STUDENT RIGHTS REGARDING RELIGIOUS AND CONSERVATIVE EXPRESSION AT PUBLIC COLLEGES AND UNIVERSITIES

The following memorandum provides an overview of student rights regarding religious and conservative expression at public colleges and universities. It explains students' rights to speak freely, distribute literature, form a student group, access facilities, receive student fee funding, and avoid censorship of their activities by administrators.

Alliance Defending Freedom is an alliance-building legal ministry that advocates for the right of people to live out their faith freely. We frequently assist students, faculty, staff, and administrators at public colleges and universities in understanding their rights and responsibilities concerning religious and conservative expression. Each legal situation differs, so the information provided below should be used only as a general reference and should not be considered legal advice.[1] If you think your rights have been violated as a result of a restriction on your expression at a public college or university or if you want to protect students' expression on campus, please contact our Legal Intake Department so that we may review your situation and possibly assist you. You can reach us at 1–800–835–5233, or visit our website at www.adflegal.org and submit a request for legal assistance.

I. Free Speech on Campus

The First Amendment to the United States Constitution gives students the right to express their personal religious and ideological beliefs on campus through speech, writing, leafleting, forums, concerts, visual or performing arts, and even silence. As government entities, public universities cannot legally enforce policies that discriminate against students, faculty, or staff on the basis of their ideological or religious beliefs, practices, and expression.

The First Amendment declares in part that "Congress shall make no law . . . abridging the freedom of speech. . . ."[2] The Free Speech Clause limits the government's ability to interfere with a citizen's right to speak his mind no matter how unpopular, controversial, or disagreeable his ideas may be to others.[3]

The Free Speech Clause provides such expansive protection that the courts have noted only a few, narrowly drawn categories of speech that are *not* protected. These include "fighting words" (*i.e.*, speech that would immediately provoke a fight), "obscenity" (*i.e.*, depictions of hard-core sexual acts), child pornography, defamation (*i.e.*, telling lies about a person that harm his reputation), and words

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2 U.S. CONST. amend. I.

3 *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

that create a "clear and present danger" (*e.g.*, falsely shouting, "Fire!" in a crowded theater).[4] All other speech is protected.[5] A public university may not prohibit speech simply because the opinions expressed are deemed to be racist, sexist, homophobic, hateful, harassing, offensive, intimidating, controversial, provocative, or indecent, or because they provoke a violent response from listeners.[6]

Despite these standards, many public universities still try to regulate such expression through speech codes, speech zones, so-called "non-discrimination" policies, and unequal access to facilities and student fees, even though federal courts have struck down these types of policies as unconstitutional.

A. Speech Codes

Perhaps the most pernicious and persistent of the various methods of campus censorship is the "speech code." A speech code is the common term for a campus regulation that prohibits speech the Constitution protects. Designed to prohibit broadly so-called "offensive" or "harassing" communications, these codes have chilled free speech at campuses from coast to coast. Facially vague and overbroad, they deter untold thousands of students from speaking freely on critical issues of race, gender, sexuality, and religion. Arbitrarily enforced, they tend to become weapons of the dominant political culture, wielded against dissenters in an effort to replace the "marketplace of ideas" with an ideological monopoly.

From the inception of speech codes in the 1980s, courts have uniformly rejected them.[7] The current generation of speech codes may come in the form of highly restrictive "student conduct" policies, email policies that ban "offensive" communication, diversity statements that include provisions to punish people who engage in "intolerant expression" or "acts of intolerance," and, of course, the ever-present "harassment" policies aimed at "unacceptable" and "offensive" viewpoints and words. No one denies that a university can and should ban true harassment or threats, but a university cannot magically free itself from its constitutional obligation to protect free speech and academic freedom simply by calling a speech code an "anti-harassment" policy. Only harassment

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4 *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (fighting words, lewd and obscene speech, and defamation); *New York v. Ferber*, 458 U.S. 747, 764 (1982) (child pornography); *Schenck v. United States*, 249 U.S. 47, 52 (1919) (clear and present danger).

5 *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010).

6 *See Johnson*, 491 U.S. at 414 ("If 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."); *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 670 (1973) ("[M]ere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'"); *DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008) ("'Harassing' or discriminatory speech, although evil and offensive, may be used to communicate ideas or emotions that nevertheless implicate First Amendment protections." (quoting *Saxe v. State Coll. Area Sch. Dist.,* 240 F.3d 200, 209 (3d Cir. 2001))).

7 *See McCauley v. Univ. of the V.I.*, 618 F.3d 232 (3d Cir. 2010); *DeJohn*, 537 F.3d 301; *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001) (Alito, J.); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1185 (6th Cir. 1995); *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1021 (N.D. Cal. 2007); *Roberts v. Haragan*, 346 F. Supp. 2d 853, 872 (N.D. Tex. 2004); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003); *Pro-Life Cougars v. Univ. of Houston*, 259 F. Supp. 2d 575, 584 (S.D. Tex. 2003); *Booher v. Bd. of Regents, N. Ky. Univ.*, No. 96-135, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 22, 1998); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989).

that is "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" loses its protection under the First Amendment and may be prohibited.[8]

The bottom line is that if the policy applies to speech and goes beyond the narrow permissible limitations on protected speech, it is likely an unconstitutional speech code.

B. Speech Zones

Many public universities have speech zone policies that restrict the ability of students to speak freely on campus. These policies sometimes provide for a "free speech zone" on campus, but often that "zone" is so small or so far removed from the heart of campus that it is an ineffective area for sharing your message. Other campuses dramatically limit free speech to certain times of the day or week and often give administrators a right to review and approve materials before they are disseminated. If campus officials have moved you from a prominent spot on your campus to a low-traffic area while you were sharing a religious or conservative message, your university may have violated your freedom of speech.

"As with any government-owned property, the standard by which the constitutionality of any regulation of free speech and expressive activity on a public university campus must be evaluated 'differs depending on the character of the property at issue.'"[9] To assess a First Amendment claim arising on government property, the first step is to "identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic."[10]

Historically, the Supreme Court has identified three types of fora: a traditional public forum, a nonpublic forum, a designated public forum, and, as a subcategory of designated public fora, a limited public forum.[11] "Traditional public fora are those places which by long tradition or by government fiat have been devoted to assembly and debate."[12] Examples of traditional public fora include public streets, sidewalks, and parks.[13] Because of their traditional status, a governmental entity's capacity to limit expressive activity in traditional public fora is sharply circumscribed and subjected to strict scrutiny.[14] This same high level of scrutiny is applied to any limits on expression in designated public fora, which are created when the government opens "place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects."[15]

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8 *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999).

9 *Roberts*, 346 F. Supp. 2d at 858 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983)).

10 *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985).

11 *Id.* at 802.

12 *Id.* (quotation marks omitted.)

13 *United States v. Grace*, 461 U.S. 171, 177 (1983).

14 *Perry*, 460 U.S. at 45.

15 *Cornelius*, 473 U.S. at 802.

A public university campus is generally a public forum for students. The historic view of the university as a "voluntary and spontaneous assemblage . . . for students to speak and to write and to learn" has persisted with respect to the modern American university.[16] "The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas.'"[17] Indeed, the "campus of a public university, at least for its students, possesses many of the characteristics of a public forum."[18]

Federal courts across the country have found that the outdoor areas of a university campus are public fora.[19] For example, in *Roberts v. Haragan*, the court found that to the extent that Texas Tech's campus has "park areas, sidewalks, streets, or other similar common areas, these areas are public forums, at least for the University's students, irrespective of whether the University has so designated them or not."[20] The court went even further and found that these areas were "the 'irreducible public forums' on campus," and the university was free to designate further areas for student expression, but could not designate less.[21] Similarly, in *Burbridge v. Sampson*, students in the South Orange County Community College District challenged restrictive policies pertaining to student speech in outdoor areas of campus. The college had opened its facilities generally for speech, so the court had "no doubt" that they had been opened to the public and analyzed the restrictions using strict scrutiny.[22]

In addition to university policy, many state laws support the conclusion that university campuses are public fora. For example, California law requires community colleges to permit student expressive activities on campuses.[23]

Many public university policies governing student conduct or speech intentionally open the campus to expression. Having done so, they are obligated to abide by constitutional standards in their regulation of speech occurring in those fora.

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16 *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 836 (1995).

17 *Healy v. James*, 408 U.S. 169, 180 (1972).

18 *Widmar v. Vincent*, 454 U.S. 263, 268 n.5 (1981).

19 *See OSU Student Alliance v. Ray*, 699 F.3d 1053, 1062–63 (9th Cir. 2012) (holding Oregon State University campus is designated public forum for students); *Flint v. Dennison*, 488 F.3d 816, 831 (9th Cir. 2007) (noting campus is a public forum); *Bowman v. White*, 444 F.3d 967, 979 (8th Cir. 2006) (finding outdoor areas of University of Arkansas are designated public forums); *Justice for All v. Faulkner*, 410 F.3d 760, 768–69 (5th Cir. 2005) (finding University of Texas is a designated forum for students); *Univ. of Cincinnati Chapter of Young Ams. for Liberty v. Williams*, 2012 WL 3636932 (S.D. Ohio Aug. 22, 2012) (finding outdoor areas of University of Cincinnati are designated public fora); *Roberts*, 346 F. Supp. 2d at 861 (holding park areas, sidewalks, streets, and common areas of Texas Tech University are traditional public forums for students); *Pro-Life Cougars*, 259 F. Supp. 2d at 582 (finding campus is a public forum for students); *Khademi v. S. Orange Cnty. Cmty. Coll. Dist.*, 194 F. Supp. 2d 1011, 1024 (C.D. Cal. 2002) (finding the generally available areas of a community college campus are public fora because they are open to the public); *Burbridge v. Sampson*, 74 F. Supp. 2d 940 (C.D. Cal. 1999) (finding a community college campus to be a public forum because it is open to the public); *cf. O'Toole v. Super. Ct.*, 44 Cal. Rptr. 3d 531 (Cal. Ct. App. 2006) (analyzing a permit requirement for nonstudent speech on a community college campus as a prior restraint in a public forum, using strict scrutiny).

20 *Roberts*, 346 F. Supp. 2d at 861.

21 *Id.* at 862.

22 *Burbridge*, 74 F. Supp. 2d at 947–48.

23 Cal. Educ. Code § 76120 (West, Westlaw through 2012 Reg. Sess.); *see also* Cal. Educ. Code § 82537(a) & (b) (2013) (labeling community colleges as civic centers for discussion).

1. Reasonable Time, Place, and Manner Restrictions Versus Unlawful Prior Restraints

Prior restraints on speech are disfavored and carry a heavy presumption of unconstitutionality because they censor speech before it occurs.[24] This presumption is "justified by the fact that 'prior restraints on speech . . . are the most serious and least tolerable infringement on First Amendment rights.'"[25] "[R]easonable time, place, [and] manner restrictions" on speech are permissible.[26] Because most college campuses are public forums for students, any regulation requiring authorization from an administrator before expressive activity may occur is a prior restraint on speech.

Often prior restraints take the form of advanced notice requirements, whereby students must obtain permission to hold an event or distribute flyers 1, 2, 5, or even 14 days in advance of the event. Sometimes the prior restraints take the form of "pre-approval" policies that require students to submit their proposed event or flyer to an administrator before engaging in speech.

In order to survive constitutional scrutiny, a regulation or scheme amounting to a prior restraint must meet several requirements. First, it may not delegate overly broad discretion to a government official. Second, any prior restraint that controls the time, place, or manner of speech must not be based on the content of the message. Finally, the regulation must also be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication.[27]

a. Policies that Grant Administrators Unfettered Discretion.

The Supreme Court consistently condemns regulations on speech that vest discretion in an administrative official to grant or withhold a permit based upon broad criteria unrelated to the proper regulation of public places.[28] If the permit scheme involves the appraisal of facts, exercise of judgment, and formation of an opinion, the danger of censorship is too great to be permitted.[29] Left with only vague or non-existent criteria on which to base their decision, government officials "may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker."[30] Even if there is no evidence to point to a content-based motive for an administrator's application of college regulations, the very fact that the regulations are so open-ended as to allow the administrator to enforce them based on content is enough for them to fail constitutional scrutiny. "The success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so."[31]

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24 *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963).

25 *Grossman v. City of Portland*, 33 F.3d 1200, 1204 (9th Cir. 1994) (quoting *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1975)).

26 *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

27 *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992).

28 *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969).

29 *Forsyth Cnty.*, 505 U.S. at 131.

30 *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763–64 (1988).

31 *Forsyth Cnty.*, 505 U.S. at 133 n.10.

Prior restraints are so heavily disfavored because they give administrators the power to deny speech before it occurs, and when those administrators are not constrained by definite, clear terms, they can stifle speech based on its content or just because they feel like it.

b. Policies that Allow for Content- or Viewpoint-Based Discrimination

Administrators cannot regulate speech solely based on its content or viewpoint.[32] Restrictions on speech are content-based when the message determines whether the speech is subject to the restriction.[33] In other words, the requirement is content-neutral if it is "justified without reference to the content of the regulated speech."[34] Administrators do have some discretion to regulate the time, place, and manner of expression,[35] but, as stated above, students enjoy expansive speech protection in the open, public areas on campus and in facilities that the university has made "generally open" to students and student groups for expressive activities.[36]

c. Policies that Are Not Narrowly Tailored to Serve a Significant Government Interest

A prior restraint on speech in a designated public forum must also be narrowly tailored to serve a substantial government interest. In order to satisfy this requirement, a regulation must promote a "substantial government interest that would be achieved less effectively absent the regulation," but must not "burden substantially more speech than is necessary to further the government's legitimate interests."[37] In other words, a regulation is narrowly tailored if it "targets and eliminates no more than the exact source of the evil it seeks to remedy."[38]

Advanced notice requirements for student speech often fail this test because they disable spontaneous and anonymous speech, which is often "the most effective kind of expression."[39] The "simple knowledge that one must inform the government of his desire to speak and must fill out appropriate forms and comply with applicable regulations discourages citizens from speaking freely."[40]

d. Policies that Leave Open No Alternative Channels of Communication

Finally, in order to pass constitutional muster, a college policy must leave open adequate alternative channels of communication. Several considerations are relevant to this analysis. First, "[a]n alternative is not ample if the speaker is not permitted to reach the intended audience." Second, if the

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32 *Rosenberger*, 515 U.S. at 828–29.

33 *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987).

34 *Clark*, 468 U.S. at 293.

35 *Widmar*, 454 U.S. at 276.

36 *Id.* at 267–68.

37 *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

38 *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (internal quotation and citation omitted).

39 *Grossman*, 33 F.3d at 1206; *see Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton*, 536 U.S. 150, 166–67 (2002) (holding permit requirement violates First Amendment because it prohibits anonymous speech); *NAACP, W. Region v. City of Richmond*, 743 F.2d 1346, 1355 (9th Cir. 1984) ("all advance notice requirements tend to inhibit speech").

40 *NAACP*, 743 F.2d at 1354.

location of the expressive activity is part of the expressive message, alternative locations may not be adequate. Third, the court will consider the opportunity for spontaneity in determining whether alternatives are ample, particularly for political speech. Fourth, the court considers the cost and convenience of alternatives.[41]

C. Student Fees and Campus Facilities

The Constitution ensures that all student groups have equal access to university resources.[42] This principle of equal access carries over into the allocation of mandatory student fees to student groups.

When a public university creates a mandatory student activity fee and then allocates a portion of the collected fees to fund student organization activities, it creates a public forum for student speech and must distribute the fees on a viewpoint neutral basis. In *Rosenberger*, the University of Virginia provided student fee funding to student organizations but prohibited the use of fees for political or religious activities.[43] The Supreme Court held that these prohibitions were unconstitutional viewpoint discrimination.[44] Later in *Southworth*, the Court reaffirmed the viewpoint neutrality principle and held that a public university must distribute student activity fee funds equally to each recognized student group on campus without any consideration of the group's viewpoint.[45] In fact, if the university does not comply with this limitation, it may not charge mandatory student fees to support extracurricular activities.

In addition, a public university that allocates student fees to student organizations may not prohibit the use of those fees for religious advocacy and sectarian activities. The University of Wisconsin violated the First Amendment when it denied student activity fees to a Catholic student group for activities involving student-led prayer, worship, and religious advocacy.[46] The university argued it would violate the Establishment Clause of the First Amendment to allocate funds for such activities.[47] But, relying on *Rosenberger*, the Seventh Circuit rejected the university's position and held that its refusal to provide student fee funding for these activities violated the viewpoint neutrality requirement, not the Establishment Clause.

In creating policies to reflect the viewpoint neutrality principle, it is paramount that universities include a statement that all fees will be distributed without reference to the viewpoint of the student group. Importantly, criteria that can seem viewpoint neutral—such as funding determinations made on the basis of past funding levels—can still be discriminatory if viewpoint discrimination in earlier requests caused funding to be historically low.[48] Finally, student activity fees may not be distributed

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41 *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1025 (9th Cir. 2008).

42 *See Widmar*, 454 U.S. 263 (holding university may not exclude religious group from meeting in university-owned buildings made available to other student groups).

43 *Rosenberger*, 515 U.S. at 825.

44 *Id.* at 837.

45 *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217, 233 (2000).

46 *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775 (7th Cir. 2010).

47 *Id.* at 777.

48 *Southworth v. Bd. of Regents of the Univ. of Wis. Sys.*, 307 F.3d 566, 593–94 (7th Cir. 2002).

by student referendum, as this violates the viewpoint neutrality guarantee.[49]

Regardless of the group's ideology, its purpose and the content of its expression may not be grounds for denying equal access to campus facilities and student activity fees. A group may be denied recognition on other legitimate grounds, such as insufficient membership, but the purpose and belief system of the group should never be the factor that prevents it from gaining recognition and equal access.

II. Freedom of Association on Campus

Many public colleges and universities require student groups to adopt a nondiscrimination membership policy as a condition of receiving official school recognition. These policies prohibit discrimination based on a very short list of characteristics, thereby permitting restrictive membership policies on any basis not listed in them. Universities often claim that these organizations "discriminate" based on "religion," "sexual orientation," "gender identity," and/or "political persuasion." Such policies can force a religious organization to accept as members and *leaders* persons who engage in religious or sexual practices that directly conflict with its religious beliefs. They also can force a politically oriented student organization to accept as members and *leaders* persons who directly oppose its political goals. So a Christian organization could be forced to accept as president an atheist student or a person who engages in homosexual behavior, while the College Republicans could be compelled to accept a left-leaning Democrat as its leader. These policies implicate students' First Amendment right to free association.

The United States Constitution guarantees all citizens the right to free association. The "ability of like-minded individuals to associate for the purpose of expressing commonly held views may not be curtailed."[50] This right is threatened when a public authority places constraints on the membership and leadership criteria of a group, because the "[f]reedom of association . . . plainly presupposes a freedom not to associate."[51] Individuals must be free to join together for common causes without interference from the government. Conditioning access to university programs is an improper restraint on this freedom.

The First Amendment's Free Speech Clause protects the right of expressive associations, like student organizations at public universities, to select their members and leaders based upon their adherence to the organizations' beliefs.[52] "Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being."[53]

The Free Exercise Clause guarantees this self-definitional right to religious organizations.[54] In

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[49] *Southworth*, 529 U.S. at 235–36; *Amidon v. Student Ass'n of State Univ. of N.Y. at Albany*, 508 F.3d 94, 100–06 (2d Cir. 2007).

[50] *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2288 (2012).

[51] *Id.*

[52] *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

[53] *Democratic Party v. Wis. ex rel. La Follette*, 450 U.S. 107, 122 n.22 (1981).

[54] *See Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1261 (10th Cir. 2008) (noting that Free Exercise and Establishment

2012, the Supreme Court held that the Free Exercise Clause protects the right of religious groups to select those responsible for "conveying [their] message and carrying out [their] mission," and held it unlawful for the government to interfere with such decisions.[55] When religious student groups select individuals who share their religious beliefs to be voting members and leaders of their groups, they are exercising this essential freedom. Public universities violate these fundamental First Amendment protections by requiring religious student groups to abandon their right to associate with persons who share their religious beliefs as a condition to accessing a student organization speech forum.[56]

The First Amendment violation is all the more egregious when a university grants access to other student groups that restrict membership in various ways, while denying access to religious groups that desire to exercise this same right. Most nondiscrimination policies list only a few characteristics, which means groups can restrict members on the basis of their political, social, and ideological views, and on any other ground not proscribed by the policy (*i.e.*, academic merit, leadership potential, dedication to community service, etc.). And universities typically grant a broad exemption for fraternities and sororities to engage in gender-based discrimination. In fact, the entire Greek system is predicated on selectivity in membership, and not just on gender grounds. Under the typical nondiscrimination policy, a university will grant speech forum access to a Democrat club that excludes Republicans, a Planned Parenthood club that rejects pro-lifers, and fraternities and sororities that choose members based on gender (and many other grounds), yet deny access to religious groups that desire to employ similarly restrictive criteria in selecting their members. It is blatant religious discrimination for a public university to enforce its nondiscrimination policy in this manner.

The Supreme Court's decision in *Christian Legal Society v. Martinez*, applies only to "all-comers" policies, not the nondiscrimination policies described above.[57] *Martinez* was expressly limited to "whether conditioning access to a student-organization forum on compliance with an all-comers policy violates the Constitution."[58] Under the "all-comers" policy at issue in *Martinez*, all student groups had to open their membership to all students, with no exceptions. Most universities do not employ extreme and nonsensical policies like *Martinez*. Rather, they enforce policies that prohibit discrimination on a few protected characteristics, thus allowing "discrimination" on any basis not listed in the policy, and also typically grant a broad exemption to fraternities and sororities to engage in gender-based discrimination. Such policies are simply not all-comers policies, and *Martinez* is

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Clauses work together in "protect[ing] religious institutions from governmental monitoring or second-guessing of their religious beliefs and practices, whether as a condition to receiving benefits . . . or as a basis for regulation or exclusion from benefits . . . .").

55 *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 708–09 (2012).

56 *See Christian Legal Soc'y v. Walker*, 453 F.3d 853 (7th Cir. 2006) (university violated First Amendment when it conditioned access to a free speech forum on Christian student organization's willingness to abandon its faith-based membership and leadership restrictions); *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839 (2d Cir. 1996) (school district violated Equal Access Act, which is an analog to the First Amendment, by conditioning Christian student organization's access to a free speech forum on its willingness to abandon requirement that its leaders share its Christian beliefs).

57 *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971 (2010).

58 *Id.* at 2984.

therefore inapplicable to them.

The Free Speech Clause also prohibits public universities from excluding speakers from a speech forum based on the content or viewpoint of their speech.[59] When universities target religious student groups for exclusion from speech fora based on the religious expression contained within their organic documents (*i.e.*, the faith-based membership and leadership restrictions they put in place to maintain control over their religious identities and expression), they are engaging in unlawful content- and viewpoint-based discrimination.

The Free Exercise Clause also prohibits public universities from adopting non-neutral and non-generally applicable policies that target religious groups for special disabilities.[60] The typical nondiscrimination policy targets religious groups on its face, since the policy includes the term "religion." Permitting nonreligious groups to select their members and leaders on the basis of their nonreligious beliefs, while denying religious groups the same right, is evidence of a non-neutral and non-generally applicable law that burdens religious exercise and practice. The same is true of granting fraternities and sororities an exemption from the prohibition on gender-based discrimination, while denying religious groups a similar exemption from the prohibition on religious discrimination.

Virtually every major public university has a nondiscrimination policy that directly infringes upon students' freedom of association.

III. Free Exercise of Religion on Campus

The freedom to exercise one's religious beliefs is enshrined in the First Amendment, which declares that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . ."[61] The Free Exercise Clause safeguards the freedom of citizens to practice their chosen form of religion, regardless of whether their religion is based on a belief in God or whether they would even consider themselves "religious."

The Free Exercise Clause offers varying protections, depending upon whether the government action at issue infringes upon the citizen's *beliefs* or *actions*. The Supreme Court has made it clear on several occasions that under the Free Exercise Clause the freedom to *believe and profess* one's religious doctrine is absolute.[62] This means that a public university may not regulate religious beliefs, compel affirmation of religious beliefs, punish the expression of religious doctrines, impose special disabilities on the basis of religious views or status, or lend its power to a particular side in controversies over religious authority or theology.[63] Hence, the Free Exercise Clause bars a public university from forcing students to change their religious beliefs or from insisting that all students adopt a specific campus orthodoxy, such as "multiculturalism" or "diversity."

The freedom to *act* on one's religious beliefs, however, is not unlimited. The Free Exercise

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59 *Widmar*, 454 U.S. 263; *Rosenberger*, 515 U.S. 819.

60 *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

61 U.S. CONST. amend. I.

62 *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990).

63 *Id.*

Clause permits public universities—and other government bodies—to enact rules and regulations that incidentally interfere with religious practice, as long as such measures are both "neutral" toward religion and "generally applicable" to members of the university community.[64] A university cannot directly restrict religion or target it by enacting measures that specifically mention religious practices, that are motivated by antireligious bias, or that affect religious practice alone.

Moreover, even "neutral" and "generally applicable" university rules will almost always be unconstitutional if they affect religious liberty *and* other First Amendment rights, such as the freedoms of speech and association. This is significant because virtually all campus policies and/or actions that inhibit religious practices will likewise affect other First Amendment liberties. So, if a public university seeks to enforce a speech code against a student on the grounds that his proselytizing is "offensive," that university action would implicate both the free exercise of religion *and* the freedom of speech, and it would likely be found unconstitutional. Indeed, the unity of free speech, free association, and the free exercise of religion severely limits university officials' ability to regulate campus religious practice at all.

There is one important, final caveat. Professors often ask students, in classroom exercises, to play "devil's advocate" or to watch or read materials that religious students may find offensive. Professors do have the academic freedom to challenge students in this way, and students do not have a right to participate only in assignments with which they agree. In short, sometimes students do have to play "devil's advocate" in a classroom context. Professors or administrators do not have the freedom (or authority), however, to make students express contrary points of view outside the classroom, such as in letters to legislators. "Although educators may limit or grade speech in the classroom in the name of learning, and although they may control their own speech and curriculum, the First Amendment does not permit educators to invoke curriculum as a pretext for punishing a student for her . . . religion."[65] Moreover, they cannot punish a student merely because the student believes that an assignment or point of view is morally repugnant.

In short, the underlying protection behind the Free Exercise Clause is one of *neutrality*. A university that treats religious students, faculty, or student organizations differently than their secular counterparts does so at its own peril.

IV. Equality of Opportunity on Campus

Christian and conservative students should have the same opportunity for academic success, employment, and promotion as non-Christians, leftists, or those members within the ideological mainstream of the campus community. When public universities pursue academic retaliation against Christian or conservative students for lawfully expressing their beliefs and viewpoints, they are in direct violation of the Constitution.

The government may not retaliate against citizens and government employees for exercising First Amendment liberties by "impos[ing] burdens on [them] in order to discourage or punish them

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64 *Id.*

65 *Ward v. Polite*, 667 F.3d 727, 734 (6th Cir. 2012) (internal quotation marks removed).

from exercising protected constitutional rights."[66] This basic freedom is implicit in the First Amendment as the Supreme Court has stated that First Amendment liberties—such as the freedoms of speech and association—must receive expansive protection because they are "delicate and vulnerable."[67] Accordingly, the government is forbidden not only from directly prohibiting expressive activities, but also from taking actions that tend to "chill" such activities.[68] Forbidden government actions can include investigations, threats, sanctions, harassment, bad grades or evaluations, denials of benefits, or virtually any action designed to punish a citizen for exercising constitutional freedoms.[69] The danger these actions present to constitutional liberties is "especially real in the [u]niversity setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition."[70]

The extent of protection provided to persons depends in large part on whether that person is a private citizen or a public employee. Private citizens—students on public university campuses—have the greatest breadth of protection because the government has virtually no legitimate interest in repressing their expression.[71] In the university setting, students may study, inquire, research, form organizations, and publicly express opinions on virtually any topic of human interest without fear of retaliation from the academic institution. From a legal perspective, a student at a public university enjoys the full breadth of liberty provided by the Constitution.

V. Conclusion

Students have the right to freedom of speech, freedom of association, freedom of religion, and other constitutional rights on campus. Public universities abridge students' freedom of speech through campus speech codes, speech zones, and prior restraints that restrict what they can say, where they can say it, when they can say it, and how they can say it, all of which may be unconstitutional. Likewise, universities may try to limit the ability of religious or conservative groups to access facilities or student fee funding, which violates the freedom of speech. In addition, universities will try to infringe students' freedom of speech, association, and religion by requiring them to select members or leaders of their student groups according to the university's so-called nondiscrimination policy. The free exercise of religion is infringed by universities when they enact policies that target religious students. Finally, public universities must give all students the same equality of opportunity on campus and not retaliate against religious or conservative students for their beliefs.

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66 *Ramirez v. Arlequin*, 447 F.3d 19, 22 (1st Cir. 2006).

67 *NAACP v. Button*, 371 U.S. 415, 433 (1963).

68 *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 500 (4th Cir. 2005).

69 *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 76 n.8 (1990).

70 *Rosenberger*, 515 U.S. at 835.

71 *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 680–81 (1996).