

Free Speech

at Public Universities

Joseph Thai

Watson Centennial Chair
Presidential Professor
OU College of Law



HOMER · HERODOTUS · SOPHOCLES · PLATO · ARISTOTLE · DEMOSTHENES · CICE

LIBERATED
ZONE

GAZA SOLIDARITY
ENCAMPMENT

STOP THE
SC
IN GAZA

ON
SHIFA

WE DE

HOW MANY KISS DID U PILE???



"SORRY" DOES NOT
UNDO YEARS OF
HISTORICAL TRAUMA

WE DEMAND
ACCOUNTABILITY!
#THEHATEYOUHIRE

WE DEMAND
ACCOUNTABILITY!
#THEHATEYOUHIRE

WE WANT ACTION
NOT EMPTY
PROMISES!
#THEHATEYOUHIRE

NO MORE EMPTY
PROMISES! WE
WANT ACTION!
#THEHATEYOUHIRE

WE'RE HERE
TO LEARN NOT
TO TALK YOU ANTI-
RACISM #

NO MORE APOLOGY
E-MAILS
WE DEMAND ACTION
#THEHATEYOUHIRE

LOGOS MEAN
NOTHING
ACCOUNTABILITY
#THEHATEYOUHIRE

YELLOW PERK
FOR
BLACK LIVES

ASSIGNMENT
FOR LEARNING
WE HATE
#THEHATEYOUHIRE

WE DEMAND
ACCOUNTABILITY
#THEHATEYOUHIRE

YES FOR
OPINION
MATTER
#THEHATEYOUHIRE



What

Why

Who

How

Free Speech

What

Why

Who

How

Free Speech

We the People of the United States, in order to form a more perfect Union, insure domestic Tranquillity, provide for the common Defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article. 1.

Section. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section. 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, in each State shall have ^{the} Qualifications requisite for Electors of the most numerous Branch in that State: No Person shall be a Representative who shall not have attained to the Age of twenty five Years, seven Years, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Year, and the Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress, and within every subsequent Term of ten Years, in such Manner as they shall



VIA
K WELL
O 1933
O 2012









What

Why

Who

How

Free Speech

Truth



“Let [Truth] and
Falsehood grapple;
who ever knew Truth
put to the worse, in
a free and open
encounter?”

*Joannis Miltoni Effigies Aetat. 62.
1670.*



“There’s a simultaneously scary and exciting future where AI-generated false stories are the norm.” *ChatGPT*

Self-Governance



“The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours.”



“The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours.”

“It [puts] the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity ...”

Self-Fulfillment

MR. WILLIAM
SHAKESPEARES
COMEDIES,
HISTORIES, &
TRAGEDIES.

Published according to the True Originall Copies.

To the Reader.

This Figure, that thou here seest
It was for gentle Shakespeare cut,
Wherein the Grauer had a strife
with Nature, to out-doo the life.
O, could he but haue drawne his wit
As well in brasse, as he hath hit
His face; the Print would then surpasse
All, that vvas euer vvit in brasse.
But, since he cannot, Reader, looke
Not on his Picture, but his Booke.



LONDON
Printed by Isaac Iaggard, and Ed. Blount. 1623.

SHINING

With an
excerpt from
the sequel,
*Doctor
Sleep*



"A master storyteller."
—LOS ANGELES TIMES

#1 BESTSELLER

STEPHEN KING *The* STAND

COMPLETE AND UNCUT EDITION

#1 BESTSELLER

STEPHEN KING *Salem's* LOT

#1 NEW YORK TIMES BESTSELLER

STEPHEN KING CARRIE



"A master storyteller."

#1 NEW YORK TIMES BESTSELLING AUTHOR

STEPHEN KING

Pet Sematary



BY THE AUTHOR OF
THE STAND & THE DEAD ZONE

STEPHEN KING

NIGHT SHIFT

EXCURSIONS INTO

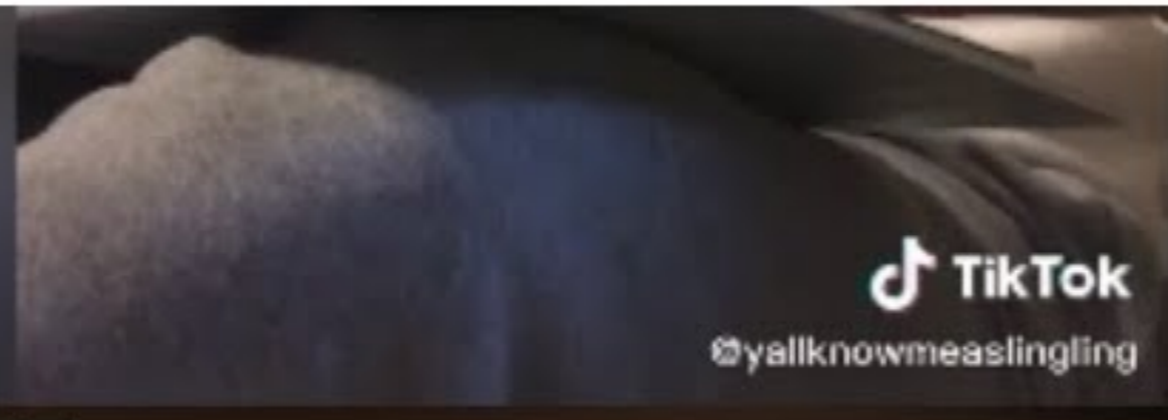


stages of me doing my homework:

2nd mental breakdown



TIK TOK UNIVERSITY



TikTok

@yallknowmeaslingling

TikTok

@mikekicks



8:00

Has class at 9:15*

What

Why

Who

How

Free Speech

What

Why

Who

How

Students

Faculty

Staff

Administrators

Public

“Congress shall make no law ...
abridging the freedom of speech ...”
- *First Amendment*

“Congress shall make no law ...
abridging the freedom of speech ...”
- *First Amendment*

“nor shall any State deprive any
person of ... liberty ...”
- *Fourteenth Amendment*

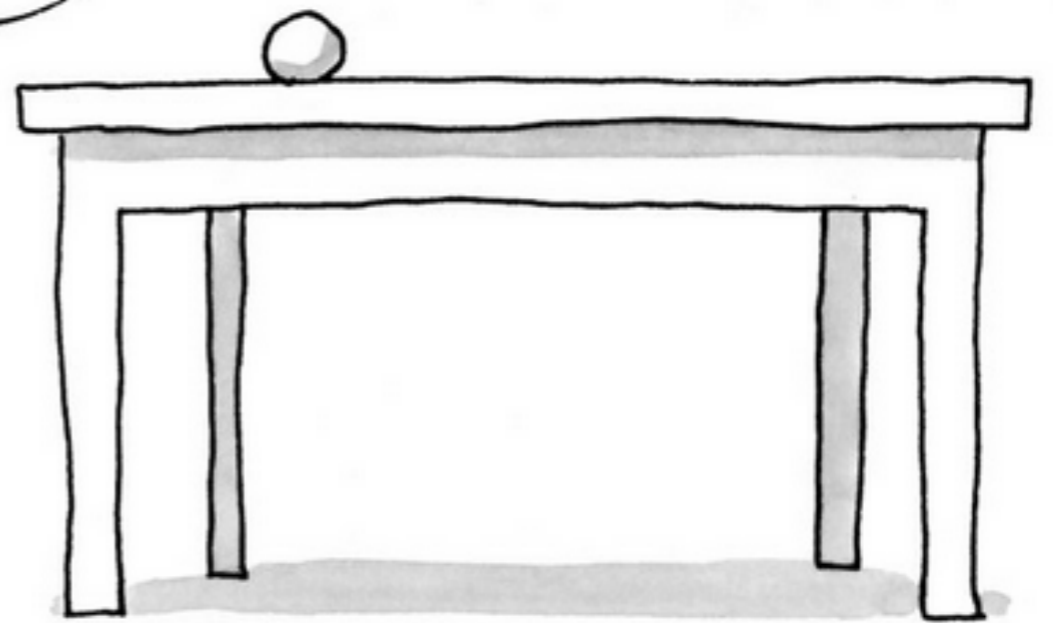
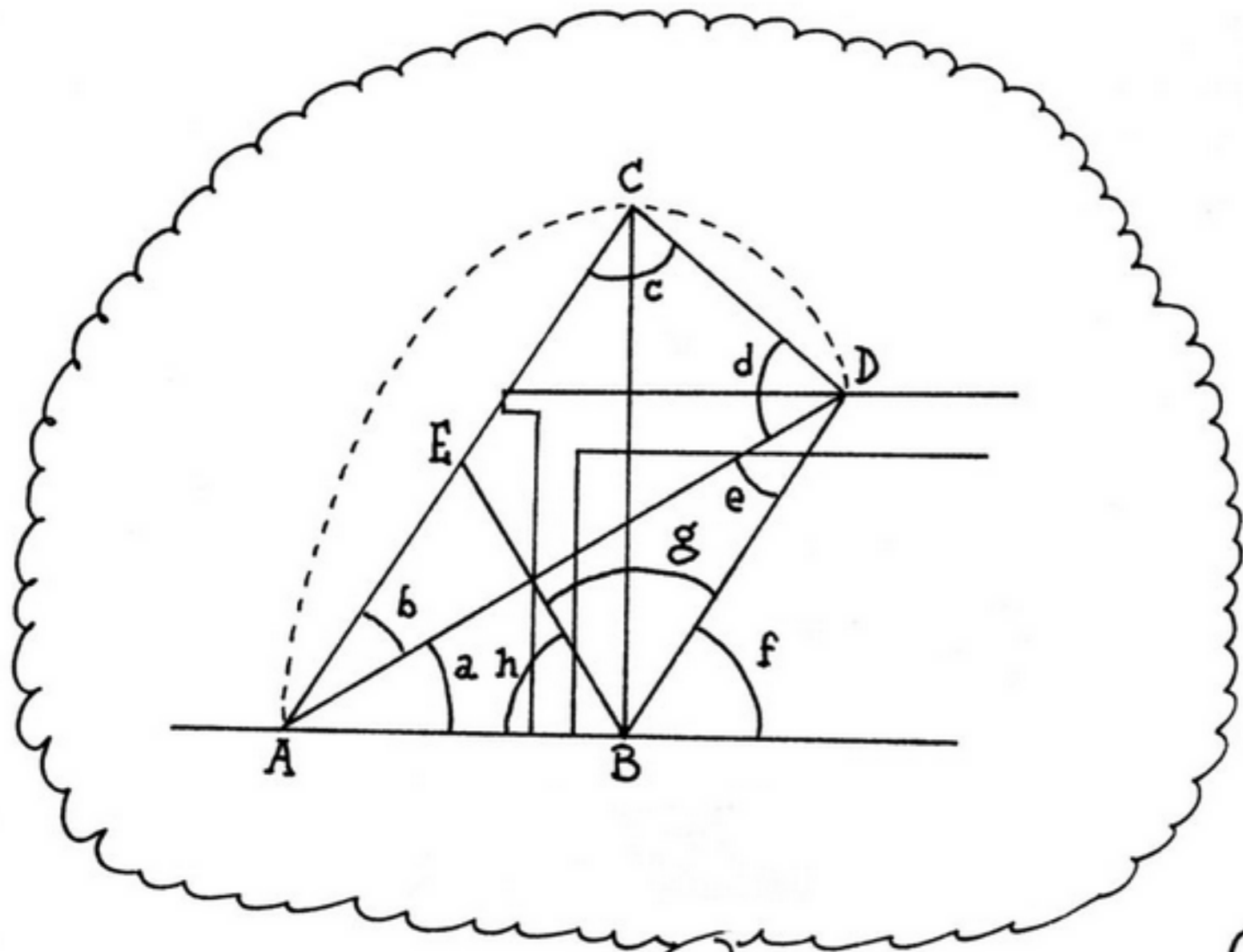
What

Why

Who

How

Free Speech



ZIGGUR



Do not censor speech
on the basis of viewpoint.
“Strict scrutiny” most
likely invalidates.



Reasonableness Test



Classes

- Reasonable content-neutral restrictions are valid
 - Only attend if enrolled or invited
 - Only speak if called on
 - No disruptions



Classes

- Reasonable content-neutral restrictions are valid
 - Only attend if enrolled or invited
 - Only speak if called on
 - No disruptions
- Reasonable content-based restrictions are valid
 - Only speak on-topic



Classes

- Viewpoint restrictions are likely invalid
 - No feminist views (in history class)
 - No pro-Israel views (in Middle East Politics class)



Speakers & Panels

- Can reasonably set format (moderated)
- Can reasonably limit audience participation (Q&A)
- Can reasonably respond to disruptions (remove protesters)
- If audience views are invited, cannot censor viewpoints



Ceremonies

- Can reasonably set format (program)
- Can reasonably limit audience participation (applause)
- Can reasonably respond to disruptions (remove protesters)
- Viewpoint restrictions likely invalid (no OU shirts)



Offices and Non-Public Areas

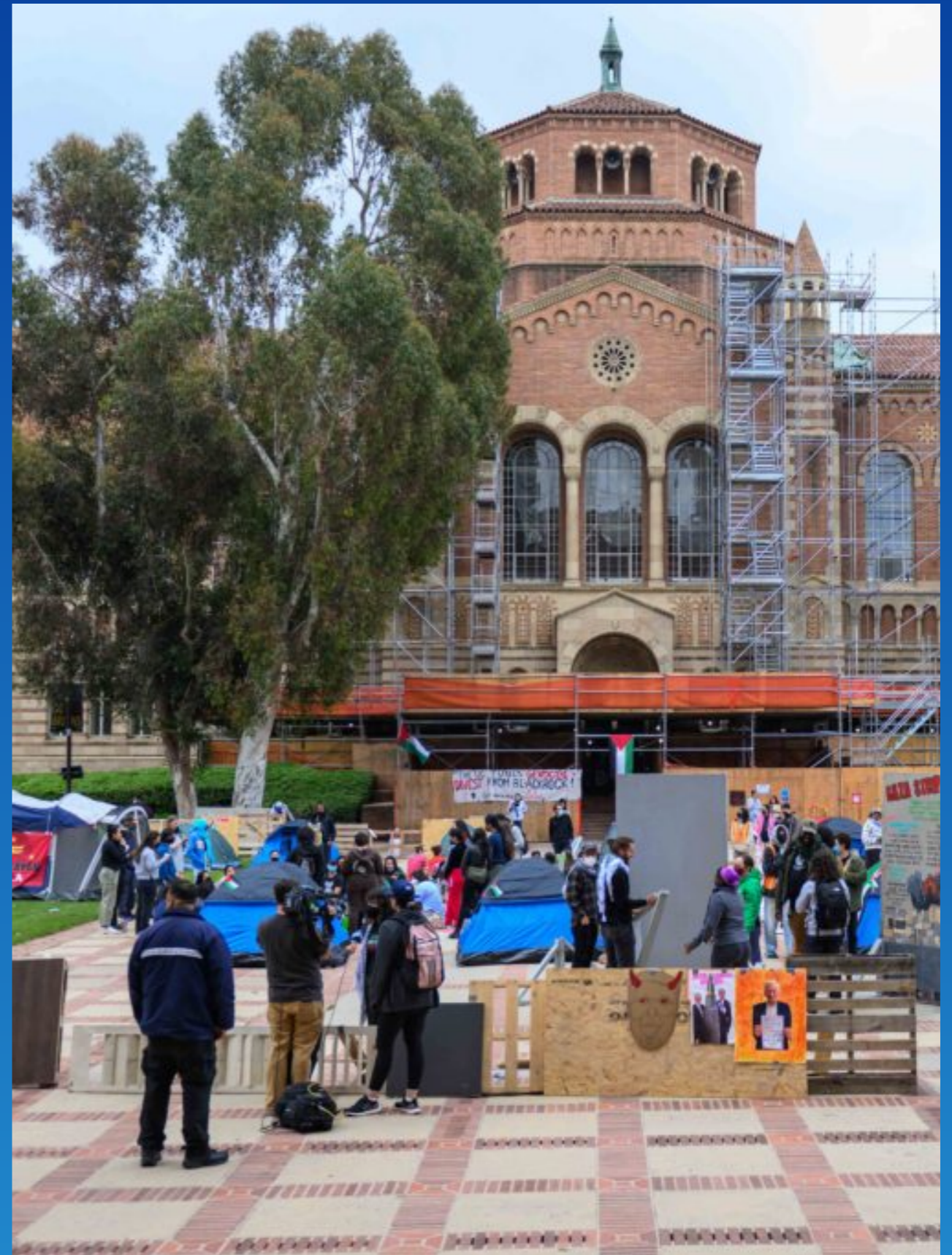
- Can reasonably restrict presence and speech to protect the function of the space.
- Viewpoint restrictions are likely invalid.



Physical Property

- Can reasonably limit to prevent damage or disassociate from message.
- Viewpoint restrictions are likely invalid.

Intermediate Scrutiny
Strict Scrutiny





"SORRY" DOES NOT UNDO YEARS OF HISTORICAL TRAUMA

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NO MORE EMPTY PROMISES! WE WANT ACTION!
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WE'RE HERE TO LEARN NOT TO TEACH YOU ANTI-RACISM

NO MORE APOLOGY E-MAILS WE DEMAND ACTION

LET ME MEAN SOMETHING ACCOUNTABILITY #THEHATEYOUHIRE

YELLOW PER FOR BLACK LIVES

ACCOUNTABILITY FOR LEARNING NOT HATE

WE DEMAND ACCOUNTABILITY

YES, YOUR OPINION MATTERS BUT NOT YOURS



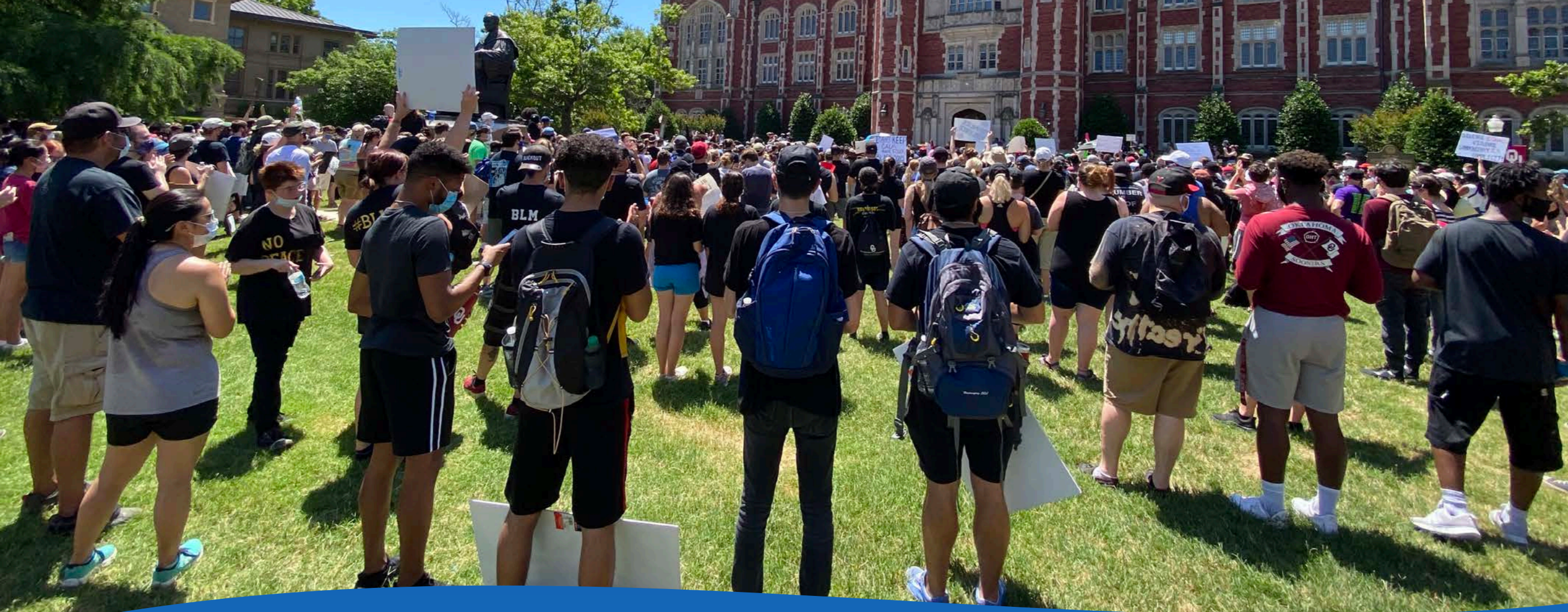
ERING
ID-19

GROUP OF OU STUDENTS ASKING FOR CHANGES TO COVID-19 PROCEDURES









Traditional Public Forums

- Lawns, plazas, streets and sidewalks
 - Open to the public
 - Where rallies, protests and marches occur





TROUTY HALL



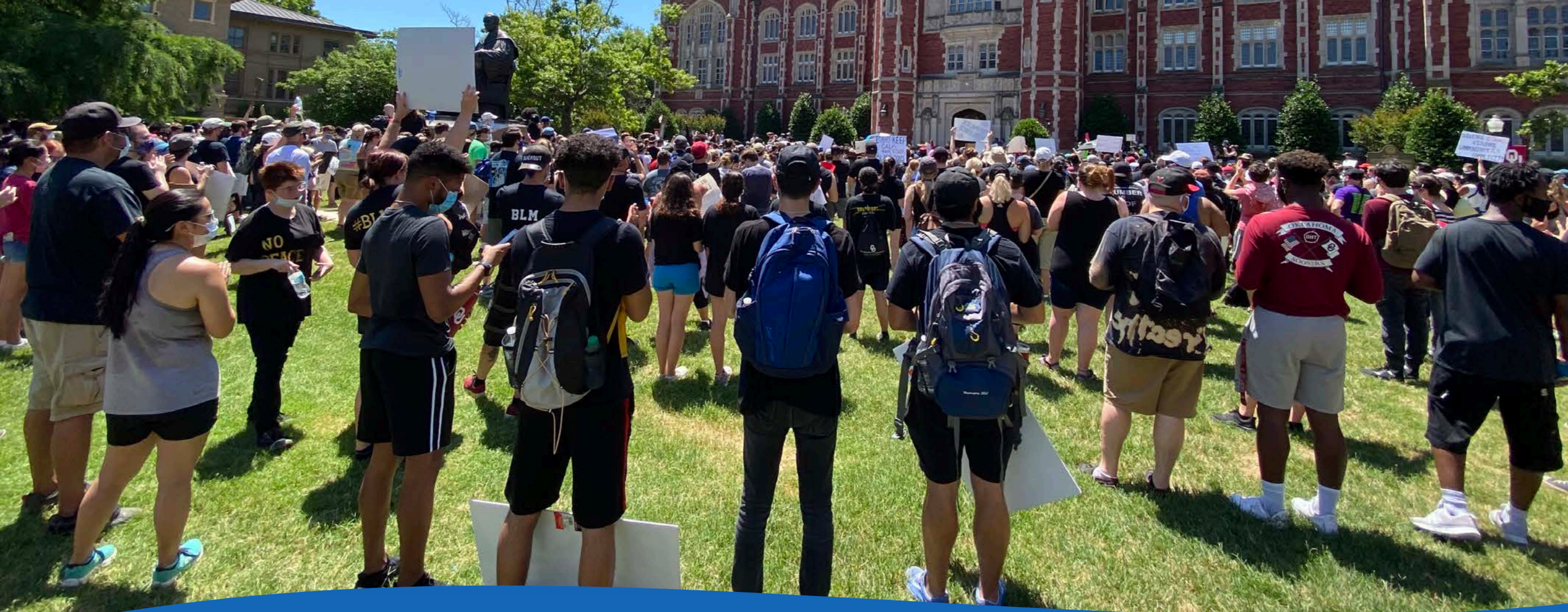
TERRITORIAL NORMAL SCHOOL OF OKLAHOMA
UNIVERSITY OF OKLAHOMA 1890

NORMAL

C. 1. The outdoor areas of campuses of public institutions of higher education in this state shall be deemed public forums for the campus community, and public institutions of higher education shall not create "free speech zones" or other designated areas of campus outside of which expressive activities are prohibited. Public institutions of higher education may maintain and enforce reasonable time, place and manner restrictions narrowly tailored in service of a significant institutional interest only when such restrictions employ clear, published, content- and viewpoint-neutral criteria and provide for ample alternative means of expression. Any such restrictions shall allow for members of the campus community to spontaneously and contemporaneously assemble and distribute literature.

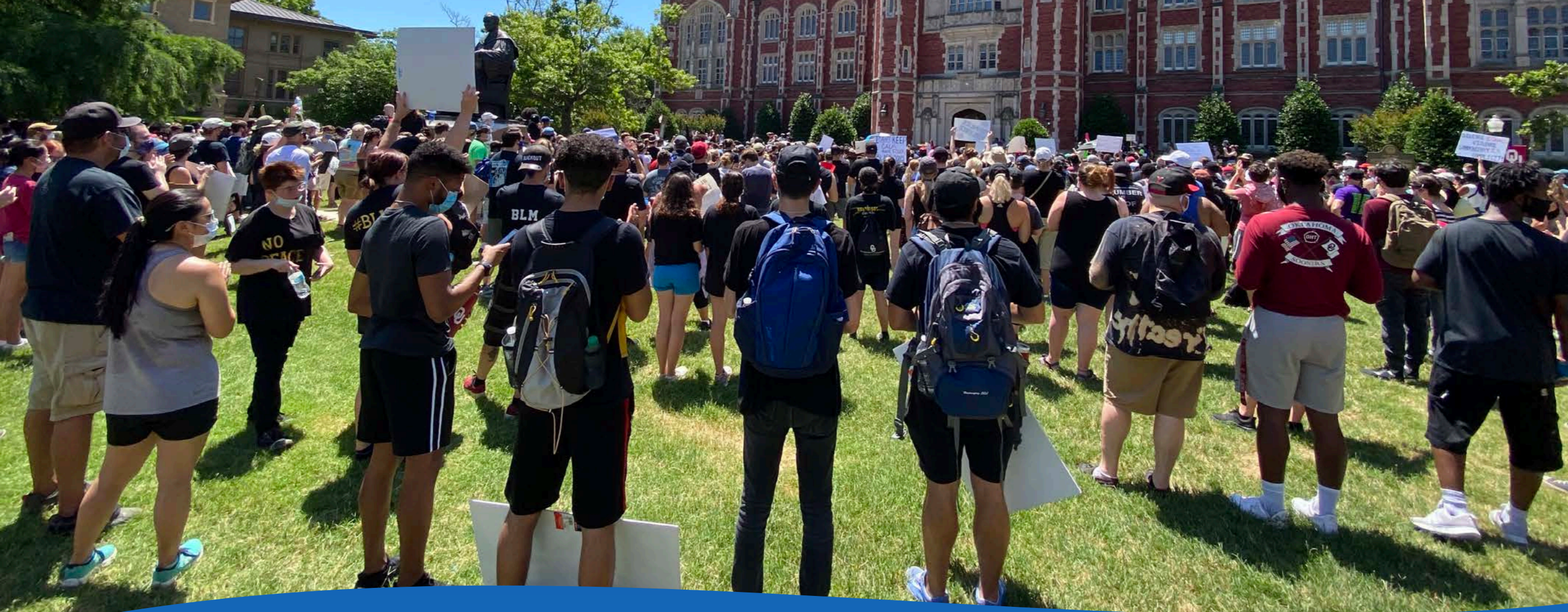
2. Nothing in this subsection shall be interpreted as limiting the right of student expression elsewhere on campus.

“outdoor areas of campuses ...
shall be deemed public forums”



Traditional Public Forums

- Cannot censor speech based on topic or view
- Strict scrutiny test
 - Compelling interest
 - Narrowest tailoring



Traditional Public Forums

- Cannot censor speech based on topic or view
- Strict scrutiny test
 - No protests of war in Gaza
 - No protests against Israel



Traditional Public Forums

- Can adopt limited time, place, or manner restrictions
- Intermediate scrutiny test (*not* reasonableness)
 - Narrow tailoring to promote
 - Significant government interest
 - Leave ample alternatives for speech



Traditional Public Forums

- Can adopt limited time, place, or manner restrictions
- Intermediate scrutiny test (*not* reasonableness)
 - No overnight encampments
 - No nighttime protests
 - No sound amplification equipment



Universities generally cannot discipline students for offensive speech on social media or off-campus.



University of Oklahoma says students involved in blackface video 'will not return to campus'

By [Nicole Chavez](#) and [Alta Spells](#), CNN

🕒 4 minute read · Updated 2:04 AM EST, Tue January 22, 2019





Do not censor speech
on the basis of viewpoint.
“Strict scrutiny” most
likely invalidates.

Hate Speech

Unprotected Speech

Hate
Speech

Unprotected
Speech

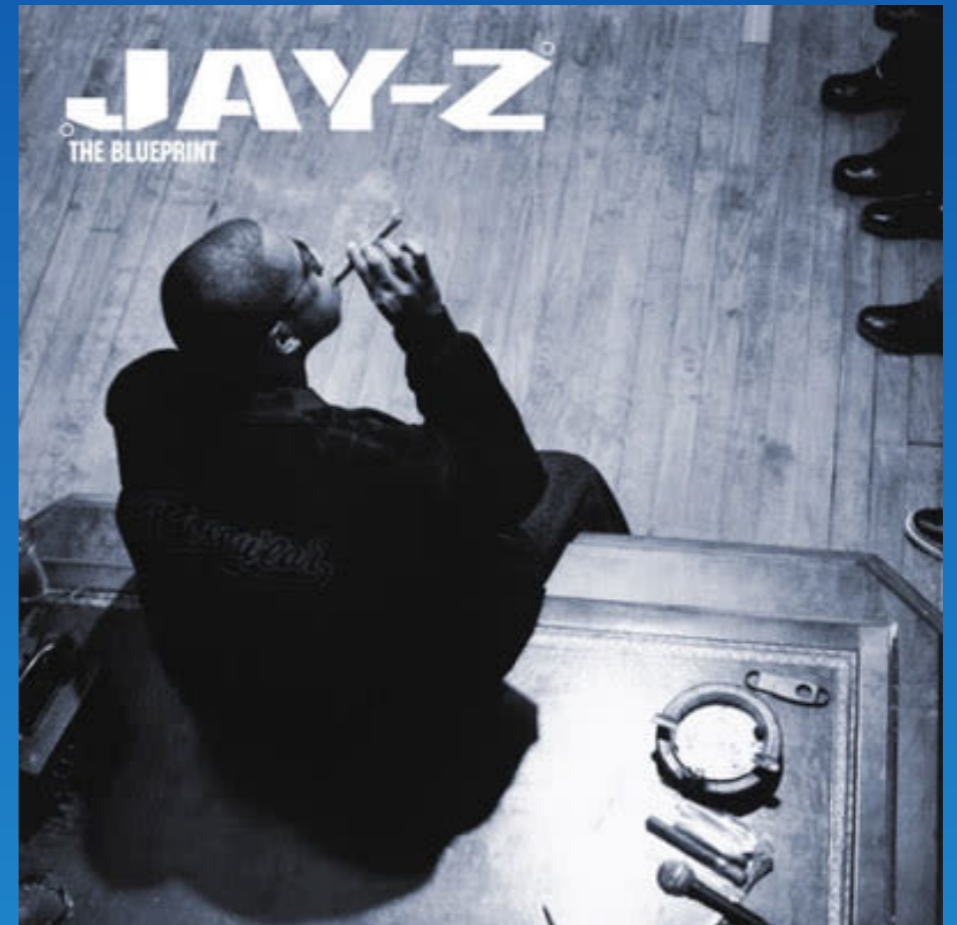
- Fighting words
- True threats
- Incitement

Fighting Words

Words which, in the context uttered,
“tend to incite an immediate breach of the peace.”

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True Threats

“Serious expressions conveying that a speaker means to commit an act of unlawful violence.”

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State of mind: Speaker consciously disregarded substantial risk that communication would be viewed as threatening violence.

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Incitement

Statements “directed at producing imminent lawless action” AND “likely” to produce imminent lawless action.

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Statements “directed at producing imminent lawless action” AND “likely” to produce imminent lawless action.

“Incitement is commonly a hair’s breadth away from political ‘advocacy’—and particularly strong protest against the government and prevailing social order.”

Incitement

Statements “directed at producing imminent lawless action” AND “likely” to produce imminent lawless action.

Calls for violence vs. “heated political rhetoric”



Hate Speech

Title VI & Title IX

A Venn diagram with two overlapping circles on a blue background. The left circle is bright green and contains the text 'Hate Speech'. The right circle is purple and contains the text 'Title VI' and 'Title IX' stacked vertically, followed by a bullet point '• Verbal harassment'. The overlapping area between the two circles is a brownish-purple color.

Hate
Speech

Title VI
Title IX

- Verbal harassment

Title VI and Title IX

- Universities receiving federal funds cannot discriminate on basis of race or sex.

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 - Unwelcome
 - Discriminatory
 - On basis of race (VI) or sex (IX)
 - Subjectively and objectively offensive

Title VI and Title IX

- Universities receiving federal funds cannot discriminate on basis of race or sex.
- Includes verbal or physical harassment that creates a hostile environment.
 - Unwelcome
 - Discriminatory
 - On basis of race (VI) or sex (IX)
 - Subjectively and objectively offensive
 - So severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity

Title VI and Title IX

Verbal or physical harassment

$f(x) = (\text{content}) (\text{context})$

(cumulative)

Title VI and Title IX

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Free Speech on Campus (2018)
Chemerinsky & Gillman

Title VI and Title IX

Verbal or physical harassment

$f(x) = (\text{content}) (\text{context})$
(cumulative)

Not harassment

Harassment



Racist song on
fraternity bus at
OU

Repeatedly yelling
racial slurs at
minority students

Free Speech on Campus (2018)
Chemerinsky & Gillman



- Student Loans
- Grants
- Laws

OCR

Office for Civil Rights

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- Reports & Resources
- News
- About OCR
- Reading Room
- Frequently Asked Questions
- Careers/Internships
- Blog

List of Open Title VI Shared Ancestry Investigations

[Protecting Students](#) > [Race, Color, or National Origin Discrimination](#) > [Issues](#) >>

Overview

As a public service, the Office for Civil Rights (OCR) publishes this list of elementary-secondary and post-secondary institutions that are currently under investigation for discrimination involving shared ancestry. OCR updates the list weekly. For the full list of cases under investigation, please see [Pending Cases Currently Under Investigation at Elementary-Secondary and Post-Secondary Schools](#).

Some of the complaints that resulted in OCR opening those investigations, and possibly additional records from those cases, are posted on a [Freedom of Information Act library page](#).

An institution named on this list means that OCR has initiated an investigation of a case concerning that institution. Inclusion on the list does not mean that OCR has made a decision about the case. For more information about OCR's case processes, please refer to [OCR's Case Processing Manual](#).

What

Why

Who

How

Students

Faculty

Staff

Administrators

Public

Public Employee Speech Rules

Capacity/Topic

Speaking as **citizen**—not as employee—on a matter of **public concern**

Rules

Balance value of speech vs. effective functioning of government workplace



Public Employee Speech Rules

Capacity/Topic

Speaking as **citizen**—not as employee—on a matter of **public concern**

Rules

Balance value of speech vs. effective functioning of government workplace

No. 18-726

In the
Supreme Court of the United States

LINDA H. LAMONE, *State Administrator of Elections,*
and DAVID J. MCMANUS, JR., *Chairman of the*
Maryland State Board of Elections,

Appellants,

v.

O. JOHN BENISEK, EDMUND CUEMAN, JEREMIAH DEWOLF,
CHARLES W. EYLER, JR., KAT O'CONNOR, ALONNIE L. ROPP,
and SHARON STRINE,

Appellees.

On Appeal from the United States District Court
for the District of Maryland

**BRIEF OF MICHAEL C. DORF, JOSHUA S. SELLERS,
ANDREW M. SIEGEL, AND JOSEPH T. THAI
AS AMICI CURIAE IN SUPPORT OF APPELLEES**

MATTHEW R. WEYBRECHT
KING & SPALDING LLP
1700 Pennsylvania Ave. NW
Suite 200,
Washington, D.C. 20006
(202) 737-0500

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Counsel for Amici Curiae

March 8, 2019



Public Employee Speech Rules

Capacity/Topic	Rules
Speaking as citizen —not as employee—on a matter of public concern	Balance value of speech vs. effective functioning of government workplace
Speaking as citizen —not as employee—on a matter of private concern	At work: no protection
	Outside of work: “some governmental justification” (TBD)

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Speaking as citizen —not as employee—on a matter of private concern	At work: no protection
	Outside of work: “some governmental justification” (TBD)
Speaking as employee pursuant to official job duties	No protection*



FOX23 SPORTS

LINCOLN RILEY

OU HEAD COACH

**BAYLOR
WEST VIRGINIA**

**0
0**

FOX 23
N E W

**8:00PM
NCAAB**



Public Employee Speech Rules

Capacity/Topic	Rules
Speaking as citizen —not as employee—on a matter of public concern	Balance value of speech vs. effective functioning of government workplace
Speaking as citizen —not as employee—on a matter of private concern	At work: no protection Outside of work: “some governmental justification” (TBD)
Speaking as employee pursuant to official job duties	No protection*
	*Except faculty “academic freedom” protected by tenure and First Amendment (TBD)

“Individual academic freedom is one of the cornerstones to ensure” the “accumulation and exchange knowledge.”

“Faculty members are entitled to full freedom in research and publication” and
“in the classroom in discussing their subject.”

OU Faculty Handbook § 3.2.1

What

Why

Who

How

Free Speech

What
Why
Who
How



One more thing...