FIRE
Foundation for Individual Rights in Education

March 25, 2015

Dr. Ronald Chesbrough
Office of the President
St. Charles Community College
SSB – 2104
4601 Mid Rivers Mall Drive
Cottleville, Missouri 63376

Sent via U.S. Mail and Electronic Mail (rchesbrough@stchas.edu)

Dear President Chesbrough:

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 about the threat to freedom of expression at St. Charles Community College (SCC) presented by the application of the college's policies regarding "solicitation" to prohibit faculty members from gathering petition signatures on campus, as well as the same policies' requirement that faculty members receive advance permission before distributing any literature on campus. These restrictions on fundamental expressive activity violate students' and faculty members' rights under the First Amendment, which SCC, as a public institution, is morally and legally bound to uphold.

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

Certain adjunct faculty members of SCC are presently engaged in a unionization effort designed to address their professional challenges, spearheaded by the St. Charles Community College Organizing Committee. As part of the unionization effort, the Organizing Committee drafted a petition explaining the challenges facing adjunct faculty members and asking the SCC administration to remain neutral toward the unionization effort.

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In order to garner support for their cause, adjunct faculty members have given presentations at several student group meetings, with the consent and invitation of those groups. During their presentations, the faculty members explained their cause and objectives in organizing, noting their petition to the administration.

On February 19, 2015, Associate Dean of Student Success Kelley Pfeiffer emailed SCC club advisors, stating:

> Some of you have been approached by adjunct faculty members, requesting to come in and speak to your respective club/organization regarding the current state of adjunct faculty employment conditions on campus. While they are welcome to speak with the approval of your students setting the agenda, they are **not** permitted to ask for petition signatures. This is considered solicitation, and is not allowed under Board Policy.
>
> Please let me know if you have any questions, and PLEASE forward this to your club leadership as well.

This application of SCC's solicitation policies ignores decades of Supreme Court precedent affording such expressive activity a high level of constitutional protection, and must be reversed.

It is settled law that the First Amendment is fully binding on public colleges like SCC. *See 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 omitted).

As a threshold matter, it is unclear whether Pfeiffer's determination that seeking petition signatures constitutes prohibited "solicitation" is a proper interpretation of the relevant SCC policies. Policy 581.4, titled "Solicitations, Distributions, and Gifts," prohibits "[s]olicitation for any cause during working time and in work areas . . . by employees," but does not define "solicitation." Taken in context, however, the policy and its associated procedures appear to contemplate *financial* solicitation. For example, Procedure 581.4.1 provides that employees may, with prior approval, display brochures for "charitable fundraising items," but may not "approach others to solicit purchases or donations." Moreover, the policy prohibits solicitation by employees only "during working time and in work areas." A presentation to a student group in which no financial transaction of any kind

occurs, at the student group's invitation and at its meeting place, should not violate either of those restrictions.

Another SCC policy does contain an express definition of "solicitation." Policy 381, titled "Solicitations and Distributions," states: "The College defines solicitation as approaching or summoning individuals for the purpose of gaining support, or collecting information, or engaging in the sale or marketing of products and services." But Policy 381 explicitly applies only to solicitation by "outside individuals or groups"—that is, by individuals and groups unaffiliated with SCC, not SCC community members like the adjunct faculty members in question here.

Even if Policy 381 is misinterpreted to apply not just to "outside individuals," but also adjunct faculty, Pfeiffer's invocation of the policy is unpersuasive and inconsistent. Policy 381 prohibits "approaching or summoning individuals," but the adjunct faculty are invited guests. Indeed, in her email, Pfeiffer recognizes that adjunct faculty members may give presentations to student groups about their cause, even though presentations are made expressly for the purpose of gaining student support. If the presentations themselves do not constitute solicitation because the adjunct faculty are invited guests, then the adjunct faculty's gathering of petition signatures likewise does not constitute solicitation.

The lack of clarity as to what constitutes prohibited "solicitation" by students and faculty raises serious concerns that Policy 581.4 is unconstitutionally vague. A regulation is said to be unconstitutionally vague when it does not "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972). Currently, SCC community members must navigate between a policy applicable to them that does not expressly define "solicitation" and a policy inapplicable to them that does offer a definition. As such, SCC community members are not afforded a reasonable opportunity to determine whether they are merely prohibited from engaging in financial solicitation, or are also prohibited from garnering support for a social or political cause. This uncertainty has a profoundly chilling effect on campus discourse, as students and faculty will invariably choose to refrain from speaking rather than risk potential discipline. Such a result is impermissible at a public institution bound by the First Amendment.

To the extent that the above policies *do* prohibit faculty members (and students[1]) from seeking petition signatures or otherwise soliciting support for a cause, they are plainly unconstitutional. The circulation of petitions is "core political speech" at the very heart of the First Amendment, where its protection is "at its zenith." *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 186–87 (1999) (quoting *Meyer v. Grant*, 486 U.S. 414 (1988)). While SCC may enact reasonable and content-neutral regulations pertaining to the time, place, and manner of expression, those regulations must be "narrowly tailored to serve a

[1] Immediately after its prohibition on employee solicitation, Policy 581.4 states: "With the exception of engaging in approved college-related fundraising activities, students may not engage in solicitation." The policy appears to make no distinction between employee and student solicitation.

significant government interest, and . . . leave open ample alternative channels for communication of the information." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). The United States Court of Appeals for the Eighth Circuit, the decisions of which are binding on SCC, has added that in order to be "narrowly tailored," such a regulation must be the least restrictive means available. *Phelps-Roper v. Koster*, 713 F.3d 942, 949 (8th Cir. 2013) ("[T]he clear rule in this circuit is that in response to a First Amendment challenge, the proponent of the regulation must demonstrate that the government's objectives will not be served sufficiently by means less restrictive of first amendment freedoms.") (internal citation and quotation marks omitted). *Accord Ass'n of Cmty. Organizations for Reform Now v. City of Frontenac*, 714 F.2d 813, 818 (8th Cir. 1983).

The ban on solicitation articulated in Pfeiffer's email fails to meet these standards. It is unclear what, if any, significant government interest SCC aims to protect. What *is* clear, however, is that a blanket prohibition on circulating petitions is not narrowly tailored, nor is it the least restrictive means possible to protect any such interest. "Broad prophylactic rules in the area of free expression are suspect," *NAACP v. Button*, 371 U.S. 415, 438 (1963), and courts have frequently disapproved of complete bans on signature gathering. *See, e.g.*, *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892 (9th Cir. 2008) (holding the complete exclusion of a canvasser from a public event hosted by a private permittee in a town square was not narrowly tailored); *Nichols v. Village of Pelham Manor*, 974 F. Supp. 243, 253–54 (S.D.N.Y. 1997) ("The outright ban on all solicitation in the Village streets is manifestly not a narrowly tailored attempt to achieve a legitimate government interest. Indeed, a number of cases have found far narrower restrictions . . . to be substantially overbroad.").

So disfavored and suspect are complete bans on signature gathering that courts have invalidated them even in nonpublic forums, where the government bears the lowest burden in justifying restrictions on expressive activity and where restrictions need only be viewpoint-neutral and reasonable in light of the forum to survive judicial scrutiny. For example, the United States Court of Appeals for the First Circuit invalidated a blanket prohibition on solicitation of signatures in the paid areas of the Boston subway system, holding that because the court did "not see how peaceful solicitation of signatures clashes with the multipurpose environment of the subway system," the prohibition could not be a reasonable restriction that "preserves the property for the several uses to which it has been put." *Jews for Jesus v. Massachusetts Bay Transp. Auth.*, 984 F.2d 1319, 1325–26 (1st Cir. 1993).

Similarly, a federal court in Michigan held that anti-foreclosure activists could not be barred entirely from soliciting petition signatures at a public informational event held by the state Attorney General in a conference center. Despite concluding that the conference center constituted a nonpublic forum, the court found it "difficult to apprehend how two people passing out leaflets and asking for signatures on petitions would be disruptive or cause congestion" and enjoined the ban's enforcement. *Norfolk v. Cobo Hall Conf. & Exhibition Ctr.*, 543 F. Supp. 2d 701, 711 (E.D. Mich. 2008). *See also Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 692 (1992) (O'Connor, J., concurring) ("Because I cannot see how peaceful pamphleteering is incompatible with the multipurpose

environment of the Port Authority airports, I cannot accept that a total ban on that activity is reasonable . . . .”). Peaceful and non-disruptive political speech on campus—including the circulation of petitions—is not only entirely compatible with the mission and function of a college, it is a proud tradition in contemporary American history.

To be clear, as pertains to its students and faculty, SCC’s campus does *not* constitute a nonpublic forum.[2] But if SCC’s ban on solicitation fails to meet even the significantly lower standard applicable to review of speech regulations in nonpublic forums, it simply cannot be narrowly tailored to serve a significant government interest.

The solicitation prohibition also fails to leave open ample alternative channels for communication, as required by legal precedent. Indeed, by instituting a complete ban on asking for petition signatures, SCC has left open *no* alternative channels for communication. This is particularly true because the prohibition greatly inhibits adjunct faculty members’ ability to solicit support from members of the SCC community—individuals with a vested interest whose support necessarily carries the most weight. Indeed, the Supreme Court has expressed skepticism that a regulation leaves open “ample alternative channels for communication” when the speaker’s ability to reach his intended audience is affected. *See Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 93 (1977). Several courts have similarly held that an alternative channel “is not ample if the speaker is not permitted to reach the intended audience.” *Saieg v. City of Dearborn*, 641 F.3d 727, 740 (6th Cir. 2011); *Berger v. City of Seattle*, 569 F.3d 1029, 1049 (9th Cir. 2009). *See also Wisconsin Action Coal. v. Kenosha*, 767 F.2d 1248, 1258 (7th Cir. 1985) (holding that because the city did not present evidence showing another time period where a comparable number of adults are home, the plaintiffs could not be barred from soliciting during the hours in question).

It is similarly implausible that this ban is the least restrictive means possible by which SCC can protect its interests. As courts have explained when invalidating curfews on door-to-door canvassing, government interests are more properly protected by prohibiting and punishing specific types and instances of misconduct than by instituting broad bans on expressive activity. *See, e.g.*, *Frontenac*, 714 F.2d at 818–19 (noting that the city’s interest in protecting its residents from crime and annoyance could be “served satisfactorily” by enforcement of its criminal and anti-trespassing laws); *Kenosha*, 767 F.2d at 1257 (finding that the city’s interest in protecting residents’ privacy could be protected by enforcement of trespass laws and by residents posting “no solicitation” signs). SCC may enforce regulations prohibiting solicitors from blocking doorways, interfering with the ordinary functions of the college, or other similar restrictions. But the First Amendment does not

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[2] *See Widmar,* 454 U.S. at 267 n.5 (“This Court has recognized that the campus of a public university, at least for its students, possesses many of the characteristics of a public forum.”). *See also Univ. of Cincinnati Chapter of Young Americans for Liberty v. Williams*, No. 1:12-cv-155, 2012 U.S. Dist. LEXIS 80967 at *16–17 (S.D. Ohio June 12, 2012) (“Defendants’ view would allow the university to restrict the speech of all students to limited topics subject only to a reasonable review. Such a theory is anathema to the nature of a university . . . .”).

permit SCC to forbid its students and faculty wholesale from engaging in core protected speech on campus.

The ban articulated by Pfeiffer is unacceptable and unconstitutional. Adjunct faculty members have been expressly invited by various student groups so that they may plead their cause. Not only is there no conceivable interest that would justify a prohibition against speech that a speaker is invited to give, SCC's actions imperil its students' rights to choose what speakers they wish to hear in the context of their organizational meetings. Moreover, expressive activity of this sort is precisely the type of speech to which colleges and universities should expose their students, as well as encourage, in the pursuit of preparing students for civic life after graduation.

Finally, review of SCC's solicitation policy reveals an additional constitutional concern. Policy 581.4.1 provides: "Employees may not distribute literature without approval of the College President or designee." Similar to its prohibition on soliciting petition signatures, this policy provision unacceptably infringes on precisely the type of expressive activity that the First Amendment was designed to protect. *See Martin v. City of Struthers*, 319 U.S. 141, 146–47 (1939) ("Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations . . . it must be fully preserved."). In striking down a municipal ordinance requiring door-to-door canvassers and pamphleteers to obtain a permit, the Supreme Court stated:

> 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.

Watchtower Bible & Tract Soc'y of NY, Inc. v. Village of Stratton, 536 U.S. 150, 165–66 (2002). There is simply no justification for requiring faculty members to obtain prior approval before distributing any literature—no matter the place or time—on SCC's campus. SCC has both a moral and legal obligation to honor the rights of those who, like Thomas Paine and Benjamin Franklin, choose to use the power of handbills and pamphlets to engage in societal and political debate.

The restriction on literature distribution also fails constitutional scrutiny because it vests the administration with standardless discretion to approve or deny such requests. "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). Policy 581.4.1 fails to provide any standards other than the unbridled discretion of SCC administrators and therefore fails to comport with the First Amendment.

SCC's decision to ban the solicitation of "support" or petition signatures and to require preapproval of literature distribution violates both the First Amendment and the college campus's time-honored role as "peculiarly the 'marketplace of ideas.'" *Healy*, 408 U.S. at 180. We urge you to immediately clarify to the students and faculty of St. Charles Community College that the circulation of petitions and distribution of literature is generally permitted. We further request that you revise SCC policies accordingly to ensure that students and faculty are afforded the constitutional rights they are entitled to at a public institution.

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 April 8, 2015.

Sincerely,

Ari Z. Cohn
Program Officer, Legal and Public Advocacy

cc:
Kelley Pfeiffer, Associate Dean of Student Success