

of
Legislative and Policy Director,
Foundation for Individual Rights in Education

Before the

September 26, 2018 hearing on
Examining First Amendment Rights on Campus

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Representative Virginia Foxx,
Chairwoman
Committee on Education and the Workforce
2257 Rayburn House Office Building
Washington, DC 20515

Representative Bobby Scott,
Ranking Member
Committee on Education and the Workforce

RE: September 26, 2018 hearing on Examining First Amendment Rights on Campus

Dear Chairwoman Foxx, Ranking Member Scott, and honorable members of the Committee:

The Foundation for Individual Rights in Education (FIRE; thefire.org) is a nonpartisan, nonprofit organization dedicated to defending student and faculty rights on America's college and university campuses. These rights include freedom of speech, freedom of assembly, legal equality, due process, religious liberty, and sanctity of conscience—the essential qualities of individual liberty and dignity.

FIRE thanks the Committee for dedicating the time to address free speech on campus. To supplement the oral testimony I provided at today's hearing, this written testimony overviews the state of written policies that regulate student and faculty speech and association. It evaluates what Congress and state legislatures have done to advance those rights, and finally concludes with a discussion of potential solutions to the challenges remaining.

It has been decades since there has been any question as to whether students at public institutions of higher education enjoy fully vested First Amendment rights on public college and university campuses. In 1957, in deciding *Keyes v. Board of Education*, the United States Supreme Court eloquently explained that

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to

gain new maturity and understanding; otherwise our civilization will stagnate and die.¹

In the decades since _____, the Supreme Court has been unwavering in its support for student and faculty First Amendment rights on public college and university campuses. For example, in _____, the Court observed:

The precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at lar(n)4(te605.95 Tm(er)-7a5 63

The threat to student and faculty speech presented by free speech zones is often exacerbated by burdensome permitting requirements. Students are sometimes required to obtain signatures from multiple officials, a process that can take days or weeks depending on the bureaucratic process, to even use a free speech zone. In contrast, much campus speech involves spontaneous responses to recent or still-unfolding circumstances. Requiring students to remain silent until a university administrator has completed paperwork may interfere with the demonstrator's message by rendering it untimely and ineffective. Furthermore, these permitting requirements often become mechanisms for viewpoint discrimination, as university administrators may waive or expedite requirements for non-controversial events but insist on observing the procedures for a more contentious event. In short, the permitting regulations that often accompany free speech zones, in addition to being unconstitutional prior restraints on their face, are also an invitation for administrative abuse.

For example, in 2015, Modesto Junior College in California settled a lawsuit by agreeing to eliminate its restrictive "free speech zone," which was brought into the national spotlight after security officers and a campus official were video-recorded telling a student—who was also a military veteran—that he could not hand out copies of the U.S. Constitution because he was not standing in the campus's tiny "free speech zone."⁷ Ironically, this incident took place on Constitution Day, the very day Congress has designated to celebrate our Constitutional rights.

Similarly, in 2017, students at Kellogg Community College in Michigan sued the institution after they were arrested while distributing pocket-sized versions of the Constitution on campus.⁸ The students had been informed that they were violating the college's solicitation policy because they had not received advance approval from the college to distribute literature to their fellow students.

In March 2015, student Nicolas Tomas filed a First Amendment lawsuit against California State Polytechnic University, Pomona, after a campus police officer stopped Tomas from handing out pro-animal rights flyers on a campus sidewalk. The officer told Tomas he would need to have a permit and wear a badge while distributing any written material. He was told he would also be confined to Cal Poly Pomona's tiny free speech zone, which made up less than .01 percent of campus.

The continued maintenance of free speech zones is detrimental to all campus community members. Institutions risk losing lawsuits; students risk punishment for protected speech and learn the wrong lesson about their expressive rights, concluding

⁷ Tal Kopan, *Student Stopped From Handing Out Constitutions on Constitution Day Sues*, *Politico* (Oct. 10, 2013), <https://www.politico.com/blogs/under-the-radar/2013/10/student-stopped-from-handing-out-constitutions-on-constitution-day-sues-174792>.

⁸ *Michigan Community College Agrees to Resolve Free Speech Lawsuit*, *USA Today* (Jan. 23, 2018), <https://www.usnews.com/news/best-states/michigan/articles/2018-01-23/community-college-agrees-to-resolve-free-speech-lawsuit>.

that speaking their minds is not worth the punishment. Establishing that outdoor areas on public campuses are traditional public forums will ensure that our public universities continue to be a traditional space for debate aptly and memorably recognized by the Supreme Court as “peculiarly the ‘marketplace of ideas.’”⁹

Federal anti-discrimination law requires colleges and universities receiving federal funding—virtually all institutions, both public and private—to prohibit discriminatory harassment on campus. Simultaneously, public universities are required by the First Amendment to honor students’ freedom of speech. While private institutions of higher education are not bound by the First Amendment, those that explicitly promise free speech must honor that commitment.

Harassment, properly defined, is not protected by the First Amendment. The Supreme Court of the United States has set forth a clear definition of discriminatory harassment in the educational setting, a definition carefully tailored to fulfill public schools’ twin obligations to respect free speech and prevent harassment. In *Harlow v. Fitzgerald*, 526 U.S. 629, 651 (1999), the Supreme Court defined student-on-student harassment in the educational context as targeted, unwelcome discriminatory conduct that is “so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims’ educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities.” Public colleges and universities are legally obligated to maintain policies and practices aimed at preventing this type of genuine harassment from happening on their campuses, while also honoring student and faculty First Amendment rights.

Unfortunately, institutions often inappropriately cite obligations under federal anti-discrimination laws to investigate and punish protected speech that is unequivocally not harassment. In April, 18 students, all members of Syracuse University’s Theta Tau fraternity, were removed from classes after a private video of them participating in satirical skits mocking bigoted beliefs was leaked to the public. Astonishingly, the campus administrators did not recognize the satirical nature of the skits and instead summarily suspended the students, prohibiting them from continuing to attend their classes.¹⁰ The campus cited its overbroad anti-harassment policy.

Further examples abound. Starting in April 2013, the University of Alaska Fairbanks’ student newspaper was subjected to a 10-month investigation because a professor repeatedly claimed that two articles constituted sexual harassment prohibited by Title

⁹ _____, 408 U.S. at 180 (internal citation omitted).

¹⁰ Lauren del Valle, _____, CNN (Apr. 23, 2018), <https://www.cnn.com/2018/04/23/us/new-video-syracuse-university-theta-thau-frat/index.html>.

IX.

Penn State, sexual harassment is defined broadly as any “verbal or physical conduct of a sexual nature that is unwanted, inappropriate, or unconsented to.”¹⁵

Similar policies have been consistently struck down on First Amendment grounds by federal courts for over two decades, yet unconstitutional definitions of harassment remain widespread.

Even when the _____ decision was rendered, the Court was concerned that if educational institutions’ responsibility to address harassment was left undefined, schools would predictably cite this obligation as a rationale for censorship. The dissenting opinion in _____, authored by Justice Anthony Kennedy, warned of “campus speech codes that, in the name of preventing a hostile educational environment, may infringe students’ First Amendment rights.”¹⁶ Justice Kennedy noted that “a student’s claim that the school should remedy a sexually hostile environment will conflict with the alleged harasser’s claim that his speech, even if offensive, is protected by the First Amendment.”¹⁷ In response, Justice Sandra Day O’Connor’s majority opinion in _____ was very careful to “acknowledge that school administrators shoulder substantial burdens as a result of legal constraints on their disciplinary authority.”¹⁸ Speaking precisely to Kennedy’s concerns, O’Connor reassured the dissenting justices that it would be “entirely reasonable for a school to refrain from a form of disciplinary action that would expose it to constitutional or statutory claims.”¹⁹ The majority’s careful, exacting standard was purposefully designed to impose what O’Connor characterized as “very real limitations” on liability, in part as recognition of the importance of protecting campus speech rights.²⁰ The _____ standard is stringent because the First Amendment requires it to be.

Overly broad and vague harassment and bullying policies benefit no one. Colleges risk

institutions have the ability to meet both their legal and moral obligations to maintain campus environments free from discriminatory harassment while protecting free speech. These twin responsibilities need not be in tension.

Another startling trend FIRE is monitoring closely is universities, both public²¹ and private,²² curtailing the fundamental freedom of association, particularly as it pertains to a student's right to join single-gender organizations, including sororities and fraternities, but occasionally also a cappella groups and intramural sports teams.

Although the institution is private, and thus not required under the First Amendment to respect the free association rights of its students, nowhere has the fight against freedom of association been more protracted or more egregious than at Harvard University. It therefore serves as a helpful example, illustrative of this new threat.

In May of 2016, Harvard's then-president, Drew Faust, announced her intention to make membership in an off-campus single-gender organization a punishable offense.²³ The reason for this, Harvard claims, is that by nature of being single-gender, the organizations' membership practices are discriminatory, and by virtue of their money and status, the male Final Clubs—which are substantially similar to fraternities—exert undue influence on the social scene at Harvard. Harvard's edict: go co-ed, dissolve, or face consequences.

Because the organizations are independent, and receive no financial or administrative support from the university, Harvard's only leverage was to deny members leadership and academic opportunities. Under the policy, those who are found to be members of unregistered single-gender social organizations lose the ability to lead official student

²¹ Ryne Weiss, _____, FIRE (April 26, 2018), <https://www.thefire.org/cal-poly-suspends-all-greek-organizations-after-controversies-at-two-fraternities>; Esther Honig and Abby Vesoulis,

_____, WOSU P M (Jan. 12, 2018), <http://radio.wosu.org/post/greek-life-ohio-state-shaken-after-fraternity-suspensions#stream/0>; Ryne Weiss, Florida State University suspends free speech and freedom of assembly unBTV0 0 sus16(itg0)6(da)4(S)10(t)10(a)-20(t)1092 re.1a315s96-/Be(g)-7(an)2i(Q)BTg0)6(da)6(da)6(da)

groups and sports teams, to apply for prestigious academic awards such as the Marshall and Rhodes scholarships, and to apply for postgraduate fellowships at Harvard.²⁴

In other words, those who exercise their freedom of association in ways Harvard does not agree with will find themselves on a blacklist, deprived of equal access to certain opportunities and benefits available to other students.

Many students objected swiftly and vigorously to this blacklist policy. Hundreds of Harvard women marched in the “Hear Her, Harvard” protest.²⁵ The female students suspected that although the policy was clearly meant to address the male groups, it was they who would be disproportionately impacted by the policy.

They turned out to be right. Interestingly, so far, most of the all men’s groups remain, while every single women’s group has chosen either to go co-ed, or to close.²⁶ Harvard, in its ostensible crusade for gender equality, now finds itself successful only at extinguishing groups for women.

The attempt to stamp out final clubs is eerily reminiscent of historical attempts by Harvard to eradicate student membership in formerly disfavored groups. In fact, this is at least the third time in its history Harvard has attempted to punish members of its community for their lawful associations. In 1920, Harvard convened a “secret court” to investigate and expel gay men and their close associates from the campus community.²⁷ In the 1950s, Harvard’s administration targeted and retaliated against faculty and graduate students accused of communist associations.²⁸

The passage of time has proven those efforts to invade the personal, extracurricular lives of students unjust and antithetical to the liberal tradition. Time will likely clarify that it is wrong still.

Although the example of Harvard illustrates the new threat to freedom of association, similar attempts to crack down on or burden single-gender organizations have taken place on public campuses. At California Polytechnic State University, pictures of members of two fraternities were leaked that community members found to be offensive, leading to the suspension of all activities in the Greek system. College

²⁴ Katie O’Dair, “Harvard’s Blacklist Policy,” *Harvard Crimson*, H (2018), <https://osl.fas.harvard.edu/deanodairpolicyletter>.

²⁵ C. Ramsey Fahs, “Harvard’s Blacklist Policy,” *Harvard Crimson*, H (2018), C.

administrations at Louisiana State University and Florida State University suspended the free assembly rights of members of all Greek students after alcohol-related deaths at individual fraternities.

At a public institution of higher education, it is indisputable that participation in a single-gender club, sorority, or a cappella group on one's own time is a protected exercise of one's constitutional right to choose one's associations. At a public institution, it would be unconstitutional for an administration to close opportunities and restrict access to educational benefits to a student on account of their decision to join a constitutionally protected association.

Congress should expressly prohibit public institutions from restricting access to opportunities and benefits it offers to only those students who reject private associations the institution disfavors. Congress should also consider extending this protection to students enrolled at private institutions that accept federal funds. FIRE has attached model language here for your consideration. (See Appendix A.)

A great deal of the work to stop campus censorship will necessarily have to occur in the courts and on the campuses themselves. Indeed, in 2014, FIRE launched its Stand Up For Speech Litigation Project to bolster the core of our efforts, which focus on direct advocacy at the collegiate level to reflect that reality. Lawmakers, however, are essential to solving this problem too. Legislators and government officials have used a variety of strategies to promote free speech on college campus. This section will discuss those efforts.

Leaders on both sides of the aisle have used their voices to speak out against campus censorship. In an interview with ABC News, former President Barack Obama gave a full-throated rebuttal to those on campus who would use censorship to silence their political adversaries:

[We] have these values of free speech. And it's not free speech in the abstract. The purpose of that kind of free speech is to make sure that we are forced to use argument and reason and words in making our democracy work. And, you know, you don't have to be fearful of somebody spouting bad ideas. Just out-argue them. Beat 'em. Make the case as to why they're wrong. Win over adherents. That's how things work in a democracy."²⁹

²⁹ Press Release, FIRE, President Obama: Student Protests Should Embrace Free Speech (Nov. 16, 2015), <https://www.thefire.org/president-obama-student-protests-should-embrace-free-speech/>.

On Constitution Day earlier this month, the Department of Justice and the Education Department each held events focusing on free speech on campus. At both events, the respective secretaries of those departments emphasized the critical importance of safeguarding free speech on college campuses for students across the political spectrum.

Senators Mitch McConnell and Bernie Sanders both publicly condemned campus censorship.³⁰ Representative Eleanor Holmes Norton made campus free speech a central theme of her 2017 commencement address to Georgetown University Law Center graduates, when she argued:

The law has been fundamental to change in our country, especially the First Amendment. Yet there is recent disquieting evidence on college campuses of intolerance of speech at odds with the progressive views members of your generation and I share.³¹

Speaking during an Oversight Committee joint subcommittee hearing on July 27, 2017, Chairwoman Foxx reflected on the dangers of campus censorship too:

As we all agree, free speech is fundamental to a free society. It's astonishing to me that so many young adults today are willing to throw those constitutionally protected rights out the window just because they are on a college campus and may disagree with the content of what is being said.³²

Congressional hearings like this one play an important role too, not only in educating the members of these committees on the threats to free speech that are persistent on our campuses, but also as an opportunity to shine light on the issue and explore solutions.

As Justice Louis Brandeis eloquently stated, "Sunlight is said to be the best of disinfectants." With congressional hearings like this one, institutions that are censoring their students and faculty have been put on notice that Congress is watching, and that it does not like what it sees.

³⁰ Tyler Coward,

, FIRE (June 26, 2017), <https://www.thefire.org/senators-mcconnell-sanders-talk-about-protecting-free-speech-on-campus-mcconnell-mentions-fire-on-senate-floor/>.

³¹ Joe Cohn, , FIRE (May 23, 2018), <https://www.thefire.org/rep-holmes-norton-latest-policymaker-to-highlight-importance-of-campus-free-speech/>.

³² Joe Cohn,

Shortly after the House Judiciary Committee's Subcommittee on the Constitution and Civil Justice held a June 2, 2015 hearing on "First Amendment Protections on Public College and University Campuses," Judiciary Committee Chairman Bob Goodlatte applied additional pressure on the 161 public institutions that at that time maintained red light speech codes. (See Appendix B.)

In his letter, Chairman Goodlatte wrote, "In FIRE's Spotlight on Speech Codes 2015, your institution received a 'red light' rating. . . . We write to ask what steps your institution plans to take to promote free and open expression on its campus(es), including any steps toward bringing your speech policies in accordance with the First Amendment." This letter, and its follow up to the 33 public institutions that didn't respond to the original, were key factors in a dramatic decrease in red light policies. (See Appendix C). In the year that followed the letter, the percentage of public institutions maintaining red light policies dropped from 45.8% to 33.9%.³³

Since 2013, 11 states have passed legislation to promote free speech on campus. Six states, including Virginia, Missouri, Arizona, Colorado, Utah, and most recently Florida have passed bills aimed exclusively at prohibitina 011E0003}TJ1cie434(as)7()-2(s)-4(t)-3(tah)6(,)-4(a -3(t6(

speech on campus, please feel free to contact me at (215) 717-3473 or at joe@thefire.org.

Respectfully submitted,



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w/ appendices