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December 14, 2023

VIA E-MAIL

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Re: *First and Final Notice to Cure Constitutional Violation*

Dear Mr. Hutson,

We represent the Young Americans for Freedom (YAF) chapter at the University of Wisconsin – La Crosse (the University or UWL). As you are aware, the University is withholding recognition of YAF unless YAF adopts a so-called "inclusivity statement"—a value-laden recitation of political and social policy positions dictated by the University.

We write to offer you an opportunity to reverse course before further legal action is necessary. As your General Counsel will be able to confirm, compelling YAF to endorse the "inclusivity statement" violates YAF's and its members' clearly-established rights to freedom of speech and association under the First Amendment, and thus subjects you to individual liability under 42 U.S.C. § 1983.

Specifically, in order to be recognized as a student organization, YAF is being required to express the following message:

> [YAF] recognizes and values the diverse identities, backgrounds, and beliefs of our faculty and of the University of Wisconsin – La Crosse student body. Our definition of diversity includes, but is not limited to ability, age, class, documentation status, gender identity, language, military status, nationality, race, religion, and sexual orientation. We are committed to providing and promoting an environment free of prejudice by addressing issues of equity and justice in our community, and we support the success of marginalized identities.

The University of Wisconsin may not compel student groups to express these ideological beliefs—regardless of their underlying merit—because the Constitution forbids it.

Moreover, the statements themselves are dubious. For instance, the requirement that YAF state that it "recognizes and values . . . diverse . . . gender identit[ies]" asks student groups like YAF to deny biological reality. Since the term "gender identity" is generally used in contexts where it is contrasted with individuals' objectively ascertainable biological sex, to "recognize" a gender identity is tantamount to a statement of actual belief that a person asserting a cross-sex gender identity *is in fact the sex they assert themselves to be*. Needless to say, this is a controversial view and inconsistent with Supreme Court precedent. *See United States v. Virginia*, 518 U.S. 515, 533 (1996) ("Physical differences between men and women, however, are enduring").

Similarly, forcing YAF to mouth a commitment to advancing the interests of individuals who lack "documentation" to be legally present in the United States, requires them to state opposition to the enforcement of valid immigration laws. Again, this is a matter of significant public controversy, and facially inconsistent with the immigration laws themselves.

Third, to the extent the University is compelling YAF to state that it "recognizes and values the diverse . . . beliefs of [UWL] faculty," it is potentially forcing YAF to assert an untruth. Given the well-recognized "near-monolithic far-left skew,"[1] among the faculty in many university departments, to claim that UWL faculty have "diverse beliefs" in any meaningful sense is false.

Finally, forcing a student group to express that it is "committed to . . . addressing issues

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[1] Phillip w. Magness and Waugh, D., The Hyperpoliticization of Higher Ed: Trends in Faculty Political Ideology, 1969–Present, The Independent Review, v. 27, n. 3, Winter 2022/23, ISSN 1086–1653, pp. 359–369, at 365, available at https://www.independent.org/pdf/tir/tir_27_3_05_magness.pdf (last visited Dec. 11, 2023).

of equity and justice," is a naked attempt to force it to mouth support for race-conscious policymaking in the University setting and at a broader social level. Once again, such policies are contrary to Supreme Court caselaw. *See, e.g.*, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023) (reiterating the principle of colorblindness in public policymaking). These are only a few of the objectionable and potentially objectionable assertions that YAF is being compelled to affirm.

State actors such as the University of Wisconsin have no business whatsoever telling YAF that it must express a position one way or the other about such things as its "support" for persons with "marginalized" "documentation status[es]," its views on "gender identities," or its appreciation for the allegedly "diverse . . . beliefs" of the faculty. Nor could the University compel a group of extreme pacifist students to assert that they "value" individuals of "military status," which is one of the "identities" singled out for official admiration by the University.

Under clearly established precedent, UWL's conduct violates YAF's and its members' First Amendment rights. First and foremost, UWL is violating the cardinal rule that government may not "compel a person to speak [the government's] own preferred message[]." *303 Creative LLC v. Elenis*, 600 U.S. 570, 586 (2023); *see also W. Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624, 642 (1943) ("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."). And, while the Supreme Court has held that a public university "may have, among its requirements for recognition, a rule that prospective groups affirm that they intend to comply with reasonable campus regulations [governing conduct]," *Healy v. James*, 408 U.S. 169, 193 (1971), the inclusivity statement goes miles beyond a mere statement that YAF intends to comply with University rules.

Lest there be any doubt: YAF intends to comply with reasonable UWL rules governing conduct. Indeed, YAF has already included in its Bylaws a non-discrimination statement required by UWL that YAF will not "restrict[any person from membership] because of age, race, creed, color, gender, sexual orientation, disabilities, gender identity or expression, national origin, ancestry, marital status, arrest record, or conviction record." The "inclusivity clause" has nothing to do with reasonable rules of conduct, and everything to do with requiring YAF to *affirmatively express a set of beliefs and policy positions*, whether or not the organization agrees with the words being put in its mouth. As the Supreme Court put it in a recent compelled speech case, "the First Amendment tolerates none of that." *303 Creative*, 600 U.S. at 590.

This letter is an admonition to immediately remove the "inclusivity statement" condition on YAF's recognition. If you do not, YAF reserves its right to seek relief through a lawsuit filed in federal court. Please be aware that individual University actors may be personally liable for their involvement in these constitutional violations, and that you may be liable for attorney fees pursuant to 42 U.S.C. § 1988.

/s/ James L. Kerwin
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