

## THE RESPECTING THE FIRST AMENDMENT ON CAMPUS ACT: KEY CONCERNS

On March 15, 2024, Rep. Brandon Williams (R-NY) and House Education and the Workforce Chairwoman Virginia Foxx (R-NC) introduced the [Respecting the First Amendment on Campus Act](#) (H.R. 7683). This bill would amend the Higher Education Act to create a new set of detailed and prescriptive new requirements for institutions related to freedom of speech and association and would create new enforcement mechanisms that would condition Title IV eligibility on compliance with the bill's requirements. Despite the bill's purported aims, it would likely complicate and undermine institutional efforts to foster free speech on campus and provide safe learning environments free from discrimination.

### Key Concerns

#### Increased litigation

Public institutions are already subject to the requirements of the First Amendment, and if there is a concern that an institution's policy violates the First Amendment's guarantees, individuals are already permitted to sue the institution in federal court. But the bill would create a new federal cause of action allowing individuals to sue a public institution for damages for any violation of the bill's requirements. Adding this the new cause of action on top of existing legal remedies is unnecessary, duplicative, and likely to result in excessive litigation. Further, the bill would take the unprecedented and troubling step of waiving a public institution's sovereign immunity rights under the 11th Amendment based on its receipt of Title IV funding.

#### Potential loss of Title IV aid

The bill would condition Title IV eligibility for institutions on complying with various detailed and prescriptive requirements. Failure to comply with even minor reporting or disclosure requirements could result in the loss of Title IV eligibility for an entire award year. Penalizing students with a loss of financial aid does nothing to further the goals of this legislation and is disproportional to the alleged infraction.

#### Publicly accessible outdoor areas

The bill would mandate that all publicly accessible outdoor areas at public institutions are "traditional public forums"—where no time, place, and manner restrictions may inhibit the "spontaneous assembly and distribution of literature" by anyone, including persons unaffiliated with and uninvited by any member of the campus community. Public institutions own and maintain an incredibly diverse set of outdoor property including athletic fields, residence halls, sewage plants, biological field stations, forests, etc. This provision would make it harder for institutions to provide safe learning environments, free from discrimination, for all students. This provision would also contradict Supreme Court precedent, which considers publicly accessible spaces at a public university "limited public forums" and not traditional public forums.

#### Security fees

The bill would severely limit the ability of public institutions to determine appropriate security fees for campus events involving controversial speakers. While many campuses already have viewpoint-neutral standards for events policies, the bill would prohibit an institution from considering the potential reaction on campus to a controversial speaker when determining the security fees to be assessed. This will make campuses less safe because preparing for controversial speakers often entails greater security costs.

## Religious student organizations

The bill would prohibit public institutions from requiring a religious student organization to adopt an “all-comers” policy as a condition of being officially recognized by the institution, even though the Supreme Court upheld the right of public institutions to require these policies in *Christian Legal Society v. Martinez*.

## Political litmus tests

The bill’s prohibition on “political litmus tests” is overly broad and ambiguous and would prohibit public institution from considering a voluntary statement from a student or faculty reflecting a belief in or personal commitment to a particular viewpoint, including one on a “social or political” issue. It is not uncommon for institutions to have departments or schools that embrace a particular viewpoint or school of thought, for example, an economics school dedicated to free market principles or a center at a law school dedicated to the study of constitutional originalism. The bill would hamper institutional efforts to recruit students or faculty that share a common view and undermine academic freedom.

## Single-sex social organizations

The bill would prohibit institutions from taking “any action to limit or deny” students’ ability to form, join, or participate in a single-sex social organization. This language would prevent, for example, a private college from imposing reasonable limitations on social clubs that, in its considered judgment, are in the best interests of the campus community, such as restricting students from joining a fraternity or sorority during their freshman year. Also, the definition of single-sex social organizations could lead to preferential treatment of some single-sex organizations over other single-sex groups that do not meet the definition, which could raise potential equal protection or Title IX concerns.