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Comment on proposed scope statement 071-18

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The Wisconsin Institute for Law & Liberty (WILL) has long been an advocate of academic freedom and free speech on campus. It has litigated on behalf of students and faculty whose free speech rights have been violated, including the landmark case of *McAdams v. Marquette University*, 2018 WI 88, 383 Wis. 2d 358, 914 N.W.2d 708. WILL has previously commented on proposed legislation to protect free speech on campus. Richard M. Esenberg & Clyde Taylor, Wisconsin Institute for Law & Liberty, *On Freedom of Expression in the University of Wisconsin System: Analysis and Recommendations of the Legislative Proposals* (May 15, 2017). We generally support the Board of Regents' efforts to protect these important rights within the University of Wisconsin System. WILL submits this comment to suggest a slight modification to the scope of the Board's proposed rulemaking.

As you know, Board Policy 4-21 prohibits conduct interfering with the expressive activity of others and subjects such disruptive conduct to the sanctions listed in administrative code section UWS 17.10. Scope Statement 071-18 proposes to modify UWS chapter 17 to establish certain required sanctions for multiple violations of this prohibition.

WILL supports this effort but opposes mandatory sanctions. The difficulty of balancing the right of legitimate – and nondisruptive – protest with protecting the right of speakers to be free from physical disruption suggests a greater degree of discretion in the selection and imposition of sanctions.

In addition, the protection of speech from improper disruption requires clear and narrow definitions of what conduct may be sanctioned. Efforts to protect speech ought not to provide opportunities to suppress constitutionally protected speech offered in response. WILL encourages the Board to also modify section 17.09, which contains a list of “conduct subject to disciplinary action,” to include Policy 4-21’s prohibition on “protests and demonstrations that materially and substantially disrupt the rights of others to engage in or listen to expressive activity.” While section 17.09 already includes a general subsection for violations of the Board’s policies, *see* Wis. Admin. Code § UWS 17.09(15), including a specific subsection for conduct interfering with others’ expressive rights would add clarity and highlight the importance of this issue.

In addition, WILL believes that the incorporation of Policy 4-21’s prohibition should be accompanied by language clarifying that it may not be applied to constitutionally protected speech. In particular, an amended UWS 17.09 should carefully delineate the type of conduct that

might constitute prohibited disruption (physical obstruction, true threats, etc.) and make clear that the expression of a particular viewpoint, without more, does not constitute interference with the rights of others to engage in expressive activity. Criticism – or the expression of an opinion that some find unwelcome, disagreeable, or even deeply offensive – does not constitute interference with the expressive rights of those who disagree with that criticism or opinion.

We do not believe that these additions would be redundant or unnecessary. Regulation that addresses constitutionally protected speech – even regulation that is intended to be benign and supportive as here – ought to be as clear as possible to avoid inadvertently deterring protected speech. If the Board believes that making these changes would be outside the current Scope Statement, then we urge it be modified or a separate Scope Statement be issued.

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