When Free Speech and Inclusion Collide: Legal and Practical Considerations for Campuses Caught in the Crossfire
April 14, 2021

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Colleges and universities have long espoused a collective commitment to academic freedom, free inquiry, scientific advancement, and the pursuit of truth, related concepts that uniquely distinguish higher education from other U.S. institutions and sit at the heart of institutional mission. The relationship between and among these values is well defined, both in the courts and in academia. As early as 1919, Justice Holmes described the relationship in a dissent in *Abrams v. United States*:

> "[T]he best test of truth is the power of the thought to get itself accepted in the market. . . I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, less they so imminently threaten immediate interference with lawful and pressing purposes of the law that an immediate check is required to save the country."[2]

But perhaps the best exposition of the relationship between academic freedom, free inquiry, and the search for truth, as it relates to American colleges and universities in the early 20th century, is the American Association of University Professors 1915 Declaration, which beautifully tethered these two concepts and forevermore enshrined free inquiry as a core aspect of university mission:

> The special dangers to freedom of teaching in the domain of the social sciences are evidently two. . . . In the political, social, and economic field almost every question, no matter how large and general it at first appears, is more or less affected with private or class interests; and, as the governing body of a university is naturally made up of men who through their standing and ability are personally interested in great private enterprises, the points of possible conflict are numberless. When to this is added the consideration that benefactors, as well as most of the parents who send their children to privately endowed institutions, themselves belong to the more prosperous and therefore usually to the more conservative classes, it is apparent that, so long as effectual safeguards for academic freedom are not established, there is a real danger that pressure from vested interests may, sometimes deliberately and sometimes unconsciously, sometimes openly and

[1] This manuscript was first prepared for the 2021 Discrimination Law Workshop for the National Association of College and University Attorneys. Thanks to panelists Traevena Byrd, Stacy Hawkins, and Lee Tyner for an incredibly thought provoking discussion that served as the basis for many of the ideas embedded in this outline.
[2] *Abrams v. U.S.,* 250 U.S. 616 (1919) (Holmes, J. dissenting)(the dissent would later shape the Court's majority opinions in subsequent cases).

sometimes subtly and in obscure ways, be brought to bear upon academic authorities. . . .

> Where the university is dependent for funds upon legislative favor, it has sometimes happened that the conduct of institution has been affected by political considerations; and where there is a definite governmental policy or a strong public feeling on economic, social, or political questions, the menace to academic freedom may consist in the repression of opinions that in the particular political situation are deemed ultra-conservative rather than ultra-radical. The essential point, however, is not so much that the opinion is of one or another shade, as that differs from the views entertained by authorities. The question resolves itself into one of departure from accepted standards; whether the departure is in the one direction or the other is immaterial. This brings us to the most serious difficulty of this problem; namely, the dangers connected with the existence in a democracy of an overwhelming and concentrated public opinion. The tendency of modern democracy is for men to think alike, to feel alike, and to speak alike. Any departure from the conventional standards is apt to be regarded with suspicion. Public opinion is at once the chief safeguard of a democracy, and the chief menace to the real liberty of an individual. It almost seems as if the danger of despotism cannot be wholly averted under any form of government. In a political autocracy there is no effective public opinion, and all are subject to tyranny of the ruler; in a democracy there is political freedom, but there is likely to be a tyranny of public opinion. An inviolable refuge from such tyranny should be found in the university.[3]

Academic freedom and free inquiry are not the only values core to higher education. As early as the 1930s, there was a trend among U.S. colleges and universities away from "elitism" and towards equality, away from exclusion and towards inclusion with respect to matriculants from different religious backgrounds.[4] A decade later, at the conclusion of World War II, American research universities would become increasingly interested in recruiting global talent.[5] It would obviously take much longer for U.S. universities to fully open doors to women, people of color, and other marginalized groups—and there still exist societal barriers that impede full inclusion—but these early movements illustrate that access and equity are not new concepts in higher education. Diversity, though not labeled "diversity" at the time, was long ago deemed central to the success of the American university. The acknowledgement of diversity as a core and central value to higher education would, of course, make a permanent historical mark in 1978 when the U.S. Supreme Court decided *Bakke,* for the first time articulating diversity as a compelling interest in college admissions.[6]

There are many who believe that the core values of free speech and inquiry, on the one hand, and diversity and inclusion, on the other, exist in harmony with one another—that our

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[3] American Association of University Professors, AAUP's 1915 Declaration of Principles (1915).
[4] *See* Jonathan R. Cole, *The Great American University: Its Rise to Preeminence, Its Indispensable National Role, Why it Must be Protected* 58 (Public Affairs Publishing Group 2009).
[5] *Id.* at 59.
[6] *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

universities can, at the same time, honor a pure commitment to academic freedom while nurturing diverse, inclusive, and welcoming environments. For those who ascribe to this philosophy, on occasions when free speech undermines or eviscerates inclusivity, the belief is that we can remedy harm with more speech.

Others suggest that free speech, on the one hand, and diversity and inclusion, on the other, instead exist in tension with one another, and colleges and universities need to do a better job confronting that tension. That is the starting point for this NACUA outline. Using law review articles and case law in both the student and employment contexts, this outline summarizes legal resources that draw attention to the inherent tension between speech, on the one hand, and diversity and inclusion, on the other.

I. Free Speech Tension with Diversity and Equality

A. Richard Delgado, Campus Antiracism Rules: Constitutional Narratives in Collision, 85 Nw. U. L. Rev. 343 (1991)

In this 1991 law review article, critical race theorist Richard Delgado points out that when you think about regulating hate speech, you could, theoretically, apply one of two legal frameworks: (1) a First Amendment analysis or (2) a Thirteenth and Fourteenth Amendment analysis. How you frame the analysis results in drastically different outcomes. Delgado acknowledges a tension between free speech and equality[7] and differentiates racist speech from other speech, characterizing racist speech as a powerful tool designed to deny equal citizenship to communities of color by "disempowering minority groups [and] crippling the effectiveness of *their* speech in rebuttal." (emphasis in original).[8]

B. Cass R. Sunstein, Words, Conduct, Caste, 60 U. Chic. L. Rev. 795 (1993)

In this law review article, Cass Sunstein argues that unrestricted speech can create a gender and racial caste system. While governments should take care to only regulate speech in a narrowly-tailored and constitutional manner that "minimize[s] infringements on [both the free speech and the anticaste principle],"[9] he suggests that a college or university should have more flexibility to regulate hate speech in order to advance its educational mission. Specifically, Sunstein suggests:

> [W]e might conclude that *the university can impose subject-mater or other restrictions on speech only to the extent that the restrictions are reasonably related to the educational mission.* If a university is to educate, it must discriminate on the basis of the quality and subject matter, and

[7] Richard Delgado, Campus Antiracism Rules: Constitutional Narratives in Collision, 85 Nw. U. L. Rev. 343, 348 (1991).
[8] *Id.* at 385 (1991).
[9] Cass R. Sunstein, Words, Conduct, Caste, 60 U. Chic. L. Rev. 795, 802 (1993).

these forms of discrimination will inevitably shade over into certain forms of viewpoint discrimination. (emphasis in original).[10]

He also points out the university's interest in protecting students as "free and equal members of the community" and suggests that hate speech is "highly destructive to the students' chance to learn."[11] Like Delgado, he points to the Constitution's prohibition of second-class citizenship as grounds upon which the courts might defer to educational judgement regarding the regulation of hate speech.[12]

II. First Amendment vs. Diversity and Inclusion in the Courts: Diversity and Inclusion Interests Prevail

In the following cases, an antidiscrimination paradigm prevailed over First Amendment concerns:

A. *Speech First v. Killeen*, 968 F.3d 628 (7th Circuit, July 28, 2020)

In this case, Speech First, along with students who "wished to express a wide variety of political, social, and policy viewpoints that are unpopular on campus," challenged various University of Illinois policies and sought to enjoin the operations of the Bias Assessment and Response Team (BART), which was charged with supporting students who reported bias incidents, providing opportunities for educational conversation and dialogue, and publishing data, but importantly, did not have any authority to conduct bias investigations or sanction students for disciplinary violations. University Housing also had Bias Incident Response Protocol that purported "to address and implement corrective action for any offensive acts committed within [the residence halls]." Students could report bias incidents that occurred in the residence halls to their resident assistants or resident directors, who would discuss whether it might be appropriate to convene students for voluntary meetings. Similar to the BART, they did not exercise investigatory, disciplinary, or sanctioning authority.

Plaintiffs alleged that the very existence of these channels chilled their speech insofar as they wanted to speak out on certain unpopular topics but feared being investigated or punished. The Seventh Circuit affirmed the district court's decision denying a preliminary injunction, reasoning that (1) it wasn't clear what the students wanted to say, (2) it was not clear if the students' desired speech

[10] *Id.* at 831.
[11] *Id.* at 832.
[12] *Id. Cf.* Alexander Tsesis, Campus Speech and Harassment, Minnesota Law Review (2017)("[r]acist, xenophobic, an sexist speech inhibits the free exchange of ideas about topics as diverse as politics, history, and the arts. In the authors mind, colleges and universities have a limited role in addressing "threats, incitements, and instigations" that "create an atmosphere of exclusion, intimidation, and harassment[.]")

would result in BART or BIP contacting them, and (3) even if they were contacted for a *voluntary* meeting, it was clear that no consequences would result.

The question before the court was whether there was an injury-in-fact to confer Article III standing. Relying on *Abbott v. Pastides*, *see infra* Part II.C, the court determined that a voluntary invitation to meet did not carry with it a threat of enforcement. Quoting *Abbott,*

> [A] threatened administrative inquiry will not be treated as an ongoing First Amendment inquiry sufficient to confer standing unless the administrative process itself imposes some significant burden.... Even an objectively reasonable "threat" that the plaintiffs might someday have to meet briefly with a University official in a non-adversarial format, to provide their own version of events in response to student complaints, cannot be characterized as the equivalent of a credible threat of "enforcement" or as the kind of "extraordinarily intrusive" process that might make self-censorship an objectively reasonable response.
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> It follows that if a mandatory meeting does not demonstrate a credible threat of enforcement, neither does an invitation to an optional one. [13]

B. *Feminist Majority Foundation v. University of Mary Washington, et al.,* 911 F.3d 674 (4th Cir. 2018)

Plaintiffs, Feminist Majority Foundation, Feminists United on Campus, and Feminists United members alleged Title IX sex discrimination and retaliation claims against the University of Mary Washington (UMW) and a section 1983 Equal Protection claim against UMW's former president. The case came about after UMW students reported to university officials that they were being threatened and subjected to relentless harassment and threats through anonymous Yik Yak posts. The University coordinated listening circles, and in some instances where there was a true threat with a specific target and time, provided police escorts to students, though the University did not endeavor to ascertain the identities of the anonymous posters or otherwise restrict access to the Yik Yak platform. Plaintiffs alleged that the University's response to their reports was inadequate and amounted to deliberate indifference under

[13] *Speech First v. Killeen*, 968 F.3d 628, 641 (7th Cir. 2020)(quoting *Abbott v. Pastides* at 179). *But see Speech First v. Fenves,* No 19-50529 (5th Cir. Nov. 9, 2020)(concluding that the bias incident response team chilled protected speech); *Speech First v. Schlissel*, 939 F.3d 756 (6th Cir. Sept. 23, 2019)(same).

Title IX and sex discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. Plaintiffs also alleged that the University was deliberately indifferent to peer-on-peer retaliation.

In vacating the District Court's dismissal of the Title IX action, the Fourth Circuit concluded that plaintiffs sufficiently alleged that UMW had substantial control over the context in which the harassment occurred because it occurred on campus due to Yik Yak's location-based feature. The court stated that UMW could have reached out to Yik Yak to ascertain the identity of the posters. The court also determined that the UMW's efforts to coordinate two listening circles were insufficient to shield them from a finding of deliberate indifference, as their efforts were not "reasonably calculated to end the harassment." As to defendants' argument that the First Amendment restrained their ability to respond to the harassment, the court disagreed, finding that several of the anonymous Yik Yak posts amounted to true threats, and even if they hadn't, UMW could have undertaken several other responsive efforts to redress the harassment without violating the First Amendment. The court also partially reinstated plaintiffs' Title IX retaliation claim, to the extent that they challenged UMW's allegedly deficient response to student-on-student retaliatory harassment.

C. *Abbott, et al. v. Pastides, et al.* (4th Cir. Aug. 16, 2018)

Plaintiffs, consisting of the student groups College Libertarians and Young Americans for Liberty at the University of South Carolina (USC), alleged under section 1983 that the University of South Carolina violated their First Amendment rights by requiring Robert Abbott, a student representative of the groups, to attend a meeting to discuss complaints about a "Free Speech Event" hosted by plaintiffs. The student group incorporated a racial slur in their advertisements for the event and displayed a swastika during the event. A non-punitive, educational meeting was called to discuss the impact these advertisements had on the university community. Finding that the University had fully complied with the First Amendment, the Fourth Circuit reasoned that USC "neither prevented the plaintiffs from holding their Free Speech Event nor sanctioned them after the fact" and that "its prompt and minimally intrusive resolution of subsequent student complaints [did] not rise to the level of a First Amendment violation."

D. *Christian Legal Society v. Martinez*, 558 U.S. 1076 (2010)

In *CLS v. Martinez*, the U.S. Supreme Court examined whether a public law school could condition official recognition of a student group—and the attendant benefits that accompany official recognition—on the group's agreement to abide by a generally applicable non-discrimination policy. The

Christian Legal Society desired to formally register as a "Registered Student Organization" (RSO) in order to avail itself of various benefits available to registered student groups, such as financial assistance for events, access to the university electronic communications channels and bulletin boards, and the ability to use the university's name and logo. To become an RSO, student groups had to agree to abide by the college's Nondiscrimination Policy, which provided that the RSO must agree to refrain from "discriminate[ing] unlawfully on the basis of race, color, religion, national origin, ancestry, age, sex or sexual orientation." CLS sought an exemption from the policy to accommodate a requirement under a CLS National Charter that all members sign a "Statement of Faith" that, among other things, forbids sexual activity outside of a marriage between a man and a woman and excludes participation of those who hold religious convictions that deviated from the Statement of Faith. Hastings denied CLS's request for an exemption, though inviting them to otherwise spread their message around campus outside of the RSO context, and CLS sued, alleging that Hastings violated members' First and Fourteenth amendment rights to free speech, expressive association, and free exercise of religion.

In holding in favor of Hastings, the U.S. Supreme Court determined that the Hastings non-discriminating policy (hereinafter the "all-comers policy") was a reasonable, viewpoint-neutral condition to formal recognition as a student organization. In so doing, the Court deferred to Hasting's justifications for adopting the all-comers' policy, namely (1) the policy "ensure[d] that the leadership, educational, and social opportunities afforded by [RSO's] are available to all students," (2) the policy divested Hastings of the impossible burden of ascertaining whether membership restrictions were based on protected beliefs or unlawful discrimination, (3) the policy "brings together individuals with diverse backgrounds and beliefs, 'encourages tolerance, cooperation, and learning among students,'" and reserves state taxpayer funds for conduct that the State of California, through state non-disclination laws, has approved. . non women allowed). The court also noted that there were alternative channels for CLS to communicate, outside of the channels available to RSOs.[14]

[14] *But see Business Leaders in Christ v. University of Iowa* (8th Cir. Mar. 22, 2021)(reversing qualified immunity for university officials who should have known that unequal application of the policy would have resulted in First Amendment liability); *Alpha Delta Chi-Delta Chapter v. Reed* (all-comers policy applied in a non-uniform manner); *InterVarsity Christian Fellowship et al. v. Board of Governors of Wayne State University, et al.* (E. D. Mich. Sept. 20, 2019) (same). Also, on September 9, 2021, the U.S. Department of Education issued a Final Rule on "Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities", which conditions certain federal grants on an agreement by public institutions not to "deny to any student organization whose stated mission is religious in nature . . . any right, benefit, or privilege that is otherwise afforded to other student organizations at the public institution (including but not limited to full access to the facilities of the public institution, distribution of student fee funds, and official recognition of the student organization by the public institution) because of the

E. *University of Pennsylvania v. Equal Employment Opportunity Commission*, 493 U.S. 182 (1990)

After the University of Pennsylvania denied tenure to Rosalie Tung, she initiated an action against the University, alleging that the decision had been grounded in impermissible race and sex discrimination. The EEOC intervened on Tung's behalf, and during discovery, the EEOC requested access to Tung's tenure review file. The University produced some relevant documents but asserted a qualified privilege, grounded in common law and the First Amendment, regarding "confidential peer review information." The issue in this case was "whether a university enjoys a special privilege, grounded in either common law or the First Amendment, that protected against disclosure of peer review materials that are relevant to charges of racial or sexual discrimination in tenure decisions."[15] Regarding petitioner's First Amendment argument, which was based on a recognition of academic freedom as a "special concern of the First Amendment" that vested the university with the constitutional right to determine "who may teach"[16], the court determined that any alleged infringement of academic freedom was remote, attenuated, and speculative, and instead ordered discovery related to the discrimination claims.[17]

F. *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995)

Plaintiff, the head coach of the men's basketball team at Central Michigan University, brought First Amendment claims against the University after the University suspended him and declined to renew his coaching contract for using the "N word." Although the court found that the University's discriminatory harassment policy was overbroad and vague, it concluded that CMU lawfully terminated plaintiff because plaintiff's use of the "N word" was not a matter of public concern insofar as it "imparted no socially or politically relevant message to his players..." Nor did the speech implicate academic freedom. In upholding the University's right to terminate plaintiff, the Court reasoned,

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religious student organization's beliefs, practices, policies, speech, membership standards, or leadership standards, which are informed by sincerely held religious beliefs." This regulation appears to undermine *CLS v. Martinez* and has not yet been repealed by the Biden Administration as of the date of this outline.

[15] *University of Pennsylvania v. Equal Employment Opportunity Commission*, 493 U.S. 182, 184 (1990).

[16] *Id.* at 196 (citing *Keyshian v. Board of Regents,* 385 U.S. 589 (1967) and *Sweezy v. New Hampshire,* 354 U.S. 234 (1957)).

[17] *Id.* at 200. This case hinged in part on the Court's reasoning that the burden of producing confidential peer review information did not amount to a content-based restriction on speech. *Id.* at 199. Again, this presents a challenge for those wishing to analogize the case in a way that would authorize constitutionally-grounded restrictions on hate speech, though it still reflects an example of a case in which non-discrimination interests outweighed First Amendment concerns.

> What the First Amendment does not do. . . is require the government as employer or the university as educator to accept [an employee's] view as a valid means of motivating players. An instructor's choice of teaching methods does not rise to the level of protected expression. Assuming but not deciding, Dambrot is subject to the same standards as any teacher in a classroom (as opposed to a locker room setting), Dambrot's speech served to advance no academic message and is solely a method by which he attempted to motivate--or humiliate--his players. . . . The University has a right to disapprove of the use of the [N Word] as a motivational tool just as the college in Martin was not forced to tolerate profanity. Finally, the University has a right to hold Coach Dambrot to a higher standard of conduct than that of his players.

G. *Bob Jones Univ. v. United States*, 639 F.2d 147 (4th Cir. 1981)

In this case, a Bob Jones University policy prohibited interracial marriage and dating. The Internal Revenue Service revoked the University's tax exempt status because the policy discriminated on the basis of racial affiliation and companionship. Bob Jones brought a First Amendment suit against the government, arguing that the government's interpretation of §501(c)(3) violated the Free Exercise and Establishment clauses of the First Amendment. Acknowledging that "the government interest in eliminating all forms of racial discrimination in education is compelling,"[18] the Fourth Circuit determined that neither the Free Exercise Clause nor the Establishment Clause could be used to justify an exemption from compliance with Title VI.[19]

[18] *Bob Jones Univ. v. United States*, 639 F.2d 147, 153 (4th Cir. 1981).

[19] Notably, this case hinged in part on the court's determination that if Bob Jones University were to revise its policies so as not to prohibit interracial dating, no student would be required to compromise sincerely held religious beliefs by entering into an interracial relationship. This aspect of the court's reasoning could prove challenging if this case were to be applied in a free speech context where a regulation may foreclose a student from speaking.

III. First Amendment vs. Diversity and Inclusion in the Courts: First Amendment Interests Prevail

In the following cases, First Amendment concerns outweighed non-discrimination principles:

A. *Meriwether v. Shawnee State University* (6th Cir. March 21, 2021)

Plaintiff, a philosophy professor at Shawnee State University and a devout Christian who believes that sex assigned at birth by God cannot be changed, brought First Amendment claims against the University after he received a warning for refusing to address students by their preferred gender pronouns in accordance with the University's nondiscrimination policy. He was also told that additional policy violations could result in suspension without pay, which prompted him to bring free speech and free exercise claims against Shawnee State. Finding that the matter concerned classroom speech, thus foreclosing defendant's *Garcetti* defense (the court noted that "the academic-freedom exception to *Garcetti* covers all classroom speech related to matters of public concern, whether that speech is germane to the contents of the lecture or not"), the court determined that speech related to "race, gender, and power conflicts" addresses matters of public concern and that plaintiff's interests in academic freedom, coupled with his core religious and philosophical beliefs, outweighed the University's interest in stopping discrimination against transgender students. The court characterized the University's interests as comparatively "weak" in-part because the University had rejected a proposed compromise where plaintiff would refer to transgender students without any identifying pronoun. Plaintiff also prevailed on his free exercise claim based on allegations that the University's application of its gender identity policy was not neutral. [20]

B. *Fraternity of Alpha Chi Rho, Inc. v. Syracuse Univ.* (N.Y. Sup. Ct. Mar. 10, 2021)

Petitioner is the Fraternity of Alpha Chi Rho, a national fraternity organization with a chapter at Syracuse University. Petitioner challenged Syracuse's decision to suspend the fraternity for one year after a non-member who had earlier been a guest at the fraternity, shouted racial slurs at another student. The court found that Syracuse's decision to suspend the fraternity was arbitrary because there was no provision in either the Fraternity and Sorority Affairs Policy nor the Code of Student Conduct that allowed Syracuse to punish fraternities for the independent, off-campus actions of former guests.

C. *Viewpoint Neutrality Now! v. Regents of the Univ. of Minn.* (D. Minn. Feb. 1, 2021)

[20] *See also* *Kluge v. Brownsburg Community School Corporation*, et al. (January 8, 2020) (allowing plaintiff's Title VII religious discrimination and retaliation claims to proceed to discovery based on allegations that Defendant Brownside High School had offered and then withdrew an offer that would have allowed plaintiff to call students by their surnames).

Plaintiffs are students at the University of Minnesota and Viewpoint Neutrality Now!, an unregistered student organization that brought First Amendment claims challenging the University's process to distribute student organization funds. Of particular note for this outline, plaintiffs alleged in-part that the University engaged in viewpoint discrimination by funding lounge space for cultural centers and disproportionally promoting identity-based student organizations on its website. At least at this stage of the litigation, the court determined that the University's allocation of funds to the cultural centers was subject to the constitutional safeguards of a viewpoint neutral analysis. However, pursuant to the government speech doctrine, the University had its own First Amendment right to determine which student groups it wished to promote on its website.

D. *Klein v. Arizona State University* (D. Az. Dec. 17, 2020)

Plaintiff, an Arizona State University student and station manager for the University's radio station, brought §1983 First Amendment claims against university officials and sought an injunction preventing her removal from the radio station, after she posted a tweet, on a personal account, that included a link to a *New York Post* article about the alleged criminal history of a black man who was killed by police officers. Dismissing several claims based on statutory immunity, the court allowed plaintiff's First Amendment claim to proceed against the Interim Dean of the School of Journalism, who had sent an email to plaintiff saying that staying at the station "was not an option." The allegations sufficiently plead that plaintiff had engaged in protected speech when she posted a personal tweet, and further that the Dean's email could "chill a person of ordinary firmness" from engaging in protected speech. Even if it was her fellow students who locked plaintiff out of her account at the radio station, and not the Dean or any other University official, the allegations sufficiently stated that the Dean's email was initiated as a direct result of her tweet, and further that the email amounted to constructive or actual termination.

E. *Speech First v. Fenves,* No 19-50529 (5th Cir. Nov. 9, 2020)

Plaintiff, a free speech watchdog group, challenged the University of Texas at Austin's (UT-Austin) policies prohibiting harassing behavior and its Campus Climate Response Team (CCRT) protocol, alleging that the policies are vague and overbroad and the CCRT's practices in responding to bias incidents intimidate students and chill their speech in violation of the First Amendment. Plaintiff moved for a preliminary injunction to prevent UT-Austin from enforcing its policies, but the district court denied that motion and found that plaintiff lacked standing. The Fifth Circuit reversed, holding first that UT-Austin's change to its policies did not moot plaintiff's challenge, and then holding that plaintiff did have standing. Regarding mootness, the court found that UT-Austin did not show with absolute certainty that the original policies would not be reinstituted. Regarding its associational standing, plaintiff was able to show a likelihood that its members would have standing to sue in their own right because they alleged that they face credible threats of enforcement under those policies or through disciplinary referral

from the CCRT. The Fifth Circuit then remanded the case for the district court to consider whether plaintiffs would be likely to succeed on the merits.[21]

F. *Hunt v. Board of Regents of the University of New Mexico, et al.* (10th Cir. November 14, 2019)

Plaintiff is a former medical student at the University of New Mexico School of Medicine (UNMSOM) who alleged that several defendants violated his free speech and due process rights under the First and Fourteenth Amendments. UNMSOM issued to plaintiff a "professionalism enhancement prescription" after plaintiff authored an incendiary social media post after the 2012 presidential election. University officials deemed the post to violate the University of New Mexico's Respectful Campus Policy. The Tenth Circuit affirmed the district court's finding that defendants were entitled to qualified immunity. The district court did not err by confining its review to only the second prong of the qualified immunity inquiry (that the constitutional right in question was clearly established at the time of the alleged violation). Because the events occurred in 2013, when off-campus online speech was an evolving area of constitutional law, reasonable officials in defendants' position would not have known that their actions might be violative of the First Amendment. Also, the events at issue occurred on the heels of a state court decision upholding a university's right to sanction a mortuary science student for a social media post said to violate the program's professional standards, again undermining any claim that the university's actions in sanctioning the medical student violated a clearly established constitutional right.

G. *Speech First v. Schlissel*, 939 F.3d 756 (6th Cir. Sept. 23, 2019)

Opinion vacating the district court's denial of injunctive relief. Plaintiff, a free speech watchdog group, challenged the University of Michigan's (U of M) policies prohibiting harassing and bullying behavior and its Bias Response Team (Response Team) protocol, alleging that the policies are vague and overbroad and the Response Team's practices in responding to bias incidents intimidate students and quash their speech in violation of the First Amendment. Plaintiff moved for a preliminary injunction to prevent U of M from inviting students to discuss allegations or referring credible policy violations to the Office of Student Conduct Resolution. Reversing the district court, the Sixth Circuit held that plaintiff had associational standing because its members face an objective chill of their protected speech. Even though the Response Team has no formal disciplinary power, it may act by an "implicit threat of punishment and intimidation to quell speech" by making referrals to the Office of Student Conduct Resolution or inviting students to meet that could carry an implicit threat of consequence if a student declines. Additionally, plaintiffs claim regarding the harassment and bullying policies was not moot. Though U of M removed objectionable definitions of "harassment" and "bulling" from its policies,

[21] *But see Speech First v. Killeen*, 968 F.3d 628, 641 (7th Cir. 2020) (bias incident response team did not chill protected speech).

U of M did not provide enough evidence to show that the allegedly wrongful behavior could not reasonably be expected to recur.[22]

H. *The Koala v. Khosla, et al.* (9th Cir. July 24, 2019)

Plaintiff, *The Koala*, a student newspaper at the University of California, San Diego (UCSD), alleged First Amendment Freedom of Press, Free Speech, and retaliation claims alleging that a constitutionally-impermissible change in campus policy had been prompted by the Newspaper's publication of satire. More specifically, two days after *The Koala* published an article satirizing "safe spaces" on college campuses, UCSD's student government organization passed the Media Act, which eliminated registered student organization funding for all print media. *The Koala* alleged that the Media Act unlawfully singled out print media in violation of the First Amendment and chilled their speech. In reversing the district court, the Ninth Circuit first found that the Eleventh Amendment did not bar *The Koala's* claim for prospective injunctive relief insofar as it sought to have its eligibility reinstated for student activity funding. The Ninth Circuit also concluded that Plaintiff stated a claim that the Media Act violates the First Amendment's Free Press Clause. *The Koala* alleged that by passing the Media Act, UCSD singled out the press and withheld a subsidy because of disfavored speech, and those facts, construed in the light most favorable to Plaintiff, were enough to state a claim. *The Koala* also alleged its free speech claim. Defendants created a limited public forum encompassing all student activity funding, and therefore the district court used the wrong framework to assess the claim. Finally, *The Koala* alleged a First Amendment retaliation claim because (1) the Media Act targeted media organizations for disfavored access to funding, and *The Koala* alleged that at least one student organization continued to receive funding for its print media and (2) bound by precedent where motive is a necessary element of a retaliation claim, *The Koala's* article, though offensive, was clearly protected speech, the Media Act chilled this speech, and *The Koala* adequately alleged a causal nexus due to the two-day window between its article the Media Act's passage.

[22] Notably, Judge White published a passionate dissent:

> [A] university should be able to address a student when his or her speech may offend or hurt other students without running afoul of the First Amendment. As counsel stated: That's education. That's what a professor should do. That's what the university should do when someone comes to a body that's created in order to promote respect and understanding on the campus. Respect and understanding are not enemies of the First Amendment. ... Respect is a condition for effective speech. Understanding is the goal of speech.

See also supra n. 21.

I. *Higbee v. Eastern Michigan University, et al.* (E.D. Mich. July 1, 2019)

Plaintiff, a Professor of American History at Eastern Michigan University (EMU), alleged First Amendment retaliation claims under section 1983 against Individual defendants, among other claims, when EMU suspended Plaintiff without pay for one semester for posting what defendants believed was a racial slur on a public Facebook page. Through this message, plaintiff criticized the University's response to racist graffiti on campus. Plaintiff alleged a prima facie case of First Amendment retaliation because he plausibly alleged that (1) he spoke on a matter of public concern because plaintiff commented on his perception of EMU's ignorance of its own alleged institutional racism; (2) Plaintiff spoke as a private citizen using a public forum, Facebook, to comment on EMU's response to racial incidents, which is not within plaintiff's official duties as a professor; and (3) for purposes of this motion only, plaintiff's speech interest outweighed EMU's efficiency interest. In making the efficiency interest determination, the court found that as pleaded, plaintiff's speech interest was substantial and there was no evidence that it caused actual disruption on campus, and the court could not credit defendants' arguments that they reasonably predicted disharmony between plaintiff and campus members at this stage. The court denied qualified immunity to individual defendants because for purposes of the motion to dismiss stage, plaintiff's First Amendment right was clearly established. EMU could not yet substantiate its efficiency interest which caused the *Pickering* balancing test to weigh in plaintiff's favor.

J. *Robinson v. Hunt County, et al.* (5th Cir. Apr. 15, 2019)

Plaintiff, a private citizen and Facebook user, alleged violations of her First and Fourteenth Amendment rights, when her comment, among others, was deleted from a post on the Hunt County Sheriff's Office (HCSO) Facebook page. Plaintiff's comment criticized an HCSO post stating that "ANY post filled with foul language, hate speech of all types, and comments that are considered inappropriate will be removed and the user banned." Assuming without deciding that the HCSO Facebook page was either a limited or designated public forum, the court concluded that defendants' actions in deleting plaintiff's post amounted to viewpoint discrimination, and that Hunt County's Facebook post announcing that it would remove foul language, hate speech, or inappropriate content constituted an explicit policy of viewpoint discrimination. The court reversed dismissal of plaintiff's request for a declaratory judgment and remanded the case to the district court to reconsider plaintiff's motion for a preliminary injunction.

K. *O'Brien v. Welty*, 818 F.3d 920 (9th Cir. 2016)

A student, who identified as a conservative political activist, was critical of Fresno State and its administration. His criticism extended to vocal opposition to Fresno State's representation by an undocumented immigrant as student body president and the institution's support of the DREAM Act. To voice this discontent, he started a website where he posted information about the student body president. Later, when a poem ran in

the student newspaper that characterized America in a way that was dissatisfactory to the student, he confronted administrators with a videorecorder, to ask they why they allowed the poem to run. The confrontation escalated, such that the administrators called the police and subjected him to discipline under the Student Code of Conduct for conduct that "threatens or endangers the health, or safety ... including physical abuse, threats, intimidation, harassment ...."

After being found responsible for violating the code provision, he filed suit, alleging that "that defendants imposed discipline under an unconstitutionally overbroad and vague regulation, that they imposed discipline for having engaged in speech and conduct protected by the First Amendment and that they retaliated against him for having engaged in protected speech and conduct."

This case, decided under California Law, hinged on whether the terms "harassment" and "intimidation" were overly broad under California Code of Regulations, tit. 5, § 41301(b)(7). The court found that they were not. Because the terms were qualified as necessarily "threaten[ing] or endanger[ing] the health or safety of another in the university community," the court found that the terms were neither overbroad nor vague. "Rather, it permissibly authorizes California State University branches to discipline students who engage in harassment or intimidation that threatens or endangers the health or safety of another person in the university community.

L. *Brown v. Chicago Bd. of Educ.*, 873 F. Supp. 2d 870 (N.D. Ill. 2013)

Plaintiff, a 6th grade schoolteacher, endeavored to diffuse a situation between two students by describing the controversial use of the "N" word over time and the power of language. In so doing, he said the N word aloud, and after an investigation, the School Board suspended him for 5 days. Plaintiff brought a First Amendment claim against the school district. Because plaintiff spoke pursuant to his official duties as a teacher, there was some discussion about whether *Garcetti* foreclosed plaintiff's First Amendment claim altogether. Aware that *Garcetti* left open the possibility that some classroom speech might be afforded greater protection than other speech, the court declined to reach that question and instead allowed plaintiff's First Amendment claim to proceed. Though the court was mindful that the School Board exercised control over the curriculum and had the authority to implement certain rules, they never banned the use of the N word specifically, and drawing all inferences in the light most favorable to the plaintiff, use of the N word, according to the court, did not necessarily amount to "verbally abusive language to or in front of a student" under School Board policy.

M. *DeJohn v. Temple University*, 537 F.3d 301 (3rd Cir. 2008)

Plaintiff DeJohn, a graduate student at Temple University, challenged the constitutionality of the University's Sexual Harassment Policy under the overbreadth doctrine, arguing that the Policy's prohibition of "gender-motivated" speech that "has the

purpose or effect of unreasonably interfering with an individual's . . . educational performance; or . . . has the purpose or effect of creating an intimidating, hostile or offensive environment," inhibited him from expressing opinions in class about women in combat. The court affirmed the lower court's opinion, concluding that the University's Policy was overbroad.

The court reasoned, "'Harassing' or discriminatory speech, although evil and offensive, may be used to communicate ideas or emotions that nevertheless implicate First Amendment protections. As the Supreme Court has emphatically declared, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable."'"

The court also distinguished harassment from other common law exceptions to the First Amendment: "[T]here is no "harassment exception" to the First Amendment's Free Speech Clause; that is, "we have found no categorical rule that divests `harassing' speech as defined by federal anti-discrimination statutes, of First Amendment protection." That this harassment is a statutory creation, instead of a judicial one, continues to let a tension percolate when one reports being subjected to "harassment" in the form of pure speech. Even so, the court recognized that "a school has a compelling interest in preventing harassment."

N. *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003)

In this case, a district court granted-in-part a preliminary injunction enjoining the university from enforcing a policy that prohibited: speech that was "inflammatory or harmful towards others"; speech that could be construed as "acts of intolerance;" speech that "provoke[s], harass[es], intimidate[s], or harm[s] another;" and speech that constitute "acts of intolerance that would demonstrate malicious intentions towards others." The court held that these provisions were overbroad. It upheld various aspirational statements in the policy. In invalidating the University's restrictions on speech, the court noted, "[The Policy] is inconsistent with our nation's tradition of safeguarding 'free and unfettered interplay of competing views' in the academic arena. Communications which provoke a response, especially in a university setting, have historically been deemed an objective to be sought after rather than a detriment to be avoided."

O. *Doe v. Univ. of Michigan*, 721 F. Supp. 852 (E. D. Mich. 1989)

This case invalidated the University of Michigan's Policy on Discrimination and Discriminatory Harassment of Students in the University Environment ("Policy"). The University adopted the Policy as an effort to "curb what the University's governing Board of Regents (Regents) viewed as a rising tide of racial intolerance and harassment on campus." The Policy was adopted in the wake of criticism regarding the University's response to a series of racially-motivated incidents, accusations that the university was "generally ignoring the problems of minority students," and an impending class action lawsuit that accused the university of failing to maintain and create a "non-racist, non-

violent atmosphere' on campus." Applying the overbreadth doctrine, the court found the Policy to be constitutionally impermissible insofar as it "swe[pt] within its ambit a substantial amount of protected speech along with that which it may legitimately regulate." The court admonished, "[w]hile the Court is sympathetic to the University's obligation to ensure equal educational opportunities for all its students, such efforts must not be at the expense of free speech."

O. *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F. 2d 386 (4th Cir. 1993)

In this case, the court upheld a lower court decision that invalidated George Mason's sanction of the Iota XI Chapter of Sigma Chi for conducting an "ugly woman contest," where students dressed up in black face and performed a pageant with crude racist and sexist overtones. In reaching this holding, the court reasoned that the University had improperly sanctioned the Fraternity for a performance that "ran counter to the views the University sought to communicate to its students and the community." It continued, "[t]he mischief was the University's punishment of those who scoffed at its goals of racial integration and gender neutrality, while permitting, even encouraging, conduct that would further the viewpoint expressed in the University's goals and probably embraced by a majority of society as well." The court acknowledged the University's obligation to pursue alternative means of achieving its goal of maintaining a non-discriminatory educational environment, although the court was clear that such means could not include impermissible restrictions on speech.

IV. Other Thoughts: A Couple of First Amendment Exceptions

A. Fighting Words

In *Chaplinsky v. State of New Hampshire*[23], the U.S. Supreme Court affirmed the criminal conviction of a Jehovah's Witness under a New Hampshire Public Law that forbid persons from uttering certain "offensive" or derisive words in a public space. In this instance, plaintiff stood outside of City Hall and proclaimed, "You are a God damned racketeer and a damned Fascist." In upholding the conviction, the U.S. Supreme Court recognized a limited exception to the First Amendment for "fighting words," that is words that would provoke "men of common intelligence. . . to fight."

In describing the limited classes of speech that are not afforded constitutional protection, the Court remarked, "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution."[24] Applying this reasoning, the Court determined that the words

[23] 315 U.S. 568 (1942).
[24] *Id.* at 572.

"damned racketeer" and "damn Fascist" were likely to provoke the average person to fight and cause a breach of the peace.

Some constitutional scholars argue that the fighting words doctrine is dead, but it is worth noting that it has been referenced by the U.S. Supreme Court as recently as 2011 in *Snyder v. Phelps*[25], when Justices Breyer and Alito acknowledged fighting words and a First Amendment exception in separate concurring and dissenting opinions.[26]

B. Disruption of the Educational Environment

In *B.L. et al. v. Mahonoy Area School District*[27], plaintiff was suspended from the Junior Varsity Cheerleading Squad after the sent a snap chat to 250 friends that included the caption "F*&% Cheer" and giving the middle finger to coaches and administration after she failed to make the varsity cheerleading squad. The issue before the court was whether plaintiff's snap chat amounted to protected speech such that the School District was foreclosed from disciplining plaintiff under team and school policies prohibiting "foul language and inappropriate gestures," among other things. Finding that plaintiff's speech occurred "off campus," the Third Circuit held that *Tinker* does not apply to off-campus speech. Rather, "the First Amendment protects students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large." This case is currently pending before the U.S. Supreme Court.

Importantly, there is ample debate among NACUA members about the extent to which *Tinker* and its progeny applies to the higher education setting. It is the author's opinion that *Tinker* is better suited for the primary and secondary school environment. Even so, this case is instructive because if the U.S. Supreme Court decides, as the 3rd Circuit did, that off campus speech through social media should be afforded greater protection than "on campus" speech, such a holding could frustrate institutional efforts to address and remedy harassment.

V. Overcoming Strict Scrutiny

We all know that the U.S. Supreme Court has again and again recognized diversity is a compelling governmental interest in the college admission process. Although the Court recognized this compelling interest as early as 1978 in *Bakke*, the *Grutter* Court explained in 2003,

> [E]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a

[25] 563 U.S. 443 (2011).
[26] *See id.* at 462 (Breyer, J. concurring); *see also id.* at 472 (Alito, J. dissenting).
[27] No. 19—1842 (3rd Cir. June 30, 2020).

> paramount government objective. And,'[n]owhere is the importance of such openness more acute than in the context of higher education.' *Effective participation* by members of all racial and ethnic groups in the civil life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.[28]

"Effective participation," it seems, would require some commitment to inclusion such that marginalized and targeted identity groups feel safe and free to exchange ideas in the marketplace. Building on that, at least in the in the 4th Circuit, courts have recognized that "the government interest in eliminating all forms of racial discrimination in education is compelling."[29]

Of course, strict scrutiny is a formidable legal barrier, but if it is true that there exists an irreconcilable tension between free speech, diversity, and inclusion that undermines the mission of higher education as an institution, the higher education community may one day need to explore additional strategies to confront this tension beyond the rallying cry of "fight harmful speech with more speech."

[28] *Grutter v. Bollinger,* 539 U.S. 306, 332 (2003) (emphasis added) (internal citations omitted).
[29] *Bob Jones Univ. v. United States*, 639 F.2d 147, 153 (4th Cir. 1981).