

SPOTLIGHT ON
SPEECH CODES 2014

**THE STATE
OF FREE
SPEECH
ON OUR
NATION'S
CAMPUSES**



ABOUT FIRE

The mission of FIRE is to defend and sustain individual rights at America's colleges and universities.

These rights include freedom of speech, legal equality, due process, religious liberty, and sanctity of conscience — the essential qualities of individual liberty and dignity. FIRE's core mission is to protect the unprotected and to educate the public and communities of concerned Americans about the threats to these rights on our campuses and about the means to preserve them.

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EXECUTIVE SUMMARY

The U.S. Supreme Court has called America's colleges and universities "vital centers for the Nation's intellectual life." However, 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 for decades. Yet they persist, even in the very jurisdictions where they have been ruled unconstitutional; the majority of American colleges and universities maintain speech codes.

FIRE surveyed 427 schools for this report and found that more than 58 percent maintain severely restrictive, "red light" speech codes—policies that clearly and substantially prohibit protected speech. While this figure remains unacceptable, there is very good news: For the sixth year in a row, the percentage of schools maintaining such policies has declined.

The extent of colleges' restrictions on free speech varies by state. In Wisconsin, for example, every school surveyed received a red light. In contrast, two of the best states for free speech in higher

education were Mississippi and Virginia, where 33.3 percent and 19 percent of schools surveyed, respectively, received a green light.

Unfortunately, not all of the news this year provided reasons for optimism. In May 2013, the federal Departments of Justice and Education issued a findings letter announcing a resolution agreement with the University of Montana, ending a joint federal investigation into the university's policies and practices regarding sexual harassment and assault. The findings letter, which refers to the agreement as a "blueprint for colleges and universities throughout the country to protect students from sexual harassment and assault," explains the Departments' interpretation of applicable legal standards and the terms of the agreement and defines sexual harassment as "any unwelcome conduct of a sexual nature." This is an overbroad definition that is not in accordance with the First Amendment. FIRE is deeply concerned that—particularly when taken together with troubling guidance from the Department of Education in 2011—this latest signal from the federal government will lead to the adoption of still more restrictive harassment codes.





METHODOLOGY

FIRE surveyed publicly available policies at 323 four-year public institutions and 104 of the nation’s largest and/or most prestigious private institutions. 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. FIRE rates colleges and universities as “red light,” “yellow light,” or “green light” based on how much, if any, protected speech their written policies restrict. FIRE defines these terms as follows:

RED LIGHT

A red-light institution is one that has at least one policy both clearly and substantially restricting freedom of speech, or barring public access to its speech-related policies by requiring a university login and password for access. A “clear” restriction is one that unambiguously infringes on protected expression. In other words, the threat to free speech at a red-light institution is obvious on the face of the policy and does not depend on how the policy is applied. A “substantial” restriction on free speech is one that is broadly applicable to important categories of campus expression. For example, a ban on “offensive speech” would be a clear violation (in that it is unambiguous) as well as a substantial violation (in that it covers a great deal of what would be protected expression in the larger society). Such a policy would earn a university a red light.

When a university restricts access to its speech-related policies by requiring a login and password, it denies prospective students and their parents the ability to

weigh this crucial information prior to matriculation. At FIRE, we consider this denial to be so deceptive and serious that it alone warrants a red-light rating. In this year’s report, two institutions receive a red-light rating for concealing speech-related policies behind password protection.¹

YELLOW LIGHT

A yellow-light institution maintains policies that could be interpreted to suppress protected speech or policies that, while clearly restricting freedom of speech, restrict only narrow categories of speech. For example, a policy banning “verbal abuse” has broad applicability and poses a substantial threat to free speech, but it is not a clear violation because “abuse” might refer to unprotected speech, such as threats of violence or genuine harassment. Similarly, while a policy banning “posters promoting alcohol consumption” clearly restricts speech, it is relatively limited in scope. Yellow-light policies are typically unconstitutional, and a rating of yellow rather than red in no way means

that FIRE condones a university’s restrictions on speech. Rather, it means that in FIRE’s judgment, those restrictions do not clearly and substantially restrict speech in the manner necessary to warrant a red light rating.

GREEN LIGHT

If FIRE finds that a university’s policies do not seriously threaten campus expression, that college or university receives a green light. A green light does not necessarily indicate that a school actively supports free expression; it simply means that the school’s *written* policies do not pose a serious threat to free speech.

NOT RATED

When a private university² expresses its own values by stating clearly and consistently that it holds a certain set of values above a commitment to freedom of speech, FIRE does not rate that university.³ Nine surveyed schools are listed as “not rated” in this report.⁴

1 These are Connecticut College and Texas Tech University.

2 The “Not Rated” list also contains two public institutions, the U.S. Military Academy and the U.S. Naval Academy, both of which are among the nation’s top universities as named in *U.S. News & World Report’s* college rankings. Although these are public institutions, First Amendment protections do not apply in the military context as they do in civilian society. Rather, the U.S. Supreme Court has held:

The military need not encourage debate or tolerate protest to the extent that such tolerance is required of

the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps. The essence of military service “is the subordination of the desires and interests of the individual to the needs of the service.

Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (internal citations omitted). These institutions clearly and consistently do not promise their students full freedom of speech. (The West Point Catalog, for example, explicitly

states that “[m]ilitary life is fundamentally different from civilian life” and requires “numerous restrictions on personal behavior.”) Like private universities, they are not legally obligated to do so.

3 For example, Vassar College makes it clear that students are not guaranteed robust free speech rights. Vassar’s policy on “Academic Freedom and Responsibility” explicitly states:

As a private institution, Vassar is a voluntary association of persons invited to membership on the under-



FINDINGS

Of the 427 schools reviewed by FIRE, 250 received a red-light rating (58.6%), 152 received a yellow-light rating (35.6%), and 16 received a green-light rating (3.7%). FIRE did not rate 9 schools (2.1%).⁵ (See Figure 1.)

For the sixth year in a row, this represents a decline in the percentage of schools maintaining red-light speech codes, down from 75% six years ago.⁶ Additionally, the number of green-light institutions has doubled from 8 schools six years ago (2%) to sixteen schools this year (3.6%).

The percentage of *public* schools with a red-light rating also fell for a sixth consecutive year. Six years ago, 79% of public schools received a red-light rating. This year, 57.6% of public schools did—a dramatic change. (See Figure 2.)

FIRE rated 323 public colleges and universities. Of these, 57.6% received a red-light rating, 37.8% received a yellow-light rating, and 4% received a green-light rating.⁷ Two schools—both military institutions (0.6%)—were not rated. (See Figure 3.)

Since public colleges and universities are legally bound to protect their students' First Amendment rights, any percentage above zero is unacceptable, so much work remains to be done. This ongoing positive trend, however, is encouraging. With continued efforts by free speech advocates on and off campus, we expect this percentage will continue to drop.

The percentage of private universities earning a red-light rating declined almost two percent, from 63.4% last year to 61.5% this year. While private universities are generally not legally bound by the First Amendment, most make extensive promises of free speech to their students and faculty. Where such promises are made, speech codes impermissibly violate them. Of the 104 private colleges and universities reviewed, 61.5% received a red-light rating, 28.9% received a yellow-light rating, 2.9% received a green-light rating, and 6.7% were not rated. (See Figure 4.)

The data showed a wide variation in restrictions on speech among the states.⁵ In Wisconsin, every school that FIRE sur-

FIGURE 1

2013 Ratings

FIRE reviewed 427 schools, of which 250 received a red-light rating, 152 received a yellow-light rating, 16 received a green-light rating. Nine schools were not rated.

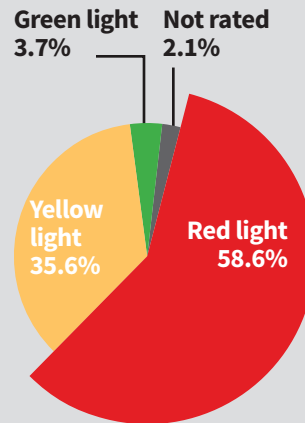


FIGURE 2

Public schools by rating, 2007-2013



	2007	2013
Red light:	79%	57.6%
Yellow light:	19%	37.8%
Green light:	2%	4%
Not Rated:	--	0.6%

standing that they will respect the principles by which it is governed. Because Vassar is a residential college, and because it seeks diversity in its membership, individuals have a particular obligation beyond that of society at large to exercise self-restraint, tolerance for difference, and regard for the rights and sensitivities of others.

The policy further provides:

[M]embers of the college community accept constraints, similar to those of parliamentary debate against personal attacks or courts of law against the use of inflammatory language. Under the rule of civility, individuals within the community are expected to behave reasonably, use speech responsibly, and respect the rights of others.

"Academic Freedom and Responsibility," *Vassar College Student Handbook*, available at [dentHandbook.pdf. It would be clear to any reasonable person reading this policy that students are not entitled to unfettered free speech at Vassar.](http://deanofthecollege.vassar.edu/documents/student-handbook/VassarStu-</p></div>
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4 FIRE has not rated the following schools: Baylor University, Brigham Young University, Pepperdine University, Saint Louis University, the U.S. Military Academy, the U.S. Naval Academy, Vassar College, Worcester Polytechnic Institute, and Yeshiva University.

5 See Appendix A for a full list of schools by rating.

6 The 2012 figure stood at 62.1%; in 2007, 2008, 2009, 2010, and 2011, it was 75%, 74%, 71%, 67%, and 65%, respectively. For a full list of rating changes since last year's report, see Appendix B.

7 Eastern Kentucky University joined the ranks of green-light schools this year.

8 State-by-state data are given in Appendix C for the 28 states in which FIRE has surveyed five or more universities.

veyed (100%) received a red light, as did 87.5% of surveyed schools in Louisiana. Connecticut and Illinois also fared poorly, with 83% of the schools surveyed in those states receiving a red light. By contrast, only 37.5% of the schools surveyed in Virginia received a red light, while 19% received a green light. In North Carolina, only 37% of surveyed schools received a red light, though none received a green light. Other states that fared comparatively well in our survey were Indiana (37.5% red light), Maryland (40%), Maine (43%), and California (43%).

California is of particular note. In addition to the constitutional guarantees of free speech applicable to public universities in every state, California has two state laws explicitly prohibiting both its state and many of its private universities from infringing on students' right to free speech. Section 66301(a) of the California Education Code provides that:

Neither the Regents of the University of California, the Trustees of the California State University, the governing board of a community college district, nor an administrator of any campus of those institutions, shall make or enforce a rule subjecting a student to disciplinary sanction solely on the basis of conduct that is speech or other communication that, when engaged in outside a campus of those institutions, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution.

And California's "Leonard Law," found at Section 94367 of the California Education Code, prohibits secular *private* colleges and universities in California from restricting speech that would otherwise be constitutionally protected. The Leonard Law provides that:

No private postsecondary educational institution shall make or enforce any rule subjecting any student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article 1 of the California Constitution.

The law clarifies that it "does not apply to a private postsecondary educational institution that is controlled by a religious organization, to the extent that the application of this section would not be consistent with the religious tenets of the organization."

Perhaps most significantly, both laws state that students at any California university that has "made or enforced" a policy in violation of students' free speech rights can bring suit against the university to obtain an injunction against the policy's enforcement.

With these strong statutory protections in place, one would expect to find a large number of green light schools in California. Unfortunately, there is not one green-light school among the 42 California institutions surveyed by FIRE, and only one of the 42 schools—Pepperdine University—is a religious institution that would be exempt from the requirements of the Leonard Law. This means that the remaining 41 institutions are all vulnerable to a lawsuit pursuant to the California Education Code and, for public institutions, under the First Amendment as well.

FIGURE 3

Public schools by rating

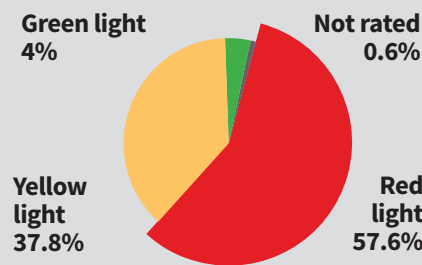
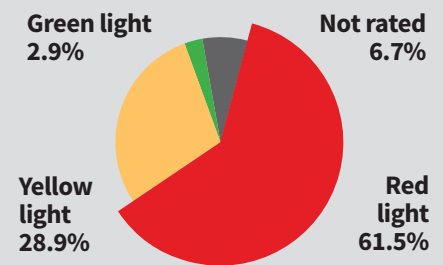


FIGURE 4

Private schools by rating



STATES WITH HIGHEST PERCENTAGE OF RED LIGHT SCHOOLS



1. Wisconsin
100% of schools surveyed



2. Louisiana
87.5% of schools surveyed



3. Connecticut & Illinois
83% of schools surveyed



DISCUSSION

SPEECH CODES ON CAMPUS: BACKGROUND AND LEGAL CHALLENGES

Speech codes—*university regulations prohibiting expression that would be constitutionally protected in society at large*—gained popularity with college administrators in the 1980s and 1990s. As discriminatory barriers to education declined, female and minority enrollment increased. Concerned that these changes would cause tension and that students who finally had full educational access would arrive at institutions only to be hurt and offended by other students, college administrators enacted speech codes.

No matter how well-intentioned, however, administrators ignored or did not fully consider the legal ramifications of placing restrictions on speech, particularly at public universities. Federal courts have overturned speech codes at numerous colleges and universities over the past two decades.⁹

Despite the overwhelming weight of legal authority against speech codes, the majority of institutions—including

some of those that have been successfully sued—still maintain unconstitutional speech codes.¹⁰ It is with this in mind that we turn to a more detailed discussion of the ways in which campus speech codes violate individual rights and what can be done to challenge them.

PUBLIC UNIVERSITIES VS. PRIVATE UNIVERSITIES

The First Amendment prohibits the government—including governmental entities such as state universities—from interfering with the freedom of speech. A good rule of thumb is that 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.

The guarantees of the First Amendment generally do not apply to students at private colleges because the First Amendment regulates only government—not private—conduct. Moreover, although acceptance of federal funding does confer some obligations upon private colleges (such as compliance with federal anti-discrimination laws), compliance with the

First Amendment is not one of them.

This does not mean, however, that students and faculty at all private schools are not entitled to free expression. In fact, most private universities explicitly promise freedom of speech and academic freedom—presumably to lure students and faculty, since many would not want to study or teach where they could not speak and write freely.

Washington University in St. Louis' University Student Judicial Code, for example, provides that "Freedom of thought and expression is essential to the University's academic mission. Nothing in this Code should be construed to limit the free and open exchange of ideas and viewpoints, even if that exchange proves to be offensive, distasteful, disturbing, or denigrating to some."¹¹ Similarly, Middlebury College's student handbook states that "The College recognizes that its students are citizens of larger communities—local, state, and federal—and should enjoy the same rights of petition and freedoms of speech and peaceful assembly that other citizens enjoy."¹² Yet both of these universities prohibit a great deal of speech that

⁹ *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.

¹⁰ Several universities that have been the target 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.

¹¹ *Washington University in St. Louis, University Student Judicial Code*, available at <http://www.wustl.edu/policies/judicial.html>.

¹² "Community Standards and Policy Overview," *Middlebury College Handbook*, available at http://www.middlebury.edu/about/handbook/student_policies/community_standards.

the First Amendment would protect at a public university.

At private universities, it is this false advertising—promising free speech and then, by policy and practice, prohibiting free speech—that FIRE considers impermissible. Students may freely choose to enroll at a private institution where they knowingly give up some of their free speech rights in exchange for membership in the university community. But universities may not engage in a bait-and-switch where they advertise themselves as bastions of freedom and then instead deliver censorship and repression.

WHAT EXACTLY IS “FREE SPEECH,” AND HOW DO UNIVERSITIES CURTAIL IT?

What does FIRE mean when we say that a university restricts “free speech”? Do people have the right to say absolutely anything, or are only certain types of speech “free”?

Simply put, the overwhelming majority of speech is protected by the First Amendment. Over the years, the Supreme Court has carved out some narrow exceptions to the First Amendment: speech that incites reasonable people to immediate violence; so-called “fighting words” (face-to-face confrontations that lead to physical altercations); harassment; true threats and intimidation; obscenity; and defamation. If the speech in question does not fall within one of these exceptions, it most likely is protected speech.

The exceptions are often misused and abused by universities to punish constitutionally protected speech. There are instances where the written policy at issue may be constitutional—for example, a prohibition on “incitement”—but its application may not be. In other instances, a written policy will purport to be a legit-

The First Amendment prohibits the government—including governmental entities such as state universities—from interfering with the freedom of speech.

imate ban on something like harassment or threats, but will, either deliberately or through poor drafting, encompass protected speech as well. Therefore, it is important to understand what these narrow exceptions to free speech actually mean in order to recognize when they are being misapplied.

THREATS & INTIMIDATION

The Supreme Court has defined “true threats” as only “those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Virginia v. Black*, 538 U.S. 343, 359 (2003). The Court also has defined “intimidation,” in the constitutionally proscribable sense, as a “type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.” *Id.* at 360. Neither term would encompass, for example, a vaguely worded

statement that is not directed at anyone in particular.

Nevertheless, universities frequently misapply policies prohibiting threats and intimidation to infringe on protected speech.

In April 2013, for example, the University of Central Florida (UCF) suspended Professor Hyung-il Jung on the basis of an in-class joke in which he likened his extremely difficult exam questions to a “killing spree.” His exact remark, made while leading an exam review session for his accounting class, was: “This question is very difficult. It looks like you guys are being slowly suffocated by these questions. Am I on a killing spree or what?”¹³ After a student reported the joke to the UCF administration, the administration sent Professor Jung a letter suspending him from teaching, barring him from campus, and prohibiting him from having any contact with students. UCF additionally demanded that Jung undergo a “thorough mental health evaluation.” Accord-

¹³ Denise-Marie Ordway, *UCF Instructor Placed on Leave After ‘Killing Spree’ Comment*, ORLANDO SENTINEL, Apr. 25, 2013, available at http://articles.orlandosentinel.com/2013-04-25/news/os-ucf-instructor-killing-spreecomment-20130425_1_killing-spreec-ucf-spokesman-chadbinette-roosen-college.

ing to the letter, UCF's actions were based on Professor Jung having "stated a desire to commit violence during a final exam."¹⁴ The university reinstated the professor three weeks later, after receiving a letter from FIRE.

Similarly, in September 2011, a professor at the University of Wisconsin–Stout was threatened with criminal charges and reported to the university's "threat assessment team" for two satirical postings hung on his office door. The first posting was a printout of a picture of the actor Nathan Fillion's character from the television series *Firefly*. The posting included a well-known line from an episode of the show: "You don't know me, son, so let me explain this to you once: If I ever kill you, you'll be awake. You'll be facing me. And you'll be armed." After the university's chief of police removed the posting, the professor posted a new flyer reading "Warning: Fascism," with a mocking line at the bottom about the violence that may be caused by fascists: "Fascism can cause blunt head trauma and/or violent death. Keep fascism away from children and pets." The poster also included a cartoon image of a police officer striking a civilian. University police removed that poster on the grounds that it "depicts violence and mentions violence and death," and summoned the professor to a meeting about the posters because of concerns raised by the university's threat assessment team.¹⁵ The university eventually reversed its decision to censor the posters, but only after FIRE launched a public campaign that generated national outrage over the case.

INCITEMENT

There is also a propensity among universities to restrict speech that deeply offends other students on the basis that it constitutes "incitement." The basic

concept, as administrators often see it, is that offensive or provocative speech will anger those who disagree with it, perhaps so much that it moves them to violence. While preventing violence is an admirable goal, this is an impermissible misapplication of the incitement doctrine.

Incitement, in the legal sense, does not refer to speech that may lead to violence on the part of those opposed to or angered by it, but rather to speech that will lead those *who agree with it* to commit immediate violence. In other words, the danger is that certain speech will convince listeners who agree with it to take immediate unlawful action. The paradigmatic example of incitement is a person standing on the steps of a courthouse in front of a torch-wielding mob and urging that mob to burn down the courthouse immediately. To apply the doctrine to an opposing party's reaction to speech is to convert the doctrine into an impermissible "heckler's veto," where violence threatened by those angry about the speech is used as a reason to censor that speech. As the Supreme Court has said, speech cannot be prohibited because it "might offend a hostile mob" or because it may prove "unpopular with bottle throwers."¹⁶

The precise standard for incitement to violence is found in the Supreme Court's decision in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). There, the Court held that the state may not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing *imminent* lawless action and is likely to incite or produce such action." 395 U.S. at 447 (emphasis in original). This is an exacting standard, as evidenced by its application in subsequent cases.

For instance, in *Hess v. Indiana*, 414 U.S. 105 (1973), the Supreme Court held



Professor Hyung-il Jung was suspended from teaching and barred from campus for a joke made during class.

that a man who had loudly stated, "We'll take the fucking street later" during an anti-war demonstration did not intend to incite or produce immediate lawless action. The Court found that "at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time," and that the man was therefore not guilty under a state disorderly conduct statute. 414 U.S. at 108–09. The fact that the Court ruled in favor of the speaker despite the use of such strong and unequivocal language underscores the narrow construction that has traditionally been given to the incitement doctrine and its requirements of likelihood and immediacy. Nonetheless, college administrations have been all too willing to abuse or ignore this jurisprudence.

OBSCENITY

The Supreme Court has held that obscene expression, to fall outside of the protection of the First Amendment, must "depict or describe sexual conduct" and must be "limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15 (1973).

This is a narrow definition applicable only to some highly graphic sexual material; it does not encompass curse words, even though these are often colloquially

¹⁴ Letter from Abraham Pizam, Dean, Rosen College of Hospitality Management, to Hyung-il Jung, Professor, Rosen College of Hospitality Management (Apr. 24, 2013), <http://thefire.org/article/15826.html>.

¹⁵ Letter from Adam Kissel, Vice President of Programs,

FIRE, to Charles W. Sorensen, Chancellor, University of Wisconsin-Stout (Sep. 21, 2011), <http://thefire.org/article/13590.html>.

¹⁶ *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992).

referred to as “obscenities.” In fact, the Supreme Court has explicitly held that curse words are constitutionally protected. In *Cohen v. California*, 403 U.S. 15 (1971), the defendant, Paul Robert Cohen, was convicted in California for wearing a jacket bearing the words “Fuck the Draft” in a courthouse. The Supreme Court overturned Cohen’s conviction, holding that the message on his jacket, however vulgar, was protected speech. In *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667 (1973), the Court determined that a student newspaper article entitled “Motherfucker Acquitted” was constitutionally protected speech. The Court wrote that “the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of ‘conventions of decency.’” *Id.* at 670. Nonetheless, many colleges erroneously believe that they may legitimately prohibit profanity and other types of vulgar expression.

Last year, for example, Saginaw Valley State University (SVSU) adopted a new posting policy requiring, among other things, administrative approval for campus postings and that all campus postings be “free from profanity” and “sexually suggestive graphics/phrasing.”¹⁷ In protest, SVSU student Daniel Chapman submitted for approval a flyer reading “Fuck Censorship, Fuck Oppression, Fuck the Draft. Fight for Free Speech and Political Expression at SVSU and Elsewhere.”¹⁸ Chapman even preemptively explained, in an email to an administrator, that he had purposely chosen this slogan to parallel the Supreme Court’s decision in *Cohen v. California*.¹⁹ Despite this, and despite two letters from FIRE explaining the clear legal precedent protecting Chapman’s expression, SVSU has refused

to allow Chapman to post his flyer.

HARASSMENT

Actual harassment is not protected by the First Amendment. In the educational context, the Supreme Court has defined student-on-student harassment as conduct “so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.” *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). This is not simply expression; it is conduct far beyond the dirty joke or “offensive” student newspaper op-ed that is too often deemed “harassment” on today’s college campus. Harassment is extreme and usually repetitive behavior—behavior so serious that it would interfere with a reasonable person’s ability to receive

his or her education. For example, in *Davis*, the conduct found by the Court to be harassment was a months-long pattern of conduct including repeated attempts to touch the victim’s breasts and genitals together with repeated sexually explicit comments directed at and about the victim.

Universities are legally obligated to maintain policies and practices aimed at preventing this type of genuine harassment from happening on their campuses. Unfortunately, they often misuse this obligation by punishing protected speech that is unequivocally not harassment. The misuse of harassment regulations became so widespread that in 2003, the federal Department of Education’s Office for Civil Rights (OCR)—the agency responsible for the enforcement of federal



¹⁷ SVSU General Posting Policies, available at https://s3.amazonaws.com/os_uploads/230841_Posting%20Guidelines%202012-2013%20Final%208-22-12.pdf.

¹⁸ Censored ‘Fuck Censorship’ Poster at Saginaw Valley State University, <http://thefire.org/article/15218.html>.

¹⁹ E-mail from Daniel Chapman to Jason Schoenmeyer, Associate Director of Student Life, Saginaw Valley State University (Aug. 29, 2012), <http://thefire.org/article/15221.html>.

harassment regulations in schools—issued a letter of clarification to all of America’s colleges and universities.²⁰ Then-Assistant Secretary of Education Gerald Reynolds wrote:

Some colleges and universities have interpreted OCR’s prohibition of ‘harassment’ as encompassing all offensive speech regarding sex, disability, race or other classifications. Harassment, however, to be prohibited by the statutes within OCR’s jurisdiction, must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive.

Reynolds wrote that “OCR’s regulations are not intended to restrict the exercise of any expressive activities protected under the U.S. Constitution” and concluded that “[t]here is no conflict between the civil rights laws that this Office enforces and the civil liberties guaranteed by the First Amendment.”

Unfortunately, in recent years, OCR has backed away from its previously robust support for students’ free speech rights. First, in an April 4, 2011, “Dear Colleague” letter,²¹ OCR discussed extensively the legal obligations borne by colleges and universities under Title IX to respond to both sexual harassment and sexual violence committed against students, but wholly failed to mention the free expression concerns raised in the 2003 letter—despite the fact that, as in 2003, a large number of institutions maintain harassment policies that violate students’ First Amendment rights.

Then, on May 9, 2013, OCR issued a

Harassment is extreme and usually repetitive behavior – behavior so serious that it would interfere with a reasonable person’s ability to receive his or her education.

letter to the University of Montana that proclaimed itself to be a “blueprint” for all colleges and universities required to comply with Title IX (which is virtually all of them).²² In that letter—discussed in greater detail on page 12 of this report—OCR stated that “sexual harassment should be more broadly defined as ‘any unwelcome conduct of a sexual nature’” including “verbal conduct” (that is, speech).

OCR’s apparent retreat from its earlier concerns about students’ free speech rights is particularly troubling in light of the fact that hundreds of universities persist in maintaining overly broad definitions of harassment that include large amounts of constitutionally protected speech. Examples include:

- The University of Connecticut’s Policy Statement on Harassment provides

that “[e]very member of the University shall refrain from actions that intimidate, humiliate, or demean persons or groups, or that undermine their security or self-esteem.”²³

- At Athens State University in Alabama, “harassment is any conduct consisting of words or actions that are unwelcome or offensive to a person in relation to race, color, national origin, age, marital status, sex, sexual orientation, disability, religion, genetic information, or veteran status.”²⁴

These examples, along with many others, demonstrate that colleges and universities often fail to limit themselves to the narrow definition of harassment that is outside the realm of constitutional protection. Instead, they expand the term to prohibit broad categories of speech that do not even approach actual harassment,

²⁰ OFFICE FOR CIVIL RIGHTS, DEPARTMENT OF EDUCATION, “Dear Colleague” Letter (Jul. 28, 2003), available at <http://www.ed.gov/about/offices/list/ocr/firstamend.html>.

²¹ OFFICE FOR CIVIL RIGHTS, DEPARTMENT OF EDUCATION, “Dear Colleague” Letter (Apr. 4, 2011), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>.

²² Letter from Anurima Bhargava, Chief, Civil Rights Division, U.S. Department of Justice, and Gary Jackson, Regional Director, Office for Civil Rights, U.S. Department of Education, to Royce Engstrom, President, University of Montana and Lucy France, University Counsel, University of Montana (May 9, 2013), available at <http://www.justice.gov/opa/documents/um-ltr-findings.pdf>.

²³ University of Connecticut Policy Statement on Harassment, available at <http://www.ode.uconn.edu/docs/Policy%20Statement%20on%20Harassment.pdf>.



despite many such policies having been struck down by federal courts.²⁵ These vague and overly broad harassment policies deprive students and faculty of their free speech rights.

Having discussed the most common ways in which universities misuse the narrow exceptions to free speech to prohibit protected expression, we now turn to the innumerable other types of university regulations that restrict free speech and expression on their face. Such restrictions are generally found in several distinct types of policies.

ANTI-BULLYING POLICIES

In recent years, “bullying” has garnered a great deal of media attention, bringing pressure on legislators and school administrators—at both the K-12 and the college levels—to crack down even further on speech that causes emo-

tional harm to other students. Members of the U.S. Congress have even formed an Anti-Bullying Caucus.²⁶ On October 26, 2010, OCR issued a letter on the topic of bullying, reminding educational institutions that they must address actionable harassment, but also acknowledging that “[s]ome conduct alleged to be harassment may implicate the First Amendment rights to free speech or expression.”²⁷ For such situations, the letter refers readers back to the 2003 “Dear Colleague” letter stating that harassment is conduct that goes far beyond merely offensive speech and expression. However, because it is primarily focused on bullying in the K-12 setting, the letter also urges an *in loco parentis*²⁸ approach that is inappropriate in the college setting, where students are overwhelmingly adults.

The same problem exists in New Jersey’s Anti-Bullying Bill of Rights Act,

which took effect on September 1, 2011.²⁹ In addition to addressing bullying at the K-12 level, the Act requires all of New Jersey’s public colleges and universities to prohibit “harassment, intimidation and bullying,” which it defines as:

[A] single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on the property of the institution of higher education or at any function sponsored by the institution of higher education, that substantially disrupts or interferes with the orderly operation of the institution or the rights of other students and that:

- (a) a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student’s property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
- (b) has the effect of insulting or demeaning any student or group of students; or
- (c) creates a hostile educational environment for the student
- (d) by interfering with a student’s education or by severely or pervasively

²⁴ Athens State University Harassment and Discrimination Policy and Procedure, *available at* <http://www.athens.edu/policies/Operating/Administrative/Harrassment-and-Discrimination.pdf>.

²⁵ See, e.g., *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008) (holding that Temple University’s sexual harassment policy was unconstitutionally broad); *Doe v. Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989) (holding

that University of Michigan’s discriminatory harassment policy was unconstitutionally broad); *Booher v. Bd. of Regents, Northern Kentucky Univ.*, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. Jul. 21, 1998) (holding that Northern Kentucky University’s sexual harassment policy was unconstitutionally broad).

²⁶ Congressional Anti-Bullying Caucus, <http://honda.house.gov/cabc>.

²⁷ OFFICE FOR CIVIL RIGHTS, DEPARTMENT OF EDUCATION, “Dear Colleague” Letter (Oct. 26, 2010), *available at* <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>.

²⁸ “In the place of parents.”

²⁹ Anti-Bullying Bill of Rights Act, P.L. 2010, Chapter 122, *available at* http://www.njleg.state.nj.us/2010/Bills/AL10/122_.PDF.

SPOTLIGHT ON THE FEDERAL BLUEPRINT

During the fall of 2011, the University of Montana (UM) received two reports of sexual assault of female students by male students. A university investigation brought to light seven additional allegations of sexual assault. Because sexual assault implicates federal anti-discrimination laws,¹ the Department of Education's Office for Civil Rights (OCR), along with the Department of Justice, launched a formal investigation into the University of Montana's "handling of sexual assault and harassment involving students...."² Although the inquiry was prompted by assault cases, which necessarily involve physical conduct, the Departments of Education and Justice proceeded not only to reiterate problematic procedures in sexual assault cases, but also to redefine the boundaries of sexual harassment, which implicates speech as well as conduct.

On May 9, 2013, the agencies issued a findings letter to the University of Montana that explicitly deemed itself "a blueprint for colleges and universities throughout the country."³ Two of the letter's findings, in particular, departed from previous OCR guidance in a manner that poses a substantial threat to free speech on campus. First, the letter purported to mandate the adoption of a broad definition of sexual harassment—"any unwelcome conduct of a sexual nature"—and explicitly noted that this definition includes "verbal conduct" (i.e., speech). Second, the letter stated that "[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.'" This provision eliminated the critical protection of the objective, "reasonable person" standard enshrined in harassment law; under this shockingly broad standard, speech that is subjectively offensive only to the most unreasonably sensitive person is still sexual harassment.

Following more than six months of criticism from FIRE and other free speech advocates, OCR backed away from the "blueprint" language. In a November 2013 letter to FIRE, the new head of OCR, Catherine Lhamon, stated that "the agreement in the

Montana case represents the resolution of that particular case and not OCR or DOJ policy."⁴ While this is welcome news, OCR has yet to inform colleges and universities—many of which have been bewildered trying to reconcile their obligations under the First Amendment with the requirements of the "blueprint"—of the change. Therefore, FIRE is still significantly concerned that the UM agreement will lead other universities to adopt broader sexual harassment policies that threaten protected speech.

As for UM itself, its new, federally approved sexual harassment policy did not include some of the most concerning language from the blueprint. However, the policy still raises significant concerns. Specifically, the policy empowers UM to "take appropriate action"—apparently including discipline—against a student or faculty member "to prevent the creation of a hostile environment,"⁵ even after a university investigation has failed to find the student or faculty member responsible for "discrimination or harassment that creates a hostile environment." This means that even if UM believes a student or faculty member's expression is protected by law, it may nevertheless prevent that person from speaking. Distressingly, Lhamon's November 2013 letter to FIRE defended this provision.

Faculty members also raised an outcry after the agreement provided that the names of faculty members who did not attend the university's trainings on the new policy would be reported to the Department of Justice.⁶ University of Montana Legal Counsel Lucy France told the *Missoulian* newspaper that the requirement has been dropped, and that attendance will now be reported per department rather than on an individual basis.⁷ Concerns remain, however, that individual faculty members will still be identifiable.

The full impact of the federal blueprint on sexual harassment policies nationwide remains to be seen. It may prompt other schools, out of caution, to adopt the definitions set forth in the blueprint in an effort to avoid a Title IX investigation. FIRE will be keeping a close eye on developments in the years to come.

¹ Colleges and universities receiving federal funds—virtually all of them—are legally required to prohibit discrimination on the basis of sex and other protected categories. Both sexual assault and sexual harassment are considered forms of sex discrimination under Title IX of the Education Amendments of 1972 (commonly referred to simply as "Title IX"). Therefore, institutions that fail to comply with OCR's regulations regarding sexual harassment and assault risk losing their federal funding.

² Letter from Anurima Bhargava, Chief, Civil Rights Division, U.S. Department of Justice, and Gary Jackson, Regional Director, Office for Civil Rights, U.S. Department

of Education, to Royce Engstrom, President, University of Montana and Lucy France, University Counsel, University of Montana (May 9, 2013), available at <http://www.justice.gov/opa/documents/um-ltr-findings.pdf>.

³ *Id.*

⁴ Letter from Catherine E. Lhamon, Assistant Secretary for Civil Rights, U.S. Department of Education, to Greg Lukianoff, President, Foundation for Individual Rights in Education (Nov. 14, 2013), available at <http://thefire.org/article/16506.html>.

⁵ University of Montana, "Discrimination, Harassment,

Sexual Misconduct, Stalking, and Retaliation," available at <http://www.umt.edu/policies/400 HumanResources>.

⁶ Martin Kidston, *UM Faculty Balk at DOJ Demand for Sexual-Assault Training Rosters*, MISSOULIAN, Sep. 26, 2013, available at http://missoulian.com/news/local/um-faculty-balk-at-doj-demand-for-sexual-assault-training/article_9f7e5056-265d-11e3-b14e-0019bb2963f4.html.

⁷ Martin Kidston, *UM Meets Initial Goals of DOJ Sex Assault, Harassment Agreement*, MISSOULIAN, Nov. 6, 2013, available at http://missoulian.com/news/local/um-meets-initial-goals-of-doj-sex-assault-harassment-agreement/article_464c4148-4681-11e3-8ee7-0019bb2963f4.html.

causing physical or emotional harm to the student.

Under this definition, speech that does not rise to the level of actionable harassment (or any other type of unprotected speech) is now punishable as “bullying.” Critically, the definition lacks any objective (“reasonable person”) standard, labeling conduct as bullying if it “has the effect of insulting or demeaning any student or group of students.” As a result, students must appraise all of their fellow students’ subjective individual sensitivities before engaging in controversial speech. While the Act does require that there be a “substantial disruption” to the educational environment, it places the onus squarely on the speaker to ensure that his or her speech will not cause another student, however sensitive or unreasonable, to react in a manner that is disruptive to the educational environment (such as by engaging in self-harm or harm to others).

Unsurprisingly, FIRE has seen a dramatic increase in the number of university policies prohibiting bullying. Many universities have addressed the issue by simply adding the term “bullying,” without definition, to their existing speech codes—giving students no notice of what is actually prohibited, and potentially threatening protected expression. Yet other policies explicitly restrict protected speech by calling it “bullying” or “cyber-bullying.” Examples of such policies include:

- The “cyber-bullying” policy at Alcorn State University in Mississippi prohibits the use of any electronic device to “embarrass” a student, faculty, or staff member on, for example, a blog or social

media site.³⁰

- At the University of Central Missouri, students may not use technology or social media to “intentionally create stress” or to impede the “social experiences” of a fellow student.³¹

POLICIES ON TOLERANCE, RESPECT, AND CIVILITY

Many schools invoke laudable goals like respect and civility to justify policies that violate students’ free speech rights. While a university has every right to actively promote a tolerant and respectful atmosphere on campus, a university that claims to respect free speech must not limit speech to only the inoffensive and agreeable.

Here are just two examples of restrictive policies on tolerance, respect, and civility from the 2012–2013 academic year:

- Kenyon College threatens students with discipline for any conduct that “offends the sensibilities of others,” including a failure to show “due respect and courtesy.”³²

- The University of Nevada, Las Vegas prohibits any “disrespect for persons” based on a wide variety of personal characteristics, including “political affiliation.”³³

While civility may seem morally uncontroversial, most “uncivil” speech is wholly protected by the First Amendment,³⁴ and is indeed sometimes of great political and social significance. Much of the expression employed in the civil rights movement of the 1950s and 60s would violate campus civility codes today. Colleges and universities may encourage civility, but public universities—and those private universities that purport to re-

spect students’ fundamental free speech rights—may not require it or threaten incivility with disciplinary action.

INTERNET USAGE POLICIES

A great deal of student expression now takes place online, whether over email or on sites like Facebook and Twitter. Numerous universities maintain policies—many of which were originally written before the Internet became one of students’ primary methods of communication—severely restricting the content of online expression.

Examples of impermissibly restrictive Internet usage policies from the 2012–2013 academic year include the following:

- Frostburg State University in Maryland prohibits “offensive or inflammatory speech” over campus networks.³⁵

- Fordham University prohibits the use of “any IT resource or communication services, including e-mail or other means” to “insult” others.³⁶

POLICIES ON BIAS AND HATE SPEECH

In recent years, colleges and universities around the country have instituted policies and procedures specifically aimed at eliminating “bias” and “hate speech” on campus. These sets of policies and procedures, frequently termed “Bias Reporting Protocols” or “Bias Incident Protocols,” often include speech codes prohibiting extensive amounts of protected expression. While speech or expression that is based on a speaker’s prejudice may be offensive, it is entirely protected unless it rises to the level of unprotected speech (harassment, threats, etc.). The speaker’s motive has no bearing

³⁰ “Cyber-Bullying and Social Media Abuse,” *Alcorn State University Student Handbook*, available at <http://www.alcorn.edu/WorkArea/DownloadAsset.aspx?id=13061>.

³¹ “Assault, Intimidation, and Bullying,” *UCM’s Guide to Good Decision-Making*, available at <http://www.ucmo.edu/student/documents/decisionmaking.pdf>.

³² “Student Rights and Responsibilities,” *Kenyon College Student Handbook*, available at <http://documents.kenyon.edu/studentlife/studenthandbook.pdf>.

³³ University of Nevada, Las Vegas, *Official University Statements*, <http://www.unlv.edu/about/statements>.

³⁴ See, e.g., *College Republicans at San Francisco St. Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007) (enjoining enforcement of university civility policy because “there is a substantial risk that the civility requirement will inhibit or deter use of the forms and means of communication that, to many speakers in circumstances of the greatest First Amendment sensitivity, will be the most valued and the most effective.”)

³⁵ “Responsible Computing at Frostburg State University,” available at http://static.frostburg.edu/fsu/assets/File/Administration/policies/fsupolicy/2_046.pdf.

³⁶ “Information Technology Usage,” *Fordham University Student Handbook*, available at http://www.fordham.edu/student_affairs/deans_of_students_an/student_handbooks/rose_hill_student_ha/university_regulation/information_technology_70916.asp.



on whether or not the speech is protected.

The protocols often also infringe on students' right to due process, allowing for anonymous reporting that denies students the right to confront their accusers. Moreover, universities are often heavily invested in these bias incident policies, having set up entire regulatory frameworks and response protocols devoted solely to addressing them.

These protocols, and the investigations that typically accompany them, can have a chilling effect on even core political speech. In October 2013, for example, offended students at Rutgers University – New Brunswick filed complaints with Rutgers' Bias Prevention Education Com-

mittee after the student group Students for Justice in Palestine distributed mock eviction notices intended to raise awareness about the eviction of Palestinians from their homes.³⁷ According to Rutgers' website, the university's Bias Prevention Education Committee exists to “monitor, prevent, report, respond, and restore environments in the aftermath of bias incidents.”³⁸ This is not the first time that students at Rutgers have been accused of perpetrating a bias incident for engaging in protected expression: In 2012, Rutgers' president announced that a student satire publication was being investigated for a possible bias incident because of a fake editorial praising Hitler.³⁹

While many bias incident protocols do not include a separate enforcement mechanism, the reality is that the mere threat of a bias investigation will likely be sufficient to chill protected speech on controversial issues. And when the only conduct at issue is constitutionally protected speech, even investigation is inappropriate.

POLICIES GOVERNING SPEAKERS, DEMONSTRATIONS, AND RALLIES

Universities have a right to enact reasonable, narrowly tailored “time, place, and manner” restrictions that prevent demonstrations and speeches from unduly interfering with the educational

³⁷ Julian Chokkattu, *Mock Eviction Notices Spark Complaints from Students*, THE DAILY TARGUM, Oct. 11, 2013, available at http://www.dailytargum.com/news/mock-eviction-notices-spark-complaints-from-students/article_aa076ff0-3231-11e3-baa4-0019bb30f31a.html.

³⁸ Bias Prevention Education Committee, <http://studentaffairs.rutgers.edu/resources/committees/bias-prevention>.

³⁹ Peter Bonilla, *Rutgers' Bias Investigation of Satirical Newspaper is No Laughing Matter*, Apr. 27, 2012, <http://thefire.org/article/14431.html>.

process. They may not, however, regulate speakers and demonstrations on the basis of content or viewpoint, nor may they maintain regulations which burden substantially more speech than is necessary to maintain an environment conducive to education.

SECURITY FEE POLICIES

In recent years, FIRE has seen a number of colleges and universities hamper—whether intentionally or just through a misunderstanding of the law—the invitation of controversial speakers by levying additional security costs on the sponsoring student organizations.

The U.S. Supreme Court addressed exactly this issue in *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), when it struck down an ordinance in Georgia that permitted the local government to set varying fees for events based upon how much police protection the event would need. Criticizing the ordinance, the Court wrote that “[t]he fee assessed will depend on the administrator’s measure of the amount of hostility likely to be created by the speech based on its content. Those wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit.” Deciding that such a determination required county administrators to “examine the content of the message that is conveyed,” the Court wrote that “[l]isteners’ reaction to speech is not a content-neutral basis for regulation. ... **Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.**” (Emphasis added.)

Despite the clarity of the law on this issue, the impermissible use of security fees to burden controversial speech is all too common on university campuses. Many universities maintain policies setting forth vague criteria by which security costs will be assessed, inviting this type of viewpoint discrimination. For example, the University of Oklahoma’s policy on

“It is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so.”

— U.S. Supreme Court, *Watchtower Bible and Tract Society of NY, Inc. v. Village of Stratton* (2002)

event security states:

Student Life, in conjunction with the University of Oklahoma Chief of Police, or his or her designee, shall review security requirements for all events scheduled outdoors or in classroom facilities. When the director of Student Life determines that additional security beyond that normally provided is necessary, the director of Student Life shall so inform the [Registered Student Organization]. The RSO shall be responsible for the cost of additional

security.”⁴⁰

PRIOR RESTRAINTS

The Supreme Court has held that “It is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so.” *Watchtower Bible and Tract Society of NY, Inc. v. Village of Stratton*, 536 U.S. 150, 165–66 (2002). Yet many colleges and universi-



ties do just that, requiring students and student organizations to register their expressive activities well in advance and, often, to obtain administrative approval for those activities.

This past spring, for example, when a pro-choice student group at the University of Alabama (UA) attempted to distribute flyers on campus, group members were warned that they would face arrest

if they continued to distribute flyers without obtaining a “grounds use permit.”

The controversy began when a pro-life student group hosted a “Genocide Awareness Project” (GAP) protest on UA’s quad on April 10 and 11, 2013. GAP protests are frequently hosted on college campuses and feature graphic, abortion-related images. Members of the Alabama Alliance for Sexual and Reproductive Justice

(AASRJ) student group decided to distribute flyers on the same day to counter GAP’s pro-life message. After someone complained to UA police about the content of the pro-choice flyers, UA police ordered the student group to stop handing out flyers—under threat of arrest—because they did not have a grounds use permit.⁴¹

Shortly afterward, AASRJ submitted a grounds use permit request to UA in order to continue its counter-protest activities on April 11. However, the group was informed by a UA official that the permit would not be approved in time. UA’s grounds use policy stated that permits may be approved in “as few as 3 days,” but otherwise instructed that “applicants for use of other campus grounds should request permission for such use 10 working days prior to the event.”⁴²

This incident illustrates several of the ways in which this type of permit requirement interferes with students’ right to free speech. First, while these policies usually do not explicitly restrict speech on the basis of content, requiring students to obtain a permit for expressive activity allows a university a great deal of discretion to discriminate against controversial or politically charged speech. (In this case, the pro-choice students were distributing flyers without incident until someone complained about the content, at which point the university shut down the distribution citing the permit requirement. The pro-life group, meanwhile, publicly supported its opponents’ right to free speech.)

Second, requiring advanced notice for expressive activity can render students’ expression irrelevant. Here, AASRJ wanted to hand out flyers during the GAP event to directly counter the anti-abortion messages that students were encountering at

⁴⁰ “Facility Use and Solicitation Policy for Registered Student Organizations,” available at <https://cq5publish.ou.edu/content/dam/studentlife/documents/Facility%20Use%20and%20Solicitation%20Policy%20for%20Registered%20Student%20Organizations%20REVISED0613.pdf>.

⁴¹ Letter from Peter Bonilla, Foundation for Individual Rights in Education, to Judy Bonner, President, University of Alabama (May 22, 2013), available at <http://thefire.org/article/15984.html>.

⁴² University of Alabama, “Use of University Space, Facilities & Grounds,” available at <http://www.uafacilities.ua.edu/grounds/information/facilities-and-grounds-use-policy.pdf>.

that event, but under the university’s policy, would have been required to wait at least an additional three days—by which time the GAP event would have been over and fading from students’ memories.

The University of Alabama is far from the only school to require students to obtain a permit for expressive activities. Here are a few other examples of permit requirements from the 2012–2013 academic year:

- At Rogers State University, “any students or student organizations wanting to hold a peaceful protest must register with the Office of Student Affairs by filling out a ‘Campus Expression Form’ at least three (3) days prior to the event.”⁴³

- At Virginia Tech, students wishing to distribute noncommercial literature on campus must obtain “prior approval by the designated authorizing office.”⁴⁴

FREE SPEECH ZONE POLICIES

Of the 427 schools surveyed for this report, roughly 1 in 6 have “free speech zone” policies—policies limiting student demonstrations and other expressive activities to small and/or out-of-the-way areas on campus.⁴⁵ Such policies are generally inconsistent with the First Amendment.

In June 2012, in a federal lawsuit brought by a student group seeking to collect signatures on campus for an Ohio ballot initiative, a federal judge held that the University of Cincinnati’s free speech zone policy violated the First Amendment. That policy required all “demonstrations, pickets, and rallies” to be held in a free speech zone comprising just 0.1% of the university’s 137-acre West Campus, and required ten days’ advance notice for any expressive activity taking place in the free speech area.⁴⁶ Judge Timothy S. Black wrote that

“While many colleges and universities might seem at times to believe that they exist in a vacuum, the truth is that neither our nation’s courts nor its citizens look favorably upon speech codes or other restrictions on basic freedoms.”

This civil case presents the question, among others, as to whether the University of Cincinnati, a public university, may constitutionally subject speech on its campus, by both students and outsiders alike, to a prior notice and permit scheme and restrict all “demonstrations, picketing, and rallies” to a Free Speech Area which constitutes less than 0.1% of the grounds of the campus. For the reasons stated here, the Court determines that such a scheme violates the First Amendment and cannot stand.⁴⁷

Despite this decision and others holding free speech zones unconstitutional, free speech zones remain common. For example:

- The University of Southern Mississippi requires students to hold their demonstrations in one designated “Speakers’ Corner” unless they register the demonstration “at least ONE month in advance of the activity.”⁴⁸

- Longwood University in Virginia limits speeches, demonstrations, and literature distribution to one area—the Lankford Mall—and requires the area to be reserved five days in advance.⁴⁹

⁴³ “Campus Expression,” *Rogers State University Student Code of Responsibilities and Conduct*, available at <http://www.rsu.edu/student-affairs/docs/student-code.pdf>.

⁴⁴ “Sales, Solicitation and Advertising on Campus,” *Virginia Polytechnic Institute and State University Policy and Procedures*, available at <http://www.policies.vt.edu/5215>.

pdf.

⁴⁵ “Infographic: Free Speech Zones on America’s Campuses,” <http://thefire.org/article/16243.html>.

⁴⁶ *University of Cincinnati Chapter of Young Americans for Liberty v. Williams*, 2012 U.S. Dist. LEXIS 80967 (S.D. Ohio Jun. 12, 2012).

⁴⁷ *Id.* at *2.

⁴⁸ *University of Southern Mississippi, “Free Speech, Demonstration and Protest Policy,”* available at <http://www.usm.edu/institutional-policies/policy-stua-una-012> (emphasis in original).



WHAT CAN BE DONE?

The good news is that the types of restrictions discussed in this report can be defeated. A student can be a tremendously effective vehicle for change when he or she is aware of First Amendment rights and is willing to engage administrators in defense of them. Public exposure is also critical to defeating speech codes, since universities are often unwilling to defend their speech codes in the face of public criticism.

Unconstitutional policies also can be defeated in court, especially at public universities. Speech codes have been struck

down in federal courts across the country, including in California, Michigan, Pennsylvania, Texas, Wisconsin, the U.S. Virgin Islands, and, most recently, Ohio. Any red-light policy in force at a public university is extremely vulnerable to a constitutional challenge. Indeed, FIRE has had a 100% success rate in court challenges to speech codes to which FIRE has assigned a red light. Moreover, as speech codes are consistently defeated in court, administrators are losing virtually any chance of credibly arguing that they are unaware of the law,

which means that they can be held personally liable when they are responsible for their schools' violations of constitutional rights.

The suppression of free speech at American universities is a national scandal. But supporters of liberty should take heart: While many colleges and universities might seem at times to believe that they exist in a vacuum, the truth is that neither our nation's courts nor its citizens look favorably upon speech codes or other restrictions on basic freedoms.





APPENDIX A

ALL SCHOOLS BY RATING

● Adams State College

● Alabama A&M University

● Alabama State University

● Alcorn State University

● American University

● Amherst College

● Angelo State University

● Appalachian State University

● Arizona State University

● Arkansas State University

● Armstrong Atlantic State University

● Athens State University

● Auburn University

● Auburn University Montgomery

● Ball State University

● Bard College

● Barnard College

● Bates College

● Baylor University

● Bemidji State University

● Binghamton University, State University of New York

● Black Hills State University

● Bloomsburg University of Pennsylvania

● Boston College

● Boston University

● Bowdoin College

● Bowling Green State University

● Brandeis University

● Bridgewater State University

● Brigham Young University

● Brooklyn College, City University of New York

● Brown University

● Bryn Mawr College

● Bucknell University

● California Institute of Technology

● California Maritime Academy

● California Polytechnic State University

● California State Polytechnic University - Pomona

● California State University - Bakersfield

● California State University - Channel Islands

● California State University - Chico

● California State University - Dominguez Hills

APPENDIX

● California State University - East Bay

● California State University - Fresno

● California State University - Fullerton

● California State University - Long Beach

● California State University - Los Angeles

● California State University - Monterey Bay

● California State University - Northridge

● California State University - Sacramento

● California State University - San Bernardino

● California State University - San Marcos

● California State University - Stanislaus

● California University of Pennsylvania

● Cameron University

● Carleton College

● Carnegie Mellon University

● Case Western Reserve University

● Central Connecticut State University

● Central Michigan University

● Central Washington University

● Centre College

● Cheyney University of Pennsylvania

● Chicago State University

● Christopher Newport University

● Claremont McKenna College

● Clarion University of Pennsylvania

● Clark University

● Clemson University

● Cleveland State University

● Colby College

● Colgate University

● College of the Holy Cross

● Colorado College

● Colorado Mesa University

● Colorado School of Mines

● Colorado State University

● Columbia University

● Connecticut College

● Cornell University

● Dakota State University

● Dartmouth College

● Davidson College

● Delaware State University

● Delta State University

● DePauw University

● Dickinson College

● Drexel University

● Duke University

● East Carolina University

● East Stroudsburg University of Pennsylvania

● East Tennessee State University

● Eastern Kentucky University

● Eastern Michigan University

● Eastern New Mexico University

● Edinboro University of Pennsylvania

● Elizabeth City State University

● Emory University

● Evergreen State College

● Fayetteville State University

● Fitchburg State University

● Florida A&M University

● Florida Atlantic University

● Florida Gulf Coast University

● Florida International University

● Florida State University

● Fordham University

● Fort Lewis College

● Framingham State University

● Franklin & Marshall College

● Frostburg State University

● Furman University

● George Mason University

● George Washington University

● Georgetown University

● Georgia Institute of Technology

● Georgia State University

● Gettysburg College

● Governors State University

● Grambling State University

● Grand Valley State University

● Grinnell College

● Hamilton College

● Harvard University

● Harvey Mudd College

● Haverford College

● Henderson State University

● Howard University

● Humboldt State University

● Idaho State University

● Illinois State University

● Indiana State University

● Indiana University - Bloomington

● Indiana University - Kokomo

● Indiana University - Purdue University Columbus

● Indiana University - Purdue University Fort Wayne

● Indiana University - Purdue University Indianapolis

● Indiana University of Pennsylvania

● Indiana University South Bend

● Indiana University, East

● Indiana University, Northwest

● Indiana University, Southeast

● Iowa State University

● Jackson State University

● Jacksonville State University

● James Madison University

● Johns Hopkins University

● Kansas State University

● Kean University

● Keene State College

● Kentucky State University

● Kenyon College

● Kutztown University of Pennsylvania

● Lafayette College

- Lake Superior State University

- Lehigh University

- Lewis-Clark State College

- Lincoln University

- Lock Haven University of Pennsylvania

- Longwood University

- Louisiana State University - Baton Rouge

- Macalester College

- Mansfield University of Pennsylvania

- Marquette University

- Marshall University

- Massachusetts College of Liberal Arts

- Massachusetts Institute of Technology

- McNeese State University

- Metropolitan State University

- Miami University of Ohio

- Michigan State University

- Michigan Technological University

- Middle Tennessee State University

- Middlebury College

- Millersville University of Pennsylvania

- Mississippi State University

- Missouri State University

- Missouri University of Science and Technology

- Montana State University - Bozeman

- Montana Tech of the University of Montana

- Montclair State University

- Morehead State University

- Mount Holyoke College

- Murray State University

- New College of Florida

- New Jersey Institute of Technology

- New York University

- Nicholls State University

- Norfolk State University

- North Carolina A&T State University

- North Carolina Central University

- North Carolina State University - Raleigh

- North Dakota State University

- Northeastern Illinois University

- Northeastern University

- Northern Arizona University

- Northern Illinois University

- Northern Kentucky University

- Northern Michigan University

- Northwestern Oklahoma State University

- Northwestern State University

- Northwestern University

- Oakland University

- Oberlin College

- Occidental College

- Ohio University

- Oklahoma State University - Stillwater

- Old Dominion University

- Oregon State University

- Pennsylvania State University - University Park

● Pepperdine University

● Pitzer College

● Plymouth State University

● Pomona College

● Princeton University

● Purdue University

● Purdue University Calumet

● Radford University

● Reed College

● Rensselaer Polytechnic Institute

● Rhode Island College

● Rice University

● Richard Stockton College of New Jersey

● Rogers State University

● Rutgers University - New Brunswick

● Saginaw Valley State University

● Saint Cloud State University

● Saint Louis University

● Salem State University

● Sam Houston State University

● San Diego State University

● San Francisco State University

● San Jose State University

● Scripps College

● Sewanee, The University of the South

● Shawnee State University

● Shippensburg University of Pennsylvania

● Skidmore College

● Slippery Rock University of Pennsylvania

● Smith College

● Sonoma State University

● South Dakota State University

● Southeastern Louisiana University

● Southern Illinois University at Carbondale

● Southern Methodist University

● Southwest Minnesota State University

● St. Olaf College

● Stanford University

● State University of New York - Albany

● State University of New York - Brockport

● State University of New York - Fredonia

● State University of New York - New Paltz

● State University of New York - Oswego

● State University of New York - Plattsburgh

● State University of New York - University at Buffalo

● State University of New York College of Environmental Science and Forestry

● Stevens Institute of Technology

● Stony Brook University

● Swarthmore College

● Syracuse University

● Tarleton State University

● Temple University

● Tennessee State University

● Texas A&M University - College Station

● Texas Southern University

● Texas Tech University

● Texas Woman's University

● The City College of New York

● The College of New Jersey

● The College of William and Mary

● The Ohio State University

● The University of Virginia's College at Wise

● Towson University

● Trinity College

● Troy University

● Tufts University

● Tulane University

● Union College

● United States Military Academy

● United States Naval Academy

● University of Alabama

● University of Alabama at Birmingham

● University of Alabama in Huntsville

● University of Alaska Anchorage

● University of Alaska Fairbanks

● University of Alaska Southeast

● University of Arizona

● University of Arkansas - Fayetteville

● University of California - Riverside

● University of California-Merced

● University of California, Berkeley

● University of California, Davis

● University of California, Irvine

● University of California, Los Angeles

● University of California, San Diego

● University of California, Santa Barbara

● University of California, Santa Cruz

● University of Central Arkansas

● University of Central Florida

● University of Central Missouri

● University of Chicago

● University of Cincinnati

● University of Colorado at Boulder

● University of Connecticut

● University of Delaware

● University of Denver

● University of Florida

● University of Georgia

● University of Hawaii at Hilo

● University of Houston

● University of Idaho

● University of Illinois at Chicago

● University of Illinois at Springfield

● University of Illinois at Urbana-Champaign

● University of Iowa

● University of Kansas

● University of Kentucky

● University of Louisville

● University of Maine

● University of Maine - Presque Isle

● University of Maine at Fort Kent

● University of Mary Washington

- University of Maryland - College Park
- University of Massachusetts - Amherst
- University of Massachusetts at Dartmouth
- University of Massachusetts at Lowell
- University of Miami
- University of Michigan - Ann Arbor
- University of Minnesota - Morris
- University of Minnesota - Twin Cities
- University of Mississippi
- University of Missouri - Columbia
- University of Missouri at St. Louis
- University of Montana
- University of Montana - Western
- University of Montevallo
- University of Nebraska - Lincoln
- University of Nevada, Las Vegas
- University of Nevada, Reno
- University of New Hampshire
- University of New Mexico
- University of New Orleans
- University of North Alabama
- University of North Carolina - Asheville
- University of North Carolina - Chapel Hill
- University of North Carolina - Charlotte
- University of North Carolina - Greensboro
- University of North Carolina - Pembroke
- University of North Carolina - Wilmington
- University of North Carolina School of the Arts
- University of North Dakota
- University of North Florida
- University of North Texas
- University of Northern Colorado
- University of Northern Iowa
- University of Notre Dame
- University of Oklahoma
- University of Oregon
- University of Pennsylvania
- University of Pittsburgh
- University of Rhode Island
- University of Richmond
- University of Rochester
- University of South Alabama
- University of South Carolina Columbia
- University of South Dakota
- University of South Florida
- University of Southern California
- University of Southern Indiana
- University of Southern Maine
- University of Southern Mississippi
- University of Tennessee - Knoxville
- University of Texas at Arlington
- University of Texas at Austin
- University of Texas at El Paso
- University of Texas at San Antonio
- University of Toledo
- University of Tulsa

APPENDIX

● University of Utah

● University of Vermont

● University of Virginia

● University of Washington

● University of West Alabama

● University of West Florida

● University of West Georgia

● University of Wisconsin - Eau Claire

● University of Wisconsin - Green Bay

● University of Wisconsin - La Crosse

● University of Wisconsin - Madison

● University of Wisconsin - Oshkosh

● University of Wisconsin - Stout

● University of Wyoming

● Utah State University

● Utah Valley University

● Valdosta State University

● Vanderbilt University

● Vassar College

● Virginia Commonwealth University

● Virginia Polytechnic Institute and State University

● Virginia State University

● Wake Forest University

● Washington & Lee University

● Washington State University

● Washington University in St. Louis

● Wayne State University

● Wellesley College

● Wesleyan University

● West Chester University of Pennsylvania

● West Virginia University

● Western Carolina University

● Western Illinois University

● Western Kentucky University

● Western Michigan University

● Western State College of Colorado

● Westfield State University

● Whitman College

● Wichita State University

● William Paterson University

● Williams College

● Winona State University

● Winston Salem State University

● Worcester Polytechnic Institute

● Worcester State University

● Wright State University

● Yale University

● Yeshiva University

● Youngstown State University

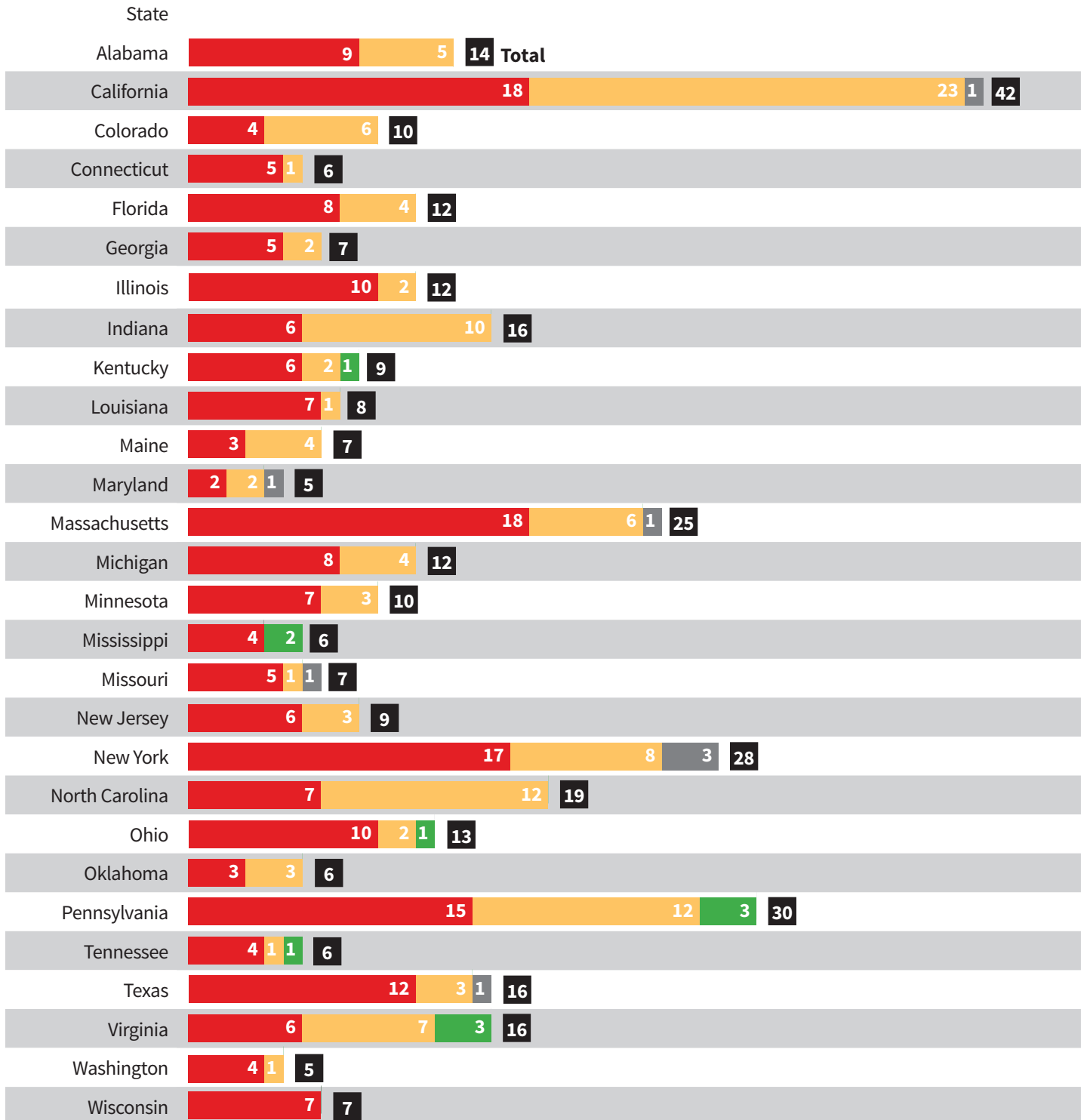
APPENDIX B

RATING CHANGES, 2012-2013 ACADEMIC YEAR

School Name	2011–2012	2012–2013
Angelo State University	●	●
Auburn University Montgomery	●	●
Bemidji State University	●	●
Edinboro University of Pennsylvania	●	●
Massachusetts College of Liberal Arts	●	●
Michigan Technological University	●	●
New Jersey Institute of Technology	●	●
Northwestern University	●	●
Stony Brook University	●	●
University of Alaska Southeast	●	●
University of Delaware	●	●
University of Massachusetts Dartmouth	●	●
University of Montana	●	●
University of North Carolina Chapel Hill	●	●
University of North Dakota	●	●
University of Southern California	●	●
University of Texas San Antonio	●	●
Vanderbilt University	●	●
Wellesley College	●	●
Whitman College	●	●

APPENDIX C

STATE-BY-STATE INFORMATION





MISSION

The mission of FIRE is to defend and sustain individual rights at America's colleges and universities. These rights include freedom of speech, legal equality, due process, religious liberty, and sanctity of conscience — the essential qualities of individual liberty and dignity. FIRE's core mission is to protect the unprotected and to educate the public and communities of concerned Americans about the threats to these rights on our campuses and about the means to preserve them.



The Foundation For Individual Rights In Education

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