ALLIANCE DEFENDING
FREEDOM
FOR FAITH FOR JUSTICE

June 20, 2018

URGENT

VIA EMAIL and USPS

John Thrasher, President
Florida State University
211 Westcott Building
Florida State University
Tallahassee, FL 32306-1470
president@fsu.edu

Re: Unconstitutional Speech Codes at Florida State University

Dear Mr. Thrasher:

We are writing to you on behalf of students at Florida State University (FSU) who have contacted us regarding provisions within your Student Conduct Code that unconstitutionally chill protected student speech. Specifically, Student Conduct Code Art. I § E.1(g) is unconstitutionally vague, overbroad, and permits unbridled discretion. As discussed below the policy is so vague and overbroad that it could penalize a student's choice of a dating partner or friends, and does chill students' expression regarding many topics that students should be free to discuss in the market place of ideas. In addition, the University retains speech zone policies that violate the First Amendment and state law.

The purposes of this letter are (1) to identify these problematic policies; (2) to explain their unconstitutionality; and (3) to urge campus leadership, through your office, to rectify the problems.

By way of introduction, Alliance Defending Freedom (ADF) is a nationally recognized non-profit legal organization that advocates for the right of people to live out their faith freely.[1]

[1] Alliance Defending Freedom has achieved successful results for its clients before the United States Supreme Court, including seven victories before the highest court in the last seven years. *See e.g. Masterpiece Cakeshop, v. Colorado Civil Rights Comm'n*, No. 16-111, 2018 WL 2465172 (U.S. June 4, 2018); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) (striking down state burden's on ADF's client's free-exercise rights); *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (per curium) (successful result for religious colleges' free exercise rights); *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015) (unanimously upholding ADF's client's free-speech rights); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014) (striking down federal burden's on ADF's client's free-exercise rights); *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811 (2014) (upholding a legislative prayer policy promulgated by a town represented by ADF); *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011) (upholding a state's tuition tax credit program defended by a faith-based tuition organization represented by ADF).

ADF's Center for Academic Freedom[2] is committed to protecting freedom of speech and association for students and faculty so that everyone can freely participate in the marketplace of ideas without fear of censorship, and has represented students and faculty in over 385 victories for First Amendment matters on public university campuses.[3]

ANALYSIS

As you are well aware, "state colleges and universities are not enclaves immune from the sweep of the First Amendment."[4] In fact, "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools,"[5] because "the core principles of the First Amendment 'acquire a special significance in the university setting, where the free and unfettered interplay of competing views is essential to the institution's educational mission.'"[6] FSU's policies currently fail to protect this free marketplace of ideas. Specifically, the University's "sex discrimination" policy is unconstitutional as applied to students because it is vague, overbroad, and discriminates based on content and viewpoint. Additionally, the University's current Speech Zone and Literature Distribution Zone policies violate free speech principles, and likely violate newly enacted Florida state law.

I. Florida State University maintains two unconstitutional policies.

First, this letter addresses the constitutional-deficiencies in FSU Policy 3.004 "Student Conduct Code" Art. 1 § E.1(g), (hereinafter "Section g" or "Sex Discrimination Policy") which reads as follows:

> The following behaviors, or the aiding, abetting, conspiring, soliciting, or inciting of, or attempt to commit these behaviors, constitute violations of the Student Conduct Code.
>
> . . . .
>
> g. Sex Discrimination: Treating individuals unequally because of their sex, gender, sexual orientation, gender identity, or gender expression. Examples of sex discrimination include:
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> i. Gender Based Hostility: Negative treatment or use of derogatory or offensive language toward a person because of that person's gender, whether or not the language itself is sexual.
>
> ii. Sex and/or Gender Stereotyping: Taking a negative employment/academic action, creating a hostile environment, or denying a benefit because the individual does not conform to sexual stereotypical notions of masculinity and femininity.

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[2] ADF Center for Academic Freedom, www.CenterforAcademicFreedom.org.
[3] ADF Center for Academic Freedom Cases, http://centerforacademicfreedom.org/cases/.
[4] *Healy v. James*, 408 U.S. 169, 180 (1972).
[5] *Id.* (quoting *Shelton v. Tucker*, 364 U.S. 479. 487 (1960)).
[6] *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1016 (N.D. Cal. 2007) (quoting *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 863 (E.D. Mich. 1989)).

Under Student Conduct Code Art. II, sanction for violations of this policy range from "[r]eprimand" to "[e]xpulsion" and "[w]ithholding of diplomas, transcripts and other records."

Second, FSU also retains FSU-2.0131(4) (herein "Speech Zone" and/or "Literature Distribution Policies") which states "The Active distribution or passing/handing out of materials shall be limited to the designated locations on the maps located at www.posting.fsu.edu." It is our understanding (as noted on the website) that this and similar speech zone policies are under review in light of recent legislation passed by the Florida legislature.

II. Section g is unconstitutionally vague and overbroad.

A law is unconstitutionally vague when "men of common intelligence must necessarily guess at its meaning."[7] The First Amendment requires that school policies fairly warn students about what is prohibited. Section g fails this common sense test.

Section g raises a myriad of questions regarding its meaning. What does it mean for a student to treat another individual "unequally because of their sex, gender, sexual orientation, gender identity, or gender expression"? Does that include denying a request for a date because of a person's sex, when you would have accepted a date from a person of a different sex? Does it mean a male has to treat his female friends the same as his male friends in every way and vice versa? Under section g, subsection ii, is it "denying a benefit" "based on stereotypical notions of masculinity" if a female prefers a stereotypically masculine man as a partner? The list could go on, but these policies and the examples, which target both expression and conduct, are beyond vague and ambiguous.

While common sense would counsel the revocation of these policies, the Constitution also dictates it. Courts regularly strike down insufficiently clear policies. For example, the Fourth Circuit ruled that a policy banning "obscene" speech was impermissibly vague because "under the guise of such vague labels [school officials] may unconstitutionally choke off criticism, either of themselves, or of school policies, which they find disrespectful, tasteless, or offensive."[8] Similarly, a federal district court invalidated a University of Michigan policy that prohibited speech that "stigmatizes" or "victimizes" others, finding it impermissibly vague because "both of these terms are general and elude precise definition."[9]

Further, as to the portions of Section g that specifically target speech, what constitutes "offensive language" based on a person's gender? Such language could cover a countless instances of protected expression. For example, an FSU student who has contacted us desires to express his beliefs that the best design for marriage is that it should be between one man and one woman for life, and that sex is binary. Specifically, he wishes to publicly express this message by hosting a table with a sign that states "marriage should be between a man and a woman—change my mind" and engaging with other students to discuss this issue. While the Supreme Court noted that this

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[7] *Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973).
[8] *Baughman v. Freienmuth*, 478 F.2d 1345, 1351 (4th Cir. 1973).
[9] *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 867 (E.D. Mich. 1989).

belief is "based on decent and honorable religious or philosophical premises,"[10] others find the very expression of this belief to be highly offensive and believe it constitutes sex discrimination. Because it appears to be prohibited by Section g, students have refrained from expressing this message—thus Section g's prohibition on treating individuals "unequally" or expressing "offensive language based on gender" chills students' expression.

As noted above, such vague regulations violate constitutional requirements. In addition, the prohibition on "offensive" expression violates the "bedrock principle underlying the First Amendment . . . that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[11] Indeed, even when speech inflicts "great pain," "we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate."[12] When people confront expression they find offensive, the First Amendment provides a simple solution: they may choose to avoid it.[13] But government cannot cleanse public discourse until it is "palatable to the most squeamish among us."[14]

This bedrock principle applies with full force to college and universities for "the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech."[15] The "Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it."[16] Thus, on these grounds alone, Section g fails constitutional scrutiny.

In addition, Section g is overbroad. "A regulation of speech may be struck down on its face if its prohibitions are sufficiently overbroad—that is, if it reaches too much expression that is protected by the Constitution."[17] The Free Speech Clause does not permit universities to restrict expression simply because it might offend others.

In *DeJohn v. Temple University*, the Third Circuit considered the constitutionality of a public university policy under which "all forms of sexual harassment are prohibited, including . . . expressive, visual, or physical conduct of a sexual or gender-motivated nature, when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work, educational performance, or status; or such conduct has the purpose or effect of creating an intimidating, hostile, or offensive environment."[18] The court declared the policy facially

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[10] *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602, 192 L. Ed. 2d 609 (2015).

[11] *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (citing cases upholding this principle); *see also Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992); *Terminiello v. City of Chi.*, 337 U.S. 1, 4 (1949); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206 (3d Cir. 2001) (Alito, J.).

[12] *Snyder v. Phelps*, 562 U.S. 443, 461 (2011).

[13] *See Cohen v. California*, 403 U.S. 15, 21–22 (1971).

[14] *Id.* at 25.

[15] *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 671 (1973).

[16] *Saxe*, 240 F.3d at 215.

[17] *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 258 (3d Cir. 2002).

[18] 537 F.3d 301, 305 (3d Cir. 2008).

overbroad, reasoning that "the policy's use of 'hostile,' 'offensive,' and 'gender-motivated' is, on its face, sufficiently broad and subjective that they 'could conceivably be applied to cover any speech' of a 'gender-motivated' nature 'the content of which offends someone.' This could include 'core' political and religious speech, such as gender politics and sexual morality."[19]

The court in *Saxe v. State College Area School District*, similarly deemed a school's anti-harassment policy overbroad because it effectively amounted to a ban on offensive speech.[20] The First Amendment's "bedrock principle" is "that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable."[21] In or out of school, "the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it."[22]

To be sure, genuine harassment (as defined in Student Conduct Code Art. 1 § E.1(b) iii) may not be subject to the same First Amendment scrutiny—but Section g goes well beyond genuine harassment. In the educational context, the Supreme Court has defined student-on-student harassment as conduct "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."[23] However, the Constitution denies public universities the power to prohibit student expression that falls short of that description, even if "offensive." Severity, pervasiveness, and objectivity are essential components of any harassment policy, and Section g's overbreadth fails to meet these constitutional standards.

III. Section g unconstitutionally restricts free speech based on content and viewpoint.

"It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." [24] Nor may the government engage in viewpoint discrimination, which is "an egregious form of content discrimination."[25] "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional."[26] By specifically targeting "offensive language," Section g is facially content and viewpoint discriminatory in violation of the First Amendment. In addition, it is an unconstitutional prior restraint and grants unbridled discretion to the University to enforce the policy in a viewpoint discriminatory manner.

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[19] *Id.* at 317.
[20] 240 F.3d 200 (3d Cir. 2001).
[21] *Id.* at 209.
[22] *Id.* at 215; *see also College Republicans v. Reed*, 523 F. Supp. 2d 1005, 1010, 1013-21 (N.D. Cal. 2007) (San Francisco State University's requirement that students "be civil to one another" unconstitutional because public university may not "proscribe speech or conduct that is 'merely offensive to good taste'") (quoting *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 670-71 (1973)); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 856 (E.D. Mich. 1989) (striking down as overbroad ban on any student speech that "stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status").
[23] *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999).
[24] *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995).
[25] *Id.* at 829.
[26] *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015).

One way in which a University engages in viewpoint discrimination is by granting unbridled discretion to an administrator to choose when a burden on speech applies without being limited by an exclusive list of content and viewpoint neutral criteria. The Supreme Court held in *Forsyth Cty., Ga. v. Nationalist Movement* that "[t]he First Amendment prohibits the vesting of such unbridled discretion" to discriminate between viewpoints "in a government official."[27] According to the Court, "[a] government regulation that allows arbitrary application is inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view."[28] As demonstrated above, Section g is so vague and ambiguous that it could be interpreted to reach whatever viewpoints individuals or administrators subjectively find to be offensive, without any objective criteria.

Speech codes, such as Section g, operate as unconstitutional prior restraints if they give college officials unfettered discretion to deny speech and lack guidelines and procedures for the officials to follow when approving or denying student expression. Prior restraints allow the government to censor speech before it occurs and are presumptively unconstitutional.[29] Prior restraints "are the most serious and the least tolerable infringement on First Amendment rights."[30] Universities bear a "heavy burden" in justifying the appropriateness of a prior restraint on campus.[31] In order to survive constitutional scrutiny, a regulation or scheme amounting to a prior restraint must not delegate overly broad discretion to a government official.[32]

Applying the principles to policies with similar constitutional deficiencies to Section g, the Fourth Circuit struck down a school policy allowing the censorship of material that, in the opinion of school officials, "contains libelous or obscene language, advocates illegal actions, or is grossly insulting to any group or individual."[33] The court found the policy to be "a rule imposing prior restraint on expression because of 'its message, its ideas, its subject matter, or its content'-a power of restraint denied government by the first amendment in public areas including state college campuses."[34] Similarly, Section g specifically restricts speech based on its message, ideas, subject matter and content. In addition, because the determination of what is "offensive" is "left to the whim of the administrator," without any consideration of "objective factors," Section g grants unbridled discretion and operates as an unconstitutional prior restraint on speech.[35]

In sum, Section g is vague, overbroad, and discriminates based on content and viewpoint. "[I]t is firmly settled that under our Constitution the public expression of ideas may not be

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[27] *Forsyth Cty., Ga. v. Nationalist Movement*, 505 U.S. 123, 133 (1992).
[28] *Id.* at 130. (quotation marks and citation omitted); *see also Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1042 (9th Cir. 2009) (noting that unbridled discretion to impose security fees indicated possible content-based discrimination).
[29] *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963).
[30] *Grossman v. City of Portland*, 33 F.3d 1200, 1204 (9th Cir. 1994) (citation and quotation marks omitted).
[31] *Healy v. James*, 408 U.S. 169, 184 (1972).
[32] *Forsyth Cty, Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992).
[33] *Baughman v. Freienmuth*, 478 F.2d 1345, 1347 (4th Cir. 1973).
[34] *Id.* at 1348.
[35] *Forsyth Cty.*, 505 U.S. at 133.

prohibited merely because the ideas are themselves offensive to some of their hearers."[36] Because the University's policies do just that, they violate the First Amendment rights of FSU students.

IV. The Speech Zone and Literature Distribution Policies violate the First Amendment and state law.

As you are likely aware, FSU's speech zone and literature distribution policies violate recently passed Florida state law.[37] In addition, the restriction of student expression to small zones, violates the First Amendment.

As recently enacted, Fla. Stat. § 1004.097(3)(d) states that "[a] public institution of higher education may not designate any area of campus as a free-speech zone or otherwise create policies restricting expressive activities to a particular outdoor area of campus."[38] In addition, "Outdoor areas of campus are considered traditional public forums."[39] The current policy limiting student expression to specific areas of campus, violates these statutory requirements. Under Florida law, students should be free to engage in expression, including the distribution of literature, on all outdoor areas of campus that are open to the public absent actual material and substantial disruption of the institution's purpose.

Florida law mirrors principles established by the First Amendment. Limiting student speech to a select location on campus is unreasonable and violates the First Amendment rights of every student.[40] The public spaces of campus must be open to free speech for all students. Not only is the "college classroom with its surrounding environs . . . peculiarly the 'marketplace of ideas,'"[41] but the Supreme Court also "has recognized that the campus of a public university, at least for its students, possesses many of the characteristics of a public forum."[42]

Thus, "to the extent the 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. These areas comprise the irreducible public forums on the campus."[43] Therefore, they must be open to free debate and expression for all students at

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[36] *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970); *see also*, *Forsyth Cty.*, 505 U.S. at 134.
[37] "Florida Excellence in Higher Education Act of 2018," *available at* http://laws.flrules.org/2018/4.
[38] Fla. Stat. Ann. § 1004.097(3)(d) (West).
[39] Fla. Stat. Ann. § 1004.097(3)(c).
[40] *See, e.g.*, *Roberts v. Haragan*, 346 F. Supp. 2d 853, 863 (N.D. Tex. 2004).
[41] *Healy*, 408 U.S. at 180.
[42] *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981).
[43] *Roberts*, 346 F. Supp. 2d at 861; *accord Justice for All v. Faulkner*, 410 F.3d 760, 766-69 (5th Cir. 2005); *Smith v. Tarrant Cty. Coll. Dist.*, 694 F. Supp. 2d 610, 625 (N.D. Tex. 2010) ("Typically, at least for the students of a college or university, the school's campus is a designated public forum."); *Univ. & Cmty. Coll. Sys. of Nev. v. Nevadans for Sound Gov't*, 100 P.3d 179, 190 (Nev. 2004) ("Typically, when reviewing restrictions placed on students' speech activities, courts have found university campuses to be designated public forums."); *Univ. of Cincinnati Chapter of Young Ams. for Liberty v. Williams*, 2012 WL 2160969, at *4 (S.D. Ohio June 12, 2012) (noting that the Sixth Circuit found such campus locations to be designated public fora (citing *McGlone v. Bell*, 681 F.3d 718, 732 (6th Cir. 2012); *Hays Cty. Guardian*, 969 F.2d at 116); *Pro-Life Cougars v. Univ. of Hous.*, 259 F. Supp. 2d 575, 681-82 (S.D. Tex. 2003).

your school. The university may "open up more of the residual campus as public forums for its students, but it can not designate less."[44]

In violation of these principles, the Speech Zone Policies unreasonably limit student expression to small areas of campus that do not leave open ample alternatives for expression. As the University considers revising these polices in light of Senate Bill 4, we urge it to keep in mind the constitutional principles at play as well.

DEMAND

Although FSU has enacted unconstitutional policies that threaten the rights of its students, we send this letter in a spirit of cooperation. It is our hope that the University will promptly correct its policies so that litigation is unnecessary.

We understand that a review of the Speech Zone policies is underway, but would urge the University to not neglect a review of its other policies that restrict speech—including those identified in this letter. We would be happy to work with University staff to formulate policies that fully comport with the First Amendment. If the University is interested in revising its policies and avoiding the need for litigation, we respectfully request a response by July 6, 2018, in order that these policies may be revised to comport with the constitution prior to the start of the Fall 2018 semester. If we do not hear from your office by that time, we will begin the process of seeking judicial review of the University's unconstitutional policies.

Thank you in advance for your attention to this important matter.

Very truly yours,

J. Caleb Dalton
Legal Counsel
Center for Academic Freedom
ALLIANCE DEFENDING FREEDOM
CDalton@ADFlegal.org
(202) 393-8690

CC:

Carolyn A. Egan, General Counsel
Florida State University
222 South Copeland Street, Suite 424
Westcott Building
Tallahassee, FL 32306-1400
cegan@fsu.edu

Mark H. Welton, Esq.
The Welton Law Firm
The Madison Building
1020 Ferdon Boulevard South
Crestview, FL 32536
mark@weltonlawfirm.com

[44] *Roberts v. Haragan*, 346 F. Supp. 2d 853, 862 (N.D. Tex. 2004).