FIRE
Foundation for Individual Rights in Education

Chairwoman Candice Keller
Higher Education Committee
The Ohio House of Representatives
77 South High Street
Vern Riffe Center, 12th Floor
Columbus, Ohio 43215

Re: FIRE's support for SB 40

Chairwoman Keller and distinguished members of the House Higher Education Committee:

The Foundation for Individual Rights in Education is a nonpartisan nonprofit organization dedicated to protecting the rights of students and faculty members at colleges and universities across the country. Since 1999, we have defended students and faculty from unlawful and illiberal censorship nationwide. Thank you for soliciting input on SB 40, the Forming Open and Robust University Minds Act.

FIRE supports SB 40. If enacted into law, it would protect student and faculty speech rights at public institutions of higher education in the state by ensuring that universities can no longer banish student expression to tiny, remote corners of campus. The bill also helpfully and carefully defines the line between constitutionally protected protests and unprotected "heckler's vetoes." It would further protect students from overbroad harassment codes that restrict constitutionally protected expression by requiring that public institutions of higher education adopt the student-on-student harassment definition issued by the Supreme Court of the United States in *Davis v. Monroe County Board of Education* and recently required by the federal Department of Education's new Title IX regulations, scheduled to take effect on August 14.[1]

I. Ohio's public colleges and universities maintain unconstitutional speech codes

As FIRE has documented across the country, the overwhelming majority of universities maintain written policies that unconstitutionally restrict expression protected by the First Amendment. In fact, in our *2020 Spotlight on Speech Codes* report, we found that of the 366 public four-year colleges and universities we reviewed, 88 percent maintain at least one

[1] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026 (May 19, 2020)(to be codified at 34 C.F.R. pt. 106).

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. A red light institution maintains at least one policy both clearly and substantially restricting freedom of speech, or that bars public access to its speech-related policies by requiring a university login and password for access. A yellow light institution maintains policies that could be interpreted to suppress protected speech or policies that, while clearly restricting freedom of speech, restrict relatively narrow categories of speech. If FIRE finds that a university's policies do not seriously threaten campus expression, that college or university receives a green light rating. A green light rating does not necessarily indicate that a school actively supports free expression in practice; it simply means that the school's *written* policies do not pose a serious threat to free speech.

Of the 12 public, four-year colleges we reviewed in Ohio, eleven earn 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, since 2012, FIRE has participated in litigation against two universities in Ohio for censoring student speech: the University of Cincinnati and Ohio University.

In 2012, FIRE and the 1851 Center for Constitutional Law 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. Such policies have nothing to do with free speech and everything to do with restricting speech. 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 and the 1851 Center helped the students secure legal representation and sue in U.S. District Court. The judge found that the policy "violates the First Amendment and cannot stand."

At Ohio University in 2014, FIRE coordinated a lawsuit on behalf of Isaac Smith, a student who was the president of a student organization called "Students Defending Students" (SDS), which assists students in the campus disciplinary process, free of charge. 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 joke for the group 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 silences viewpoints from across the political spectrum, including non-political speech.

II. Eliminating unconstitutional restrictions on student protests and literature distribution

Public universities may enact reasonable, narrowly tailored "time, place, and manner restrictions" on speech in the open areas of campus. However, as we noted in the University of Cincinnati litigation, universities often write policies far broader than constitutionally permissible, sometimes sequestering student expression to "free speech zones" or requiring advanced permission to engage in expressive activities. To ensure that Ohio's public colleges and universities respect their students' free speech rights, SB 40 provides:

> State institutions of higher education may maintain and enforce reasonable time, place, and manner restrictions specifically developed in service of a significant institutional interest only when such restrictions employ clear, published, viewpoint- and content-neutral criteria, and provide for ample alternative means for expressive activities. Any such restrictions shall allow for members of a campus community to spontaneously and contemporaneously assemble and distribute literature.

The bulk of this test is pulled directly from the Supreme Court of the United States' ruling in *Ward v. Rock Against Racism*.[2] In other words, including this definition in state statute isn't imposing any new obligations on institutions; it simply eliminates any confusion, helping prevent further incidents and lawsuits like those against the University of Cincinnati and Ohio University.

The bill would also eliminate requirements that students submit requests to institutions before being permitted to distribute literature or collect signatures, which are unconstitutional prior restraints on their speech. The Supreme Court of the United States has held that "[i]t is offensive—not only to the values protected by the First Amendment,

[2] 491 U.S. 781 (1989).

but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so."[3] Yet Youngstown State University has a policy that does just that. Its policy states: "Students acting individually or on behalf of a registered student organization/group may distribute written material at designated on-campus locations after reserving those locations with the site administrator."[4] A demand that students seek permission in order to be allowed to speak or distribute written materials in the open areas of a campus is not constitutional, and SB 40's requirements will require Youngstown State to change its policy and ensure that similar policies are not replicated at other public institutions in the state.

III. Addressing harassment effectively without infringing on the First Amendment

There is no doubt that universities are both morally and legally obligated to respond to known instances of sexual harassment in a manner reasonably calculated to prevent its recurrence. Public universities are also bound by the First Amendment to protect students' free speech rights.[5] The twin responsibilities of combating discrimination and protecting constitutional rights need not be in tension.

Unfortunately, overbroad harassment codes are one of the most common forms of unconstitutional speech codes maintained by colleges and universities. Harassment, properly defined, is not protected by the First Amendment.

In the educational context, in a decision by Justice Sandra Day O'Connor, joined by Justices Ruth Bader Ginsburg, John Paul Stevens, David Souter, and Stephen Breyer, the Supreme Court defined peer-on-peer harassment as discriminatory, unwelcome conduct "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." *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 651 (1999). Harassment is extreme and usually repetitive behavior—behavior so serious that it would interfere with a reasonable person's ability to receive his or her

[3] *Watchtower Bible and Tract Society of NY, Inc. v. Village of Stratton*, 536 U.S. 150, 165–66 (2002).
[4] YSU Student Organization Policies *available at* https://cms.ysu.edu/administrative-offices/student-activities/ysu-student-organization-policies, (last visited May 21, 2020).
[5] *See Healy v. James*, 408 U.S. 169, 180 (1972) (rejecting the idea that, "because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, 'the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'").

education. In *Davis*, for example, the behavior found by the Court to be harassment was a months-long pattern of conduct including repeated attempts to touch the victim's breasts and genitals together with repeated sexually explicit comments directed at and about the victim.[6]

For decades now, however, many colleges and universities have maintained policies defining harassment too broadly and prohibiting constitutionally protected speech. Kent State University's sexual harassment policy, for example, states that

> Sexual harassment is a form of unlawful gender discrimination and is defined as unfavorable or unwelcome treatment, made without consent and based on a person's gender or sex, that is severe or pervasive and has the purpose or effect of unreasonably interfering with an individual's employment or academic performance or creates an intimidating, hostile or offensive working, academic or university environment. Sexual harassment includes, but is not limited to:
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> a) Verbal and/or physical behavior including, but not limited to: sexually explicit jokes, insults, and taunts; obscene gestures; offensive pictorial, written, and electronic communications; and unwelcome touching.[7]

This definition does not require that the conduct be objectively offensive to a reasonable person as required by *Davis* and misleadingly implies that "sexually explicit jokes, insults, or taunts" constitute sexual harassment, when those forms of expression are protected *unless* they are part of pattern of conduct that otherwise meets the *Davis* standard.

The University of Toledo's sexual harassment policy is also overbroad. It states:

> Harassment: Physical, verbal, or non-verbal conduct of an offensive, intimidating or threatening nature based on an individual's race, color, religion, sex, age, national origin, ancestry, sexual orientation, gender identity and expression, military or veteran status, genetic information, familial status, or political affiliation that is sufficiently serious to deny or limit the individual's ability to participate in the

[6] 526 U.S. at 633–34.
[7] *Administrative Policy Regarding Complaints of Unlawful Gender Discrimination, Gender/Sexual Harassment, Sexual Misconduct, Stalking, and Intimate Partner Violence,* Kent State University Policy Register, *available at* https://www.kent.edu/policyreg/administrative-policy-regarding-complaints-unlawful-gender-discrimination-gendersexual (last visited May 21, 2020).

> University's educational program or working environment. Harassment is a form of discrimination.[8]

That definition allows "offensive" verbal conduct (i.e., speech) to be punished if it is "offensive" and "sufficiently serious to deny *or limit* the individual's ability to participate in the University's educational program or working environment." (Emphasis added). This definition crucially lacks both a pervasiveness requirement and a requirement that offending speech be objectively offensive to a reasonable person. Without such a requirement, campus expression is put at the mercy of the most sensitive person on campus, no matter how unreasonable he or she may be.

SB 40, in contrast, defines "harassment" as "unwelcome conduct that is so severe, pervasive, and objectively offensive that it effectively denies an individual equal access to the individual's education program or activity." This definition is taken directly from the Supreme Court's definition in *Davis* and the federal government's Title IX regulations which are scheduled to take effect on August 14.[9]

Some have argued that the *Davis* standard is only the liability standard to determine whether a school can be sued for damages, and that it is not the proper measure of the constitutionality of a harassment policy. This argument is demonstrably wrong. Just this past December, the Court of Appeals for the Sixth Circuit (which includes Ohio), in *Kollaritsch v. Michigan State University Bd. of Trustees,* decisively held (internal citation to *Davis* omitted):

> Actionable Sexual Harassment. We can conservatively describe "harassment," without additional qualification, as some type of aggressive and antagonistic behavior that, from the victim's perspective, is uninvited, unwanted, and non-consensual. For student-on-student sexual harassment to be actionable under *Davis*'s Title IX private-cause-of-action formulation, it must be (a) severe, (a) pervasive, and (c) objectively offensive.[10]

The *Kollaritsch* decision is binding on public institutions in Ohio and it is no outlier. There are many courts across the country that have used the *Davis* standard of "severe, pervasive,

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[8] University of Toledo Policy Statement, *available at* https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2003/06/25145711/3364-50-021.pdf (last visited May 21, 2020).
[9] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026 (May 12, 2020)(to be codified at 34 C.F.R. pt. 106).

[10] *Kollaritsch v. Mich. State Univ. Bd. of Trs.*, 994 F.3d 613 (6th Cir. 2019).

and objectively offensive." These cases are not just cases about the institutions' liability. The *Davis* standard is used to evaluate whether injunctive relief was appropriate, as well.[11]

It is particularly telling that courts, citing the *Davis* standard, have allowed lawsuits to proceed against schools because their policies violated student free speech rights *as well as* cases where the lawsuits by complainants were allowed to continue because those institutions ignored conduct that met the *Davis* standard. That there are many cases where the *Davis* standard was effectively used to protect the rights of complainants and those accused of harassment demonstrates that the standard is workable and fair.

By codifying the *Davis* standard's definition of harassment, Ohio will strike the right balance by ensuring that public institutions are compliant with the First Amendment and Title IX.

IV. Heckler's veto

Over the past few years, there have been several high-profile, well-documented instances of students and community members using violence and other disruptive tactics to silence speakers on college campuses. When government agencies allow such tactics to succeed, it is referred to as a heckler's veto. There is no First Amendment right to shout down a speaker when that speaker is in a reserved space.

SB 40 gives universities the ability to appropriately respond to heckler's vetoes by borrowing from well-established principles in First Amendment jurisprudence. In *Forsyth County v. Nationalist Movement*, the Supreme Court of the United States explained that the First Amendment protects "[t]hose wishing to express views unpopular with bottle

[11] *See, e.g.*, *Hill v. Cundiff*, 797 F.3d 948, 972-73 (11th Cir. 2015) (Reversing summary judgement against plaintiff's claims for injunctive relief because a jury could find that the alleged conduct was "severe, pervasive, and objectively offensive" under *Davis*); *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 322-23 (3d Cir. 2013) (upholding preliminary injunction against school for banning students from wearing bracelets because the school failed to show that the "bracelets would breed an environment of pervasive and severe harassment" under *Davis*); *Haidak v. Univ. of Mass. at Amherst*, 299 F. Supp. 3d 242, 270 (D. Mass. 2018) (denying plaintiff's request for a preliminary injunction because he failed to show that that school was deliberately indifferent to an environment of severe and pervasive discriminatory conduct under *Davis*); *Jones v. Pi Kappa Alpha Int'l Fraternity*, 2017 U.S. Dist. LEXIS 148806, at *31 (D.N.J. Sep. 13, 2017) (allowing plaintiff's claim for injunctive relief to proceed after finding that plaintiff's allegations of harassment, if true, are "severe, pervasive, and objectively offensive" under *Davis*); *Tveter v. Derry Coop. Sch. Dist. SAU # 10*, U.S. Dist. LEXIS 73516, at *24 (D.N.H. Apr. 25, 2017) (analyzing student's request for preliminary injunction under *Davis*'s requirement that sexual harassment must be "severe, pervasive, and objectively offensive" to be actionable).

throwers . . . Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob."[12]

Even prior to *Forsyth*, this general principle was applied to a student in *Jones v. Board of Regents*, where the United States Court of Appeals for the Ninth Circuit struck down a university handbill ban after the student was removed from campus when threatened with violence for passing out anti-war handbills.[13] The court stated that the public university's goal should have been "to prevent the infringement of [the student's] constitutional right by those bent on stifling, even by violence, the peaceful expression of ideas or views with which they disagreed."

The roots of this doctrine grew from the civil rights movement, where courts rejected efforts by local governments to silence civil rights organizers over fears that their presence would result in violent reactions from political opponents.[14]

This well-established principle is also reflected in *Gregory v. Chicago*, where the Supreme Court overturned a conviction for disorderly conduct which was the result of civil rights marchers refusal to stop their peaceful activity when police ordered them to disperse because they were concerned that the crowd was growing increasingly hostile to the marchers.[15] In *Watson v. Memphis*, the Supreme Court didn't mince words in holding that "constitutional rights may not be denied simply because of hostility to their assertion or exercise."[16]

Ohio's public institutions of higher education have the responsibility to prevent the creation of a heckler's veto, but must do so in a manner that is respectful of the equally important right to protest. Courts have addressed that balance. For example, in *In re Kay*, the California Supreme Court held that a protest of a political event could only be punished if it created a substantial disruption.[17]

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[12] 505 U.S. 123, 134-35 (1992).
[13] 436 F.2d 618, 621 (9th Cir. 1970).
[14] *See Cox v. Louisiana*, 379 U.S. 536, 549-50 (1965)(overturning convictions of civil rights protesters convicted of breaching the peace, despite the protester's peaceful conduct where the arrests were justified by concern that the crowd would react violently. The Court observed, "The fear of violence seems to have been based upon the reaction of the group of white citizens looking on from across the street.")
[15] 394 US 111 (1969).
[16] 373 U.S. 526, 535 (1963).
[17] 1 Cal. 3d 930, 943 (Cal. 1957). *See also Morehead v. State*, 807 S.W.2d 577, 581 (Tex. Crim. App. 1991), where the Court of Criminal Appeals of Texas similarly held that disruptions needed to be substantial before they were actionable.

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SB 40 appropriately addresses the heckler's veto by setting forth that conduct crosses the line from protected speech to unprotected speech when it "intentionally, materially, and substantially disrupts another individual's expressive activity if it occurs in a campus space reserved for the exclusive use or control of a particular individual or group."

Under this formulation, fleeting protests that cause mild disruptions of planned events are protected. The language in the bill also helpfully defines and provides examples of what constitutes an intentional, material and substantial disruption. This gives both students and administrators alike a better idea of what type of conduct is permissible when counterprotesting events, and what type of conduct could lead to removal from an event and/or potential discipline.

V. Conclusion

SB 40 would go a long way to ensuring that the written policies at public institutions of higher education in Ohio comply with First Amendment standards. The legislation mirrors the standards and tests that courts — including the Supreme Court — use to evaluate the contours of the right to free expression. 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 both money and reputation.

Thank you for your attention to FIRE's analysis of SB 40. We hope you will support the bill's passage and are available to answer any questions you might have.

Respectfully submitted,

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