FIRE
Foundation for Individual Rights in Education

September 7, 2018

Marcelo Casillas
Chair, Board of Trustees
Alamo Colleges District
201 W. Sheridan Street, Building A
San Antonio, Texas 78204-1429

Sent via Express Mail and Electronic Mail (mcasillas45@alamo.edu)

URGENT

Dear Mr. Casillas:

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 about the threat to faculty expressive rights posed by Policy C.4.1 (titled "(Policy) Communications"), currently under consideration by the Board of Trustees of the Alamo Colleges District ("ACD"). If adopted, the policy will violate ACD's binding legal obligations under the First Amendment by restricting faculty members' ability to communicate with the press and the general public on matters of public concern. We review each of Policy C.4.1's provisions in turn below.

As an initial matter, however, we remind you that the First Amendment is fully binding on public institutions such as the constituent colleges of ACD. *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.'"). The Supreme Court of the United States has "long recognized that, given the important purpose of public

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education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003). 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 ACD 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). However, 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." *Id.* at 425. Lower courts have recognized *Garcetti's* reservation with respect to faculty speech.[1]

Instead, "academic employee speech not covered by *Garcetti* is protected under the First Amendment, using the analysis established in *Pickering v. Board of Education*, 391 U.S. 563 (1968)." *Demers v. Austin*, 746 F.3d 402, 412 (9th Cir. 2014). The *Pickering* test provides that an employee's speech remains protected where (1) the employee's speech address "matters of public concern," 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 teacher's expression must be substantial and material: If the teacher's speech "neither [was] shown nor can be presumed to have in any way either impeded the 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

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[1] *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).

than its interest in limiting a similar contribution by any member of the general public," and the teacher's speech enjoys First Amendment protection. *Id.* at 568, 573. (It is important to note that *Garcetti* also left intact the First Amendment rights of all public employees to speak as private citizens on matters of public concern.)

In sum, ACD is bound by the First Amendment as a public, taxpayer-supported institution of higher education. Generally speaking, ACD 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.

With this binding legal framework in mind, we turn now to the specific policy provisions of C.4.1 that would unlawfully infringe upon the First Amendment rights of ACD faculty.[2] Relevant sections are excerpted below:

> GOVERNMENT RELATIONS
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> [...]
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> Communication with regional, state and federal officials should be coordinated through the DSO [District Support Operations] Communications Office.
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> [...]
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> CONTACT WITH THE MEDIA AND STUDENT MEDIA
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> Employees must also direct all media requests to the DSO Communications Office or their college PR office.
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> [. . .]
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> All employees who handle media requests must have passed the State of Texas Open Records Act online course and must participate in media relations courses offered by the DSO Communications Office.

[2] Although outside the scope of this letter, two policies currently in force, ACD Policy B.5.2, titled "(Policy) Board Member Authority" and Policy B.8.1, titled "(Policy) Board Meetings," and summarized in Policy. B.8.1.1, titled "Administrative Remedies Before Resort to Citizens to Be Heard," suffer from similar defects by limiting faculty and student rights to communicate with board members. FIRE urges ACD to rescind these policies.

> [. . .]
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> When an employee is going to be interviewed by a reporter they must notify the DSO Communications Office or the college PR office in advance. This will allow the Communications Office or college PR office to contact the reporter to find out if additional information or interviews are needed.
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> [. . .]
>
> PRESS RELEASES
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> [...]
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> Departments planning joint events or initiatives with external organizations must notify the communication or PR office in the early stages of the planning to ensure a smooth and cohesive joint communication and marketing initiative.
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> [. . .]
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> CONTROVERSIAL CATASTROPHIC EVENTS
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> All administrators will keep the DSO Communications Office or college PR office informed of events and activities that are likely to make the news. Types of stories to be reported are those with a potential for controversy, those that might be considered negative or embarrassing, those that threaten public health and safety, and those that might produce follow-up questions from the media. The college PR offices and the DSO Communications Office will coordinate on all controversial or catastrophic events.
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> [...]
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> Information should not be released by employees who are not designated to speak with the media.

Both individually and in the aggregate, these requirements impermissibly burden faculty expression protected by the First Amendment. By effectively requiring faculty members to obtain administrative approval prior to speaking to the media, government figures, or external organizations, ACD has imposed a prior restraint on faculty speech. Prior restraints are "the

most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). "Any system of prior restraints of expression [bears] a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). As the Supreme Court has observed, a requirement that one inform authorities of their desire to speak, and obtain permission to do so, is "offensive—not only to the values protected by the First Amendment, but to the very notion of a free society." *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 165–66 (2002).

Simply put, ACD has no authority to force faculty members to secure governmental permission or provide the institution with notice before speaking to the press or the general public about scholarly work, events, activities, expertise, accomplishments, or interests. ACD faculty cannot be forced to submit to the oversight of ACD administrators, for example, when communicating with "regional, state and federal officials," when "interviewed by a reporter," when "planning joint events or initiatives with external organizations," or when responding to stories "with a potential for controversy," "that might be considered negative or embarrassing," or "that might produce follow-up questions from the media." Because the policy dictates otherwise, it is at odds with the First Amendment and must be revised immediately.

The legal and practical problems with Policy C.4.11 should be immediately apparent. Consider a faculty member who wishes to speak to media about the forthcoming publication of a book she has authored. Per the policy, ACD's District Support Operations Communications Office possesses sole authority to control "developing, directing, and implementing the overall ACD DSO community and media relations function." This provision operates as a gag order on the faculty member and unacceptably subordinates her voice to that of the institution. Faculty contacted about their work by journalists must be free to answer their queries by themselves, without administrative management or fear of retaliatory punishment.

Likewise, both individual faculty members and faculty groups must be free to speak publicly about ACD's decision-making. While "not all speech by a teacher or professor addresses a matter of public concern," and may instead involve "purely private matters," ACD must recognize that "academics, in the course of their academic duties, also write memoranda, reports, and other documents addressed to such things as a budget, curriculum, departmental structure, and faculty hiring," and comments on these matters "may well address matters of public concern." *Demers v. Austin*, 746 F.3d 402, 415–16 (9th Cir. 2014); *see also Gardetto v. Mason*, 100 F.3d 803, 813 (10th Cir. 1996) ("The objectives, purposes, and mission of a public university are undoubtedly matters of public concern. Moreover, in general, speech about the use of public funds touches upon a matter of public concern . . . . Similarly, complaints about the proposed closing of a branch of a university or its spending priorities, when these decisions affect the basic functions and missions of the university, also constitute speech on

matters of public concern.") As the U.S. Court of Appeals for the Ninth Circuit noted, "in *Pickering* itself the teacher's protected letter to the newspaper addressed operational and budgetary concerns of the school district." *Demers,* 746 F.3d at 416.

Accordingly, faculty members who comment upon or criticize ACD may not be punished simply because they did not obtain administrative permission to do so. As the *Pickering* Court made plain:

> Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.

391 U.S. at 572. Even if the faculty expression at issue is critical of ACD, it is protected if it involves a matter of public concern and can "neither [be] shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally." *Id.* at 572–73. In such circumstances, ACD's interest "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." *Id.* at 573.

If faculty do not communicate that they are speaking on behalf of ACD or its constituent colleges, they retain the right to disclose their experience and position as part of their commentary on matters of public concern. *Pickering* prevents ACD from denying faculty the ability to note their "official title or status" when they comment as private citizens on matters of public concern. In upholding the right of a teacher to write a letter to the editor referencing his position, the *Pickering* Court rejected the notion "that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work[.]" *Id.* at 568. Private citizens have a First Amendment right to disclose their places of employment or professional expertise. A great deal of public commentary seeks to root its credibility and persuasiveness in the "official title or status" of the speaker. Indeed, the U.S. Court of Appeals for the Fifth Circuit recently noted that a faculty member's status as an employee of a public university may make his private commentary on the issue of tenure "of greater interest to the public given his unique experience and vantage point." *Wetherbe v. Tex. Tech Univ. Sys.*, 699 F. App'x 297, 300 (5th Cir. 2017).

ACD's policy's requirement that "all employees who handle media requests must have passed the State of Texas Open Records Act online course and must participate in media relations courses offered by the DSO Communications Office" is also suspect under *Pickering*. If the policy is meant to apply only to those ACD employees who handle media requests as part of their regular duties or outlined in their job description, the policy may be permissible if its language clarifies that its requirements apply only to that specific set of ACD employees.

The defect could easily be remedied with a modest amendment to the policy:

> All employees who handle media requests **as part of their regular duties** must have passed the State of Texas Open Records Act online course and must participate in media relations courses offered by the DSO Communications Office.

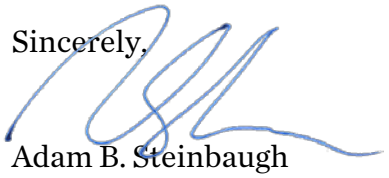
Yet this policy, as proposed, is constitutionally overbroad because it impermissibly abridges the rights of private citizens, which ACD faculty retain, to speak on matters of public concern without passing a course on media relations developed by ACD's communications office. Moreover, there does not appear to be any requirement under the Texas Public Information Act that requires individuals speaking as private citizens to pass a state-run online course before exercising their constitutional right to communicate with journalists.

Moreover, the potential for the application of Policy C.4.1 in a viewpoint discriminatory manner renders it still more troubling. Because the policy's several flaws include the lack of limiting language with regard to that provision's scope or application, an administrator is empowered to "manage" a dissenting, critical, controversial, or unpopular faculty member's interactions with the media in a way that effectively silences or fundamentally alters the faculty member's message. Again, ACD does not possess the legal authority to "make the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official." *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969).

Were ACD to adopt a policy that imposes a prior restraint on faculty speech, ACD would exhibit a deeply disappointing disregard for the expressive rights of its faculty. As a public college bound by the First Amendment, ACD may not condition its faculty members' right to speak to journalists or members outside the ACD community on administrative approval or notice. FIRE asks that ACD decline to adopt Policy C.4.1 in its recognition of the essentiality of freedom of expression and academic freedom on public university campuses, consistent with Supreme Court jurisprudence and the core tenets of higher education.

We request a response to this letter by September 21, 2018.

Sincerely,



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Encl.