AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

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Dear College or University Office of the General Counsel:

News reports have revealed that, as part of its investigation into alleged Title VI violations at dozens of universities and colleges across the United States, the Office for Civil Rights (OCR) in the U.S. Department of Education has requested the names and nationalities of students and faculty who may have been involved.[1] **On behalf of our members and chapters, we write to you to clarify some of the legal implications of complying with the federal government's request to provide the personally-identifiable information of students and faculty, to make clear that you are under no legal compulsion to comply with such a request, and to strongly urge you not to comply, given the serious risks and harms of doing so.**

More than 300 noncitizen students and faculty have reportedly had their visas summarily revoked in the last three weeks of the Trump administration's "Catch and Revoke" program, in many cases because they engaged in political speech or protest activity that the administration has targeted.[2] While the legality of the program is being challenged,[3] these visa revocations alongside widely publicized student and faculty member ICE abductions and detentions have led to pervasive fear and the chilling of speech and expressive activity across campuses.[4] News reports, and the administration's own statements, make clear that many of these revocations and detentions have been motivated by students' and faculty members' speech and expressive activities.

As we detail below, **Title VI does not require higher education institutions to provide the personally identifiable information of individual students or faculty members so that the administration can carry out further deportations**. This information is irrelevant to legitimate agency efforts to investigate compliance with Title VI. **Moreover, sharing this information may violate the First Amendment rights of students and faculty for multiple reasons.** In addition to the Title VI and constitutional concerns, both **FERPA and analogous state law protections also affirmatively preclude such**

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[1] Laura Meckler, *New Trump Demand to Colleges: Name Protesters — And Their Nationalities*, Wash. Post (Mar. 25, 2025). https://www.washingtonpost.com/education/2025/03/25/trump-administration-campus-antisemitism-investigations/.

[2] Edward Wong, *Rubio Says He Has Revoked 300 or More Visas in Trump's Deportation Push,* N.Y. Times (March 28, 2025), https://www.nytimes.com/2025/03/28/us/politics/rubio-immigration-students-ozturk-chung-khalil.html.

[3] Am. Assoc. of Univ. Professors v. Rubio, No. 1:25-cv-10685 (D. Mass filed Mar. 25, 2025), https://knightcolumbia.org/documents/pwkvocf6z4.

[4] Evan Goldstein and Len Gutkin, *"It is Remarkable How Quickly the Chill Has Descended,"* Chronicle of Higher Education (March 25, 2025), https://www.chronicle.com/article/it-is-remarkable-how-quickly-the-chill-has-descended/?sra=true.

disclosure. And finally, but no less importantly, **sharing this information is inconsistent with institutional commitments to freedom of speech and academic freedom.** These principles apply particularly urgently to institutional decisions to disclose information to the federal government, given the broader political context in which these disclosure requests occur.

I. Title VI: The names and personally identifiable information of individual students and faculty do not appear to be relevant to the Title VI investigations in question and are not a necessary means of enforcing the statute. They should not be shared.

Title VI prohibits discrimination "on the ground of race, color, or national origin," including shared ancestry, "under any program or activity receiving Federal financial assistance."[5] If a federal agency charged with enforcing the statute finds that an institution that receives federal funds, such a university or college, is not in compliance with Title VI's nondiscrimination mandate, and that informal means of resolution are unable to bring the institution into compliance, the statute provides that it may suspend or terminate federal financial assistance to the program or provision within that institution that is in violation.[6]

In order to determine whether an institution is complying with Title VI, the federal agency charged with its enforcement—in this case, OCR—is authorized to conduct a compliance investigation.[7] These investigations are not intended to determine whether the students and faculty who attend these schools have violated any civil rights laws, let alone discipline or punish students or faculty by means of individual sanctions or immigration consequences.[8] Instead, they are intended to determine whether the institution itself has discriminated, either by affording disparate treatment to different groups on the basis of their race, color or national origin or—more relevant here—by exhibiting deliberate indifference to the discriminatory conduct of others that creates a hostile educational environment.[9]

In conducting these investigations, agencies like OCR are authorized to request information from regulated entities that is relevant to their inquiry.[10] This information may sometimes involve information about a discrete individual. For example, OCR might ask for information about a particular student or faculty member's conduct, in an effort to

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[5] Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq*.

[6] 42 U.S.C. § 2000d-1.

[7] 34 C.F.R. § 100.7.

[8] Department of Justice, *Defining Title VI*, https://www.justice.gov/crt/fcs/T6manual5 ("Title VI does not apply to direct, unconditional assistance to ultimate beneficiaries, the intended class of private citizens receiving federal aid" and therefore "does not provide for action against individuals receiving funds under federally assisted programs—for example, widows, children of veterans, homeowners, farmers, or elderly persons living on social security benefits" (quoting 110 Cong. Rec. 15866 (1964) (statement of Sen. Humphrey)).

[9] *See* 34 C.F.R. § 100.3 (specifying the various ways that federally-funded institutions may violate the statute).

[10] 34 C.F.R. § 100.6 (requiring recipients to "keep such records" as are necessary to enable the department "to ascertain whether the recipient has complied or is complying with this part.")

determine whether a university failed to effectively respond to an incident of discriminatory harassment. Nevertheless, this kind of data gathering is typically conducted in a manner that protects the privacy of the individuals involved. For example, OCR's recently-updated case processing manual permits the agency to request only de-identified forms of information wherever practicable, such as by replacing names with a code, with the school retaining a key to the de-identifying code.[11] If OCR claims that this procedure cannot suffice in a given case, for instance because it would impede its timely resolution,[12] it should at the very least provide a justification for that assertion with respect to the specific circumstances of the incidents in question.

Furthermore, OCR is only authorized to request information that is *relevant* to the inquiry it is conducting. As the Supreme Court has made clear, an administrative agency is entitled to demand information from regulated entities so long as that information is "not plainly incompetent or irrelevant to any lawful purpose of the [agency] in the discharge of [its] duties."[13] As a result, requests for personally identifiable information such as names can likely *never* be issued on a blanket basis across a broad set of Title VI investigations, since the need to divulge this information would depend on a fact-specific determination of its relevance in the context of a specific investigation.

In addition, because immigration status is not a ground of prohibited discrimination under Title VI, the disclosure of such information will almost never be relevant to the legitimate purposes of an OCR investigation, and requests for such information are reportedly unprecedented in the practice of that office. And while information about the nationality of students may be relevant to certain kinds of Title VI investigations—for example, where the allegation that a university itself discriminated against students based on their national origin requires a head-to-head comparison of the treatment of different groups of students—it is irrelevant to most current allegations of antisemitism on college campuses. If the allegation is that a campus failed to curb incidents of antisemitism leading to a hostile environment, for instance, the nationality of the students allegedly responsible for those incidents would not be relevant; rather, the relevant facts would be whether the incidents involved antisemitic harassment, whether that harassment was severe and pervasive, and whether the institution sufficiently addressed the harassment. Indeed, the idea that the national origin of the perpetrators would be relevant might itself rely on the kinds of stereotypes about particular nationalities that are proscribed by Title VI.

For these reasons, as a former OCR attorney told the *Washington Post* in response to reports that the office was seeking the names and nationalities of students involved in pro-Palestinian protests, "There is no investigative reason for us to be asking for that

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[11] *See* U.S. DEP'T OF ED. OFFICE FOR CIV. RTS, CASE PROCESSING MANUAL 28-29 (Feb. 19, 2025) ("To protect the confidential nature of the records, OCR, for example, may permit the recipient to replace names with a code and retain a key to the code.").

[12] The Case Processing Manual takes the position that access to the unmodified records is available "if at any time such a procedure impedes the timely investigation of the case." Id.

[13] Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 509 (1943). *See also* United States v. Morton Salt Co., 338 U.S. 632, 649 (1950) (requiring that information demanded as part of an agency compliance investigation involve "conduct and practices … [about] which the [agency] is authorized to inquire").

information."[14] Citizen and non-citizen students and faculty possess identical rights under Title VI, which clearly provides that "*no person in the United States* shall… be excluded from participation in, or be denied the benefits of, to be subject to discrimination" by a federally-funded college or university.[15] Administrators have no obligation to provide information that is so "plainly… irrelevant" to OCR's duties.[16]

II. Federal Demands that Higher Education Institutions Provide the Personally Identifiable Information of Students and Faculty Violate the First Amendment, and Institutions that Comply May Also Violate the First Amendment.

Demands to higher education institutions that they provide the names and nationalities of students and faculty are not justified by federal agencies' enforcement responsibilities under Title VI. They also, and independently, violate the First Amendment by unlawfully targeting students and faculty because of the content of their speech and by chilling their rights to freedom of speech and association.[17] And colleges and administrators that comply with such directives may themselves violate the First Amendment by willfully participating in the government's unconstitutional actions.

The First Amendment prohibits the government from restricting speech or punishing speakers because it dislikes what those speakers say.[18] Although the First Amendment applies most familiarly to government actions that directly restrict or punish speech, courts have recognized that "constitutional violations [can also] arise from the deterrent, or 'chilling,' effect of governmental [actions]."[19] More specifically, courts have recognized that the government violates the First Amendment when it uses "the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation" to compel private actors to engage in self-censorship, or to use their private power to suppress or punish other private people's speech.[20] Courts have also recognized that the

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[14] Laura Meckler, *New Trump Demand To Colleges: Name Protesters — And Their Nationalities*, Wash. Post (Mar. 25, 2025). https://www.washingtonpost.com/education/2025/03/25/trump-administration-campus-antisemitism-investigations/

[15] 42 U.S.C. §§ 2000d.

[16] *See* Endicott, 317 U.S. at 509.

[17] *See* Nat'l Rifle Ass'n of Am. v. Vullo, 602 U.S. 175 (2024) ("[A]lthough [Superintendent of the New York Department of Financial Services] Vullo can pursue violations of state insurance law, she cannot do so in order to punish or suppress the NRA's protected expression.")

[18] Police Dep't of City of Chicago v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

[19] Laird v. Tatum, 408 U.S. 1, 11 (1972).

[20] Bantam Books, Inc. v. Sullivan, 372 U. S. 58, 67 (1963). *See also* Vullo, 602 U.S. at 190 (2024) ("Ultimately, *Bantam Books* stands for the principle that a government official cannot do indirectly what she is barred from doing directly: A government official cannot coerce a private party to punish or suppress disfavored speech on her behalf.").

government violates the First Amendment when it retaliates against individuals *because* of their past speech or expressive activity.[21]

The demand for the disclosure of such personally sensitive information as the names and nationalities of students who were involved in campus protests is clearly intended to achieve and enable both of these prohibited ends. The federal government has made clear that the focus of the Title VI investigations to which these disclosure requests apply is the failure of university and college administrators to adequately discipline students and faculty when they engaged in pro-Palestinian protest on campus.[22] *And yet, much of the speech involved in protest is protected speech*.[23]

The demand for this information represents therefore a not-very-veiled threat to all students and faculty on campus that they may be subject to very significant legal harms—including the harms of detention and deportation—if they engage in certain kinds of advocacy or protest activity. Indeed, the administration has gone to considerable effort to communicate this threat to students and faculty as forcefully as it can, not only by attempting to deport non-citizen students and faculty who engaged in pro-Palestinian advocacy or expressed pro-Palestinian viewpoints who it happens to know about, but also by *threatening* to deport any other non-citizen activists it can find.

On March 27, for example, Secretary of State Marco Rubio stated that the administration had already revoked more than 300 student visas, and that "every time I find one of these lunatics, I take away their visa...At some point I hope we run out because we have gotten rid of all them."[24] In several cases, the students and faculty in question who have been victims of the Catch and Revoke program have been flagged solely on the basis of their speech or limited participation in college protests for Palestinian human rights.[25]

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[21] Nieves v. Bartlett, 587 U.S. 391, 398 (2019) ("'As a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions' for engaging in protected speech.") (internal citations omitted); Crawford-El v. Britton, 523 U.S. 574, 589 (1998) ("The reason why such retaliation offends the Constitution is that it threatens to inhibit exercise of the protected right. Retaliation is thus akin to an 'unconstitutional condition' demanded for the receipt of a government-provided benefit.").

[22] *See e.g.,* Press Release, U.S. Department of Education, U.S. Department of Education Probes Cases of Antisemitism at Five Universities (Feb. 3, 2025), https://www.ed.gov/about/news/press-release/us-department-of-education-probes-cases-of-antisemitism-five-universities (explaining that the investigations are a response to the willingness of university administrators to "tolerate… the illegal encampments that paralyzed campus life last year").

[23] N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886, 907–08 (1982) (noting that "boycott[s]" as well as "speeches and nonviolent picketing" are all "form[s] of speech or conduct that [are] ordinarily entitled to [constitutional] protection" and that "'the practice of persons sharing common views banding together to achieve a common end'" is not only "'deeply embedded in the American political process'" but protected by the First Amendment) (quoting Citizens Against Rent Control Coalition for Fair Housing v. Berkeley, 454 U.S. 290, 294 (1981)).

[24] Ali Bianco, *Rubio Says State Department Has Revoked More Than 300 Student Visas*, Politico (Mar. 27, 2025), https://www.politico.com/news/2025/03/27/marco-rubio-student-visas-palestine-00005141.

[25] *See* Miranda Jeyaretnam, *These Are the Students Targeted by Trump's Immigration Enforcement Over Campus Activism*, Time, (Mar. 27, 2025), https://time.com/7272060/international-students-targeted-trump-ice-detention-deport-campus-palestinian-activism/.

Furthermore, the administration has declared it to be its general policy to target students who espouse what it considers to be "hateful ideologies," thus making clear that its purpose is the suppression of disfavored political speech. For example, Executive Order 14161, *Protecting the United States from Foreign Terrorists and Other National Security Threats*, declares it the policy of the federal government to protect U.S. citizens from noncitizens who "espouse hateful ideology" and to "ensure that admitted aliens and aliens otherwise already present in the United States do not bear hostile attitudes toward its citizens, culture, government, institutions, or founding principles."[26] Executive Order 14188, *Additional Measures to Combat Antiterrorism*, directs federal agencies to familiarize universities with the security grounds for inadmissibility of noncitizens "so that such institutions may monitor for and report activities by alien students and staff relevant to those grounds and for ensuring that such reports about aliens lead, as appropriate and consistent with applicable law, to investigations and, if warranted, actions to remove such aliens."[27] The accompanying fact sheet to Executive Order 14188 proclaims the government's intent to deport "all the resident aliens who joined in the pro-jihadist protests" and "cancel the student visas of all Hamas sympathizers on college campuses, which have been infested with radicalism like never before." The orders, by design, leave vague the definition of "pro-jihadist" and "Hamas sympathizers."

These statements make it not only possible but reasonable for non-citizen students and faculty who wish to engage in any pro-Palestinian advocacy on campus to understand that, if they do, and that information is communicated to the federal government, they may themselves be at risk for visa cancellation and deportation. Although ordinarily the Privacy Act of 1974 would prevent OCR or any other federal agency from sharing this kind of personally identifiable information with other actors in the federal government, the Privacy Act exempts disclosures made pursuant to law-enforcement purposes.[28] Furthermore, President Trump recently signed an Executive Order declaring it the policy of the federal government to, wherever possible, eliminate barriers to the sharing of unclassified information across the federal government.[29] Therefore, the likely effect of the disclosure of information of this kind to OCR will be the chilling of political speech and association on campus and off.

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[26] President Donald J. Trump, Exec. Order 14161, *Protecting the United States from Foreign Terrorists and other National Security and Public Safety Threats*, Jan. 20, 2025, https://www.whitehouse.gov/presidential-actions/2025/01/protecting-the-united-states-from-foreign-terrorists-and-othernational-security-and-public-safety-threats/.

[27] President Donald J. Trump, Exec. Order 14188, *Additional Measures to Combat Anti-Semitism*, Jan. 29, 2025, https://www.whitehouse.gov/presidential-actions/2025/01/additional-measures-to-combat-anti-semitism/.

[28] 5 U.S.C.A. § 552a.

[29] President Donald J. Trump, Exec. Order 14243, *Stopping Waste, Fraud, and Abuse by Eliminating Information Silos*, March 20, 2025, https://www.whitehouse.gov/presidential-actions/2025/03/stopping-waste-fraud-and-abuse-by-eliminating-information-silos/ (ordering "Agency Heads [to] take all necessary steps, to the maximum extent consistent with law, to ensure Federal officials … have full and prompt access to all unclassified agency records, data, software systems, and information technology systems … for purposes of pursuing Administration priorities related to the identification and elimination of waste, fraud, and abuse").

The administration has no constitutional authority to chill the speech of students and faculty members in this way, by demanding sensitive information about them that can be used to cause very significant legal harm. To the contrary, as scholars have noted, "the First Amendment requires that government actors respect the free speech rights of those they regulate not only when they exercise formal power—by, for example, passing a law or filing a legal claim—but also when they act more informally by, for example, issuing guidance to regulated parties, warning them of legal risks they face, or threatening investigations."[30] The same principle obviously applies to the conduct of agency investigations as well.

Even when the government does not specifically intend to suppress speech by requiring the disclosure of sensitive information, the Supreme Court has found that the mandated disclosure can nonetheless violate the First Amendment if the *effect* is sufficiently chilling. For example, in *NAACP v. Alabama*, the Court upheld the refusal of the state chapter of the NAACP to comply with an otherwise valid state disclosure law by disclosing the names of its members because it found that disclosure would impose a "substantial restraint upon [its members'] right to freedom of association" by rendering them vulnerable to "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."[31] In these circumstances, the Court concluded that enforcement of the law violated the First Amendment, even if in other circumstances it would not.[32] Here, as in *NAACP v. Alabama*, requests to colleges and universities to disclose the identities and nationalities of students would "fall[] short of showing a controlling justification" for the profound chilling effect that required disclosure would produce.[33]

Federal courts have recognized the significant chilling effect that the compelled disclosure of immigration status can have, when it raises the implied threat of deportation. In *Rivera v. Nibco*, a group of immigrant workers sued their employer for national origin discrimination and, in depositions, the defendant sought information about the worker plaintiffs' place of birth and immigration status.[34] The Ninth Circuit upheld the grant of a protective order to prevent the disclosure of this information on the grounds that it would chill workers from reporting abusive workplace practices by raising the possibility that they could be deported as a result.[35] Even if the plaintiffs' immigration status eventually proved relevant to the determination of damages, the court held, the plaintiffs' interest in avoiding the harm from disclosure "outweighed" the employer's

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[30] Evelyn Douek & Genevieve Lakier, *Title VI as a Jawbone*, Knight Institute, Sept. 26, 2024.

[31] NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 462 (1958).

[32] *Id.* at 461 ("In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action.").

[33] *See id.* at 466.

[34] 364 F.3d 1057 (2004).

[35] *Id.* at 1064 ("The protective order at issue bars discovery into each plaintiff's immigration status on the basis that allowing [the defendant] to use the discovery process to obtain such information would chill the plaintiffs' willingness and ability to bring civil rights claims. By revealing their immigration status, any plaintiffs found to be undocumented might face criminal prosecution and deportation.")

interests in obtaining that information at that stage.[36] "Granting employers the right to inquire into workers' immigration status in cases like this," it wrote, "would allow them to raise implicitly the threat of deportation and criminal prosecution every time a worker, documented or undocumented, reports illegal practices or files a Title VII action."[37]

The same argument clearly applies in this context—and is, arguably, only stronger than it was in *Rivera*, given the court's acknowledgment in that case that the disclosure of immigration status might at some point prove relevant to the litigation. As discussed above, disclosure of students' and faculty members' nationalities or immigration status would not only have a profound chilling effect on the rights of students and faculty to express their views, but it serves no legitimate regulatory purpose. To the contrary: the primary purpose of the demand for information appears to be to facilitate the administration's unconstitutional retaliation against students who engaged in prior expressive activity, as well as to chill future such activity on campus.

Under current law, to plead a First Amendment retaliation claim a plaintiff must show that "(1) he has a right protected by the First Amendment; (2) the defendant's actions were motivated or substantially caused by his exercise of that right; and (3) the defendant's actions caused him some injury."[38] Students clearly have a right to engage in controversial speech under the First Amendment. While some of the activity that takes place in campus protests may not be protected where it violates university rules, much of it remains constitutionally protected speech. The Executive Orders quoted above, along with officials' statements, make clear that the administration's actions are motivated by the exercise of that right. And there is no doubt that depriving students of the right to study and live in the United States causes them injury.

The request for information by the Trump administration therefore can be understood as part of a broader attempt to unconstitutionally retaliate against students and faculty.[39] For this reason also, the disclosure requests violate the federal government's long stated commitment to interpreting its obligations under Title VI in line with the First Amendment.[40] The Trump administration recently reiterated this commitment, when it stated its intention to "enforce[] federal civil rights law consistent with the First

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[36] *Id*. at 1064. The Court noted that the chilling effect of disclosure would extend beyond those individuals who were out of legal status. "Even documented workers may be chilled by the type of discovery at issue here. Documented workers may fear that their immigration status would be changed, or that their status would reveal the immigration problems of their family or friends; similarly, new legal residents or citizens may feel intimidated by the prospect of having their immigration history examined in a public proceeding. Any of these individuals, failing to understand the relationship between their litigation and immigration status, might choose to forego civil rights litigation." Id. at 1065. The same is likely to be true in this case also. Any number of students would feel chilled by the forced disclosure of other students' immigration or nationality status, even if they are U.S. citizens, because the disclosure would suggest unrelated punitive consequences might be imposed against any individual affected by an investigation due to expressive activity through the disclosure of their personally identifiable information to government officials.

[37] *Id.* at 1065.

[38] Dorsett v. Cnty. of Nassau, 732 F.3d 157, 160 (2d Cir. 2013)

[39] Nat'l Rifle Ass'n of Am. v. Vullo, 602 U.S. 175, 187 (2024) ("At the heart of the First Amendment's Free Speech Clause is the recognition that viewpoint discrimination is uniquely harmful to a free and democratic society.")

[40] Asst. Sec. for U.S. Dep't of Ed. Office of Civ. Rts., First Amendment: Dear Colleague, July 28, 2003.

Amendment of the U.S. Constitution" and reminded universities and colleges that "[n]othing in Title VI, its implementing regulations, or [agency guidance] requires or authorizes a school to restrict any rights otherwise protected by the First Amendment."[41]The recently-updated case processing manual produced by the Office for Civil Rights in the Department of Education (OCR) also asserts that "all actions taken by OCR must comport with First Amendment principles" and that "OCR will not interpret any statute or regulation to impinge upon rights protected under the First Amendment or to require recipients to encroach upon the exercise of such rights."[42] In short, the federal government must act consistently with the First Amendment.

Schools consequently have no obligation to provide information to the federal government that is intended to, or will have the effect of, infringing on students' First Amendment rights. And in fact, school administrators might themselves be complicit in the violation of the First Amendment if they do so.[43]

III. Sharing Personally Identifiable Information May Violate Institutional Missions and Campus Free Speech Codes, as well as Contractual Obligations.

Higher education institutions that comply with overbroad information requests about their students also violate their own institutional missions. Many universities have declared that both free speech and academic freedom are core institutional values.[44] And yet, handing over information that will result in the chilling of student and faculty speech—and potentially also, retaliation against members of the university community because of their speech—cannot be reconciled with a strong institutional commitment to academic freedom or freedom of speech.

In 1967, the American Association of University Professors recognized the rights and freedoms of students, including "minimal standards of academic freedom" that were "essential to any community of scholars."[45] The AAUP statement specifically noted

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[41] Frequently Asked Questions About Racial Preferences and Stereotypes Under Title VI of the Civil Rights Act (Feb. 28, 2025), https://www.ed.gov/media/document/frequently-asked-questions-about-racial-preferences-and-stereotypes-under-title-vi-of-civil-rights-act-109530.pdf.

[42] U.S. Dep't of Ed. Office for Civil Rights, Case Processing Manual (Feb. 19, 2025), https://www.ed.gov/sites/ed/files/about/offices/list/ocr/docs/ocrcpm.pdf.

[43] Lugar v. Edmondson Oil Co., 457 U.S. 922, 941–42 (1982) ("[W]e have consistently held that a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment."). Private persons become state actors when they "jointly participate" with government actors in actions that unconstitutionally deprive other private persons of their constitutional rights. And courts have found that this requirement is satisfied when private actors share a "common goal" with the government officials "to violate [another'[s] rights." Betts v. Shearman, 751 F.3d 78, 85 (2d Cir. 2014).

[44] *See, e.g.*, ERWIN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS x (2017) ("Freedom of expression and academic freedom are at the very core of the mission of colleges and universities… ."); AM. ASS'N OF UNIV. PROFESSORS, JOINT STATEMENT ON RIGHTS AND FREEDOMS OF STUDENTS (1967) (describing "free inquiry and free expression" as "indispensable" to stated university purposes).

[45] *Id.*

student rights to express opinions publicly, invite speakers to campus, and organize among themselves.[46]

Universities have acknowledged their institutional obligation to protect expressive freedom against excessive chill. Administrators cannot therefore ignore the profound chilling effects that disclosing this information to the federal government will have on non-citizen students, faculty, and potentially also staff, who wish to engage in activism and advocacy the administration dislikes. A commitment to expressive freedom on campus is not consistent with the disclosure of this information.

Where administrative demands for disclosure entail providing personally identifiable information about faculty, such disclosure may also violate the contractual rights of faculty. Free speech commitments are often included within faculty handbooks and other materials that may qualify as binding contracts between faculty and the university. And courts have found, in certain circumstances, that faculty can bring contract claims to vindicate these rights when they are violated.[47]

Releasing the names of students and/or faculty and their nationalities or immigration status in response to administrative demands, when those demands appear clearly intended to revoke student visas, detain, and deport international students for their speech, would necessarily chill the speech of all members of the university community in violation of the most basic principles—and potential contractual obligations—of colleges and universities.

IV. Strong FERPA Protections Make Unlawful the Disclosure of Personally Identifiable Information for Purposes Not Relevant to the Purpose of Title VI. Sharing this Information Makes Universities Susceptible to Violations of State Privacy Law.

By disclosing the requested information, university administrators may also violate the privacy protections provided by the Family Educational Rights and Privacy Act (FERPA).[48] FERPA generally prohibits educational institutions from disclosing personally identifiable information from students' education records without the consent of the student or their parent.[49] This includes sensitive information such as immigration status. Indeed, FERPA's implementing regulations require that when personally-identifying information is requested about students, the purpose of the request must be disclosed and a description of the activity to be undertaken in connection to the PII must be provided "with sufficient specificity to make clear that the work falls within [one of

[46] *Id.*

[47] *See, e.g.,* McAdams v. Marquette University, 383 Wisc. 2d 358 (2018).

[48] 20 U.S.C. § 1232g.

[49] *Id.* 20 U.S.C. § 1232g(b)(1) ("No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein …) of students without the written consent of their parents"). In the higher education context, the consent sought is that of students.

the limited statutory] exception[s], including a description of how the personally identifiable information from education records will be used."[50]

It is true that FERPA permits the disclosure of personally identifiable information when necessary for specified law enforcement purposes. Specifically, the statute permits disclosure of this information in response to a lawfully issued subpoena or court order,[51] or when necessary to comply with federal and state laws that require information sharing with the government under specific circumstances.[52] Neither of these exceptions applies in this context, however. If federal officials believe they have the lawful authority to compel the disclosure of students' names and nationalities from schools and universities, they must obtain a judicial order or issue a lawful subpoena.[53]

The Department of Education does not have the authority to enforce immigration laws or otherwise take actions related to the immigration status of students. A request for immigration-related information from the Department of Education therefore does not relieve the university of its non-disclosure obligations under FERPA. Section 99.35(a)(1) makes clear that "authorized…officials…may have access to education records…for the enforcement of or compliance with Federal legal requirements" but as we have argued, the disclosure request in this case is not related to the lawful authority of the Department of Education.[54] For this reason, also, administrators should not release this information to the Department. Disclosure might in fact expose colleges and universities to legal liability. While there is no private right of action under FERPA it is possible that a student whose information was improperly disclosed in violation of FERPA could use a state privacy cause of action to sue over the disclosure.

Federal courts have recognized that preventing the unauthorized disclosure of personally identifiable information is in the public interest. In a lawsuit recently filed by the American Federation of Teachers (AFT) , the plaintiffs alleged that the disclosure of their records to affiliates of the newly established Department of Government Efficiency (or DOGE) constitutes a violation of the Privacy Act for which no exception applies.[55] In that case, the District Court issued a temporary restraining order enjoining federal agencies from disclosing student borrower information to DOGE and finding that the government failed to establish a legitimate basis for the broad disclosure it sought.[56] The Privacy Act and FERPA share the same underlying purpose of protecting personally identifiable information from disclosure and were passed by Congress in the same period

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[50] 34 C.F.R. § 99.35(a)(3).

[51] 20 U.S.C. § 1232g(b)(1)(J) and (b)(2)(B).

[52] These are federal and state laws that are unrelated to the authorities of the Department of Education. They are largely in the domains of national security, health emergencies, tax investigations and state laws relating to child abuse and neglect. *See, e.g.,* 20 U.S.C. § 1232g(b)(1)(K).

[53] 34 C.F.R. § 99.31(a)(9)(i).

[54] 34 C.F.R. § 99.35(a)(1).

[55] American Federation of Teachers, et al, v. Bessent, Civ. No. DLB-25-0430 (D. Md. Feb. 24, 2025).

[56] American Federation of Teachers, et al, v. Bessent, Civ. No. DLB-25-0430, 2025 U.S. Dist. LEXIS 25 (D. Md. Feb. 24, 2025).

to achieve similar goals.[57] In the AFT case, the District Court found that the government failed to explain why it needed "such comprehensive, sweeping access to the plaintiffs' records" and that "[t]here appears to be no precedent" for the broad disclosure requested.[58] The court determined that the "balance of the equities and the public interest" favor preventing the disclosure of plaintiffs' "sensitive personal information" to government officials who "do not have a need to know the information to perform their duties."[59] The same argument applies to the Department of Education's request in this context.

The harms asserted by plaintiffs in the AFT case are invasion of privacy and increased risk of identity theft. The harms produced by the disclosure of students' personally identifiable information relating to nationality and immigration-related information are likely to be much greater than those entailed by the disclosure of student borrower information. As discussed above, because federal officials have repeatedly stated their intention to target non-citizen students for visa revocation, detention and deportation, the risk of harm due to improper disclosure of personally identifiable information to the Department of Education is particularly grave.[60] As in the case of the DOGE requests enjoined by the Maryland court, here, too, the Department of Education has provided no legitimate basis for the broad requests it has issued.

* * *

Given the very significant risks to students and faculty, and the significant statutory and constitutional problems that compliance may create, we urge you not to comply with requests for the names of students and faculty that are made in connection with the federal government's ongoing Title VI investigations absent clear justification for the release of specific information related to a legitimate purpose in the context of a particular active investigation. As this memo lays out, you are under no legal obligation to do so. To the contrary: significant legal and institutional considerations counsel against disclosure.

Sincerely,

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[57] Both FERPA and the Privacy Act were passed during the same legislative session in 1974. FERPA was specifically designed to protect the privacy of student education records and control the disclosure of PII contained in these records, while the Privacy Act focuses more broadly on regulating the federal government's collection, use and dissemination of personal data with the aim of safeguarding individuals' privacy from unauthorized disclosure of their records. For a discussion of the FERPA and the Privacy Act as applied to student records, see Lindsey Tonsager & Caleb W. Skeath, *Ask and You Might Not Receive: How FERPA's Disclosure Provisions Can Affect Educational Research*, 47(3) J. STUD. FIN. AID 88 (2017).

[58] Moreover, the Court noted in its order that whereas most disputes involving the application of an exception to disclosure prohibitions typically involve "the alleged unauthorized disclosure of one record" the case under consideration "involves unauthorized disclosure of millions of records." American Federation of Teachers, et al, v. Bessent, Civ. No. DLB-25-0430, 2025 U.S. Dist. LEXIS 23 (D. Md. Feb. 24, 2025).

[59] *Id.* at 32-33.

[60] *See, e.g.,* Secretary of State Marco Rubio Remarks to the Press, U.S. Dept. of State, March 28, 2025, https://www.state.gov/secretary-of-state-marco-rubio-remarks-to-the-press-3/ (stating that the standard for visa revocation for foreign students is whether the student is "supportive of movements that run counter to the foreign policy of the United States.")

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