



COMMENT FOR SUBMISSION TO THE HOUSE SUBCOMMITTEE ON
HEALTHCARE, BENEFITS, AND ADMINISTRATIVE RULES AND THE
HOUSE SUBCOMMITTEE ON INTERGOVERNMENTAL AFFAIRS FOR
THE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
REGARDING THE MAY 22, 2018 HEARING ENTITLED:

Challenges to the Freedom of Speech on College Campuses: Part II

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Dear Chairman Jordan, Chairman Palmer, and Members of the Committee:

The importance of a robust enforcement of First Amendment protections on our nation’s campuses is difficult to overstate. The United States Supreme Court has called public universities “peculiarly the ‘marketplace of ideas.’”¹ Without this marketplace of ideas, “our civilization will stagnate and die.”² As the marketplace’s custodians, public universities should be places where young adults learn to exercise the First Amendment rights necessary to participate in our system of government and to tolerate others’ exercise of those same rights. Indeed, teaching students about our constitutional system and their role in it as citizens is a necessary part of education, and students learn as much or more from universities’ policies and practices of protecting or restricting expression and association as they do from the classroom.

We can only protect the First Amendment if we understand it. Congress and the American people have every right to expect that our public universities will advance, not hinder, that understanding. But on this score our public universities are simply failing. Only seventeen percent of Americans can even identify the free exercise of religion as a right protected by the First Amendment.³ Thirty-nine percent of all Americans and twenty-seven percent of college graduates cannot identify *any* of the protections of the First Amendment.⁴ Even more troubling, nearly one in five students agree that using violence to silence speech that a student deems “offensive and hurtful” is “acceptable.”⁵ Putting these beliefs into action, many speakers (disproportionately conservative) on campuses in the last year have been met with violence and administrative roadblocks to prevent their viewpoints being heard in the University marketplace.

The status quo is unsustainable and Alliance Defending Freedom (ADF) is dedicated to changing it to advance the cause of freedom. By way of introduction, ADF is an alliance-building, non-profit legal organization that advocates for the right of people

¹ *Healy v. James*, 408 U.S. 169, 180 (1972).

² *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion of C.J. Warren).

³ The Newseum Institute, *The 2016 State of the First Amendment*, available at http://www.newseuminstitute.org/wp-content/uploads/2016/06/FAC_SOFA16_report.pdf (last visited May 18, 2018).

⁴ *Id.*

⁵ John Villasenor, *Views Among College Students Regarding the First Amendment*, Brookings Institution, Sept. 18, 2017, available at <https://www.brookings.edu/blog/fixgov/2017/09/18/views-among-college-students-regarding-the-first-amendment-results-from-a-new-survey/>.

to live out their faith freely.⁶ ADF's Center for Academic Freedom⁷ 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, and has represented clients in over 385 victories for First Amendment matters on public university campuses.⁸

Unfortunately, a significant majority of public universities are restricting the First Amendment rights of speech and association of their students and faculty through a vast array of onerous policies and restrictions that not only violate students' rights now, but teach them false lessons about how they should think about their own and others' constitutional rights once their college days are done. This letter addresses recent instances where ADF's clients' First Amendment rights have been violated at public post-secondary institutions, and it identifies four subject-matter areas where these institutions routinely infringe on speech and associational rights.

Most Public Universities' Written Policies and Unwritten Practices Restrict Free Expression and Association on Campus, Teaching Students that Government May Restrict the Expression of Unpopular Viewpoints

Rather than teaching their students about the robust protections of the First Amendment and the value of hearing other opinions in the "marketplace of ideas," the vast majority of public universities maintain policies or regular practices that violate constitutional rights. Universities routinely,

- (1) impose unconstitutional speech codes,
- (2) create restrictive speech zones,
- (3) require advance approval for student expression,
- (4) authorize "bias response teams" to chill student speech through perpetual investigation,
- (5) charge mandatory student activity fees that require students to fund others' ideological expression and discriminate against disfavored views in allocating those funds, and

⁶ 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*, 137 S. Ct. 2012 (2017) (striking down state burdens 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*, 135 S. Ct. 2218 (2015) (unanimously upholding ADF's client's free-speech rights); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014) (striking down federal burdens on ADF's client's free-exercise rights); *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (upholding a legislative prayer policy promulgated by a town represented by ADF); *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125 (2011) (upholding a state's tuition tax credit program defended by a faith-based tuition organization represented by ADF).

⁷ ADF Center for Academic Freedom, www.CenterforAcademicFreedom.org (last visited May 17, 2018).

⁸ ADF Center for Academic Freedom Cases, <http://centerforacademicfreedom.org/cases/> (last visited May 17, 2018).

(6) impose security fees that authorize heckler’s vetoes, raising the price for speakers under the guise that they are “controversial.”

In the last decade, ADF has assisted hundreds of students and student groups of varying religious and political beliefs facing violations of their First Amendment rights on campus. While the Center for Academic Freedom has achieved a 100% success rate in challenging the all-too-common “speech zones” listed below, universities nevertheless persist in applying such unconstitutional policies to our nation’s students every day. The following select incidents encountered by ADF clients in 2016 and 2017 alone illustrate the breadth of the constitutional crisis students face on campus.

A Young Americans for Liberty member at Michigan’s Kellogg Community College was arrested for distributing copies of the Constitution on her campus.⁹ Administrators explained that students could only speak freely by reserving a table in the student union and applying for a permit. The rest of the school’s campus was off-limits for student speech. Video of the arrest is publicly available online.¹⁰

At California State University-Los Angeles, faculty members actually linked arms to prevent students from entering an auditorium to hear a speech from nationally known speaker Ben Shapiro on—ironically—freedom of speech, hosted by a Young Americans for Freedom student group.¹¹ The President of the University personally tried to prevent these students from hosting their free speech event, imposing burdensome security fees, trying to cancel the event, and—when protestors attempted to stop the event—ordering the police to stand down, thus permitting faculty members and others to block students from entering and engage in physical violence. Video of, and commentary regarding, this incident is publicly available online.¹²

At Georgia Gwinnett College in suburban Atlanta, Chike Uzuegbunam sought to peacefully discuss his faith with other students on his campus. The school ordered him not to speak outside of a tiny speech zone, representing .0015% of the campus,

⁹ Press Release, ADFMedia, Student Club Supporters Arrested for Handing out US Constitution at Michigan College (Jan. 18, 2017), <http://www.adfmedia.org/News/PRDetail/10155>.

¹⁰ Video: Students Arrested for Passing Out US Constitutions on Kellogg Community College Campus, Jan. 18, 2017, <https://www.youtube.com/watch?v=5OnIuRetVb4>.

¹¹ Young America’s Foundation v. Covino, <http://www.adfmedia.org/News/PRDetail/10117> (last visited May 18, 2018).

¹² Video: ADF, YAF, Ben Shapiro File Free Speech Suit Against CSULA, May 18, 2016, <https://www.youtube.com/watch?v=Hwr5TvGrMiU>.

and even then only after he applied for permission. But after he had satisfied all of the school's demands and secured the permit to speak in this ludicrously small speech zone, an officer told him that he could no longer speak even there. Because others objected, his discussion of the Gospel was be deemed "disorderly conduct" and a "disturb[ance] [of] the peace and/or comfort of persons."¹³

Despite billing itself as America's most diverse campus, Queens College in New York City rejected a Students for Life group's application for registered student organization status, excluding the group from meeting space, the opportunity to bring in speakers, funding, and all of the benefits that allow the nearly one hundred other student organizations at Queens to participate in the marketplace of ideas.¹⁴

At Fresno State, a Students for Life Club received permission to chalk positive, life-affirming messages on the sidewalks leading to the university's library. Despite being informed that the group had permission, a professor recruited at least seven students from his 8:00 a.m. class to erase and deface the pro-life chalk messages. When he was reminded that the club was acting with full permission, the professor walked over to one of the pro-life messages and began erasing it himself, claiming that he was exercising his free speech rights. In addition, he erroneously proclaimed, "College campuses are not free speech areas."¹⁵ Around the same time, in Pennsylvania, Kutztown University employees erased pro-life messages from the sidewalks despite the students' compliance with the Universities chalking policies that permitted the students to express their messages.¹⁶

These recent cases in Michigan, California, Georgia, Pennsylvania, and New York, only represent a fraction of speech-restriction incidents on public university campuses. In just the last year, ADF has also represented students in federal lawsuits against universities restricting their rights in North Carolina,¹⁷ Wisconsin,¹⁸ and

¹³ Press Release, ADFMedia , "Georgia college sued for censoring student speech, restricting it to .0015% of campus," (Dec. 20, 2016), <http://www.adfmedia.org/News/PRDetail/?CID=92219>.

¹⁴ Press Release, ADFMedia, NYC College Relegates Pro-Life Student Group to Second-Class Status (Jan. 25, 2017), <http://www.adfmedia.org/News/PRDetail/10145>.

¹⁵ Press Release, ADFMedia, Fresno State U. Professor Sued for Erasing, Censoring Students' Pro-life Sidewalk Chalk Expression (May 11, 2017), <http://www.adfmedia.org/News/PRDetail/10264>.

¹⁶ Press Release, ADFMedia, Pennsylvania University Scrubs Chalked Pro-life Messages from Sidewalks (March 13, 2017), <http://www.adfmedia.org/News/PRDetail/10196>.

¹⁷ Press Release, ADFMedia, NC State Revises Speech Policy After Losing Court Battle With Student Group (July 19, 2016), <http://www.adfmedia.org/News/PRDetail/9975>.

¹⁸ Press Release, ADFMedia, UW-Eau Claire to Religious Students: 'Your Service Doesn't Count' (Nov. 10, 2016), <http://www.adfmedia.org/News/PRDetail/?CID=92002>.

Iowa.¹⁹ These violations of the First Amendment are not limited to red or blue states, or to any region of the country. Nor are these isolated events. ADF attorneys regularly advise students who experience similar discrimination but are afraid to publicly challenge the colleges that are supposed to be the protectors of freedom in the marketplace.

College students are learning by example how government officials—university administrators—value the First Amendment. Today’s students are tomorrow’s Members of Congress, judges, teachers, and voters. Our university campuses are where the next generation should be learning how the Constitution works, what rights it protects, and why they are worth defending—even when one does not always agree with the views or the beliefs of those that it protects. But instead, students are learning by example from public university administrators that the First Amendment means what government officials want it to mean—and that the full exercise of the First Amendment is too dangerous to permit.

We highlight these examples to underscore the significance of this growing cultural and constitutional crisis facing our university students. This crisis will impact the future of our nation’s commitment to the First Amendment freedoms that ensure the American experiment will continue. These campuses are heavily funded by taxpayer dollars. For example, roughly half of the Department of Education’s budget, allocated by Congress, goes to higher education programs, and this does not even include student loans.²⁰ Congress has a fiscal responsibility to ensure that these tens of billions of dollars in federal taxpayer funds are being used in a way that advances, not discourages, respect for the First Amendment rights of all Americans.

Four Common University Policies that Restrict Free Expression or Association

1. “Speech Zones”

Many universities prohibit “free speech” activities (whether just talking with fellow students, gathering signatures, holding signs, or handing out free copies of the Constitution) except on small designated areas of campus, and often even then require prior approval. This is the case at Georgia Gwinnett College in suburban Atlanta (referenced above) where Mr. Uzuegbunam was told he could only tell

¹⁹ Press Release, ADFMedia, Iowa State Requiring Students to Give up Free Speech to Graduate (Oct. 17, 2016), <http://www.adfmedia.org/News/PRDetail/10096>.

²⁰ See Issue Brief, Federal and State Funding of Higher Education, PewTrusts.org (June 11, 2015), <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/06/federal-and-state-funding-of-higher-education>.

others about his Christian faith on .0015% of the campus with prior permission, at Kellogg Community College where individuals were arrested for passing out the Constitution outside the “speech zones,” and at Southern Illinois University where expression was limited to a speech zone that is only .0013% of the campus.²¹

Often, the speech police do not enforce these restrictions equally against all expression. For example, ADF’s clients at Grand Valley State University in Michigan attempted to hold an informal event celebrating free speech by having students write on a “free speech ball” in a large open area on campus.²² They were told they would be arrested if they did not move to the small zone that excludes 99.7% of the campus. On the other hand, a large crowd of students was allowed to hold signs and march around campus outside of the two small speech zones (including in buildings) as they protested the election of Donald Trump. The University agreed to change its policies after ADF represented the students in a federal lawsuit challenging the speech zones,²³ but such inequitable application of policies to prohibit some viewpoints and permit others is commonplace on campuses—especially those with restrictive “speech zones.”

2. Vague harassment and other speech policies

Many schools have adopted vague and ambiguous harassment and speech policies that chill student expression. When a policy defines harassment as words which “offend” or warn students that “intolerance will not be tolerated,” many students are reasonably concerned about expressing unpopular opinions for fear of being accused of “harassment.” Iowa State University even stated in its policies that “engaging in First Amendment protected speech activities” may be punished as “harassment.”²⁴ This mentality that administrators’ views of offensive speech can override the First Amendment not only chills students’ speech on these campuses, but it also teaches the nation’s future leaders that the government is the ultimate arbiter of what opinions are acceptable to hold. Thus, the marketplace of ideas turns into the intellectual vacuum of intolerance—breeding fear instead of freedom.

²¹ Press Release, ADFMedia, Student Group Sues SIU-Edwardsville for Restricting Speech to Less than .0013% of Campus (Oct. 25, 2017), <http://www.adfmedia.org/News/PRDetail/10404>.

²² Press Release, ADFMedia, Take Your ‘Free Speech’ Beach Ball and Go Home, Michigan University Tells Students (Dec. 8, 2016), <http://www.adfmedia.org/News/PRDetail/10124>.

²³ Press Release, ADFMedia, Grand Valley State University Revises Expressive Activity Policy (March 1, 2017), <http://www.adfmedia.org/News/PRDetail/10181>.

²⁴ Press Release, ADFMedia, Iowa State Requiring Students to Give up Free Speech to Graduate (Oct. 17, 2016), <http://www.adfmedia.org/News/PRDetail/10096>.

3. Granting unlimited power to administrators

Another way in which the universities engage in viewpoint discrimination is by granting unbridled discretion to an administrator to choose when a burden on speech applies or a permit will be approved. These open doors to discrimination may be found in policies requiring advance review of literature before it may be distributed, imposing security fees on speech where an administrator deems the speaker “controversial,” or authorizing funding for student organizations through a process that permits discrimination in favor of some views and against others. The Supreme Court held in *Forsyth County, Georgia v. Nationalist Movement* that “[t]he First Amendment prohibits the vesting of such unbridled discretion” to discriminate between viewpoints “in a government official.”²⁵ According to the Court, “such discretion has the potential for becoming a means of suppressing a particular point of view.”²⁶ Because the “decision [of] how much to charge for police protection . . . or even whether to charge at all” is “left to the whim of the administrator,” without any consideration of “objective factors” or any requirement for “explanation,” such policies are unconstitutional.²⁷

Such policies, however, are commonplace on our nation’s campuses. Just this spring the University of Southern Maine attempted to charge students approximately \$450 (a substantial amount for a student group) in “security fees” when they invited a sitting state legislator to speak on immigration policy.²⁸ The University President called the state legislator “offensive and repulsive” and “distasteful and nasty,” and encouraged the student body to “peacefully” protest him. He then told the press that he would charge the student group for security because their speaker’s viewpoints were controversial and could lead to “a highly charged situation.”²⁹ But the Supreme Court held that “[s]peech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob”³⁰—much less one stirred up by the university president. Such fees literally transform “free speech” into “expensive speech.”

²⁵ *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 133 (1992).

²⁶ *Id.* at 130 (quotation marks and citation omitted); see also *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1042 (9th Cir. 2009) (noting that unbridled discretion to impose security fees indicated possible content-based discrimination).

²⁷ *Forsyth Cty.*, 505 U.S. at 133.

²⁸ Press Release, ADFMedia, U. of Southern Maine Agrees Not to Charge Conservative Student Group \$450 for ‘Free’ Speech (Feb. 20, 2017), <http://www.adfmedia.org/News/PRDetail/92875?search=1>.

²⁹ *Id.*

³⁰ *Forsyth Cty.*, 505 U.S. at 134-35.

At other schools, such as Queens College, committees are granted similar unbridled discretion to decide what student groups are worthy of even being “recognized” at all. This process grants them the ability to decide what viewpoints may bring speakers to campus, post on the bulletin boards, and use classrooms for meetings. In this case, the Students for Life group was denied recognition, with no ability to appeal, while other groups were able to use campus facilities to spread competing viewpoints.³¹ And at Queens College and many other universities, the student government is authorized to distribute millions in mandatory student activity fees to student groups with few if any limits on the discretion of these decision-makers. At Queens College, for example, each student pays over \$1,200 in student activity fees over a four year period, substantially adding to their debt burden. And this injury is compounded by the university distributing those funds to groups for ideological expression they oppose, excluding *some* groups whose members pay these fees from student activity funding altogether, and allocating these funds to groups in a manner that favors some viewpoints over others.

Granting administrators unbridled discretion to restrict viewpoints at-will not only violates constitutional principles, it educates the next generation with the proposition that government officials are a law unto themselves, making the rules as they go along and favoring those they wish to favor.

4. Limiting equal access and free association

Every university seeks to eliminate invidious discrimination, enacting non-discrimination policies that forbid discrimination based on irrelevant characteristics like race, sex, religion, or political views. But some schools turn these policies on their head, using these rules meant to protect religious students, for example, to actually forbid religious or political student groups from being officially recognized groups precisely because of their ideological distinctives. These policies, and “all comers” policies that take this prohibition on free association one step further by denying it to all groups, can result in absurd consequences for student groups that have unique and defining viewpoints like the College Democrats, Christian Legal Society, or even the Black Law Students Association. These policies are often misused to prohibit student clubs from choosing their leaders based on shared agreement with the very religious or political beliefs the group is formed to foster.

³¹ Press Release, ADFMedia, NYC College Relegates Pro-Life Student Group to Second-Class Status (Jan. 25, 2017), <http://www.adfmedia.org/News/PRDetail/10145>. After Students for Life filed a federal lawsuit challenging this policy the school agreed to recognize the group. Press Release, ADFMedia, NYC College Recognizes Pro-Life Club but Must Make Policy Changes (Jan. 30, 2017), <http://www.adfmedia.org/News/PRDetail/10162>.

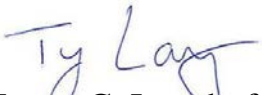
If applied uniformly, these policies do not just ostracize faith-based student organizations. For example, the dean of Hastings Law School agreed that his school's policy would force an organization like the Black Law Students Association to admit white supremacists as official voting members and leaders. Similar examples abound: a Muslim group must admit an atheist to its leadership ranks, a Democrat organization must allow a Republican to speak for it. And Christian student groups must not only allow an atheist Bible study leader, they would also be required to allow a believer in racial supremacy to do so—under the threat of sanction from their school if they do not relent.

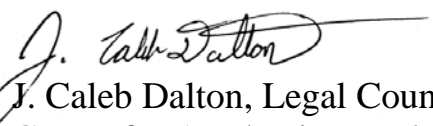
No one supports discrimination against students on the basis of race, sex or other irrelevant reasons. But these policies can be especially harmful when colleges misuse them to prevent religious student groups from being religious. The right to speak means little if a group cannot control who speaks for it. The First Amendment protects everyone's right to associate around and advocate for shared political, social, or religious views and religious students should have that same right.

Conclusion

The state of the First Amendment on public universities and colleges is not well. The status quo at most institutions substantially restricts free speech and association, and teaches students that government censorship is the norm, not the exception. But, identifying and acknowledging the problems are the first steps in remedying them so that the future of freedom is secured through a well-educated citizenry that appreciates the value of the First Amendment. We commend the Committee for its attention to this vital matter.

Very truly yours,


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