STATEMENT

of Professor David D. Cole

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"Beyond the Ivy League: Stopping the Spread of Antisemitism on American Campuses"

A Hearing Before the House Committee on Education and Workforce

May 7, 2025

Thank you for inviting me to testify on this very important subject.

I am the former national legal director of the American Civil Liberties Union, and a professor at Georgetown University Law Center. I speak here on my own behalf as a scholar and practitioner of First Amendment and civil rights law. I have spent 45 years teaching, litigating, and writing about constitutional law and civil rights.

I have committed my career both to the elimination of discrimination of all forms, and to the protection of free speech for all. On the antidiscrimination side, among other cases, I represented a transgender woman, Aimee Stephens, in *Bostock v. Clayton County*, which established that discrimination on the basis of transgender status is sex discrimination prohibited by Title VII. And on the free speech side, just last year I represented the National Rifle Association in *NRA v. Vullo*, a case challenging efforts by the Democratic Governor of New York and his chief financial regulator to blacklist the NRA for its political viewpoint. The Supreme Court ruled unanimously on our behalf. And in my capacity at the ACLU, I have advocated for the speech rights of liberals and conservatives alike, including those of the NRA, Black Lives Matter activists, Donald Trump, social media platforms, Ilya Shapiro, and fundamentalist Christians.[1] I have also worked actively against discrimination and in favor of free speech on college campuses.

I say this because at the heart of the issue this committee is investigating is the difficult challenge of balancing our commitments to free speech with our commitment to equality reflected in civil rights laws like Titles VI and IX of the Civil Rights Act. The remarks I make here reflect principles advanced by myself and 17 fellow constitutional law scholars, from across the ideological spectrum, in connection with the Trump administration's actions against Columbia University. In that statement, joined by many of the leading conservative First Amendment and constitutional scholars in the country, as well as the founder of the Federalist Society, is attached as Appendix A to my testimony.

I will make three points. First, the vast majority of antisemitic speech is constitutionally protected, even if hateful. We can and should condemn it, but it remains protected. Second, while Title VI prohibits discrimination on the basis of race and national identity, it is narrowly defined, especially when it comes to speech, and most antisemitic speech is not discrimination under Title VI, just as most sexist speech is not discrimination under Title IX. Third, because drawing the line between protected speech and unprotected discrimination is very difficult, it requires careful consideration on a case-by-case and incident-by-incident basis, best conducted by tribunals that are designed to assess conflicting factual accounts and draw careful lines. It is not sufficient, as this committee has in the past, to make broad charges of antisemitism and assume that one has established discrimination.

1. **The First Amendment Protects Antisemitic Speech.**

I start from the premise that antisemitism, like Islamophobia, racism, sexism, homophobia and transphobia, all forms of identity-based hate, should be condemned. We should see each other as human beings, and everyone deserves equal dignity and respect, regardless of their racial, religious, or sexual identity.

[1] See David Cole, Defending Speech We Hate, ACLU Blog, Feb. 20, 2024, https://www.aclu.org/news/civil-liberties/defending-speech-we-hate.

That said, the First Amendment protects antisemitic speech, just as it protects racist, sexist, homophobic, and Islamophobic speech. The only forms of speech *not* protected by the First Amendment are true threats, incitement, defamation, obscenity, speech integral to illegal conduct, and fighting words. Offensive speech that expresses bias or animus towards someone because of who they are does not fall within any of those categories. The Supreme Court has repeatedly reaffirmed this principle. It has protected the speech rights of Westboro Baptist Church members to protest a military funeral with homophobic slurs;[2] of the Nazis to march in Skokie, Illinois, home to many Holocaust survivors;[3] and of the Ku Klux Klan to engage in racist speech and cross-burnings.[4] The Supreme Court has held unconstitutional even efforts to punish fighting words, a form of unprotected speech, where those fighting words were singled out for worse treatment because they expressed a racist point of view.[5] All such speech, like antisemitic speech, is hateful, offensive, and often inflicts psychic injury on those exposed to it; but it is nonetheless protected by the First Amendment.

Under longstanding First Amendment principles, we must tolerate offensive speech, even when listeners experience it as deeply harmful, because giving government officials the power to determine whose views can be heard and whose should be silenced is a greater danger. As Chief Justice John Roberts wrote in the Westboro Baptist Church case:

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.[6]

Accordingly, it will not do to proclaim that because a student or faculty member on campus engaged in speech that is perceived to be antisemitic, colleges are somehow violating federal law by tolerating that speech. On the contrary, tolerating such speech will often simply be respecting principles of free speech.[7] Many Republicans and conservatives have long criticized universities for failing to tolerate speech that was perceived to be racist, sexist, or homophobic. Conservatives argued—and I agree—that such speech must be tolerated in a free society. But the same is true of antisemitic speech—the vast majority of it is constitutionally protected, no matter how offensive we find it. And therefore free speech principles preclude its suppression.

2. Federal Law Prohibits Discrimination Based on Race, National Origin, and Sex, and in Narrow Circumstances, Speech Can Constitute Discrimination.

While antisemitic speech is protected, discrimination is not. Federal law, particularly Titles VI and IX, prohibit discrimination because of race, sex, or national origin by educational institutions that receive

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[2] *Snyder v. Phelps*, 562 US 443 (2011).
[3] *Nat'l Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977).
[4] *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *see also Virginia v. Black,* 538 U.S. 343 (2003)
[5] *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).
[6] *Snyder v. Phelps*, 562 U.S. at 460-61.
[7] While private universities, unlike public universities, are not constitutionally obligated to adhere to the First Amendment, most universities have adopted "free speech" policies that impose on them the same restrictions that the First Amendment imposes on public institutions. That is because free speech is widely viewed as essential to free inquiry.

federal funding—in effect, virtually all educational institutions. Most discrimination consists of conduct, as when someone is hired or fired or denied a promotion based on a protected characteristic. In those instances, the challenge is to determine the motive behind the conduct – if it is motivated by criticism of Israel or Hamas, for example, it is not antisemitic or Islamophobic. If it is motivated by animus against Jews or Muslims, it is.

In some instances, discrimination can take the form of speech. Thus a quid pro quo request for sex in exchange for a promotion is sexual harassment, and is not protected even though it is expressed through words. Similarly, harassing speech that is targeted at a particular individual because of his race or national origin is prohibited. But drawing the line between free speech and targeted harassment can be difficult.

More difficult still is defining when non-targeted speech rises to the level of discrimination. As a general matter, speech that is not targeted at an individual, even if it is virulently sexist, racist, or antisemitic, will rarely constitute discrimination under Title VI or IX, and is constitutionally protected by the First Amendment. The only exception is when the non-targeted speech is so severe, pervasive, and objectively offensive as to create a "hostile learning environment" that denies individuals equal access to education based on race, sex, or national origin.[8] But precisely because this theory runs up against the free speech protections for hate speech, very few claims of "hostile learning environment" have ever succeeded. It is, and should be a very high bar, lest it trench on protected speech.

It is, in addition, critical to distinguish criticism of Israel, or defense of Palestinian rights and lives, from antisemitic discrimination—just as one cannot equate criticism of Hamas or defense of Israeli citizens' right and lives, with Islamophobia. Most criticism of Israel is not antisemitic; indeed, many Jews are deeply critical of how Israel has responded to the terrorist attacks of October 7, and of how Israel has managed its long-term conflict with the Palestinian people. Nor is defense of Hamas's right to fight back antisemitic, even if it seeks to justify terrorist actions—just as defense of Israel's bombing and killing of civilians in Gaza is not Islamophobic. In commenting upon or protesting a military conflict between a religiously-identified state and a religiously identified terrorist group, one has to be able to take sides and criticize either or both sides. It is not surprising that people on both sides experience taking sides in a war as antisemitic or Islamophobic. But that doesn't make it so. Accordingly, defining what is "antisemitic" in this setting is very difficult. This means that even when conduct, not speech, is involved, as in a physical blockade or assault, the conduct is only discrimination if it is motivated by the race or national origin of a particular target, and not if it is motivated by criticism of Israel or Hamas.

And the difficulty doesn't end there. Because, as noted above, most even indisputably antisemitic speech does not violate federal law, universities committed to free speech, as most are, must tolerate it, not punish it. And where the assertion is that a series of statements have collectively created a "hostile learning environment," appropriate remedies are especially challenging to formulate. For example, if one person engages in antisemitic speech on the campus lawn, not targeted at anyone, that is not discrimination. If two people say the same thing, that is also not discrimination. If three people say it, it is still not discrimination. But if 1,000 people said it, it might become sufficiently "sever, pervasive, and objectively offensive" to create a hostile learning environment. But if the first 999

[8] *Davis v. Monroe County Bd. of Educ.,* 526 US 629 (1999).

students can't be punished for saying it, is it fair to punish the 1,000th student? Or if it's protected to say it for two hours, but not for three weeks, who draws that line, and on what basis? These are extremely difficult questions, and they are not answered by loose charges of rampant antisemitism and demands to punish students.

If one is committed to both free speech and equality, it is important to make careful assessments, and not paint as off limits all speech that might be deemed offensive to a particular group. To take one example close to home for me: When conservative lawyer Ilya Shapiro, who had recently been hired by Georgetown, posted a tweet in 2022 claiming that because President Biden had promised to select the first Black woman for the Supreme Court, and there were in Shapiro's view more qualified candidates on the federal bench, Biden would necessarily choose a "lesser Black woman," many people called his remarks discriminatory, and argued that they rendered him unfit to direct an institute at Georgetown Law, where I teach. I defended Shapiro's right to say what he did, arguing that even if his speech was offensive to many, and could be viewed as racist and sexist, it was protected by the First Amendment, and by Georgetown's free speech policy.[9] After an investigation, the Dean declined to withdraw an offer to Mr. Shapiro, upholding his speech rights. Such incidents illustrate the importance of not treating any speech that is racist, sexist, or antisemitic as unworthy of protection, or as constituting discrimination.

By the same token, the fact that someone says something deemed antisemitic, whether a student or a faculty member, is not necessarily discrimination. In fact, in most instances, it will not be discrimination at all, but protected speech.

3. Distinguishing Protected Antisemitic Speech from Prohibited Discriminatory Harassment Requires Careful, Case-by-Case Analysis, and Cannot be Adjudicated in a Congressional Committee Hearing.

Because only a very small subset of antisemitic (or racist or sexist) remarks even conceivably constitute discriminatory harassment under Title VI or Title IX, determining whether a particular antisemitic statement is protected speech or prohibited harassment is necessarily a fact-specific inquiry. One simply cannot conclude that antisemitic remarks are discrimination without a careful assessment of all the facts and circumstances surrounding any alleged incident. People often have very different views about what happened—as countless Title IX sexual harassment cases have illustrated over the years. In that context, one person's consensual encounter is often another person's assault or harassment; the only way to get to the truth is to carefully assess the facts in a fair and impartial hearing. The same is true with charges of antisemitism, Islamophobia, or other forms of alleged hate speech.

Accordingly, colleges must investigate, and where appropriate, hold fair hearings that afford both sides an opportunity to be heard and to challenge opposing testimony, weigh often conflicting testimony about what happened, and seek a fair resolution.

In addition, the fact that *students* engage in harassing behavior does not mean *the college* has violated Title VI. Nor does it violate Title VI for a college to resolve a particular incident or series of

[9] David Cole, The University and Free Speech, New York Review of Books, Feb. 15, 2022, https://www.nybooks.com/online/2022/02/15/the-university-and-freedom-of-expression/; David Cole, Georgetown Law Did the Right Thing on Ilya Shapiro, Wash. Post, June 4, 2022, https://www.washingtonpost.com/opinions/2022/06/04/georgetown-law-ilya-shapiro-free-speech/.

incidents in ways that members of this committee do not deem sufficiently harsh. One student's harassment of another does not violate Title VI; the students themselves are not bound by Title VI, only the college is. As students do not speak for the college, their actions are not attributable to the college. Accordingly, colleges violate Titles VI or IX only when they are "deliberately indifferent" to a credible claim of discrimination.[10] That is an extraordinarily high bar. The fact, for example, that a college resolves a charge of sexual harassment against the accuser, and imposes no penalty, is not deliberate indifference—even if a reasonable person might have found for the accuser. Nor is it deliberate indifference for a college to impose a modest penalty, or a mere warning, for particular incidents. The college's obligation is to take credible complaints seriously—not to reach any particular result in any particular case. Thus, very few colleges have ever been found to be deliberately indifferent under Titles VI or Title IX, by courts or the Department of Education.

What does this mean for this committee? It means that throwing around broad charges of antisemitism is not helpful. This committee and this hearing are not capable of engaging in the fact-intensive inquiry necessary to determine the facts of any particular incident. Since most antisemitism is protected speech, only a very small subset of antisemitic remarks even arguably constitute discrimination, and schools are liable only if they are "deliberately indifferent" to an actual instance of discrimination, one cannot possibly fairly assess any particular case in this committee room. Just as we don't try criminal or civil cases by congressional committee, we ought not pretend we are enforcing Title VI in this committee.

Complaints about antisemitism should be adjudicated in the first instance in college hearings or by college investigators, in the second instance by the Department of Education's Office of Civil Rights, or, where a lawsuit is filed, in the courts. But this Committee has already made clear, through its conduct of similar hearings last Congress, that it is not a venue that can get to the bottom of what actually happened in a particular instance or whether it was fairly decided.

To be honest, and with all due respect, the hearings this committee held on this same subject last year are reminiscent not of a fair trial of any sort, but of the kind of hearings the House Committee on Un-American Activities used to hold.[11] And I think we can all agree that the HUAC hearings were both a big mistake and a major intrusion on the First Amendment rights of Americans.

Finally, I will close with a word about academic freedom and the Constitution. The core premise of academic freedom, which the Supreme Court has said is a "special concern" of the First Amendment,[12] is that universities and professors get to decide what to teach and research, and whom to hire as faculty and admit as students. Absent actual discrimination, those decisions are not for politicians to make, even if politicians don't like the viewpoint a university seems to have adopted. Whether a university leans in a conservative direction, a liberal direction, or seeks a diverse set of voices, it is not the role of the government to interfere. Thus, demands, as the Trump administration has

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[10] *Davis v. Monroe County Bd. of Educ.,* 526 US 629 (1999).

[11] I note, in this regard, that the Committee's Oversight Plan expressly states, at p. 3, that the committee seeks to fight not only "antisemitism" but "anti-Americanism" in education. See https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=117778. That is *exactly* what the House Committee on **Un-American** Activities did. Anti-Americanism is also, needless to say, constitutionally protected speech.

[12] *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

recently made, that schools stop teaching about "diversity, equity, and inclusion," or subject their hiring and admissions decisions to federal review for "viewpoint diversity," are impermissible. So, too, are threats to withdraw major grants and contracts from programs and departments that are not even charged with any Title VI violations. And so, too, are threats to revoke tax-exempt status in retaliation for universities standing up for academic freedom, as President Trump has now twice illegally suggested with respect to Harvard.

The actions of this committee, and of the Trump administration, violate one of the Constitution's most important principles: that the government doesn't get to tell us what can and cannot be said, or what side of issues of public concern we must be on. In a constitutional democracy, those decisions are left to the people and private institutions – because we don't trust government to do a fair job. Rarely has that risk been more manifest than right now.

APPENDIX A

A Statement of Constitutional Law Scholars on Columbia, https://www.nybooks.com/online/2025/03/20/a-statement-from-constitutional-law-scholars-on-columbia/

A Statement from Constitutional Law Scholars on Columbia

Eugene Volokh, **Michael C. Dorf**, **David Cole**, and **15 other scholars**

March 20, 2025

We write as constitutional scholars—some liberal and some conservative—who seek to defend academic freedom and the First Amendment in the wake of the federal government's recent treatment of Columbia University.

The First Amendment protects speech many of us find wrongheaded or deeply offensive, including anti-Israel advocacy and even antisemitic advocacy. The government may not threaten funding cuts as a tool to pressure recipients into suppressing such viewpoints. This is especially so for universities, which should be committed to respecting free speech.

At the same time, the First Amendment of course doesn't protect antisemitic violence, true threats of violence, or certain kinds of speech that may properly be labeled "harassment." Title VI rightly requires universities to protect their students and other community members from such behavior. But the lines between legally unprotected harassment on the one hand and protected speech on the other are notoriously difficult to draw and are often fact-specific. In part because of that, any sanctions imposed on universities for Title VI violations must follow that statute's well-established procedural rules, which help make clear what speech is sanctionable and what speech is constitutionally protected.

Yet the administration's March 7 cancellation of $400 million in federal funding to Columbia University did not adhere to such procedural safeguards. Neither did its March 13 ultimatum stipulating that Columbia make numerous changes to its academic policies—including the demand that, within one week, it "provide a full plan" to place an entire "department under academic receivership for a minimum of five years"—as "a precondition for formal negotiations regarding Columbia University's continued financial relationship with the United States government."

Under Title VI, the government may not cut off funds until it has

- conducted a program-by-program evaluation of the alleged violations;
- provided recipients with notice and "an opportunity for hearing";
- limited any funding cutoff "to the particular program, or part thereof, in which…noncompliance has been…found"; and
- submitted a report explaining its actions to the relevant committees in Congress at least thirty days before any funds can be stopped.

These requirements aim to ensure that any withdrawal of funds is based on genuine misbehavior on the university's part—on illegal toleration of discriminatory conduct, not just on allowance of First Amendment–protected expression. The requirements aim to make clear to recipients of federal funds just what behavior can form the basis for sanctions. And each of the requirements aims to make sure that the sanction fits the offense.

Yet here the sanction was imposed without any agency or court finding that Columbia violated Title VI in its response to antisemitic harassment or discrimination. Even to the extent that some protesters' behavior amounted to illegal harassment of Jewish students, no agency and no court has concluded that Columbia illegally failed to reasonably respond to such discriminatory behavior—much less failed to act at a level justifying withdrawal of nearly half a billion dollars in funds. The government's action therefore risks deterring and suppressing constitutionally protected speech—not just illegal discriminatory conduct.

And this danger extends beyond universities. The safeguards and limits that the administration has ignored are designed to protect all recipients of federal funding from unwarranted or excessive sanctions. They protect recipients of federal funding across the ideological spectrum, including K-12 schools, hospitals, nursing homes, and business and agricultural initiatives. The administration's failure to honor the Title VI safeguards creates a dangerous precedent for every recipient of federal financial assistance.

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*Titles for identification purposes only.