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For the

UNITED STATES HOUSE OF REPRESENTATIVES

COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

June 2, 2015 Hearing on

"First Amendment Protections on Public College and University Campuses"

Chairman Franks, Ranking Member Cohen, and Members of the Subcommittee, thank you for giving me the opportunity to comment for the record. I am concerned about how the Education Department, where I used to work, is now pressuring colleges to restrict constitutionally protected speech, by redefining sexual and racial harassment in ways that are at odds with federal court rulings.

SUMMARY

The Education Department has effectively redefined constitutionally protected speech as "sexual harassment" even when it would not offend the reasonable person; is not severe; does not occur on school grounds; and is not gender-discriminatory. By doing so, it has ignored Supreme Court rulings and other court decisions, which require that speech or conduct be offensive to a reasonable person to constitute sexual harassment; be both severe *and* pervasive to trigger Title IX liability[1]; occur on school grounds[2]; and be based on victims' *sex*, not merely sexual in content or subject matter.[3]

In doing so, it has effectively mandated an unconstitutional speech code even broader than the ones struck down by federal judges after college students demonstrated a real possibility that they could be punished merely for discussing certain gender-based differences between men and women, or advocating political positions on gender issues, such as that women be banned from combat roles in the

[1] *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633, 650, 651, 652, and 654 (1999) (emphasizing five times that the conduct must be "severe, pervasive, and objectively offensive" to violate Title IX); *Harris v. Forklift System*, 510 U.S. 17 (1993) (even in the workplace, where conduct need only be "severe *or* pervasive" to trigger liability, the conduct must still be offensive to the "reasonable person" to be illegal).

[2] *Roe v. St. Louis Univ.*, 746 F.3d 874 (8th Cir. 2014) (declining to find that university had violated Title IX in situation involving student raped at off-campus party by another student because plaintiff failed to show that the university "had control over the situation in which the harassment or rape occurs," as required by the Supreme Court's *Davis* decision).

[3] *See Gallant v. Board of Trustees*, 997 F. Supp. 1231 (N.D. Cal. 1998) (graphic sexual discussions were not a violation of Title IX where they did not occur because of the sex of the complainant or any victim). Similarly, in *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998), the Supreme Court noted that there is no liability for sexual harassment unless "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed," and the mere fact that a man addresses words with "sexual connotations" to a woman does not *automatically* make them sexually harassing.

military.[4] The danger that overly broad definitions of harassment will stifle campus debate about important political and social issues is very real, since students have been charged with racial or sexual harassment for discussing issues such as affirmative action, feminism, homosexuality, and the death penalty under broadly worded campus harassment policies.[5]

While colleges could theoretically raise First Amendment objections to the Education Department's overly broad definition of harassment, they are unlikely to do so, because the Education Department's Office for Civil Rights (OCR) could cut off all their federal funds, or subject them to an extremely costly investigation, for failure to comply. It is generally cheaper for a college to violate the First Amendment than to be accused of violating laws against sexual harassment or discrimination, as I explain later on.

To prevent widespread censorship, and prevent OCR from enforcing an unconstitutionally overbroad definition of "harassment" at the expense of free speech, Congress should consider passing a law requiring the Education Department to use the definition of sexual harassment found in the Supreme Court's *Davis* decision in its regulations. That would keep speech from being defined as harassment in violation of federal regulations unless it is unwelcome, aimed at victims based on their sex, and "severe, pervasive, and objectively offensive" enough to interfere with access to an education.[6]

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[4] *See, e.g., Doe v. University of Michigan*, 721 F.Supp. 852, 858-860 (E.D. Mich. 1989) (in striking down the University of Michigan's discriminatory harassment policy, the court cited a "realistic and credible threat that" a graduate student "could be sanctioned were he to discuss certain biopsychological theories" "positing biologically-based differences between sexes and races" in his field of "biopsychology," the "study of the biological bases of individual differences in personality traits and mental abilities"); *DeJohn v. Temple University*, 537 F.3d 301, 305 (3rd Cir. 2008)("because of the sexual harassment policy" at Temple, a former U.S. soldier "felt inhibited in expressing his opinions in class concerning women in combat and women in the military.").

[5] See the examples cited in the *Amicus* brief of Students for Individual Liberty, *et al.*, filed in *Davis v. Monroe County Board of Education*, No. 97-843 (filed Dec. 8, 1998), available in the Westlaw database at 1998 WL 847365.

[6] *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999); *see also Wolfe v. Fayetteville Sch. Dist.*, 648 F.3d 860 (8th Cir. 2011) (vulgar conduct not aimed at victim based on his sex did not violate Title IX).

I. How the Education Department's Office for Civil Rights Restricts Speech

To be classified as sexual harassment, speech needs to meet a certain threshold under Supreme Court precedent. That threshold is generally higher on campus than in the workplace.

In the workplace, it needs only to be "severe *or* pervasive" enough to create a hostile work environment based on the complainant's sex.[7] On campus, by contrast, it needs to be "severe, pervasive, and objectively offensive" enough to interfere with access to an education.[8] A mildly offensive idea about a racial or sexual topic does not violate Title IX or Title VI merely because it is expressed by many students and thus is "pervasive" on campus, because the expression must also be "severe." That higher threshold makes sense, because colleges and universities are the quintessential "marketplace of ideas."[9] You can't have meaningful debate (about a subject like affirmative action, the frequency of false harassment or rape charges, or why there are gender-based pay disparities) when a participant in that debate can be disciplined or expelled for expressing a commonplace view in that debate, merely because that viewpoint is commonplace on campus and thus "pervasive."

In colleges, even commonplace views like opposition to affirmative action have been depicted as racist, and OCR's general counsel once refused to take a position on whether a student's criticism of affirmative action could constitute racial harassment under Title VI if it was expressed to a black student.[10] For example,

> "In 1994, Judith Winston, overseer of the Clinton Administration's Office for Civil Rights (OCR), told American Lawyer columnist Stuart Taylor that

[7] *Harris v. Forklift Systems*, 510 U.S. 17 (1993).

[8] *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999). The Court emphasized five times that the conduct must be "severe, pervasive, and objectively offensive" to violate Title IX. *See id.* at 633, 650, 651, 652, and 654.

[9] *Healy v. James*, 408 U.S. 169, 180 (1972) (Supreme Court describes universities as such).

[10] Stuart Taylor, Jr., A *Clintonite Threat to Free Speech*, The Legal Times, May 9, 1994, at 27. *See* OCR's *Racial Harassment Investigative Guidance,* 59 Fed. Reg. 11448 (1994) (imposing Title VI liability on schools for speech or conduct deemed to create a hostile learning environment or interfere with educational benefits).

> federal laws against racial and sexual 'harassment' might be violated by a student arguing against affirmative action in a college classroom. (This same Judith Winston helped plan Mr. Clinton's national 'dialogue' on race). In 1993, Chico State University's award-winning historian Joseph Conlin was disciplined for 'racial harassment' after he publicly criticized the university's affirmative-action policies. The university claimed that his comments created a 'racially hostile' environment for minorities. After Prof. Conlin threatened a First Amendment lawsuit, the university dropped its harassment code and its action against him. But under pressure from OCR, the university subsequently imposed a new, vaguer harassment code." [11]

In 2007, a university found a student-employee guilty of racial harassment for merely reading the book, *Notre Dame vs. The Klan: How the Fighting Irish Defeated the Ku Klux Klan*, silently to himself, although it reversed this decision after a First Amendment lawsuit was threatened.[12]

Similarly, a prominent feminist professor and author, Laura Kipnis, was recently accused of sexual harassment and retaliation for an article she published in the Chronicle of Higher Education, and subsequent public statements on Twitter. She was accused of sexual harassment by students over an article she wrote arguing that overly broad notions of sexual harassment under Title IX had created a climate of fear and "sexual paranoia."[13] Then, when she wrote about the sexual harassment complaint against her based on that article, in tweets describing it as a violation of academic freedom, she was investigated for retaliation in violation of Title IX, even though she had not even mentioned the complainants' names.[14] (OCR's policies contributed to her plight, since it has told schools to regulate off-

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[11] Karl Jahn, *Harassment Almost Ruined Her Life*, Wall Street Journal, Jan. 21, 1999, http://www.wsj.com/articles/SB91686693179718000.

[12] *University Says Sorry to Janitor Over KKK Book*, Associated Press, July 15, 2008, www.nbcnews.com/id/25680655/ns/us_news-life/t/university-says-sorry-janitor-over-kkk-book

[13] *See* Laura Kipnis, *Sexual Paranoia Strikes Academe*, Chronicle of Higher Education, Feb. 27, 2015, http://chronicle.com/article/Sexual-Paranoia-Strikes/190351/

[14] Jonathan H. Adler, *How Northwestern University is Throwing Academic Freedom Under the Bus (and Wasting Money) Under the Guise of Title IX Compliance*, Washington Post, May 29, 2015, http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/29/how-northwestern-university-is-throwing-academic-freedom-under-the-bus-and-wasting-money-under-the-guise-of-title-ix-compliance/.

campus conduct, including speech "on the internet,"[15] even though federal appeals courts have rejected Title IX lawsuits over off-campus conduct, including severe misconduct.[16])

Moreover, a Title IX complaint was also filed against the faculty-support person who accompanied her to a session with her investigators, because he had described the charges against her as a potential threat to academic freedom in discussing her situation with the faculty senate. The Title IX attorneys investigating her case then informed her that due to the complaint against him, he could no longer be allowed to act as her support person.[17]

The Title IX complaint against Kipnis was dropped after a national outcry from professors in publications like the Washington Post (although a retaliation complaint against her under the Faculty Handbook, as opposed to Title IX, remains pending).[18] But other colleges, to avoid the potential wrath of OCR, have punished professors for retaliation for speaking out, even when they did not even mention the identity of the complainant in questioning a complaint's merit based on academic freedom. And due to the limited nature of public employees' free speech rights against their employer in some circuits, one federal appeals court rejected a professor's challenge to his punishment for speaking out in this fashion.[19]

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[15] *See* OCR, Oct. 26, 2010 Dear Colleague letter, at pg. 2 ("graphic and written statements" on "Internet"), and pg. 6 ("creating . . . Web sites of a sexual nature"), www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html; *see also* OCR Letter re: Complaint No. 01-11-2012 Harvard Law School, at pg. 15 ("the University has an obligation to consider the effects of off-campus conduct") (www2.ed.gov/documents/press-releases/harvard-law-letter.pdf)

[16] *See, e.g., Roe v. St. Louis Univ.*, 746 F.3d 874 (8th Cir. 2014) (declining to find that university had violated Title IX in situation involving student raped at off-campus party by another student because plaintiff failed to show that the university "had control over the situation in which the harassment or rape occurs," as required by the Supreme Court's *Davis* decision).

[17] Jonathan H. Adler, *How Northwestern University is Throwing Academic Freedom Under the Bus (and Wasting Money) Under the Guise of Title IX Compliance*, Washington Post, May 29, 2015.

[18] *See* Brock Read, *Laura Kipnis Is Cleared of Wrongdoing in Title IX Complaints,* Chronicle of Higher Education, May 31, 2015, http://chronicle.com/blogs/ticker/laura-kipnis-is-cleared-of-wrongdoing-in-title-ix-complaints/99951; Robin Wilson, *For Northwestern, the Kipnis Case Is Painful and Personal*, Chronicle of Higher Education, June 4, 2015, http://chronicle.com/article/For-Northwestern-the-Kipnis/230665/.

[19] *Bonnell v. Lorenzo*, 241 F.3d 800 (6th Cir. 2000).

OCR has thumbed its nose at the Supreme Court's *Davis* decision by stating that speech or conduct need only be "persistent" *or* "pervasive" *or* "severe" to violate Title IX or Title VI, not "severe" *and* "pervasive," and need not necessarily interfere with a student's access to educational opportunities to violate Title IX. [20] For example, its April 4, 2011 Dear Colleague letter to the nation's school officials states that "a single or isolated incident of sexual harassment may create a hostile environment" if it is severe, even if it is not pervasive.[21] Similarly, its 2010 "Dear Colleague" letter about bullying, sent to the nation's school officials, claimed that "harassment does not have to . . . involve repeated incidents" to be actionable, but rather need only be "severe, pervasive, or persistent." (The letter took aim at student speech even outside of school boundaries, arguing that harassment includes speech, such as "graphic and written statements" on the "Internet" and elsewhere,[22] even though the courts have given schools less ability to restrict speech outside of school,[23] and even though the Supreme Court's *Davis* decision indicated that liability was limited to events occurring on school grounds[24]).

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[20] *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties,* 65 Fed. Reg. 66092, 66097 (Nov. 2, 2000) (Education Department will hold schools liable for conduct that is "severe, persistent, or pervasive" so as to *either* "limit a student's ability to participate in or benefit from the education program, or to create a hostile or abusive educational environment"); *compare Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999) ("We thus conclude that funding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.")

[21] http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104_pg3.html.

[22] *See* October 26, 2010 Dear Colleague letter about school bullying to the nation's school officials, http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010_pg2.html.

[23] *See, e.g., Klein v. Smith*, 635 F.Supp. 1440 (D. Me. 1986) (school could not punish student for vulgar out-of-school gesture towards teacher that could certainly be punished in school).

[24] *See Roe v. St. Louis Univ.*, 746 F.3d 874 (8th Cir. 2014) (declining to find that university had violated Title IX in situation involving student raped at off-campus party by another student because plaintiff failed to show that the university "had control over the situation in which the harassment or rape occurs," as is required by language in the Supreme Court's *Davis* decision).

Needless to say, people's views, especially when they are commonplace, tend to be "persistent," and they tend to persistently express them over time in campus debates. By allowing liability for expression that is "persistent" but neither "pervasive" nor "severe," OCR has defined sexual harassment even more broadly on campus than it is defined in the workplace, disregarding the Supreme Court's decision to define sexual harassment more narrowly on campus than in the workplace, and turning the law upside down.

The net result of OCR's redefinition of harassment (whether intended or not) is to pressure colleges to punish students for a single instance of controversial speech that a complainant deems "severe" (like a criticism of a university's affirmative action policy made to a black student[25]) even though it is clearly not pervasive or persistent, and to punish students for individual instances of speech that are clearly only mildly offensive, but which the complainant views as collectively "pervasive" or "persistent" because multiple students say them.

Getting rid of the "severe" *and* "pervasive" requirement for educational harassment claims violates federal appeals court rulings that struck down campus hostile-environment harassment policies modeled on workplace harassment rules.[26] Two of those rulings cited *Davis*'s "severe" and "pervasive" requirement.[27]

Getting rid of the severity requirement drives colleges to adopt unconstitutional zero-tolerance rules against sexual or racist speech, similar to the ones adopted by risk-averse employers in non-academic settings like factories.

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[25] *Department of Corrections* v. *State. Personnel Bd.,* 59 Cal.App.4th 131 (Cal. App. 1997) (appeals court, in 2-to-1 ruling, finds that angry diatribe by white prison guard against affirmative action to Hispanic colleague did not constitute hostile-environment racial harassment, although the Hispanic colleague viewed it as such; the liberal dissenting judge argued it was illegal racial harassment, while the majority argued it was largely free speech).

[26] *See, e.g., Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995) (striking down hostile-environment racial harassment policy as unconstitutionally overbroad as to student speech, but allowing coach to be fired for racial epithet due to fact that employees' free speech rights are narrower than students'); *DeJohn v. Temple University*, 537 F.3d 301 (3d Cir. 2008).

[27] *See Saxe v. State College Area School District*, 240 F.3d 200, 205-06, 210-11 (3d Cir. 2001) (striking down discriminatory harassment policy that lacked the severity and pervasiveness limitation found in the Supreme Court's *Davis* decision, and also finding that even an instance of speech that manifests a "purpose" of creating a hostile environment can be protected, even though such speech is banned by the EEOC's workplace guidelines); *DeJohn v. Temple University*, 537 F.3d 301, 317-19 (3d Cir. 2008) (same).

Describing how workplace harassment liability under Title VII works, one federal appeals court decision said, "In essence, while Title VII does not require an employer to fire all 'Archie Bunkers' in its employ, the law does require that an employer take prompt action to prevent such bigots from expressing their opinions in a way that abuses or offends their co-workers. By informing people that the expression of racist or sexist attitudes in public is unacceptable, people may eventually learn that such views are undesirable in private, as well. Thus, Title VII may advance the goal of eliminating prejudices and biases in our society."[28] To avoid the risk of a recurring viewpoint being deemed "pervasive," civil rights agencies encourage employers to adopt zero tolerance policies banning all racially or sexually offensive comments or conduct, as some employers in fact do.[29]

But banning "the expression of racist or sexist attitudes" and preventing "bigots from expressing their opinions" can sometimes create First Amendment problems even when applied to workplaces. For example, a federal appeals court concluded that the First Amendment barred a racial harassment lawsuit brought by Hispanic faculty over a white colleague's persistent anti-immigration emails, in light of academic freedom considerations.[30] And a state supreme court justice cited the First Amendment in a ruling dismissing a sexual harassment lawsuit over the recurring, persistent sexual jokes told in the process of producing the TV show "Friends" by Hollywood sitcom writers, which offended a writer's female assistant.[31]

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[28] *Davis v. Monsanto Chem. Co.*, 858 F.2d 345, 350 (6th Cir. 1988); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1486 (3rd Cir. 1990) (quoting the *Monsanto* decision).

[29] *See* Maryland Commission on Human Relations, *Preventing Sexual Harassment: A Fact Sheet for Employees* (1994) ("Because the legal boundaries are so poorly marked, the best course of action is to avoid all sexually offensive conduct in the workplace."), quoted at http://www2.law.ucla.edu/volokh/harass/breadth.htm#74; Annette Delavallade, *Confusion About Harassment Is Not Seen as a Legal Excuse*, Cap. District Bus. Rev., Oct. 14, 1996 ("zero tolerance" policies needed to protect against liability); Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?,* 85 Geo. L.J. 627 (1997).

[30] *See Rodriguez v. Maricopa Community College District*, 605 F.3d 703 (9th Cir. 2010).

[31] *See Lyle v. Warner Brothers TV Productions,* 132 P.3d 211, 295-96, 300 (Cal. 2006) (Chin, J., concurring) (advocating a creative-necessity defense against liability for certain types of speech-based harassment claims).s

Given how this "severe *or* pervasive" test can violate academic or artistic freedom even in the workplace, it is a big mistake for the Education Department to impose it on *student* speech despite the Supreme Court's decision not to do so in its *Davis* decision. That is especially true given the fact that colleges and universities are the quintessential "marketplace of ideas."[32]

It would be a mistake for this Congress to overlook OCR's overreaching, given the tendency of liberal civil-rights officials to classify commonplace conservative (and even moderate) views as racist in effect, if not intent.[33] For example, a civil-rights historian argued in a Washington Post op-ed that "the tea party movement's assault on so-called Big Government," "despite the sanitized language of fiscal responsibility," "constitutes an attack on African American jobs," because "public-sector employment . . .has traditionally been an important venue for creating a black middle class."[34] Even the use of the term "black" rather than "African-American" is viewed as a racial provocation by some school racial equity officials.[35]

This pressure to censor is aggravated by periodic advice to colleges from Education and Justice Department bureaucrats that they should classify *any* unwelcome sexual or racial speech as harassment, even if it is isolated and *not* even offensive to any reasonable person, in order to nip harassment in the bud.

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[32] *Healy v. James*, 408 U.S. 169, 180 (1972) (Supreme Court describes universities as such).

[33] *Compare Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074 (3d Cir. 1996) (workplace racial harassment claim can be based on non-racial code words).

[34] Carol Anderson, *Ferguson Isn't About Black Rage Against Cops. It's White Rage Against Progress*, Washington Post, Aug. 29, 2014, www.washingtonpost.com/opinions/ferguson-wasnt-black-rage-against-copsit-was-white-rage-against-progress/2014/08/29/3055e3f4-2d75-11e4-bb9b-997ae96fad33_story.html?hpid=z5. "Blacks generally have a higher representation in government than private industry." *NAACP v. East Haven*, 892 F.Supp. 46, 50 (D.Conn.1995); *see also Cleveland Branch, N.A.A.C.P. v. Parma*, 263 F.3d 513, 518 (6th Cir. 2001).

[35] *See* Susan Du, *Distrust and Disorder: A Racial Equity Policy Summons Chaos in the St. Paul Schools*, City Pages, May 27, 2015 (discussing a school district policy designed to reduce suspensions of black students under which rather than being suspended, "disruptive or destructive students would essentially receive a 20-minute timeout . . . counseling by a 'behavioral coach,' then return to class when they calmed down"; a school "cultural specialist" said if minority "'students cuss them out, teachers should evaluate their own failures to earn a child's respect and trust'. . . 'When you use the word "black" versus "African American" and the student flips out, understand where that might be coming from.'") (http://blogs.citypages.com/blotter/2015/05/a_racial_equity_policy_summons_chaos_in_the_st_paul_schools.php).

For example, the University of Montana applied federal court definitions of sexual harassment, which do not reach trivially-offensive conduct or comments that do not offend reasonable people, in its internal sexual harassment policy. The Justice and Education Departments took issue with this, saying that conduct, or speech on sexual topics, should be classified as harassment even if "it is" not "objectively offensive." In the course of a letter to the University of Montana finding it in violation of Title IX (largely for other reasons, such as campus sexual assaults), they wrote that the University of Montana's sexual harassment policy

> **improperly suggests that the conduct does not constitute sexual harassment unless it is objectively offensive**. This policy provides examples of unwelcome conduct of a sexual nature but then states that "[w]hether conduct is sufficiently offensive to constitute sexual harassment is determined from the perspective of an objectively reasonable person of the same gender in the same situation." **Whether conduct is objectively offensive** is a factor used to determine if a hostile environment has been created, but it **is not the standard to determine whether conduct was "unwelcome conduct of a sexual nature" and therefore constitutes "sexual harassment."** . . . sexual harassment should be more broadly defined as "**any** unwelcome conduct of a sexual nature."[36]

As education writers observed, under the Obama administration's logic, a professor could be classified as a sexual harasser merely for teaching sex education. If a professor discusses a sexual issue, like HIV transmission through anal sex, "making one of his 500 students uncomfortable," "he's a sexual harasser" under the Administration's proposed definition, noted Joanne Jacobs.[37] It would also cover any other "expression related to sexual topics that offends any person," such as "'The Vagina Monologues,' a presentation on safe sex practices, a debate about sexual morality, a discussion of gay marriage, or a classroom lecture on

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[36] *See* May 9, 2013 Letter of Findings, at pg. 9, http://www.justice.gov/opa/documents/um-ltr-findings.pdf. (boldface added).

[37] Joanne Jacobs, *U.S. Rule Makes Every Student a Sex Harasser*, May 11, 2013 (http://www.joannejacobs.com/2013/05/u-s-rule-makes-every-student-a-sex-harasser/).

Vladimir Nabokov's Lolita."[38] (Some overly sensitive students view discussion of such topics as sexual harassment and file charges as a result.[39]).

In response to widespread outcry from civil libertarians, OCR's head backpeddled and indicated that its letter to the University of Montana merely "represents the resolution of that particular case" with the University of Montana, "and not OCR or DOJ policy" required for all colleges. However, other Justice and Education Department officials have continued to suggest that this overly broad definition of harassment was a blueprint for colleges nationwide.[40]

As a result, some colleges have radically expanded their "harassment" policies to cover constitutionally protected speech that would not previously have been treated as harassment.[41] That apparently includes Northwestern University, where Professor Kipnis was charged with sexual harassment over the essay she wrote in the Chronicle of Higher Education; its policy expansively provided that "sexual harassment is any unwelcome conduct of a sexual nature."[42]

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[38] Joanne Jacobs, *U.S. Rule Makes Every Student a Sex Harasser*, May 11, 2013 (quoting the Foundation for Individual Rights in Education).

[39] For example, sexual harassment charges were brought after sex educator Toni Blake told a joke while demonstrating a condom. *See* http://www.zoominfo.com/p/Toni-Blake/1720503. Unlike the Education Department, courts have explicitly rejected the idea that such humor inherently constitutes "sexual harassment." *See Brown v. Hot, Sexy & Safer Productions*, 68 F.3d 525 (1st Cir. 1995) (students sued over comments in sex education class; court ruled that since sexual speech must be "severe" or "pervasive" and create "hostile environment" to constitute sexual harassment, the lawsuit should be dismissed; it ruled that sexual humor in the sex education lecture about "erection wear" and anal sex was not enough for liability, since a reasonable person would not have viewed the comments as intended to harass).

[40] *See* Written Testimony of Greg Lukianoff for this hearing, at pp. 10-11 (http://judiciary.house.gov/_cache/files/cb2a2b82-2c21-4fa3-8a94-896c108c6b47/06022015-lukianoff-testimony.pdf).

[41] *See* Written Testimony of Greg Lukianoff for this hearing, at pg. 11 ("Over the past several years, many universities—including Pennsylvania State University, the University of Connecticut, Clemson University, Colorado College, and Georgia Southern University — have revised their sexual misconduct policies to include the blueprint's broad definition of sexual harassment.").

[42] Northwestern University, *Policy on Sexual Harassment, Title IX Statement, and Additional Guidance*, http://www.northwestern.edu/sexual-harassment/university-policies/sexual-harassment-policy/index.html; *see also Jessica Gavora*, *How Title IX Became a Political Weapon*, Wall Street

II. Why OCR's Pressure to Restrict Speech Succeeds Despite Its Illegality

Although the Office for Civil Rights has encroached on the First Amendment by defining protected speech as harassment, many colleges have acquiesced in its overly broad definition, because the real and perceived consequences of incurring the wrath of a civil-rights agency like OCR are much more severe for them than the consequences of violating the First Amendment.[43]

OCR can cut off all of a college's federal funds for a violation of its Title IX regulations. For a college, that can mean losing hundreds of millions of dollars, including all federal financial aid to its students. For example, "Harvard received $656 million" in 2012 just "in federal research funding,"[44] and its "Medical School alone took in over $250 million in federal funds during the 2012 fiscal year, a sum that accounted for 34 percent of its operating budget."[45] Using this massive leverage, OCR is now forcing some colleges to pay large amounts of compensation to students who allege harassment or sexual assault, even though it lacks statutory

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Journal, June 8, 2015 at A13 (under Northwestern's Title IX regulations, "an unwelcome . . . comment was grounds for a Title IX investigation").

[43] *See, e.g., Lela v. Board of Trustees of Community College District No. 516*, 2015 WL 351243, *2, *4 (N.D. Ill. Jan. 27, 2015) (college violated students' First Amendment rights when it denied plaintiffs' request to hand out flyers on the school's campus, which it did based on the rationale that their content was "in direct conflict with and disruptive of the College's mission to uphold and adhere to the legal requirements for maintaining a non-discriminatory educational environment, free of unlawful hostility")("defendant argues that WCC's antidiscrimination policy permissibly bars plaintiffs from leafleting on campus" because "plaintiffs' message is 'demeaning to a protected class at the College'"); *Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board*, 578 F.2d 1122 (5th Cir. 1978) (school district violated First Amendment by kicking out racist group that sought to meet after hours in empty classroom based on its viewpoint, in order to appease the Office for Civil Rights' predecessor entity, HEW's Office for Civil Rights).

[44] Tracy Jan, *Research Giants Win on Federal Funding*, Boston Globe, March 18, 2013, https://www.bostonglobe.com/news/nation/2013/03/17/harvard-mit-and-other-research-schools-thwart-obama-administration-effort-cap-overhead-payments/Nk5PT0Mc8MQZihFVNs5gNK/story.html.

[45] Nicholas Fandos & Samuel Weinstock, *Harvard Braces for Decline in Federal Funding*, Harvard Crimson, Dec. 30, 2012, http://www.thecrimson.com/article/2012/12/30/sequestration-research-budget-cuts/.

authority to award such compensatory damages (which is the province of the judiciary).[46]

By contrast, private colleges are not subject to the First Amendment (although a student could theoretically sue the government for forcing a private college to restrict speech[47]). And even if a state university violates the First Amendment, it often pays nothing for the violation. The Eleventh Amendment protects a state university from having to pay any monetary damages for such a violation.[48] (The Supreme Court has said that Congress can waive Eleventh Amendment immunities to protect civil rights, but Congress has only done so for discrimination and harassment cases, not First Amendment cases.[49])

State university officials -- as opposed to the university itself -- can be individually sued for First Amendment violations, but they are protected by the defense of qualified immunity from having to pay any monetary damages at all, unless the court finds that they not only violated the First Amendment, but did so

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[46] *See, e.g.,* Marcella Bombardieri, *US, Tufts University at odds on handling sexual assaults*, Boston Globe, April 29, 2014 ("Tufts signed an agreement with the government earlier this month . . . providing monetary compensation to the student."), www.bostonglobe.com/metro/2014/04/28/department-education-finds-tufts-university-violating-title-sexual-assault-cases/VO7QmYgGvyCpz8c4q0mWNM/story.html; Hans Bader, *Dept. of Ed's Sexual Harassment Guidance Radically Expands Harassment Liability,* CNS News, March 2, 2015 (http://cnsnews.com/commentary/hans-bader/dept-eds-sexual-harassment-guidance-radically-expands-harassment-liability) (discussing how OCR's January 2014 guidance suggests even blameless colleges may be forced to pay compensation for student-on-student harassment even if they punished the harasser); Catherine Sevchenko, *Department of Education's Latest 'Dear Colleague' Letter on Title IX Retaliation is Puzzling*, The Torch, April 29, 2013 (OCR's "granting an individual monetary relief seems like an insupportable usurpation by OCR of a function usually provided by the courts") (www.thefire.org/department-of-educations-latest-dear-colleague-letter-on-title-ix-retaliation-is-puzzling/).

[47] *See Okwedy v. Molinari*, 333 F.3d 339 (2d Cir. 2003) (city official could be sued for pressuring a billboard company to stop displaying a church's anti-homosexuality billboard); *Rattner v. Netburn*, 930 F.2d 204 (2d Cir.1991) (pressure on chamber of commerce to not publish ad in its publication violated First Amendment).

[48] *Dube v. State Univ. of New York,* 900 F.2d 587, 594-95 (2d Cir.1990).

[49] *See Crawford v. Davis*, 109 F.3d 1281 (8th Cir. 1997) (Congress waived schools' sovereign immunity against damages in Title IX sexual harassment lawsuits).

in a very clear, unambiguous way that violated a controlling court decision.[50] Even when damages are awarded for First Amendment violations, the amount is typically rather small.[51]

Although universities cannot be sued for damages for First Amendment violations, they can be sued for an injunction barring further violations of First Amendment rights. But a university can often avoid such an injunction (as well as the need to pay the student's attorneys' fees) by dropping the challenged speech restriction at the last minute, right before a court ruling.[52] Free speech may be priceless, but for a school's bottom line, First Amendment violations are cheap.

By contrast, a college or school district can be ordered to pay a million dollars or more in damages in a racial or sexual harassment lawsuit.[53] To avoid the possibility of such damages, and head off a costly Title IX investigation by the Office for Civil Rights that can consume hundreds of hours of staff time and result in huge amounts of negative publicity, colleges will pay out hundreds of thousands of dollars to settle sexual harassment complaints. While the courts have generally not defined "harassment" as expansively as OCR, the law can be murky or confusing to colleges, and they don't want to incur even the risk of an adverse ruling in a high profile case. As a result, they have paid large amounts to settle

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[50] *See, e.g., Reichle v. Howards*, 132 S.Ct. 2088, 2094 (2012) (the right "violated must be established, not as a general proposition, but in a particularized sense"); *Harrell v. Southern Oregon University*, 474 Fed. Appx. 665 (9th Cir. July 20, 2012) (circuit court of appeals granted qualified immunity because "the appropriate speech standard for college and graduate students' speech remains an open question in this circuit"; First Amendment violation must be "sufficiently clear that every reasonable official would have understood" that it was illegal).

[51] *Nekolny v. Painter*, 653 F.2d 1164, 1172-73 (7th Cir.1981) (the court reversed awards of damages for emotional harm for firings in violation of the First Amendment, based on statements that employees were "depressed," "a little despondent," or even "completely humiliated"), *Spence v. Board of Educ. of Christina Sch. Dist.*, 806 F.2d 1198, 1201 (3d Cir.1986) (overturning award of $22,060 as excessive in First Amendment case, where "The evidence of emotional distress consisted chiefly of plaintiff's own testimony that she was depressed and humiliated by the transfer and that she had lost her motive to be creative").]

[52] *See Buckhannon Board and Care Home v. West Virginia,* 532 U.S. 598 (2001).

[53] *Zeno v. Pine Plains Central School District*, 702 F.3d 655 (2nd Cir. 2012) (upholding million dollar damage award in Title VI racial harassment case); *cf. Passantino v. Johnson & Johnson*, 212 F.3d 493 (9th Cir. 2000) (court upheld $1 million in emotional distress damages for retaliatory refusals to promote woman who alleged sex discrimination).

Title IX sexual harassment lawsuits, sometimes exceeding a million dollars.[54] Individual school officials can also be sued for engaging in, or condoning, sexual harassment under 42 U.S.C. 1983.[55] Even back before OCR or the courts awarded damages for Title IX or Title VI violations, schools were inclined to violate the First Amendment rather than OCR's interpretation of these statutes, when a conflict arose.[56]

For example, the University of Colorado paid $825,000 to settle a student's Title IX retaliation lawsuit after a professor "challenged her allegations" of sexual harassment "in a report to the university that, among other things, accused her of lying." The complainant viewed this speech as retaliatory harassment in violation of Title IX regulations. The university, which was under investigation by the Education Department's Office for Civil rights, paid out this settlement, and moved to fire the professor, even though a faculty grievance panel was skeptical about whether the professor's "derogatory" criticisms rose to the level of illegal retaliation,[57] and even though some court rulings suggest such speech is protected by the First Amendment.[58]

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[54] Howard Pankratz, *$2.8 million deal in CU rape case*, Denver Post, Dec. 5, 2007 ($2.5 million to a plaintiff), www.denverpost.com/ci_7640880; Associated Press, *UConn to pay $1.3M to settle federal lawsuit over handling of sex assault claims*, New York Daily News, July 18, 2014 ($900,000 to a plaintiff), http://www.nydailynews.com/sports/college/uconn-pay-1-3m-settle-lawsuit-handling-sex-assault-claims-article-1.1871933; Lester Munson, *Landmark Settlement in ASU Rape Case*, ESPN, Feb. 3, 2009 ($850,000 to a plaintiff), http://sports.espn.go.com/espn/otl/news/story?id=3871666.

[55] *See, e.g., Fitzgerald v. Barnstable School Committee*, 555 U.S. 246 (2009).

[56] *See, e.g., Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board*, 578 F.2d 1122 (5th Cir. 1978) (court found that school district violated First Amendment by kicking out racist group that sought to meet after hours in empty classroom, to appease the Office for Civil Rights' predecessor entity, HEW's Office for Civil Rights).

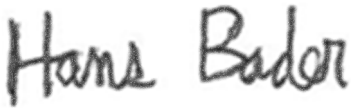
[57] Charles Huckabee, *U. of Colorado Settles With Philosophy Professor It Was Seeking to Fire*, Chronicle of Higher Education, May 13, 2015, http://chronicle.com/blogs/ticker/u-of-colorado-settles-with-philosophy-professor-it-sought-to-fire/98817.

[58] *See* the settlement in *Osborne v. Mesabi Community College*, expunging a professor's discipline for "retaliation" for criticizing a harassment complaint against him, after Judge Kyle indicated that his First Amendment lawsuit could proceed, a case discussed in Alan Charles Kors & Harvey Silverglate, *The Shadow University* (1998) at pp. 125-127; *Brooks v. City of San Mateo*, 229 F.3d 917 (9th Cir. 2000) (noting that banning criticism or ostracism in response to a discrimination charge could violate the First Amendment freedoms of speech and association);

CONCLUSION

The Education Department is pressuring colleges to adopt unconstitutional speech codes. To put a stop to that, Congress should, as a first step, consider passing legislation to replace the Education Department's overly broad harassment definition with a narrower definition. For example, it could codify the more limited definition found in the Supreme Court's *Davis* decision, defining sexual harassment as unwelcome conduct aimed at victims based on their sex that is "severe, pervasive, and objectively offensive" enough to interfere with access to an education.[59]

Respectfully submitted,



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Bain v. City of Springfield, 678 N.E.2d 155 (Mass. 1997) (retaliation ban, as applied to criticism of harassment charge to newspaper, is limited by "constitutional guarantees of freedom of speech. The interest in remedying discrimination is weighty but not so weighty as to justify what amounts to a restriction on core political speech."); *BE&K Constr. Co v. NLRB*, 536 U.S. 516 (2002) (First Amendment protected employer's non-baseless lawsuit against union even if it had a retaliatory motive, and federal labor laws could not ban such petitioning activity by the employer). *But see Bonnell v. Lorenzo*, 241 F.3d 800 (6th Cir. 2000) (court ruled that professor's criticism of harassment complaint was not protected, given limited free speech rights of public employees).

[59] *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999).

PUBLIC COMMENTS OF JOAN BERTIN

Executive Director
National Coalition Against Censorship

to the

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

in response to the June 2, 2015 Hearing on

First Amendment Protections on Public College and University Campuses

June 11, 2015

Chairman Franks, Vice-Chairman DeSantis and Members of the Subcommittee:

The National Coalition Against Censorship ("NCAC"), founded in 1974, is an alliance of more than 50 national non-profit organizations, including literary, artistic, religious, educational, professional, labor, and civil liberties groups united in support of freedom of thought, inquiry, and expression.[1] NCAC supports the right of access to information and the freedom of the individual to question, learn, and think independently. Academic freedom is essential to these goals and to education. Suppression of discussion and debate on sensitive topics deprives students of the resources to address issues they will inevitably encounter as adults. It is NCAC's position that educational institutions are the best places for young people to learn how to function in a pluralistic society, and that limiting the ability of students and faculty to discuss and debate the challenging issues of their time will leave them unprepared to make the kind of informed decisions required of participants in a representative democracy.

These comments address the threat to free speech and academic freedom on college campuses from certain policies of the Department of Education Office of Civil Rights (OCR). In our view, in an otherwise laudable effort to eliminate discrimination in education, OCR has adopted an expansive and vague definition of harassment that encompasses speech that is clearly protected under the First Amendment. Given its enforcement powers, and the threat of charges, investigations, and possible disciplinary action, this effort to prevent discrimination has reached well beyond what the enabling statutes -- as interpreted by the Supreme Court -- envisioned and has instead created a climate of fear on college and university campuses that not only threatens free speech and academic freedom but also undermines the educational environment and the cause of equality.

Recent events at Northwestern University illustrate the problem. In February 2015, Laura Kipnis, a professor of Radio, TV and Film at Northwestern University, published an article entitled "Sexual Paranoia Strikes Academe," commenting on "the layers of prohibition and sexual terror surrounding the unequal-power dilemmas of today," along with other observations on contemporary attitudes about feminism and sexuality. In her essay, she referred to highly publicized charges of sexual assault that had been made by students against one professor. In response, two students involved in that incident, who were not named by Kipnis, claimed that her essay, and particularly the reference to the assault case, constituted retaliation; the students filed a Title IX complaint and Northwestern initiated an investigation, as it claims it was required to do, for which it retained outside counsel. While the matter was pending, Kipnis asked a fellow faculty member, the leader of the faculty senate, to accompany her to a meeting with investigators, and the university president defended free speech rights in an essay in the Wall Street Journal. According to published reports, the students then filed Title IX complaints against both Kipnis's colleague and the university president.

Even though the charges against Kipnis were ultimately dismissed, these events dramatically illustrate how an expansive definition of harassment that includes clearly protected speech invites complaints against the expression of unpopular or controversial ideas, resulting in an extensive, expensive, and disruptive investigation. This was never the intent of Title IX.

[1] The views presented in these comments are those of the NCAC alone and do not necessarily represent the views of its individual members.

How did this happen? In our view, it started publicly with a widely-distributed "Dear Colleague" letter from OCR on October 26, 2010, in which the agency defined harassment as follows:

> Harassing conduct may take many forms, including verbal acts and name-calling; graphic and written statements, which may include use of cell phones or the Internet; or other conduct that may be physically threatening, harmful, or humiliating. Harassment does not have to be directed at a specific target, or involve repeated incidents. Harassment creates a hostile environment when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school.

http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html

OCR's approach here represents a significant departure from its own previous interpretations of the statue, and from Supreme Court rulings in cases alleging discrimination based on harassment or hostile environment under federal civil rights laws prohibiting discrimination in education and employment, some of which OCR is charged with enforcing.

Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), a case involving unwanted sexual advances of a supervisor toward a female employee, was the Court's first major pronouncement. The Court held that for "sexual harassment to be actionable [under Title VII of the Civil Rights Act] it must be sufficiently severe or pervasive 'to alter the conditions of the [the victim's] employment and create an abusive working environment.'" *Id.* at 67. In *Harris v. Forklift Systems, Inc.,* 510 U.S. 17 (1993), another Title VII case, the plaintiff alleged repeated, targeted and egregious forms of verbal harassment; the Court reaffirmed the approach in *Meritor,* but noted that offensive language alone is ordinarily insufficient to make a hostile environment claim. Rather, "whether an environment is 'hostile' or 'abusive' can be determined only by looking at …the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id*. at 23. *See also Clark County School District v. Breeden*, 532 U.S. 268, 271 (2001) ("simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to" harassment), and *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004).

Rulings in cases in the education context have adopted a similar analysis. In *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), a case alleging peer-to-peer harassment, the Court held that harassment must be so "severe, pervasive, and objectively offensive, that it effectively bars the victim's access to an educational opportunity or benefit." *Id*. at 633. The Court further noted that "harassment depends on a constellation of surrounding circumstances, expectations, and relationships." *Id*. at 651. The cautious approach to regulating speech -- even speech that allegedly causes discrimination -- reflects an effort by the Court to respect rights under the First Amendment as well as those granted by civil rights laws.

It is clear from Justice Kennedy's dissenting opinion in *Davis* that First Amendment concerns had a prominent place in the Court's deliberations:

> A university's power to discipline its students for speech that may constitute sexual harassment is also circumscribed by the First Amendment. A number of federal courts have already confronted difficult problems raised by university speech codes designed to deal with peer

> sexual and racial harassment. See, *e. g.*, *Dambrot* v. *Central Mich. Univ.*, 55 F. 3d 1177 (CA6 1995) (striking down university discriminatory harassment policy because it was overbroad, vague, and not a valid prohibition on fighting words); *UWM Post, Inc.* v. *Board of Regents of Univ. of Wis. System*, 774 F. Supp. 1163 (ED Wis. 1991) (striking down university speech code that prohibited, *inter alia,* "`discriminatory comments' " directed at an individual that "`intentionally . . . demean' " the "`sex . . . of the individual'" and "`[c]reate an intimidating, hostile or demeaning environment for education, university related work, or other university-authorized activity' "); *Doe* v. *University of Mich.*, 721 F. Supp. 852 (ED Mich. 1989) (similar); *Iota XI Chapter of Sigma Chi Fraternity* v. *George Mason Univ.*, 993 F. 2d 386 (CA4 1993) (overturning on First Amendment grounds university's sanctions on a fraternity for conducting an "ugly woman contest" with "racist and sexist" overtones).

Id. at 667 (Kennedy, J., dissenting). Indeed, the four dissenting justices considered even the narrow definition of cognizable harassment adopted by the majority insufficient to address potential First Amendment claims. It is highly unlikely that the Court would countenance expanding those boundaries even further, as OCR has done.

The caution reflected in the majority opinion, and the reservations expressed in the dissent, are consistent with Supreme Court jurisprudence involving other government efforts to deter and penalize speech that reflects or perpetuates discriminatory attitudes. In *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377 (1992), the Court struck down a law targeting bias-motivated crimes, which it characterized as "a prohibition of fighting words that contain… messages of 'bias motivated' hatred…." While acknowledging that "'[i]t is the responsibility, even the obligation, of diverse communities to confront such notions in whatever form they appear,'" the Court held that

> the manner of that confrontation cannot consist of selective limitations upon speech. St. Paul's brief asserts that a general "fighting words" law would not meet the city's needs because only a content-specific measure can communicate to minority groups that the "group hatred" aspect of such speech "is not condoned by the majority." …. The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content.

Id. at 392 (references omitted).

Prior to 2010, OCR's pronouncements reflected the careful balancing of speech and equality interests expressed in these and other Supreme Court opinions. Its 1997 Guidance advises that harassment must be "sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from an education program or activity…" and cautions that "if the alleged harassment involves issue of speech or expression, a school's obligations may be affected by the application of First Amendment principles."

> Title IX is intended to protect students from sex discrimination, not to regulate the content of speech….[T]he offensiveness of a particular expression …is not a legally sufficient basis to establish a sexually hostile environment ….[W]hile the First Amendment may prohibit the school from restricting the right of students to express opinions about one sex that may be considered derogatory, the school can take steps to denounce those opinions and ensure that competing views are heard.

62 Fed. Reg, 12033, 12038 and 12045-46 (3/13/1997). See also Revised Sexual Harassment Guidance, Jan. 19, 2001 (schools "must formulate, interpret, and apply its rules so as to protect academic freedom and free speech.") http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html.

A "Dear Colleague" letter dated July 28, 2003, is even more explicit:

> OCR's regulations are not intended to restrict the exercise of any expressive activities protected under the U.S. Constitution. The OCR has consistently maintained that the statutes that it enforces are intended to protect students from invidious discrimination, not to regulate the content of speech….[Harassment] must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive. Under OCR's standard, the conduct must also be considered sufficiently serious to deny or limit a student's ability to participate in or benefit from the educational program…. OCR interprets its regulations consistent with the requirements of the First Amendment, and all actions taken by OCR must comport with First Amendment principles.

http://www2.ed.gov/about/offices/list/ocr/firstamend.html.

In contrast, the October 2010 Dear Colleague Letter takes a markedly different approach. In place of the previous language, this letter defines harassment as follows:

> Harassing conduct may take many forms, including verbal acts and name-calling; graphic and written statements, which may include use of cell phones or the Internet; or other conduct that may be physically threatening, harmful, or humiliating. Harassment does not have to be directed at a specific target, or involve repeated incidents. Harassment creates a hostile environment when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school.[2]

This definition departs in significant ways from both Supreme Court language and prior statements issued by OCR. First, the definition of harassment in *Davis* requires that the conduct is "severe, pervasive, *and* objectively offensive," and that it "so undermines and detracts from the victims' educational experience, that the victims are effectively denied equal access to an institution's resources and opportunities."

In contrast, the Letter merely requires the conduct to be "severe, pervasive, *or* persistent," leaving out the "objectively offensive" requirement, and indicating that any one of these will suffice to make a claim of hostile environment. Second, *Davis* states that harassing conduct must "undermine[ ] and detract[ ] from the victims' education experience [effectively denying them] equal access…." The Letter only requires that the conduct "interfere with *or* limit a student's ability to participate in or benefit from" the educational program. (Emphasis added.) The term "interfere with" is so open-ended as to include innocuous comments that are clearly protected speech, and makes the response of the hearer the critical issue, ignoring the requirement in *Davis* that the speech be "objectively offensive."

[2] This paragraph contains a footnote stating that "some conduct alleged to be harassment may implicate the First Amendment right to free speech or expression," and refers to the 2001 and 2003 documents quoted above. This is the only reference to the First Amendment in the Letter.

In addition, the statement that harassment may consist of "verbal acts and name-calling … that may be harmful or humiliating" could encompass precisely the kind of language that the Supreme Court has said is *not* harassment: "simple teasing, offhand comments, and isolated incidents (unless extremely serious)," *Clark*, 532 U.S. at 271 (citations omitted), or "mere utterance of an …epithet which engenders offensive feelings." *Meritor*, 477 U.S. at 67. Recent OCR pronouncements have adopted the same approach. See http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104_pg3.html

A settlement agreement with the University of Montana in 2013 confirms that First Amendment rights have been essentially disregarded in the effort to enforce civil rights laws. The testimony of Greg Lukianoff before this committee (http://judiciary.house.gov/index.cfm/hearings?Id=C256F82E-1F4E-4F60-B702-78A58B81E4F8&Statement_id=DCF30A73-930B-4C70-BBA7-C7C1D9BBCC83) details the defects in that agreement, which will not be repeated here. While OCR asserts that the settlement applies merely to that one situation, there is no indication that OCR has backed off its expansive definition of harassment or its aggressive approach to enforcement. Quite the opposite.[3]

Kipnis is hardly the only victim of this aggressive posture. Another recent example involves a University of Colorado professor of sociology, Patti Adler, who was charged with sexual harassment because of a classroom presentation on the subject of prostitution in a course on "Deviance in U.S. Society." http://www.dailycamera.com/cu-news/ci_24737023/cu-boulder-pulls-patti-adler-from-deviance-class The incident highlights the threat to academic freedom resulting from an overbroad definition of harassment, as revealed in a statement from the American Association of University Professors. http://www.aaup.org/file/ColoradoStatement.pdf In response to the charges and subsequent actions, Adler resigned from the university. For many years, her course on Deviance was among the most popular on campus. Future students will be deprived of the opportunity to take the course as a result. Much has been lost, little has been gained, by bringing charges that stretch the meaning of harassment and disregard the value of academic freedom.

Harvard's adoption of a similarly overbroad approach recently prompted a letter of protest from 28 law professors saying that the policy embraced "a definition of sexual harassment that goes significantly beyond Title IX and Title VII law." http://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html.

The Harvard law professors' statement reflects increasing recognition of OCR's over-reaching with regard to verbal harassment and the implications for higher education. We urge the committee to consider these and other expressions of concern from individuals and organizations who are deeply sympathetic to efforts to eradicate discrimination in education but, like NCAC, submit that it can and must be achieved without a loss of First Amendment rights or the erosion of academic freedom.

Conclusion

By threatening free speech rights, OCR's approach endangers the cause of equality as much as free speech. The civil rights movement, and every other movement to expand equality rights, has succeeded

[3] In May 2014, the Department of Education released a list of more than fifty institutions of higher education that were being investigated by OCR for possible violations of law in their handling of harassment and sexual assault charges. http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations

precisely because advocates vigorously exercised their First Amendment rights to protest, demonstrate, petition government, and speak freely, even to those to whom their message was unpopular, controversial, and often deeply offensive. To undermine that critical right is to put at risk the very equality goals the Commission and OCR seek to promote.

OCR's apparent willingness to sacrifice free speech rights in the name of equality is not only short-sighted, it is in conflict with core constitutional principles:

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and … inflict great pain…. [W]e cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course — to protect even hurtful speech on public issues to ensure that we do not stifle public debate.

Snyder v. Phelps, 582 U.S. 443, 460-61 (2011). We submit that even hateful speech can provide "teachable moments," and that students need all the instruction and guidance educational institutions can provide to deal with these most sensitive and challenging issues, which they will encounter both in and out of school.

PUBLIC COMMENT OF HENRY REICHMAN

First Vice-President and Chair, Committee on Academic Freedom and Tenure
American Association of University Professors

to the

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

in response to the June 2, 2015 Hearing on

First Amendment Protections on Public College and University Campuses

June 9, 2015

Chairman Franks, Vice-Chairman DeSantis and Members of the Subcommittee:

My name is Henry Reichman. I am Professor Emeritus of History at California State University, East Bay, located in the San Francisco Bay Area, and have taught at a variety of public colleges and universities in several states for over forty years. I write on behalf of the American Association of University Professors (AAUP), which I currently serve as First Vice-President and Chair of the Association's Committee A on Academic Freedom and Tenure.

Founded in 1915, the AAUP has for a century played a leading role in ensuring the rights of college and university faculty and has defined and defended the standards and principles of academic freedom that have helped make the American higher education system the envy of the world. In 1915, the AAUP issued its "Declaration of Principles on Academic Freedom and Academic Tenure," which first elaborated the principles of academic freedom that have subsequently been accepted by both the academic community and in important aspects the American judiciary. Our 1940 "Joint Statement of Principles on Academic Freedom and Tenure," formulated in cooperation with the Association of American Colleges (now the Association of American Colleges and Universities), along with its 1970 interpretive comments, has been endorsed by more than 240 scholarly organizations and institutions. The principles elaborated in the Joint Statement remain widely accepted throughout American higher education and continue today to provide the standard by which the academy measures academic freedom. The AAUP's principles have been adopted in whole or part by the great majority of American institutions of higher education, and may be found in hundreds of faculty handbooks, university policy manuals, and collective bargaining agreements. A copy of the Joint Statement is appended to these comments.

In 1967, the AAUP joined with the United States National Student Association (now the United States Student Association), the Association of American Colleges (now the Association of American Colleges and Universities), the National Association of Student Personnel Administrators, and the National Association of Women Deans and Counselors to formulate a "Joint Statement on Rights and Freedoms of Students." This important statement remains the best and most thorough description of students' freedom to learn and to exercise the rights of citizenship, including those rights guaranteed by the First Amendment, on and off campus. A copy of this Statement is also appended to these comments.

The 1940 Joint Statement defines academic freedom as comprising three elements: 1) "full freedom in research and in the publication of the results;" 2) freedom of classroom instructors to discuss their subject matter and define curriculum and standards without political or other extraneous constraint; and 3) the freedom of faculty to speak as citizens on matters of both public and internal college or university concern. Although these principles of academic freedom developed outside the law, beginning in the 1950s the Supreme Court began to interpret the First Amendment to include some protections for academic freedom for faculty at public institutions. In 1967, in *Keyishian v. Board of Regents*, the U.S. Supreme Court stated, "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment." In a subsequent decision, *Rust v. Sullivan,* the Court described *Keyishian* as recognizing that "the university is a traditional sphere of free expression ... fundamental to the function of society."

Hence, the state of First Amendment protections and the application of the principles of free speech and academic freedom at both public and private colleges and universities are topics of great significance to our Association. We have read with interest the testimony heard by the Subcommittee on June 2, 2015 and wish both to comment on and add to that testimony.

On the Written Testimony

The written testimony provided by Greg Lukianoff of FIRE raises a number of issues that are also of concern to the AAUP. We largely agree with Mr. Lukianoff and Professor Jamin Raskin that impermissibly restrictive speech codes, overly broad harassment policies, and "free speech zone" policies imperil free expression, especially of students.[1] With respect to speech codes, our 1994 report "On Freedom of Expression and Campus Speech Codes," raised some of the same issues that rightfully trouble Mr. Lukianoff and FIRE, arguing that

> Freedom of thought and expression is essential to any institution of higher learning. Universities and colleges exist not only to transmit knowledge. Equally, they interpret, explore, and expand that knowledge by testing the old and proposing the new. This mission guides learning outside the classroom quite as much as in class, and often inspires vigorous debate on those social, economic, and political issues that arouse the strongest passions. In the process, views will be expressed that may seem to many wrong, distasteful, or offensive. Such is the nature of freedom to sift and winnow ideas.
>
> On a campus that is free and open, no idea can be banned or forbidden. No viewpoint or message may be deemed so hateful or disturbing that it may not be expressed. . . .
>
> An institution of higher learning fails to fulfill its mission if it asserts the power to proscribe ideas—and racial or ethnic slurs, sexist epithets, or homophobic insults almost always express ideas, however repugnant. Indeed, by proscribing any ideas, a university sets an example that profoundly disserves its academic mission.
>
> Some may seek to defend a distinction between the regulation of the content of speech and the regulation of the manner (or style) of speech. We find this distinction untenable in practice because offensive style or opprobrious phrases may in fact have been chosen precisely for their expressive power.

More recently, our 2007 statement on "Freedom in the Classroom" addressed concerns over the invocation of "hostile learning environments," which "presupposes much more than blatant disrespect or harassment":

> It assumes that students have a right not to have their most cherished beliefs challenged. This assumption contradicts the central purpose of higher education, which is to challenge students to think hard about their own perspectives, whatever those might be. It is neither harassment nor discriminatory treatment of a student to hold up to close criticism an idea or viewpoint the student has posited or advanced. Ideas that are germane to a subject under discussion in a classroom cannot be censored because a student with particular religious or political beliefs might be offended. Instruction cannot proceed in the atmosphere of fear that would be produced were a teacher to become subject to administrative sanction based upon the idiosyncratic reaction of one or more students.

[1] However, we can neither endorse nor oppose any of the three pieces of draft legislation submitted to the subcommittee by Mr. Lukianoff.

Then, last summer we issued an influential statement "On Trigger Warnings," which declared:

> A current threat to academic freedom in the classroom comes from a demand that teachers provide warnings in advance if assigned material contains anything that might trigger difficult emotional responses for students. This follows from earlier calls not to offend students' sensibilities by introducing material that challenges their values and beliefs. . . . The presumption that students need to be protected rather than challenged in a classroom is at once infantilizing and anti-intellectual.

In this light, we also largely share Mr. Lukianoff's and Wendy Kaminer's concerns about overly broad harassment policies, and in particular the apparent abuse of Title IX, although we disagree strongly with Ms. Kaminer's contention that such policies and abuse derive from the actions of "the left" or "progressive" groups. The source of the problem is, we believe, significantly more complex than her testimony would acknowledge. In his testimony, Professor Raskin opined that "the overwhelming number of public universities and colleges know the difference between a serious intellectual debate and a relentless campaign of personal harassment." I certainly hope that he is correct. However, some of the examples provided by Mr. Lukianoff and Ms. Kaminer suggest that this may not always be the case. Certainly the story shared by Ms. Kaminer of Professor Laura Kipnis's experience with a Title IX investigation is a troubling tale that has attracted attention in our Association as well. In response to growing concerns about this issue among faculty members, the AAUP has recently decided that a joint subcommittee of our Committee on Academic Freedom and Tenure and our Committee on Women and the Profession will investigate the implications for academic freedom and for student and faculty free expression rights of harassment rules, including enforcement of Title IX.[2]

With respect to the academic freedom of faculty, Mr. Lukianoff's written testimony focuses on the implications for faculty free speech of the U.S. Supreme Court's 2006 decision in *Garcetti v. Ceballos*. Again, we largely share his concerns. In fact, our organization submitted an *amicus curiae* brief to the Court when it heard this case, which warned of the sorts of difficulties that have since arisen. In 2009 we released a lengthy report, "Protecting an Independent Faculty Voice: Academic Freedom after *Garcetti v. Ceballos*," which expressed alarm at a number of post-*Garcetti* decisions that would restrict the First Amendment rights of faculty at public institutions and urged colleges and universities to adopt policies to protect free expression from the potential impact of the decision. Although we are heartened by subsequent rulings in the Ninth and Fourth Circuits limiting the application of *Garcetti* in academic speech cases, we share Mr. Lukianoff's unease about the unresolved nature of the issue and continue to urge faculty to develop policy statements at the institutional level that will explicitly incorporate protections for faculty speech on institutional academic matters and governance.

I would now like to turn to three topics not addressed in the written testimony: the impact of social media on academic freedom and free expression more generally; the growing abuse of financial justifications for faculty dismissals or program eliminations in ways that may restrict academic freedom; and the dramatic increase in employment of faculty on contingent or "adjunct" appointments as a major threat to academic freedom.

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[2] An additional statement, first issued by the AAUP in 1984 and subsequently revised in 1990 and again in 2014, also of relevance here is "Sexual Harassment: Suggested Policy and Procedures for Handling Complaints."

Social Media

In September 2013, at the University of Kansas, journalism professor David Guth, responding to a shooting incident at the Washington Navy Yard, tweeted a comment about gun control that many gun advocates found offensive, even threatening. He was barraged with hate messages and death threats, and several legislators called for his dismissal. Although the university publicly reaffirmed its commitment to his freedom of speech, he was suspended to "avoid disruption." This incident prompted the Kansas Board of Regents in December 2013 to adopt new rules under which faculty members and other employees may be suspended or dismissed for "improper use of social media." The new policy defined social media as "any facility for online publication and commentary," a definition that covered but was "not limited to blogs, wikis, and social networking sites such as Facebook, LinkedIn, Twitter, Flickr, and YouTube."

This definition could arguably also include any message that appears electronically, including email messages and even online periodicals and books. The policy defined "improper use of social media" in extremely broad terms, including communications made "pursuant to . . . official duties" that are "contrary to the best interest of the university," as well as communication that "impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, impedes the performance of the speaker's official duties, interferes with the regular operation of the university, or otherwise adversely affects the university's ability to efficiently provide services."

The AAUP, the ACLU and faculty leaders in Kansas quickly condemned the new policy as "a gross violation of the fundamental principles of academic freedom." In the face of widespread criticism, the regents agreed to work with campus leaders to revise the policy, but when a faculty-administration task force recommended an entirely different approach, the idea was rejected and the policy remains largely intact.

In 2014, the AAUP published a revised and expanded version of its 2004 policy on "Academic Freedom and Electronic Communications." Our fundamental starting point when it comes to the regulation of all electronic communications by faculty is simple. As we stated initially in 2004 and have repeated frequently ever since:

> Academic freedom, free inquiry, and freedom of expression within the academic community may be limited to no greater extent in electronic format than they are in print, save for the most unusual situation where the very nature of the medium itself might warrant unusual restrictions—and even then only to the extent that such differences demand exceptions or variations. Such obvious differences between old and new media as the vastly greater speed of digital communication, and the far wider audiences that electronic messages may reach, would not, for example, warrant any relaxation of the rigorous precepts of academic freedom.

Unfortunately, this is not always the case. The events in Kansas were perhaps the most extreme example of a growing and distressing trend in our public (as well as private) colleges and universities. Increasingly, college and university administrators are treating faculty emails, Facebook posts, and Twitter messages as somehow exempt from the full protections of academic freedom and, arguably, the First Amendment. There are many other examples in states as varied as Colorado, Idaho, Illinois, and Wisconsin, among others. Sometimes administrators have couched their censorious actions under

cover of combating cyberbullying, undoubtedly a significant problem among some students but hardly one that justifies the surveillance and censorship of faculty expression.

Finances and Freedom

Even before the 2008 economic crisis, public colleges and universities were facing increasingly difficult financial conditions stemming, we would argue, from a now decades-old trend among states and our society more generally to disinvest in public higher education, placing a growing burden on students who must make ever-increasing tuition payments and often accumulate inordinate levels of debt. But in a disturbing number of cases, difficult financial straits have provided college and university administrators with specious justifications for assaulting the academic freedom of the faculty.

The AAUP has long recognized that *bona fide* "financial exigency" may justify dismissal of even tenured faculty members.[3] In 2013 the AAUP published an extensive and detailed report on "The Role of the Faculty in Conditions of Financial Exigency." The report defined financial exigency as "a severe financial crisis that fundamentally compromises the academic integrity of the institution as a whole and that cannot be alleviated by less drastic means." The report also argued that increasingly college and university administrators are making budgetary decisions that profoundly affect the curricula and the educational missions of their institutions; rarely are those decisions recognized as decisions about the curriculum, even though the elimination of entire programs of study (ostensibly for financial reasons) has obvious implications for the curricular range and the academic integrity of any university.

In a disquieting and perhaps rising number of cases, college and university administrators (and some legislators) have sought to justify faculty layoffs and program discontinuance not by claiming exigency but simply some sort of ill-defined distress -- sometimes on grounds that seem unproven if not outright bogus. To take but one example, later this week our annual meeting will decide whether to censure the administration of the University of Southern Maine, which dismissed some 60 faculty members and closed several programs with the justification that this was required by the university's financial condition. In fact, as our investigation revealed, there was no genuine financial crisis, at least not one justifying such drastic actions, nor were the faculty ever consulted about the situation. The layoffs, many suspected, were as much designed to punish or silence critics of the administration as they were to save money or reorient the mission. Whether or not this was true, there can be little doubt that colleges and universities that employ the justification of financial distress or "program prioritization" to dismiss long-time faculty members establish a chilling atmosphere for free expression among the faculty that remain.

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[3] Contrary to common misperceptions, the tenure system in colleges and universities does not guarantee lifetime employment. It does guarantee that faculty members will be judged by professional and not political or arbitrary standards by academically qualified peers. I essentially agree with Professor Raskin's statement in his testimony that "the rank and tenure process is a professional domain different from a public speech forum. Academic freedom means you cannot get bounced out of academia because your ideas are unorthodox or contrary to prevailing opinion but you can get bounced out because your research is sloppy, your data is flawed, or your ideas are illogical or unjustified by evidence." I would add, however, that such judgments must be made only by qualified academic professionals in due process procedures that provide opportunities for all sides of a controversy to be heard and considered.

Perhaps the most dramatic example of how financial conditions may negatively impact the academic freedom of faculty is currently transpiring in Wisconsin. On May 29, the Joint Finance Committee of the Wisconsin legislature approved an omnibus higher education funding bill that would, if approved by the Legislature as a whole, cut funding for the University of Wisconsin system by $250 million over two years. In addition to this draconian cut, the committee also approved provisions to remove the protections of tenure from Wisconsin law, increase the power of administrators and degrade the longstanding system of shared governance, and lastly authorize the Board of Regents to terminate faculty appointments for reasons of "program discontinuance, curtailment, modification, or redirection." This is a profound departure from current policy, which allows termination of faculty appointments only for just cause after due notice and hearing, or in the event of a fiscal emergency.

As a group of 459 award-winning research scholars at the University of Wisconsin-Madison wrote, "this provision would greatly weaken any guarantees of tenure provided by the Board of Regents. In essence, state statute would say that tenure at the University of Wisconsin does not mean what it means at every other institution: a guarantee that university administrators cannot arbitrarily dismiss faculty who have earned tenure through research, teaching, and service." Or, as a statement by PROFS, an organization of UW-Madison faculty members, put it:

> Given legal cover by the vague terms "modification" and "redirection", there could be no meaningful limit on the power of the Regents to dismiss faculty and/or to close programs or research centers that fell out of favor with administrators or political leaders.
>
> It is above all the promise of academic freedom directly afforded by tenure that provides the fertile ground for independent scholarly inquiry. That promise would be rendered hollow by the provision in the omnibus motion on faculty and staff dismissals. The "fearless sifting and winnowing" central to the Wisconsin Idea would be no more.

Contingent and Adjunct Faculty

Our country's long-term disinvestment in higher education has also created another obstacle to academic freedom and free expression at public colleges and universities. Increasingly these institutions have, rightly or wrongly, felt compelled to respond to funding cuts in part by hiring fewer tenure-track and full-time faculty and ever more adjuncts, many of them part-time. At this point we estimate that only about one-fourth of all faculty teaching in American higher education are tenured or on the tenure track, down from nearly half in 1975.[4] And about half of all faculty are hired on a part-time basis, although many of these actually work full-time, sometimes at multiple institutions. While the AAUP and other organizations have won protections for such faculty members at some institutions where collective bargaining is permitted and the faculty have organized into unions, the overwhelming majority of such faculty members enjoy no job security; they may more often than not be dismissed without cause and without explanation, even after many years of service; and they frequently have diminished access to support systems, even office space, available to those on the tenure track.[5] It is little wonder

[4] AAUP, "Trends in Instructional Staff Employment Status, 1975-2011."

[5] After public hearings in late 2013, in January 2014 the Democratic staff of the House Committee on Education and the Work Force produced a report, "The Just-in-Time Professor," which examined the working conditions of contingent faculty in higher education. The report concluded: "While the occupation of "college professor" still

then that many of these faculty members have decided that they cannot afford to exercise their rights to teach in accordance with their understanding of their disciplines, challenge students to think independently, engage in original but potentially controversial research, advocate unpopular or innovative ideas, or speak out on issues of institutional or public concern.

Throughout its 100-year history the AAUP has believed and argued that a system of tenure based on a reasonable probationary period is the strongest protection for academic freedom and that institutions whose faculty enjoy academic freedom are most likely to create an environment that supports the First Amendment rights of students. Unfortunately, the extraordinary expansion of what some have called the academic "precariat" calls this into question. I fervently hope that the abuse of adjunct and part-time faculty will be recognized not only as the terrible injustice it is, but also as a major threat to academic freedom and to educational quality. Should this trend not soon be reversed, I fear that free expression on campus will be meaningless in an environment in which teachers are perpetually fearful of retaliation and even dismissal should they ruffle the wrong feathers.

Lastly, it may be asked what might the Congress do about these problems? At this time the AAUP does not support any specific legislative remedies. We are cognizant of the country's long tradition of decentralized state and local control of public education, including higher education. But the Congress can do much by allocating federal funds to reverse the lamentable national trend to disinvest in public higher education. And the members can use their positions to help us educate the public about the important role that academic freedom and free expression have played in building the finest and most democratic system of higher education yet known and in ensuring that our campuses are havens for the robust exchange of ideas that is essential both for genuine quality education and the preservation of our democracy.

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retains a reputation as a middle -class job, the reality is that a growing number of people working in this profession fill positions not intended to provide the stability, pay, or benefits necessary for a family's long-term economic security. Whether some adjunct professors piece together a living from their teaching job or only use it to supplement a more stable primary career elsewhere, many contingent faculty might be best classified as working poor. . . . While these individuals worry about their own futures and how to provide for their families, they are equally distressed by what they believe is a shortchanging of students who pay ever-increasing tuitions to attend their courses. The link between student outcomes and contingent faculty working conditions—not just the adjuncts' schedules and compensation but the respect and professional support they receive from their schools—deserves serious scrutiny from the Committee and other policymakers around the country, as well as from institutions of higher education themselves." The AAUP has issued numerous reports and policy statements on contingent and adjunct appointments.

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APPENDIX 1

1940 Statement of Principles on Academic Freedom and Tenure

In 1915 the Committee on Academic Freedom and Academic Tenure of the American Association of University Professors formulated a statement of principles on academic freedom and academic tenure known as the 1915 Declaration of Principles, which was officially endorsed by the Association at its Second Annual Meeting held in Washington, D.C., December 31, 1915, and January 1, 1916.

In 1925 the American Council on Education called a conference of representatives of a number of its constituent members, among them the American Association of University Professors, for the purpose of formulating a shorter statement of principles on academic freedom and tenure. The statement formulated at this conference, known as the 1925 Conference Statement on Academic Freedom and Tenure, was endorsed by the Association of American Colleges (now the Association of American Colleges and Universities) in 1925 and by the American Association of University Professors in 1926.

In 1940, following a series of joint conferences begun in 1934, representatives of the American Association of University Professors and of the Association of American Colleges (now the Association of American Colleges and Universities) agreed upon a restatement of principles set forth in the 1925 Conference Statement on Academic Freedom and Tenure. This restatement is known to the profession as the 1940 Statement of Principles on Academic Freedom and Tenure.

Following extensive discussions on the 1940 Statement of Principles on Academic Freedom and Tenure with leading educational associations and with individual faculty members and administrators, a joint committee of the AAUP and the Association of American Colleges met during 1969 to reevaluate this key policy statement. On the basis of the comments received, and the discussions that ensued, the joint committee felt the preferable approach was to formulate interpretations of the 1940 Statement from the experience gained in implementing and applying it for over thirty years and of adapting it to current needs.

The committee submitted to the two associations for their consideration Interpretive Comments that are included below as footnotes to the 1940 Statement.[1] These interpretations were adopted by the Council of the American Association of University Professors in April 1970 and endorsed by the Fifty- Sixth Annual Meeting as Association Policy.

The purpose of this statement is to promote public understanding and support of academic freedom and tenure and agreement upon procedures to ensure them in colleges and universities. Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole.[2] The common good depends upon the free search for truth and its free exposition.

Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning. It carries with it duties correlative with rights.[3]

Tenure is a means to certain ends; specifically: (1) freedom of teaching and research and of extramural activities, and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.

Academic Freedom

1. Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.
2. Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject.[4] Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.[5]
3. College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.[6]

Academic Tenure

After the expiration of a probationary period, teachers or investigators should have permanent or continuous tenure, and their service should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies.

In the interpretation of this principle it is understood that the following represents acceptable academic practice:

1. The precise terms and conditions of every appointment should be stated in writing and be in the possession of both institution and teacher before the appointment is consummated.
2. Beginning with appointment to the rank of full-time instructor or a higher rank,[7] the probationary period should not exceed seven years, including within this period full-time service in all institutions of higher education; but subject to the proviso that when, after a term of probationary service of more than three years in one or more institutions, a teacher is called to another institution, it may be agreed in writing that the new appointment is for a probationary period of not more than four years, even though thereby the person's total probationary period in the academic profession is extended beyond the normal maximum of seven years.[8] Notice should be given at least one year prior to the expiration of the probationary period if the teacher is not to be continued in service after the expiration of that period.[9]
3. During the probationary period a teacher should have the academic freedom that all other members of the faculty have.[10]
4. Termination for cause of a continuous appointment, or the dismissal for cause of a teacher previous to the expiration of a term appointment, should, if possible, be considered by both a faculty committee and the governing board of the institution. In all cases where the facts are in dispute, the accused

teacher should be informed before the hearing in writing of the charges and should have the opportunity to be heard in his or her own defense by all bodies that pass judgment upon the case. The teacher should be permitted to be accompanied by an advisor of his or her own choosing who may act as counsel. There should be a full stenographic record of the hearing available to the parties concerned. In the hearing of charges of incompetence the testimony should include that of teachers and other scholars, either from the teacher's own or from other institutions. Teachers on continuous appointment who are dismissed for reasons not involving moral turpitude should receive their salaries for at least a year from the date of notification of dismissal whether or not they are continued in their duties at the institution.[11]

5. Termination of a continuous appointment because of financial exigency should be demonstrably bona fide.

Endorsers

The 1940 Statement of Principles has been endorsed by more than 240 scholarly and education groups.

Endnotes:

1. The Introduction to the Interpretive Comments notes: In the thirty years since their promulgation, the principles of the 1940 "Statement of Principles on Academic Freedom and Tenure" have undergone a substantial amount of refinement. This has evolved through a variety of processes, including customary acceptance, understandings mutually arrived at between institutions and professors or their representatives, investigations and reports by the American Association of University Professors, and formulations of statements by that association either alone or in conjunction with the Association of American Colleges. These comments represent the attempt of the two associations, as the original sponsors of the 1940 "Statement," to formulate the most important of these refinements. Their incorporation here as Interpretive Comments is based upon the premise that the 1940 "Statement" is not a static code but a fundamental document designed to set a framework of norms to guide adaptations to changing times and circumstances.

Also, there have been relevant developments in the law itself reflecting a growing insistence by the courts on due process within the academic community which parallels the essential concepts of the 1940 "Statement"; particularly relevant is the identification by the Supreme Court of academic freedom as a right protected by the First Amendment. As the Supreme Court said in *Keyishian v. Board of Regents*, 385 US 589 (1967), "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."

2. The word "teacher" as used in this document is understood to include the investigator who is attached to an academic institution without teaching duties.

3. First 1970 comment: The Association of American Colleges and the American Association of University Professors have long recognized that membership in the academic profession carries with it special responsibilities. Both associations either separately or jointly have consistently affirmed these responsibilities in major policy statements, providing guidance to professors in their utterances as citizens, in the exercise of their responsibilities to the institution and to students, and in their conduct when resigning from their institution or when undertaking government-sponsored research. Of particular relevance is the "Statement on Professional Ethics" adopted in 1966 as Association policy

(AAUP, *Policy Documents and Reports*, 11th ed. [Baltimore: Johns Hopkins University Press, 2015], 145–46).

4. Second 1970 comment: The intent of this statement is not to discourage what is "controversial." Controversy is at the heart of the free academic inquiry which the entire statement is designed to foster. The passage serves to underscore the need for teachers to avoid persistently intruding material which has no relation to their subject. Back to text.

5. Third 1970 comment: Most church-related institutions no longer need or desire the departure from the principle of academic freedom implied in the 1940 "Statement," and we do not now endorse such a departure.

6. Fourth 1970 comment: This paragraph is the subject of an interpretation adopted by the sponsors of the 1940 "Statement" immediately following its endorsement:

If the administration of a college or university feels that a teacher has not observed the admonitions of paragraph 3 of the section on Academic Freedom and believes that the extramural utterances of the teacher have been such as to raise grave doubts concerning the teacher's fitness for his or her position, it may proceed to file charges under paragraph 4 of the section on Academic Tenure. In pressing such charges, the administration should remember that teachers are citizens and should be accorded the freedom of citizens. In such cases the administration must assume full responsibility, and the American Association of University Professors and the Association of American Colleges are free to make an investigation.

Paragraph 3 of the section on Academic Freedom in the 1940 "Statement" should also be interpreted in keeping with the 1964 "Committee A Statement on Extramural Utterances," *Policy Documents and Reports*, 31, which states inter alia: "The controlling principle is that a faculty member's expression of opinion as a citizen cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member's unfitness for his or her position. Extramural utterances rarely bear upon the faculty member's fitness for the position. Moreover, a final decision should take into account the faculty member's entire record as a teacher and scholar."

Paragraph 5 of the "Statement on Professional Ethics," *Policy Documents and Reports*, 146, also addresses the nature of the "special obligations" of the teacher:

As members of their community, professors have the rights and obligations of other citizens. Professors mea sure the urgency of these obligations in the light of their responsibilities to their subject, to their students, to their profession, and to their institution. When they speak or act as private persons, they avoid creating the impression of speaking or acting for their college or university. As citizens engaged in a profession that depends upon freedom for its health and integrity, professors have a particular obligation to promote conditions of free inquiry and to further public understanding of academic freedom.

Both the protection of academic freedom and the requirements of academic responsibility apply not only to the full-time probationary and the tenured teacher, but also to all others, such as part- time faculty and teaching assistants, who exercise teaching responsibilities.

7. Fifth 1970 comment: The concept of "rank of full-time instructor or a higher rank" is intended to include any person who teaches a full- time load regardless of the teacher's specific title. [For a discussion of this question, see the "Report of the Special Committee on Academic Personnel Ineligible for Tenure," *AAUP Bulletin* 52 (September 1966): 280– 82.]

8. Sixth 1970 comment: In calling for an agreement "in writing" on the amount of credit given for a faculty member's prior service at other institutions, the "Statement" furthers the general policy of full understanding by the professor of the terms and conditions of the appointment. It does not necessarily follow that a professor's tenure rights have been violated because of the absence of a written agreement on this matter. Nonetheless, especially because of the variation in permissible institutional practices, a written understanding concerning these matters at the time of appointment is particularly appropriate and advantageous to both the individual and the institution. [For a more detailed statement on this question, see "On Crediting Prior Service Elsewhere as Part of the Probationary Period," *Policy Documents and Reports*, 167– 68.]

9. Seventh 1970 comment: The effect of this subparagraph is that a decision on tenure, favorable or unfavorable, must be made at least twelve months prior to the completion of the probationary period. If the decision is negative, the appointment for the following year becomes a terminal one. If the decision is affirmative, the provisions in the 1940 "Statement" with respect to the termination of service of teachers or investigators after the expiration of a probationary period should apply from the date when the favorable decision is made.

The general principle of notice contained in this paragraph is developed with greater specificity in the "Standards for Notice of Nonreappointment," endorsed by the Fiftieth Annual Meeting of the American Association of University Professors (1964) (*Policy Documents and Reports*, 99). These standards are:

Notice of nonreappointment, or of intention not to recommend reappointment to the governing board, should be given in writing in accordance with the following standards:

1. Not later than March 1 of the first academic year of service, if the appointment expires at the end of that year; or, if a one-year appointment terminates during an academic year, at least three months in advance of its termination.

2. Not later than December 15 of the second academic year of service, if the appointment expires at the end of that year; or, if an initial two-year appointment terminates during an academic year, at least six months in advance of its termination.

3. At least twelve months before the expiration of an appointment after two or more years in the institution.

Other obligations, both of institutions and of individuals, are described in the "Statement on Recruitment and Resignation of Faculty Members," *Policy Documents and Reports*, 153– 54, as endorsed by the Association of American Colleges and the American Association of University Professors in 1961.

10. Eighth 1970 comment: The freedom of probationary teachers is enhanced by the establishment of a regular procedure for the periodic evaluation and assessment of the teacher's academic performance during probationary status. Provision should be made for regularized procedures for the consideration of complaints by probationary teachers that their academic freedom has been violated. One suggested procedure to serve these purposes is contained in the "Recommended Institutional Regulations on Academic Freedom and Tenure," *Policy Documents and Reports*, 79– 90, prepared by the American Association of University Professors.

11. Ninth 1970 comment: A further specification of the academic due process to which the teacher is entitled under this paragraph is contained in the "Statement on Procedural Standards in Faculty Dismissal Proceedings," *Policy Documents and Reports*, 91– 93, jointly approved by the American Association of University Professors and the Association of American Colleges in 1958. This interpretive document deals with the issue of suspension, about which the 1940 "Statement" is silent.

The “Statement on Procedural Standards in Faculty Dismissal Proceedings” provides: “Suspension of the faculty member during the proceedings is justified only if immediate harm to the faculty member or others is threatened by the faculty member’s continuance. Unless legal considerations forbid, any such suspension should be with pay.” A suspension which is not followed by either reinstatement or the opportunity for a hearing is in effect a summary dismissal in violation of academic due process.

The concept of “moral turpitude” identifies the exceptional case in which the professor may be denied a year’s teaching or pay in whole or in part. The statement applies to that kind of behavior which goes beyond simply warranting discharge and is so utterly blameworthy as to make it inappropriate to require the offering of a year’s teaching or pay. The standard is not that the moral sensibilities of persons in the particular community have been affronted. The standard is behavior that would evoke condemnation by the academic community generally

APPENDIX 2

Joint Statement on the Rights and Freedoms of Students

In June 1967, a committee composed of representatives from the American Association of University Professors, the United States National Student Association (now the United States Student Association), the Association of American Colleges (now the Association of American Colleges and Universities), the National Association of Student Personnel Administrators, and the National Association of Women Deans and Counselors formulated the joint statement. The document was endorsed by each of its five national sponsors, as well as by a number of other professional bodies. The governing bodies of the Association of American Colleges and the American Association of University Professors acted in January and April 1990, respectively, to remove gender-specific references from the original text; references were updated in 2006.

In September 1990, September 1991, and November 1992, an inter-association task force met to study, interpret, update, and affirm (or reaffirm) the Joint Statement. Members of the task force agreed that the document had stood the test of time quite well and continued to provide an excellent set of principles for institutions of higher education. The task force developed a set of interpretive endnotes to incorporate changes in law and higher education which had occurred since 1967. A list of associations endorsing the annotations appears as an appendix.

Preamble

Academic institutions exist for the transmission of knowledge, the pursuit of truth, the development of students, and the general well-being of society. Free inquiry and free expression are indispensable to the attainment of these goals. As members of the academic community, students should be encouraged to develop the capacity for critical judgment and to engage in a sustained and independent search for truth. Institutional procedures for achieving these purposes may vary from campus to campus, but the minimal standards of academic freedom of students outlined below are essential to any community of scholars.

Freedom to teach and freedom to learn are inseparable facets of academic freedom. The freedom to learn depends upon appropriate opportunities and conditions in the classroom, on the campus, and in the larger community.[1] Students should exercise their freedom with responsibility.

The responsibility to secure and to respect general conditions conducive to the freedom to learn is shared by all members of the academic community. Each college and university has a duty to develop policies and procedures that provide and safeguard this freedom. Such policies and procedures should be developed at each institution within the framework of general standards and with the broadest possible participation of the members of the academic community. The purpose of this statement is to enumerate the essential provisions for students' freedom to learn.

Freedom of Access to Higher Education

The admissions policies of each college and university are a matter of institutional choice, provided that each college and university makes clear the characteristics and expectations of students that it considers relevant to success in the institution's program.[2] While church-related institutions may give admission preference to students of their own persuasion, such a preference should be clearly and publicly stated. Under no circumstances should a student be barred from admission to a particular institution on the basis of race.[3] Thus, within the limits of its facilities, each college and university should be open to all students who are qualified according to its admissions standards. The facilities and services of a college or university should be open to all of its enrolled students, and institutions should use their influence to secure equal access for all students to public facilities in the local community.

In the Classroom

The professor in the classroom and in conference should encourage free discussion, inquiry, and expression. Student performance should be evaluated solely on an academic basis, not on opinions or conduct in matters unrelated to academic standards.

1. Protection of Freedom of Expression

Students should be free to take reasoned exception to the data or views offered in any course of study and to reserve judgment about matters of opinion, but they are responsible for learning the content of any course of study for which they are enrolled.

2. Protection against Improper Academic Evaluation

Students should have protection through orderly procedures against prejudiced or capricious academic evaluation. 4 At the same time, they are responsible for maintaining standards of academic performance established for each course in which they are enrolled.

3. Protection against Improper Disclosure

Information about student views, beliefs, and political associations that professors acquire in the course of their work as instructors, advisers, and counselors should be considered confidential. Protection against improper disclosure is a serious professional obligation. Judgments of ability and character may be provided under appropriate circumstances, normally with the knowledge and consent of the student.

Student Records

Institutions should have carefully considered policy as to the information that should be part of a student's permanent educational record and as to the conditions of its disclosure. To minimize the risk of improper disclosure, academic and disciplinary records should be separate, and the conditions of access to each should be set forth in an explicit policy statement. Transcripts of academic records should contain only information about academic status. Information from disciplinary or counseling files should not be available to unauthorized persons on campus, or to any person off campus without the express consent of the student involved, except under legal compulsion or in cases where the safety of persons or property is involved. No records should be kept that reflect the political activities or beliefs of

students. Provision should also be made for periodic routine destruction of non-current disciplinary records. Administrative staff and faculty members should respect confidential information about students which they acquire in the course of their work.[5]

Student Affairs

In student affairs, certain standards must be maintained if the freedom of students is to be preserved.[6]

1. Freedom of Association

Students bring to the campus a variety of interests previously acquired and develop many new interests as members of the academic community. They should be free to organize and join associations to promote their common interests.

a. The membership, policies, and actions of a student organization usually will be determined by vote of only those persons who hold bona fide membership in the college or university community.

b. Affiliation with an extramural organization should not of itself disqualify a student organization from institutional recognition.[7]

c. If campus advisers are required, each organization should be free to choose its own adviser, and institutional recognition should not be withheld or withdrawn solely because of the inability of a student organization to secure an adviser. Campus advisers may advise organizations in the exercise of responsibility, but they should not have the authority to control the policy of such organizations.

d. Student organizations may be required to submit a statement of purpose, criteria for membership, rules of procedure, and a current list of officers. They should not be required to submit a membership list as a condition of institutional recognition.

e. Campus organizations, including those affiliated with an extramural organization, should be open to all students without respect to race, creed, or national origin, except for religious qualifications which may be required by organizations whose aims are primarily sectarian.[8]

2. Freedom of Inquiry and Expression

a. Students and student organizations should be free to examine and discuss all questions of interest to them and to express opinions publicly and privately. They should always be free to support causes by orderly means that do not disrupt the regular and essential operations of the institution. At the same time, it should be made clear to the academic and larger community that in their public expressions or demonstrations students or student organizations speak only for themselves.

b. Students should be allowed to invite and to hear any person of their own choosing. Those routine procedures required by an institution before a guest speaker is invited to appear on campus should be designed only to ensure that there is orderly scheduling of facilities and adequate preparation for the event, and that the occasion is conducted in a manner appropriate to an academic community. The institutional control of campus facilities should not be used as a device of censorship. It should be made

clear to the academic and larger community that sponsorship of guest speakers does not necessarily imply approval or endorsement of the views expressed, either by the sponsoring group or by the institution.[9]

3. Student Participation in Institutional Government

As constituents of the academic community, students should be free, individually and collectively, to express their views on issues of institutional policy and on matters of general interest to the student body. The student body should have clearly defined means to participate in the formulation and application of institutional policy affecting academic and student affairs. 10 The role of student government and both its general and specific responsibilities should be made explicit, and the actions of student government within the areas of its jurisdiction should be reviewed only through orderly and prescribed procedures.

4. Student Publications

Student publications and the student press are valuable aids in establishing and maintaining an atmosphere of free and responsible discussion and of intellectual exploration on the campus. They are a means of bringing student concerns to the attention of the faculty and the institutional authorities and of formulating student opinion on various issues on the campus and in the world at large.

Whenever possible the student newspaper should be an independent corporation financially and legally separate from the college or university. Where financial and legal autonomy is not possible, the institution, as the publisher of student publications, may have to bear the legal responsibility for the contents of the publications. In the delegation of editorial responsibility to students, the institution must provide sufficient editorial freedom and financial autonomy for the student publications to maintain their integrity of purpose as vehicles for free inquiry and free expression in an academic community.

Institutional authorities, in consultation with students and faculty, have a responsibility to provide written clarification of the role of the student publications, the standards to be used in their evaluation, and the limitations on external control of their operation. At the same time, the editorial freedom of student editors and managers entails corollary responsibilities to be governed by the canons of responsible journalism, such as the avoidance of libel, indecency, undocumented allegations, attacks on personal integrity, and the techniques of harassment and innuendo. As safeguards for the editorial freedom of student publications the following provisions are necessary:

a. The student press should be free of censorship and advance approval of copy, and its editors and managers should be free to develop their own editorial policies and news coverage.

b. Editors and managers of student publications should be protected from arbitrary suspension and removal because of student, faculty, administration, or public disapproval of editorial policy or content. Only for proper and stated causes should editors and managers be subject to removal and then only by orderly and prescribed procedures. The agency responsible for the appointment of editors and managers should be the agency responsible for their removal.

c. All institutionally published and financed student publications should explicitly state on the editorial page that the opinions there expressed are not necessarily those of the college, university, or student body.

Off-Campus Freedom of Students

1. Exercise of Rights of Citizenship

College and university students are both citizens and members of the academic community. As citizens, students should enjoy the same freedom of speech, peaceful assembly, and right of petition that other citizens enjoy and, as members of the academic community, they are subject to the obligations that accrue to them by virtue of this membership. Faculty members and administration officials should ensure that institutional powers are not employed to inhibit such intellectual and personal development of students as is often promoted by their exercise of the rights of citizenship both on and off campus.

2. Institutional Authority and Civil Penalties

Activities of students may upon occasion result in violation of law. In such cases, institutional officials should be prepared to apprise students of sources of legal counsel and may offer other assistance. Students who violate the law may incur penalties prescribed by civil authorities, but institutional authority should never be used merely to duplicate the function of general laws. Only where the institution's interests as an academic community are distinct and clearly involved should the special authority of the institution be asserted. Students who incidentally violate institutional regulations in the course of their off-campus activity, such as those relating to class attendance, should be subject to no greater penalty than would normally be imposed. Institutional action should be independent of community pressure.

Procedural Standards in Disciplinary Proceedings

In developing responsible student conduct, disciplinary proceedings play a role substantially secondary to example, counseling, guidance, and admonition.[11] At the same time, educational institutions have a duty and the corollary disciplinary powers to protect their educational purpose through the setting of standards of scholarship and conduct for the students who attend them and through the regulation of the use of institutional facilities. In the exceptional circumstances when the preferred means fail to resolve problems of student conduct, proper procedural safeguards should be observed to protect the student from the unfair imposition of serious penalties.

The administration of discipline should guarantee procedural fairness to an accused student.[12] Practices in disciplinary cases may vary in formality with the gravity of the offense and the sanctions that may be applied. They should also take into account the presence or absence of an honor code, and the degree to which the institutional officials have direct acquaintance with student life in general and with the involved student and the circumstances of the case in particular. The jurisdictions of faculty or student judicial bodies, the disciplinary responsibilities of institutional officials, and the regular disciplinary

procedures, including the student's right to appeal a decision, should be clearly formulated and communicated in advance.[13] Minor penalties may be assessed informally under prescribed procedures.

In all situations, procedural fair play requires that a student charged with misconduct be informed of the nature of the charges and be given a fair opportunity to refute them, that the institution not be arbitrary in its actions, and that there be provision for appeal of a decision. The following are recommended as proper safeguards in such proceedings when there are no honor codes offering comparable guarantees.

1. Standards of Conduct Expected of Students

The institution has an obligation to clarify those standards that it considers essential to its educational mission and its community life. These general behavioral expectations and the resultant specific regulations should represent a reasonable regulation of student conduct, but students should be as free as possible from imposed limitations that have no direct relevance to their education. Offenses should be as clearly defined as possible and interpreted in a manner consistent with the aforementioned principles of relevancy and reasonableness.[14] Disciplinary proceedings should be instituted only for violations of standards of conduct formulated with significant student participation and published in advance through such means as a student handbook or a generally available body of institutional regulations.

2. Investigation of Student Conduct

a. Except under extreme emergency circumstances, premises occupied by students and the personal possessions of students should not be searched unless appropriate authorization has been obtained. For premises such as residence halls controlled by the institution, an appropriate and responsible authority should be designated to whom application should be made before a search is conducted. The application should specify the reasons for the search and the objects or information sought. The student should be present, if possible, during the search. For premises not controlled by the institution, the ordinary requirements for lawful search should be followed.

b. Students detected or arrested in the course of serious violations of institutional regulations, or infractions of ordinary law, should be informed of their rights.[15] No form of harassment should be used by institutional representatives to coerce admissions of guilt or disclosure of information about conduct of other suspected persons.

3. Status of Student Pending

Final Action Pending action on the charges, the status of a student should not be altered, or the student's right to be present on the campus and to attend classes suspended, except for reasons relating to the student's physical or emotional safety and well-being, or for reasons relating to the safety and well-being of other students, faculty, or institutional property.

4. Hearing Committee Procedures

When the misconduct may result in serious penalties, and if a penalized student questions the fairness of disciplinary action, that student should be granted, on request, the privilege of a hearing before a regularly constituted hearing committee. The following suggested hearing committee procedures satisfy the requirements of procedural due process in situations requiring a high degree of formality.

a. The hearing committee should include faculty members or students, or, if regularly included or requested by the accused, both faculty and student members. No member of the hearing committee who is otherwise interested in the particular case should sit in judgment during the proceeding.

b. The student should be informed, in writing, of the reasons for the proposed disciplinary action with sufficient particularity, and in sufficient time, to ensure opportunity to prepare for the hearing.[16]

c. The student appearing before the hearing committee should have the right to be assisted in his or her defense by an adviser of the student's choice.

d. The burden of proof should rest upon the officials bringing the charge.

e. The student should be given an opportunity to testify, to present evidence and witnesses, and to hear and question adverse witnesses. In no case should the committee consider statements against the student unless he or she has been advised of their content and of the names of those who made them and has been given an opportunity to rebut unfavorable inferences that might otherwise be drawn.

f. All matters upon which the decision may be based must be introduced into evidence at the proceeding before the hearing committee. The decision should be based solely upon such matters. Improperly acquired evidence should not be admitted.

g. In the absence of a transcript, there should be both a digest and a verbatim record, such as a tape recording, of the hearing.

h. The decision of the hearing committee should be final, subject only to the student's right of appeal to the president or ultimately to the governing board of the institution.[17]

Appendix

The following associations endorsed the interpretive notes below:

American Association of Community Colleges
American Association of University Administrators
American Association of University Professors
American College Personnel Association
Association for Student Judicial Affairs
National Association for Women in Education
National Association of Student Personnel Administrators
National Orientation Directors Association
Southern Association for College Student Affairs
United States Student Association

Notes

1. In order to protect the freedom of students to learn, as well as enhance their participation in the life of the academic community, students should be free from exploitation or harassment.

2. In order to enable them to make appropriate choices and participate effectively in an institution's programs, students have the right to be informed about the institution, its policies, practices, and characteristics. Institutions preparing such information should take into account applicable federal and state laws.

3. The reference to race must not be taken to limit the nondiscrimination obligations of institutions. In all aspects of education, students have a right to be free from discrimination on the basis of individual attributes not demonstrably related to academic success in the institution's programs, including, but not limited to, race, color, gender, age, disability, national origin, and sexual orientation. Under *Grutter* v. *Bollinger*, 539 US 306, 330 (2003), "student body diversity"— including racial diversity—" is a compelling state interest that can justify the use of race in university admissions." This means that, when colleges and universities determine that achieving diversity within the student body is relevant to their academic mission, their admissions offices may take an applicant's race into account as one factor among many in making an admission decision.

4. The student grievance procedures typically used in these matters are not appropriate for addressing charges of academic dishonesty or other disciplinary matters arising in the classroom. In these instances, students should be afforded the safeguards of orderly procedures consistent with those set forth in "Procedural Standards in Disciplinary Proceedings." (In 1997, the AAUP's Committee A on Academic Freedom and Tenure approved a statement on "The Assignment of Course Grades and Student Appeals," AAUP, *Policy Documents and Reports*, 11th ed. [Baltimore: Johns Hopkins University Press, 2015], 29– 30.)

5. The Family Educational Rights and Privacy Act (FERPA) provides for the protection of student records. Consistent with FERPA, institutions should have a statement of policy on the content of a student's educational record, as well as the conditions for its disclosure. Institutions should also have policies and security practices to control access to student records that may be available or transmitted electronically.

6. As in the case of classroom matters, students shall have protection through orderly procedures to ensure this freedom.

7. "Institutional recognition" should be understood to refer to any formal relationship between the student organization and the institution.

8. The obligation of institutions with respect to nondiscrimination, with the exception noted above for religious qualifications, should be understood in accordance with the expanded statement on nondiscrimination in note 3. Exceptions may also be based on gender as authorized by law.

9. The events referred to in this section should be understood to include the full range of student-sponsored activities, such as films, exhibitions, and performances.

10. “Academic and student affairs” should be interpreted broadly to include all administrative and policy matters pertinent to students’ educational experiences.

11. The student conduct that may be subject to the disciplinary proceedings described in this section should be understood to include alleged violations of standards of student academic integrity.

12. In addition, student organizations, as well as individual students, may be subject to institutional disciplinary sanctions, and in those circumstances, student organizations should also be guaranteed procedural fairness.

13. Like other practices in disciplinary cases, the formality of any appellate procedures should be commensurate with the gravity of the offense and the sanctions that may be imposed.

14. The institution should state as specifically as possible the sanctions that may be imposed through disciplinary proceedings.

15. This provision is intended to protect students’ rights under both institutional codes and applicable law. Where institutional regulations are violated, students should be informed of their rights under campus disciplinary procedures. Where arrests are made for infractions of the law, students must be informed of their rights by arresting authorities.

16. The student should also be informed of the specific sanctions that may be imposed through the disciplinary proceeding.

17. As a matter of responsible practice, the decision of the hearing committee, as well as grounds and procedures for appeal, should be communicated to the student in writing within a reasonable period of time.

June 10, 2015

The Honorable Trent Franks, Chair
Subcommittee on the Constitution and Civil Justice,
The Judiciary Committee of the
United States House of Representatives
2141 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Franks,

My name is Cinnamon McCellen. I was the student president of the ReJOYce in Jesus Campus Fellowship ("RJCF") at California State University Northridge ("CSUN") from 2013-15. RJCF has been a recognized student group at CSUN for over 40 years and always required that its leaders believe in Jesus Christ as their Lord and Savior. In January 2015, we were told that RJCF would "no longer be recognized given failure to submit an organizational constitution that is in compliance with nondiscrimination and open membership requirements as outlined in California State University Executive Order 1068." As students of faith, we feel our constitutional rights are being violated and we are no longer welcome at CSU.

As a group whose membership draws many students from the African American community, RJCF understands the critical importance of nondiscrimination policies and discrimination is not something we take lightly. We have painfully come to learn that nondiscrimination policies can be misused, as CSU is doing by recently reinterpreting and misinterpreting its nondiscrimination policy to exclude religious student organizations from campus for being religious.

RJCF meets weekly for Bible study, prayer, and mutual encouragement. We help one another, pray for one another, and encourage one another. Many RJCF members are away from home for the first time. RJCF's meetings provide a spiritual home during the challenging adjustment to college life. Because Christian views are not always welcome in the classroom or dormitories, it is refreshing to have a place where we can be open about our faith and learn what the Bible says about specific problems we face or contrary views we hear from professors and other students.

On February 20, 2013, we received an email stating that RJCF's ability to remain a recognized student organization was in jeopardy as a result of Executive Order 1068. Many other religious groups at CSU received similar notices. In the summer of 2013, the religious groups petitioned the new chancellor for a moratorium on implementation of Executive Order 1068. We were grateful when the CSU chancellor announced a one-year moratorium for the 2013-14 academic year. The fact that the moratorium was sought by, and applied solely to, religious student groups showed that Executive Order 1068 really affected only the religious groups that could not in good conscience renounce their religious requirements for leadership. As a result of the moratorium, RJCF remained a recognized student group at CSUN for the 2013-2014 academic year.

Despite RJCF's and other religious groups' requests that the moratorium be extended, CSU refused to extend it for the 2014-15 academic year. After making all the changes that we could in good conscience make, RJCF submitted its constitution and the required recognition forms with a statement that it signed the forms based on RJCF's belief that it is not religious discrimination for a religious group to have religious leadership requirements, as it has had for the 41 years that it has been a recognized student organization at CSU, and as it will continue to have.

On January 22, 2015, I received a letter from the CSUN administration stating that RJCF "will no longer be recognized." RJCF could not pay the weekly rental fee of $200 that CSU said we would have to pay to keep meeting in the room that we had held our weekly meetings in for free. We reluctantly moved our meetings off-campus.

Because we are no longer a recognized student group, we've lost numerous benefits. The most damaging consequences of CSU's discrimination are the inability to meet on campus, to advertise on campus and to participate in student organizational fairs. These are critical avenues for student groups to be accessible to new students and continue to grow and serve the campus community. Student groups that can't grow eventually can't function as members graduate.

Leaders are the life and future of any organization. Ask any corporation looking for a new CEO. To suggest that this is not the case seems extremely ignorant at best. How can someone lead you effectively in something which they do not believe? Just as it is understood that a fraternity by nature would be led by a male person and a sorority by a female person because of the nature and purpose of the organization, it should also be understood that a religious organization would best be led by a person of that religion. We are not asking a math club to require their leaders to be religious. The nature and purpose of our organization is religious and our leaders must be able to demonstrate and promote our beliefs in order to be effective. To call this discrimination is ridiculous.

We feel that CSU is engaging in religious discrimination by excluding religious student groups from campus solely because they exercise their basic religious liberty to choose their leaders according to their religious beliefs. But we see additional discrimination in the fact that CSU continues to allow fraternities and sororities to choose their leaders and members on the basis of sex, even though Executive Order 1068 prohibits sex discrimination. We deeply appreciate anything that you can do to restore our constitutional freedoms on CSU's campuses.

Sincerely,

Cinnamon McCellen

Cinnamon McCellen

The Honorable Trent Franks, Chair
Subcommittee on the Constitution and Civil Justice,
The Judiciary Committee of the
United States House of Representatives
2141 Rayburn House Office Building
Washington, D.C. 20515

June 9, 2015

Dear Chairman Franks,

Thank you for the opportunity to submit my story for the record.

I am the student president of a Christian student group at a California public university. This year, for the first time in almost 40 years, our student group was kicked off campus by the university's administrators, all because of our religious identity. So instead of enjoying my senior year as the president of a long-standing service-oriented group, I was forced to spend dozens of hours trying to get us treated fairly again. I have attached a letter that provides a detailed description of the situation.

Unfortunately, the school continues to discriminate against us. That continued discrimination makes the opportunity you are providing all the more important to us: it helps ensure we won't be forgotten.

Thank you very much,

Bianca Travis
Chi Alpha
California State University-Stanislaus

Zollie **Smith**
Executive Director
U.S. Missions

E. Scott **Martin**
National Director
Chi Alpha

Curtis **Cole**
Administrative Director

Nathan **Cole**
Communications Director

Harvey **Herman**
Program Development Director

Bob **Marks**
Missionary Personnel Director

Crystal **Martin**
XA Internationals Director

February 6, 2015

President Joseph F. Sheley
California State University, Stanislaus
One University Circle
Turlock, CA 95382

Dear President Sheley,

I am writing to inform you about a serious problem and ask for your assistance in solving it. As you may know, the Chi Alpha student chapter at CSU Stanislaus—which has been a part of the student body for almost 40 years—has been kicked off campus for expressing its sincere religious beliefs. As the National Director of Chi Alpha, an international Christian student ministry organization, the exclusion of our chapter at CSU Stanislaus represents a significant problem. Below, I set out the background of Chi Alpha and the dispute, why I think the University's actions raise a number of legal issues, and how we can move forward together.

Background on Chi Alpha. Chi Alpha Campus Ministries is the college outreach ministry of the General Council of the Assemblies of God. Based in Springfield, Missouri, Chi Alpha has more than 300 student groups on campuses in the U.S. and around the world. The Assemblies of God is a Christian denomination that traces its roots back to 1906 Los Angeles and the sermons of William J. Seymour, an African-American minister who was one of the founders of the Pentecostal movement. The denomination has grown to become one of the most robust, diverse religious communities in the world, with much of its growth in the U.S. driven by young people and immigrants, and most of its growth internationally in the Global South. Forty percent of U.S. members of the Assemblies of God are already from minority groups, and we expect to reach majority-minority status in about five years.

The Chi Alpha CSU Stanislaus chapter already reflects this remarkable diversity: the chapter is led by an African-American woman, Bianca Travis, and the majority of our 45-plus Stanislaus members are African-American or Latino. This diversity is no accident—it's one of Chi Alpha's Core Values. That's because we believe a diverse community reflects the love of Jesus for *everyone* on campus. And the key to our unity in diversity—what draws our different Chi Alpha communities together—is a deep, authentic love for Jesus and a desire to show His love to fellow students. That is, what makes each student chapter not just overlook, but rejoice in, our differences is our *shared faith*.

Chi Alpha has been a chartered student organization at the University for almost 40 years. Our members meet together weekly to help support and encourage each other, and the national Chi Alpha organization provides resources to strengthen those efforts. And, like Chi Alpha chapters worldwide, our Stanislaus group has been active in the student community. For instance:

- We've raised thousands of dollars annually to provide financial assistance, education, school supplies, and clothing for children in India and Philippines rescued out of human trafficking.
- We've worked closely with the International Student Office to welcome international students and help them both find housing and feel at home.
- For the past ten years, we have helped CSU Stanislaus's housing office on dorm move-in days.
- For five years, we worked with the CSU Stanislaus police department to hand out free food and water at the annual Warrior Day celebrations.
- For four years, we worked with the CSU Stanislaus police department to serve students and their families during commencement.
- For the past eleven years, we've regularly given out free espresso to students on campus.

Chi Alpha has also been active in the local community. For the past six years, we served in local election booths twice a year. We also ran all of the ticketing booths for the Stanislaus County Fair for three years.

Despite this lengthy history of positive engagement in student and community life, CSU Stanislaus has recently begun treating Chi Alpha unfairly.

Background of the dispute. Since at least 2001, the Chi Alpha chapter at CSU Stanislaus has had a copy of its constitution on file with the University and needed only to turn in the names of new officers and members to receive its charter each year. The deadline for this information has generally been about a month from the start of the Fall semester. In 2014, the deadline was October 17.

On September 11 of this year, Bianca Travis received a letter from Alissa Aragon, the Student Organization Advisor of the Office of Student Leadership & Development. The letter said that Chi Alpha was not permitted to hold events on campus until it changed its constitution. This, she said, was because Chi Alpha's constitution was not in compliance with the University's new interpretation of Executive Order 1068 (which was released in 2011). When asked why this was taking place before the October 17 deadline, Ms. Aragon told Ms. Travis that Chi Alpha had been "randomly" selected for immediate compliance.

The University's new interpretation of EO 1068 required Chi Alpha to change its constitution to state "that membership is open to all CSU students" and that Chi Alpha "leaders cannot be selected on the basis of faith[.]" Ms. Aragon's letter was on University letterhead and copied the Director of Student Leadership & Development, Clarissa Lonn-Nichols, and the Dean of Students, Ronald Noble.

On October 10, 2014, Chi Alpha submitted an updated constitution that had adopted all of the requests made in the September 11 letter. This constitution included the following language to comply with the University's new interpretation of EO 1068:

> "Eligibility for membership or appointed or elected student officer positions may not be limited on the basis of race, religion, national origin, ethnicity, color, age, gender, gender identity, marital status, citizenship, sexual orientation, or disability. The organization shall have no rules or policies that discriminate on the basis of race, religion, national origin, ethnicity, color, age, gender, gender identity, marital status, citizenship, sexual orientation or disability."

Chi Alpha included a statement after this language explaining that (a) it believed that the University's new interpretation violated its religious beliefs and (b) that it was complying under duress.

> Chi Alpha understands that, as of September 2014, the University interprets its anti-discrimination policy to prohibit religious student organizations from requiring their members or officers to share the religious beliefs that the organizations exist to further. Chi Alpha believes that the University's post-September 2014 interpretation of its anti-discrimination policy burdens Chi Alpha's sincere religious exercise, improperly interferes with the internal affairs of a religious organization, and violates the law, including but not limited to the First Amendment of the U.S. Constitution and Article I Sections 1, 2, and 4 of the California Constitution. Chi Alpha agrees to comply with the University's post-September 2014 interpretation of its anti-discrimination policy only under duress and only to the extent that Chi

> Alpha retains the ability to select leaders that fully support Chi Alpha's mission and are capable of carrying out that mission.

On October 18, Ms. Aragon refused to reinstate Chi Alpha's charter but said she would do so if the final sentence—which stated that Chi Alpha was complying under duress—was removed. Ms. Travis twice asked if Chi Alpha had to remove the entire statement or just the last sentence; Ms. Aragon twice confirmed the latter.

On November 11, Chi Alpha resubmitted an updated constitution that removed the last sentence. The next day, Ms. Aragon deviated from her previously-stated position and said she would not reinstate Chi Alpha's charter unless the rest of the statement—which stated that Chi Alpha believed it had a legal right to require its leaders to share its religious beliefs—was removed.

On November 18, Ms. Aragon and her supervisor, Ms. Lonn-Nichols, held a meeting with Ms. Travis, B.J. Miller (Chi Alpha's student vice-president), Dr. Richard Weikart (Chi Alpha's faculty advisor), and Jeremy Anderson (the regional Chi Alpha director of student ministries). Ms. Lonn-Nichols opened the meeting by expressly conditioning reinstatement of Chi Alpha's charter on removing the rest of the statement. All Chi Alpha representatives in the room confirmed their intent to comply with the University's EO 1068 interpretation and said that they just needed, as a matter of conscience, to express their disagreement with being forced to give up selecting student leaders who shared their faith. Even with these assurances and the presence of the required non-discrimination language in the constitution, both Ms. Lonn-Nichols and Ms. Aragon said that Chi Alpha must remove the rest of the statement or it would not have its charter reinstated. When Chi Alpha asked Ms. Lonn-Nichols to put this requirement and her rationale in writing, she ended the meeting and said, "I'm done playing games with you."

After prayerfully considering Ms. Lonn-Nichols' ultimatum, Chi Alpha decided that it could not remove the rest of the statement. On December 1, Ms. Aragon sent Ms. Travis an email stating that Chi Alpha was not chartered at the University and instructing her to remove Chi Alpha's booth from the Campus Quad by December 5. Because of the University's actions, Chi Alpha was forced to cancel 15 previously-approved events in the fall semester and is being denied equal access to campus for the spring semester.

Legal Issues. Through its policies and actions, the University has conditioned Chi Alpha's chartered status on the removal of a purely expressive religious statement from its constitution. It is my understanding that this violates the First Amendment's guarantees of free speech, free exercise of religion, and free association, equal protection, as well as several other federal and California laws. I

describe the legal issues concerning freedom of speech and the free exercise of religion below.

Freedom of Speech. The University is restricting Chi Alpha's speech because of its content, even though that content has no operative effect on the University's interests and that the speech serves only to express Chi Alpha's internal religious beliefs.

The First Amendment protects Chi Alpha's rights to be free from governmentally compelled speech or silence. *See Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796-97 (1988) ("[T]he First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say."). Since the University is banning Chi Alpha's "expression because of its message, its ideas, its subject matter, or its content," the University's actions are subject to "the most exacting scrutiny." *Doe v. Harris*, 772 F.3d 563, 574 (9th Cir. 2014) (striking down California law that regulated the speech of sex offenders).

To pass this scrutiny, the University must have a compelling interest in restricting Chi Alpha's religious expression, and be doing so in the least restrictive way possible. *TBS, Inc. v. FCC*, 512 U.S. 622, 642 (1994). But here, the University has no interest at all. Chi Alpha has already promised, both in writing and in person, to abide by the University's non-discrimination policy. And its mild expression of religious disagreement is far less likely to cause a prominent public dispute than is controversial anti-war attire that is broadly protected as "pure speech." *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 508 (1969). Indeed, with the exception of Chi Alpha members and University administrators, few would have even known of Chi Alpha's verbal expression of dissent because it was made in the context of the constitution. The University cannot have an interest in censoring dissenting ideas, particularly where those ideas are important solely to the members of a voluntary religious association. *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion"). This is doubly true given the "essentiality of freedom in the community of American universities," where the First Amendment rejects "any strait jacket" that "'cast[s] a pall of orthodoxy' over the free exchange of ideas in the classroom." *Dube v. State University of New York*, 900 F.2d 587, 597-98 (2d Cir. 1990) (quoting *Sweezy v. New Hampshire*, 354 U.S. 237, 250 (1957), and *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967), and finding that university officials could be personally liable for damages for censoring free speech).

The University's actions here go well beyond this standard and unreasonably violate clearly established constitutional rights. A comparison to other cases is

instructive: government defendants often try to excuse compelled speech by noting that the speakers could still *express disagreement* with a governmentally compelled message. *Frudden v. Pilling*, 742 F.3d 1199, 1205 (9th Cir. 2014) (banning a school from forcing students to wear its message of "Tomorrow's Leaders"). Courts uniformly reject those arguments, *id.* at 1205-06, and would look even more dimly on the University's attempt here to both compel speech *and* censor disagreement with that speech.

In Chi Alpha's view, since the University is "not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike [it]," *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 661 (2000), it certainly may not censor speech for no reason at all.

Free Exercise of Religion. The University gives its administrators unbridled discretion to control Chi Alpha's access to charter reinstatement. And its administrators have exercised that discretion to arbitrarily restrict the kind of religious speech that Chi Alpha may engage in. Under the Free Exercise Clause a law burdening religious exercise is generally permissible only if it is "neutral" and "generally applicable." *Employment Division v. Smith*, 494 U.S. 872, 880 (1990). Laws cannot meet this standard where they allow the government discretion to create "individualized exemptions" on a case-by-case basis or where they are enforced unevenly. *Id.* at 884 (citing *Sherbert v. Verner*, 374 U.S. 398, 401 (1963)); *accord Tenafly Eruv Ass'n, Inc. v. The Borough of Tenafly*, 309 F.3d 144, 166-67 (3d Cir. 2002) (striking down law that was not enforced uniformly). That is just as true in the university context as any other. *See*, *e.g.*, *Rader v. Johnston*, 924 F. Supp. 1540 (D. Neb. 1996) (striking down college actions both because the policy in question had several exemptions and because of administrative insensitivity toward religious conduct).

Because the University permits such broad discretion over granting student group charters and because University administrators have exercised that discretion to single out and arbitrarily target Chi Alpha's religious speech for censorship, the University's actions would have to stand up under strict scrutiny in court. And those actions fail that scrutiny for the reasons outlined above. Indeed, since the University can't have an interest in banning the wholly expressive religious dissent of a voluntary association, even if the University's actions *were* the result of a neutral and generally applicable law, they would fail simply because they are an irrational restriction on religious expression. *In re Levenson*, 587 F.3d 925, 931 (9th Cir. 2009) (under even rational-basis review, "[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.").

Moving forward. On behalf of Chi Alpha and of the Assemblies of God, I am writing this letter in the hope that we can resolve this dispute together. Chi Alpha

has been a part of the University's student body for almost 40 years and is filled with students who want to resume building unified diversity on campus as soon as possible. I am sure you agree with me that CSU Stanislaus should not discriminate against Chi Alpha or treat students like Bianca Travis as second-class citizens simply for their expression of religious dissent. If anything, CSU Stanislaus should be *encouraging* active, community-serving student groups like Chi Alpha, not excluding them. Therefore I would request that we meet to discuss this issue and how CSU Stanislaus and Chi Alpha can work together going forward. Please let me know when we might have such a meeting.

Sincerely,

E. Scott Martin
National Director
Chi Alpha, U.S.A.

cc: Richard Weikart, Organization Faculty Advisor, rweikart@csustan.edu

June 10, 2015

The Honorable Trent Franks,
Chair Subcommittee on the Constitution and Civil Justice,
The Judiciary Committee of the United States House of Representatives
2141 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Franks:

My name is Dr. Ra'sheedah Richardson, and it is an honor to submit this letter for your review on the behalf of ReJOYce in JESUS Campus Fellowship (RJCF) at Texas A&M University (TAMU). I was a member of RJCF at TAMU during graduate school from 2003-2012. RJCF has been a recognized student organization on the campus of TAMU since 1996. RJCF enjoyed this status uninterrupted for well over a decade, until the 2011-2012 school year when TAMU restricted our status as a campus group.

RJCF hosts a number of activities and services open to the Texas A&M community, such as a weekly Bible study, weekend fellowship events and prayer. RJCF typically has from 20-30 students who participate. Personally, RJCF not only supported me through spiritual development and in my relationship with the Lord Jesus, but the fellowship encouraged me to pursue academic excellence and to develop character traits like integrity, wisdom, composure and faithfulness that have been essential for a successful professional career. RJCF has helped me as well as countless other students make the adjustments needed to stand through the pressures and challenges faced in college life and beyond.

In October 2011, the TAMU Office of Student Organization Development and Administration (OSODA) within the Department of Student Activities sent us an email taking exception to RJCF's criteria for voting membership and/or leadership. RJCF seeks to preserve the intent of our organization through our voting member/leadership requirements. OSODA cited the University's statement on harassment and discrimination which states, "Texas A&M University, in accordance with applicable federal and state law, prohibits discrimination, including harassment, on the basis of race, color, national or ethnic origin, religion, sex, disability, age, sexual orientation, or veteran status." The email went on to state that, "This statement extends to student organization membership and leadership, and since ReJOYce in Jesus has a religious component outlined for its voting membership and leadership eligibility, your criteria warrants further review."

Following a review process which included a face-to-face meeting with Office of Student Organization Development and Administration personnel, RJCF was asked to change its constitution in order to remain a recognized student organization at TAMU. I and others in our group were greatly troubled by what we felt was an attack on our rights as students of faith on campus and a misuse of TAMU's non-discrimination policy. We were informed that many other religious student groups at Texas A&M received similar notices and were forced to review and/or revise their constitutions.

For a Christian student organization, having leadership that holds to the same beliefs and values is essential. Without it, we would not be able to preserve the integrity of our values, beliefs and purposes as a faith-based group. I would have personally felt very uncomfortable if the leadership of our organization had been someone who did not subscribe to the tenets of the Christian faith as it would have changed the direction of RJCF monumentally. RJCF would have ceased to have the same

meaning and purpose as a Christian organization if a non-Christian was an officer. This would have subsequently caused me to withdraw my membership. As a result, I would not have received the support offered by RJCF through college.

Without student group recognition, we would not have been able to continue to meet freely on campus to encourage each other in our growth both spiritually and academically. According to TAMU policy, non-recognized student groups are required to pay $100 per instance for each room reservation. It would have cost our group up to $7,600 per academic year to continue to operate on campus. This is far too great a hardship for a small student group like RJCF to maintain.

Additionally, non-recognized student groups have a much more difficult time advertising for the group on campus. Specifically, they are unable to post fliers, reserve other advertising media or reserve campus outdoor space. Non-recognized student groups are also not allowed to participate in the MSC Open House – the most significant campus-wide event that allows students to connect with and learn about organizations consistent with their interests, needs or beliefs and what they have to offer.

I have no doubt that had not we sought legal assistance clarifying the interpretation of federal law, RJCF would have ceased to exist on Texas A&M University's campus. After reviewing a letter received from our legal counsel, the University changed its position and acknowledged that RJCF "meets the criteria necessary for an exemption to the open membership requirement outlined in Texas A&M Student Rule 41.1.S which states that student organizations should 'be open in its membership unless otherwise permitted under applicable federal law.'" RJCF's recognized status was subsequently restored.

Sincerely,

Ra'sheedah Richardson

Ra'sheedah Richardson, Ph.D.

Justin P. Gunter

660 Ralph McGill Blvd. NE, Apt. 2509, Atlanta, GA 30312

The Honorable Trent Franks, Chair
Subcommittee on the Constitution and Civil Justice,
The Judiciary Committee of the
United States House of Representatives
2141 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Franks,

Thank you for the opportunity to provide this letter for the record in the Subcommittee's hearing "First Amendment Protections on Public College and University Campuses." Thank you also for your, and the Subcommittee's, attention to the threats to the First Amendment taking place on college and university campuses across our nation.

As a brief introduction, from 2011–2012 I served as President of the Vanderbilt Student Chapter of the Christian Legal Society while studying at the Vanderbilt University Law School. This letter briefly summarizes my experiences during this time. The Christian Legal Society is a national organization that facilitates student chapters at law schools across our nation. Our particular chapter at Vanderbilt focused primarily on promoting student spiritual well-being and encouraging the discussion of diverse viewpoints. For many students, law school is an intense and stressful experience. In this environment, our Christian Legal Society Chapter promoted student's spiritual well-being by providing group prayer meetings, Bible studies, and a safe-place for students to discuss the difficulties of law school with their peers. Additionally, the law school education is designed not only to teach students legal principles, but also to expose them to a diverse group of people and ideas—exposure which serves future lawyers well when they must represent diverse clients or create policies that take into account the needs of diverse communities. At Vanderbilt, this task was filled in large part by student groups, whether they be groups dedicated to environmental concerns, business policy, animal rights, or political views (both Republican and Democrat). In this eclectic mix, our Christian Legal Society Chapter sought to encourage discussion of Christian viewpoints. To do so, we regularly invited speakers to come to Vanderbilt and speak on topics of special important to Christians in our nation.

For years the our chapter of the Christian Legal Society was recognized as a student group at Vanderbilt—all the while supporting student's spiritual needs and promoting discussions of diverse viewpoints on campus. However, in summer 2012, the leadership of our chapter was informed that we would not be allowed to continue in the following school year. After engaging Vanderbilt administrators to ascertain the rationale for this sudden change, we were told by Vanderbilt administrators that Vanderbilt had instituted a new policy that did not allow religious groups to ask their leaders to agree with the group's basic beliefs and did not

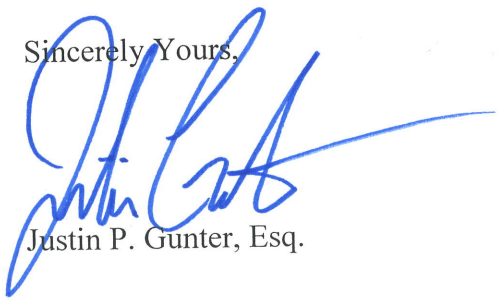
allow requirements that leaders should hold prayer meetings or Bible studies. In short, Vanderbilt's policy stated that a Christian group could not ask that its leader believe in Christianity—even if the group (like the Christian Legal Society) welcomed all students to be members and attend its events regardless of their religious beliefs.

The leadership of our Christian Legal Society Chapter, and many other religious groups on campus tried to no avail to reason and work with the Vanderbilt administrators. In spring 2012, our chapter, along with thirteen other religious groups, were removed from Vanderbilt. Through this process, Vanderbilt once again redefined its policy as an "all-comers" policy—a policy purporting to require that any student group must allow anyone to be a leader regardless of whether they support (or are even hostile to) the group's basic beliefs. Despite this sweeping policy, Vanderbilt only removed Christian student groups. In fact, Vanderbilt specifically exempted groups that discriminate on the basis of sex from its policy.

For many college students, the activities and time they spend on their college or university campus constitutes the vast majority of their college experience. A student group that is removed from campus loses many abilities to support and engage students. At Vanderbilt specifically, our removal meant that we could no longer promote our events on campus except by word of mouth, were not allowed to participate in Vanderbilt events (such as student organizational fairs), were deprived of funding to sponsor speakers, and were allowed space to meet at Vanderbilt only at the lowest priority. Similarly situated groups at public universities face even more severe sanctions—including being banned altogether.

The idea that a group could be banned at colleges and universities in the United States of America for nothing more than seeking to express a specific viewpoint is contrary to both the text and the principles enshrined in the First Amendment to our Constitution. Policies, like those implemented by Vanderbilt, contradict the American ideal of a pluralistic society—where individuals and associations may express their opinions and beliefs freely without being censored by a university administrator or government executive. As the drafters of the First Amendment recognized, this basic freedom is essential to a free society. I thank the subcommittee for its attention to this important issue and once again thank the subcommittee for allowing me to submit this letter.

Sincerely Yours,



Justin P. Gunter, Esq.

The Honorable Trent Franks, Chair
Subcommittee on the Constitution and Civil Justice,
The Judiciary Committee of the
United States House of Representatives
2141 Rayburn House Office Building
Washington, D.C. 20515

June 5, 2015

Dear Chairman Franks,

I write to you as the former President of the Christian Legal Society (CLS), The Ohio State University Moritz College of Law student chapter. Founded in 1961 CLS is a non-profit organization that exists to educate, train, and equip Christian legal professionals and law students to practice Christian principles in the legal profession. Student chapters are part of CLS' Law Student Ministries. I was privileged to serve as the chapter President during the 2003-2004 academic year, which was my second year of law school. We were a chapter of modest size, with a membership of approximately ten law students, and one faculty sponsor. Membership in CLS required affirmation of a Statement of Faith, and adherence to a code of conduct that follows a biblical approach to inter- and intrapersonal conduct. Membership in CLS conferred several privileges, including the right to vote for the chapter's officers. In order to maintain good standing with CLS' national organization, student chapters had to adopt a constitution, bylaws, and codes of conduct that are consistent with those of the national organization.

Of the literally hundreds of student organizations available at a large, public university such as Ohio State, I chose to devote my time and energy to serving with CLS. CLS' stated mission is to "inspire, encourage, and equip Christian lawyers and law students both individually and in community to proclaim, love and serve Jesus Christ through the study and practice of law, the provision of legal assistance to the poor and needy, and the defense of the inalienable rights to life and religious freedom." Upon learning of CLS, I instantly knew I had found an organization with whom I would find purpose and meaning during my law school tenure. Little did I know that groups who sought to impose their notions of "liberty" upon us would challenge CLS' continued existence.

In the fall of 2003—only weeks into my tenure as chapter President—some fellow students approached me and asked whether non-CLS members could attend CLS chapter meetings. I responded that non-members were not only permitted, but were welcomed and encouraged to attend our meetings. Several days later, those same students asked whether non-members could become voting members or officers. I responded that I would need to review the chapter constitution and bylaws. After review and consultation with other chapter officers, we determined that only those who were able to affirm CLS' Statement of Faith, and adhere to our bylaws and code of conduct, were eligible for voting membership and officership.

As a result of our candid response, the students filed a formal complaint with the law school administration. The Law School Dean requested a meeting with me, whereupon she explained the nature of the complaint and asked for my response. I explained that, as a student chapter, we had no choice but to maintain consistency with CLS' national organization, or we would no longer be permitted to affiliate ourselves with them. In essence, to change our constitution and bylaws would be to change the very nature of our organization. We would cease to be a Christian Legal Society.

Several days later, The Ohio State University initiated an investigation into our chapter for allegedly violating the University's non-discrimination policy. The University threatened to void our status as a recognized group, thereby rescinding our ability to use University facilities, receive funding from our student fees, and possibly requiring repayment of past funds received. The consequences of such action would have been devastating. Without the ability to meet on campus, to receive financial assistance, or to even exist as a recognized organization, I am certain CLS would have ceased to continue its ministry at The Ohio State University. Those of us for whom CLS provided a meaningful and important vehicle through which we could use our legal education for the greater good would be relegated to second-class citizens simply because of our sincerely held beliefs.

Unfortunately, I also experienced personal consequences. I was often the subject of name-calling, gossip, and rumor-mongering. The Law School "advised" that I undergo mediation with those whom I had "offended." In short, the law school—*my* law school—created a hostile environment for me. I was warned by upperclassmen not to take courses by certain professors who were not likely to give me fair evaluations. Some of my classmates verbally admonished me for my sincerely held religious beliefs. And I was only in my second year of law school. I would have to endure this treatment and hostility for another year.

I agreed to undergo mediation with a leader from the complaining organization, in the hopes that we could achieve reconciliation. I also hoped to demonstrate that our organization was open and welcoming to all, but that we simply could not compromise our core principles and beliefs. At the next chapter meeting—we met weekly—I apprised the attendees of the situation, and asked that we all make every effort to maintain a friendly and welcoming environment. I recall specifically inviting the very students who complained to CLS meetings, so they could observe for themselves our desire for friendship and collegiality. Unfortunately, our attempts were to no avail.

Once informed of the University's decision to investigate us, I convened an emergency session with our chapter's members and officers. We decided that the appropriate action was to contact the CLS national organization to inform them of the situation. I soon learned that CLS sued The Ohio State University in federal court for religious discrimination. After doing so, my involvement and role diminished significantly, so that I could maintain my focus on my legal studies. I provided some assistance with the preparation of legal documents on our student chapter's behalf, but my involvement primarily consisted of signing documents and providing statements. It also helped to

receive affirmation and encouragement that we had not violated the law, and that we did the right thing.

Several acrimonious months later, we were informed that the University reached a settlement with CLS, and agreed to amend its non-discrimination policy with an exception for student organizations that hold "sincerely held beliefs." My understanding is that the exception was a stop-gap measure, and I do not know if the University continues to provide such an exception today. My hope is that it does; there are many faith-based organizations with sincerely held religious beliefs who would be unfairly and unlawfully penalized were the University to rescind this hard-won exception.

Mr. Chairman, thank you for the opportunity to share my experience. I am happy to provide additional details if necessary.

Sincerely,

Michael Berry

The Honorable Trent Franks, Chair
Subcommittee on the Constitution and Civil Justice
The Judiciary Committee of
the United States House of Representatives
2141 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Franks:

My name is Ryan Finigan, I am a 3rd year medical student at Temple School of Medicine and a 2nd Lt in the United States Air Force, and I am deeply concerned about recent events that have taken place on my medical school campus. I am writing to inform you of the situation happening on our campus, and also to appeal for your help in protecting religious freedom at our school and many others across the country. I do not want to waste your valuable time so I will detail the events succinctly as follows.

During my second year I was asked to be a leader in the Christian Medical and Dental Association at my campus chapter. As part of that process I was required to sign a contract which stated that I conduct my life according to biblical morality and that I would be held accountable by my peers to do so. This combination of morality and accountability, as the Bible details, has been a cornerstone of the Christian faith centuries before this nation even began.

Shortly after beginning my role as a leader we were confronted by the Student Affairs Office concerning the contract we had signed. The Temple staff informed us that our group would very likely have its official status revoked because they claimed that we were discriminating in our selection of leader by having our leader contract to lead a life according to biblical morality.

Biblical morality also encompasses caring for the poor, integrity, humility, and purity in our relationships; and all of these aspects of morality are inseparable within our faith. If we were to throw out even one aspect of biblical morality then the validity and authority of our faith would be gone. Therefore we were faced with the choice of surrendering our beliefs or surrendering CMDA's presence at Temple School of Medicine.

This is a clear case of restricted religious freedom. Holding each other accountable to a biblically moral life is at the core of training the next generation of physicians, and I need not remind you how dire a need there is for physicians who value integrity, humility, and love. Thousands of America's finest physicians who benefited from their campus CMDA would agree with me in saying that we need CMDA to maintain its presence in our schools.

Therefore, I implore you to intercede on our behalf and defend our religious freedom. This is not only because we should be allowed to practice our faith on our school campus, but also because the CMDA has played a critical role in the training of American physicians.

Thank you for your time,

Ryan Finigan

Dear Chairman Franks,

My name is Emily Abraham and I was a freshman this year at Minnesota State University, Mankato.

Until just two months ago, Mankato had a residential life policy that said, "During community standards discussions at floor and building meetings, each area votes to determine if religious solicitation is allowed." I still remember our first floor meeting when we had to vote about this. I was so mad and had a bunch of thoughts going through my mind. Something about this vote we had didn't seem right.

In January of this year, I wanted to invite some neighbors in my dorm to eat pizza and discuss theirs and my opinions about the Bible. My CA told me that to do so was a direct violation of the campus religious solicitation policy. I was then reminded of the vote we had taken at the beginning of the year prohibiting any "religious solicitation" on the floor. I thought this policy was dumb and I still didn't understand. What was so wrong with me wanting to share about Jesus on the floor? In the Bible we are told to make disciples... that's hard to do when we are prohibited to talk about religion on the floors. Though I couldn't talk about religion it was 100% okay to invite someone to a fraternity party, a concert, a non-religious movie, or most anything else. Just not to a religious event. It didn't make sense.

When some others and I asked a residential life administrator about the policy, we were told that the policy had been applied by the university for at least as long as he had been at the campus (which is well over ten years), and that, in his eyes, the policy didn't have any negative ramifications or opposition. The message to me was clear: the policy is

not the problem; you are the problem.

This policy had made me angry throughout the whole year and I finally built up enough courage to meet with some of the faculty members. I refused to allow my free speech to be quieted, and after persisting with my questions through a number of discussions, Minnesota State University, Mankato wisely agreed to repeal their policy. Many others and I trust that they will remove this policy from next year's handbook as they have promised.

But who knows how many other campuses implement this type of speech policing, and how many students have opted, and continue to opt, for quiet obedience rather than standing up to intimidation and even ridicule from various administrators?

Thank you,

Emily Abraham

Emily Jones

533 Yellowstone Avenue
Billings, MT 59101

June 10, 2015

The Honorable Trent Franks, Chair
Subcommittee on the Constitution and Civil Justice
The Judiciary Committee of the United States
House of Representatives
2141 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Franks:

I am writing to you out of concern for the protection of religious freedom on public college and university campuses. I attended the University of Montana ("UM") School of Law from 2005 through 2008. During my law school tenure, I and several other students attempted to form a local chapter of the Christian Legal Society ("CLS"), a national organization of Christian lawyers, judges, law students and others that seeks to "proclaim, love and serve Jesus Christ through all we do and say in the practice of law, advocating biblical conflict resolution, legal assistance for the poor and needy, religious freedom and the sanctity of human life." The aspiration of the local UM chapter of CLS is to "maintain a vibrant Christian Law fellowship on The University of Montana campus which enables its members, individually and as a group, to fulfill the Christian mandate to love God and to love their neighbors as themselves." During my time at the law school, our group was denied status as a recognized student group at UM by the student body and by its governing Board.

In 2007 CLS–UM sought recognition and an allocation of student activity fees from the Student Bar Association ("SBA") Executive Board. The Board determines whether a student organization at UM School of Law is eligible for recognition and student activity fee funding and then allocates student activity fees to these recognized student groups. This budget is then submitted to the general student body for a vote. No guidance is given to the students in determining which student groups may receive funding, and no instruction is given regarding maintaining a viewpoint-neutral vote. Thus, the student body can decide to fund or de-fund groups based on those they like or agree with, and those they do not.

In order to ensure that it maintains its distinctive Christian voice – a right conferred on its members by the Constitution's canons regarding freedom of association and freedom of religious expression – CLS–UM limits those who control that voice, the voting members and officers, to those who affirm its Christian views and endeavor to live a life of integrity conforming to those beliefs. CLS–UM invites anyone, however, to attend and participate in its meetings and events. With full knowledge of CLS–UM's voting membership and leadership policies, the SBA Board voted to recognize CLS–UM and allocate student activity

funds to it in the SBA budget. However, when the Board submitted these allocations to the student body for a vote, they were narrowly rejected amid opposition to CLS–UM.

Following the rejection of the proposed budget, which included funding for CLS–UM, the SBA Board revoked CLS–UM's recognition. The Board then re-submitted the budget to the student body with the funding allocation for CLS–UM excluded. The student body approved this budget. No other student group included in the first budget was excluded from the second budget. As a result, CLS–UM was substantially hindered in its ability to carry out its activities and advocate for its views during the 2007–2008 academic year.

Eventually, the CLS–UM students decided they would, reluctantly and unfortunately, have to go to court to protect their First Amendment rights. They primarily challenged the SBA's method of allocating student activity fees as viewpoint discriminatory and, therefore, a violation of students' freedom of speech. They also challenged the denial of recognition to CLS–UM because of its leadership and voting membership requirements. After the district court ruled against them, they appealed to the Ninth Circuit. *CLS v. Eck*, 625 F. Supp.2d 1026 (D. Mont. 2009), *appeal voluntarily dismissed, No. 09-35581* (9th Cir. Aug. 10, 2011). The appeal was stayed pending the Supreme Court's decision in *CLS v. Martinez*.

Eventually, UM and CLS reached a settlement agreement by which officials of the UM School of Law agreed to impose new rules upon the SBA student activity fee funding system in order to ensure that student fees were allocated among student groups in a viewpoint-neutral manner. In total, officials at the UM School of Law agreed to approximately 23 new rules for the allocation of student activity fee funding. Law school officials also agreed to recognize CLS as an independent student organization with the same access to law school facilities and channels of communication as enjoyed by other recognized student groups. In return, CLS acknowledged that it was ineligible for SBA funding under the SBA's current interpretation of its bylaws, but law school officials agreed that CLS was eligible to apply for funding through the community grants program administered by the law school.

Please take immediate action to ensure that others do not experience the same disparate treatment that the members of CLS–UM experienced. Religious liberty is the foundation for freedom in America, and sets us apart from much of the rest of world. Please protect our longstanding heritage and constitutional rights of college and university students to express their religious beliefs, to associate with others who share those beliefs, and to receive the same treatment as other student groups receive. Thank you very much for your consideration.

Sincerely,

EMILY JONES

June 11, 2015

The Honorable Trent Franks, Chair
Subcommittee on the Constitution and Civil Justice
The Judiciary Committee of the United States
House of Representatives
2141 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Franks:

My name is Justin Ranger. I have lived in Idaho since 2001. I graduated from Boise State University in the Spring of 2009 with a major in Philosophy and a minor in Mathematics. While I was a student, I was the President of the student club, Cornerstone Ministry.

During my involvement with Cornerstone Ministry, I desired to create an environment that would engage students, and would contribute to campus life in general. The purpose of Cornerstone Ministry was to hold Bible studies, book discussions, prayer meetings, and to distribute free literature to students on campus. The focus of the club was to engage students academically and intellectually on matters that related to our religious views. This we believed added to diversity and contributed to campus life.

At the end of my sophomore year at Boise State, some other students and myself began the process of starting a new religious club on campus, The Veritas Forum. We used as a template the constitution of Cornerstone Ministry which was a fully recognized student club. The new constitution was rejected based on BSU's interpretation of the non-discrimination clause. In our dialogue with BSU staff and student Judiciary members we pointed out that the new constitution was modeled on a constitution of a club which had already received full recognition. The constitution for Cornerstone Ministry was reviewed by BSU and declared to be discriminatory as well. After submitting several revisions of our constitution in an attempt to be fully compliant with BSU's non-discrimination clause, it became apparent that the club would not be recognized simply because we required its officers to agree to the beliefs and purpose of the club. Eventually the Cornerstone Ministry club was de-recognized as an official club on campus.

After Cornerstone Ministry was de-recognized we lost all of the rights and benefits of being an officially recognized club, e.g., reserving meeting rooms on campus for free, submitting flyers to be posted on bulletin boards, receiving discounts on catered food for events, being able to recruit students at orientations, etc. Furthermore, while our constitution was under review, the time of the few students that were still involved with the club was consumed in dealing with this issue, rather than fulfilling the purpose of the club. Not only did the size and vitality of the club diminish, but the club's ability to benefit student life was severely limited during this time.

Cornerstone Ministry could not withhold the statement of belief from our constitution since it is what determines our identity and the purpose of the club. Although, we were assured that it was unlikely that anyone who did not agree with our beliefs or the purposes of the club would attempt to run for an office in our club, it was a matter of honesty, integrity, and transparency to

be upfront with the criteria by which officers would be considered. Since BSU would not accept our criteria for officers before the settlement agreement, we were forced to be de-recognized.

Thank you for caring about this issue, and hearing about the plight of the club that I served.

June 11, 2015

The Honorable Trent Franks, Chair
Subcommittee on the Constitution and Civil Justice
The Judiciary Committee of the United States
House of Representatives
2141 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Franks:

My name is Jesse Barnum, and I graduated from Boise State University in 2009 with a B.A. in Philosophy and minors in German, Latin, and History. I was a member of the Cornerstone, a religious student organization, from 2006 until I graduated in 2009. I was also one of the organizing members of the Veritas Forum from 2007 through 2009. The Veritas Forum was a religious student organization who applied for official recognition as a student organization, but was denied that status.

As a student, religious organizations helped meet my need for community, and they provided me encouragement and support. They were an integral part of my success as a student, and without them I would not have engaged in the broader campus community to the extent that I did.

Religious student organizations have a vital role in university life. Not only do they support those students who are part of a particular religion, they increase the cross-section of ideas present on campus. Without the presence and articulate expression of these ideas on campus, the quality and success of a university education diminishes. The story of the Veritas Forum at Boise State University illustrates this well.

In 2007, I and a group of students began the process of organizing The Veritas Forum at Boise State University. Our goal was to create university events that explored life's hardest questions; questions like what is morality, and why is there suffering and pain in our lives and in the world. We wanted our own professors and other leading minds around the world come to Boise State to discuss these issues with us, the students, without the constraints of the classroom, and to engage in these issues in a way that was relevant to us in our everyday lives. In this way, the ideas and purpose of The Veritas Forum fit perfectly with the purposes of the university and organized student groups.

However, The Veritas Forum was also a religious student organization and we believed that Jesus, who he was and what he did, was important to any discussion and understanding of these questions. And in spite of Jesus' undeniable prominence and significance in the history of the world, He was conspicuously lacking from most campus dialogue on these issues. Given our stated goal and belief, it was necessary that to be successful and preserve the integrity of our

organization we needed to establish qualifications for leadership that were consistent both with that goal and our religious beliefs. These two elements were inextricably linked.

We submitted our application for recognition as a student group in the Fall of 2007. It was rejected because of the qualifications we required to hold office. In spite of the setback, we continued to organize an event under another recognized student organization, The Cornerstone. Our first event discussed suffering and pain: its meaning, why does it exist, and is there an answer to it. Professor Scott Yenor of Boise State University, whose own daughter had recently undergone treatment for cancer, was the presenter. We advertised the event on campus and scheduled it for a Friday night during the spring semester of 2008. Given the day and time of year, our expectations were that maybe 40 people would attend. Instead of 40 people, about 240 students and faculty attended. The 200 person capacity room was filled well past its limitations. The event was a huge success, and was well received by numerous campus organizations and departments, many of them regardless of their own opinions and beliefs.

But the university continued to pursue its policy of not allowing student religious organizations to identify qualifications for leadership, and Cornerstone was derecognized as a club for the same reasons The Veritas Forum was denied recognition.

Again, in spite of this additional setback, we began work on hosting another event because the desire and interest in what we were doing was so clearly demonstrated by the success of the first event. In order to hold the event, we worked with another student religious organization that had yet to be derecognized. The second event was held in the spring of 2009 and was attended by more than 100 students and faculty. The topic discussed this time was the trend of removing “faith” and “religion” from public dialogue and discourse.

I and some other key students in the Veritas forum graduated in the spring of 2009. We were very proud of the work that had been accomplished and we were excited about the interest that was shown by the campus community in what we were doing. We were also disappointed that we had been unable to organize The Veritas Forum in such a way that it would have enabled it to continue past our graduation. The interest and the need for open and honest dialogue were clearly demonstrated, but the legal and institutional obstacles we faced prevented us from ever having The Veritas Forum formally recognized. There is no Veritas Forum at Boise State today.

Religious student organizations like the Veritas Forum benefit the university, but their inability to maintain officer qualifications will mean that they can no longer fully participate in the university community. Not only will individual students suffer, but the quality of our state universities will suffer as well.

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June 11, 2015

The Honorable Trent Franks, Chair
Subcommittee on the Constitution and Civil Justice,
The Judiciary Committee of the
United States House of Representatives
2141 Rayburn House Office Building
Washington, D.C. 20515

Re: "First Amendment Protections on Public College and University Campuses"
Hearing Date: June 2, 2015

Dear Chairman Franks:

Thank you for considering this letter in connection with the above-referenced Congressional hearing. I served as the President of the local chapter of the Christian Legal Society at the University Of South Carolina School Of Law during the 2007-08 academic school year, during which time our local chapter filed a First Amendment lawsuit challenging the University's discriminatory policies against student organizations that were religious in nature.

While I was a law student, the University had a policy of assessing and collecting a "student activity fee" from all students and allocating those monies collected into "general funds" and "special funds" available to certain student organizations. Under the USC Student Government Finance Codes (§390.05), "Religious Organizations" were ineligible for general funding. Although religious organizations like CLS were technically eligible for the special funding, those resources were more limited in their use (funds could only be applied to "content neutral" programs) and the entire fund itself was often depleted during the Fall semester.

The result of these policies left the CLS chapter with limited to no access to funds in the Fall semester and without any funds at all during the Spring semesters. This despite the fact that all of the CLS student members were assessed/charged the student activity fees and non-religious organizations had substantial budgets for their use from both the general and special funding.

As President of the CLS chapter, I approached school officials and elected student government members seeking redress for these policies to no avail. Ultimately, I was faced with the decision to keep quiet in the face of the deprivation of my First Amendment rights or to sign my name verifying a Complaint against the University in the federal courts. Still to this day I can recall the weight of the pen as I inscribed my signature on the Verification.

Thankfully for me and the CLS chapter and its members, the University quickly cooperated after reading the Complaint and once counsel explained to the University the First Amendment rights of its "religious" students. The University admitted its policies were discriminatory in that they treated religious organizations differently from every other type of student organization on campus. The University issued a moratorium on disbursement of student activities fees to student organizations until their policies were revised to treat students equally.

I am very thankful to CLS for their assistance to the local chapter during this trying and difficult time and also to the University officials for their acknowledgement of our disparate treatment and their willingness to redress the situation. Nevertheless, I wish that it did not have to come to filing a federal action to get the attention of the University to the constitutional violations they endorsed and I am confident that there were many other student "religious" organizations that simply accepted inequality or were without the help necessary to seek justice.

I would be very glad to speak further with anyone about this matter and, again, I thank you for your consideration.

Sincerely,

/s/Robert S. "Trey" Ingram III