

October 22, 2024

Neeli Bendapudi
Office of the President
Pennsylvania State University
201 Old Main
University Park, Pennsylvania 16802

URGENT

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

Dear President Bendapudi:

FIRE¹ and the ACLU of Pennsylvania² have received complaints that Penn State is restricting students' ability to engage in election-related expressive activities on campus in violation of both its constitutional obligations and, seemingly, its own established policies. These reported restrictions are the most recent in a concerning pattern of Penn State suppressing political speech, which FIRE also raised in its September 27 letter (enclosed) regarding the removal of political advertising from *Daily Collegian* newsstands and newspapers. Penn State's failure to respond to those concerns, now coupled with new reports of restrictions on students' election-related activities, raises serious alarm about the university's commitment to, and compliance with, its legally binding First Amendment obligations.

As you know, as a public university Penn State is bound by the First Amendment. Its actions and decisions must comply with the First Amendment's requirements, including the "right to participate in the public debate through political expression and political association."³

¹ For more than 20 years, FIRE has defended freedom of expression, conscience, and religion, and other individual rights on America's university campuses. You can learn more about our mission and activities at thefire.org.

² The ACLU of Pennsylvania is a state affiliate of the American Civil Liberties Union. The ACLU and its state affiliates have a long history of successfully litigating First Amendment freedom of expression cases.

³ *McCutcheon v. Fed. Elec. Comm'n*, 572 U.S. 185, 203 (2014); *see also Williams v. Rhodes*, 393 U.S. 23, 29 (1968) (state's authority to regulate elections may not be exercised so as to violate other provisions of the Constitution).

Indeed, political expression during an election season “occupies the core of the protection afforded by the First Amendment.”⁴

The First Amendment unambiguously applies to election-related activities such as registering voters and canvassing.⁵ In fact, in-person voter engagement activities such as urging students to register to vote or to support particular candidates are precisely the type of interactive, one-on-one communication that characterizes the “core political speech” characteristic of our liberal democracy.⁶

Restrictions on these activities are therefore highly suspect under First Amendment law, and must satisfy strict scrutiny to be legally valid.⁷ That is, such restrictions are “presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”⁸ Yet Penn State has not asserted *any* compelling interest as to why common expressive activities, such as tabling in communal areas or knocking on doors to speak to fellow students, must be restricted *only* when the interactions concern elections and voting.

In fact, Penn State’s policy acknowledges the rights of students and student groups to engage in political and election-related activities—subject only to the content-neutral time, place, and manner rules that apply to similar forms of non-political speech.⁹ The First Amendment requires no less.

⁴ *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 346–47 (1995); *Meyer v. Grant*, 486 U.S. 414, 425 (1988); *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (the First Amendment “has its fullest and most urgent application to speech uttered during a campaign for political office”).

⁵ *Buckley v. Amer. Constitutional Law Found., Inc.*, 525 U.S. 182 (1999) (circulating petition for ballot initiative); *McIntyre*, 514 U.S. at 346–47 (leafletting for controversial referendum); *Meyer*, 486 U.S. at 425 (circulating petition for ballot initiative); *Project Vote v. Kelly*, 805 F.Supp.2d 152, 174 (W.D. Pa. 2011) (voter registration); *Am. Ass’n of People with Disabilities v. Herrera*, 690 F.Supp.2d 1183, 1200 (D.N.M. 2010) (voter registration); *League of Women Voters v. Cobb*, 447 F.Supp.2d 1314, 1334–39 (S.D. Fla. 2006) (voter registration); *Project Vote v. Blackwell*, 455 F.Supp.2d 694, 700 (N.D. Oh. 2006) (voter registration); *La Union del Pueblo Entero v. Abbott*, --- F.Supp.3d ---, 2024 WL 4337515, at *26 (W.D. Tex. Sept. 28, 2024) (canvassing, voter advocacy).

⁶ *Mazo, v. Sec’y of State*, 54 F.4th 124, 143 (3d Cir. 2022) (defining core political speech as interactive, one-on-one communication regarding political change); *La Union del Pueblo Entero*, 2024 WL 4337515, at *27–28 (distinguishing regulations directed at core political speech, which are subject to strict scrutiny, from regulations directed at the “mechanics of the electoral process,” which are subject to lesser scrutiny).

⁷ *McIntyre*, 514 U.S. at 346; *Meyer*, 486 U.S. at 420; *Lichtenstein v. Hargett*, 83 F.4th 575, 593 (6th Cir. 2023) (collecting cases applying strict scrutiny to election laws implicating core political speech); *Mazo*, 54 F.4th at 142; *La Union del Pueblo Entero*, 2024 WL 4337515, at *27 (“Burdens on core political speech during elections, like all burdens on core political speech, are subject to strict scrutiny. And with good reason: it would defy logic to subject a content-based restriction of core political speech to lesser scrutiny because it happens to regulate speech during elections, when ‘the importance of First Amendment protections’ is at its ‘zenith.’” (internal citations omitted)).

⁸ *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015).

⁹ *AD92 Political Campaign Activities*, PENN STATE (updated Nov. 24, 2020), <https://policy.psu.edu/policies/ad92> [<https://perma.cc/B5EU-8ZRF>] (“Students and RSOs are encouraged to help educate and inform students about elections, including urging students to exercise their right to vote, and are also free to express their views about political parties, candidates and ballot issues. Students and

Thus, Penn State violates not only the Constitution but also its own policies by prohibiting students from engaging in First Amendment-protected core political speech, like voter registration and canvassing, on campus. This is neither lawful nor acceptable. With less than a month before the election, Penn State must act immediately to ensure that all administrators understand the university's First Amendment obligations to protect students' political expression—including registering voters and canvassing—on campus.

Given the urgent nature of this matter, we request a substantive response to this letter no later than Friday, October 25, confirming Penn State will ensure no students are prevented from engaging in core political speech about the 2024 election. We are committed to exploring all available legal options should Penn State continue to unconstitutionally restrict students from engaging in First Amendment protected election activities. Please do not hesitate to contact Jessie Appleby at (215) 717-3473 if you would like to discuss this request.

Respectfully,



Witold Walczak
Legal Director
ACLU of Pennsylvania



Jessie Appleby
Program Officer, Campus Rights Advocacy
FIRE

Cc: Tabitha R. Oman, Vice President and General Counsel

Encl.

RSOs are permitted to use student activities fees to support their own expressive activities and viewpoints on public policy issues and other interests and, as noted above, may sponsor events for candidates so long as they comply with the rules and regulations governing student organization-sponsored events.”).



September 27, 2024

Neeli Bendapudi
Office of the President
The Pennsylvania State University
201 Old Main
University Park, Pennsylvania 16802

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

Dear President Bendapudi:

FIRE¹ is gravely concerned by Penn State’s sudden and indefensible removal of newspapers and newsstands belonging to the *Daily Collegian*, an independent, student-run publication that has served as Penn State’s primary student newspaper for more than a century. By retaliating against the *Collegian* over the content of its advertising, Penn State flagrantly violated its First Amendment obligations. Furthermore, this effort to close off a critical revenue stream for the *Collegian* after stripping the paper of university funding presents an assault on press freedom, a liberty Penn State is bound to uphold. Penn State must publicly assure the *Collegian* that this will not happen again.

On September 18, Penn State officials removed 35 *Collegian* newsstands — and the newspapers they contained.² Administrators initially did not notify *Collegian* staff of the removal or where they had taken the newsstands; after numerous inquiries, the administration only told student staff that the stands would be returned on September 20.³ That day, Michael Wade Smith, senior vice president and chief of staff, wrote *Collegian* General Manager Wayne Lowman to explain the removal.⁴ Smith alleged the paper had “begun to place ... commercial and political advertisements on newspaper racks” and that this violated university policies AD02 and AD27,

¹ For more than 20 years, FIRE has defended freedom of expression, conscience, and religion, and other individual rights on America’s university campuses. You can learn more about our mission and activities at thefire.org.

² Emma Naysmith, ‘A violation against free speech’ | *Penn State removes Collegian from campus*, DAILY COLLEGIAN (Sept. 19, 2024) https://www.psucollegian.com/news/campus/a-violation-against-free-speech-penn-state-removes-collegian-newspapers-from-campus/article_488f73f8-76e5-11ef-9105-77de6ac0f398.html. The following recitation of facts is our understanding of the situation. We appreciate you may have additional information to offer and invite you to share it with us.

³ *Id.*

⁴ Letter from Michael Wade Smith, Senior Vice President and Chief of Staff, to Wayne Lowman, Daily Collegian General Manager (Sept. 20, 2024) (on file with author).

both of which prohibit commercial activity using university buildings.⁵ Like many newsstands, the *Collegian's* racks feature a poster frame above the bin, often used for advertisements. This has been the paper's practice for years, and Penn State itself has used this ad space to promote its own initiatives.⁶

While a contract between the *Daily Collegian* and Penn State regarding the display of advertisements expired on June 30, the *Collegian* continued to run ads on its newsstands without incident for months. Recent advertisements placed on the stands and in the newspaper by the Kamala Harris presidential campaign allegedly sparked complaints from some alumni, according to *Collegian* staffers, but Penn State gave students no warning that their newsstands and papers would face removal.

The university did begin the process of returning the newsstands two days after their removal, but the university did not replace the last stand until just before 6:30 PM—hours after the *Collegian's* traditional distribution window and after most students had left campus for the day.⁷ The university also failed to return hundreds of copies of the stolen newspapers. And while administrators removed some of the ads that allegedly violated university policy, including all the ads supporting Kamala Harris, it left two advertisements for NextGen America, a voter registration non-profit, in newsstands.⁸

It has long been settled law that the First Amendment binds public universities like Penn State,⁹ such that its actions and decisions—including interactions with the student press¹⁰—must comply with the First Amendment. This principle applies particularly to universities dedicated to open debate and discussion, as you profess Penn State is.¹¹

Put simply, state actors—such as state university officials—engaging in newspaper theft egregiously violates the First Amendment.¹² Having been stripped of university funding, the

⁵ *Id.*

⁶ The Daily Collegian, Call for donations, FACEBOOK, https://www.facebook.com/story.php/?story_fbid=10158988933508739&id=126500288738&_rdr/.

⁷ Kaitlyn Murphy, *Daily Collegian newsstands and newspapers returned on campus*, (Sept. 20, 2024) https://www.psucollegian.com/news/daily-collegian-newsstands-and-newspapers-returned-on-campus/article_9b17cc5a-7772-11ef-8595-f33c54c95f2a.html/.

⁸ *Id.* For fear of further censorial action by the university, the *Collegian* staff later removed the NexGen America ads.

⁹ *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).

¹⁰ *Stanley v. Magrath*, 719 F.2d 279, 282 (8th Cir. 1983); *see also Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829–30 (1995).

¹¹ Penn State University, *Controversial Speakers on Campus*, YOUTUBE, <https://www.youtube.com/watch?v=ewNJUuLCnWs/>.

¹² In fact, these actions also often constitute criminal theft. *See Rossignol v. Voorhaar*, 316 F. 3d 516, 525–26, (4th Cir. 2003), While student newspapers such as the *Collegian* are usually distributed for free, this does not make the papers valueless, nor does it permit Penn State to confiscate them *en masse*. *See Adam*

Collegian depends on advertisements sold in the weekly paper and on its newsstands for most of its revenue.¹³ Removing the papers from circulation deprives advertisers of the exposure for which they paid and could expose the *Collegian* to claims for lost revenue. To deprive the *Collegian* of circulation because of apparent displeasure with content constitutes an intolerable prior restraint on the press.

The context in which this censorship occurred demonstrates its content animus.¹⁴ The *Collegian* has a long history of using newsstands to display advertising,¹⁵ including in the months after its written agreement with the university lapsed. During this time, the university did not so much as hint that running these advertisements violated university policy. Only *after* the *Collegian* ran Harris campaign advertising did the university react, demonstrating its concern not with the newspaper running ads in general, but with the content of those particular ads. That the university removed did not remove all ads from the confiscated newsstands further signals content discrimination.¹⁶

The Supreme Court has held the government “has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”¹⁷ Penn State has long allowed newsstand advertisements, including in the months after the expiration of its written contract with the *Collegian*. The university may not, consistent with the First Amendment, abruptly choose to break with longstanding practice to enforce dormant policies when it disagrees with the content of the advertisements.¹⁸

Furthermore, Penn State’s dramatic actions—not simply removing the supposedly offending advertisements, but also dedicating staff to suddenly abscond with 35 bulky newsstands and thousands of newspapers, without even a word of warning to the *Collegian*—is wildly out of proportion to be a reasonable, viewpoint-neutral enforcement of campus rules.

Even if Penn State had not engaged in content discrimination, the regulations it cites to justify this egregious infringement, as applied to the *Collegian*, do not pass constitutional muster. It is settled law that the presence of *some* commercial expression ancillary to a noncommercial purpose, such as ads funding a newspaper’s operation, does not strip the expression of its noncommercial character.¹⁹ Thus, the university cannot label the *Collegian*, its newspapers, or its newsstands as “commercial” to justify censorship.

Goldstein, *Thieves steal 500 copies of U. of South Carolina student newspaper*, FIRE, Mar. 1, 2019, <https://www.thefire.org/thieves-steal-500-copies-of-u-of-south-carolina-student-newspaper>.

¹³ *Return of Organization Exempt from Income Tax*, I.R.S., 1, (2022), https://apps.irs.gov/pub/epostcard/cor/240861373_202205_990_2023060521375132.pdf/.

¹⁴ See *Stanley*, 719 F.2d at 282 (reducing funding to a student newspaper in response to the content of that newspaper violated the First Amendment).

¹⁵ See *The Daily Collegian*, *supra* note 6.

¹⁶ See *Frederick Douglass Found., Inc. v. District of Columbia*, 82 F. 4th 1122 (D.C. Cir. 2023) (“What the District cannot do consistent with the First Amendment is open its streets from the painting of some messages and not others.”)

¹⁷ *Police Dep’t. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

¹⁸ See *id.*

¹⁹ *Hays Cnty. Guardian v. Supple*, 969 F. 2d 111, 120 (5th Cir. 1992).

Further, Penn State's stated goal in enacting policy AD02 is to limit commercial activity *unrelated to the university's educational programs*.²⁰ Applying this policy to the *Collegian*, a student publication with a track record of preparing Penn State students for success in journalism, fails to serve those ends and needlessly restricts the freedom of the press. The *Collegian* continues to instruct and train individuals in the operation of a professional newsroom, undeniably providing those individuals with the "professional skills that will enable them to enter positions in all areas of journalism."²¹ Penn State has long understood the value this experience offers students, as the university provided financial support to the paper for decades. That the university has since slashed funding for the publication does not eliminate the value the *Collegian* adds to Penn State students' education.

Student newspapers like the *Collegian* are an integral part of journalism programs across the country and function not just as an integral part of campus life and culture but also as an "extension of the formal instructional process itself."²² The *Collegian*, in keeping with its educational mission,²³ teaches students about all aspects of a professional newsroom, including the sale of advertising on newsstands.²⁴ Indeed, now that Penn State has cut funding, the *Collegian* is forced to teach students about the challenges media outlets face in a high-stakes laboratory. For Penn State to apply AD02 and AD27 to the *Collegian* defies the spirit of those policies as well as the law.

Even if Penn State denies the clear educational benefits of a publication like the *Collegian* and maintains the advertisements on the newsstands are purely commercial speech, AD02 and AD27 are nonetheless facially unconstitutional. Commercial speech is protected by the First Amendment, though afforded slightly less protection than noncommercial speech.²⁵ To pass constitutional muster, regulations on commercial speech are subject to heightened scrutiny.²⁶ The government must prove its interest in restricting speech is "substantial," the regulation directly advances that interest, and the restriction on speech is no more extensive than necessary to serve that interest. While it may seek to bar certain methods of commercial expression, such as group sales demonstrations in student dormitories, Penn State cannot unilaterally ban commercial expression from almost all campus spaces.²⁷

²⁰ *Administrative Policies*, AD02 Non-University Groups Using University Facilities, PA. STATE UNIV (Mar. 3, 2022), <https://policy.psu.edu/policies/ad02/>.

²¹ *Journalism, B.A.*, Program Description, PA. STATE UNIV., (2024), <https://bulletins.psu.edu/undergraduate/colleges/bellisario-communications/journalism-ba/>.

²² I.R.S. Rev. Rul. 72-513, 1972-2 C.B. 246.

²³ *Return of Organization Exempt from Income Tax*, *supra* note 13, at 2.

²⁴ *See, e.g.*, Mark Katches, *Tampa Bay Times unveils newspaper racks that can stream video news and advertising*, TAMPA BAY TIMES, (Apr. 11, 2019), <https://www.tampabay.com/news/tampa-bay-times-unveils-newspaper-racks-that-can-stream-video-news-and-advertising-20190411/>.

²⁵ *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 637 (1985).

²⁶ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. of N.Y.*, 447 U.S. 557, 566 (1980). Heightened scrutiny may be avoided only where regulations are limited to misleading speech or speech relating to illegal activity.

²⁷ *Am. Future Sys., Inc. v. Pa. State Univ.*, 752 F. 2d 854, 866 (3rd Cir. 1984). Indeed, part of what allowed Penn State to prevail in this case was the fact the university left open other avenues of expression. Some of the alternative avenues the court used to justify its ruling for the university would be barred under AD02 and AD27.

Standing alone, the affront to press freedom Penn State's confiscation of newspapers and newsstands poses would be bad enough. But in the context of the university's repeated attacks on the *Collegian*, these actions reek of a pernicious assault. Despite the *Collegian's* 137-year history of award-winning journalism,²⁸ Penn State first halved and then eliminated its funding for the publication, citing a budget deficit that somehow failed to necessitate similar cuts to administrators' private jet travel or the university's nearly \$1 billion in capital expenditures.²⁹ Now, the university is taking aim at the paper's advertising revenues.

The *Collegian's* margins were slim even when the paper received university funding.³⁰ Flagship student newspapers at other universities routinely receive generous funding from student fees. Yet having already cut the entire university fee allocation, which constituted half of the *Collegian's* total revenue,³¹ Penn State now seeks to further stifle the paper's financial viability. Such a move is yet another clear statement that Penn State does not value a culture of free expression and does not want the *Collegian* on its campus at all. In our letter decrying the initial funding cut, FIRE said Penn State's actions showed it valued the student press at \$0.³² Now that Penn State has shown its willingness to steal from the press and further slash revenues through overbearing regulation, that appraisal is generous. Penn State now puts a negative value on an independent student press.

The First Amendment requires Penn State to respect the freedom of the press. Here, the university did not just fail to uphold this freedom but wantonly trampled it.

Given the irreversible harm that has already occurred in this case, we must respectfully insist that Penn State issue an unequivocal, public apology to the *Collegian* and affirm that it will ensure its administrators do not engage in publication theft or other forms of press censorship in the future.

Sincerely,



Dominic Coletti
Program Officer, Campus Rights Advocacy

²⁸ See, e.g., *2017 Online Pacemaker Awards*, ASSOCIATED COLLEGIATE PRESS, <https://studentpress.org/acp/awards/2017-online-pacemaker-winners/> (last visited Sept. 23, 2024); *2013 Newspaper Pacemaker*, ASSOCIATED COLLEGIATE PRESS, <https://studentpress.org/acp/awards/2013-newspaper-pacemaker> (last visited Sept. 23, 2024); Mallery Tenore Tarpley, *Sara Ganim, 24, wins Pulitzer for coverage of Penn State sex abuse scandal*, POYNTER, Apr. 16, 2012, <https://www.poynter.org/newsletters/2012/sara-ganim-24-wins-pulitzer-for-coverage-of-penn-state-sex-abuse-scandal/>.

²⁹ Letter from Lindsie Rank, FIRE Student Press Counsel, to Matthew W. Schuyler, Pa. State Univ. Chairman of the Board of Trustees, (July 8, 2023), available at <https://www.thefire.org/research-learn/fire-letter-pennsylvania-state-university-july-28-2023/>; *Capital Plan 2024-2028*, OFF. OF THE PHYSICAL PLANT, <https://www.opp.psu.edu/capital-plan-2024-2028/> (last visited Sept. 26, 2024).

³⁰ *Return of Organization Exempt from Income Tax*, *supra* note 13.

³¹ *Id.* at 9.

³² Letter from Lindsie Rank, *supra* note 29.

Cc: Michael Wade Smith, Senior Vice President and Chief of Staff
Tabitha R. Oman, Vice President and General Counsel