



September 23, 2021

Maria Feeley  
Chief Legal Officer & General Counsel  
Washington and Lee University  
204 W. Washington  
Lexington, Virginia 24450

**URGENT**

*Sent via U.S. and Electronic Mail (mfeeley@wlu.edu)*

Dear Ms. Feeley:

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.

We write today to share our concerns about how Washington and Lee University ("W&L") interprets its obligations under 501(c)(3) of the Internal Revenue Code in light of an administrator's directive that the College Republicans ("CR") remove campaign materials from its table at the university's student activity fair. W&L's political activity statement<sup>1</sup> correctly acknowledges that student organizations "are not prohibited from pursuing their normal activities consistent with the academic nature of their endeavors," and W&L's status as a 501(c)(3) organization does not compel the university to depart from its commitments to students' freedom of expression. In light of increased political discourse surrounding the imminent election in Virginia, we call on the university to make clear to students that their political expression will not be restricted.

**I. W&L Requires College Republicans to Remove Campaign Materials**

The following is our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us. To these ends, please find enclosed an executed privacy waiver authorizing you to share information about this matter.

---

<sup>1</sup> *Statement Concerning Political Activity*, General Counsel, WASHINGTON & LEE UNIV., <https://my.wlu.edu/general-counsel/answer-center/political-activity/statement-concerning-political-activity> (last visited Sept. 23, 2021).

The Washington & Lee University College Republicans is a registered student organization at W&L.<sup>2</sup> CR is eligible to participate in the university’s Activities Fair, an orientation week event that took place on September 12, 2021, on Cannan Green, an outdoor area of campus.<sup>3</sup>

The CR table displayed campaign materials for candidates in the upcoming Virginia election. The table offered political stickers and flyers for those interested and was accompanied by signs supporting a gubernatorial candidate. During the fair, Kelsey Goodwin, Director of Student Activities, told the students, including CR President Lillian Gillespie, that the display violated university policy and directed that all materials endorsing or about a candidate for office be removed. Goodwin cited section 501(c)(3) of the Internal Revenue Code, which restricts the political activities of tax-exempt organizations such as W&L.

The next day, Goodwin sent an email to Gillespie and the president of the Washington & Lee University College Democrats with a link to W&L’s statement concerning political activity.<sup>4</sup> On September 20, Gillespie sent Goodwin an email outlining her concerns about Goodwin’s position and stating that it is “preposterous that the actions and opinions of a small minority of students dedicated to politics and political activity could be construed to represent the beliefs of the University as a whole.”<sup>5</sup> Gillespie is scheduled to meet with Goodwin on Thursday, September 30 to discuss the issue.

## **II. W&L Will Not Risk its 501(c)(3) Status by Adhering to its Commitments to Students’ Freedom of Expression**

Maintaining tax-exempt status under section 501(c)(3) does not require censorship of student political speech by campus administrators. To the contrary, W&L’s admirable commitment to protecting its students’ political expression—if the university adheres to that commitment—shields the university from liability for *student* political expression, because it does not constitute university *participation* in a political campaign by the university. It is in W&L’s institutional interest to refrain from censoring student political expression, because its commitment to free expression avoids the appearance that it is the *university* that is endorsing political viewpoints.

### ***A. W&L Promises Its Students Freedom of Expression.***

W&L adopted the University of Chicago’s Statement on Freedom of Expression (the “Chicago Statement”).<sup>6</sup> In doing so, W&L has affirmed that it is “vitally important” that exceptions to

<sup>2</sup> *Student Clubs and Organizations*, WASH. & LEE UNIV., <https://my.wlu.edu/student-life/student-activities/clubs-and-organizations> (last visited Sept. 23, 2021).

<sup>3</sup> *Class of 2025 Orientation Week Schedule*, WASH. & LEE UNIV. (rev. Sept. 4, 2021), <https://my.wlu.edu/student-life/first-year-experience/arrivals-and-orientation/orientation-week-schedule>.

<sup>4</sup> Email from Kelsey Goodwin to Lillian Gillespie, et al., Sept. 13, 2021, 7:54 PM (on file with author); *Statement Concerning Political Activity*, *supra* note 1.

<sup>5</sup> Email from Gillespie to Goodwin, Sept. 20, 2021, 10:41 AM (on file with author).

<sup>6</sup> *Affirmation of Freedom of Expression at Washington and Lee University*, WASH & LEE UNIV., <https://my.wlu.edu/provosts-office/resources-for-faculty/freedom-of-expression-at-wandl> (last visited Sept. 23, 2021).

free expression “never be used in a manner that is inconsistent with the University’s commitment to a completely free and open discussion of ideas.”<sup>7</sup>

W&L also values “the central importance of freedom of expression in a vibrant and intellectually challenging university community” and recognizes that its “commitment to honor, civility, and the free exchange of ideas defines who we are as an educational institution.”<sup>8</sup> We think you will agree that W&L must keep the laudable promises of freedom of expression it makes to its students and faculty.

***B. Political Speech is at the Core of Freedom of Expression.***

Political speech, including advocacy on behalf of political candidates, is at the core of the “freedom of expression” protected by the First Amendment.<sup>9</sup> “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.”<sup>10</sup> Promotion of a candidate for the gubernatorial office is undoubtedly “core political speech” at the very heart of freedom of expression, where protection is “at its zenith.”<sup>11</sup> In striking down a rule prohibiting the display of signs, the Supreme Court observed that political signs “play an important part in political campaigns” and are a “venerable means of communication that is both unique and important.”<sup>12</sup>

***C. W&L’s Obligations as a 501(c)(3) Organization Do Not Require the University to Censor Student Political Expression.***

The university’s status as a 501(c)(3) entity does not provide a compelling interest that justifies a departure from its commitment to students’ expressive rights. To the contrary, it is abundantly clear that a student’s—or student organization’s—individual endorsement of a political candidate cannot reasonably be construed to be an endorsement by the university that the student attends. While the university itself is prohibited from participating or intervening in a political campaign,<sup>13</sup> W&L’s requirement that CR remove campaign materials from its exhibit ignores the distinction between institutional expression and the expression of its students, who are strongly presumed to speak only for themselves.

---

<sup>7</sup> REPORT OF THE COMMITTEE ON FREEDOM OF EXPRESSION, UNIV. OF CHICAGO (Jan. 2015), <https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf>.

<sup>8</sup> *Affirmation of Freedom of Expression at Washington and Lee University*, WASHINGTON AND LEE UNIV., <https://my.wlu.edu/provosts-office/resources-for-faculty/freedom-of-expression-at-wandl> (last visited Sept. 23, 2021).

<sup>9</sup> While the First Amendment does not require Washington and Lee University to protect freedom of expression, legal decisions concerning the scope of the “freedom of speech” protected by the First Amendment inform students’ reasonable expectations as to the meaning of the university’s promise that its students will enjoy freedom of expression.

<sup>10</sup> *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

<sup>11</sup> *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 186–87 (1999) (quoting *Meyer v. Grant*, 486 U.S. 414 (1988)).

<sup>12</sup> *City of Ladue v. Gilleo*, 512 U.S. 43, 54–55 (1994).

<sup>13</sup> See 26 C.F.R. § 1.501(c)(3)-1(c)(3)(i)-(iii).

W&L policy appears to understand the distinction between a student organization’s political expression and the university’s political expression. As stated in its “Statement Concerning Political Activity”:<sup>14</sup>

Student political organizations (College Republicans, Young Democrats, etc.) are not prohibited from pursuing their normal activities consistent with the academic nature of their endeavors. However, these student organizations must pay the normal “student organization rates” associated with using institutional facilities, and must identify at any such event - particularly one in which a candidate for political office is present - that the purpose of the event is educational, and does not imply any endorsement of (or opposition to) any candidate by the University. Administrators and faculty should take special care with regard to such activities, in order to avoid the appearance of institutional endorsement. Mock convention activities, being educational in nature, are not prohibited.

Having committed to protecting students’ expressive rights and having made clear that student organizations “are not prohibited from pursuing their normal activities consistent with the academic nature of their endeavors,” W&L violated its policies by requiring CR to remove campaign materials from its exhibit at the student activities fair.

Additionally, the Supreme Court has made clear that the use of a public university’s facilities<sup>15</sup> by a religious student group—on the same basis made available to other student groups—no more committed the institution to the religious group’s religious views than to the views of any other student group.<sup>16</sup> This further demonstrates that the courts do not consider the expression of student groups—political or religious—to constitute expression by the university itself.

Internal Revenue Service (IRS) training materials and rulings are in accord. These materials have drawn a distinction between “the individual political campaign activities of students” and their universities, and 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” university officials.<sup>17</sup> “In 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.”<sup>18</sup> Before that, in

---

<sup>14</sup> *Statement Concerning Political Activity*, *supra* note 1.

<sup>15</sup> *See* note 9.

<sup>16</sup> *Widmar v. Vincent*, 454 U.S. 263, 274 (1981); *see also Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000) (expressive activities of student organizations at public university, funded by mandatory student activity fees, were not speech by the institution); *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 religious publication funded by fee was not speech on behalf of university).

<sup>17</sup> 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>.

<sup>18</sup> *Id.* at 377.

1972, an IRS ruling held that a student newspaper receiving funding and other resources from an educational institution does not endanger the institution's tax-exempt status by endorsing a candidate.<sup>19</sup>

Accordingly, CR's display of campaign materials at the student activities fair did not risk the university's tax-exempt status, nor does that status provide a defensible basis for regulating student political speech. Moreover, no reasonable person could be misled into believing that W&L has chosen to endorse a candidate in a state or national election through a student organization's inclusion of campaign materials in its exhibit at a student activities fair, especially given that the College Democrats and other advocacy-oriented student groups also attended the fair. To the contrary, students and other observers of political speech would naturally understand it to be the speech of the student organization: Campuses are understood to be places of contested expression—an expectation that W&L commendably nurtures by committing to protecting that exchange of views.

### **III. Conclusion**

Given W&L's commitments to free expression, it is obligated to make clear to its students and student organizations that they may display campaign materials and endorse candidates in their personal capacity. With an upcoming election in Virginia, W&L must act swiftly in recommitting to students' expressive rights.

We request receipt of a response to this letter by close of business on October 1, 2021, affirming that W&L will allow student organizations to support candidates in their individual capacity.

Sincerely,



Sabrina Conza  
Program Analyst, Individual Rights Defense Program

Cc: Kelsey Goodwin, Director of Student Activities

---

<sup>19</sup> I.R.S. Rev. Rul. 72-513, 1972-2 C.B. 246.

## Authorization and Waiver for Release of Personal Information

I, Lillian Clare Gillespie, born on ██████████, do hereby authorize Washington and Lee University (the "Institution") to release to the Foundation for Individual Rights in Education ("FIRE") any and all information concerning my current status, disciplinary records, or other student records maintained by the Institution, including records which are otherwise protected from disclosure under the Family Educational Rights and Privacy Act of 1974. I further authorize the Institution to engage FIRE's staff members in a full discussion of all matters pertaining to my status as a student, disciplinary records, records maintained by the Institution, or my relationship with the Institution, and, in so doing, to fully disclose all relevant information. The purpose of this waiver is to provide information concerning a dispute in which I am involved.

I have reached or passed 18 years of age or I am attending an institution of postsecondary education.

In waiving such protections, I am complying with the instructions to specify the records that may be disclosed, state the purpose of the disclosure, and identify the party or class of parties to whom disclosure may be made, as provided by 34 CFR 99.30(b)(3) under the authority of 20 U.S.C. § 1232g(b)(2)(A).

This authorization and waiver does not extend to or authorize the release of any information or records to any entity or person other than the Foundation for Individual Rights in Education, and I understand that I may withdraw this authorization in writing at any time. I further understand that my execution of this waiver and release does not, on its own or in connection with any other communications or activity, serve to establish an attorney-client relationship with FIRE.

I also hereby consent that FIRE may disclose information obtained as a result of this authorization and waiver, but only the information that I authorize.

DocuSigned by:  
██████████  
DEB8B796978A442...  
Student's Signature

9/23/2021  
Date