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VIA EMAIL April 3, 2024

Santa J. Ono, University President
Timothy Lynch, Vice President and General Counsel
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Re: Our Concerns Regarding the University's Draft "Disruptive Activity Policy"

Dear President Ono and General Counsel Lynch,

The University of Michigan has sought community feedback on a proposed Disruptive Activity Policy. We write on behalf of the American Civil Liberties Union of Michigan to express our serious concern that the proposed policy, as drafted, will impair civil liberties on campus. We believe the proposed policy is vague and overbroad, and risks chilling a substantial amount of free speech and expression. We recognize that the University has an interest in carrying out its operations without major disruptions; however, in attempting to achieve that goal, the proposed policy sacrifices far too much. We therefore urge the University to abandon its efforts to adopt this policy or, at the very least, substantially re-write it to better protect First Amendment rights.

As discussed in our December 19, 2023, letter to University officials, universities are the cradle of our democracy. In fact, courts have recognized that First Amendment concerns are at their peak in the university setting, where "the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995). As a result, public universities like the University of Michigan should be especially sensitive to protecting and promoting the freedom of speech and expression of its students and faculty—especially when that speech is controversial or critical of the University. For the reasons set forth below, we believe that the proposed Disruptive Activity Policy does not live up to this standard.

The Proposed Disruptive Activity Policy Is Vague and Overbroad

Our principal constitutional concern with the proposed policy is its vagueness and overbreadth. We do not question the premise that all colleges and universities have a legitimate interest in minimizing major disruptions to their events and operations so that they may fulfill their academic mission, and doing so may incidentally regulate, to some extent, the time, place, and manner that speech and expressive activity on campus may occur. *Healy v. James*, 408 U.S. 169, 184, 192-93 (1972). However, when a policy that validly restricts some activity also sweeps within its ambit a substantial amount of protected speech that cannot constitutionally be restricted, the policy is overbroad in violation of the First Amendment. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002). And when the terms of a policy are ill-defined (or, as here, not defined at all),

leaving it unclear whether and what speech comes within its coverage and how it will be applied, the policy is unconstitutionally vague. *United States v. Williams*, 553 U.S. 285, 304 (2008).

Several aspects of the proposed policy stand out as vague, overbroad, or both. Policy paragraph #1 provides: "No Person without legal authority may prevent or impede the free flow of persons about campus, whether indoors or outdoors, including any pedestrian, bicycle, or vehicular traffic." Although it is not unconstitutional to prohibit individuals from intentionally blocking sidewalks, streets, and entrances and exits to buildings, classrooms, and similar venues, the proposed policy risks chilling a substantial amount of expressive activity that the University does not have a legitimate interest in preventing. In particular, the proposed policy does not define "impede." The online Cambridge Dictionary defines "impede" as "to slow something down or prevent an activity from making progress at its previous rate." It is very common for protests and rallies to peaceably assemble on sidewalks, in large public places like the Diag, or in front of University buildings. As a natural and accepted consequence of such gatherings some people will have to walk around the gathering or slow their pace to make it through. Similarly, when someone speaks or holds up a sign in a public place, onlookers may naturally slow down and pause to watch, listen, or engage—for which neither they nor the speaker should be subject to penalty. *See Stahl v. City of St. Louis*, 687 F.3d 1038, 1040-42 (8th Cir. 2012). The Constitution's broad free-expression protections accommodate these minor inconveniences and interactions, but the proposed Disruptive Activity Policy does not. Instead, the policy's imprecise language sweeps so broadly that it risks chilling constitutionally protected speech and expressive activity, inviting University officials to enforce the policy in a subjective or discriminatory manner, and leaving the public to guess at exactly what activity is and is not prohibited.

Policy paragraph #2 is likewise problematic. It provides:

> No Person may disrupt the University Operations of UM Facilities, including but not limited to the communications or activities of speakers or performers on University Facilities, or of any class, laboratory, seminar, examination, performance, formal proceeding, activity in a reserved space, field trip, or other educational, research, artistic, athletic, medical, operational, or service activity occurring on UM Facilities by obstructing lines of sight, making loud or amplified noises, projecting light or images, or otherwise creating substantive distractions.

Again, although the University has a legitimate interest in minimizing major disruptions to its events and operations and can take appropriately tailored measures to do so, the above-quoted language is vague and overbroad as it fails to properly delineate between activity that is constitutionally protected and activity that is not. Conduct that is substantially disruptive because it is specifically designed and intended to physically, audibly, or visually prevent a speech or performance from continuing or from reaching its intended audience is not constitutionally protected. But a distraction, communicating perhaps contrarian and unwelcome ideas yet not substantially disrupting the University's operations or educational mission, is part of the push-and-pull of campus activity and cannot be a legitimate target of University policies threatening discipline, police enforcement, prosecution, and similar penalties. *See Shamloo v. Mississippi State Bd. of Trs.*, 620 F.2d 516, 522 (5th Cir. 1980).

The proposed policy fails to recognize this key distinction in a number of respects. In failing to define the key terms "disrupt" and "substantive distractions," the proposed policy threatens to chill an unspecified but substantial amount of expressive activity that has long been accepted and even embraced in the campus environment but could be regarded by some as "disruptive" or "distracting." Additionally, in stating that no person may "disrupt" operations "by obstructing lines of sight, making loud or amplified noises, projecting light or images, or otherwise creating substantive distractions," the proposed policy is unclear as to whether these latter activities are definitionally what it means to disrupt, or instead that these activities are prohibited only if they are also disruptive. Either way, the prohibitions sweep or threaten to sweep far beyond what is necessary to protect the University's legitimate interests. Street performances, the hash bash, rallies and counter-rallies with picketing or protest marches, even vigils using cell phone flashlights—on the Diag or in other public venues within earshot or visibility of University operations—could all be subject to penalty, as well as ad hoc and discriminatory enforcement, due to the proposed policy's overbreadth and vagueness. *See, e.g.*, *McClellan v. City of Alexandria,* 363 F. Supp. 3d 665 (E.D. Va. 2019). Indeed, by leaving "disrupt" and "substantive distractions" undefined, the proposed policy leaves open the possibility that window signs, bumper stickers, painting the "Rock," the innocent use of flash photography, and even fraternity parties could all fall within its scope of prohibited activity.

Policy paragraph #3 is overbroad as well. It provides: "All Persons in violation of this policy, or those who knowingly aide or assist others in committing a violation of this policy, must comply with lawful requests to leave UM Facilities." Although the proposed policy imposes a knowledge requirement for aiding and abetting those who violate the policy, noticeably absent is any requirement of intentional or continuing wrongdoing for the violators themselves. Thus, it appears that an entire group of people engaged in some kind of concerted activity, however innocent, trivial, or innocuous, can be ejected from an event or facility if just one person does something disruptive, and even if the disruption was not intended and not ongoing. And when coupled with the proposed policy's failure to define key terms or set meaningful boundaries, the lack of an intentionality requirement risks producing even more absurd results. For example, if a student suffers a visible, yet involuntary health complication in the middle of class, they will arguably violate the Policy's prohibition on "creating substantive distractions" in a class setting, which would carry the specter of disciplinary proceedings. Classmates who rush to that student's aid—that is, knowingly aid and abet the distraction—may also be subject to discipline. Or, if a member of the audience at a UMS concert stands up to use the restroom and obstructs the line of sight of those in the next row, that individual could be ejected from campus and barred from returning. Here, too, the proposed policy sweeps far too broadly relative to its legitimate purpose, and threatens, through vagueness and overbreadth, to chill the exercise of First Amendment rights and penalize innocent quotidian conduct.

The proposed policy is imprecise in another way that may lead to First Amendment violations. Namely, the University consists of property and functions that are varied and extensive, covering many types of venues and activities. The governing standards for First Amendment-protected activity differ depending on the context, nature, and purpose of the location or event, but the policy fails to reflect that nuance. Courts typically deploy a "forum analysis" for determining what kinds of restrictions on speech on government or public property are permissible: Restrictions on speech in traditional or designated public forums, like the Diag and many University sidewalks, are subject to the highest scrutiny, whereas speech in other forums, like a classroom, can be subject

to more regulation. *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45-46 (1983). And within forums, the legal standards for determining whether restrictions are reasonable or appropriately tailored depend on the nature, purpose, and traditional uses of the particular forum involved. *See United States v. Doe*, 968 F.2d 86, 88-90 (D.C. Cir. 1992). Thus, the nature and strength of the University's interest in preventing "substantive distractions," as well as the level of constitutional protection for expressive activity that might distract, varies widely depending on whether the distraction occurs in an organic chemistry exam, a football game, open-heart surgery, a cafeteria, a dormitory, the Arb, or as a graduate walks across a stage. The University's proposed policy, however, appears to apply bluntly and uniformly throughout campus regardless of the location, event, or activity at issue.

Courts have long recognized that laws and policies that are vague or overbroad in the ways discussed above have harmful chilling effects on the exercise of the right to freedom of speech. *Reno v. ACLU*, 521 U.S. 844, 871-72 (1997). With an overbroad policy, individuals whose speech is constitutionally protected will stay silent rather than speak out of fear that their speech will be punished. *Virginia v. Hicks*, 539 U.S. 113, 119 (2003). So, too, with vagueness: A policy's ill-defined terms will lead speakers to steer far wider of what is prohibited than if the boundaries were clearly marked, inhibiting speech that the First Amendment protects. *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964).

Vague and overbroad restrictions on speech are also harmful in that they lead to discriminatory enforcement and uneven self-censorship. Such policies leave so much discretion in the hands of those who enforce the law that they create an impermissible risk that such enforcement will be ad hoc, subjective, discriminatory, and targeted at those whose speech is unpopular, controversial, or critical of public officials. *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 498 (1982). Similarly, the chilling effect created by such policies is likely to be uneven, as those individuals and groups most likely to be targeted for enforcement are more likely to self-censor. *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940). The result is a distortion of the marketplace of ideas in which the government has placed its thumb on the scale of public discourse, indirectly dictating which messages on matters of public importance are safe to be spoken and allowed to be heard. Needless to say, an intellectually and politically vibrant university campus is no place for such speech-suppressive policies.

In sum, the proposed Disruptive Activity Policy is vague and overbroad, it fails to make important distinctions that would prevent predictable First Amendment violations, and if adopted in its current form the policy risks chilling a substantial amount of constitutionally protected speech and expression on campus. We urge the University to cure these errors through a substantial rewriting of the policy. Or, as we explain below, we urge the University to reconsider whether adopting this policy is even necessary in light of relevant existing policies and procedures.

The Proposed Disruptive Activity Policy Is Unnecessary in Light of Existing University Policies That Address Substantial Disruptions to University Operations

The University made clear—both in its announcement of the policy and in a statement from President Ono—that the proposed Disruptive Activity Policy is coming in response to protests that disrupted the University's annual Honors Convocation. But an entirely new policy is not necessary to address that incident. Existing University policies—namely, Standard Practice Guide ("SPG")

601.01 and paragraph IV(N) of the Statement of Student Rights and Responsibilities—adequately address that scenario and others like it. Creating new disciplinary policies instead of utilizing existing ones here is unnecessarily punitive and reactionary.

SPG 601.01, the University's policy on "Freedom of Speech and Artistic Expression," covers "settings in which an audience has been assembled for a talk or performance, or in which a talk or performance takes place in a public setting at the University…."—i.e., settings in which the First Amendment rights of speakers, audience members, and protesters are of utmost importance. It, along with the Statement of Student Rights and Responsibilities, clearly covers the Honors Convocation and other graduation ceremonies that feature speakers or performances. Major disruptions at those events and others can be addressed through these longstanding policies.

Not only do SPG 601.01 and the Statement of Student Rights and Responsibilities already address disruptions to University programming, but they also do a far better job of it than the proposed Disruptive Activity Policy. Unlike the proposed policy, SPG 601.01 recognizes and fairly addresses the First Amendment concerns outlined above, while articulating comparatively clear and coherent guidance about what is prohibited and what is permitted at various campus events. For example, SPG 601.01(E) states that "protesters must not interfere unduly with communication between a speaker or artist and members of the audience," but recognizes that the "prohibition of undue interference does not include suppression of the usual range of human reactions commonly displayed by an audience during heated discussions of controversial topics" or "various expressions of protest, including heckling and the display of signs (without sticks or poles), so long as such activities are consistent with the continuation of a speech or performance and the communication of its content to the audience." Similarly, SPG 601.01(F) explicitly recognizes that "[p]rotesters have rights" at campus events, and warns that "[t]he standard of 'undue interference' must not be invoked lightly, merely to avoid brief interruptions, or to remove distractions or embarrassment." It also expressly states that protesters always have the right to demonstrate outside of the hall or facility where an event is being held, or elsewhere. And the Statement of Student Rights and Responsibilities, while prohibiting obstructions and disruptions, expressly carves out exceptions "for behavior that is protected by [SPG 601.01]."

Unfortunately, the proposed Disruptive Activity Policy does not appear to recognize—and certainly fails to explicitly embrace—any of these important nuances and distinctions which are critical to a healthy and free exchange of ideas in a university community. In addition, there is reason to be concerned that the Disruptive Activity Policy will not just overlap with SPG 601.01 but supersede it. The proposed policy references SPG 601.01 in passing, but goes on to state: "In the event of a conflict with another University policy, this Policy shall apply." That proviso stands in stark contrast to paragraph IV(N) of the existing Statement of Student Rights and Responsibilities, which prohibits conduct "*except* for behavior that is protected by SPG 601.01" (emphasis added). This ambiguity regarding the role the proposed policy plays in the University's existing policy framework is further reason to abandon this proposal.

Thus, if the University believes that a demonstration substantially disrupted University operations, we encourage the University turn to SPG 601.01 and other existing polices and processes (such as those referenced in the Statement of Student Rights and Responsibilities) to address them. A new policy—especially one as vague, overbroad, and hastily written as the

Disruptive Activity Policy—will only add more unnecessary fuel to an already fiery campus environment.

The Proposed Disruptive Activity Policy Will Almost Certainly Lead to Discriminatory Enforcement Against Disfavored Speech and Unnecessarily Harsh Disciplinary Outcomes

For several reasons, if the University adopts the Disruptive Activity Policy in its current form, it will almost certainly result in selective enforcement and potentially life-altering consequences for arguably protected speech and protest.

First, as explained above, the proposed policy's vagueness and overbreadth invites discriminatory enforcement, whereby University officials will be empowered to enforce the policy primarily against those who are subjectively perceived as being disruptive, including based on the content or viewpoint of their speech. Given recent events and the current political tensions permeating campus environments, many expect that the University will enforce the proposed policy against pro-Palestine protesters during graduation ceremonies or potential demonstrations related to the November 2024 presidential election. In contrast, we doubt the University will be as quick to enforce the policy against, say, fraternities who disrupt class instruction by playing loud music or football fans who impede pedestrian traffic on their way to the Big House. A policy without specific, objective, and manageable standards is a license to target disfavored speech.

This is not hypothesis or hyperbole. Just recently, the Dean of the School of Nursing emailed the student body informing them that, in light of President Ono's recent statement about disruptions at the Honors Convocation, she was prohibiting "any political/social/anti-war statements or demonstrations" from occurring at the School of Nursing's graduation ceremony. This email from the Dean, singling out political and anti-war statements while making no mention of other loud noises or actions that could predictably disrupt a graduation ceremony, was clearly viewpoint discrimination. *See Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg'l Transp.*, 978 F.3d 481, 493-98 (6th Cir. 2020). There can be little doubt that the proposed Disruptive Activity Policy would more or less invite deans and others to selectively discipline students who engage in speech they or other University officials disfavor.

Second, it is now a well-recognized nationwide phenomenon that there are racial disparities in student discipline and campus policing, including at universities. With a policy so vague and overbroad, we are concerned that the University will end up wielding it primarily against students of color—especially given the University of Michigan's long history of racial justice protests led by students of color. Although we do not suggest that this is the University's intent in drafting the proposed policy or in enforcing it, unfortunately it is the likely if not inevitable consequence of allowing such a policy to be implemented.

Finally, the proposed Disruptive Activity Policy's disciplinary outcomes are unnecessarily harsh in relation to the conduct it seeks to punish. It contemplates a wide range of sanctions, up to and including expulsion and "requests for misdemeanor charges." Seeking to impose potentially life-altering sanctions for vaguely defined disruptive activity is a draconian approach to efficiently managing University operations. That is especially so when the bulk of that disruptive activity will likely student be speech and protest on matters of public importance. The University's recently adopted Principles on Diversity of Thought and Freedom of Expression states that "[w]hen we

disagree on matters of intellectual significance, we make space for contesting perspectives…. We strive to meet conflict and controversy with understanding and reason, refuting our opponents rather than revoking invitations or refusing them a platform." In contrast, the proposed policy threatens expulsion and criminal charges for engaging in disfavored demonstrations. That is an unfortunate about-face from the Principles.

Taken together, the high risk of discriminatory enforcement and unduly harsh penalties point to one likely outcome: Those with disfavored opinions, and Black and brown student protesters especially, will inequitably bear the brunt of the University's proposed policy.

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Protest, disagreement, and debate on campus rarely happen quietly. As a 200-year-old institution with a long and proud history of student activism, the University of Michigan knows this well. Yet, despite decades of criticism and protest from its students, it is still standing strong. And along the way, it has crafted a good (and constitutional) balance between the competing rights and interests of protesters and non-protesters. If adopted, the proposed Disruptive Activity Policy as drafted will throw off that balance and send the University of Michigan in the wrong direction. We urge the University of Michigan to abandon its efforts to adopt this policy at the expense of the freedom of speech and expression of its community members. The University should pursue far narrower options—many of which already exist—to address concerns about major disruptions to University operations.

Sincerely,

Dan Korobkin, Legal Director
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ACLU of Michigan

CC: Universty of Michigan Board of Regents
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