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**Testimony of ACLU of Wisconsin
In Opposition to permanent rules to amend Chapters UWS 17, Wis. Admin. Code
Via email to board@uwsa.edu**

President John Behling and Members of the Board of Regents:

Thank you for the opportunity to provide testimony in opposition to permanent rules to amend Chapters UWS 17, Wis. Admin. Code. These new rules threaten First Amendment rights by endorsing the suspension and expulsion of student protesters who merely “interfere with the rights of others to engage in or listen to expressive activity.” This is overly broad and could potentially silence speech and expression. Students attending a lecture are left to guess whether booing a statement that others applaud, or asking a pointed question during a Q&A period will be deemed to “interfere” with those who support the speaker’s views. And protesters outside a speaker’s venue may legitimately wonder whether an attempt to persuade another student not to attend will be subject to punishment for interfering. That the punishment could include suspension or expulsion makes the cost of guessing wrong so high that many students may self-censor, an unacceptable result in a university community committed to open and robust debate.

Instead of protecting free expression, this new policy will have the opposite effect – threatening the First Amendment rights of students and suppressing constitutionally-protected speech. Giving controversial figures the right to speak – which the ACLU supports – does not mean denying students the right to protest them. Rather than restricting free speech, the University of Wisconsin should foster an environment where all voices are heard and competing viewpoints can be aired without fear of punishment or expulsion. The university should not make this misguided policy a permanent rule.

College students across America have long been at the forefront of the First Amendment conversation. Campuses have frequently been the epicenter for confronting controversial issues and feeling out social discourse through oratory and protest. Accordingly, higher education institutions have historically struggled to balance the free speech rights of students against those of invited guest speakers.

To those unfamiliar with its rich history and tension with First Amendment rights, the University of Wisconsin–Madison is the site of the infamous Dow Chemical protests in late 1960s. UW–Madison was the first major higher education institution to have an on-campus protest turn violent and necessitate a multiple-day campus shutdown. In fact, throughout the ‘60s, UW–Madison students engaged in sit-ins, walkouts, boycotts, massive rallies, and heckling on a variety of issues, from the Vietnam War to civil rights for African Americans. While each instance of protest was met with varying forms of discipline, citations, suspensions, and even arrests, UW–Madison did not attempt to preemptively curb protest in any way other than continuing to discourage violent behavior.

The UW Regents now believe that protesting is still permissible but disrupting others' free speech rights through certain acts of protest is not. The problem is that where they draw the line is murky. In an uncharacteristic shift from its history of protecting broad forms of protest, in October 2017, the University of Wisconsin Board of Regents passed a policy that would require a student to be suspended or even expelled if they more than once attempt to silence a speaker or shut down an event with a disruption.

The problem is that the University seems to be prioritizing speech that is likely to garner protest over a student's right to protest. Both are considered protected speech under the First Amendment, so why does one result in suspension or expulsion while the other receives a shield of policy protection?

The Supreme Court of the United States has made it clear that First Amendment protection in educational settings is often a fact-specific inquiry, but vague and overbroad restrictions on speech and expression will likely be found unconstitutional. More importantly, where there are less restrictive options available to protect whatever the asserted governmental interest in limiting speech, the government action is probably unconstitutional.¹ In the 2007 Supreme Court case *Morse v. Frederick*, the Court found that the First Amendment did not protect a high school student's right to display a banner reading "Bong Hits 4 Jesus". While it was clear that students have the right to engage in political speech and protest, the Court believed that the right was outweighed by the school's mission to discourage drug use among young, impressionable high school students. Again, it was a fact-specific inquiry that largely turned on the validity of the school's reasoning in curbing the student's speech that likely does not apply to college students, who are presumptively better equipped to evaluate controversial speech.

The UW Regents are attempting to curb student speech and expression with the sole justification that other speech ought not be disturbed. There is no specific factual justification that applies to protecting college students. The policy is also overbroad in its definition of disruption. It considers "blocking the vision of others in any manner" and "producing noise that interferes with events and activities" as forms of disruptive speech subject to the sanction of suspension or expulsion if done more than once. Setting aside the fact that the guidelines are extremely broad, arguably, there are multiple less restrictive ways for the University to achieve its goal in protecting unpopular speech that do not include the drastic measure of expelling a student from college after two disruptions. Students around the country are challenging stricter campus speech rules and litigation surrounding protected speech is active and ongoing in the federal circuits, which often focuses on the content of the speech at issue. While the Regents maintain that this does not single out protest based on content, it seems a difficult pill for students to swallow given the fact that these actions are only triggered when someone is protesting an event, viewpoint, or concept they might disagree with. That in itself could read as a content-based restriction.

It seems disingenuous for the UW System to cloak these rules under the mandate of First Amendment protection. From a constitutional perspective, the First Amendment does not require UW to protect a

¹ *Ashcroft v. ACLU*, 542 U.S. 656 (2004).

speaker from being shouted down or heckled nor does it require UW to prevent hecklers or other dissidents from controlling what is said on campus. As a public educational institution, UW may want to commit to the position that free discussion is of the highest importance on a college campus and, in keeping with its duty to foster that discussion, it will not allow certain types of speech to be eliminated from circulation. To suspend or expel a student for protesting is an extreme measure. The First Amendment answer to disfavored speech is not to limit expression opposing the viewpoint, it is to encourage robust debate by making space for the speaker and the protestor.

Please reconsider adopting permanent rules to amend Chapters UWS 17, Wis. Admin. Code.