



November 11, 2021

VIA OVERNIGHT DELIVERY SERVICE

Ms. Maria Feeley
Chief Legal Officer & General Counsel
Washington and Lee University
204 W. Washington Street
Lexington, Virginia 24450
mfeeley@wlu.edu

Re: Free Speech for College Republicans on Campus

Dear Ms. Feeley:

By way of introduction, the American Center for Law and Justice (“ACLJ”) is a non-profit organization dedicated to defending constitutional liberties secured by law. ACLJ attorneys have successfully argued numerous free speech and religious freedom cases before the Supreme Court of the United States¹ as well as before both federal and state trial and appellate courts.

The ACLJ has been approached by a concerned relative of a Washington and Lee (“W&L”) student regarding a recent incident on the W&L campus in which the College Republicans (“CR”) were told that they were not permitted to openly support political candidates for office, because such support allegedly endangered the University’s 501(c)(3) status. The implication was that actions by private individuals (to wit, W&L students) could endanger W&L’s status with the IRS.

We would suggest that, if that is a serious concern, it could be remedied quite easily by requiring a visible statement by such private individuals/club members disclaiming W&L’s agreement with,

¹*See, e.g.,* Pleasant Grove City v. Sumnum, 555 U.S. 460 (2009) (unanimously holding that the Free Speech Clause does not require the government to accept other monuments merely because it has a Ten Commandments monument on its property); McConnell v. FEC, 540 U.S. 93 (2003) (unanimously holding that minors enjoy the protection of the First Amendment); Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (unanimously holding that denying a church access to public school premises to show a film series on parenting violated the First Amendment); Bd. of Educ. v. Mergens, 496 U.S. 226 (1990) (holding by an 8–1 vote that allowing a student Bible club to meet on a public school’s campus did not violate the Establishment Clause); Bd. of Airport Comm’rs v. Jews for Jesus, 482 U.S. 569 (1987) (unanimously striking down a public airport’s ban on First Amendment activities).



or support of, their actions/advocacy. Two possible disclaimer statements are provided for your consideration:

DISCLAIMER: As an institution of higher learning, W&L is committed to the free and robust exchange of ideas on its campus. However, W&L does not take sides in political contests and neither supports nor opposes individual candidates for public office. Accordingly, the views expressed by [insert the name of the Club] are those of the individuals expressing them and not necessarily those of the University, its Board of Trustees or any other employee of the University.

Or perhaps:

DISCLAIMER: The views expressed and the causes or candidates supported reflect the private views and choices of the members of [insert name of Club] and do not necessarily reflect the views or position of the University, its Board of Trustees, or any other employee of the University. W&L strictly adheres to a policy of neither supporting nor opposing candidates for public office.

The University's contrary position with respect to a Club committed to a political philosophy and its candidates for office (especially during an ongoing election campaign) seems a bit bizarre in light of the University's Mission Statement that purports to provide "a liberal arts education" as well as to prepare graduates for *inter alia* "engaged citizenship."² Liberal arts universities have traditionally been proponents of a robust exchange of views in the proverbial "marketplace of ideas." W&L's position also seems to violate the University's Diversity Statement³ which, though calling for a community embodying "many experiences, cultures, points of view, interests, and identities," then shuts down one of the most common ways citizens actually engage "in a global and diverse society" "through open and substantive dialogue," to wit, through advocacy during an election campaign.

The ACLJ is not the only public interest organization to notice what appears to be an anomalous policy for an institution claiming to be a liberal arts university that values "engaged citizenship" as well as engagement "in a global and diverse society." We will not repeat the arguments made by the Foundation for Individual Rights in Education ("FIRE") in its letter to you of September 23, 2021, but we believe that many of its points are valid.

We do note that a recent W&L posting, entitled "Political Activities on Campus", stated that W&L's "longstanding" guidance on such matters

is in place to protect the university's non-profit status by complying with Internal Revenue Code § 501(c)(3). The university's guidance applies to the distribution of campaign materials by a student organization *under circumstances where the university may be perceived to be endorsing a candidate for public office*. The

² *Mission & Vision*, WASH. & LEE, <https://www.wlu.edu/the-w-l-story/mission-and-vision/> (last visited Nov. 11, 2021).

³ *Institutional Efforts and Leadership*, WASH. & LEE, <https://www.wlu.edu/the-w-l-story/diversity-equity-and-inclusion/institutional-efforts-and-leadership/> (last visited Nov. 11, 2021).

guidance is not intended to, nor does it, infringe upon an individual student's political expression.⁴

As stated earlier, we believe that W&L can both protect its 501(c)(3) status AND avoid infringing upon an individual student's political expression (which expression does include advocating for and/or opposing individual candidates for public office) by requiring the use of a disclaimer. A disclaimer would serve to rebut any perception of University endorsement of a candidate for a public office or an issue of public concern.

We also noted that W&L has posted a "Statement Concerning Political Activity"⁵, which reads, in part, as follows:

Internal Revenue Code § 501(c)(3) requires, as a condition for tax-exemption, that *organizations* "not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." This prohibition is absolute, and includes distribution of statements prepared by others that favor or oppose any candidate for public office.⁶

In light of court decisions and the IRS ruling cited below, we believe that the phrase, "[t]his prohibition is absolute," applies only to those who represent the University in an official capacity, not to private individuals (like students) expressing their own, private views. Note also that the prohibition applies to "organizations," not individuals.

Legal Analysis

In light of the above, we respectfully offer the following legal analysis. While it is true that the University itself is prohibited from engaging in certain political activities,⁷ there is a clear difference between the University as an institution and a student organization that speaks only for itself and its members. In that sense, it is no different than a student expressing his or her political views, which is a classically protected free speech activity.

This understanding of the demarcation between the University's political expression and the student organization's political expression is not at all controversial. In fact, in its written policies, the University itself seems to get it right, noting that "Student political organizations (College Republicans, Young Democrats, etc.) are not prohibited from pursuing their normal activities

⁴ *Political Activities on Campus*, WASH. & LEE, <https://www.wlu.edu/alumni/key-communications-for-alumni/political-activities-on-campus/> (last visited Nov. 11, 2021) (emphasis added).

⁵ *Statement Concerning Political Activity*, WASH. & LEE, <https://my.wlu.edu/general-counsel/answer-center/political-activity/statement-concerning-political-activity> (last visited Nov. 11, 2021).

⁶ *Id.* (emphasis added).

⁷ *Id.*

consistent with the academic nature of their endeavors.”⁸ As FIRE has already pointed out,⁹ the relevant case law¹⁰ and IRS materials¹¹ are all in accord.

In *Widmar v. Vincent*, for example, the question was “whether a state university, which makes its facilities generally available for the activities of registered student groups, may close its facilities to a registered student group desiring to use the facilities for religious worship and religious discussion.”¹² Justice Powell, writing for the majority, explained that,

an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices. . . . [S]uch a policy would no more commit the University . . . to religious goals than it is now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance, or any other group eligible to use its facilities.¹³

Though W&L is a private university, the *Widmar* analysis is certainly relevant. It seems quite reasonable to assume that W&L is not automatically and/or inevitably committed to every goal of a W&L student organization (such as CR) merely because the student organization is a recognized club and conducts its activities on University grounds.

In *Board of Education v. Mergens*, Justice O’Connor makes essentially the same point.¹⁴ Here, the Court had to decide whether the Equal Access Act prohibited a high school “from denying a student religious group permission to meet on school premises during noninstructional time, and if so, whether the Act, so construed, violate[d] the Establishment Clause of the First Amendment.”¹⁵ Within this context, Justice O’Connor explained that, “[t]o the extent a school makes clear that its recognition of respondents’ proposed club is not an endorsement of the views of the club’s participants . . . students will reasonably understand that the school’s official recognition of the club evinces neutrality toward, rather than endorsement of, religious speech.”¹⁶ Similar to the *Widmar* analysis, it seems quite reasonable to assume that IRS employees are more than capable of differentiating between W&L student club activities versus W&L University endorsed activities. In fact, the following comments make this even more clear.

The “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.”¹⁷ Moreover, in order to constitute participation or intervention in a political campaign, “the political activity must be

⁸ *Id.*

⁹ Letter from Sabrina Conza, Program Analyst, FIRE, to Maria Feeley, Chief Legal Officer, WASH. & LEE (Sep. 23, 2021), <https://www.thefire.org/fire-letter-to-washington-lee-university-september-23-2021/>.

¹⁰ See *Widmar v. Vincent*, 454 U.S. 263, 274 (1981).

¹¹ See I.R.S. Rev. Rul. 72-513, 1972-2 C.B. 246. See also JUDITH E. KINDELL & JOHN FRANCIS REILLY, ELECTION YEAR ISSUES: EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 2002, 365 (2002), <http://www.irs.gov/pub/irs-tege/eotopici02.pdf>.

¹² *Widmar v. Vincent*, 454 U.S. at 264–65.

¹³ *Id.* at 274 (internal quotations omitted) (internal citations omitted).

¹⁴ *Board of Educ. v. Mergens*, 496 U.S. 226, 251 (1990)

¹⁵ *Id.* at 231.

¹⁶ *Id.* at 251 (internal citation omitted).

¹⁷ KINDELL & REILLY, *supra* note 11.

that of the college or university and not the individual activity of its faculty, staff, or students.”¹⁸
The following IRS Revenue Ruling evidences this as well:

The provision of facilities and faculty advisors for a campus newspaper that publishes the students’ editorial opinions on political and legislative matters does not constitute an attempt by the university to influence legislation or participate in political campaigns. . . .

[T]he fact that the university furnishes physical facilities and faculty advisors in connection with the operation of the student newspaper does not make the expression of political views *by the students* in the publishing of the newspaper the acts of the university within the intendment of section 501(c)(3) of the Code.¹⁹

Based on the above analysis, we believe that W&L has adopted a policy *against student advocacy for political candidates* based on an incorrect understanding of the law.

Conclusion

In light of the law discussed above, we believe that W&L should revisit its policy, taking into account the fact that private student expression and/or advocacy should not disturb W&L’s 501(c)(3) status, provided that the University and/or its officials are not directing or encouraging students to support a particular candidate or issue of public concern. If W&L is merely providing its students with an opportunity to express their personal views or advocate for their preferred candidates, the University should not run afoul of the IRS regulations. In our view, such a policy revision would also better accord with the principles W&L otherwise espouses.

Should W&L officials desire to discuss these issues further, we stand ready to assist you in any way we can.

Respectfully yours,



Marshall H. Goldman
Senior Litigation Counsel

cc: President William C. (Will) Dudley

¹⁸ *Id.* at 377–78.

¹⁹ Rev. Rul. 72-513, 1972-2 C.B. 246, <https://www.irs.gov/pub/irs-tege/rr72-513.pdf> (emphasis added).



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VIA OVERNIGHT DELIVERY SERVICE

President William C. Dudley
Washington and Lee University
Washington Hall, 2nd Floor
204 West Washington Street
Lexington, VA 24450

Dear President Dudley:

Attached please find a letter that we sent to Ms. Maria Feeley regarding a recent incident on the Washington and Lee campus in which the College Republicans were told that they were not permitted to openly support political candidates for office.

Should Washington and Lee officials desire to discuss these matters further, we stand ready to assist you in any way we can.

Thank you for your kind attention to this matter.

Respectfully yours,

A handwritten signature in blue ink, appearing to read "Marshall H. Goldman".

Marshall H. Goldman
Senior Litigation Counsel

