FIRE
Foundation for Individual Rights in Education

February 1, 2016

Dean William M. Treanor
Georgetown University Law Center
600 New Jersey Avenue NW
McDonough 508
Washington, DC 20001

Sent via U.S. Mail and Electronic Mail (wtreanor@law.georgetown.edu)

Dear Dean Treanor:

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 concerned by the threat to freedom of expression presented by Georgetown University Law Center's ("Georgetown Law's") inhibition of students' political speech on campus. Specifically, administrators have prevented Georgetown Law students supporting the presidential campaign of Senator Bernie Sanders from engaging in political speech and activity on several occasions, on the grounds that the university's tax-exempt status obligates it to ban campaign-related activities on campus and prevent any university resources from being used to support political campaign activity. This justification reflects a misinterpretation of Georgetown's obligations under the Internal Revenue Code and improperly curtails its students' right to engage in political expression. We ask that Georgetown Law reevaluate its policy on partisan speech and affirm students' right to engage in such expression within the academic community.

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

In September 2015, law student Alexander Atkins requested a table reservation in McDonough Hall through Georgetown Law's Office of Student Life (OSL) so that he and other students supporting Sanders' presidential campaign could distribute campaign materials and offer fellow students information on voting in the 2016 primary elections. On September 15, OSL denied Atkins' request in an email stating: "Unfortunately, we cannot

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approve your request to table since you are requesting to table on behalf/in support of a specific candidate."

On October 13, the date of the CNN Democratic Primary Debate, several Georgetown Law students sat at an outside table open to campus community members, near McDonough Hall, displaying posters supporting Sanders' campaign, handing out campaign materials, and offering information on primary voting. An OSL representative asked the students to cease their activities and remove their materials because engaging in such campaign-related activities was not permitted. After the students asked the representative to confirm that they were not allowed to engage in this activity on campus, Coordinator of Student Organizations Kenrick Roberts came out to the table and confirmed that campaign-related activities were not permitted on campus.

On November 4, Atkins emailed Roberts, referencing these two incidents and seeking clarification of Georgetown Law's policies with regard to political activity by individual students and groups. Roberts responded, in relevant part:

> [A]s a non-profit institution of higher education whose activities are regulated in part by Section 501(c)(3) of the Internal Revenue Code, Georgetown University (which includes the Law Center) must avoid engaging in partisan political campaign activity and must restrict the use of University resources in support of such activity. . . . [E]ven if a group is recognized on campus, student organizations may not use University resources to engage in partisan political campaign activities and must obtain advance approval from the Office of Student Life (and the Office of Federal Regulations) for any such activities that occur on University premises (which includes Law Center premises as well). . . . [A]s it relates specifically to candidates for office, campaigning and solicitation, including transmission of campaign materials over the internet, leaflet distribution, and display of posters, is not allowed anywhere on Law Center property or using University servers or equipment.

Roberts' email cited Georgetown Law's "Student Organization Policy on Partisan Political Activities," which supports his statement and defines "University resources" with respect to the ban on campaign activity:

> Students, student organizations and departments may use campus communications to announce political forums and discussions that are sponsored by officially constituted campus groups, but may not use University-supported resources, including space on campus, Georgetown's phone system, computer networks or servers, or postal service, for partisan political campaign activity.

Georgetown Law's total ban on partisan political campaign activity on campus misstates its obligations under Section 501(c)(3) of the Internal Revenue Code. While the university

itself is prohibited from participating or intervening in a political campaign, *see* 26 C.F.R. 1.501(c)(3)-1(c)(3)(ii)–(iii), in prohibiting campaign activity by its students, Georgetown Law fails to recognize the distinction between institutional expression and that of individual students and student organizations, which are strongly presumed to speak only for themselves and not their institutions. Provided that students and student organizations comply with relevant policies applied in a content-neutral manner to all individuals and groups, the university does not face a threat to its tax-exempt status by permitting them to engage in partisan political speech.

Because of the frequency of improper university restrictions on students' and professors' political activity, FIRE publishes a *Policy Statement on Political Activity on Campus*, last updated for the 2012 election cycle. In our 2012 *Policy Statement* (enclosed), we addressed the issue of private universities censoring political expression and activity out of concern for their tax-exempt status:

> Despite the seeming severity of the restrictions on political activity at private colleges and universities imposed by the requirements of section 501(c)(3) . . . it is extremely important to note that these prohibitions apply to the institution itself and those reasonably perceived to be speaking on its behalf, not to individual students, faculty, or staff engaged in clearly individual, unaffiliated activity. In a 1994 statement, the IRS made clear that "[i]n order to constitute participation or intervention in a political campaign . . . the political activity must be that of the college or university and not the individual activity of its faculty, staff or students."
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> [. . .]
>
> In determining the potential impact of student and faculty political activity on a private university's tax-exempt status, some important guidelines should be remembered. First, the political activity of students and faculty, unless reasonably perceived as communicating an official institutional position, generally does not impact tax-exempt status. Second, the use of institutional resources and facilities by established student groups for partisan purposes is allowable as long as the groups pay the normal fee (if any) and obtain the use of the resources and facilities through the same process used by all student groups.
>
> To be clear: As long as partisan political activity on campus by students and student groups is neither privileged nor hindered by the institution, and as long as partisan political speech by students and faculty does not overcome the strong presumption that they do not speak for the institution, then the tax-exempt status of universities and colleges should not be affected.

With respect to student speech generally and the university's obligations under Section 501(c)(3), Internal Revenue Service (IRS) training materials draw a distinction between

"the individual political campaign activities of students" and their universities. 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." 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/eotopici02.pdf.

Similarly, the Supreme Court of the United States recognized 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 *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000). The Court noted 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," but it may not be evaluated this way 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.* at 229; *see also Rosenberger v. Rector & Visitors of the Univ. of Va.,* 515 U.S. 819, 841 (1995) (where university adhered to viewpoint neutrality in administering student fee program, student newspaper funded by fee did not speak on behalf of university). If a recognized student group funded by student activity fees is not presumed to speak on behalf of its institution (and therefore does not implicate university "participation" under applicable law), an unfunded group of individual students devoting extracurricular time to their chosen partisan cause certainly should not raise such concerns.

Speaking specifically to the use of university facilities, IRS training materials underscore that the content-neutral administration of resources for use by students does not support the conclusion that an institution has engaged in partisan activity:

> Colleges and universities frequently make facilities available to student groups and others. Whether the provision of facilities to a group for the conduct of political campaign activities will constitute participation or intervention in a political campaign by the college or university will depend upon all the facts and circumstances, **including whether the facilities are provided on the same basis that the facilities are provided to other non-political groups and whether the facilities are made available on an equal basis to similar groups**. [Emphasis added.]

Kindell & Reilly, "Election Year Issues," at 378; *see also* 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 (former general counsel for the American Council on Education noting 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").

The unnecessary restrictiveness of Georgetown Law's ban on campus campaign activity is evident in its stark contrast with policies on partisan speech in place at other tax-exempt higher education institutions. Looking, for example, at Muhlenberg College's "Policy on Partisan Political Activity," the private liberal arts college starts from the premise that:

> Muhlenberg College values the free exchange of ideas in an atmosphere of open and free academic inquiry. Participation in the political process by students, faculty, and staff can, and should, be an educational experience in keeping with the Muhlenberg College mission and values. At the same time, the College must comply with the provisions governing its tax exempt status under Section 501(c)(3) of the Internal Revenue Code.

Unlike Georgetown Law, Muhlenberg's policy takes the position that partisan political speech by individual students and student organizations does not jeopardize the college's tax-exempt status by itself. Rather, there must be a reason that the speech would be construed as expressing the position of the college or misappropriating its resources, for example, by using them to fundraise for a candidate. Individual students are explicitly permitted to engage in activity like distributing candidate materials in public areas of campus and even collecting money for individual campaigns. Muhlenberg's policy expressly recognizes that student organizations "are free to express their views about and publicly support political parties and candidates, by hosting partisan voter activities including events with specific candidates," and provides that "[r]ecognized student organizations may use College facilities for meetings, speeches, and events involving candidates for office and political parties provided that such groups pay the usual and normal charge, if any, for use of institutional facilities or equipment by student groups." In sum, Muhlenberg's policy illustrates how a college or university can permit significant breathing room for its students to actively engage in partisan political speech without endangering its tax-exempt status.

Section 501(c)(3) does not require Georgetown Law to prevent its students from engaging in partisan political activity on campus or from utilizing campus facilities on the same content-neutral terms as any other individual student or student group. Imposing an outright ban on campaign activities is unjustified and undermines Georgetown's commitment to the values of free speech, expressed in the university's "Speech and Expression Policy":

> [A]ll members of the Georgetown University academic community, which comprises students, faculty and administrators, enjoy the right to freedom of speech and expression. This freedom includes the right to express points of view on the widest range of public and private concerns and to engage in the robust expression of ideas.

If Georgetown Law truly wishes to adhere to these ideals, it should revise its policy on political activities and allow students to engage in partisan and campaign-related speech on

campus. Doing so will affirm that Georgetown Law is an institution committed to fostering civic engagement in its academic halls and in the future leaders it educates.

We appreciate your attention to our concerns and request a response to this letter by February 12, 2016.

Sincerely,

Marieke Tuthill Beck-Coon
Senior Program Officer, Individual Rights Defense Program

Encl.

cc:
Mitch Bailin, Dean of Students, Georgetown University Law Center
Lisa Brown, General Counsel, Georgetown University
Todd Olson, Dean of Students, Georgetown University

FIRE
Foundation for Individual Rights in Education

Policy Statement on Political Activity on Campus 2012

By admin November 2, 2011

INTRODUCTION

As we approach another election season, the Foundation for Individual Rights in Education (FIRE; thefire.org) remains concerned by the continuing trend towards preemptive censorship of political expressive activity on our nation's college and university campuses.

The 2008 election cycle presented several abuses of student and faculty rights with regard to political activity and expression on campus. At the University of Illinois, for instance, faculty and staff members were told that they could not participate in a wide variety of political activity on campus, including wearing a pin or button in support of a political candidate or placing a partisan bumper sticker on their cars. At the University of Oklahoma, students and faculty were notified that they could not use their school email accounts to disseminate any partisan or political speech, including political humor and commentary.

These and similar cases have demonstrated to FIRE the need to reiterate and emphasize the protections that apply to political speech on campus. In determining policy regarding political speech, colleges and universities must heed Internal Revenue Service (IRS) regulations, as well as state and federal law. However, correctly interpreted, none of these legal guidelines seriously conflict with the equally crucial duty to uphold the First Amendment and basic principles of free expression on campus.

In October 2004, weeks before the presidential election, FIRE issued a statement outlining ways in which universities could "prove themselves as models for democratic discourse" instead of succumbing to censorship. In 2008, we updated our statement with specific guidelines for faculty, staff, and student speakers on campuses both public and private. Now, for 2012, we again present an update of our Policy Statement on Political Activity on Campus in the interest of securing the right to political activity and expression on campus for all students and faculty who choose to exercise it.

SUMMARY

Students and student groups at public colleges and universities enjoy the full protection of the First Amendment and must be free to engage in political activity, expression, and association on campus. Students and student groups at private colleges and universities are entitled to

that degree of freedom of expression and association promised them in institutional handbooks, policies, and promotional materials. It is important to note that the overwhelming majority of private colleges and universities provide extensive promises of free speech in their materials, and therefore should be held to standards comparable to those required by the First Amendment.

Faculty at public colleges and universities enjoy a broad right to engage in partisan political speech when such expression occurs outside the parameters of their employment-related activities. This right allows for a wide variety of political speech, while the list of activities in which faculty at public universities may not participate is comparatively narrow and easily understood. Faculty may be prevented, for instance, from fundraising in class, making statements in support of candidates or a party on university letterhead, or otherwise offering oral or written public support for a candidate or party in a manner that could be reasonably perceived as attributable to the university.

Faculty at private colleges and universities enjoy the right to free speech as specified in their contracts with their employing institution. If freedom of expression is guaranteed, the faculty members of private institutions may engage in partisan political speech without impacting the 501(c)(3) status of their institution when such speech is not likely to be identified as officially representing the views of their employing institution. As a general rule, the presumption should be that faculty are not speaking on behalf of the university. It is, however, possible to overcome this presumption. Faculty who also serve in an administrative capacity are accordingly more likely to run afoul of rules preventing the appearance of official endorsement.

Non-faculty employees of universities do not enjoy the same political speech protections as students and faculty.

Students, student groups, and faculty members do not endanger the 501(c)(3) status of private colleges and universities by engaging in partisan political speech when such speech is clearly separate and distinct from the institution's views or opinions. The presumption is that such speech does not represent the views of the university as an institution. Moreover, this presumption applies with particular vigor when speakers clearly indicate that they are not speaking for the university. The risk of appearance of institutional endorsement may be greater when the speaker is a high-level university administrator, but decreases as one moves down the chain of command to lower-level administrators. Additionally, this risk does not

apply to students or student groups, or to faculty who do not hold a position as an administrator or department head.

At public universities, partisan student groups may use institutional resources and facilities for partisan political expression and activities when the use of such resources and facilities is obtained in the same way that non-partisan student groups obtain such use. Similarly, students and student organizations at private institutions promising freedom of speech are not prohibited by IRS regulations from using student activity fees to engage in political speech and activity. They may also use institutional resources and facilities for such speech, again provided that (a) the resources are made available to all speakers and student groups, and (b) they follow the same procedures observed by all other student groups seeking to obtain use of university resources.

ANALYSIS

Students

By law, students at public universities enjoy the full protection of the First Amendment on campus. This protection has been affirmed by decades of Supreme Court jurisprudence. The Court has stated, for instance, that "state colleges and universities are not enclaves immune from the sweep of the First Amendment," and that there is no basis in the Court's jurisprudence for the proposition that "First Amendment protections should apply with less force on college campuses than in the community at large." *Healy v. James*, 408 U.S. 169, 180 (1972). The Court has consistently upheld the notion that "[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas.'" *Id.*

When it comes to partisan expression, it is important to remember that one of the core motivations of the First Amendment was to protect political speech from official censorship or interference. As the Supreme Court has declared, "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."*Mills v. Alabama*, 384 U.S. 214, 218 (1966). Elsewhere, the Court has emphasized that "speech concerning public affairs is more than self-expression; it is the essence of self-government," reflecting "our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) (internal quotations omitted). Given these holdings, it becomes clear that the right to engage in partisan and political speech is unequivocally enjoyed by students at public universities.

Students at private universities are entitled to receive that degree of freedom of expression promised them in university publications like handbooks, codes of conduct, and promotional materials. Courts have held in several cases that private universities must live up to these types of promises, based on a contract theory. See *Tedeschi v. Wagner College*, 49 N.Y.2d 652 (Ct. App. 1980); *McConnell v. Le Moyne College*, 2006 N.Y. Slip Op. 256 (Sup. Ct. 2006); *Schaer v. Brandeis*, 432 Mass. 474 (Sup. Ct. 2000). Likewise, the Seventh Circuit has stated that "the basic legal relation between a student and private university or college is contractual in nature. The catalogues, bulletins, circulars, and regulations of the institution made available to the matriculant become a part of the contract." *Ross v. Creighton Univ.*, 957 F.2d 410, 416 (7th Cir. 1992) (internal quotations omitted). Therefore, any student at a private college or university which promises speech rights to its students is entitled to engage in a wide variety of partisan and political speech.

Given that it is difficult to attract students to schools that promise them few or no rights, most colleges promise robust free speech rights in their materials. Indeed, of the 392 colleges and universities rated in FIRE's 2012 report on campus speech codes, only seven private institutions granted so few rights as to be listed as "not rated": Baylor University, Brigham Young University, Pepperdine University, Saint Louis University, Vassar College, Worcester Polytechnic Institute, and Yeshiva University. It is FIRE's belief that students who attend private colleges that promise free speech rights should enjoy the same level of free speech protections as students at public colleges and universities.

In California, students at non-sectarian private universities enjoy the same First Amendment protection afforded their public university counterparts by virtue of California's "Leonard Law" (California Education Code § 94367). See *Corry v. Leland Stanford Junior Univ.*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995) (slip opinion). Given that students at public universities enjoy the right to disseminate a broad range of partisan and political messages, private university students in California enjoy the same right by virtue of the Leonard Law.

Student Groups

Generally speaking, the freedoms afforded student groups mirror the freedoms afforded individual students. Student groups at public universities enjoy First Amendment rights of free expression and association. Student groups at private universities enjoy those freedoms promised them by handbooks, codes of conduct, and promotional materials.

Student Groups at Public Colleges and Universities

At public universities, student groups must be able to freely express the political viewpoint of their choice. Like individual students, the speech of student groups must be limited by the

very few exceptions to the First Amendment's protection of free expression (including obscenity, intimidation, true threats, incitement, and harassment—as defined by law, not by university regulation) and by reasonable and content-neutral time, place, and manner regulations. This means that student groups must be allowed to publish, sponsor, advocate, denounce, or otherwise engage in political expression as they see fit.

Student groups at public universities must also be free to determine their own qualifications for membership and leadership, thus exercising their First Amendment right to freedom of association. Public universities must recognize and allow liberal groups to be liberal, libertarian groups to be libertarian, and conservative groups to be conservative. Denying a political or ideological student organization the right to associate with other students who share the group's beliefs deprives them of their full freedom of association, a basic right guaranteed by the First Amendment. (It is important to note the Supreme Court's recent holding in *Christian Legal Society v. Martinez*, 561 U.S. ___, 130 S. Ct. 2971 (2010), in which the Court held that a public university's law school did not violate the First Amendment in denying recognition to a student group that sought to accept only those students that shared its beliefs as voting members or leaders. However, this narrow decision rested solely on the school's unique "all comers" policy, which required all student groups to accept all students, regardless of belief. While the Court deemed such a policy constitutional, it did not mandate the use of such a policy and insisted that those schools maintaining such a policy enforce it evenly. FIRE believes that "all comers" policies are prohibitively difficult to administer and deny students the opportunity to associate around shared beliefs.) Moreover, public universities may not target particular political or ideological student groups for forced inclusion on account of their viewpoint—no matter how unpopular their views are on campus—because such viewpoint-based restrictions are an especially pernicious violation of the First Amendment.

Further, student groups at public universities may not be denied access to funds or university resources available to other groups on account of their partisan commitments. Student activity funds, when comprised of student activity fees, are not institutional resources. Rather, as the Supreme Court held in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 851-52 (1995), they are "a fund that simply belongs to the students." Therefore, activities, events, speaking engagements, and other partisan activities funded by the student activities fund are not institutional activities. When a public university decides to use student fees to fund a multiplicity of independent student groups, each student group retains its status as a private party expressing its personal viewpoint and cannot be censored by the university, nor cautioned against using allocated fees for "partisan purposes" or other

political speech. If a public university denies such funding to a student organization because of its partisan message or ideology, it is engaging in unlawful viewpoint discrimination. *Id.* at 834.

With regard to political activity on student groups' websites and hyperlinks to politically-oriented student groups' websites on the university's official website, universities sometimes attempt to limit such speech out of concern that not only links to student websites, but also links to third-party websites on linked student websites, might be construed as the university's own political statement. However, a university's official website does not automatically become implicated in a linked website's political activity. The presumption in such cases should be that the speech is not attributable to the university, and this presumption should be overcome only where the speaker represents himself or herself as speaking on behalf of the institution to the extent that a reasonable person would believe this to be the case. Just as with general forum-related issues, whether a university website's links are partisan or not must be determined by an ad-hoc assessment of all relevant facts and circumstances, including the context for the link on the organization's website, whether all candidates are represented, any exempt purpose served by offering the link, and the directness of the link between the organization's website and the webpage that contains material favoring or opposing a candidate for public office.

Section 501(c)(3) of the United States Internal Revenue Code, discussed in further detail below, does not require all linked websites on a university's official website to be free of campaign activity. A website that provides links to all candidates in an election on a viewpoint-neutral basis would be in full compliance. Thus, even if a university's main website linked to student organizations' websites that actively campaigned for individual candidates, so long as the university's website did not appear to favor some candidates over others by, *e.g.*, giving favorable arrangements to websites campaigning for a specific candidate, or excluding only those websites that campaign for a specific candidate, the university would not have not engaged in prohibited political activity by linking to student websites.

Additionally, a university would not be responsible for political activities carried out on third-party websites that are twice-removed, *i.e.*, websites that are linked from a site listed on an official website. Here, the context and the arrangement of links are crucial factors in determining whether a nonprofit is responsible for partisan content on a third-party website. As a student organization's activities are typically understood to take place with a great degree of independence from the host university, links on a student organization's website would not, by its context, indicate the host university's official position. Absent indications by the host university that it implicitly or explicitly endorses the political content of the third-party

website, the host university has little to fear from links to extramural websites on student organizations' websites.

Student Groups at Private Colleges and Universities

Student groups at private universities, while not protected by the First Amendment, are entitled to exercise those freedoms promised them in university materials, literature, and policies. As is the case with individual students, the promises made by a private university regarding student groups' rights are enforceable under a contract theory. Therefore, if a private university states in its materials that student groups on campus are entitled to robust expressive and associational rights, it must live up to its promise.

As discussed below, student groups at private universities do not endanger their university's 501(c)(3) tax-exempt status by engaging in partisan speech, even when using university resources, when (a) those resources are made available to all speakers and student groups, regardless of political viewpoint, and (b) partisan student groups follow the same procedures observed by all other student groups in obtaining use of university resources.

Faculty

Faculty members at public colleges and universities have traditionally been accorded robust speech rights under the rubric of academic freedom. The Supreme Court stated many years ago that "[t]o impose any straight jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation," because "[s]cholarship cannot flourish in an atmosphere of suspicion and distrust."*Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). Therefore, the Court has held that academic freedom is a "special concern of the First Amendment" and that "[o]ur nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to teachers concerned." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (internal citations omitted). In recognition of the essentiality of academic freedom, most colleges and universities—both public and private—have adopted the American Association of University Professors' (AAUP's) statements on academic freedom. This is relevant both in terms of the promises made by universities regarding professors' academic freedom and in terms of the expectations that faculty members hold.

Further, individual state constitutions, state caselaw, collective bargaining agreements, and faculty resolutions may provide for additional protections or rights beyond those enunciated by the First Amendment or federal caselaw. Faculty members at public universities are encouraged to consult these sources when considering the scope of their speech rights on campus.

At the same time, faculty members at public colleges and universities, like other public employees, may sometimes be restricted in what they say by their employer. The Supreme Court's 2006 decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006) held that "when public employees make statements pursuant to their official duties ... the Constitution does not insulate their communications from employer discipline." *Garcetti*, 547 U.S. at 421. However, the Court's opinion purposefully left unresolved the specific question of whether the same holds true for the speech of university faculty, noting that "[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests." *Id.* at 425. Given the fundamental importance of academic freedom on a university campus, the fact that free expression is vital to the unique pedagogical work of professors, and that universities are ideally continuously inundated with new and challenging ideas, there is a good argument to be made that *Garcetti* should not apply in the academic setting.

What remains clear, even after *Garcetti*, is that faculty at public colleges and universities enjoy the right to engage in a wide variety of partisan political speech. Even under a broad construction of *Garcetti*'s "pursuant to their official duties" element, faculty members are free to participate in political rallies on campus, express partisan messages outside of the classroom (for instance, by wearing political buttons), disseminate political speech via email, post political humor and commentary on their office doors, and much more. Professors taking part in such activities should be understood to be speaking as citizens on matters of public import, not as faculty members acting pursuant to their job-related duties. Confirming this understanding, the United States Court of Appeals for the Fourth Circuit held in a 2011 decision that a lower court had improperly dismissed a public university professor's First Amendment lawsuit against his institution. The professor's lawsuit alleged that he had been denied a promotion due to the conservative political viewpoints he had expressed in his work as a columnist. *Adams v. Trustees of the University of North Carolina – Wilmington*, 640 F.3d 550 (4th Cir. 2011). In so deciding, the Fourth Circuit found that the professor's columns were unrelated to his assigned teaching duties, and were clearly the expression of a citizen speaking on a matter of public concern. The appellate court further held that the expression implicated the professor's right to academic freedom, as it is understood that faculty members will provide such commentary as a function of their role as academics.

Moreover, the presumption must be that a professor's political speech represents his or her own views, not the views of the university as a whole. This presumption is overcome only in exceptional situations, such as when a professor implies that he or she actually is speaking on behalf of the university. Otherwise, it makes little sense to attribute every faculty member's

expression to the institution, as such a diverse cacophony of voices rarely, if ever, produces a singular, coherent message. Therefore, unless a university can demonstrate that a professor's political expression threatens the proper functioning of the university and that its interest in preventing such disruption outweighs the professor's interest in speaking, he or she enjoys the right to speak, even post-*Garcetti*.

While working, faculty at private universities and colleges enjoy the right to free expression promised them in their contractual agreements with their employing institution. The extent of this right and its potential impact on the private college or university's status as a 501(c)(3) tax-exempt non-profit organization is discussed below. Of course, when not working, private university faculty members enjoy the fullest protection of the First Amendment as private citizens.

Staff

Non-faculty employees of universities do not enjoy the same political speech protections as students and faculty. Under*Garcetti*, staff at public universities making political statements pursuant to their official duties can presumptively be disciplined for engaging in political speech. Again, individual state constitutions and state caselaw may provide for additional protections or rights beyond those enunciated by the First Amendment or federal caselaw. Staff members at public universities are encouraged to consult these sources when considering the scope of their speech rights on campus. Staff at private universities must follow their employer's regulations.

It is important to note that student-employees at both public and private schools should be accorded the same speech rights in their capacities as students as their peers. Too often, colleges forget the "student" part of the student-employee equation. Students should not give up their rights to freedom of expression or association as a function of working for their college.

Private Colleges and Universities as 501(c)(3) Organizations: Political Activity

In FIRE's experience, private colleges and universities often cite their tax-exempt status as justification for banning political activity. Accordingly, it is important to clarify exactly what political activity is and is not prohibited by the Internal Revenue Code, and how to know the difference.

Background

Private colleges and universities usually operate as 501(c)(3) non-profit organizations. This means that, as non-profit institutions incorporated exclusively for educational purposes, they are exempt from paying federal income tax under United States Internal Revenue Code 26

U.S.C. § 501(c)(3). (As government instrumentalities, public colleges and universities are also exempt from federal income tax, but are granted that status under section 115 of the Internal Revenue Code.)

Section 501(c)(3) also restricts qualifying non-profit organizations from engaging in certain political activity. Specifically, 501(c)(3) organizations cannot "participate in, or intervene in (including the publishing or distributing of statements) any political campaign on behalf of (or in opposition to) any candidate for public office." In a 2006 statement, the IRS defined prohibited political intervention as "any and all activities that favor or oppose one or more candidates for public office," including but not limited to "[d]istributing statements prepared by others that favor or oppose any candidate," "[a]llowing a candidate to use an organization's assets or facilities ... if other candidates are not given an equivalent opportunity," "[c]oordinating institutional fund-raising with fund-raising of a candidate for public office," and "[s]ponsoring events to advance the candidacy of particular candidates."

Whether or not a 501(c)(3) organization has engaged in prohibited political activity is an *ad hoc* determination contingent upon examination of "all of the facts and circumstances of each case." However, in the campus context, the IRS has interpreted the restriction on political activity differently in light of the educational mission of colleges and universities, allowing certain activities (such as a political science class that requires students to work on a campaign, as long as the student, not the instructor, is allowed to choose the campaign; or a political editorial in favor of a candidate published in a student newspaper) that would otherwise likely constitute prohibited activity.

Application

Despite the seeming severity of the restrictions on political activity at private colleges and universities imposed by the requirements of section 501(c)(3), however, it is extremely important to note that these prohibitions apply to the institution itself and those reasonably perceived to be speaking on its behalf, not to individual students, faculty, or staff engaged in clearly individual, unaffiliated activity. In a 1994 statement, the IRS made clear that "[i]n order to constitute participation or intervention in a political campaign ... the political activity must be that of the college or university and not the individual activity of its faculty, staff or students."

There is a greater risk that an individual's political activity may be attributed to the university as a whole when that individual is a high-level administrator, but this risk diminishes greatly when one moves down the chain of command to lower-level administrators, and almost

disappears completely when one reaches the political activity of students and faculty members who do not also serve as administrators or department heads. As such, many of the fears expressed by administrators at private colleges and universities about partisan student and faculty political activity impacting the university's tax-exempt status are unfounded.

In determining the potential impact of student and faculty political activity on a private university's tax-exempt status, some important guidelines should be remembered. First, the political activity of students and faculty, unless reasonably perceived as communicating an official institutional position, generally does not impact tax-exempt status. Second, the use of institutional resources and facilities by established student groups for partisan purposes is allowable as long as the groups pay the normal fee (if any) and obtain the use of the resources and facilities through the same process used by all student groups.

To be clear: As long as partisan political activity on campus by students and student groups is neither privileged nor hindered by the institution, and as long as partisan political speech by students and faculty does not overcome the strong presumption that they do not speak for the institution, then the tax-exempt status of universities and colleges should not be affected.

CONCLUSION

Students, student groups, and faculty at public and private universities should enjoy a robust right to engage in political expression on campus-and they generally do, as we have documented here. This is as it should be; political speech is a unique and vital component of democratic participation in the United States. Accordingly, the abilities to create, engage, support, critique, refute, and verify the content of speech are necessary civic skills crucial to the health of our democracy. As the Supreme Court has observed: "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy*, 354 U.S. at 250. But too often—and particularly in election years—FIRE confronts censorship of political expression on campus. The proffered administrative rationales vary from case to case, but usually revolve around profoundly mistaken ideas about the university's legal obligations. As we have described in this statement, the law tends to encourage more speech on campus, and interpretations that circumvent the function of a university as a "marketplace of ideas" are usually wrong.

Whenever students, student groups, and faculty members are prohibited from engaging in the political issues of the day, our democracy suffers. FIRE urges universities and colleges to

carefully consider the unique function our institutions of higher education play in fostering debate and discussion on the most important issues of our time, and to greet with suspicion any legal interpretation or contrivance that would undermine this crucial role.