Written Testimony of
Joe Cohn, FIRE's Legislative and Policy Director
In support of SB 40

Chairwoman Lehner, Vice Chairman Terhar, and distinguished members of the Senate Education Committee,

My name is Joe Cohn and I am the Legislative and Policy Director for the Foundation for Individual Rights in Education, or as we are better known, FIRE. FIRE is a nonpartisan, nonprofit organization dedicated to protecting the free speech and due process rights of students and faculty members at colleges and universities across the country. Thank you for taking the time to hold this important hearing.

FIRE supports SB 40 and its counterpart HB 88 which protect student and faculty speech rights at public institutions of higher education in the state. The important protections provided in this bill would ensure that universities can no longer quarantine student expression to tiny, out of the way corners of campus. The bill also helpfully and carefully defines the line between constitutionally protected protests and unprotected "heckler's vetoes."

It would protect students from overbroad harassment codes that restrict constitutionally protected expression by adopting the student-on-student harassment definition issued by the United States Supreme Court in a case called *Davis v. Monroe County Board of Education*. Although, I would note that under Davis, anti-harassment measures are intended to be anti-discrimination measures, and thus traditionally require the conduct in question to be on the basis of a protected class. FIRE recommends that you continue with that approach. We also recommend that SB 40 be amended to reflect the language of HB 88 which requires schools to use the Davis standard.

As FIRE has seen across the country in our nearly 20 years of existence, the overwhelming majority of universities maintain written policies that unconstitutionally restrict expression protected by the First Amendment. In fact, in our 2019 spotlight on Speech Codes report, we found that of the 362 public four-year colleges and universities we reviewed, 90 percent maintain at least one policy that unconstitutionally restricts protected speech. Each year, we review speech codes at schools across the country, and rate them on a "red light," "yellow light," and "green light" scale. Of the 12 public, four year colleges we reviewed in Ohio, eleven maintain overall "yellow light" ratings, and only one — Cleveland State University — earns our highest, "green light" rating.

Those eleven yellow light institutions show that public colleges in Ohio just aren't getting it right when it comes to protecting student expression. For example, FIRE has had to litigate against two universities in Ohio for censoring student speech.

In 2012, FIRE coordinated a legal challenge to an unconstitutional free speech zone policy at the University of Cincinnati that limited all "demonstrations, pickets, and rallies" to a "free speech area" comprising just .01% of the University's 137 acre West Campus. The policy further required all activity in the free speech zone be registered 10 working days in advance, threatening that "anyone violating this policy may be charged with trespassing." After UC's Young Americans for Liberty Chapter was told it could not gather signatures and talk to students across campus in support of a statewide "right to work" ballot initiative, FIRE helped the

students secure legal representation and sued in U.S. District Court. The judge in that case, Timothy S. Black, wrote that the policy "violates the First Amendment and cannot stand."

At Ohio University in 2014, FIRE filed a lawsuit on behalf of Isaac Smith, a student who was the president of a student organization called "Students Defending Students," which aimed to assist students in the campus disciplinary process. Smith and fellow SDS members were ordered by OU administrators not to wear an SDS t-shirt with the phrase "we get you off for free"—a long-running SDS joke dating back to the 1970s—claiming that the slogan "objectified women" and "promoted prostitution." Smith and SDS rightly feared the administration because of an overbroad harassment policy which forbade "any act that degrades, demeans, or disgraces" another student, which rendered a vast amount of speech protected by the First Amendment off-limits and subject to punishment. Thankfully, the office of then-Attorney General Mike DeWine, which was representing OU in the litigation, ushered the lawsuit to a timely settlement, which resulted in a policy change and a $32,000 settlement in damages, court fees, and attorney's fees.

These lawsuits serve to show that campus free speech is a long-running issue that affects students from all over the political spectrum, including non-political speech as well. HB 88 would go a long way to ensuring that the written policies at public institutions of higher education in Ohio comply with First Amendment standards. By adopting policies consistent with this bill, universities will both protect their students' First Amendment rights while also insulating themselves from future lawsuits that could cost the institutions in both money and reputation.

Thank you again for holding this hearing, and I look forward to answering your questions.