AMERICAN CIVIL LIBERTIES UNION FOUNDATION

**Open Letter to U.S. College and University Presidents**

We write on behalf of the American Civil Liberties Union, the nation's premier defender of civil rights and civil liberties for more than 100 years.

As leaders of American colleges and universities are painfully aware, the ongoing Israel-Palestine conflict has roiled campuses across the country, with student groups weighing in on both sides of the controversy—sometimes in intemperate, offensive, and deeply regrettable terms. The current climate at some college campuses has resulted in a rise in documented threats against Jewish, Palestinian, Muslim, and Middle Eastern– and South Asian–origin students and faculty alike, leading to mounting concerns for personal safety. We take these threats seriously, and know that you do as well.

However, the Anti-Defamation League and The Louis D. Brandeis Center for Human Rights Under Law recently issued an open letter to university presidents alleging, without citing to any evidence, that pro-Palestine student groups are, through their words, providing material support to Hamas, a designated Foreign Terrorist Organization, and have urged sweeping investigations into these groups for material support of terrorism under 18 U.S.C. §§ 2339A and 2339B and state analogues.[1]

The ACLU is a U.S.-focused civil liberties and human rights organization and, as a matter of official policy, does not take positions on other nations' overseas conflicts. We do, however, strongly oppose efforts to stifle free speech, free association, and academic freedom here at home. In the name of those principles, we urge you to reject calls to investigate, disband, or penalize student groups on the basis of their exercise of free speech rights.

All students deserve equal access to education—free from harassment and discrimination on campus. Schools have a responsibility to address discrimination and harassment wherever it occurs. But the experience of our country's universities during the McCarthy era demonstrates that ideologically motivated efforts to police speech on campus destroy the foundation on which academic communities are built. A college or university, whether public or private, cannot fulfill its mission as a forum for vigorous debate if its leaders initiate baseless investigations into those who express disfavored or even loathsome views. Such investigations chill speech, foster an atmosphere of mutual suspicion, and betray the spirit of free inquiry, which is based on the power to persuade rather than the power to punish.

Free speech and free association are thus central to all academic institutions, and students should not be penalized for their political speech or associations. In *Healy v. James*, for example, the Supreme Court affirmed that the First Amendment protects the right of student groups to associate

[1] Letter from Jonathan A. Greenblatt, Alyza D. Lewin & Kenneth L. Marcus to University Presidents (Oct. 25, 2023), https://www.adl.org/resources/letter/adl-and-brandeis-center-letter-presidents-colleges-and-universities.

and speak out on matters of public concern, free from censorship by public university officials.[2] In that case, the president of a public college in Connecticut denied recognition to a local chapter of Students for a Democratic Society, based on its perceived association with the national organization and the national organization's radical philosophy and actions. Reiterating that "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools,"[3] the Court held that the college's refusal of recognition to the student group amounted to a prior restraint, imposing a "heavy burden" on the college to justify the propriety of its action under the First Amendment.[4] The Court explained that a student group's mere affiliation with an "unpopular organization" like the national Students for a Democratic Society could not satisfy the college's "burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims."[5] While the First Amendment does not constrain private universities because it applies only to public entities, principles of academic freedom nonetheless demand protection of free speech and association on private as well as public campuses.

Our concern about impermissible chilling of free speech and association on campus is not hypothetical. On October 24, 2023, Florida State University System Chancellor Ray Rodrigues issued an order "in consultation with Governor DeSantis," calling for the deactivation of the Students for Justice in Palestine (SJP) chapters at public universities in Florida.[6] In his order, Chancellor Rodrigues cited Florida's material support for terrorism statute and asserted that a "toolkit" released by the National SJP expressed the group's support for terrorism. In particular, Chancellor Rodrigues cited the toolkit's reference to Hamas's "Al Aqsa Flood" operation as "the resistance," and its statement that "Palestinian students in exile are PART of this movement, not in solidarity with this movement," as examples of the organization's "support for terrorism."

To be clear, the ACLU in no way approves of or endorses such statements. Endorsing brutal mass murder of civilians is contrary to the principles of human rights that animate our domestic agenda. And yet under basic free speech principles, such statements are constitutionally protected. University officials may criticize or condemn the statements contained in the National SJP's toolkit. Those statements, however, are not material support for terrorism, but political advocacy fully protected by the First Amendment.

The Supreme Court made that distinction clear in *Holder v. Humanitarian Law Project*.[7] There, the Court confirmed that the federal statute prohibiting material support to terrorist groups does not criminalize independent advocacy, but only "advocacy performed in coordination with, or at

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[2] 408 U.S. 169 (1972).

[3] *Id.* at 180 (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

[4] *Id.* at 184.

[5] *Id.* at 186.

[6] *See* Memorandum from State University of Florida System (SUS) Chancellor Ray Rodrigues to SUS Presidents (Oct. 24, 2023), https://flbog.edu/wp-content/uploads/2023/10/Deactivation-of-Students-for-Justice-in-Palestine.pdf.

[7] 561 U.S. 1 (2010).

the direction of, a foreign terrorist organization."[8] The Court expressly rejected any suggestion "that a regulation of independent speech would pass constitutional muster, even if the [g]overnment were to show that such speech benefits terrorist organizations."[9] Thus, if a state's authorities were to apply that state's material support statute to independent advocacy, they would violate the First Amendment.[10]

We are aware of no evidence suggesting that the National SJP published the statements referenced by Chancellor Rodrigues in coordination with, or at the direction of, Hamas. If coordination and direction are absent, the National SJP's independent advocacy is fully protected by the First Amendment. And local SJP chapters cannot be penalized for their association with the National SJP. In the absence of any indication that these student organizations have themselves engaged in unlawful activity, or violated valid university policies, both the First Amendment and bedrock principles of academic freedom stand firmly against any attempts to punish them for their protected speech and associations.

We urge you to hold fast to our country's best traditions and reject baseless calls to investigate or punish student groups for exercising their free speech rights.

Sincerely,

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Executive Director

David Cole
National Legal Director

Hina Shamsi
Director, National Security Project

Ben Wizner
Director, Speech, Privacy, and Technology Project

[8] *Id*. at 24.

[9] *Id.* at 39.

[10] *Id.* at 36.