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November 2, 2017

UNC Board of Governors
University Governance Committee
Center for School Leadership Development
Chapel Hill, North Carolina

Dear Members of the University Governance Committee:

I am writing on behalf of the American Civil Liberties Union of North Carolina ("ACLU of NC"). The ACLU of NC is dedicated to defending and preserving the individual rights and liberties guaranteed by the U.S. and North Carolina Constitutions, including the First Amendment rights of free speech and expression. As you consider and debate the Policy on Free Speech and Free Expression ("Policy"), developed pursuant to S.L. 2017-96, I want to bring some concerns with the current draft to your attention.

We understand that the Board has been charged to enact a policy under S.L. 2017-96. However, we write today to remind the Board that no statute can override its constitutional obligations. Moreover, as free speech advocates, we welcome the Board's interest in protecting speech and expression on North Carolina's college campuses, but we believe that this policy is a solution in search of a problem.

We are confident that North Carolina schools' existing policies to protect and preserve free speech on campus are working. In fact, the Foundation for Individual Rights in Education (FIRE)—an organization dedicated to defending free speech on campuses—recently gave a "green light" rating to 6 of our state's universities for their exemplary free speech policies—more than any other state in the nation. The existing policies, including university codes of conduct, already contain appropriate remedies to address free speech issues on our campuses.

Given that background, the most recent iteration of the Policy contains presumptions of harsh disciplinary consequences that are wholly unnecessary, contravene the stated purpose of the Policy, and are likely to have a chilling effect on protest—which is itself a constitutionally protected form of speech.¹ This Policy creates a presumptive "three strikes and you're out" rule that applies *only* to free speech. Students will now be punished more harshly for shouting down a speaker than for myriad other offenses like plagiarism or hazing. And these draconian punishments appear motivated by the fact that students around the country are pushing back forcefully against racist speakers on their campuses. Giving

¹ See, e.g., *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 660 (2004) ("the Constitution demands that content-based restrictions on speech be presumed invalid and that the Government bear the burden of showing their constitutionality.") (internal citations omitted); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid.").

controversial figures the right to speak – which the ACLU supports – does not mean denying students and others the right to protest them. Rather than restricting free speech, the Board of Governors should foster an environment where all voices are heard and competing viewpoints can be aired without fear of punishment or expulsion.

Finally, the U.S. Supreme Court mandates that a high hurdle be cleared before constitutionally protected free speech is restricted.² The Policy as currently drafted risks deviating from that mandate. It contains overly broad definitions of what constitutes a “substantial and material disruption” – for example, subjecting a momentary interruption (NCGS § 143-318.17) to disciplinary consequences. To pass constitutional muster, the Policy must narrowly define a “substantial and material disruption” to reach only intentional conduct that prevents people from speaking or hearing a speaker for a sustained period of time.

For these reasons, we strongly recommend discarding the draconian disciplinary presumptions recently added to the draft, and revising the definition of what constitutes a “substantial and material disruption.” We will continue to monitor the implementation of this policy to ensure that it protects the speech of all students, including protesters. In a country that protects and values the right to free speech, the answer to speech we don't like is more speech, not censorship.

Thank you for your dedication to ensuring that the Policy on Free Speech and Free Expression lives up to its name.

Best regards,



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² *Id.*; See also *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *United States v. Grace*, 461 U.S. 171, 182 (1983).