

SEC. 1. SHORT TITLE.

This act may be cited as the "Guaranteeing University Academic Rights and Discourse Act" (GUARD Act)

SEC. 2. FINDINGS.

- (1) The Supreme Court of the United States has long emphasized and understood the importance of free and open expression on our nation's public campuses, proclaiming in 1957's *Sweezy v. New Hampshire* that the "essentiality of freedom in the community of American universities is almost self-evident." Ten years later in *Keyishian v. Board of Regents*, the Court further declared that academic freedom "is a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." And in *Healy v. James*, the Court stated that "the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, 'the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'"
- (2) The Supreme Court held in *Garcetti v. Ceballos* that a public employee's speech made pursuant to official duties is not protected by the First Amendment but recognized that its decision "may have important ramifications for academic freedom." Accordingly, the Court declined to address whether its analysis would apply in the same manner to a case involving scholarship or teaching. Every federal circuit to address this question has recognized a clear exception to *Garcetti*, but the issue has not been finally settled.
- (3) The Supreme Court held in *Pickering v. Board of Education* that when a public employee speaks as a private citizen on a matter of public concern, the government-employer may discipline the employee only after determining that their interest, "as an employer, in promoting the efficiency of the public services it performs through its employees," outweighs the interest of the employee, "as a citizen, in commenting on matters of public concern." Despite this requirement, many public universities have fired faculty members for their speech as private citizens on matters of public concern without properly engaging in this balancing test or specifically demonstrating the speech at issue created significant issues in the workplace, or they have misapplied the test.
- (4) Faculty members are employed for the very purpose of speaking and academic freedom is critically important for faculty members to contribute to public knowledge and debate.
- (5) In order to protect academic freedom and the First Amendment rights of faculty at public universities, it is necessary to clarify the limitations on the authority of public institutions of higher education to discipline faculty for their speech, both as faculty members and as private citizens speaking on matters of public concern.

SEC. 3. DEFINITIONS.

- (1) "Faculty" refers to any person, whether or not they are compensated by an institution of higher education, who is tasked with providing scholarship, academic research, or teaching. For purposes of this statute, the term "faculty" shall include tenured and non-tenured professors, adjunct professors, visiting professors, lecturers, graduate student instructors, and those in comparable positions, however titled. For purposes of this statute, the term "faculty" shall not include persons whose primary responsibilities are administrative or managerial.
- (2) "Public institution of higher education" means [insert state definition].
- (3) "Adverse personnel action" means actions by the institution or its agents and includes, but is not limited to, discharge, demotion, suspension, denial of promotion or tenure, reduction in pay or benefits, reassignment, non-renewal of contract, or any other action that would dissuade a person from exercising their First Amendment rights, including causing financial or professional harm.
- (4) "Harassment" means conduct directed at a particular individual or group that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to a public institution of higher education's educational programs or activities.

SEC. 4. ACADEMIC SPEECH.

- (1) No public institution of higher education shall take adverse personnel action, or maintain a policy that allows it to take adverse personnel action, against a faculty member for expression related to their teaching or academic work, or for the dissemination of their academic work, except as provided in subsection (2).
- (2) Nothing in this act shall be interpreted as prohibiting a public institution of higher education from taking adverse personnel action, or maintaining a policy that allows it to take adverse personnel action, against a faculty member for:
 - (a) Classroom expression that is not reasonably germane to the subject matter of the class, broadly construed, and that comprises a substantial portion of classroom instruction;
 - (b) Violating basic professional standards laid out in lawful institutional policies, provided, however, that this provision may not be used to punish a faculty member on the basis of the viewpoints expressed in their scholarly work, or because their scholarly work is unorthodox or deviates from a majority view.

SEC. 5. SPEECH AS A PRIVATE CITIZEN ON MATTERS OF PUBLIC CONCERN.

- (1) A public institution of higher education shall not take adverse personnel action, or maintain a policy that allows it to take adverse personnel action, against a faculty member for their speech as a private citizen on a matter of public concern, unless the institution, via a neutral, multi-member decision-making body that includes at least one faculty member:
 - (a) Finds that their interest, as an employer, in promoting the efficiency of the public services it performs through its employees, outweighs the interest of the faculty member, as a citizen, in commenting on matters of public concern; and
 - (b) Articulates, with specificity and in writing shared with the faculty member, the ways in which the speech has objectively interfered with either the faculty member's duties or with regular university operations.
- (2) When undertaking the balancing test pursuant to subsection (1)(a), the faculty member's interest shall be deemed to outweigh the institution's interest unless the institution demonstrates with specificity and through objective evidence that the faculty member's speech:
 - (a) Severely impairs discipline by superiors or close working relationships between co-workers for which personal loyalty and confidence are necessary;
 - (b) Directly and substantially impairs the faculty member's ability to perform essential job responsibilities; or
 - (c) Severely disrupts the institution's regular operations.
- (3) When considering (2)(a)(i)–(iii), the institution will account for the unique nature of the academic environment and the academic value of scholarly debate and discussion. This includes giving significant weight to the risk that disciplining the faculty member would produce a chilling effect, wherein other faculty members self-censor or modify their speech as scholars or teachers in order to avoid adverse personnel action. Further, disruption may not be inferred solely from disapproval of the content or viewpoint of a faculty member's speech by government officials, administrators, other employees, students, or members of the public.

SEC. 6. INTERPRETATION.

- (1) Nothing in this act shall be construed to:
 - (a) Prohibit an institution from adopting and enforcing policies addressing unlawful conduct, discriminatory harassment as defined in this act or federal law, unlawful discriminatory conduct, and speech that the United States Supreme Court has explicitly identified as a category of unprotected speech;
 - (b) Limit compliance with federal or state law; or
 - (c) Supersede any valid collective bargaining agreement provisions that afford equal or greater protection for faculty speech.

SEC. 7. CAUSE OF ACTION.

- (1) The Attorney General may bring an action to enjoin a policy, practice, or action prohibited by this act.
- (2) Any person whose rights under this act were violated may bring an action against the institution or its agents in any federal or state court of competent jurisdiction to enjoin a violation of this act and seek compensatory damages as defined in this section. In an action brought under this act, if the court finds that protected expression, as defined in this act, was a motivating factor behind the public institution of higher education's decision to take an adverse personnel action, the court shall provide a prevailing plaintiff appropriate equitable remedies and shall award:
 - (a) Actual damages including but not limited to lost salary and benefits, or \$10,000, whichever is greater;
 - (b) Reasonable court costs; and
 - (c) Reasonable attorney's fees.

The court may also award any other relief in law, including punitive damages, as deemed appropriate.

- (3) A person must bring suit for violation of this act not later than two years after the day the cause of action accrues. For purposes of calculating the two-year limitation period, the cause of action shall be deemed accrued on the date that the person receives final notice of the adverse personnel action from the institution of higher education or the date in which the act of retaliation occurred, whichever date is later.