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TO: Senate Education Committee
FROM: Gary Daniels, Chief Lobbyist, ACLU of Ohio
DATE: October 15, 2019
RE: Senate Bill 40 – Interested Party Testimony

To Chairwoman Lehner, Ranking Member Fedor, and members of the Senate Education Committee, thank you for this opportunity to present interested party testimony on Senate Bill 40.

Inquiries from committee members led the ACLU of Ohio to testify in April on House Bill 88 before the House Primary and Secondary Education Committee. HB 88 is the House version of this legislation.

I believe that testimony was helpful to the committee. I appear today to share our thoughts and answer any questions the committee may have on this issue and bill.

As you might expect, the ACLU of Ohio has always and remains committed to broad free speech protections including speech that takes place on the campuses of Ohio's state universities.

For that reason, there are several provisions found in SB 40 the ACLU of Ohio supports including:

- 1) Removal from current law the outdated, unenforceable and unconstitutional restrictions on the speech of communists, those who "presence is not conducive to high ethical and moral standards" and similar language.
- 2) The elimination of free speech zones on campus. These ironically-named locations do not facilitate the free exchange of ideas or information; they purposely limit them in unacceptable and unconstitutional ways.
- 3) Allowances for spontaneous assemblies of students and individuals. Too often, such scenarios are unfortunately overlooked by government entities who seek to regulate speech, even when the regulation is not meant to stifle First Amendment rights.

4) Requiring students to be informed about their First Amendment rights on campus.

Indeed, much of SB 40 errs on the side of free speech and against government restrictions, an overall goal we appreciate and share.

However, there are other sections, provisions, and language found in SB 40 that give us pause. It appears, in SB 40's zeal to protect campus speech, it is designed to enshrine into state law much of what is current First Amendment court jurisprudence. It is that which leads to our hesitation.

You may be familiar with the old saying – the answer to any legal question is “it depends.” It is an observation that both pokes fun at the legal profession but also accurately describes it. It also applies to First Amendment law and litigation.

This “it depends” allows judges and courts to weigh specific factors, variables, and interests for each individual case before them. So, while some principles may apply very broadly in a majority of situations, there may also be rare exceptions. Exceptions that then change the legal landscape. When those exceptions occur, judges, attorneys, plaintiffs, and defendants adjust by necessity to any changes in case law.

But SB 40 plants various specific language and principles into the Ohio Revised Code. By doing so, it begs the question what happens when future court decisions regarding speech on campus weaken or improve this area of law, leaving Ohio law antiquated and frozen in time, like current restrictions against communists?

There is also various language found in SB 40 we feel is unhelpful and confusing. For example, references to “public forums” (without defining what kind of public fora), what a “significant institutional concern” entails when deciding whether a university's concerns are legitimate or not, unclear language regarding the rights of counter protestors, and more.

This lack of clarity in some provisions of SB 40 and too much rigidity in others will lead to further confusion for students, speakers, administrators, and university staff and will inevitably conflict with future court rulings on campus free speech.

For now, I will say the ACLU of Ohio's ideal version of such legislation would include the provisions found in Senate Bill 40 we support while leaving much of the specific and detailed language about the First Amendment out of state law.