



June 18, 2024

The University of Texas at Austin
110 Inner Campus Dr.
Austin, Texas 78712-1701

Sent Via E-mail

Re: Respecting Students' Rights in Disciplinary Proceedings about Protest Activity

Dear President Hartzell,

We write to express concern that the University of Texas at Austin may be squelching the First Amendment rights of its students by disciplining or threatening discipline against them for participating in pro-Palestine protests on April 24th and April 29th. The right to engage in peaceful protest has been a hallmark of our democracy since our country's founding, and government officials at public universities may not "use the power of the State to punish or suppress disfavored expression." *Nat'l Rifle Ass'n of Am. v. Vullo*, 144 S. Ct. 1316, 1326 (2024). Indeed, "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Healy v. James*, 408 U.S. 169, 180 (1972) (cleaned up).

Notwithstanding these guardrails, we recently learned that the University sent notices to students who were arrested during the April protests to ask them to provide written responses to a list of questions about their protest activity on April 24 and 29, along with documents supporting their written statements.¹ The tenor of the questions presupposes that students receiving these notices violated University policy and ignores that the First Amendment protects peaceful protest. For students that had, or have pending, criminal charges related to the protests at issue, the questions also probe the circumstances concerning each student's arrest. As discussed below, this process undermines the principles of the Due Process Clause to the U.S. Constitution. Further, to the extent that eliciting written responses is a new or newly modified investigatory process, it also raises concerns that it was designed to target only students involved in pro-Palestine protest activity.

¹ See, e.g., Audrey McGlinchy, *UT Austin is investigating students arrested during pro-Palestinian protests*, Texas Standard (Jun. 10, 2024), <https://www.texasstandard.org/stories/ut-austin-palestinian-protests-investigating-students-campus/>.

As a threshold matter, the University’s reliance on probable cause affidavits to target students raises concerns, as most of the underlying arrests at the protests were unsupported by individualized facts showing that they actually violated any law or university policy. All laws and policies, including the “behavioral misconduct” activities listed in Section 11-402 of the Institutional Rules, must be interpreted to allow “breathing space” for First Amendment freedoms to survive. *Cox v. State of La.*, 379 U.S. 559, 574 (1965). The 57 people arrested on April 24th all had their charges dropped after Travis County found the evidence against them to be insufficient.² The critical deficiencies in the probable cause affidavits make clear that students were arrested simply for being part of a group that was engaging in constitutionally protected expressive activity. Even for probable cause affidavits not immediately thrown out for obvious deficiencies, students still cannot be held responsible for the actions of a group simply because they participated in free speech activity. University policy does not give the University the legal authority to commence punitive investigations against specific individuals without individualized evidence for those specific individuals. Doing so violates the First Amendment. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1986) (holding that in the context of free speech activities, no liability can be imposed on even the leader of a group “merely because [that] individual belonged to a group, some members of which committed [criminal acts]”). Subjecting students to a disciplinary process for simply participating in peaceful protest chills the First Amendment rights of every person connected to the University and erodes the core tenets of our democracy.

The University’s targeted process also offends the Fifth Amendment. Many students who received these notices have, or could face in the future, criminal charges even if they are innocent of any wrongdoing. Yet, the University seeks written information about the facts supposedly supporting those charges. This request puts students in an impossible situation: either they offer statements and documentary materials in writing to prove their innocence and risk inadvertently incriminating themselves in the process, or they exercise their right to remain silent and lose the opportunity to protect themselves from any disciplinary action. Particularly when students are engaging in peaceful protest activity, they have a right to assert in their criminal cases that they were engaging in expressive conduct shielded by the First Amendment. Thus, the University should wait for any criminal cases to be resolved to respect the guarantees of the Fifth and First Amendments.

Even in instances where the University enforces its rules in a neutral and non-discriminatory manner, it may not use its policies to deprive students of their due process rights or to punish them for engaging in constitutionally protected speech. Students at public universities have due process rights that require a meaningful opportunity to be heard. *Shah v. Univ. of Texas Sw. Med. Sch.*, 129 F. Supp. 3d 480, 497 (N.D. Tex. 2015), *aff’d*, 668 F. App’x 88 (5th Cir. 2016). Investigations cannot be used as a “fishing expedition” to discover alleged offenses nor infringe

² Kate Winkle, *Not enough probable cause to charge all 57 arrested protesters with criminal trespass, Travis County Attorney says*, KXAN (Apr. 26, 2024), <https://www.kxan.com/news/local/austin/will-charges-be-dropped-against-ut-austin-protesters/>; Andrew Weber, *Charges dropped against all 57 pro-Palestinian demonstrators arrested on UT campus*, Houston Public Media (Apr. 26, 2024), <https://www.houstonpublicmedia.org/articles/civil-rights/protests/2024/04/26/484816/charges-dropped-against-all-57-pro-palestinian-demonstrators-arrested-on-ut-campus/>.

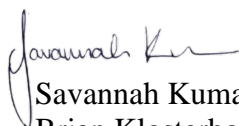
on students' constitutional right to be free from unreasonable searches or seizures. *Cf. Travina v. Univ. of Texas*, No. A-21-CV-01040-RP, 2022 WL 1308828, at *7 (W.D. Tex. May 2, 2022).

In light of these constitutional concerns, we ask that the University:

1. Review the attached Know Your Rights information (Appendix A) and Open Letter to College and University Presidents (Appendix B) to ensure that the University does not force students into disciplinary proceedings for simply exercising their First Amendment right to peacefully protest. University policies and procedures must also be applied fairly and neutrally to all students, faculty, and staff, with no viewpoint discrimination or political influence;
2. Ensure that investigations and any disciplinary actions are based on individualized facts about each student, recognizing the importance of giving breathing space to the First Amendment when interpreting any alleged rule violations, to ensure no student is disciplined or threatened with discipline on the basis of engaging in constitutionally protected protest activity;
3. Advise students explicitly about their right to remain silent and the benefits of consulting an attorney, especially while criminal cases may still be pending. The University must not presume wrongdoing if students decline to provide a written response to any questions and must provide students who wish to consult an attorney an extension of time to respond to the University's questions.

We are available to meet to answer any questions about the constitutional concerns outlined above and the attached guidance.

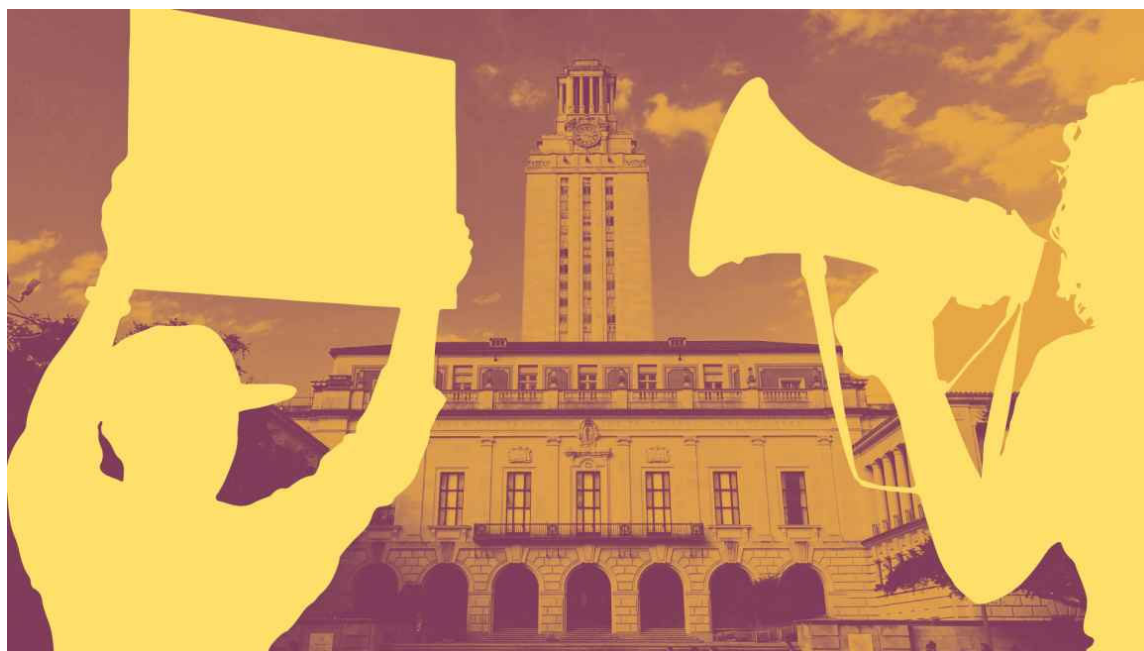
Sincerely,



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APPENDIX A

UNIVERSITY STUDENTS' PROTEST RIGHTS



This content is intended to serve as general information; it is not legal advice nor intended as legal advice.

UNIVERSITY STUDENTS' RIGHT TO PROTEST

The right to protest is a long-standing protection afforded by the U.S. and Texas constitutions, and that right extends to students across college and university campuses. However, because institutions have an interest in maintaining peace and public order, they may restrict some protest activities in certain ways.

This Know Your Rights information is intended for **students on college and university campuses** who want to understand their rights while exercising their right to protest. If you are looking for

information about protest rights beyond college and university campuses, [you can access that here \(https://www.aclutx.org/en/know-your-rights/freedom-of-speech-right-to-protest\)](https://www.aclutx.org/en/know-your-rights/freedom-of-speech-right-to-protest). This webpage does not cover every nuance of the law surrounding protest rights at Texas colleges and universities and is not and should not be taken as legal advice. If you have specific legal questions, consult an attorney or [the ACLU of Texas \(https://intake.aclutx.org/\)](https://intake.aclutx.org/).

Q&A

What are my speech and protest rights on my college or university campus?

Your right to protest on campus depends on whether you attend a public or private school.

If you attend a private school: Private institutions generally are not bound by the First Amendment. That means private school students do not have the exact same rights to freedom of speech as students in public institutions. Rather, a private school student's free speech rights are generally as outlined or described in the institution's policy rules and codes of conduct.

If you attend a public school: The First Amendment protects the rights of students in public colleges and universities to express their opinions, even if others disagree with the views expressed or the form of expression. Spoken and written words are protected, as well as other types of expression, like wearing symbolic clothing, sit-ins, passing out flyers, and picketing – as long as this expression doesn't violate any reasonable, viewpoint-neutral rules that schools may have related to the time, place, and manner of student speech (more on that below).

Can public colleges and universities restrict student speech?

Public institutions are allowed to set reasonable, viewpoint-neutral rules related to the time, place, and manner of student speech.

For example, a speech or rally that might be permissible in a park may be restricted if made in the reading room of a library. Colleges and universities can also restrict speech – including protests, marches, and demonstrations – that directly calls for immediate, violent action. And they can restrict “substantial disruptions” to campus, such as blocking entryways and exits to campus buildings, causing property damage, endangering the safety of others, or creating a hostile environment for other students that amounts to harassment. However, the ways our government can restrict speech are carefully limited, and both the U.S. and Texas Constitutions typically require that the free and robust exchange of ideas be allowed on university campuses.

Can I be disciplined for my speech on campus?

Your public college or university can discipline you for your speech if it determines that the speech violates the university’s student conduct rules, or other established rules and guidelines, and is not protected by the First Amendment. It may also discipline you if you violate a reasonable and neutral rule that regulates the time, place, or manner of your protest. However, that investigation and determination must be applied neutrally to all students and adhere to the rules outlined in the university’s student code of conduct (as well as the First Amendment). Understanding your college or university’s policies and code of conduct is essential to understanding your due process rights.

Do any state laws impact speech rights on campus?

In 2019, the Texas legislature passed [a law \(https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=86R&Bill=SB18\)](https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=86R&Bill=SB18) that declared “all common outdoor areas” of public university campuses to be traditional public forums. This allows anyone – not just students and university

members – to freely “engage in expressive activities” there, as long as their activities are lawful and don’t “materially and substantially disrupt the functioning of the institution.” The law also authorized public institutions to implement “reasonable restrictions on the time, place, and manner of expressive activities in the common outdoor areas of the institution’s campus” if those restrictions, among other things, do not discriminate based on viewpoint and “allow members of the university community to assemble or distribute written material without a permit or other permission from the institution.”

Where can I protest on campus?

Although the common outdoor areas at all Texas public universities have been designated as traditional public forums by our state legislature, it is important to check your campus policies to see what rules exist for when and where you may protest. For example, some universities might prohibit certain activities from taking place in classrooms, dorms, and other buildings – and they might close certain areas at night or during holidays. These rules must be reasonable and viewpoint-neutral and allow for alternative channels for engaging in free speech activity.

Can I be prevented from protesting if my views are controversial?

No. Restrictions on speech must generally be unrelated to the content of the speech and may not be viewpoint based. Even if your views are unpopular, controversial, or critical of the government, you still have the right to express them through speech and assembly.

Additionally, counterprotesters also have free speech rights. Police must treat protesters and counterprotesters equally. Police are permitted to keep antagonistic groups separated but should allow them to be within sight and sound of one another.

Am I allowed to videotape or take photos at protests on campus?

When you are lawfully present outside on public property, you generally have the right to photograph anything in plain view, including government buildings and the police. Check your campus policies before taking photographs or videos inside.

Police officers may not confiscate or demand to view your photographs or video without a warrant, nor may they delete data under any circumstances. However, they may order you to cease activities that are truly interfering with legitimate law enforcement operations.

Be aware that live-streaming or posting photos or videos of protest activity may be used by law enforcement and may expose people to criminal liability. If you have evidence that you believe could prove someone's innocence or reveal police misconduct, consider consulting an attorney.

What about Gov. Greg Abbott's 2024 executive order on campus free speech?

On March 27, 2024, the Governor of Texas signed an [executive order](https://gov.texas.gov/uploads/files/press/EO-GA-44_antisemitism_in_institutions_of_higher_ed_IMAGE_03-27-2024.pdf) (https://gov.texas.gov/uploads/files/press/EO-GA-44_antisemitism_in_institutions_of_higher_ed_IMAGE_03-27-2024.pdf), No. GA44, requiring public universities in Texas to review their free speech policies and to ensure that these policies are enforced against groups such as the Palestine Solidarity Committee and Students for Justice in Palestine.

Gov. Abbott's order seems to abandon the First Amendment's requirement that the government not censor speech because of people's views. Universities already have legal obligations to protect students, faculty, and staff from harassment and ensure that they do not permit hostile environments based on the targeting of any racial, ethnic, or religious group. Governor Abbott's executive order conflates these legal concepts and fails to mention universities' obligations to all of their students, including those experiencing a sharp rise in anti-

Muslim or anti-Arab hatred.

IF YOU ARE APPROACHED BY LAW ENFORCEMENT

Try to stay safe and remember your constitutional rights. Don't resist, keep your hands clear and visible, and stay silent: Remember that anything you say or do can be used against you. Arguing or resisting may give police an excuse to arrest you.

- **On foot:** If you are stopped while you are on foot and have not been detained, you are not required to answer officers' questions. You may respond to questions from a police officer with: *"I am exercising my right to remain silent."*
- **Ending the encounter:** There are various ways to end the law enforcement interaction. You may ask, *"Am I free to go?"* when a police officer is speaking to you on the street, and leave if they say yes. If the police officer responds with anything other than yes, you may follow up with: *"Am I being detained?"* If they respond with anything other than yes, you may state that you do not wish to continue speaking, and leave immediately.
- **Searches:** The police may pat down your clothing if they suspect that you are concealing a weapon. Don't resist or touch the officer, but clearly state that you don't consent to any further searches. Police generally need your permission or a search warrant to search beyond a pat down. If you do not directly say that you do not want to be searched, a judge may determine that your silence was consent to the search.
- **Being detained:** If the police detain you, you may be required to provide your name, address, and date of birth. It is a criminal offense to give false or inaccurate information to a police officer, threaten them, or resist arrest. If you are arrested, you only have

to speak to identify yourself and ask for an attorney, and may state *"I am exercising my right to remain silent, and I would like to speak to an attorney."* Remember that anything you say can be used against you.

- **After arrest:** Before participating in a protest, try to identify an attorney or trusted friend who could help you if you are arrested. Memorize or write that person's phone number on your body. If you do not have access to an attorney, the government is required to appoint you one, but there could be a delay of hours or days depending on where you are arrested, and you have a right to remain silent during that time.

IF YOUR RIGHTS ARE BEING VIOLATED

- When you can, write down everything you remember, including the officers' names, badge numbers, patrol car numbers, and the agency they work for.
- Get contact information for witnesses.
- Take photographs or video of any injuries.
- **Contact an attorney:** You may consult a private attorney, contact your local bar association, or call the Texas Lawyer Referral Service operated by the State Bar of Texas at 1-800-252-9690 or 1-877-9TEXBAR (toll-free) to connect with a lawyer.
- **File a police complaint:** If you think the police have acted outside their authority, don't protest or resist on the scene. File a written complaint with the agency's internal affairs division or civilian complaint board.
- **Request legal assistance from the ACLU of Texas:** If you believe that your rights have been violated, visit [our legal](#)

[assistance page to submit a request. \(https://www.aclutx.org/en/request-legal-assistance%20\)](https://www.aclutx.org/en/request-legal-assistance%20)

APPENDIX B



Open Letter to College and University Presidents on Student Protests

We write in response to the recent protests that have spread across our nation’s university and college campuses, and the disturbing arrests that have followed. We understand that as leaders of your campus communities, it can be extraordinarily difficult to navigate the pressures you face from politicians, donors, and faculty and students alike. You also have legal obligations to combat discrimination and a responsibility to maintain order. But as you fashion responses to the activism of your students (and faculty and staff), it is essential that you not sacrifice principles of academic freedom and free speech that are core to the educational mission of your respected institution.

The ACLU [helped](#) establish the right to protest as a central pillar of the First Amendment. We have defended those principles for more than a century. The [First Amendment](#) compels public universities and colleges to respect free speech rights. And while the Constitution does not apply directly to private institutions, academic freedom and free inquiry require that similar principles guide private universities. We approach this moment with appreciation for the challenges you confront. In the spirit of offering constructive solutions for a way forward, we offer five basic guardrails to ensure freedom of speech and academic freedom while protecting against discriminatory harassment and disruptive conduct.

Schools must not single out particular viewpoints for censorship, discipline, or disproportionate punishment.

First, university administrators must not single out particular viewpoints — however offensive they may be to some members of the community — for censorship, discipline, or disproportionate punishment. Viewpoint neutrality is essential. Harassment directed at individuals because of their race, ethnicity, or religion is not, of course, permissible. But general calls for a Palestinian state “from the river to the sea,” or defenses of Israel’s assault on Gaza, even if many listeners find these messages deeply offensive, cannot be prohibited or punished by a university that respects free speech principles.

These protections extend to both students and faculty, and to speech that supports either side of the conflict. Outside the classroom, including on social media, students and professors must be free to express even the most controversial political opinions without fear of discipline or censure. Inside the classroom, speech can be and always has been subject to more restrictive rules to ensure civil dialogue and a robust learning environment. But such rules have no place in a public forum like a campus green. Preserving physical safety on campuses is paramount; but “safety” from ideas or views that one finds offensive is anathema to the very enterprise of the university.

Schools must protect students from discriminatory harassment and violence.

Second, both public and private universities are bound by civil rights laws that guarantee all students equal access to education, including Title VI of the Civil Rights Act. This means that schools can, and indeed must, protect students from discriminatory harassment on the basis of

race or national origin, which has been [interpreted](#) to include discrimination on the basis of “shared ancestry or ethnic characteristics,” or “citizenship or residency in a country with a dominant religion or distinct religious identity.”

So, while offensive and even racist speech is constitutionally protected, shouting an epithet at a particular student or pinning an offensive sign to their dorm room door can constitute impermissible harassment, not free speech. Antisemitic or anti-Palestinian speech targeted at individuals because of their ethnicity or national origin constitutes invidious discrimination, and cannot be tolerated. Physically intimidating students by blocking their movements or pursuing them aggressively is unprotected *conduct*, not protected *speech*. It should go without saying that violence is never an acceptable protest tactic.

Speech that is *not* targeted at an individual or individuals because of their ethnicity or national origin but merely expresses impassioned views about Israel or Palestine is not discrimination and should be protected. The only exception for such untargeted speech is where it is so severe or pervasive that it denies students equal access to an education — an extremely demanding standard that has almost never been met by pure speech. One can criticize Israel’s actions, even in vituperative terms, without being antisemitic. And by the same token, one can support Israel’s actions in Gaza and condemn Hamas without being anti-Muslim. Administrators must resist the tendency to equate criticism with discrimination. Speech condoning violence can be condemned, to be sure. But it cannot be the basis for punishment, without more.

Schools can announce and enforce reasonable content-neutral protest policies but they must leave ample room for students to express themselves.

Third, universities can announce and enforce reasonable time, place, or manner restrictions on protest activity to ensure that essential college functions can continue. Such restrictions must be content neutral, meaning that they do not depend on the substance of what is being communicated, but rather where, when, or how it is being communicated. Protests can be limited to certain areas of campus and certain times of the day, for example. These policies must, however, leave ample room for students to speak to and to be heard by other members of the community. And the rules must not only be content neutral on their face; they must also be applied in a content-neutral manner. If a university has routinely tolerated violations of its rules, and suddenly enforces them harshly in a specific context, singling out particular views for punishment, the fact that the policy is formally neutral on its face does not make viewpoint-based enforcement permissible.

Schools must recognize that armed police on campus can endanger students and are a measure of last resort.

Fourth, when enforcement of content-neutral rules may be warranted, college administrators should involve police only as a last resort, after all other efforts have been exhausted. Inviting armed police into a campus protest environment, even a volatile one, can create unacceptable risks for all students and staff. University officials must also be cognizant of the history of law enforcement using inappropriate and excessive force on communities of color, including Black,

Brown, and immigrant students. Moreover, arresting peaceful protestors is also likely to escalate, not calm, the tensions on campus — as events of the past week have made abundantly clear.

Schools must resist the pressures placed on them by politicians seeking to exploit campus tensions.

Finally, campus leaders must resist the pressures placed on them by politicians seeking to exploit campus tensions to advance their own notoriety or partisan agendas. Recent congressional hearings have featured disgraceful attacks by members of Congress on academic freedom and freedom of speech. Universities must stand up to such intimidation, and defend the principles of academic freedom so essential to their integrity and mission.

The Supreme Court has forcefully [rejected](#) the premise 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 court stated, “the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.” In keeping with these values, we urge you to resist the temptation to silence students or faculty members because powerful voices deem their views offensive. Instead, we urge you to defend the university’s core mission of encouraging debate, fostering dissent, and preparing the future leaders of our pluralistic society to tolerate even profound differences of opinion.

Sincerely,

Anthony D. Romero
Executive Director

David Cole
National Legal Director