

FREE SPEECH AT WEST VIRGINIA COLLEGES AND UNIVERSITIES: PERIL AND PROMISE

By Adam Kissel, Laura Beltz, and Jenna A. Robinson



INTRODUCTION

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

— *West Virginia State Board of Education v. Barnette* (1943)

Freedom of speech is a hallmark of a free people. Vigorous challenge of ideas helps secure truth. The freedom of individual and group expression enables us to be fully who we are.

Yet, a campus-climate survey published by the Foundation for Individual Rights and Expression (FIRE) in 2021—the largest of its kind ever performed, including 37,104 students at 159 institutions—found that 5-in-6 college students have self-censored because of how they perceived other students, a professor, or the college administration would respond. [1] Two-thirds of college students agreed that it was acceptable to shout down a campus speaker or to try to prevent them from speaking. [2]

Unfortunately, colleges across West Virginia contribute to this restrictive culture by maintaining speech codes—policies that restrict guarantees of freedom of speech. Not only do the U.S. and West Virginia constitutions acknowledge the right to free speech, which must be protected at public colleges, but Senate Bill 657, which became law in 2021, requires that public colleges protect “any lawful verbal and nonverbal speech.” [3] Furthermore, many private colleges also promise free speech to their students. Speech codes violate these guarantees.

FIRE reviewed the restrictions on free speech at 17 public or private colleges and universities in West Virginia and found 92 policies that restrict freedom of speech. [4] This report reviews FIRE’s ratings, gives examples of restrictive policies, and recommends ways to improve students’ free speech rights.

[1] 2021 *College Free Speech Rankings: What’s the Climate for Free Speech on America’s College Campuses?* FIRE at 10, 21 (Sept. 21, 2021), <https://rankings.thefire.org/>. In the present report, “colleges” usually includes universities.

[2] *Id.*

[3] W. Va. Code §18B-20-2.

[4] The sum was calculated by counting the number of policies that do not meet First Amendment standards operating at each institution. Since several West Virginia University campuses enforce the same Board of Governors policy, however, the true number of policies is slightly lower.

FIRE'S RATING SYSTEM

For more than 15 years, FIRE has rated campus speech codes with a “red light,” “yellow light,” or “green light” rating, based on the extent to which they restrict free speech. [5] A “red light” institution has at least one policy that both clearly and substantially restricts freedom of speech. A “yellow light” institution has at least one policy that restricts a more limited amount of protected expression or, by virtue of vague wording, can too easily be used to restrict protected expression.

These policies are unconstitutional at public colleges or violate a private college’s promise of free speech. Courts regularly strike down unconstitutional policies or find that a private college has violated its binding promise to its students.

FIRE assigns a “green light” rating to a school with free speech obligations that maintains no policies that seriously imperil free speech. Regretfully, only 59 colleges in America currently earn a green light rating.

Finally, since private colleges have their own associational right to prioritize other values above free speech, FIRE does not assign one of the above ratings to a private college that clearly and consistently states such a priority. Instead, FIRE issues a “Warning” rating so that students and others may be informed about the institution from a free speech point of view. [6] In West Virginia, these institutions include Appalachian Bible College, Catholic Distance University, Davis & Elkins College, and Ohio Valley University.

[5] *Speech Code Reports*, FIRE, <https://www.thefire.org/resources/spotlight/reports> (last visited May 27, 2022) (displaying all published speech code reports since 2006).

[6] *Using the [Spotlight] Database*, FIRE, <https://www.thefire.org/resources/spotlight/using-the-spotlight-database/> (last visited May 27, 2022).

SPEECH CODE RATINGS

Of the 17 institutions FIRE reviewed for this report, 47% earn an overall red light rating, while the other 53% earn an overall yellow light rating. No West Virginia institution earns an overall green light rating. Unfortunately, the percentage of West Virginia institutions with red light ratings greatly exceeds the national average of 18.5%. [7]

The following tables show how many policies are inconsistent with First Amendment standards at each rated institution in West Virginia.

Public Colleges: Red Light

Institution	Red Light Policies	Yellow Light Policies	Total Unconstitutional Policies
Concord University	1	8	9
Glenville State College	2	11	13
Shepherd University	1	4	5
West Liberty University	1	4	5

Private Colleges: Red Light

Institution	Red Light Policies	Yellow Light Policies	Total Speech Codes
Bethany College	1	5	6
University of Charleston	3	3	6
West Virginia Wesleyan College	3	1	4
Wheeling University	1	5	6

[7] *Spotlight on Speech Codes 2022*, FIRE, <https://www.thefire.org/resources/spotlight/reports/spotlight-on-speech-codes-2022> (last visited May 27, 2022).

Public Colleges: Yellow Light

Institution	Yellow Light Unconstitutional Policies
Bluefield State College	6
Fairmont State University	7
Marshall University	5
Potomac State College of West Virginia University	6
West Virginia State University	3
West Virginia University	1
West Virginia University at Parkersburg	4
West Virginia University Institute of Technology	1

Private Colleges: Yellow Light

Institution	Yellow Light Speech Codes
Alderson Broaddus University	5

SPEECH CODE EXAMPLES

Many students and administrators are mistaken about the limits of free speech. There is no First Amendment exception, for example, for “hate speech,” offensive language, jokes, or conversations about sex. Nevertheless, colleges frequently ban such language. Some language from red light policies is quoted below.

West Virginia Wesleyan University

The university bans the following:

- “Attitudes of condescension” towards others (calling such attitudes “harassment”) [8]
- “attempting ... to subject another person to unwanted ... verbal contact” [9]
- “transferring text or graphics [*sic*] images that would be deemed hateful [or] demeaning” [10]
- Using email “to create offensive or disruptive messages. This includes messages which contain sexual implications, racial slurs, gender-specific comments, or any other comment that offensively addresses someone’s age, sexual orientation, religious or political beliefs, national origin, or disability.” [11]

Indeed, the university generally bans “Non-Sexual Harassment,” defined as “actions which are intended to annoy and/or alarm another.” Properly defined, harassment is unlawful. But the university’s ban is overbroad: Preventing an attempt “to subject another person to unwanted ... verbal contact,” for example, is so overbroad that it subjects even a single unwelcome joke to punishment. Students do not need prior permission from the hearers to tell an intentionally annoying joke.

[8] *Wesleyan Student Handbook 2021-22*, WEST VIRGINIA WESLEYAN UNIV., <https://www.wvwc.edu/wp-content/uploads/2021/11/Student-Handbook-2021-2022-1.pdf> (last visited May 27, 2022).

[9] *Id.*

[10] *Acceptable Use*, WEST VIRGINIA WESLEYAN UNIV., <https://www.wvwc.edu/acceptable-use-policy> (last visited May 27, 2022).

[11] *Id.*

Glenville State College

The college bans the following as “examples of sexual harassment in any setting”: [12]

- “Offensive name calling, jokes, pictures, objects”
- “Sexually explicit questions, jokes, or anecdotes about gender specific traits”
- “Unwelcome or uninvited sexual comments or innuendo”
- “Communication of unsought sexual propositions, requests for dates, sexual favors, or lewd remarks or sounds”
- “Oral, written, or electronic communications that are sexually explicit in nature”
- “Sexually suggestive sounds, gestures, gifts, or visual materials such as magazines, pictures, posters, photos, cartoons, or drawings”
- “Unwanted ... sexual advances, spreading of sexual rumors”
- “Making sexual comments about appearance, clothing, or body parts”
- “Asking sexual questions, such as questions about someone’s sexual history or their sexual orientation”

The U.S. Supreme Court defined when an institution is required to address student-on-student sexual harassment: Conduct must be “so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims’ educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities.” [13] This standard was codified in U.S. Department of Education regulations in 2020. [14]

While the types of expression listed in Glenville State’s policy could be a part of a larger pattern of repeated conduct that would constitute sexual harassment, these examples do not come close to meeting that standard when standing alone. As the policy prohibits each example “in any setting,” students reading the policy are left with the unmistakable view that such conduct is prohibited across the board, causing a chilling effect on protected expression.

[12] *Sexual Harassment*, GLENVILLE STATE UNIV., <https://www.glenville.edu/about-us/title-ix/sexual-misconduct> (last visited May 27, 2022)

[13] *Davis v. Monroe Cnty. Bd. Of Educ.*, 526 U.S. 629, 650 (1999); Robert Shibley, *Why the Supreme Court’s Davis standard is necessary to restore free speech to America’s college campuses: Part I*, FIRE (Oct. 14, 2019), <https://www.thefire.org/why-the-supreme-courts-davis-standard-is-necessary-to-restore-free-speech-to-americas-college-campuses-part-i/>.

[14] 34 C.F.R. Part 106, Nondiscrimination on the Basis of Sex in Education Programs Or Activities Receiving Federal Financial Assistance, <https://www.ecfr.gov/current/title-34/subtitle-B/chapter-I/part-106>.

University of Charleston

- “All posters must be in good taste and contain no offensive language” [15]
- “Promoting in the Residence Halls: You must gain approval from the Resident Director in order to hand out flyers or hang up posters in the building.” [16]
- The university’s ban on cyber-bullying “[i]ncludes any language that can ... potentially result in another student feeling tormented, threatened, harassed, humiliated, embarrassed.” [17]

Since much of what is subjectively found “offensive” or not “in good taste” is protected under First Amendment standards, the University of Charleston’s policy places impermissible limits on the content of posters. Further, students are seemingly unable to post anywhere on campus without first gaining permission from an administrator.

The University of Charleston’s policy on “cyber-bullying” prohibits speech that merely has the potential to result in another student feeling, for example, “humiliated” or “embarrassed.” While bullying conduct that rises to the level of peer harassment or true threats as defined by the Supreme Court would legitimately be punishable, this definition is far broader than those legal standards, and it includes protected speech. Attempting to regulate student speech to try to ensure that no student ever feels embarrassed requires such a profound intrusion on basic and innocuous student interactions that violations of protected speech are practically inevitable.

West Liberty University

The university bans “[a]ny inappropriate online conduct via online communities, including but not limited to ... hate speech.” [18]

In regulating “abuse of computer facilities and resources,” West Liberty prohibits all subjectively “inappropriate” conduct, including “hate speech.” However, most speech commonly identified as “hate speech” is protected by the First Amendment and cannot be censored, punished, or unduly burdened by the government—including a public university like West Liberty. [19]

[15] *Student Handbook 2021-22*, UNIV. OF CHARLESTON, <https://www.ucwv.edu/wp-content/uploads/2020/08/2020-2021-UC-Student-Handbook.pdf> (last visited May 27, 2022).

[16] *Id.*

[17] *Id.*

[18] *2021-22 West Liberty University Student Handbook*, WEST LIBERTY UNIV., <https://westliberty.edu/residence-life/files/2021/12/Student-Handbook-2021-22.pdf> (last visited May 27, 2022).

[19] *Is hate speech legal?* FIRE (Mar. 28, 2019), <https://www.thefire.org/issues/hate-speech>.

Even if the policy did not specifically prohibit “hate speech,” it still restricts students’ rights by banning all “inappropriate online conduct.” Whether speech is “inappropriate” is a boundlessly subjective term, and speech does not lose First Amendment protection simply because it is seen as inappropriate by others.

Bethany College

The college bans the use of “software or data that infringes on the rights of others,” calling the circulation of “material that is abusive, profane or sexually, racially or religiously offensive” examples of policy violations.” [20]

As mentioned above, campus expression that is merely “offensive,” without rising to the Supreme Court’s standard for student-on-student harassment or other unlawful speech or conduct, is protected under First Amendment standards.

Additionally, Bethany’s policy prohibits material that is “abusive” or “profane.” However, “abusive” is a term that is both broad and vague, and it could be applied to punish protected speech. Indeed, the Supreme Court held long ago that a Georgia statute prohibiting “opprobrious words or abusive language” was unconstitutional because those terms, as commonly understood, encompass speech and expression protected by the First Amendment. [21] And while “profane” material could be included in speech that rises to the level of unprotected speech like harassment or true threats, on their own, subjectively profane words are constitutionally protected speech.

Shepherd University

The university bans “hate activities that demean [or] ridicule ... other members of the campus.” [22] By including “hate activities” as a type of discrimination, the university bans much speech that would be protected under First Amendment standards. Any conduct or expression the university wishes to legitimately target with this policy would already be encompassed in other policies preventing peer harassment, discriminatory conduct, and other unlawful expression.

[20] *Policy Manual Volume 7: Student Life Policy*, BETHANY COLLEGE, <https://2a2fc3rfbvx3losa0396kxen-wpengine.netdna-ssl.com/about-bethany/wp-content/uploads/sites/2/2021/11/Volume-7-Student-Life-Policies.pdf> (last visited May 27, 2022).

[21] *Gooding v. Wilson*, 405 U.S. 518 (1972).

[22] *Student Code of Conduct*, SHEPHERD UNIV., <https://www.shepherd.edu/student-handbook/student-conduct-2> (last visited May 27, 2022).

WEST VIRGINIA UNIVERSITY: A SUCCESS STORY, WITH ONE LAST POLICY TO FIX

West Virginia University has a longstanding commitment to free expression. In his 2017 State of the University Address, President Gordon Gee stated, “Any attempt to deny free speech protections to others is a threat to our own freedom. It is a threat to education. And it is a threat to democracy itself.” [23]

A year ago, WVU maintained several policies that conflicted with this commitment. Over the past year, however, it appears that the university has come almost fully into compliance with the First Amendment.

Today, WVU and WVU Institute of Technology each maintain only one unconstitutional policy: Board of Governors Governance Rule 1.8, which was just adopted in 2019. [24] This policy first warns:

First Amendment rights must always be applied in light of the special characteristics of the higher education institutional environment ... reasonable restrictions on time, place, and manner of speech are appropriate and necessary.

In this rule, the university also states that the university expects students to comply with university rules, policies, and laws. In this context, therefore, students reasonably understand that the following expectation is binding:

The University expects that persons engaging in expressive activities will demonstrate civility, concern for the safety of persons and property, respect for University activities, respect for those who may disagree with their message, and compliance with University rules and policies, as well as applicable local, state, and federal laws.

[23] E. Gordon Gee, *2017 State of the University Address* (March 22, 2017), <https://presidentgee.wvu.edu/speeches/2017-state-of-the-university-address>.

[24] *BOG Governance Rule 1.8 Freedom of Expression*, WEST VIRGINIA UNIV., <https://policies.wvu.edu/finalized-bog-rules/bog-governance-rule-1-8-freedom-of-expression2> (last visited May 27, 2022).

If this expectation is merely aspirational, students have no way of knowing, since the expectation appears along with the requirement to obey university rules and laws.

Furthermore, while respect is an important value for most people in most situations, a public university may not require students to engage in expressive activities in a way the university subjectively deems as demonstrating “civility” and “respect for those who may disagree with their message.”

It should never be up to an administrator to decide whether someone has been so uncivil or disrespectful that they deserve an official sanction. But students are likely to self-censor and fail to vigorously stand up for their beliefs and values out of fear that WVU will apply this policy against them.

The federal court in *Bair v. Shippensburg* agreed. Shippensburg University in Pennsylvania had a policy stating that “[t]he expression of one’s beliefs should be communicated in a manner that does not provoke, harass, intimidate, or harm another.” The court took the word “should” as enough of a prohibition to declare (on this and other policies), “the cited portions of the Speech Code would lead a reasonable person to believe that the University sets a number of restrictions on student conduct.” [25]

Likewise, in *College Republicans at San Francisco State University v. Reed*, a federal judge issued a preliminary injunction prohibiting San Francisco State University and the California State University System from enforcing a policy stating, “Students are expected to be good citizens and to engage in responsible behaviors that reflect well upon their university, to be civil to one another and to others in the campus community, and contribute positively to student and university life.” [26] The judge found the university’s argument that this language was merely aspirational or hortatory unpersuasive, noting the provision “appears within a set of pronouncements that are entitled “Standards for Student Conduct.”

Similarly, by appearing in an enforceable Board of Governors Rule, WVU’s expectations are likely to be read as mandatory by students and to have an impermissible chilling effect on protected speech. In *Speech First, Inc. v. Schlissel*, the U.S. Court of Appeals for the Sixth Circuit held that while the university’s bias reporting policy disclaimed disciplinary authority, its powers to refer reports to other university offices and to invite accused students to voluntarily meet objectively chilled protected speech, demonstrating that student speech rights may be violated even when a policy does not claim direct disciplinary authority. [27]

[25] *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 365 (M.D. Pa. 2003).

[26] *College Rep. at San Francisco State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1016-17 (N.D. Cal. 2007).

[27] 939 F.3d at 765; see also *Speech First, Inc. v. Fenves*, 979 F.3d 319, 333 (5th Cir. 2020) (holding bias policy enforced by referrals for discipline “sufficiently proscriptive to objectively chill student speech.”).

The cure for the deficiency in WVU's policy is simple. Separating the moral expectation of civility and respect from the legitimate expectation of compliance could look like this:

The University strongly encourages persons engaging in expressive activities to demonstrate civility, concern for the safety of persons and property, respect for University activities, and respect for those who may disagree with their message. The university expects compliance with University rules and policies, as well as applicable local, state, and federal laws.

RISKS OF NONCOMPLIANCE AND BENEFITS OF COMPLIANCE

When a college administrator enforces an unlawful policy and violates free speech rights, senior-level leaders must step in to preserve the institution’s legal compliance and public face. If they do not, the institution risks further public shame and the expense of a defeat in court.

When a college loses in court, two additional troubles can follow. First, public college administrators can lose their immunity from personal liability as public officials. Their immunity is qualified, not absolute, which means here that they can be liable in their personal capacities if they should have known better. Since the First Amendment rights of college students are well established, campus administrators are clearly on notice that their unconstitutional policies may not be enforced. Enforcing them anyway—even permitting a chilling effect on speech due to the policies’ existence—threatens administrators’ legal immunity. [28]

Second, the U.S. Department of Education promulgated a regulation in 2020 requiring that institutions comply with First Amendment obligations “as a material condition” of receiving any grant from the department—including formula grants. The department will determine noncompliance “if there is a final, non-default judgment by a State or Federal court that the public institution or an employee of the public institution, acting in his or her official capacity, violated the First Amendment.” [29] Private colleges are similarly bound to their “stated institutional policies regarding freedom of speech.” [30] In other words, a defeat in court risks a college’s grant funding.

[28] See, e.g., Marieke Tuthill Beck-Coon, *FIRE Lawsuit against Iowa State University Administrators Ends with Nearly \$1 Million in Damages and Fees*, FIRE (Mar. 23, 2018), thefire.org/fire-lawsuit-against-iowa-state-university-administrators-ends-with-nearly-1-million-in-damages-and-fees/; see also Azhar Majeed, *Putting Their Money Where Their Mouth Is: The Case for Denying Qualified Immunity to University Administrators for Violating Students’ Speech Rights*, 8 CARDOZO PUB. L., POL’Y & ETHICS J. 3, 515 (2010).

[29] 34 C.F.R. §§ 75.500, 76.500.

[30] *Id.*

On the positive side, conforming policies to free-speech commitments and obligations is the right thing to do for several reasons that support the mission of most colleges and universities. Enabling free speech facilitates a more robust search for truth and interrogation of theories. It enables students and faculty members to say what they really believe and, thereby, enjoy the intellectual, pedagogically rich experience of vigorous engagement and challenge. And instead of suffering the negative press of being a violator, a college that respects its students' rights and earns an overall green light rating often is recognized as a true bastion of free expression.

NEXT STEPS

This report shows that there is much need for reform on West Virginia’s campuses, but other colleges and universities have demonstrated that this reform is attainable.

A decade ago, the James G. Martin Center for Academic Renewal (under an earlier name) produced a similar report to this one regarding free speech at North Carolina colleges, finding that no colleges in the state earned an overall green light rating. [31] Over time, North Carolina became the top state for green light institutions, with an amazing 15 fully compliant institutions—more than two-thirds of the state’s institutions rated by FIRE.

Furthermore, in 2017, North Carolina legislators passed House Bill 527, the Campus Free Speech Act. [32] The act protects students’ speech in university common areas, prevents some forms of compelled speech, and requires institutions to punish any student who “substantially disrupts the functioning of the constituent institution or substantially interferes with the protected free expression rights of others.” The law also mandates that UNC institutions teach students about free speech during first-year orientation and report regularly to the legislature on campus free speech.

These protections have significantly improved the dialogue and tolerance for free speech on North Carolina’s public university campuses.

Here is what can happen next in West Virginia:

(1) The writers of this report look forward to opportunities to work with West Virginia colleges and universities to align their policies with their commitments and obligations to free speech.

[31] *Do North Carolina Students Have Freedom of Speech?*, FIRE, <https://www.thefire.org/research/publications/do-north-carolina-students-have-freedom-of-speech/> (last visited May 27, 2022).

[32] N.C. Gen. Stat. Ann. §§ 116-300-116-304.

(2) Legislators can ask West Virginia public college and university representatives to appear before the Legislative Oversight Commission on Education Accountability (LOCEA) to discuss violations of the U.S. and state constitutions in addition to Senate Bill 657, which even more directly protects free speech on campus. [33] Legislators also can ask the Higher Education Policy Commission to ensure that speech codes are part of its annual report to LOCEA on barriers to free expression on campus. [34]

Further, legislators can address flaws in Senate Bill 657, particularly by using the correct content- and viewpoint-neutral standard for time, place, and manner restrictions, and applying this standard to open outdoor areas that are generally accessible to the public and to indoor spaces where colleges allow for expressive activities, rather than to the entirety of a campus, which includes legitimately restricted areas. [35]

Legislators can also pass legislation prohibiting the assessment of security fees based on the content of speech of an invited speaker or hosting campus organization. Finally, legislators should consider “New Voices” legislation to better safeguard the rights of student journalists at the public institutions of higher education in the state. [36]

(3) Students can advocate for the expressive rights they are due on campus. Faculty members can support them.

(4) Administrators can adopt a free speech policy statement in the model of the “Report of the Committee on Freedom of Expression” at the University of Chicago (the “Chicago Statement”) to emphasize to faculty, students, and the general public that their campus is a place where freedom of speech is expected and encouraged. [37]

(5) Administrators can teach free speech from day one, using materials on free speech principles in their freshman orientation and first-year programming. [38]

[31] *Do North Carolina Students Have Freedom of Speech?*, FIRE, <https://www.thefire.org/research/publications/do-north-carolina-students-have-freedom-of-speech/> (last visited May 27, 2022).

[32] N.C. Gen. Stat. Ann. §§ 116-300-116-304[33] W. Va. S.B. 657, Apr. 9, 2021, amending W. Va. Code Chapter 18B, https://www.wvlegislature.gov/Bill_Status/bills_text.cfm?billdoc=SB657%20SUB2%20ENR.htm&yr=2021&sesstype=RS&i=657.

[34] See W. Va. Code §18B-20-7.

[35] Joe Cohn, *Flawed bill to protect campus free speech signed into law in West Virginia; FIRE urges fixes*, FIRE (Apr. 27, 2021), <https://www.thefire.org/flawed-bill-to-protect-campus-free-speech-signed-into-law-in-west-virginia-fire-urges-fixes>.

[36] See *New Voices*, Student Press Law Center, <https://splc.org/new-voices/> (last visited May 27, 2022).

[37] For more resources on adopting a free speech statement and to view the list of more than 80 institutions that have signed on so far, see *FIRE Launches Campaign in Support of University of Chicago Free Speech Statement*, FIRE, <https://www.thefire.org/cases/fire-launches-campaign-in-support-of-university-of-chicago-free-speech-statement> (last visited June 8, 2022).

[38] FIRE has partnered with New York University’s First Amendment Watch to develop a series of modules for universities to utilize when teaching incoming students about their free speech rights and the principles behind the First Amendment. See “Free Speech Lessons for Freshman Orientation & First-Year Experience Programming,” FIRE, <https://www.thefire.org/resources/free-speech-freshman-orientation> (last visited May 27, 2022).



6) Colleges can collect data, conducting annual surveys of students, professors, and administrators to understand attitudes toward free expression, and to gather opinions of the campus climate for debate, discussion, and dissent.

(7) University leadership can defend the free speech rights of students and faculty—loudly, clearly, and early—when free speech controversies arise.

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Acknowledgments

The authors thank Ryan Ansloan, Mary Griffin, Sumantra Maitra, and Anelise Powers for their contributions to this report and Amanda Kieffer & Jessica Dobrinsky for designing this report.



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