

June 12, 2019

Dr. Paul B. Beran  
Executive Director & CEO  
South Dakota Board of Regents

Kevin V. Schieffer  
President  
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Cc: Members of the Board of Regents

Submitted via e-mail to Molly Weisgram  
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**Re: Intellectual Diversity in Higher Education Hearing**

Dear Dr. Beran, Mr. Schieffer, and Members of the South Dakota Board of Regents:

The American Civil Liberties Union of South Dakota (ACLU SD) writes on its own behalf to submit public comment regarding the Board of Regents' (Board) June 26 public hearing on intellectual diversity. The ACLU is a nationwide, nonprofit, nonpartisan organization dedicated to defending the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU SD is a state chapter of the national ACLU that works in courts, the state legislature as well as local units of government, and in communities across South Dakota to advance civil rights and civil liberties for everyone in our state.

The fight for freedom of speech has been a bedrock of the ACLU's mission since the organization was founded in 1920, driven by the need to protect the constitutional rights of conscientious objectors and anti-war protestors. Our work quickly spread to combating censorship, securing the right to assembly, and promoting free speech in schools. We believe the First Amendment is the foundation of a vibrant democracy and, as the Board acknowledged in its adoption of Policy 1:32<sup>1</sup> ("Commitment to Freedom of Expression"), the Constitution provides robust protection for free speech, including protest, counter protest, and other expressive activity.

In addition to our organizational mission of defending freedom of speech, we are also an organization deeply committed to racial justice. At its best, this commitment shapes and contextualizes all of our work, including that on free speech. As such, we have engaged in a multitude of advocacy and policy efforts to further racial justice and have appeared both as direct counsel and amicus curiae in numerous racial justice cases both within South Dakota<sup>2</sup> and across the country.<sup>3</sup>

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<sup>1</sup> <https://www.sdbor.edu/policy/Documents/1-32.pdf>

<sup>2</sup> <https://www.aclu.org/cases/antoine-v-winner-school-district>

We deeply appreciate your invitation to provide public comment on the important issues with which the Board is grappling surrounding its intellectual diversity policy and we commend the Board for making efforts to connect with South Dakotans from a variety of perspectives. We submit our comment today through the lenses of freedom of speech and racial justice.

## I. Background and context

As the Board has noted, last year it revised its free speech policies including a provision encouraging intellectual diversity. This was done in part after a discussion that arose in the 2018 South Dakota Legislative Session with the filing of Senate Bill 198.<sup>4</sup> After this legislation failed to pass, several legislators corresponded with the Board about free speech issues from July 2018 through January 2019.<sup>5</sup> Despite what we feel were earnest, good-faith efforts on the part of the Board to remedy legislator concerns, another piece of legislation was filed in the 2019 Legislative Session. That bill, House Bill 1087,<sup>6</sup> ultimately passed into law. Among other provisions, the enrolled legislation inserted a definition of intellectual diversity into state law and mandated that the Board “prepare and submit to the Governor and each member of the legislature a report that: (1) Sets forth all actions taken by each institution to promote and ensure intellectual diversity and the free exchange of ideas; and (2) Describes any events or occurrences that impeded intellectual diversity and the free exchange of ideas.”<sup>7</sup>

Our aim in this letter is to provide guidance that may be useful to the Board in its endeavor to develop effective ways to meet the definition and objective of intellectual diversity and to identify measurable metrics to track its progress. However, after our review of the correspondence between legislators and the Board there are several issues we feel must be explored. Therefore, we will dedicate a portion of this letter to addressing the context in which the correspondence and legislation has taken place and to identify some the legal and policy issues therein.

Before delving in to free speech issues that commonly arise in university settings and a discussion of diversity in a broad sense, we wish to note that we feel the underlying premise of this discussion suffers from serious flaws. After following legislative efforts in 2018 and 2019 and reviewing the correspondence between legislators and the Board we feel there has not been sufficient, verifiable evidence

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<sup>3</sup> Including *Fisher v. University of Texas at Austin (Fisher II)*, 136 S. Ct. 2198 (2016), *Fisher v. University of Texas at Austin (Fisher I)*, 570 U.S. 297 (2013), *Gratz v. Bollinger*, 539 U.S. 244 (2003), *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

<sup>4</sup> [https://sdlegislature.gov/Legislative\\_Session/Bills/Bill.aspx?Bill=198&Session=2018](https://sdlegislature.gov/Legislative_Session/Bills/Bill.aspx?Bill=198&Session=2018)

<sup>5</sup> <https://www.sdbor.edu/administrative-offices/infogovrelations/Pages/Free-Speech-Intellectual-Diversity-Efforts.aspx>

<sup>6</sup> [https://sdlegislature.gov/Legislative\\_Session/Bills/Bill.aspx?Bill=1087&Session=2019](https://sdlegislature.gov/Legislative_Session/Bills/Bill.aspx?Bill=1087&Session=2019)

<sup>7</sup> <https://sdlegislature.gov/docs/legsession/2019/Bills/HB1087ENR.pdf> to be inserted into SDCL §13-53.

brought forth of either the infringement of First Amendment rights or a lack of intellectual diversity on South Dakota campuses. Instead, and through no fault of the Board's, the record is rife with assumptions, references to anonymous second-hand reports, and thinly-veiled opposition to the notion that racial, cultural, or other diversity efforts on campuses are important or worthwhile. Though this may not be relevant in a strictly practical sense – at this point the law has been passed and the Board has an obligation to fulfill that law's mandates – it does provide context to the overall discourse.

#### **a. Free speech on campus**

Free speech on campus is critical to ensure space for the advancement, exploration, and sharing of ideas. Restrictions on speech by public colleges and universities may amount to government censorship and violate the Constitution. Such restrictions deprive students of their right to invite speech they wish to hear, debate speech with which they disagree, and protest speech they find bigoted or offensive. An open society – and true intellectual diversity – is founded on this principle of free speech.

As is often the case outside of a university setting as well as inside, how much value we place on the right to free speech is put to the severest test when the speaker is someone with whom we emphatically disagree. Speech that deeply offends our morality or is hostile to our way of life warrants the same constitutional protection as other speech because the right of free speech is indivisible: when we grant the government the power to suppress controversial ideas we are all subject to censorship by the state. This is true regardless of whether the speech at issue fits within our modern conception of a binary conservative/liberal framework or exists outside that narrow framing.

There are a certain number of free speech issues that regularly arise on college campuses, including the platform to speak (and the First Amendment's prohibition on viewpoint discrimination), speech that incites violence, harassment, discipline of students for speech or expressive activity, the very narrow categories of speech that the Constitution does not protect, and more. For the sake of brevity, we point you to a background on these issues available on the ACLU national website titled *Speech on Campus*.<sup>8</sup>

Fundamentally, we believe that the answer to the vilest speech – that which is racist, misogynistic, homophobic, transphobic, and the like – is not suppression. Instead, we believe that more speech, not less, is the answer most consistent with our constitutional values. To be clear, the First Amendment does not protect behavior on campus that crosses the line into targeted harassment or threats, or that creates a pervasively hostile environment for vulnerable students. But merely offensive or bigoted speech does not rise to that level, and determining when conduct crosses that line is a legal question that requires examination on a case-by-case basis. Restricting such speech may be attractive to college administrators as a quick fix to address campus tensions. But

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<sup>8</sup> <https://www.aclu.org/other/speech-campus>

real social change comes from hard work to address the underlying causes of inequality and bigotry, not from purified discourse. The ACLU believes that instead of symbolic gestures to silence ugly viewpoints, colleges and universities as a whole must increase their efforts to recruit diverse faculty, students, and administrators; increase resources for student counseling; and raise awareness about bigotry and its history.

## **b. Diversity makes South Dakota educational institutions stronger**

In reviewing the correspondence between legislators and the Board over the past year some legislators expressed animus towards campus diversity efforts and offices,<sup>9</sup> social justice,<sup>10</sup> affirmative action,<sup>11</sup> and more. We feel it is important to respond and we wish to articulate what we believe is the critical importance of campus diversity.

As Justice O'Connor stated in her opinion in the case of *Grutter v. Bollinger*,<sup>12</sup> "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." As the ACLU stated in its brief in the case of *Students for Fair Admissions v. Harvard*,<sup>13</sup> the educational benefits of diversity carry beyond the classroom and beyond any individual student's experience. The Supreme Court has repeatedly emphasized the importance of education as "pivotal to 'sustaining our political

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<sup>9</sup> Examples include but are not limited to Qualm Letter, July 2018, page 3, question 9 (<https://www.sdbor.edu/administrative-offices/infogovtrelations/Documents/07.02.2018%20Rep.%20Qualm%20Letter.pdf>); Stalzer/Peterson Letter, October 2018, page 3, question 7 ("In response to question 2 in the Qualm letter, some universities report that they include 'diversity offices' in the process of writing campus speech codes. Is this wise given the propensity of diversity offices to advance restrictions on free speech (as indicated by the response to question 7)?") (<https://www.sdbor.edu/administrative-offices/infogovtrelations/Documents/10.05.2018%20Sen.%20Stalzer%20and%20Rep.%20Peterson%20Letter.pdf>); *Id.* at page 5, question 13 ("Could not these funds [spent on diversity/inclusion/equity offices and affirmative action offices] be easily reallocated to boost funding for the programs discussed in questions 11, 12, and 15 in the Qualm letter?").

<sup>10</sup> Qualm Letter, July 2018, page 4, question 13 ("Some South Dakota citizens have expressed concerns about the prominence and influence of members of Black Lives Matter at SDSU (both professors and students) and noted how BLM's efforts to pressure students and administrators has led to limitations on campus discourse."); *Id.* at page 4, question 16 ("Are courses which offer a counter point of view to 'social justice' and 'equity' courses offered at South Dakota universities? If so, please list them.")

<sup>11</sup> Examples include but are not limited to Qualm/Langer Letter, Dec. 2018, page 5, question 14 (<https://www.sdbor.edu/administrative-offices/infogovtrelations/Documents/12.10.2018%20Sen.%20Stalzer%20and%20Langer%20and%20Rep.%20Qualm%20and%20Peterson%20Letter.pdf>).

<sup>12</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>13</sup> <https://www.aclum.org/en/cases/students-fair-admissions-v-harvard>; for an excellent discussion of how racial diversity in a university setting leads to measurably better outcomes once students leave campus please see pages 9-17.

and cultural heritage’ with a fundamental role in maintaining the fabric of society.”<sup>14</sup> Education, as the Court expressed in *Brown v. Board of Education*, “is the very foundation of good citizenship.”<sup>15</sup> “Effective participation by members of all racial and ethnic groups in the civil life of our Nation” therefore depends acutely on effective participation in higher education.<sup>16</sup> A diverse student body furthers these values in part by demonstrating to “[a]ll members of our heterogeneous society” that they can “have confidence in the openness and integrity” of a university.<sup>17</sup>

We applaud the efforts of campuses across South Dakota to recognize the importance of diversity and the simple truth that identities are multifaceted. A diverse student body and faculty is one comprised of people of all races, cultures, religions, genders, sexual orientations, gender identities, and far more. We believe that these measures of diversity are neither the opponent to nor incompatible with intellectual diversity, and that multifaceted diversity is equally as important as exposing students to a wide array of intellectual thought, debate, argument, and discussion. Indeed, diverse faculty, staff, and student bodies lead to the vision of intellectual diversity that Board seeks to enhance.

## II. Areas of awareness in crafting intellectual diversity efforts and metrics

We acknowledge that the task in front of the Board today is not a small one. Identifying effective ways to meet the definition and objective of intellectual diversity<sup>18</sup> and to track and report those efforts under state law will require significant care. To that end, we are submitting our suggestions in the form of “areas of awareness”; our intent is that these areas of awareness will highlight potential concerns or considerations that could arise in this endeavor based on our expertise and scope of work as an organization. This is not to say that there are not important considerations for the Board that fall outside this scope – there almost certainly are – but rather to be clear that our approach comes from both a free speech and a racial justice perspective.

**Academic freedom:** South Dakota Board of Regents’ Policy 1:11<sup>19</sup> guarantees academic freedom for faculty subject only to accepted standards of professional responsibility. As the policy states, academic freedom “includes the right to study, discuss, investigate, teach, and publish . . . [i]t includes the freedom to perform one’s professional duties and to present differing and sometimes controversial points of view, free from reprisal.” Ideally, any policy or measure of intellectual

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<sup>14</sup> *Grutter*, 539 U.S. at 331 (quoting *Plyler v. Doe*, 457 U.S. 202, 221 (1982)).

<sup>15</sup> *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

<sup>16</sup> *Grutter*, 539 U.S. at 331–32

<sup>17</sup> *Id.* at 332

<sup>18</sup> The definition of intellectual diversity was passed into law with HB 1087 (2019) and will be inserted into SDCL §13-53. It reads: “‘Intellectual diversity,’ denotes a learning environment that exposes students to and encourages exploration of a variety of ideological and political perspectives.”

<sup>19</sup> <https://www.sdbor.edu/policy/documents/1-11.pdf>

diversity would hold a special reverence for academic freedom and an intentional consideration to avoid infringing upon that freedom. Such infringement could result in a chilling of speech for faculty and other academic staff whether in research or the classroom.

**Chilled speech of faculty and students:** It is of the utmost importance that the Board keep in mind the potential for an intellectual diversity policy to inadvertently lead to the chilling of free speech. The point of promoting intellectual diversity, in our view, is to encourage robust debate and an exchange of a variety of ideas. If the policy articulated does not emphatically promote the sharing of ideas and discussion regardless of the popularity or unpopularity of those ideas there is a risk that faculty, staff, and students may fear speaking out. A fear of potential Board, governmental, or legislative retaliation that leads to self-censorship would not only undercut intellectual diversity efforts but may also run afoul of the First Amendment.

**Viewpoint neutrality:** The First Amendment does not require the government to provide a platform to anyone, but it does prohibit the government from discriminating against speech on the basis of the speaker's viewpoint. For example, public colleges and universities have no obligation to fund student publications; however, the Supreme Court has held<sup>20</sup> that if a public university voluntarily provides these funds, it cannot selectively withhold them from particular student publications simply because they advocate a controversial point of view.

Of course, public colleges and universities are free to invite whomever they like to speak at commencement ceremonies or other events, just as students are free to protest speakers they find offensive. College administrators cannot, however, dictate which speakers students may invite to campus on their own initiative. If a college or university usually allows students to use campus resources (such as auditoriums) to entertain guests, the school cannot withdraw those resources simply because students have invited a controversial speaker to campus.

**Over-monitoring:** Actions that could lead to chilled speech include an over-monitoring of faculty, staff, and student discussion. We urge the Board to be aware of the potential for over-monitoring in search of measurable metrics and to critically assess whether the metrics they are seeking or the method of collection could cross a line into surveillance of discussion and research happening in classes, student groups, and across campus broadly.

**Stigmatization of marginalized groups:** Intellectual diversity is not antithetical to multifaceted diversity amongst faculty, staff, and students. Conceptualizing intellectual diversity as a more important or worthwhile aim than other diversity efforts should be firmly rejected in theory and practice. If presented as a false dichotomy or competing interests there is a significant risk that efforts could

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<sup>20</sup> *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995).

further marginalize students or faculty who are racial, religious, or other minorities. Any rubric or policy that de-emphasizes the importance of multifaceted identity should be actively avoided.

### **III. Conclusion**

It is clear that the Board will have to consider many perspectives and potentialities with regard to its compliance with South Dakota's recently-passed law on intellectual diversity. What ultimately makes this task a difficult one is that intellectual diversity does not fit within a rigid points system and cannot be met with a check-the-box approach. It is not a binary which can be balanced by measuring two imagined sides. Instead, it's an all-encompassing and messy effort.

We believe that embracing true intellectual diversity is a worthwhile endeavor. A comprehensive approach to intellectual diversity necessarily includes the First Amendment rights of free speech and expression; of composing a faculty and student body that will challenge one another and create a robust exchange of ideas; and an embrace of the importance of multifaceted diversity on a grand scale. It is our hope that the Board continues to conduct business in a content and viewpoint neutral basis that best encourages academic freedom.

We thank you again for your sincere efforts to solicit the perspectives of a variety of South Dakotans. We also thank you for your time and consideration of this important matter and your ongoing commitment to public service. Should you have any questions or desire more information we would be happy to assist.

Sincerely,

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