

December 6, 2021

The Honorable Robert Cupp
Speaker, Ohio House of Representatives
77 South High Street, 14th Floor
Columbus, Ohio 43215

Dear Speaker Cupp:

The obligation of any university is, at least in part, to teach students to become critical thinkers and engaged citizens. Public universities are uniquely the marketplace of ideas and censorship has no place in Ohio's public universities.¹ While we appreciate and support the sponsors diligence to protect the rights and freedoms of students in the classroom, we do not support how the most recent substitute version of House Bill 327 pending before the House State and Local Government Committee seeks to impose a state mandated orthodoxy governing what may be taught in the classroom. This is a bill that the presidents of Ohio's public universities strongly oppose as it attempts to prohibit the teaching of "divisive concepts" in the classroom.

Please do not confuse our opposition to the bill as any lessening of our deep commitment to maintaining campuses that are free from discrimination and harassment based on nationality, race, color, ethnicity, religion, or sex or any other protected class status. This includes our vehement opposition to the concept that any one nationality, race, color, ethnicity, religion, or sex is inherently superior to another. However, when it comes to educating students, Ohio's public university presidents believe the prohibitions against and penalties for teaching "divisive concepts" represent an existential threat to public higher education in the state of Ohio as it abridges the academic freedom granted to public universities, faculty, and students by the First Amendment to the Constitution of the United States.²

The teaching of "divisive concepts," whether it be about race or any other subject, are matters that the Constitution places squarely in the hands of public universities, their faculty, and students. As presidents of

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1. In *Keyishian v. Board of Regents of the State Univ. of New York*, 385 U.S. 589 (1967), the Court held that faculty members' First Amendment rights were violated by a state requirement that they sign a certificate stating that they were not and never had been Communists, and by vague and over broad restrictions on verbal and written expression. In so ruling, the Court opined:

Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The classroom is peculiarly the "marketplace of ideas." The nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."

2. It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university -- to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.' (*Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957)) In *Bakke*, Justice Powell explained, "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment.

The Public Universities of Ohio

The University of Akron
University of Cincinnati
Miami University
Ohio University
Wright State University

Bowling Green State University
Cleveland State University
Northeast Ohio Medical University
Shawnee State University
Youngstown State University

Central State University
Kent State University
The Ohio State University
The University of Toledo

Ohio's public universities, we believe the teaching of any subject must be left to the institution, and not dictated by state statute.

When it comes to educating students, Ohio's public university presidents believe the prohibitions against and penalties for teaching, supporting, or promoting "divisive concepts" represent an impermissible prior restraint of free speech under the First Amendment to the United States Constitution. To the extent these proposed laws would prevent students from being forced to say things against their conscience, identify in particular ways, or mouth opinions that are not their own, the proposals are reiterating a right that already is firmly established under the law.

This places university students and faculty in a quandary and raises a contradictory question -- do they follow state law as proposed in House Bill 327, if or when it is enacted, in contravention of the United States Constitution or do our students and faculty conduct themselves in adherence to what current federal law is as determined by the United States Supreme Court -- and several of those cases are cited in this letter. Enactment of House Bill 327 would place public university students and faculty in an untenable and confusing position. It must be either one or the other, and we believe federal case law is well established and should take precedence.

Public universities should not be put into a position to be forced to choose between adhering to state law and violating the Constitutional rights of faculty and students (and the ensuing lawsuits) or protecting the Constitutional rights of its faculty and students and losing state funding. If the fundamental academic freedoms of Ohio's public universities are impaired because of this bill and the choice it forces upon us, then the essential mission of each university's search for truth and knowledge is significantly undermined.

The bill also invites many unintended consequences. The Higher Learning Commission (HLC), which is the national accreditation body for the state's public universities, has long held that the trustees of our colleges and universities have certain responsibilities. Importantly, in the "Criteria for Accreditation" document (newly revised in 2020) produced by HLC provides a university must "preserve its independence from undue influence on the part of donors, elected officials, ownership interests, or other external parties." (Section 2C4). "The Institution's educational responsibilities take precedence over other purposes, such as generating financial returns for investors, contributing to a related or parent organization, or supporting external interests." (Section 1B2). Clearly, the commission recognizes the importance of protecting the educational mission and academic freedom of the university and "external interests," such as those motivated by political ideology. If an institution runs afoul of any HLC required responsibility, then accreditation is put at risk.

In addition, Ohio's public university presidents believe House Bill 327 violates the spirit of local rule in that it removes the long implemented and recognized Board of Trustees' responsibility for the operations of public universities. It replaces the responsibility of nine trustees, all appointed by the Governor of Ohio, to manage institutional operations with legislative mandates. We believe these trustees, appointed by the Governor and confirmed by the Ohio Senate, should continue to be guardians of local rule with respect to public university operations.

Mr. Speaker, our students enroll in university to gain the knowledge and skills needed to succeed as workers in a competitive market and citizens in a democratic society. Ohio's employers require workers with the capability to handle difficult topics, think critically and make informed decisions. But House Bill 327 would place graduates of Ohio public institutions of higher education at a competitive disadvantage vis-à-vis graduates of universities that permit a free marketplace of ideas.

Under the regime envisioned by this legislation, one might reasonably expect the best and brightest high school graduates to choose not to apply to Ohio institutions of public education—where they would be deprived of a free marketplace of ideas, placed in an untenable position with their instructors, and face constant risk that their chosen university suddenly would be deprived of vital state funding. House Bill 327 not only places students in the indefensible position of monitoring their instructors for alleged thought crimes but rewards their pursuit of

such by putting their school in a worse funding position because of the financial penalties proposed. Please do not put our students in that position.

No matter how “wrong-headed” the General Assembly may believe an idea to be, any effort to restrict curriculum at the university level must be rejected. “The proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’” *Matal v. Tam*, 137 S. Ct. 1744 at 1764 (2017).

Thank you for your consideration of our concerns.

Sincerely,

The Inter-University Council of Ohio
Signature Page Attached

Cc: Governor Mike DeWine
All Members 134th Ohio General Assembly
Chancellor Randy Gardner



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