FIRE
Foundation for Individual Rights in Education

November 27, 2018

Dr. Kenneth D. Kitts
President's Office
University of North Alabama
One Harrison Plaza
UNA Box 5004
Florence, Alabama

Sent via U.S. Mail and Electronic Mail (president@una.edu)

Dear President Kitts:

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 for the state of the First Amendment rights of faculty and students at the University of North Alabama (UNA).[1] In recent months, the university has advised students, staff, and faculty members of the existence of an unwritten "protocol" concerning interactions with members of the media, including the *Flor-Ala*, a student newspaper at the university. If the university maintains a policy or practice of directing all media interactions to a particular administrator, it must reduce that policy to writing and ensure that it withstands First Amendment scrutiny.

[1] Our concerns about the state of First Amendment rights at the University of North Alabama are deepened by the report from the College Media Association's First Amendment Advocacy Committee concerning UNA's removal of the *Flor-Ala*'s advisor. FIRE echoes the concerns raised by the CMA, which took the rare step of censuring the University of North Alabama. The university's approach to its student journalists' rights appears haphazard, falling short of the obligations of a public university of any caliber.

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I. Statement of Facts

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 that end, please find enclosed a request under the Alabama Public Records Law (Ala. Code § 36-12-40 *et seq.*) seeking documents concerning use of the "protocol" discussed here.

On October 25, a student journalist with the *Flor-Ala*, a newspaper operated by UNA students, sought to interview UNA Police Chief Kevin Gillian concerning a trip to New Mexico taken by a UNA police official.[2] Chief Gillian declined to be interviewed, citing his receipt of a "reminder about the university's media protocol from a vice president" earlier that day.[3] The university has declined to identify which vice president, if any, has sent any such reminder.[4] On that same day, another *Flor-Ala* reporter was unable to interview another UNA staff member, Student Affairs Education and Prevention Coordinator Madeline Frankford, concerning an educational event concerning sexual assault.[5]

On November 1, *Flor-Ala* Managing Editor Harley Duncan emailed Director of Communications and Marketing Bryan Rachal asserting that it was "unclear who is subject to the university implemented media protocol," and asking whether it was "for staff exclusively" or also applied to faculty members. Rachal responded to Duncan via email the same day, explaining that the university "asks that all employees follow the media protocol," and that this "includes all faculty and staff." The purpose, Rachal said, was to "ensure that whatever is communicated to and through the media is accurate, clear and has been vetted by administrators who have the information and are responsible for the subject matter."

On November 2, in response to questions posed by Duncan via email, Rachal explained that the policy had been "established in 2015 by the University's administration," but that there was "no official documentation regarding the protocol." Since then, Rachal averred, the Office of Marketing and Communications has provided an annual "reminder to the local media regarding the protocol," a reminder "almost always" provided orally. Rachal said that faculty and staff members "are not subject to discipline for failure to follow the protocol."

II. The University of North Alabama's Unwritten Media "Protocol" Chills First Amendment Rights

While there may be a benefit in providing journalists with a point-of-contact who can facilitate their inquiries, a guide should not operate as a gatekeeper. Because they are unwritten and subject to uncertainty, UNA's unwritten "protocol" will chill the First

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[2] Harley Duncan, *Vice president sends a reminder to employees of 'media protocol'*, FLOR-ALA, Nov. 7, 2018, https://www.florala.net/news/vice-president-sends-a-reminder-to-employees-of-media-protocol/article_d7e1228c-e2d4-11e8-9658-2f178cc84909.html.
[3] *Id.*
[4] *Id.*
[5] *Id.*

Amendment rights of its constituents, to the detriment of student journalists and all members of the campus community.

A. Employees and faculty members of public universities continue to enjoy First Amendment rights

It has long been settled law that the First Amendment is binding on public colleges like the University of North Alabama. *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); *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."); *see also DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008) (on public campuses, "free speech is of critical importance because it is the lifeblood of academic freedom"). With regard to faculty expression at public institutions, the Court has made clear that academic freedom is a "special concern of the First Amendment," stating that "[o]ur nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

Public employers like UNA may lawfully discipline employees for statements made "pursuant to their official duties"; in such circumstances, the Court has held that "the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

But an employment relationship does not obliterate the First Amendment rights of employees. *Garcetti* left intact the First Amendment rights of all public employees to speak as private citizens on matters of public concern under *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). Under the *Pickering* test, an employee's speech remains protected where (1) the employee's speech address "matters of public concern,"[6] and (2) the employee's interest "in commenting upon matters of public concern" outweighs "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. The Court made clear in *Pickering* that, in order for the employer to regulate the employee's speech, the negative impact of the employee's expression must be substantial and material: If the speech of the employee—in *Pickering*, a public school teacher—"neither [was] shown nor can be presumed to have in any way either impeded the

[6] The test for "matters of public concern" is broad, encompassing speech that can "be fairly considered as relating to any matter of political, social, or other concern to the community," or speech that "is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Snyder v. Phelps*, 562 U.S. 443, 453 (2011).

teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally," then "the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public," and the employee's speech enjoys First Amendment protection. *Id.* at 568, 573.

Thus, when employees, speaking as private citizens, address matters of public concern, their speech remains protected by the First Amendment. This is true even if the matter of public concern relates to their employment. For example, in *Pickering*, the speaker was a teacher whose "erroneous" public criticism of his employer remained protected by the First Amendment. 391 U.S. at 573–74.

With respect to faculty members, First Amendment rights are even broader. The *Garcetti* Court explicitly reserved the question of whether its holding is applicable to expression "related to academic scholarship or classroom instruction" voiced by faculty at public colleges and universities, carefully noting that such speech may "implicate[] additional constitutional interests . . . not fully accounted for by this Court's customary employee-speech jurisprudence." 547 U.S. at 425. Lower courts have recognized *Garcetti's* reservation with respect to faculty speech.[7] Instead, "academic employee speech not covered by *Garcetti* is protected under the First Amendment, using the analysis established in *Pickering*[.]" *Demers v. Austin*, 746 F.3d 402, 412 (9th Cir. 2014).

In sum, UNA may not lawfully penalize or restrict faculty members for speaking as private citizens on matters of public concern or for speaking pursuant to their official duties when such speech is related to academic instruction or scholarship. Because UNA is bound by the First Amendment as a public, taxpayer-supported institution of higher education, the rights of its staff and faculty members to speak to the public, including student journalists, may not be ignored.

B. UNA's unwritten "protocol" cannot be squared with the university's obligations under the First and Fourteenth Amendments

In directing staff and faculty members not to speak to members of the media without approval by university officials, UNA's unwritten "protocol" impermissibly collides with the First Amendment rights of the university's constituents for a number of reasons.

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[7] *See Demers v. Austin*, 746 F.3d 402, 406 (9th Cir. 2014) ("We hold that *Garcetti* does not apply to 'speech related to scholarship or teaching'"); *Adams v. Trs. of the Univ. of N. Carolina Wilmington*, 640 F.3d 550, 564 (4th Cir. 2011) ("Applying *Garcetti* to the academic work of a public university faculty member . . . could place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment. That would not appear to be what *Garcetti* intended, nor is it consistent with our long-standing recognition that no individual loses his ability to speak as a private citizen by virtue of public employment."). *But cf. Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008) (applying *Garcetti* to a professor's complaints regarding proposed use of grant money, because grant administration fell within his teaching and service duties).

First, the policy is unwritten, depriving those it purports to govern from knowing what is or is not permitted.

Fundamental norms of procedural due process, however, require more. A "basic principle of due process" is that a regulation may not be enforced "if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Put another way, a rule must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Id.* These concerns apply "with particular force where" the rule "affects" speech. *The UWM Post, Inc., v. Board of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1178 (E.D. Wis. 1991). "Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked," and risk "arbitrary and discriminatory enforcement" by those applying the rule. *Grayned,* 408 U.S. at 108–09 (internal citations and quotations omitted). What UNA's policy requires, to whom it applies, and the potential consequences[8] for its breach are left to the imagination.

Second, because it is unwritten, the protocol fails to anticipate and account for the First Amendment rights of those it purports to guide, as set forth above, in its scope or enforcement process. The policy, as publicly disclosed, makes no effort to distinguish between speech on behalf of the institution or speech in a private capacity on matters of public concern. If faculty members are required to have their commentary vetted by an administrator for accuracy, they may be disinclined to discuss subjects within their expertise or speak critically of the institution. Further, faculty not only have no clear guidance on *when* they're supposed to "follow the media protocol," they're left to assume that *how* they follow the media protocol is to maintain silence unless they're told otherwise.

Third, to the extent the policy's requirements are ascertainable at all, it is clear that they abridge the First Amendment because the protocol mandates that "whatever is communicated to and through the media . . . has been vetted by administrators." Any requirement that commentary first be "vetted" by administrators before it is communicated to the public is an impermissible prior restraint on speech. Prior restraints are "the most serious and the least tolerable infringement on" freedom of expression. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). The threat prior restraints present to freedom of expression is so great that the "chief purpose" in adopting the First Amendment was to prevent their use. *Near v. Minnesota*, 283 U.S. 697, 713 (1931). Accordingly, "[a]ny system of prior restraints [bears] a heavy presumption against its constitutional validity." *Bantam*

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[8] In a welcome first step, the university now says that it will not "discipline" those who do not adhere to the policy. However, the university gives the policy the aura of enforceability by referring to it as a "protocol," and it is not clear whether there are potential consequences, other than formal discipline, which might occasion the policy's breach. The First Amendment does not apply only to formal discipline, but can apply to any "adverse action" sufficient to "chill a person of ordinary firmness from continuing" to engage in protected expression. *Scheffler v. Molin*, 743 F.3d 619, 621 (8th Cir. 2014). The policy is expressly intended to deter speech the university views as erroneous, and its failure to identify consequences for its breach increases, not decreases, the likelihood that university constituents might reasonably believe that *some* consequences may come to them and choose not to speak.

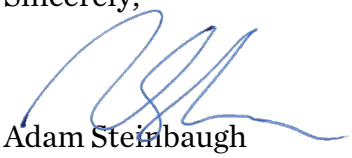
Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963). The university's interest in seeking to ensure that speech is "accurate" and "clear" is insufficient to justify any restriction on speech on matters of public concern, particularly with respect to faculty members commenting on matters within their expertise.

III. Conclusion

In failing to enshrine in writing what is expected of members of its community, the University of North Alabama writes off its community members' First Amendment rights. An invisible policy is contrary to the basic principles of due process under the Fourteenth Amendment, and offends the First Amendment rights a public university is obligated to uphold. If the university is to persist in its "protocol" at all, it must reduce it to a written policy that clearly and unequivocally upholds its community members' First Amendment rights.

We request receipt of a response to this letter no later than the close of business on December 11, 2018.

Sincerely,



Adam Steinbaugh
Director, Individual Rights Defense Program

Cc:
Harley Duncan, Managing Editor, *Flor-Ala*.

Encl.

Request for Records

This is a request for the following records pursuant to the Alabama Public Records Law (Ala. Code § 36-12-40 *et seq.*).

Records Requested:

1. A copy of any protocol, policy, or regulation which pertains to the responsibilities of employees, administrators, staff, or faculty members at the University of North Alabama with respect to interactions with members of the media.
2. For the period beginning January 1, 2015, to the present date, a copy of the "reminder to the local media regarding the protocol" sent each year by the Office of Communications and Marketing.
3. For the period of January 1, 2018, to the present date, any email sent to or received by any person employed within the Office of Communications and Marketing which references the aforementioned protocol, policy, or regulation.

Fee waiver request: This request is made on behalf of the Foundation for Individual Rights in Education, a nonprofit and nonpartisan organization that works to preserve civil liberties on college campuses. We request a waiver of any fees or costs associated with this request.

This request concerns a matter of public interest. The records sought pertain to the policy or practice of a public university with respect to what employees, staff, and faculty members are expected to do when they speak with members of the media. The records are not sought for a commercial or personal interest.

Request for expedited processing: The records pertain to a matter of public importance and current debate. Providing expedited production of the records will facilitate the public understanding of these matters before they are fully resolved. Any undue delay in production will undermine the purpose of the public records laws, which serve to allow public input and oversight of government affairs.

Request for Privilege Log: If any otherwise responsive documents are withheld on the basis that they are privileged or fall within a statutory exemption, please provide a privilege log setting forth (1) the subject matter of the document; (2) the person(s) who sent and received the document; (3) the date the document was created or sent; and (4) the basis on which it is the document is withheld.

Please note that this request does not seek a search of faculty or student email accounts or records. These requests should in no way be construed to include a review or search of email accounts, websites, or other forms of data or document retention which are controlled by students, alumni, or faculty members. Any search should be limited to documents held by the administration and/or its staff members.