

# **FREEDOM OF EXPRESSION AND CONTEMPORARY COLLEGE CAMPUS CULTURE**

An Introduction to Free Speech on a College Campus  
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## **Introduction**

Oklahoma law mandates biannual free speech training for “all college deans, heads of departments, and individuals responsible for establishing university free speech policies or handling free speech complaints.”<sup>3</sup> The Legislature has tasked the Oklahoma Free Speech Committee,<sup>4</sup> an advisory committee to the Oklahoma State Regents for Higher Education,<sup>5</sup> with the job of providing that training. Committee members are honored to do so.

Higher education is a great calling. It is also hard work. Those who are covered by the free speech training mandate face

difficult, sometimes immediate challenges. Sometimes, the event giving rise to a freedom of expression issue involves a matter of extreme tension between differing campus constituencies. The Oklahoma Free Speech Committee is hopeful that its training will provide a useful resource for the leaders of the state system institutions.

### **Disclaimer**

The comments and opinions contained in this article are ours and ours alone. These remarks are not legal advice and should not be considered as such. Moreover, they do not necessarily reflect the views of any group with which we are affiliated, including our law firm, Spencer Fane LLP, or the Oklahoma Free Speech Committee. With that said, let us be clear: in law and in fact, our state has committed to preserving, promoting, and protecting the free exchange of ideas on our college campuses.

### **Academic Freedom, Freedom of Expression, and the Future**

## **of Higher Education**

The role of academic freedom and freedom of speech in higher education in general is a timely issue. Virtually every issue of *The Chronicle of Higher Education* or *Inside Higher Ed* contains a story on this topic. *The New York Times*, *The Wall Street Journal*, and *The Atlantic*, are all writing about it. Congressional hearings investigate it. Network news outlets cover it.

Oklahoma has taken positive steps to support freedom of expression on all of the State System's campuses. Our state is leading the way in showing that expressive freedom is the best – the only – path for American higher education to follow.

Nothing we do as a society is more important to our future than higher education. Yet, as recent events have made clear, college campuses around the country are confronting mounting challenges to freedom of expression.

We have all seen the deplorable status of expressive freedom at many of our nation's elite schools. Many on college campuses appear to be turning their backs on freedom of speech, freedom of thought, freedom of expression. This is wrong. We can – we must – make our campuses welcoming places for the civil, respectful discussion of ideas.

Across America, institutions of higher education face a serious, immediate, and existential threat. No institution is immune. It has shown up at public and private institutions, on the east coast and the west coast, and everywhere in between. It exists in blue states, purple states, and red states. It has appeared in the Ivy League and the Power Five conferences. It has found its way into large research institutions, small liberal arts schools, regional universities, and community colleges.

Sometimes it is subtle and insidious. At other times, it is open and notorious. It is always perfidious. It is anti-education,

anti-freedom, and anti-intellectual.

Institutions of higher education, traditional bastions of free speech, are being targeted for providing people, who might believe differently from some accepted norm, a forum to air their thoughts. Sometimes faculty members or administrators are obstructing free speech. The fact that students often lead the charge to exclude from their campuses ideas they do not like is especially troubling.

Just last year, an egregious incident occurred at the Stanford Law School. A student group invited a Trump-appointed federal appeals court judge to speak. His proposed topic – the relationship between the federal circuit courts of appeals and the United States Supreme Court – is hardly something to provoke an uproar.

But Kyle Duncan, a Judge of the United States Court of Appeals for the Fifth Circuit, was unable to deliver his remarks. Some Stanford Law School students deemed him controversial.

Before he became a judge, he wrote a legal brief in support of the losing side of the *Obergefell* case, the ruling in which the Supreme Court held that laws banning same sex marriage are unconstitutional.<sup>6</sup> Additionally, in one of his judicial rulings, Judge Duncan declined to order a federal district court judge to refer to a transgender party by that person's chosen pronouns.

When Judge Duncan arrived at the law school, the lecture hall was substantially occupied by students who heckled him non-stop, repeatedly and loudly interrupting his attempts to speak. Aware that an administrator was present, Judge Duncan asked her to intervene. She did, but not in a way you might expect. She did not denounce those who were using a "hecklers' veto"<sup>7</sup> to disrupt the speech. Instead, she denounced the judge, the person who had been invited to campus to speak. She claimed his "advocacy" and "opinions" constituted "disenfranchisement" of the hecklers. Shortly afterwards, the judge's attempt to speak came to an end.

It is not just conservatives who face a heckler's veto. At a prominent east coast state university, one of the most liberal members of Congress suffered a similar fate. The school's president sat idly by while the hecklers effectively barred the Congressman from speaking.

Countless examples exist. Concerned that removing student protesters from the planned site of a lecture would present problems, officials at one school forced the invited scholar to speak to an empty room, merely live-streaming the event. After interviewing another "controversial" scholar, a professor at another institution was assaulted by a group of student protestors. She suffered a serious neck injury and a concussion, requiring hospitalization.

Should an institution of higher education disinvite a commencement speaker who is deemed controversial because he is Jewish? Should a state university disinvite the former U.S.

Secretary of State, herself a longtime university professor, because she served in a Republican administration? Should the same institution investigate a perceived left-wing professor because he supposedly “exercised astonishingly poor judgment” in posting an anti-gentrification blurb on his personal blog?

*The Chronicle of Higher Education* recently reported that protesters gathered outside the home of the Colorado Board of Regents Chair, chanting slogans and carrying “Wanted” posters accusing the regent of “funding the genocide of the Palestinian people.”<sup>8</sup> And the June 4 edition of *The Detroit Free Press* reported the law office of University of Michigan Regent Jordan Acker, who is Jewish, was vandalized with red paint handprints on the doors, red and black paint covering the firm’s sign, and painted messages including, “Free Palestine,” “Divest Now,” “F\*\*\* You Acker,” and “UM Kills.”<sup>9</sup>

Having started with Stanford, let us end with Stanford,

where, earlier this month, 13 students and alumni broke into, barricaded themselves inside of, and vandalized – slopping around red paint, destroying property – the president’s office while fellow demonstrators outside battered an officer, further damaged the building’s exterior, and scrawled graffiti with slogans like “De@th to Isr@hell” and “F\*\*\* Amerikkka.”<sup>10</sup>

### **Boorish Behavior Permeates a Cantankerous Culture**

Boorish behavior, to be sure, is not limited to college campuses. Nor are attempts to shut down discussion and debate. This kind of conduct permeates our contemporary culture. It is happening in the political world. It is happening on television, on radio, and on social media.

But misbehavior by politicians, commentators, or others is not our topic. Our topic is to discuss what happens on college campuses, and what leaders of our universities should do about it. For these kinds of actions hit at the very core of what higher

education is all about.

(As an aside, note that the Stanford Law School Dean and the Stanford University President promptly criticized the shutting down of Judge Duncan's talk, came out strongly in favor of free speech, and took affirmative steps to correct the situation and to try to assure that the problem would not repeat itself. And Duke University did not cancel what turned out to be an excellent commencement address last May by Jerry Seinfeld.)

### **Freedom of Expression and the First Amendment**

This is not the way things ought to be. What has made the American system of higher education the envy of the world is its commitment to the free exchange of ideas, to discerning truth from falsehood, to providing the opportunity to civilly and civically confront challenging ideas.

Americans enshrined freedom of expression in the United States Constitution, using short, simple language:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.<sup>11</sup>

The Oklahoma Constitution also contains its own provision protecting free speech rights:

Every person may freely speak, write, or publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.<sup>12</sup>

These provisions bar the government from interfering with expressive freedom.

Thus, freedom of speech, crucial at all colleges, is especially central to the mission of public higher education. Public universities are government institutions, and as our constitutions make clear, special rules apply to the government.

### **Critical Thinking and the Free Exchange of Ideas**

Those who have devoted their lives to higher education

know that the most important thing higher education does is to develop critical thinking. And critical thinking comes about not by avoiding challenges or disagreements, but instead by encouraging free inquiry, free debate, and free thought. This is nothing new. Educators have known this at least since the time of Socrates.

The movement to suppress the free exchange of ideas, however, does the opposite. It does not foster critical thinking. It tries to obliterate it. That is why the anti-free expression on college campuses trend is so corrosive.

### **HB 3543 and State Regents Policy 2.28**

Events such as those previously mentioned could happen anywhere. But Oklahoma has taken steps that make such events much less likely to happen here.

In April 2022, the state Legislature adopted and Governor Stitt signed HB 3543, which created the Oklahoma Free Speech

Committee as an adjunct to the State Regents. Later that year, the State Regents, pursuant to the power vested in them by the Oklahoma Constitution to “prescribe standards of higher education applicable to each institution,”<sup>13</sup> unanimously adopted Policy No. 2.28.<sup>14</sup> This System-wide policy is a slightly revised version of the so-called Chicago Principles.<sup>15</sup>

This article first discusses First Amendment law. It then turns to HB 3543 and the Oklahoma Free Speech Committee. Finally, it concludes with the Chicago Principles as adopted by the State Regents.

### **The Supreme Court and the First Amendment**

The United States Supreme Court regularly decides cases involving the First Amendment. When it does, it often speaks in broad, aspirational tones. The First Amendment, the Court says, enshrines “[o]ur profound national commitment to the free exchange of ideas[.]”<sup>16</sup> “At its core, ‘the First Amendment

reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”<sup>17</sup>

The Supreme Court has stated that “the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”<sup>18</sup> Or, to put it another way, “[t]he government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves.”<sup>19</sup>

Insofar as public institutions of higher education are concerned, free speech issues regularly arise in several situations. One involves university employees. What free speech rights do public employees enjoy vis-à-vis their government employer? A second category involves students, professors, staff, and even the public, when they speak as citizens on matters of public concern. What rights do they have to speak on university property? May

the university regulate their speech? And then there is a third, perhaps in-between class of individuals, typically professors, lecturers, instructors, researchers, and the like, but also involving students, especially in a classroom setting. Does academic freedom have special protection? And if it does, what role does a higher education institution have to play in regulating academic freedom?

### **Employee Speech**

Over the last several decades, courts have expended a lot of ink explicating public employee free speech rights. Perhaps the most important case involving free speech rights of public employees was the 2006 decision in *Garcetti v. Ceballos*.<sup>20</sup> In its ruling, the Court distinguished between speech of a public employee acting as a citizen and speech the employee makes pursuant to official duties.

*Garcetti* stands for the proposition that statements public

employees make pursuant to their official duties do not constitute protected speech. In perhaps the most important First Amendment public employment speech case of the past 50+ years, the Court explored the full panoply of its holdings since its 1968 decision in *Pickering v. Bd. of Educ.*,<sup>21</sup> and determined that an assistant district attorney had not spoken as a citizen on a matter of public concern when he voiced to his supervisor doubts about the veracity of an affidavit used to obtain a search warrant. That is a long way of saying his speech was not protected.

Speech is on a matter of public concern if it can fairly be considered as relating to any matter of political, social, or other concern to the community. Courts conduct a case-by-case inquiry, looking to the content, form, and context of the speech, and scrutinizing whether the speaker's purpose is to bring an issue to the attention of the public, or merely to air personal grievances.

Where the government can show that it would have reached the

challenged decision without considering the employee's speech, the employer prevails.<sup>22</sup>

Generally, “public employees do not surrender all their First Amendment rights by reason of their employment.”<sup>23</sup> Yet, employee speech rights are not absolute.<sup>24</sup> In *Garcetti*, the Court repeatedly referred to protected public employee speech as words the employee uttered *as a citizen*. The important inquiries are: (1) “whether the employee spoke *as a citizen* on a matter of public concern,”<sup>25</sup> and (2) whether the government has “an adequate justification for treating the employee differently from *any other member of the general public*.”<sup>26</sup> “The First Amendment limits the ability of a public employer ... to restrict ... the liberties employees enjoy in their capacities *as private citizens*.”<sup>27</sup>

*Garcetti* explained the goal of “treating public employees like ‘any member *of the general public*.’”<sup>28</sup> The First Amendment protects the “liberties the [public] employee might have enjoyed

*as a private citizen.*”<sup>29</sup> “When an employee speaks *as a citizen* addressing a matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences.”<sup>30</sup> Such employees “retain some possibility of First Amendment protection [when performing] the kind of activity engaged in *by citizens who do not work for the government.*”<sup>31</sup>

By contrast, “[w]hen a public employee speaks pursuant to employment responsibilities, [] there is no relevant analogue to speech *by citizens* who are not government employees.”<sup>32</sup> The fact that the speech occurs within the office, not publicly, does not necessarily strip it of its protected status. “Employees in some cases may receive First Amendment protection for expressions made at work.”<sup>33</sup>

The Supreme Court held that the speech in *Garcetti* was made pursuant to the employee’s official duties. “Restricting

speech that owes its existence to a public employee's professional responsibilities," the Court said, "does not infringe any liberties the employee might have enjoyed *as a private citizen*. It simply reflects the exercise of employer control over what the employer itself has commissioned or created."<sup>34</sup> In other words, "the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities."<sup>35</sup>

Speech regarding the public workplace, but which simply involves the employee's personal interest, may not constitute speech on a matter of public concern. Thus, "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the

employee's behavior.”<sup>36</sup>

Although *Garcetti* held that government employee speech made pursuant to the employee's official responsibilities is unprotected, “speech that simply relates to public employment or concerns information learned in the course of public employment”<sup>37</sup> may be protected. “The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties.”<sup>38</sup>

During its recently concluded term, the Supreme Court again took up the issue of defining when a public employee speaks as a citizen on a matter of public concern. In a case called *Lindke v. Freed*,<sup>39</sup> the employee was a city manager. Unlike in *Garcetti*, the issue in *Lindke* was not whether the government could discipline the employee, but whether the government was liable for the employee's allegedly offending action. On his personal Facebook

page, the city manager shared information he had learned through his government employment. The Court said: “The distinction between private conduct and state action turns on substance, not labels: Private parties can act with the authority of the State, and state officials have private lives and their own constitutional rights.”<sup>40</sup>

### **Academic Freedom in the Supreme Court**

Interestingly, although the case did not involve a college or university, the Court in *Garcetti* took a moment to discuss the importance of academic freedom. The *Garcetti* ruling left open the question whether “expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence.”<sup>41</sup> Nevertheless, the Court said that the concept of academic freedom may lead to a different analysis in “a case involving speech related to scholarship or

teaching.” As the Court has stated elsewhere, a university’s academic mission is “a special concern of the First Amendment.”<sup>42</sup>

Almost 60 years ago, the Supreme Court explicitly stated that “[o]ur Nation is deeply committed to safeguarding *academic freedom*[.]”<sup>43</sup> Moreover, academic freedom “*is of transcendent value to all of us*, and not merely to the teachers concerned.”<sup>44</sup>

This is a fascinating statement. According to the Court, academic freedom is not merely about academicians, though it certainly concerns them. Academic freedom involves everybody. “*That freedom is therefore a special concern of the First Amendment*, which does not tolerate laws that cast a pall of orthodoxy over the classroom.”<sup>45</sup>

### **Beyond Employee Speech – Specific Examples**

So-called fighting words are not protected speech.<sup>46</sup> Fighting words include epithets, directed at the hearer, which are

inherently likely to cause a violent reaction, and which play no role in the expression of ideas. They are not speech on a matter of public concern.<sup>47</sup> Impolite, insulting epithets and vulgarities, unaccompanied by provocative gestures or threats, may not constitute fighting words.<sup>48</sup>

The First Amendment does not create a right to post a true threat on social media.<sup>49</sup> Yet, the fact that speech, including employee speech, is inappropriate or controversial does not mean that it is unprotected.

A governmental entity may bar its employees from using offensive utterances to members of the public or people with whom they work.<sup>50</sup> The First Amendment, however, has been used to uphold rights of those who use offensive words,<sup>51</sup> including loudly saying the word, “b\*\*\*\*.”<sup>52</sup> In one famous case from the early 1970s, the Court overturned a disturbing the peace conviction of an individual who wore a jacket inside the Los

Angeles County Courthouse visibly bearing the words, “F\*\*\* the Draft.”<sup>53</sup>

On March 30, 1981, shortly after President Reagan was shot, a 19-year-old Harris County, Texas, constable’s office clerk told a co-worker, “shoot, if they go for him again, I hope they get him.”<sup>54</sup> Are those words, uttered during the workday by a clerk in a law enforcement office, protected or unprotected? The Supreme Court held that comment to be protected speech. It was on a matter of public concern – assassination of a President – and did not disrupt the office.

Viewpoint discrimination – favoring one viewpoint over another – is unconstitutional. One Supreme Court ruling involving a state university denying funds to a student-run newspaper with an overtly religious editorial perspective states the law well: “[T]he government may not regulate speech based on its substantive content or the message it conveys.”<sup>55</sup> As the

Court noted, “In the realm of private speech or expression, government regulation may not favor one speaker over another. Discrimination against speech because of its message is presumed to be unconstitutional.”<sup>56</sup> The First Amendment, the Court ruled, barred the university from imposing “financial burdens on certain speakers” – the students running the newspaper – “based on the content of their expression.”<sup>57</sup> Viewpoint discrimination – targeting particular views taken by speakers on a subject – is “an egregious form of content discrimination.”<sup>58</sup>

Note that “the government may not regulate speech based on its substantive content or the message it conveys.”<sup>59</sup> This precept is especially true as to religious matters. As the Court said recently, the Free Speech, Free Exercise, and Establishment Clauses “appear in the same sentence of the same Amendment [and a] natural reading of that sentence would seem to suggest the Clauses have ‘complementary’ purposes, not warring ones[.]”<sup>60</sup>

This has been an extremely abbreviated overview of applicable First Amendment law. We have not even covered issues like whether a student activities fund constitutes a public forum<sup>61</sup> or whether a law school dean's private home, at which he hosts members of the graduating class,<sup>62</sup> constitutes a limited public forum.<sup>63</sup> Let's turn to HB 3543 and then Policy Number 2.28. After discussing the Committee's work, we will conclude with comments about State Regents Policy 2.28.

### **The Oklahoma Free Speech Committee**

The Free Speech Committee was created by statute. Like the Oklahoma State Regents for Higher Education, the Committee consists of nine members. The four women and five men who make up the Committee's membership have deep professional connections to higher education in this state, many to the University of Oklahoma. Five are lawyers. Three are current or former legislators. Among the members are one current and one

former State Regent. Importantly, the members are truly bipartisan.

According to state law, it is an advisory committee to the State Regents.<sup>64</sup> The Committee has three task forces, which correspond to its three main jobs:<sup>65</sup>

(1) The Institutional Policies and Procedures Task Force reviews institutional free speech policies and makes recommendations for improvements.

(2) The Complaints Task Force receives and reviews free speech complaints and may advise complainants of their rights. The law, by the way, mandates that each university “publish contact information on how to report free speech concerns to the Oklahoma Free Speech Committee on its website.”<sup>66</sup>

(3) Finally, the Training Task Force reviews institutional training, recommends improvements, and develops its own training, which, as stated earlier, is “required for all college deans,

heads of departments, and individuals responsible for establishing university free speech policies or handling free speech complaints.”<sup>67</sup> Moreover, “[t]he training will be required every two (2) years, or upon hire or promotion to one of the positions described by this section.”<sup>68</sup>

The Committee made great progress in a short period of time. The Complaints Task Force has designed a complaint form. It is available on the State Regents website<sup>69</sup> and should be available on each institution’s website, as well.

The process of reviewing institutional policies is well underway. The Institutional Policies and Procedures Task Force has initiated reviews with several State System institutions. That process, by its very nature, is labor intensive. Reviewing the policies of all 25 institutions of higher education will quite naturally take time. Fortunately, institutional leaders have welcomed the review process and have been open to engaging in

discussions and exploring opportunities for improvement.

On April 11, 2024, the Oklahoma Free Speech Committee hosted its inaugural training program as mandated by HB 3543. Over 300 college and university leaders met at the University of Central Oklahoma for two hours to learn about best free speech practices.<sup>70</sup> After some introductions and opening remarks, University of Oklahoma College of Law Professor Joseph Thai gave the keynote address. Additionally, A&M Regents Associate General Counsel Brandee Hancock and the new Executive Secretary of the University of Oklahoma Regents Mackenzie Wilfong took part in a panel discussion answering various questions on practical free speech issues. A few weeks later, the Committee hosted a follow-up Q&A Zoom conference with Professor Thai.

The Oklahoma Free Speech Committee is advisory in nature. It does not adjudicate. It does not command. Instead, it is a safety

valve. It is designed to complement the work of each of the State's 25 public institutions of higher education in safeguarding expressive freedom on campus.

The members of the Committee have specialized expertise and diverse backgrounds, focusing on one function – promoting free speech on college campuses. The collaborative partnership between the Committee and Oklahoma's public institutions of higher education will foster better policies and better practices. The work of the Oklahoma Free Speech Committee and the emphasis the State Regents have placed on free speech mean that our public colleges and universities will be better equipped to resolve such issues in the proper manner.

### **Policy 2.28: The Chicago Principles, Oklahoma Version**

Regents Policy No. 2.28 contains a handful of slight variations from the Chicago Principles. Those changes do not affect the substance whatsoever. They simply make the Chicago

Principles, originally written for a single, private university, applicable to an entire state system of public higher education.

The Oklahoma State System of Higher Education has made the “fundamental commitment ... that debate ... may not be suppressed because the ideas put forth are thought by some or even most members of a college or university community to be offensive, unwise, immoral, or wrong-headed.”

That means that “each college or university has a solemn responsibility not only to promote a lively and fearless freedom of debate and deliberation, but also to protect that freedom when others attempt to restrict it.” The message is unequivocal: Our institutions of higher education embrace freedom of expression.

The public policy of all state institutions of higher education is explicit: “Without a vibrant commitment to free and open inquiry, an institution of higher education ceases to fulfil its mission.” Free and open inquiry, free speech, free expression, and

academic freedom are central to what we do and who we are.

All State System institutions must embrace free and open inquiry in all matters. According to Policy 2.28, Oklahoma's public colleges and universities "support the right of members of the institution's community to have the broadest possible latitude to speak, to write, to listen, to challenge, and to learn."

"Except insofar as limitations on that freedom are necessary to the functioning of an institution of higher education, the Oklahoma State System of Higher Education fully respects and supports the freedom of all members of a college or university community to discuss any problem that presents itself."

"Commitment to the principle of freedom of expression lies at the very core of the Oklahoma State System of Higher Education."

"Of course, the ideas of different members of a college or university community will often and quite naturally conflict. But it is not the proper role of a college or university to attempt to

shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive.”

Our colleges and universities should greatly value civility. Today’s college students are tomorrow’s leaders, and we all want our future leaders to be respectful of others. They should be humble enough to hear differing ideas, to evaluate them, to distinguish good ideas from bad ones, to defend the good, and to reject the bad. But they will not be able to do so in the real world by simply blathering banalities in the face of challenging thoughts.

As events of the last few months at many campuses around the country have shown, civility and doing what is right remain important. Thus, “[a]ll members of a college or university community share in the responsibility for maintaining a climate of mutual respect.”

“Concerns about civility and mutual respect, however, can

never be used as a justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be to some members of the college or university community.”

To be sure, “[t]he freedom to debate and to discuss the merits of competing ideas does not mean that individuals may say whatever they wish, wherever or whenever they wish.” Thus, “[a] college or university may restrict expression that violates the law, that falsely defames an individual, that constitutes a genuine threat or harassment, that unjustifiably invades substantial privacy or confidentiality interests, or that is otherwise directly incompatible with the functioning of the institution.”

“In addition, the college or university may reasonably regulate the time, place, and manner of expression, to ensure that it does not disrupt the ordinary activities of the institution.” To put it plainly, classes must go on. No one has the right to interrupt a class or to seize the room to speak through a bullhorn.

“But these are narrow exceptions to the general principle of freedom of expression, and it is vitally important that these exceptions never be used in a manner that is inconsistent with the commitment of the Oklahoma State System of Higher Education to a completely free and open discussion of ideas.”

“It is for the individual members of a college or university community, not for the institution, to make those judgments for themselves.” And they may “act on those judgments, not by seeking to suppress speech, but by openly and vigorously contesting ideas they oppose.”

Never forget this. “[F]ostering the ability of members of a college or university community to engage in debate and deliberation in an effective and responsible manner is an essential part of an institution’s educational mission.” Moreover, “[a]s a corollary to the commitment to protect and to promote free expression, members of a college or university community must

also act in conformity with the principle of free expression.”

“Although members of the community are free to criticize and to contest views expressed on campus, and to criticize and to contest speakers who are invited to express their views on campus, they may not obstruct or otherwise interfere with the freedom of others to express views they reject or even loathe.”

“To this end, each college or university has a solemn responsibility not only to promote a lively and fearless freedom of debate and deliberation, but also to protect that freedom when others attempt to restrict it.”

Each institution “shall adopt such policies and procedures as they deem necessary and appropriate to implement this standard.”

That is so because each institution is different, and each might need to implement the free speech policy in a different way. The point is that the policy must be implemented. Freedom of speech, freedom of expression, and academic freedom are that important.

Of course, having good policies is only the first step. Once you have the policies, you must follow through. You must abide by them. And you must continually review them. The best policies are worth little if you fail to follow them.

Those who work in higher education have a difficult job. We balance so many different considerations. We allow and even encourage freedom of expression. But we also must consider the safety of our students, faculty, employees, and others who come to our campuses. We know that individuals have the right to protest a war. But, under Title VI of the Civil Rights Act of 1964,<sup>71</sup> we also must make certain that we protect a student of any religion from discrimination, including harassment,<sup>72</sup> based on the student's actual or perceived shared ancestry or ethnic characteristics.<sup>73</sup> Education and preparation in these areas will make a significant difference. The Oklahoma Free Speech Committee stands ready to help promote and protect expressive

freedom on our college campuses

### **Embrace Expressive Freedom**

Freedom of expression is hard to do. The rubber meets the road not as to views that are popular, but as to those that are not. This is what has made American higher education the best in the world. We do not indoctrinate. We do not merely pass on knowledge. We do not simply certify. Instead, we foster critical thinking and thereby pass on the key to lifelong learning and a better, more civil society.

The State Regents have made a strong commitment to free speech. It is not always easy. But it is the law, it is our higher education policy, and it is the right thing to do.

Thank you for the work you do to support higher education in Oklahoma. And a special thank you for your commitment to expressive freedom.

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matters involving free speech, she serves as the initial Chair of the Training Task Force on the Oklahoma Free Speech Committee, where she led the effort to establish Oklahoma’s first free speech training program for college and university leaders. Prior to establishing her current areas of focus, Pitts primarily worked in business immigration law, aiding individuals and institutions in professional fields, including education, medicine, and energy. With a multinational, quadrilingual background that includes being raised in Ukraine, obtaining undergraduate degrees in Poland and the United States, and earning her Juris Doctor at the University of Oklahoma, she maintains a high capacity for serving clients and the community with markedly diverse backgrounds, experiences, and interests. Pitts is fluent in English, Ukrainian, Polish, and Russian.

<sup>3</sup> 70 O.S. § 3205.14.

<sup>4</sup> 70 O.S. § 3205.11.

<sup>5</sup> Okla. Const. Art. 13A, § 2.

<sup>6</sup> *Obergefell v. Hodges*, 576 U.S. 644 (2015).

<sup>7</sup> According to one federal court of appeals, “A ‘heckler’s veto’ is an impermissible content-based speech restriction where the speaker is silenced due to an anticipated disorderly or violent reaction of the audience.” *Rosenbaum v. City and County of San Francisco*, 484 F.3d 1142, 1158 (9th Cir. 2007). The Supreme Court has recognized that a “heckler’s veto” is a form of censorship. *Reno v. American Civil Liberties Union*, 521 U.S.

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844, 847 (1997). The Court has stated “the Establishment Clause does not include anything like a modified heckler’s veto, in which religious activity can be proscribed based on perceptions or discomfort,” *Kennedy v. Bremerton School District*, 597 U.S. 507, 535 (2022), quoting *Good News Club v. Milford Central School*, 533 U.S. 98, 119 (2001) (cleaned up), and strongly hinted in *Kennedy* that it would rule similarly under the Free Speech Clause.

<sup>8</sup> <https://www.chronicle.com/newsletter/daily-briefing/2024-06-07> (last viewed on June 16, 2024); *see also* <https://www.cbsnews.com/colorado/news/protestors-clash-israel-gaza-palestine-home-university-colorado-regent-chair/> (last viewed on June 16, 2024).

<sup>9</sup> <https://shorturl.at/W2XZf> (last viewed on June 16, 2024).

<sup>10</sup> <https://tinyurl.com/387k57tb> (last viewed on June 16, 2024).

<sup>11</sup> U.S. Const. Am. I.

<sup>12</sup> Okla. Const. Art. 2, § 22.

<sup>13</sup> Okla. Const. Art. 13A, § 2.

<sup>14</sup> <https://okhighered.org/wp-content/uploads/2024/03/freedom-of-expression-policy.pdf> (last viewed on August 1, 2024).

<sup>15</sup> <https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf> (last viewed on August 1, 2024).

<sup>16</sup> *Spacecon Specialty Contrs., LLC v. Bensinger*, 713 F.3d 1028,

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1042 (10th Cir. 2013), quoting *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 685 (1989).

<sup>17</sup> *iMatter Utah v. Njord*, 774 F.3d 1258 (10th Cir. 2014), quoting *Boos v. Barry*, 485 U.S. 312, 318 (1988), citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>18</sup> *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002).

<sup>19</sup> *Planned Parenthood Association of Utah v. Herbert*, 828 F.3d 1245, 1259 (10<sup>th</sup> Cir. 2016), quoting *Knox v. Service Employees International Union, Local 1000*, 567 U.S. 298, 309 (2012).

<sup>20</sup> *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

<sup>21</sup> *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

<sup>22</sup> *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977).

<sup>23</sup> *Garcetti*, 547 U.S. at 417.

<sup>24</sup> *Connick v. Myers*, 461 U.S. 138 (1983).

<sup>25</sup> *Garcetti*, 547 U.S. at 418 (emphasis added)

<sup>26</sup> *Id.* (emphasis added).

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<sup>27</sup> *Id.*, 547 U.S. at 419 (emphasis added).

<sup>28</sup> *Id.*, 547 U.S. at 420-21 (emphasis added), quoting *Pickering*, 391 U.S. at 573.

<sup>29</sup> *Id.*, 547 U.S. at 421-22 (emphasis added).

<sup>30</sup> *Id.*, 547 U.S. at 423 (emphasis added).

<sup>31</sup> *Id.* (emphasis added).

<sup>32</sup> *Id.*, 547 U.S. at 424 (emphasis added).

<sup>33</sup> *Id.*, 547 U.S. at 420.

<sup>34</sup> *Id.*, 547 U.S. at 421-22 (emphasis added).

<sup>35</sup> *Id.*, 547 U.S. at 424.

<sup>36</sup> *Connick*, 461 U.S. at 147.

<sup>37</sup> *Lane v. Franks*, 573 U.S. 228, 239 (2014).

<sup>38</sup> *Id.*, 573 U.S. at 240.

<sup>39</sup> *Lindke v. Freed*, 601 U.S. 187 (2024).

<sup>40</sup> *Id.*, 601 U.S. at 197.

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<sup>41</sup> *Garcetti*, 547 U.S. at 425.

<sup>42</sup> *Fisher v. Univ. of Texas*, 570 U.S. 297, 308 (2013), quoting *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 312 (1978).

<sup>43</sup> *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

<sup>44</sup> *Id.* (emphasis added).

<sup>45</sup> *Id.* (emphases added).

<sup>46</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

<sup>47</sup> *Burns v. Bd. of Cty. Comm'rs of Jackson Cty.*, 330 F.3d 1275 (10th Cir. 2003).

<sup>48</sup> *Klen v. City of Loveland, Colo.*, 661 F.3d 498, 510 (10th Cir. 2011).

<sup>49</sup> *U.S. v. Stevens*, 881 F.3d 1249 (10th Cir. 2018).

<sup>50</sup> *Waters v. Churchill*, 511 U.S. 661 (1994).

<sup>51</sup> *Guffey v. Wyatt*, 18 F.3d 869 (10th Cir. 1994).

<sup>52</sup> *York v. City of Las Cruces*, 523 F.3d 1205 (10th Cir. 2008).

<sup>53</sup> *Cohen v. California*, 403 U.S. 15, 16 (1971).

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<sup>54</sup> *Rankin v. McPherson*, 483 U.S. 378, 381 (1987).

<sup>55</sup> *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 828 (1995).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*, 515 U.S. at 829.

<sup>59</sup> *Id.*.

<sup>60</sup> *Kennedy v. Bremerton School District*, 597 U.S. 507, 533 (2022).

<sup>61</sup> *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000).

<sup>62</sup> See <https://www.nytimes.com/2024/04/12/us/uc-berkeley-palestinian-protest-free-speech.html> and <https://www.theatlantic.com/ideas/archive/2024/04/campus-protest-first-amendment-berkeley/678186/> for two descriptions of an incident that occurred in April 2024 at the home of Erwin Chemerinsky, Dean at the University of California, Berkeley School of Law.

<sup>63</sup> *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (explaining the concept of limited public forum); *Vidal v. Elster*,

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602 U.S. 286 (2024) (suggesting that the federal trademark register is not analogous to a limited public forum).

<sup>64</sup> 70 O.S. § 3205.11.

<sup>65</sup> 70 O.S. §§ 3205.12, 3205.13, and 3205.14.

<sup>66</sup> 70 O.S. § 3205.13.

<sup>67</sup> 70 O.S. § 3205.14.

<sup>68</sup> *Id.*

<sup>69</sup> <https://okhighered.org/state-system/free-speech/free-speech-violation-complaint-form/> (last viewed on August 1, 2024).

<sup>70</sup> <https://tinyurl.com/ymvbdeby> (last viewed on August 11, 2024).

<sup>71</sup> 42 U.S.C. §§ 2000d, *et seq.*

<sup>72</sup> *See, e.g.,* Education Department Finds Michigan, Katherine Knott, *CUNY Failed to Follow Title VI*, Inside Higher Education, June 18, 2024, <https://tinyurl.com/bdeph7kf> (last viewed on June 18, 2024).

<sup>73</sup> *See also* Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681, *et seq.* (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]”).