

# FIRST AMENDMENT PROTECTIONS ON PUBLIC COLLEGE AND UNIVERSITY CAMPUSES

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## HEARING BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE OF THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES ONE HUNDRED FIFTEENTH CONGRESS FIRST SESSION

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## ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

Letter submitted by the Alliance Defending Freedom. This material is available at the Committee and can be accessed on the committee repository at:  
<http://docs.house.gov/meetings/JU/JU10/20170404/105828/HHRG-115-JU10-20170404-SD002.pdf>

Letter submitted by the American Legislative Exchange Council (ALEC). This material is available at the Committee and can be accessed on the committee repository at:  
<http://docs.house.gov/meetings/JU/JU10/20170404/105828/HHRG-115-JU10-20170404-SD002.pdf>

Articles Submitted by The Honorable Steve King, Iowa, Chairman, Subcommittee on the Constitution and Civil Justice. This material is available at the Committee and can be accessed on the committee repository at:  
<http://docs.house.gov/meetings/JU/JU10/20170404/105828/HHRG-115-JU10-20170404-SD002.pdf>



## FIRST AMENDMENT PROTECTIONS ON PUBLIC COLLEGE AND UNIVERSITY CAMPUSES

TUESDAY, APRIL 4, 2017

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON THE CONSTITUTION  
AND CIVIL JUSTICE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The subcommittee met, pursuant to call, at 11:30 a.m., in Room 2237, Rayburn House Office Building, Hon. Steve King [chairman of the subcommittee] presiding.

Present: Representatives King, Goodlatte, Franks, Gohmert, DeSantis, Cohen, Conyers, Nadler, and Raskin.

Staff Present: John Coleman, Counsel; Jake Glancy, Clerk; James Park, Minority Chief Counsel; Matthew Morgan, Minority Professional Staff Member; and Veronica Eligan, Minority Professional Staff Member.

Mr. KING. The Subcommittee on the Constitution and Civil Justice will come to order.

Without objection, the chair is authorized to declare a recess of the committee at any time. We welcome everyone to today's hearing on the First Amendment Protections on Public College and University Campuses. And I now recognize myself for my opening statement.

Fears of government overreach, in our Nation's founding era, necessitated the inclusion of explicit protections of liberty in the United States Constitution. Among them includes provisions to protect speech. Indeed, the First Amendment states that "Congress shall make no law abridging the freedom of speech or of the press or of the right of the people peaceably to assemble."

The Supreme Court has long held that the First Amendment applies to States and government entities, including public colleges and universities. While the First Amendment prohibits public colleges and universities from restricting free speech, it generally does not apply to private institutions because the First Amendment regulates only government conduct.

And while acceptance of Federal funding confers some obligations on private colleges, such as compliance with Federal antidiscrimination laws, compliance with the First Amendment is not among these obligations.

Today, our institutions of high learning have, too often, turned from being a marketplace of ideas to a dictatorship of ideas. Students, for example, no longer feel comfortable expressing ideas. According to a 2015 national survey released by Yale University's

William F. Buckley, Jr. Program, 49 percent of students surveyed often, “Felt intimidated to share their ideas, opinions, or beliefs in class because they were different than their professors and course instructors.”

According to the same survey, half of the students surveyed often, “Felt intimidated to share their ideas, opinions, or beliefs in class because they were different than their classmates or peers.” This is, in part, due to the administrative policies maintained by the institutions. These administrative policies known as “speech codes” are defined by the Foundation for Institutional Rights in Education, known as FIRE, F-I-R-E, defined this way: “Any campus regulation that punishes, forbids, heavily regulates, or restricts a substantial amount of protected speech.” They come in a variety of forms, including restricting free speech to designated areas on campus called, “free speech zones,” or banning offensive communication altogether. Not at all what our Founding Fathers had in mind.

Time and time again, courts have struck down these administrative policies; nevertheless, we continue to hear that students are being prevented from engaging in all manner of expression. For example, Alliance Defending Freedom filed a lawsuit earlier this year regarding the arrest by campus police of a student and of Young Americans for Liberty supporters who were passing out copies of the Constitution on the sidewalk of Kellogg Community College in Battle Creek, Michigan.

Last week, FIRE warned student newspapers about printing satire on April Fools’ Day. The warning stated in part, “Disturbingly, colleges have, indeed, launched full-fledged investigations into newspapers following satirical editions, threatening the publications with loss of funding and future oversight by content review boards. Staff members have been subjected to sensitivity training; editors have been fired, newspapers themselves confiscated.”

A police state is what that sounds like to me, not the United States of America, and I happen to remember standing outside at Charlie Hebdo in Paris, some months ago. I went there to witness the location of what it would be like, when they come in with a speech code and slaughter, I believe, 12 people in that place for their satire. In America, we stand up against that.

These examples in the hundreds, if not thousands, of stories that continue to arise reflect a dangerous trend. It was observed in the founding era by Benjamin Franklin, who was, himself, a great satirist, that, without freedom of thought, “There can be no such thing as wisdom and no such thing as public liberty without freedom of speech.” It is, therefore, clear that we seek to maintain our form of government. To do so, we must uphold its fundamental principles.

I think of some other circumstances, and I mentioned what happened in Paris, but I am also thinking of sitting down with a young lady named Elizabeth Wolff in Vienna some couple of years ago, who was on her last appeal and on her way to the European court because she had been convicted of hate speech through the Austrian legal system, and all the way up, appealed to the European court for this, for asking the rhetorical question, “If you have sex-

ual relations with a 9-year-old, does that make you a pedophile?" It was politically incorrect, and she faced that criticism.

I think, very recently, of the second most popular politician in the Netherlands, Mr. Geert Wilders, who was convicted of hate speech by the courts in his own country that he nearly became the Prime Minister of. We do not want to see that in this country, but what the motive is, I think, is captured here.

First, I would point out Charles Murray has been booed, and hissed, and some violence on campus, and driven off campus because they did not like the ideas that they thought he might speak to, or they did not like what he had written 20-some years ago.

But I think it was captured to a degree by George Orwell in his book 1984. He wrote, "We are not interested in the overt act; it is the thought that we care about." And the thought of that is, "If you can control the words, you can control the thoughts; if you can control the thoughts, you can control the action."

So, this anti-hate speech thing and this suppression of our First Amendment liberties, and this God-given First Amendment liberties in this country, are being suppressed by political correctness; they are being suppressed on the campuses across this land; and it is not just suppressing our freedom of speech: what it is doing, it is suppressing our freedom of thought. And a Nation that does not have freedom of thought cannot cure its problems. That is why we have freedom of speech.

So, I would yield back the balance of my time and recognize the ranking member from Tennessee for his opening statement.

Mr. COHEN. Thank you, Mr. Chair. I cannot and will not get into the pros and cons on this issue. There are both pros and cons. We are all for free speech, and we all understand, though, I think, that are some limits to it: "fire" in a theatre; and speech, maybe, where you incite people to gross people out of a political arena; where there are limits, and you cause violence, or you threaten people. So, there are limits, but then we have respect for free speech.

My concern is, while this is important, and no question, it is an important issue, that the real important issues facing this country at this time is the First Amendment is freedom of the press. And there are attacks on the press on a regular basis today, which I think this subcommittee needs to look into. It was Richard Nixon that first thought that the press was the enemy, the enemy of the people, in modern history.

Before that, it was Stalin; that was modern, too, but it was not American. It was before the Russian-American melding took place. And what we have seen here is the beginnings of fascism, in some ways, and part of what you see with fascism, disdain for the press, controlling mass media; there are other signs that we see that are scary. That is part of it.

The freedom of the press is so important to being a check and balance on government and to government that is uncontrolled. That is overarching the issue that we face today concerning the First Amendment, is the freedom of the press, not necessarily this particular limited freedom of speech, which is, oftentimes, on campuses and, oftentimes, invective that is hurled at sexual orientation, minorities, and/or people of minority religions, whether Jews, or Muslims, gays, transgendered, et cetera.

And there are some reasons to limit that speech because sometimes it turns to violence, and that is another problem that we have, as one of the signs of fascism that is exhibited at the Holocaust Museum is identification of enemies as a unifying cause, and some of this is what happens there, and we are seeing it today.

I also must mention, today is the anniversary of Dr. King's assassination in Memphis 49 years ago. It is also the 50th anniversary of his speech at Riverside Church, which is the most powerful speech, I think, that I know in my lifetime. Reflecting on the three -ism's, militarism, materialism, and racism, that still are the enemies of this Nation and mankind, which we have not been able to deal with in an appropriate way. And Dr. King was not allowed to speak in Memphis, was not allowed to march in Memphis, and that is part of speech, is the ability to protest and to march, and the city did not want him to protest.

Lucius Burch had to go to court to get the Federal court to allow him to march. And that is why he came to Memphis, for people's rights and workers' rights, which were not being respected. Unfortunately, that is where he was assassinated.

So, freedom of speech is important. We have come a long way with it. I understand, Mr. King, you are having this hearing, and I will submit into the record my wonderful remarks that were prepared on this subject that are just outstanding, but were not the remarks I wanted to deliver today because I thought, with this anniversary of this speech and the assassination, it was important to reflect on Dr. King, but so much more important to reflect on the press and the limits that we have got in this country right now and the ability to attempt to paint the press as enemies and fake news and to discredit the truth.

You can have freedom of the press, but when you have got powerful people in your country claiming that the press is not to be believed and is putting out fake news, that is a problem, and the First Amendment did not envision it. Our Founding Fathers, who we talk about reverently and how brilliant they were, even though they did not understand slavery was wrong and did not understand—or if they did, they did not have the guts to put it in the Constitution, and they did not understand the fact that women should have a right to vote and to full participation, and people without property should have that right. They did not anticipate an executive who talked about fake news, remarks without any profession or expert consultation that sometimes came straight from Russian television.

So, I would ask the chairman to try to look into having the freedom of the press, First Amendment hearing, because that is what faces this country right now and is most urgent.

And with that, I yield back the balance of my time.

Mr. KING. The gentleman returns his time, and his unanimous request to introduce his statement into the record is, hearing no objection, so ordered, along with, before I recognize the ranking member, or the full chairman of the committee, I would ask also unanimous consent to introduce into the record statements from the American Legislative Exchange Council, the Alliance for Defending Freedom, and also these two newspaper articles that I referenced in my opening statement on Mr. Charles Murray.



Hearing no objection, so ordered.

This information is available at the Committee or on the Committee repository at: <http://docs.house.gov/meetings/JU/JU10/20170404/105828/HHRG-115-JU10-20170404-SD002.pdf>.

I now recognize the chairman of the full committee, Mr. Goodlatte, for his opening statement.

Chairman GOODLATTE. Thank you, Mr. Chairman. Mr. Chairman, on August 14, 2015, this committee sent a letter to 160 public colleges and universities that had received a red light rating from the Foundation for Individual Rights and Education, FIRE. According to FIRE, a red light institution is one that has at least one policy that both clearly and substantially restricts freedom of speech. FIRE defines a “clear restriction” as a policy that, on its face, is a threat to free speech and does not depend on how the policy is applied. FIRE defines a “substantial restriction” as a policy that is broadly applicable to speech on campus.

Given the positive responses to this letter by many colleges and universities and the increased attention to this issue, we have seen a substantial decrease in unconstitutional policies across the country in the last 2 years. FIRE reported last year that only 45.8 percent of the public schools surveyed received a red light rating. This year, the number has dropped to 33.9 percent. My hope is that the number will soon reach zero.

Policies that limit free speech limit the expression of ideas, and no one, no one, can be confident in their own ideas, unless those ideas were constantly tested through exposure to the widest variety of opposing arguments. This is especially crucial in a democracy.

Founders of our country understood this clearly; George Washington and Thomas Jefferson wrote of the importance of knowledge in a democracy. Washington wrote, “Knowledge is, in every country, the surest basis of public happiness. In proportion, as a structure of a government gives force to public opinion, it is essential that public opinion should be enlightened.”

And as Thomas Jefferson reminded us, “Knowledge is power. If a Nation expects to be ignorant and free in a state of civilization, it expects what never was and never will be.”

James Madison wrote of the inherent connection between learning and liberty, writing, “What spectacle can be more edifying or more seasonable than that of liberty and learning, each leaning on the other for their mutual and sure support? A popular government without popular information or the means of acquiring it is but a prologue to a farce, or a tragedy, or perhaps both. The people who mean to be their own governors must arm themselves with the power which knowledge gives.”

John Adams wrote specifically of the young that, “It should be your care, therefore, and mine to elevate the minds of our children and exalt their courage. If we suffer their minds to grovel and creep in infancy, they will grovel all their lives.”

I thank Chairman King for holding this hearing, and I thank our witnesses for coming today. I look forward to your testimony and your ideas about how we can continue to foster the free expression of ideas on college campuses.

Mr. KING. The gentlemen from Virginia has returned his time, and the chair would now recognize the ranking member of the full committee, Mr. Conyers, for his opening statement.

Mr. CONYERS. Thank you, Chairman King. I am happy to welcome the witnesses. I am going to yield to Jamie Raskin of Maryland as soon as I make these two sentences.

While I do not pretend that we can fully resolve the long-standing debate over hate speech and the First Amendment on public campuses during the course of this hearing, and while I acknowledge some tension between free speech and equality interest, I hope we can have a productive discussion about the proper balance between protecting free speech and ensuring equal education opportunities for all students. So, I will be looking forward to the discussion that will follow, and I yield to the distinguished gentleman from Maryland, Mr. Raskin.

Mr. RASKIN. Mr. Conyers, thank you very much for your courtesy and your kindness, as I have another meeting I am going to have to get to in a moment. Delighted to be here at this very interesting panel with such great witnesses.

I suppose I should start by remarking that it is very easy for the left to denounce right-wing political correctness on campus, and it is very easy for the right to denounce left-wing political correctness on campus. The issue is whether all of us can stand up for all free speech, including the speech we disagree with.

You know, I used to tell my students that free speech is like an apple, and everybody wants to just take one bite out of it. "I am okay with free speech except for sexist speech; except for racist speech; except for extreme, left-winged speech; except for extreme, right-winged speech." Pretty soon, everybody has taken a bite, and there is nothing left to the apple. So, we have got to accept the whole apple if we want to have free speech for real in the country.

Now, there are certain things that I imagine that would unify everybody on the panel and everybody on this side of the panel, as well, which is free speech zones are an anathema. In America, under the First Amendment, the whole campus is a free speech zone. And, to the extent that you depart from free speech, that should be the exception and not the rule. So, campuses that rope off a little area on the other side of the soccer fields and say, "That is the area where you can exercise your free speech," are really in violation of the First Amendment, and I think we should all be able to agree to that.

It gets more complicated, of course, when you get into the question of, what goes on in the classroom. What goes on with people's scholarship and so on? And I think we need a little bit of historical context, which I would be happy to have some of the witnesses elaborate on. Seems clear to me, when you look at it historically, that most of the speech suppression that we saw in the 1950s and 1960s and 1970s was of a conservative or right-wing nature against left-wing political speech.

In the 1950s, of course, it was McCarthyism, and there were lots of professors who lost their jobs because they did not conform to the standard academic or electoral dogmas of the time. William F. Buckley's book, "God and Man at Yale," was an important moment in the history of orthodox political correctness on campus. In that

book, which I recommend to anybody who has not read it, Buckley comes out very strongly for indoctrination on campus in Christianity and individualism and attacks views that he views as dissenting from that and saying that they do not belong on campus.

In the 1960s and 1970s, of course, there were tens of thousands of antiwar protestors, civil rights protestors, who were suspended or expelled or, otherwise, driven off campus for their views, or perhaps, their views interlace with different actions that they took in terms of sit-in protests or whatever it might be.

Today, it is not right-wing political correctness that is seen as a big threat on campus; we hear a lot more about left-wing political correctness, and of course, we have not seen anything like the mass expulsion suspensions, firings that took place in the 1950s, 1960s, and 1970s, but, undoubtedly, there seems to be a rise in kind of puritanical language protocols that are enforced in the classroom or on campus.

People are made to feel uncomfortable if they arrive at campus not knowing the correct gender pronouns to use in this case or that. And, you know, all of that, I think, is problematic, but we need to put it in the overall historical context of what really has gone on.

So, just a couple of points that I would welcome any reaction to: one is about booing and heckling, which Mr. King mentioned. And I think I agree with his point about this. Booing and heckling is a venerated American art. If you go back and read the transcripts to the Lincoln-Douglas debates, there was lots of heckling that took place, but it was a kind of interjection, and then there would be an answer from the speaker, and that was all right. But the booing and heckling that drowns somebody out is just stupid and is, I think, outside of our free speech tradition and should not be considered to be part of the general First Amendment norm.

The basic rule in the academic context was set forth by the Supreme Court in *Hazelwood v. Kuhlmeier*, which said, "Students have the free speech right to wear a black armband," as Mary Beth Tinker did in protest to the Vietnam War or to speak out, as long as they are not materially interrupting the educational mission and making it impossible for other people to learn. And I think that is the most critical point here.

Obviously, kids have got to learn to accept other people having a point of view that is antithetical to their own. That is part of what it means to live in a liberal society. At the same time, we do not want face-to-face vilification and harassment of people, such that you really do create an adverse, hostile learning environment. And I think that is the difficult line to draw and that we would welcome the views of the committee about that.

And then, finally, as to the question of academic freedom, it seems to me that professors and teachers should have a First Amendment right to take the views that they want, to have the positions that they want. On the other hand, the schools and the universities do have the power, through the tenure process, to decide whether someone is actually progressing and succeeding according to the rigorous academic standards in a particular field.

So, if somebody on their own time, for example, wants to, you know, say, deny that the Holocaust happened, but they are a pro-

fessor of mathematics, and it has nothing to do with their academic teaching, that is obviously okay. If their whole academic project is to show that the Holocaust did not happen, and it is found not to live up to the rigors and the standards of academic success in that field, I think it is perfectly fine to say, "That person does not get tenure."

And so, I think that is another line that we need to draw, and that is the right for people to have their private political views, but not to say, just because I take some extremist stance, that somehow that qualifies me to tenure. Somebody can deny the existence of climate change off campus, again, if they are a professor of history, but if they are in a scientific field and they think that, just by denying the existence of climate change, they should get tenured, that strikes me as wrong, unless they are actually able to do, you know, the scientific evidence that would lead to that conclusion.

I yield back, and thank you very much.

Mr. CONYERS. I yield back, Mr. Chairman.

Mr. KING. His time has expired 2 minutes and 54 seconds ago. Let the record reflect the chair resisted his temptation to limit the gentleman's freedom of speech.

Mr. RASKIN. Forgive me.

Mr. KING. And now I would, without objection, other members' opening statements will be made a part of the record.

Mr. KING. And let me now introduce our witnesses.

Our first witness is Mr. Stanley Kurtz, a senior fellow at the Ethics and Public Policy Center, and our second is Mr. Greg Lukianoff, who is the president and CEO of the Foundation for Individual Rights in Education, FIRE. And our third witness is Mr. David Hudson; he is an ombudsman for the Newseum Institute's First Amendment Center, and our fourth witness is Ken Klukowski, a senior counsel and the director of strategic affairs at the First Liberty Institute.

Excellent credentials, all, gentlemen, and I would ask each of the witnesses' written statements will be entered into the record in their entirety, and I ask you to summarize your statements in 5 minutes or less. And hopefully, you can stay within that timeframe. There is a light in front of you that I think you are all familiar with by now.

And before I recognize the witnesses, we ask that you stand and be sworn in. Stand and raise your right hand, please.

Gentlemen, do you swear that the testimony you are about to give before this committee is the truth, the whole truth, and nothing but the truth, so help you God?

You may be seated.

And thank you, and let the record reflect that all the witnesses responded in the affirmative.

And so, I now recognize our first witness, Mr. Kurtz, for your testimony. Mr. Kurtz.

Can you turn on your microphone, please?

**STATEMENTS OF STANLEY KURTZ, SENIOR FELLOW, ETHICS AND PUBLIC POLICY CENTER; GREG LUKIANOFF, PRESIDENT AND CEO, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (FIRE); DAVID HUDSON, OMBUDSMAN, FIRST AMENDMENT CENTER; AND KEN KLUKOWSKI, SENIOR COUNSEL & DIRECTOR OF STRATEGIC AFFAIRS, FIRST LIBERTY INSTITUTION.**

**STATEMENT OF STANLEY KURTZ**

Mr. KURTZ. Okay, how is it possible that the condition of free speech on our college campuses should be so precarious, despite broad, public support for the First Amendment? I believe that a critically important part of the answer to this question lies in the failure of administrators to discipline students who silence or disrupt visiting speakers or their fellow students.

However problematic safe spaces and trigger warnings may be, however important it is to overturn campus speech codes and so-called free speech zones, so long as students are permitted to silence the speech of visiting speakers or their fellow students without disciplinary consequences, the growing threat to campus free speech will never be overcome.

The destructive effects of speaker shout-downs, meeting take-overs or acts, like the destruction of a run of conservative student newspapers, go far beyond their statistical occurrence. A university may host numerous visiting speakers who conform to campus orthodoxies without incident. Yet, even a single case in which a visiting speaker who clashes with campus orthodoxies is shouted down sends a powerful signal to students and faculty, who would also challenge those orthodoxies, to keep silent.

Each silencing incident, moreover, makes it far less likely that speakers who depart from campus orthodoxies will be invited in the first place or will accept an invitation when offered. Each act of silencing that escapes discipline also encourages students to believe that they can continue to attack and disrupt the speech of others. In short, the failure to discipline direct attacks on the free expression of others creates a kind of low-grade anarchy on campus, a world in which intimidation rules, and violence can never be far behind.

All of this means that there is no substitute for well-enforced policies of administrative discipline for incidents in which protestors go beyond legitimate bounds and silence the expression of others. Sadly, however, administrators, in our day, are extremely reluctant to impose discipline on students who interfere with the free speech rights of others, despite the fact that public colleges and universities are obligated to protect the First Amendment rights of their students.

Administrators, all too often, fail to enforce those rights. This means that freedom of speech will never be secure at our public colleges and universities until counter-pressures are brought to bear upon administrators who remain reluctant to discipline those who violate the free speech rights of others.

The key potential sources of such counter-pressures are public scrutiny, university system boards of trustees, State legislatures, and the Federal Congress. Along with James Manley and Jonathan

Butcher of Arizona's Goldwater Institute, I recently co-authored a report that offers and explains model State-level legislation designed to protect First Amendment speech rights on America's public college and university campuses. That report is published by the Goldwater Institute.

Although there are several legislative proposals in various States designed to restore and protect campus free speech, only the Goldwater Proposal systematically addresses the central problem of discipline for those who interfere with the expressive rights of others. While the Goldwater Proposal offers the best legislative solution at the State level, there is much that Congress could do to safeguard freedom of speech on America's campuses.

I have outlined a possible Federal approach to campus free speech in some detail, in a piece entitled Federal Funding and Campus Free Speech: A Proposal. For example, Congress has the option of requiring public colleges and universities, and even private, secular colleges and universities, potentially, seeking to qualify for Federal student loans under title IV of the Higher Education Act, to file a pledge with the Department of Education to uphold student speech and association rights.

So, for example, colleges wishing to qualify for student aid could be required to agree to establish, maintain, and utilize a system of sanctions to discipline students who interfere with the expressive rights of others.

My written testimony explains both the State-level and Federal legislative plans in greater detail. Thank you.

Mr. KING. Thank you, Mr. Kurtz.

Mr. Lukianoff.

#### **STATEMENT OF GREG LUKIANOFF**

Mr. LUKIANOFF. Chairman King, Vice Chairman DeSantis, Ranking Member Cohen, and distinguished members of the subcommittee, my organization, FIRE, was founded in 1999 to defend free speech, academic freedom, and due process on America's college campuses. FIRE is a principled, non-partisan non-profit, and this is reflected in both our staff and the cases we take. For example, our litigation has recently defended the right of students to protest animal cruelty and advocate for pot legalization, Second Amendment rights, and more.

Just last week, we filed a lawsuit against Pierce College in California, which told a student that, if he wanted to engage in free speech activities, he had to limit himself to a tiny free speech zone. The zone comprised only 0.003 percent of the campus. Put another way, if Pierce College were the size of a tennis court, free speech would be restricted to an area the size of a cell phone.

Since our founding, FIRE has fought free speech zones, efforts by administrators to quarantine freedom of speech to tiny areas, and we have defeated many of them, including Texas Tech's infamous Free Speech Gazebo, the University of Hawaii at Hilo's Free Speech Swamp, and this sad, little one at Blinn College in Texas, which was divided into even smaller halves by a bulletin board.

Many institutions even required advance permission for students to speak inside of the zones. For example, the University of Cincinnati asked for 10 working days' notice. Other speech codes com-

prise broad and vague restrictions on expression that practically anyone would be found guilty of violating. Take the University of West Alabama's prohibition on harsh text messages or emails, which is in force, currently, or both the University of Connecticut and Drexel University's now-defunct prohibitions on "inappropriately-directed laughter."

While many speech codes are absurd, fighting them, even at colleges bound by the First Amendment, has required more than 60 lawsuits since 1989, and all of the 56 suits that have concluded have resulted in either a speech-protective court decision or the repeal of the speech code. The money and time public campuses waste defending these manifestly unconstitutional codes is a national scandal. Campuses should not be forced to respect students' First Amendment rights.

But there is good news. Since I last spoke with the committee in 2015, and thanks in no small part to a letter sent by Chairman Goodlatte to 160 colleges and universities across the country, the number of speech codes on campus has decreased significantly.

FIRE uses a simple red, yellow, and green traffic light system to rate colleges' written policies on expression. When we first published our findings in 2007, 75 percent of colleges maintained red light, or laughably unconstitutional, speech codes.

In 2015, after years of fighting both inside and outside court, the percentage of red light codes had dropped to around 55 percent. And since Chairman Goodlatte's letter was sent, that number has now dropped to below 35 percent. At the same time, the number of green light schools, colleges whose codes do not threaten protected speech, has nearly doubled.

While there is no need to be fatalistic about speech codes, much work still has to be done, particularly as the Department of Education has championed a definition of sexual harassment that is so vague and broad that it seriously threatens campus speech. The Department of Education hailed this as a blueprint for all universities to follow, but it specifically eliminated the requirement that speech be both subjectively and objectively offensive, and it also reduced the definition of harassment to simply any unwelcome verbal conduct, also known as speech, of a sexual nature.

To give you an idea of how broad such a code is, Professor Teresa Buchanan was fired from her job at Louisiana State University for violating a policy just like the blueprint, allegedly because she explained, in realistic detail, the way some parents talk to some teachers. She is currently suing Louisiana State University, with FIRE's help, and we believe that any judge looking at the Department of Education's blueprint definition of harassment would have to find it glaringly unconstitutional.

The House Judiciary Committee has already been a great ally in the fight for free speech on campus. Even in these polarized times, we hope that free speech on campus can be an issue that unites all parties. In my written testimony, I recommend four additional approaches: warn public campuses in each State that speech codes are unconstitutional and can unnecessarily cost the State money; support the CAFE Act to put a legislative end to free speech zones; codify the Supreme Court's definition of student-on-student harassment set forth in *Davis v. Monroe County Board of Education*,

which I think would address Congressman Conyers's concerns; and pass a Federal New Voices Act to protect student journalists, which should please Representative Cohen.

So, thank you so much for your time.

Mr. KING. The gentleman returns his time, and we appreciate his testimony. The chair would now recognize Mr. Hudson for his testimony.

Mr. Hudson.

#### STATEMENT OF DAVID HUDSON

Mr. HUDSON. Mr. Chairman, distinguished members of the subcommittee, it is a great honor to speak to you about First Amendment protections on public university and college campuses. I first want to discuss four animating principles of First Amendment jurisprudence that should govern any consideration of free speech issues. I then want to discuss the four issues that I have covered in my written testimony.

The first animating principle is the marketplace of ideas. Back in 1919, Justice Oliver Wendell Holmes, in his great dissent in *Abrams v. United States*, wrote that, "But when time has upset many fighting face, men have come to realize and believe in the very foundations of their own conduct that the ultimate good desired is better reached through free trade of ideas, that the best test of truth is the power of the thought to get itself accepted into the competition of the market." United States Supreme Court in *Keyishian v. Board of Regents* in 1967 ruled that the classroom was peculiarly the quintessential marketplace of ideas.

Any principles or legislation must consider the fact that public universities must maintain a commitment to the marketplace of ideas. I realize that critical race theorists and others question the marketplace of ideas, saying that there is not equal access to the market. And while this may be true in some circumstances, where can we have a true marketplace of ideas but at a public university campus? We must deal with competing viewpoints.

The second animating principle is the counter-speech doctrine. It was authored by Justice Louis Brandeis in his concurring opinion in *Whitney v. California* in 1927. "If there be time to expose, through discussion, the falsehood and fallacies, to avert the evil by processes of education, the remedy to be applied is more speech, not enforced silence." We must counter negative, harmful speech with positive speech. Public university officials must take an approach where they do not silence offensive, controversial speakers. We allow people to protest peacefully, but not engage in substantial disruption.

The third animating principle is content discrimination and viewpoint discrimination. I like to tell my students, my First Amendment students from the National School of Law in my alma mater, Vanderbilt Law School, about the famous quote from Justice Thurgood Marshall, who wrote in 1972, "But above all else, the First Amendment means that the government may not restrict speech because of its message, its ideas, its subject matter, or its content."

Justice Antonin Scalia wrote that, "Content-based restrictions on speech are presumptively unconstitutional." And Anthony Kennedy



said that viewpoint discrimination is, “An egregious form of content discrimination.” When public university officials allow some groups to distribute literature and not allow other groups, that can be content discrimination, and even worse, it can be viewpoint discrimination.

The fourth animating principle is that we, in this society, must protect speech that we do not like. Chief Justice John G. Roberts, Jr. said, “Speech is powerful. It can stir people to action, bring them both tears of joy and sorrow, and inflict great pain. But the First Amendment requires that we do not punish the speaker for inflicting pain. As a Nation, we have chosen a different course; that is, to protect even hurtful speech on public issues so as not to stifle public debate.”

The four issues that I cover in my written testimony: one, we need to be very careful about allowing the infiltration of legal standards from K through 12 decisions that negatively impact college and university employees, professors, and students. The standard from Hazelwood that Senator Raskin mentioned, reasonably related to legitimate pedagogical concerns, is breathtakingly broad. We are seeing this now in the censorship of public officials and public school students who engage in online speech.

The second principle I deal with is *Garcetti v. Ceballos*, 547 U.S. 41. On page 421, the U.S. Supreme Court wrote, “When public employees make statements pursuant to their official job duties, they have no First Amendment protection.” Thank you very much.

Mr. KING. The gentleman’s time has expired, and we appreciate his testimony. I now recognize Mr. Klukowski for your testimony.

Mr. Klukowski. Thank you.

#### **STATEMENT OF KEN KLUKOWSKI**

Mr. KLUKOWSKI. Thank you, Mr. Chairman and members of the committee. The Framers considered the Constitution’s First Amendment necessary to enlightened self-government, the oxygen by which citizens can be informed to think through the issues of the day and hold accountable those in power. Public universities are State actors bound by the Free Speech Clause. Because free speech is a fundamental right, government restrictions on content are subject to strict scrutiny where government must show the restriction narrowly tailored to achieve a compelling interest. But often, we see viewpoint discrimination. For example, saying you cannot discuss abortion is content, but saying you can say pro-choice comments but not pro-life, that is viewpoint.

We, at First Liberty Institute, have had to deal with this issue. For example, Audrey Jarvis was a 19-year-old student at Sonoma State University in 2013 and a devout Catholic. She was working for the associated student production organization at a student fair. During that event, her supervisor instructed her to remove the cross necklace that she was wearing because it might offend others.

Also in 2013, Ryan Rotela’s professor at a communications class in Florida Atlantic University instructed the students to write the name Jesus on a piece of paper, put it on the ground, and stomp on it. Ryan is a devout Christian who was not comfortable stepping on his savior’s name. He was suspended from the class.

Purdue University accepted a financial gift from a family who asked them to choose words for a plaque at the engineering school. When they chose, "Seeking to better the world through understanding God's physical laws," Purdue called it an unconstitutional endorsement of religion, even though the Supreme Court in 2014 rejected this endorsement concept as a faulty misinterpretation of the Constitution's First Amendment.

The reality is that viewpoint discrimination from private speakers in protected speech categorically violates the First Amendment. This is true in all forms of public forum, the doctrine governing which is discussed in my written testimony. More places on college campuses, most, are either traditional, designated, or limited public forum, where students enjoy broad free speech protections, and First Liberty Institute, as the largest law firm in the U.S. exclusively dedicated to protecting religious liberty for all Americans, represents all of these students and donors entirely free of charge. We also represent students in public grade schools dealing with similar issues. All these infringements on speech are unconstitutional. While First Liberty prevailed in all those cases, hostility is increasing against certain viewpoints and beliefs on campuses.

A university is supposed to facilitate the free exchange of ideas to advance our understanding of the world. Students are better off when they are exposed to ideas or viewpoints they do not share, and learning to respect speakers with whom a student disagrees is vitally important to advancing a diverse and tolerant culture, and the First Amendment commands public universities to respect these principles.

Yet now, we see a culture of free speech zones, islands surrounded by an ocean of university facilities and locations where safe spaces, micro-aggression, and trigger are code words justifying censorship. Multi-syllabic terms are invented to whitewash the suppression of speech by covering them with a veneer of pseudo-intellectualism. This intolerance for certain ideas is found across many subjects, though with one disturbing common denominator: political speech supporting President Trump is disfavored.

Immigration speech on securing our borders is disfavored. Speech supporting America's greatest ally in the Middle East, the Nation of Israel, is disfavored, especially speech on Jerusalem or Israel maintaining defensible borders. There is even a boycott movement actively being promoted against Israel on Americans' campuses today in an attempt to delegitimize Israel.

America's Christian community is a great friend to Israel. And speaking of Christians, no beliefs are under greater assault on secular campuses. I have referred to orthodox Christian beliefs in whatever tradition, carrying out the great commission to share the gospel of Jesus Christ, speaking biblical truths on the issue of the day, and believing the Bible to be or contain the word of God. Opposition to these views often forbids even mild expressions of belief. The Capitol's painting on the baptism of Pocahontas, the portrait of Jesus hanging outside the Great Hall in the Justice Department, these works of art would not be welcome on many modern campuses.

The common denominator here is that such conservative speech does not comport with the prevailing ideology of some campuses.

People of faith, whether evangelical, Catholic, Jewish, or other faith have a civil right under the First Amendment to share their faith and viewpoint on public campuses, and a university abridging those violates their civil rights and could be investigated by the Justice Department. My additional remarks are included, in addition to other topics, that this committee could explore in my written testimony. Thank you again.

Mr. KING. The chair thanks the witnesses for your testimony, and I will now recognize myself for my 5 minutes' questioning period.

And I would turn first to Mr. Kurtz, whom I happen to know to be a historian, and I would ask you if you are aware of what our Founding Fathers thought about the limitations of free speech as they watched the Greek city-states and how they handled free speech there? Have you had any study on that topic?

Mr. KURTZ. The Founders, I think, were concerned that the classical world as a whole, both the Greek city-states and the Romans, had a kind of democracy and yet lost it. And this example was always in their mind. There was a question, when the Founders began, as to whether a viable democracy was even possible. So yes, they were very concerned about whether freedom was sustainable, and the Constitution was a kind of structural attempt to solve that problem, and of course, the Bill of Rights as well.

Mr. KING. Thank you, Mr. Kurtz. Have you taken a look on balances? Are there any countries in the world that protect freedom of speech the way we do here in the United States?

Mr. KURTZ. No, I really do not think there are any comparable examples, and the examples you gave at the beginning of Europe are very telling. And I would note that the attack on freedom of speech on campuses is often framed in terms of civility, but in my view, freedom of speech is the ultimate act of civility. It is an exercise in the teaching of civility.

I go back to Justice Oliver Wendell Holmes, who said the key test of free speech is not tolerating ideas that agree with you, but freedom for the thought that you hate. So, think about that. Free speech means that we have to tolerate something that we hate. We have to hold ourselves back from attacking them, physically attacking them, or trying to snuff them out.

Actually, we call it freedom, and it is, but freedom is inherently an exercise in self-restraint, and I believe that it is precisely because of America's unique tradition of liberty that we have had greater civil peace, on the whole, than Europe, where they do not have those protections. The Civil War is the exception that proves the rule. That happened because we violated freedom in a very important case. But on the whole, freedom of speech actually produces civility, and this is what I think people on campus need to learn.

Mr. KING. Thank you, Mr. Kurtz, and I point out from a historical perspective, our Founding Fathers were very well aware that in the Greek city-states, if a demagogue became too effective with his freedom of speech, he was banished from the city-state for 7 years.

Presumably, he got over it, and he could come back again. The Founding Fathers did not opt into anything of that nature. They

decided, instead, let's have this competition of freedom of speech. Let the ideas compete. Let the good ideas surface, and the bad ideas would be treated with the level of disrespect that they deserved. I would turn to Mr. Klukowski and ask, on college campuses, what is your recommendation? The private schools, should they be allowed to focus, as much as they choose, on their particular religions, whether it is Christianity or Judaism, or any other religious group?

Mr. KLUKOWSKI. Two recommendations, Mr. Chairman. First of all, regarding private institutions, Congress does have authority under the Spending Clause to condition eligibility for Federal funding on private universities respecting speech in such a manner that, if they were to suppress speech in a way, that would be a civil rights violation, actionable by the Justice Department.

If done by a public university, that could be a trigger, to use the word appropriately, for reducing or eliminating certain types of Federal funding. The amount of Federal funds that Ivy League universities are now receiving is so astounding that, in just a few years, they would be in a financial position where all of their students could attend for free if they would allow that to go. So, I believe that's something that would really get their attention.

The second is, and this is very disturbing, the increasing difficulty that individuals and groups have at getting quality legal representation. There are major corporations who are severing their ties with law firms that are taking on religious liberty and conservative speech issues, whether paid or pro bono, and I believe the committee could also look at how to ensure that access to the courthouse remains open for these groups.

Mr. KING. Thank you, Mr. Klukowski, but you would not assert, then, that if you had a robust freedom of speech, even in promoting a particular religion on a private campus, as any kind of constitutional violation, it just might be to the discretion of Congress to limit their funding?

Mr. KLUKOWSKI. Well, and in fact, for faith-based organizations, such as Liberty University, where I once taught on faculty, or Notre Dame, where I received my undergraduate degree, or Brigham Young, where I have been a guest lecturer, at any religious-mission, private university, they enjoy additional protections, not just free speech, but also free exercise and even establishment. And so, I believe those faith-based institutions could enjoy protections.

Mr. KING. Thank you, Mr. Klukowski. And I want to quickly ask Mr. Hudson, with regard to this topic we have in front of us, is the truth a factor at all, or are we free to speak freely, true or not, and is that even a judgment that should enter into this discussion, Mr. Hudson?

Mr. HUDSON. Well, I think I would go back to John Milton in *Areopagitica*. "Let truth and falsehood grapple; who ever knew truth put to the worst in a free and open encounter?" We hope that true ideas will trump negative ideas, and certainly truth is important if there is an allegation of defamation, because truth and the substantial truth defense is important if somebody is accused of defamation. But we want to have competing ideas, because it is

through competing ideas that we, as a society, come to recognize what we consider to be the greater truth at that time.

Mr. KING. Agreed, Mr. Hudson. Thanks for your responses, and the chair now recognizes the gentleman from Tennessee, the ranking member, Mr. Cohen.

Mr. COHEN. Thank you. Are we on here? I guess we are. Thank the panelists. Very distinguished group of panelists, and wonderful testimony. Mr. Hudson, I could not even see your teleprompter. You did such a good job.

I am just amazed at your memory of the aces, the verbiage, and the citations. Credit to Vanderbilt.

Dynamite, dynamite, when Vandy starts to fight.

Mr. HUDSON. I agree.

Mr. COHEN. Congress has a program where they encourage students to submit artwork to be chosen from each congressional district to be displayed in a hallway between Capitol and House office buildings. One of those paintings, submitted by Lacy Clay of Missouri, was by a student in his district that showed police and citizens in Ferguson, Missouri, and was a painting that did not show, necessarily, policemen in the best light. Quite a few people objected to it, and it was taken off the halls, even though chosen by Representative Clay, and is not hanging any longer.

I would like to know what each of you think about that practice of the Congress taking down a painting chosen by a member without any previous policy concerning content and censoring the publication. Mr. Kurtz, would you go first?

Mr. KURTZ. As you describe it, Congressman Cohen, I would not have wanted to take down the painting. But while I do not recall the details, as I understand it, part of that dispute had something to do with rules. Apparently, there were some sort of rules about what sort of painting could be up there to begin with, and there was an allegation that the painting violated the fundamental rules of the contest.

I really cannot comment, finally, on the controversy, because I would have to study that aspect. As you present it, it sounds like the painting should have been left up, but I have the proviso that there are further elements of the controversy that need to be studied regarding those rules, and perhaps other things, as well, before I can give a final opinion.

Mr. COHEN. The rules had never been enforced before, and the rules were fairly vague about political controversies. And that is all in the mind of the beholder, I guess. Mr., is it, Lukianoff?

Mr. LUKIANOFF. Lukianoff.

Mr. COHEN. I am sorry.

Mr. LUKIANOFF. FIRE restricts its work to issues surrounding higher education, and it is actually a very deep field. So we do not have a particular opinion on that. However, we do work routinely with the great National Coalition Against Censorship, and I know that they wrote a letter objecting to this as a form of viewpoint discrimination that was, if not unconstitutional, inappropriate, and we definitely defer to the NCAC on that.

Mr. COHEN. Thank you. Mr. Hudson.

Mr. HUDSON. It sounds like content discrimination, perhaps even viewpoint discrimination. If I was representing the student, I

would try to analogize to the Barbara Papish case, which I believe was slide one of Mr. Lukianoff's presentation, in August of 2015, where a graduate student wrote an article that depicted the police very negatively, with a negative action toward the Statue of Liberty. I understand there may be different rules, as Mr. Kurtz has said, and so I would have to study that further, but on first glance, it does sound like content discrimination.

Mr. COHEN. What would the rules have to be to be constitutionally valid? I mean, you just cannot have a rule, "There shall be no painting that pictures the police in a bad perspective." How would you have a rule that could limit content and be specific enough to give notice to the artist?

Mr. HUDSON. That is a very good question. I think it would have to be extremely narrowly-drafted. I think you would have to have notice, and I think you would have to have no problem of selective enforcement. You may be able to argue the government speech doctrine, if you are on the government side, and argue that it has not been opened up as a true public forum or limited public forum. But again, I tend to take the First Amendment side of it. I think it sounds like content discrimination to me.

Mr. COHEN. Thank you, sir. Mr. Klukowski.

Mr. KLUKOWSKI. Congressman, I think there is a two-part way to answer that, and I, too, would have to study it further. First, as my colleague just said, the first question is whether this is, in fact, private speech, and whether this is any type of public forum. If it is a limited public forum, content-based restrictions are permissible to keep the forum consistent with the purposes for which the public has access to it. If it is a non-public forum, any reasonable restrictions would be permitted. Now, if it is viewpoint-based instead of content-based, then it would be unconstitutional under either of those.

However, there is an entire line of Supreme Court free speech jurisprudence regarding government speech versus private speech. The protections we are referring to are for private speakers engaging in protected speech. If this is, in fact, the government subsidizing or providing a platform to associate itself with speech, the government does not need to associate itself with speech with which it disagrees. And I think the question there would be whether or not that depiction would then be associated as the expression of Congress.

Mr. COHEN. Thank you. I appreciate each of you, and I think you have shown well that this issue and the issue of the First Amendment and art and censorship is much like health care. It is complicated.

Mr. KING. The gentleman's time has expired, and the chair would now recognize the vice chairman of this subcommittee, Mr. DeSantis of Florida. Mr. DeSantis.

Mr. DESANTIS. Thank you, Mr. Chairman. Mr. Lukianoff, part of the things that I have noticed about this debate is that there seems to be a declining support for First Amendment values amongst younger people. And so, we deal with the issues that you guys ably deal with because we want free expression on the campus; that is just a good thing, but it seems to me the result of some of these codes and restrictions has been, that is, kind of what people are

now socialized to, or maybe they are even advocating it. So, can you speak to the issue of the extent to which younger people have really walked away from core First Amendment values and are actually supportive of having a lot of these restrictions?

Mr. LUKIANOFF. Absolutely. And that is the thing that keeps me up at night right now. So, I have been doing this since 2001, and for the overwhelming majority of my career, the people that were on the, in my opinion, wrong side of freedom of speech were campus administrators. Sometimes faculty were pro-speech code. The single best constituency on campuses were always the students themselves. Often poor and minority students, often non-traditional age students have been some of our best allies.

I do not know precisely what happened, but somewhere around 2013, 2014, we started seeing a shift to students demanding freedom of speech for themselves, understanding that it was really important for them to have that, to what I dub freedom from speech that they dislike. And this is the most distressing cultural change I have seen in my career, but that means what we have to do is think about ways of getting not just the law, not just the First Amendment in front of them, but we have to get the philosophy of freedom of speech in front of more students.

I think it is crucial for students to know, for example, the incredibly important role that freedom of speech played in the Gay Rights Movement, in the Civil Rights Movement. In all American history, when it was recognized it has been a force for innovation and progress, but I think students are primarily taught that freedom of speech is the argument of the bully, the bigot, and the robber baron, and that is completely inappropriate.

So, I am constantly thinking of ways to get in front of people at a younger age. I was even toying with the idea of writing a children's book about freedom of speech, but we have to be creative in teaching this as a profound philosophy that helps protect deep pluralism in our society.

Mr. DESANTIS. Mr. Kurtz, I think you get at this, a little bit, but, I mean, if you look at the Yale situation that happened. I mean, you have the Woodward Report of Standards, clearly, they had walked very far away from that.

But, as you watch those videos, it seemed to me that was really lead by the students, one of these really radical students, and that the administration caved rather than standup for the values of the Woodward Report. I think that may track with your view about, you know, they are not really holding some of these people accountable. So, can you address that?

Mr. KURTZ. Yes, Congressman DeSantis, as I emphasized in my remarks, I think the administrators caving is very much at the heart of the problem, although it is absolutely true that we have a generational difficulty now, and Greg Lukianoff has discussed that, both in his writings and today, very well.

And so, I think we have to intervene in this sector now, and you mention the Woodward Report. Woodward Report was published in 1974, and it gave a history of a series of attacks on free speech that had occurred at Yale going back to 1963. These were, pretty much, attacks from the left against the right. The problematic pattern,

the McCarthyism of the 1950s, was a very big problem, but beginning in the early 1960s, the problem went the other way.

So, we have to realize this problem on campus has been going on for more than five decades, and it is getting worse now, and administrators are still caving. That is why I have suggested legislative intervention at both the State and the Federal level. Ordinarily, you try to take a hands-off posture and see if a sector could right itself. But, what has happened now is that for, literally, five and one-half decades, the problem has been getting worse. I think legislators, ultimately, their first responsibility is to protect the rights of their constituent. So, I think it is time to intervene.

Mr. DESANTIS. Well, I mean, we are sending a lot of money. So, that is really why we have a role. If we were not funding anything, then I would just say we just stay out of it, but if we are going to be subsidizing these types of forums that are not infused with free speech values, then it becomes an issue.

Mr. Klukowski, you mentioned, you know, some of the drowning out of pro-Israel voices in college campuses. This is very concerning to me. Is that something that is relatively recent, or is this been a long-running problem.

Mr. KLUKOWSKI. The BDS movement is a more recent phenomenon. I mean, there has been different types of disfavored views on campuses, of course, going back countless decades. But, what you see here is the Israel and America's conservative, Christian community married as close cousins, in terms of the sort of disfavor that they see for their viewpoints and their values.

I do not know if one is a proxy for the other, or what, precisely, the connection there is, but it tends to be the same students who both try to express biblical beliefs or other observant, conservative Christian beliefs, who are also outspoken supporters of the Nation of Israel, and we see, between the two of those, we see a multi-pronged opposition taking all of these various points.

Mr. DESANTIS. Great, it was a good panel. You guys did a good job, and I would just say that I would echo my colleague on the other side about, you know, trying to drown out speech by just yelling people down. I mean, be passionate and make your voice heard, but these speakers that come to campus should be heard. Defeat them with the ideas, if you do not like them; make good counterarguments, but do not just scream, so they cannot get their point across, and I yield back.

Mr. KING. The gentleman returns his time, and the chair will now recognize the ranking member of the full Committee, the venerable gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Venerable is, well, I do not know if it is appropriate. Let me say, Chairman King, that you have demonstrated a very open and very fair examination of this whole question of First Amendment protections yourself, and I wanted to compliment you on it. I think this discussion with these distinguished witnesses would pass muster at an American Civil Liberties Union in itself.

And I sincerely congratulate you on it, and the witnesses have been very provocative. To David Hudson, I would like to ask, would not requiring colleges to punish students, possibly with expulsion, or shouting down of offensive speakers itself, violate student free speech rights? What do you think of that, sir?



Mr. HUDSON. It could be. It would have to be analyzed on a case-by-case basis. I do think that you would have to have a clear standard, something that cancels the substantial disruption. If a student does, intentionally and substantially, disrupt a school function, then that is rewarding freedom of speech, and that is disallowing invited speakers. As far as expulsion, that seems like a drastic remedy to me. I think that there certainly could be punishments far less severe, and I hope it would be an opportunity for the university to have a teaching moment.

You know, I believe fully in the counter-speech doctrine, and I mentioned Justice Brandeis, "More speech, not enforced silence." The very next sentence, I believe, in his opinion is, "Only an emergency can justify repression." So, in emergency circumstances, I certainly believe that the university can take the steps that it needs to ensure that there is order and that the invited speaker can speak.

Anytime you have punishment for a student for speaking out, I think there has to be clearly delineated standards, or we run afoul of due process concerns, and the last thing we would want to do is to have a zero-tolerance mentality that is infecting many K through 12 school districts and superimpose that on the college and university level.

Mr. CONYERS. Thank you so much. Continuing our discussion, some of you argued that hate speech is not merely a symptom of merely underlying bigotry, but also a cause of such bigotry, and that hateful speech and images can create social realities that put minorities and women at risk, thus justifying limits on such speech. How do you figure that kind of situation into our examination of this important subject?

Mr. HUDSON. Well, I generally think that speech should be protected. In our free society, hate speech is protected unless it incites imminent lawless action, unless it crosses the line into a true threat, or it constitutes fighting words.

Now, on a college and university campus, I would support a well-drafted, narrowly-tailored, anti-harassment code that deals with direct, face-to-face harassment and vilification. That has to be addressed; we cannot ignore racism in this country, and we cannot ignore racism on public college and university campuses because that could deny somebody the opportunity to attend and have a free educational environment. But, that does need to be severe and pervasive harassment, as Mr. Lukianoff has said and written in his stated and written testimony. Severe and pervasive harassment is a recognized standard in employment discrimination law, and I certainly think the U.S. Supreme Court used it in *Davis v. Monroe*.

So, I think, when we have an anti-harassment code, it has to be narrowly tailored, and it has to deal with direct, face-to-face vilification.

Mr. CONYERS. Thank you, sir. Now, my last question is to Greg Lukianoff. If a harassment policy modeled on the title IX standard would pass constitutional muster, why have not more colleges and universities, particularly public ones, adopted its severe, pervasive, and objectively offensive requirements?

Mr. LUKIANOFF. That is a terrific question, and the answer is that, the first thing that they believe, falsely, that by having a

more expansive definition of harassment or, for that matter, having speech zones, for example, that they are protecting themselves from legal liability, and this is a fear that is fed into by what is known as the risk management industry, which have consultants that, more or less, say, "You know, definitely cover yourselves." And this is made worse by the growth and bureaucracy on campus.

So, you have full-time employees who are trying to figure out ways to regulate every aspect of student life, and they overregulate. Political correctness, of course, is real. So, there are people who actually do want to protect people's feelings, but there is also ignorance of the law, is a problem.

So, FIRE works closely with administrators all the time, trying to make sure they understand, again, both the law and philosophy behind it, and, unfortunately, the fifth factor that is new is that students, some relatively small number of students nonetheless, that seem to be demanding these new codes. So, when we talk about changing university codes to reflect the actual, Federal Davis standard that we recommend, we are saying, "First of all, the code you have is going to get you sued eventually, and you are going to lose in court." The definition that we propose comes directly from the Supreme Court; it is never going to be overturned, and it does actually deal with cases of serious harassment.

Now the, one last thing, trick though is to tell universities that it should be no less or no more than Davis because the heart-breaking thing, looking at these policies sometimes, is you will see a perfectly constitutional harassment policy in one section and then the other section they say things like, "Inappropriately directed laughter."

Mr. CONYERS. Thank you, sir, and I thank all the witnesses, and I yield back, Mr. Chairman.

Mr. KING. The humble gentleman and venerable gentleman from Michigan has returned his time, and now the chair would recognize—

Mr. CONYERS. You used that word again.

Mr. KING. And the chair would now recognize the gentleman from Arizona, Mr. Franks, for 5 minutes.

Mr. Franks.

Mr. FRANKS. Well, thank you, Mr. Chairman. First, Mr. Chairman, I would just like to congratulate you on having this hearing on such a profoundly significant and important issue. I consider freedom of religion and freedom of expression to be the cornerstone of all other freedoms, and I have heard the tremendous comments here today. It gives me hope.

Mr. Hudson, I think you are the minority witness here, and yet, I have heard a lot of things that comport with what I hear from the rest of the witnesses here and, sir, I do not think you are ever going to need a microphone in your class.

But I was really astonished at your ability to call these things from memory, and I assume that is probably partly because you teach this in class on a number of occasions.

It gives me hope to see that, among thinking and studious individuals, that there is a large commonality here in free speech in general, because I am convinced that truth and time do, indeed,

travel on the same road, and if truth is given a chance, it will prevail over fallacy. So, again, I just congratulate everyone.

Mr. Kurtz, your quiet scholarship is stunning, and Mr. Lukianoff, I think you are going to be at the forefront of a lot of good things that are going to happen, and I have already addressed Mr. Hudson, and Mr. Klukowski has been a friend of mine for 25 years or more, and I should not say that publicly because it will completely undermine his testimony.

But, I think he has presented himself tremendously well today. So, I am going to, you know, remind us all what Abraham Lincoln said: "Those that deny freedom to others deserve it not for themselves, nor under a just God can they long retain it," and one of the great concerns I have are these campus shout-downs, and I see that in the political arena a great deal now, where there is not a discussion, where there is just, simply, a bullhorn that just drowns everyone out and, to me, that is the antithesis of free speech, and I appreciate how it has been very forthrightly addressed by all of you.

So, Mr. Lukianoff, I was just going to give you another chance to, kind of, give us an update on how prevalent speech zone policies in the Nation's public colleges and universities are, and what do you think? Is there rationale to quarantine free speech to one specific area?

Mr. LUKIANOFF. Oh my, well, they have been decreasing. I said there has been about 60 lawsuits against speech codes, and an awful lot of those have been against speech zones. So, they are about one-fifth of the colleges we survey now maintain speech zones. But, if it is okay to talk about the shout-downs for a second, I am working on a book right now, and I have to spend a lot of time watching some of the recent situations. For example, at U.C. Berkeley when the riots broke out, and the thing that scared me the most about that was that it was not just merely shouting someone down; it was actually responding with violence.

People were hit in the face with flagpoles; people were Maced; people were struck; there were pools of blood that protestors were trying to clean up, and I felt genuinely scared watching that because they were very lucky that nobody got killed. And when we start actually making the transition from merely shouting down, surely bad enough, but when it becomes we have to do more; we have to physically attack these people; we have entered a situation that makes me genuinely quite scared.

Mr. FRANKS. Well, I could not agree with you more, and I think it kind of falls on us. When we allow people to be shouted down, if we do not draw the line there, then we invite what follows it.

Mr. LUKIANOFF. As for an example where people absolutely should have been arrested, what happened at Berkeley, you know, by not doing that, they encourage bad behavior in the future.

Mr. FRANKS. I agree. Mr. Klukowski, I am troubled by the double standard that colleges seem to be applying when they let fraternities choose their leaders and members based on sex, but refuse to let the religious groups choose their leaders based on religious beliefs, and I think it is great for colleges to allow fraternities to choose their leaders and members as they always have done, but

why not allow the religious groups to do the same? Why the double standard?

Mr. KLUKOWSKI. Well, it is disturbing, and there is a recent Supreme Court case, *Christian Legal Society v. Martinez*, it was a 5-4 decision; I respectfully believe that the court decided that wrongly, where you had the Christian Legal Society just said, "If you wanted to be an officer of the club, then you needed to adhere to certain religious views and conduct consistent with those religious views," and in that case, it was on the matter of sexuality.

And it is no surprise to anyone on this committee that there is a robust debate in the country on matters of marriage, and sexuality, and gender, and in a regard, it is just an evolution of debate that has been going on for decades on abortion, and that becomes, for individuals who have certain views that are derived from millennia-old religious beliefs, are they allowed to express those, both in terms of their written and spoken words, and are they also allowed to organize themselves according to those principles? And I think there has been a very disturbing trend in the law in that regard, and I hope the Supreme Court now moves more in the direction of the original meaning of the relevant provisions of the First Amendment and restore these safeguards for people of faith.

Mr. FRANKS. Well, Mr. Chairman, that is certainly the Supreme Court's job, to consider the original intent. I thank you for this, and I guess I am just reminded, from all of us, that true tolerance is not pretending you have no differences. It is being kind and decent to each other in spite of those differences. Thank you, sir.

Mr. KING. The gentleman returns his time, and the chair would now recognize the gentleman from New York, Mr. Nadler.

Mr. NADLER. Thank you. I am glad Mr. Franks just went before me because he raised a subject that I want to pursue for a moment with Mr. Klukowski. I would think that a college religious society, the Christian Society of whatever college, should be allowed to limit its officers to believing Christians.

What I want to ask is, you made a statement about controversies. Now, I can understand if the Catholic Society of so-and-so college wanted to limit its officers, or its membership, for that matter, only to people who believe abortion was immoral; they should be able to do that.

On the other hand, if they wanted to bar people who said, "Well, I believe, as a practicing Catholic, that abortion is immoral, but I also believe that I should not impose my views through government, then I disagree politically with governments opposing abortion." Should that be allowed, too, or is that going beyond the religious requirement?

Mr. KLUKOWSKI. Well, and I think that is not necessarily exclusive to religion. For example, if you had an NRA club on campus, and you had a gun control advocate who wanted to be an officer and then to try to start creating policy for the organization who says, "I support the Second Amendment, but I believe what I consider reasonable restrictions, such as saying no one can have a handgun in their home."

Mr. NADLER. No, no, that is a wrong analogy. Someone who agrees with the Catholic Church's position on abortion 100 percent;

it is immoral; it is horrible, et cetera, but disagrees about government policy.

Mr. KLUKOWSKI. I believe it is the same, Congressman, because this is someone who can say, "I personally think everyone should own these things, but I do not believe I should impose those rules on government that they have to have laws that respect those things." I think the two are inseparable. A person's faith and their religious beliefs—

Mr. NADLER. So, you think that the society should be able to bar, as officers or members, both groups of people?

Mr. KLUKOWSKI. I believe it is the role of the faith-based organization and not the government, which the university administration is the government, to impose that requirement on them.

Mr. NADLER. I just wanted to clarify. Now, let us get back to the subject of the hearing. Let me say, I feel very strongly about these issues and, personally, that these issues are being shouted down. When I was an undergraduate at Columbia, I was very deliberately shouted down at a political meeting and prevented from expressing my view as soon as a certain faction got a whiff of what they thought my view might be, and I was not the only person at that meeting. And I remember what it felt like, and I am very much opposed to that.

First, Mr. Hudson, and please answer briefly because I have a number of questions, do you believe the Garcetti decision has created confusion in the lower courts over whether there is an academic exception from the general rule that a public employee's speech made pursuant to official duties is not protected under the First Amendment, and have we seen public university professors punished under Garcetti and, specifically, under the K to 12 rules of Garcetti?

Mr. HUDSON. Yes, there is a split in the circuits. The Fourth Circuit in the Adams decision and the Ninth Circuit in the Demers decision that said Garcetti does not apply in the academic context when we are talking about scholarship.

Mr. NADLER. Okay, and Mr. Hudson, and Mr. Lukianoff, the campus anti-harassment act proposed by FIRE defines actionable harassment, in part, as part of a pattern of targeted unwelcomed conduct. Could a single incident, if it is sufficiently severe and objectively offensive, also constitute harassment, as would be the case under employment discrimination law?

Mr. LUKIANOFF. Generally, it would be a pattern of behavior. It would have to be something that actually becomes more behavioral—

Mr. NADLER. Mr. Hudson.

Mr. LUKIANOFF. Sorry.

Mr. HUDSON. It depends on how egregious the act is. Generally, it needs to be repetitious. If the act is egregious enough, at least in employment discrimination law, it could rise to the level of severe and pervasive.

Mr. LUKIANOFF. And by the way, generally, things that are egregious enough are unprotected speech for other reasons. Threats would not be protected, for example, because it is already unprotected speech.

Mr. NADLER. Now, Mr. Kurtz and Mr. Klukowski, are you concerned that any Federal legislation that would penalize a State college or university by withholding Federal student aid or other educational funds for refusing to implement the federally-mandated speech disciplinary system or for failing to abide by a pledge to uphold religious liberty, as defined by congressional statute, might run afoul of constitutional limitations placed on the spending clause? In other words, that it is beyond our ability to do that under our spending clause power?

Mr. KLUKOWSKI. You are referring, Congressman, to the coercion doctrine under the Tenth Amendment. To date, there has only been one case where it has been held that the dollar amount that was on the table actually coerced the States to such a degree that they did not have a meaningful choice.

Mr. NADLER. It is not just the coercion. We have to have a constitutional basis for anything we do.

Mr. KLUKOWSKI. Yes.

Mr. NADLER. If we were to pass such legislation penalizing a State college/university for the reasons stated, would that be within our power to do such a thing because we give them money under the spending clause?

Mr. KLUKOWSKI. Under *United States v. Butler*, 1936, it would be. The Supreme Court was divided on that issue: Madison's view would be that would have been unconstitutional, but Hamilton's view defeated Madison's there, and the court interpreted a very broad mandate for spending power that would authorize that sort of restriction.

Mr. NADLER. Mr. Kurtz.

Mr. KURTZ. Well, there are already something called program participation agreements that colleges and universities sign that have quite a number of requirements when they receive Federal money.

And, of course, under title IX of the Higher Education amendments, I actually think that enforcement through guidance from the secretary has gone too far, but we have got a precedent of a tremendous amount of Federal involvement in fine-toothed issues in universities. So, I would be surprised if fundamental protection for freedom of speech would run afoul of that provision.

Mr. NADLER. Thank you, and let me thank the chairman for letting me go over time.

Mr. KING. The gentleman returns his time, and the chair would now recognize the gentleman from the first district of Texas, Mr. Gohmert.

Mr. GOHMERT. Thank you, Mr. Chairman. Thanks for having this hearing because it really is critical. You are all asked to speculate, without the rules being before you, about the Congressional Art Contest. So, let me read you the rule that every contestant had to read and sign, saying they understood the rules.

In part, it says, "Exhibits depicting subjects of contemporary political controversy or of a sensationalistic or gruesome nature are not allowed. Any portion not in conscience with the Commission's policy will be omitted from the exhibit. If an entrant is unsure about whether a piece of art is acceptable, he or she should contact the staff, or his or her member of Congress, and then the congress-

sional staff can speak with personnel who can determine whether the artwork would be acceptable.”

So, only if you believe contemporary political controversy is vague and unreasonable, or arbitrary and capricious, would one say depicting our Nation’s law enforcement officers, who risk their lives to save ours every day, depicting them as dogs, that that would not be political controversy? So, I never removed the painting; I felt like that should be left for those in authority, who would make the decision.

It was not my decision, but I guess this points to the problem we have in Washington, where members of Congress cannot discern whether or not depicting our law enforcement, who are heroes somewhere in America every day, depicting them as dogs, pigs, whatever, that that is not controversial, that is a good thing. It is amazing.

Yet, at the same time, toward the end of last year, we had an Israeli writer, fantastic writer, Caroline Glick, writes for the Jerusalem Post. She has written a book regarding a one-state solution, and she was invited to speak at the University of Texas in Austin. Apparently, from what I have been provided, the J-Street group that is considered the more moderate, or liberal, some would say self-loathing, of Jewish patriots patriotic to Israel, but apparently, they also are involved in APAX.

So, it was allegedly pro-Israeli group that put pressure to have her disinvited. Another group stepped in and pressure was brought to bear against them not to have such a controversial author and writer, and ultimately, she was disinvited, although a rabbi offered to let her speak in his home when pressure was brought to bear about him trying to have her come to a public institution.

As I attended Texas A&M, it was one of the most conservative, public institutions when I attended. We were proud to have very liberal people there. I was helping host Ralph Nader, and I loved the exchange, but what deeply bothers me about Texas A&M and most all colleges, with just a very few exceptions, it is as if they are afraid to debate a conservative position.

So, let me ask what you see as the biggest danger in our college campuses and how would you recommend we, specifically, take steps to stop it or prevent it? Just, very quickly. I know you gave statements in your dealing with this issue, but I would like to get down to a nutshell real quickly.

Mr. KURTZ. Sure, Congressman Gohmert, as I said in my testimony, I think the shout-downs are really fundamental at this point. They are spectacular; the news travels across the country through media of all kinds, and so they have a kind of contagious effect, and that is why I think the State and Federal legislative proposals I mentioned are necessary, at least in some form, and that they have got to include something about the shout-downs.

Mr. GOHMERT. But if it is just the shout-downs, could not that be the local authorities just make sure there is no shout-downs or usher them out?

Mr. KURTZ. Unfortunately, the local authorities, who are the university administrators or the police that they choose to call or not to call in, aren’t doing anything. That is the real problem, is that the administrators that ought to be enforcing the First Amendment

on their public college and university campuses really are not doing that.

Mr. GOHMERT. So, it is like George Wallace refusing to follow the Constitution requiring Federal action until people started following, correct? Mr. Lukianoff, do you agree?

Mr. LUKIANOFF. Well it is a big, grand question. I want to give, sort of, bigger answers to it on what can be done. Now, the biggest thing Congress can do is help fix the legal incentives that actually make it easier for university general counsels to justify speech codes, to justify erring on the side of censorship rather than free speech. There is a lot, I think, Congress can do about that. But there are deeper things that we need to do, which I had mentioned before, which is teach philosophy, freedom of speech, earlier, create the right expectations of students when they come into school.

Students should be taught when they come into—and the University of Chicago, for example, does a very good job of this, saying we believe in freedom of speech. That is an incredible vision, but that also includes that you do not have the right to shout down a speaker. And you certainly do not have the right to respond violently.

Probably the subtlest thing, but that we desperately need to do as a society, is we have to habituate people to listening to each other across lines of differences. That is something that institutions like higher education could actually be helping with, but I think what we are actually doing is we are encouraging people to talk inside their echo chambers instead of talk across lines of difference.

Mr. GOHMERT. Mr. Hudson.

Mr. HUDSON. Limit Garcetti legislatively as applied in the academic and university context; provide enhanced protections for student journalists and not allow the importation of standards for K-12; educate young people with civic education and give them an opportunity to live in an environment where they appreciate a constitutional democracy; and continue the work of groups like FIRE that limit over-broad free speech zones and over-broad and vague anti-harassment policies.

Mr. GOHMERT. Mr. Klukowski.

Mr. KLUKOWSKI. Well, first, thank you for sharing the rules regarding the pictures.

Mr. KLUKOWSKI. And on that basis, I would say it is a viewpoint-neutral, content-based restriction, which would survive, either under a limited public-forum analysis, or that it could be associated as governmental speech.

Regarding university campuses, once again, you are touching, in your example, on a subject matter, which I have noted as singularly disfavored. And in that regard, again, I do believe there is spending clause legislation that can be used to encourage private universities to act like public universities. I believe that the Justice Department Civil Rights Division could start investigating public universities where they are engaging in censorship of speech.

And finally, the Congress needs to consider what can be done to help protect the ability of individuals and groups to be able to get lawyers, whether paid or pro-bono, because, again, there is an increasing boycott movement right now that, if you take on certain



cases, there are major corporations that are subject to Congress' Commerce Clause power that will drop you as a law firm.

Mr. GOHMERT. Thank you. And Mr. Chairman, thanks for letting them each answer, though my question went right up to the time. And if I might inquire, I was trying to remember, was George Wallace a Republican? Do you recall?

Mr. KING. I do not recall that he was ever a Republican, Mr. Gohmert.

Mr. GOHMERT. So, he was a Democrat, okay.

Mr. KING. I thank you for your inquiry. I would point out, as we conclude this hearing, that, at the last straw pull in Ames, I had an individual come from behind me, reach around, and grab my microphone, and try to scream and yell and speak into my microphone. I did not see him coming. I wrestled the microphone out of his hands, back into mine, and I said, "Get your own microphone."

So, I think that is a relevant narrative to conclude today's hearing. And I want to thank all the witnesses, not only for your testimony, but for your response to the questions, and thank the panelists for your participation, and the staff.

Without objection, all members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

This hearing is now adjourned.

