to Hell,” did not disrupt the funeral of a soldier who was killed in Iraq and was protected by the First Amendment).

¹¹ *U.S. v. Williams*, 553 U.S. 285, 304 (2008).

¹² *Dunaway v. New York*, 442 U.S. 200, 213 (1979) (internal citations and quotation marks omitted).

¹³ See *People v. Davis*, 660 N.W.2d 67, 69 (Mich. 2003) (“Thus, . . . the standard to be employed by Michigan appellate court . . . [is] whether facts available to the officer at the moment of arrest would justify a fair-minded person of average intelligence in believing that the suspected person had committed a felony. Each case must be analyzed in light of the particular facts confronting the arresting officer.” (citing *People v. Oliver*, 338 N.W.2d 167 (Mich. 1983) (citations and quotations marks omitted))). See also *People v. Champion*, 549 N.W.2d 849 at 860 (Mich. 1996) (“Probable cause to arrest exists where the facts and circumstances within an officer’s knowledge and of which he has reasonably trustworthy

Trespass Warnings Should Be of Limited Duration and Scope

Under the current policy, TWs are generally issued for an indefinite duration and often ban an individual from all property that is owned or leased by the University. We appreciate that emergency situations may arise in which dangerous individuals must be immediately prohibited from all University-controlled property. Such sweeping bans should be the exception rather than the rule, however, as they are unnecessarily broad under most circumstances.

We are particularly concerned that the current policy interferes with individuals' ability to exercise their right to engage in constitutionally protected speech and expression in traditional public forums like the Diag, the thoroughfares through campus or the sidewalks shared by the University and the City of Ann Arbor. Given the large amount of land that is owned by the University, a ban from all University property is particularly onerous. Indeed, perpetually banned individuals cannot visit loved ones who are being treated at the University hospital or who live or work on campus, even if the event triggering the trespass warning was geographically remote from, and completely unrelated to, the area where their loved one is located.

Taking a case-by-case approach to TW issuance will better protect individual rights while maintaining DPS' ability to keep the campus safe. Under this method, the duration and geographic scope of each TW should be tailored to the activity triggering the particular issuance. We encourage the University to adopt the following duration and geographical guidelines for TWs.

With respect to duration, TWs should expire automatically after a specific, short time limit. This time period should be just long enough to neutralize the situation or prevent harm or further harm but not so long as to needlessly prevent the individual from visiting their loved ones or from participating in events on campus, particularly those held in traditional or designated public forums.¹⁴ The University may extend TWs beyond this initial time period where an extension is necessary to protect people and property on campus, but only through obtaining the approval of the DPS Oversight Committee (as explained below). Durational extensions must be for a limited time period. The University must gain the approval of the Oversight Committee for any subsequent extension, each of which must be for a limited time period.

With respect to geographical scope, TWs generally should be limited to the geographic area or buildings relevant to the activity triggering issuance. Moreover, TWs should explicitly exclude the hospital, the Diag, and the streets and sidewalks shared by the University and the City of Ann Arbor. Such streets and parks "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between

information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." (citations omitted)). *See also* MCL 764.15(1)(c) and (d) ("A peace officer, without a warrant, may arrest a person in any of the following situations: . . . (c) A felony in fact has been committed and the peace officer has reasonable cause to believe the person committed it. (d) The peace officer has reasonable cause to believe a misdemeanor punishable by imprisonment for more than 92 days or a felony has been committed and reasonable cause to believe the person committed it").

¹⁴ Of course, an officer cannot pretextually issue a TW to prevent an individual from participating in a specific event on campus. An individual who suspects this has occurred and who wants to participate in an event that will take place during the time limit must have access to an expedited appeals process.

citizens, and discussing public questions.”¹⁵ An exception to these limits on geographical scope should only exist for extreme emergency situations where there is an immediate and serious risk to persons or property and a ban across all University property is the only reasonable solution.

The Appeals Process Should be Robust and Before a Neutral Arbiter

An effective appeals process is an important mechanism to balance the need for effective policing with respect for individuals rights. Unfortunately, the current policy’s appeals process does not sufficiently protect individuals’ procedural rights. We are particularly concerned by the lack of standards governing such appeals, the lack of necessary procedural protections for individuals involved in the appeals, and the lack of a neutral arbiter to act as the ultimate decision-maker in the appeals process.

Under the current policy, a TW can be amended or rescinded only through an appeal to the Director of DPS, who is the University’s chief law enforcement officer.¹⁶ It is not appropriate to have law enforcement be the accuser, judge and jury, especially when banning individuals from public forums. Indeed, a neutral arbiter “is one of the most basic due process protections.”¹⁷ A new policy should include a robust appeals process before a neutral appeals board consisting of students, faculty and staff. We encourage the University to engage its existing infrastructure and resources to provide a neutral appeals process through the DPS Oversight Committee. We understand that the Committee already hears appeals of TWs and issues advisory opinions to DPS. In order to provide a constitutionally meaningful appeal, however, the Committee’s decisions must become binding and enforceable on DPS. Individuals should have the ability to appeal the initial issuance of a TW to this Committee. This same body should also oversee every University request for, and individual appeal from, an extension.

Additionally, the appeals process should incorporate constitutionally required due process protections. The current bare-bones policy does not protect an individual’s constitutionally-protected liberty interests, in direct contravention of the Sixth Circuit’s recent reaffirmation that individuals “possess[] a constitutionally protected liberty interest to use municipal property open to the public and [] depriving [them] of [their] liberty interest, without procedural due process, constitutes a violation of a clearly established constitutional right.”¹⁸ Such protections should include adequate notice of the hearing and any allegations, as well as an opportunity to be heard, to call witnesses, to cross examine witnesses and to be represented by an attorney or other advocate.¹⁹

Finally, the appeals process should be governed by standards that are articulated in writing, something which we understand is now lacking under the current policy. These guidelines should include a clearly articulated burden of proof as well as standards for meeting that burden of proof, which should track the definitions described in the first section of this letter. Thus, extensions of TWs should be based on evidence of specific behavior by the individual that establishes a probable cause to believe there is a continued risk of physical harm or injury to people or property on campus.

¹⁵ *Hague v. Committee for Indus. Organization*, 307 U.S. 496, 515 (1939).

¹⁶ DPS Trespass Policy, § III(B)(5), (D).

¹⁷ *Galvan v. Holder*, No. 09-3686, 2010 WL 4721145, *7 (6th Cir, Nov 12, 2010) (internal quotation marks omitted).

¹⁸ *Kennedy v. Cincinnati*, 595 F.3d 327, 331 (2009).

¹⁹ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004).

The Committee members should receive training to ensure that these standards are appropriately applied.

Conclusion

We are encouraged by your commitment to review and reconsider the University of Michigan's current trespass policy. Free speech is the lifeblood of academic freedom, and therefore is of critical importance on our public university campuses. This is particularly relevant at the University of Michigan, which is one of the premiere academic institutions in this country. The legitimate desire to protect campus safety can and must be carried out in a way that also protects these First Amendment and Due Process rights.

As articulated in its mission statement, the University aims to be a resource for the community and to "develop leaders and citizens who will challenge the present and enrich the future."²⁰ Amending the current trespass policy to better protect individual rights along the lines outlined above will help the University achieve these goals. We look forward to talking with you further about this important issue.

Very truly yours,



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²⁰ See <http://www.umich.edu/pres/mission.php>.