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BEFORE THE HOUSE CIVIL JUSTICE COMMITTEE

REPRESENTATIVE STEVE HAMBLEY
CHAIR

HOUSE BILL 88
TESTIMONY
OF
BRUCE JOHNSON
PRESIDENT
INTER-UNIVERSITY COUNCIL OF OHIO

APRIL 30, 2019

Chair Hambley, Vice Chair Patton, Ranking Minority Member Brown, and members of the House Civil Justice Committee, thank you for the opportunity to testify before you today as an interested party to House Bill 88. My name is Bruce Johnson and I am the President of the Inter-University Council of Ohio.

The IUC was established in 1939 as a voluntary educational association of Ohio's public universities. Today, the association represents all of Ohio's fourteen public universities.

Contrary to the popular political perception of the moment, universities, both public and private, historically have been and still are places where thoughts and ideas of all sorts, across all spectrums, can be freely articulated and challenged. They are places where sharing differing perspectives and opinions is not stifled or censored, but rather encouraged. I suggest to you that freedom of speech at our institutions is the rule, not the exception, and that we currently provide a robust forum for the free expression of ideas. We support the First Amendment to the United States Constitution, we uphold the First Amendment to the United States Constitution, we promote freedom of speech within the law and we always will. Ohio's public institutions of higher education pose no threat to free speech, which is why we believe this legislation is not necessary and why, if the Legislature feels that it is necessary to enact, we have identified several provisions that cause us concern.

Without question, willing compliance with First Amendment rights can be challenging. The absolute right of free speech is tempered on a university campus by the legitimate rights of students and faculty to pursue their academic mission. Therefore, universities are permitted to prohibit "actions which materially and substantially disrupt the work and discipline of the school." (*Healy v. James*, 408 U.S. 169, 189 (1972)). Limitations founded on this rationale cannot be based on the content of the speech or expression but rather must focus on the time, place, and manner of the speech creating the disruption. As a result, university officials have the right to regulate the time, place, and manner of speech and expression. Time, place, and manner regulations, however, do not provide any right to regulate speech or expression based on content.

Outside of time, place, and manner regulations, there do exist a very few limited areas in which university officials are entitled to act based on the content of the expression or speech. The theory is that certain speech falls outside the protection of the First Amendment (i.e. yelling fire in a crowded theatre). The areas are:

- **Obscenity**: Material that meets the Constitutional definition and is prosecutable under the law. There are special rules for child pornography. The First Amendment generally protects entertainment, short of obscenity. (See *Iota Chapter of Sigma Chi Fraternity v. George Mason University*, 993 F.2d 386 (4th Cir. 1993)).
- **Fighting words**: "Those personally abusive epithets which when addressed to the ordinary citizen are, as a matter of common knowledge, inherently likely to provoke violent reaction" (See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)).
- **True threats**: "Those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. Intimidation in the Constitutional sense of the word is a type of true threat." The United States Supreme Court held that cross burning with intent to intimidate could be outlawed because of its "long and pernicious history as a signal of impending violence". (See *Virginia v. Black*, 538 U.S. 343 (2003)).

Specific to House Bill 88, our first concern is the unnecessary codification of First Amendment case law in the Ohio Revised Code, which is what this legislation tries to do. Even if the proponents get it right, case law often changes. Cases brought under this section of Ohio law may be decided differently than cases brought pursuant to the ever-evolving state of First Amendment law. The result will be an inconsistent, confusing morass of two separate bodies of case law – one for the Ohio statutory standards and one for the First Amendment standards applicable to the rest of the country. A better approach would be to remove all of the language currently in the bill and replace it with a simple, straightforward requirement that Ohio's public institutions of higher education adopt a free speech policy that complies with and is consistent with the First Amendment to the United State

Constitution, and then require the institution to provide a copy of that policy to the State Attorney General and General Assembly. We have competent legal counsel on campus, appointed by the Ohio Attorney General, who understand current constitutional standards. The state should have confidence that those legal counsel know the law and will apply it to the best of their ability.

A second concern is that this legislation singles out institutions of higher education as the "problem" and makes them a special target for a new "super free speech zone." If there is a right to free speech on college campuses, and there is, then there should be a right to free speech on all public property. The First Amendment of the United State Constitution does not single out public universities. To the contrary, court decisions recognize the unique educational role of universities and distinguish them from traditional public forums like city hall, the Statehouse, or public parks and streets. If the state is truly interested in protecting free speech by articulating clear standards, then the legislation should apply to expression by any individual in any public forum within the jurisdiction of a political subdivision, instrumentality of the state, or any other state entity, including a state institution of higher education.

A third concern is the confusion over certain definitions or the absence of definitions leading to what we believe is an expansion of public forums, or, at best, a muddying inconsistency within the language relative to the operation of the bill and its intent. The bill makes all outdoor areas of campus public forums. This is an expansion of free speech rights, not a codification of constitutional rights. The *Widmar* decision (See *Widmar v. Vincent* 454 U.S. 263 (1981 fn. 5)) effectively presumes that a public college or university is a **limited** public forum. The bill, however, puts conditions on the institution's ability to maintain and enforce reasonable time, place, and manner restrictions. The definition of "outdoor areas of campus" arguably makes all outdoor areas of campus a public forum – as we would define public forum. This is too broad.

While our campuses may be limited public forums for our faculty, staff, and students, it does not follow that any third party that wants to do so should be able to treat the outdoor areas of campus as a traditional public forum. The law today does not require us to do this, and the First Amendment does not control or guarantee access to property simply because it is owned or controlled by the government. (See *United States Postal Service v. Greenburgh Civic Assn*., 453 U.S.114 (1981)). Unlike parks and streets, a college campus is by tradition a place for study and introspection, not a free for all free speech zone. (See *Widmar v. Vincent* 454 U.S. 263 (1981 fn. 5)). Balancing the interest in First Amendment expression with the need to ensure the orderly operation of schools, the United States Supreme Court in *Tinker* explained that a school may limit expressive activity that "would materially and substantially disrupt the work and discipline of the school." (See *Tinker* v. *Des Moines Indep. Cmty. School District* 393 U.S. 503, at 513 (1969)). The U.S. Supreme Court has expressly stated that the same material and substantial disruption standard applies on university campuses.

The second and third concerns create a fourth and that is one of cost. If the state creates a "super free speech zone", otherwise known as a public institution of higher education, the state and not its students should bear the financial responsibility of doing so. The confusion caused by the definitions, or lack thereof, of certain provisions of the bill serves only to create additional security risks, which in turn, create additional costs for the institution. Allowing anyone and everyone to come onto campus raises security issues that the campus will be compelled to address. This requires additional security services, including personnel, barriers for crowd control, lighting, and, when a specific threat to safety is identified, multi-jurisdictional coordination is required. The bill makes no provision for reimbursing the university for these costs.

A fifth concern is the language in the bill specifically stating that the state and a state institution of higher education shall not be immune from suit or liability for violations of ORC sections 3345.0212 and 3345.0213. In addition, this section of the bill allows an aggrieved party to seek and obtain appropriate relief, including injunctive relief, compensatory damages, attorney's fees, and court costs. Further, it mandates that if a court finds a violation of section 3345.0212 or 3345.0213 of the Revised Code, it shall issue an award of not less than one thousand dollars. This language, applying only to the new "super free speech zone", establishes special legal

remedies at the expense of the state, and more specifically, state institutions of higher education, and by extension, Ohio taxpayers. The sole purpose of these changes can only be to make the plaintiffs lawyers happy.

Mr. Chairman and members of the committee, public universities have a duty to secure a safe learning environment for their students. One free from disruption and violence and one conducive to learning and growing. I will conclude by saying that the bill, as it is currently drafted, raises serious concerns. The IUC continues to review the legislation and there may be additional concerns to share, but the five identified in this testimony are significant and should be addressed. Further government involvement in micromanaging this issue on campus is not necessary and may, instead of creating clarity, cause confusion and ambiguity. I ask you to trust in the members of the Boards of Trustees that the Legislature considers and confirms to develop policies that are legal and in compliance with the United States Constitution. Together I am confident we can come up with a more sensible solution.

I am happy to answer any questions the committee may have.