WRITTEN TESTIMONY of GREG LUKIANOFF
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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

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[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

[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 Regent*s, 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

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[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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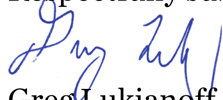
[48] Mem. in Supp. of Mot. for Summ. J. for Defs. at 26, *Adams v. Trs. of the Univ. of N.C.-Wilmington*, No. 07-CV-64-H (E.D.N.C. May 1, 2009), ECF No. 132.
[49] Mem. in Supp. of Mot. for Summ. J. for Defs. at 8, *Capeheart v. Hahs et al.*, No. 08-cv-1423 (N.D. Ill. Sept. 8, 2010), ECF No. 136.

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

APPENDIX A: CAMPUS ANTI-HARASSMENT ACT.

114th CONGRESS

1st Session

H.B. ______

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

IN THE HOUSE OF REPRESENTATIVES

JUNE __, 2015

Mr./Ms. ____________introduced the following bill; which was referred to the Judiciary Committee.

A BILL

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

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

SEC. 1. CAMPUS ANTI-HARASSMENT ACT.

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

SEC. 2. FINDINGS.

(1) Educational institutions should facilitate the free and open exchange of ideas.

(2) All public educational institutions are required by the First Amendment to the United States Constitution to protect and honor students' freedom of speech.

(3) Private educational institutions are not bound by the First Amendment to the Constitution. Nevertheless, many private educational institutions explicitly promise students freedom of speech.

(4) All public educational institutions and and private educational institutions that accept federal funding are obligated under Title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], Title IX of the Education Amendments of 1972 [20 U.S.C. 1681 et seq.], Section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], and the Age Discrimination Act of 1975 [42 U.S.C. 6101 et seq.] to take immediate action to eliminate discriminatory harassment, prevent its recurrence, and address its effects.

(5) In *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), the Supreme Court of the United States provided a clear definition of peer harassment in the educational context that simultaneously prohibits harassment and protects speech.

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

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

SEC. 3. DEFINITIONS.

In this Act:

(1) EDUCATIONAL INSTITUTION- The term `educational institution′ means--

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

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

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

(2) SECRETARY- The term `Secretary′ means the Secretary of Education.

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

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

2) Speech shall only constitute actionable harassment when directed at an individual and:

> (a) part of a pattern of targeted, unwelcome conduct that is discriminatory on the basis of race, color, national origin, disability, religion, age, sex, sexual orientation, or gender;
>
> (b) so severe, pervasive, and objectively offensive;
>
> (c) and that so undermines and detracts from the victim's educational experience that the victim-student is effectively denied equal access to an institution′s resources and opportunities.

3) An educational institution is not liable under this Act for failing to punish speech that does not satisfy Section 4(2) herein.

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

SEC. 5. CAUSE OF ACTION.

1) The following persons may bring an action in any Federal or State court of competent jurisdiction to enjoin violation of this Act. The court may award compensatory damages, reasonable court costs, and attorneys' fees, including expert fees, or any other relief in equity or law as deemed appropriate:

> a) the attorney general;
>
> b) any aggrieved person whose expressive rights were infringed upon through violation of this Act.

2) In an action brought under Subsection (5), if the court finds a violation of this Act, the court shall award the aggrieved person not less than $1000.

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

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

SEC. 6. STATUTE OF LIMITATIONS.

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

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

SEC. 7. EXEMPTIONS

1) This Act shall not apply to:

> (a) an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization; or

(b) an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine.

APPENDIX B: CAMPUS FREE EXPRESSION ACT.

114th CONGRESS

1st Session

H.B. ______

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

IN THE HOUSE OF REPRESENTATIVES

June __, 2014

Mr./Ms. ____________introduced the following bill; which was referred to the Judiciary Committee.

A BILL

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

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

SEC. 1. SHORT TITLE.

This Act may be cited as the "Campus Free Expression Act."

SEC. 2. RIGHT TO USE CAMPUS FOR FREE SPEECH ACTIVITIES.

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

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

3) Any person who wishes to engage in noncommercial expressive activity on campus shall be permitted to do so freely, as long as their conduct is not unlawful and does not materially and substantially disrupt the functioning of the institution subject to the requirements of subsection 2 of this section;

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

SEC. 3. CAUSE OF ACTION.

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

a) the attorney general;

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

2) In an action brought under this Section, if the court finds a violation of this act, the court shall award the aggrieved persons no less than $500 for the initial violation plus $50 for each day the violation remains ongoing.

SEC. 4. STATUTE OF LIMITATIONS.

1) ONE-YEAR LIMITATIONS PERIOD.

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

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

APPENDIX C: ACADEMIC FREEDOM AND WHISTLEBLOWER PROTECTION ACT.

114th Congress
1st Session

H.B. _____

IN THE UNITED STATES HOUSE OF REPRESENTATIVES

June __, 2014

Mr./Ms. ____________introduced the following bill, which was referred to the Judiciary Committee.

A BILL

To amend Title VII of the Higher Education Act of 1964 to clarify that it is unlawful for a publicly operated institution of higher education to take adverse personnel action or otherwise retaliate against a faculty member or graduate student instructor for expression related to academic scholarship, academic research, or classroom instruction.

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

SECTION 1. SHORT TITLE.

This Act may be cited as the "Academic Freedom and Whistleblower Protection Act of 2015."

SEC. 2. DEFINITIONS.

(A) Except as otherwise provided, the term "institution of higher education" refers only to public institutions defined by 20 U.S.C. 1001 and any amendments to it hereto.

(B) Except as otherwise provided, the term "faculty" refers to any person, whether or not they are compensated by an institution of higher education, who is tasked with providing scholarship, academic research, or teaching. For purposes of this statute, the term "faculty" shall include tenured and non-tenured professors, adjunct professors, visiting professors, lecturers, graduate student instructors, and those in comparable positions, however titled. For purposes of this statute, the term "faculty" shall not include persons whose primary responsibilities are administrative or managerial.

SEC. 3. FINDINGS.

Congress finds the following:

(1) In Section 104 (C) of the Higher Education Act, Congress expressed its sense that "an institution of higher education should facilitate the free and open exchange of ideas." 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 the "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 Regent*s, 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."

(2) Despite these and other long-established precedents, the Supreme Court placed academic freedom at our nation's public colleges and universities in jeopardy when it held in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), that that a public employee's speech made pursuant to official duties is not protected by the First Amendment. The Court acknowledged that its decision "may have important ramifications for academic freedom," but it declined to decide whether an exception for the academic setting was warranted ("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.").

(3) 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 offi cial duties' of a teacher and 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."

(4) Universities frequently 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. 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.

(5) 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.

SEC. 4. ACADEMIC FREEDOM AND WHISTLEBLOWER PROTECTION.

Section xxxx of the Higher Education Act of 1964 is amended by adding to the end the following:

Section (xx) (A) No publicly operated institution of higher education, as defined by 20 U.S.C. 1001 and amendments to it hereto, shall take adverse personnel action, or maintain a policy that allows it to take adverse personnel action, against a faculty member in retaliation for:

(i) expression related to scholarship, academic research, or teaching, except as provided in subsection (B), herein; or

(ii) expression as a private citizen, or within the context of the faculty member's activities as an employee of the institution of higher education, related to matters of public concern, including matters related to professional duties, the functioning of the institution of higher education, and the institution's positions and policies; or

(iii) disclosure, whether formal or informal, of information the faculty member reasonably believes evidences—

(a) any violation of any law, rule, or regulation; or

(b) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(B) It shall not be unlawful under this Act for a publicly operated institution of higher education to take adverse personnel action, or to maintain a policy that allows it to take lawful adverse personnel action, against a faculty member for classroom expression that—

(i) is not reasonably germane to the subject matter of the class, broadly construed; and

(ii) comprises a substantial portion of classroom instruction.

(C) Any person whose rights under this Act have been violated may bring an action in any federal court of competent jurisdiction. In an action brought under this Act, if the court finds that protected expression, as defined in this Act, was a significant motivating factor behind the institution of higher education's decision to take an adverse personnel action, the court shall award the aggrieved person compensatory damages, reasonable court costs, and attorney's fees, including expert fees, or any other relief in equity or law as deemed appropriate, unless the institution of higher education can demonstrate that it would have taken the same personnel action in absence of the protected activity.

(D) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in federal court for a violation of this Act, provided that the institution of higher education subject to the cause of action has accepted federal funding. In a suit against a State for a violation of this Act, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in a suit against any public or private entity other than a State.

(E) A person must bring suit for violation of this Act not later than one year after the day the cause of action accrues. For purposes of calculating the one-year limitation period, the cause of action shall be deemed accrued on the date that the person receives final notice of the adverse personnel action from the institution of higher education or the date in which the act of retaliation occurred, whichever date is later.

SEC. 5. EXEMPTIONS.

This Act shall not apply to any privately operated institution of higher education or to any institution of higher education whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine.

SEC. 6. EFFECTIVE DATE.

This Act is effective immediately when it becomes law.