Comment of the Foundation for Individual Rights and Expression on the Florida Board of Governors of the State University System proposed regulation 10.003, Post-Tenure Faculty Review

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Introduction

The Foundation for Individual Rights in Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the rights of all Americans to free speech and free thought—the essential qualities of liberty. Because colleges and universities play an essential role in preserving free thought, FIRE places a special emphasis on defending these rights on our nation's college campuses. Since 1999, FIRE has successfully defended the rights of students and faculty nationwide.

The Florida Board of Governors of the State University System (the "Board") proposed regulation 10.003, Post-Tenure Faculty Review, in response to Senate Bill 7044, which amended section 1001.706, Florida Statutes, adding that the Board "may adopt a regulation requiring each tenured state university faculty member to undergo a comprehensive post-tenure review every 5 years."[1] We note that the statute allows the Board to adopt a post-tenure review regulation but does not require it.

FIRE does not take a position on the merits of post-tenure review. We recognize Florida's interest in maintaining a high standard of academic achievement, teaching acumen, and research accomplishments. However, we remind the

[1] *See* FLA. STAT. § 1001.706(6)(b) (2022).

Board that tenure exists in significant part to shield faculty from institutional repercussions for their scholarship, teaching, research, or views. It has, indeed, been instrumental to ensuring faculty — especially those with disfavored or dissenting views— remain free to teach, research, and speak publicly on matters within their expertise and on matters of public concern without repercussions aimed at stifling their unpopular perspectives. Those concerned that viewpoint diversity is in serious jeopardy in the academy should be especially wary of policies that weaken tenure, as tenure has proven instrumental in protecting unpopular faculty voices from reprisal. Simply put, without the protection of tenure, or statutory protections safeguarding academic freedom, dissenting voices would likely be even rarer on college campuses.

If tenure is to retain any value, Florida must ensure its policies affirmatively protect the academic freedom and expressive rights of those who have earned it.

With these interests in mind, FIRE has multiple concerns about the Board's proposed regulation.

Analysis

I. The Board cannot require compliance with an unconstitutional law, which has now been enjoined by a federal court.

Proposed regulation 10.003(3)(a)(5) requires the post-tenure review to take into consideration "[a]ny violation of section 1000.05(4), Florida Statutes." That provision deems it "discrimination" to "subject any student or employee to training or instruction that espouses, promotes, advances, inculcates, or compels such student or employee to believe" a list of eight concepts. However, after students and professors represented by FIRE and other organizations filed a constitutional challenge to the higher education provisions in that statute, a federal court on November 17, 2022, enjoined the Board from enforcing sections 1000.05(4)(a)–(b), Florida Statutes which comprises the entirety of section 1000.05(4).[2] The court held that the "positively dystopian" provision codified at section 1000.05(4) "officially ban[ned] professors from expressing disfavored viewpoints in university classrooms while permitting unfettered expression of

[2] *Pernell v. Fl. Bd. Governors State Univ. Sys.*, No. 4:22cv304-MW/MAF, 2022 WL 16985720, at *52 (N.D. Fla. Nov. 17, 2022). Section 1000.05(4)(a)–(b), Florida Statutes, which is colloquially known as the "Stop WOKE Act" has been enjoined. Board of Governor Regulation 10.005(2)–(3) and (4)(d) is the Board's regulation implementing that statute. The regulation has also been enjoined.

the opposite viewpoints."[3] The court invoked novelist George Orwell to drive home that if "liberty means anything at all it means the right to tell people what they do not want to hear."[4] As the court made clear: "The First Amendment protects university professors' in-class speech . . . ."[5] The Board was enjoined from enforcing the regulations adopted pursuant to section 10.005(4), Florida Statutes.[6] The order also explicitly commanded that "[The Board] must take no steps to enforce . . . the Board of Governors's Regulation 10.005(2)–(3) and (4)(d).)."[7] The language in the proposed regulation 10.003(3)(a) is so similar to the enjoined statute and regulation that it would be unconstitutional to proceed with that language here.

The Board's inclusion of section 1000.05(4), Florida Statutes, as a tenure review criterion in the proposed regulation 10.003, signals that, despite the court's ruling, discussion of the specified concepts prohibited by law could affect professors' performance ratings, and ultimately, their employment status. This is improper, and the implementation or application of an enjoined statute cannot stand. At a minimum, implementation of the proposed regulation would create an unconstitutional chilling effect on faculty speech. As the Supreme Court made clear in *Keyishian v. Board of Regents*, the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom."[8] This provision, as well as the reference to section 1000.05(4), Florida Statutes, in proposed regulation 10.003(2)(b), must be removed from the proposal.

II. The proposal must clarify the "professional conduct" criterion.

Proposed regulation 10.003(3)(a) requires that post-tenure review consider a "faculty member's history of professional conduct." But the concept of "professionalism" is so elastic as to easily be abused as a pretext for viewpoint-based discrimination. In fact, university and college sanctions and grievance proceedings often include charges that a faculty member's underlying behavior was "unprofessional," even if the conduct is clearly protected by academic freedom.

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[3] *Pernell*, 2022 WL 16985720 at *1.

[4] *Id.* at *1 (*quoting* George Orwell*, The Freedom of the Press,* TIMES LITERARY SUPPLEMENT, Sep. 15, 1972).

[5] *Id.* at *12.

[6] *Id.* at *52.

[7] *Id.* at *52-53.

[8] 385 U.S. 589, 683 (1967).

For example, in 2014, a political science professor at Marquette University published a personal blog post criticizing a graduate student instructor for stating that it was inappropriate for a student in a philosophy course to express opposition to same-sex marriage.[9] Citing "standards of personal and professional excellence," Marquette suspended the professor and revoked his tenure.[10] After nearly three years of litigation, the Wisconsin Supreme Court ruled that the university had violated the professor's academic freedom rights and ordered him reinstated.[11] As the Marquette University example illustrates, notions of "professional conduct" and what may be deemed "unprofessional" are so vague and subjective as to empower administrators to target faculty holding disfavored views.

FIRE has similarly criticized amorphous tenure review criteria including "collegiality" requirements which suffer from the same overbreadth.[12] Faculty have faced termination, discipline, and denial of tenure under collegiality (or similar) requirements simply for expressing unpopular viewpoints or criticizing their administrations.[13] FIRE's Scholars Under Fire database has catalogued numerous examples where faculty have been targeted for sanctions for speech that is squarely protected under norms of academic freedom and constitutional

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[9] *Wisconsin Supreme Court: Marquette University wrongly fired professor for opinions on personal blog*, FIRE (July 6, 2018), https://www.thefire.org/news/wisconsin-supreme-court-marquette-university-wrongly-fired-professor-opinions-personal-blog.

[10] Letter from Richard C. Holz, Dean, Marquette Univ, to Dr. John McAdams, (Jan. 30, 2015), https://www.thefire.org/research-learn/letter-marquette-university-dean-richard-c-holz-dr-john-mcadams-0.

[11] *McAdams v. Marquette Univ.*, 383 Wis. 2d 358 (Wis. 2018).

[12] *See* Letter from Alex Morey, Director, Individual Rights Defense Program, FIRE & Jeremy C. Young, Senior Manager, PEN America, to Dr. Alfred Rankins Jr., Comm'n of Higher Educ., Bd. of Trustees of State Institutions of Higher Learning (Apr. 27, 2022), https://www.thefire.org/news/fire-pen-america-condemn-new-rule-forcing-some-mississippi-universities-consider-collegiality); Letter from Laura Beltz, Program Officer, Policy Reform, FIRE, to Daniel A. DiBiasio, President, Ohio Northern Univ. (May 23, 2017) https://www.thefire.org/research-learn/fire-letter-ohio-northern-university-may-23-2017-0.

[13] *See, e.g.*, Alex Morey, *Salaita's 'Why I Was Fired' Puts Civility in the Spotlight*, FIRE (Oct. 8, 2015), https://www.thefire.org/salaitas-why-i-was-fired-article-puts-civility-in-the-spotlight; Colleen Flaherty, *Requiring Civility*, INSIDE HIGHER ED, (Sept. 12, 2013), https://www.insidehighered.com/news/2013/09/12/oregon-professors-object-contract-language-divorcing-academic-freedom-free-speech; Ari Cohn, *Marquette's Consistent Inconsistency on Academic Freedom, Tenure, and Civility*, FIRE (Mar. 4, 2015), https://www.thefire.org/marquettes-consistent-inconsistency-academic-freedom-tenure-civility; Erica Goldberg, *Outspoken Professor Faces Dismissal from Idaho State University*, FIRE (Oct.29, 2009), https://www.thefire.org/outspoken-professor-faces-dismissal-from-idaho-state-university.

guarantees of free speech.[14] To avoid authorizing discipline for protected speech, the Board should revise its definition of "professional conduct" so that it includes only objective factors like viewpoint-neutral standards related to scholarship and teaching as determined by faculty peers.

III. The regulation's "substantiated student complaints" criterion is vague and requires clarification.

The proposed post-tenure review policy includes "substantiated student complaints" as an evaluative criterion. Of course, institutions must fairly evaluate and, where appropriate, pursue student complaints regarding claims of harassment or other professional misconduct. However, FIRE's decades of experience defending faculty rights demonstrates that too often, student complaints concern faculty speech protected by the First Amendment.

For example, the University of Central Florida suspended and then quickly reinstated Professor Hyung-il Jung after he quipped in an exam review session, "It looks like you guys are being slowly suffocated by these questions. Am I on a killing spree or what?"[15] In Professor Jung's case, the alleged misconduct could have been deemed "substantiated" in the language of the criterion proposed here because the facts were uncontested. Thankfully, the institution eventually concluded that the professor had not engaged in wrongdoing because the First Amendment protected his speech. Still, his case demonstrates that the term "substantiated student complaints" is both vague and overbroad because it could mean that in cases where a student complains and the facts are not disputed, the student complaint is "substantiated."

The Board must therefore define the term "substantiated student complaints" narrowly, to include only those cases where the institution finds a faculty member is found responsible for misconduct that violates the law or university regulations after a process in which the professor is afforded a fair hearing and full procedural rights.

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[14] FIRE, SCHOLARS UNDER FIRE DATABASE, https://www.thefire.org/research-learn/scholars-under-fire (last visited Nov. 22, 2022).

[15] FIRE, *University of Central Florida Professor Reinstated After Suspension for In-Class Joke* (May 21, 2013),

https://www.thefire.org/news/university-central-florida-professor-reinstated-after-suspension-class-joke.

IV. The proposed appeal process is inadequate.

Any policy that allows for the removal of a tenured professor must allow for a meaningful appeal. Yet the appeal process set forth in the proposal falls short of this standard. It states:

> Final decisions regarding post-tenure review may be appealed under university regulations or collective bargaining agreements, as applicable to the employee. The arbitrator shall review a decision solely for the purpose of determining whether it violates a university regulation or the applicable collective bargaining agreement and may not consider claims based on equity or substitute the arbitrator's judgment for that of the university.

Although due process does not necessarily preclude affording some deference to the findings of fact established through an initial process, it is unjust to accord total deference to such findings even when the factual conclusions are erroneous. The Board must therefore change the rule to make clear that an arbitrator may overrule university findings that are plainly contrary to the weight of the evidence.[16]

The value of an appeal is greatly diminished when the arbitrator or appellate body cannot overrule a university's factual judgments even when there is clear evidence that the factual findings of an initial determination are in direct conflict with evidence on the record. The Board must ensure that the appeal process for post-tenure review decisions provides a meaningful opportunity for faculty to dispute the university's findings.

V. Faculty must play integral roles in any post-tenure review processes.

American institutions of higher education have long benefited when university administrators and faculty share the responsibility of governing institutional policies and practices. Faculty have historically defended freedom of expression, even when administrators have not. Faculty are naturally incentivized and well-suited to serve as a necessary check on administrative decision-making that might jeopardize academic freedom—after all, faculty rights are most directly affected when academic freedom protections are lacking.

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[16] *See, e.g.*, *Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299, 1312-13 (11th Cir. 2013) ("[N]ew trials should not be granted on evidentiary grounds unless, at a minimum, the verdict is against the great—not merely the greater—weight of the evidence.").

The proposed rule, however, does not fully allow faculty stakeholders to participate in the post-tenure review process. Section 4(i) states:

> With guidance and oversight from the university president, the chief academic officer will rate the faculty member's professional conduct, academic responsibilities, and performance during the review period. The chief academic officer may accept, reject, or modify the dean's recommended rating. The chief academic officer may request assistance from a university advisory committee in formulating an assessment.

As written, faculty peers are not guaranteed participation in this rating process. At the very least, this language should *require* consultation with a university advisory committee comprised of faculty. Even better, tenure should not be revokable without substantive involvement from faculty stakeholders.

VI. The proposal should maintain its prohibition on viewpoint and ideological discrimination while adding explicit protections for academic freedom.

Tenure is fundamental to ensuring protection for faculty with dissenting or unpopular viewpoints that differ from those held by others within the university community. The proposed regulation helpfully states: "The [post-tenure] review shall not consider or otherwise discriminate based on the faculty members' political or ideological viewpoints." FIRE urges the Board to adopt this provision in the finalized regulation. Still, this language cannot be squared with the provision that would require lack of compliance with section 1000.05(4), Florida Statutes, as a criterion, given that the referenced statute explicitly prohibits classroom engagement with certain viewpoints. A savings clause will not cure the unconstitutional evaluation required by application of section 1000.05(4). That this good provision is contradicted by other language in the proposed regulation will leave tenured faculty to guess whether the prohibition on political or ideological viewpoint discrimination will be meaningful in practice, engendering an impermissible chill on faculty expression.

While FIRE is pleased to see that the proposed post-tenure review procedure includes these protections, the Board should recognize that institutions often attempt to mask viewpoint-based discrimination by pretextually asserting that disfavored viewpoints are discriminatory themselves or otherwise unprofessional as set forth herein.[17] To guard against this, the Board should

[17] *See* Jeannie Suk Gersen, *Laura Kipnis's Endless Trial by Title IX*, NEW YORKER (Sept. 20, 2017), https://www.newyorker.com/news/news-desk/laura-kipniss-endless-trial-by-title-ix.

make clear that the review process will protect, to the greatest degree, the academic freedom that lies at the core of American higher education.

As the Supreme Court warned some 65 years ago:

> The essentiality of freedom in the community of American universities is almost self-evident. . . . No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.[18]

Post-tenure review has the potential to reduce academic freedom by weakening or eliminating procedural safeguards typically associated with tenure. To obviate this concern, the Board must reaffirm its commitment to academic freedom by explicitly stating so in the final regulations.

More specifically, the policy should expressly guarantee faculty the right to teach, research, and speak about matters within their areas of expertise and on matters of public concern, without facing punishment—even where some find their views, ideas, findings, or methods "uncomfortable, unwelcome, disagreeable, or offensive."[19] It must protect all classroom speech germane to the topic of the course—as broadly construed—and even speech not germane to the course if it is of short duration. Moreover, the policy should make clear that educators on college and university campuses are free to speak their minds, ask tough questions, and facilitate learning without the threat of institutional censorship, coercion, or intimidation. Finally, the proposed regulations should make clear that professors are free to speak as private citizens on matters of public concern.

[18] *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

[19] FLA. STAT. § 1004.097(2)(f) (2022).

Conclusion

The policy language as it currently stands, if adopted, will seriously imperil academic freedom at your member institutions. FIRE thanks the Board of Governors for its attention to our concerns. Of course, we would be happy to discuss our concerns with the Board further at its convenience.

Respectfully submitted,

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