



September 15, 2017

*Via U.S. Mail and Email*

Dr. Robin G. Cummings  
Office of the Chancellor  
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**Re: UNCP Unlawful Speech Zone Policies**

Dear Chancellor Cummings:

Young Americans for Liberty at University of North Carolina Pembroke (“YAL”), chapter affiliate of the national organization Young Americans for Liberty, is an association of students seeking to form a registered student organization at University of North Carolina Pembroke (“UNCP”). YAL contacted Alliance Defending Freedom’s Center for Academic Freedom regarding UNCP’s speech and solicitation policies’ impact on its ability to effectively speak on campus. These policies violate recently enacted North Carolina law and the First Amendment of the United States Constitution. On behalf of our clients, we ask that you immediately revise UNCP’s speech policies to conform to the First Amendment.

By way of introduction, Alliance Defending Freedom (ADF) is an alliance-building, non-profit legal organization that advocates for the right of people to freely live out their faith.<sup>1</sup> ADF’s Center for Academic Freedom is committed to protecting freedom of speech and association for students and faculty so that everyone can freely participate in the marketplace of ideas without fear of censorship.

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<sup>1</sup> Alliance Defending Freedom has achieved successful results for its clients before the United States Supreme Court, including six victories before the highest court in the last six years. *See e.g. Trinity Lutheran Church of Columbia, Inc. v. Comer*, No. 15-577, 2017 WL 2722410 (U.S. June 26, 2017) (striking down state burden’s on ADF’s client’s free-exercise rights); *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (per curiam) (successful result for religious colleges’ free exercise rights); *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015) (unanimously upholding ADF’s client’s free-speech rights); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (striking down federal burden’s on ADF’s client’s free-exercise rights); *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811 (2014) (upholding a legislative prayer policy promulgated by a town represented by ADF); *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011) (upholding a state’s tuition tax credit program defended by a faith-based tuition organization represented by ADF).

Unfortunately, UNCP maintains at least two policies that, as explained below, restrict this marketplace and violate North Carolina Law and the First Amendment: its speech zone policy and its anti-solicitation policy. ADF notified the University of the speech zone's constitutional infirmities via letter dated November 28, 2012.<sup>2</sup> Since then, the North Carolina legislature has passed legislation prohibiting speech zones on public university campuses, and we now write to you on behalf of our client, YAL.

### **Factual Background and Policies**

YAL is comprised of students at UNCP who associate together to promote the natural rights of life, liberty, and property set forth by the Founding Fathers. It recognizes that government was created to protect the freedoms of the individual, and that freedom requires individual responsibility. Its members associate together to learn about and promote these ideals. This semester, YAL began a drive to recruit additional members in order to meet the ten-member threshold required to be recognized as a student organization at UNCP.

On August 18, 2017, in order to promote its mission and recruit members, YAL hosted a free speech event where students could write pro-free-speech messages on a large beach ball and where YAL could collect information about students who may be interested in joining the organization. After planning the event, YAL members discovered that UNCP policy 04.05.01 requires advance registration in order to speak on campus and that even after registration, speech activities are limited to two small zones on campus.<sup>3</sup> Further, under policy 04.05.02, "any activity conducted for the purpose of . . . encouraging membership or participation in any event, group, association or organization," "is prohibited unless approved" under the policy, and "[t]he Office of the Vice Chancellor for Student Affairs reserves the right to approve any and all solicitations."<sup>4</sup> Furthermore, if approved, membership drives may only be conducted in the speech zones, must be approved at least four days in advance and all literature distributed must include the sponsor's phone number and an "alternative format statement."<sup>5</sup> In addition, "[o]ffensive, obscene, inflammatory advertising, etc. will not be permitted."<sup>6</sup>

As explained below, these policies are unconstitutional and violate state law. YAL declines to submit to pre-registration for its speech or to limit its expression to small speech zones. While UNCP has declined to punish YAL for its violation of these policies to date, YAL remains subject to these policies – chilling its speech and risking punishment anytime it exercises its rights in violation of these policies.

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<sup>2</sup> Letter from Mathew Sharp, Legal Counsel, to Kyle Carter, Chancellor, UNCP (Nov. 28, 2012) (on file with Alliance Defending Freedom).

<sup>3</sup> POL 04.05.01 Free Speech Event Policy, available at [www.uncp.edu/about-uncp/administration/policies-and-regulations/all-policies/pol-040501-free-speech-event-policy](http://www.uncp.edu/about-uncp/administration/policies-and-regulations/all-policies/pol-040501-free-speech-event-policy).

<sup>4</sup> POL 04.05.02 Solicitation on University Property Policy at 8.9, 3.1, available at [www.uncp.edu/about-uncp/administration/policies-and-regulations/all-policies/pol-040502-solicitaiton-university-property-policy](http://www.uncp.edu/about-uncp/administration/policies-and-regulations/all-policies/pol-040502-solicitaiton-university-property-policy).

<sup>5</sup> *Id.* at 3.3.

<sup>6</sup> *Id.* at 7.2.1.

## Analysis

These policies, on their face, constitute an impermissible prior restraint on speech and discriminate based on content and viewpoint. In addition, as applied, permitting administrators to exercise unbridled discretion as to when to enforce the policies violates the First Amendment.

As you are well aware, “state colleges and universities are not enclaves immune from the sweep of the First Amendment.”<sup>7</sup> In fact, “the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools,”<sup>8</sup> because “the core principles of the First Amendment ‘acquire a special significance in the university setting, where the free and unfettered interplay of competing views is essential to the institution’s educational mission.’”<sup>9</sup> UNCP’s speech zone and solicitation policies violate North Carolina law and are unconstitutional because they act as a prior restraint on speech, grant administrators unbridled discretion to disfavor speakers due to their viewpoint or due to the perceived controversial nature of their viewpoints, and restrict the content and viewpoint of student expression.

### **I. UNCP’s speech zone and solicitation policies are unconstitutional because they operate as a prior restraint, and are content and viewpoint discriminatory.**

Limiting student free speech to a restricted location on campus is unreasonable and violates the free speech rights of every student.<sup>10</sup> The public spaces of campus must be open to free speech for all students. Not only is the “college classroom with its surrounding environs . . . peculiarly the ‘marketplace of ideas,’”<sup>11</sup> but the Supreme Court also “has recognized that the campus of a public university, at least for its students, possesses many of the characteristics of a public forum.”<sup>12</sup>

Thus, “to the extent the campus has park areas, sidewalks, streets, or other similar common areas, these areas are public forums, at least for the University’s students, irrespective of whether the University has so designated them or not. These areas comprise the irreducible public forums on the campus.”<sup>13</sup> Thus, they must be open to free debate and expression for all students at your school. The university may open up more of the residual campus as public forums for its students, but it may not designate less.

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<sup>7</sup> *Healy v. James*, 408 U.S. 169, 180 (1972).

<sup>8</sup> *Id.* (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

<sup>9</sup> *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1016 (N.D. Cal. 2007) (quoting *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 863 (E.D. Mich. 1989)).

<sup>10</sup> *See, e.g., Roberts v. Haragan*, 346 F. Supp. 2d 853, 863 (N.D. Tex. 2004).

<sup>11</sup> *Healy*, 408 U.S. at 180.

<sup>12</sup> *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981).

<sup>13</sup> *Roberts*, 346 F. Supp. 2d at 861-862; *accord Justice for All v. Faulkner*, 410 F.3d 760, 766-69 (5th Cir. 2005); *Smith v. Tarrant Cnty. Coll. Dist.*, 694 F. Supp. 2d 610, 625 (N.D. Tex. 2010) (“Typically, at least for the students of a college or university, the school’s campus is a designated public forum.”); *Univ. & Cmty. Coll. Sys. of Nev. v. Nevadans for Sound Gov’t*, 100 P.3d 179, 190 (Nev. 2004) (“Typically, when reviewing restrictions placed on students’ speech activities, courts have found university campuses to be designated public forums.”); *Univ. of Cincinnati Chapter of Young Ams. for Liberty v. Williams*, 2012 WL 2160969, at \*4 (S.D. Ohio June 12, 2012) (noting that the Sixth Circuit found such campus locations to be designated public fora (citing *McGlone v. Bell*, 681 F.3d 718, 732 (6th Cir. 2012); *Hays Cnty. Guardian v. Supple*, 969 F.2d 111 at 116 (5th Cir. 1992)); *Pro-Life Cougars v. Univ. of Hous.*, 259 F. Supp. 2d 575, 681-82 (S.D. Tex. 2003).

Here, far from recognizing the public areas of campus as public fora or even designated public fora for students, UNCP policies limit speech events to two small zones and forbid the distribution of literature, including student club membership drive literature, unless it is pre-approved and only distributed in the speech zones.<sup>14</sup> Furthermore, UNCP policies restrict the content of literature distributed,<sup>15</sup> prohibit anonymous speech,<sup>16</sup> prohibit spontaneous speech,<sup>17</sup> and grant unbridled discretion to administrators who may approve or disapprove of the speech based on its content or viewpoint.<sup>18</sup> Each of these restrictions violates the First Amendment. Public colleges may establish reasonable “time, place and manner” restrictions on expressive activity in order to limit disruptions to college activities. However, these restrictions must be content neutral and “narrowly tailored” to “serve a significant governmental interest,” and they must “leave open ample alternative channels for communication.”<sup>19</sup>

First, a blanket pre-approval and registration requirement for speech and literature distribution is not a reasonable time, place, and manner restriction, nor is it narrowly tailored to any significant interest.<sup>20</sup> “[A] law requiring a permit to engage in such speech constitutes a dramatic departure from our national heritage and constitutional tradition.”<sup>21</sup>

Second, banning literature which administrators deem to be “[o]ffensive, obscene, inflammatory”<sup>22</sup> is content and viewpoint discrimination prohibited by the First Amendment,<sup>23</sup> and permits unbridled discretion because there is no object definition to “offensive.”<sup>24</sup> Third, the policy provides that “All solicitations [including at least some non-commercial literature

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<sup>14</sup> Pol. 04.05.01 Free Speech Event Policy; Pol. Solicitation on University Property Policy 04.05.02 at 6.1-6.3, 8.9).

<sup>15</sup> Pol. 04.05.02 Solicitation on University Property Policy at 7.2.1 (“Offensive, obscene, inflammatory advertising, etc. will not be permitted....”).

<sup>16</sup> Pol.04.05.02 Solicitation on University Property Policy at 7.2.1 (requiring the name of the sponsor to be on all distributed literature), 3.3 (require that literature include the distributor’s phone number and an “alternative format statement.”).

<sup>17</sup> Pol. 04.05.01 Free Speech Event Policy (requiring advance registration for use of the speech zones); Pol. 04.05.02 Solicitation on University Property Policy at 6.1 (requiring pre-approval for literature distribution and membership drives with at least a four day waiting period).

<sup>18</sup> See Pol. 04.05.01 Free Speech Event Policy and Pol. 04.05.02 Solicitation on University Property Policy (failing to list exhaustive, neutral criteria to guide administrators decisions whether to approve use of the speech zones or whether to approve literature distributions or membership drives).

<sup>19</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

<sup>20</sup> *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 167 (2002).

<sup>21</sup> *Id.*

<sup>22</sup> Pol. 04.05.02 Solicitation on University Property Policy at 7.2.1 (“Offensive, obscene, inflammatory advertising, etc. will not be permitted. No posters are permitted in which alcohol consumption or alcohol, weapons, and tobacco sales are part of the advertisement.”).

<sup>23</sup> *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (citation and quotations omitted) (“We have said time and again that ‘the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.’”); *Westfield High Sch. L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98, 123-24 (D. Mass. 2003) (holding high school policy limiting distribution to “curriculum or activity related literature” was unconstitutional content discrimination).

<sup>24</sup> See *Westfield*, 249 F. Supp. 2d at 125; *Forsyth Cty., Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (citation and quotations omitted) (“A government regulation that allows arbitrary application is inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.”).

distribution<sup>25]</sup> must include contact information for the responsible party including [the student's] phone number and the alternative format statement.”<sup>26</sup> However, the United States Supreme Court has repeatedly made clear that bans on anonymous publications violate the First Amendment.<sup>27</sup> Fourth, requiring pre-approval for literature distribution effectively bans spontaneous speech or demonstration and operates as a prior restraint. Such spontaneous speech is protected by the First Amendment,<sup>28</sup> and “[a]ny system of prior restraints of expression comes to [the Supreme] Court bearing a heavy presumption against its constitutional validity.”<sup>29</sup> Lastly, the policies grant unbridled discretion to administrators because it fails to limit their discretion with “*narrow, objective, and reasonable standards* by which the material will be judged,” permitting viewpoint discrimination.<sup>30</sup>

Just last year, the Federal District Court for the Eastern District of North Carolina enjoined North Carolina State’s non-commercial solicitation policy for similar constitutional violations to those at issue here.<sup>31</sup>

## II. UNCP’s speech zone and solicitation policies violate recently enacted North Carolina law.

On June 30, 2017, HB 527 became law, affirming that at public universities in North Carolina, “[s]tudents and faculty shall be permitted to assemble and engage in spontaneous expressive activity,” “[i]t is not the proper role of any [University] to shield individuals from speech protected by the First Amendment, including, without limitation, ideas and opinions they find unwelcome, disagreeable, or even deeply offensive,” and any restrictions on speech must be content and viewpoint neutral, and narrowly tailored.<sup>32</sup> Furthermore, under the new law, UNCP must comply with the legal standards for designated public forums.<sup>33</sup> As noted above, UNCP’s current policies fail these standards as required by HB 527.

UNCP’s inconsistent (at best) enforcement of these policies highlights that the University does not have a compelling interest in enforcing these policies and also opens the University to additional claims of unbridled discretion and viewpoint or content discrimination in the event it enforces the policy against other speech. Yet, YAL members and other students are required to take the risk of punishment for exercising their First Amendment rights. As noted above, similarly

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<sup>25</sup> Pol. 04.05.02 Solicitation on University Property Policy at 8.9.

<sup>26</sup> Pol. 04.05.02 Solicitation on University Property Policy at 3.2-3.3, 6.1-6.3, 8.9.

<sup>27</sup> See e.g. *Talley v. California*, 362 U.S. 60, 64 (1960); *Watchtower*, 536 U.S. at 166.

<sup>28</sup> *Watchtower*, 536 U.S. at 167-68.

<sup>29</sup> *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). See also *Westfield*, 249 F. Supp. 2d at 127 (holding that high school’s prior restraint on literature distribution was unconstitutional).

<sup>30</sup> See *Westfield*, 249 F. Supp. 2d at 125; *Forsyth Cty., Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (citation and quotations omitted) (“A government regulation that allows arbitrary application is inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.”).

<sup>31</sup> *Grace Christian Life v. Woodson*, No. 5:16-CV-202-D, 2016 WL 3194365 (E.D.N.C. June 4, 2016).

<sup>32</sup> An Act to Restore and Preserve Free Speech on the Campuses of the Constituent Institutions of the University of North Carolina, Session, Session Law 2017-198 (HB 527), available at <http://www.ncleg.net/Sessions/2017/Bills/House/PDF/H527v6.pdf>.

<sup>33</sup> *Id.*

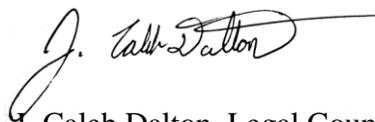
inconsistently-enforced policies at North Carolina State were recently enjoined by a federal district court.<sup>34</sup>

The University should immediately revise its policies to recognize that publicly accessible areas of the campus are designated public fora for speech by members of the campus community and that limiting speech activities to small zones is not justified by a compelling interest, nor implemented in the least restrictive manner. Furthermore, its policies should be revised to make clear that distribution of literature by students and student organizations, including as part of membership drives, is not subject to prior approval, is not banned because of its “offensive” content or viewpoint, and is not subject to being banned at the discretion of any University official.

### Conclusion

At our nation’s universities, even more so than in other fora, “free speech is of critical importance because it is the lifeblood of academic freedom.”<sup>35</sup> While our clients are gravely concerned at the threat UNCP’s speech and solicitation policies pose to their and their fellow students rights, given UNCP’s initial decision to forgo enforcement of its policies, we are sending this letter in a spirit of cooperation. It is our hope that UNCP will promptly correct these policies by eliminating the speech zones and anti-solicitation policies as they relate to students. In fact, we would happily work with you to revise these policies to comply with the First Amendment. Many large public institutions around the country have successfully balanced their institutional interests while fully protecting campus members’ free speech rights and we would be happy to assist in such an endeavor here. If you are serious about reforming these policies and avoiding litigation, please contact us by September 29, 2017. Otherwise, our clients will seek other avenues for vindicating these freedoms.

Sincerely,



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<sup>34</sup> *Grace Christian Life v. Woodson*, No. 5:16-CV-202-D, 2016 WL 3194365 (E.D.N.C. June 4, 2016).

<sup>35</sup> *DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008).