Inter-University Council of Ohio

10 West Broad Street, Suite 450
Columbus, Ohio 43215-7415
(614) 464-1266
fax (614) 464-9281
www.iuc-ohio.org

BEFORE THE HOUSE HIGHER EDUCATION COMMITTEE

REPRESENTATIVE CANDICE KELLER
CHAIR

SENATE BILL 40
TESTIMONY
OF
BRUCE JOHNSON
PRESIDENT
INTER-UNIVERSITY COUNCIL OF OHIO

NOVEMBER 19, 2020

Chair Keller, Ranking Minority Member Ingram, and members of the House Higher Education Committee, thank you for the opportunity to present written testimony to you today as an interested party to Senate Bill 40. 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 popular political perception, 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. As you consider a possible vote on the bill today, we also ask you to consider the following amendments:

1. **Lines 48-60 and 83-90:** This proposed definition discusses individual actions that are considered to be "materially and substantially" disruptive. However, when used in the statute (lines 89-90), the definition is used differently and, instead, is framed as actions that are materially and substantially disruptive to the institution. The later usage aligns with U.S. Supreme Court case law (e.g., *Tinker*), but the definition (lines 48-60) is incorrectly framed and based on its usage in the proposed statute, it is unclear why a definition is needed.

   Further, if the intent is to prohibit institutions from addressing speech unless it is "violent or otherwise unlawful" or "physically blocking or using threats of violence", this will prohibit institutions from addressing other types of disruptive speech that is technically lawful. For example, this would prohibit universities from addressing student disruption in the classroom; it appears to allow individuals to disrupt the speech of others (and conflict with lines 116-120); it would interfere with institution's ability to address disruption that may violate the institution's workplace violence policy but not be "unlawful"; and, it would create issues with enforcement of an institution's sexual harassment policy if the individual's behavior does not rise to "unlawful" criminal behavior.

   Recommendation: strike the definition of "materially and substantially disrupt" (lines 48-60) and lines 83-90. Add new language in place of lines 83-90 that requires institutions to adopt a statement regarding the institution's commitment to the First Amendment and its principles and require that that statement be made available publicly on the institution's website.

2. **Lines 121-123:** Requires all outdoor areas of campuses be made public forums under the First Amendment. This would turn outdoor areas directly outside of residence halls, hospitals, academic buildings, which are generally not available for reservation due to disruption of academic, living, and medical care, into public forums available for reservation and usage for speech activities.

   Recommendation: (A)(1) A state institution of higher education shall define its outdoor areas of campuses ~~of state institutions of higher education are public~~ into forums in alignment with the First Amendment of the United States Constitution ~~campus communities~~ and share with its campus community a list of these forums.

3. **Lines 116-120:** The framing of this language may lead institutions to violate the First Amendment and require that an institution prevent lawful counter-speech from occurring.

   Recommendation: Nothing in this section shall prevent an institution of higher education from responding to disruptive behavior, including addressing disruption that ~~enable individuals to engage in conduct that intentionally, materially, and substantially disrupts~~ prevents another individual's expressive activity from occurring ~~if it occurs~~ in a campus space reserved for exclusive use or control of a particular individual or group.

4. **Lines 44-47:** Although the SB40 definition of harassment tracks to Title IX's new definition, it differs from the ***Title VII*** workplace standard definition, which is broader than the Title IX language. This use of a different standard is specifically acknowledged by the US Department of Education in the summary of the new Title IX regulations (see: https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf, #2 Definition of Sexual Harassment for Title IX Purposes, bullet 4.)

   Because of this, having a state definition of harassment that tracks to the standard in one federal law, but clearly differs from the standard that we are required to use under another federal law (which applies, for example, in cases of race discrimination) means that if universities are required to comply with the SB40 definition in all cases of harassment (as it is currently defined in SB40), universities will be required to violate federal law.

   Requiring that institutions "strictly" use this definition may put institutions out of alignment with federal legal requirements. It also overlooks that harassment analysis typically includes review of both subjective and objective elements to determine if there is a violation.

   The only usage of this definition in the proposed statute is to require that institutions have policies that use this proposed definition of "harassment." In addition to being at odds with federal requirements, it is unclear why this is needed, as institutions are federally required to have policies addressing harassment and sexual harassment in order to receive federal funding. Note: this definition does not align with the definition of harassment used by DAS.

   Recommendation: Strike lines 44-47 and 98-100, as the institution already is required to meet this requirement to receive federal funding and any conflict between the state requirements and federal requirements will be a major compliance issue for institutions.

5. **Lines 72 – 76:** This definition includes groups seeking registration, which may require that an institution extend benefits to groups that do not qualify for benefits (e.g., suspended fraternities, groups that fail to meet basic registration requirements). It is worth noting that this definition would also apply in other places within the Ohio Revised Code (e.g., 3345.023) and that removing this language would not otherwise effect or impact the rights students, as members of the campus community, that are generally afforded under this statute.

   Recommendation: (9) "Student group" means an officially recognized group at a state institution of higher education~~, or a group seeking official recognition,~~ comprised of ~~admitted~~ students that receive~~, or are seeking to receive,~~ benefits through the institution of higher education.

6. **Lines 84 – 85:** This language singles out a "state 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.

Recommendation: Remove the reference to state institution of higher education and make all provisions of the bill applicable to expression by any individual in any traditional 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.

Specific to Senate Bill 40, our primary 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 set 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.

As identified above, confusion over certain definitions or the absence of definitions will lead to what we believe is an expansion of public forums, or, at best, 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.

Madam Chair and members of the committee, thank you for the opportunity to present these issues to the House Higher Education Committee. I will conclude by saying, 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. Without question, willing compliance with First Amendment rights can be challenging and 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.