

**WRITTEN TESTIMONY of GREG LUKIANOFF**  
President and Chief Executive Officer,  
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Before the

**UNITED STATES HOUSE OF REPRESENTATIVES  
COMMITTEE ON THE JUDICIARY,  
SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE**

April 4, 2017 Hearing on  
First Amendment Protections on Public College and University Campuses

April 4, 2017

Representative Steve King  
Chairman  
Subcommittee on the Constitution and Civil Justice  
2138 Rayburn House Office Building  
Washington, DC 20515

Representative Ron DeSantis  
Vice-Chairman  
Subcommittee on the Constitution and Civil Justice  
2138 Rayburn House Office Building  
Washington, DC 20515

**RE: April 4, 2017 Hearing on First Amendment Protections on Public  
College and University Campuses**

Dear Chairman King, Vice-Chairman DeSantis, and honorable members of the  
Subcommittee:

On June 2, 2015, I was honored to testify on behalf of the Foundation for Individual  
Rights in Education (FIRE; [thefire.org](http://thefire.org)) before this subcommittee during a hearing  
on “First Amendment Protections on Public College and University Campuses.”

As the President and Chief Executive Officer of FIRE—a nonpartisan, nonprofit  
organization dedicated to defending students’ and faculty members’ individual  
rights on America’s college and university campuses—I am once again honored to  
share FIRE’s perspective on what Congress can do to protect students’ free speech  
rights. Instead of duplicating my testimony from June 2, 2015, which provides  
important background on the persistent threats of censorship common on  
campuses across the nation, I write to you today to supplement the testimony I will  
be giving at the April 4, 2017 hearing on “First Amendment Protections on Public  
College and University Campuses.” This testimony is designed to update the  
committee on the important developments with respect to free speech on campus  
that have unfolded since I last appeared before this body.

Thank you for the opportunity to submit this testimony. I hope FIRE’s input and  
suggestions are helpful.

## INTRODUCTION

Our public colleges and universities are “vital centers for the Nation’s intellectual life,” home to a “background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.”<sup>1</sup> Despite the fact that the “essentiality of freedom in the community of American universities is almost self-evident,” far too many of our public institutions of higher education censor their students and faculty, restricting expressive activity in both policy and practice.<sup>2</sup> Speech codes—campus regulations that punish or restrict protected speech, or what would be protected speech in society at large—have repeatedly been struck down when challenged in court.<sup>3</sup> Nevertheless, the majority of our nation’s colleges and universities maintain speech codes.<sup>4</sup>

Since FIRE’s founding in 1999, FIRE has employed several strategies to defend free speech on campus. When colleges or universities have censored students or faculty members, FIRE has organized advocacy campaigns on their behalf. In July 2014, we launched our Stand Up For Speech Litigation Project to coordinate lawsuits aimed at eliminating unconstitutional speech codes through targeted First Amendment lawsuits.<sup>5</sup> Just last week, we initiated our brand new Million Voices Campaign, designed to free the voices of one million students by striking down unconstitutional speech codes across the country.<sup>6</sup>

In 2012, FIRE opened our Legislative and Policy Department because we observed that lawmakers and agencies were increasingly dictating that institutions adopt specific policies. Some of those policy mandates promoted individual rights and

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<sup>1</sup> *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 835–36 (1995).

<sup>2</sup> *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

<sup>3</sup> *See, e.g.,* *McCauley v. Univ. of the V.I.*, 618 F.3d 232 (3d Cir. 2010); *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008); *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995); *Univ. of Cincinnati Chapter of Young Am. for Liberty v. Williams*, 2012 U.S. Dist. LEXIS 80967 (S.D. Ohio Jun. 12, 2012); *Smith v. Tarrant Cty. Coll. Dist.*, 694 F. Supp. 2d 610 (N.D. Tex. 2010); *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003); *Booher v. N. Ky. Univ. Bd of Regents*, No. 2:96-CV-135, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 21, 1998); *Corry v. Leland Stanford Junior Univ.*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995) (slip op.); *UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis.*, 774 F. Supp. 1163 (E.D. Wisc. 1991); *Doe v. Univ. of Mich.*, 721 F.Supp. 852 (E.D. Mich. 1989).

<sup>4</sup> *See* FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., SPOTLIGHT ON SPEECH CODES 2017: THE STATE OF FREE SPEECH ON OUR NATION’S CAMPUSES, <https://www.thefire.org/spotlight-on-speech-codes-2017> [hereinafter Spotlight Report 2017].

<sup>5</sup> Press Release, Found. for Individual Rights in Educ., FIRE Brings Four Free Speech Lawsuits in One Day (July 1, 2014), <https://www.thefire.org/fire-brings-four-free-speech-lawsuits-in-one-day>; *see also* STAND UP FOR SPEECH, <http://www.standupforspeech.com>.

<sup>6</sup> Press Release, Found. for Individual Rights in Educ., Student sues Los Angeles Community College District to free over 150,000 students from unconstitutional ‘free speech zones’ (Mar. 28, 2017), <https://www.thefire.org/student-sues-los-angeles-community-college-district-to-free-over-150000-students-from-unconstitutional-free-speech-zones>.

others threatened them dramatically. Over the past five years, FIRE has worked with state legislators to pass bills promoting free speech on campus in states as varied as Virginia, Missouri, Utah, and Colorado. Each of those bills passed with overwhelming bipartisan support.

FIRE also works to defeat speech codes that chill speech and can be used to censor students and faculty by analyzing campus policies and rating them in our annual *Spotlight on Speech Codes* report. In that report, published annually since 2007, FIRE surveys publicly available policies at a sample of four-year public institutions and our nation's largest and/or most prestigious private institutions.<sup>7</sup> FIRE rates colleges and universities as “red light,” “yellow light,” or “green light” based on how much, if any, protected speech their written policies restrict. A “red light” institution maintains at least one policy both clearly and substantially restricting freedom of speech, or bars public access to its speech-related policies by requiring a university login and password for access. A “yellow light” institution maintains at least one policy that could be interpreted to suppress protected speech or a policy that, while clearly restricting freedom of speech, restricts only a narrow category of protected speech. If FIRE finds that a university's policies do not seriously threaten campus expression, that college or university receives a “green light” rating. FIRE often works directly with college administrators to reform their policies, in the hope that all colleges will earn green light ratings. We provide this service completely free of charge.

In 2015, when I last testified before this subcommittee, a good deal of the conversation focused on the various forms of speech codes common at our public colleges and universities. At that time, of the 437 schools FIRE surveyed for the 2015 *Spotlight on Speech Codes* report, more than 55% maintained severely restrictive, red light speech codes.<sup>8</sup> Among public colleges, 54.1% had red light speech codes on the books.

As you know, shortly after the 2015 hearing, House Judiciary Committee Chairman Bob Goodlatte sent letters to the presidents of red light public schools, demanding answers about those universities' unconstitutional policies.<sup>9</sup> In his letter, Chairman Goodlatte wrote:

In FIRE's Spotlight on Speech Codes 2015, your institution received a “red light” rating. . . . We write to ask what steps your institution plans

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<sup>7</sup> *Speech Code Reports*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., <https://www.thefire.org/spotlight/reports> (last visited Apr. 1, 2017).

<sup>8</sup> FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., SPOTLIGHT ON SPEECH CODES 2015, <https://www.thefire.org/spotlight-speech-codes-2015>.

<sup>9</sup> Press Release, House of Representatives Judiciary Comm., Chairman Goodlatte Urges Public Colleges and Universities to Update Free Speech Codes (Aug. 14, 2015), <https://judiciary.house.gov/press-release/chairman-goodlatte-urges-public-colleges-and-universities-to-update-free-speech-codes>.

to take to promote free and open expression on its campus(es), including any steps toward bringing your speech policies in accordance with the First Amendment.<sup>10</sup>

In the weeks and months after the Chairman's letter, FIRE received communications from many college administrators seeking assistance in revising their policies. The effort has been fruitful; according to our latest data, only 33.9% of public colleges surveyed by FIRE now maintain red light speech codes.<sup>11</sup> FIRE attributes this dramatic improvement in significant part to the attention this subcommittee placed on the issue and to the Chairman's efforts.

While the drop in red light speech codes is significant, the threats to free speech on campus remain persistent. This testimony will focus on those threats and the steps Congress can take to address them.

## **OVERBROAD HARASSMENT CODES**

In my 2015 testimony, I explained that overbroad harassment codes are one of the most common forms of unconstitutional speech codes maintained by colleges and universities. That unfortunate trend remains unchanged.

As I explained to this subcommittee in 2015, harassment, properly defined, is not protected by the First Amendment. In the educational context, the Supreme Court has defined peer-on-peer harassment as discriminatory, unwelcome conduct "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999). Harassment is extreme and usually repetitive behavior—behavior so serious that it would interfere with a reasonable person's ability to receive his or her education. In *Davis*, for example, the behavior found by the Court to be harassment was a months-long pattern of conduct including repeated attempts to touch the victim's breasts and genitals together with repeated sexually explicit comments directed at and about the victim.<sup>12</sup>

For decades now, however, many colleges and universities have maintained policies defining harassment too broadly and prohibiting constitutionally protected speech. Recent directives from the Department of Education's Office for Civil Rights (OCR), combined with that agency's increasingly aggressive enforcement of Title IX, has exacerbated the problem by leading numerous colleges and universities to enact more restrictive policies in an effort to avoid an OCR investigation.

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<sup>10</sup> Letter from Bob Goodlatte, Chairman, House Comm. on the Judiciary (Aug. 14, 2015), *available at* [https://judiciary.house.gov/wp-content/uploads/2016/02/2078\\_001.pdf](https://judiciary.house.gov/wp-content/uploads/2016/02/2078_001.pdf).

<sup>11</sup> Spotlight Report 2017, *supra* note 4.

<sup>12</sup> 526 U.S. at 633–34.

In May 2013, OCR and the Department of Justice (DOJ) issued a findings letter to the University of Montana, following an investigation of that university's policies and practices, that proclaimed itself to be a "blueprint for colleges and universities throughout the country."<sup>13</sup> In that letter, OCR stated that "sexual harassment should be more broadly defined as 'any unwelcome conduct of a sexual nature'" including "verbal conduct" (that is, speech). Although OCR backed away from its use of the term "blueprint" in a letter to FIRE (stating that "the agreement in the Montana case represents the resolution of that particular case and not OCR or DOJ policy"), it never communicated this clarification directly to the many colleges and universities within its jurisdiction.<sup>14</sup>

Moreover, an April 2016 findings letter stemming from a DOJ investigation into the University of New Mexico's (UNM's) handling of sexual misconduct claims *explicitly reiterated* that in the view of the federal government, sexual harassment is not limited to quid pro quo and hostile environment harassment.<sup>15</sup>

Specifically, it found fault with UNM's policies on the grounds that

each of these policies mistakenly indicates that unwelcome conduct of a sexual nature does not constitute sexual harassment until it causes a hostile environment or unless it is quid pro quo. Unwelcome conduct of a sexual nature, however, constitutes sexual harassment regardless of whether it causes a hostile environment or is quid pro quo. Indeed, federal guidance defines sexual harassment as "unwelcome conduct of a sexual nature."<sup>16</sup>

This definition is deeply problematic. Unlike the definition set forth by the Supreme Court in *Davis*, defining sexual harassment as "unwelcome conduct of a sexual nature" conditions the permissibility of speech entirely on the subjective reaction of the listener—something courts have repeatedly held violates the First Amendment.<sup>17</sup> Moreover, even speech that is objectively offensive may still be

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<sup>13</sup> Letter from Anurima Bhargava, Chief, Civil Rights Div., U.S. Dep't of Justice, and Gary Jackson, Reg'l Dir., Office for Civil Rights, U.S. Dep't of Educ., to Royce Engstrom, President, Univ. of Mont. and Lucy France, Univ. Counsel, Univ. of Mont. (May 9, 2013), *available* at <http://www.justice.gov/opa/documents/um-ltr-findings.pdf>.

<sup>14</sup> Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to Greg Lukianoff, President, Found. for Individual Rights in Educ. (Nov. 14, 2013), *available* at <http://www.thefire.org/letter-from-department-of-education-office-for-civil-rights-assistant-secretary-catherine-e-lhamon-to-fire>.

<sup>15</sup> Letter from Shaheena Simons and Damon Martinez, U.S. Dep't of Justice to Robert G. Frank, President, Univ. of N.M. (Apr. 22, 2016), *available* at <https://www.justice.gov/opa/file/843901/download>.

<sup>16</sup> *Id.*

<sup>17</sup> See *DeJohn v. Temple Univ.*, 537 F.3d 301, 318 (3d Cir. 2008) (holding that because university policy failed to require that the speech in question "objectively" create a hostile environment, it provided "no shelter for core protected speech"). See also *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d

constitutionally protected unless it “effectively bars the victim’s access to an educational opportunity or benefit,” whereas the definition put forth by OCR and DOJ includes all “unwelcome” verbal conduct of a sexual nature, no matter how minor.

As a result, many colleges and universities have revised their sexual harassment policies to include the broad definition prescribed by OCR and DOJ. For example:

- At Clemson University, “Sexual harassment is unwelcome conduct of a sexual nature.”<sup>18</sup>
- At the University of Rhode Island, “Sexual Harassment is any unwelcome conduct of a sexual nature.”<sup>19</sup>
- Norfolk State University defines sexual harassment as “unwelcomed conduct of a sexual nature,” including “dirty jokes,” “offensive language of a sexual nature,” and “hostility or stereotyping, even if those acts do not involve conduct of a sexual nature.”<sup>20</sup>
- At Penn State, “sexual harassment is defined as . . . verbal or physical conduct of a sexual nature that is unwanted, inappropriate, or unconsented to.”<sup>21</sup>

These examples, along with far too many others, demonstrate that colleges and universities often fail to limit themselves to the narrow definition of harassment that is outside the realm of constitutional protection. Instead, they expand the term to prohibit broad categories of speech that do not even *approach* actual harassment, despite similar policies having been struck down by federal courts years earlier. These vague and overly broad harassment policies deprive students and faculty of their free speech rights.

In June 2015, for example, tenured Louisiana State University (LSU) professor Teresa Buchanan was fired for alleged sexual harassment over her occasional use of profanity and sexual humor in the classroom.<sup>22</sup> While her speech did not constitute

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357 (M.D. Pa. 2003) (“[R]egulations that prohibit speech on the basis of listener reaction alone are unconstitutional both in the public high school and university settings.”).

<sup>18</sup> CLEMSON UNIV., ANTI-HARASSMENT AND NON-DISCRIMINATION POLICY, <http://www.clemson.edu/campus-life/campus-services/access/documents/policies/anti-harassment.pdf> (last visited Apr. 1, 2017).

<sup>19</sup> UNIV. OF R.I., STUDENT HANDBOOK 2015–2017, <http://web.uri.edu/studentconduct/files/2015-2017-Student-Handbook.pdf>.

<sup>20</sup> NORFOLK STATE UNIV., BOARD OF VISITORS POLICY #05: SEXUAL MISCONDUCT (2014), <https://www.nsu.edu/Assets/websites/policy-library/policies/01/BOV-Policy-05-Sexual-Misconduct.pdf>.

<sup>21</sup> *Policy AD85: Sexual and/or Gender-Based Harassment and Misconduct (Including Sexual Harassment, Sexual Assault, Dating Violence, Domestic Violence, Stalking and Related Inappropriate Conduct)*, PA. STATE UNIV., <https://guru.psu.edu/policies/ad85.html> (last visited Apr. 1, 2017).

<sup>22</sup> Colleen Flaherty, *Fired for Being Profane*, INSIDE HIGHER ED (Sept. 2, 2015), <https://www.insidehighered.com/news/2015/09/02/aaup-report-alleges-violations-academic-freedom-due-process-new-report-professors>.

sexual harassment in the legal sense, LSU policy defines sexual harassment as “unwelcome verbal, visual, or physical behavior of a sexual nature.” Both the American Association of University Professors<sup>23</sup> and the LSU faculty senate<sup>24</sup> have censured the LSU administration over Buchanan’s firing, and in January 2016, Buchanan filed a federal lawsuit—as part of FIRE’s Stand Up For Speech Litigation Project—alleging that LSU’s sexual harassment policy violates the First Amendment. Her suit is ongoing as of this writing.<sup>25</sup>

## **RESTRICTIONS ON STUDENT PROTESTS AND DISTRIBUTION OF LITERATURE**

Another form of speech code we discussed in 2015 that continues to infringe on free expression on campus is unconstitutional restrictions on student protest and distribution of literature.

Universities have a right to enact reasonable, narrowly tailored “time, place, and manner” restrictions that prevent demonstrations and other expressive activities from unduly interfering with the educational process. They may not, however, regulate speakers and demonstrations on the basis of content or viewpoint, nor may they maintain regulations that burden substantially more speech than is necessary to maintain an environment conducive to education.

### Prior Restraints

The Supreme Court has held that “[i]t is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so.” *Watchtower Bible and Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 165–66 (2002). Yet many colleges and universities do just that, requiring students and student organizations to register their expressive activities well in advance and, often, to obtain administrative approval for those activities.

For example:

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<sup>23</sup> AMERICAN ASS’N OF UNIV. PROFESSORS, ACADEMIC FREEDOM AND TENURE: LOUISIANA STATE UNIVERSITY, BATON ROUGE (Sept. 2015), *available at* <https://www.thefire.org/aaup-supplementary-report-on-a-censured-administration>.

<sup>24</sup> LOUISIANA STATE UNIV. FACULTY SENATE, FACULTY SENATE RESOLUTION 15–15 REGARDING THE CASE OF DR. TERESA BUCHANAN (Oct. 8, 2015), *available at* <https://www.thefire.org/faculty-senate-resolution-15-15>.

<sup>25</sup> *Buchanan v. Alexander*, No. 3:16-cv-00041 (M.D. La. filed Jan. 20, 2016).



- At Fort Hays State University, “Individuals wishing to express their concerns should confer with the Vice President of Student Affairs regarding procedural policy and appropriateness of their proposed actions.”<sup>26</sup>
- Lake Superior State University requires that “prior to sponsoring a rally, demonstration, march or other event, a group or organization representative must complete and submit an event application (see below) at least 72 hours in advance of any activity to the Public Safety Office.”<sup>27</sup>
- At the University of New Hampshire, “A license/permit shall be required by all students, University units and groups for outdoor assemblies, solicitation, and distribution of literature . . . .”<sup>28</sup>

### Free Speech Zone Policies

FIRE surveyed speech codes at 449 colleges for our most recent annual report on campus speech codes. Of those 449 schools, roughly 1 in 10 have “free speech zone” policies—policies limiting student demonstrations and other expressive activities to small and/or out-of-the-way areas on campus.<sup>29</sup> Such policies are generally inconsistent with the First Amendment, and they have repeatedly been struck down by courts or voluntarily revised as part of lawsuit settlements. FIRE’s Stand Up For Speech Litigation Project has included successful challenges to free speech zone policies at Modesto Junior College; the University of Hawaii at Hilo; Citrus College; California State Polytechnic University, Pomona; Dixie State University; and Blinn College.<sup>30</sup>

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<sup>26</sup> FORT HAYS STATE UNIV., STUDENT ORGANIZATION HANDBOOK 3 (2014–15), <https://www.fhsu.edu/csi/stuorg/stuorghandbook>.

<sup>27</sup> *Campus Right to Assemble/Demonstration Policy*, LAKE SUPERIOR STATE UNIV., <http://www.lssu.edu/procedures/1-15.php> (last visited Apr. 1, 2017).

<sup>28</sup> UNIV. OF N.H., STUDENT RIGHTS, RULES AND RESPONSIBILITIES 43 (2016–17), [https://www.unh.edu/sites/default/files/departments/student\\_life/pdf/rightsandrulesfinal16-17.pdf](https://www.unh.edu/sites/default/files/departments/student_life/pdf/rightsandrulesfinal16-17.pdf).

<sup>29</sup> Spotlight Report 2017, *supra* note 4.

<sup>30</sup> Press Release, Found. for Individual Rights in Educ., Victory: Texas College Settles Free Speech Lawsuit After Telling Student That Gun Rights Sign Needs ‘Special Permission’ (May 4, 2016), <https://www.thefire.org/victory-texas-college-settles-free-speech-lawsuit-after-telling-student-that-gun-rights-sign-needs-special-permission>; Press Release, Found. for Individual Rights in Educ., Victory: Lawsuit Settlement Restores Free Speech Rights at Dixie State U. After Censorship of Bush, Obama, Che Flyers (Sept. 17, 2015), <https://www.thefire.org/victory-lawsuit-settlement-restores-free-speech-rights-at-dixie-state-u-after-censorship-of-bush-obama-che-flyers>; Press Release, Found. for Individual Rights in Educ., Victory: Animal Rights Activist Restores Free Speech Rights of Cal Poly Pomona Students with Lawsuit Settlement (July 23, 2015), <https://www.thefire.org/cases/california-polytechnic-state-university-stand-up-for-speech>; Press Release, Found. for Individual Rights in Educ., Second Victory in 24 Hours: College that Suppressed Anti-NSA Petition Settles Lawsuit (Dec. 3, 2014), <https://www.thefire.org/second-victory-24-hours-college-suppressed-anti-nsa-petition-settles-lawsuit>; Press Release, Found. for Individual Rights in Educ., U. of Hawaii Settles Lawsuit Over Handing Out Constitutions (Dec. 2, 2014), <https://www.thefire.org/u-hawaii-settles-lawsuit-handing-constitutions>; Press Release, Found. for Individual Rights in Educ., Victory: Modesto Junior College Settles Student’s First Amendment

Despite the possibility of successful litigation, many universities still maintain free speech zones. Just last week, for example, student Kevin Shaw filed suit against Los Angeles Pierce College in California, represented by FIRE attorneys, after he was told that he could not hand out Spanish-language copies of the U.S. Constitution outside Pierce's tiny "free speech zone," which comprises just .003 percent of campus.<sup>31</sup>

## DISINVITATIONS AND THE HECKLER'S VETO

Recent months have been punctuated by two highly visible and violent campus assaults on freedom of expression. Protesters at the University of California, Berkeley caused over \$100,000 in damage and several injuries while violently protesting an appearance by controversial commentator Milo Yiannopoulos, causing the event to be canceled.<sup>32</sup> Only three arrests were made by the police.<sup>33</sup> Perhaps seizing on the message sent by the lack of consequences for the Berkeley rioters,<sup>34</sup> students at Middlebury College in Vermont disrupted an event featuring Charles Murray, forcing the event to be relocated to and live-streamed from a private, remote location with only Murray and Middlebury professor Allison Stanger present.<sup>35</sup> Protesters became aware of the new location and attacked Murray and Stanger, surrounding their car and sending Stanger to the emergency room.<sup>36</sup>

These are but two of the most recent examples of the illiberal phenomenon FIRE calls "disinvitation," a trend that has been rising since 2000.

Simply put, the disinvitation phenomenon is the increased demand by some students and faculty that speakers with whom they disagree be prevented from speaking on campus (as opposed to critics merely expressing disagreement with, or even protesting, an invited speaker's views or positions). While originally most

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Lawsuit (Feb. 25, 2014), <https://www.thefire.org/victory-modesto-junior-college-settles-students-first-amendment-lawsuit>.

<sup>31</sup> Shaw v. Burke, No. 2:17-cv-02386 (C.D. Cal. filed Mar. 28, 2017).

<sup>32</sup> Rick Hurd, *UC Berkeley condemns violent Milo Yiannopoulos protests*, EAST BAY TIMES (Feb. 2, 2017), <http://www.eastbaytimes.com/2017/02/02/uc-berkeley-classes-open-after-milo-yiannopoulos-protests>.

<sup>33</sup> *Id.*

<sup>34</sup> Robert Shibley, *Colleges are ground zero for mob attacks on free speech, lawyer says*, WASH. POST (Mar. 7, 2017), <https://www.washingtonpost.com/news/grade-point/wp/2017/03/07/colleges-are-ground-zero-for-mob-attacks-on-free-speech-lawyer-says>.

<sup>35</sup> Scott Jaschik, *Shouting Down a Lecture*, INSIDE HIGHER ED (Mar. 3, 2017), <https://www.insidehighered.com/news/2017/03/03/middlebury-students-shout-down-lecture-charles-murray>.

<sup>36</sup> Robby Soave, *A Professor Who Attended Charles Murray's Middlebury Talk Is Now Wearing a Neck Brace. Protesters Attacked Her.*, REASON (Mar. 3, 2017), <http://reason.com/blog/2017/03/03/a-professor-who-attended-charles-murrays>.

noticeable around commencement season due to the high-profile status of many commencement speakers, disinvitations occur all year—and have been steadily increasing over the past 15 years.<sup>37</sup>

Successful disinvitations are categorized into three distinct types. First, formal disinvitations occur when a speaker’s invitation is revoked or withdrawn. The second category consists of incidents where speakers withdraw from campus speaking engagements in the face of demands that they be disinvited. Finally, FIRE regards as disinvitations those instances where audience members persistently disrupt or entirely prevent a speaker’s ability to speak.

FIRE first began officially documenting the disinvitation phenomenon in 2014, when we conducted in-depth research into disinvitation attempts since 2000 and published a report with our findings.<sup>38</sup> We have since made our data available to the public for examination in a database hosted on our website.<sup>39</sup> While our data is necessarily incomplete and imperfect, that data shows an upward trend and raises cause for concern. In 2016, FIRE documented at least 43 disinvitation attempts—the most in a single year in the 16 years of data we have amassed—more than half of which were successful.<sup>40</sup>

In addition to a rise in the number of disinvitation attempts, our data indicates that disinvitation attempts are increasingly being aimed not at commencement speakers—where protesters often argue that they should not be subjected to the views of individuals they find disagreeable on their “special day”<sup>41</sup>—but at campus panels and speaking engagements. From 2000–2014, nearly half of all disinvitation attempts targeted commencement speakers.<sup>42</sup> But from 2015–2016, 80% of disinvitation attempts focused on other speakers invited to campus.<sup>43</sup> This troubling shift underscores the movement for freedom *from* speech, where campus community members seek to prevent ideas or views they find disagreeable from being discussed and debated by *anyone*.

The dangers posed by the disinvitation phenomenon are clear. In refusing to hear out a speaker with whom they disagree—oftentimes on a topic unrelated to their

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<sup>37</sup> FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., DISINVITATION REPORT 2014: A DISTURBING 15-YEAR TREND, (May 28, 2014), <https://www.thefire.org/disinvitation-season-report-2014>.

<sup>38</sup> *Id.*

<sup>39</sup> FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., DISINVITATION DATABASE, <https://www.thefire.org/resources/disinvitation-database>.

<sup>40</sup> Alex Morey, *Campus Disinvitations Set Record in 2016*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC.: NEWSDESK (Dec. 20, 2016), <https://www.thefire.org/campus-disinvitations-set-record-in-2016>. While the article states that 2016 saw 42 disinvitation attempts, that data has since been updated.

<sup>41</sup> Greg Lukianoff, *New Report: The Push Against Campus Speakers Is Getting More Intense*, HUFFINGTON POST (May 30, 2014), [http://www.huffingtonpost.com/greg-lukianoff/new-report-the-push-again\\_b\\_5417664.html](http://www.huffingtonpost.com/greg-lukianoff/new-report-the-push-again_b_5417664.html).

<sup>42</sup> DISINVITATION DATABASE, *supra* note 39.

<sup>43</sup> *Id.*

planned remarks—students hinder their intellectual development. Learning how to think critically, grapple with opposing viewpoints, and formulate arguments supporting one’s position is crucial to the enterprise of higher education, and illiberal demands to banish speakers from campus due to disagreement with their views are an unfortunate sign that our colleges and universities are not doing enough to instill that foundational concept in students.

Unfortunately, the disinvitation phenomenon shows no sign of abating. There have been at least 11 disinvitation attempts so far in 2017,<sup>44</sup> a pace that threatens to break the disinvitation record set last year.

## BIAS REPORTING TEAMS

Another growing trend is for colleges and universities to implement “bias reporting systems” encouraging students to report on one another—and on faculty members—whenever they subjectively perceive that someone’s speech or expression is biased. These systems often subject students and faculty members to intervention by conflict-wary administrators providing “education,” if not punishment, for engaging in vaguely defined acts of “bias.” Although bias reporting systems are not new, they have proliferated in recent years.

To better understand this phenomenon, FIRE gathered data throughout 2016 on every bias reporting system we could locate—231 in total. FIRE sought to determine who reviews the bias reports, what categories of bias they are charged with addressing, and whether the institution acknowledges that the system generates a tension with free speech and academic freedom.<sup>45</sup>

Among other things, we found that universities tend to cast a wide net when defining “bias,” soliciting reports on a broad range of constitutionally protected speech and expression. The exceedingly predictable result of these types of broad definitions is that administrators monitor political and academic speech in an effort to avoid controversy and controversial speech. In turn, administrators encourage faculty members and students to avoid controversial subjects, under the guise of “educating” them. The result is an impermissible chilling effect on free speech.

For example, the University of Northern Colorado (UNC) abolished its controversial Bias Response Team after faculty members were told to avoid controversial subjects. One faculty member who was reported to the UNC Bias Response Team—after encouraging his students to consider countering views—

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<sup>44</sup> *Id.*

<sup>45</sup> FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., BIAS RESPONSE TEAM REPORT 2017, <https://www.thefire.org/fire-guides/report-on-bias-reporting-systems-2017>.

recorded an administrator warning him away from discussing controversial subjects, lest he be summoned by more aggressive investigators.<sup>46</sup>

It is not just faculty members who are targeted by bias response teams. At the University of Oregon (UO), where the Bias Response Team solicits reports of bias against “political or religious ideology,” a “Case Manager” intervened with a student newspaper’s reporter and editor after a student complained that the paper “gave less press coverage to trans students and students of color.” Other complaints alleged that a faculty member “belittled” a student’s “request for trigger warnings” and that students expressed “anger” over “oppression.” Based on these vague reports published by UO, FIRE issued a public records request for documents showing the complaints and how UO’s Bias Response Team intervened. UO went to great lengths to resist this request, arguing that it was not in the public interest to share information on how its team operates.<sup>47</sup>

## PROTECTING THE STUDENT PRESS

Student newspapers often serve the vital functions of reporting on matters of public concern and providing commentary on political issues. But student journalists are often chilled from performing these functions when they are punished, or subjected to prolonged investigations, because professors or administrators object to the content or viewpoint of published pieces.

In April 2013, for example, the University of Alaska Fairbanks’ student newspaper, *The Sun Star*, published an April Fools’ Day article that described the university’s plans to build a “new building in the shape of a vagina” and was illustrated with a picture from the 1998 PG-13 rated film *Patch Adams*.<sup>48</sup> Shortly thereafter, the paper published an investigative piece about the “UAF Confessions” page on Facebook, including screenshots of public posts and an interview with the target of some insulting remarks on the page.<sup>49</sup> A UAF professor reported both of these articles as “sexual harassment.”<sup>50</sup> The paper remained under investigation until February

<sup>46</sup> Adam Steinbaugh, *University of Northern Colorado Defends, Modifies ‘Bias Response Team’ as Criticism Mounts and Recording Emerges*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC.: NEWSDESK (July 7, 2016), <https://www.thefire.org/university-of-northern-colorado-bias-response-team-recording-emerges/>.

<sup>47</sup> Adam Steinbaugh, *University of Oregon on ‘Bias Response Team’: Nothing to See Here*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC.: NEWSDESK (May 27, 2016), <https://www.thefire.org/university-of-oregon-on-bias-response-team-nothing-to-see-here>.

<sup>48</sup> Press Release, Found. for Individual Rights in Educ., *Victory: Free Press Vindicated at University of Alaska Fairbanks* (Feb. 11, 2014), <https://www.thefire.org/victory-free-press-vindicated-at-university-of-alaska-fairbanks>; Lakeidra Chavis, *UAF announces plans for new Kameel Toi Henderson Building in honor of 59 percent female demographic*, SUN STAR (Mar. 26, 2013), <https://www.uafsunstar.com/uaf-announces-plans-for-new-kameel-toi-henderson-building-in-honor-of-59-percent-female-demographic>.

<sup>49</sup> Annie Bartholomew, *UAF Confessions harbors hate speech*, SUN STAR (Apr. 23, 2013), <https://www.uafsunstar.com/uaf-confessions-harbors-hate-speech>.

<sup>50</sup> *Victory: Free Press Vindicated at University of Alaska Fairbanks*, *supra* note 48.

2014—nearly a year—despite the fact that the articles were unequivocally protected expression under the First Amendment.<sup>51</sup> The editor-in-chief of the newspaper told FIRE that as a result of the investigation, she felt compelled to abandon her plans to publish an informational piece on campus sexual assault. She was worried that, too, would offend someone and land her in trouble.<sup>52</sup>

Following April Fools’ Day 2016, a student newspaper at another public institution was formally investigated for its satire.<sup>53</sup> The University of Wisconsin – Superior’s student newspaper, *The Promethean*, published several articles with joke bylines like “Tater Tot” and “Jake From State Farm” in its issue dated March 32.<sup>54</sup> Among the articles was one written by the Jewish editor-in-chief that included a number of Jewish stereotypes.<sup>55</sup> The editor subsequently posted on Facebook, encouraging offended readers to explore the real-life controversies that inspired some of the satirical articles.<sup>56</sup> Nevertheless, a student filed a formal grievance and the university announced it would investigate the newspaper for its April Fools’ issue.<sup>57</sup>

The investigations at both UAF and Wisconsin ended only after letters from FIRE explaining that public universities cannot censor or punish speech simply because some may find it offensive.<sup>58</sup>

Inappropriate investigations are not the only tool universities use to hinder the student press; student newspapers have also been defunded because of content- or viewpoint-based objections to articles. For example, in November 2015, administrators at the University of California, San Diego publicly condemned a controversial article by satirical student newspaper *The Koala*, which mocked the

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<sup>51</sup> *Id.*

<sup>52</sup> TheFIREorg, *Chilled in Alaska: Student Newspaper Investigated for Nearly a Year for Protected Speech*, YOUTUBE (Sept. 19, 2014), <https://www.youtube.com/watch?v=DCgYHj8E3LE>.

<sup>53</sup> Adam Steinbaugh, *University of Wisconsin – Superior Conducting ‘Investigation’ Into Student Newspaper’s April Fools’ Edition*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC.: NEWSDESK (Apr. 21, 2016), <https://www.thefire.org/university-of-wisconsin-superior-conducting-investigation-into-student-newspapers-april-fools-edition>.

<sup>54</sup> Tater Tot, *GO! GET TO THE CLASSROOM!*, 96 PROMETHEAN, no. 3, Apr. 1, 2016, at 1, available at <https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2016/04/19104443/University-of-Wisconsin-Superior-Promethean-2016-April-Fools-Edition.pdf>; Jake From State Farm, *SSC wins the National C.L.E.A.N. Award*, *id.* at 2.

<sup>55</sup> Dirty Dan, *Area Jewish Man Doesn’t Know How the Fuck He Got Here*, 96 PROMETHEAN, no. 3, Apr. 1, 2016, at 4.

<sup>56</sup> UW-Superior Promethean, *Statement from the Editor-in-Chief*, FACEBOOK (Apr. 1, 2016), <https://www.facebook.com/uwspromethean/posts/10153692586354023>.

<sup>57</sup> Steinbaugh, *supra* note 53.

<sup>58</sup> Victory: Free Press Vindicated at University of Alaska Fairbanks, *supra* note 48; Adam Steinbaugh, *University of Wisconsin-Superior Abandons Investigation of Newspaper’s April Fools’ Edition*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC.: NEWSDESK (Apr. 27, 2016), <https://www.thefire.org/university-of-wisconsin-superior-abandons-investigation-of-newspapers-april-fools-edition>.

use of “safe spaces” and “trigger warnings.”<sup>59</sup> The same day, the university’s student government voted to remove funding from all student print media in an effort to hamstring *The Koala*.<sup>60</sup> Another UCSD student newspaper reported that student government members were open about their motivation and agreed to help all other student publications besides *The Koala* find other sources of funding.<sup>61</sup> FIRE wrote a letter to the university explaining that it must ensure mandatory student fees are distributed in a viewpoint-neutral manner, as mandated by Supreme Court precedent.<sup>62</sup> Unfortunately, this time, the university couldn’t be convinced to abide by its legal obligations. *The Koala* sued the university, and in February 2017, a judge ignored several lines of longstanding case law in order to dismiss the lawsuit.<sup>63</sup>

Two court rulings present a particular threat to student journalists. In 1988, the Supreme Court of the United States ruled in *Hazelwood School District v. Kuhlmeier* that the First Amendment did not prohibit a public high school from making editorial decisions about a newspaper produced as part of a class curriculum, “so long as [the decisions] are reasonably related to legitimate pedagogical concerns.”<sup>64</sup>

In 2005, the U.S. Court of Appeals for the Seventh Circuit extended *Hazelwood’s* holding to the context of higher education in *Hosty v. Carter*. The court held that a public college’s administration did not violate the First Amendment when it demanded prior review of the student newspaper due to disapproval of the newspaper’s content, effectively limiting the rights of adult journalists to those of schoolchildren.<sup>65</sup> In 2006, the Supreme Court declined to hear the case.<sup>66</sup> As a result, college and university journalists in Illinois, Indiana, and Wisconsin were left vulnerable to content-based censorship and the door was left open for other jurisdictions to follow in *Hosty’s* footsteps.

As discussed below, lawmakers in a growing number of states have taken legislative action to correct the abuses enabled by *Hazelwood* and *Hosty*, and I urge Congress to follow their lead.

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<sup>59</sup> Letter from Marieke Tuthill Beck-Coon, Senior Program Officer, Individual Rights Defense Program, Found. for Individual Rights in Educ., to Pradeep K. Khosla, Chancellor, Univ. of Cal., San Diego, and Dominick Suvonnasupa, President, UCSD Associated Students (Dec. 14, 2015), *available at* <https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2015/12/18145123/2015-FIRE-Letter-to-UCSD-12.14.15-copy.pdf>.

<sup>60</sup> *Id.* at 2; Naftali Burakovsky, *11/18 A.S. Council*, THE GUARDIAN (Nov. 19, 2015), <http://ucsdguardian.org/2015/11/19/1118-a-s-council>.

<sup>61</sup> Burakovsky, *supra* note 60.

<sup>62</sup> Letter from Marieke Tuthill Beck-Coon, *supra* note 59.

<sup>63</sup> *Koala v. Khosla*, No. 16cv1296 JM(BLM), 2017 U.S. Dist. LEXIS 29124 (S.D. Cal. Feb. 28, 2017); *see also* Adam Goldstein, *In flawed opinion, district court dismisses The Koala’s lawsuit*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC.: NEWSDESK (Mar. 3, 2017), <https://www.thefire.org/in-flawed-opinion-district-court-dismisses-the-koalas-lawsuit>.

<sup>64</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

<sup>65</sup> *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005).

<sup>66</sup> *Hosty v. Carter*, 546 U.S. 1169 (2006).

The entire campus community suffers a loss when student publications cannot decide for themselves what topics to cover and how, without fear of punishment by the university or its agents. When student journalists are at risk of retaliation based on the content they publish, they are more likely to shy away from coverage of controversial issues and criticism of the status quo—critically important functions of the press.

## SOLUTIONS

### *The Campus Anti-Harassment Act*

Despite the Supreme Court’s clear guidance, and the reduced number of public institutions that now maintain red light speech codes following Chairman Goodlatte’s letter, far too many universities continue to maintain harassment policies that fall short of the Court’s *Davis* standard and prohibit or threaten speech protected by the First Amendment—or, in the case of private universities, speech protected by the school’s own promises.

Overly broad and vague harassment and bullying policies benefit no one. Colleges risk lawsuits by chilling or punishing protected speech, while students learn the wrong lesson about their expressive rights, concluding that self-censorship is safer than risking discipline for speaking their mind. Thankfully, the solution is simple: Congress should require universities to implement anti-discriminatory harassment policies that precisely track the Supreme Court’s *Davis* standard. By simply incorporating a definition carefully crafted by the Supreme Court, such a requirement would end decades of confusion and the abuse of harassment policies on campus, eliminating what has historically been the most common form of speech code.

Precisely defining peer-on-peer harassment as no more or less than the requirements of *Davis* will ensure that institutions have the ability to meet both their legal and moral obligations to maintain campus environments free from discriminatory harassment while protecting free speech. These twin responsibilities need not be in tension. Accordingly, as we did in 2015, FIRE urges Congress to pass legislation that would codify the *Davis* standard. **FIRE has attached draft legislation—the Campus Anti-Harassment Act—as Appendix A.**

### *The Campus Free Expression Act*

Restricting student speech to tiny free speech zones diminishes the quality of debate and discussion on campus by preventing expression from reaching its target audience. Moreover, many of the institutions that maintain these restrictive policies also employ burdensome permitting schemes that require students to obtain administrative and law enforcement permission days or even weeks before being



allowed to speak their minds. Even worse, many of these policies grant campus administrators unfettered discretion to deny applications based on the viewpoint or content of the speakers' intended message. A recent study conducted by FIRE concluded that roughly 1 in 10 of America's top 400 universities restricted student expression with free speech zones.<sup>67</sup>

These free speech quarantines persist despite an overwhelming string of defeats in court. In 2012, a federal court in Ohio struck down the University of Cincinnati's tiny "free speech zone" as unconstitutional. In 2014, Modesto Junior College<sup>68</sup> and the University of Hawaii at Hilo<sup>69</sup> both settled lawsuits brought by students who were prohibited from distributing copies of the U.S. Constitution because they were not in their campuses' free speech zones. Alliance Defending Freedom is counsel in a similar case where students were *arrested* for distributing copies of the U.S. Constitution outside of Kellogg Community College's free speech zone.<sup>70</sup> Just last month, FIRE sued the Los Angeles Community College District over its use of unconstitutional misleadingly labeled free speech zones.<sup>71</sup> These policies aren't used only against students trying to distribute copies of the U.S. Constitution. Last year in a lawsuit sponsored by FIRE, a student-plaintiff settled her lawsuit against Blinn College after it told her she needed special permission to advocate for gun rights outside of the school's tiny free speech zone.<sup>72</sup> A settlement was also reached with California State Polytechnic University, Pomona after it prohibited a student from handing out flyers about animal abuse outside of the school's free speech zone.<sup>73</sup>

The continued maintenance of free speech zones benefits no one. Properly recognizing outdoor areas on public campuses as public forums, subject only to reasonable, content- and viewpoint-neutral time, place, and manner restrictions

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<sup>67</sup> Spotlight Report 2017, *supra* note 4.

<sup>68</sup> Press Release, Found. for Individual Rights in Educ., Victory: Modesto Junior College Settles Student's First Amendment Lawsuit (Feb. 25, 2014) <https://www.thefire.org/victory-modesto-junior-college-settles-students-first-amendment-lawsuit>.

<sup>69</sup> Press Release, Found. for Individual Rights in Educ., U. of Hawaii Settles Lawsuit Over Handing Out Constitutions (Dec. 2, 2014) <https://www.thefire.org/u-hawaii-settles-lawsuit-handing-constitutions>.

<sup>70</sup> Press Release, Alliance Defending Freedom, Student Club Supporters Arrested for Handing Out US Constitution at Michigan College, ADF Sues, (Jan. 18, 2017), <http://www.adfmedia.org/News/PRDetail/10155>.

<sup>71</sup> Press Release, Found. for Individual Rights in Educ., Student sues Los Angeles Community College District to free over 150,000 students from unconstitutional 'free speech zones' (Mar. 28, 2017), <https://www.thefire.org/student-sues-los-angeles-community-college-district-to-free-over-150000-students-from-unconstitutional-free-speech-zones>.

<sup>72</sup> Press Release, Found. for Individual Rights in Educ., Victory: Texas College Settles Free Speech Lawsuit After Telling Student That Gun Rights Sign Needs 'Special Permission' (May 4, 2016), <https://www.thefire.org/victory-texas-college-settles-free-speech-lawsuit-after-telling-student-that-gun-rights-sign-needs-special-permission>.

<sup>73</sup> Press Release, Found. for Individual Rights in Educ., Victory: Animal Rights Activist Restores Free Speech Rights of Cal Poly Pomona Students with Lawsuit Settlement (July 23, 2015), <https://www.thefire.org/cases/california-polytechnic-state-university-stand-up-for-speech>.

will ensure that our public universities continue to be a traditional space for debate, aptly and memorably recognized by the Supreme Court as “peculiarly the ‘marketplace of ideas.’” **FIRE has attached draft legislation—the Campus Free Expression Act—as Appendix B.**

### *The New Voices Act*

Ten states—including Illinois, where *Hosty* originated—have passed laws to protect student journalists from the kind of administrative intervention sanctioned by the courts in *Hazelwood* and *Hosty*.<sup>74</sup> Congress should extend this protection to students in all states by passing a federal New Voices Act.

The Student Press Law Center<sup>75</sup> and its New Voices USA campaign<sup>76</sup> have been a driving force in crafting and implementing legislative solutions to the serious problem of campus newspaper censorship. Led by Frank LoMonte, SPLC’s executive director, and Steven Listopad, who has taught journalism at two North Dakota universities and across the globe,<sup>77</sup> the movement aims to “give young people the legally protected right to gather information and share ideas about issues of public concern.”<sup>78</sup>

North Dakota’s John Wall New Voices Act,<sup>79</sup> for example, on which other states have modeled their bills, provides that

a student journalist has the right to exercise freedom of speech and of the press in school-sponsored media, regardless of whether the media is supported financially by the school district, by use of facilities of the school district, or produced in conjunction with a class in which the student is enrolled. Subject to subsection 3 [providing exceptions for defamation, invasion of privacy, violations of state or federal law, and incitement], a student journalist is responsible for determining the news, opinion, feature, and advertising content of school-sponsored media.

Other state legislatures are currently considering similar bills.<sup>80</sup> The proliferation of these bills is a positive step for freedom of the press at schools across the country.

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<sup>74</sup> Arkansas (Ark. Code Ann. § 6-18-1203), California (Cal. Educ. Code § 48907), Colorado (Colo. Rev. Stat. § 22-1-120), Illinois (105 Ill. Comp. Stat. Ann. 80/10), Iowa (Iowa Code § 280.22), Kansas (Kan. Stat. Ann. § 72-1506), Maryland (Md. Code Ann., Educ. §§ 7-121 & 15-119), Massachusetts (Mass. Ann. Laws ch. 71, § 82), North Dakota (N.D. Cent. Code §§ 15.1-19-25 & 15-10-55), and Oregon (Or. Rev. Stat. Ann. §§ 336.477 & 350.260) have enacted laws protecting student journalists.

<sup>75</sup> See *Cure Hazelwood*, STUDENT PRESS LAW CENTER, <http://www.splc.org/section/cure-hazelwood> (last visited Mar. 31, 2017).

<sup>76</sup> *Talking Points*, NEW VOICES USA, <http://newvoicesus.com/talkingpoints> (last visited Mar. 31, 2017).

<sup>77</sup> *About Us*, NEW VOICES USA, <http://newvoicesus.com/aboutus> (last visited Mar. 31, 2017).

<sup>78</sup> *Talking Points*, *supra* note 76.

<sup>79</sup> N.D. Cent. Code §§ 15.1-19-25.

Too many student journalists, however, remain unprotected from censorship and punishment. It is imperative that student journalists enjoy robust protections for their journalistic speech regardless of the jurisdiction in which they are attending university. Enacting a federal New Voices law would help ensure a free student press in every state. **FIRE has attached a copy of North Dakota’s John Wall New Voices Act to serve as a model for Congress as Appendix C.**

### *Conditioning Federal Funding upon First Amendment Compliance*

With increased attention to campus censorship in the aftermath of the violent protests earlier this year at the University of California, Berkeley and Middlebury College, some have suggested that Congress should condition federal funding on public colleges’ compliance with the First Amendment. At present, institutions’ federal funding may be rescinded for violating federal anti-discrimination statutes, but there is no corollary punitive measure aimed at compelling public institutions to fulfill their obligations under the First Amendment.

Through tax benefits and grants, the federal government subsidizes higher education with billions of dollars each year. Congress should consider whether those expenditures are appropriate with respect to public institutions of higher education that maintain written policies that substantially infringe on students’ free speech, free press, or free association rights.<sup>81</sup>

If a reasonable portion of public universities’ federal funding could be withheld when those institutions maintain unconstitutional speech codes, those institutions

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<sup>80</sup> See, e.g., Katina Paron, *N.Y.’s tongue-tied student journalists*, N.Y. DAILY NEWS (Mar. 30, 2017, 5:00 AM), <http://www.nydailynews.com/opinion/n-y-s-tongue-tied-student-journalists-article-1.3013200>. See also Joe Cohn, *Missouri and Nebraska Legislators Introduce Campus Press Legislation*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC.: NEWSDESK (Jan. 12, 2016), <https://www.thefire.org/missouri-and-nebraska-legislators-introduce-campus-press-legislation>.

<sup>81</sup> Tying federal funding to First Amendment compliance at private institutions presents different considerations. Because private institutions enjoy their own right to freedom of association under the First Amendment, conditioning their federal dollars on eliminating speech codes may pit their freedom of association rights against the free speech rights of their students. To date, only one state (California) requires private institutions to comply with the First Amendment, through Section 94367 of the California Education Code—the “Leonard Law.” It provides:

No private postsecondary educational institution shall make or enforce a rule subjecting a student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution. . . . This section does not apply to a private postsecondary educational institution that is controlled by a religious organization, to the extent that the application of this section would not be consistent with the religious tenets of the organization.

would have a powerful incentive to reform their policies. FIRE would welcome the opportunity to discuss this possibility with the subcommittee.

## CONCLUSION

FIRE's recommendations are intended to assist Congress in defending and promoting students' free speech rights at our nation's public institutions of higher education so that they can truly fulfill their promise as the marketplaces of ideas.

Thank you for your continued interest in supporting free speech on campus and for your attention to FIRE's proposals. If you are interested in discussing our suggestions further, or have any questions about FIRE's work, please feel free to contact me at (215) 717-3473 or at [greg@thefire.org](mailto:greg@thefire.org).

Respectfully submitted,



Greg Lukianoff

President and Chief Executive Officer  
Foundation for Individual Rights in Education

## APPENDIX A: Campus Anti-Harassment Act

115th CONGRESS

1st Session

**H.R. \_\_\_\_\_**

To define discriminatory harassment in higher education, and for other purposes.

**IN THE HOUSE OF REPRESENTATIVES**

**April \_\_, 2017**

Mr./Ms. \_\_\_\_\_ introduced the following bill; which was referred to  
\_\_\_\_\_.

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**A BILL**

To define discriminatory harassment in higher education, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SEC. 1. CAMPUS ANTI-HARASSMENT ACT.**

This Act may be cited as the “Campus Anti-Harassment Act.”

**SEC. 2. FINDINGS.**

- (1) Educational institutions should facilitate the free and open exchange of ideas.
- (2) All public educational institutions are required by the First Amendment to the United States Constitution to protect and honor students’ freedom of speech.
- (3) Private educational institutions are not bound by the First Amendment to the Constitution. Nevertheless, many private educational institutions explicitly promise students freedom of speech.
- (4) All public educational institutions and and private educational institutions that accept federal funding are obligated under Title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], Title IX of the Education Amendments of 1972 [20 U.S.C. 1681 et seq.], Section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], and the Age Discrimination Act of 1975 [42 U.S.C. 6101 et seq.] to take immediate action to eliminate discriminatory harassment, prevent its recurrence, and address its effects.
- (5) In *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), the Supreme Court of the United States provided a clear definition of peer harassment in the educational context that simultaneously prohibits harassment and protects speech.

(6) The Court determined that schools must respond to discriminatory conduct "that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."

(7) Despite this clear definition, many educational institutions maintain overly broad or vague harassment policies that threaten students' right to freedom of speech.

### **SEC. 3. DEFINITIONS.**

In this Act the term 'educational institution' means--

(1) an institution of higher education, as defined in section 102 of the Higher Education Act of 1965 (20 U.S.C. 1002);

(2) a school or institution that offers a program of postsecondary education and that is an eligible provider of training services under section 122 of the Workforce Investment Act of 1998 (42 U.S.C. 2842); and

(3) any entity that provides postsecondary training programs that are approved by the Secretary of Labor under section 236 of the Trade Act of 1974 (19 U.S.C. 2296) for workers who receive benefits under the trade adjustment assistance program under chapter 2 of title II of that Act (19 U.S.C. 2271 et seq.).

### **SEC. 4. ELIMINATING DISCRIMINATORY HARASSMENT AND PROTECTING FREE SPEECH.**

(1) Educational institutions are prohibited from punishing as discriminatory harassment speech that does not constitute actionable discriminatory harassment as defined herein.

(2) Speech shall only constitute actionable discriminatory harassment as prohibited by Title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], Title IX of the Education Amendments of 1972 [20 U.S.C. 1681 et seq.], Section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], and the Age Discrimination Act of 1975 [42 U.S.C. 6101 et seq.] when it is:

(a) directed at an individual;

(b) part of a pattern of targeted, unwelcome conduct that is discriminatory on the basis of race, color, national origin, disability, religion, age, sex, sexual orientation, gender, or gender identity; and

(c) so severe, pervasive, and objectively offensive, and it so undermines and detracts from the victim's educational experience, that the victim-student is effectively denied equal access to an institution's resources and opportunities.

(3) An educational institution is not liable under this Act or any of the statutes referenced in Section 4(2) herein for failing to punish speech that does not satisfy the definition set forth in that section.

(4) Nothing in this Act prohibits an educational institution from being held liable for deliberate indifference to known acts of actionable discriminatory harassment in the educational context.

(5) Nothing in this Act, or an amendment made by this Act, shall be construed to diminish or infringe upon any right protected under the First Amendment to the Constitution of the United States.

(6) If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

## **SEC. 5. CAUSE OF ACTION.**

(1) The following persons may bring an action against an institution of higher education and campus administrators at those institutions acting in their official capacities, in any Federal or State court of competent jurisdiction to enjoin violation of this Act. The court may award compensatory damages, reasonable court costs, and attorneys' fees, including expert fees, or any other relief in equity or law as deemed appropriate:

(a) the attorney general;

(b) any aggrieved person whose expressive rights were infringed upon through violation of this Act;

(c) any aggrieved person who:

- (i) was the victim of discrimination that is prohibited under any of the statutes referenced in this Act, including peer-on-peer discriminatory harassment;
- (ii) made the allegations known to the educational institution; and
- (iii) where the allegations were met with deliberate indifference by an educational institution as evidenced by the institution's failure to take reasonable steps to respond to the discrimination or peer-on-peer discriminatory harassment and prevent its recurrence.

(2) In an action brought under this Section, if the court finds a violation of this Act, the court shall award the aggrieved person not less than \$1000.

(3) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of this Act.



(4) In a suit against a State for a violation of this statute referred to in section (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in a suit against any public or private entity other than a State.

## **SEC. 6. STATUTE OF LIMITATIONS.**

(1) A person must bring suit for for violation of this Act not later than one year after the day the cause of action accrues;

(2) For purposes of calculating the one-year limitation period, the cause of action under Section 5(1)(b) shall be deemed accrued on the date that the student receives final notice of discipline from the educational institution for the speech as defined herein.

(3) For purposes of calculating the one-year limitation period in cases alleging deliberate indifference to known acts of actionable discriminatory harassment, under Section 5(1)(c), the cause of action shall be deemed accrued on the date the educational institution received actual knowledge of the discriminatory harassment. This statute of limitations shall be reset for each instance of conduct that is known to the educational institution, that constitutes discriminatory harassment as defined herein, and that involves the same parties to the harassment.

## **SEC. 7. EXEMPTIONS.**

(1) This Act shall not apply to educational institutions whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine.

## APPENDIX B: Campus Free Expression Act

115th CONGRESS

1st Session

**H.R. \_\_\_\_\_**

To designate outdoor areas of public post-secondary educational institutions as traditional public forums open to free speech, and for other purposes.

**IN THE HOUSE OF REPRESENTATIVES**

**April \_\_, 2017**

Mr./Ms. \_\_\_\_\_ introduced the following bill; which was referred to the Committee on \_\_\_\_\_.

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**A BILL**

To designate outdoor areas of public post-secondary educational institutions as traditional public forums open to free speech, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SEC. 1. SHORT TITLE.**

This Act may be cited as the “Campus Free Expression Act.”

**SEC 2. DEFINITIONS.**

1) INSTITUTION OF HIGHER EDUCATION- Except as provided in Section 2.2, the term ‘institution of higher education’ means--

(A) an institution of higher education, as defined in section 102 of the Higher Education Act of 1965 (20 U.S.C. 1002);

(B) a school or institution that offers a program of postsecondary education and that is an eligible provider of training services under section 122 of the Workforce Investment Act of 1998 (42 U.S.C. 2842); and

(C) any entity that provides postsecondary training programs that are approved by the Secretary of Labor under section 236 of the Trade Act of 1974 (19 U.S.C. 2296) for workers who receive benefits under the trade adjustment assistance program under chapter 2 of title II of that Act (19 U.S.C. 2271 et seq.).

2) The term ‘institution of higher education’ shall not include privately operated institutions, nor institutions of higher education that are publicly operated by a state, if the publicly operated institution of higher education is not a recipient of federal funding.

### **SEC. 3. RIGHT TO USE CAMPUS FOR FREE SPEECH ACTIVITIES.**

1) The First Amendment to the U.S. Constitution protects expressive activities including, but not limited to, all forms of peaceful assembly, protests, speeches, distribution of literature, carrying signs, and circulating petitions.

2) The outdoor areas of campuses of public institutions of higher education that accept federal funding shall be deemed traditional public forums. Public institutions of higher education may maintain and enforce reasonable time, place, and manner restrictions only when such restrictions are narrowly tailored in service of a significant institutional interest; employ clear, published, content- and viewpoint-neutral criteria; and provide for ample alternative means of expression. Any such restrictions must allow for members of the university community to spontaneously and contemporaneously distribute literature and assemble.

3) Any person who wishes to engage in expressive activity in the outdoor areas of campuses of public institutions of higher education that accept federal funding shall be permitted to do so freely, as long as their conduct is not unlawful and does not materially and substantially disrupt the functioning of the institution, subject to the provisions of subsection 2. An institution of higher education shall not designate any area of its campus as a “free speech zone” or otherwise create policies restricting expressive activities to particular areas of campus.

4) No public institution of higher education that accepts federal funding shall infringe on a person’s ability to exercise their right to engage in expressive activity protected by the First Amendment in the outdoor areas of campus, except as permitted by this section.

5) Nothing in this act prevents a public institution of higher education that accepts federal funding from maintaining or enforcing policies prohibiting expressive conduct found to be defamatory, libelous, or slanderous by an American court of law; or expressive conduct unprotected by the First Amendment, including true threats, incitement, obscenity, or actual harassment, as defined by applicable legal precedent.

6) Nothing in this section grants any person the right to materially disrupt previously scheduled or reserved activities in a portion or section of the campus at that scheduled time.

7) Nothing in this act shall be interpreted as limiting the right of student expression elsewhere on campus.

8) Nothing in this act shall be interpreted as preventing a public institution of higher education, acting as an employer, from regulating the speech of faculty, when the faculty speech is not related to scholarship or teaching and does not address matters of public concern.

#### **SEC. 4. CAUSE OF ACTION.**

1) The following persons may bring an action in a court of competent jurisdiction to enjoin violation of this act or to recover compensatory damages, reasonable court costs, and attorneys' fees:

a) the attorney general;

b) persons whose expressive rights were violated through the violation of this act;

2) A violation of this act is established by:

a) demonstrating that an institution subject to this act maintains a policy that does not conform with the requirement herein after the act has taken effect; or

b) demonstrating that an institution, by an action by one of its agents or by the enforcement of a policy, violated the free speech rights guaranteed under this act.

3) In an action brought under this Section, if the court finds a violation of this act, the court shall award the aggrieved persons no less than \$500 for the initial violation plus \$50 for each day the violation remains ongoing, which shall accrue starting on the day after the complaint is served on the institution of higher education. The total damages, excluding court costs and attorney's fees, available to a plaintiff or set of plaintiffs, in a case or cases stemming from a single controversy shall not exceed \$250,000 in total. In violations harming multiple plaintiffs, the court shall divide the damages equally among them until the maximum award is exhausted, if applicable.

#### **SEC. 5. STATUTE OF LIMITATIONS.**

1) ONE-YEAR LIMITATIONS PERIOD.

a) A person must bring suit for violation of this act not later than one year after the day the cause of action accrues;

b) For purposes of calculating the one-year limitation period, each day that the violation of this act persists, and each day that a policy in violation of this act remains in effect, shall constitute a new violation of this act and, therefore, a new day that the cause of action has accrued.

APPENDIX C: North Dakota's John Wall New Voices Act

Introduced by

Representatives Looyesen, Rick C. Becker, Haak, Mock

Senators Grabinger, Luick

1 A BILL for an Act to create and enact a new section to chapters 15-10, 15-18.1, and 15.1-06 of  
2 the North Dakota Century Code, relating to freedom of expression rights of students of public  
3 institutions of higher education and public schools.

4 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

5 **SECTION 1.** A new section to chapter 15-10 of the North Dakota Century Code is created  
6 and enacted as follows:

7 **Student journalists - Freedom of expression - Civil remedy.**

8 1. As used in this section:

- 9 a. "School-sponsored media" means any material that is prepared, substantially  
10 written, published, or broadcast by a student journalist at an institution under the  
11 supervision of the state board of higher education, distributed or generally made  
12 available to members of the student body, and prepared under the direction of a  
13 student media adviser. The term does not include any media intended for  
14 distribution or transmission solely in the classroom in which the media is  
15 produced.
- 16 b. "Student journalist" means a student of an institution under the supervision of the  
17 state board of higher education who gathers, compiles, writes, edits,  
18 photographs, records, or prepares information for dissemination in  
19 school-sponsored media.
- 20 c. "Student media adviser" means an individual employed, appointed, or designated  
21 by an institution under the supervision of the state board of higher education to  
22 supervise or provide instruction relating to school-sponsored media.
- 23 2. Except as provided in subsection 3, a student journalist has the right to exercise  
24 freedom of speech and of the press in school-sponsored media, regardless of whether

1           the media is supported financially by the institution or by use of facilities of the  
2           institution or produced in conjunction with a class in which the student is enrolled.  
3           Subject to subsection 3, a student journalist is responsible for determining the news,  
4           opinion, feature, and advertising content of school-sponsored media. This subsection  
5           may not be construed to prevent a student media adviser from teaching professional  
6           standards of English and journalism to student journalists.

7           3. This section does not authorize or protect expression by a student that:

8           a. Is libelous or slanderous;

9           b. Constitutes an unwarranted invasion of privacy;

10          c. Violates federal or state law; or

11          d. So incites students as to create a clear and present danger of the commission of  
12          an unlawful act, the violation of institution or state board of higher education  
13          policies, or the material and substantial disruption of the orderly operation of the  
14          institution.

15          4. A student enrolled in an institution under the supervision of the state board of higher  
16          education may commence a civil action to obtain damages under this section and  
17          appropriate injunctive or declaratory relief as determined by a court for a violation of  
18          subsection 2, the first amendment to the United States Constitution, or section 4 of  
19          article I of the Constitution of North Dakota.

20          **SECTION 2.** A new section to chapter 15-18.1 of the North Dakota Century Code is created  
21 and enacted as follows:

22          **Student journalists - Freedom of expression - Civil remedy.**

23          1. Notwithstanding the exemptions in section 15-18.1-02, a postsecondary educational  
24          institution may not make or enforce any rule subjecting any student to disciplinary  
25          sanctions solely on the basis of conduct that is speech or other communication which,  
26          when engaged in outside the campus or facility of the postsecondary institution, is  
27          protected from governmental restriction by the first amendment to the United States  
28          Constitution or section 4 of article I of the Constitution of North Dakota.

29          2. A student enrolled in a postsecondary institution may commence a civil action to  
30          obtain appropriate injunctive or declaratory relief as determined by a court for a  
31          violation of subsection 1.



- 1       3. This section does not apply to any postsecondary educational institution that is  
2           controlled by a religious organization, to the extent the application of this section would  
3           not be consistent with the religious tenets of the organization.
- 4       4. This section does authorize any prior restraint of student speech.
- 5       5. This section does not prohibit the imposition of discipline for harassment, threats, or  
6           intimidation, unless constitutionally protected.
- 7       6. This section does not prohibit an institution from adopting rules and policies that are  
8           designed to prevent hate violence from being directed at students in a manner that  
9           denies students full participation in the educational process, so long as the rules and  
10          policies conform to standards established by the first amendment to the United States  
11          Constitution or section 4 of article I of the Constitution of North Dakota.

12       **SECTION 3.** A new section to chapter 15.1-06 of the North Dakota Century Code is created  
13 and enacted as follows:

14       **Student journalists - Freedom of expression - Civil remedy.**

- 15       1. As used in this section:
  - 16           a. "School-sponsored media" means any material that is prepared, substantially  
17           written, published, or broadcast by a student journalist at a public school,  
18           distributed or generally made available to members of the student body, and  
19           prepared under the direction of a student media adviser. The term does not  
20           include any media intended for distribution or transmission solely in the  
21           classroom in which the media is produced.
  - 22           b. "Student journalist" means a public school student who gathers, compiles, writes,  
23           edits, photographs, records, or prepares information for dissemination in  
24           school-sponsored media.
  - 25           c. "Student media adviser" means an individual employed, appointed, or designated  
26           by a school district to supervise or provide instruction relating to  
27           school-sponsored media.
- 28       2. Except as provided in subsection 3, a student journalist has the right to exercise  
29           freedom of speech and of the press in school-sponsored media, regardless of whether  
30           the media is supported financially by the school district, by use of facilities of the  
31           school district, or produced in conjunction with a class in which the student is enrolled.

- 1           Subject to subsection 3, a student journalist is responsible for determining the news,  
2           opinion, feature, and advertising content of school-sponsored media. This subsection  
3           may not be construed to prevent a student media adviser from teaching professional  
4           standards of English and journalism to student journalists.
- 5           3. This section does not authorize or protect expression by a student that:
- 6           a. Is libelous or slanderous;
- 7           b. Constitutes an unwarranted invasion of privacy;
- 8           c. Violates federal or state law; or
- 9           d. So incites students as to create a clear and present danger of the commission of  
10           an unlawful act, the violation of school district policy, or the material and  
11           substantial disruption of the orderly operation of the school.
- 12           4. A student enrolled in a public school or the student's parent or guardian may  
13           commence a civil action to obtain damages under this section and appropriate  
14           injunctive or declaratory relief as determined by a court for a violation of subsection 2,  
15           the first amendment to the United States Constitution, or section 4 of article I of the  
16           Constitution of North Dakota.
- 17           5. Each school district shall adopt a written student freedom of expression policy in  
18           accordance with this section. The policy must include reasonable provisions for the  
19           time, place, and manner of student expression.