



**FIRE**  
Foundation for Individual  
Rights and Expression

**NATIONAL  
COALITION  
AGAINST  
CENSORSHIP**

January 25, 2023

**Sent via U.S. Mail and Electronic Mail**

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***Re: Florida College Presidents' "Statement" on "Critical Race Theory" and "related concepts"***

Dear President Falconetti:

The Foundation for Individual Rights and Expression (FIRE)<sup>1</sup> and the National Coalition Against Censorship (NCAC)<sup>2</sup> write to share our deep concern regarding your recent pledge to violate the First Amendment.

On January 18, 2023, you joined a public statement pledging to eliminate—within two weeks—all “instruction” that “promote[s] any ideology that suppresses” expressive freedom, including instruction on “critical race theory or related concepts such as intersectionality” or ideas about “systems of oppression.”<sup>3</sup> Such “instruction” is, according to the statement, a form of

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<sup>1</sup> FIRE is a nonpartisan nonprofit dedicated to defending freedom of speech, with a particular focus on higher education. For more than 20 years, FIRE has successfully defended speech across the ideological spectrum.

<sup>2</sup> NCAC is an alliance of more than 50 national non-profit literary, artistic, religious, educational, professional, labor, and civil liberties groups that are united in their commitment to freedom of expression. Since its founding, NCAC has worked to protect the First Amendment rights of students and teachers, artists, authors, librarians, readers, and others around the country.

<sup>3</sup> Fla. Coll. Sys. Presidents Statement on Diversity, Equity, Inclusion & Critical Race Theory (Jan. 18, 2023), <https://bit.ly/3GXfWh5> [perma.cc/E5JF-7UCS]. The statement was heralded by Commissioner of Education Manny Diaz, Jr., who said it “commits” your institution “to removing all woke positions and ideologies” within two weeks’ time. Press Release, *Florida College System Presidents Reject ‘Woke’ Diversity, Equity and Inclusion (DEI)*,

“discrimination.” Even where “critical race theory or related concepts” are permitted to be taught, faculty may only discuss them if presented “as one of several theories and in an objective manner.”

Your statement is a promise to enforce the “Stop WOKE Act”<sup>4</sup> in the very manner the First Amendment prohibits: as a viewpoint-discriminatory constraint, as a federal court has already ruled.<sup>5</sup> Simply put, you have pledged to impose the views of elected officials on what students and faculty discuss in undergraduate and graduate classes, Bill of Rights be damned.

Your pledge to enforce or replicate the Stop WOKE Act is a willful departure from the First Amendment’s requirements. It is also an about-face from the “fundamental” principles your institution embraced in a similar collective statement four years ago, acknowledging that it was “not the proper role of our institutions to attempt to shield individuals from ideas and opinions they find unwelcome . . . however offensive or disagreeable those ideas may be to some members of our communities.”<sup>6</sup>

Again, just four years ago, your institution’s principles were clear:

Our fundamental commitment is to the principle that debate or deliberation may not be suppressed because the ideas put forth are thought by some or even by most members of our communities to be offensive, unwise, or immoral. It is for the individual members of

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*Critical Race Theory Ideologies and Embrace Academic Freedom*, FLA. DEP’T OF EDUC. (Jan. 18, 2023), <http://bit.ly/3GVlk4m> [perma.cc/W345-S39L].

<sup>4</sup> The “Stop WOKE Act” provides, as does your statement, that any “instruction” that “promotes” certain concepts “constitute[s] discrimination” unless presented “in an objective manner and without endorsement.” Fla. Stat. § 1000.05(4). The proscribed concepts have been collectively characterized by the Act’s proponents as “Critical Race Theory” and “woke indoctrination,” as does the press release accompanying the statement. *Cf.* Press Release, *Governor DeSantis Announces Legislative Proposal to Stop W.O.K.E. Activism and Critical Race Theory in Schools and Corporations*, OFFICE OF GOV. RON DESANTIS (Dec. 15, 2021), <http://bit.ly/3J80Ckx> [perma.cc/S7N5-AXHS]; Press Release, FLA. DEPT. OF EDUC., *supra* note 3. Most glaringly, your counterparts in the university system—expressly enjoined from enforcing the Stop WOKE Act—have not joined your statement or issued their own.

<sup>5</sup> The U.S. District Court for the Northern District of Florida enjoined the Stop WOKE Act’s enforcement by the state’s public universities because of its “positively dystopian” limits on the First Amendment rights of faculty and students. *Pernell v. Fla. Bd. of Governors of the State Univ. Sys.*, No. 4:22cv304, 2022 WL 16985720 (N.D. Fla. Nov. 17, 2022).

<sup>6</sup> Ava Parker, *The Florida College System Council of Presidents Statement on Free Expression*, Apr. 12, 2019, available at <https://bit.ly/3HkGKJC> [perma.cc/Z9ZR-3Y9W].

our communities, not for the institutions, to make those judgments for themselves[.]

But you have now abandoned those principles. Your embrace of administrative censorship—defended with some chutzpah as *effectuating* freedom of expression, under the notion that some ideas are dangerous because they (or their proponents) are hostile to freedom of expression—defies the Constitution in multiple respects.

**First**, your statement purports to impose a speech code over pedagogically relevant faculty speech, even where it does not amount to discriminatory harassment. The First Amendment forbids state officials from imposing the “pall of orthodoxy” over the college classroom, which is “peculiarly the ‘marketplace of ideas.’” *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). Academic freedom, which is “a special concern of the First Amendment,” *id.*, protects the right of the academic to determine how to discuss material “germane to the classroom subject matter,” including “matters of overwhelming public concern” like “race, gender, and power conflicts in our society,” however “repugnant” others might find the discussion. *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 679–80, 683 (6th Cir. 2001). The notion that administrators can censor college faculty, or that they have “no First Amendment rights when teaching,” is “totally unpersuasive.” *Id.* at 680.

**Second**, your speech code is content- and viewpoint-discriminatory. It is content-discriminatory because it singles out for special treatment academic discussion on particular subjects. Your statement does not require that *all* academic discussion be “objective” and present “several theories”—it *only* applies to discussion about “critical race theory” and “related” subjects.

The restriction is viewpoint-discriminatory because it is triggered *only* when faculty introduce a particular viewpoint but not when they discuss *only* the competing “theories.” Therefore, it is presumptively unconstitutional and anathema to the free exchange of ideas, “woke” or otherwise.

**Third**, your statement fails to provide faculty with adequate notice as to what academic speech will amount to “discrimination.” Your statement prohibits, without any accompanying definition, “any ideology that suppresses intellectual and academic freedom”<sup>7</sup> or the “related concepts such as intersectionality.” Because this is incapable of objective definition, it

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<sup>7</sup> For example, it would appear to violate your prohibition for a professor to read and endorse the text of the “Stop WOKE Act” now that a federal court has ruled that it suppresses intellectual and academic freedom.

simultaneously deprives faculty of any “fair notice of what is prohibited” and is “so standardless that it authorizes or encourages seriously discriminatory enforcement.” *Loc. 8027, AFT-N.H., AFL-CIO v. Edelblut*, No. 21-cv-1077-PB, 2023 WL 171392 (D.N.H. Jan. 12, 2023) at \*13 (quoting, in holding that a prohibition on “divisive concepts” in K-12 institutions was unconstitutionally vague, *U.S. v. Williams*, 553 U.S. 285, 304 (2008)).

The ambiguity of your statement invites, and intends, a chilling effect. Because you assert that “instruction” that “promotes” certain “ideologies” is itself “discrimination,” faculty will rationally avoid subject matter that may expose them to personal and professional consequences.

Your statement imposes the very “pall of orthodoxy” our Supreme Court has condemned, and does so without care for clarity, precision, or concern for the First Amendment rights it trammels. Institutional leaders, administrators, and staff asked to violate the First Amendment rights of faculty and students must refuse. No statute, regulation, or statement can relieve you—or them—of the obligations imposed by the First Amendment.

Sincerely,



Adam Steinbaugh

Attorney<sup>8</sup>

Foundation for Individual Rights and Expression



Chris Finan

Executive Director

National Coalition Against Censorship

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<sup>8</sup> This attorney is a member of the Pennsylvania and California bars.