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TESTIMONY OF THE WISCONSIN INSTITUTE FOR LAW & LIBERTY REGARDING ASSEMBLY BILL 444 AS AMENDED BY ASSEMBLY SUBSTITUTE AMENDMENT 1

Chairman Murphy and Committee Members:

Thank you for the opportunity to provide input to you on this important piece of legislation. We are Rick Esenberg and Lucas Vebber and we are commenting today on behalf of the Wisconsin Institute for Law & Liberty ("WILL"). WILL is a non-partisan law and policy center based out of Milwaukee. WILL's mission is to advance the public interest in the rule of law, individual liberty, constitutional government, and a robust civil society through education, litigation, and participation in public discourse.

I. Introduction

Protecting free expression on campus is an ideal that all parties ought to be able to get behind. Free expression is vital everywhere, but especially important on our state's campuses. Students should be free to discuss ideas, hear viewpoints, and explore various perspectives on issues. This legislation is a step in the right direction to protect those noble goals. While the right to protest must be protected, physically obstructing speakers is conduct and not speech. Narrowly focused measures to prevent this are salutary and we commend the authors and coauthors of this legislation for bringing this important issue to the forefront.

In these comments we make a few suggestions on ways to improve this legislation. These comments are specifically aimed at Assembly Substitute Amendment 1 to Assembly Bill 444. We are happy to meet with anyone or answer further questions on any of these suggestions as may be appropriate.

II. Applying the *Davis* Standard

This legislation protects students from peer-on-peer harassment and discriminatory harassment, while still attempting to protect valid conduct that is protected under the First Amendment. This, we assume, is to comply with the U.S. Supreme Court's standards set forth in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). That case, which was brought under Title IX, dealt with the question of when a school district may be held liable for student-on-student harassment. In *Davis*, the Court found that sanctionable behavior had to be "so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." *Davis*, 526 U.S. at 651.

The U.S. Department of Education's Office of Civil Rights issued a "Dear Colleague" letter which provided additional guidance to educational institutions that any regulations "are not intended to restrict the exercise of any expressive activities protected under the U.S. Constitution" and further that OCR's regulations "do not require or prescribe speech, conduct or harassment codes that impair the exercise of rights protected under the First Amendment." It made clear that harassment must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive.

While the legislation does appear to incorporate much of this language, it could be clearer. For example, this standard could be better incorporated into the "Discipline" section of the legislation, to make it abundantly clear that the policies that must be adopted should, in no way, impair the exercise of rights protected under the First Amendment.

While this may seem laborious, a critical threat to free expression on campus – more serious even than occasional shout downs and physical obstruction of speech – are vague proscriptions of certain forms of speech. For example, UW-Oshkosh says that all members of the University have a responsibility to promote an environment that is free of insulting and demeaning comments and epithets based on race, gender, religion, sexual orientation, age, disability, military status, socio-economic status or political views. While we may all endorse the notion that people ought not to make such comments, they are, without more, protected by the First Amendment. And because we almost certainly will not agree on what remarks constitute "insulting or demeaning" comments based on the listed statuses, broad injunctions like this are likely to deter protected speech and provide administrators with excessive discretion to target unpopular speech.

The Foundation for Individual Rights in Education has rated university policies using a "traffic light" approach in which public university campuses are rated "red" (meaning the school "has at least one policy that clearly and substantially rejects freedom of speech"), yellow (meaning the school "is one whose policies restrict restrict a more limited amount of protected expression or, by virtue of their vague wording, could too easily be used to restrict protected expression") or green (meaning the school's policies "do not seriously imperil speech"). FIRE rated certain (but not all UW campuses) and found that 23% had a "red" policy. A forthcoming analysis by our organization finds that 40% of the remaining campuses have at least one red policy as do 75% of the state's technical colleges.

The need to be clear and emphatic about the protection of speech can be further served by this bill.

III. Mandatory Minimums

The bill establishes certain mandatory minimum penalties for individuals who have been found responsible for interfering with the expressive rights of others. Specifically, an individual found twice responsible for such an act faces a minimum suspension of one semester from school, while a third offense results in explosion. Statutory mandatory minimum penalties are ill advised, and especially ill-fitting here.

While we appreciate the motivation behind them, mandatory minimum penalties in a free expression context run the risk of having penalties that outweigh the offense. Not all offenses are to the same degree, and mandatory minimums fail to take that into account. Further, such mandatory minimums will have a chilling effect on the free expression of others. We hope these mandatory minimum sentence provisions can be removed.

IV. Definition of "Unlawful Disruption"

Additionally, the proposed substitute amendment continues to allow institutions to prohibit "[a]n action that unlawfully disrupts the function of an institution." The phrase "unlawfully disrupts" is not defined, and it is unclear as to what the purpose of that line is. The substitute amendment goes to great lengths to define "materially and substantially disrupts" but then does not use it here.

Here again the use of vague terms is likely to have a chilling effect on free expression. This section should be clarified and these terms better defined.

V. Rulemaking

The legislation requires both the Board of Regents of the University of Wisconsin System and the Technical College System Board to adopt a policy on free expression, but section four of the substitute amendment exempts those policies from the rule-promulgation process under Chapter 227. The statutory rulemaking process is designed to ensure transparency and accountability. We strongly discourage the legislature from ever exempting an agency from the statutory rulemaking process, especially on issues as important as free expression.

Second, while the underlying policy on free expression does not need to be promulgated under this legislation, it still delegates to both the Board of Regents and the Technical College System Board broad powers to promulgate new regulations "to further the purposes of" that un-promulgated free expression policy. As drafted, the legislature has allowed those boards to adopt a policy regarding free expression without promulgating that policy as a rule, and then has given those boards the broad power to "further the purposes of" that promulgated policy. This broad delegation of power seems to be a recipe for disaster and administrative overreach, and we would encourage you to rethink it.

VI. Conclusion

Thank you for your time and consideration of these comments, as was noted earlier, we would be happy to discuss further or answer any questions that may come up.

Sincerely,

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Wisconsin Institute for Law & Liberty, Inc.