



ORAL STATEMENT OF

Emerson J. Sykes

**Senior Staff Attorney
Speech, Privacy & Technology Project
American Civil Liberties Union**

For a Hearing on

“Speech or Silence? The Future of the First Amendment in Higher Education”

Before the

**United States House of Representatives
Committee on Education & the Workforce
Subcommittee on Higher Education and Workforce Development**

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Good morning, Chair Walberg, Ranking Member Scott, Subcommittee Chair Burgess, Subcommittee Ranking Member Adams, and Members of the Subcommittee. On behalf of ACLU, thank you for the privilege of testifying today on this critically important topic.

I'm a First Amendment litigator and adjunct professor of law, so it won't surprise you that I'd like to start with a quote from the United States Supreme Court. A generation ago, our highest court recognized that:

“The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. [...] 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.”¹

That case, *Sweezy v. State of New Hampshire*, was about a state law requiring public university professors to submit to loyalty oaths to the United States. The Supreme Court said the law was misguided and un-American. Throughout the ensuing decades, we have seen free speech and academic freedom rights challenged on college campuses across the country. While the details of campus speech jurisprudence can get murky, one thing is clear: the government cannot censor students, instructors, or even visitors, just because the government doesn't like the ideas they express. The principle of viewpoint neutrality when regulating campus speech is paramount.

Academic freedom and campus speech rights can operate somewhat differently on public and private universities, because public universities are themselves governmental entities subject to the limitations of the First Amendment. Private universities can impose limitations on speech within their campuses that public universities cannot, though many leading private universities recognize the importance of allowing the full breadth of speech that the First Amendment would require a public university to permit. While the academic freedom rights of private universities

¹ *Sweezy v. State of New Hampshire*, 354 U.S. 234, 250 (1957).

are of paramount importance, I'll here focus on the rights and responsibilities of public universities.

Public colleges and universities occupy a special place in our society as government-funded institutions responsible for pushing the bounds of our understanding of the world around us. Censorship in the academy is therefore especially pernicious. Of course, public universities have discretion to regulate the curriculum and the courses offered on campus--this is a core component of academic freedom--but that discretion is not unlimited. Location matters.

Universities can enforce stricter speech regulations in a library or classroom, for example, than in a campus plaza. And while academic work requires some inherent judgement of different viewpoints, scholarly analysis of what is appropriate pedagogy or intellectually rigorous material (an analysis that is protected by academic freedom) is distinct from efforts to enforce ideological orthodoxy (which are prohibited by the First Amendment).

Turning from big ideas to current challenges, I'll highlight six areas where First Amendment rights are being restricted on campuses: campus protests, censorship of noncitizen scholars and students through weaponized immigration authority, limitations on student groups, curriculum censorship, punishment for online speech by students and professors, and retaliatory investigations and funding restrictions on universities for ideological conformity.

1. ***Campus Protest:*** In recent years, we have seen protests and counter-protests on college campuses across the United States. Those protests have addressed local as well as global issues and have varied in size, duration, and tenor. While most universities facilitate student activism without major incident, there were newsworthy examples of universities doing too little to prevent discrimination and harassment and doing too much in response to peaceful campus protests. Generally, universities can regulate the time, place, and

manner of campus protests, but cannot treat protesters differently just because of the positions they espouse.²

2. ***Weaponized Immigration Authority***: The federal government has sought to impose a regime of censorship on campuses by detaining and seeking to deport students and scholars who express views the government doesn't like. Many people, including several ACLU clients,³ were secreted around the country and threatened with deportation because of their activism and advocacy on behalf of Palestinians. Rarely have we seen such a stark and brazen example of campus speech censorship effectuated by way of federal executive power.
3. ***Student Groups***: For decades, courts have recognized the rights of student groups to register with their university, seek funding, and solicit members on equal footing with other groups, regardless of their viewpoints. The Supreme Court has vindicated the First Amendment rights of groups as disparate as Students for a Democratic Society in *Healy v. James* and Cornerstone, a Christian student organization, in *Widmar v. Vincent*.⁴ Later, the Supreme Court protected religious student groups' like *Wide Awake* access to university funding in *Rosenberger v. University of Virginia*.⁵ At the ACLU, we have recently helped chapters of Students for Justice in Palestine withstand university efforts

² ACLU Open Letter to College and University Presidents on Student Protests (April 26, 2024) (<https://www.aclu.org/news/free-speech/open-letter-to-college-and-university-presidents-on-student-protests>).

³ See, for example, *Khalil v. Trump* (<https://www.aclu.org/cases/khalil-v-trump>), *Mahdawi v. Trump* (<https://www.aclu.org/cases/mahdawi-v-trump>), *Ozturk v. Trump* (<https://www.aclu.org/cases/ozturk-v-trump>), and *Suri v. Trump* (<https://www.aclu.org/cases/suri-v-trump>).

⁴ See *Healy v. James*, 408 U.S. 169 (1972) and *Widmar v. Vincent*, 454 U.S. 263 (1981).

⁵ *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995)

to de-register the groups⁶ and I co-wrote an ACLU brief several years ago to allow Turning Point USA to solicit members at the Arkansas State University.⁷

4. ***Curriculum Censorship***: In recent years, we have seen unprecedented efforts by state and federal officials to regulate what ideas can be taught in public colleges and universities. Traditionally, academic freedom has served to protect individual professors from censorship, as well as to protect the university from interference by courts and the political branches of government. This traditional understanding of academic freedom is under severe threat. Recently, professors at California community colleges have successfully challenged mandatory DEI statements that infringe on academic freedom.⁸ In one ACLU case, we are challenging Florida’s Stop W.O.K.E. Act which prohibits “espousing” eight concepts related to race and sex. In federal court, Florida has argued that there is no such thing as academic freedom in public universities—that they are entirely subject to the whims of the party in power.⁹ This cannot be how our world-class public educational institutions are meant to be run, nor is it consistent with the First Amendment.
5. ***Online Speech by Students and Professors***: Campus speech controversies are as old as campuses, but the pervasiveness of social media has added a new layer. When students or

⁶ See *Students for Justice in Palestine at the University of Florida v. Rodrigues* (<https://www.aclu.org/cases/students-for-justice-in-palestine-at-the-university-of-florida-v-raymond-rodrigues>).

⁷ See ACLU Amicus brief in *Turning Point USA at Arkansas State v. Rhodes* (https://www.aclu.org/sites/default/files/field_document/2019-02-04_motion_for_leave_re_amici_curiae_brief.pdf).

⁸ See *Palsgaard v. Christian* (<https://www.fire.org/cases/palsgaard-v-christian-california-community-colleges-administrators-compel-professors-parrot>) and *Johnson v. Watkin* (<https://www.ifs.org/cases/johnson-v-watkin/>).

⁹ See *Pernell v. Lamb* (<https://www.aclu.org/cases/pernell-v-florida-board-governors>).

professors share controversial or offensive views online, universities must decide whether to act. While universities have a responsibility to keep their campuses safe and respond to threats to the community's well-being, they also have an obligation to respect all viewpoints. The ACLU has recently advocated for the free speech rights of students and professors regarding social media posts about a wide range of topics from claims of human rights violations in Gaza¹⁰ to discussions about the murder of Charlie Kirk.¹¹ I have even written briefs in a case involving a self-described white Christian nationalist law student who was expelled because of his bigoted social media posts which the school said were "disruptive." We argued that whatever disruption means with respect to graduate students' online speech, it cannot be the same standard that applies to schoolchildren in the classroom in the famous *Tinker* case.¹² The ACLU has always stood for the principle that we need clear and fair First Amendment rules that apply equally to all regardless of viewpoint.

6. ***Retaliatory Investigations and Funding Restrictions:*** Finally, the ACLU has been appalled by the unprecedented intimidation of colleges and universities by federal agencies. That pressure has included threats of litigation, absurdly high monetary demands, demands of sworn compliance to Executive Orders with the possibility of potentially enormous False Claims Act remedies as a hammer, cutoffs of federal research funds, threats to universities' foreign students as punishment of the university for

¹⁰ See *Christensen v. Carter* (<https://www.acluohio.org/cases/christensen-v-carter-et-al/>).

¹¹ See, for example, *Breg v. Clemson* (<https://www.aclusc.org/cases/bregy-v-clemson>) and *Swierc v. Ball State University* (<https://www.aclu-in.org/press-releases/aclu-of-indiana-files-suit-against-ball-state-university-president-for-violating-former-employees-first-amendment-rights/>).

¹² See ACLU amicus briefs in *Damsky v. Summerlin* (<https://www.aclu.org/cases/damsky-v-summerlin>).

perceived noncompliance with executive agency demands, and threats to federal student aid. Although Harvard and Columbia get much of the attention, the University of California schools and even Ohio State have come under threat, with UCLA getting a \$1.2 billion demand. The "compact" that the administration proffered to several public and private universities several months ago was maybe the boldest effort to assert governmental power over fundamental academic decision by universities. Thankfully, that effort failed.

I humbly submit that there is a great deal we can all do to help safeguard academic freedom and the First Amendment in higher education. First, *we the people* must remain vigilant against censorship from local school boards and state legislatures. Together, we can ensure quality public education for all. Second, *university leadership* should be clear-eyed about their academic and community missions. Clear communication about expectations of community members is always the best practice, as are clear and viewpoint-neutral rules around protest, student groups, and on-campus speakers. Third, *state legislatures* should resist the trend of ideological mandates via statute or regulation. Lawmakers should stay out of the business of banning ideas. Fourth, *federal officials* should refrain from wielding executive power for censorial ends whether via Executive Orders or armed ICE agents.

Finally, you all, *Congress*, should refrain from misusing your investigatory authority to intimidate universities, and more importantly, stop trying to commandeer fundamental curricular and research decisions of universities by imposing ideological restrictions by legislation, including funding cutoffs. The courts are not the only branch of government charged with protecting constitutional rights; Congress has an equal obligation to protect the Constitution, including by protecting academic freedom.

I really appreciate the opportunity to speak with you today.