



FIRE

Foundation for Individual
Rights in Education



Student Organizations, Student Government, and the Student Press

Will Creeley, Legal Director

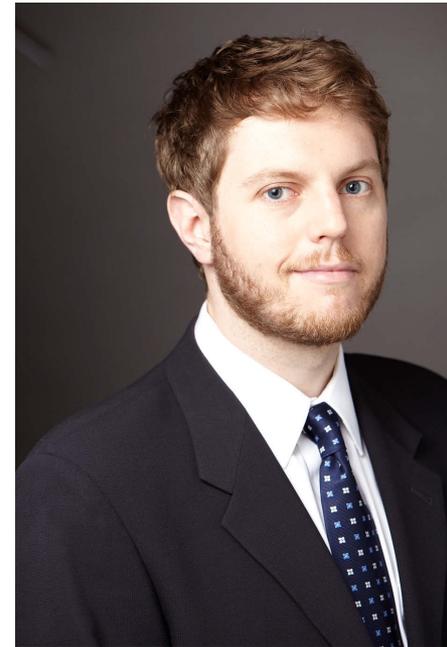
Foundation for Individual Rights in Education

Legal Issues Conference, Mississippi State University

May 4, 2022

It's Good to Be Back in Starkville!

- I'm Will Creeley, FIRE's Legal Director.
- Conference attendee since 2013!
- 2006 graduate of the New York University School of Law; barred in New York and Pennsylvania; member of the First Amendment Lawyers Association; Co-Chair of ABA Administrative Law & Regulatory Practice, Education Subcommittee
- co-author of *First Things First: A Modern Coursebook on Free Speech Fundamentals*; edited second editions of FIRE's *Guide to Free Speech on Campus* and *Guide to Due Process and Campus Justice*



What is FIRE?

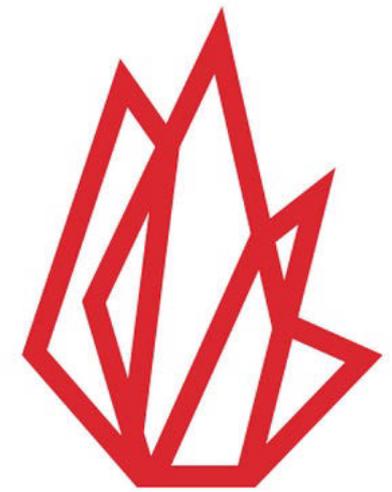


FIRE

Foundation for Individual
Rights in Education

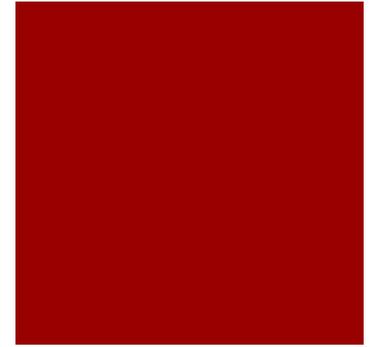
- Non-partisan, non-profit 501 (c) (3) educational foundation founded in 1999
- Dedicated to defending and sustaining core civil liberties at our nation's colleges and universities
- Freedom of speech, freedom of the press, freedom of conscience, religious liberty, legal equality, and due process
- Headquartered in beautiful Philadelphia, PA, with an office in lovely Washington, DC

What We're Talking About: Overview



- **Student Groups!**
- **Student Government!**
- **Student Press!**
- **Quick review of case law for each. . .**
- **. . . and we'll add a quick review of FIRE's recent work.**
- **Takeaways: Basic legal principles for maintaining a vibrant campus environment.**
- **Questions and answers!**

Student Organizations



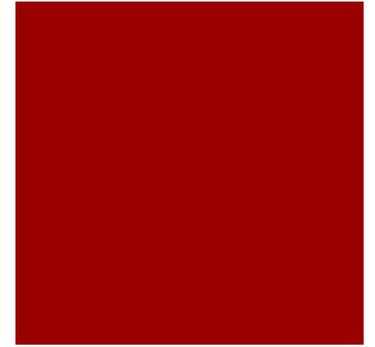
Healy v. James

408 U.S. 169 (1972)

- Central Connecticut State College's president had denied official status to a left-wing student group associated with violence on other campuses
- “[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large.”
- **“Quite to the contrary, ‘the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’”**



Widmar v. Vincent 454 U.S. 263 (1981)

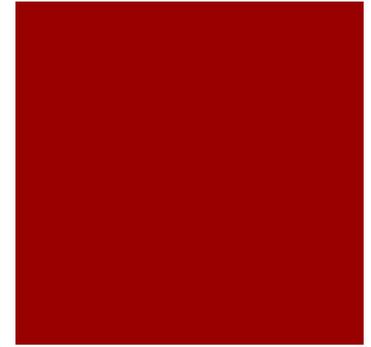


- Cornerstone, evangelical student group, uses university facilities to promote its religious views
- Draws up to 125 people
- School cracks down; says group can no longer use meeting rooms on campus
- Concern for violating Establishment Clause



Widmar v. Vincent

454 U.S. 263 (1981)

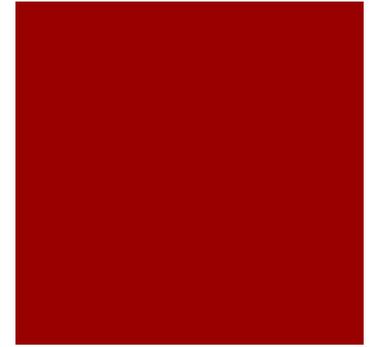


- “Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups. Having done so, the University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms. The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place.”
- “This Court has recognized that the campus of a public university, at least for its students, possesses many of the characteristics of a public forum. . . .”

Rosenberger v. Rector and Visitors of the Univ. of Virginia

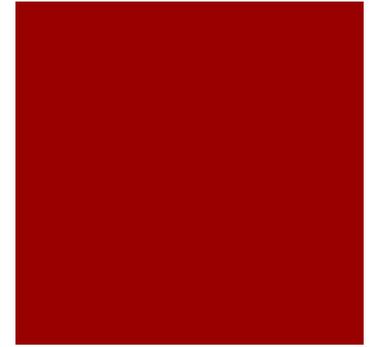
515 U.S. 819 (1995)

- “The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and if so for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression. **That danger is especially real in the University 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.**”



Board of Regents of the University of Wisconsin System v. Southworth

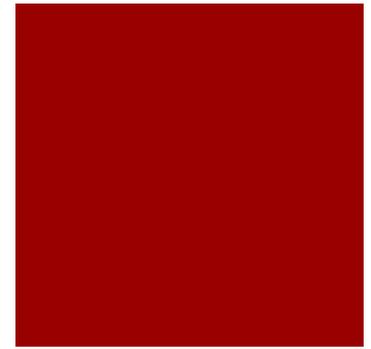
529 U.S. 217 (2000)



- “The First Amendment permits a public university to charge its students an activity fee used to fund a program to facilitate extracurricular student speech if the program is viewpoint neutral. We do not sustain, however, the student referendum mechanism of the University’s program, which appears to permit the exaction of fees in violation of the viewpoint neutrality principle.”
- “When a university requires its students to pay fees to support the extracurricular speech of other students, all in the interest of open discussion, it may not prefer some viewpoints to others.”
- “To the extent the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires. The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views.”

Gerlich v. Leath

861 F.3d 697 (8th Cir. 2017)



Gerlich v. Leath

861 F.3d 697 (8th Cir. 2017)



- Iowa State University censored NORML-ISU t-shirts based on marijuana-related messaging and imagery, removed NORML ISU's advisor, and changed ISU's trademark policy in order to restrict NORML ISU's speech.
- Students sue in July 2014.
- Federal district court issues permanent injunction against application of policy to NORML-ISU, denies qualified immunity to administrators.
- Eighth Circuit affirms.

Gerlich v. Leath

861 F.3d 697 (8th Cir. 2017)



- **Not government speech:**

“The university has recognized approximately 800 student organizations and has approved trademark designs for groups such as the ISU College Republicans, Iowa State Democrats, Navy Marine Corps Drill Team, and Iowa State Fencing Club. Because ISU's trademark licensing program facilitated the speech of private persons and was capable of accommodating a large number of speakers, ISU's administration of that program was not government speech under clearly established law.”

- **Viewpoint discrimination:**

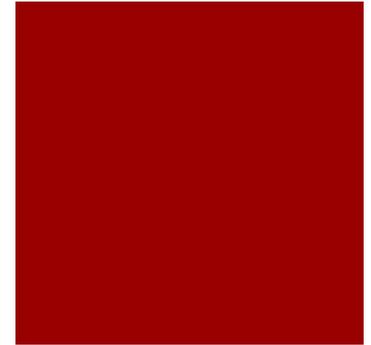
“It has long been recognized that if a university creates a limited public forum, it may not engage in viewpoint discrimination within that forum. . . . Given this history, plaintiffs' right not to be subjected to viewpoint discrimination while speaking in a university's limited public forum was thus clearly established at the times in question.”

- **Cost to ISU? Nearly \$1,000,000 in fees and damages.**

Awad v. Fordham University



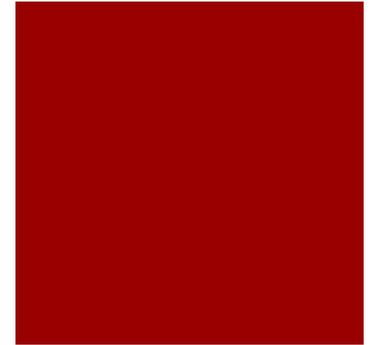
Awad v. Fordham University



- Fordham refuses to grant Students for Justice in Palestine official recognition in December 2016, citing support of BDS and claiming it would be “polarizing.” (Student government had approved.)
- Students sue in April 2017 under New York’s Article 78, which requires organizations to follow their own by-laws and rules
- **Court finds for students in August 2019:**

“The issue of whether a club’s political message may be polarizing is not enumerated or identified as a relevant factor in any governing or operating rules, regulations, or guidelines issued by Fordham, and appears to have been arbitrarily considered by Dean Eldredge after input from others who are critical of SJP’s political beliefs. **Importantly, consideration of whether a group’s message may be polarizing is contrary to the notion that universities should be centers of discussion of contested issues.**”

Awad v. Fordham University



- Trial court overturned on appeal by Fordham four years later, in December 2020.

- Concludes that Fordham followed its policies and that case is now moot:

“Given that the original petitioners have all graduated, their claims have become moot, inasmuch the relief they sought is no longer available to them ([citations omitted]). Given that students currently enrolled in the respondent university’s undergraduate program may file an application for recognition of a similar club at any time, this is not a matter likely to evade judicial review. ”

- New York’s highest court declines to hear the case, ending the saga.

Viewpoint-based Discrimination

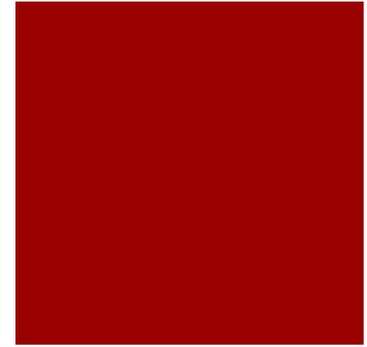
- **Naomi Mathew, Truman State University (Mo.)**
- Denies recognition to “Animal Alliance” citing “the emotional risk of this subject matter” for both club members and “potentially hostile students,” and discussed the “reputational risk” of the group’s proposed association with PETA
- Open records request discovered routine rejections: Philosophy and Religion Club, a “Consent is so Frat” group, a “Love Your Melon” group . . .
- After FIRE letter pointing out viewpoint discrimination, Truman State reverses and reforms policies.



Recent FIRE advocacy

■ TPUSA, Emerson College

- Group distributed stickers reading “China Kinda Sus” on campus — stickers that the administration, after initially suspending the group, later conceded were intended to criticize China’s government, not its people.
- Either criticism would still be protected under Emerson’s firm promises to protect freedom of expression, which make no exception for speech others view as hateful.
- Administration publicly denounced TPUSA in September for “anti-Asian bigotry and hate,” nor did it stop the administration from then placing a “Formal Warning” on the group’s record, asserting that it had to do so because of the “pervasive environment of anti-Asian discrimination” — by other people.



FIRE
@TheFIREorg



A student group at [@EmersonCollege](#) was suspended and is under investigation for handing out these stickers critical of the Chinese government.

Emerson promises free speech, but those promises are now kinda "SUS" — “suspicious.”

thefire.org/emerson-colleg... #FreeSpeech



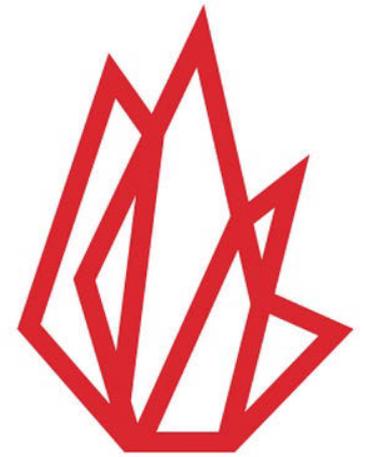
6:37 PM · Oct 5, 2021



1.1K Reply Copy link

[Read 103 replies](#)

Recent FIRE advocacy



Fresno State’s investigation of College Republicans for tweet critical of military raises First Amendment concerns

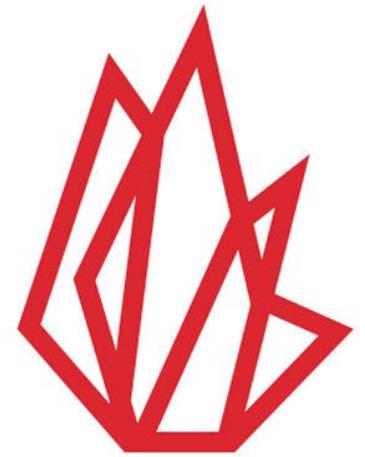
by [Graham Piro](#)

August 12, 2021

UPDATE (August 16, 2021): The California State University system confirmed to FIRE on Friday that Fresno State “has no plans” to investigate or punish the Fresno State College Republicans for their controversial tweets. In a [letter](#), legal counsel for the CSU system wrote: “Fresno State fully recognizes the free speech rights of our student organizations and has no intent to compromise those rights.”

Speech criticizing the military has a long and controversial history in American discourse. The Fresno State College Republicans are beginning to discover the [firestorm that is unleashed](#) when one takes aim at members of the United States military. In this case, that firestorm is protected counterspeech. In contrast to the criticism on social media and beyond, however, the administration of Fresno State has gone too far in announcing a “[review](#)” of the group’s protected speech. FIRE [wrote](#) to the university this afternoon reminding Fresno State that it may not punish students for protected speech — even speech many find offensive.

Recent FIRE advocacy



NEWSDESK

SHARE



Stanford Law School student Nicholas Wallace (Photo courtesy of Nicholas Wallace)

VICTORY: After FIRE sounds the alarm, Stanford ends investigation into law student who satirized Federalist Society

Christian Legal Society v. Martinez

561 U.S. 661 (2010)

“A person who advocates or unrepentantly engages in sexual conduct outside of marriage between a man and a woman is not considered to be living consistently with the Statement of Faith and, therefore, is not eligible for leadership or voting membership. A person’s mere experience of same-sex or opposite-sex sexual attraction does not determine his or her eligibility for leadership or voting membership. CLS individually addresses each situation that arises in a sensitive Biblical fashion.”

CLS Statement of Faith



CHRISTIAN

LEGAL SOCIETY
Est. 1961 • Seeking Justice with the Love of God

Christian Legal Society v. Martinez

561 U.S. 661 (2010)

“Even if a regulation has a differential impact on groups wishing to enforce exclusionary membership policies, ‘[w]here the [State] does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.’

[....]

Finding Hastings’ open-access condition on RSO status reasonable and viewpoint neutral, we reject CLS’ free-speech and expressive-association claims.”

-- Justice Ginsburg



Christian Legal Society v. Martinez

561 U.S. 661 (2010)

“The Court ignores strong evidence that the accept-all-comers policy is not viewpoint neutral because it was announced as a pretext to justify viewpoint discrimination. Brushing aside inconvenient precedent, the Court arms public educational institutions with a handy weapon for suppressing the speech of unpopular groups—groups to which, as Hastings candidly puts it, these institutions ‘do not wish to ... lend their name[s].’”

-- Justice Alito, dissenting.



Christian Legal Society v. Martinez

561 U.S. 661 (2010)

“No recognized religious or political student organization is hindered or discriminated against in the ordering of its internal affairs, selection of doctrines and principles, and resolving of organizational disputes in the furtherance of its mission, or in its determination that only persons committed to its mission should conduct these activities.”

Kentucky Senate Bill 17, signed into law 3-16-17.



BUT:

BlinC v. University of Iowa

991 F.3d 969 (8th Cir. 2021)

- **University of Iowa policy:** “The organization will guarantee that equal opportunity and equal access to membership, programming, facilities, and benefits shall be open to all persons.”
- **Also:** “The University acknowledges the interests of students to organize and associate with like-minded students, therefore any individual who subscribes to the goals and beliefs of a student organization may participate in and become a member of the organization.”
- **BlinC statement of faith:** “As I hold an Executive position with Business Leaders in Christ, I commit to live a life in which I turn from my sin and actively choose the biblical principles of Godly sanctification and righteousness.”

BLinC v. University of Iowa

991 F.3d 969 (8th Cir. 2021)

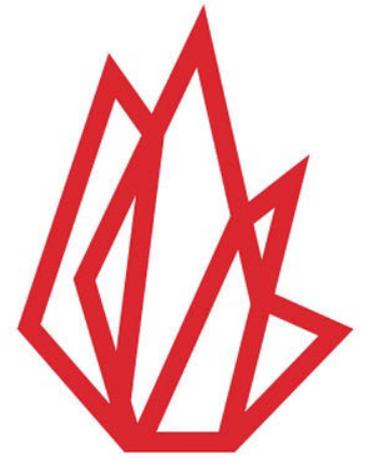
- Gay student applies for leadership position; rejected by Board after concern about student “not sharing BLinC's views on the Bible's sexual-conduct teachings.” Allowed to be member but not leader.
- Student files complaint. After wrangling over group’s Statement of Faith, RSO status revoked.
- Other student groups limited leadership or membership:
 - Love Works requires leaders to sign a "gay-affirming statement of Christian faith."
 - House of Lorde holds membership "interview[s]" to maintain "a space for Black Queer individuals and/or the support thereof."
 - The Chinese Students and Scholars Association limits membership to "enrolled Chinese Students and Scholars."
 - The Iowa National Lawyers Guild requires all members to agree with the group's goal of bringing about "basic change in the structure of our political and economic system."
- BLinC files suit, alleging First Amendment violations.

BLinC v. University of Iowa

991 F.3d 969 (8th Cir. 2021)

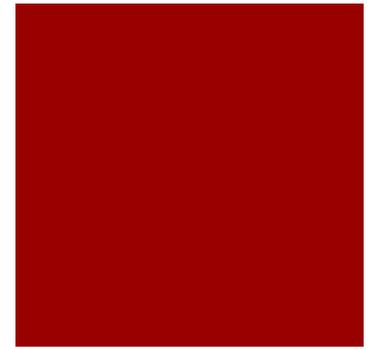
- First, "it was clearly established at the time of these events" that the University's recognition of RSOs constituted a limited public forum. "As the Supreme Court has repeatedly pointed out, a university `establish[es] limited public forums by opening property limited to use by certain groups or dedicated solely to the discussion of certain subjects.'"
- Second, "it was clearly established that a university may not discriminate on the basis of viewpoint in a limited public forum." *Martinez, Rosenberger, Widmar, Healy, and Gerlich* all place "beyond debate," that BLinC had a "right not to be subjected to viewpoint discrimination while speaking in [the] [U]niversity's limited public forum."
- As the district court recognized, "the individual [d]efendants *should have been aware* that their actions implicated BLinC's First Amendment rights; and, indeed, the record shows that they were."
- **End result? University of Iowa owes \$1,370,000 in attorneys' fees.**

Student Organizations: Key Points



- Once your institution has established a registered student organization system, it **cannot** discriminate on the basis of viewpoint.
- Discrimination may take the form of denial of recognition, funding cuts, group punishments, investigations...
- Student organizations cannot be denied simply because they are “political” or “religious,” or because another group has similar beliefs.
- Be careful: The law is well-established!

Student Government



Gay & Lesbian Students Ass'n v. Gohn

850 F.2d 361 (8th Cir. 1988)

“[A] public body that chooses to fund speech or expression must do so even-handedly, without discriminating among recipients on the basis of their ideology. The University need not supply funds to student organizations; **but once having decided to do so, it is bound by the First Amendment to act without regard to the content of the ideas being expressed.** This will mean, to use Holmes's phrase, that the taxpayers will occasionally be obligated to **support not only the thought of which they approve, but also the thought that they hate.** That is one of the fundamental premises of American law.”

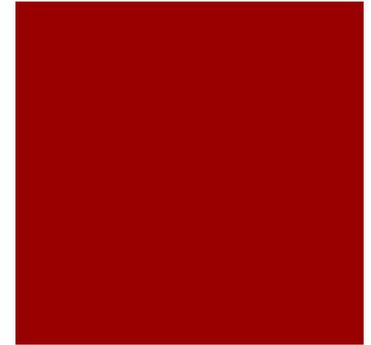


UNIVERSITY OF
ARKANSAS

The Koala v. Khosla

931 F.3d 887 (9th Cir. 2019)

- “Defendants argue that the Media Act amounts to a forum closure of the media funds category, and that they were free to close this limited forum. We agree that a government is not obligated to indefinitely maintain a limited public form, see [Sea-MAC, 781 F.3d at 496](#), but we know of no case in which the government has been allowed to define a forum one way at its inception, then redefine it in response to speech it deems offensive and close only the portion of the forum where that speech occurs. **If the government could define the contours of a limited public forum one way at its inception, then redefine its scope in response to speech it disfavors, the government would be free to zero-in and selectively silence any voice or perspective.**”



Recent FIRE advocacy: Rutgers University - Camden



- **May 2021:** The SBA of Rutgers' Camden campus added a section to its constitution entitled “Student Organizations Fostering Diversity and Inclusion” on Nov. 20, mandating that any group that wishes to receive more than \$250 in university funding must “plan at least one (1) event that addresses their chosen topics through the lens of Critical Race Theory, diversity and inclusion, or cultural competency.”
- This puts student clubs in a bind: Should they request the funding they need, even though it would require planning an event — such as hosting a speaker, outing, or mixer — **that may be at odds** with or unrelated to the group’s own views? The fall prior, 19 of 22 student groups requested more than \$250.
- **Requirement rescinded after FIRE letter.**

Recent FIRE advocacy: University of Northern Iowa



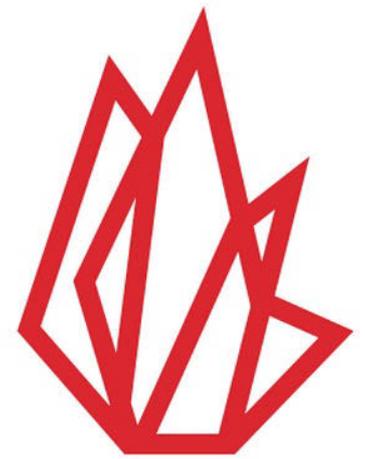
- University of Northern Iowa's Student Government rejects recognition of Students for Life.
- Argued that organization was “hateful,” “infring[ed] on human rights,” and would open the door to “outside agitation” on campus because of its affiliation with the national organization.
- Student Supreme Court denies appeal.
- University president reverses decision, noting parallels to *Healy*.
- “Universities exist to give students and all members of the university community an opportunity to wrestle with a vast diversity of ideas and opinions, to challenge their perception of their own identity and the beliefs and opinions of others, and to grow in their understanding of natural and social systems.”

Edward Si, Eastern Virginia Medical School

- Med student sought to start a pro-single payer health care student organization, Students for a National Health Program.
- EVMS Student Government Association told him they denied SNaHP's application for recognition because they did not want to approve clubs "based on opinions."
- School recognizes other belief-based groups, including Christian group and pro-choice group, but refused to reverse denial.
- After suit filed, EVMS recognizes club. Case settled soon after with policy revisions to student gov't procedures.



Student Government: Key Points



- Student governments may be ostensibly independent, but ...
- ... universities must step in when student governments make indefensible, viewpoint-discriminatory decisions.
- Universities have delegated student governments substantial authority – over forum participation, over spending of mandatory student activity fees – and that authority comes with legal obligations.
- Opportunity to educate future public servants about importance of civil liberties.
- Again: Viewpoint discrimination is most central concern.

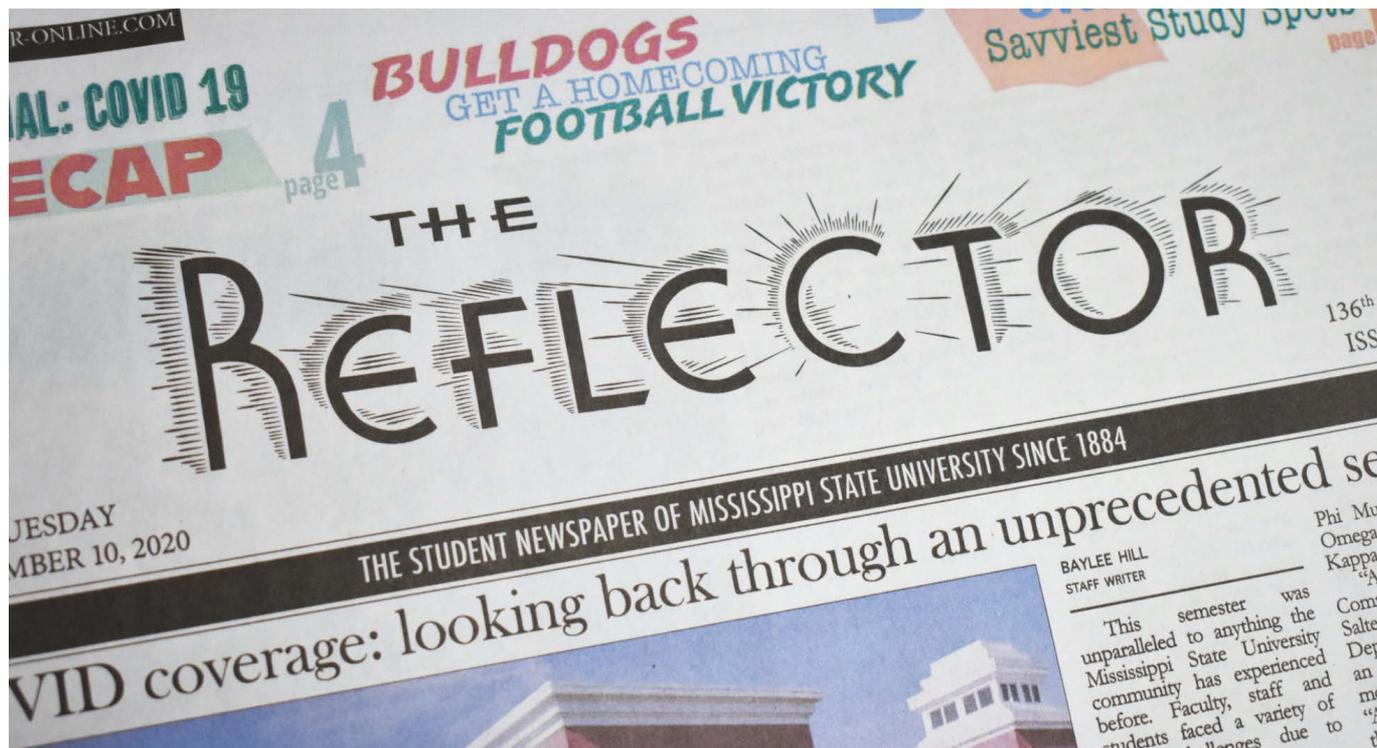
Student Press

THE DIALECTIC REFLECTOR.

Vol. 1.

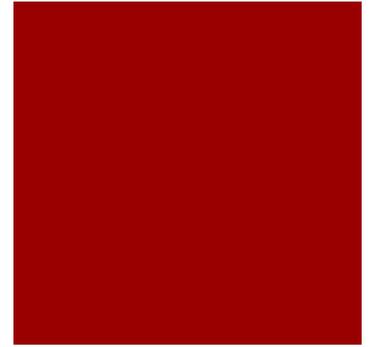
AGRICULTURAL COLLEGE, MISS., DECEMBER, 1884.

No. 1.



Hazelwood School District v. Kuhlmeier

484 U.S. 260 (1988)



*Robert Eugene Reynolds, principal of
Hazelwood East High School.*

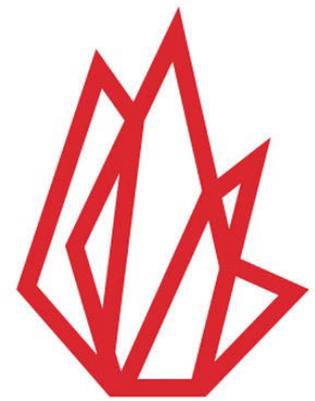
Hazelwood School District v. Kuhlmeier

484 U.S. 260 (1988)

“[E]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities, **so long as their actions are reasonably related to legitimate pedagogical concerns.**”

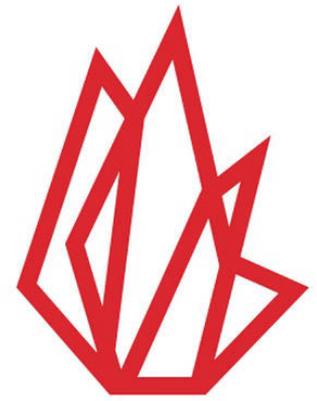


“New Voices” Legislation



- Ensures that school-sponsored media remain free from administrative control or prior review
- May apply to public high school and/or college students
- Response to 1998 Supreme Court decision in *Hazelwood v. Kuhlmeier*, allowing censorship for “legitimate pedagogical concerns”
- Passed in CA, NV, OR, CO, KS, ND, IA, AR, IL, PA, MD, VT, MA, RI, and more
- Project of the Student Press Law Center

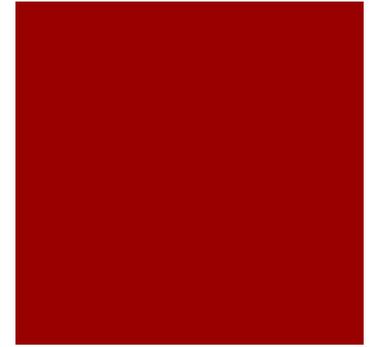
FIRE launches Student Press Freedom Initiative



- A 24/7 legal hotline: 717-734-SPFI.
- Can I Publish This? — an online guide to media law.
- Virtual training events for student journalists.
- Free in-person workshops.
- Student media advocacy and litigation, in coordination with FIRE's Individual Rights Defense Program and Litigation Project.

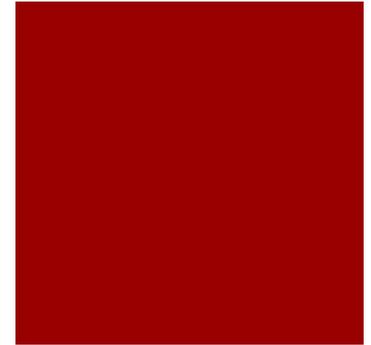


Recent FIRE Advocacy: Central Washington University



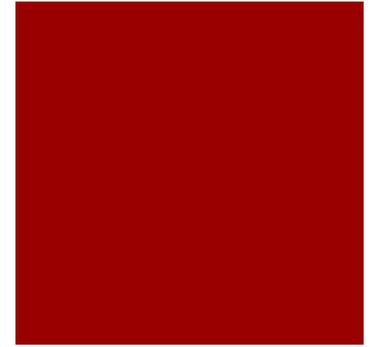
- *The Observer*, CWU's student paper, publishes piece on school's budgetary woes and projected layoffs of non-tenure track faculty
- Front page story published on CWU Preview Day
- Dean of CWU College of Business removes (read: recycles) stacks of papers
- Removing newspapers – even free student newspapers – is theft
- University apologizes after FIRE letter

Recent FIRE Advocacy: Montclair State University



- Montclair State maintained policy prohibiting resident assistants from making statements to media that "reflect negatively" on university
- FIRE wrote letter reminding school that student employees have right to speak to media as private citizens on matters of public concern
- Montclair State quickly reverses, changes policy after letter from FIRE
- Similar cases recently at University of Wisconsin Oshkosh, University of Northern Iowa
- FIRE regularly sees similar restrictions on faculty, too

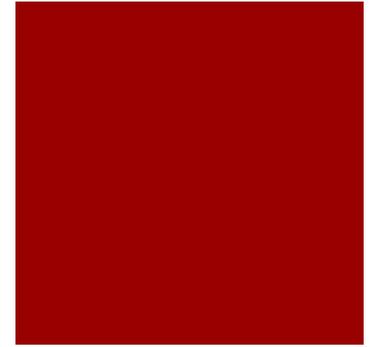
Recent FIRE Advocacy: Tarleton State University



- Professor accused of booking hotel room for himself and female student during travel; inviting another student to his homes for drinks and a movie when his wife was away.
- University pays professor to leave employment.
- Student newspaper reports on matter three years later; professor threatens suit.
- School forces paper to choose: Take down article or lose funding.
- After FIRE / SPLC letter, school takes over newspaper.
- FIRE files open records suit in February after school refuses to produce.

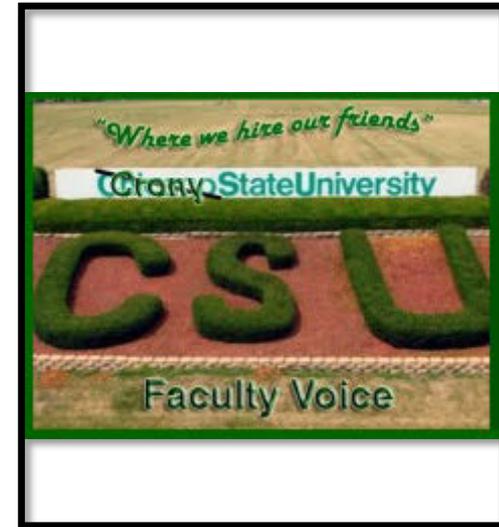
Recent FIRE Litigation

- **Jared Nally, Haskell Indian Nations University (Kan.)**
- Editor-in-chief of award-winning student newspaper threatened with discipline by former prez for basic reporting.
- Recognition withheld, funding frozen for articles that criticized administration.
- President fired after suit filed.
- Lawsuit settled February 8.

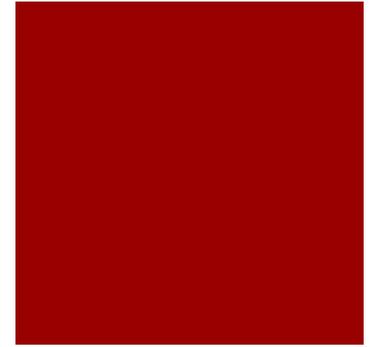


Beverly v. Chicago State University

- CSU administration determined to silence faculty members Phillip Beverly and Robert Bionaz for their blog, the *CSU Faculty Voice*, which provides critical commentary on mismanagement at the university.
- After demand to shut down blog for trademark violation failed, the university adopted a broad and poorly defined “Cyberbullying Policy” as a tool of censorship.
- Bionaz charged under this policy for telling the university spokesman to “shut his yap” in a face-to-face conversation.
- *Beverly v. Watson* settles for \$650,000, policy changes.



Threat to Student Press: University of Alaska – Fairbanks



- Student newspaper *The Sun Star* subjected to multiple investigations for publishing two articles
- Charges of “sexual harassment” and creating a “hostile environment”
- Both charges filed by offended professor



UAF Sun Star Picture

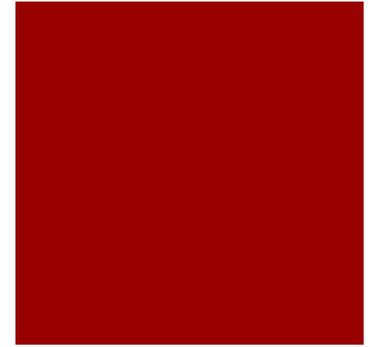


Still from
"Patch
Adams," PG-
13, 1998.

Harassment

- What's the legal definition for peer-on-peer harassment in the educational context?
- Discriminatory conduct that is "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."

Davis v. Monroe County Board of Education, 526 U.S. 629, 633 (1999).



Investigating *The Sun Star*

- Multiple rounds of review.
- Outside attorney retained.
- Months-long investigation: April 2013 to February 2014.
- After FIRE letter, investigations finally concluded — paper exonerated.
- Afterward, Chavis says it's important to defend student First Amendment rights to hold the university accountable: **“If I had to do it again, I definitely would.”**



**Former *Sun Star* Editor-in-Chief
Lakeidra Chavis**

Impact of Student Rights Defense

Lakeidra Chavis Joins The Marshall Project

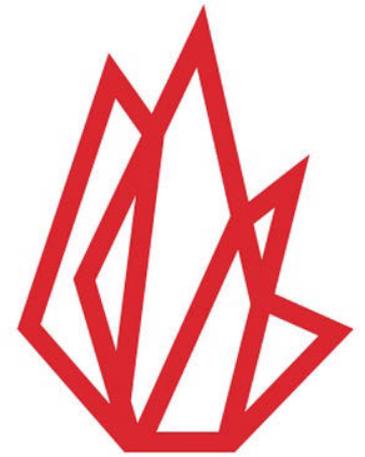
Chavis will expand reporting on juvenile justice and other criminal justice issues.

Lakeidra Chavis is becoming a staff writer for The Marshall Project, the Pulitzer Prize-winning nonprofit that covers the U.S. criminal justice system. She will report on juvenile justice and other criminal justice issues. Chavis joins The Marshall Project from The Trace, where her original reporting on rising suicides among Black people in Chicago made her a finalist for a 2021 Livingston Award. She has previously worked as a reporter for ProPublica Illinois and WBEZ in Chicago.

“Lakeidra is an accomplished and talented reporter with an impressive record producing thoughtful, impactful journalism,” said Susan Chira, editor-in-chief of The Marshall Project. “As we expand our coverage of juvenile justice and the experiences of young people inside the criminal justice system, Lakeidra brings depth and eloquent reporting on the impact of crime on communities.”



Student Press: Key Points



- Hands off the student press!
- Treating the student press as independent is to your benefit!
- Don't muzzle reporters...
- ... and don't muzzle your student-employees or faculty.
- Recognize that a dynamic student press is an institutional asset. Make the paper a part of your campus and lead by example.

Emerging Issues!

■ **Student Groups:**

- Ideological battles;
- Boycott questions;
- National nastiness in campus setting.

■ **Student Government:**

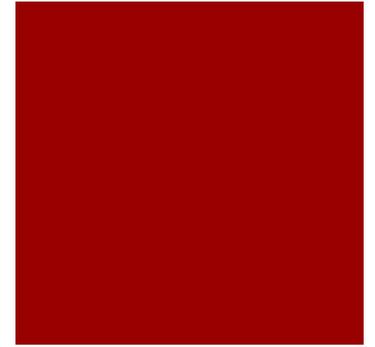
- Internal fights amongst elected students;
- Requests for punishment;
- Again: Boycott questions!

■ **Student Press:**

- Open records acts;
- Administrative takeovers;
- Libel liability post-Oberlin ruling.



Thanks for attending!

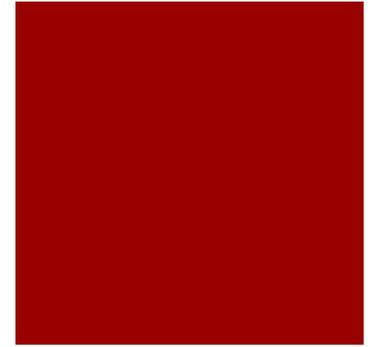


Will Creeley
215-717-3473
will@thefire.org
@WillatFIRE



FIRE
Foundation for Individual
Rights in Education

Thanks for attending!



Will Creeley
215-717-3473
will@thefire.org
@WillatFIRE



FIRE
Foundation for Individual
Rights in Education