



**PACIFIC LEGAL  
FOUNDATION**

September 21, 2020

Mayor James Kenney  
City Hall, Office 215  
Philadelphia, PA 19107

**VIA EMAIL: [president@temple.edu](mailto:president@temple.edu),  
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Commissioner Thomas Farley  
1101 Market St.  
13<sup>th</sup> Floor  
Philadelphia, PA 19107

President Richard M. Englert  
Temple University  
Second Floor, Sullivan Hall  
1330 Polett Walk  
Philadelphia, PA 19122

Dear Mayor Kenny, Commissioner Farley, and President Englert:

Pacific Legal Foundation (PLF) writes to urge you to clarify and if necessary modify the City of Philadelphia and Temple University's recently announced policies banning students from participating in all gatherings whether on campus or off campus ("student gathering policies"). If taken literally, these policies would significantly curtail First Amendment protected speech and association. Even during a pandemic, students are entitled to exercise their constitutional rights on par with other residents of Philadelphia.

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PLF is among the nation's preeminent public interest law firms litigating in defense of the freedom of expression. PLF is concerned by how your recently announced ban on association is impacting students and student organizations, especially in light of political speech and association surrounding the upcoming election in November.

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## **The Student Gathering Policy**

In response to COVID-19, the City of Philadelphia and the State of Pennsylvania have both issued public health ordinances restricting the permitted size of gatherings. The City of Philadelphia has attempted to impose more restrictive limits on gatherings than the State of Pennsylvania. Currently, the City of Philadelphia prohibits indoor gatherings of more than 25 and outdoor gatherings of more than 50 (while Governor Wolf's most recent state order allows outdoor gatherings of up to 250 people). But these more restrictive limits apply only in the City of Philadelphia and not outside of the City.

On August 29, 2020, the City of Philadelphia released guidance singling out college students and stating that colleges and universities in the city should “[s]trongly discourage and make efforts to prevent gatherings (other than academic classes) of any size, whether on campus or off-campus, and communicate clearly to students that they should avoid such gatherings.”

Following the City's guidance, the University sent all students a text message stating that “City health officials have issued new guidelines. Temple is directing students to avoid all social gatherings in order to limit the spread COVID-19. New COVID cases are coming from even small gatherings.” Spokesperson Ray Betzner [told](#) the Philadelphia Inquirer that anyone who defied the ban would face discipline. Subsequently, Dean of Students Stephanie Ives made a statement declaring that: “Sanctions for students in violation of the four public health pillars and other COVID-related policies, such as hosting a social gathering, refusing to cooperate with contact tracers, and other blatant disregard for the health and well-being of Temple University and the surrounding community may result in

- revocation of university building access,
- removal from campus housing,
- suspension, or
- expulsion”

## **The Student Gathering Policy Needs Clarification**

The student gathering policy is troublingly vague and unclear. As written these policies appear to apply to any type of gathering for any purpose. But will a

student really be suspended or expelled for getting together with others to phone bank on behalf of a political candidate? Or attending a protest? Or attending a religious worship service? It is also not clear whether the policy applies to an event that a student attends, but did not organize. Furthermore, it isn't clear whether the policy applies only to events that occur on-campus, or whether it is intended to apply to students anywhere in the City of Philadelphia or even outside of the City of Philadelphia or the state of Pennsylvania.

Because a student can be suspended or expelled for violating these new policies, it is imperative that the exact contours of the policy be clear so that students can conform their behavior to these policies. Expulsion or suspension infringes upon a protect liberty interest, and so students are entitled to the Fourteenth Amendment's guarantee of procedural due process. And when First Amendment rights are at stake, policies are unlawful if people of "common intelligence must necessarily guess as at its meaning and differ as to its application." *Keyshian v. Board of Regents*, 385 U.S. 589 (1967).

### **The Need for Clarity Is Especially Urgent Now**

While a complete prohibition on all student gatherings would be problematic at any time, it is even more troubling right now in the middle of a national election. During this election season, Temple University students would ordinarily be participating in a wide range of election related gatherings. For instance, students might help prepare yard signs at a precinct office, ask questions at a town hall meeting, participate in a phone bank, or go door to door canvassing for political candidates. These gatherings all involve core political speech and are vital to American democracy.

I have spoken to students at Temple University who hope to be able to participate in these activities and have voiced concern over the risk of being disciplined by their University for engaging in core political speech. They fear that these policies are also having a significant chilling effect and limiting their ability to recruit their fellow students to participate in these activities. In some instances, students are afraid that if they participate in canvassing or other political activities even outside of the City of Philadelphia that they will be punished for their political activity. With only a few weeks to go until the November 2020 election, it is vital for

the University and the City to clarify that the student gathering policy does not apply to gatherings protected by the First Amendment.

### **The City's Policy Unlawfully Singles Out Students**

Singling out students for gathering restrictions is unconstitutional, especially if applied to expressive activities such as political or religious gatherings. The Supreme Court has explained that “[t]he right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental.” *De Jonge v. State of Oregon*, 299 U.S. 353, 364 (1937). And it has accordingly applied the same scrutiny to restrictions of assembly as it has to restrictions of free speech.

In this case, strict scrutiny applies because the student gathering policy singles out students for disfavored treatment. Restricting speech based on the identity of the speaker is a form of content control, which is presumptively unlawful. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015) (“Speech restrictions based on the identity of the speaker are all too often simply a means to control content.”). First Amendment protections are at their apex when the government imposes “restrictions distinguishing among different speakers, allowing speech by some but not others.” *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011); *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 658 (1994) (“laws favoring some speakers over others demand strict scrutiny when the legislature’s speaker preference reflects a content preference”). Even if a policy is advanced with the best of intentions, “[i]nnocent motives do not eliminate the danger of censorship presented by a facially content-based” law. *Reed*, 135 U.S. at 2229.

The student gathering policy is impermissibly speaker- and content-based because it prohibits speech and association by students, and only students. Government officials must determine who is gathering and speaking in order to know whether the gathering is lawful or not. If two dozen lawyers get together to discuss the upcoming election, that is lawful. If two dozen law students from Temple University do the same thing, then that is an unlawful gathering and those students could be disciplined or punished. This is precisely the type of content control that the First Amendment does not leave to the discretion of government officials because a severe danger of censorship accompanies such restrictions. This is especially true since students as a group tend to be distinct from the general

population, based on a variety of factors such as age and political ideology. The student gathering policy is therefore unlawful if it cannot satisfy strict scrutiny.

### **Restricting Students from Gathering Violates the First Amendment**

Under strict scrutiny, the government bears the burden of proving “that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.” *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011). The policy banning student gatherings will not survive this level of scrutiny.

This week, the U.S. District Court for the Western District of Pennsylvania ruled that Governor Wolf’s executive order limiting indoor social gatherings to 25 people and 250 persons for outdoor gatherings likely violated the First Amendment. Judge William S. Stickman “look[ed] at right of assembly challenges through the lens for free speech jurisprudence,” and concluded that the state’s gathering restrictions “place[d] substantially more burdens on gatherings than needed to achieve their own states purpose.” Judge Stickman noted that the state allowed a large number of people to “congregate in stores, malls, large restaurants and other businesses based only on the occupancy limit of the building.” This created “a topsy-turvy world where Plaintiffs are more restricted in areas traditionally protected by the First Amendment than in areas which usually receive far less, if any, protection.” This double standard could not be justified, even under the lesser intermediate scrutiny standard applied to the speaker- and content-neutral restrictions at issue in that case.<sup>1</sup>

The same can be said for the new student gathering policy, which is not narrowly tailored in at least two respects. First, the City’s order presumes that the general population of the City of Philadelphia can meet in small groups while engaging in social distancing and other safety precautions; those measures are equally effective when a student is canvassing for a candidate or attending a religious service. It is irrational to single students out for disfavored treatment, especially because students are not in an at-risk population and are far less likely to get seriously ill or die from COVID-19 than the average resident of Philadelphia.

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<sup>1</sup> The student gathering policy is even less likely to survive review than the Pennsylvania gathering order because Judge Stickman applied intermediate scrutiny rather than strict scrutiny which is the standard that would apply to the student gathering policy.

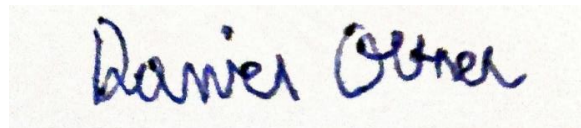
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Nor is it clear how students attending classes primarily online, as most Temple students are currently required to do, are at greater risk of transmitting the novel coronavirus. Second, students are allowed to go to restaurants, shops, or other businesses. It is “topsy-turvy” to allow students to go to restaurants but not to campaign for a political candidate, attend a religious service, or engage in other expressive activities. Such a “topsy-turvy” policy cannot survive scrutiny for the same reason the Pennsylvania gathering order failed—it imposes the most onerous limits on the most strongly protected activities.

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At bottom, students in Philadelphia deserve to be treated as adults and accorded the same freedom allowed to all other individuals in Philadelphia. PLF’s request in support of students in Philadelphia is modest: Mayor Kenney, Commissioner Farley, and President Englert must immediately issue a clarification explaining that students are allowed to gather for First Amendment related purposes in a manner consistent with generally applicable city-wide safety protocols.

Sincerely,



DANIEL M. ORTNER  
Attorney  
Pacific Legal Foundation