



NACUA

Webinar

Sponsored by

LAW@U

Navigating Campus Activism: Legal Insights for University Protests

Shelby Boseman, Chief Legal Officer, The University of Texas at Arlington
Kelly Cruz, Associate General Counsel, University of Michigan

Agenda

- Emerging Trends in Today's Campus Climate
- First Amendment & Title VI Overview
- Case Law Update
- Audience Q&A
- Case Studies
- Practical Tips & Considerations
- Audience Q&A

Emerging Themes: Campus Climate

- A shift in expectations of the management of campus protests
- Increased reliance on law enforcement to manage protests
- Institutions continue to update speech and behavior policies
- Institutional neutrality continues to gain traction

The First Amendment

The U.S. Bill of Rights

Amendment I

- 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.

Applicability

- Public Institutions
 - As state agents, all public colleges and universities are legally bound to respect the constitutional rights of their students.
- Private Institutions
 - State constitutions
 - State statutes
 - Federal regulations
 - Free expression policies

Forum Analysis

Type of Forum	Defined As	Permitted Restrictions
Traditional Public Forum	Spaces such as sidewalks that have traditionally been open to political speech/debate	Content neutral Narrowly tailored Ample alternative channels of communication Serve a significant interest
Designated Public Forum	Spaces where government chooses to allow speech generally	<i>Same as Traditional Public Forum</i>
Limited Public Forum	Spaces where government allows certain types of speech and/or speech by certain groups (e.g., History Department bulletin board)	Viewpoint neutral Reasonable in light of the purpose of the forum
Nonpublic Forum	Spaces not available for public expression (e.g., faculty offices)	<i>No general free speech rights, but same limitations as Limited Public Forum if speech occurs</i>

For further information, please visit "[Free Speech Under Scrutiny \(Again!\)](#)" from the NACUA 2024 Annual Conference.

Reasonable Time, Place, Manner Restrictions

- ***Cox v. New Hampshire, 312 U.S. 569 (1941)***. A unanimous Supreme Court, held that, although the government cannot regulate the contents of speech, it can place reasonable time, place, and manner restrictions on speech for the public safety.
- ***Ward v. Rock Against Racism, 491 U.S. 781 (1989)***. The requirements for time, place, and manner regulations in a public forum are that they must be content-neutral, be narrowly tailored to serve a significant government interest, and provide alternative channels for communicating the same content.
 - Time, place, manner regulations do not need to be the least intrusive means of furthering a legitimate government interest, since a "less-restrictive-alternative analysis" has never been a part of the inquiry into the validity of a time, place, or manner regulation. The requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation, and the means chosen are not substantially broader than necessary to achieve that interest.

Reasonable Time, Place, Manner Restrictions

- Imposing limits on the noise level of speech,
- Capping the number of protesters who may occupy a given forum,
- Barring early-morning or late-evening demonstrations,
- Restricting the size or placement of signs on government property,
- Posting of information on university buildings is limited to designated bulletin boards,
- Time limits on signage,
- Locations of demonstrations,
- Head/face covering intended to conceal the identity of the wearer, which does not include personal protective or religious coverings,
- Open fires or flames.

Reasonable Time, Place, Manner Restrictions - Injunction

- ***Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994)**
 - Judicial injunctions that impose content-neutral time, place, and manner restrictions are subject to a heightened form of intermediate scrutiny. Appellate courts should subject content-neutral injunctions to more “stringent” First Amendment scrutiny than comparable legislation – that “when evaluating a content-neutral injunction, we think that our standard time, place, and manner analysis is not sufficiently rigorous.”
 - Creating a new standard of review for judicially imposed time, place, and manner restrictions, the Court wrote, “[w]e must ask instead whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest.”
 - This effectively converts the second prong of *Ward* into a least restrictive means requirement.

Unprotected Speech

- Obscenity - *Miller v. California* (1973)
- Defamation - *New York Times Co. v. Sullivan* (1964)
- Incitement to Illegal Activity - *Brandenburg v. Ohio* (1969)
- True Threats - *Virginia v. Black* (2003); *Counterman v. Colorado*, 600 U.S. 66 (2023)
- Fighting Words - *Chaplinsky v. New Hampshire* (1942)
- Harassment - *Davis v. Monroe County Bd. of Educ.* (1999)

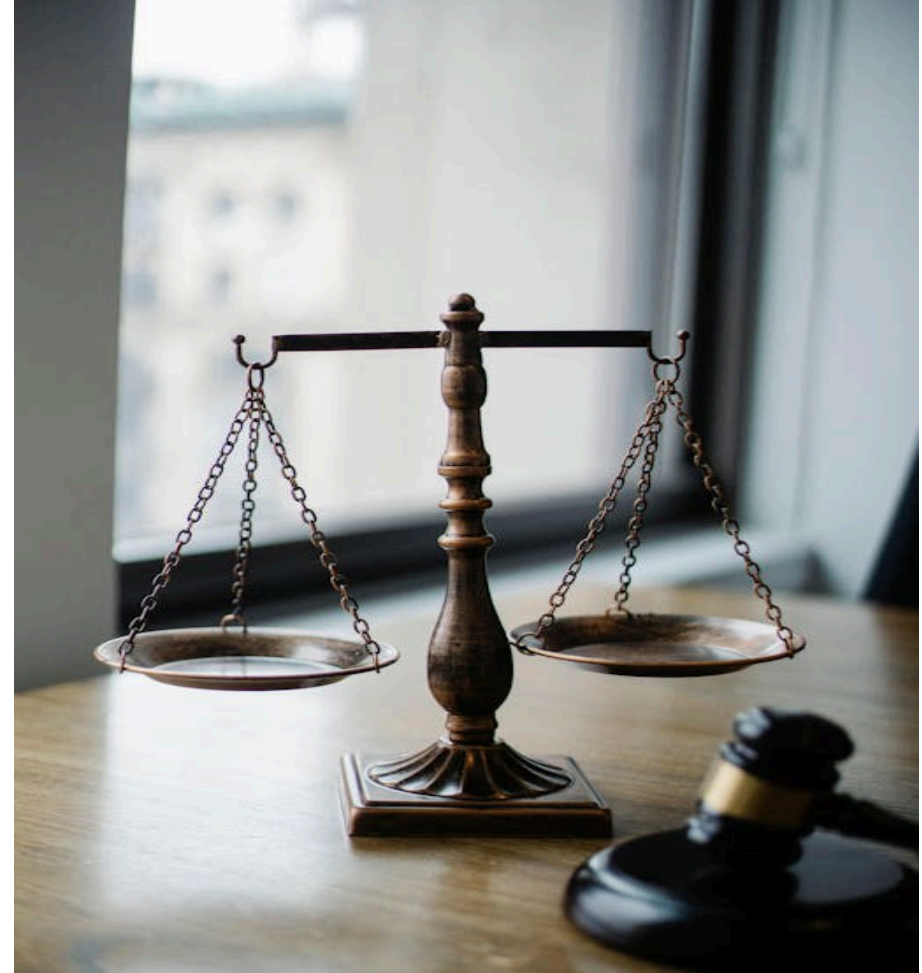
Obscenity

- Whether the average person applying contemporary community standards would find the work, taken as a whole, appeals to the prurient interest;
- Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- Whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.



Defamation

- A false statement purporting to be fact;
- Publication or communication of that statement to a third person;
- Fault amounting to at least negligence; and
- Damages, or some harm caused to the reputation of the person or entity.



Incitement to Illegal Activity

- The speech must be directed at inciting or producing imminent lawless action; and
- The circumstances have to be such that the speech was likely to produce such action.



True Threats

- A serious expression
- of intent to commit an act of unlawful violence
- to a particular individual or group of individuals.



Fighting Words

- Words which by their very utterance inflict injury or tend to incite an immediate breach of the peace.
- Offensive and insulting language, even when directed at specific individuals, is not fighting words.



Title VI

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

Title VI of the Civil Rights Act of 1964

Title VI



Title VI



Title VI



Title VI

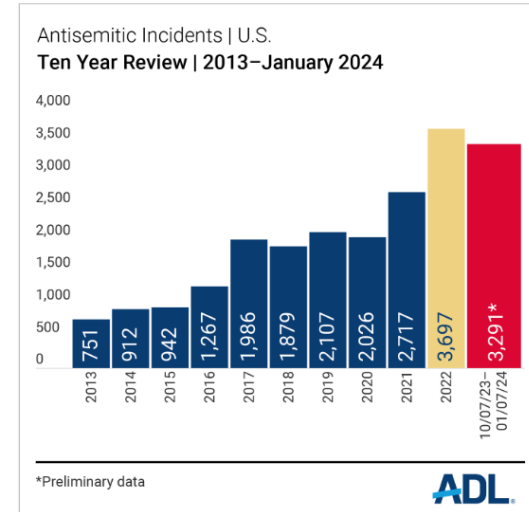


Title VI



Title VI

List of Open Title VI Shared Ancestry Investigations



ADL

About Research Centers What We Do Resources Take Action

Donate

PRESS RELEASE

U.S. Antisemitic Incidents Skyrocketed 360% in Aftermath of Attack in Israel, according to Latest ADL Data

[↪](#) [📄](#)



Title VI

List of Open Title VI Shared Ancestry Investigations

State:
 Basis of Discrimination:
 Race and National Origin Discrimination:

Show:
 Institution:
 Institution Type:
 Open Date Between:
 And:
 Specific Date:

State ^	Institution	Institution Type	Type of Discrimination	Open Investigation Date
AZ	ARIZONA STATE UNIVERSITY-MAIN CAMPUS	PSE	Title VI - National Origin Discrimination Involving Religion	01/23/2024
CA	CALIFORNIA STATE UNIVERSITY-SACRAMENTO	PSE	Title VI - National Origin Discrimination Involving Religion	07/10/2024
CA	ABRAHAM LINCOLN UNIVERSITY	PSE	Title VI - National Origin Discrimination Involving Religion	01/22/2024
CA	POMONA COLLEGE	PSE	Title VI - National Origin Discrimination Involving Religion	08/06/2024
CA	UNIVERSITY OF CALIFORNIA-SAN DIEGO	PSE	Title VI - National Origin Discrimination Involving Religion	12/11/2023
CA	UNIVERSITY OF CALIFORNIA-SANTA BARBARA	PSE	Title VI - National Origin Discrimination Involving Religion	03/21/2024
CA	UNIVERSITY OF CALIFORNIA-SANTA CRUZ	PSE	Title VI - National Origin Discrimination Involving Religion	05/28/2024
CA	UNIVERSITY OF CALIFORNIA-DAVIS	PSE	Title VI - National Origin Discrimination Involving Religion	12/14/2023
CA	UNIVERSITY OF CALIFORNIA-DAVIS	PSE	Title VI - National Origin Discrimination Involving Religion	06/11/2024
CA	UNIVERSITY OF CALIFORNIA-DAVIS	PSE	Title VI - National Origin Discrimination Involving Religion	06/21/2024
CA	UNIVERSITY OF SOUTHERN CALIFORNIA	PSE	Title VI - National Origin Discrimination Involving Religion	06/11/2024
CA	UNIVERSITY OF CALIFORNIA-LOS ANGELES	PSE	Title VI - National Origin Discrimination Involving Religion	12/06/2023
CA	UNIVERSITY OF CALIFORNIA-LOS ANGELES	PSE	Title VI - National Origin Discrimination Involving Religion	05/07/2024
CA	UNIVERSITY OF CALIFORNIA-LOS ANGELES	PSE	Title VI - National Origin Discrimination Involving Religion	05/08/2024
CA	CHAPMAN UNIVERSITY	PSE	Title VI - National Origin Discrimination Involving Religion	06/07/2024
CA	STANFORD UNIVERSITY	PSE	Title VI - National Origin Discrimination Involving Religion	12/07/2023
CA	SAN DIEGO STATE UNIVERSITY	PSE	Title VI - National Origin Discrimination Involving Religion	01/02/2024
CA	SANTA MONICA COLLEGE	PSE	Title VI - National Origin Discrimination Involving Religion	12/04/2023
CA	SANTA MONICA COLLEGE	PSE	Title VI - National Origin Discrimination Involving Religion	05/20/2024
CT	YALE UNIVERSITY	PSE	Title VI - National Origin Discrimination Involving Religion	01/22/2024

Displaying 1 - 20 of 73 records

Title VI

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

Title VI of the Civil Rights Act of 1964

Title VI

Courts and OCR use two different frameworks to evaluate whether a school has engaged in discrimination that violates Title VI

- Different treatment framework
- Hostile environment framework

Title VI

OCR's Definition of Hostile Environment

Unwelcome conduct based on race, color, or national origin when, based on the totality of the circumstances, is:

- Subjectively and objectively offensive; and
- So severe or pervasive that it
- Limits or denies a person's ability to participate in or benefit from the recipient's education program or activity

Harassing conduct need not be targeted at a particular person to create a hostile environment.

Title VI

OCR's Examples of Hostile Environments

- Israeli filmmaker is invited to campus for a screening. Protestors prevent anyone from entering, holding signs "No Jewish Propaganda Allowed." College arranges for different location for movie. Protestors do the same thing again.
- Students surround and shove members of the Arab Student Association and chant "jihad supporters." Members recognize chanters as classmates and skip classes out of fear and cancel future meetings.
- 100 students peacefully engage in a march in support of Gaza. Counter-protestors shout things like "terrorist" and physically attack the students. Muslim students feel unsafe, skip classes, and report the incident. Institution sends campuswide email "we support peaceful protest but we condemn all violence."

Title VI

What is an institution expected to do?

- Make a determination of whether a hostile environment exists
- If yes, take prompt and effective steps to end harassment, eliminate hostile environment, and prevent recurrence

What isn't enough?

- Referring matter to law enforcement
- Denouncing it via campuswide email
- Declaring the activity protected under the First Amendment

New Cases to Highlight

Frankel et al., v. Regents of the Univ. of California et al., 24-CV-04702 (C.D. Cal. 2024).

- Pro-Palestinian protesters occupied Royce Quad, a major thoroughfare on campus. Encampment checkpoints required passersby to wear a specific wristband to cross them. People who supported Israel were not allowed to travel through the Quad. This “directly interfered with instruction by blocking students' pathways to classrooms.”
- Court granted a preliminary injunction and held that UCLA's failure to remove the encampment – even if for safety reasons – had the effect of excluding individuals from public benefits based on their religious beliefs in violation of Free Exercise Clause.

New Cases to Highlight

Molina v. Book, No. 21-1830 (8th Cir. 2023).

- Molina and Book were observing a protest in St. Louis triggered by a fatal police shooting. Wearing bright green hats bearing the label “National Lawyers Guild Legal Observer,” they monitored the demonstration. Upon police orders to disperse, Molina and Vogel complied, relocating to Molina's residence several blocks away, where they stood on the sidewalk. Subsequently, police, traveling in an armored vehicle, passed by Molina's home and deployed tear gas canisters towards them.
- The plaintiffs sued contending that the police targeted them due to their role and identification as legal observers, actions protected under the First Amendment and that the police did not have qualified immunity to fire tear gas at them. The Eighth Circuit held that printed words on clothing lacked First Amendment protection because it did not convey a "particularized message," and it deemed the right to observe and record police actions in public not clearly established, thus granting the officers "qualified immunity."

New Cases to Highlight

Kestenbaum v. Harvard Coll., No. CV 24-10092-RGS (D. Mass. Aug. 6, 2024).

- Jewish student alleges Harvard ignored discrimination against Jewish and Israeli students post Oct. 7.
- Court held that student plausibly pled a claim under Title VI, survives motion to dismiss.
- Court focused on protests that were, at times, confrontational, physically violent, and caused significant impact on Kestenbaum's student experience.

New Cases to Highlight

Mckesson v. Doe, 601 U.S. ____ (2024).

- The Fifth Circuit held that Mckesson, the leader of a Black Lives Matter protest in Baton Rouge, Louisiana, could be liable under a negligence theory for serious injuries sustained by a police officer by a third party.
- The USSC denied certiorari, but provided a statement authored by Justice Sotomayor providing clarity on the court's decision. The decision not to hear the case, was unnecessary based on their recent opinion in *Counterman v. Colorado*, which made clear that “the First Amendment precludes punishment [for incitement], whether civil or criminal, unless the speaker’s words were ‘intended’ (not just likely) to produce imminent disorder, using a standard no greater than recklessness.” She suggested the same principle should guide lower courts when the Mckesson case comes back for review.

An illustration of several hands of different skin tones holding up colorful speech bubbles in various colors like blue, yellow, green, pink, red, and purple. The hands are positioned at the bottom of the frame, and the speech bubbles float upwards. The background is a solid light beige color.

Questions?

Scenario 1

A student in an accounting course asks for the last few minutes of your class to announce a rally in support of Gaza taking place that evening on the quad, including how students can support the cause. You inform the student that you will not allow class time for this purpose. They respond, “but you gave Jane class time last week to announce the fundraiser for her church.”

Even after informing the student that they may not use class time to promote a rally, they insist on speaking. How will you respond?

Scenario 1 Poll

How would you advise the professor?

A – The professor must say "yes" because they have created precedent by already saying yes to Jane.

B – The professor must say "no" because the topic is too sensitive for class and could create a hostile environment for other students.

C – The professor has no obligation to allow students to present during class time and should say "no," even if they've said yes before.

Scenario 2

The Young Republican Student Organization has registered to hold a protest scheduled for the day after the presidential election on campus. They expect about 50 people. The day of the election, University Police become aware of Reddit posts for anti-MAGA students to crash the protest. It has been liked over 200 times. Many posts call for the counter protesters to wear masks and be "ready for anything." The PD is worried about violence and the size of the crowd. The PD notifies administration it will cost about \$20,000 in overtime and additional security for the event. The president wants to cancel the scheduled protest.

Scenario 2 Poll

What do you advise the President?

A – Cancel the protest based on the credible evidence of violence.

B – Allow the protest, but notify the student organization that they will be responsible for the additional security costs.

C – Allow the protest, but move it to a location better suited for security purposes, and tell the President the University is going to have to eat the costs.

D – Allow the protest, keep it in the same reserved location, and tell the President the University is going to have to eat the costs.

Scenario 3

Two students in Professor Adam's seminar report feeling unwelcome and unsafe because six other students consistently wear "Intifada Until Victory" t-shirts to class and sit in the front row. In response, at the next class several students wear shirts stating, "Christians United for Israel" and hand out pamphlets supporting Israel. What should the professor do?

Scenario 3 Poll

What should the professor do?

A – Let the students wear whatever they want and pass out whatever they want. They have First Amendment rights to do so.

B – Students should be asked to stop wearing provocative t-shirts in class because the t-shirts can create a hostile environment for other students.

C – So long as the t-shirts aren't creating disruption, continue class as normal.

Scenario 4

Your president forwards you an email from a donor who is very upset with a faculty member's signature line, which states below their title "Vote - Trump 2024". You speak with the dean to get some background on the faculty and the dean laughs and says, "that's just the tip of the iceberg." She then forwards you emails from faculty with land acknowledgments, "Free Palestine", and even "Happy Hannukah or Merry Christmas". The president tells the donor that their attorney will fix this. The donor tweets this news. The next day the faculty senate shows up at your office and are not going to leave until you meet with them.

Scenario 4 Poll

What do you do now?

A – Faculty tag lines are protected speech, which you need to explain to the President and then re-assure the Senate faculty are okay.

B – Faculty tag lines are not protected speech, so you need to correct this practice, and tell the Senate they are not allowed to protest in your office and need to leave.

C – It doesn't matter if faculty tag lines are protected or not if there is not a policy, so quickly draft a policy and tell Senate you'll meet with them next week.

D – Quickly schedule vacation and delegate to your Deputy GC.

Scenario 5

Your institution's medical school has an open listserv that is available to communicate with members of the school. The Medical School's listserv is available for any member to use freely for any purpose, so long as the use doesn't violate institution policy or the law.

A staff member is furious that they keep getting spammed with political content, unnecessary reply alls, and "pro-this" and "anti-that" from student organizations. The Student Affairs Office, which manages the listserv, asks for your help.

Scenario 5 Poll

What are some options to manage the listserv?

- A – Advise the Student Affairs Office that they can shut down the listserv.
- B – Advise the Student Affairs Office that they can remind the irritated staff member that they can ignore the messages or opt-out of the listserv.
- C – Advise the Student Affairs Office to create a new policy that limits use of the listserv to official university business.
- D – All of the above.

Scenario 6

On Tuesday you receive an email from a national church known for its inflammatory "protests", which are intentionally provocative and single out the LGBTQ+ community. They notify you that they will be on your campus Friday to engage in protected First Amendment speech. The event spreads on social media and the Lavender Alliance student organization contacts you about their safety concerns and demands that the university not allow the event. The faculty advisor for the Lavendar Alliance circulates a petition for a walkout and counter-protest if the event occurs that 50 faculty have signed. The event occurs, there is a significant counter protest, which turns violent, students and visitors are injured and there are multiple arrests including two faculty members. The President calls you and asks how this cluster was allowed to happen and wants the faculty fired.

Scenario 6 Poll

How do you advise the President?

A – You're the president, do your job!

B – First Amendment events can be challenging. We'll assess each step of our response and develop a plan for future events.

C – Don't worry, someone's going to take the fall for this, and I know exactly who....

D – You have the right to be frustrated. This event should have been handled much better. We're reviewing each step, preparing media responses and I'll have a full debriefing for you with next steps by early next week.

Practical Tips and Considerations

- If your campus is anticipating a shift in enforcement, tell students what won't be tolerated.
- Enforce policies and enforce them consistently.
- Create an internal protest response operating procedure so roles, responsibilities, and escalation options are clear.
- Consult with local DA annually to determine necessary elements and appetite to prosecute protestors.
- If you don't have campus PD, meet with local PD preemptively to understand the PD response and so they understand campus concerns.
- Have someone on campus monitoring social media daily for harassment/protest intel.

An illustration of several hands of various skin tones holding up colorful speech bubbles in shades of blue, yellow, green, pink, red, and purple. The hands are positioned at the bottom of the frame, and the speech bubbles are floating upwards. The background is a solid light beige color.

Questions?

NACUA materials, PowerPoint slides and recordings available as part of this program are offered as educational materials for higher education lawyers and administrators. They are prepared by presenters and are not reviewed for legal content by NACUA. They express the legal opinions and interpretations of the authors.

Answers to legal questions often depend on specific facts, and state and local laws, as well as institutional policies and practices. The materials, PowerPoint slides and comments of the presenters should not be used as legal advice. Any hypothetical scenarios presented are based on fictional facts and persons. Legal questions should be directed to institutional legal counsel.

Those wishing to re-use the materials, PowerPoint slides or recordings should contact NACUA (nacua@nacua.org) prior to any re-use.