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To the Faculty Senate:

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Folks,

Thank Goodness that's over.

The Trump Rally is now behind us and despite some early concerns and a few bumps along the way the event went about as well as we could have expected an event like this to go. Dr. Ciocca previously shared with the Senate his wife's experience, one protester reportedly spat on a policeman, and I'm sure there was some level of individual incivility. Otherwise, police only made three arrests: one for disorderly conduct and two for public intoxication. This amount of disruption to public safety is on par with a normal home football game, and in fact, exactly matches arrests made at the Murray v ECU home game the week following the rally (1 Disorderly; 2 PI).

The university received praise from Rally organizers and Protest organizers alike for security at the event. The safe environment was due in large measure to the [Interim Policy 9.3.3 on Time, Place and Manner of Demonstrations, Meetings and Other Assemblies](#), which is presently before the Faculty Senate for ratification. Rarely does a university policy receive such an acid test so soon after being written. The Secret Service told Exec. Dir. for Public Safety Bryan Makinen that it was the best organized rally security they had witnessed to date. The Faculty Senate Executive Committee queried legal and law enforcement officials about any deficiencies in the new policy. None were reported.

Print media coverage of the event appeared to be fair and accurate ([Washington Post](#), [The Hill](#), [Courier Journal](#), [Herald-Leader](#), [Eastern Progress](#)); [commentary](#) somewhat less so.

Some folks reasoned that the university had “invited” the Trump Campaign to campus and that such an invitation was a tacit endorsement. In fact, the Trump Rally was a straight-up facility rental, and not due to any invitation from ECU. The decision to use ECU actually came from Congressman [Andy Barr](#) who told the assembly that “Trump easily could have filled Rupp Arena in Lexington, but I wanted him at ECU because of school’s commitment to veteran staff and strong military presence in Madison County.”

As reported by the [Herald-Leader](#), the rental contract and supporting documents ([here](#), following 12 pages of state boilerplate) charged the Trump Campaign \$10,800, the standard published rate for Alumni Coliseum, and specified reimbursement to ECU for anticipated and unanticipated costs incurred by the event. The Rally employed 16 private security personnel inside the arena. There were additional costs for the event to cover staging, portables, Hi Tech staff, and communication lines. The Trump Campaign has fully paid ECU’s invoice for costs associated with the event in the amount of \$21,530.19.

A short paragraph related to “national security” was redacted from the contract.

Contrary to one person’s suggestion, the administration did not waive university policies and I found no evidence of “administrative misfeasance [sic].” Rather, the administration bound the group to adhere to university policies by contract, followed Policy 9.3.3 to assure campus safety, and acted to preserve freedom of expression on campus. So far as I could determine, the administration performed a lawful act in an appropriate manner according to policy. If evidence of administrative wrongdoing did exist, it would be the responsibility of knowledgeable individuals to report their evidence to the appropriate authority.

Claims that the university had a legal right to deny a sitting president the ability to rent space for a rally at a state university (based on “impairment of the educational mission,” “offensiveness,” “potential disruption,” and violation to “the principle of free exchange”) were heard, taken seriously, explored, and rejected.ⁱ

I’m just glad the event is over. Don’t forget to vote.



Richard

ⁱ As everyone seems to agree, any restriction on the Constitutionally-protected right of free expression must be applied in a content-neutral manner, both on its face and as applied, but reasonable time, place, and manner restrictions that leave open ample avenues of communication have been upheld.

The US Supreme Court has recognized certain limited categories of speech that may be prevented: "These include the

lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those by which their very utterance inflict injury or tend to incite an immediate breach of the peace." (*Chaplinsky v. New Hampshire*, 315 US 568, 571-72 (1942)). General offensiveness, or speech that does not represent "prevailing community standards and fails to promote socially acceptable behavior" is not a recognized category of speech that can be abridged or silenced.

But every case cited as a justification for the university to deny the Trump Rally rental dealt with student speech in a K-12 public school setting.

A K-12 institution and its administrators stand "in loco parentis," meaning that a K-12 school principal has a much higher legal duty of care for the minor pupil than President Benson has as a university president of adult college students. While K-12 students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" (*Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 US 503, at 506 (1969)), the courts have recognized that a K-12 student's right to free expression is not "automatically coextensive with the rights of adults." (*Bethel School District No. 403 v. Fraser*, 478 US 675, at 682 (1986)).

It was asserted that an exception could be made and speech can be silenced where it is related to "legitimate pedagogical concerns" as set forth in *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 US 260 (1988). In this case, student speech related to teenage pregnancy was censored for the school-sponsored newspaper. The Supreme Court noted the difference in school-sponsored speech and student speech that just merely occurs on school grounds. In *Hazelwood*, the student speech was school-sponsored and, thus, could be censored. In addition, it was student speech, not speech that just happened to occur on campus.

In fact, during the run up to the Trump Rally, Eastern Kentucky University had a case dismissed by the 6th Circuit on the same grounds, wherein a student made a blackboard post completely off topic, and raving about the positives of Hitler, and a professor was sued after removing the post. (See *McBrearty v. Kappeler, et. al*, No. 18-5064 (6th Cir. 2018)).

It was argued that *Bethel School District v Fraser*, 478 US 675 (1986) allowed for a general "offensive" speech exception. In that case, a student was giving a speech in a school assembly, and the speech was peppered with sexual innuendo and vulgarity. On those limited grounds, the US Supreme Court upheld the high school's decision to silence the student speaker for the "lewd", "vulgar", "indecent" and "plainly offensive" character of the speech as it is "a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse" among its student population (*Fraser* at 683). This "offensive" exception cannot be applied more broadly, nor has it been.

An assertion was also made that the "substantial disruption" exception was enough to stop or prevent the political rally. This exception, first established in *Tinker*, notes that a student may express his opinions on public school grounds absent the school district being able to show that the speech would "materially and substantially disrupt the work and discipline of the school" (*Tinker* at 513). *Tinker* does not apply here for two main reasons: (1) the Trump Rally was not K-12 student speech; and (2) there was not a disruption to ongoing student learning (it was Fall Break, classes are not ongoing, etc.). The rally was an inconvenience, but not a disruption to the ongoing educational process.

Not allowing the rally based on an anticipated erosion it may cause to the "principle of free exchange of ideas," "academic freedom," and the "academic integrity of the university" amounts to "prior restraint" which was clearly found unconstitutional in *Near v. Minnesota*, 283 U.S. 697 (1931). A government actor cannot simply ban speech anticipating a reaction or anticipating what might be said (or has been said in the past). At the time our Constitution was being written, the British government was squelching expression on those grounds routinely. As a result, US courts take a particularly dim view of prior restraint.

The courts make a clear distinction between K-12 student speech in the cases cited and the political nature of the speech at issue with the Trump Rally on a university campus. Historically, political speech has had the utmost protection: "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental

affairs.” *Mills v. State of Alabama*, 384 US 214 (1966).

Even recently, the Court has held that political speech is “speech that is central to the First Amendment's meaning and purpose,” and applied a strict scrutiny to controls on it. *Citizens United v. FCC*, 558 US 310, 329 (2010), citing *Morse v. Frederick*, 551 U.S. 393 at 403 (2007). The Trump Rally was most certainly political speech, and entitled to the utmost constitutional protection.