



November 2, 2015

President Neil Kerwin  
American University  
Office of the President  
4400 Massachusetts Avenue NW  
Washington, DC 20016-8060

*Sent via U.S. Mail and Electronic Mail ([president@american.edu](mailto:president@american.edu))*

Dear President Kerwin:

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 freedom of expression presented by several recent decisions and pronouncements by American University (AU) administrators regarding student political speech on campus. First, the unrecognized student group "Students for Rand"—a group supporting the election of Rand Paul in the 2016 presidential election—was denied recognition as an official student organization by AU based on its affiliation with a national organization involved in a political campaign. Next, AU administrators informed students attending a "Political Activity Training" that recognized student organizations were not permitted to sponsor events endorsing a candidate or participate in such an event. Finally, Students for Rand was informed that its members are forbidden from gathering contact information with clipboards while speaking to other students on campus under the university's policy against unauthorized solicitation.

AU's misunderstanding of its obligations under federal law, as well as its overbroad interpretation of solicitation, leave the basic rights of students and student organizations to engage in political expression at serious risk. We ask that AU correct its errors and clarify students' right to engage in political expression within the AU community.

This is our understanding of the facts; please inform us if you believe we are in error. Early in the Fall 2015 semester, several students applied to the AU Office of University Center & Student Activities (UCSA), through the University Center New Club Registration Process, to start a recognized Students for Rand club on campus. As a national youth organization,

Students for Rand has over 350 chapters nationwide, with the goal of establishing a chapter on every college campus in the United States. On September 18, 2015, the AU students received an email from the University Center Team rejecting their application on grounds that Students for Rand was ineligible for club status, stating in relevant part:

After a review of the bylaws it has been determined that the national election campaign focus of **Students for Rand** is in conflict with the American University Student Activities policy regarding Political Activities. The university is a non-profit, private institution of higher education whose activities are regulated by Section 501(c)(3) of the Internal Revenue Code and by the Federal Election Campaign Act.

With regard to clubs involved in political activity, it states that a student organizations [sic] cannot use university facilities for planning or participating in the operation process of a political campaign.

On September 25, 2015, after deciding to carry on student group activities without university recognition, four members of Students for Rand went to the AU Quad, carrying clipboards, to talk with students and collect contact information from those interested in receiving further information about the group. The four students stood in the plaza outside the AU library. Some approached students to engage them in discussion while others remained standing in one place talking to students walking by. The students were soon approached by security officers and told to stop their activity. They were permitted to continue after the officers discussed the matter with a supervisor. Later, however, UCSA Student Activities Coordinator Annalise Setorie informed a Students for Rand member by email that the group would not be permitted to repeat the activity. Setorie told the group that “clipboarding” was considered solicitation and was not permitted on campus.<sup>1</sup>

On October 14, the UCSA arranged a meeting, billed as a “Political Activities Training,” for student groups to meet with administrators to discuss what political activities students may engage in on campus. The administrators in attendance included Justin Perillo, Associate General Counsel; Setorie; Michael Elmore, UCSA Senior Director; and Darcy Frailey, UCSA Assistant Director of Facilities & Event Services. At the meeting, they articulated several limitations on political activity on campus by student groups based on their understanding of requirements pertaining to the university’s status as a tax-exempt organization regulated by section 501(c)(3) of the Internal Revenue Code:<sup>2</sup>

- Recognized student groups cannot hold events endorsing a particular candidate or piece of legislation or invite a speaker engaging in partisan speech.

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<sup>1</sup> Section IV of the AU Student Conduct Code includes “unauthorized soliciting or canvassing by any individual, group, or organization” within its list of misconduct subject to disciplinary action.

<sup>2</sup> The summary of points articulated at the October 14 Political Activities Training contained herein is based on information obtained from an audio recording of the meeting made by an AU student member of Students for Rand who was present and obtained the permission of administrators to record the proceedings. We are happy to provide AU with a copy of this audio recording upon request.

- Recognized student groups and individual members cannot sponsor or participate in events or activities endorsing a candidate or legislation if doing so within their organizational roles. For example, AU Democrats could not sponsor a pro-Hillary event, nor could the club president speak at such an event as a representative of the club.
- There was apparent confusion among the administrators present as to whether a student organization endorsing a specific candidate, such as Students for Rand, could become a recognized student group, given AU's tax-exempt status. Mr. Perillo indicated that such a club would be permissible, if it used sufficient disclaimers and received no university funding. However, Perillo's indication is inconsistent with the reasons supplied by the UCSA in its September 18 email to Students for Rand rejecting its application for recognition, and administrators present at the meeting suggested that such a club would still be ineligible for recognition based on criteria unrelated to tax status.

In addition, the UCSA administrators identified several generally-applicable restrictions on the speech of individuals and unrecognized student groups under university policy:

- Because unrecognized groups are subject to AU rules and policies affecting any individual student, they do not have access to certain privileges extended only to recognized student groups, including the ability to reserve meeting space on campus or reserve tables in designated areas of campus.
- Recognized student groups may petition students for signatures or contact information only in the vicinity of a reserved table in a designated area of campus. Apart from this, administrators confirmed Setorie's email statement to Students for Rand that "clipboarding" is not permitted anywhere on campus because it is considered unauthorized solicitation. Thus, individual students and unrecognized student groups are not permitted to approach students with a clipboard on campus at all.

With respect to the UCSA administrators' representations regarding the limitations on student political activity imposed by section 501(c)(3), AU misstates its obligations under federal law. AU fails to recognize the important distinction between institutional expression and that of student organizations, which are strongly presumed to speak only for themselves and not their institutions. With respect to AU's application of its solicitation policy to ban all clipboarding by individuals and unrecognized student groups, AU ignores its own promises of free expression by censoring core expressive activity. We discuss each of these issues in turn.

### **Institutional Tax-Exempt Status and Political Activity by Student Groups**

Provided that a student organization complies with relevant policies applied in a content-neutral manner to all organizations, the university does not face a threat to its tax-exempt status by permitting it to engage in partisan political speech.

With respect to the university's obligations under section 501(c)(3), Internal Revenue Service (IRS) training 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 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>. Indeed, AU’s own Policy on Lobbying and Political Activities reflects this distinction between individual and institutional political activity. The Policy expressly permits participation in political activities by students, faculty, and staff in an individual capacity, but prohibits such participation, “**on behalf of the University** without specific prior authorization . . .” (emphasis in original).

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 in that case 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. Per the Court’s reasoning in *Southworth*, the partisan political speech of a recognized AU student organization funded by a viewpoint-neutral student activity fee program is properly considered to be distinct from the university’s institutional views. *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). This result reflects common sense: No reasonable observer would conclude that by recognizing Students for Rand, or by allowing a College Democrats club to sponsor a “Vote for Hillary” event, that AU had endorsed the presidential candidacy of either.

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 wrongly 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), 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.”

...

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.** [Emphasis added.]

IRS training materials themselves reiterate this understanding:

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.

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.").

AU recognizes—through written policy and as reiterated at the October 14 Political Activities Training—that it does not have control over the political activity of individual students and unrecognized student groups. However, by refusing to recognize Students for Rand based on its partisan activities and forbidding recognized student groups from engaging in such expression, AU effectively takes the position that a student group must choose between the ability to endorse particular candidates or legislation and the ability to reserve tables and space in AU facilities or on AU grounds. Section 501(c)(3) does not require the university to impose this choice. AU's tax-exempt status is not endangered where a student organization endorsing a partisan position is permitted to access university facilities and resources in the same content-neutral manner as other organizations.

### **Application of Solicitation Policy**

While AU, as a private university, is not bound by the First Amendment, it is both legally and morally obligated to honor the promises of free speech it makes to its students. For example, AU's Freedom of Expression Guidelines states:

Freedom of expression and dissent is protected by University policy for all members of the University community. The exercise of these rights must not deny the same rights to any other individual. The University therefore both fosters and protects the rights of individuals to express dissent. Protest or demonstration shall not be discouraged so long as neither force nor the threat of force is used, and so long as the orderly processes of the University are not deliberately obstructed.

By extending its ban on unauthorized solicitation to encompass clipboarding activities such as those of Students for Rand on September 25, AU violates the principles expressed in its Freedom of Expression Guidelines.

We remind AU that political canvassing, clipboarding, and literature distribution are “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)). The university’s outright ban on clipboarding by an unrecognized group or community member anywhere on campus is out-of-step with courts’ treatment of similar activity. “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) (the exclusion of a canvasser from a public event hosted by a permitted private party in a town square was a constitutional violation); *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.”). Courts disfavor outright bans on petitioning even in spaces not considered traditional forums of speech and debate. *See, e.g., Jews for Jesus v. Mass. Bay Transp. Auth.*, 984 F.2d 1319 (1st Cir. 1993) (invalidating a blanket prohibition on solicitation of signatures in the paid areas of the Boston subway system); *Norfolk v. Cobo Hall Conf. & Exhibition Ctr.*, 543 F. Supp. 2d 701 (E.D. Mich. 2008) (holding activists could not be entirely barred from petitioning at a public event held by the state Attorney General in a conference center even though it was deemed a nonpublic forum).

AU’s ban on clipboarding anywhere on campus by individuals and unrecognized groups—as well as its limitation of recognized groups to tables in designated areas—cannot be squared with the university’s own Freedom of Expression Guidelines. Without consideration of whether the relevant expression threatens campus safety or obstructs the “orderly processes of the University,” the rule excludes that speech which our constitutional tradition regards as most deserving of protection. What type of expression *is* protected under the Guidelines if one student may be prevented from discussing a candidate with another student and offering to provide further information? As the Supreme Court has noted, “It is offensive . . . 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 v. Vill. of Stratton*, 536 U.S. 150, 166 (2002). Having made its community members a promise to protect free expression on campus, AU should hold itself to the same standards any citizen would enjoy off-campus.

Peaceful and non-disruptive political speech on campus is precisely the type of speech colleges and universities should encourage in the pursuit of preparing students for civic life after graduation. AU should acknowledge that clipboarding, including the gathering of signatures or contact information, is protected under the Guidelines. Such activity should be permitted on campus to the extent it does not conflict with limitations articulated in the Freedom of Expression Guidelines to ensure campus safety and operations.

FIRE asks that AU clarify its position on political activity by recognized and unrecognized student groups and its interpretation of unauthorized solicitation by students. Recognized student groups should not forfeit their right to host, sponsor, or participate in activities that endorse a candidate or piece of legislation because of a misguided concern for AU's tax status. Nor must partisan groups like Students for Rand be prevented from receiving recognition for that reason. AU's solicitation policy should not be interpreted to ban clipboarding by small groups of students in a large, open area of campus. Rather, political speech should be protected consistently with AU's Freedom of Expression Guidelines.

We appreciate your attention to these important concerns and request a response to this letter by November 16, 2015.

Sincerely,



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

Encl.

cc:

Mary Kennard, Vice President and General Counsel  
Robert Hradsky, Assistant Vice President and Dean of Students  
Michael Elmore, Senior Director, University Center & Student Activities