

CSU

The California State University

OFFICE OF THE CHANCELLOR

WELCOME!

2023 TITLE IX & DHR
ANNUAL CONFERENCE

DAY 3 - JULY 27, 2023





The California State University

OFFICE OF THE CHANCELLOR

AGENDA

2023 TITLE IX & DHR ANNUAL CONFERENCE

DAY 3 - JULY 27, 2023

DAY 3: THURSDAY, JULY 27 | 8:00 A.M. TO 3:15 P.M. | DUMKE CONFERENCE CENTER

- 8:00 a.m. BREAKFAST
- 9:00 a.m. WELCOME, UPDATES AND HOUSEKEEPING
Laura Anson, Sr. Systemwide Director for DHR/Whistleblower/Equal Opportunity Compliance Services
- 9:15 a.m. NON-DISCRIMINATION POLICY - ACADEMIC FREEDOM - FREE SPEECH RIGHTS
Robin Webb, University Counsel
- 10:15 a.m. BREAK
- 10:30 a.m. ADDRESSING OTHER CONDUCT OF CONCERN
Gina Maisto-Smith, Chair, Institutional Response Group | Cozen O'Connor
Leslie Gomez, Vice Chair, Institutional Response Group | Cozen O'Connor
- 12:00 p.m. LUNCH
- 1:00 p.m. UNCONSCIOUS BIAS
Christina J. Ro-Connolly, Partner | Oppenheimer Investigations Group LLP
- 2:00 p.m. BREAK
- 2:15 p.m. HIGHLIGHTS AND CLOSING THOUGHTS
Laura Anson, Sr. Systemwide Director for DHR/Whistleblower/Equal Opportunity Compliance Services
Sue McCarthy, Sr. Systemwide Title IX Compliance Officer & Sr. Director, SW Title IX Compliance Services



WELCOME & UPDATES & HOUSEKEEPING

Laura Anson

**Sr. Systemwide Director for DHR/Whistleblower/Equal Opportunity
Compliance Services**

9:00 a.m – 9:15 a.m.



NON-DISCRIMINATION POLICY – ACADEMIC FREEDOM – FREE SPEECH RIGHTS

Robin Webb
University Counsel

9:15 a.m – 10:15 a.m.

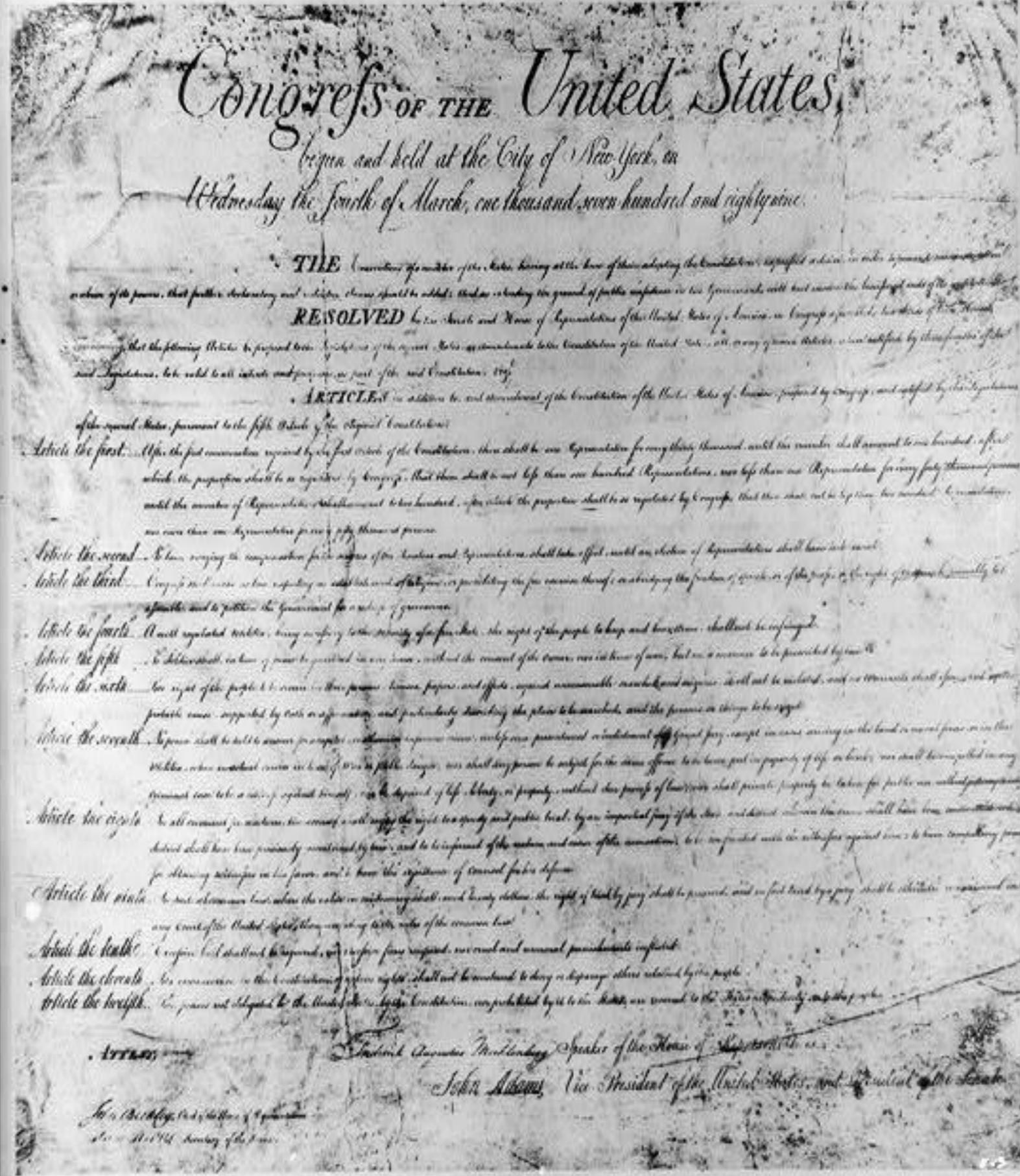
Freedom of Speech and DHR/Title IX Issues

Office of General Counsel 2023



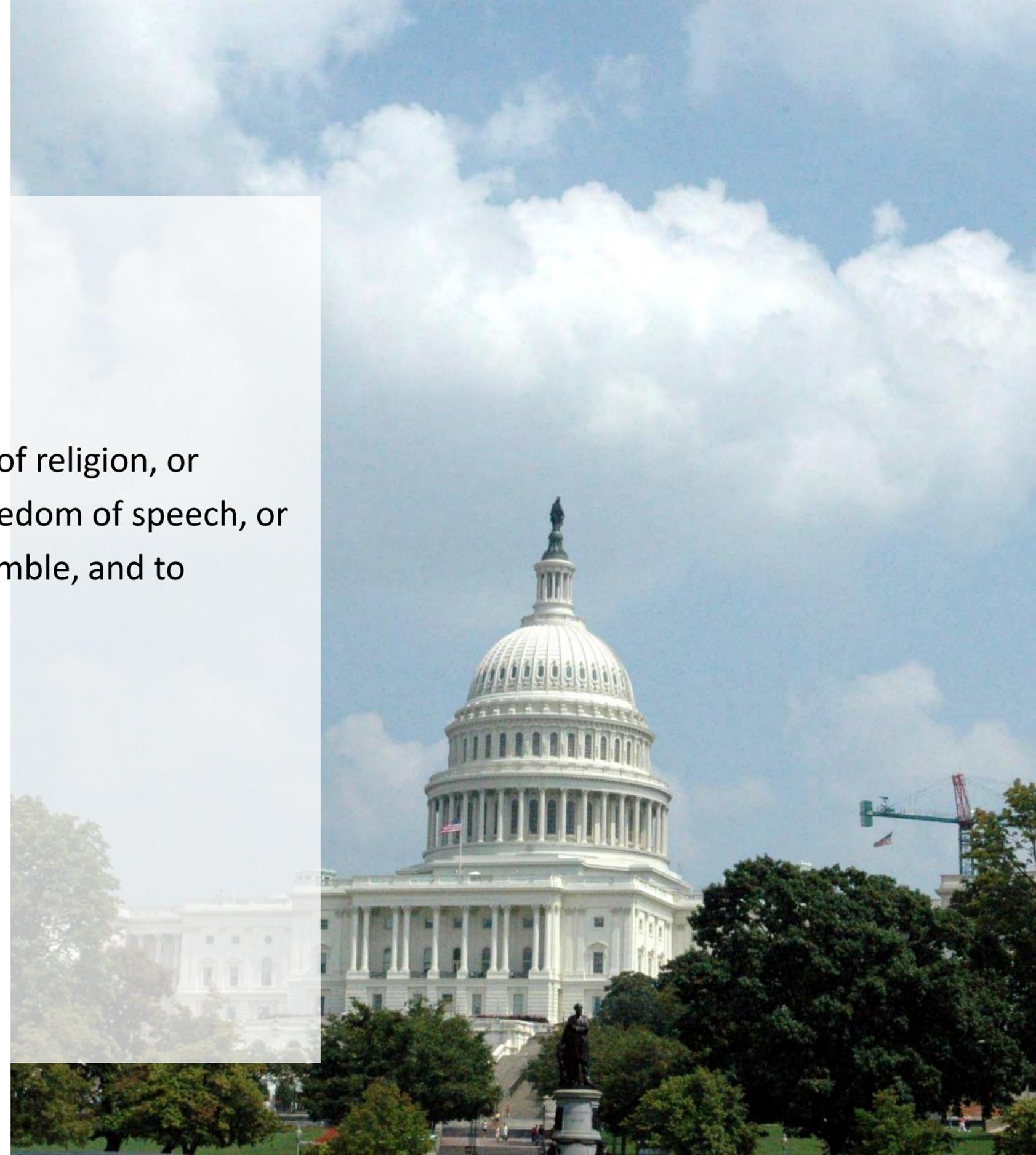
Topics

- What is “freedom of speech?”
- Why is speech protected?
- What speech is protected?
- Who is protected?
- When does speech become actionable under DHR/Title IX policies?



First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances



California Constitution

Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press



What Does This Mean?

The government,
including the CSU,
may not restrict speech,
except in limited circumstances



Why Does Speech Receive Protection?

Encourages dialogue

Allows us to see other points of view

Fosters new ideas

Provides progression in society

Prevents authoritarianism



What Speech Is Protected?

- Written words
- Spoken words
- Expressive conduct
 - Art
 - Clothing
 - Gestures
 - Symbolic behavior



Speech Is Generally Protected Except:

- Speech that incites actual violence or harm
- Fighting words
- True threats
- Defamation
- Obscenity/child pornography
- Severe harassment
- False advertising
- The use of public resources for partisan politics

CSU generally cannot punish or prevent speech unless it falls into a non-protected category

(CSU can regulate employee speech in certain circumstances, such as when the employee is speaking on behalf of the university)



Incitement of Violence or Harm:

Speech is not protected when it is “directed to inciting or producing *imminent* lawless action” and is “*likely* to incite or produce such action”

General advocacy for violence in the future will not lose First Amendment protection

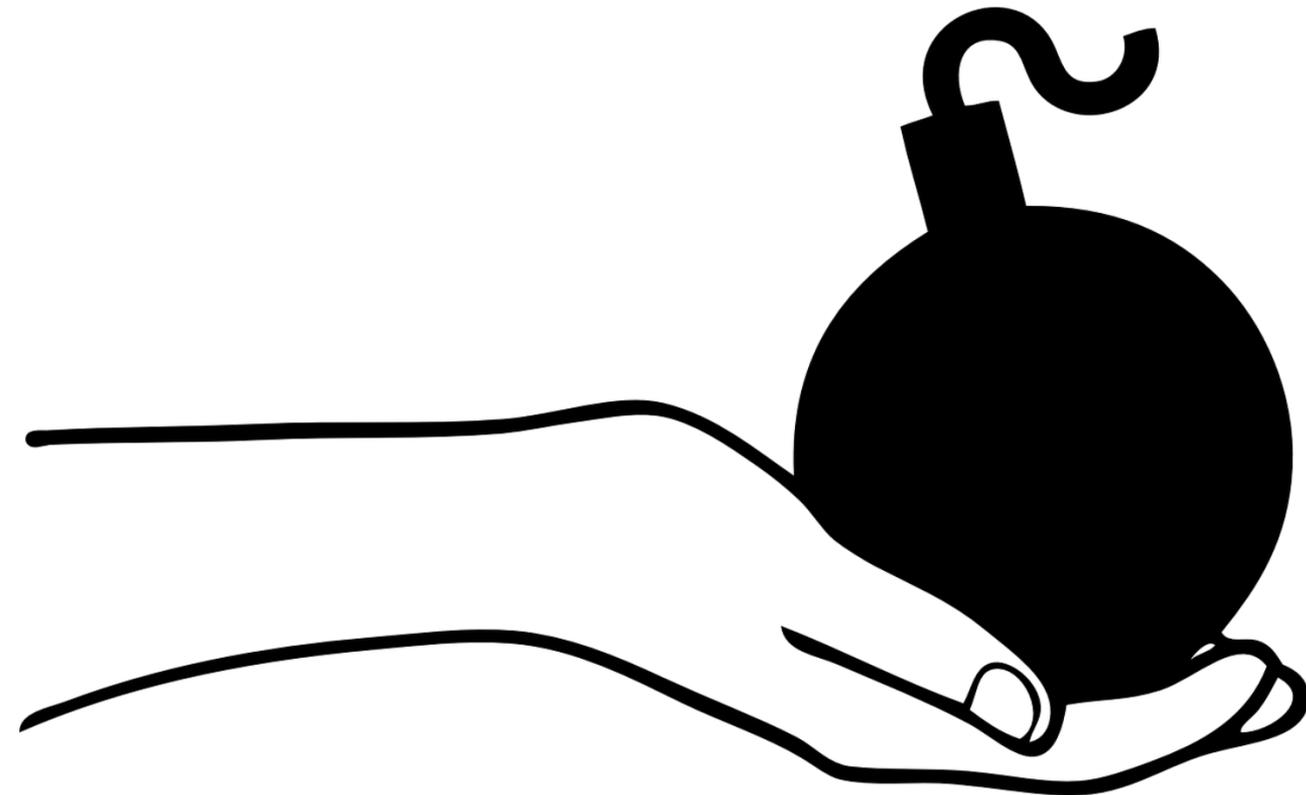
Fighting Words:

- Fighting words require a direct, face-to-face target and immediate breach of the peace
- The words make it clear that violence is imminent
- General profanities and insults alone are not “fighting words”
- Consider contemporaneous conduct (spitting, shaking fist, volume of speech, slurs)



True Threats:

- A true threat is found where a *speaker* understands his/her statements' threatening nature. Recklessness is enough, meaning the speaker is aware that the statements could be viewed as threatening violence and delivers them anyway.
- Consider: Conditional nature, context, hyperbole, warnings, communications by recipient
 - *Prior law suggested words could be considered a threat if a reasonable person would view the statement as a serious intent to harm*



Defamation:

Defamatory speech is that which is untrue and damages a person's good name, character or reputation

Slander = spoken

Libel = written

Students and employees often want the University to take action against those who make defamatory statements



Obscenity:

The work, taken as a whole, appeals to the prurient interest; is patently offensive in light of community standards; and lacks serious literary, artistic, political or scientific value

Extremely subjective

Sexual expression that is indecent but not obscene is protected

CLASSIFIED

Harassment:

Harassing speech is not protected when it creates a hostile educational environment

- Severe or pervasive
- Based on protected status
- Undermines and detracts from the victims' educational experience
- Causes the victim-student to be effectively denied equal access to an institution's resources and opportunities



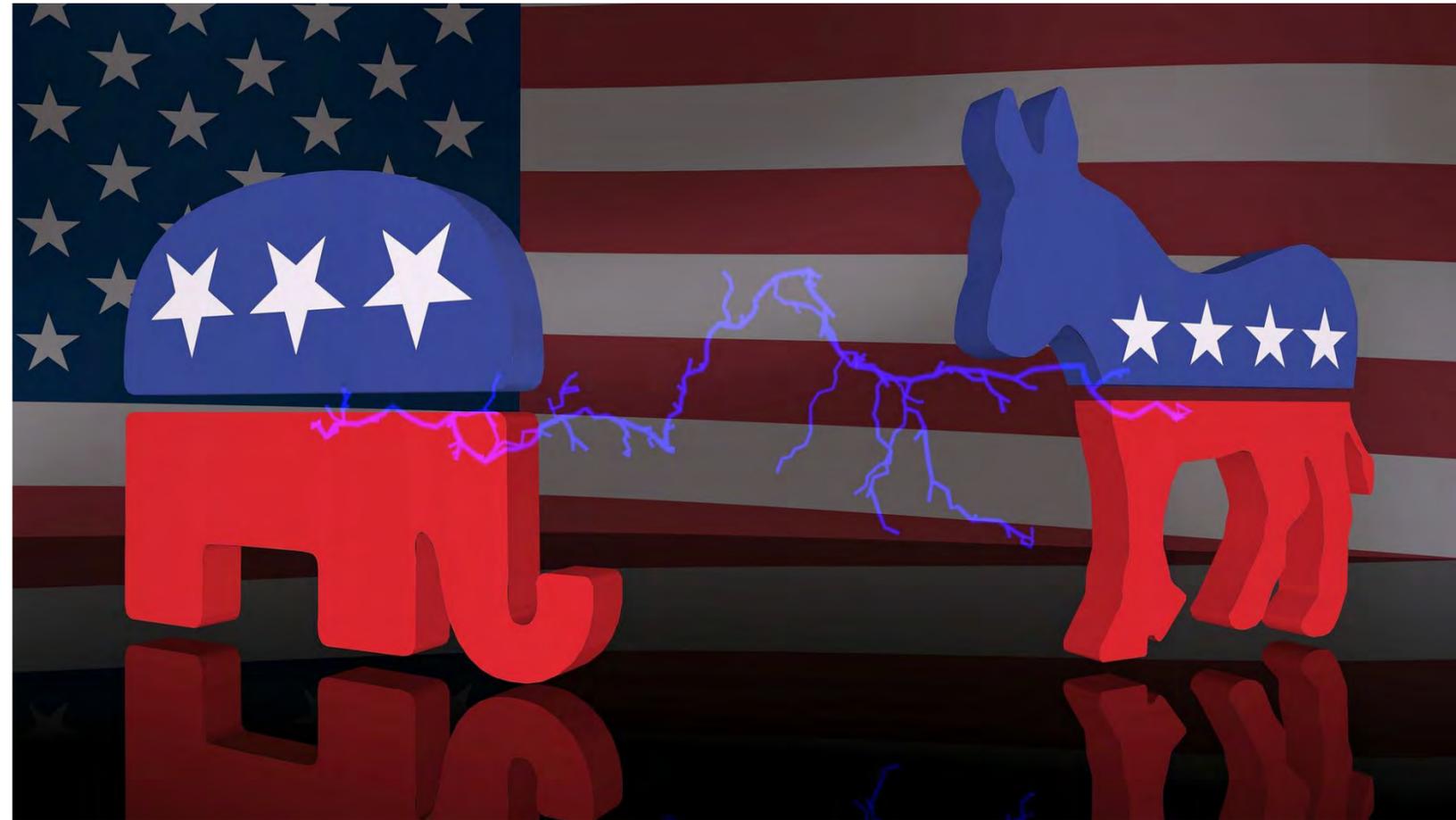
False Advertising:

- Untrue or misleading publications concerning the performance of property or services
- Not for the campus to determine unless it involves campus marks, rights, or interests



Use of Public Funds for Political Activity:

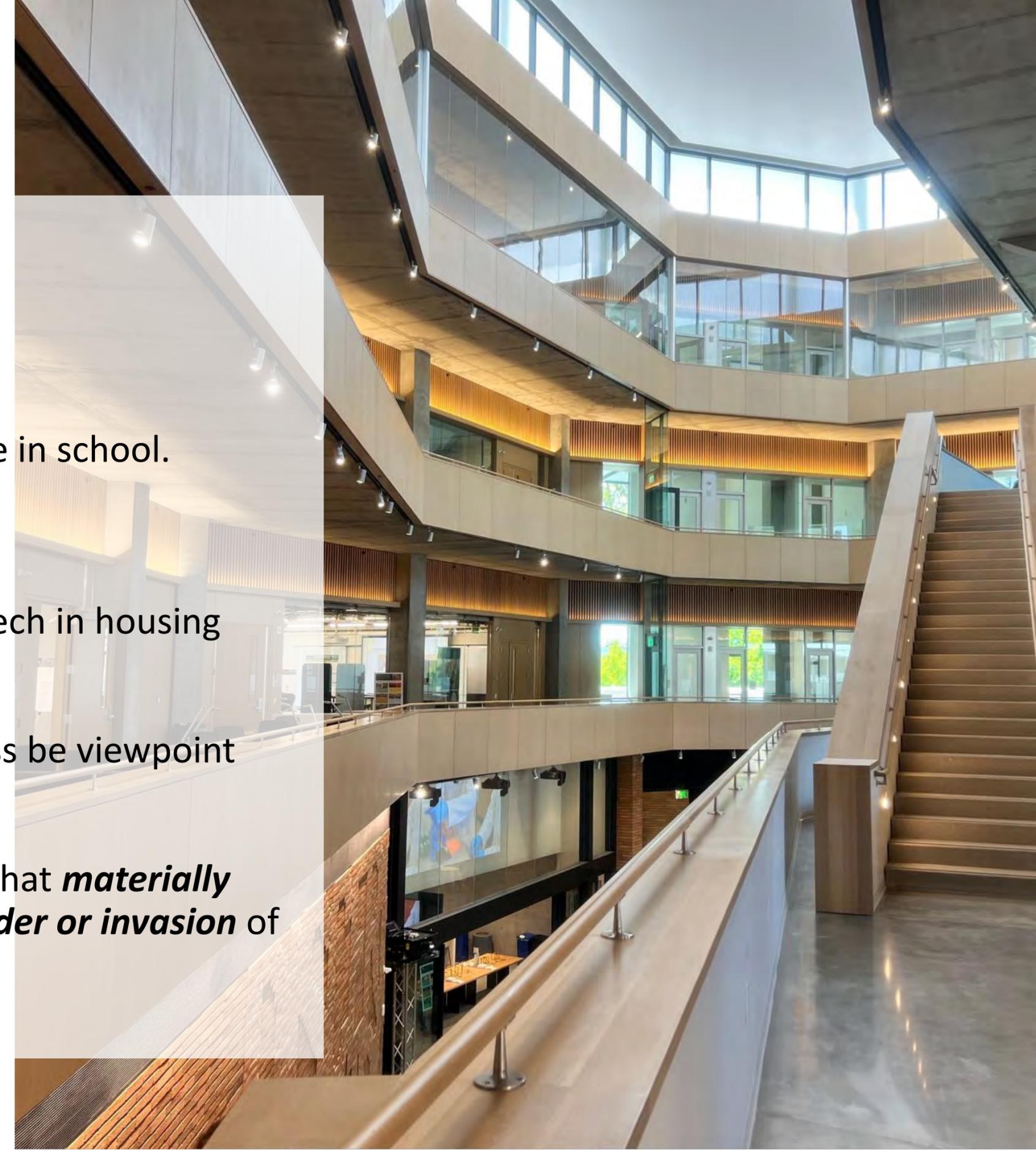
- CSU may not use public funds to promote partisan positions in election campaigns
- Public funds includes money and resources



Who Is Protected?

Students do **not** give up their free speech rights while in school.

- Student speech while in class may be limited
- Campus may impose greater restrictions on speech in housing (must be viewpoint neutral)
- Students don't have the right to insist that a class be viewpoint neutral
- Students may not engage in conduct or speech that ***materially disrupts*** class work or involves ***substantial disorder or invasion*** of the rights of others



Who Is Protected?

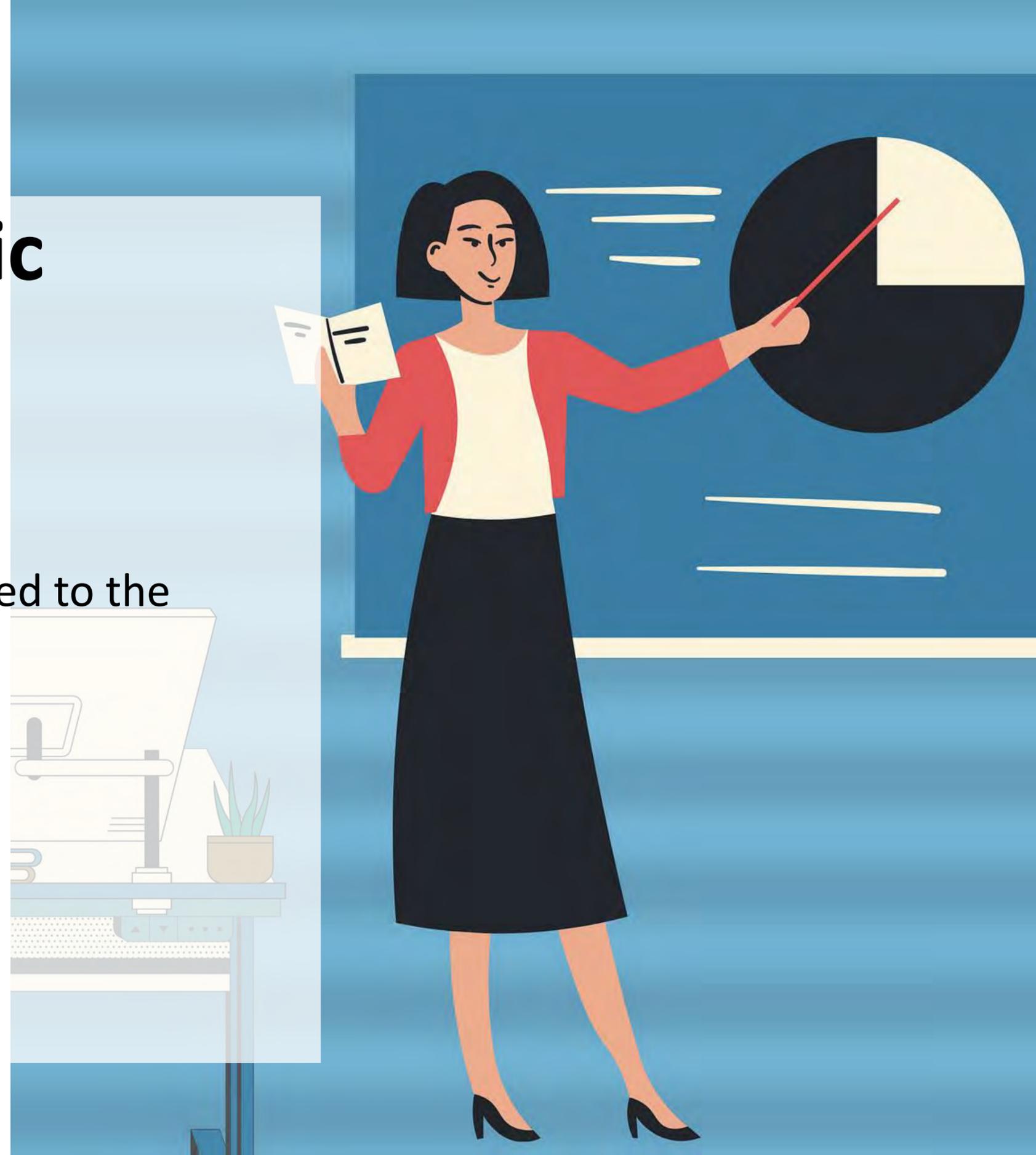
Faculty/Staff are entitled to academic freedom

- Academic freedom allows professors to exercise their professional judgment in teaching and research, it is not unrestricted free speech rights
- Some speech may exceed the protections provided under the 1st Amendment and academic freedom



Limitations on Academic Freedom

- Verbal abuse of students
- Discussion of political/social topics unrelated to the subject matter
- Defamation
- Verbal or physical harassment of students



Employee Speech

- Public employee speech is protected if they are speaking as private citizens on matters of public concern
- Public employees are entitled to engage in political activities when acting in their private capacity

Employee Speech

- Matters of public concern include speech that relates to any matter of political, social or other matters of concern to the public or community
- Consider the content, form and context of the statement
- Public concern or not?
 - Employee speaking about a personnel dispute?
 - Statements regarding race or gender conflicts in society?
 - Employee shedding light on wrongdoing in the workplace?

Who is Protected?

Outside Speakers

- If the campus allows outside speakers to use facilities, broad access must be provided to speakers from every spectrum, in both formal and informal settings
- There can be no viewpoint discrimination or censorship
- All speakers/groups must be treated equally in our terms and conditions of access



Who Is Protected?

Government speech rights allow the CSU:

- To publish its own materials
- Establish its own internet sites
- Take particular positions without having to also state an opposing view
- Create campaigns, events, and statements that may include values such as inclusiveness and diversity, or defuse controversial presentations



Time, place and manner restrictions

Can be used to govern the use of university facilities



Time, Place & Manner Restrictions

These restrictions regulate when, where, and how speech may occur

They do not regulate on the basis of content





When Does Content of Speech Become Actionable Under DHR/TIX Policies?

Hate Speech?

Bullying?

Insults?

Offensive/Insensitive Social Media Posts?

University Harassment Policies:

- Courts routinely strike down harassment policies that censor speech
- Stanford's 1995 speech code defined harassment to include: "Personal vilification of students on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin using insulting or fighting words, or non-verbal symbols"
- CA Supreme Court found the policy too broad:
 - It legitimately prohibited speech that would cause people to react violently, BUT
 - It also prohibited speech that would cause people to feel "merely" insulted or stigmatized

Hate Speech

Many believe that Americans should be prohibited from expressing unpopular opinions

Some believe that universities should control the messages that may be voiced on campus

For the CSU, controlling the messages would constitute government interference with speech



Hate Speech

- Courts have made clear that there is no “hate speech” exception to the First Amendment, and that no one has a right not to be offended by speech
- Most “hate speech” is as fully protected as any other form of protected speech
- We would ideally live in a community free of bias, free of hate, and free of bullying; but we cannot prohibit this in violation of the First Amendment



Bullying/Insults

People have a right to express their dislike for others

Mean words, without more (such as adverse action based on protected status) is not actionable

Non-violent expressions of disagreement and disapproval are protected



Offensive Social Media

Students and employees can generally express what they want on their private social media pages

Racially or sexually offensive material is generally protected, with some possible exceptions

Even hateful symbols or memes are beyond the university's disciplinary reach



Potential Responses to Offensive Speech

- Organize events and activities that support campus values of DEI
- Remind students of their right to express their own values through speech and peaceful protest
- Offer support of campus resources to those impacted
- Employee speech that may not violate DHR policy might still be subject to HR remedies

Harassment:

- Offense and disruption are not enough.
- The speech must genuinely interfere with a reasonable person's ability to participate in the educational process.
- It must be evaluated not only from the victim's perspective, but from the perspective of a "reasonable person" in the victim's position.
- The speech may be prohibited only if it is both subjectively and objectively harassing.

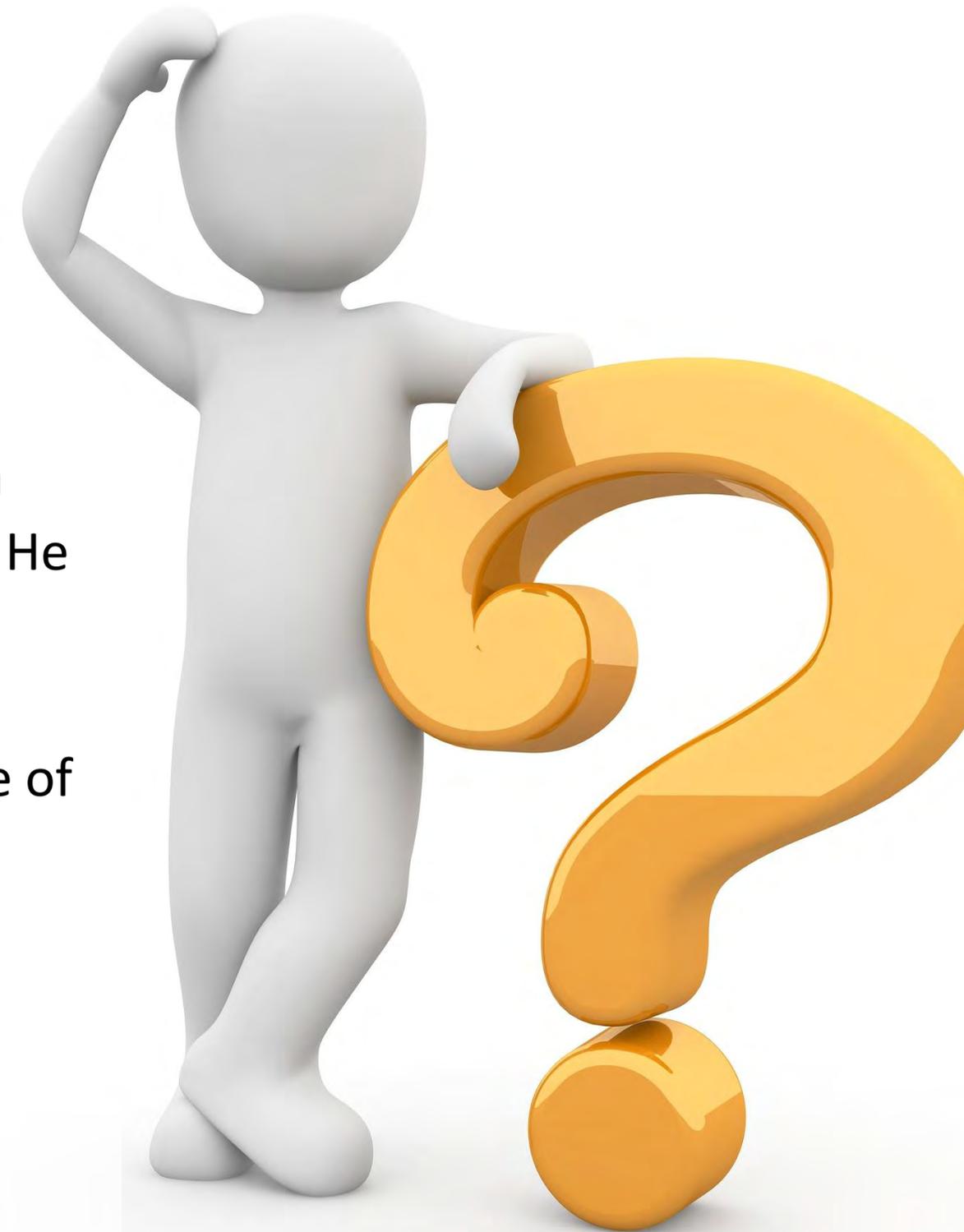
Harassment:

- What can the campus do if student conduct does not constitute harassment?
 - Talk with the student about his/her conduct and what behavior is appropriate
 - Explain to the student the impact his/her conduct is having on others
 - Evaluate whether the conduct is subject to discipline on other grounds

Hypothetical

A literature professor required students to read *To Kill a Mockingbird* as a class assignment. He read passages aloud in class that used the n-word. He also used the n-word in discussions about the novel. Students complained about the nature of the required reading, the professor's use of n-word while reading passages, and the professor's use of the n-word while engaging in class discussions.

- Would you investigate?
- Which allegations would you investigate and why?
- What additional facts would you seek?



Hypothetical

A student complained to the Title IX office that there is a social media group in which she is not a member but is often the subject of discussion. She has heard that the group members talk about the ways they want to have sex with her and discuss different sexual scenarios. The members of the group are the male students in her engineering major.

- Would you investigate based on these facts?
- What additional information do you need about this conduct?



Hypothetical



In between classes, a faculty member regularly goes to the open outdoor spaces on campus and holds a sign that says that homosexuals will go to hell unless they repent and change their ways. Students and faculty members complain that this is harassment.

- Would you investigate?
- What additional information do you need about this conduct?

Resources

First Amendment Watch

<https://firstamendmentwatch.org/>

American Council on Education

<https://www.acenet.edu/Pages/default.aspx>

National Center for Free Speech and Civic Engagement

<https://freespeechcenter.universityofcalifornia.edu/>

