



October 3, 2014

Susan A. Cole
Montclair State University
Office of the President
1 Normal Avenue
Montclair, New Jersey 07043

Sent via U.S. Mail and Facsimile (973-655-7195)

Dear President Cole:

The Foundation for Individual Rights in Education (FIRE) unites leaders in the fields of civil rights and civil liberties, scholars, journalists, and public intellectuals across the political and ideological spectrum on behalf of liberty, legal equality, academic freedom, due process, freedom of speech, and freedom of conscience on America's college campuses. Our website, thefire.org, will give you a greater sense of our identity and activities.

FIRE is deeply concerned by the threat to freedom of expression at Montclair State University (MSU) posed by the Student Government Association's sanctioning of a student organization because it distributed "offensive" and "political" materials. Both the monetary fine and the instruction to cease all political expression violates the well-established First Amendment rights of student organizations on campus and must be rescinded immediately.

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

MSU's Student Government Association (SGA) is a student-run organization responsible for overseeing, chartering, and funding student organizations on campus. As part of this role, the SGA is authorized to allocate portions of the mandatory student fees paid by MSU students. Montclair Students for Justice in Palestine (MSJP) is a duly chartered student organization under the SGA. As part of its statement of purpose, MSJP states:

Through education and activism, MSJP advocates for the end of the illegal Israeli military occupation and colonization of Palestine, right of return of Palestinian refugees and the immediate end to the discriminatory treatment of Palestinian citizens of the state of Israel.

MSJP registered to staff an informational table at MSU's Student Center on September 22, 2014. While tabling, MSJP members handed out a pamphlet (Attachment A) to interested individuals. The pamphlet contained a description of MSJP's values, its views on the Israeli-Palestinian conflict, meeting dates, and a summary of the group's intended activities.

On September 25, SGA Attorney General Demi M. Washington issued a "Letter of Sanction" (Attachment B) to MSJP after receiving a complaint that the group's pamphlet "contained offensive and political wording in regards to the Israeli-Palestinian War." Washington's letter chided: "Must I remind you, you are a cultural organization and not a political one." Informing MSJP that its pamphlet was unacceptable, Washington wrote:

Montclair State is a university that unites students regardless of race, religion, ethnicity, nationality, gender or sexual preference. We do not take positions in political issues.

[. . .]

We have strict rules from the government on how to run the organization while remaining in non-profit status . . . Part of the list of things we cannot be associated with is any political or lobbyist organization.

Washington additionally concluded that MSJP's pamphlet "did not include the proper stamping."

As a result of these alleged infractions by MSJP, Washington imposed a fine of five percent of MSJP's fall semester budget, ordered that MSJP "cease and desist and [sic] political propaganda including the pamphlet called in question," and threatened that MSJP would be dechartered if it failed to comply "or if this matter is revisited again." Washington further instructed MSJP to "focus your events on the Palestinian culture, host events with other organizations and review the Montclair State University SGA posting policies."

The sanctions and censorship demands imposed by Washington violate the First Amendment rights of MSJP and must be reversed.

It has long been settled that the First Amendment applies with full force on public university campuses. *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."); *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. Quite to the contrary, the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.") (internal citation and quotation marks omitted).

Because MSU has delegated authority with respect to student organization recognition and funding, the SGA acts as an agent of the university. In turn, MSU is both morally and legally responsible for any violations of the First Amendment perpetrated by the SGA.

It is similarly beyond question that student organizations such as MSJP enjoy fundamental First Amendment rights. No member of the SGA or any member of the MSU administration may dictate to a student organization what its purpose and mission is (or must be) or what topics it may discuss. MSU is required to grant political, religious, and other expressive organizations equal access to campus facilities. *See Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 829–31 (1995) (holding that denial of support to student religious group violated the First Amendment and observing that “[d]iscrimination against speech because of its message is presumed to be unconstitutional. . . . It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint.”). It also must grant political, religious, and other expressive organizations equal access—on a viewpoint-neutral basis—to student fee funding available to other student organizations. *See Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217, 233 (2000) (“When a university requires its students to pay fees to support the extracurricular speech of other students, all in the interest of open discussion, it may not prefer some viewpoints to others.”); *Rosenberger*, 515 U.S. at 836 (“For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation’s intellectual life, its college and university campuses.”).

Put simply: The Supreme Court of the United States has repeatedly declared that disparate treatment of a student organization simply because it engages in political speech is unconstitutional viewpoint discrimination.

Washington’s justification that the prohibition is warranted due to the tax-exempt status of the SGA is without merit. Student organizations are presumed to speak as private individuals and not as representatives of the university (or student government). Recognizing the distinction between the institutional speech of a university and the private speech of recognized student groups funded by a mandatory student activity fee in *Southworth*, the Supreme Court noted in that case that when speech is “financed by tuition dollars,” with “the University and its officials . . . responsible for its content,” then it “might be evaluated on the premise that the government itself is the speaker.” 529 U.S. at 229. However, this evaluation is not permissible when the expressive activity springs from student groups funded by a student activity fee intended for “the sole purpose of facilitating the free and open exchange of ideas by, and among, its students.” *Id.* *See also Widmar*, 454 U.S. at 274 (granting facilities access to religious student groups “would no more commit the University . . . to religious goals than it is now committed to the goals of the Students for a Democratic Society”) (quoting *Chess v. Widmar*, 635 F.2d 1310, 1317 (8th Cir. 1980)) (internal quotation marks omitted); *Rosenberger*, 515 U.S. at 834 (“A holding that the University may not discriminate based on the viewpoint of private persons whose speech it

facilitates does not restrict the University’s own speech, which is controlled by different principles.”).

MSU and the SGA have created a forum for a diverse collection of student groups with a wide array of viewpoints, and, in light of these and similar precedents, the speech of these groups does not jeopardize either MSU’s or the SGA’s tax-exempt status. Indeed, Internal Revenue Service training materials have likewise drawn a distinction between “the individual political campaign activities of students” and those of their university. The agency has noted that “[t]he actions of students generally are not attributed to an educational institution unless they are undertaken at the direction of and with authorization from a school official.”¹ Noting that “civic engagement is an important part of college life, and First Amendment protections come into play,” Ada Meloy, general counsel for the American Council on Education, has summarized IRS guidance in this area by writing that “even openly partisan student groups may use an institution’s facilities without violating any rules” because such activities “further the goal of fostering students’ civic engagement while avoiding the perception of institutional bias.”² The law is clear on this matter and governs both MSU and the SGA.

Washington’s justification for the prohibition and punishment of political speech also fundamentally misunderstands and misstates the SGA’s (and by extension, MSU’s) obligations as a tax-exempt organization. The Internal Revenue Code prohibits tax-exempt organizations from participating or intervening in a campaign for public elected office and from attempting to influence federal, state, or local legislation as a substantial part of its activities. *See* 26 C.F.R. 1.501(c)(3)-1(c)(3)(ii)–(iii). MSJP’s pamphlet does neither. Rather, it communicates and explains the organization’s views on a particular political issue and why it believes others should take interest. The Internal Revenue Service allows this type of issue advocacy. *See* Rev. Rul. 80-282, 1980-2 C.B. 178 (holding that an organization did not act contrary to its obligation as a tax-exempt entity by publishing “its own views on selected legislative issues”). Again, the political speech of student organizations does not jeopardize the tax-exempt status of either MSU or the SGA.

FIRE is concerned that Washington’s justification is disingenuous and pretextual. Fearing that any political speech by a student organization would jeopardize the tax-exempt status of either MSU or the SGA strains credulity. Expressly partisan student groups (*e.g.*, College Democrats, College Republicans, and a host of issue-driven groups) are recognized and funded at tax-exempt colleges and universities (and under tax-exempt student governments) across the country. Additionally, even a cursory review of MSJP’s chartering documents reflects its intention to engage in cause-based activism—yet no objections were raised during the organization’s chartering process. Nor has Washington apparently

¹ Judith E. Kindell and John Francis Reilly, “Election Year Issues,” *Exempt Organizations Continuing Professional Education Technical Instruction Program for Fiscal Year 2002*, 365 (2002), *available at* <http://www.irs.gov/pub/irs-tege/eotopic02.pdf>.

² Ada Meloy, “Legal Watch: Political Activity on Campus,” *available at* <http://www.acenet.edu/the-presidency/columns-and-features/Pages/Legal-Watch-Litigation-and-regulation-in-academe.aspx>.

expressed concern regarding other student groups that have made equally “political” statements. For example, the SPECTRUMS student organization maintains as its picture on Facebook a red “equal” sign, expressing support for same-sex marriage rights—undeniably a political statement.

More likely is that MSJP’s speech was sanctioned because it offended some members of the MSU community, as reflected in Washington’s sanction letter. But the principle of freedom of speech does not exist to protect only non-controversial speech; it exists precisely to protect speech that some members of a community may find controversial, offensive, or disrespectful. The Supreme Court has explicitly held, in rulings spanning decades, that speech cannot be restricted simply because it offends some, or even many, listeners. *See, e.g., Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (“[F]ree speech . . . may indeed best serve its high purpose when it induces a condition of unrest . . . or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.”). *See also Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670 (1973) (“[T]he 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.’”). That MSJP’s speech may have offended someone is an unacceptable and unconstitutional basis for imposing sanctions on the group.

Finally, the sanction letter also includes the allegation that MSJP’s pamphlet “did not include the proper stamping,” and it referred the organization to review applicable posting policies that mandate any posted materials be approved and stamped by MSU’s Center for Student Involvement. But these policies do not appear to apply to materials distributed by hand. Indeed, both the “Montclair State University Posting Regulation” and the “Student Government Association Posting Policy” clearly delineate specific kiosks and bulletin boards where materials may be posted, prohibit attaching posters or flyers to certain surfaces, and specify the methods of attaching signage. MSJP at no time “posted” any materials; instead, its members distributed materials to interested parties while tabling during an authorized and reserved time. In the absence of any activity covered by these policies, this charge is erroneous and unfounded.

To the extent that the additional “Posting Policy for the Student Center” does in fact apply to materials distributed by hand³ at an organization’s authorized table, it is unconstitutional and may not serve as the basis for any disciplinary action or penalty against MSJP.

In particular, if MSU requires prior approval of student publications before distribution, it may not *in any way* condition that approval on the content or viewpoint of those materials.

³ This policy—found in the Center for Student Involvement Handbook—refers to itself as a “posting” policy, but also contains the phrase “*distribution* of printed materials.” Nevertheless, as with the previously mentioned policies, it describes primarily materials attached to surfaces or left in specified circulation areas. Distributing materials at a reserved table cannot and should not trigger the applicability of such a policy.

According to the Supreme Court, “a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.” *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150–51 (1969). The “Posting Policy for the Student Center” demands that student organizations acquire a “license” from the university in the form of permission to distribute *and* pre-approval of the materials but states no such “narrow, objective, and definite standards.”

The free distribution of noncommercial handbills and pamphlets is a quintessentially American tradition. In *Watchtower Bible and Tract Society of New York v. Village of Stratton*, 536 U.S. 150, 165–66 (2002), the Supreme Court strongly criticized a prior notice requirement for handbills:

The mere fact that the ordinance covers so much speech raises constitutional concerns. It is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so. Even if the issuance of permits by the mayor’s office is a ministerial task that is performed promptly and at no cost to the applicant, a law requiring a permit to engage in such speech constitutes a dramatic departure from our national heritage and constitutional tradition.

In addition, the United States Court of Appeals for the Third Circuit—the decisions of which are binding in New Jersey—ruled in *SEIU, Local 3 v. Municipality of Mt. Lebanon*, 446 F.3d 419 (3d Cir. 2006) that a canvassing ordinance, which required all political and religious groups to register with the police before going door to door, violated “the First and Fourteenth Amendments’ guarantee that no State shall abridge the freedom of speech.” *Id.* at 421. The Third Circuit wrote:

The scope of Mt. Lebanon’s ordinance and the burden it places on free speech are comparable to the scope and “pernicious” effects found in *Watchtower*. Mt. Lebanon’s registration requirement extends to the core First Amendment areas of religious and political discourse, and its regulation of written material encompasses all subject matter without limitation. Moreover, its effect on spontaneous speech, anonymous advocacy, and advocacy by those with religious or patriotic scruples is indistinguishable from that of the *Watchtower* ordinance.

[...]

As the *Watchtower* Court concluded, “even if the interest in preventing fraud could adequately support [an] ordinance [regulating] commercial transactions and the solicitation of funds, that interest provides no support

for its application to . . . political campaigns, or to enlisting support for unpopular causes.”

Id. at 426–27 (internal citation and footnotes omitted).

There is no justification for requiring preapproval for MSJP to distribute literature, particularly as the distribution occurred at an informational table for which the group had registered. MSU has both a moral and legal obligation to honor the rights of those who, like Thomas Paine and Benjamin Franklin before them, choose to use the power of handbills and pamphlets to engage in societal and political debate.

If the SGA is unwilling to comply with its constitutional obligations as an agent of MSU, the university is obligated to step in to uphold the First Amendment rights of its students. The sanctions imposed against the Montclair Students for Justice in Palestine organization must be withdrawn immediately, and all instructions to refrain from engaging in “offensive” or “political” speech must be unequivocally rescinded.

FIRE is committed to using all of the resources at our disposal to see this matter through to a just conclusion. We request a response to this letter by October 17, 2014.

Sincerely,



Ari Z. Cohn
Program Officer, Legal and Public Advocacy

Encl.

cc:

Rose Mary Howell, Dean of Students
Fatima DeCarvalho, Assistant Dean for Student Life
Demi M. Washington, Attorney General, Student Government Association
Kristen Bunk, President, Student Government Association