FIRE
Foundation for Individual Rights in Education

Dear members of the Joint Committee on Education and Cultural Affairs,

I am writing on behalf of the Foundation for Individual Rights in Education (FIRE) to share our support for LD 1640. FIRE is a nonpartisan, nonprofit organization dedicated to defending the free speech and due process rights of students and faculty members at institutions of higher education. Since our founding in 1999, we have fought for the expressive rights of students and faculty on either side of virtually any controversial issue you can name. **We urge an ought pass of LD 1640.**

LD 1640 addresses three types of campus censorship. First, it prohibits university administrators from quarantining student expression into misleadingly labeled "free speech zones." Second, it requires colleges to assign security fees for expressive activities on a viewpoint- and content-neutral basis. Finally, it extends important protections to student journalists and their advisors. By passing LD 1640, the legislature will send a strong message to students at Maine's public colleges and universities that it takes protecting their rights seriously.

The right to use campus for free speech activities

Universities have a right to enact reasonable, narrowly tailored "time, place, and manner" restrictions that prevent demonstrations and other expressive activities from substantially and materially disrupting the educational process. They may not, however, regulate speakers and demonstrations on the basis of content or viewpoint, nor may they maintain regulations that burden substantially more speech than is necessary to maintain an environment conducive to education.

LD 1640 codifies the "time, place, and manner" test announced by the Supreme Court of the United States in *Ward v. Rock Against Racism* to determine when governments may restrict expression in public forums.[1] The bill also declares that the open, outdoor areas of campus that are generally accessible to the public are public forums, a provision consistent with longstanding precedent from courts across the country. For example, one federal court wrote, "to the extent the campus has park areas, sidewalks, streets, or other similar common areas, these areas are public forums, at least for the University's students, irrespective of whether the University has so designated them or not.[2]"

[1] 491 U.S. 781, 791 (1989) ("Our cases make clear, however, that even in a public forum, the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.") (internal citations omitted).
[2] *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004).

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One of the critiques of the bill during the hearing was that it might prevent institutions from asking students not to use amplified sound outside of classrooms. This claim does not hold up to scrutiny. The bill states:

> The publicly accessible outdoor areas of public institutions of higher education must be treated as traditional public fora. In those areas, public institutions of higher education may maintain and enforce reasonable time, place and manner restrictions in service of a significant institutional interest only when such restrictions employ clear, published, content-neutral and viewpoint-neutral criteria and provide for ample alternative means of expression. Any such restrictions must provide for opportunities for members of the institution's community to spontaneously and contemporaneously distribute literature and assemble.

Institutions clearly have a significant interest in ensuring that classes aren't disrupted. Accordingly, any reasonable reading of the provision leads to the conclusion that institutions may, indeed, regulate expressive activity that substantially and materially disrupts the campus learning environment, such as the use of amplified sound near academic buildings during days when classes are meeting.

By declaring that the open, outdoor areas of campus are available for expressive activity subject only to reasonable content- and viewpoint-neutral "time, place, and manner" restrictions, the legislature will signal that its state colleges and universities are essential sites for the "marketplace of ideas." It will also codify what many courts across the country have already declared: that public institutions of higher education are quintessential public fora.

Bans on unconstitutional assessments of security fees

Another common way that institutions of higher education violate student rights is by assessing unconstitutional security fees on students or student organizations, particularly when those student organizations bring a guest speaker who the institution anticipates will invite controversy. The justification usually sounds something like, "Your group is bringing in a controversial speaker, and we anticipate that the speaker will attract dissenters and counter-protesters, and therefore your group needs to pay for extra security so we can manage those counter-protests."

This approach is flatly unconstitutional and prohibited by longstanding U.S. Supreme Court precedent. As the Court wrote in *Forsyth County v. Nationalist Movement*,

"Listeners' reaction to speech is not a content-neutral basis for regulation.... Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob."[3]

One of the critiques of the bill from Maine's higher education community suggested that such a provision would hamstring campus police in their efforts to maintain peace and order on campus. That a representative of an institution of higher education in the state thought it should retain an unconstitutional power to levy additional security fees based on the anticipated reaction of the campus community to an invited speaker should indicate why the legislature should pass LD 1640.

Protections for student journalists

Student newspapers investigate and expose corruption, harassment, and other ills. They educate students and often serve as a major source of local news, too. But student press often suffers threats or instances of impermissible, and even unconstitutional, suppression or punishment just for practicing good journalism. LD 1640 would address many of the worst forms of campus press censorship.

This legislation would establish that university administrators may not subject campus journalism to prior restraints, a practice the Supreme Court of the United States has declared, "the most serious and the least tolerable infringement on First Amendment rights."[4] Prior restraints on or prior review of collegiate student journalism happens across the country. For example, the University of California, Davis created a "media board" reporting to its own chancellor with the authority to regulate campus journalism and even investigate complaints by outside parties.[5]

The Supreme Court has permitted the prior restraint of high school student journalism in some situations.[6] Troublingly, one federal circuit, the Court of Appeals for the Seventh Circuit, has extended that authority to the journalism of adults in higher education.[7] LD 1640 would prevent Maine universities and colleges from adopting K-12 style prior restraint or review for adult student journalists.

Additionally, this legislation would protect an advisor to a campus newspaper from

[3] 505 U.S. 123, 134-35 (1992).
[4] *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).
[5] Lindsie Rank, *How UC Davis's Orwellian 'Media Board' can control student media*, FIRE (May 8, 2020), https://www.thefire.org/how-uc-daviss-orwellian-media-board-can-control-student-media/.
[6] *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).
[7] *Hosty v. Carte*r, 412 F.3d 731 (7th Cir. 2005).

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retaliation, including termination, simply for defending the integrity of that newspaper's reporting. Diablo Valley College in California fired an advisor after he defended student journalists who reported on and criticized the university's response to racist graffiti scrawled on the campus.[8] This bill prevents institutions from using this tactic to control campus press.

FIRE has opposed the recent, nationwide spikes in censorship of campus press.[9] I urge you to join the eleven states that have already passed legislation codifying the rights of student journalists by voting in support of LD 1640.

Thank you for your time, and please let me know if I can be of any further assistance to you. I can be reached by email tyler@thefire.org or by phone at 215-717-3473.

Tyler Coward

Tyler Coward
Legislative Counsel

[8] Alex Morey, *After popular adviser fired, Diablo Valley student reporters describe a journalism program in crisis*, FIRE (Dec. 5, 2019), https://www.thefire.org/after-popular-adviser-fired-diablo-valley-student-reporters-describe-a-journalism-program-in-crisis/.
[9] Alex Morey, *Cassie Conklin is asking questions,* FIRE (Feb. 23, 2021), https://www.thefire.org/cassie-conklin-is-asking-questions/.

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