No. 02-3627

**UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

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**CYDNEY A. CRUE, JOHN M. MCKINN, DEBBIE A. REESE, et al.**

*Plaintiffs-Appellees*

v.

**MICHAEL AIKEN**

*Defendant-Appellant*

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Appeal from the United States District Court
For the Central District of Illinois, No. 01-1144

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# BRIEF OF *AMICI CURIAE* FOR THE NATIONAL AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS AND THE UNIVERSITY OF ILLINOIS-CHAMPAIGN AAUP CHAPTER IN SUPPORT OF PLAINTIFFS-APPELLEES FOR AFFIRMANCE

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## INTEREST OF *AMICI**

The American Association of University Professors (AAUP) was founded in 1915 to advance "the standards, ideals, and welfare" of the academic profession, and is an organization of approximately 44,000 members, which includes faculty members in all academic disciplines. The University of Illinois-Champaign AAUP Chapter, which promotes the AAUP's mission, is made up of approximately 113 faculty members.

Since its founding the AAUP has adopted statements of policy establishing standards of sound academic practice. Paramount among these is the 1940 *Statement on Principles on Academic Freedom and Tenure* (hereinafter 1940 *Statement*), drafted jointly with the Association of American Colleges and currently endorsed by more than 180 disciplinary societies and educational organizations. 1940 *Statement of Principles on Academic Freedom and Tenure*, POLICY DOCUMENTS & REPORTS 3 (9th ed. 2001) *available at* www.aaup.org/statements/Redbook/1940stat.htm (as of September 15, 2003). The 1940 *Statement*, and the gloss of meaning placed on it by the Association over the past sixty years, is generally accepted as normative in American higher education. Richard Hofstadter & Walter Metzger, THE DEVELOPMENT OF

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* This *amicus* brief is filed with the consent of both parties. Fed. R. App. Proc. 29(a).

ACADEMIC FREEDOM IN THE UNITED STATES Ch. X (1955); *Developments in the Law - Academic Freedom*, 81 HARV. L. REV. 1045, 1105-1112 (1968).

The national AAUP has frequently participated as *amicus curiae* before federal and state courts where its standards were implicated. *See, e.g., Keyishian v. Board of Regents*, 385 U.S. 589 (1967). Relatedly, the courts have often relied upon AAUP standards. *See, e.g., Hulen v. Yates*, 322 F.3d 1229, 1239 (10th Cir. 2003); *Gray v. Bd. of Higher Educ., City of New York*, 692 F.2d 901, 907 (2d Cir. 1982); *Jimenez v. Almodovar*, 650 F.2d 363, 368 (1st Cir. 1981).

In sum, the AAUP is a repository of the academic experience that meaningfully assists this Court. *See Ryan v. CFTC*, 125 F.3d 1062, 1063 (7th Cir. 1997).

## STATEMENT OF FACTS

The facts in this case were set out by the district court. AAUP emphasizes that neither it nor its Chapter at the Champaign-Urbana campus has a position on whether "The Chief" should be abandoned as that campus' totemic figure.

## SUMMARY OF ARGUMENT

Article X of the *Statutes of the University of Illinois* guarantees the faculty academic freedom. *University of Illinois Statutes*, Article X, § 2, *available at* www.uillinois.edu/university/policies/statutes.php (September 15, 2003) (hereinafter *Statutes*). It embraces the 1940 *Statement* by precluding the Administration from censoring a faculty member's "speech as a citizen," such as his or her public utterance on a public controversy, even one in which the University is embroiled. Such is the nature of the speech here.

Even so, the University Administration advances three justifications for the suppression of this speech: that the speech might work to the detriment of the institution's income ("the bottom line"); that it might "sully" the institution's reputation; and, that it might confuse the youthful athletic prospects to whom it is targeted. The former two justifications have long been rejected by the academic profession. The latter is risible.

The Administration also seeks shelter under the broad deference the judiciary accords the actions of universities as self-governing communities. That deference would be misplaced.

## ARGUMENT

### I. NATIONAL NORMS OF ACADEMIC FREEDOM, ADOPTED BY THE UNIVERSITY OF ILLINOIS AND CONSISTENTLY RECOGNIZED IN PRINCIPLE BY THIS COURT, PRECLUDE CENSORSHIP OF POLITICAL UTTERANCE

The Administration recognizes in its brief that the 1940 *Statement* establishes the standard governing faculty members when they speak or write as citizens. Brief of Appellant at 41-42, note 10. Decisions of this Court have consistently recognized the imperative of free expression and academic freedom within the university community, *see, e.g.*, *Omosegbon v. Wells*, 335 F.3d 668 (7th Cir. 2003); *Hosty v. Carter*, 325 F.3d 945 (7th Cir.), *appeal docketed*, 2003 U.S. App. LEXIS 13195 (7th Cir. 2003) (*en banc*); *Linnemeier v. Board of Trustees of Purdue Univ.*, 260 F.3d 757, 760 (7th Cir. 2001); *Piarowski v. Illinois Community College, District 515,* 759 F.2d 625, 629 (7th Cir. 1985); *Dow Chemical Co. v. Allen*, 672 F.2d 1262, 1277, 1279 (7th Cir. 1982), whether denominated as "academic freedom" or broadly subsumed under the First Amendment, *cf. Trejo v. Shoben*, 319 F.3d 878, 884 & n.3 (7th Cir. 2003).

In its brief, the Administration argues that the "Plaintiffs' letters fail . . . in every respect" to meet the standards for faculty speech as private citizens set forth in the 1940 *Statement.* Brief of Appellant at 41-42, note 10. The 1940

*Statement* is important. If the Administration is correct and the academic profession recognizes that the speech at issue here has no claim on professorial civil liberty, these plaintiffs can secure no academic shelter for it. But if the profession's norms do shelter the faculty plaintiffs' speech, the claim of potential "disruption" flowing from it loses all purchase. The latter is the case.

### A. THE 1940 *STATEMENT* PROHIBITS INSTITUTIONAL CENSORSHIP OF FACULTY POLITICAL SPEECH

The full text of the provision of the 1940 *Statement,* relied upon by the Administration, states:

> College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, *they should be free from institutional censorship* or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.

1940 *Statement* (emphasis added). The Administration's argument elides the emphasized portion and goes on to treat the latter part as setting standards of conduct that, if breached, deny protection. The argument misapprehends the *Statement*'s meaning.

The question of whether this provision sets standards of conduct or serves only as an admonition was presented in 1960 when the Board of Trustees of the University of Illinois dismissed Professor Leo Koch for having published a letter-to-the-editor of the student press condoning student pre-marital sex. *Academic Freedom and Tenure: The University of Illinois*, 49 A.A.U.P. Bull. 25 (1963). Section 39 of the *Statutes* of the University in effect at the time provided in pertinent part:

> (b) In his role as citizen, the faculty member has the same freedoms as other citizens, without institutional censorship or discipline, although he should be mindful that accuracy, forthrightness, and dignity befit his association with the University and his position as a man of learning.

49 A.A.U.P. BULL. at 27.

In dismissing Professor Koch, the Trustees found that his expression fell afoul of § 39(b) as a standard of academic "responsibility."[1] The AAUP's *ad hoc* committee of investigation, chaired by Professor Thomas Emerson of the Yale Law School, rejected that reading of the *Statutes* and of the parallel provision of the 1940 *Statement* as setting out any standard of "'responsible'

[1] As the Trustees put it, Professor Koch's decision to publish the letter "taken together with the language, tone, and contents of the letter, constituted a decidedly serious and reprehensible breach of the academic and professional responsibility . . . which has caused great concern to the parents of students attending the University and to citizens of the State of Illinois as to the moral standards which prevail . . . which has been and is clearly prejudicial to the best interests of the University of Illinois . . ." *Academic Freedom and Tenure: The University of Illinois*, 49 A.A.U.P. BULL. at 30.

extramural utterance." *Id.* at 35-39. The committee drew upon the history of the 1940 *Statement*, on the vagueness of the test of "responsibility," and on the degree of freedom of expression that the 1940 *Statement* sought to secure. It opined:

> There can be no doubt that the ordinary citizen, addressing himself *to a matter of public concern*, is not limited by any standard of "responsibility." Apart from the law of libel or similar legal restrictions — which are clearly not applicable here — there is no requirement that the citizen speak with restraint, dignity, respect for the opinion of others, or even accuracy. To impose any such official limitation would effectively cut off any real discussion of controversial issues of either fact or opinion. This is a cardinal principle of freedom of expression.

*Id.* at 36 (emphasis added). It concluded that sanctions for political speech are the "unofficial judgment and pressures derived from" the academic profession and the intellectual community. *Id.*

Though members of the parent AAUP Committee A on Academic Freedom and Tenure ("Committee A") were immediately divided on the question, both it and the larger Association soon came to adopt the Emersonian reading of the text.[2] *See, e.g.*, AAUP, *Statement on Extramural Utterances*, POLICY DOCUMENTS & REPORTS 32 (9th ed. 2001); 1970 *Interpretive Comment*,

[2] The history of the provision, both in drafting and in application, is treated by Walter Metzger, *The 1940 Statement of Principles on Academic Freedom and Tenure*, *in* FREEDOM AND TENURE IN THE ACADEMY 51-54 (William Van Alstyne, ed., 1993). Professor Emerson's exegesis is more fully explored in Thomas Emerson and David Haber, *Academic Freedom of the Faculty Member As Citizen*, 28 LAW. & CONTEMP. PROBS. 525, 526-528 (1963).

*id.* at 6; *Academic Freedom and Tenure: The University of California at Los Angeles*, 57 A.A.U.P. BULL. 382, 398 (1971).

A professor's speech "as a citizen" may give reason to inquire into the speaker's fitness for office. It may, for example, be so extreme and counterfactual as to place in question whether the speaker falls afoul of disciplinary standards of care in teaching or research, but it cannot give rise independently to censorship or discharge. The contrary reading, the reading given by the Trustees of the University of Illinois in 1960 and resurrected here, contravenes the governing principle that when faculty members speak "as citizens, they should be free from institutional censorship or discipline." *See* 1940 *Statement.*

### B. THE UNIVERSITY OF ILLINOIS SHELTERS FACULTY SPEECH "AS A CITIZEN" FROM INSTITUTIONAL CENSORSHIP

On the basis of the report of the *ad hoc* committee, the AAUP placed the University of Illinois on its list of censured administrations in 1963. *Report of Committee A, 1962-1963*, 49 A.A.U.P. BULL. 134 (1963).[3] Two years later, censure was conditionally removed due to "revision of the University of Illinois statutes," a revision heralded as "a substantial victory for academic freedom."

[3] The history of censure is discussed by Jonathan Knight, *The AAUP's Censure List*, 89 ACADEME: BULLETIN OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS 44 (2003).

*Report of Committee A, 1965-1966*, 52 A.A.U.P. BULL. 125 (1966). The University *Statutes* were thus brought into conformity with the 1940 *Statement* as understood by the Association. It is to the *Statutes* we now turn.

The Board of Trustees of the University of Illinois has, pursuant to statutory authority, promulgated the *Statutes* for the regulation of matters over which the Board has jurisdiction. *McElearney v. Univ. of Illinois*, 612 F.2d 285, 290 (7th Cir. 1979). Article X of the current *Statutes of the University of Illinois* provides for the protection of academic freedom, including speech "as a citizen":

> b. *As a citizen, a faculty member may exercise the same freedoms as other citizens without institutional censorship or discipline.* A faculty member should be mindful, however, that accuracy, forthrightness, and dignity befit association with the University and a person of learning and that the public may judge that person's profession and the University by the individual's conduct and utterances.
> c. If, in the president's judgment, a faculty member exercises freedom of expression as a citizen and fails to heed *the admonitions* of Article X, Section 2b, the president may publicly disassociate the Board of Trustees and the University from and express their disapproval of such objectionable expressions.

Art. X, § 2 (b) & (c) (emphases added).

Note that, consistent with the AAUP's reading of the 1940 *Statement*, but contrary to the Administration's argument here, the University's *Statutes* reject the claim that faculty political speech must observe "appropriate restraint" as a

standard of conduct. The stricture of the "should be mindful" clause is, as the *Statutes* label it, an "admonition," not a standard of conduct. Consequently, the only action that the President faced with an "objectionable expression" is allowed to take is to disassociate the University from it; yet what the Administration did in this case was censor it.

Under the Chancellor's "Preclearance Directive," before a faculty member can provide information to a prospective student-athlete about the racial atmosphere on campus or about the Chief Illiniwek controversy, he or she would have had to secure an "authorization" from the Director of Athletics. This suffers from all the infirmities that place a "heavy presumption" against any system of prior restraint on free speech. *Crue v. Aiken*, 204 F. Supp. 2d 1130, 1141 (C.D. Ill. 2002); *see also* Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648 (1955).

As a matter of state administrative law, the "Preclearance Directive" may have been *ultra vires* the administration's authority under Article X, § 2(c) of the *Statutes*; but that state law issue was not raised below. Suffice it to say, the *Statutes* recognize the faculty's freedom to engage in just the kind of speech engaged in here, subject only to the President's privilege of disassociation if he deems the speech "objectionable." Inasmuch as the *Statutes* deny the

Administration any power to impose discipline or prior restraint on the faculty's political utterances, it follows that the University has, by the *Statutes*, sheltered it. Thus, the Administration cannot now plead to the potential for "disruption" flowing from a category of speech it has sheltered.

## II. NONE OF THE JUSTIFICATIONS OFFERED FOR THE SUPPRESSION OF FACULTY POLITICAL SPEECH HAS PURCHASE IN THE UNIVERSITY SETTING

The district court properly ruled that *United States v. NTEU,* 513 U.S. 454 (1995), applies to the type of speech restraint that the Administration seeks to impose on faculty. *Crue v. Aiken*, 204 F. Supp. 2d 1130, 1143 (C.D. Ill. 2002). Even under *Pickering v. Board of Education,* 391 U.S. 563 (1968), however, freedom of speech prevails. The Administration's argument to *Pickering* rests on the ground of the "disruption" potentially triggered by the speech. Assuming *Pickering* to be the applicable test, both it and its progeny are at pains to stress how context-sensitive that test is.

A University faculty is not a paramilitary body. The "chain of command" necessary for the maintenance of discipline in a police or fire department has been recognized as a valid element of the *Pickering* balance, as evidenced in the authorities relied upon by the Administration.[4] These

[4] *See, e.g., Greer v. Amesqua*, 212 F.3d 358, 372 (7th Cir. 2000)(citing *Kokkinis v. Inkovich*, 185 F.3d 840, 846 (7th Cir. 1999)). The University also cites *Verri v. Nanna*, 972 F. Supp. 773, 802

decisions are not apt in the University setting. As the Tenth Circuit recently put it, "conflict is not unknown in the university setting given the inherent autonomy of tenured professors and the academic freedom they enjoy. . . . " *Hulen* v. *Yates*, 322 F.3d 1229, 1239 (10th Cir. 2003) (citing the 1940 *Statement*).

Importantly, all the cases where "disruption" in the University setting has been held to outweigh expressive interest are cases of sharp intramural, interpersonal conflict (even if implicating an issue of public interest), not of political appeals on highly charged public controversies targeted to audiences outside the University. In *Propst v. Bitzer*, 39 F.3d 148 (7th Cir. 1994), for example, University administrators alleged that a supervisor, Donald Bitzer, retaliated against them after they accused him of misappropriating university funds. In rejecting the plaintiffs' First Amendment claim, this Court noted that they worked closely with Bitzer, that their relationship with him "deteriorated to the point of affecting their ability to work with him," and that their unit "could no longer accomplish its mission unless either Bitzer or the Propsts were removed." *Id.* at 153; *see also Webb v. Board of Trustees of Ball State*

(S.D.N.Y. 1997), which similarly allowed limits on the right of a police officer to petition because of the police department's need to respect the "chain of command."

*University*, 167 F.3d 1146, 1150 (7th Cir. 1999) (this Court termed the speech at issue an excrescence of intramural "fraternal warfare.")

Suffice it to say, the faculty speakers in this case are not in a "close working relationship" with the Chancellor or the Director of Athletics; there is no "fraternal warfare," nor any hint of a breakdown in working relationships; nor is the "learning environment" compromised in any conceivable way.[5] There is only the Administration's displeasure with the consequences to the athletic program and the publicity given to the plaintiffs' public criticism of "The Chief," criticism that the University's *Statutes* and national norms

[5] The Administration seeks to narrow the scope of academic freedom by relying upon *Bonnell v. Lorenzo*, 241 F.3d 800 (6th Cir. 2001). Brief of Appellant at 41-42. The plaintiff, a faculty member at a community college, was sanctioned *inter alia* for circulating within the college, in violation of college policy requiring confidentiality of such complaints, a complaint of sexual harassment that a student had filed against him, and for intramural circulation of a derisive reply addressed to the student, albeit pseudonymously. The Administration suggests that this case stands for the proposition that the "college's interests, including 'creating an atmosphere free of faculty disruption' outweighed professors' rights to academic freedom and freedom of expression." Brief of Appellant at 42. What the Sixth Circuit said, however, was that the college's interests,

> including maintaining the confidentiality of student sexual harassment complaints, *disciplining teachers who retaliate against students who file sexual harassment claims*, and creating an atmosphere free of faculty disruption, outweigh Plaintiff's purported interests.

*Bonnell*, 241 F.3d at 823 (emphasis added).

Nevertheless, the Administration asserts that this decision stands for the additional proposition that academic freedom "is not absolute." Brief of the Appellant at 41. On that, this is what the Sixth Circuit said:

> While a professor's rights to academic freedom and freedom of expression are paramount in the academic setting, they are not absolute *to the point of compromising a student's right to learn in a hostile-free environment.*

*Bonnell*, 241 F.3d at 823-824 (emphasis added).

recognize that faculty are entitled to utter. *See* Part I, *supra*. Displeasure is not disruption, but the Administration conflates them.

More particularly, the Administration points to three sources of potential "disruption" flowing from the faculty members' appeals to prospective student athletes: (1) a potential loss of income (or "bottom line" as the Administration calls it) resulting from an impaired athletic program; (2) a potential sullying of the reputation of the University, with a consequent impact on enrollment; and (3) a potential interference with "impressionable teenage recruiting prospects" in violation of the rules of the National Collegiate Athletic Association. Brief of Appellant at 20, 31. Each needs be unpacked.

### A. IMPACT ON "THE BOTTOM LINE"

"[I]ntercollegiate athletics is 'big business.'" Brief of Appellant at 31 (citing *NCAA v. Miller*, 795 F. Supp. 1476, 1482 (D. Nev. 1992)). This business interest — the potential loss of hot athletic prospects as a result of the faculty members' informational campaign — is argued constitutionally to license the Administration to censor that speech:

> Damage to recruiting or other aspects of the athletics program is damage to the bottom line, and "fiscal responsibility [is also a] powerful government interes[t]." *Messman* [*v. Helmke*], 133 F.3d [1042, 1047 (7th Cir. 1998)]; see also *Lewis v. Cowen*, 165 F.3d 154, 164 (2d Cir. 1999) (state employee's "refusal to promote the proposed change would result in negative publicity and decreased

> morale, in turn impairing * * * profitability . . . "); . . . These interests are more than sufficient to justify Chancellor Aiken's e-mail.

Brief of Appellant at 31.

The plea to the "bottom line" has a powerful historical resonance in higher education. Influential donors and others have long attempted to exert economic leverage to restrain the exercise of academic freedom.[6] Not every President has had the fortitude of Harvard's Lowell, who reportedly turned down a $10,000,000 bequest in 1914 conditioned on the dismissal of a professor. Richard Hofstadter & Walter Metgzer, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES 458 (1955).

Consequently, the AAUP has long confronted appeals to the bottom line as justifying a restriction on speech or the dismissal of an outspoken professor whose political utterances displeased powerful interests upon whose financial support the institution depended. In 1949, for example, Rocky Mountain College refused to continue a faculty member whose service in the Montana legislature brought down the ire of a number of powerful interests. *Academic Freedom and Tenure: Rocky Mountain College,* 42 A.A.U.P. BULL. 292

[6] Most recently, Bloomberg L.P. was reported to have withdrawn support for a business journalism program at New York University because the professor who directed the program had criticized the company. Stephanie Strom, *Bloomberg L.P. Stops Aid for N.Y.U. Program,* N.Y. TIMES, at A26 (Feb. 21, 2003).

(1956). Trustees of the college reported that the "principal factor" motivating the Board was that the professor's retention "'would make it difficult to solicit funds . . . from conservative businessmen.'" *Id.* at 303. This has been a recurring theme. *See, e.g., Academic Freedom and Tenure: University of Wichita*, 21 A.A.U.P. BULL. 549 (1935) (two professors of English dismissed because they had failed to befriend local businessmen); *Academic Freedom and Tenure: Lincoln College*, 50 A.A.U.P. BULL. 244 (1964) (college dismissed a faculty member for picketing in protest of the blockade of Cuba, explaining that it could not alienate the local community from which it derived its financial support). In a notable example, President George F. Parker of Evansville College justified the dismissal of a professor, for supporting Henry Wallace's presidential campaign, on grounds of "irresponsibility," in an argument indistinguishable from the Administration's argument here.[7]

[7] *Academic Freedom and Tenure: Evansville College*, 35 A.A.U.P. BULL. 74 (1949). President Parker stated:

> Of basic significance is . . . the fact that Evansville College is "closely integrated with the city, whose broad educational need it serves," and therefore "is sensitive to the community which values its work and services." Because of this integration and sensitivity, the conspicuous involvement of a Faculty member in politics is interpreted by the public as involving the College itself; as a result the College loses the general, non-partisan support of the community. . . . *A teacher who stands stubbornly upon some theoretical right and disregards the effect upon the College exhibits such a degree of irresponsibility that the College can protect itself only by removing him.*

*Id.* at 102 (emphasis added).

The academic profession has responded that institutions of higher education are conducted not for the institution's parochial interests, but for "the common good." An institution that capitulates to such pressure has removed itself as a seat of learning. The *ad hoc* committee of investigation at Evansville College rejected the Administration's argument to a potentially devastating loss of economic support from the local community. The committee did not scoff at the danger, but opined that yielding to it "would be embracing a greater danger to institutional welfare, namely, the loss of freedom, without which no institution of higher education can fulfill its obligation to the students and to society." *Academic Freedom and Tenure: Evansville College,* 35 A.A.U.P. BULL. 74, 105 (1949).[8]

[8] The Committee confronted well the Administration's argument that the professor's political activity was repugnant to the majority sentiment of the community from which the College drew its support. *Id*. at 109. The Committee responded:

> One of the freedoms of a citizen is the freedom to support minority views, even when those views are considered by the majority of citizens to be extreme or radical. In the Annual Report of the Association's Committee [A] . . . for 1947, it was emphasized that there could be no retreat from this position; that if a retreat should be permitted from the first line, there is no second line to which we can retire. Once the principle of interference with open, lawful political activity is permitted, interference will not stop with "extreme" or "radical" activity, but will extend to other minority movements. . . . The 1940 Report of Committee A expressed this concern as follows:
>
> > A part of the freedom which we are all anxious to preserve is the right of minorities to be heard and of individuals to protest, provided it is done in an orderly manner and without violence. An essential element in a free government is this right of those who are outnumbered for the moment to seek to win adherents to their views by argument and persuasion. To dismiss a teacher for indulging in this freedom would scarcely seem to be an appropriate way to preserve it.

President Parker's argument recrudesces here. The judicial response should be no less categorical. Indeed, the pressures of the bottom line have increased today as universities have become ever more intertwined with business interests; and the need to insulate the exercise of academic freedom and free speech has risen commensurately. As Derek Bok has pointed out, in pursuit of moneymaking ventures universities "risk compromising their essential academic values," a risk illustrated in the "long, sorry history of intercollegiate sports." Derek Bok, *Academic Values and the Lure of Profit*, THE CHRONICLE OF HIGHER EDUCATION B7, B8 (Apr. 4, 2003). Some universities, for example, have signed contracts with manufacturers of athletic shoes for the display of their footwear by the Universities' teams, contracts that include clauses that forbid any university employee from disparaging the company, its product, the University's association with the product, or any other entity connected with the company. W. Lee Hansen, *Introduction* to ACADEMIC FREEDOM ON TRIAL 1, 11 (W. Lee Hansen ed., 1998) (setting out just such a proposed contract between the University of Wisconsin and Reebok). By exact parity of the Administration's reasoning here, were such a contract executed with the University of Illinois, the Administration could

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*Id.* at 109-110.

forbid the faculty from protesting the manufacturer's working conditions, here or abroad, as a potential threat to "the bottom line."

The Administration's argument is also contrary to the teaching of *Pickering* and its progeny. Marvin Pickering publicly opposed a tax increase sought by his school board employer and was critical of its expenditures, in point of fact, on athletics. *Pickering*, 391 U.S. at 566. But although his opposition was contrary to his employer's bottom line, his speech lay at the heart of a "free and unhindered debate on matters of public importance — the core value" of the First Amendment. *Id.* at 573. The Administration of the University of Illinois can point no more successfully to "the bottom line" as a basis for speech suppression here than could the Board of Education of Township High School District 205.

For this reason the authority relied upon by the Administration is inapposite. In *Lewis v. Cowen*, 165 F.3d 154 (2d Cir. 1999), the Second Circuit did indeed point to the potential impact of the plaintiff's conduct on the agency's profitability. But the agency was a state lottery, a profit-making enterprise. The plaintiff's job was to raise money. Yet, he had engaged in a personal struggle over policy with his superior, whose directive he refused to

carry out. The present faculty members were not employed to raise athletic income nor were they engaged in personal struggle with an immediate superior.

So, too, in *Messman v. Helmke*, 133 F.3d 1042 (7th Cir. 1998), this Court pointed to "fiscal responsibility" as a government interest in support of restriction. But that restriction forbade firefighters from moonlighting for contiguous fire departments. The court held that "reducing off-duty injuries," and "minimizing liability for paid sick leave are interests that outweigh the firefighters' interest in volunteering for other firefighting organizations." *Id.* at 1047. Limiting moonlighting out of fear for workers' compensation liability is distinguishable from limiting political speech because it might affect the city's bottom line. Indeed, to the extent the firefighters' associational liberty of working for other departments in *Messman* was a form of political expression contrary to the City's desire to annex these communities, this Court was at pains to note that the firefighters *were* free to engage in *just* that advocacy directly. *Id.* Thus, neither *Lewis* nor *Messman* stand for the proposition that faculty political speech contrary to the University's "bottom line" may be censored.

## B. REPUTATIONAL EFFECT

The tacit assumption is that faculty members, in common with all others in a master-servant relationship, owe a duty of loyalty to the employer, in particular, to eschew any public disparagement of its policies or actions. But the struggle for academic freedom at the turn of the century was a struggle against the existence of just such a duty. *See* Richard Hofstadter & Walter Metzger, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES 458-467 (1955). In the words of the AAUP's founding 1915 *Declaration of Principles on Academic Freedom and Tenure*, apropos of "the relationship between university trustees and members of university faculties,"

> [t]he latter are the appointees, but not in any proper sense the employees of the former . . . A university is a great and indispensable organ of the higher life of a civilized community, in the work of which the trustees hold an essential and highly honorable place, but in which the faculties hold an independent place . . .

Hofstadter & Metzger, *supra*, at 397 (quoting the 1915 *Declaration*).

Academic freedom means not only the freedom to teach and to publish the results of one's research consistent with a professional standard of care even if contrary to the dictates of consecrated authority, donors, and trustees, but also the freedom to criticize the policies of the employing institution. *See Omosegbon v. Wells*, 335 F.3d 668 (7th Cir. 2003) (finding that plaintiff's

"academic freedom claim fails because he did *not* allege that he was ever restricted from or sanctioned for speaking publicly about an issue" (*emphasis added*)); *see generally* Matthew Finkin, *Intramural Speech, Academic Freedom, and the First Amendment*, 66 TEX. L. REV. 1323, 1332-1345 (1988) (reviewing the history). In this regard, the norms of the academic community differ from those of the business and professional world. As former President Dodds of Princeton University observed, academic freedom is

> a peculiar kind of freedom, of a sort which the honest layman does not encounter in his own business or professional experience. Indeed, on the surface it seems to him to contravene those standards of responsibility for the interest of colleagues in the organization and of personal loyalty to the welfare of the institution which he observes in his ordinary business and professional relationships.

Harold Dodds, *Academic Freedom and the Academic President*, 28 LAW & CONTEMP. PROBS. 602, 602-603 (1963).

It would belabor the obvious to recite the many instances where the profession has confronted — and rejected — the claim of a duty to maintain the institution's public image as a limit on faculty speech. To take but one as illustrative of the class: where a faculty member was terminated for leading a community protest (involving low income and black residents) against his University's planned expansion, and the administration justified its decision in

part on the ground that the faculty member had tended "to tarnish the University's image," the AAUP's *ad hoc* committee of investigation found the decision to violate the "speech as a citizen" clause of the 1940 *Statement* without seeming to need any further explanation. *Academic Freedom and Tenure: A Successfully Resolved Case at Northern Michigan University*, 55 A.A.U.P. BULL. 374 (1969).[9]

For the very same reason the "bottom line" cannot justify the suppression of academic speech, neither can negative reputational effects flowing from that speech. Were the University to dismiss a professor because of parental or alumni displeasure with what he said on the ground that he had "sullied" the University's reputation — which fairly well characterizes what the Trustees of the University of Illinois did in the Koch case[10] — and were the AAUP to impose public censure on the University, as it did in that case, then by the Administration's reasoning here it could forbid members of the faculty from publicizing that fact in faculty recruiting conferences of the disciplinary societies.

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[9] Upon circulation of the *ad hoc* committee's draft report to the University administration to assure accuracy, a normal part of the Association's investigative process, the administration reinstated the faculty member.

[10] *See supra* note 1 and accompanying text.

There are two reasons why this *reductio ad absurdum* is not to be produced. First, under Article X of the University's *Statutes*, faculty are free to speak as citizens irrespective of the alleged reputational consequences to the institution. Second, even in the secondary school setting, the *Pickering* court rejected the "duty of loyalty" as a wholesale constraint on free speech. The Board of Education argued in *Pickering* that a teacher in its employ owed it "a duty of loyalty to support his superiors in attaining the generally accepted goals of education." *Pickering*, 391 U.S. at 568. In response, the Court refused to "lay down [such a] general standard." *Id.* at 569. The fact that the teacher's speech, including an accusation "that too much money was being spent on athletics," was detrimental to the policies supported by the Board meant only that it reflected a "difference of opinion that clearly concerns an issue of general public interest." *Id.* at 571. It is "essential," the Court opined, for teachers "to be able to speak out freely" on such questions. *Id.* at 572. Robust, uninhibited public discussion of controversial questions of public policy is not to be held hostage on the ground of adverse reputational effect on the public employer.[11]

[11] Nor is *Trejo v. Shoben*, 319 F.3d 878 (7th Cir. 2003), to the contrary. The plaintiff challenged the non-renewal of his appointment on the ground *inter alia* that it was arbitrary under the Fourteenth Amendment. That is, even though the speech (and conduct) giving rise to the nonrenewal were *not* constitutionally protected, reliance on it was "'utterly unreasonable'." *Id.* at 887. A majority of this Court disagreed, noting both the egregious nature of the probationer's conduct and the University's concern for its reputation were it to tolerate such behavior. *Id.* at 888. Importantly, this Court did not hold that a concern for reputation permits the imposition of discipline (or censorship) for speech that *is* constitutionally protected.

### C. NCAA RULES AND IMPRESSIONABLE YOUTH

The Administration argues that one of the goals of the Preclearance Directive was to comply with NCAA rules intended to "insulate[] student athletes, most of whom are teenagers, from 'undue pressure' and 'interruption' of their academic and athletic pursuits." Brief of Appellant at 14.

The court below disposed of the former element on two distinct grounds, each sufficient to warrant affirmance here. On one hand, the court recognized that the most nearly applicable NCAA rules do not remotely constrain contacts with prospective athletes by faculty who are not official university representatives, dealing with issues that are not part of the recruitment process. *Crue v. Aiken*, 204 F. Supp. 2d 1130, 1144-47 (C.D. Ill. 2002). Moreover, the court concluded that the rules of a private organization which, by membership, the University is contractually bound to observe, cannot truncate the faculty's First Amendment rights. *Id.*

By agreeing to adhere to NCAA rules the University made them its own and so must defend its action under them. For this reason the University could not forbid a faculty product boycott of an athletic shoe manufacturer for its alleged sweat shop conditions on the basis of a "non-disparagement" clause in the manufacturer's contract with the University. *See supra* Section II. A.

*Messman v. Helmke*, *supra*, speaks to this question. The prohibition on employee moonlighting there was contained in a collective bargaining agreement (CBA). *Messman*, 133 F.3d at 1047. This Court did not hold that the CBA had bargained away the firefighters' First Amendment rights; rather, this Court was at pains to note that the City was subject to §1983 "for the managerial policy embodied in the CBA." *Id.* at 1044 n.2.

The question becomes whether the Administration can censor faculty speech directed at prospective student-athletes because the latter are under pressure, might be "confused" by such communications, or might not "know what to do with the information." Brief of Appellant at 44. The University's athletic program and the "big business" of intercollegiate athletics of which it is a part has placed these athletes in the position of having a wide range of choice about their collegiate/athletic careers. The instant speech supplies these prospective students with information relevant to their decisions. (The same would be so if the University were to abandon "The Chief" and a campaign mounted to inform students that the University was drenched in "political correctness."). But the Administration's argument would deny them their constitutional right to *receive* information relevant to the political environment of the school they are considering. *Cf. Martin v. City of Struthers*, 319 U.S.

141, 143 (1943) (on the application of the First Amendment to the right to receive information).

These students are no less impressionable, confused, or ignorant the day they set foot on campus to matriculate than the day before, but once on campus they cannot be insulated from exposure to the robustness of the anti- and pro-Chief debate. Should they not be informed beforehand of what they might encounter? It ill becomes a University to plead to the ignorance of prospective students as a ground of denying them, or anyone, information.[12]

The Administration's argument to the availability of alternative channels of communication, Brief of Appellant at 49-52, eviscerates this claim. According to the Administration, faculty speakers could purchase advertising space, say for "open letters" in the hometown papers where these prospective students reside. What they may not do is take that open letter, cut it from the local press, and mail it directly to the audience they wish to reach. This is nonsensical. *Cf. Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988) (First Amendment issue would be

[12] The authority relied upon by the Administration permits restriction by public school authorities on student speech in secondary schools. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986). These cases would be relevant here if, and only if, those restrictions translate into the University setting. They do not. *Hosty v. Carter*, 325 F.3d 945 (7th Cir.), *appeal docketed*, 2003 U.S. App. LEXIS 13195 (7th Cir. 2003) (*en banc*). Moreover, the justification in *Hazelwood* for restricting *student speech* in *secondary school* does not apply to *faculty speech* at a *university*.

presented if the National Labor Relations Act were to be read to prohibit consumer leafleting of the target of the union's boycott while conceding that newspaper and radio advertising by the union would not be prohibited).

The real basis for the University's claim rests not on the confusion or ignorance of the targets of the faculty members' speech, but on the speakers' connections to the University. Thus, the analysis returns to the issues presented in Section II. A and II. B, *supra*.

## CONCLUSION

The Administration argues to the role of University self-government as a caution on judicial intervention. Brief of Appellant at 41-42. This Court has also strongly endorsed this principle. *Linnemeier v. Bd. of Trs. of Purdue Univ.*, 260 F.3d 757 (7th Cir. 2001).

A university, as a self-governing community, includes its faculty. James Conant, PRESIDENT'S REPORT, HARVARD UNIVERSITY 2 (1948). But the Administration adverts only to consultations with officials of the NCAA, of the Big Ten Conference, of the Department of Athletics, and with legal counsel, Brief of Appellant at 5, 12-14. The Chancellor did report the Preclearance Directive to the Faculty Senate and explained his reasons for it, but he did not seek the Senate's advice nor that of the faculty's Committee on Academic

Freedom and Tenure concerning the reach of his power to censor speech under Article X. In this case, the system of self-government failed because the Administration ignored it. Hence, this Court is called upon, necessarily as a last resort, to save the University, and its faculty, from its Administration's headstrong folly.

Respectfully submitted,

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