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## Assembly Bill 885

Assembly Committee on Colleges and Universities

Thursday, February 10

Thank you Chair Murphy and members of the committee for the opportunity to testify in favor of Assembly Bill 885. I apologize for not being able to be in attendance today, but I appreciate the opportunity to submit written testimony.

Assembly Bill 885 eliminates immunity for certain campus administrators from liability for violations of individual expressive rights under the Wisconsin Constitution. Claimants may bring an action in state court against the UW System or technical college district employees who subject that individual to a violation of certain rights. Governmental and qualified immunity may not be used as a defense for a claim brought under this legislation. In addition, actions against a college administrator must be commenced within two years after the cause of action accrues.

The U.S. Supreme Court has been very clear that college students enjoy the full force of First Amendment protections on public college campuses. But since 1982, when it invented the doctrine of qualified immunity, it has been abused in a manner that has enabled college administrators to violate students' rights without consequence. In addition, students looking to vindicate their rights in the court system are often met with a lengthy trial, only to be dismissed upon their graduation on grounds of mootness.

Colleges and universities were founded to be a place to share ideas, thoughts, and beliefs for the betterment and progress of society. It is all too common on college campuses for students' ideas to be silenced if they are not the same as the professor, class, or student organization. As a legislator with a college campus in my district as well as two other UW schools within an hour from my district, I have heard from many students attending these UW campuses that they are fearful to share their thoughts openly on campus.

I thank Senator Roth for co-authoring this legislation with me and I would be happy to meet and answer any questions you may have at a later date.



**WISCONSIN**

UNIVERSITY OF WISCONSIN-MADISON

**Assembly Committee on Colleges & Universities**

**2021 Assembly Bill 885**

*Eliminating immunity for public campus administrators from liability for violations of individual expressive rights under the declaration of rights in the Wisconsin Constitution*

February 10, 2022

Chairman Murphy and members of the Assembly Committee on Colleges & Universities:

The University of Wisconsin–Madison thanks the committee for the opportunity to provide written testimony for information only on Assembly Bill 885, which would eliminate immunity for public campus administrators from liability for violations of individual expressive rights under the declaration of rights in the Wisconsin Constitution.

With over 9,000 courses, nearly 300 majors and certificates and more than 2000 faculty members, UW-Madison graduates alumni who are well-rounded critical thinkers. We aim to teach our students not what to think but how to think. Our ability to do so and our ability to attract and retain world class faculty and staff depend upon a thriving, and sometimes contentious marketplace of ideas, shaped by our commitment to both academic freedom and freedom of speech.

UW-Madison believes strongly in the rights of free speech and expression and in the right to assemble for the purposes of voicing differing opinions. We likewise deeply value the academic freedom of our faculty to shape our curriculum, both as individual scholars & instructors and working together in curriculum committees at the department, school/college and campus levels. And similarly, the ability of our students to advance arguments, including those that are controversial, as part of their educational experience is something in which we strongly believe and seek to foster.

While UW-Madison shares the goals of the author to ensure that student voices are valued and heard at our institution, we believe that the proposed legislation is unnecessary and could be problematic in application and employee retention. The university's policies and practices, including the Board of Regents' Policy 4-21 Commitment to Academic Freedom and Freedom of Expression, already reflect our obligations under the extensive body of caselaw defining First Amendment rights and exceptions and provide protections and remedies for violations. UW-Madison is required to submit a report to the Board of Regents on an annual basis outlining our compliance with this policy.

Office of University Relations

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UW-Madison does not restrict free speech or expression. At the start of each academic year, university officials remind the campus community of Regent policy and the campus protest guidelines that will help keep them safe and in good standing as they exercise their constitutional rights. These guidelines on protesting serve two purposes: they help individuals and groups plan for peaceful, successful events, and they provide students and employees with behavior expectations as they participate in these campus activities. UW-Madison shares these guidelines on an annual basis and provides opportunities for students and employees to ask questions and learn more.

If students feel that their voices have not been heard they have various remedies, depending on the situation: they can speak up in class, talk to the instructor outside of class, talk to the department chair, talk to the dean's office, or file a bias report with the Dean of Students office. Those are all meaningful protections for free speech that work alongside our commitment to academic freedom—and students do avail themselves of those options. The best and most frequent solution is an open, honest conversation between students and UW-Madison instructors and administrators that almost always leads to an amicable resolution.

University employees and staff are asked to bear an increasing amount of responsibility for the academic, physical, mental, and emotional well-being of students. For UW-Madison, these areas could include HR, Academic Affairs, and Student Affairs. A environment where the state imposes legal responsibility on UW employees who are making decisions in good faith with no ill-intent is chilling for employee recruitment and retention. Situations involving expressive activities can be very fact-specific and extremely challenging to address and may require university administrators to make tough judgment calls to balance physical safety and expressive rights. In these often time-sensitive situations, employees should not have to be focused on or distracted by the fear that their discretionary decisions could subject them to frivolous or baseless claims with no ability to raise a defense of qualified immunity. Eliminating qualified immunity for these individuals may cause them to refrain from acting in a challenging situation for fear of lawsuit.

Qualified immunity is important to the State of Wisconsin, as it limits liability while allowing state employees to use their discretion to address challenging situations without penalty in certain circumstances. Therefore, the removal of that protection for a certain group of university administrators would result in the University of Wisconsin, and the state by extension, bearing the cost of damages and awards under this kind of suit, which will lead to increased costs for the state.

Thank you for the opportunity to submit written testimony on the impact this legislation would have on UW-Madison. If you have any questions, please reach out to UW-Madison Director of State Relations Crystal Potts [crystal.potts@wisc.edu](mailto:crystal.potts@wisc.edu) or (608) 265-4105.



Office of Government Relations

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DATE: February 10, 2022

TO: Members of the Assembly Committee on Colleges and Universities

FROM: Jeff Buhrandt, UW System Interim Vice President for University Relations

RE: Written Testimony on Assembly Bill 885

Thank you, Chair Murphy and committee members, for providing the UW System (UWS) an opportunity to provide testimony on Assembly Bill 885.

First Amendment rights are of the utmost importance to our universities. We encourage open expression and open dialogue among our students, faculty, and staff. The UWS continues to maintain the objective and policy set by the Board of Regents in 1894 that open discourse and freedom of expression on our campuses supports to "...ever encourage that continual and fearless sifting and winnowing by which alone the truth can be found." This commitment is also enshrined in state statute as part of the UWS statement of purpose and mission in Chapter 36, with the line "Basic to every purpose of the system is the search for truth."

Since 1982, campus administrators have been included in the definition of government official and been provided qualified immunity by the courts at the federal level. Qualified immunity protects government officials from personal liability when they are found to violate constitutional rights of individuals that are not "clearly established." This legislation would remove this immunity for campus administrators for matters involving expressive rights under the Wisconsin constitution.

Constitutional rights to free expression are a constant subject of litigation, with new court decisions refining these rights nearly every year. Qualified immunity protects those officials who make decisions on matters of first impression in difficult, close-call situations, not those who knowingly violate others' constitutional rights. It should be noted that even in this continually developing space, no case has been brought forward in Wisconsin in which a UWS employee was found to have violated the expressive rights of another individual under the state constitution. As such, it seems unnecessary to remove this protection for campus administrators, which was put in place to protect all government officials from excessive, personal lawsuits.

We are all aware that cases arise from both students and faculty, in which an individual experiences a grievance. UWS has procedures and policies in place for students and faculty to bring forth these concerns. Regent Policy Document (RPD) 4-21 outlines our commitment to academic freedom and provides procedures for violations of this policy. We are doing more than ever as a system to ensure that students and employees are aware of mechanisms to report

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concerns and violations, including a requirement that all UWS institutions annually provide notice of this policy to students and employees, and an annual written report to the BOR listing any policy violations.

As we have noted earlier, cases of campus administrators violating the Wisconsin constitution are not occurring. But the removal of qualified immunity could lead to additional frivolous lawsuits or lawsuits of questionable merit, circumventing the policies and procedures we have on our campuses that allow intervention and mediation if an individual feels their expressive rights have been violated by a student or staff. The bill would also impose legal responsibility on the employee, even if an action was taken in good faith or without intent to bar an individual from exercising their constitutional rights. Threat of these lawsuits could have a chilling effect on the retention and recruitment of UWS employees. Further, any lawsuit brought forth would be defended at taxpayer expense, as the state would remain responsible to defend any employee sued for actions taken pursuant to their employment and the UWS would be responsible for indemnifying employees held liable for damages, of which statutory limits are removed, in any lawsuit.

We agree with the authors that administrators at public universities should not, and cannot, violate the constitutional rights of students or employees. Our administrators believe this too, which is why they work diligently, and in good faith, to resolve any concerns that may arise on their campus. This bill may only serve to increase litigation in Wisconsin and limit the environment which serves to foster the freedom of expression in which truth can be found.

Thank you again for the opportunity to provide testimony on this bill.



Dr. Morna K. Foy, President

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**Wisconsin Technical College System  
Testimony on AB 885  
Morna K. Foy, President  
Assembly Committee on Colleges and Universities  
February 10, 2022**

The WTCS believes current Wisconsin statutes require appropriate accountability of Wisconsin public employees for their decisions and actions. The liability protections in s. 893.80, *Wis. Stats.*, acknowledge the unique complexities of public decision-making and recognize public employees have a responsibility, to the best of their ability, to enforce and execute state laws and organization policies and procedures.

Enactment of AB 885 would eliminate any defense for a single group of public employees accused of violations of certain individual expressive rights. This change would make public college and university campus administrators the only Wisconsin public employees without these protections.

In addition, enactment of AB 885 would have a chilling effect on recruitment and retention efforts for these positions. Many of these individuals also provide instruction or student support services beyond their administrative duties.

Moreover, eliminating the liability limits in current law will increase the cost of operating Wisconsin's public colleges and universities. WTCS college liability insurance annual premium costs will increase at least \$1 million if AB 885 is enacted.

WTCS requests that the Legislature reject AB 885 as unnecessary and detrimental to the effective and efficient operation of Wisconsin's public college and university campuses.



**To:** Members of the Assembly Committee on Colleges and Universities

**From:** Megan Novak, Legislative Director, Americans for Prosperity - Wisconsin

**Date:** February 10, 2022

**Subject:** Support for Assembly Bill 885 to Protect Campus Free Speech

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Chairman Murphy, and members of the Assembly Committee on Colleges and Universities, thank you for the opportunity to provide testimony today in favor of Assembly Bill 885 and in favor of protecting free speech on campuses in Wisconsin.

Americans for Prosperity engages the grassroots across this state and country to break down government-imposed barriers that limit each individual's ability to succeed. Barriers to expressing our opinions, petitioning our government, and assembling together are of major concern to our organization and grassroots activists.

Article 1, Sections 1, 3 and 4 of the Wisconsin Constitution clearly protect our equal rights, our freedom of expression, written and spoken, and our rights to peaceably assemble and petition our government. While these rights are enshrined in the Wisconsin Constitution, a judge-made doctrine, commonly called "qualified immunity" places strict limitations on when an individual, is able to file suit against a government official for purposefully violating these constitutionally protected rights.

Thankfully, Senator Roth and Representative Moses have authored Assembly Bill 885, before this committee today, which will break down one of the biggest barriers to free expression for university and technical college students across this state. Passing Assembly Bill 885 is one of the most critical steps the Wisconsin Legislature can take to help protect free speech on our public university and technical college campuses, by eliminating the judge-made doctrine of "qualified immunity" when a student's freedom of expression rights are violated by a campus administrator.

***What is Qualified Immunity?***

The 1871 Civil Rights Act, passed in the aftermath of the Civil War, authorized lawsuits against state and local government officials who violate our constitutionally protected rights. However, in cases since this Act was first passed, the U.S. Supreme Court has judicially altered the law to

create the doctrine of “qualified immunity,” which protects government officials, including administrators on public college campuses, who violate these rights if the law is not already “clearly established.”

Essentially, under this judge-made doctrine, “clearly established” means another court must have already said that another government official violated the Constitutional rights of another individual in the exact same manner and for the exact same action being challenged. As the Committee can imagine, it is nearly impossible for a suit to be brought against a government official that meets these strict constraints, leaving those whose constitutional rights are violated, without any meaningful recourse.

Wisconsin courts have for all intents and purposes adopted the U.S. Supreme Court’s doctrine of “qualified immunity” without any separate analysis as to how it should be viewed and applied under state law<sup>1</sup>. Because the state courts have adopted this doctrine as well, Wisconsin citizens are severely limited in trying to bring action against government officials for violations of our rights under the Wisconsin Constitution as well.

### *Free Expression on Wisconsin Campuses*

The Foundation for Individual Rights in Education (FIRE)<sup>2</sup> reviews the so-called speech codes of colleges all across our nation for potential violations of the First Amendment. Of the University of Wisconsin System schools’ speech codes they have reviewed, six campuses have earned a yellow rating, meaning “*at least one ambiguous policy that too easily encourages administrative abuse and arbitrary application.*” One UW campus has a rating of red, meaning it “*enforces at least one policy that both clearly and substantially restricts freedom of speech.*”

Sadly, the real-world implications of these flawed speech codes and examples of First Amendment violations are seemingly never ending on Wisconsin’s campuses. Today, we are joined by students and alumni from across the UW System who will share their stories of viewpoint discrimination, the chilling of free expression, and outright hostility to open discourse from campus administrators.

The protection offered by judge-made “qualified immunity” is arguably one of the biggest reasons why university administrators continue to violate free expression rights on campuses. From concerns with written speech codes to the experiences of students the committee will hear from today, it is clear that campus administrators do not worry about any consequences they may face for free expression related decisions. This is especially of concern as administrators are able

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<sup>1</sup> State ex rel. Jones v. Schwochert, 949 N.W.2d 883 (2020)

<sup>2</sup>[https://www.thefire.org/resources/spotlight/?x=wisconsin&speech\\_code=&y=&institution\\_type=&speech\\_code\\_advanced=&y\\_advanced=#search-results](https://www.thefire.org/resources/spotlight/?x=wisconsin&speech_code=&y=&institution_type=&speech_code_advanced=&y_advanced=#search-results)



to, and should be, consulting with legal counsel to evaluate the risks and repercussions of each decision they make in regard to free expression on campus prior to making it.

If we want campus administrators to start prioritizing and protecting constitutional rights, they must be motivated to do so. AB 885 provides this much-needed motivation.

### ***The Impact of Assembly Bill 885***

What happens if we eliminate qualified immunity in Wisconsin by passing Assembly Bill 885? State government officials who run Wisconsin's universities will know they are accountable for constitutional violations. The state, university, or insurer is still able to cover employees' liability, but by allowing more cases for constitutional violations to go forward, more rights will be vindicated, and universities will finally begin prioritizing and respecting civil liberties.

Universities will get their written policies into compliance with the Constitution and train employees on what it requires of them. When universities must weigh the costs of getting the free expression rights of students wrong, they will be more focused on getting them right. In other words, we incentivize doing what government is created to do, protect the constitutional rights of its citizens.

Finally, when students graduate from universities where free speech and open inquiry is valued, not just in rhetoric but in lived reality, the next generation of teachers and judges and policymakers and community leaders will leave university well equipped to be the antidote to the broader attacks on civil liberties coming from all directions, and our society, as a whole, will be better for it.

### ***Conclusion***

Thank you, Senator Roth and Representative Moses and all bill coauthors for realizing the importance of this legislation and the need to protect free expression on campuses in Wisconsin.

Government's primary job is to protect the constitutional rights of its people. We want it to be difficult for someone's constitutional rights to be violated, not for anyone to use their rights. It's time for Wisconsin to stand for free expression on campus and end qualified immunity for campus administrators by supporting Assembly Bill 885.

Thank you, Mr. Chairman, and Senators/Representatives. My name is Will Paltz and I am here today to testify in favor of Senate Bill 837

Newspapers, companies, and leaders lament Wisconsin's "brain drain" - people leaving Wisconsin after college for other states. I grew up in Madison, attended undergrad at UW-Milwaukee, and after, was accepted to UW Madison for law school. I wanted to be excited about starting my next adventure in my home state of Wisconsin, but I declined this acceptance offer, largely because of my experiences with the open suppression of free speech at UW Milwaukee. Instead, I moved my family to Texas and attend law school there.

While attending UW-Milwaukee as an undergrad, I found myself running a conservative political club. One of our goals was provide a space to bring together students on campus and members of the community to discuss conservative beliefs and policy solutions in a positive, constructive way. Our club grew and grew, as there were few other spaces for conservatives on the UW-Milwaukee campus. As our events grew in both size and success, several bad actors within UWM staff and administration began to actively erect barriers to our success.

In 2018 our organization attracted the attention of Ben Shapiro, a popular conservative speaker. We got to work immediately to host him as a speaker for a club-sponsored event. Despite having hosted several speakers successfully in the past, the university actively tried to slowball the event to prevent it from happening.

Administrators suddenly required us to have multiple "collaborative" conversations to discuss which speakers our club should consider bringing to campus - despite our having a speaker already selected. These were challenging to attend, with club leadership needing to skip classes to attend these now "required" meetings when staff were available. We were told securing funding could be an issue, despite progressive political activists' speakers often facing no barriers to large speaker fees despite tiny numbers of participants. We put in the work and secured funding commitments ourselves from off campus organizations, instead of trying to navigate this new requirement from campus administrators.

Once we worked through the previously mentioned challenges and the date was set, even more barriers were erected by administrators. In addition to being questioned at every new mandatory meeting about why we chose this speaker, UWM suddenly refused to give us access to either of the two large venue spaces first under the guise of logistics issues and then claiming the event wouldn't be popular enough to fill them. Just prior to the event, new access restrictions were placed on our club and, we were told that we had to use security wrist bands to make sure the event space wasn't over filled. We were not allowed to count or control these wristbands and check-in volunteers were only given a handful at a time by a visibly angry and adversarial staff member while thousands of UWM students and other Wisconsin citizens waited in line to get into an event that could only seat 800.

The event itself was relatively successful, but over two thousand people were turned away needlessly because of the space restrictions put on our event, and afterwards the university immediately placed even more restrictions on any future club events. We were told club leadership was required to sign an agreement to these new terms before any contract would be signed for a speaker. The new requirements being placed on our organization included:

- Required use of the university's ticket registration system
- No standby line for events allowed

These new restrictions were crushing for our organization and event planning. With the school allowing only a fixed number of registrations and no standby line, we feared, and as we have seen in schools around the state – politically motivated staff would leak the registration link of future events to progressive activists who reserve all the tickets and then don't show up. A standby line allows students who legitimately want to attend an event to do so despite such sabotage. Additionally new restrictions on marketing, combined with staff dragging their feet on marketing often led to forced reschedule of events because they simply wouldn't produce the materials in time. The University called these "good faith efforts". When compared to the ease of booking and resourcing our fellow students on the other side of the political spectrum, its laughable to call them "good faith". And worst of all, student leaders, like myself, previously had no real recourse available to us to hold these administrators liable for their actions. With legislation like SB 837, that would eliminate the protection of "qualified immunity" for these administrators, we would have been able to better protect our free speech rights on campus.

To be clear, I don't think \*All\* staff and administrators are openly hostile to free speech and the views of those they disagree with – but right now, those who are hostile to conservatives are empowered to operate with impunity. Human behavior is shaped by incentives and disincentives, and there needs to be a firm disincentive for those who seek to suppress the free speech of the young students who pay their salaries.

I'm just one person, but hearing about SB 837 and that free expression might once again be valued on campuses in this state made me think about moving back to Wisconsin for the first time in years. Thank you Senator Roth and Representative Moses for putting SB 837/AB 885 together, and thank you committee members for the opportunity to testify today. I hope you will all vote in support of campus free speech.