



October 7, 2016

Dr. Maria C. Bennett Rose  
President's Office  
Fairmont State University  
1201 Locust Avenue  
Fairmont, WV 26554

*Sent via U.S. Mail and Electronic Mail (Maria.Rose@fairmontstate.edu)*

Dear President Rose:

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses.

FIRE is concerned by the threat to free speech presented by Fairmont State University's (FSU's) directive, through both a campus police officer and an administrator interpreting FSU policy, that a student cease gathering signatures without a permit for "solicitation." This unconstitutional restriction of FSU students' expressive rights cannot stand at a public university legally and morally bound by the First Amendment. FSU must promptly make clear to students that their First Amendment rights will not be unduly burdened by an overbroad policy subjecting student speech to administrators' prior review.

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

On August 30, 2016, FSU student Dustin Winski and Leadership Institute Field Representative Abe Alassaf were wearing signs outside the main entrance of FSU's Falcon Center, where a fair for registered student organizations was being held inside. Winski and Alassaf sought to collect signatures for the national Young Americans for Liberty (YAL) organization, a campus libertarian group, and gauge students' interest in starting a chapter of YAL at FSU.

After less than an hour, an FSU campus police officer approached Winski and Alassaf and informed them that campus police had received "a couple calls" about them from students who found them "annoying" and were "freaked out" by them. When Winski, who had not heard any complaints from students and was surprised by the assertion, asked why students were "freaked out" by their attempts to gather signatures, the officer replied that

he had “not a clue.” Alassaf filmed the entire incident on his phone and later posted it to YouTube.<sup>1</sup>

The officer then asked if Winski and Alassaf had sought permission from Falcon Center director Robin Yeager before gathering signatures. After being informed that they had not, the officer told them “soliciting requires you to talk to one of the people, especially Falcon Center, and ask permission to do it, they set something up, a time for you.”

Winski cited his First Amendment right to speak to fellow students on campus and explained his intention to gain signatures for YAL. The officer replied that it was “not a problem,” but requested that they speak to Yeager, who he believed would not object to Winski and Alassaf setting up a table. The officer noted that students inside the Student Center were distributing literature and went on to tell Winski, “I think what the deal is though, is that you’re out here, you’re kind of engaging people, you know how it is nowadays. People get freaked out by any outgoing person, basically.” He advised Winski to get a table, and warned that he would have to ask Winski to stop gathering signatures if he failed to obtain a permit and more students complained.

Immediately after this interaction, Winski and Alassaf spoke with Falcon Center assistant director Kevin Philyaw about FSU’s free speech policies. This interaction was also filmed by Alassaf.<sup>2</sup> Citing FSU’s solicitation policy,<sup>3</sup> Winski asked Philyaw for clarification on whether he would need a permit to collect signatures while wearing a sign. Philyaw noted that this type of speech “comes across to campus police as you’re soliciting, because you’re not doing it the way most people would do it with a table” and explained that FSU’s decision to permit or limit Winski’s speech would rest on “a judgment call based on campus security and what they feel is soliciting.” He advised the students to instead reserve a table from 12:30-1:15 on Tuesdays and Thursdays. After speaking with Philyaw, Winski did not attempt to gather more signatures for YAL.

FSU’s “Soliciting” policy states, in relevant part:

- “Soliciting” shall include canvassing, soliciting or seeking to obtain membership in or support for any organization, requesting contributions, and posting or distributing handbills, pamphlets, petitions, and materials of any like kind on campus property or using University/College resources (including without limitation bulletin boards, computers, mail, e-mail and telecommunication systems, photocopiers and telephone lists and databases)

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<sup>1</sup> Abe Alassaf, *YAL free speech denied*, YOUTUBE (Aug. 30, 2016), <https://www.youtube.com/watch?v=qBpNTax98cg>.

<sup>2</sup> Abe Alassaf, *YAL Free Speech 2*, YOUTUBE (Aug. 30, 2016), <https://www.youtube.com/watch?v=0GVqVDjSvCY>.

<sup>3</sup> See <http://www.fairmontstate.edu/files/institutionalforms/formrepo/2015-2016-student-handbook.pdf>.

#### On-Campus Organizations:

- Must apply for and be granted a solicitation permit by the Falcon Center/Student Activities to solicit on campus;
- Are exempt from obtaining a solicitation permit when the activity pertains to University /Community College business or activities; and
- Must clearly identify the sponsoring organization.

#### Off-campus Organizations:

- Must apply for and be granted a solicitation permit by Falcon Center/Student Activities Center to solicit on campus;
- Must apply for and be granted an [sic] solicitation permit by Falcon Center/Student Activities Center to solicit with intent to advertise and/or sell merchandise on campus; and
- Must be sponsored by an on-campus organization in order to solicit on campus.

Additionally, FSU's "NON-COMMERCIAL SOLICITATION PERMIT APPLICATION"<sup>4</sup> requires that, after explaining the nature of their proposed speech, applicants "attach a copy of any handouts, literature, etc. to be distributed" before they can be given permission to distribute them.

By requiring students to obtain a permit for core protected expression in the public outdoor spaces of campus and provide a copy of literature they intend to distribute before doing so, FSU unconstitutionally burdens its students' First Amendment rights and impermissibly grants campus security broad discretion to decide what constitutes solicitation. FSU must immediately revise its policies and practices to rectify these problems.

It has long been settled law that the First Amendment is binding on public universities such as FSU. *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)).

Expressive activities such as signature gathering, political canvassing, and literature distribution are "core" speech at the very heart of the First Amendment, where its

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<sup>4</sup> See <http://www.fairmontstate.edu/falconcenter/sites/default/files/campus-solicitation-permit-application.pdf>.

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)).

Administrative procedures requiring a speaker to obtain a license or permit or to register before engaging in basic expressive activity are disfavored under the law and difficult to justify. See *New York Times v. United States*, 403 U.S. 713, 714 (1971) (“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”) (internal quotation marks omitted). 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 and Tract Soc’y of NY, Inc. v. Vill. of Stratton*, 536 U.S. 150, 165–66 (2002); see also *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.”)

Universities may, in some instances, have a legitimate interest in placing narrow constraints and prior approval requirements on some forms of campus expression, such as sizeable demonstrations involving large displays, temporary structures, or the use of amplified sound. But they may not, under similar rationales, require that individual students or student organizations obtain permission—or prior approval of their literature—in order to seek their fellow students’ support or distribute pamphlets in open, public areas of campus. See *Watchtower*, 319 U.S. at 166–68 (permitting scheme placed unconstitutional burden on speech by preventing spontaneous or anonymous speech and deterring speakers not wishing to seek a permit); see also *Nichols v. Vill. of Pelham Manor*, 974 F. Supp. 243, 254 (S.D.N.Y. 1997) (holding a ban on all solicitation in village streets to be unconstitutional and noting that “a number of cases have found far narrower restrictions . . . to be substantially overbroad.”).

Moreover, FSU seems to grant campus security unconstitutional latitude to define what constitutes “solicitation” that must receive prior approval to proceed. Philyaw indicated that identifying solicitation requires a “judgment call” by individual campus security officers. In this case, the security officer appeared to define the type of expressive activity requiring a permit by the number of complaints he received from other campus community members.

Courts will strike down permitting systems “without narrow, objective, and definite standards to guide the licensing authority.” *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969). In *Shuttlesworth*, the Supreme Court struck down an ordinance requiring a permit

for parades and demonstrations where it vested “virtually unbridled” authority on government actors to decide what permits to grant or deny. *Id.* at 150. Indeed, the danger of allowing unfettered discretion was made evident here, where the officer gave an impermissible, viewpoint-based reason for potentially shutting down a student’s unpermitted expressive activity, namely, the reaction of others to his message.

FSU must make clear in all policies governing the use of outdoor space by students and student organizations that, except in narrow circumstances involving large events, protected expressive activity by individuals or small groups will not be subject to permitting requirements, in keeping with FSU’s First Amendment obligations. Additionally, FSU must remove its requirement that students present their literature or pamphlets for examination by administrators as a pre-condition of exercising their First Amendment rights. Finally, FSU should not allow campus police officers the unfettered discretion to decide what type of expressive activity or literature constitutes solicitation subject to prior approval.

FIRE is happy to work with FSU in making any changes to its Solicitation Policy to better protect its students’ First Amendment rights.<sup>5</sup> In addition to making such modifications, we ask that FSU communicate to Dustin Winski that his gathering of signatures will not be unconstitutionally burdened with permitting requirements, and make clear such activity will not be censored or interfered with in the future.

We request a response to this letter by October 21, 2016.

Sincerely,



Sarah McLaughlin  
Program Officer, Individual Rights Defense Program

cc:

Kevin Philyaw, Assistant Director, Falcon Center  
Robin Yeager, Director, Falcon Center

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<sup>5</sup> For an example of an assembly policy fulfilling these objectives, *see* Mississippi State University’s “Free Speech and Assembly Policy,” available at [https://www.thefire.org/fire\\_speech-codes/ms-state-free-speech-15-16/](https://www.thefire.org/fire_speech-codes/ms-state-free-speech-15-16/).