AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

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Dear Ms. Graham:

As you know, last week, the chairmen of the House Committee on Education and the Workforce sent a letter to the President of Northwestern University and the Chairman of its Board of Trustees asking for detailed information about the operation of legal clinics at Northwestern Law School.[1] The chairmen requested 1) written guidance as to what constitutes appropriate work for the law school clinics, and direction on appropriate client representations; 2) a detailed budget for the law school clinical program; 3) a list of the clinical program's source of funding, broken down by each of the 20 clinics and 12 centers that operate at Northwestern; 4) a list of all the payments made by one clinic, the Community Justice and Civil Rights Clinic (CJCRC), to people or groups not employed by Northwestern since 2020; and 5) all hiring materials and performance reviews for the director of the CJCRC, Professor Sheila A. Bedi.[2]

We write to explain the constitutional principles that limit the ability of members of Congress to demand information that threatens constitutionally protected academic freedom and explains why institutional commitments to freedom of speech require that administrators at private institutions like Northwestern not comply with requests that violate these principles. As we show, Northwestern's own commitment to protect freedom of speech and academic freedom—commitments that it claims to be foundational to the institution—strongly suggest that it should not comply with the Committee's requests at this time, and should challenge a congressional subpoena if one materializes.

A. The First Amendment Limits Congress's Otherwise Expansive Power to Demand Information

Members of Congress possess significant power to investigate the activities of private persons and institutions as part of their legislative and oversight duties.[3] However, congressional

[1] Letter from Tim Walberg and Burgess Owens to Michael Schill and Peter J. Barris, March 27, 2025, https://edworkforce.house.gov/uploadedfiles/ltr_to_northwestern_3.27.25.pdf [hereinafter Committee Letter].

[2] *Id.* at 3.

[3] *See* Barenblatt v. United States, 360 U.S. 109, 111 (1959) ("The scope of [Congress's] power of inquiry. . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.").

power to require the disclosure of information from private entities as part of its investigative duties is limited by the constraints that "the Constitution [imposes] on governmental action, [including]… the relevant limitations of the Bill of Rights."[4]

This means that when the disclosure of information threatens constitutionally protected freedoms, members of Congress need to show a compelling justification for requiring that information.[5] As the Supreme Court has made plain on multiple occasions, "[t]here is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress."[6]

Lawmakers must show not only a compelling interest in the information, but also the existence of a "substantial relation" between that interest and the information sought.[7] And they need to demonstrate both with respect to the *specific* kind of information that is requested. As the Court noted in *Gibson v. Florida Legislative Investigation Commission*: "The fact that the general scope of the [legislative] inquiry is authorized and permissible does not compel the conclusion that the investigatory body is free to inquire into or demand all forms of information. Validation of the broad subject matter under investigation does not necessarily carry with it automatic and wholesale validation of all individual questions, subpoenas, and documentary demands."[8]

B. Private Institutions Like Northwestern Should Not Collude With Congress to Voluntarily Circumvent the First Amendment's Protections.

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[4] *Id.* at 112. *See also* Watkins v. United States, 354 U.S. 178, 196–97 (1957) ("Clearly, an investigation is subject to the command that the Congress shall make no law abridging freedom of speech or press or assembly. While it is true that there is no statute to be reviewed, and that an investigation is not a law, nevertheless an investigation is part of lawmaking. It is justified solely as an adjunct to the legislative process. The First Amendment may be invoked against infringement of the protected freedoms by law or by lawmaking.")

[5] Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 546 (1963) ("[I]t is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest."). *See also* Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 91–92 (1982) ("The right to privacy in one's political associations and beliefs will yield only to a subordinating interest of the State [that is] compelling') (internal citations omitted).

[6] Watkins v. United States, 354 U.S. 178, 187 (1957). *See also* Gojack v. United States, 384 U.S. 702, 711 n.9 (1966) ("This Court has emphasized that there is no congressional power to investigate merely for the sake of exposure or punishment, particularly in the First Amendment area.").

[7] Buckley v. Valeo, 424 U.S. 1, 64–65 (1976) ("We long have recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest…. We also have insisted that there be a "relevant correlation" or "substantial relation" between the governmental interest and the information required to be disclosed. This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure.").

[8] 372 U.S. 539, 545–46 (1963).

These principles formally govern only compelled disclosures. Under the First Amendment, individuals and institutions are free to waive their constitutional rights by, for example, voluntarily providing information that would otherwise be protected against disclosure when asked, so long as they do so clearly, knowingly, and voluntarily.[9]

However, institutional commitments to protect academic freedom, and potentially also contractual guarantees embedded in faculty labor contracts, indicate that private institutions like Northwestern should not voluntarily disclose information to Congress when doing so cannot be justified by the standards laid out above. This is because, by providing this information, the private institution would in effect collude with the Congressional committee to violate the associational, expressive, and perhaps also contractual, rights of its students and faculty.[10] And yet Northwestern, like many other private universities schools, has asserted its "deep commitment to academic freedom" and pledged to "regularly review its policies with respect to students, faculty, and staff to ensure their consistency with [the university's commitment to] free expression and open dialogue."[11]

In the instant case, these commitments mean that Northwestern should provide the requested information to the House Committee only if 1) it poses no substantial threat to its institutional academic freedom or free speech interests, or those of its faculty or students; or 2) can be justified by a compelling interest that bears a "substantial relation" to the information sought. Neither of these conditions is satisfied in this case.

C. The First Amendment Robustly Protects Academic Freedom, Including Freedom from Disclosures that Chill Research and Teaching.

Academic freedom is a "special concern" of the First Amendment, which "does not tolerate laws that cast a pall of orthodoxy over the classroom."[12] The First Amendment does not permit legislatures to dictate what shall be taught in university classrooms because courts recognize that "[t]o impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation" and that "[s]cholarship cannot flourish in an atmosphere of suspicion and distrust."[13]

To vindicate this interest in unconstrained academic exchange, courts have interpreted the First Amendment to protect the right of students and faculty to engage in an "independent and uninhibited exchange of ideas" as well as the right of the university to engage in "autonomous

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[9] Curtis Pub. Co. v. Butts, 388 U.S. 130, 145 (1967) ("Where the ultimate effect of sustaining a claim of waiver might be an imposition on that valued freedom [protected by the First Amendment], we are unwilling to find waiver in circumstances which fall short of being clear and compelling.").

[10] See McAdams v. Marquette Univ., 383 Wis. 2d 358, 366 (Wis. 2018) (holding that Marquette University breached its contract with a tenured professor for "suspend[ing] him for engaging in activity protected by… academic freedom").

[11] https://www.northwestern.edu/president/about-the-office/special-projects/committee-free-expression/

[12] Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

[13] Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

decisionmaking" free of legislative or, for that matter, judicial control.[14] More concretely, courts have interpreted the First Amendment to prohibit efforts by the government to "usurp" the right of academic institutions to "determine [for themselves] who may teach" or "what may be taught"—including by requiring faculty members or others to disclose private or teaching-related information to government officials.[15] When interpreting the rights of students and others in the university community, courts have also tended to defer to the "professional judgment" of members of university faculties.[16] And they have protected researchers and other members of the university community from disclosure when that disclosure threatens to "chill[] the exercise of academic freedom."[17]

These precedents make clear that significant academic freedom interests would be imperiled by the disclosure of the information requested of Northwestern. As the letter from Chairmen Walberg and Owens make clear, the Committee on Education and the Workforce is requesting information from Northwestern about its law school clinics because of its concern with what students are learning in the legal clinics, and with the cases those clinics take up. As the letter notes, the Committee is focusing on Northwestern because of its concern with Professor Bedi's decision to represent pro-Palestinian activists who were arrested for blocking

[14] Regents of Univ. of Michigan v. Ewing, 474 U.S. 214, 226 (1985).

[15] *Sweezy*, 354 U.S. at 263 (Frankfurter J., concurring) (recognizing the necessity of "governmental intervention [from] the intellectual life of a university" and describing "the four essential freedoms of a university" as the freedom "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study"); *Keyishian*, 385 U.S. at 589 (holding that loyalty oath requirement for university professors mandated by state law will unconstitutionally "chill… the exercise of vital First Amendment rights"). *See also* Univ. of Penn. v. E.E.O.C., 493 U.S. 182, 197–99 (1990) (upholding mandated disclosure of information by distinguishing it from earlier cases in which the demand for disclosure reflected an attempt by government actors "to *substitute* its teaching employment criteria for those already in place at the academic institutions, directly and completely usurping the discretion of each institution").

[16] *See, e.g.,* Regents of Univ. of Michigan v. Ewing, 474 U.S. 214, 227 (1985) (refusing to interpret the due process clause to grant any rights to a student whose disenrollment from the program of study was not "such a substantial departure from accepted academic norms as to demonstrate that the faculty did not exercise professional judgment"); Bd. of Curators of Univ. of Missouri v. Horowitz, 435 U.S. 78, 89 (1978) (same); *Univ. of Penn.*, 493 U.S. 182 at 199 (recognizing the "principle of respect for *legitimate* academic decisionmaking").

[17] Dow Chem. Co. v. Allen, 672 F.2d 1262, 1276–77 (7th Cir. 1982) (concluding that administrative subpoena to compel the disclosure of research findings was unreasonable in part because of the threat the disclosure posed of "chilling the exercise of academic freedom"); Sweezy v. N.H., 354 U.S. 234, 261–62 (1957) (Frankfurter J., concurring) ("Progress in the natural sciences is not remotely confined to findings made in the laboratory. Insights into the mysteries of nature are born of hypothesis and speculation… . Political power must abstain from intrusion into this activity of freedom… except for reasons that are exigent and obviously compelling. In the political realm, as in the academic, thought and action are presumptively immune from inquisition by political authority.").

traffic, and its general unhappiness with what the letter describes as the "institutionalization of left-wing political activism at Northwestern Law."[18]

Disclosure therefore raises the substantial risk that whatever information is handed over to the Committee will be used to retaliate against Northwestern University, Professor Bedi, other clinical faculty, and potentially also the clinics' donors, for using the clinics to advance the wrong kinds of causes, or to provide the wrong kind of legal training. In an environment in which the ability of lawyers to represent ostensibly "left-wing causes" has been intensely politicized, disclosing the information could also expose clinical professors, staff, students, and donors to public obloquy, social sanction, and even potentially violence or threats thereof, thereby chilling their willingness to engage in this kind of expressive association in the future.[19] And yet, as the Court has recognized, the First Amendment prevents the government from "attempting to control or direct the content of the speech engaged in by the university or those affiliated by it."[20] It also protects speakers, listeners, and funders of speech against the chilling of speech produced by the threat of private retaliation.[21]

This protection extends to the speech and pedagogical choices of clinical faculty, as much as it extends to the speech and pedagogical decisions of non-clinical faculty. As the Seventh Circuit noted in *Dow Chemical v. Allen*, "whatever constitutional protection is afforded by the First Amendment extends as readily to the scholar in the laboratory as to the teacher in the classroom."[22] Or as the Association of American Law Schools put it, in 1998: "[I]t is clear that clinical teachers…have a First Amendment right to select cases as their course materials for their clinics….Law schools…have hired clinical teachers to teach law students lawyering skills and professional values through the representation of actual clients. Once these teachers have been

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[18] Committee Letter at 1-2 (noting also that "although the Community Justice and Civil Rights Clinic's work is troubling, it is only one of numerous Northwestern Law clinics and centers promoting left-wing causes.")

[19] See, John W. Keker, Robert A. Van Nest and Elliot R. Peters, *Our Law Firm Won't Cave to Trump. Who Will Join Us?,* NY Times (March 30 2025), https://www.nytimes.com/2025/03/30/opinion/perkins-coie-trump.html?smid=nytcore-ios-share&referringSource=articleShare (describing the fear produced by the governmental targeting of lawyers who "stand[] up for causes [the administration] views unfavorably").

[20] *Univ. of Penn.*, 493 U.S. at 198.

[21] *Buckley*, 424 U.S. at 74 (recognizing the need for close scrutiny of mandated disclosure when there is a significant risk of chilling of expressive freedom even in cases where "any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure" and that minor parties should be constitutionally exempted from requirements to disclose the identities of their donors when there is "a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties"); NAACP v. Ala., 357 U.S. 449, 462–63 (1958) (recognizing that mandated disclosure imposes a substantial restraint upon the exercise [of First Amendment rights when it] "expose[s individuals] to economic reprisal, loss of employment, threat of physical coercion" and other social sanctions).

[22] 672 F.2d 1262, 1275 (7th Cir. 1982).

hired for that purpose, they must have the right, like any other law professor, to choose the materials which in their opinion are best suited to performing their objective."[23]

The fact that the Committee is seeking the information it has requested out of concern with how clinical faculty have been exercising their protected right to select cases and course materials for their clinics makes it virtually impossible to conclude that the disclosure of information poses no threat to academic freedom. This means that, to honor its institutional commitments, Northwestern may voluntarily disclose the information the Committee has requested *only* if it is satisfied that the interests the disclosure serves are compelling and the information is substantially related to those interests.[24] These standards appear very difficult to satisfy in this case.

D. The Committee's Information Request Is Unlikely To Satisfy the First Amendment Standards That Apply

Government officials clearly have a compelling interest in ensuring the effective enforcement of the federal civil rights law. As the Court noted in *University of Pennsylvania v. EEOC*, "[f]ew would deny that ferreting out th[e] kind of invidious discrimination [prohibited by the Civil Rights Act of 1964] is a great, if not compelling, governmental interest."[25]

However, officials have *no* legitimate interest in ensuring the political neutrality of clinical education, or in dictating the content or case selection of clinical classes, as the previous discussion makes clear.[26] Rules of professional conduct constrain the ability of lawyers to dispense with cases or clients that are politically unpopular.[27] And, like any exercise of academic freedom, the freedom that the clinical professor exercises both in the classroom and out of it

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[23] Submission of the Association of American Law Schools to the Supreme Court of the State of Louisiana Concerning the Review of the Supreme Court's Student Practice Rule, 4 Clinical L. Rev. 539, 557-58 (1998). See also American Bar Association, Statement on Interference in Law School Clinical Activities (2013-2014), https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2013_2014_council_statements.pdf (recognizing that "attempts by persons or institutions outside law schools to interfere in the ongoing activities of law school clinical programs and courses" the educational mission of affected law schools and jeopardize principles of law school self-governance, academic freedom, and ethical independence").

[24] NAACP v. Button, 371 U.S. 415, 438 (1967) ("Precision of regulation must be the touchstone in an area so closely touching on our most precious freedoms.").

[25] Univ. of Pennsylvania v. E.E.O.C., 493 U.S. 182, 193 (1990).

[26] *See infra* notes and accompanying text. See also Trister v. Univ. of Miss., 420 F.2d 499, 504 (5th Cir. 1969) ("The University may well decide not to employ any part-time professors, and it may decide to forbid the practice of law to every member of its faculty. What the University as an agency of the State must not do is arbitrarily discriminate against professors in respect to the category of clients they may represent.").

[27] *See, e.g.,* Model Rules of Professional Conduct 6.2 cmt ("A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.").

must be exercised in accordance with professional norms.[28] But these norms do not require political neutrality. Instead, they dictate the very thing the Committee's letter to Northwestern criticizes: namely, a commitment on the part of clinical professors to the pursuit of social justice and the representation of unpopular causes.[29]

The primary purpose of requiring Northwestern to disclose information about its clinics to the House Committee on Education and the Workforce, as articulated in the letter from Chairmen Walberg and Owens—namely, to ensure that the clinics do not use taxpayer (as well as other) funds to "promot[e] left-wing causes"—therefore fails the first hurdle of the First Amendment means-end test. It is not only *not* the kind of compelling purpose that the First Amendment requires when government officials intervene "in an area so closely touching on our most precious freedoms."[30] It also appears intended to further precisely the kind of governmental "usurpation" of the academic freedom of the university and its faculty that the First Amendment forbids.[31]

Language in the letter does suggest that a secondary purpose of the information disclosure may be to enforce federal civil rights law. For example, the letter complains of "Northwestern's lengthy pattern of permissiveness and support for antisemitic conduct" as a reason to be particularly concerned about the direction and case-selection choices of its clinics.[32] It also expresses alarm at the decision by Professor Bedi's clinic to represent protestors who engaged in what the letter characterizes as "illegal, antisemitic conduct."[33] Read generously, therefore, the request for the disclosure of information could be viewed as an attempt by the Committee to ensure that Northwestern is complying with the non-discrimination mandate imposed on it as a recipient of federal funding by Title VI of the Civil Rights Act of 1964, as well as other provisions in the federal civil rights law.

But even if construed in this manner to further a compelling governmental interest, the disclosure request fails the second hurdle of the First Amendment means-end test. It is extremely difficult to see how the information requested by the letter bears a "substantial relation" to the compelling governmental interest in preventing discrimination. A comparison to the facts of *University of Pennsylvania* illustrates this well. In that case, the Supreme Court held that principles of academic freedom did not excuse the University of Pennsylvania from having to respond to an EEOC subpoena that requested the tenure file of an associate professor in

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[28] MATTHEW W. FINKIN AND ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM 59 (Yale Univ. Press 2011) ("[T]he actual exercise of academic freedom of research and publication continues to depend on the application of professional norms, even though support for these norms has grown increasingly disenchanted.").

[29] *See, e.g.,* Association of American Law Schools, Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities, at I (Nov. 17, 1989) ("Because of their inevitable function as role models, professors should be guided by the most sensitive ethical and professional standards" including "an enhanced obligation to pursue individual and social justice.")

[30] *Button,* 371 U.S. at 438.

[31] *Univ. of Penn.* 493 at 193.

[32] Committee Letter, at 2.

[33] *Id.* at 1.

business school who had filed a sex discrimination charge with the Commission after she was denied tenure, as well as the tenure files of her five male colleagues who had most recently received tenure.[34] The Court concluded that the university had to provide the information [because] disclosure of the materials was likely "necessary … for the Commission to determine whether illegal discrimination has taken place."[35] Indeed, it noted, "if there is a "smoking gun" to be found that demonstrates discrimination in tenure decisions, it is likely to be tucked away in peer review files."[36] The Court also noted that there were no allegations in the case that "the Commission's subpoenas are intended to or will in fact direct the content of university discourse toward or away from particular subjects or points of view."[37]

Here, by contrast, there is no reason to think that the information requested of Northwestern will have any probative value whatsoever for an analysis of antisemitic discrimination at the law school. It is extremely unlikely that any of the written standards that guide the operation of the clinics will say anything about, or have any implications for, the question of whether clinical directors or anyone else directly discriminate, or fail to respond to discrimination against Jewish students, or any other students for that matter. The same is true of the clinic budget. What information in the budget could possibly shed light on the question of whether, in the operation of its legal clinics or any other part of the university, Northwestern discriminates against or shows deliberate indifference to discrimination against its Jewish students, or any other kinds of students, for that matter. The fact that funders wish to fund a particular kind of clinic, not another, is not the kind of question that is relevant to the enforcement of the civil rights laws. And while it may be the case that Professor Bedi's performance reviews touch on relevant matters, it is very unlikely to be the case that analysis of her conduct as a professor will reveal much. This is hardly where one would look to find the "smoking gun" of discrimination.

Instead, the request for information appears the kind of fishing expedition that the First Amendment forbids when protected freedoms are at stake. Indeed, the request for information appears in this case, in marked contrast to the *University of Pennsylvania* case, "intended to or [likely to have the effect of] directing the content of university discourse toward or away from particular subjects or points of view."[38] Indeed, the Committee letter strongly suggests that this is its primary purpose.

Under established constitutional principles, Northwestern is under no obligation to comply with the Committee's disclosure request. To the contrary: the university's "deep commitment to academic freedom" strongly indicates that Northwestern should not comply with the request for information about its clinical program and faculty, given the very serious and palpable risk that such disclosure poses of doing just what the First Amendment, and

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[34] *Id.* at 186.
[35] *Id.* at 193.
[36] *Id.*
[37] *Id.*
[38] *Univ. of Penn*., 493 at 193.

academic freedom principles forbid: namely, casting a "pall of orthodoxy over the classroom."[39] Moreover, if the demand for information transforms into a subpoena, Northwestern's institutional commitment to academic freedom and free inquiry strongly suggests that it should test the constitutionality of that subpoena in court.

Sincereley,

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[39] *Keyishian,* 385 U.S. at 603.