

Testimony of Kenneth A. Klukowski, Esq.,
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of the House Judiciary Committee

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Good morning, Mr. Chairman. It is an honor to be here, and I would like to thank you for taking time to highlight what is a growing trend of intolerance on some university campuses to certain forms of speech and belief.

The First Amendment to the Constitution of the United States, situated as the first words in the Bill of Rights, was considered absolutely necessary as a prerequisite to enlightened self-government. Rights of free speech, free press, religious freedom, and the freedom to gather were seen as the oxygen of democracy. Free speech is the mechanism by which citizens can be sufficiently informed to think through the great issues of the day, determine who should be entrusted with the powers of government to serve the American people, and hold to account those elected and appointed officials for their discharge of the public trust. That is why free speech is enshrined in the Supreme Law of the Land.

The Constitution's Bill of Rights is a charter of negative liberties imposed on the Federal Government. It is a list of "thou shalt nots" originally directed only at the federal level in our governmental system. But after the Civil War, the Fourteenth Amendment was ratified in 1868, and extended many of the protections from the Bill of Rights to apply with equal force against the States, as well as local and municipal governments as political subdivisions of the States. According to the original meaning of the Fourteenth Amendment's provisions, those rights applied to the States through the Privileges or Immunities Clause. However, the Supreme Court in its 1873 decision in the *Slaughter-*

House Cases imposed a narrow construction on that Clause. Although *Slaughter-House* does not restrict the Privileges or Immunities Clause to the degree that commentators and lower courts subsequently said it did, the Court in later years began declaring provisions of the Bill of Rights to be incorporated into the Fourteenth Amendment's Due Process Clause. While the concept of substantive rights being engrafted into a constitutional provision that, by the plain meaning of its text, is procedural in nature seems a contradiction in terms—indeed, giving this doctrine the oxymoronic designation of “substantive due process”—it nonetheless became the Supreme Court's preferred method for extending the Bill of Rights to the States. (With certain exceptions, that is. Justice Clarence Thomas, who in 2010 joined the Court's applying the Second Amendment to the States in *McDonald v. City of Chicago*, took the bold step of doing so through the Privileges or Immunities Clause, not the Due Process Clause.) In 1925, the Court in *Gitlow v. New York* held that the Free Speech Clause applied to the States through the Fourteenth Amendment.

Public universities are state actors. Ever since *Gitlow* in 1925, they have been bound by the strictures of the Free Speech Clause. The Supreme Court has held that free speech is a fundamental right. Government restrictions on that right are generally subjected to what is called “strict scrutiny.” Under this judicial construct, government-imposed burdens on speech are presumed unconstitutional, and the government must carry the legal burden of demonstrating that the restriction is to serve a public interest that is truly compelling, and that the restriction is narrowly tailored (meaning necessary and very closely fitted) to achieving that compelling interest. Constitutional rights are not absolute; everyone acknowledges that the right to free speech does not include the right to shout “Fire!” in a crowded theatre (unless there actually is a fire, of course). While the Supreme Court rightly

holds that certain types of speech are not protected by the First Amendment because they were unprotected in 1791 when the First Amendment was ratified—such as committing perjury, impersonating a police officer, or engaging in fraud or defamation—strict scrutiny has been the framework the Court has preferred to strike a balance when not looking exclusively to history.

This analytical approach has its limitations, and is part of a larger framework the Supreme Court has developed over the past several decades. The Court has held that strict scrutiny applies specifically to content-based restrictions on speech. Content-neutral regulations, which are restrictions on the time, place, or manner of speech, and subject to what the Supreme Court has labeled as intermediate scrutiny. Under this standard, the restriction is still presumed unconstitutional. The burden is still on the government to defend it, rather than on the challenger to attack it. But the ends-means analysis becomes less demanding for both of its parts. The restriction must be substantially related to advancing an important public interest, instead of narrowly tailored to achieve a compelling public interest.

Another aspect of this framework is viewpoint discrimination. The regulation of content is different from the regulation of viewpoint. For example, the government saying that you cannot discuss abortion is content discrimination, but the government saying you can discuss abortion so long as all of your comments are pro-abortion, but that you cannot make comments that are pro-life, is viewpoint discrimination. It is favoring one viewpoint over another regarding a specific content subject-matter.

When the speech is government speech, government can control the message, including the viewpoint. Government also has a say when it is facilitating or funding the

speech. But for purely private speech, where government is not the speaker or directly subsidizing or otherwise funding the speech, government can never favor one viewpoint of protected speech by restricting competing viewpoints. Such a restriction should be categorically impermissible under the Free Speech Clause.

A final part of free speech jurisprudence relevant here is the public forum doctrine. The rules outlined above govern private speech in a private forum. Things are different when the speaker attempts to speak on government land or in a government facility. In a public forum, the government can sometimes impose additional restrictions. All public land can be put into one of four categories of public forum: traditional, designated, limited, or nonpublic. A traditional public forum is a publicly owned space where people are traditionally free to express views and exchange ideas. This includes streets, sidewalks, and parks. A designated public forum is land that is sometimes closed to the public, but when opened up to the public, takes on the hallmarks of a traditional forum. An example of a designated public forum would be a county fairground. A limited public forum is a facility that is open to the public for only specific reasons, with a public library being a good example. A nonpublic forum is any government land or facility that, although members of the public are regularly able to access it, is not open to the general public for purposes of speech or debate. An airport is an example of a nonpublic forum.

Free speech rights shift based on the type of public forum. A traditional forum has the broadest protections for free speech, being the same set of protections for viewpoint-based, content-based, and content-neutral regulation as if the speaker were speaking on private land. When open to the public, Americans likewise enjoy that fullest range of protection in a designated forum. A limited forum can be further restricted in whatever

manner is appropriate to preserve the purpose for which the public has access to the forum, such as a public library enforcing rules to keep your voice down or give presentations only in certain specified side rooms that must be booked in advance. In a nonpublic forum, government may impose any restriction it wishes on speech, so long as that restriction is reasonable, and must always be viewpoint-neutral.

Public universities are a mix of all four varieties of public forum. The commons, the sidewalks, and the streets are traditional fora. Areas opened up for events are designated fora. The university libraries are limited fora. Certain isolated facilities may be nonpublic fora, but generally speaking, most open spaces would be one of the first three categories. As such, most places in a public university are bound by the very robust protections the First Amendment affords to speakers, and viewpoint discrimination cannot be allowed anywhere on campus when the university is not providing funding or other subsidy support for private speakers.

First Liberty Institute, where I am senior counsel, has had a number of clients who are students at public universities who have been subject to negative treatment due to their faith-based beliefs or expressions. First Liberty is the largest law firm in the United States exclusively dedicated to protecting religious liberty for all Americans. We are a 501(c)(3) nonprofit organization committed to advancing religious liberty nationwide. As with all of our clients, we represent these students pro bono—entirely free of charge. We are honored to have the opportunity to fight for their rights, and are saddened that some of these conflicts are necessary at all.

Audrey Jarvis was a 19-year-old student at Sonoma State University in 2013. Audrey is a devout Roman Catholic. One day she was working for the university's

Associated Student Production organization at a student orientation fair. During that event, her supervisor instructed her to remove the cross necklace she was wearing, because—she was told—it “might offend others.”

Also in 2013, Ryan Rotela’s professor in an intercultural communications class at Florida Atlantic University instructed the students in class to write the name “Jesus” on a piece of paper. The professor then instructed them to put the paper on the floor, then stomp on it. Because Ryan is a devout Christian, he informed the professor that he would not be comfortable stepping on the name of his Lord and Savior. Ryan was suspended from the class for not complying with the assignment.

Things continue to worsen, as some schools are becoming hypersensitive. Purdue University accepted a financial gift from a family, and asked them to choose words for a plaque in the mechanical engineering school where the gift was directed. When the family included language about “seek[ing] to better the world through the understanding of God’s physical laws,” the university rejected the language as an unconstitutional endorsement of religion, notwithstanding that the Supreme Court in its 2014 case *Town of Greece v. Galloway* rejected this endorsement concept as a faulty misinterpretation of the Constitution’s Establishment Clause.

Detouring for a moment from universities, First Liberty represents students in all sorts of educational environments, including primary and secondary schools. Those students have religious-liberty rights as well. We represented Angela Hildebrand, a valedictorian whose school attempted to stop her from mentioning words of prayer during her valedictory address. We represented Gabriella Perez, a sweet five-year-old girl who was quietly praying in the cafeteria to give God thanks before eating her lunch, when a

school official stopped her and told her she was not allowed to pray in school. We represented Giovanni Rubeo, a fifth-grader whose class was told to bring a book of their individual choice for quiet reading time, who then brought his prized possession, his Bible, only to be told by the teacher that he was not allowed to read a Bible in class, even during a time when ever other student could read any book they wanted. The Supreme Court has drawn a distinction between children in public schools versus young adults in public universities, but it is worth noting that the First Amendment protects them all.

All these infringements on speech—both those at universities and those in K-12 schools—were unconstitutional. While First Liberty prevailed in all of those cases—as we do with God’s help in most of our cases, with over a 90 percent victory rate in recent years—hostility has continued to increase against the expression of certain viewpoints and beliefs, including millennia-old mainstream religious beliefs, on college campuses. A university is supposed to be a place that facilitates the free exchange of ideas in search of greater truth and advancing our understanding of the world. Sometimes this can even lead to vigorous debate, which observant Christians embrace, since the Bible teaches us in Proverbs, “Iron sharpens iron, and one man sharpens another.”

Sometimes when iron sharpens iron, sparks fly. We see the benefits of that sort of adversarial debate format in the legal process, where two lawyers take opposite sides to make the best possible arguments for each. When done properly, this gives the decision-maker all the intellectual tools needed to reach the correct conclusion, whether that decision-maker is a judge or a group of citizens sitting as a jury. The same dynamic works in a university setting, where the role of the lawyer can be played by professors, by visitors, or by students, and the decision-makers can be either scholars who are seeking to test

theories to advance and refine their own future research, or the students themselves, as part of their education and training.

Students are better off, not worse off, when they are exposed to ideas or viewpoints they do not share. Many times they have never fully considered certain ideas. Learning to respect speakers with whom a student disagrees is vitally important to advancing a culture that is truly diverse and tolerant. All universities should aspire to such principles, and the First Amendment commands that public universities cannot work to thwart such a goal.

Yet now we see a culture of “safe spaces,” and small so-called “free speech zones” tucked away on college campuses in corners where they are not likely to precipitate much speech. These First Amendment islands are surrounded by a vast ocean of university facilities and locations where “micro-aggression” and “trigger” are code-words for justifying censorship. Multisyllabic terms are invented to whitewash this suppression of the First Amendment by covering them with a veneer of pseudo-intellectualism. After all, those terms sound scientific. One would be excused for not noticing those terms’ vacuous character, designed to foreclose debate and preclude serious discussion of significant issues.

This intolerance for certain ideas is found across many seemingly diverse subject-matters, though with one disturbing common denominator. Political speech supporting Donald Trump is disfavored. Speech on immigration that advocates securing our borders is disfavored. Speech supporting America’s greatest and truest ally in the Middle East, the nation of Israel as a Jewish State, is disfavored, especially speech directed at recognizing Jerusalem as the capital of Israel, or of Israel’s maintaining defensible borders. In fact, Israel deserves special mention here, because not only is speech supporting Israel often

censored, but there is even a BDS movement—boycott, divestment, and sanctions—actively being promoted on American university campuses as an attempt to delegitimize Israel and economically punish the world’s only Jewish State. America’s observant Christian community is a great friend to Israel, the birthplace of the Christian religion, from the Sea of Galilee in the north, to Jerusalem, to hundreds of biblical locations between and besides.

Speaking of Christians, no belief system is under greater assault on secular campuses than Christian beliefs. By these I mean observant and orthodox Christian beliefs, in whichever tradition. Carrying out the Great Commission to share the gospel of Jesus Christ. Speaking biblical truth on the issues of the day, including abortion, marriage, and gender. Believing the Bible to be or contain the Word of God rather than a fanciful collection of outdated stories and mythologies. Opposition to these views is sometimes so extreme that even gentlest expressions of Christian belief is forbidden. The Capitol’s painting of the baptism of Pocahontas, the large oil painting of Jesus Christ with his hand extended to the viewer hanging outside the Great Hall in the Department of Justice, and the large statue outside the federal courthouse here in Washington, of Moses with the Ten Commandments, along with a large Christian cross—none of these pieces of beautiful and historic artwork would be tolerated on many modern public university campuses.

The common denominator here is that such speech does not comport with the prevailing ideology of most university administrations and faculties. If they do not share your viewpoints, then those viewpoints are not treated equally.

People of faith, whether Evangelicals, Catholics, Jewish Americans, or people of various other religious faiths, have a civil right under the First Amendment to share their

faith and their viewpoint on public university campuses, certainly within the public forum doctrine. Any university abridging their speech, or taking adverse action against any student, group of students, or in many instances a faculty member, or other employee, or donor, thereby commits a civil rights violation, one that could be investigated by the Civil Rights Division of the U.S. Department of Justice.

Although not the focus of today's hearing, it is worth noting that there are at least two other matters where this Committee has concurrent jurisdiction with other Committees of the House that warrant further discussion.

The first is federal funding for both public and private universities. Although private universities are not constrained by the First or Fourteenth Amendments, they receive a great many federal dollars. They receive so much federal money, in fact, that recent reports show many Ivy League universities could drastically cut their tuition rates, and with their growing endowments, might in just a few years be in a financial position where all students who are admitted could attend for free. These institutions are tremendously dependent on federal dollars, both from research grant money and from federally guaranteed student loans. Congress could exercise its power under the Spending Clause of Article I of the Constitution to condition a university's eligibility for federal funding on that university's respecting free speech by not behaving in a manner that would be an illegal civil rights violation if done by a public university. Another panelist testifying today is focusing his presentation on this topic, so I will not belabor it further, beyond saying that I believe faith-based universities, whether Evangelical such as Liberty University where I once worked on faculty, or Catholic such as the University of Notre Dame where I received my undergraduate degree, or LDS such as Brigham Young where

I have guest-lectured, these schools enjoy additional protections under the Free Speech Clause, Free Exercise Clause, and possibly even the Establishment Clause, to maintain speech on campus that is consistent with the religious-faith mission of those universities. But secular private universities are an entirely different matter. Congress may debate appropriate ways to encourage those private universities to respect the religious beliefs of their students and employees, and could reduce federal funding for universities that do not.

The second is the increasing difficulty some individuals have in obtaining legal representation. Some companies are severing ties with law firms that are willing to represent certain political or religious viewpoints, using their spending power in a boycott fashion as a means to pressure those firms into refusing to represent such clients. The American system of vindicating people's rights through the legal process necessarily requires those people to be able to hire a lawyer to make their case. Your rights are only as good as your ability to get a lawyer who can fight for you when your rights have been violated. One of the pillars of American exceptionalism is that, in this Nation, whether rich or poor, high or low, educated or simple, popular or unpopular, every person who claims that his or her rights are being violated is entitled to his or her day in court. Congress has vast power under current Commerce Clause jurisprudence. While that Clause has been expanded far beyond any acceptable bounds, certain nondiscrimination protections ensuring access to legal counsel may survive judicial review even if the Supreme Court moves significantly toward a jurisprudence that begins to restore much-needed limits on Congress' authority under that Article I provision. I urge the members of this Committee to consider how to keep the courthouse doors open to those seeking justice.

Permit me to close by thanking again this Committee, especially its distinguished Chairman and the Chairman of this Subcommittee, for examining this matter and inviting me to participate in today's hearing. May God continue to bless and prosper you and your efforts in service to our great Nation.