FIRST AMENDMENT PROTECTIONS ON PUBLIC COLLEGE AND UNIVERSITY CAMPUSES

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION
AND CIVIL JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

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JUNE 2, 2015

FIRST AMENDMENT PROTECTIONS ON PUBLIC COLLEGE AND UNIVERSITY CAMPUSES

TUESDAY, JUNE 2, 2015

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Subcommittee met, pursuant to call, at 2:23 p.m., in room 2141, Rayburn Office Building, the Honorable Trent Franks (Chairman of the Subcommittee) presiding.

Present: Representatives Franks, Goodlatte, Gohmert, Cohen, and Conyers.

Staff Present: (Majority) John Coleman, Counsel; Tricia White, Clerk; (Minority) James J. Park, Minority Counsel; and Veronica Eligan, Professional Staff Member.

Mr. FRANKS. We will now turn to our next order of business, our hearing on First Amendment Protections on Public Colleges and University Campuses. We want to welcome all the witnesses here and all the audience here today.

June is graduation season for many colleges and universities across America. It is a time of reflection, as these graduates take what they have experienced in college and go off to pursue their own happiness in a world that consists of people of different views, perspectives, philosophies, and beliefs. So it is timely that today's hearing is about protecting students' constitutional rights on public colleges and university campuses, particularly the rights to free expression and association.

The First Amendment of the Constitution prohibits the government, including governmental entities such as public colleges and universities, from encroaching on free speech and the free exercise of religion. The First Amendment of the United States of America clearly states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble."

Yet regarding free speech, the American Association of Colleges and Universities found in a 2010 survey of 24,000 college students that only 36 percent strongly agreed with the following statement that "it is safe to hold unpopular views on campus." Of 9,000 campus professionals, only 19 percent agreed with the same statement.

As students progress toward their senior year, they become even more doubtful that it is safe to hold unpopular views on campuses.

We should all let that sink in for a moment. According to the American Association of College and University's own survey, an overwhelming majority of students and faculty were not confident that it was safe to hold unpopular views on campus.

Regarding religious liberty, one of our witnesses today, Greg Lukianoff, in his book, "Unlearning Liberty: Campus Censorship and the End of American Debates," writes, "While it sometimes seems that there is no rhyme or reason to what can get a student group in trouble on campus, certain trends emerge over time. In particular, the fundamental misunderstanding of tolerance and freedom of association is widely applied to evangelical Christian groups. If you told me 12 years ago that I, a liberal atheist, would devote a sizable portion of my career to Christian groups, I might have been surprised. But almost from my first day at the Foundation for Individual Rights in Education, I was shocked to realize how badly Christian groups are often treated."

Indeed, a survey conducted by the Institute for Jewish and Community Research showed that the only group that a majority of the faculty were comfortable admitting that evoked strong negative feelings in them were evangelical Christians.

According to a 2015 report published by the Foundation for Individual Rights in Education, 55 percent of the 437 colleges and universities they examined "maintain policies that seriously infringe upon the free speech rights of students"—55 percent. That is a pretty shocking number.

With very few and very narrow exceptions, the Supreme Court has declared that the government cannot regulate speech based on its content. The Court has stated that, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.

This core principle is neither conservative nor liberal. Indeed, it is to the mutual benefit of all to oppose the silencing of others. As Thomas Paine stated in his "Dissertations on the First Principles of Government," "He that would make his own liberty secure must guard even his enemy from opposition, for if he violates this duty, he establishes a precedent that will reach to himself."

Thomas Jefferson stated it another way, but even more directly when he said, "I have sworn upon the altar of God eternal hostility against every form of tyranny over the mind of man."

A Nation of free people must be vigilant of government encroachment on unpopular thought. We must be particularly vigilant to protect the freedom of religious exercise since it is a cornerstone of all other freedoms.

Today in America, we face the very real danger of allowing students in our public colleges and universities to graduate without experiencing what it is that makes us truly free as Americans. Whether on college campuses or anywhere else across this Nation, it is our undeniable and sworn duty to guard those sacred First Amendment rights contained in our Constitution for our young and for all Americans, and to make sure that we pass them along intact for all American generations to come.

Now before I yield to the Ranking Member for an opening statement, I think that we are ready for the vote.

[Break.]

Mr. FRANKS. So now before I yield to the Ranking Member for an opposing statement, I would first like to show a short "Fox and Friends" interview with student Bianca Travis, who is the president of a Christian student group that this year lost its official status at California State University, because the group requires student leaders to hold the same religious beliefs as the organization.

[Video presentation.]

Mr. FRANKS. And I would first thank the Ranking Member for his indulgence.

And I would now yield to Mr. Cohen from Tennessee for his opening statement.

Mr. COHEN. Thank you, Mr. Chair. Normally, it is only when I am at the doctor's office that I have to watch Fox, but it is free speech.

And I want to commend you for having two ACLU-connected people as witnesses on the Republican side. This is, indeed, a first. Two that they have chosen, but we can say three and that makes it a better story.

I have been a long supporter of the First Amendment and the ACLU, the First Amendment right to free speech, as well as its other rights.

I sponsored the SPEECH Act, which became law. Chairman Franks cosponsored it, and President Obama signed it into law. It required American courts to deny recognition or enforcement of foreign defamation judgments that did not comport with our First Amendment speech protections.

It would be difficult for anybody to think back upon the 1960's and 1970's when so much happened in our country that was revolutionary concerning Vietnam and civil rights where free speech wasn't a part of the discourse by college and university students. Freedom to speak was vital to the anti-Vietnam War, pro-civil rights, other social justice movements at the time. And those sentiments were at the time unpopular or offensive to some listeners, but they led to a change for the better in our society.

I share the basic commitment that all of our witnesses have to open inquiry and the free and vigorous exchange of ideas that is the hallmark of higher education. And I share the skepticism that any First Amendment defender feels toward government attempts to limit speech on the basis of its offensiveness.

It is not a coincidence that most of the Supreme Court's decisions governing the First Amendment's scope today concern speech or expressive conduct that would be offensive to many listeners. Such unpopular speech is exactly the kind the First Amendment is meant to protect, and there is no surprise that the court has protected things like flag-burning, insensitive protests at military funerals, and clothing with expletives written on them worn in open court.

At the same time, I am sympathetic to the concerns animating the promulgation of antiharassment policies at universities. These concerns are not hypothetical, rather real harassment on the basis

of race, gender, religion, ethnicity, and sexual orientation is a problem.

I have read about and heard about problems at UCLA. Ms. Beyda wanted to be on a college group and the board didn't vote her on because she was Jewish, assuming that she wasn't going to vote like they wanted her to vote on divestment of investments with Israel. This was difficult. You wouldn't think this would happen at UCLA, but it did.

In fact, anti-Semitism is prevalent on many campuses, and maybe people don't even understand when they are being anti-Semitic.

According to the National Demographic Survey of American Jewish College Students conducted by researchers at Trinity College, 54 percent of Jewish students reported experiencing anti-Semitism on campus in the first 6 months of the 2013-2014 school year—54 percent, anti-Semitism, in the first 6 months.

This follows the 2013 Pew Research Center report that found 22 percent of younger Jewish Americans reported being called an offensive name based on their Jewish identity.

According to the American Association of University Women, 80 percent of female college students report having been sexually harassed at their school by a peer, and 25 percent of men admitted targeting others with homophobic slurs. According to another study, 20 percent of the college students surveyed said that harassment caused the inability to concentrate in class, and 23 percent said it prevented them from even attending class.

Part of the problem is the lack of student body diversity. According to a study in the Chronicle of Higher Education, the less diverse the student body, the higher the percentage of minority students who report experiencing discrimination, with more than 60 percent reporting such discrimination at the least diverse schools. Great support for public education.

Notwithstanding the existence of civil rights laws that are designed to address harassment on the basis of protected characteristics, harassment interferes with the student right to a safe learning environment and remains a very real concern. Too often, the need for a vigorous defense of free speech values results in dismissing or minimizing some legitimate concerns motivating attempts to regulate verbal conduct.

This is not to justify in any way overly broad, vague, or subjective policies that sweep in protected speech in the name of addressing harassment, but to challenge for the First Amendment defenders is to ensure that pure harassment is deterred and punished while at the same time staying true to our constitutional values.

So it is a very difficult subject. Mr. Chair, I concur with some of the statements made in the broadcast by the student. It would be difficult for somebody who doesn't believe to be the leader of that group. But times, they are a-changin'. And, indeed, we can see, possibly, where a man could lead a sorority, but that is another issue.

I yield back the balance of my time.

Mr. FRANKS. There would probably be plenty of volunteers.

With that, I thank the gentleman, and I would yield to the Chairman of the Judiciary Committee, Mr. Goodlatte from Virginia.

Mr. GOODLATTE. Thank you, Mr. Chairman. I want to welcome all of today's witnesses.

According to the Department of Education, about 21 million students were expected to attend a college or university in 2014. And according to the U.S. Bureau of Labor Statistics, about 70 percent of high school graduates in 2014 were enrolled in colleges or universities.

As more and more young people go to college, they will be exposed to and shaped by campus policies, including policies regulating speech. But what effect will that have?

Research shows that young adults are often less tolerant of free speech than older generations. The results of overly restrictive campus speech policies are noted with increasing frequency in the press.

On September 17, 2013, for example, a student at a community college in California was barred by administrators from distributing copies of the United States Constitution because the student didn't seek prior permission. He was also told that such activity must be performed in a narrowly designated free speech zone.

Administrators at a public university in Alabama, according to a complaint filed in Federal court by Alliance Defending Freedom, denied a student group request in 2013 and 2014 to set up a pro-life display in an area commonly used by other groups for expressive activities. Instead, according to the complaint, university administrators insisted they congregate in a narrowly designated free speech zone because the group advocates for a position that involves political and social controversy.

A student in Texas recently filed a suit against her public college because she and a classmate were displaying signs supporting the Second Amendment when they were approached by a campus official and three police officers and told they couldn't hold the signs again in the public area without special permission. The official had apparently received complaints that their signs were offensive.

There are many, many more examples. And the huge volume of personal accounts coming from our Nation's public colleges and universities is disturbing. The Foundation for Individual Rights in Education alone lists on its Web site nearly 390 reported cases of speech violation. Given that more than half of American colleges and universities maintain what appear to be unconstitutional speech policies, no doubt many, many more cases of free speech infringement have gone unreported.

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

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

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

James Madison wrote of the inherent connection between free speech learning and liberty writing, and I quote, "What spectacle can be more edifying or more seasonable, than that of Liberty and Learning, each leaning on the other for their mutual and surest support. . . . A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy, or perhaps both. . . . And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."

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

This is an important topic about one of our fundamental freedoms as Americans. I thank Chairman Franks for holding this hearing, and I thank our witnesses for coming today. I look forward to your testimony.

Mr. FRANKS. And I thank the Chairman.

And I would know yield to the Ranking Member of the Committee, Mr. Conyers from Michigan.

Mr. CONYERS. Thank you, Mr. Chairman.

I, too, welcome the witnesses and appreciate the importance of this hearing entitled "First Amendment Protections on Public College and University Campuses."

Today's hearing gives us an opportunity to consider the important issue of how best to ensure the protection of fundamental constitutional rights for college and university students while also protecting them from hateful and demeaning harassment.

To begin with, harassment and intimidation based on race, sex, religion, sexual orientation remains a serious problem on campuses today. Hostility against racial and religious minorities, women, lesbian, gay, and transgender students remains all too common, despite decades of efforts aimed at combating discrimination.

Just a few months ago, a video surfaced of a group of White fraternity members at the University of Oklahoma singing a horribly racist song, one that repeatedly used the "n" word and referred to hanging African-Americans from a tree.

To understand the kind of climate on campuses that many minority students face and that university administrators must address, according to the American Association of University Women, 62 percent of female college students report having been sexually harassed at their university, and 80 percent of that harassment was committed by a peer. The same study also revealed that 51 percent of male college students admitted to sexually harassing someone in college, with 22 percent acknowledging they engaged in that kind of harassment often.

According to a study by the Chronicle of Higher Education, 25 percent of lesbian and gay students report having been harassed because of their sexual orientation, as well as a third of all transgendered students.

Without question, universities must ensure equal educational opportunities for their students, and such opportunities are effectively denied in a hostile and intimidating environment. While addressing discrimination, public universities must also ensure com-

pliance with the Constitution's guarantee of freedom of speech, which is one of our Nation's bedrock values.

The right to free speech undergirds our democracy and is especially critical to supporting another key role of the university, which is to foster open inquiry and the free and vigorous exchange of ideas. But restrictions on speech that seek to prohibit offensive speech can also silence First Amendment protected speech, as there is no First Amendment exception for offensive speech.

Indeed, the First Amendment is supposed to protect speech that most of us find offensive, because it is precisely that kind of unpopular speech that most needs protection. And we protect unpopular speech to ensure that all speech is protected and that our political debates remain robust and open.

It is not enough, however, to simply say that because the Constitution makes it hard for public colleges and universities to limit speech that they should do nothing about discrimination and harassment. Wherever there is a hate speech incident on campus, administrators and faculty have a right and duty to speak out against such bigotry. Longer term, there ought to be enhanced efforts to increase diversity in the student body and faculty at public universities.

Finally, there should be ongoing education for university students and faculty on the evils of bigotry against minorities, women, and others who face harassment and discrimination based on protected characteristics.

While I do not pretend that we can fully resolve the longstanding debate over hate speech and the First Amendment on public campuses during the course of this hearing, I hope we can at least have a productive discussion about the proper balance between protecting free speech and ensuring equal education opportunity for all students.

Accordingly, I very much look forward to hearing the testimony from our witnesses. Thank you, Mr. Chairman.

Mr. FRANKS. And I thank the gentleman.

Without objection, other Members' opening statements will be made part of the record.

So let me now introduce our witnesses.

Our first witness is Greg Lukianoff, president and CEO of Foundation for Individual Rights in Education. He is the author of two books, "Unlearning Liberty: Campus Censorship and the End of the American Debate" and "Freedom From Speech."

Our second witness is Kim Colby, senior counsel for the Christian Legal Society's Center for Law and Religious Freedom, where she worked for over 30 years to protect student rights to meet for religious speech on college campuses. Ms. Colby has represented religious groups in several appellate cases, including two cases heard by the United States Supreme Court.

Our third witness is Jamie Raskin, a state senator in Maryland and a professor of constitutional law at American University's Washington College of Law. He also taught at Yale Law School and authored several books, including "We the Students: Supreme Court Cases For and About Students."

Our fourth and final witness today is Wendy Kaminer, a lawyer, social critic, and freelance journalist. She is an adviser to the Foun-

dation for Individual Rights in Education and a member of the Massachusetts State Advisory Committee to the U.S. Civil Rights Commission.

We welcome you all.

Each of the witness's written statements will be entered into the record in its entirety, so I would ask each of you to summarize his or her testimony in 5 minutes or less. And to help you stay within that time, there is a timing light in front of you. The light will switch from green to yellow, indicating that you have 1 minute to conclude your testimony. When the light turns red, it indicates that the witness's 5 minutes have expired.

Before I recognize the witness, it is the tradition of the Subcommittee that they be sworn, so if you would please stand to be sworn?

Do you solemnly swear that the testimony that you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

Please be seated.

Let the record reflect that the witnesses answered in the affirmative.

I will now recognize our first witnesses, Mr. Lukianoff,

Sir, please turn that microphone on, if you have not already done so.

TESTIMONY OF GREG LUKIANOFF, PRESIDENT AND CHIEF EXECUTIVE OFFICER, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION

Mr. LUKIANOFF. I have a PowerPoint.

Mr. FRANKS. Do we want to start the PowerPoint first? Okay.

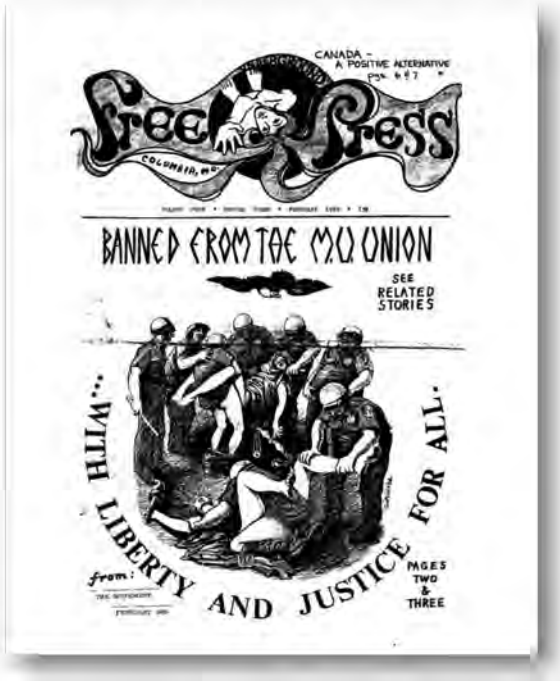
[The PowerPoint presentation follows:]

Free Speech on Campus

Greg Lukianoff, President and CEO
Foundation for Individual Rights in Education

FIRE
Foundation for Individual
Rights in Education

Papish v. Board of Curators of the University of Missouri, 410 U.S. 667 (1973)



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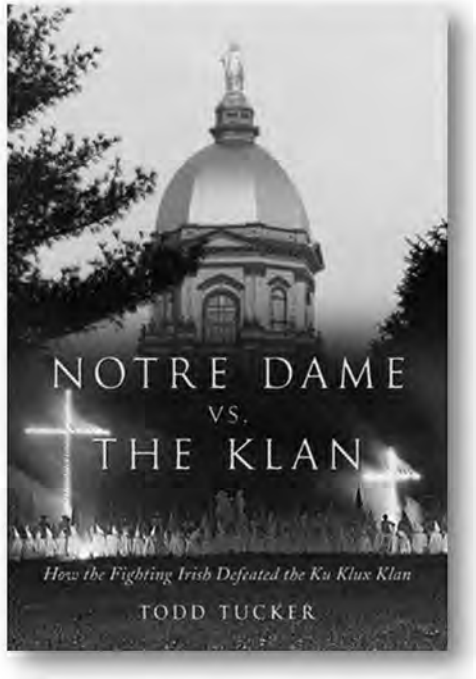
Indiana University – Purdue University Indianapolis (IUPUI)



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2014 *Spotlight* Speech Code Ratings

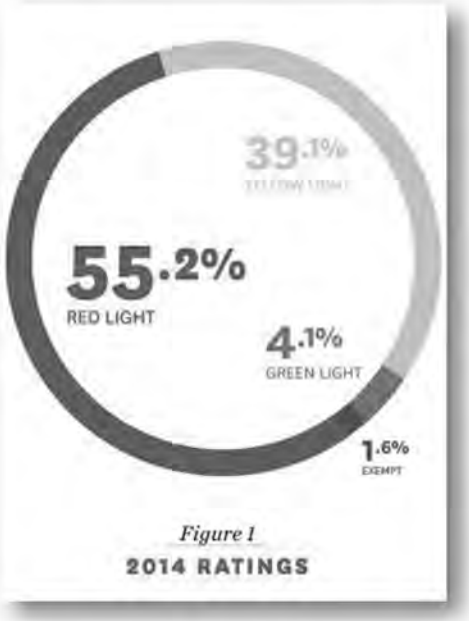

Figure 1
2014 RATINGS

FIRE
Foundation for Individual Rights in Education

Blinn College Free Speech Zone

FIRE
Foundation for Individual Rights in Education

BLINN COLLEGE

Texas Tech University Free Speech Zone

FIRE
Foundation for Individual Rights in Education

TEXAS TECH
UNIVERSITY

Example of harassment speech code

"The following are examples of improper use of the Computer System: …

Harassment: Harassing others by sending **annoying**, **abusive**, **profane**, threatening, defamatory or **offensive** messages is prohibited. Some examples include: obscene, threatening, or repeated unnecessary messages; **sexually, ethnically, racially, or religiously offensive** messages; continuing to send messages after a request to stop; and procedures that hinder a computer session."

- Syracuse University, *Computing and Electronic Communications Policy* (current)

FIRE
Foundation for Individual Rights in Education

Red Light Policy

Examples of harassment speech codes

- *For example, under Colorado State University – Pueblo's Code of Student Conduct, "harassment" includes any conduct that **subjectively inflicts "emotional harm** upon any member of the University community **through any means**, including but not limited to **e-mail, social media**, and other technological forms of communication."*
- *At Lehigh University, harassment "occurs when a member of the Lehigh University community or a guest is subjected to **unwelcome statements, jokes, gestures, pictures**, touching, or other conducts that **offend, demean**, harass, or intimidate."*

The "Blueprint"

- May 9, 2013: The Departments of Justice and Education issued a findings letter announcing a resolution agreement with the University of Montana.
- "..**a blueprint for colleges and universities throughout the country** to protect students from sexual harassment and assault."
- Defines sexual harassment as "**any unwelcome conduct of a sexual nature**."
- Also "**[w]hether conduct is objectively offensive … is not the standard to determine whether conduct was 'unwelcome conduct of a sexual nature'** and therefore constitutes 'sexual harassment.'"

FIRE
Foundation for Individual Rights in Education

OCR
Office for Civil Rights

Legislative Solutions for Securing First Amendment Rights on Campus

1. **Campus Anti-Harassment Act** (*Davis v. Monroe County Board of Education* legislation)
2. **Campus Free Expression Act** (CAFE Act—anti-free speech zone legislation)
3. **Academic Freedom and Whistleblower Protection Act** (Anti-*Garcetti v. Ceballos* legislation)

Thank you!


greg@thefire.org


TheFIRE.org

Mr. LUKIANOFF. My name is Greg Lukianoff. I am a First Amendment specialized attorney and president and CEO of the Foundation for Individual Rights in Education, also known as FIRE. I am here to testify about the serious threats to free speech and academic freedom on campus.

Since I generally don't issue trigger warnings, I will go ahead and show the first slide. I show this not to shock you, but to establish that the case law protecting freedom of speech on campus is extraordinarily strong. This is a cartoon depicting police officers raping the Statue of Liberty that the Supreme Court found was clearly protected speech on a public college campus. Subsequent case law has overturned virtually any attempt in higher education to ban or limit speech on the basis of its offensiveness.

Nevertheless, here is a classic example of the kind of cases I deal with. In 2007, a student was found guilty of racial harassment without so much as a hearing for publicly reading this book. The cover of the book, which ironically celebrates the defeat of the Klan, was viewed as offensive by a university employee. This incident took place at a public university, but it nonetheless took the combined efforts of FIRE, the ACLU, and the Wall Street Journal, to get the university to back down.

And I deal with cases like this on a regular basis. But despite the strength of case law, according to FIRE's extensive research, the most extensive ever conducted into campus speech codes, we have found that 55 percent of them maintain codes that severely depart from First Amendment standards.

Less than 2 weeks ago, this free speech zone at Blinn College in Texas—look at that—we filed a lawsuit against them. Blinn is a public college bound by the First Amendment. But when a student wanted to protest in favor of her Second Amendment rights, she was told that she had to limit her free speech activities to this tiny zone.

FIRE's research shows that nearly one out of every six universities maintain such ludicrous free speech zones, and this is despite the fact that we have been fighting these quarantines for almost our entire 15-year existence.

For example, here you will see the infamous Texas Tech free speech gazebo where, back in 2003 anti-Iraq war students were told they had to limit their protests. Though these zones fail in court and in the court of public opinion, FIRE has had to file 10 lawsuits in the past 1.5 years, mostly dealing with these zones.

And then there are the harassment-based speech codes. Here is an example from Syracuse University, where they flat out ban offensive speech.

Anyone with passing knowledge of the First Amendment knows that the government cannot ban speech merely because it is offensive. Nonetheless, campuses claim that Federal law requires them to ban such speech.

Here are some additional examples of harassment-based speech codes.

And while the Department of Education had been helpful in the past by letting universities know that Federal anti-discrimination law cannot be used to justify passing campus speech codes, unfor-

tunately, in 2013, the Department of Education issued a "blueprint" to every university in the country muddying the waters.

In a settlement with the University of Montana, they defined harassment as merely unwelcome speech and explicitly rejected the reasonable person standard.

While the Department of Education backed away somewhat from this being a national blueprint in a letter sent to me, they must clarify to every university in the country that Federal harassment law cannot be used as a justification for unconstitutional speech codes.

We propose Congress take three actions on three fronts.

First, pass our campus anti-harassment act, which simply asks the Federal Government to provide a clear definition of actionable harassment based on the Supreme Court's holding in *Davis v. Monroe County*, a 1999 case dealing with peer-on-peer harassment. This single act would eliminate an entire category of the most common, tenacious and unconstitutional speech codes in a single stroke.

Congress should pass a law declaring open areas on public campuses as traditional public forums, which would end absurd and tiny free speech zones while still allowing universities to apply common sense time, place, and manner restrictions.

And lastly, Congress should pass legislation making it clear that professors' free speech rights are not limited by the *Garcetti v. Ceballos* Supreme Court decision.

I explain all of these in much greater detail in my written testimony.

Across the political spectrum, I believe we all must agree that free speech belongs on our college campuses. Together, we can make sure that universities remain a true marketplace of ideas. Thank you.

[The prepared statement of Mr. Lukianoff follows:]*

***Note:** Supplemental material submitted with this statement is not printed in this hearing record but is on file with the Subcommittee and the statement, in its entirety, can be accessed at:

http://docs.house.gov/meetings/JU/JU10/20150602/103548/HHRG-114-JU10-Wstate-LukianoffG-20150602.pdf.

WRITTEN TESTIMONY of GREG LUKIANOFF
President and Chief Executive Officer,
Foundation for Individual Rights in Education

Before 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.

June 2, 2015

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

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

RE: June 2, 2015 Hearing on First Amendment Protections on Public College and University Campuses

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

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.

Since FIRE's founding in 1999, our efforts have won 217 victories on behalf of students and faculty members whose rights were unjustly denied, defeated 178 repressive speech codes thereby advancing freedom of expression for more than 3.2 million students, educated millions of Americans about the problem of censorship on campus, and spurred reforms across the entire California, Hawaii, and Wisconsin state university systems. Every day, FIRE receives pleas for help from students and professors who have found themselves victims of administrative censorship or unjust punishments simply for speaking their minds. With their fundamental rights denied, they come to FIRE for help.

I write you today to provide additional testimony to supplement the testimony I will be giving at the "First Amendment Protections on Public College and University Campuses" hearing on June 2, 2015.

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

INTRODUCTION

The Supreme Court of the United States has identified America's colleges and universities as "vital centers for the Nation's intellectual life,"[1] but the reality today is that many of these institutions severely restrict free speech and open debate.

Speech codes—policies prohibiting student and faculty speech that would, outside the bounds of campus, be protected by the First Amendment—have repeatedly been struck down by federal and state courts. Yet they persist, even in the very jurisdictions where they have been ruled unconstitutional. The majority of American colleges and universities maintain speech codes.[2]

The First Amendment prohibits the government—including governmental entities such as state universities—from restricting freedom of speech. Generally, if a state law would be declared unconstitutional for violating the First Amendment, a similar regulation at a state college or university is likewise unconstitutional. Despite the overwhelming weight of legal authority against college speech codes,[3] the majority

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[1] *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 836 (1995).

[2] FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, SPOTLIGHT ON SPEECH CODES 2014: THE STATE OF FREE SPEECH ON OUR NATION'S CAMPUSES, *available at* http://issuu.com/thefireorg/docs/2014_speech_code_report_final (last visited May 28, 2015).

[3] *McCauley v. University of the Virgin Islands*, 618 F.3d 232 (3d Cir. 2010); *DeJohn v. Temple University*, 537 F.3d 301 (3d Cir. 2008); *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995); *University of Cincinnati Chapter of Young Americans for Liberty v. Williams*, 2012 U.S. Dist. LEXIS 80967 (S.D. Ohio Jun. 12, 2012); *Smith v. Tarrant County College District*, 694 F. Supp. 2d 610 (N.D. Tex. 2010); *College Republicans at San Francisco State University v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004); *Bair v. Shippensburg University*, 280 F. Supp. 2d 357 (M.D. Pa. 2003); *Booher v. Northern Kentucky University Board of Regents*, No. 2:96-CV-135, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 21, 1998); *Corry v. Leland Stanford Junior University*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995) (slip op.); *UWM Post, Inc. v. Board of Regents of the University of Wisconsin*, 774 F. Supp. 1163 (E.D. Wisc. 1991); *Doe v. University of Michigan*, 721 F.Supp. 852 (E.D. Mich. 1989). In addition, several institutions have voluntarily rescinded their speech codes as part of settlement agreements. *See, e.g.*, Press Release, Foundation for Individual Rights in Education, *Victory: Modesto Junior College Settles Student's First Amendment Lawsuit*, Feb. 25, 2014, *available at* http://www.thefire.org/victory-modesto-junior-college-settles-students-first-amendment-lawsuit; Press Release, Foundation for Individual Rights in Education, *U. of Hawaii Settles Lawsuit Over Handing Out Constitutions*, December 2, 2014, *available at* https://www.thefire.org/u-hawaii-settles-lawsuit-handing-constitutions; Press Release, Foundation for Individual Rights in Education, *Second Victory in 24 Hours: College that Suppressed Anti-NSA Petition Settles Lawsuit*, December 3, 2014, *available at* https://www.thefire.org/second-victory-24-hours-college-suppressed-anti-nsa-petition-settles-lawsuit; Press Release, Foundation for Individual Rights in Education, *Students, FIRE Go Four-for-Four as Ohio U. Settles Speech Code Lawsuit*, February 2, 2015 *available at* https://www.thefire.org/students-fire-go-four-four-ohio-u-settles-speech-code-lawsuit; Press Release, Foundation for Individual Rights in Education, *Western Michigan U. Settles Boots Riley 'Speech Tax' Lawsuit, 'Stand Up For Speech' Scores Fifth Victory*, May 4, 2015, *available at* https://www.thefire.org/western-michigan-u-settles-boots-riley-speech-tax-lawsuit-stand-up-for-speech-scores-fifth-victory (FIRE website last visited May 28, 2015).

of institutions—including some of those that have been successfully sued over speech restrictions—still maintain and enforce unconstitutional policies.[4]

Speech codes are almost never identified as such by the many colleges and universities that impose and enforce them. Instead, speech codes come in many forms, often with innocuous-sounding titles: "free speech zone" policies that limit student or faculty expression to small, remote areas of campus; email policies that ban "offensive" communication; civility policies that mandate politeness on pain of punishment; and—most commonly—overbroad, vague harassment policies that rely on subjective, amorphous definitions and thus restrict vast swaths of protected speech.

The effect of decades of speech codes in higher education is now sadly apparent in the attitudes of today's students towards speech with which they disagree. Increasingly, students are seizing the initiative from administrators by leading their own campaigns for censorship. Having been taught to fear freedom *of* speech, too many of today's students instead seek freedom *from* speech.[5] This troubling, illiberal phenomenon has many manifestations: student-led campaigns to "disinvite" outside speakers who hold minority, contrarian, unpopular views;[6] demands that literature dealing with mature content be accompanied by "trigger warnings";[7] and the demand for colleges to be "safe places" free from emotional harm.[8]

Faculty free speech rights are also at risk. FIRE frequently defends professors who have been threatened with disciplinary action or punished for expressing unpopular views. The speech rights of faculty at public institutions have been particularly imperiled by confusion over the applicability, in the collegiate setting, of the Supreme Court's decision in *Garcetti v. Ceballos*—where the Court held that speech by public employees made pursuant to their official duties receives no First

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[4] See FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, *supra* note 2. FIRE surveyed publicly available policies at 333 four-year public institutions and at 104 of the nation's largest and/or most prestigious private institutions—437 institutions in total. Our research focuses in particular on public universities because, as explained in detail below, public universities are legally bound to protect students' right to free speech. Note that several universities that have been the targets of successful speech code lawsuits—such as the University of Michigan and the University of Wisconsin—have revised the unconstitutional policies challenged in court but still maintain other, equally unconstitutional policies.

[5] I explore the shifting attitudes of students towards opposing viewpoints in detail in a recent book. *See* GREG LUKIANOFF, FREEDOM FROM SPEECH (2014).

[6] *See, e.g.*, Bill Briggs, *Pomp and Circumstances*, NBC NEWS (May 2, 2014), http://www.nbcnews.com/news/education/pomp-circumstances-booted-speakers-raise-academic-concerns-n90141.

[7] *See, e.g.*, Colleen Flaherty, *Law School Trigger Warnings?*, INSIDE HIGHER ED (Dec. 17, 2014), https://www.insidehighered.com/news/2014/12/17/harvard-law-professor-says-requests-trigger-warnings-limit-education-about-rape-law.

[8] *See, e.g.*, Judith Shulevitz, *In College and Hiding From Scary Ideas*, N.Y. TIMES (March 21, 2015), http://www.nytimes.com/2015/03/22/opinion/sunday/judith-shulevitz-hiding-from-scary-ideas.html?_r=0.

Amendment protection. With some appellate courts finding an academic freedom exception to *Garcetti* and others refusing to do so, faculty members are increasingly uncertain as to whether they may face retaliation for speech made in the context of their roles as public academics. This threat to academic freedom affects not only faculty members, but also students and American society more generally.

Although free speech on campus is imperiled in all of the ways described above, this testimony will focus on the three areas that Congress is uniquely positioned to help: (1) overly broad harassment policies, (2) impermissibly restrictive "free speech zone" policies, and (3) threats to academic freedom. If Congress were to address these three areas, college campuses might again begin to honor and fulfill their role as "the marketplace of ideas."

I. **Harassment Policies**

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.

Actual harassment 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 *Davis v. Monroe County Board of Education*, 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.

The *Davis* definition's utility in the educational setting is widely acknowledged. For example, it has been approvingly cited by groups including the American Civil Liberties Union's Women's Rights Project,[9] the National Center for Higher

[9] AMERICAN CIVIL LIBERTIES UNION, FACT SHEET: TITLE IX AND SEXUAL ASSAULT—KNOW YOUR RIGHTS AND YOUR COLLEGE'S RESPONSIBILITIES, Oct. 2, 2008, *available at* https://www.aclu.org/files/pdfs/womensrights/titleixandsexualassaultknowyourrightsandyourcollege%27sresponsibilities.pdf.

Education Risk Management (NCHERM),[10] the California Advisory Committee to the United States Commission on Civil Rights,[11] the American Booksellers Foundation for Free Expression,[12] the Woodhull Sexual Freedom Alliance,[13] and the National Coalition Against Censorship.[14]

Unfortunately, institutions often inappropriately cite obligations under federal anti-discrimination laws to investigate and punish protected speech that is unequivocally not harassment. For example, just last Friday, Northwestern University professor Laura Kipnis published a shocking essay in *The Chronicle of Higher Education* detailing her university's heavy-handed investigation of two Title IX complaints filed against her by students offended by an opinion piece she had written months earlier.[15] The complaints centered on an article and a single "tweet"— neither of which named students—authored by Kipnis about a sexual harassment charge concerning a Northwestern professor that had already received extensive national media coverage. Despite the fact that *none* of the material in question even *approaches* sexual harassment or retaliation, Kipnis has been subjected to an extensive investigation in which she has been forced to meet with attorneys retained by the university to investigate the allegations, denied the right to have her own attorney present, told not to discuss her case, and given substantive notice of the charges only after repeated complaints about being left in the dark.

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 IX.[16] The two articles at issue were an April Fool's Day article

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[10] Saundra K. Schuster, *Sexual Harassment and the First Amendment: Will Your Policies Hold Up In Court?*, LEADERSHIP EXCHANGE, Winter 2011, at 34, https://www.ncherm.org/documents/Winter2011-PrintPages.pdf.

[11] CALIFORNIA ADVISORY COMMITTEE TO THE UNITED STATES COMMISSION ON CIVIL RIGHTS, EQUAL EDUCATIONAL OPPORTUNITY AND FREE SPEECH ON PUBLIC COLLEGE AND UNIVERSITY CAMPUSES IN CALIFORNIA: A REPORT OF THE CALIFORNIA ADVISORY COMMITTEE TO THE UNITED STATES COMMISSION ON CIVIL RIGHTS, Oct. 2012, http://www.thefire.org/equal-educational-opportunity-and-free-speech-on-public-college-and-university-campuses-in-california-a-report-of-the-california-advisory-committee-to-the-united-states-commission-on-civil-rights-oc.

[12] Letter from Foundation for Individual Rights in Education *et al.*, to Russlynn Ali, Assistant Secretary for Civil Rights, Office for Civil Rights, United States Department of Education, Jan. 6, 2012, http://www.thefire.org/fire-coalition-open-letter-to-office-for-civil-rights-assistant-secretary-russlynn-ali-january-6-2012/.

[13] *Id.*

[14] NATIONAL COALITION AGAINST CENSORSHIP, COMMENT FOR THE U.S. COMMISSION ON CIVIL RIGHTS ON FEDERAL ENFORCEMENT OF CIVIL RIGHTS LAWS PROTECTING STUDENTS AGAINST BULLYING, VIOLENCE AND HARASSMENT, May 27, 2011, http://ncac.org/resource/ncac-comments-on-us-commission-on-civil-rights-harassment-letter-dont-bully-free-speech-in-schools/.

[15] Laura Kipnis, *My Title IX Inquisition*, CHRON. OF HIGHER ED., May 29, 2015, http://chronicle.com/article/My-Title-IX-Inquisition/230489.

[16] Sam Friedman, *Appeal seeks re-examination of sexual harassment complaints against UAF student newspaper*, FAIRBANKS DAILY NEWS-MINER, Nov. 11, 2013,

about a "building in the shape of a vagina" and a factual report about the public "UAF Confessions" Facebook page.[17] Student journalists told FIRE that this baseless investigation chilled their reporting, even making the then-editor-in-chief too apprehensive to publish an in-depth informational article about the important issue of sexual assault on campus.[18]

In the fall of 2013, a sociology professor at the University of Colorado at Boulder was threatened with a harassment investigation after a former teaching assistant alleged that a presentation about prostitution during a course on "Deviance in U.S. Society" left some students "concerned."[19] In 2011, the University of Denver suspended a professor and found him guilty of sexual harassment because of his class discussion on sexual taboos in American culture in a graduate-level course.[20] In 2012, Appalachian State University suspended Professor Jammie Price for creating a "hostile environment" after she criticized the university's treatment of sexual assault cases involving student-athletes and screened a documentary critical of the adult film industry.[21]

And perhaps most egregiously, in 2007, Indiana University-Purdue University Indianapolis student-employee Keith John Sampson was found guilty of racial

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http://www.newsminer.com/news/local_news/appeal-seeks-re-examination-of-sexual-harassment-complaints-against-uaf/article_82c9309e-4ab0-11e3-b059-0019bb30f31a.html. For more information about the University of Alaska Fairbanks case, including FIRE's correspondence with the university, please visit FIRE's case page at https://www.thefire.org/cases/university-of-alaska-fairbanks-complaint-over-student-newspapers-articles-results-in-months-long-harassment-investigation (last visited May 28, 2015).

[17] Lakeidra Chavis, *UAF announces plans for new Kameel Toi Henderson Building in honor of 59 percent female demographic*, THE SUN STAR, Mar. 26, 2013, http://www.uafsunstar.com/uaf-announces-plans-for-new-kameel-toi-henderson-building-in-honor-of-59-percent-female-demographic; Annie Bartholomew, *UAF Confessions harbors hate speech*, THE SUN STAR, Apr. 23, 2013, http://www.uafsunstar.com/uaf-confessions-harbors-hate-speech.

[18] Susan Kruth, *VIDEO: University of Alaska Fairbanks Newspaper Investigated for Nearly a Year for Protected Speech*, THE TORCH, Sept. 19, 2014, https://www.thefire.org/video-university-alaska-fairbanks-newspaper-investigated-nearly-year-protected-speech.

[19] Sarah Kuta, *CU-Boulder: Patti Adler could teach deviance course again if it passes review*, DAILY CAMERA (Dec. 17, 2013, 12:47 PM), http://www.dailycamera.com/cu-news/ci_24738548/boulder-faculty-call-emergency-meeting-discuss-patti-adler. For more information about the Adler case, including FIRE's correspondence with the university, please visit FIRE's case page at http://www.thefire.org/cases/university-of-colorado-at-boulder-professor-threatened-with-harassment-investigation-forced-retirement-over-classroom-presentation (last visited May 28, 2015).

[20] Vincent Carroll, *Carroll: Prof's rights disregarded by DU*, DENVER POST, Nov. 5, 2011, http://www.denverpost.com/ci_19268296. For more information about the Gilbert case, including FIRE's correspondence with the university, please visit FIRE's case page at https://www.thefire.org/cases/university-of-denver-sexual-harassment-finding-violates-professors-academic-freedom-in-the-classroom (last visited May 28, 2015).

[21] *See* Foundation for Individual Rights in Education, *Appalachian State University: Professor Suspended for Classroom Speech*, https://www.thefire.org/cases/appalachian-state-university-professor-suspended-for-classroom-speech (last visited May 28, 2015).

harassment for merely reading the book *Notre Dame vs. The Klan: How the Fighting Irish Defeated the Ku Klux Klan* silently to himself. Only after a successful intervention by FIRE did the university reverse its racial harassment finding against Sampson.[22] This case is instructive because it illustrates the fact that universities' broad understanding of sexual harassment informs their unconstitutional policies and practices with respect to racial and other types of harassment. Often, these policies and applications bear no resemblance to the legal principles governing discriminatory harassment in the educational setting and instead reveal a general, "catch-all" understanding of the term "harassment." The Sampson case demonstrates that when not properly cabined to the *Davis* standard, university harassment policies are routinely used to punish students and faculty, often with absurd, illiberal results.

These misguided policies contribute to a climate of chilled speech on campuses across the nation—an effect apparent in the statistical data, which indicate that many students are reluctant to engage in open and robust debate in school. For example, a 2010 study by the American Association of Colleges and Universities (AACU) asked students, professors, and staff whether they agreed with the statement that it was "safe to hold unpopular positions on campus."[23] (Note that the survey did not ask whether it was safe to *express* those viewpoints, but merely whether it was safe to "hold" them.) Only 40% of college freshmen strongly agreed with that statement, a percentage that fell steadily when the statement was presented to older students: Somewhat fewer sophomores strongly agreed, and substantially fewer juniors did. Finally, only 30% of seniors strongly agreed. In other words, the longer students stayed on campus, the more pessimistic they became about their freedom to dissent and debate. Yet even their pessimism paled in comparison to that of their professors, of whom only 16.7% told the AACU that they strongly agreed that it was safe to hold unpopular opinions on campus.

When students learn that saying the "wrong" thing can get them in trouble, they react predictably, interacting only with people with whom they already agree and otherwise keeping their opinions about important topics to themselves. The result is a group polarization that follows graduates into the real world. As the sociologist Diana C. Mutz discovered in her 2006 book *Hearing the Other Side: Deliberative versus Participatory Democracy*, those with the highest levels of education have the *lowest* exposure to people with conflicting points of view, while those who have not

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[22] *University says sorry to janitor over KKK book*, ASSOCIATED PRESS, July 15, 2008, http://www.nbcnews.com/id/25680655/ns/us_news-life/t/university-says-sorry-janitor-over-kkk-book. For more information about the Sampson case, including FIRE's correspondence with the university, please visit FIRE's case page at https://www.thefire.org/cases/indiana-university-purdue-university-indianapolis-student-employee-found-guilty-of-racial-harassment-for-reading-a-book (last visited May 28, 2015).

[23] ERIC L. DEY & ASSOCIATES, ASS'N OF AM. COLLEGES AND UNIVERSITIES, ENGAGING DIVERSE VIEWPOINTS: WHAT IS THE CAMPUS CLIMATE FOR PERSPECTIVE-TAKING? (2010), http://www.aacu.org/core_commitments/documents/Engaging_Diverse_Viewpoints.pdf.

graduated from high school can claim the most diverse discussion partners.[24] In other words, people with the highest levels of education are most likely to live in the tightest echo chambers. Of course, it should be the opposite: A good education ought to teach students to seek out the opinions of intelligent people with whom they disagree, in order to prevent the problem of "confirmation bias."

Despite the Supreme Court's clear guidance, far too many universities continue to maintain harassment policies that fall far short of the Court's *Davis* standard and prohibit or threaten speech protected by the First Amendment—or, in the case of private universities, speech protected by the school's own promises.

For example, under Colorado State University – Pueblo's Code of Student Conduct, "harassment" includes any conduct that subjectively inflicts "emotional harm upon any member of the University community through any means, including but not limited to e-mail, social media, and other technological forms of communication."[25] At Lehigh University, harassment "occurs when a member of the Lehigh University community or a guest is subjected to unwelcome statements, jokes, gestures, pictures, touching, or other conducts that offend, demean, harass, or intimidate."[26]

Similar policies have been consistently struck down on First Amendment grounds by federal courts for over two decades (*see supra* note 3), yet unconstitutional definitions of harassment remain widespread.

Contradicting the Supreme Court's decision in *Davis*, on May 9, 2013, the United States Department of Justice (DOJ) and the Department of Education's Office for Civil Rights (OCR) entered into a settlement with the University of Montana that poses a grave threat to free expression on campus. In the findings letter that accompanied the agreement, which described itself as a "blueprint for colleges and universities throughout the country to protect students from sexual harassment and assault," the agencies warn institutions that to comply with Title IX, they must broadly define sexual harassment on campus as "any unwelcome conduct of a sexual nature" including "verbal conduct" (that is, speech). This staggeringly broad definition is made even worse by the Departments' explicit statement that allegedly harassing expression need not even be offensive to an "objectively reasonable person of the same gender in the same situation." In other words, if any listener takes offense to sex-related speech for any reason, no matter how irrationally or unreasonably, the speaker may be punished. As evidenced by the earlier examples of professors investigated for harassment over protected, germane classroom speech,

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[24] DIANA C. MUTZ, HEARING THE OTHER SIDE: DELIBERATIVE VERSUS PARTICIPATORY DEMOCRACY (2006).
[25] COLORADO STATE UNIVERSITY – PUEBLO 2014–15 CATALOG 42 (2014), http://www.csupueblo.edu/catalog/Documents/Catalog2014-2015.pdf.
[26] Lehigh University Policy on Harassment, http://www.lehigh.edu/~policy/university/harassment.htm (last visited May 28, 2015).

the implications for freedom of speech and academic freedom on campus are enormous.

This troubling approach to sexual harassment contradicts decades of legal precedent and would leave virtually everyone on campus guilty of sexual harassment. The danger to free expression on our nation's campuses can hardly be overstated. The federal government was imposing an unconstitutional speech code at colleges nationwide.

Joined by civil libertarians, commentators, faculty, First Amendment experts, and even Senator John McCain,[27] FIRE pointed out the serious threats to free speech and due process presented by the resolution agreement.[28] Ultimately, and only after pressure from FIRE, OCR quietly backed away from its characterization of the University of Montana agreement as a national blueprint. In a November 2013 letter addressed to me, Assistant Secretary for Civil Rights Catherine Lhamon wrote that "the agreement in the Montana case represents the resolution of that particular case and not OCR or DOJ policy."[29] While I appreciated that the letter to me seemed to imply that the national blueprint was not, in fact, a national blueprint, OCR must write every college and university in the country a similar letter to make this clear. A single letter to me is insufficient to remedy the constitutional confusion caused by OCR publicly touting its unconstitutional code as a model for all other universities.

And while we were pleased to see that the new policies adopted by the University of Montana in collaboration with OCR and the DOJ did not ultimately track the blueprint's broad definition of sexual harassment, it nevertheless included new constitutional infirmities. For example, UM's definition of "discrimination" includes "treat[ing an] individual differently" on the basis of 17 different characteristics, including an individual's "political ideas." This definition could classify protected speech—for example, satirizing fellow students' political beliefs—as "discrimination."

Neither the letter to FIRE nor the policy changes eventually made at the University of Montana ultimately stymied the national impact of the blueprint. At a June 2, 2014 roundtable on sexual assault hosted by Senator Claire McCaskill, Acting Assistant Attorney General for Civil Rights Jocelyn Samuels from the Department of Justice repeatedly offered the terms of the University of Montana resolution

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[27] Letter from Sen. John McCain to Eric Holder, Attorney General of the United States, United States Department of Justice, Jun. 26, 2013, http://www.thefire.org/letter-from-senator-john-mccain-to-attorney-general-eric-holder.

[28] Letter from Foundation for Individual Rights in Education et al., to Anurima Bhargava, Chief, Educational Opportunities Section, Civil Rights Division, United States Department of Justice, Jul. 16, 2013, http://www.thefire.org/fire-coalition-letter-to-departments-of-education-and-justice.

[29] Letter from Catherine E. Lhamon, Assistant Secretary for Civil Rights, United States Department of Education, to Greg Lukianoff, President, Foundation for Individual Rights in Education, Nov. 14, 2013, https://www.thefire.org/letter-from-department-of-education-office-for-civil-rights-assistant-secretary-catherine-e-lhamon-to-fire.

agreement—some of which were never actually adopted as university policy—as a national model. During his testimony before the United States Commission on Civil Rights on July 25, 2014, OCR's Principal Deputy Assistant Secretary Seth Galanter continued to promote the Montana resolution agreement as a national model as well. Contradictory signals from the DOJ and OCR are deeply unhelpful and confuse universities about their obligations under federal law—and this uncertainty has only served to further chill speech on campus.

Because OCR never communicated the apparent shift away from the "blueprint" to universities themselves, it continues to have a substantial impact on universities' efforts to revise their sexual harassment policies to comply with Title IX. 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. FIRE expects the number of institutions defining sexual harassment as any "unwelcome conduct of a sexual nature" to increase until OCR clarifies to universities that such a definition is not (and indeed cannot be) required.

We ask that Congress recall the *Davis* Court's concerns for First Amendment rights. The dissenting opinion in *Davis*, 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."[30] 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."[31] In response, Justice Sandra Day O'Connor's majority opinion in *Davis* was very careful to "acknowledge that school administrators shoulder substantial burdens as a result of legal constraints on their disciplinary authority."[32] 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."[33] 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.[34] The *Davis* standard is stringent because the First Amendment requires it to be.

Overly broad and vague harassment and bullying policies benefit no one. Colleges risk lawsuits by chilling or punishing protected speech, while students learn the

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[30] *Davis*, 526 U.S. at 682 (Kennedy, J., dissenting).
[31] *Id.* at 683.
[32] *Id.* at 649.
[33] *Id.*
[34] *Id.* at 652.

wrong lesson about their expressive rights, concluding that self-censorship is safer than risking discipline for speaking their mind. Thankfully, the fix is simple: Congress should require universities to implement anti-discriminatory harassment policies that precisely track the Supreme Court's *Davis* standard. By simply incorporating a definition carefully crafted by the Supreme Court, such a requirement could end decades of confusion and abuse of harassment policies on campus and eliminate what has historically been the most common form of unconstitutional speech code. Precisely defining peer-on-peer harassment as *no more or less than* the requirements of *Davis* will ensure that institutions have the ability to meet both their legal and moral obligations to maintain campus environments free from discriminatory harassment while protecting free speech. These twin responsibilities need not be in tension. **FIRE has attached draft legislation—the Campus Anti-Harassment Act—as Appendix A.**

II. Free Speech Zones

Far too many universities have "free speech zones," which limit rallies, demonstrations, distribution of literature, petition circulation, and speeches to small and/or out-of-the-way parts of campus. Many also require students to inform university administrators that they intend to engage in expressive activity, even requiring that the university give permission for such activities. For example, Southeastern Louisiana University's policy on "Public Speech, Assembly, and Demonstrations" requires that "[a]n application to assemble publicly or demonstrate must be made seven (7) days in advance on a form provided by the Assistant Vice President for Student Affairs. . . ." The policy also establishes just three areas on campus for "public discussion and/or peaceful public assembly or demonstration."[35]

Such prior restraints are generally inconsistent with the First Amendment. Universities may enact reasonable, narrowly tailored "time, place, and manner" restrictions that prevent demonstrations and speeches from unduly interfering with the educational process. They may not, however, regulate speakers and demonstrations on the basis of content or viewpoint, nor may they maintain regulations that burden substantially more speech than is necessary to prevent material disruption to the functioning of the institution. Restricting student speech to tiny free speech zones diminishes the quality of debate and discussion on campus by preventing expression from reaching its target audience.

The threat to student and faculty speech presented free speech zones is often exacerbated by burdensome requirements. Sometimes students are required to obtain signatures from multiple officials, a process that can take days or weeks

[35] SOUTHEASTERN LOUISIANA UNIVERSITY, *University Policy on Public Speech, Assembly, and Demonstrations*, STUDENT HANDBOOK 2014–2015, at 111, http://issuu.com/oursoutheastern/docs/2014handbook.

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 demonstrators' message by rendering it untimely and ineffective. (For instance, such policies would have prevented students from gathering for candlelight vigils on the evening of the Boston Marathon attack in memory of the victims.) 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 are an invitation for administrative abuse.

These free speech quarantines persist despite a string of defeats in court. In 2010, a federal court held that Tarrant County Community College's attempt to limit its students' free speech rights to a small "free speech zone" was unconstitutional.[36] The litigation, coordinated by FIRE and the American Civil Liberties Union of Texas, resulted in an attorneys' fee award of $240,000. Similarly, in 2012, a federal court in Ohio struck down the University of Cincinnati's tiny "free speech zone" as unconstitutional.[37]

Following the University of Cincinnati ruling, FIRE launched its Stand Up For Speech Litigation Project. In less than two years, FIRE has supported 10 lawsuits to eliminate unconstitutional speech policies, six of which have involved challenges to free speech zones. So far, no school has tried to defend its free speech zone in court: three cases have settled, two other defendant institutions have agreed to a moratorium pending settlement discussions, and the last was only sued a few weeks ago.

Specifically, Modesto Junior College in California settled a lawsuit by agreeing to eliminate its restrictive "free speech zone" brought into the national spotlight after security officers and a campus official were video-recorded telling a student 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." Ironically, this incident took place on Constitution Day, the very day Congress has designated to celebrate our Constitutional rights. [38]

FIRE coordinated a similar federal lawsuit against the University of Hawaii at Hilo after officials there told the two plaintiffs that if they wanted to protest National Security Agency (NSA) spying, they would have to do so in a small and remote "free

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[36] *Smith v. Tarrant County College District*, No. 4:09-CV-658-Y (N.D. Tex. Mar. 15, 2010).
[37] *University of Cincinnati Chapter of Young Americans for Liberty v. Williams*, 2012 U.S. Dist. LEXIS 80967 (S.D. Ohio Jun. 12, 2012).
[38] *Van Tuinen v. Yosemite Comm. Coll. Dist.*, No. 1:13-CV-01630 (E.D. Cal. dismissed Mar. 17, 2014).

speech zone" that was prone to flooding.[39] This case also settled quickly, resulting in a change in policy that eliminated free speech zones throughout the University of Hawaii system. Finally, an administrator at Citrus College threatened to remove a student from campus because he had solicited another student to sign his petition against NSA spying outside of the designated free speech zone. When the student sued, he was the second person to challenge Citrus College's free speech zone in court. Citrus College settled the 2003 case quickly and also settled the most recent suit, paying $110,000 in damages and attorneys' fees for its repeat attempt to stifle student expressive rights.[40]

FIRE's most recent Stand Up For Speech litigation has involved three more egregious free speech zones. At Dixie State University, an administrator created a free speech zone in a small area of campus with little pedestrian traffic for a student group that wanted to put up a free speech wall where students could write whatever they wanted.[41] In addition, the campus police spent a half hour monitoring the event and reading the messages on the wall to make sure they did not include "hate speech," apparently unaware that offensive speech is unambiguously protected by the First Amendment. At California State Polytechnic University, Pomona, campus police told a student he needed a "permit" to hand out flyers about animal rights and that he then could only do so in the school's free speech zone.[42] Finally, at the end of May, a student filed a lawsuit against Blinn College in Texas for forcing her to advocate for gun rights in a free speech zone that is the size of a parking space.[43]

In April of 2014, the Commonwealth of Virginia became the first state to statutorily prohibit public colleges and universities from restricting student speech to unreasonable speech zones when it passed HB 258 with unanimous support.[44] In December, *The Wall Street Journal* heralded the bill, writing, "Perhaps the biggest breakthrough for First Amendment advocates this year was a Virginia law that bars "free-speech zones" on public campuses."[45] This year, FIRE capitalized on the momentum created in Virginia by supporting similar legislation, the Campus Free Expression Act (CAFE Act) to abolish "free speech zones" from public campuses in Missouri. The Bill, SB 93, passed unanimously in the State Senate and with an impressive majority in the State House of Representatives.[46] It currently awaits the Governor's signature.

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[39] *Burch v. Univ. of Hawaii Sys.*, No. 1:14-cv-00200 (D. Haw. dismissed Dec. 18, 2014).
[40] *Sinapi-Riddle v. Citrus Comm. Coll. Dist.*, No. 2:14-cv-05104 (C.D. Cal. dismissed Dec. 4, 2014).
[41] *Jergins v. Williams*, No. 2:15-cv-00144 (D. Utah filed Mar. 4, 2015).
[42] *Tomas v. Coley*, No. 2:15-cv-02355 (C.D. Cal. filed Mar. 31, 2015).
[43] *Sanders v. Guzman*, No. 1:15-cv-00426 (W.D. Tex. filed May 20, 2015).
[44] Va. Code Ann. §23-9.2:13 (2014).
[45] *Unfree Speech on Campus*, WALL ST. J., Dec. 12, 2014, http://www.wsj.com/articles/unfree-speech-on-campus-1418429013.
[46] S.B. 93, 98th Gen. Assemb., First Reg. Sess. (Mo. 2015), http://www.senate.mo.gov/15info/BTS_Web/Bill.aspx?SessionType=R&BillID=165.

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 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.'"[47]

When Congress reauthorizes the Higher Education Act, it should include a provision that would guarantee that public campuses are once again places where expressive activity may flourish, subject only to reasonable, content- and viewpoint-neutral time, place, and manner restrictions. **FIRE has attached draft legislation—the Campus Free Expression Act—as Appendix B.**

III. *Garcetti* and Faculty Speech

The Supreme Court of the United States has long emphasized and understood the importance of free and open expression on our nation's public campuses, proclaiming more than a half-century ago that "[t]he essentiality of freedom in the community of American universities is almost self-evident." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). In *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967), the Supreme Court explained that academic freedom is a "special concern of the First Amendment," stating that "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned."

Despite these and other long-established precedents, the Supreme Court placed academic freedom in our nation's public colleges and universities in jeopardy when it held that that a public employee's speech made pursuant to official duties is not protected by the First Amendment in *Garcetti v. Ceballos*, 547 U.S. 410 (2006). The Court acknowledged that its decision "may have important ramifications for academic freedom," but declined to decide whether an exception for the academic setting was warranted. 547 U.S. at 425 ("We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.").

The Court's *Garcetti* decision has created considerable confusion at universities and in the lower courts. In *Demers v. Austin*, 746 F.3d 402, 412 (9th Cir. 2014), the United States Circuit Court of Appeals for the Ninth Circuit decided, "*Garcetti* does not—indeed, consistent with the First Amendment, cannot—apply to teaching and academic writing that are performed 'pursuant to the official duties' of a teacher and

[47] *Healy v. James*, 408 U.S. 169, 180 (1972) (internal citation omitted).

professor." Similarly, the United States Circuit Court of Appeals for the Fourth Circuit concluded in *Adams v. Trustees of the University of North Carolina-Wilmington*, 640 F.3d 550 (4th Cir. 2011), that *Garcetti* did not apply to academic speech submitted as part of a professor's application for a full tenure professorship. However, in *Savage v. Gee*, 665 F.3d 732 (6th Cir. 2012), the United States Circuit Court of Appeals for the Sixth Circuit expressed skepticism about any exception to *Garcetti* for academic speech. The United States Circuit Court of Appeals for the Seventh Circuit failed to find an academic freedom exception in *Renken v. Gregory*, 541 F.3d 769, 774 (7th Cir. 2008), in which it dismissed the First Amendment claims of a professor who complained of difficulties in administering a grant because "the proper administration of an educational grant fell within the scope of Renken's teaching duties."

Universities regularly ask courts to apply *Garcetti* to faculty expression. At the University of North Carolina-Wilmington, university defendants argued, on a motion for summary judgment, that *Garcetti* precluded a public university professor's First Amendment claim that the university had retaliated against him for conservative, Christian writings.[48] Similarly, in 2008, a professor brought a First Amendment retaliation claim against officials at Northeastern Illinois University, arguing that the university took adverse action against her because of her comments about the low number of Latino faculty at the university and advocacy on behalf of students arrested at a political protest. The university argued that under *Garcetti*, the First Amendment did not protect the professor's expression.[49]

By leaving unanswered the question of whether an academic freedom exception applies to public employee speech doctrine following *Garcetti*, the Supreme Court's decision threatens academic freedom and free speech. Congress should statutorily protect academic freedom by making clear that there is an exception to *Garcetti* for academics. **FIRE has attached draft legislation—the Academic Freedom and Whistleblower Protection Act—as Appendix C.**

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[48] Mem. in Supp. of Mot. for Summ. J. for Defs. at 26, *Adams v. Trs. of the Univ. of N.C.-Wilmington*, No. 07-CV-64-H (E.D.N.C. May 1, 2009), ECF No. 132.

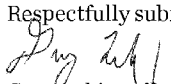
[49] Mem. in Supp. of Mot. for Summ. J. for Defs. at 8, *Capeheart v. Hahs et al.*, No. 08-cv-1423 (N.D. Ill. Sept. 8, 2010), ECF No. 136.

CONCLUSION

The recommendations suggested by FIRE are intended to advance the cause of student and faculty rights at our nation's public institutions of higher education so that our colleges and universities might fulfill their promise by serving as engines for innovation and true marketplaces of ideas.

Thank you for your attention to FIRE's proposals. If you are interested in discussing our suggestions further or have any questions regarding free speech on campus, please feel free to contact me at 215-717-3473 or at greg@thefire.org.

Respectfully submitted,



Greg Lukianoff
President and CEO

Mr. FRANKS. I thank you, sir.

We would now recognize our second witness, Ms. Colby.

And if you would make sure that microphone is on?

TESTIMONY OF KIMBERLEE WOOD COLBY, DIRECTOR, CENTER FOR LAW AND RELIGIOUS FREEDOM, CHRISTIAN LEGAL SOCIETY

Ms. COLBY. Chairman Franks, Ranking Member Cohen, and Members of the Subcommittee, I am Kim Colby, director of Christian Legal Society's Center for Law and Religious Freedom, where I have worked for over 30 years to protect student rights to meet for religious speech on campus.

Thank you for inviting me to testify regarding the ongoing discrimination that religious student groups experience on campuses across the country.

On a typical university campus, hundreds of student groups meet to discuss political, social, and philosophical ideas. Religious student organizations enrich this marketplace of ideas. Often, the religious groups are among the more diverse student groups, drawing students from a wide range of ethnic and economic backgrounds.

For 40 years, religious student groups too often have been denied their right to meet on campus. In the 1970's and 1980's, many universities would invoke the establishment clause to justify discriminating against religious groups. But the Supreme Court ruled in 1981 and 1995 that religious groups had free speech rights to meet on campus, like other student groups.

After the Supreme Court removed the establishment clause as justification for excluding religious groups, some university administrators began to misinterpret and misuse their university nondiscrimination policies to exclude religious groups from campus, as you saw with Bianca's interview. For the past 20 years, many colleges have told religious groups they must leave campus because it is religious discrimination for a religious group to require its leaders to agree with it religious beliefs. But it is common sense and basic religious liberty, not discrimination, for a religious group to expect its leaders to share its core religious beliefs.

Nondiscrimination policies are good and essential, but they are supposed to protect religious students, not drive them from campus. Properly interpreted, nondiscrimination policies and student religious liberty are eminently compatible. Universities need not misinterpret their policies and many do not. Indeed, as a commendable best practice, some universities have embedded robust protection for religious liberty in their nondiscrimination policies.

I want to just mention two recent examples that illustrate the discrimination religious students too often face. In 2011, Vanderbilt University said it was religious discrimination for a Christian Legal Society student group to expect its leaders to lead its Bible study, prayer, and worship. Vanderbilt demanded that another Christian group delete five words from its leadership requirements, if it wanted to remain on campus. Those five words were "personal commitment to Jesus Christ." The students left campus rather than recant their core religious belief.

In the end, Vanderbilt forced 14 Catholic and evangelical Christian student groups from campus. While Vanderbilt refused to

allow religious groups to have religious leadership requirements, it announced that fraternities could continue to engage in sex discrimination in their selection of both leaders and members.

With 437,000 students on 23 campuses, the California State University is the largest 4-year university system in the Nation. This past year, Cal State withdrew recognition for many religious groups. Several had met for over 40 years on Cal State campuses with religious leadership requirements. But under a new policy, as the Cal State administrator said in the interview you heard, "What they cannot be is faith-based where someone has to have a profession of faith to be that leader."

California State also applies a double standard. Fraternities can choose their leaders and members based on sex, but religious groups cannot choose their leaders based on religious belief.

Our Nation's colleges are at a crossroads. They can respect student freedom of speech, association, and religion, or they can discriminate against religious students who refuse to abandon their basic religious liberty. The road colleges choose is important not only for the students threatened with exclusion and not only to preserve the diversity of ideas on college campuses, but also because the lessons learned on college campuses inevitably spill over into our broader civil society.

I look forward to answering your questions.

[The prepared statement of Ms. Colby follows:]**

Note: Supplemental material submitted with this statement is not printed in this hearing record but is on file with the Subcommittee and the statement, in its entirety, can be accessed at:

http://docs.house.gov/meetings/JU/JU10/20150602/103548/HHRG-114-JU10-Wstate-ColbyK-20150602.pdf.

Written Statement of
Kimberlee Wood Colby
Director, Center for Law and Religious Freedom
Christian Legal Society

Submitted to
The Judiciary Committee of the
United States House of Representatives,
Subcommittee on the Constitution and Civil Justice

Written Statement for Hearing:
"*First Amendment Protections on Public College and University Campuses*"
June 2, 2015

Chairman Franks, Ranking Member Cohen, and Members of the Subcommittee, thank you for inviting me to testify at this hearing on "*First Amendment Protections on Public College and University Campuses*," regarding the ongoing discrimination against religious student groups on many college campuses. I am Kim Colby, the Director of the Christian Legal Society's Center for Law and Religious Freedom, where I have worked for over thirty years to protect students' right to meet for religious speech on college campuses.

The Christian Legal Society ("CLS") has long believed that pluralism is essential to a free society and prospers only when the First Amendment rights of all Americans are protected, regardless of the current popularity of their speech or religious beliefs. For that reason, CLS was instrumental in the bipartisan passage of the Equal Access Act of 1984[1] that protects the right of all students to meet for "religious, political, philosophical or other" speech on public secondary school campuses.[2] The Act was a bipartisan effort to protect religious student groups from being excluded from high school campuses because they wanted to meet for religious speech, including Bible studies and prayer, when other student groups met. For over 30 years, the Act has protected both religious and LGBT student groups seeking to meet for disfavored speech.[3]

CLS is an association of Christian attorneys, law students, and law professors, with student chapters at approximately 90 public and private law schools. CLS law student chapters typically are small groups of students who meet for weekly prayer, Bible study, and worship at a time and place convenient to the students. All students are welcome at CLS meetings. As Christian groups have done for nearly two millennia, CLS requires its leaders to agree with a statement of faith, signifying agreement with the traditional Christian beliefs that define CLS.

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[1] 20 U.S.C. §§ 4071-4074 (2013). House Education and Labor Committee Chairman Carl Perkins (D-KY), along with Committee ranking member Representative William Goodling (R-PA), Representative Don Bonkers, (D-WA), and Representative Trent Lott (R-MS), shepherded the Act through the House, which passed it by a vote of 337-77. Senator Mark Hatfield (R-OR), Senator Jeremiah Denton (R-AL), and Senator Orrin Hatch (R-UT) led the bipartisan effort in the Senate, which passed it 88-11, with Senator Ted Kennedy (D-MA) and Senator Joe Biden (D-DE) among its Democratic supporters.

[2] *See* 128 Cong. Rec. 11784-85 (1982) (Sen. Hatfield statement) (recognizing CLS's role).

[3] *See, e.g., Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (requiring access for religious student group); *Straights and Gays for Equality v. Osseo Area School No. 279*, 540 F.3d 911 (8th Cir. 2008) (requiring access for LGBT student group).

I. For Forty Years, Religious Student Groups Frequently Have Been Discriminatorily Excluded from College Campuses.

A. From the 1970s to the mid-1990s, the Establishment Clause was used by some university administrators to justify discriminatory treatment of religious student groups.

On a typical university campus, hundreds of student groups meet to discuss political, social, cultural, and philosophical ideas.[4] These groups form when a few students apply to the university administration for "recognition" as a student group. "Recognition" allows a student group to reserve meeting space on campus, communicate with other students, and apply for student activity fee funding available to all student groups. Without recognition, a group finds it nearly impossible to exist on campus.

Religious student organizations enhance campus diversity in myriad ways by contributing to the religious, philosophical, cultural, and social "marketplace of ideas" on campus. Often the religious groups themselves are among the most ethnically diverse student groups. Religious groups support students through easy and hard times, a particularly important source of support for students who may be away from home for the first time. By performing community service projects both on and off campus, they enrich campus life in tangible and intangible ways.

1. *Healy v. James* (1972)

The Supreme Court acknowledged the importance to student groups of recognition as an official student group in its landmark 1972 decision, *Healy v. James*.[5] There the Court ruled that a public college must recognize the Students for a Democratic Society ("SDS"). Denial of recognition would violate the political group's freedoms of speech and association. The Supreme Court rejected the college's argument that it would be endorsing the SDS's extremist political agenda if it recognized the group. Recognition of a student group by a college, the Court said, did not mean that the college endorsed the student group's political beliefs.

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[4] The Ohio State University, for example, has over 1,100 recognized student organizations. *See* http://ohiounion.osu.edu/get_involved/student_organizations ("With over 1,100 student organizations, Ohio State provides a wide range of opportunities for students to get involved.") (last visited May 27, 2015).

[5] 408 U.S. 169 (1972).

2. *Widmar v. Vincent* (1981)

In the 1970s, discrimination against religious student associations began to emerge when some college administrators claimed that the Establishment Clause would be violated if religious student groups were allowed to meet in empty classrooms to discuss their religious beliefs on the same basis as other student groups were allowed to meet to discuss their political, social, or philosophical beliefs. The administrators claimed that merely providing heat and light in unused classrooms gave impermissible financial support to the students' religious speech, even though free heat and light were provided to all student groups. The administrators also claimed that college students were "impressionable" and would believe that the university endorsed religious student groups' beliefs, even though hundreds of student groups with diverse, and contradictory, ideological beliefs were allowed to meet on campus.[6]

In 1981, the University of Missouri -- Kansas City (UMKC) made similar arguments before the United States Supreme Court in the landmark case of *Widmar v. Vincent*.[7] UMKC had adopted a policy that prohibited the use of buildings or grounds "for purposes of religious worship or religious teaching" by the approximately 100 student groups that met on its campus.[8] In order to be recognized, a student group had to affirm that its meetings did not include "religious worship or religious teaching." A group of evangelical Christian students, calling themselves "Cornerstone," had met for a number of years on campus.[9] But the Cornerstone students refused to eliminate religious worship and religious teaching from their meetings, even though their decision meant their group would lose recognition and the ability to meet on campus. UMKC refused to renew Cornerstone's recognition, claiming that allowing a student group to

[6] "A 2007 study of faculty on college campuses found that 53 percent of university professors had 'cool' or negative feelings toward evangelicals. This raises serious questions about how Christian students can expect to be treated on secular campuses." Kirsten Powers, *The Silencing: How the Left is Killing Free Speech* xiii (*citing* Gary A. Tobin and Aryeh K. Weinberg, "*Profiles of the American University: Volume II: Religious Beliefs & Behavior of College Faculty*," Institute for Jewish & Community Research, 2007, http://www.jewishresearch.org/PDFs2/FacultyReigion07.pdf).

[7] 454 U.S. 263 (1981).

[8] 454 U.S. at 265 & n.3. The University of Missouri currently has over 750 recognized student organizations. *See* http://getinvolved.missouri.edu/ (last visited Feb. 9, 2015).

[9] *Id.* at 265.

engage in worship and religious instruction on campus violated the "establishment clauses" of both the federal and state constitutions.

In an 8-1 ruling, the Supreme Court held that the university had violated Cornerstone's speech and association rights. The Court found that "UMKC has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment."[10]

The Court then held that the federal Establishment Clause was not violated by allowing religious student associations access to public college campuses.[11] The Court ruled that college students understand that recognizing a student group does not mean that the university *endorses* the students' religious speech or beliefs. Relying on *Healy*, the Court again ruled that recognition is not endorsement. As the Court observed in a subsequent equal access case protecting high school students' religious meetings, "the proposition that schools do not endorse everything they fail to censor is not complicated."[12]

3. *Rosenberger v. University of Virginia* (1995)

In *Rosenberger v. Rector & Visitors of the Univ. of Virginia,*[13] the Court reaffirmed *Widmar*'s reasoning. The Court ruled that the University of Virginia violated a religious student organization's rights of free speech and association when it denied a religious student publication the same funding available to sixteen other nonreligious student publications. Access for a religious student group, even to student activity fee funding, does not mean that the university endorses the group's religious viewpoints.[14]

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[10] *Id.* at 269.

[11] *Id.* at 270-75. The Court also held that the state constitution did not justify suppressing the religious student group's free speech and association rights. *Id.* at 275-76.

[12] *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (holding that the Equal Access Act protects students' right to meet for religious speech in public secondary schools).

[13] 515 U.S. 819 (1995).

[14] The Court has repeatedly applied this principle over the past four decades in granting religious groups access to the public square. *See, e.g., Good News Club v. Milford Central School*, 533 U.S. 98 (2001) (religious community group's access to elementary school); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (religious community group's access to high school auditorium in evenings); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990)

B. For the past twenty years, some university administrators have misused college nondiscrimination policies to exclude religious student groups from campus.

After the Supreme Court removed the Establishment Clause as a credible justification for excluding religious groups, university nondiscrimination policies became the new justification. At too many colleges, religious student groups have been told that they cannot meet on campus if they require their leaders to agree with their religious beliefs.[15] Beginning in the early 1990s, religious student groups, including CLS student chapters, began to encounter some university administrators who *misused* nondiscrimination policies to exclude religious student groups from campus, simply because they required their leaders to agree with their religious beliefs.[16]

But it is common sense and basic religious liberty – not discrimination – for religious groups to expect their leaders to share their religious beliefs. Nondiscrimination policies are good and essential. But nondiscrimination policies are intended to *protect* religious students, not *prohibit* them from campus. The problem is not with the nondiscrimination policies. The problem is that colleges *misinterpret* and *misuse* these policies to exclude religious student groups from campus. In the name of "tolerance," college administrators institutionalize religious intolerance. In the name of "inclusion," college administrators exclude religious student groups from campus.

(religious student group's access to high school recognition); *Fowler v. Rhode Island,* 345 U.S. 67 (1953) (religious community group's access to park); *Niemotko v. Maryland,* 340 U.S. 268 (1951) (religious persons' access to park).

[15] *See* Michael Paulson, "Colleges and Evangelicals Collide on Bias Policy," *The New York Times*, June 9, 2014, p. A1, *available at* http://www.nytimes.com/2014/06/10/us/colleges-and-evangelicals-collide-on-bias-policy.html?_r=0 (last visited May 29, 2015) ("For 40 years, evangelicals at Bowdoin College have gathered periodically to study the Bible together, to pray and to worship. . . . After this summer, the Bowdoin Christian Fellowship will no longer be recognized by the college. . . . In a collision between religious freedom and antidiscrimination policies, the student group, and its advisers, have refused to agree to the college's demand that any student, regardless of his or her religious beliefs, should be able to run for election as a leader of any group, including the Christian association.").

[16] *See, e.g.,* Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups,* 29 U.C. Davis L. Rev. 653, 668-72 (1996) (detailing University of Minnesota's threat to derecognize CLS chapter).

Basic religious liberty presupposes that religious groups may choose leaders who agree with their religious beliefs and religious standards of conduct. Indeed, it should be common ground, particularly among those who advocate strong separation of church and state, that government officials, including public college officials, should not interfere with religious groups' internal selection of their leaders.

Of course, the leadership of any organization affects its ability to carry out its mission. This is particularly true for religious groups because leaders conduct the Bible studies, lead the prayers, and facilitate the worship at their meetings. To expect the person conducting the Bible study to believe that the Bible reflects truth seems obvious. To expect the person leading prayer to believe in the God to whom she is praying seems reasonable. Both are a far cry from any meaningful sense of discrimination. Yet some university administrators woodenly characterize these common sense expectations and basic religious liberty principles as "religious discrimination."

Caution needs to be taken before affixing the stigmatizing label of "discrimination" to religious groups' exercise of a fundamental religious liberty. To our society's credit, affixing the label of "discrimination" to an action immediately casts that action as bad and intolerable. But for that very reason, the push to recast as "discrimination" religious groups' right to have religious leadership requirements must be carefully weighed (and ultimately rejected) if religious liberty and pluralism are to survive in our society.[17]

An important purpose of college nondiscrimination policies is to protect religious students on campus. It is simply wrong to use nondiscrimination policies to punish religious student groups for being religious. When universities misuse nondiscrimination policies to exclude religious student groups, they actually undermine nondiscrimination policies' purposes and the good they serve.[18]

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[17] "It is tempting and common, but potentially misleading and distracting, to attach the rhetorically and morally powerful label of 'discrimination' to decisions, conduct, and views whose wrongfulness has not (yet) been established." Richard W. Garnett, *Religious Freedom and the Nondiscrimination Norm*, ch. 4 in Austin Surat, ed., *Legal Responses to Religious Practices in the United States* 194, 197 (Cambridge University Press, 2012).

[18] Joan W. Howarth, *Teaching Freedom: Exclusionary Rights of Student Groups*, 42 U.C. Davis L. Rev. 889, 914 (2009) ("application of the nondiscrimination policy against faith-based groups undermines the very purpose of the nondiscrimination policy: protecting religious freedom").

Such misuse of nondiscrimination policies is unnecessary. Reflecting an appropriate sensitivity to religious liberty, most nondiscrimination laws, such as the federal Title VII, simultaneously prohibit discrimination while protecting religious groups' ability to maintain their religious identities.[19] In interpreting their policies, college administrators should show a similar tolerance and respect for religious groups and their basic religious liberty to be led by persons who share their religious beliefs.[20]

Nondiscrimination policies and students' religious liberty are eminently compatible. As a commendable best practice, many universities embed robust protection for religious liberty within their nondiscrimination policies, thereby creating a sustainable environment in which nondiscrimination principles and religious liberty harmoniously thrive.[21] Because it is possible to have strong nondiscrimination policies *and* religious liberty, the better approach is to facilitate both, rather than demand that religious liberty lose.

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[19] *See* 42 U.S.C. § 2000e-1(a) (protecting right of religious associations' to employ only "individuals of a particular religion"); 42 U.S.C. § 2000e-2(e)(2) (protecting religious educational institutions' right to employ only "employees of a particular religion"); 42 U.S.C. § 2000e-2(e)(1) (allowing any employer to hire on the basis of religion "where religion . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise").

[20] The Supreme Court itself "decline[s] to construe" federal laws "in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979). How much more should college administrators avoid interpreting nondiscrimination policies to create an entirely avoidable conflict with students' First Amendment rights.

[21] Many universities have policies that protect religious groups' religious leadership criteria. The University of Florida has a model nondiscrimination policy that strikes the appropriate balance between nondiscrimination policies and religious liberty, which reads: "A student organization whose primary purpose is religious will not be denied registration as a Registered Student Organization on the ground that it limits membership or leadership positions to students who share the religious beliefs of the organization. The University has determined that this accommodation of religious belief does not violate its nondiscrimination policy." The University of Texas provides: "[A]n organization created primarily for religious purposes may restrict the right to vote or hold office to persons who subscribe to the organization's statement of faith." The University of Houston likewise provides: "Religious student organizations may limit officers to those members who subscribe to the religious tenets of the organization where the organization's activities center on a set of core beliefs." The University of Minnesota provides: "Religious student groups may require their voting members and officers to adhere to the organization's statement of faith and its rules of conduct." These policies are found in Attachment G.

II. Colleges Have Threatened to Exclude Religious Student Groups from Campus Because They Require that Their Leaders Agree with the Groups' Religious Beliefs.

A. Vanderbilt University

In 2011, Vanderbilt University denied recognition to a Christian Legal Society student chapter because the group expected its leaders to lead Bible study, prayer, and worship, and to affirm that they agreed with the group's core religious beliefs.[22] Vanderbilt University demanded that another Christian group delete five words from its leadership requirements if it wanted to remain on campus: "personal commitment to Jesus Christ."[23] The group left campus rather than recant their core religious belief.

In the end, Vanderbilt University forced fourteen Catholic and Evangelical Christian student groups from campus.[24] But "the right to religious freedom" must not be redefined as "the right to recant." Religious freedom must remain the right to hold traditional religious beliefs without fear of expulsion from campus.[25]

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[22] This email is Attachment A.

[23] This email is Attachment B.

[24] The excluded groups are: Asian-American Christian Fellowship; Baptist Campus Ministry: Beta Upsilon Chi; Bridges International; Campus Crusade for Christ (CRU); Christian Legal Society; Fellowship of Christian Athletes; Graduate Christian Fellowship; Lutheran Student Fellowship; Medical Christian Fellowship; Midnight Worship; The Navigators; St. Thomas More Society; and Vanderbilt + Catholic.

Two videos feature Vanderbilt students discussing their exclusion from campus. *See* Foundation for Individual Rights in Education (FIRE), "Exiled from Vanderbilt: How Colleges Are Driving Religious Groups Off Campus," *available at* https://www.youtube.com/watch?v=dGPZQKpzYac&feature=youtu.be (last visited May 28, 2015); and Vanderbilt Alumni, "Leadership Matters for Religious Organizations," *available at* https://www.youtube.com/watch?v=X5bdOIaLBzI (last visited May 28, 2015). Another short video captures highlights of a remarkable "town hall meeting" on January 31, 2012, during which administrators attempted to explain their stance to several hundred students. https://www.youtube.com/watch?v=msT_lI7mNcA&list=UUlRloSC2llSI2Mwf5eQJhsQ&index=1&feature=plcp (last visited May 28, 2015).

[25] Tish Harrison Warren, an InterVarsity staffperson at Vanderbilt University during the 2011-12 academic year, wrote about the experience: "The word *discrimination* began to be used—a lot—specifically in regard to creedal requirements. It was lobbed like a grenade to end all argument. Administrators compared Christian students to 1960s segregationists. I once mustered courage to ask [the Vanderbilt administrators] if they truly thought it was fair to equate racial prejudice with

Even though Vanderbilt University is a private university, its misuse of a nondiscrimination policy to exclude religious groups from campus is germane to this hearing because its exclusion strategy parallels the strategies of some public universities. For example, both Vanderbilt University and some public universities have applied a double standard to religious and Greek groups: the religious groups are prohibited from having religious leadership requirements, while fraternities and sororities are permitted to engage in sex discrimination in their selection of both leaders and members.[26]

B. California State University

The California State University comprises 23 campuses with 437,000 students. In the 2014-15 academic year, the University withdrew recognition from many religious student associations, including InterVarsity, Cru (formerly Campus Crusade for Christ), Chi Alpha, Rejoyce in Jesus Campus Fellowship, and Ratio Christi. Several of the excluded groups had met for over forty years on California State University campuses with requirements that their leaders agree with the groups' religious beliefs.[27] But under a new policy, as one California State University administrator explained to the media, "What they cannot be is faith based where someone has to have a profession of faith to be that leader."[28]

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asking Bible study leaders to affirm the Resurrection. The vice chancellor replied, 'Creedal discrimination is still discrimination.'" Tish Harrison Warren, "The Wrong Kind of Christian," *Christianity Today*, August 27, 2014, http://www.christianitytoday.com/ct/2014/september/wrong-kind-of-christian-vanderbilt-university.html?start=2 (last visited May 28, 2015).

[26] Colleges frequently invoke Title IX's exemption for fraternities and sororities to justify their unequal treatment of religious groups compared to Greek groups. But that response is a red herring. Title IX gives fraternities and sororities an exemption *only* from Title IX's own prohibition on sex discrimination in higher education. It does not give fraternities and sororities a blanket exemption from all nondiscrimination laws or policies, including a university's own nondiscrimination policy or an "all-comers" policy. If a university exempts fraternities and sororities from its nondiscrimination or "all-comers" policies, it must also exempt religious groups. *See Christian Legal Society v. Martinez*, 561 U.S. 661 (2010); *cf., Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 545-46 (1993).

[27] Ms. Bianca Travis, the student president of the Chi Alpha chapter at California State University Stanislaus campus, described the harm done her religious group by the university's de-recognition of religious groups. http://video.foxnews.com/v/4141090722001/faith-under-fire-at-cal-state/?playlist_id=930909787001#sp=show-clips (last visited May 28, 2015).

[28] KMVT News, "Another Fraternity Controversy – But It's Not What You Think," March 22, 2015, print and video *available at* http://www.kmvt.com/news/latest/Another-Fraternity-Controversy-But-Its-Not-What-You-Think-297181301.html (last visited May 29, 2015).

The student president of a religious student group that had met for forty years on California State University's Northridge campus received a letter withdrawing her group's recognition that read:

> This correspondence is to inform you that effective immediately, your student organization, Rejoyce in Jesus Campus Fellowship, will no longer be recognized by California State University, Northridge.
>
> . . . . The Rejoyce in Jesus Campus Fellowship organization will 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.
> In withdrawing University recognition, your organization is no longer afforded the privileges of University recognition (sic) Clubs and Organizations.[29]

The letter then listed seven basic benefits of recognition that the university had denied the religious student group because it required its student leaders to agree with its religious beliefs. These included: 1) free access to meeting space; 2) the ability to attract new student members through club fairs; and 3) access to a university-issued email account or website. As the letter explained, "[g]roups of students not recognized by the university who reserve rooms through [University Student Union ("USU")] Reservations and Events Services will be charged the off-campus rate and will not be eligible to receive two free meetings per week in USU rooms." As a result of being "de-recognized," some religious student groups paid thousands of dollars to rent meeting space and obtain insurance coverage that had been free for forty years – and was still free to recognized student organizations.

The problem at California State University centers on its own Executive Order 1068, issued in December 21, 2011, which re-interpreted the university's nondiscrimination policy to prohibit religious student groups from maintaining religious leadership requirements. The order also purported to adopt an "all-

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[29] The letter is Attachment C.

comers" policy that would prohibit all student groups, including religious groups, from choosing their leaders according to the groups' beliefs.[30]

But the executive order's attempt to establish an "all-comers" policy fails because the order explicitly allows fraternities and sororities to continue to engage in sex discrimination in selecting leaders and members. California State University employs the same double standard as Vanderbilt University: fraternities and sororities may select their leaders and members on the basis of sex, but religious organizations may not select their leaders on the basis of their religious beliefs.

In 2013, the university employed "Constitutional Review Student Assistants" to comb through student associations' constitutions and censor those constitutions that did not conform to the new executive order. As a result of this review, California State notified several religious student organizations that they would no longer be recognized as student organizations unless they stopped requiring their leaders to agree with the groups' religious beliefs.

Demonstrating that the order falls most heavily, if not exclusively, on religious student groups, California State University granted religious student associations a one-year moratorium from August 2013 to August 2014. That the religious groups were the only groups seeking a moratorium strongly suggests that other groups could adapt their leadership requirements to comply with the new policies whereas the religious groups could not.

In recent weeks, California State University has provided certain religious groups with a letter clarifying that, under specific circumstances, their leadership selection processes may include questions about a candidate's religious beliefs. But the use of such questions remains limited; the answers to such questions may not be considered as part of leadership eligibility requirements by the organization

[30] The California State University executive order is Attachment D. The executive order evidently was issued in order to moot a religious student group's appeal to the Supreme Court, seeking review of a Ninth Circuit ruling that allowed the university to apply its nondiscrimination policy to prohibit religious student groups from using religious criteria for leadership and membership. *Alpha Delta Chi-Delta Chapter v. Reed,* 648 F.3d 790, 805-806 (9th Cir. 2011), *cert. denied,* 132 S. Ct. 1743 (2012). The student group's petition was filed December 14, 2011, and the executive order was issued December 21, 2011. Review was denied March 19, 2012. One-quarter of the nation's college students live in the Ninth Circuit, which includes California, Alaska, Washington, Oregon, Hawaii, Arizona, Nevada, Idaho, and Montana within its jurisdiction.

corporately; they may be considered only by the individual voters as informing their decisions.

Nor has Executive Order 1068 been revised in any way. Instead all religious groups are at the mercy of administrators' unbridled discretion. As a result, California State University continues to deny religious student groups their religious liberty and free speech rights to choose leaders according to the groups' religious beliefs.

In December 2014, members of Congress sent a letter to California State University, expressing their disapproval of the religious student groups' exclusion. To date, no response has been received.

C. Students of other faiths are recent targets of religious intolerance at California public universities.

Sowing intolerance for one faith eventually reaps intolerance for other faiths. In recent months, student government leaders at UCLA and Stanford have targeted Jewish students for inquisitions about whether their Jewish faith or their known involvement in Jewish organizations should disqualify them from serving in student government. At UCLA, the student government "tangled in a debate about whether [a student's] faith and affiliation with Jewish organizations, including her sorority and Hillel, a popular student group, meant she would be biased in dealing with sensitive governance questions that come before the board."[31] Similarly, "[a] candidate for the student Senate at Stanford University filed a complaint after she was asked how her Jewish faith would inform her decisions."[32]

D. Boise State University

In 2008, the Boise State University student government threatened to exclude several religious organizations from campus, claiming their religious leadership requirements were discriminatory. The BSU student government

[31] "In U.C.L.A. Debate over Jewish Student, Echoes on Campus of Old Biases," *The New York Times*, March 5, 2015, *available at* http://www.nytimes.com/2015/03/06/us/debate-on-a-jewish-student-at-ucla.html?_r=0 (last visited May 29, 2015).

[32] "Stanford Student Candidate Files Complaint Over Jewish Faith Questions," *Jewish Telegraphic Agency*, April 13, 2015, *available at* http://www.jta.org/2015/04/13/news-opinion/united-states/stanford-u-student-senate-candidate-asked-about-jewish-faith?utm_source=Newsletter+subscribers&utm_campaign=5f8397c435-daily_briefing_4_14_15_old_subj_line_4_14_2015&utm_medium=email&utm_term=0_2dce5bc6f8-5f8397c435-25362373 (last visited May 29, 2015).

informed one religious group that its requirement that its leaders "be in good moral standing, exhibiting a lifestyle that is worthy of a Christian as outlined in the Bible" violated the student government's policy. The student government also found that the group's citation of Matthew 18:15-17, in which Jesus is quoted, also violated the policy. The student government informed another religious group that "not allowing members to serve as officers due to their religious beliefs" conflicted with the policy.[33]

In 2009, to settle a lawsuit, BSU reversed course and agreed to allow religious organizations to maintain religious criteria for leaders. In June 2012, however, BSU informed the religious organizations that it intended to adopt a new policy, which would exclude religious organizations with religious leadership requirements. In March 2013, the Idaho Legislature enacted legislation to protect religious organizations from exclusion.[34]

E. The Ohio State University

From October 2003 through November 2004, the Christian Legal Society student chapter at the Ohio State University Moritz College of Law was threatened with exclusion because of its religious leadership requirements. After months of discussions with university administrators, a lawsuit was filed, which was dismissed after the university revised its policy "to allow student organizations formed to foster or affirm sincerely held religious beliefs to adopt a nondiscrimination statement consistent with those beliefs in lieu of adopting the University's nondiscrimination policy." CLS then met without problems from 2005-2010.

In September 2010, the university asked the student government whether the university should change its policy to no longer allow religious groups to have religious leadership and membership requirements. On November 10, 2010, the OSU Council of Graduate Students unanimously adopted a resolution urging the University to drop its protection of religious student groups. The OSU Undergraduate Student Government passed a similar resolution. On January 18, 2011, the OSU Council on Student Affairs voted to remove the protection for religious student groups and "endorse[d] the position that every student, regardless of religious belief, should have the opportunity . . . to apply or run for a leadership

[33] These letters are Attachment E.

[34] Idaho Code § 33-107D.

position within those organizations."[35] In June 2012, the Ohio Legislature prohibited public universities from denying recognition to religious student organizations.[36]

III. Religious Liberty on College Campuses is at a Critical Tipping Point.

That this is an ongoing national problem is demonstrated by the Supreme Court's decision in 2009 to hear *Christian Legal Society v. Martinez.*[37] But in its decision, the narrow 5-4 majority explicitly refused to address the issue of nondiscrimination policies. All nine justices agreed that the Court was *not* deciding the nondiscrimination policy issue.[38]

Instead, the Court confined its decision to an unusual policy, unique to Hastings College of the Law, which required *all* student groups to allow any student to be a member and leader of the group, regardless of whether the student agreed with – or actively opposed – the values, beliefs, or speech of the group. Under this "all-comers" policy, no student group at Hastings had any associational rights whatsoever. According to Hastings administrators, the Democratic student group must allow a Republican to be president, just as CLS must allow any student to be its president, regardless of whether the student agreed with CLS's religious beliefs.

Five justices upheld this novel policy that wiped out all student groups' First Amendment rights. But in doing so, the majority was unequivocal that if a university allows *any* exemption to its "all-comers policy," it cannot deny an exemption to a religious group.[39]

In addition to the inherent unworkability of "all-comers" policies,[40] the *Martinez* decision has been heavily criticized on multiple grounds.[41] Deeply

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[35] The student government resolutions are Attachment F.

[36] Ohio Rev. Code § 3345.023.

[37] *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez,* 561 U.S. 661 (2010).

[38] *Id.* at 678 & n.10; *id.* at 698 (Stevens, J., concurring); *id.* at 704 (Kennedy, J., concurring); *id.* at 728-29 (Alito, J., dissenting) (joined by Roberts, C.J., Scalia, J., and Thomas, J.).

[39] *Id.* at 694, 698-99; *id.* at 704 (Kennedy, J., concurring).

[40] "All-comers" policies are unworkable and actually undermine a nondiscrimination policy. There are several reasons for this: 1) fraternities and sororities are completely incompatible

flawed in numerous ways, the *Martinez* majority implicitly accepted as its basic premise the notion that by recognizing a student group, a college endorses that group's specific religious or political beliefs. But, as discussed above, the Court has repeatedly rejected that precise premise for forty years: recognition is not endorsement.[42]

For evidence of what the Supreme Court will do when it actually decides a case involving university nondiscrimination policies and religious liberty, consider the Court's subsequent unanimous ruling in *Hosanna-Tabor v. EEOC*.[43] The Court

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with an "all-comers" policy; 2) single-sex a cappella groups and club sports teams are also incompatible; 3) minority groups cannot protect themselves against leaders who oppose their values; for example, an "all-comers" policy would require an African-American group to admit white supremacists to leadership positions; 4) the vulnerability of minority religious groups is increased; and 5) consistent and uniform administrative enforcement of an "all-comers" policy is nearly impossible, increasing a college's legal exposure.

[41] *See, e.g.*, Michael Stokes Paulsen, *Disaster: The Worst Religious Freedom Case in Fifty Years*, 24 Regent U. L. Rev. 283 (2012); John D. Inazu, *Justice Ginsburg and Religious Liberty*, 63 Hastings L.J. 1213, 1231-1242 (2012); John D. Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly* 5-6, 145-149 (Yale University Press 2012); Richard W. Garnett, *supra* note 17, at 194, 208-211, 219-225; Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. Det. Mercy L. Rev. 407, 428-29 (2011); Mary Ann Glendon, *Religious Freedom A Second-Class Right?*, 61 Emory L. J. 971, 978 (2012); Richard Epstein, *Church and State at the Crossroads:* Christian Legal Society v. Martinez, 2010 Cato Sup. Ct. Rev. 105 (2010); William E. Thro & Charles J. Russo, *A Serious Setback for Religious Freedom: The Implications of* Christian Legal Society v. Martinez, 261 Ed. Law Rep. 473 (2010); Carl H. Esbeck, *Defining Religion Down: Hosanna-Tabor, Martinez, and the U.S. Supreme Court*, 11 First Amendment L. Rev. 1 (2012); Note, *Freedom of Expressive Association*, 124 Harv. L. Rev. 249 (2010).

[42] An attorney with the Student Press Law Center stated that "the rationale of this opinion could end up doing more violence to student expression rights than any decision in the last 22 years." Adam Goldstein, *Supreme Court's CLS Decision Sucker-Punches First Amendment* (June 28, 2010), *available at* http://www.huffingtonpost.com/adam-goldstein/supreme-courts-cls-decisi_b_628329.html (last visited May 28, 2015).

[43] *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012). Legitimate questions have been raised whether the 2010 decision in *Martinez* survives the Court's 2012 decision in *Hosanna-Tabor* or the 2013 decision in *Agency for International Development v. Alliance for an Open Society*, 133 S. Ct. 2321 (2013) (holding that the government violated an organization's First Amendment rights by conditioning federal funding on the organization adopting a policy expressing views that the organization did not agree with). *See, e.g.*, William E. Thro, *Undermining* Christian Legal Society v. Martinez, 295 Ed. Law Rep. 867 (2013).

ruled unanimously, in the context of the "ministerial exception," that nondiscrimination laws cannot be used to prohibit religious organizations from deciding who their leaders will be. The Supreme Court acknowledged that nondiscrimination laws are "undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission."[44] In their concurrence, Justice Alito and Justice Kagan stressed that "[r]eligious groups are the archetype of associations formed for expressive purposes, and their fundamental rights surely include the freedom to choose who is qualified to serve as a voice for their faith."[45]

Conclusion

Our nation's colleges are at a crossroads. They can respect students' freedoms of speech, association, and religion. Or they can misuse nondiscrimination policies to exercise intolerance toward religious student groups who refuse to abandon their basic religious liberty. The road colleges choose is important not only for the students threatened with exclusion -- and not only to preserve a diversity of ideas on college campuses -- but also because the lessons taught on college campuses inevitably spill over into our broader civil society.[46]

Misuse of nondiscrimination policies to exclude religious persons from the public square threatens the pluralism at the heart of our free society.[47] Those who insist that we must choose between religious liberty and nondiscrimination policies demand a zero-sum game in which religious liberty, nondiscrimination principles, and pluralism ultimately lose.

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[44] *Id.* at 710.

[45] *Id.* at 713 (Alito, J., concurring).

[46] For example, a federal appellate judge has opined that a church might be denied the opportunity to rent a public school auditorium on weekends, which other community groups are allowed to rent, because its meetings might not be "open to the general public" if the church reserved Communion to baptized persons. *Bronx Household v. Bd. of Educ.*, 492 F.3d 89, 120 (2d Cir. 2007) (Leval, J., concurring).

[47] Constitutional scholar Professor Richard Garnett provides a thoughtful analysis of how best to reconcile nondiscrimination policies and religious liberty. Richard W. Garnett, *supra* note 17, at 194. *See also,* Richard W. Garnett, *Confusion about Discrimination, The Public Discourse,* Apr. 5, 2012, *available at* http://www.thepublicdiscourse.com/2012/04/5151/ (last visited May 28, 2015).

The genius of the First Amendment is that it protects everyone's speech, no matter how unpopular, and everyone's religious beliefs, no matter how unfashionable. When that is no longer true—and we seem dangerously close to the tipping point – when nondiscrimination policies are misused as instruments for the intolerant suppression of religious speech and traditional religious beliefs, then the pluralism so vital to sustaining our political and religious freedoms will no longer exist.

Mr. FRANKS. I thank the gentlelady.

I would know recognize our third witness, Mr. Raskin.

And, sir, if you would make sure that microphone is on?

TESTIMONY OF JAMIN B. RASKIN, PROFESSOR OF LAW, AND DIRECTOR, PROGRAM ON LAW AND GOVERNMENT, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW

Mr. RASKIN. Thank you very much. I am delighted to be with you.

Higher education has been a critical force in advancing free inquiry in America. And as Chairman Goodlatte noted, his fellow Virginian Thomas Jefferson was a key force in defining the university as a place of secular inquiry free from both governmental and religious compulsion and dogma and repression.

It is also one of America's leading industries, higher education, and it is also, I would say, the paradigm exemplar of free discourse and debate in our vibrant, pluralist, and multicultural democracy. So if we have no freedom of thought and speech on campus, it is hard to imagine where we are going to have it in the United States.

I want to set forth three principles that I think should govern political speech on campus, and I should add that although the presence of state action may arguably be missing from most private colleges and universities, there is no reason that these free speech principles should not operate for private colleges and universities, too, from Harvard and Yale to Southern Methodist and Oberlin and Liberty University, at least to the extent that these institutions want to think of themselves as centers of free thought and inquiry rather than centers of dogma and propaganda. And this may be the major point of difference between my perspective on these matters and my good friend Greg Lukianoff, who stands up zealously and strongly for the free speech of rights of students at public universities and colleges and some private universities but not others.

I think that Liberty University, for example, should no more be able to exclude a gay student group than Harvard or Berkeley should be able to exclude an antigay student group. So I would defend free speech across-the-board, public and private, which I suppose makes me the strongest free speech absolutist here. Or maybe not. I will wait to hear from my friend Wendy Kaminer, too.

So the three principles, first, the political and social and artistic expression of students should be considered part of the educational experience rather than a detraction or diversion from it. So this means that the common areas of the university, such as the streets, the sidewalks, the greens, the commons, the cafeteria, the TV station, the radio station, the atriums, and so on, should all be treated as traditional public fora or at least limited public fora for the purposes of social communication and First Amendment analysis. These areas are paid for, at least substantially, by taxpayers, and they lend themselves to expressive activity and assembly of students and faculty, staff members and alumni, and, indeed, other members of the public.

Now, of course, public expression and protest on campus must be subject, as everywhere else, to reasonable time, place, and manner restrictions. You can have your pro-choice or your pro-life rally on

the campus green, but not in the hallway outside a history lecture in such a way as to make it impossible for anyone to hear the lecture proceed.

This distinction permeates Supreme Court jurisprudence governing student speech. As the Court wrote in the seminal *Tinker v. Des Moines School District* case, when a student is in the cafeteria or on the playing field on the campus during authorized hours, he may express his opinions even on controversial subjects like the conflict in Vietnam, if he does so without materially and substantially disrupting the educational process and without colliding with the rights of other students.

This has become the standard doctrine. All student speech is accepted which does not interfere with the operation of the school and does not violate the rights of other students.

And if this principle was right, the current trend of setting up a free speech zones, or what students call free speech pens, is totally antithetical to free speech values. Under the First Amendment, the whole country is a free speech zone, or at least the public places within it.

The doctrine of reasonable time, place, and manner restrictions presupposes that public places are open for free speech to the people and can be regulated reasonably and modestly in the interest of sleep hours, preventing scheduling conflicts, limiting the decibel level, and so on. But by sharply limiting restricting the space and time allotted to students and citizens for expression, the free speech zone reverses all of the presumptions and makes the exception of reasonable regulation at the margins into a rule of censorship in most public places. The creation of a tiny free speech zone makes the rest of the campus a speech-free zone.

This is a dangerous trend that, of course, goes beyond campus now. In the last several Democratic and Republican national conventions, there were free speech zones set up 10 or 12 blocks away from where the conventions were and where delegates were entering and exiting.

Secondly, and here I echo Congressman Conyers, it is implicit in and, indeed, it is integral to the *Tinker* standard that freedom of speech cannot be turned into an effective cover for what the Supreme Court called in *Davis v. Munroe County Board of Education* severe, pervasive, and objectively offensive harassment of students by other students or other members of the community. In that case, the Court determined that Title IX is violated by such harassment, which makes it difficult if not impossible for the student victims to learn and to thrive.

Surely, we can all agree that while students and faculty can try out whatever theories they want in the classroom, they have no right to engage in personal, face-to-face, racial, or sexual harassment that is so severe, pervasive, and objectively offensive that it undermines and detracts from the victims' educational experience and effectively denies them equal access to the education available at the school.

This is an essential point, even if sometimes difficult to implement.

My sense is that the overwhelming number of public universities and colleges know the difference between real intellectual debate

and a relentless campaign of personal harassment designed to drive another student to leave the school or to commit suicide or something like that.

For the sake of all of our children who go to college, it is important for the schools to recognize the difference. Now, there are, of course, some campuses where overly broad and vague speech or conduct codes have been used to target students simply for unorthodox or radical expression. And it is important to understand that a lot of these speech codes are left over from the 1960's and 1970's when they were set up to target and vilify antiwar protesters and used again in the 1980's to go after the South Africa divestment antiapartheid protesters on campus. Thousands of students were punished and disciplined during that period.

To the extent that these codes are still hanging around and are being used in an episodic or idiosyncratic way to go after people for speech that others determine to be offensive or experience as offensive, then those codes should, indeed, be restricted and shut down for that impermissible application, and they should be forced to conform to the First Amendment.

Finally, when it comes to faculty, administrators may not treat their academic research and inquiry and speech as government speech, which can be regulated by administrators. Academic speech, as the Fourth Circuit found in a 2011 case, combines whatever public prestige or authority there is in a university with the private citizen expression and ideas of the professor. And so that has to be protected.

And finally, let me just say one thing about Ms. Colby's testimony, if I could, and the Fox News segment we saw. The Supreme Court has ruled on this question in *Christian Legal Society v. Martinez* in 2010, where the Court upheld Hastings' so-called all-comers policy. That policy said that any group can operate on campus, but if you want to be recognized by the university and get money and use official email system, you have to be open to all comers, to all students who want to join. And the majority on the Court, including Justice Kennedy, upheld that policy as being viewpoint neutral, and upheld it as promoting academic discourse and free discussion on campus.

So I think that the alternative position is one that would actually lead to more censorship. Imagine if one faction seizes hold of the Christian Legal Society and says we don't think that Mormons are Christians, and they can't belong here, and you sign an oath saying that you believe that Mormonism is antithetical to Christianity while the position of saying whoever gets there first gets to define the code and the constitution of the group would lead to just that kind of race into the campus door to seize control of the group and say we are the real Christians.

The way the Supreme Court upheld it is simply to say that anybody can join, anybody has the right to participate in the democratic dialogue and discussion in elections. I think that is libertarian and the democratic approach.

[The prepared statement of Mr. Raskin follows:]

TESTIMONY OF PROFESSOR JAMIN B. RASKIN
DIRECTOR, PROGRAM ON LAW AND GOVERNMENT
AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW

BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
JUDICIARY COMMITTEE
CONSTITUTIONA AND CIVIL JUSTICE SUBCOMMITTEE

"First Amendment Protections on Public College and University Campuses."

TUESDAY, JUNE 2, 2015

Chairman Goodlatte and Ranking Member Conyers and Distinguished Members of the Committee:

Thank you for this opportunity to share my thoughts with you about First Amendment protection on public college and university campuses.

As a professor of constitutional law at American University and an author of a book on the rights of students, I take great interest in the subject before us. Higher education has not only been a critical force in advancing free inquiry in our society and it is not only one of America's leading "industries," if you will. It is also the paradigm and exemplar for free discourse, debate, and dialogue generally in our vibrant pluralist and multicultural democracy. If we have no freedom of thought and speech on campus, it is hard to think of where we might have it.

In the few minutes I have, I would like to set forth three major principles that ought to govern political speech on the campus of public universities and colleges. I should add that, although the presence of state action may arguably be missing for most private colleges and universities, there is no reason that these free speech principles should not operate for private colleges and universities as well, from Harvard and Yale to Southern Methodist and Oberlin and Liberty University, at least to the extent that the institutions want to think of themselves as universities as opposed to centers of dogma and propaganda.

First, the political, social, and artistic expression of students should generally be considered to be part of the educational experience rather than any kind of detraction from it. This means that the common areas of the universities and colleges, such as the streets, the sidewalks, the greens, the commons, the parks, the cafeteria seating areas, the atriums, and so on, should all be treated as traditional public fora for the purposes of political and social communication and First Amendment analysis. These areas are paid for, at least substantially, by taxpayers, and they lend themselves to expressive activity and assembly of students, faculty, staff members, alumni, and indeed other members of the public. Of course, public expression and protest on campus must be subject, as everywhere else, to reasonable time, place and manner restrictions; you can have your pro-choice or pro-life rally on the campus green, but not in a hallway immediately outside a calculus lecture in a way that makes it impossible for the class to proceed. This distinction permeates Supreme Court jurisprudence governing student speech. As the Court wrote in the seminal *Tinker v. Des Moines School District*, when a student "is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without 'materially and substantially interfer(ing)" with operation of the school and "without colliding with the rights of others." This has become the standard doctrine: all student speech is accepted which does not interfere with the operation of the school and its classes and does not violate the rights of other students to learn.

If this foundational principle is still right, and surely it must be, the current trend of setting up "free speech zones" or what students call "free speech pens" is totally antithetical

to free speech values. Under the First Amendment, the *whole country* is a free speech zone, or at least the public places within it. The doctrine of reasonable time place and manner restrictions presupposes that public places are open for free speech business to the public and can be regulated reasonably and modestly in the interest of sleep hours, preventing scheduling conflicts, limiting the decibel level and so on. But, by sharply restricting the space and time allotted to citizens for expression, the "free speech zone" reverses all of the proper presumptions and makes the exception of reasonable regulation at the margins into a rule of censorship in public places. This is a dangerous trend that you should watch and legislate against if necessary by using your 14th Amendment powers to adopt congruent and proportional legislation to protect free speech on campus.

Secondly, it is implicit in, and indeed integral to, the *Tinker* standard that freedom of speech cannot be turned into an effective cover for what the Supreme Court called in *Davis v. Monroe County Board of Education* "severe, pervasive, and objectively offensive" harassment of students by other students or other members of the community. In that case, the Court determined that Title IX is violated by such harassment, which makes it difficult if not impossible for the student victims to learn and thrive. Surely we can all agree that while students and faculty can try out whatever theories they want in the classroom, including discredited theories of racial phrenology or gender differences in cognition, they have no right to engage in personal, face-to-face racial or sexual harassment that is "so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victim's educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."

This is an essential point, even if sometimes difficult to implement and define. My sense is that the overwhelming number of public universities and colleges know the difference between a serious intellectual debate and a relentless campaign of personal harassment designed to drive another student to leave school or commit suicide. For the sake of all of our children who go to college, it is important for the schools to recognize the difference and honor it.

Finally, when it comes to faculty, administrators at public universities and colleges may not treat the academic research, inquiry, publications, and pronouncements of their professors as government speech which can be regulated or censored under the authority of the *Garcetti* decision. This speech, as the Fourth Circuit found in a decision called *Adams v. Trustees of the University of North Carolina-Wilmington*, 640 F.3d 550 (2011), combines the public authority of the university with the private-citizen expression and ideation of the professor. Or, to put it differently, the professor's speech, although bolstered by the imprimatur and prestige of the state, is an expression of the citizen-academic and cannot be censored or stifled simply because of disagreement or disapproval of it. However, we also must point out that the rank and tenure process is a professional domain different from a public speech forum. In the rank and tenure process, we advance by virtue of meeting rigorous academic professional standards for research, writing, teaching and service. 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. Simply calling yourself a victim

of right-wing or left-wing political correctness should not be sufficient to gain tenure if you have not met the independent professional standards for academic advancement.

Within these principles lurk many opportunities for ambiguity and controversy, and I am happy to discuss them.

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Mr. FRANKS. I think the gentleman.

I would now recognize our fourth and final witness, Ms. Kaminer.

And make sure that microphone is on, okay?

TESTIMONY OF WENDY KAMINER, WRITER/LAWYER, AND FREE SPEECH FEMINIST, BOSTON, MA

Ms. KAMINER. Thank you for inviting me to testify.

I am Wendy Kaminer. I am a writer, a lawyer, and a free speech feminist. That is not an oxymoron. I have been following, participating in, and occasionally provoking free speech battles on and off campus for decades.

While the legality of censorship at public and private institutions differs dramatically, the culture of censorship is virtually the same. I hope to offer an understanding of that culture.

You have heard, you have seen a few typically extreme examples of it. For now, I will simply note that these days when students talk about feeling safe, they are often talking about feeling protected from what one college campus newspaper called being attacked by viewpoints.

How did opposing viewpoints become so fearful? The impulse to censor is a nonpartisan vice, but I will focus on the roots of progressive censorship campaigns, which are largely responsible for restrictive speech codes on campus and Department of Education policies.

On the left, censorship is an extension of the drive for civil rights. It equates words with actions and insists that equality requires policing offensive words or micro-aggressions. Now, new technologies obviously have played a role in increasing anxiety about speech, but this essential view of pure speech as active discrimination partly reflects the confluence of three popular movements that date back some 30 years, feminist antiporn crusades of the 1980's, late 20th century personal development fads, and multiculturalism, which accompanied a commendable drive for diversity on campus.

In the 1980's, law professor Catherine MacKinnon and the late writer Andrea Dworkin popularized what became a highly influential view of speech as a substantial bar to equality. They denied the difference between words and action, framing pornography as actual sexual assault and a civil rights violation. They persuaded Indianapolis to adopt a model civil rights antiporn ordinance, which was soon struck down by the Seventh Circuit. So MacKinnon and Dworkin lost that battle, but their successors are winning the war. Campus speech codes reflect their view of presumptively bad speech as discrimination.

Equating offensive speech with harmful actions was also at the center of 1980 personal development movements that focused on recovery from verbal abuse and the supposed disease of codependency. Pop psychologists declared that virtually all of us were victims of child abuse, which was defined very broadly to include being chastised occasionally by your parents. Consequently, virtually all of us were said to be fragile, easily damaged by unwelcome speech. This made censorship seem only humane. It made

censorship seem a moral necessity as well as an essential path to equality.

These ideas were readily absorbed on campuses concerned with diversity. Multiculturalists sought to protect students deemed historically disadvantaged from offensive speech. Like abuse, discrimination, and even oppression were defined down to include feeling offended, demeaned, or insulted by attitudes and remarks. Offensiveness, and I think this is really important, offensiveness was defined by the unpredictable subjective responses of listeners who belonged to protected classes.

So it is not surprising that many students report being harassed. The question is what do they mean by being harassed? They may mean that they have been offended or attacked by viewpoints.

Campus censorship, like Western European bans on hate speech, establishes a right of particular audiences not to be offended at the expense of a universal right to speak.

And what happens is on campus doesn't stay on campus. Students graduate. They become faculty, administrators, government regulators. Because speech restrictions date back decades now, some middle-aged policymakers as well as students support and promulgate bans on whatever they deem discriminatory speech.

So as you consider censorship on public campuses, consider the possible far-reaching consequences of producing generations of potential censors. American constitutional guarantees of free speech established in the 20th century may not survive the 21st. We may go the way of Western Europe in banning whatever is considered hateful speech.

What can Congress do to arrest and perhaps reverse these campus trends? It can monitor the Department of Education, which seems out of control. The case of Northwestern Professor Laura Kipnis, who has been investigated for publishing unfashionable opinions about sexual politics on campus, exemplifies the department's overreach.

It can also consider enacting the kind of affirmative protections on speech that the Foundation for Individual Rights of Education has proposed.

But perhaps the most important thing for Congress to do legislatively is not very much. Don't react to bad speech by enacting bad laws that confuse offensive words with discriminatory action. Freedom of speech is freedom from government interference. It depends on official inaction.

Now, if I may just as a quick postscript, I would like to comment on Professor Raskin's comment on Liberty University. I think that in trying to impose First Amendment protections on a private religious institution, he is, I suppose, giving them First Amendment speech rights at the expense of their First Amendment associational rights.

Thank you.

[The prepared statement of Ms. Kaminer follows:]

TESTIMONY OF WENDY KAMINER ON "FIRST AMENDMENT PROTECTIONS ON PUBLIC COLLEGES AND UNIVERSITIES" BEFORE THE HOUSE JUDICIARY SUB-COMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

SUBMITTED MAY 29, 2015

I'm a writer, lawyer, and free speech feminist, an adviser to the Foundation for Individual Rights in Education, and a member of the Massachusetts State Advisory Committee to the U.S. Civil Rights Commission. I've have been following, participating in and occasionally provoking free speech battles on and off campus for decades. I was a staff attorney in the New York City Mayor's midtown office, working on 42nd street, when the feminist anti-pornography movement emerged in the 1980s. I was briefly involved in the movement in a futile effort to discourage it from seeking legislative remedies for misogynist speech and became a strong opponent of proposed civil rights laws restricting pornography. I was a fellow at Radcliffe College throughout the 1990s when political correctness was taking hold and civility or harassment codes began restricting the freedom to express unsettling ideas.

"Harassment is making someone un-comfortable," students began asserting some 20 years ago. "That makes me a harasser" I'd respond, "since I strive to make at least a few people uncomfortable everyday."

Today, students on both public and private campuses are encouraged to fear discomfiting or disturbing language and ideas more than ever, as a quick review of the Foundation for Individual Rights website will confirm.[1] Last fall, I inadvertently ignited a controversy at my alma mater, Smith College, by offering a strong defense of free speech during a panel discussion. I argued for the protection of allegedly hateful speech, offering examples of distasteful, constitutionally protected advocacy. I quoted a few forbidden words instead of referencing them by their initials and discussed the difference between hurling an epithet and quoting a word in context of a discussion of language, literature, and

[1] https://www.thefire.org/

law.

My presentation was characterized as threatening and potentially traumatic, requiring a trigger warning. My speech, part of a polite, academic debate, was condemned as an act of "racial violence." And, in open letter to the campus community, college president Kathleen McCartney subsequently apologized that "some students and faculty were hurt" and made to "feel unsafe."[2]

An un-armed, aging 5'2" female, I surely presented no physical threat, but these days, when students talk about threats to their safety and demand access to "safe spaces," they're often talking about the threat of unwelcome speech and demanding protection from opposing ideas. It's not just rape that some women on campus fear: It's discussions of rape. At Brown University, a scheduled debate between two feminists about rape culture was criticized for, as the *Brown Daily Herald* put it, undermining "the University's mission to create a safe and supportive environment for survivors." The paper reported that students who feared being "attacked by the viewpoints" aired at the debate could instead "find a safe space" among "sexual assault peer educators, women peer counselors and staff" during the same time slot.[3] Presumably they all shared the same viewpoints and could be trusted to attack no one with their ideas.

If these excessive fears of academic debate seem frivolous they can have serious consequences, including abuses of government power. At Northwestern University, Professor Laura Kipnis has been charged with "retaliation" and is under investigation by the university's Title IX coordinator for publishing an article in the *Chronicle Review* about campus sexual politics that challenged some contemporary feminist shibboleths. As Professor Kipnis explains in an account of her "Title IX inquisition":

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[2] http://www.smith.edu/president/speeches-writings/new-york-alumnae-panel

[3] http://www.browndailyherald.com/2014/11/17/janus-forum-sexual-assault-event-sparks-controversy/

> "I learned that professors around the country now routinely avoid discussing subjects in classes that might raise hackles. A well-known sociologist wrote that he no longer lectures on abortion. Someone who'd written a book about incest in her own family described being confronted in class by a student furious with her for discussing the book. A tenured professor on my campus wrote about lying awake at night worrying that some stray remark of hers might lead to student complaints, social-media campaigns, eventual job loss, and her being unable to support her child. I'd thought she was exaggerating, but that was before I learned about the Title IX complaints against me."[4]

How did we get here? I'll offer at least a partial explanation of how a verbal defense of free speech became a virtual hate crime, how safety came to mean protection not from physical assault but from the "attack" of unwelcome words and ideas, and why providing intellectual comfort to students is taking precedence over confronting them with intellectual challenges. While the legality of censorship at public and private institutions differs dramatically, thanks to the First Amendment, the culture of censorship is virtually the same. I hope an understanding of that culture will help you address its consequences.

I'll focus on censorship campaigns from the left, a dominant force in recent years, but, first, I want to stress that the impulse to censor is a non-partisan vice. Mid 20th century campus censorship emanated from the right and, recently, for example, controversies over inappropriate political interference by conservative officials have roiled the North Carolina state university system.[5]

But campus speech and harassment codes incorporating broad, subjective definitions of illicit offensive speech are essentially products of the left (although activists and administrators on the right may and will make use of them.) Progressives who champion these restrictive speech codes at public universities are apt to view the First Amendment itself as a kind of civility code

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[4] Laura Kipnis, My Title IX Inquisition" The Chronicle Review, May 29, 2015 http://chronicle.com/article/My-Title-IX-Inquisition/230489/?key=Tj8ilVA8NStOZnEyMTsVbG4EbHA/OB94YHUYOH5xbltWEQ

[5] http://www.newyorker.com/news/news-desk/new-politics-at-the-university-of-north-carolina

that does not protect allegedly hateful or demeaning speech, especially when it targets presumptively disadvantaged people or groups. (The First Amendment is, in this view, also an equality code that subjects private associational rights to public anti-discrimination rules, as the Christian Legal Society cases show.)[6]

Thus, progressive campus censorship campaigns are, in a way, misguided extensions of the drive for civil rights. In part, free speech has been a victim of relative success in achieving formal legal equality through civil rights laws. That mission more or less accomplished, with some exceptions, the progressive movement turned to the challenge of achieving social equality through law. It began advocating restrictions on speech to eradicate social slights -- as if we could or should require people to respect each other. We don't have the categorical right to act on our biases, but we do have a fundamental right to harbor and express them.

But that is a civil libertarian view not necessarily shared by civil rights activists. Many of them tend to view social slights, "micro-aggressions" in today's parlance, as serious threats to equality -- largely because they regard speech as a form of action. How did verbal offenses become so fearful, so readily likened to physical assaults? New communications technologies obviously arouse new anxieties, not entirely misplaced. Human viciousness has never been disseminated so instantly, broadly, and indelibly. But the normalization of campus censorship, treating words as actions, predates social media and widespread Internet access.

In part, it reflects the confluence of three popular movements dating back nearly 30 years: Feminist anti-pornography crusades of the 1980s; late 20th century personal development movements about dysfunction and abuse; and multi-culturalism on college campuses, which accompanied a commendable drive for diversity.

In the 1980s, two impassioned anti-porn feminists, law professor Catherine MacKinnon and the late writer Andrea Dworkin, popularized what became a highly influential view of free speech as a substantial bar to equality.

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[6] https://www.law.cornell.edu/supct/html/08-1371.ZS.html

They denied the difference between words and action, framing whatever they considered pornographic speech as an actual sexual assault. (MacKinnon called it a "form of forced sex."[7]) They devised a novel definition of pornography as a civil rights violation and persuaded the City of Indianapolis to enact their model ordinance, regulating pornography as a discriminatory practice. It was struck down by the 7th Circuit Court of Appeals: "Indianapolis justifies the ordinance on the ground that pornography affects thoughts," the Court noted. "This is thought control."[8]

But while MacKinnnon and Dworkin lost that battle, their successors are winning the war. As the feminist anti-porn movement retreated from the legislative arena, its equation of pure speech with active discrimination gained strength on college campuses. The view of unwelcome speech as a civil rights violation and the conflation of words and actions are at the core of campus speech and harassment codes that have flourished over the past 20 years.

Contemporary mistrust of free speech among campus progressives is also, in part, a legacy of personal development movements that emerged in the late 1980s, alongside feminist anti-porn protests. Popular therapies focused on recovery from the "disease" of codependency and adopted a similarly dire view of unwelcome speech. Best-selling pop psychologists and a proliferation of 12 step groups echoed the anti-porn feminist view that "words wound," quite grievously. Self-appointed recovery experts declared that virtually all of us were victims of child abuse, in one form or another. They justified this diagnosis by defining abuse down, very broadly, to include a range of common, normal childhood experiences, like being chastised on occasion or treated insensitively by your parents.[9]

As a consequence of this ubiquitous "abuse," virtually all of us were said to

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[7] MacKinnon, Catharine (1987). *Feminism unmodified: discourses on life and law*. Harvard University Press, 1987, p. 148.

[8] http://www.bc.edu/bc_org/avp/cas/comm/free_speech/hudnut.html

[9] Wendy Kaminer, I'm Dysfunctional, You're Dysfunctional, Addison Wesley, 1992

be fragile, vulnerable and easily damaged by unwelcome speech. So, the self-esteem movement of the 1980s and early '90s advocated nearly constant praise, assuming our extreme sensitivity to insults, slights, (now "micro-aggressions") and what might once have been considered constructive criticism. These broad views of vulnerability and abuse made censorship seem a moral necessity, as well as an essential path to equality.

Feminism absorbed these lessons over the past several decades. Because it focused on familial abuse, the recovery movement was a natural partner for many feminists involved in anti-violence movements. The result was a popular strain of censorious, therapeutic feminism, which dominates the movement today, especially on campus, infecting contemporary feminism with a strong strain of authoritarianism.

By the 1990's, however, women were only one of several campus groups presumed to be particularly vulnerable to verbal abuses. As campuses diversified, multiculturalists sought to protect a range of historically disadvantaged student groups from speech considered racist, sexist, homophobic, or otherwise discriminatory. Like abuse, oppression was defined down. I remember the first time, in the early 1990s, that I heard a Harvard student describe herself as oppressed, as a woman of color. She hadn't been systematically deprived of fundamental rights and liberties. After all, she'd been admitted to Harvard. But she had been offended by attitudes and remarks.

Did she have good reason to take offense? That was an irrelevant question. Popular therapeutic culture defined verbal offenses by the emotional responses of their self-proclaimed victims. The 12-step/recovery movement had exalted subjectivity in its deference to individual "feeling realities" and the belief that personal testimony was proof of objective truths. Speech and harassment codes tend to reflect this reliance on the feelings of offended listeners, particularly those who are presumptively disadvantaged. Lacking clear, predictable, relatively objective, constitutional standards of unprotected speech, the codes are supposed to ensure equality. Instead they've spawned the soft, arbitrary authoritarianism that now governs many American campuses.

But what happens on campus doesn't stay on campus. Students graduate. They become faculty members, administrators, political candidates, and state or federal regulators. Considering the fact that campus speech restrictions and a culture of censorship date back decades, it's not surprising that some policy-makers and opinion leaders approaching middle age, as well as students, support restrictions on whatever they deem hateful, bigoted, or generally offensive speech. "Free speech doesn't include hate speech," is now a familiar mantra on and off campus. It's also a nonsensical mantra: We don't need free speech guarantees to protect speech that doesn't offend and isn't condemned by some influential person or group as hateful.

So as you consider censorship on public campuses today, keep in mind that support for it has already influenced the wider culture. As you consider campus censorship, consider its possible, far-reaching consequences: Will American constitutional guarantees of free speech established in the 20th century survive the 21st? Or will we follow the lead of Western European nations in criminalizing allegedly hateful, bigoted speech? It's been regulated on campus for years, producing a generation or two, so far, of potential censors.

What happens when hate speech prohibitions move off campus? The Western European experience is instructive. Penal laws against insults and various expressions of bigotry don't simply ban epithets or threats: they ban the expression of unwelcome ideas, like opposition to immigration or criticism of homosexuality as sinful.[10] These laws may now favor stereotypically liberal beliefs over conservative ones, but the content of speech bans is always subject to change; they reflect the ideology of people and parties in power.

What can Congress do to arrest and perhaps reverse these worrisome campus trends? It can and should monitor the Department of Education's regulatory activity, notably overbroad definitions of harassment and retaliation that virtually obliterate academic freedom and, at public universities, ignore the constitutional rights of students and faculty. Congress can consider legislation

[10] http://brendanoneill.co.uk/post/80975874876/how-a-ban-on-hate-speech-helped-the-nazis

offering affirmative protection of speech rights to try undoing the damage already done, like legislation proposed by the Foundation for Individual Rights in Education.

But perhaps the most important thing for Congress to do legislatively is -- not very much. It should be wary of enacting bad law in response to hard and heart-wrenching cases involving "bad" speech. Freedom of speech is freedom from government interference. It depends on official inaction. The history of legislation effecting speech is, in large part, a history of speech restrictions, whether justified by appeals to national security or equality and civil rights, whether aimed at suppressing ideologies presumed particularly dangerous or protecting people presumed particularly vulnerable.

"Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good, as well as by evil, men," Justice Jackson wrote in his landmark 1943 opinion upholding the First Amendment right of students to refrain from saluting the flag.[11] Speech restrictions are generally well intended. They're supposed to protect us from language and ideas considered more harmful than restrictions on expressing them. They reflect a wishful belief that censorship can be effectively cabined, a belief invariably proven wrong, as the increasing absurdity of campus censorship regimes demonstrates. Well-intended speech restrictions have unintended consequences. "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent," Justice Brandies observed presciently, nearly a century ago.[12]

What should Congress do? It should remember that liberty is a leash on power and free speech is most at risk when people in power restrict it for our own imagined good.

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[11] https://www.law.cornell.edu/supremecourt/text/319/624

[12] https://www.law.cornell.edu/supremecourt/text/277/438#writing-USSC_CR_0277_0438_ZD

Mr. FRANKS. Thank you all for your testimony.

We will now proceed under the 5-minute rule of questions. I will begin by recognizing myself for 5 minutes.

Mr. Lukianoff, I guess my first question to you, sir—incidentally, your testimony is very compelling—how prevalent are speech zone policies in our Nation's public universities and colleges? For the record, what is the rationale for quarantining free speech expression to one specific area on campus? What is the legal foundation for it?

Mr. LUKIANOFF. We do very extensive research, and the best we can tell, it is about one-sixth of universities. We survey about 437 universities. We usually prefer the ones that are the biggest universities, so that 437 ends up bringing in a lot of the biggest schools in the country as well. About one-sixth of them have speech zones that we think are, to use an easy way to say it, laughably unconstitutional.

Every time we have challenged them, whether in the court of law or just naming them a "Speech Code of the Month," they generally drop the zones. But nonetheless, we have been fighting these for 15 years.

Part of the rationale, I am not totally clear on what the rationale is. I think Jamie is right, that Professor Raskin is right, that these were probably started up in the 1960's as what was presumed to be a positive thing, as an additional place you could always engage in free speech. And then at some point, they became the only place you could engage in free speech, thereby quarantining 99.9 percent of campus from meaningful speech and protest.

I think that because of the mass expansion of the bureaucracy on college campuses, you end up with administrators really, frankly, preferring—and sometimes it is not ideological at all. They just want peace and quiet. They don't really get the chaotic paradise that our universities are supposed to be. They would really rather, if you have something to say that is controversial, frankly, it is more convenient if you get advance permission.

Oh, and I should emphasize, in a lot of these cases, they are not just free speech zones. They are free speech zones that you have to apply 10 days in advance to use, that if you want to hand out flyers that might upset somebody, it is better if you do it in the corner over there.

So I think it is partially peace and quiet on campus. I think partially it is mass bureaucratization. And I think there are people on campus who would rather nobody said anything at all, at least nothing near anyone, rather than have anyone offended.

Mr. FRANKS. Thank you, sir.

Ms. Kaminer, I found your testimony particularly compelling. And I would like to just pose the notion to you, are pro-censorship attitudes from campus areas, are they spreading beyond campuses? And if so, to what extent and in what ways?

Ms. KAMINER. Absolutely. We have seen a few recent examples of it. We saw the reaction of many commentators in the press, from Fox News to the New York Times editorial page, to the attacks on the draw Mohammed contest that was organized by Pam Geller in Texas. A lot of journalists blamed Pamela Geller for essentially in-

citing the violence instead of blaming the people who engaged in it.

Without expressing an opinion on the niceness or the integrity or the appropriateness of what Geller was trying to do, there is no question that she had an absolute right to do it and that we should not hold people who engage in protected speech, regardless of how provocative, responsible for violent acts committed in reaction to it.

That is just one obvious example. But I think that if you go into the general population, you will hear many people say things like, "I am not in favor of censorship, but free speech isn't hate speech." That is a very common sentiment. It is also somewhat a nonsensical one because, as Congressman Conyers said, free speech is supposed to protect unpopular speech, speech that some people consider hateful. Otherwise, free speech guarantees are completely redundant.

Mr. FRANKS. Ms. Colby, I am troubled by the double standard that colleges seem to be applying when the fraternities choose their leaders and members based on sex or gender, and it occurs to me that you made that point very strongly in your comments. But then they, of course, refuse to allow religious groups to choose their leaders based on religious beliefs.

I think it is very appropriate for colleges to allow fraternities to choose their leaders and members as they have always done, but why not allow religious groups to do the same? Why the double standard? Again, I am sort of being redundant to your comments previously.

Ms. COLBY. Well, I think the reason for the double standard is that the fraternities and sororities are a much more powerful constituency on and off campus than the religious groups are, and so the universities don't tend to want to restrict them, but they think they can go ahead with the religious groups.

These exceptions for the fraternities and sororities go to Professor Raskin's point about what was actually the holding in *CLS v. Martinez*. In *CLS v. Martinez*, the Court was very specific. It actually went on for about three pages about the fact that it was not deciding the issue of whether nondiscrimination policies could be used to prohibit religious groups from having religious leadership requirements. That is an issue that has not been decided by the Supreme Court.

Instead, what the Court said, what Justice Ginsburg said in her opinion was, we are focusing on this very narrow policy that Hastings College of Law had, which was that all groups had to be open to all comers, but the Court was very clear in its holding that universities don't have to have such policies. There was even a question of whether they are good policies. But furthermore, that if they have an all-comers policy, it has to apply to all groups.

So Hastings College of Law didn't have a problem doing that. It had very few student groups compared to your normal public university. But any public university that has fraternities and sororities really cannot apply an all-comers policy.

So that is why this issue of how nondiscrimination policies should be applied to religious groups is very much a live one on campuses, because as long as universities have these fraternities and sororities, and they create these exceptions for them and keep

this double standard, they don't have an all-comers policy and have to treat the religious groups the way they treat the fraternities and sororities.

Mr. FRANKS. I understand.

With that, I will now yield to the Ranking Member for 5 minutes for his questions.

Mr. COHEN. Thank you, Mr. Chair.

Ms. Colby, I would like to ask you about your statements concerning Vanderbilt University.

Are you aware of the fact that Vanderbilt requires groups to get university approval and use the university name to be eligible for university funding and other university benefits to simply allow all students to be a member of the organization? It doesn't say who can be the head of the organization. Anybody can be the head, and if it is the Baptist student groups, they can elect a Baptist, they can elect a Muslim, they can elect a Presbyterian, they can elect whomever they wanted. But they can't not allow somebody to ask for membership and to be a member of a university authorized, benefited group.

Is that how you understand the situation at Vanderbilt?

Ms. COLBY. Well, what I understand is that at Vanderbilt, they specifically say that they don't allow religious groups to have faith requirements for their leaders, and that is their policy.

Mr. COHEN. I believe it may be, and I don't know it for a fact, the groups elect the leaders and the groups can elect anybody they want. Now, if you have a clause that says you can't be the leader unless you think X, then you are putting a factor over the election that doesn't make it a democratic process because the majority might want to elect somebody who doesn't believe in X. And if that is the case, then I guess they should change their bylaws. But it simply leaves it up to the group the decision of who is going to be the head of the group, and the group makes that decision.

And that is democracy, and that seems like something that should be applied in religious groups and nonreligious groups. I think there are 13 different religious groups that have gone through and abide by it, as have 460 other groups at Vanderbilt that are part of the Vanderbilt University extracurricular social blah-blah-blah groups.

Ms. COLBY. So another thing that Vanderbilt says is that the Democratic club has to allow Republicans to be leaders, if they get elected.

Mr. COHEN. If they get elected, it becomes that.

Ms. COLBY. Then how is it the Democratic club?

It has always been the practice of groups that deal with social or political or philosophical or religious ideas, groups that form around ideas have constitutions that say our leaders have to agree with our ideas. And that is how the group from year to year maintains its identity.

And so it is just very strange—it is actually an elimination of freedom of association for all of these groups when you adopt an all-comers policy like Vanderbilt tried to do, to say to groups you can't define yourself around beliefs, whether they are political beliefs or interests.

Mr. COHEN. I don't know if they do or don't, but I would say this, first what you said about the Democrats, that they would make Republicans be a member, if the Republicans outvoted them, that happens.

Let's say Indiana, Mr. Lugar, a great Senator, a fine Republican, lost to a tea party guy. My buddy Joe Donnelly is now the Senator. That is what happens. The Republicans picked the wrong guy. Lugar probably would have won. They picked the other guy. Donnelly won. It is democracy.

If the Republicans infiltrate the Democrats and elect, it because the Mugwump Party. But that is part of democracy.

And as far as Vanderbilt, you picked a bad subject with me. I am at Vanderbilt graduate. I was Mr. Commodore at Vanderbilt. We are going to win the NCAA baseball championship again. We are looking at Illinois on Saturday. Good stuff happening there.

Vanderbilt has long been a citadel of progressive and open policies in the South, a leader in universities and other institutions in the South, bringing Stokely Carmichael to speak in the 1960's when people did not maybe appreciate that, and a lot did not. But they brought Stokely Carmichael to speak on campus, as did Julian Bond when I was there, and Robert Kennedy.

Vanderbilt has long been a citadel of open thought and openness, and that is why the nondiscrimination policy is important.

And I remember the Baptist student union when I was there. I didn't go to join the Baptist student union, but I went to the Baptist student union some. And if I would have joined and they elected me president of the Baptist student union, it would have been Kumbaya. That wouldn't have been bad because it would have been the decision of the Baptist student union.

We are all here up in Congress because we were elected by our constituents, the ones who showed up and voted. And if it so happens that people show up and vote and elect somebody else, it doesn't say you have to elect somebody of the same faith.

Ms. COLBY. Well, in the past, until 2011, Vanderbilt had always allowed religious groups and other political groups and other thought groups to define themselves by what their thoughts were, and to say, if you are our leader, you have to agree with these basic beliefs. And then Vanderbilt, it just changed course.

But I think you put your finger on one of the reasons that all-comers policies are particularly a threat to smaller groups on campus, because they do then have a problem with maintaining their identity if they are a minority group on campus because if someone decides that they don't like that group, it is becoming too pesky, they don't like the pro-life group's position, say, they can go in and change what that group's message is for that particular year. And that is really a threat to free speech across-the-board.

Mr. COHEN. All they have to do is give up the right to money from Vanderbilt University and the right to use Vanderbilt University as a title group. If they want to give that up, that is fine. But it is part of society and a part of law and a part of life, and it is tough.

Vanderbilt has not always been perfect. Listen, I was going to tell you that, when I went to school there, Jews were not allowed in any fraternity. When you went through rush, you were told you

are going to love being a ZBT or AEPi. Those were the Jewish fraternities. It was like you go there. And you went to the non-Jewish fraternities sanctioned by the university, and they said, oh, you are going to love being a ZBT.

I hadn't felt that in my life. All of sudden, it was there.

Now there are no Jews in the ZBT house. They have gone, like you said, but it is still ZBT. It is kind of weird, but that is the way it is.

Ms. COLBY. And what you are saying is religious discrimination, right? There is no reason there should be a fraternity that limits its members.

Mr. COHEN. That was 1969.

Ms. COLBY. But when it comes to a religious group defining itself by its religious beliefs, then it is not religious discrimination. It is actually religious liberty.

Mr. COHEN. But they are not discriminating. They are just saying, if you are going to be a Vanderbilt University Baptist X or Christian X, you have to allow any Vanderbilt student to join. And they get to run for office. And if they win, they win.

Ms. COLBY. Well, what they are really saying is that every Christian group has to be a Unitarian group. They can't really have specific creedal requirements. And that is not fair to the evangelical Christian groups, who do define themselves by their beliefs.

And also, Vanderbilt always said it was just withholding the name and the funds, but recognition brings with it the right to free meeting space on campus and access to channels of communication, which are essential to a group.

But I noticed you were a Vanderbilt grad, and I have never met better students than the Vanderbilt student body. They are incredible students, and I am sure they were when you were there, too, but they are incredible now.

Mr. COHEN. Thank you.

Mr. FRANKS. I thank the gentleman.

I guess sometimes, it occurs to me, that if we allowed the Republicans to vote in the Democratic primary, that we might nominate some pretty unique people for you. And perhaps, in the interest of broad mindedness, if we allowed our friends in China to vote in the presidential election, we might come up with a different situation here.

So we have to kind of keep an eye on where we are going here, don't we?

With that, I would now recognize the gentleman from Texas for his 5 minutes, Mr. Gohmert.

Mr. GOHMERT. Thank you. I appreciate the 8 minutes I am going to get as well.

I went to Texas A&M, and it was a very conservative public university. I was very involved in student activities, including the student center that had so many different groups. And back then, as conservative as we were, we had no fear of inviting very liberal speakers.

I really enjoyed Ralph Nader, helping host Ralph Nader. I didn't agree with him on much, but really enjoyed the questions. And he was open to any questions, and he listened to us. It was one of the better programs, even though I didn't agree with much.

But, of course, nowadays, since the intellectual elite liberals have taken over more of the college campuses, a conservative like me is not particularly welcome to come speak on college campuses. So times have changed. The liberals, as they have taken over, have become perhaps some of the most intolerant folks.

And I appreciate what was just said. It seems that now we have devolved to a standard where you can have your religious beliefs so long as we agree with them. But if we don't agree with them, then you are going to fund all of the groups on campus through your fees and your money, and they are going to get up and say things about how terrible you are, particularly if you are a Christian group, because in this realm of political correctness, the only group that it is okay to be totally politically intolerant toward are Christians.

And we had some of this discussion and I pointed out someday, when we were talking about hate crime, someday, somebody is going to say Christianity is a hateful religion because these people believe what Jesus said, that he was the way, the truth, and the life, and nobody could go to heaven but through him. So, therefore, it is hateful to anybody they are saying can't go to heaven except through Jesus.

And they have totally lost the founding of the country when you found a country on democracy that just what a majority votes and says will carry the day, then you are ultimately going to again devolve into a situation where might makes right, and pilgrims will leave this country to go find one where once again they won't be discriminated against, which is why they came here.

But when you look at the First Amendment, Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof or abridging the freedom of speech or the press or the right of the people to peacefully assemble.

So what we see on some of our college campuses is an extreme abridgment of the freedom to assemble. You can assemble off campus. We are going to take all your fees. We are going to fund these people that hate your guts and think you are crazy as Christians. But you have the right to assemble off campus.

It is so entirely unfair and truly un-American.

When I look at Thomas Jefferson's comment, it is part of the Jefferson Memorial, "God who gave us life gave us liberty. Can the liberties of a nation be secure when we have removed a conviction that these liberties are the gift of God? Indeed, I tremble for my country when I reflect that God is just, that His justice cannot sleep forever."

It just seems that, at this point in time, we have been overtaken by the thought that we cannot base our beliefs on the idea that freedom is a gift from God. But like any gift, it requires defense.

You have FDR on D Day praying for several minutes, "Help us, Almighty God, to rededicate ourselves in renewed faith in Thee in this hour of great sacrifice. And, O Lord, give us faith. Give us faith in Thee."

And people didn't get upset with that. They were okay with prayer going to God.

But as C.S. Lewis said, you know, when he was an atheist, agnostic, he loved to chide to Christians, gee, how can there be so

much injustice and there be a just God? Well, that is well and good, but wouldn't it be easier just to say there can't be a just God. And then one day he realized he could never know what was just, or that there was any injustice, unless there was some unwavering, eternal standard of justice and injustice. Otherwise, you could never know there was injustice, just like a person that has been blind all their lives could never know whether there was light or dark.

Nobody gets it right, as he said. Just because some people can't hit the notes doesn't mean the music is not beautiful.

So anyway, I realize I haven't gotten to a question, but I am just quite concerned. And I appreciate actually all of your efforts on behalf of free speech, and I look forward to the day when we won't hate anybody. We can be like my family was growing up. We can fuss. We can argue. But we still love each other at the end of the day.

But thank you for your work. I really appreciate your stands for free speech. Thank you.

Mr. FRANKS. So true tolerance is not in pretending you have no differences. It is being kind and loving to each other like family in spite of those differences, right?

With that, I would now recognize the Ranking Member, Mr. Conyers, for 5 minutes.

Mr. CONYERS. Thank you, Mr. Chair.

I would like each of you, starting with Senator Jamie Raskin, to tell me what main thing you have gotten out of this open discussion with each other and anything else you would like to contribute to your feelings about the hearing itself today. Welcome.

Mr. RASKIN. Thank you very much, Congressman, and thank you for your passionate advocacy on behalf of freedom of expression and civil liberties and civil rights for your whole career.

I would say, to Congressman Gohmert, I agree very much with a lot of what I heard. But when he said that he does not feel welcome at a lot of universities or colleges, I want to issue an invitation to you right now to come to American University, and I think we would benefit a lot from your views, so I hope we can——

Mr. GOHMERT. Actually, I have been there and spoken before. Thank you.

Mr. RASKIN. Okay, well, you are welcome to come back. You have not been banned from campus.

So, Congressman, I was very interested. I was fascinated by the colloquy between Congressman Cohen and Ms. Colby about Vanderbilt, having just read the book about my colleague at AU Law School, Perry Wallace, who is a great basketball player at Vanderbilt and experienced just dreadful, intense racism at many different points in his career as the first African-American basketball player in the conference.

The specific doctrinal dispute between the two of you was over the provision which says the groups have to be open to everybody. Obviously, that has a historical context where much of the academic civil society life, if you will, at Vanderbilt, and many colleges throughout the South and beyond the South and the rest of the country, were segregated by race, by religion, as you suggest. And the universities, the Supreme Court said in the Martinez decision,

have an academic freedom interest in trying to promote real social interaction.

And that doesn't mean agreement. It doesn't mean ideological conformity, but getting students who come to college for the first time, often leaving a community of whatever type where they been used to just one set of views or one set of people, to have the freedom at least to go check out the Republican club if they have always been in a Democratic community. Or as you were saying, if you grew up in a Jewish community, check out the Baptist group. And you can't be excluded at the door, simply because you don't sign a loyalty oath on the way in.

So there is a positive value there in promoting the all-comers policy. Not every university or college has to do it. Ms. Colby is right. The Supreme Court didn't say it is First Amendment compulsory. But, certainly, the colleges that want to promote a liberal arts integrative experience can go ahead and do it.

Let me say that this goes beyond religion. We are making it seem as if it is about religion. It is about politics, too.

My group could get into the Democratic club before the other kids show up or while they are off at bowling night or something. And we say if you want to belong to the Democratic club, you have to come out against the TPP, or you have to come out for the TPP. And if you don't sign on the way in, you are no longer a member of the Democratic club.

The people could get in and take over the Republican club, the first people to arrive on campus the day before everybody else, and say if you want to belong to the Republican club, you have to sign off on the tea party philosophy. And if you don't, you don't belong in the Republican club.

Now you have the university trying to mediate and litigate and adjudicate all these disputes between different factions, as opposed to what you are suggesting, which is the democratic way, which is the doors are open, everybody goes in and you participate and democratically elect them.

If you don't like what the group ends up standing for, you have the right not just of voice but of exit, and you go and create a new group. I think that is lot more like what civil society in a robust pluralistic democratic society is all about.

Mr. CONYERS. Thank you. You used up all my time.

Mr. COHEN. Will the gentleman yield?

Mr. CONYERS. Yes, I will yield to you.

Mr. COHEN. Thank you.

I want to thank you for asking Mr. Raskin to respond. He did an outstanding job in really capsulizing the issue. And in bringing up Perry Wallace, Perry was the first African-American to play in the Southeastern Conference at Vanderbilt. He integrated the SEC. And the book is a great book. He was my view scepter when I went to Vanderbilt, my person to kind of lead me and orient me as a freshman.

But much of the discrimination he got, it was everywhere, but a lot of it was from campuses around when he went on road games. But it wasn't perfect at Vanderbilt either, but it has become much better.

Thank you, Mr. Conyers.

Mr. CONYERS. You are more than welcome.

And I want to thank all of the witnesses for making this very stimulating.

And I want to thank especially the Chairman of the Subcommittee, because I think we see that, with other witnesses, this can continue to grow, in terms of the understanding of what goes on, in terms of trying to see and appreciate the differences in the kinds of policies that may look the same on the surface.

So I thank all the witnesses.

Mr. FRANKS. Well, let me just express the same sentiments in return, Mr. Ranking Member.

And I suppose any people who search for the truth would recognize that the surest way to get there is with the free exchange of ideas, and we should not be afraid of that. I can't express to you what, again, an encouraging hearing this has been for me. It gives me hope, and I thank all of you. I know that there are some differences in certain areas, but that is kind of why we are all here.

But again, the commonality here this morning for me was very encouraging.

And this concludes today's hearing, and I want to thank all of our witnesses for attending and all of our audience for attending.

And without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional material for the record.

And again, I thank the witnesses, and I thank the Members and the audience.

And this hearing is adjourned.

[Whereupon, at 3:45 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

SUPPLEMENTAL COMMENTS OF WENDY KAMINER ON "FIRST AMENDMENT PROTECTIONS ON PUBLIC COLLEGES AND UNIVERSITIES" BEFORE THE HOUSE JUDICIARY SUB-COMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

Submitted June 10, 2015

Thank you for the opportunity to supplement my June 2, 2015 testimony before this committee. I'd like to elaborate on my brief answer to the important question posed by Congressman Franks regarding the influence of campus censorship, dating back 20 years, on American ideals of free speech.

One widely cited poll by Internet tracker YouGov, found that "many Americans support making it a criminal offense to make public statements which would stir up hatred against particular groups of people." 41% of Americans, including 51% of Democrats, support criminalizing hate speech, with 37%, including 47% of Republicans, opposed."[1]

It's difficult to gauge the accuracy of these findings, but there is ample anecdotal evidence of a trend toward a Western European approach to regulating and even criminalizing "hate speech." A dramatic, recent example is the Montana prosecution of David Lenio for anti-Semitic speech, cited by Eugene Volokh in the *Washington Post*.[2] Lenio's remarks were vicious, and Volokh notes, could conceivably have been considered threats, but he has been charged with exposing Jews "to hatred, contempt, ridicule, degradation, or disgrace." There's no question that a conviction in this case, upheld on appeal, would reverse decades of First Amendment jurisprudence. As Volokh warns:

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[1] https://today.yougov.com/news/2015/05/20/hate-speech/

[2] http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/04/hate-speech-prosecution-in-montana/

> (T)he prosecutor has interpreted the Montana criminal defamation statute in a way that I don't think any criminal defamation statute has been interpreted in decades — a way that risks criminalizing derogatory opinions as well as controversial factual statements about religious groups, racial or ethnic groups, either sex, sexual orientations, professions, political movements, and more.

Speech considerably less hateful than the speech at issue in the Lenio case is already apt to be considered harassment, subject to civil regulation, by the Department of Education.[3] It has also been the subject of recent anti-bullying campaigns and local policies of breathtaking scope.

The District of Columbia "Model Bullying Prevention Policy," for example, applies the same degree of protection from "bullying" and the same expansive restrictions on speech to 20 year-old students that it applies to grade school children.[4] The District's not atypical, lengthy, model definition of bullying includes any "persistent act or conduct whether physical, verbal, or electronic," that may be based on any "distinguishing characteristic" (in addition to a long list of specified characteristics) and can "reasonably be predicted" to "substantially interfere" with the youth's participation in public services, activities, or privileges. This is, of course, much broader than the Supreme Court's definition of actionable student on student harassment, as "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."[5]

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[3] http://www.cato.org/blog/rule-dear-colleague-letter-time-end-stealth-regulation-department-education. And see written testimony of Greg Lukianoff before this committee, http://judiciary.house.gov/_cache/files/cb2a2b82-2c21-4fa3-8a94-896c108c6b47/06022015-lukianoff-testimony.pdf, pp. 10 – 11.

[4] http://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/DCBullyingPreventionPolicy_PressQ_022513.pdf

[5] *Davis v. Monroe County Bd. of Ed.*,526 U.S. 629 (1999)

I don't mean to dismiss the concerns of parents and educators about the taunting and torments some students endure, in school and online. I do mean to stress the corrosive effect of well-intentioned anti-bullying policies on First Amendment values. These policies carve out broad areas of unprotected insulting, demeaning, or otherwise unwelcome speech, establishing expectations of a general right to be protected from verbal offenses.

Censorship in public institutions of higher education, the subject of this hearing, exists in a cultural and regulatory context, not in isolation. It reflects a mistrust of free speech inculcated early in the educational process; it reinforces and may codify that mistrust as college and university graduates enter and begin to shape the wider world.

ONE HUNDRED FOURTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

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June 11, 2015

Jamie Raskin
American University Washington College of Law
4801 Massachusetts Avenue, NW
Washington, DC 20016

Dear Mr. Raskin,

The Committee on the Judiciary's Subcommittee on the Constitution and Civil Justice held a hearing on "First Amendment Protections on Public College and University Campuses" on Tuesday, June 2, 2015 in room 2141 of the Rayburn House Office Building. Thank you for your testimony.

Questions for the record have been submitted to the Committee within five legislative days of the hearing. The questions addressed to you are attached. We will appreciate a full and complete response as they will be included in the official hearing record.

Please submit your written answers by Friday, July 11, 2015 to Tricia White at tricia.white@mail.house.gov or 362 Ford House Office Building, Washington, DC, 20002. If you have any further questions or concerns, please contact Paul Taylor on my staff at 202-225-2825.

Thank you again for your participation in the hearing.

Sincerely,

Bob Goodlatte
Chairman

Enclosure

Note: The Subcommittee did not receive a response from this witness at the time this hearing record was finalized on August 18, 2015.

Questions for the record from Representative Steve Cohen:

1. If there are additional responses that you would like to provide to the Subcommittee in response to Ms. Cobly's points which you did not have an opportunity to provide during the hearing, please do so here.

Testimony of
Americans United for Separation of Church and State

Maggie Garrett
Legislative Director

Elise Helgesen Aguilar
Federal Legislative Counsel

Submitted to the

U.S. House of Representatives Judiciary Committee
Subcommittee on the Constitution and Civil Justice

Written Testimony for the Hearing Record on

"First Amendment Protections on Public College and University Campuses"

held on
June 2, 2015

Mr. Chairman, Ranking Member Cohen, and Members of the Subcommittee, thank you for this opportunity to submit testimony for the hearing on First Amendment protections on public college and university campuses.

Founded in 1947, Americans United for Separation of Church and State (Americans United) is a nonpartisan educational organization dedicated to preserving the constitutional principle of church-state separation as the only way to ensure true religious freedom for all Americans. We fight to protect the right of individuals and religious communities to practice religion—or not—as they see fit without government interference, compulsion, support, or disparagement. We have more than 120,000 members and supporters across the country.

One of the issues commonly debated in the area of free speech on college campuses, and one that was discussed in depth by the panelists, is that of nondiscrimination policies for student clubs. Americans United has closely followed this debate, and we believe that nondiscrimination policies that require clubs to accept all students do not violate the Free Exercise Clause of the First Amendment and are important to ensuring that universities and colleges do not subsidize discrimination.

University Nondiscrimination Policies and Student Groups

Because they enable students to experience an on-campus educational laboratory for democratic values in action, public universities and colleges often provide official support and funding for student groups. Public colleges and universities also have a strong interest in supporting inclusionary practices for on-campus student organizations. First, inclusion ensures that certain students are not barred from participating in school groups.[1] Second, inclusion provides students opportunities to participate in these organizations, alongside people of different races, genders, and religions, which teaches them critical interpersonal and leadership skills that are both necessary for participation in a democratic society and helpful to a student's future career and professional opportunities.[2] Accordingly, many colleges and universities implement nondiscrimination policies requiring student groups seeking official recognition to allow any student to join and participate in that group.

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[1] Professor Jamie Raskin stated that nondiscrimination policies are especially important given the "historical context where much of the academic civil society life . . . at Vanderbilt and many colleges . . . [throughout] the rest of the country were segregated by race, by religion." *First Amendment Protections on Public College and University Campuses Before the H. Subcomm. on the Const. & Civil Justice,* 114th Cong. (2015) (statement of Jamin B. Raskin, Director, American University Washington College of Law Program on Law and Government); *Christian Legal Soc'y v. Martinez,* 561 U.S. 661, 669 (2010) (Hastings explained that the all-comers policy "ensures that the leadership, educational, and social opportunities afforded by [RSOs] are available to all students.").

[2] Professor Jamie Raskin similarly testified that colleges "have an academic freedom interest in trying to promote real social interaction." Raskin, *supra* note 1.

Nondiscrimination Policies for Student Groups Do Not Threaten Religious Liberty
Contrary to rhetoric surrounding nondiscrimination, sometimes called "all-comers," policies, such policies do not target religious groups, nor do they coerce students into taking actions that would violate their religious beliefs. Rather, they are simply policies that condition official recognition on the premise that student groups must be open to all and free from discrimination.

In *Christian Legal Society v. Martinez*,[3] the Supreme Court upheld as constitutional a public university's all-comers policy, which required student groups seeking official recognition to allow any student to join and participate in that group, including in elections for leadership positions. The Court rejected arguments that such policies violated the free speech, expressive association, and free exercise rights of the students.[4] Nonetheless, some continue to argue that all-comers policies violate religious liberty. Such claims, however, are a mischaracterization: all-comers policies promote equality and fairness and do not target religious beliefs.

In *Christian Legal Society*, the Court easily dismissed the argument that all-comers policies violate the Free Exercise Clause. The Court explained that its decision in *Employment Division v. Smith*,[5] which held that neutral and generally applicable laws do not violate the Free Exercise Clause, "forecloses that argument."[6] The Court rejected the argument that such policies are not neutral but rather target religion,[7] explaining that exempting religious groups from the policy would provide them "preferential, not equal, treatment."[8]

Nondiscrimination and all-comers policies do not single out religious groups for disfavored treatment, nor do they contain a masked hostility towards religion.[9] Instead, they treat religious student groups the same as all other student groups.

The Government Cannot Sanction Discrimination
Even if student groups could make a First Amendment claim, the government has a strong interest in avoiding even the appearance of facilitating discrimination. The Supreme Court has held that preventing discrimination in institutions of public education is a compelling

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[3] *Christian Legal Soc'y* , 561 U.S. at 698 (decided on the basis that the all-comers policy was reasonable and viewpoint neutral).
[4] *Id.* at 697.
[5] 494 U.S. 872, 879 (1990).
[6] *Christian Legal Soc'y* 561 U.S. at 697 n.27.
[7] *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993).
[8] *Christian Legal Soc'y* 561 U.S. at 697 n.27 ("In seeking an exemption from Hastings' across-the-board all-comers policy, CLS . . . seeks preferential, not equal treatment; it therefore cannot moor its request for accommodation to the Free Exercise Clause.").
[9] *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 804 (2011), *cert. denied*, 132 S. Ct. 1743 (2012) ("nondiscrimination policy, as written, is a rule of general application. It does not target religious belief or conduct, and does not 'impose special disabilities' on Plaintiffs or other religious groups").

interest.[10] Nondiscrimination policies further this compelling interest by preventing government subsidization of discrimination.[11] These polices also ensure that the mandatory student activity fees paid by all students do not, in effect, subsidize groups that exclude from membership some of those students.

It is important to remember that religious student groups retain their free exercise and speech rights. At Hastings College, for instance, the Christian Legal Society could gain access to school facilities to conduct meetings and could use generally available bulletin boards and chalkboards to advertise events. But, they, like any other student group, do not have the right to force their public university to subsidize their discriminatory policies that exclude many students from leadership positions.

Conclusion

The First Amendment is not a bar to universities' commitment to ensuring that extracurricular student clubs operate in an open and nondiscriminatory manner. Nondiscrimination and all-comers policies do not represent a threat to religious liberty on public college and university campuses. Rather, these policies promote equality and fairness and prevent discrimination.

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[10] *E.g., Bob Jones Univ. v. U.S.,* 461 U.S. 574, 593 (1983) ("[E]very pronouncement of this Court and myriad acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education."); *Brown v. Bd. of Educ.*,347 U.S. 483, 493 (1954) ("[W]here the state has undertaken to provide it, [public education] is a right which must be made available to all on equal terms.").

[11] *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) ("It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice."); *Norwood v. Harrison*, 413 U.S. 455, 463 (1973); *see also Christian Legal Soc'y*, 661 U.S. at 663 (Student group seeking government subsidy "may exclude any person for any reason if it forgoes the benefits of official recognition."); *Alpha Delta Chi-Delta Chapter*, 648 F. 3d at 803.

List of Material Submitted for the Official Hearing Record*

Written Statement of Hans Bader, Senior Attorney, Competitive Enterprise Institute

Public Comments of Joan Bertin, Executive Director, National Coalition Against Censorship

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

Letter from Cinnamon McCellen

Letter from Bianca Travis, Chi Alpha, California State University—Stanislaus

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

Letter from Ra'sheedah Richardson, Ph.D.

Letter from Justin P. Gunter, Esq.

Letter from Michael Berry

Letter from Ryan Finigan

Letter from Emily Abraham

Letter from Emily Jones

Letter from Justin Ranger

Letter from Jesse Barnum

Letter from Robert S. "Trey" Ingram III

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*__Note:__ The submitted material is not printed in this hearing record but is on file with the Subcommittee and can also be accessed at:

http://docs.house.gov/meetings/JU/JU10/20150602/103548/HHRG-114-JU10-20150602-SD003.pdf.