

## MODEL FREE SPEECH POLICY<sup>i</sup>

*-Proposed by Young America's Foundation for the University of California, Berkeley-*

### I. Statement on Freedom of Expression<sup>ii</sup>

Because the University is committed to free and open inquiry in all matters, it guarantees all members of the university community the broadest possible latitude to speak, write, listen, challenge, and learn. Except insofar as limitations on that freedom are necessary to the functioning of the University—*as determined by a strict scrutiny analysis that any limitation is narrowly tailored to achieve a compelling interest, and is not selectively applied to suppress disfavored speech*—the University of California, Berkeley fully respects and supports the freedom of all members of the University community to discuss any problem that presents itself.

Of course, the ideas of different members of the University community will often and quite naturally conflict. But it is not the proper role of the University to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive. Although the University greatly values civility, and although all members of the University share in the responsibility for maintaining a climate of mutual respect, concerns about civility and mutual respect 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 our community.

The freedom to debate and discuss the merits of competing ideas does not, of course, mean that individuals may say whatever they wish. The University may restrict expression that violates the law, that falsely defames a specific 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 University, *but only if the restriction survives a strict scrutiny analysis and is determined not to be selectively applied*. In addition, the University may reasonably regulate the time, place, and manner of expression to ensure that it does not disrupt the ordinary activities of the University, *but only if the regulation leaves open ample alternative channels for communication, is determined to be content neutral, and is narrowly tailored to achieve a significant interest.*<sup>iii</sup> *The restrictions may not be selectively applied to suppress disfavored speech.* 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 University's commitment to a completely free and open discussion of ideas.

In a word, the University's fundamental commitment is to the principle that debate or deliberation may not be suppressed because the ideas put forth are thought by some or even by most members of the University community to be offensive, unwise, immoral, or wrong-headed. It is for the individual members of the University community, not for the University as an institution, to make those judgments for themselves, and to act on those judgments not by seeking to suppress speech, but by openly and vigorously contesting the ideas that they oppose

*or by just allowing alternative viewpoints to be heard.* Indeed, fostering the ability of members of the University community to engage in such debate and deliberation in an effective and responsible manner is an essential part of the University's educational mission.

As a corollary to the University's commitment to protect and promote free expression, members of the University community must also act in conformity with the principle of free expression. Although members of the University community are free to criticize and contest the views expressed on campus, and to criticize and 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—or *the freedom of audiences to hear and consider views*—they reject or even loathe. To this end, the 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 – *for example, by removing disruptors shouting down speakers or otherwise interfering with the right of the University community to hear the views of a speaker.*

## **II. Statement on the Freedom of Assembly<sup>iv</sup>**

The University of California, Berkeley respects the right of all members of the academic community to explore and to discuss questions which interest them, to express opinions publicly and privately, and to join together to demonstrate their concern by orderly means. It is the policy of the University to protect the right of voluntary assembly, to make its facilities available for peaceful assembly, to welcome guest speakers, to protect the exercise of these rights from disruption or interference.

## **III. Fora for Expressive Activity<sup>v</sup>**

As a public institution of higher learning in the State of California, the University of California, Berkeley maintains traditional public fora, designated public fora, and limited-public fora. According to Cal. Code Reg. tit. 5, § 100014, all buildings and grounds under the control of, or operated by, the Regents of the University of California are subject to reasonable time, place, manner restrictions. Time, place, manner restrictions on expression must be (1) content-neutral, (2) narrowly tailored to serve a significant government interest, and (3) leave open alternative channels for communication.

- Traditional public fora include the University's public streets, sidewalks, parks, outdoor plazas and similar common areas. These areas are generally available for expressive activity, planned or spontaneous, for individuals or groups, at any time without the need for reservation, or prior approval. (Obstructing or impeding the flow of vehicular or pedestrian traffic is prohibited.) The following areas on campus are traditional public fora: (insert specific areas of campus here)
- Designated public fora<sup>vi</sup> include other parts of campus that are intentionally opened up for expressive use by the general public or by a particular class of speakers.<sup>vii</sup> These locations will be treated similar to public streets, sidewalks, and parks in terms of access

and availability for expressive activity. (Obstructing or impeding the flow of vehicular or pedestrian traffic is prohibited.)

- Limited-public fora are areas that are open for use by certain groups or dedicated solely to the discussion of certain topics.<sup>viii</sup> Any approval for gatherings or demonstrations, use of structures or equipment, or use of amplified sound may only be subject to reasonable, content-neutral, time, place, and manner restrictions specified in writing in advance. Under no circumstances is viewpoint discrimination permitted.

#### **IV. Reservation Requirements and Procedures<sup>ix</sup>**

In an effort to ensure safety and to promote an environment conducive to study, advanced reservation for expressive activity is required (in the form of an approved Event Registration form) for events or activities that are expected to draw a crowd of more than 300 people, and/or events where alcohol is intended to be served (unless the event is a memorial service reception attended by fewer than 300 people or is an event at the Lawrence Hall of Science, Botanical Garden, Blake House, or Anthony Hall), and/or events where outdoor amplification is requested. Advance reservation is also required for activities near intersections, and/or in close proximity to academic buildings anytime classes, and/or study activities, and/or research are taking place.

Individuals or groups who are either required to make advance reservations or those individuals or groups who otherwise wish to make advance reservations shall request use of the space through the LEAD (Leadership, Engagement, Advising, & Development) Center. If advance reservation is required, requests must be made at least five business days in advance of the event. Additional collaboration and coordination may be required from a building/space proctor and the UCPD; *however, UCPD's involvement in the reservation process is limited to security and its security assessment may not, in any way, impede an individual or a group's ability to reserve an on-campus facility for student expression. UCPD's security assessment must be in writing and made available upon request.*<sup>x</sup> Usually use of the space will be assigned to the person or organization that requests the area first. University sponsored events have first priority on the use of campus facilities. The University reserves the right to locate any assembly so as to ensure that the activity does not interfere with the normal operation of the University or interfere with the rights of others.

The decision to confirm a request for space will be based on proper and timely completion of the Event Registration form, compliance with applicable sound and sign requirements, and availability of space. The decision to confirm will be based on the foregoing criteria, and in no circumstance will any decision be based on the content or viewpoint of the expressive activity or upon the expected reaction of others. If a request is denied, the rationale for the decision will be provided in writing. The denial of a reservation request can be appealed to the Associate Vice Chancellor and Dean of Students or a designee.

At the time of the request the following information will be required:

- Name and information of the person or organization sponsoring the event. Contact information for one individual who will be present during the course of the event.
- Location, date and time requested for the event.
- General purpose of the event.
- List of planned activities (i.e. speech or rally, march with signs, distribution of literature, sit-in).
- Special equipment requested.
- Anticipated attendance.

For recognized student organizations, an officer of the sponsoring organizations must be present at the event, and during the entire course of the event.

#### **V. Protest and Demonstrations Policy<sup>xi</sup>**

The primary function of a university is to discover and disseminate knowledge by means of research and teaching. To fulfill this function, a free interchange of ideas is necessary not only within the university but also with the larger society. At the University of California, Berkeley, freedom of expression is vital to our shared goal of the pursuit of knowledge. Such freedom comes with a responsibility to welcome and promote this freedom for all, even in disagreement or opposition.

The right of freedom of expression at the University includes peaceful protests and orderly demonstrations. At the same time, the University has long recognized that the right to protest and demonstrate does not include the right to engage in conduct that disrupts the University's operations or endangers the safety of others.

A determination to discourage conduct which is disruptive and disorderly does not threaten academic freedom; it is rather, a necessary condition of its very existence. Therefore, the University will not allow disruptive or disorderly conduct on its premises to interrupt its proper operation. Persons engaging in disruptive action or disorderly conduct shall be subject to disciplinary action, including expulsion or separation, and also charges of violations of law.

#### **VI. Compelled Speech<sup>xii</sup>**

The University also respects the right of each member of the academic community to be free from coercion. *The freedom to speak includes the freedom not to speak<sup>xiii</sup> and as such the university affirms that no member of the Berkeley community may be punished, in any way, for expressing disfavored viewpoints or for withholding affirmation of favored viewpoints.<sup>xiv</sup>* The university recognizes that academic freedom is no less dependent on ordered liberty than any other freedom, and it understands that *compelled* speech is especially reprehensible in a community of scholars.<sup>xv</sup> The substitution of noise for speech, *opinions or feelings for evidence-*

*based argument<sup>xvi</sup>*, and force for reason is a rejection and not an application of academic freedom. *No Berkeley official has the authority to determine what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force members of the Berkeley community to confess by word or act their faith therein.*

## **VII. Security Fees<sup>xvii</sup>**

The University shall annually post, online, the maximum cost to secure each reservable venue for student expression. The annual assessment shall be based solely on objective factors, including size, location, and a venue's number of entrances/exits. If an on-campus venue is reserved, and the total number of expected attendees is less than its maximum capacity, the security fee charged may be diminished proportionately. No security fee may be assessed based on the content or viewpoint of a speaker's speech. Likewise, no security fee may be assessed based on the community's reaction, or expected reaction, to a particular speaker because such an assessment is content-based.

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<sup>i</sup> To aid in the understanding and implementation of this policy, and to ensure that the school's prior First Amendment violations are not repeated, Young America's Foundation offers to provide First Amendment sensitivity training for Berkeley administrators, specifically those named in the lawsuit. On November 3, 2017, the parties in *Fresno State Students for Life v. Thatcher* entered into a settlement agreement that required a Fresno State University professor to undergo two hours of First Amendment sensitivity training provided by the plaintiff's lawyer. In that case, professor Gregory Thatcher unconstitutionally interfered with students' legal expressive activity. Similar to our case, Young America's Foundation's lawyers are eminently qualified to provide a similar training to Berkeley administrators.

<sup>ii</sup> Thirty-nine colleges and universities have adopted or endorsed this Statement on Freedom of Expression, or a substantially similar statement, based on the University of Chicago's 2015 Report of the Committee on Freedom of Expression. Schools include:

- . University of Chicago: Officially Adopted.
- . Princeton University: Officially Adopted.
- . Purdue University: Affirmed by the Board of Trustees.
- . Johns Hopkins University: Officially Adopted.
- . American University: Affirmed by Faculty Senate.
- . Chapman University: Officially Adopted.
- . Winston-Salem State University: Affirmed by Faculty Senate.
- . University of Wisconsin system: Affirmed by Board of Regents.
- . University of Virginia College at Wise: Affirmed by Faculty Senate.
- . Columbia University: Officially Adopted.
- . Louisiana State University: Affirmed by Faculty Senate.
- . City University of New York: Affirmed by Faculty Senate.
- . Franklin & Marshall College: Officially Adopted.
- . University of Southern Indiana: Officially Adopted.
- . University of Minnesota: Affirmed by Faculty Body.
- . Washington University in St. Louis: Affirmed by Faculty Senate.
- . Eckerd College: Affirmed by Faculty Senate.
- . Vanderbilt University: Affirmed by Faculty Senate.
- . University of Missouri system: Officially Adopted.
- . Georgetown University: Officially Adopted.

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- . University of Montana: Affirmed by Faculty Senate.
  - . The Citadel: Officially Adopted.
  - . Kansas State University: Officially Adopted.
  - . Kenyon College: Affirmed by Faculty Senate.
  - . Claremont McKenna College: Officially Adopted.
  - . Amherst College: Affirmed by Faculty Senate.
  - . Michigan State University: Officially Adopted.
  - . Appalachian State University: Affirmed by Faculty Senate.
  - . State University of New York- University at Buffalo: Officially Adopted.
  - . University of Denver: Affirmed by Faculty Senate.
  - . Ashland University: Officially Adopted.
  - . Northern Illinois University: Officially Adopted.
  - . Denison University: Affirmed by Faculty Senate.
  - . University of Central Florida: Affirmed by Faculty Senate.
  - . University of Nebraska: Affirmed by Board of Regents.
  - . University of Maine System: Affirmed by Board of Trustees.
  - . Middle Tennessee State University: Affirmed by Board of Trustees.
  - . University of North Carolina – Chapel Hill: Affirmed by Faculty Council.
  - . Joliet Junior College: Affirmed by Board of Trustees.

The italicized sections have been added by Young America’s Foundation for purposes of clarity and to provide further assurances to protect students from the improper exercise of discretion by school administrators. The additional language addresses ongoing concerns regarding UC Berkeley. UC Berkeley celebrates its history as the birthplace of the Free Speech Movement, and yet, it is spending hundreds of thousands of dollars on lawyers to fight against free speech and for the “right” of administrators to favor politically correct speech and prevent its students from hearing and considering alternate viewpoints. Thousands of students have already graduated from UC Berkeley since the beginning of our lawsuit. Our goal is to ensure that upcoming classes of students have the opportunity to hear a diversity of ideas in pursuit of a full education.

<sup>iii</sup> *McCullen v. Coakley*, 134 S.Ct. 2518 (2014).

<sup>iv</sup> This statement was originally adopted by Duke University and has been subsequently tailored for the University of California, Berkeley.

<sup>v</sup> This policy was originally adopted by Texas A&M University and has been subsequently tailored for the University of California, Berkeley.

<sup>vi</sup> All buildings and grounds under the control of, or operated by, the Regents of the University of California are subject to reasonable time, place, manner restrictions, per Cal. Code Reg. tit. 5, § 100014, and must be specified in advance. Time, place, manner restrictions on expression must be (1) content-neutral, (2) narrowly tailored to serve a significant government interest, and (3) leave open alternatives channels for communication. As such, the University of California, Berkeley does not have any limited public fora because the reasonableness standard associated with limited public fora is a lesser standard than time, place, manner restrictions.

<sup>vii</sup> *Arkansas Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 678 (1998).

<sup>viii</sup> *Christian Legal Soc’y v. Martinez*, 561 U.S. 661, 679 n.11 (2010).

<sup>ix</sup> This policy was originally adopted by Texas A&M University and has been subsequently tailored for the University of California, Berkeley.

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<sup>x</sup> The italicized section was added by Young America’s Foundation to clarify the role of the UCPD in event reservation procedures.

<sup>xi</sup> This policy was originally adopted by the University of Chicago (first two paragraphs) and the Duke University (third paragraph) and has been subsequently tailored for the University of California, Berkeley.

<sup>xii</sup> This policy was originally adopted by Duke University and has been subsequently tailored for the University of California, Berkeley. The italicized sections have been added by Young America’s Foundation for purposes of clarity and to provide further assurances to protect students from the improper exercise of discretion by administrators.

<sup>xiii</sup> *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). In *Wooley*, the Court recognized that the right to refrain from speaking is a “complementary” component “of the broader concept of ‘individual freedom of mind.’”

<sup>xv</sup> Justice Jackson’s rejection of compelled speech in *West Virginia State Board of Education v. Barnette* is a timeless authority on academic freedom in higher education. “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” *W. Va. State Bd. Of Educ. V. Barnette*, 319 U.S. 624, 642 (1943).

<sup>xvii</sup> This section was added by Young America’s Foundation to address free speech concerns frequently raised by students who are charged large security fees based on the content of speech.