

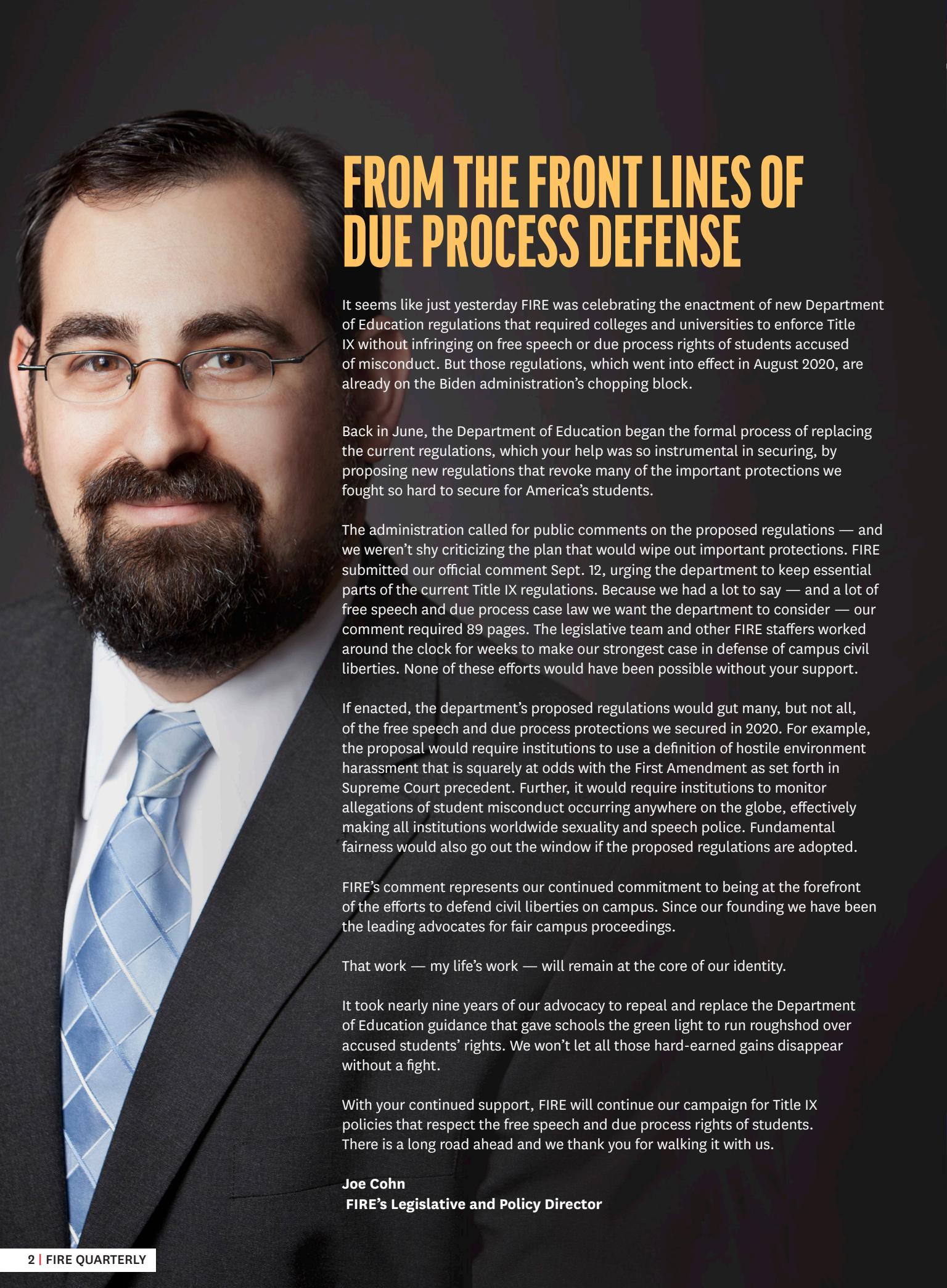


FIRE QUARTERLY

FALL 2022



**RAISING OUR VOICE: FIRE DEFENDS
AUTISTIC-LED ADVOCACY GROUP
AGAINST LAWSUIT THREAT**



FROM THE FRONT LINES OF DUE PROCESS DEFENSE

It seems like just yesterday FIRE was celebrating the enactment of new Department of Education regulations that required colleges and universities to enforce Title IX without infringing on free speech or due process rights of students accused of misconduct. But those regulations, which went into effect in August 2020, are already on the Biden administration's chopping block.

Back in June, the Department of Education began the formal process of replacing the current regulations, which your help was so instrumental in securing, by proposing new regulations that revoke many of the important protections we fought so hard to secure for America's students.

The administration called for public comments on the proposed regulations — and we weren't shy criticizing the plan that would wipe out important protections. FIRE submitted our official comment Sept. 12, urging the department to keep essential parts of the current Title IX regulations. Because we had a lot to say — and a lot of free speech and due process case law we want the department to consider — our comment required 89 pages. The legislative team and other FIRE staffers worked around the clock for weeks to make our strongest case in defense of campus civil liberties. None of these efforts would have been possible without your support.

If enacted, the department's proposed regulations would gut many, but not all, of the free speech and due process protections we secured in 2020. For example, the proposal would require institutions to use a definition of hostile environment harassment that is squarely at odds with the First Amendment as set forth in Supreme Court precedent. Further, it would require institutions to monitor allegations of student misconduct occurring anywhere on the globe, effectively making all institutions worldwide sexuality and speech police. Fundamental fairness would also go out the window if the proposed regulations are adopted.

FIRE's comment represents our continued commitment to being at the forefront of the efforts to defend civil liberties on campus. Since our founding we have been the leading advocates for fair campus proceedings.

That work — my life's work — will remain at the core of our identity.

It took nearly nine years of our advocacy to repeal and replace the Department of Education guidance that gave schools the green light to run roughshod over accused students' rights. We won't let all those hard-earned gains disappear without a fight.

With your continued support, FIRE will continue our campaign for Title IX policies that respect the free speech and due process rights of students. There is a long road ahead and we thank you for walking it with us.

Joe Cohn
FIRE's Legislative and Policy Director

FIRE TO DEPARTMENT OF EDUCATION: YOUR PROPOSED TITLE IX REGULATIONS ARE UNCONSTITUTIONAL

The Department of Education is in the process of replacing the due process and speech protective Title IX regulations it adopted in 2020 with new regulations that undermine those rights. What's more, many of the proposed provisions directly conflict with a growing body of case law that addresses institutions' obligations under Title IX and balances the rights of accusers and those accused of misconduct. Since 2011, there have been over 200 opinions favorable to the rights of students accused! Despite these decisions, if the department has its way, procedural protections will go out the window.

In FIRE's comment to the Department of Education, we defend due process, outlining our concerns about how the regulations would violate this fundamental right.

One such concern is that the proposed regulations would eliminate the right to a live hearing and only require schools that choose to provide live hearings to give the parties the right to cross-examination of witnesses. Without a live hearing and cross-examination, students and faculty would be denied the right to adequately defend themselves. In our comment, we argued that live hearings must be mandatory, in accordance with multiple courts that have held there is a constitutional right to them in Title IX cases.

Worryingly, the proposed Title IX regulations go even further in violating students' rights, allowing institutions of higher education to implement a single investigator model of adjudication in which a single person both investigates and judges the merits of complaints. This is unconstitutional. About this practice, one federal judge wrote:

The dangers of combining in a single individual the power to investigate, prosecute, and convict, with little effective power of review, are obvious. No matter how well-intentioned, such a person may have preconceptions and biases, may make mistakes, and may reach premature conclusions.

It is important for the Department of Education to follow case law, not only because it is legally bound to do so, but because not doing so risks destroying due process and violating Title IX. That's why FIRE has taken — and will continue to take — action in this arena. The department will now take several months to consider input it received during the public comment period before it releases the final version. When that happens, FIRE will provide quick, thorough analysis and will be ready to fight back against any provisions that undermine student rights.

SPOTLIGHT ON DUE PROCESS

This year's Spotlight on Due Process report is FIRE's most extensive yet, rating 155 policies at 53 of America's top universities. The report reveals modest improvements in due process across the board — a continuation of a trend we've seen since 2020's Title IX regulations went into effect. Since then, more students have the right to a live hearing, the right to cross-examine witnesses against them, and the right to be presumed innocent until proven guilty.

Notably, for the first time ever, one of the rated policies received an A grade. This policy, at Columbia University, provides more than 8 of the 10 elements FIRE considers critical to a fair procedure. But overall, the situation is bleak, with none of the other policies at any school featured in the report earning higher than a B. The University of Notre Dame stands out as the worst institution overall, receiving an F for multiple policies.

Unfortunately, if the proposed Title IX regulations are enacted, students' due process rights will only be further jeopardized.



CLOUDY WITH A CHANCE OF CENSORSHIP: COLLEGE FREE SPEECH RANKINGS MEASURE SPEECH CLIMATE AT OVER 200 SCHOOLS

FIRE and College Pulse released the third annual College Free Speech Rankings, which ranks the speech climates of 203 of America's largest and most prestigious campuses. The largest survey on student free expression ever conducted, this report adds 45,000 student voices to the national conversation about free speech — and finds that many are afraid to speak out. Many others want to silence the voices of those who don't share their viewpoints, creating campus echo chambers.

"That so many students are self-silencing and silencing each other is an indictment of campus culture," said FIRE Senior Research Fellow Sean Stevens. **"How can students develop their distinct voices and ideas in college if they're too afraid to engage with each other?"**

What factors into the scoring? The rankings rely heavily on student responses. Each school's speech code rating also plays a role: Most schools without any policies that imperil free speech rose in the rankings, while those with restrictive speech codes fell. This year, FIRE also took into account which schools sanctioned faculty for their speech or disinvited guest

speakers based on viewpoint since 2019, giving the institutions that did lower marks.

Self-censorship is pervasive across top-ranked and bottom-ranked schools alike: 63% of respondents worried about damaging their reputation because someone misunderstands something they have said or done. An equal percentage said that students shouting down a speaker to prevent them from speaking on campus was acceptable to some degree.

Other findings from the report include:

- Conservative students are most likely to feel they cannot express their opinions freely, with 42% reporting that they "often" feel uncomfortable speaking freely, compared to 13% of liberal students.
- 40% of students are uncomfortable disagreeing with a professor — in public or in a written assignment.
- The three most difficult topics to discuss on campus are abortion, racial inequality, and COVID-19 vaccine mandates.

FIRE hopes that prospective college students and their parents will use the rankings to make informed decisions about where to apply.

"The situation for freedom of speech and academic freedom has been in trouble on campus since before FIRE was founded in 1999," said FIRE President and CEO Greg Lukianoff. "That situation has gotten far worse in the last few years. Our new and improved rankings are intended to reward universities that protect and defend the freedom of speech, while empowering students and parents who care about free speech not to attend or support universities that don't."

How worried are you about damaging your reputation because someone misunderstands something you have said or done?



- 21% Worried a lot
- 25% Not very worried
- 42% Worried a little
- 12% Not at all worried

2022'S BEST COLLEGES FOR FREE SPEECH:

University of Chicago
Kansas State University
Purdue University
Mississippi State University
Oklahoma State University

2022'S WORST COLLEGES FOR FREE SPEECH:

Skidmore College
Georgetown University
Rensselaer Polytechnic Institute
University of Pennsylvania
Columbia University



FIRE & ICE: ICE-T BECOMES THE LATEST FACE OF FREE SPEECH

The latest ad in FIRE's "Faces of Free Speech" campaign features musician, actor, and producer Ice-T, who speaks about his experiences with music censorship and the importance of protecting free speech.

The campaign, designed to share the personal stories of those who faced censorship and stood up for free speech, reached viewers on broadcast and streaming television and ran during the season premiere of "Law & Order: Special Victims Unit" on NBC. Ice-T is



a member of the "Law & Order" cast, playing New York Police Department Sergeant Fin Tutuola since 2000.

"We don't have to like what we hear, but we all have the right to express ourselves," says Ice-T in the ad. "Silencing artists doesn't make our society any better or safer."

FIRE Executive Vice President Nico Perrino said that artistic freedoms must be preserved for art and culture to flourish: "In America, we don't take the microphone or the paint brush out of artists' hands because we don't like what they have to say."

'CONFORMITY ISN'T FUNNY': COMEDIANS ADVOCATE FOR A FREE SPEECH CULTURE



Comedians serve an important role in society, shedding light on controversial subjects and bringing levity to issues many are reluctant to openly discuss. But today, too many think they should just keep quiet. As the cancellation of Dave Chappelle's scheduled performance at Minneapolis' First Avenue shows, even successful

comedians aren't safe from being silenced.

In a recent ad campaign from FIRE, Comedian Judy Gold and Comedy Cellar owner Noam Dworman swim against the rising tide of cancel culture, speaking up about the importance of protecting free speech in comedy.

Today people are telling comedians what they can and cannot say. Organizations like FIRE are so important because we need more speech, not less speech. Silencing comedians and silencing points of view is only going to hurt us and divide us.

—Judy Gold

"People are terribly scared to say the wrong thing ... free speech is important because it's the only way to get to the truth of anything." - Noam Dworman

We hope the ads, which aired on Comedy Central and streaming services, will foster a culture that's more hospitable to humor. The alternative is an atmosphere of conformity. And, in the words of FIRE Executive Vice President Nico Perrino, "conformity isn't funny."

FIRE DEFENDS AUTISTIC-LED ADVOCACY GROUP AGAINST INSTITUTION THAT USES ELECTRIC-SHOCK DEVICES ON DISABLED RESIDENTS



Zoey Read
NeuroClastic Advisory
Board member

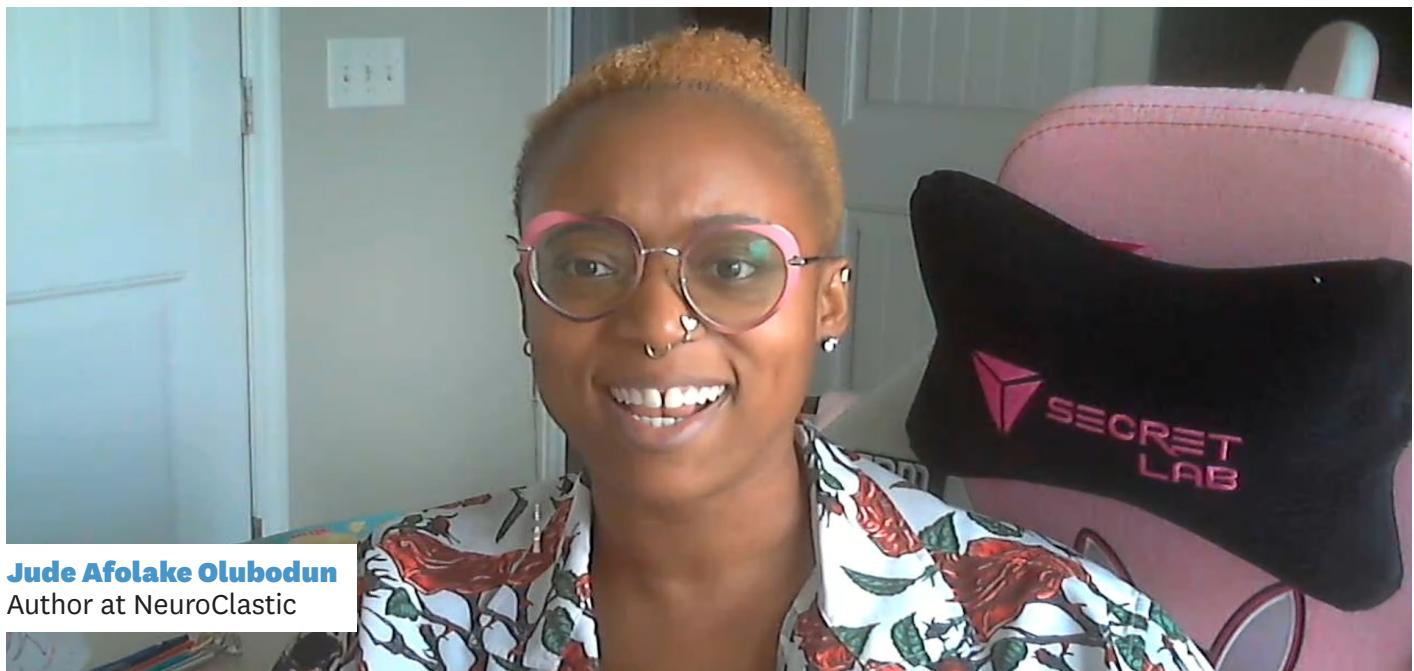
Can a powerful organization bully a critic into silence for condemning the use of electric-shock devices on autistic disabled residents? Not on FIRE's watch.

On Aug. 30, FIRE demanded the Judge Rotenberg Educational Center drop its threat of litigation against NeuroClastic, an autistic-led advocacy nonprofit. NeuroClastic received the threat of a defamation suit after it published the results of a survey about the Rotenberg Center's use of electric-shock devices.

"I was terrified when I got a letter from the Judge Rotenberg Center's most notorious lawyer," said NeuroClastic founder and CEO Terra Vance. "But the autistic people at the Judge Rotenberg Center cannot defend themselves — so we will. FIRE believes in the value of our freedom to use our voices, even those of autistic people who do not speak. They understand that we don't just want to fight back, but that we have to fight back."

The Rotenberg Center, an institution that houses autistic and other disabled people as young as five, is infamous for its use of devices that administer electric shocks to residents through a remote control. This practice is so notorious that it was condemned by the United Nations Special Rapporteur on Torture.

In August 2021, NeuroClastic evaluated the views of professionals in the field of Applied Behavior Analysis regarding the Rotenberg Center's use of electric-shock devices to program autistic



Jude Afolake Olubodun

Author at NeuroClastic

FIRE believes in the value of our freedom to use our voices, even those of autistic people who do not speak.

respondent, NeuroClastic edited the article to lower its estimate of the power of the shocks from 10X to 6X more powerful than that of a stun gun, to account for variations in power among stun guns and differences among shock devices at the Rotenberg Center.

“NeuroClastic is just one of countless organizations that have called for an end to the use of these devices,” said Zoey Read, a member of NeuroClastic’s advisory board. “It is thus both regrettable and inexplicable that the Rotenberg Center has chosen to target NeuroClastic in an attempt to silence them.”

Because the Rotenberg Center is well-known for its use of the devices, the First Amendment requires that if it sues for defamation, it must prove by clear and convincing evidence that NeuroClastic knew its statements were false or acted with reckless disregard for the truth. Additionally, defamation only applies to statements of fact. Opinions, including opinions on electric-shock therapy, are not actionable in a defamation suit.

FIRE’s letter explains that the threatened defamation claims are meritless and puts the Rotenberg Center on notice to preserve its records of the use of the electric-shock devices

given its threat of further legal action. Additionally, FIRE notes that an apology from the Rotenberg Center and retraction of its litigation threat is warranted.



“Just because the Rotenberg Center doesn’t like what NeuroClastic has to say, doesn’t mean their critiques are defamatory,” said FIRE attorney Gabe Walters. “The Rotenberg Center wants NeuroClastic to cease and desist, but NeuroClastic and FIRE won’t cease or desist in our advocacy for free expression.”

people’s behavior. The findings, which were published on NeuroClastic’s website, note that 89% of surveyed professionals were “strongly opposed” to the electric-shock devices used by the Rotenberg Center.

The Rotenberg Center sent NeuroClastic a cease-and-desist letter in April, arguing that seven statements in the article were defamatory, and threatening to sue NeuroClastic for damages if it did not permanently and immediately delete the statements.

But NeuroClastic stands by all statements made in the article, barring one. At the request of a survey

LAWSUIT:

FIRE CHALLENGES HB 7'S LIMITATIONS ON FLORIDA PROFESSORS' SPEECH ABOUT RACE AND SEX

Professor Adriana Novoa knows a thing or two about suppression. She grew up under a dictatorship in Argentina before immigrating to the United States, where she now teaches history at the University of South Florida. That's why she and Sam Rechek, a USF student and head of the school's First Amendment forum, sought FIRE's help in fighting HB 7, a bill prohibiting instruction on specific race-related concepts — severely limiting teaching and learning in the higher ed context.

The lawsuit, filed by FIRE in August, alleges that the higher education provisions of Florida's ironically-named "Individual Freedom" law (dubbed the "Stop WOKE Act" by its proponents), impermissibly chill free expression and promote unconstitutional censorship on the state's college campuses.

"HB 7's provisions about higher education are probably the most clearly unconstitutional legislative threat to academic freedom I've seen in my 21 year career," said FIRE President and CEO Greg Lukianoff.

The law is stuffed with vague language that leaves professors unsure which lessons are government-approved and which could result in punishment, including termination. It constrains professors' ability to play devil's advocate and forbids them from "advancing" viewpoints, even for the sake of Socratic discussion.

HB 7's provisions about higher education are probably the most clearly unconstitutional legislative threat to academic freedom I've seen in my 21 year career.

— FIRE President and CEO
Greg Lukianoff

The bill unlawfully restricts discussions of advantages or disadvantages of a particular race or sex; whether individuals are unconsciously biased based on race or sex; and whether certain virtues — including "merit" and "colorblindness" — are racist. It suppresses viewpoints disfavored by Florida lawmakers, threatens tens of millions of dollars in annual funding for universities that don't crack down on faculty who "promote" an opinion on a government blacklist, and encourages people to report other Americans to government authorities if they "advance" those views.

Novoa reviewed her course materials through the lens of this law and found that, in order to comply with it, she must remove assigned readings and entire lecture topics: Among them are readings on Jackie Robinson and segregation in professional baseball and texts about colonialism in Latin America.

Student-plaintiff Recheck, a 2020 FIRE summer intern, says the bill will prevent the USF First Amendment Forum from fully and frankly discussing important issues.

"I came to college to have real debates about issues that are important to me — not to have politicians decide which conversations are too controversial for class," said Recheck. "It's important to fight back because I came to USF for an education, not government-approved indoctrination."

By challenging this bill as it applies to higher education, FIRE hopes to see to it that nothing stands in the way of professors delivering, or students receiving, a college education uninhibited by government censorship.



NOT-SO-SOCIAL MEDIA: NEW YORK SENATE BLOCKS CRITICS ON TWITTER



FIRE is calling on the New York State Senate to stop blocking Twitter critics and hiding their tweets. Here, FIRE represents William Silver, who was among many blocked after criticizing new gun control legislation. His critique constituted two simple words in reference to the Second Amendment: "Shall not."

The Senate's actions are unconstitutional. Courts across the country have recognized that when a government actor invites public comments on social media, the government's regulation of that online speech is restrained by the First Amendment.

"The New York State Senate cannot hide tweets or block users based on their viewpoints," said FIRE attorney Adam Steinbaugh. "In culling tweets and blocking users based on viewpoint, the New York State Senate undermines its own role in facilitating the democratic process and violates the Constitution."

FIRE has called on the New York State Senate to unblock all users, unhide any tweets or Facebook comments, and agree not to block users or hide comments going forward.

"We can't expect politicians to agree with us on every issue, but they also can't subvert the democratic process by hiding constituents' publicly voiced concerns," said Silver.

PRONOUN POLICE: UNIVERSITY PUNISHES PROF FOR REFUSING TO USE STUDENT'S PREFERRED PRONOUNS

When administrators at Southern Utah University punished theater professor Richard Bugg for refusing to use a student's preferred pronouns, he fought back with FIRE, filing a lawsuit to defend his right not to use compelled speech.

In fall of 2021, professor Bugg was asked by a student in his acting class to refer to that student using "they/them" pronouns. Bugg declined, offering instead to use the student's given or preferred proper name and attempting throughout the semester, not to use female pronouns to refer to the student — but mistakenly did two or three times. In response, the student filed a Title IX complaint against him.

After a hearing, SUU determined Bugg violated university policy by engaging in "conduct that constitutes 'discrimination' and 'harassment' based on gender identity." As punishment, the school required Bugg to take a class about the use of gender-neutral pronouns and warned him that if his continued refusal to use preferred pronouns causes students to avoid registering for his classes, SUU would open additional sections and reduce his pay to offset the cost of those sections. It also threatened Bugg with termination.

With his lawsuit, Bugg seeks to ensure that public colleges and universities do not overstep where matters

of free speech and conscience are at stake. Professors have a right to private conscience: Compelling speech to align with a particular viewpoint violates this right.

SHE/HER
HE/HIM
THEY/THEM

EYE ON DEI: ON THE USE OF ‘DIVERSITY, EQUITY, AND INCLUSION’ CRITERIA IN FACULTY HIRING AND EVALUATION

As institutions dedicated to the free pursuit of knowledge, universities are the last place you should expect to find attempts to enforce ideological conformity. That’s why FIRE is increasingly concerned by the trend of universities requiring current or prospective faculty to demonstrate their commitment to diversity, equity, and inclusion, often through a written statement that factors into hiring, promotion, or tenure decisions.

DEI might sound unobjectionable; after all, universities surely can evaluate whether their faculty are effective at teaching and interacting with students of diverse backgrounds and identities. But DEI statement policies commonly go beyond this reasonable goal. Many universities evaluate such statements using ideological criteria that penalize faculty members who refuse to affirm university-approved views on issues that are a source of public discussion and disagreement. The policies also pressure faculty to devote substantial time and energy to academic (or even non-academic) activities aligned with their institution’s ideological preferences.

What do the policies look like?

- The University of Oregon’s policy penalizes faculty applicants who oppose “outreach or affinity groups aimed at underrepresented individuals because it keeps them separate from everyone else, or will make them feel less valued.”
- California’s community college system proposed a regulation that would compel faculty to endorse and apply ideas like “racial equity,” “intersectionality of social identities,” and “axes of oppression” faced by members of “minoritized groups.”
- At the Indiana University School of Medicine, a new policy will require faculty seeking promotion and tenure to “show effort toward advancing DEI.” The policy contrasts “equity” with “equality,” stating that while the latter “recognizes a common humanity, ‘equity’ recognizes the distinct needs of individuals and groups, which cannot be addressed with generalized solutions that fail to acknowledge structural inequities.”

Any litmus test in higher education is unacceptable, regardless of its specific political valence. The above policies are no more appropriate than would be a policy requiring faculty to affirm the values of “patriotism,” “individualism,” or “racial colorblindness,” or to demonstrate involvement in activities that promote such values.

Both the First Amendment, and the promises of free speech and academic freedom that most colleges and universities make, preclude compelled allegiance to any political, moral, or ideological dogma. Academic freedom also means faculty enjoy wide latitude in their teaching and scholarly pursuits, free from institutional pressure to filter their work through a prescribed ideological lens.

Considering the increasingly frequent (and often successful) attempts to sanction faculty for protected speech, the persistence of speech codes and bias reporting systems, training programs that compel speech, and institutional leaders who frequently use their bully pulpit to simply reinforce popular political opinions on campus, institutions of higher education do not need another way to enforce ideological orthodoxy in the form of politicized DEI statement mandates.

FIRE will continue to defend faculty against DEI statement policies that threaten their expressive rights.



DONOR SPOTLIGHT

EDWARD TABASH



I joined FIRE because it universally protects free expression by fighting censorship from both the left and the right. In 1990 I became active in the effort to repeal speech code restrictions on college and university campuses. I also got involved in opposing attempts to amend the Constitution in a way that would prohibit the desecration of the American flag. I believe that both pornography and racist speech are protected by the First Amendment, though I must confess to being more sympathetic to the former than to the latter. FIRE is also faithful to the rights of the accused, which is essential to a comprehensive civil libertarian outlook.

Censorship is now so rampant that it can only be countered by a large ideologically diverse group who come together to protect the free expression rights of everyone. Regardless of how fervently we may support various causes, we must always defend the rights of our opponents to present their arguments. FIRE enables us to be allies with people with whom we may disagree on a number of other issues, because we all agree on protecting free expression.

Eddie Tabash is a lawyer in the Los Angeles area whose practice focuses on constitutional law, criminal defense, and real estate transactions. He is a valued member of FIRE's Ember Club and FIRE's Eternal Flame Society. Eddie has dedicated his career to protecting constitutional rights and is providing FIRE with long-lasting support to defend individual rights and freedom of speech for all.

FIRE is deeply grateful to have him on our team. You can learn more about the Ember Club and the Eternal Flame Society at thefire.org/donate. If you would like to discuss membership and benefits, please contact Ashley Adams at ashley@thefire.org or 215-717-3473.

POST-EXPANSION ACHIEVEMENTS

On June 6, FIRE announced our ambitious plan to expand our mission off campus to defend expressive rights for all Americans. Since then, we've been hard at work transforming our vision into reality, and we've made some remarkable achievements.

We launched our first off-campus legal cases and we're gearing up for additional exciting off-campus litigation.

Our work was mentioned over 1,100 times by a broad spectrum of media outlets, and our expert free speech analysis was featured in The New York Times, The Wall Street Journal, Newsweek, on FOX News, "Dr. Phil" and more. Clips of FIRE Fellow Rikki

Schlott appearing on "Real Time with Bill Maher" were retweeted by Sen. Ted Cruz.

We've also surpassed our goal of hitting 200,000 email subscribers in 2022, and we've gained over 20,000 followers across all of our social media platforms since June, bringing our total social number of social media followers over 140,000. We know that to change the culture, we need to show young Americans why their rights matter. Our TikTok following more than doubled, thanks in part to our new viral TikTok series "Lawyer Up," featuring FIRE's Legal Director Will Creeley explaining free speech law in short, humorous clips.

By almost any measure, FIRE is making significant progress toward becoming America's premier guardian of expressive rights and building a movement to defend them — restoring free speech as a fundamental value respected and celebrated by Americans everywhere.



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EMAIL SUBSCRIBERS**



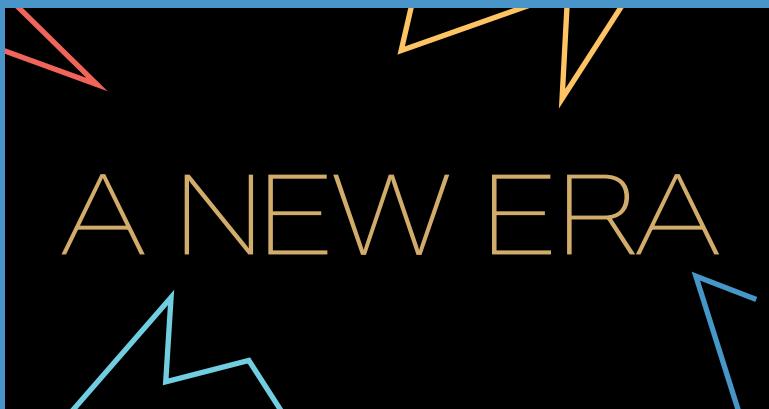
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BUT WAIT! There's more...



SAVE THE DATE

APRIL 18, 2023
CIPRIANI 42ND ST.
NEW YORK CITY

We're bringing friends, allies, and supporters together at a special gala celebrating FIRE's new era of advocacy.

Save the date:
thefire.org/gala2023



FIRE WELCOMES NEW SENIOR FELLOWS

As FIRE expands its mission to include off-campus free speech advocacy, we are honored to announce a new fellowship program that will expand FIRE's roster of in-house experts and advocates for free speech.

We are pleased to welcome our inaugural Senior Fellows, Nadine Strossen and Jacob Mchangama, both leading experts on free expression and the First Amendment. We look forward to highlighting their writing, speaking, and other public advocacy in support of FIRE's mission to protect the individual rights of all Americans.



We are grateful to our Senior Fellows for the work they have already done to promote and protect individual rights and for the work that they continue to do every day to advance free expression. Their writing, speaking, and advocacy will surely equip us — and the American public — to better understand, value, and protect free speech.