



## Foundation for Individual Rights in Education

601 Walnut Street, Suite 510 • Philadelphia, Pennsylvania 19106  
T 215-717-3473 • F 215-717-3440 • [fire@thefire.org](mailto:fire@thefire.org) • [www.thefire.org](http://www.thefire.org)

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September 28, 2012

President Roderick J. McDavis  
Ohio University  
Office of the President  
Cutler Hall, Room 108  
Athens, Ohio 45701

Sent via U.S. Mail and Facsimile (740-593-9196)

Dear President McDavis:

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](http://thefire.org), will give you a greater sense of our identity and activities.

FIRE is concerned by the threat to free expression presented by Ohio University's (OU's) decision to order a student to remove a political flyer from her residence hall door. This intrusion on the right to free speech is wholly at odds with OU's legal and moral obligation to respect its students' First Amendment rights.

Our understanding of the facts follows. Please inform us if you believe we are in error.

On or around September 4, 2012, OU student Jillyann Burns, a member of the Ohio University Students for Liberty (OUSFL), hung a flyer promoting OUSFL on the outside of the door to her room on James Hall's fourth floor. The flyer (enclosed) features images of President Barack Obama and Republican presidential nominee Governor Mitt Romney and two identical columns listing various policy issues, implying that the two candidates hold the same positions and would thus govern similarly. On September 6, after another OUSFL member had posted flyers for the group in James Hall's hallways, Burns and other residents of James Hall received an email from resident assistant Andrea Stacho, which read in part:

I also wanted to remind everyone of some policies,

1. If you want to hang something in the hallway you have to get [Residential Coordinator Micah McCarey's] permission first
2. Due to the upcoming election I wanted everyone to know that NO political posters/flyers should be hung in the hallways **or on you[r] door** until 14 days before the actual election & with the 1st condition satisfied

[Emphasis added.]

The second point of Stacho's email was an apparent reference to the OU Student Housing Handbook's Posting Policy, which states that "Political election posters are allowed only 14 days prior to election as directed by the university's political campaign policy (1 per hall)." Stacho's email extended the reach of the policy, however, by explicitly banning all political flyers, as opposed to "political election" posters, and by explicitly banning students from placing them on their doors.

On September 17, Residential Coordinator Micah McCarey conducted a routine health and safety inspection of Burns' room. Following the inspection, McCarey included the statement "political posters not [be] displayed outside room until within 14 days of election date" as a mandatory "Corrective Action" on the completed Room Health and Safety Inspection form. The inspection form also noted that Corrective Action items "must be corrected within 48 hours. Failure to do so will result in billing and possible Judicial Referral." Burns responded to the order by taping a piece of paper reading "Censored until further notice" over the flyer. As of this writing, no further action has been taken.

Both OU's prohibition of political expression on students' doors and its order that Jillyann Burns remove her flyer from her door or else face possible disciplinary charges constitute impermissible violations of the First Amendment rights OU is obligated to uphold.

It has long been settled law that the First Amendment is fully binding on public universities like OU. 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) (internal citation omitted) ("[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.'").

While public universities may establish reasonable "time, place and manner" regulations governing student expression in certain fora, any such restrictions must be content- and viewpoint-neutral and must be "narrowly tailored" to serve a significant government interest. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). While reasonable, narrowly tailored prior-approval requirements may permissibly govern certain student expression in common areas of OU's residence halls, OU has violated Jillyann Burns' First Amendment rights by enforcing its

posting policy against her personal expression on her door. FIRE is unaware of any governmental interest significant enough to justify OU's restrictions on Burns' or any other student's right to post political materials on their dorm room doors until 14 days before an election. Indeed, OU students should be particularly able to express themselves freely in their own dorm room. As the United States Court of Appeals for the Third Circuit noted in *McCauley v. University of the Virgin Islands*, 618 F.3d 232, 247 (3d Cir. 2010), "university students ... often reside in dormitories on campus, so they remain subject to university rules at almost all hours of the day"—and, as a result, students should not "constantly be subject to a circumscription of their free speech rights due to university rules" that restrict protected speech in residence halls.

With regard to OU's obligations under section 501(c)(3) of the Internal Revenue Code, OU should recognize that Internal Revenue Service training materials have 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/topici02.pdf> (further observing that the IRS has drawn a distinction between "the individual political campaign activities of students" and their university). FIRE hopes that OU's illiberal prohibition is not the result of an untenable and mistaken conclusion that student political speech on dorm room doors could somehow be considered to bear the university's imprimatur.

Further, as pictures provided to FIRE by Burns (enclosed) demonstrate, the doorways in James Hall function as a forum for student expression by the students living there. Students in James Hall—and all but certainly students in OU's other residence halls, as well—employ their doors to express themselves in myriad ways. Given this fact, enforcing content-based speech restrictions on personal student expression—in this case, mandating that political posters may not be displayed more than 14 days in advance of an election—while apparently taking no action against other content holds certain categories of expression to an unfair and unconstitutional double standard. To be clear: OU may not single out political expression for censorship.

FIRE's concerns are magnified by the fact that OU's restriction of political expression occurred in the final weeks before the presidential election. Limiting political expression to the two weeks before an election unconstitutionally prohibits political activity through the vast majority of the campaign season, including the time period encompassing the party conventions and the first two presidential debates. It is unclear how OU arrived at this arbitrary timeframe, given the fact that the "political campaign policy" referenced in the Student Housing Handbook's posting policy—and, specifically, the prohibition on displaying political posters more than 14 days before an election—is not found anywhere in OU's published policies.<sup>1</sup> As FIRE stated in our 2012 *Policy Statement on Political Activity on Campus*:

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<sup>1</sup> Ohio University does have a policy on Political Activity (Proc. 41-140). However, this policy's scope only extends to faculty, and makes no mention of time restrictions on the placement of political posters. OU Student Senate Policy 100.13 ("Campaigning, Generally") states that "Posters, flyers, television or radio commercials, or other non-personal methods of campaigning ... shall be prohibited prior to twenty-one days from the Wednesday of the election," though its scope is limited to Student Senate elections.

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.

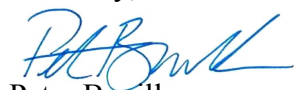
A copy of FIRE’s policy statement, written in response to numerous election-year instances of censorship of political speech on campuses across the country, is enclosed with this letter for your reference.

FIRE asks that Ohio University quickly rescind its order that Jillyann Burns remove her political flyer and retract its threat to subject her to possible disciplinary charges if she refuses. Moreover, we ask that OU make clear to all the students living in its residence halls that its posting policies will never be used to violate their right to political expression, and that they will never be applied against students in a content- or viewpoint-discriminatory manner.

Please spare OU the embarrassment of a fight against the Bill of Rights and the regrettable spectacle of having to publicly defend its intrusions upon a most fundamental form of First Amendment expression.

We request a response to this letter by October 12, 2012.

Sincerely,



Peter Bonilla

Associate Director, Individual Rights Defense Program

Enclosures

cc:

Ryan T. Lombardi, Interim Vice President for Student Affairs

Jennifer Hall-Jones, Dean of Students

Peter Trentacoste, Executive Director of Residential Housing

Micah McCarey, Residential Coordinator, James Hall