

Federal Funding Restrictions, Academic Research, and the First Amendment

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Academic research is integral to discovery, innovation, and economic prosperity. The funding that sustains this enterprise is also indispensable to American universities' financial sustainability. Seizing on universities' reliance on this funding, the Trump Administration has leveraged the federal government's position as the leading funder of academic research to make its mark on America's higher education system. Specifically targeting diversity, equity, and inclusion, environmental justice, and progressive notions of gender identity, the Trump Administration has revoked research funding and instructed federal agencies to decline to fund any research that touches on ideas it disfavors. It has also threatened to broadly strip funding from universities that promote diversity, equity, and inclusion in curriculum, instruction, and programming. Given the significant amounts of money at stake—as much as billions of dollars for the wealthiest universities—higher education institutions and researchers are understandably feeling the chill. But some universities and academics have fought back successfully, prevailing in court challenges to the Trump Administration's executive orders, agency policies, and grant terminations.

This Essay will assess the role the First Amendment is playing in the disputes between the Trump administration and higher education. Speech doctrine unfortunately does not provide easy answers. The Trump Administration's restrictions on academic research fall within a doctrinal quagmire of competing and conflicting rules. Implicated in these disputes are the unconstitutional conditions doctrine, government speech, subsidized speech, academic freedom, coercion, and viewpoint discrimination. This Essay clarifies how these doctrines fit together and provides advice to universities and academics on how to most effectively repel the federal government's overreach. Ultimately, it concludes that most of the Trump Administration's threats to and conditions on federal funding in the higher education context violate the First Amendment.

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INTRODUCTION

The Trump Administration is leveraging its control over billions of dollars of federal funding to put the squeeze on universities: institutions must either abandon researching ideas the Administration deems verboten or lose the funding needed to maintain their research capabilities.¹ Indeed, President Trump's education secretary outright admitted this: "Universities should continue to be able to do research as long as they're . . . in sync, I think, with the administration and what the administration is trying to accomplish[.]"² To be in sync with the Trump Administration, universities must abandon research that promotes "gender ideology;" expresses "support for . . . diversity, equity, inclusion, and accessibility (DEIA) initiatives;" or advocates for "environmental justice initiatives."³ As with many of the Trump Administration's executive actions, people are wondering, "Is this constitutional?" This Essay will employ speech doctrine to examine this question and demonstrate how universities and their faculty can deploy the First Amendment to halt the federal onslaught on core academic expression.

Complicating this endeavor are two of the murkiest areas of First Amendment law: (1) government-subsidized speech and (2) academic freedom. Government-subsidized speech cases—disputes involving government-funded expression—generally turn on whether the speech at issue is government speech or private expression.⁴ Unfortunately, the "contours of the [government speech] doctrine are blurred" in this context, which "has caused great confusion . . . in the lower courts."⁵ To the extent general principles have emerged, they are that the government can define the limits of programs it is choosing to fund and has greater First Amendment leeway when awarding merit-based grants, but it cannot leverage funding conditions to regulate speech outside the bounds of what it is specifically funding or impose viewpoint-based restraints on private expression.⁶ The Supreme Court of the United States has

¹ See Ryan Quinn, *Trump Is Targeting DEI in Higher Ed. But What Does He Mean?*, INSIDE HIGHER ED (Feb. 27, 2025), <https://www.insidehighered.com/news/diversity/2025/02/27/trump-targeting-dei-higher-ed-what-does-he-mean> [<https://perma.cc/9AMQ-K9RJ>] (discussing the Trump Administration's targeting of DEI in the University of North Carolina system); Max Kozlov, *Revealed: NIH Research Grants Still Frozen Despite Lawsuits Challenging Trump Order*, NATURE (Feb. 24, 2025), <https://www.nature.com/articles/d41586-025-00540-2> [<https://perma.cc/5G6V-XR2B>] (noting that the National Institute of Health is "the world's largest public funder of biomedical research" with a \$47 billion annual budget); Kathryn Palmer, *Trump Orders Disrupt Academic Research*, INSIDE HIGHER ED (Feb. 3, 2025), <https://www.insidehighered.com/news/government/science-research-policy/2025/02/03/how-trumps-executive-orders-are-disrupting> [<https://perma.cc/X8UL-VUM2>] (detailing the early implementation of the Trump Administration's viewpoint-based restrictions on STEM research).

² Dan Gooding & Gabe Whisnant, *Linda McMahon Says Colleges Must Be 'In Sync' with Trump Administration*, NEWSWEEK (May 28, 2025, 2:51 PM), <https://www.newsweek.com/linda-mcmahon-says-colleges-must-sync-trump-administration-2078065> [<https://perma.cc/Y3DP-4M4E>].

³ *NEH Implementation of Recent Executive Orders*, NAT'L ENDOWMENT FOR THE HUMANITIES (Mar. 20, 2025), <https://www.neh.gov/executive-orders> [<https://perma.cc/4QKZ-947G>].

⁴ "When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015).

⁵ Mark Strasser, *Ignore the Man Behind the Curtain: On the Government Speech Doctrine and What It Licenses*, 21 B.U. PUB. INT. L.J. 85, 85 (2011).

⁶ See *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214–15 (2013) (holding that the government cannot leverage funding to restrict speech outside the bounds of its grant program); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542 (2001) (explaining that Congress cannot impose viewpoint-based funding conditions on private speech when a grant is noncompetitive); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 585–86 (1998) (concluding that Congress has greater leeway to restrict the content of speech when it is funding

acknowledged that the “line” between what is constitutional and unconstitutional in this area of law “is hardly clear.”⁷

Meanwhile, leading commentators have described the constitutional academic freedom doctrine as “stand[ing] in a state of shocking disarray and incoherence”⁸ and “float[ing] in the law, picking up decisions as a hull does barnacles.”⁹ Yet, some general principles can be gleaned from the leading precedents. Academic freedom protects universities from the government interfering with their core academic functions and faculty’s “speech related to scholarship or teaching.”¹⁰ It is an interest that receives robust First Amendment protection because it sustains the marketplace of ideas by promoting ideological heterodoxy “in one of the vital centers for the Nation’s intellectual life.”¹¹

Accordingly, it is understandable why these doctrines’ lack of clarity combined with the Trump Administration’s leveraging of billions of dollars of federal funding has had a significant chilling effect.¹² But capitulation risks allowing the federal government to distort the marketplace of ideas and coerce consensus where it does not exist.¹³ Professor Caroline Mala Corbin presciently warned of the danger we now face: “[T]he fear is that the contested speech will be categorized as government speech, giving the government the ability to eliminate competing viewpoints entirely.”¹⁴ While it may prove difficult for the Trump Administration to entirely eradicate pro-diversity or environmental justice viewpoints, the Administration certainly has the power to broadly stifle research of and support for these ideas.

That should cause alarm. Because the federal government provides a significant percentage of the money that funds academic research, withdrawing funds for any idea it deems “DEI,” “environmental justice,” or “gender ideology” will discourage researchers from pursuing

merit-based grants); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833–34 (1995) (refusing to fund private speech because of prohibited viewpoints violates the First Amendment); *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (holding that Congress can define the limits of its grant program without running afoul of the First Amendment).

⁷ See *Agency for Int’l Dev.*, 570 U.S. at 214–15.

⁸ ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 62 (2012).

⁹ J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 YALE L.J. 251, 252 (1989).

¹⁰ *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006); see also *Osteen v. Henley*, 13 F.3d 221, 225–26 (7th Cir. 1993) (Posner, C.J.) (“[O]ne dimension of academic freedom is the right of academic institutions to operate free of heavy-handed governmental . . . interference.”); Michael W. McConnell, *Academic Freedom in Religious Colleges and Universities*, 53 L. & CONTEMP. PROBS. 303, 305 (1990) (“[Academic freedom] refers both to the freedom of the individual scholar to teach and research without interference (except for the requirement of adherence to professional norms, which is judged by fellow scholars in the discipline) and to the freedom of the academic institution from outside control. Academic freedom thus has two faces: one individual, the other institutional.”).

¹¹ *Rosenberger*, 515 U.S. at 836; see also *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967); *Meriwether v. Hartop*, 992 F.3d 492, 506 (6th Cir. 2021).

¹² See Taylor Jung, *‘Chilling Effect’ Feared as Trump Administration Attacks DEI*, N.J. SPOTLIGHT NEWS (Feb. 14, 2025), <https://www.njspotlightnews.org/2025/02/chilling-effect-trump-administration-attacking-dei-will-courts-decide/> [<https://perma.cc/E9JZ-NU7P>].

¹³ Cf. *Moody v. NetChoice, LLC*, 603 U.S. 707, 732 (2024) (“[I]t is critically important to have a well-functioning sphere of expression, in which citizens have access to information from many sources. That is the whole project of the First Amendment.”); *id.* at 733 (“However imperfect the private marketplace of ideas, here was a worse proposal—the government itself deciding when speech was imbalanced, and then coercing speakers to provide more of some views or less of others.”).

¹⁴ Caroline Mala Corbin, *Government Speech and First Amendment Capture*, 107 VA. L. REV. ONLINE 224, 232 (2021).

projects that even remotely implicate these concepts.¹⁵ The loss of this valuable research will frustrate the processes that lead to truth and discovery, impoverishing the marketplace of ideas and thwarting societal progress.¹⁶ But there is an even greater threat lurking here. The Trump Administration is also using the threat of grant terminations to try and impose its ideology on leading institutions of higher education, seeking government control of higher education.¹⁷ As Professor Robert Post has warned, “[a] state that controls our knowledge controls our mind.”¹⁸ It is thus incumbent that universities zealously guard their institutional autonomy. Fortunately, an array of stakeholders—including civil rights organizations, unions, professors, and universities—have challenged the Trump Administration’s policies in court.¹⁹ These lawsuits are currently making their way through the legal system.²⁰

¹⁵ See ACADEMIC RESEARCH AND DEVELOPMENT, U.S. NAT’L SCI. FOUND., NSB-2023-26 (2023), <https://nces.nsf.gov/pubs/nsb202326> [<https://perma.cc/N426-H5ZH>] (“The federal government is the main funder of U.S. academic [research and development] spending, financing nearly 55% of academic [research and development] expenditures in FY 2021[.]”); Julia Busiek, *Cuts to Federal Science Spending Will Cost Every American*, U.C. NEWSROOM (June 26, 2025) <https://www.universityofcalifornia.edu/news/cuts-federal-science-spending-will-cost-every-american> [<https://perma.cc/DP83-QXSB>] (“The federal government is the nation’s top source of support for basic research, providing 40 percent of total U.S. spending on research in its earliest, most exploratory phase.”).

¹⁶ See *Urofsky v. Gilmore*, 216 F.3d 401, 430 (4th Cir. 2000) (en banc) (Wilkinson, C.J., concurring).

¹⁷ The Associated Press, *Trump Administration Cuts Another \$450 Million in Grants for Harvard in Escalating Battle*, NBC NEWS (May 13, 2025, 11:40 ET), <https://www.nbcnews.com/news/us-news/trump-administration-cuts-another-450-million-grants-harvard-escalatin-rcna206509> [<https://perma.cc/3XSH-7DVY>] (noting that the Trump Administration cut off huge sums of money to try and pressure Harvard, Columbia, Cornell, and the University of Pennsylvania to “compl[y] with Trump’s agenda”).

¹⁸ POST, *supra* note 8, at 33.

¹⁹ See, e.g., Alvin Powell, *University Sues Trump Administration over Move to Bar International Students, Scholars*, HARVARD GAZETTE (May 23, 2025), <https://news.harvard.edu/gazette/story/2025/05/university-sues-administration-over-move-to-bar-international-students-scholars/> [<https://perma.cc/D2HM-Z2P5>] (challenging the Trump Administration’s campaign of retaliation against Harvard); Nate Raymond, *Harvard Professors Sue Over Trump’s Review of \$9 Billion in Funding*, REUTERS (Apr. 14, 2025, 6:15 ET), <https://www.reuters.com/legal/harvard-professors-sue-over-trumps-review-9-billion-funding-2025-04-12/> (highlighting faculty and union suing over threats to strip Harvard of \$9 billion in federal funding); Anthony D. Romero, *ACLU and NEA Sue U.S. Department of Education Over Unlawful Attack on Educational Equity*, ACLU (Mar. 5, 2025, 1:00 ET), <https://www.aclu.org/press-releases/aclu-and-nea-sue-u-s-department-of-education-over-unlawful-attack-on-educational-equity> [<https://perma.cc/2SUE-2TJN>] (challenging Department of Education’s anti-DEI “Dear Colleague” letter); *Civil and Human Rights Organizations Sue Trump Administration Over Executive Orders Banning Diversity, Equity, Inclusion, Accessibility and Erasing Transgender People*, NAACP LEGAL DEF. FUND (Feb. 19, 2025), <https://www.naacpldf.org/press-release/civil-and-human-rights-organizations-sue-trump-administration-over-executive-orders-banning-diversity-equity-inclusion-accessibility-and-erasing-transgender-people/> [<https://perma.cc/4WAW-BJCJ>] (suing over President Trump’s anti-DEIA executive order); Tina Reed, *22 States Sue to Halt NIH Research Funding Cuts*, AXIOS (Feb. 10, 2025), <https://www.axios.com/2025/02/10/states-sue-stop-cuts-to-nih-funding> (overviewing lawsuit to halt NIH funding freeze).

²⁰ At the time of this writing, the lawsuits have mostly been successful. See, e.g., Cecilia Nowell, *Trump Officials Cutting \$1bn in NIH Grants Is ‘Void and Illegal’, Judge Rules*, GUARDIAN (June 17, 2025, 12:02 ET), <https://www.theguardian.com/us-news/2025/jun/16/trump-national-institutes-of-health-grants> [<https://perma.cc/WP74-C6TR>] (rejecting NIH’s termination of DEI-related research grants); Bianca Quilantan & Josh Gerstein, *Federal Judge Blocks Trump’s Latest Effort to Ban Harvard’s International Students*, POLITICO (June 5, 2025, 20:32 ET), <https://www.politico.com/news/2025/06/05/harvard-judge-trump-effort-ban-international-students-00391244> (blocking the Trump Administration’s attempt to prohibit international students from attending Harvard); Sarah Hinger, *Federal Court Grants Preliminary Injunction Against Department of Education’s Unlawful Directive*, ACLU (Apr. 24, 2025, 1:08 ET), <https://www.aclu.org/press-releases/federal-court-grants-preliminary-injunction-against-department-of-educations-unlawful-directive> [<https://perma.cc/WCK6-XH5L>] (enjoining enforcement of the Department of Education’s “Dear Colleague” letter). But see *Nat’l Urb. League v. Trump*, 783 F.

This Essay has two parts. Part I will summarize the First Amendment doctrines implicated by conditions placed on federal funding for academic research. Part II will discuss how these doctrines apply to the Trump Administration's actions and explain where universities and faculty can most effectively resist restrictions imposed on academic expression.

I. THE FIRST AMENDMENT'S APPLICATION TO FUNDING RESTRICTIONS

Before assessing whether the Trump Administration's funding restrictions are constitutional, it is necessary to offer a brief overview of the most important considerations underlying speech doctrine in this context. These considerations include the unconstitutional conditions doctrine, government speech, the process for awarding grants, and academic freedom.

A. UNCONSTITUTIONAL CONDITIONS

The "unconstitutional conditions doctrine" prohibits "the government from coercing people into giving . . . up" their constitutional rights.²¹ This doctrine "holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether."²² To provide an example of how this doctrine works in practice, the Eleventh Circuit ruled that it is unconstitutional for Florida to require that indigent Floridians agree to submit to drug tests in order to be eligible for TANF benefits.²³ Florida could not condition access to government benefits on applicants waiving their Fourth Amendment rights. The central tenet of this doctrine is, "[w]hat the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly."²⁴ Courts have applied the unconstitutional conditions doctrine to government-controlled benefits or privileges as significant as access to bail and freedom from unreasonable searches and as trivial as falconry licenses and tax breaks.²⁵ Access to federal funding undoubtedly implicates this doctrine.

B. GOVERNMENT SPEECH

However, the unconstitutional conditions doctrine does not protect government speech. The government speech doctrine holds that when the government speaks, "it is entitled to say what it wishes and to select the views that it wants to express[.]"²⁶ Practically speaking, this means that the Free Speech Clause does not protect expression that qualifies as government

Supp. 3d 61, 97–105 (D.D.C. 2025) (denying motion for preliminary injunction challenging President Trump's anti-DEI executive order); Martha J. Zackin, Beth Tyner Jones, & Zachary S. Buckheit, *Appeals Court Lifts Injunction on Pair of DEI-Targeting Executive Orders: What It Means for Federal Contractors and Grantees*, NAT'L L. REV. (Mar. 17, 2025), <https://natlawreview.com/article/appeals-court-lifts-injunction-pair-dei-targeting-executive-orders-what-it-means> [<https://perma.cc/7LUH-TDWK>] (staying the injunctions blocking President Trump's anti-DEI executive order).

²¹ *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013).

²² Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

²³ *See* *Lebron v. Sec'y Fla. Dep't of Child. & Fams.*, 710 F.3d 1202, 1217–18 (11th Cir. 2013).

²⁴ *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 77–78 (1990). While *Rutan* dealt with the First Amendment, the unconstitutional conditions doctrine applies to other constitutional rights. *See Koontz*, 570 U.S. at 604.

²⁵ *See Speiser v. Randall*, 357 U.S. 513, 526–29 (1958); *Stavrianoudakis v. U.S. Fish & Wildlife Serv.*, 108 F.4th 1128, 1137 (9th Cir. 2024); *Bourgeois v. Peters*, 387 F.3d 1303, 1324–25 (11th Cir. 2004); *Leary v. United States*, 431 F.2d 85, 90 (5th Cir. 1970).

²⁶ *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–68 (2009) (internal citations omitted).

speech.²⁷ The government speech case that bears most directly on the issues discussed in this Essay is *Rust v. Sullivan*.²⁸ In *Rust*, the federal government gave funds to doctors to provide family planning services to patients. A condition placed on these funds prohibited doctors from offering abortion counseling, referrals, or advocating for abortion as a method of family planning.²⁹ The Supreme Court of the United States held that this condition did not violate the First Amendment because this was a mere “prohibition on a project grantee or its employees from engaging in activities outside of the project’s scope.”³⁰ In a subsequent decision, the Court clarified that *Rust* stands for the proposition that “when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.”³¹ That remains true “[w]hen the government disburses public funds to private entities to convey a governmental message”: It retains the authority “to ensure that its message is neither garbled nor distorted by the grantee.”³² Thus, *Rust* permits the government “to define the limits of [its] program” when it offers federal funds to grantees.³³

Chief Justice Roberts summed this rule up as distinguishing “between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself.”³⁴ Unfortunately, too often that line is “hardly clear.”³⁵ For example, in *Rosenberger v. Rector & Visitors of the University of Virginia*, the Supreme Court rejected the argument that the government was merely defining the limits of its grant when it refused to provide funds to student publications that promoted religious perspectives, holding instead that it was unconstitutionally censoring private expression.³⁶ The Court came to the same conclusion in *Legal Services Corp. v. Velazquez*, where Congress provided grants to attorneys to represent indigent welfare claimants on the condition that the funds could not be used to challenge existing welfare law.³⁷ Because Congress imposed a viewpoint-discriminatory burden on private expression, this condition violated the First Amendment.³⁸ Since neither *Rosenberger* nor *Velazquez* fit neatly as cases involving “speech outside the contours of the program itself,”³⁹ it might be best to think of these cases as establishing an alternative rule: When the government offers non-competitive grants “encourag[ing] a diversity of views from private speakers” or

²⁷ See *Shurtleff v. City of Boston*, 596 U.S. 243, 252 (2022) (“The Constitution therefore relies first and foremost on the ballot box, not on rules against viewpoint discrimination, to check the government when it speaks.”).

²⁸ See generally 500 U.S. 173 (1991).

²⁹ *Id.* at 178–80. However, doctors were not prevented from advocating for abortion outside of the activities paid for by this grant program. See *id.* at 180–81.

³⁰ *Id.* at 194.

³¹ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995).

³² *Id.*

³³ *Rust*, 500 U.S. at 194.

³⁴ *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 214–15 (2013).

³⁵ *Id.* at 215.

³⁶ *Rosenberger*, 515 U.S. at 833–37.

³⁷ *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 536–37 (2001); *id.* at 547 (“Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise.”).

³⁸ See *id.* at 548–49. One commentator criticized the incongruity between the outcomes in *Rust* and *Velazquez*, labeling the latter as “*Rust* . . . in lawyer’s clothing.” Steven H. Goldberg, *The Government-Speech Doctrine: “Recently Minted,” but Counterfeit*, 49 U. LOUISVILLE L. REV. 21, 27 (2010).

³⁹ *Agency for Int’l Dev.*, 570 U.S. at 214–15.

otherwise “facilitat[ing] private speech,” it cannot discriminate based on viewpoint.⁴⁰ What is a non-competitive grant? *Rosenberger* offers a perfect example. The grant was available to any student organization that met the University of Virginia’s eligibility requirements.⁴¹ The University was not picking and choosing which organizations to fund based on the merits of their request.

C. COMPETITIVE GRANTS

Competitive grants are not governed by the same rules as non-competitive grants. *National Endowment for the Arts v. Finley* is an example of a competitive grant case.⁴² The National Endowment for the Arts (NEA) chose which grantees to fund based on “artistic excellence and artistic merit.”⁴³ In other words, the federal government was only going to fund what it deemed the worthiest projects.

Understandably, competitive grants require a different constitutional analysis. With non-competitive grants, it is purely an issue of access. Because the government is not seeking to separate the wheat from the chaff, *Rosenberger*’s use of forum analysis and repudiation of a viewpoint-based restriction make sense.⁴⁴ But as *Finley* correctly observes in the context of competitive grants, “[t]he ‘very assumption’ of the NEA is that grants will be awarded according to the ‘artistic worth of competing applicants,’ and absolute neutrality is simply ‘inconceivable.’”⁴⁵ One cannot judge a proposal’s merit without consideration of its content. Accordingly, the federal government has significantly more leeway when imposing content- or

⁴⁰ *Velazquez*, 531 U.S. at 542 (“Although the [Legal Services Corporation (LSC)] program differs from the program at issue in *Rosenberger* in that its purpose is not to ‘encourage a diversity of views,’ the salient point is that, like the program in *Rosenberger*, the LSC program was designed to facilitate private speech, not to promote a governmental message.”); *Rosenberger*, 515 U.S. at 834. Cf. *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 158 (1946) (holding federal government cannot withdraw a subsidy solely because it disfavors the publication’s viewpoint). There is a strong analogy here to the Supreme Court’s recent school-funding cases where it has applied a non-discrimination rule under the Free Exercise Clause. See, e.g., *Carson v. Makin*, 596 U.S. 767, 779–80 (2022) (“‘A State need not subsidize private education,’ we concluded, ‘[b]ut once a State decides to do so, it cannot disqualify some private schools solely because they are religious.’” (quoting *Espinoza v. Mont. Dep’t of Rev.*, 591 U.S. 464, 487 (2020))).

⁴¹ *Rosenberger*, 515 U.S. at 823–34.

⁴² 524 U.S. 569 (1998).

⁴³ *Id.* at 572 (quoting 20 U.S.C. § 954(d)(1)).

⁴⁴ See *Rosenberger*, 515 U.S. at 828–30, 834–37. Courts utilize “‘forum analysis’ to evaluate government restrictions on purely private speech that occurs on government property.” *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 215 (2015). Courts first “identify the type of government forum involved and then apply the test specific to that type of forum in evaluating whether a restriction violates the First Amendment.” *Barrett v. Walker Cnty. Sch. Dist.*, 872 F.3d 1209, 1224 (11th Cir. 2017). There are four types of forums: “the traditional public forum, the designated public forum, the limited public forum, and the nonpublic forum,” with the greatest scrutiny applied to speech restrictions in traditional public forums and the least scrutiny applied to speech restrictions in nonpublic forums. *Id.*; *McDonough v. Garcia*, 116 F.4th 1319, 1322 (11th Cir. 2024) (en banc). However, all of these forums require speech restrictions to be “viewpoint neutral.” *Barrett*, 872 F.3d at 1224.

⁴⁵ See *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 585 (“Any content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding . . . [I]t would be ‘impossible to have a highly selective grant program without denying money to a large amount of constitutionally protected expression.’”) (citation omitted). Cf. *United States v. Am. Libr. Ass’n*, 539 U.S. 194, 205 (2003) (plurality opinion) (“Public library staffs necessarily consider content in making collection decisions and enjoy broad discretion in making them.”); *People for Ethical Treatment of Animals, Inc. v. Gittens*, 414 F.3d 23, 28 (D.C. Cir. 2005) (explaining the government’s authority to exercise its editorial discretion free of First Amendment restraints).

viewpoint-based restrictions on competitive grants.⁴⁶ That said, *Finley* did not confer unlimited power to the government to engage in viewpoint discrimination when setting the criteria for competitive grants. It recognized that if the government sought to use its funding coercively to suppress ideas it disfavored or to burden certain ideas in order to drive them from the marketplace, it might run afoul of the First Amendment.⁴⁷ It, however, remains unclear what it would take for funding restrictions to rise to the level of “coercive[ly] . . . suppress[ing] . . . ideas” or “driv[ing] [them] from the marketplace.”⁴⁸

D. ACADEMIC FREEDOM

Because universities and professors are common recipients of competitive grants, the constitutional academic freedom doctrine is also important to this analysis. Academic freedom has two faces, which provide constitutional protection to “the independent and uninhibited exchange of ideas among teachers and students” and “autonomous decisionmaking by the [university] itself.”⁴⁹ While there are contexts where these freedoms come into conflict,⁵⁰ they are aligned when facing federal funding restrictions that limit faculty’s expression and universities’ academic judgments. The university-level academic judgments protected by academic freedom are “who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”⁵¹ Meanwhile, faculty’s core academic expression includes “speech related to scholarship or teaching.”⁵² The First Amendment protects this expression because it furthers the marketplace of ideas by enabling the processes that produce truth, innovation, and discovery.⁵³ This is why the Supreme Court has repeatedly identified speech in the university

⁴⁶ But see *R.I. Latino Arts v. Nat’l Endowment for the Arts*, 777 F. Supp. 3d 87, 105 (D.R.I. 2025) (arguing that viewpoint discrimination is prohibited).

⁴⁷ See *Finley*, 524 U.S. at 587. A district court recently seized on this language from *Finley* in ruling that the Trump Administration’s funding restrictions violate the First Amendment. See *R.I. Latino Arts*, 777 F. Supp. 3d at 107–09.

⁴⁸ *Finley*, 524 U.S. at 587 (citations omitted). Professor Lloyd Hitoshi Mayer has implied that coercion requires “an offer the recipients cannot refuse.” Lloyd Hitoshi Mayer, *Nonprofits, Speech, and Unconstitutional Conditions*, 46 CONN. L. REV. 1045, 1076 (2014). Professor Mitchell Berman has argued for a broader understanding—that a threat is coercive if the government is withholding the benefit to deter the exercise of a right. Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 37 (2001). The Supreme Court’s recent holding in *NRA v. Vullo* would seemingly support Professor Berman’s theory, but that case’s First Amendment analysis does not neatly map onto funding grants. See 602 U.S. 175, 191 (2024) (“To state a claim that the government violated the First Amendment through coercion of a third party, a plaintiff must plausibly allege conduct that, viewed in context, could be reasonably understood to convey a threat of adverse government action in order to punish or suppress the plaintiff’s speech.”).

⁴⁹ *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985).

⁵⁰ See, e.g., *Piarowski v. Ill. Cmty. Coll. Dist.* 515, 759 F.2d 625, 629 (7th Cir. 1985) (Posner, J.) (“[Academic freedom] is used to denote both the freedom of the academy to pursue its ends without interference from the government . . . and the freedom of the individual teacher . . . to pursue his ends without interference from the academy; and these two freedoms are in conflict, as in this case.”).

⁵¹ *Widmar v. Vincent*, 454 U.S. 263, 276 (1981) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)).

⁵² *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006).

⁵³ See *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967); *Urofsky v. Gilmore*, 216 F.3d 401, 428 (4th Cir. 2000) (Wilkinson, C.J., concurring) (“A faculty is employed professionally to test ideas and to propose solutions, to deepen knowledge and refresh perspectives.”); *id.* at 430 (“Speech in the social and physical sciences, the learned professions, and the humanities is central to our democratic discourse and social progress.”); *Bazaar v. Fortune*, 476 F.2d 570, 580 (5th Cir. 1973) (“[W]e must take note of the historical role of the University in expressing opinions which may well not make favor with the majority of society and in serving in the vanguard in the fight for freedom of expression and opinion.”).

environment as meriting special protection.⁵⁴ As academic freedom is “a special concern of the First Amendment,”⁵⁵ attempts to limit core academic expression are closely scrutinized under speech doctrine.

These considerations should offer insight into why at least some of the Trump Administration’s funding restrictions present thorny issues in the First Amendment context. On the one hand, core academic speech receives special First Amendment protection. On the other hand, the government has a lot of leeway in discriminating against speech in doling out competitive grants. The government can also define its programs, to the point of excluding expression it does not want to fund. But that ability only goes so far. If the government seeks to leverage its funding to suppress speech outside its grant program, it violates the First Amendment. And, in the context of non-competitive grants, the government cannot discriminate based on viewpoint when it has encouraged a diversity of views. The next part will apply these principles and seek to provide useful guidance to universities and faculty about where they can push back against the federal government’s restrictions on academic expression.

II. THE CONSTITUTIONALITY OF THE TRUMP ADMINISTRATION’S FUNDING RESTRICTIONS

Since the inauguration of President Donald Trump’s second term, his Administration has sought to use all available levers of power to suppress the viewpoints disfavored by his political movement.⁵⁶ Targeting universities’ federal funding is a particularly potent lever—one this Administration hopes to use to silence the discussion of certain ideas. In this Part, I will attempt to unpack the First Amendment implications of viewpoint-based restrictions in three specific areas: (1) new competitive grants for academic research; (2) preexisting grants that are funding ongoing research; and (3) threats to universities that maintain diversity, equity, and inclusion (DEI) initiatives or programming.

A. NEW RESEARCH GRANTS

The Trump Administration’s stance appears to be that it will not fund any academic research that promotes DEI or acknowledges the existence of transgender people and seeks to help them. The National Endowment for the Humanities (NEH), prior to a court injunction,⁵⁷ signaled that it would not fund any project that promoted “gender ideology” or “discriminatory

⁵⁴ See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (“[G]iven . . . the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.”); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995) (“[I]n the University setting, . . . the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.”); *Rust v. Sullivan*, 500 U.S. 173, 200 (1991) (“[T]he university is a traditional sphere of free expression . . . fundamental to the functioning of our society[.]”); *Healy v. James*, 408 U.S. 169, 180 (1972) (noting that “[t]he vigilant protection of constitutional freedoms is nowhere more vital than in” our nation’s universities and colleges).

⁵⁵ *Keyishian*, 385 U.S. at 603.

⁵⁶ See, e.g., The White House, *Ending Illegal Discrimination and Restoring Merit-Based Opportunity*, OFF. OF THE PRESIDENT OF THE U.S. (Jan. 21, 2025), <https://www.whitehouse.gov/presidential-actions/2025/01/ending-illegal-discrimination-and-restoring-merit-based-opportunity/> [<https://perma.cc/XD4L-Y9GH>] (anti-DEI executive order); The White House, *Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government*, OFF. OF THE PRESIDENT OF THE U.S. (Jan. 20, 2025), <https://www.whitehouse.gov/presidential-actions/2025/01/defending-women-from-gender-ideology-extremism-and-restoring-biological-truth-to-the-federal-government/> [<https://perma.cc/FP6W-AKRU>] (executive order targeting transgender people).

⁵⁷ See generally *Nat’l Ass’n of Diversity Officers in Higher Educ. v. Trump*, 767 F. Supp. 3d 243, 259 (D. Md. 2025) (enjoining parts of President Trump’s anti-DEI executive order).

equity ideology,” expressed support for DEI initiatives, or advocated for “environmental justice.”⁵⁸ The federal government placed similar restrictions on other federal agencies that provide vast amounts of research funding, including the National Institute of Health (NIH).⁵⁹ Does it violate the First Amendment for the Trump Administration to bar the funding of new projects exploring one of these prohibited ideas? Because academic research grants typically are competitive grants, there is unfortunately not a clear answer. I am of the opinion that it will be an uphill battle for universities or scholars to prevail on these types of challenges.

The answer here is unclear because the case law includes caveats that could potentially apply to the Trump Administration’s conduct. The Trump Administration will argue that these viewpoint-based restrictions are merely the federal government defining what it will and will not research. In other words, as in *Rust*, it is a “prohibition on a project grantee or its employees from engaging in activities outside of the project’s scope.”⁶⁰ Relying on *Finley*, they will further assert that because these are competitive grants, they put this guidance in place to clarify the administration’s priorities and assist its employees in determining which ideas most merit funding.⁶¹ Actual motives aside, these are compelling legal arguments. After all, President Trump did win the 2024 election, so shouldn’t he have some say over federal research priorities?⁶²

But certain caveats from *Finley* and its forebears may prove a challenge for the Trump Administration. The Supreme Court in *Finley* expressly cautioned that if the government sought to use funding coercively to suppress ideas it considered dangerous, it might run afoul of the First Amendment.⁶³ The Court also warned that the government cannot leverage its funding “to drive certain ideas or viewpoints from the marketplace.”⁶⁴ Prior cases included similar caveats.⁶⁵ Of course, what constitutes coercion in this context is an open question. Justice Scalia suggested that if there are alternative funding sources available, then the government denying funding is

⁵⁸ See *supra* note 3 and accompanying text. The NEH funds research and scholarship “on subjects as diverse as religion, history, art history and criticism, languages, philosophy, literature, and ethics, among others.” Alvaro Ignacio Anillo, Note, *The National Endowment for the Humanities: Control of Funding Versus Academic Freedom*, 45 VAND. L. REV. 455, 462 (1992) (“To receive NEH funding, a project should advance scholarship and research in a humanities subject, improve humanities education, or promote understanding and interest in the humanities among Americans.”).

⁵⁹ See, e.g., Judd Legum, *UPDATE: NIH Reimposes “DEI” Funding Freeze Despite Court Order*, POPULAR INFO. (Feb. 24, 2025), <https://popular.info/p/update-nih-reimposes-dei-funding> [<https://perma.cc/LKM6-FCCR>] (NIH); Jeffrey Mervis, *EXCLUSIVE: NSF Starts Vetting All Grants to Comply with Trump’s Orders*, SCIENCE (Jan. 30, 2025, 18:15 ET), <https://www.science.org/content/article/exclusive-nsf-starts-vetting-all-grants-comply-trump-s-orders> (National Science Foundation); see also Chloe Veltman, *Artists Protest New NEA Restrictions*, NPR (Feb. 18, 2025, 18:23 ET), <https://www.npr.org/2025/02/18/nx-s1-5301179/artists-protest-nea-restrictions-trump-executive-orders> [<https://perma.cc/7A67-GVHE>] (NEA).

⁶⁰ *Rust v. Sullivan*, 500 U.S. 173, 194 (1991).

⁶¹ *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 585 (1998) (“The ‘very assumption’ of the NEA is that grants will be awarded according to the ‘artistic worth of competing applicants,’ and absolute neutrality is simply ‘inconceivable.’”) (citation omitted).

⁶² *Cf. Shurtleff v. City of Boston*, 596 U.S. 243, 252 (2022) (“The Constitution . . . relies first and foremost on the ballot box, not on rules against viewpoint discrimination, to check the government when it speaks.”).

⁶³ 524 U.S. at 587.

⁶⁴ *Id.* (citation omitted).

⁶⁵ See *Rust*, 500 U.S. at 194 (“This is not a case of the Government ‘suppressing a dangerous idea’”); *Regan v. Tax’n with Representation of Wash.*, 461 U.S. 540, 548 (1983) (“The case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to ‘aim[] at the suppression of dangerous ideas.’”) (citation omitted).

not coercive.⁶⁶ Certainly, there are alternative funding sources available to academics.⁶⁷ Nor is it clear that the Trump Administration’s refusal to fund disfavored ideas rises to the level of driving them from the marketplace. Ultimately, I expect our conservative Supreme Court—claiming respect for the democratic process and relying on *Rust*—to give the Trump Administration the leeway to define the research it wants to fund and exclude disfavored viewpoints.⁶⁸

There is one important caveat, though. The NIH attempted to impose a new condition on grantees that appeared to restrict pro-DEI expression outside of the specific research it is funding.⁶⁹ If the NIH had interpreted this condition as reaching mere DEI advocacy, it would run afoul of the Supreme Court’s prohibition on “conditions that seek to leverage funding to regulate speech outside the contours of the program itself.”⁷⁰ However, in June 2025, the NIH seemingly backed down and rescinded this condition.⁷¹

B. PREEXISTING GRANTS

Preexisting grants, however, present a different issue with a stronger First Amendment hook. Reporting indicates that the Trump Administration has started to cancel previously awarded research grants that support “DEI activities” or study “transgender issues.”⁷² At the

⁶⁶ *Finley*, 524 U.S. at 596–97 (Scalia, J., concurring in the judgment). Of note, neither Justice Scalia nor the Court has imposed such an onerous standard in Tenth Amendment funding coercion cases. *See, e.g.*, *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 581–82 (2012) (characterizing a “loss of over 10 percent of a State’s overall budget” as “a gun to the head”); *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (finding the loss of five percent of state highway funds did not “pass the point at which ‘pressure turns into compulsion’”) (citation omitted).

⁶⁷ *But see* Nisha Gaiind, *How the NIH Dominates the World’s Health Research—in Charts*, NATURE (Mar. 10, 2025), <https://www.nature.com/articles/d41586-025-00754-4> (“The World RePORT project, which tracks global health-research spending, showed that, in 2022, the NIH spent 25 times more on grants than the next biggest funder—the London-based charity Wellcome—that reported data to the initiative[.]”). There is an argument here that the government leveraging such a significant amount of the funding for science against these disfavored viewpoints risks “overwhelm[ing] public discourse, [and] seriously ruptur[ing] foundational notions of a functioning marketplace of ideas.” Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 192 (1996).

⁶⁸ Personally, I believe, based on *Sebelius* and the magnitude of the research funding at stake, that President Trump’s policy is coercive. *See Sebelius*, 567 U.S. at 582; *see also* *R.I. Latino Arts v. Nat’l Endowment for the Arts*, 777 F. Supp. 3d 87, 109 (D.R.I. 2025). If the Supreme Court rejects my view and takes this approach, it must distinguish between the funding decision itself (the government exercising what is akin to editorial discretion) and the output of the funding (academic research) to avoid the implication that core academic expression is government speech. *Cf. People for the Ethical Treatment of Animals, Inc. v. Gittens*, 414 F.3d 23, 28 (D.C. Cir. 2005).

⁶⁹ Nat’l Inst. of Health, Notice of Civil Rights Term and Condition of Award, NOT-OD-25-090 (Apr. 21, 2025), <https://grants.nih.gov/grants/guide/notice-files/NOT-OD-25-090.html> [<https://perma.cc/XY8K-DZW4>] (requiring grantees to agree that “[t]hey do not, and will not during the term of this financial assistance award, operate any programs that advance or promote DEI, DEIA, or discriminatory equity ideology in violation of Federal anti-discrimination laws”).

⁷⁰ *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 214–15 (2013).

⁷¹ Nat’l Inst. of Health, Notice of Rescission of Civil Rights Term and Condition of Award, NOT-OD-25-124 (June 12, 2025), <https://grants.nih.gov/grants/guide/notice-files/NOT-OD-25-124.html> [<https://perma.cc/KDH4-6UJR>] (rescinding NOT-OD-25-090). *But see* Johanna Alonso, *NIH Reinstates DEI Ban Hours After Rescinding It*, INSIDE HIGHER ED (June 11, 2025), <https://www.insidehighered.com/news/quick-takes/2025/06/11/nih-reinstates-dei-ban-hours-after-rescinding-it> [<https://perma.cc/LT9P-PYMQ>] (noting that the NIH previously changed its mind on whether to rescind this condition).

⁷² Jeffrey Mervis, *NSF Slashes Number of ‘Rotators’ and Well-Paid Managers as Part of Restructuring*, SCIENCE (May 8, 2025, 18:25 ET), <https://www.science.org/content/article/nsf-slashes-number-rotators-and-well-paid-managers-part-restructuring> (noting that NSF terminated 331 existing grants because “[t]hey were seen to be out of step with a presidential directive on diversity, equity, and inclusion”); Mary Kekatos, *NIH Terminating Active Research Grants Related to LGBTQ+, DEI Studies*, ABC NEWS (Mar. 7, 2025, 20:01 ET),

NIH, for example, their multi-year grants require scientists to submit annual progress reports in order to receive the awarded funding for the next year.⁷³ The Trump Administration is seizing on this opportunity to either discontinue funds or negotiate with the lead researcher to remove expressions of support for DEI from the research project.⁷⁴

This presents a different legal issue than *Finley* because the federal government is no longer at the part of the process where it is choosing based on the merit of the ideas which projects to support.⁷⁵ Instead, it has already decided that the research merits funding and committed itself to funding the project. That makes this circumstance more akin to *Rosenberger* and *Velazquez*—two cases where the Court struck down viewpoint-based restraints on non-competitive grants.⁷⁶ While one could argue that the Trump Administration’s actions should not receive First Amendment scrutiny under *Rust* and its progeny because the speech restrictions here are not “seek[ing] to . . . regulate speech outside the contours of the [grant] program itself[.]”⁷⁷ that line of cases dealt with conditions that were placed on the funding before it was awarded. Here, the government awarded the grants and is now trying to place subsequent viewpoint-based restrictions on the grantees. This is not an example of the government defining the research it will fund.⁷⁸ It did that when it originally awarded the grant. This is censorship.⁷⁹

However, what is not clear is the mode of analysis that should apply. Courts could apply forum analysis and declare the grants to be limited public forums like the student activity fees in *Rosenberger* and the LSC funding in *Velazquez*.⁸⁰ In that scenario, the Trump Administration’s subsequently imposed viewpoint-based restrictions violate the First Amendment.⁸¹ The upside of this test is that it would prevent the federal government from defunding academic researchers for coming to conclusions that contradict the federal government’s preferred policy stances or vision. The downside is that the test’s rigidity could create scenarios where it impedes the federal

<https://abcnews.go.com/Health/nih-terminating-active-research-grants-related-lgbtq-dei/story?id=119553232> [<https://perma.cc/M5QJ-BAB4>]; Max Kozlov & Smriti Mallapaty, *Exclusive: NIH to Terminate Hundreds of Active Research Grants*, NATURE (Mar. 6, 2025), <https://www.nature.com/articles/d41586-025-00703-1>.

⁷³ See Kozlov & Mallapaty, *supra* note 72.

⁷⁴ *Id.*

⁷⁵ See Nat’l Endowment for the Arts v. Finley, 524 U.S. 569, 585 (1998).

⁷⁶ Cf. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995) (“Having offered to pay the third-party contractors on behalf of private speakers who convey their own messages, the University may not silence the expression of selected viewpoints.”).

⁷⁷ *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 214–15 (2013).

⁷⁸ *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (“[W]hen the Government appropriates public funds to *establish* a program it is entitled to define the limits of that program.”) (emphasis added).

⁷⁹ See *Esperanza Peace & Just. Ctr. v. City of San Antonio*, 316 F. Supp. 2d 433, 463 (W.D. Tex. 2001) (holding city violated First Amendment when it stripped competitive funding it awarded to arts and education center over center’s pro-LGBTQ+ expression); *Brooklyn Inst. of Arts & Scis. v. City of New York*, 64 F. Supp. 2d 184, 200 (E.D.N.Y. 1999) (holding city violated First Amendment by withholding funding it contractually promised art museum due to city’s hostility towards viewpoints expressed in museum’s exhibit). Cf. *Speiser v. Randall*, 357 U.S. 513, 518 (1958) (“To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech.”); *Cuban Museum of Arts & Culture, Inc. v. City of Miami*, 766 F. Supp. 1121, 1129 (S.D. Fla. 1991) (holding city’s refusal to renew lease with art museum due to museum’s artistic expression violated the First Amendment). After all, the First Amendment’s purpose is to prohibit the “official suppression of ideas.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992).

⁸⁰ See *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 543–44, 548–49 (2001); *Rosenberger*, 515 U.S. at 830.

⁸¹ *Rosenberger*, 515 U.S. at 829 (“The State may not exclude speech where its distinction is not ‘reasonable in light of the purpose served by the forum,’ nor may it discriminate against speech on the basis of its viewpoint.”) (citations omitted).

government's ability to ensure compliance with the standards of the researcher's discipline or revoke funding from researchers who engage in misconduct.

There is another option. Courts could treat the grantees as federal contractors and apply the *Pickering* framework.⁸² The *Pickering* framework governs public employee speech and asks whether the employee spoke as a citizen on a matter of public concern. If she did, courts balance the employee's interest in speaking against the government's interests as an employer.⁸³ However, *Garcetti v. Ceballos* held that when public employees speak pursuant to their official duties, that speech receives no First Amendment protection.⁸⁴ That said, *Garcetti* excepted speech protected by academic freedom from its rule, so academic researchers are not subject to *Garcetti*'s speech-restrictive official duties test.⁸⁵ This is because "professors at public universities are paid—if perhaps not exclusively, then predominantly—to speak, and to speak freely, guided by their own professional expertise, on subjects within their academic disciplines."⁸⁶ Thus, they are not tasked with relaying a governmental message. This is why every circuit to consider the issue post-*Garcetti* has ruled that professors' core academic expression receives First Amendment protection, regardless of whether it is per their official duties.⁸⁷

The benefit of applying the *Pickering* framework is that it is a more flexible test that would give the federal government greater ability to ensure compliance with the grant proposal and academic standards.⁸⁸ The disadvantage is that the federal government generally is not the direct employer of the researchers who work at private and public universities, so *Pickering* and its progeny are not natural fits for these circumstances. My recommendation is for courts to apply *Rosenberger* and *Velazquez*'s mode of analysis and enjoin the Trump Administration's cancelling of preexisting research grants on viewpoint-based grounds.⁸⁹ This is the right approach because stringent viewpoint-based protections will most effectively further the purposes that animate the constitutional academic freedom doctrine—namely, safeguarding the processes that produce knowledge and truth and encouraging "ardor and fearlessness [in]

⁸² Bd. of Cnty. Comm'rs, Wabaunsee Cnty., v. Umbehr, 518 U.S. 668, 673 (1996) (holding "*Pickering* balancing test" applies to government contractors).

⁸³ Borough of Duryea, Pa. v. Guarnieri, 564 U.S. 379, 386 (2011).

⁸⁴ 547 U.S. 410, 421 (2006) ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.").

⁸⁵ See *id.* at 425 (excepting "speech related to scholarship or teaching").

⁸⁶ Heim v. Daniel, 81 F.4th 212, 226–27 (2d Cir. 2023).

⁸⁷ See Meriwether v. Hartop, 992 F.3d 492, 505 (6th Cir. 2021) (collecting cases); see also Heim, 81 F.4th at 228.

⁸⁸ Because the Trump Administration is relying on executive orders that are "sweeping . . . impediment[s] to speech," courts would utilize the balancing test laid out in *United States v. Nat'l Treasury Emps. Union*, if they take this tack. 513 U.S. 454, 467–68 (1995) ("The Government must show that the interests of both potential audiences and a vast group of present and future [grantees] in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government.") (citation omitted).

⁸⁹ Courts have thus far split on similar challenges to President Trump's policies. Compare R.I. Latino Arts v. Nat'l Endowment for the Arts, 777 F. Supp. 3d 87, 107–10 (D.R.I. 2025) (funding termination is unconstitutional viewpoint discrimination), and Nat'l Ass'n of Diversity Officers in Higher Educ. v. Trump, 767 F. Supp. 3d 243, 284–86 (D. Md. 2025) (same), with Nat'l Urb. League v. Trump, 783 F. Supp. 3d 61, 97–105 (D.D.C. 2025) (First Amendment claim is unlikely to succeed on the merits), and Chi. Women in Trades v. Trump, 778 F. Supp. 3d 959, 984–86 (N.D. Ill. 2025) (First Amendment funding termination claim is unlikely to succeed on the merits).

scholars.”⁹⁰ This mode of analysis will also draw clearer lines, informing universities and researchers of their rights and the federal government of what it cannot do.⁹¹

C. FEDERAL RESTRICTIONS ON DIVERSITY, EQUITY, AND INCLUSION

In addition to its attacks on academic research, the Trump Administration has targeted DEI initiatives and curricula at public and private universities. On February 14, 2025, the Department of Education sent a “Dear Colleague” letter arguing that DEI initiatives could qualify as racial discrimination under federal law and threatening to strip universities of federal funding.⁹² This letter singled out ideas like systemic racism and “teach[ing] students that certain racial groups bear unique moral burdens that others do not.”⁹³ This letter had its desired effect, as even resource-rich private institutions like Northwestern University and the University of Pennsylvania eliminated DEI offices and scrubbed DEI resources from their websites.⁹⁴ The Trump Administration was even able to pressure University of Virginia President Jim Ryan into resigning using an investigation into the university’s DEI practices.⁹⁵ Additionally, the interim United States Attorney for the District of Columbia, Ed Martin, threatened Georgetown University Law Center that it must “eliminate[] all DEI” from its school, including its curriculum

⁹⁰ *Sweezy v. New Hampshire*, 354 U.S. 234, 262 (Frankfurter, J., concurring in the result); *see also id.* at 250 (plurality opinion).

⁹¹ There is one additional complication here. If the plaintiffs sue to enjoin these policies under the Administrative Procedure Act as “contrary to constitutional right, power, privilege, or immunity,” they will have to contend with the argument that this is actually a contract dispute that should be brought before the Court of Federal Claims. *See* 5 U.S.C. § 706(2)(b); *Dep’t of Educ. v. California*, 604 U.S. 650, 650–52 (2025) (per curiam). The problem with the Court of Federal Claims is that it “does not have the general equitable powers of a district court to grant prospective relief.” *Bowen v. Massachusetts*, 487 U.S. 879, 905 (1988). The best way to avoid that problem is to frame the lawsuit as seeking “prospective, nonmonetary relief to clarify future obligations,” but that is hard to do with grants that were already cancelled. *Me. Cmty. Health Options v. United States*, 590 U.S. 296, 327 (2020). As a backup option, litigants can follow Harvard’s example and sue for equitable relief alleging that it is an “ultra vires act.” Daniel Jacobson & John Lewis, *Overcoming the Tucker Act After Department of Education v. California*, *LAWFARE* (Apr. 17, 2025, 9:48 ET), <https://www.lawfaremedia.org/article/overcoming-the-tucker-act-after-department-of-education-v.-california> [<https://perma.cc/UY4L-U9T6>] (explaining why this approach would avoid the Tucker Act issue, particularly in the First Amendment context); *see also* First Amended Complaint for Declaratory and Injunctive Relief at 36–37, *President & Fellows of Harvard Coll. v. U.S. Dep’t of Health & Hum. Servs.*, No. 1:25-cv-11048-ADB, ECF No. 1 (D. Mass. Apr. 21, 2025) (asserting this type of claim).

⁹² Craig Trainor, Acting Assistant Secretary for Civil Rights, *Dear Colleague Letter*, U.S. Dep’t of Educ. (Feb. 14, 2025), <https://www.ed.gov/media/document/dear-colleague-letter-sffa-v-harvard-109506.pdf> [<https://perma.cc/5CCS-MTB5>].

⁹³ *Id.* at 3.

⁹⁴ Jerry Wu, *The Daily Explains: How Northwestern Has Responded to Trump’s Anti-DEI Orders*, *DAILY NW* (Mar. 3, 2025), <https://dailynorthwestern.com/2025/03/03/campus/the-daily-explains-how-northwestern-has-responded-to-trumps-anti-dei-orders/> [<https://perma.cc/6E3X-X9UY>] (“The University has erased mentions of DEI in nearly all of its schools and colleges, as well as other support sites.”); Anvi Seghal, *Penn Strips Central DEI Website as ‘Review’ of Programs Begins*, *DAILY PENNSYLVANIAN* (Feb. 14, 2025, 17:45 ET), <https://www.thedp.com/article/2025/02/penn-central-dei-website-stripped-trump-diversity> [<https://perma.cc/24BU-LA99>] (“Penn has scrubbed the University’s main Diversity and Inclusion website—the latest in a series of moves removing references to equity initiatives, policies, and practices on University sites.”).

⁹⁵ *See* Margaret Brennan, *University of Virginia President Resigns Amid Trump Administration DEI Investigation*, *CBS NEWS* (June 27, 2025, 17:49 ET), <https://www.cbsnews.com/news/university-of-virginia-president-resigning-trump-administration-investigation/> [<https://perma.cc/GN42-HKSJ>].

and instruction.⁹⁶ Fortunately, Georgetown Law Dean William Treanor rebuffed Martin and stood on Georgetown's constitutional rights.⁹⁷ Following Georgetown's example, Harvard too chose to fight the Trump Administration's attempts to infringe on its academic freedom rights.⁹⁸

These are areas where universities should push back. Curricula and classroom instruction receive robust protection under the First Amendment's academic freedom doctrine.⁹⁹ While diversity trainings and resources may not always fall into the academic freedom bucket, this expression still receives First Amendment protection from federal regulation.¹⁰⁰ The reason diversity trainings and resources are not guaranteed protection under the constitutional academic freedom doctrine is because this expression may not qualify as "speech related to scholarship or teaching."¹⁰¹ Thus, if a state targets diversity trainings at its own public universities, litigants cannot rely on individual or institutional academic freedom protections.¹⁰² However, when the federal government seeks to restrict pro-DEI expression at public universities, a litigant can at minimum rely on the university's right to institutional autonomy to resist these efforts.¹⁰³ Private universities do not have this problem, as they can always assert their right to institutional autonomy.¹⁰⁴

With hundreds of millions or even billions of dollars in federal funding at stake, it is understandable why some universities feel chilled by the Trump Administration's threats. Regardless, universities should stand on their First Amendment rights and refuse to eliminate diversity trainings or scrub DEI resources and statements from their websites.¹⁰⁵ This is a time for universities to support faculty and students from marginalized groups, not to throw them

⁹⁶ Emma Camp, *U.S. Attorney Threatens Georgetown Law for 'Teaching DEI'*, REASON (Mar. 7, 2025, 15:15 ET), <https://reason.com/2025/03/07/u-s-attorney-threatens-georgetown-law-for-teaching-dei/> [<https://perma.cc/FZ7B-T5GH>].

⁹⁷ *Id.*

⁹⁸ See Raymond, *supra* note 19; Max Matza, *Judge Temporarily Blocks Trump's Ban on Foreign Harvard Students*, BBC (June 5, 2025), <https://www.bbc.com/news/articles/c9911z2zd0ko> [<https://perma.cc/2WZB-YJXM>]. But see Dhruv T. Patel & Grace E. Yoon, *Harvard Fights in Court but Retreats on Campus*, HARV. CRIMSON (Apr. 30, 2025), <https://www.thecrimson.com/article/2025/4/30/Harvard-Fights-Retreats/> [<https://perma.cc/VFZ7-XR87>] (noting Harvard's strategic retreat on certain DEI-related issues). Earlier this month, Harvard obtained a victory on First Amendment grounds in the district court. *President & Fellows of Harvard Coll. v. U.S. Dep't of Health & Hum. Servs.*, No. 25-CV-10910, 2025 WL 2528380, at *21–28 (D. Mass. Sep. 3, 2025).

⁹⁹ See, e.g., *Widmar v. Vincent*, 454 U.S. 263, 276 (1981) ("Nor do we question the right of the University . . . '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.'") (citations omitted).

¹⁰⁰ See *Honeyfund.com Inc. v. Governor*, 94 F.4th 1272, 1277 (11th Cir. 2024) (describing Florida's attempt to prohibit mandatory DEI trainings in private workplaces as committing "the greatest First Amendment sin"—viewpoint discrimination).

¹⁰¹ *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006); see also *Porter v. Bd. of Trs. of N.C. State Univ.*, 72 F.4th 573, 583 (4th Cir. 2023) (construing this phrase narrowly).

¹⁰² See generally *Pernell v. Fla. Bd. of Governors of State Univ. Sys.*, 641 F. Supp. 3d 1218 (N.D. Fla. 2022) (analyzing the intersection of government speech and academic freedom).

¹⁰³ See *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985) ("Academic freedom thrives . . . on autonomous decision making by the academy itself.") (citations omitted); *Widmar*, 454 U.S. at 276.

¹⁰⁴ Cf. Michael Banerjee, *Universities Need to Go Corporate*, INSIDE HIGHER ED (July 2, 2025), [<https://perma.cc/NGQ8-DA2R>] (arguing that universities should take advantage of their ancient corporate rights).

¹⁰⁵ The Supreme Court's recent decision, *NRA v. Vullo*, affirmed that the First Amendment prohibits the government from coercing people into silence using threats of financial harm. 602 U.S. 175, 198 (2024).

under the bus. The First Amendment provides robust tools capable of combatting the Trump Administration's censorship in this context.¹⁰⁶

CONCLUSION

At the height of the McCarthy-era attacks on academic freedom, Justice Felix Frankfurter warned that “[t]his kind of evil grows by what it is allowed to feed on.”¹⁰⁷ Facing renewed assaults on higher education, it is incumbent that universities do not feed the beast. The Trump Administration is ramping up efforts to silence pro-DEI viewpoints on university campuses and eliminate academic research supporting diversity and transgender people. Well-resourced universities must resist these attacks on free inquiry and expression. For universities that lack resources comparable to the Ivy League schools, a mutual defense pact where a number of smaller institutions “pool their legal and financial resources to help defend member schools” may provide a solution to countering the federal government’s censorious campaign.¹⁰⁸ This Essay demonstrates that the First Amendment provides tools to defend DEI initiatives and academic research. But the First Amendment cannot advocate for itself. It requires courageous people and institutions who refuse to capitulate to the threats of an illiberal regime.

¹⁰⁶ See generally, e.g., Frederick P. Schaffer, *Speech-Related Conditions on Federal Funding in the University Context*, KNIGHT FIRST AMEND. INST. (May 20, 2025), <https://knightcolumbia.org/blog/speech-related-conditions-on-federal-funding-in-the-university-context> [<https://perma.cc/5E6V-6BLX>] (concluding that the government “may not impose funding conditions on colleges and universities so as to make them mouthpieces of the state”); Paul Gowder, *Standpoint Epistemology, the First Amendment, and University Affirmative Action*, 32 WM. & MARY BILL RTS. J. 979, 979 (2024) (relying on inclusive expressive rights to make a First Amendment case for affirmative action at universities); Keith E. Whittington, *Professorial Speech, the First Amendment, and Legislative Restrictions on Classroom Discussions*, 58 WAKE FOREST L. REV. 463, 522–23 (2023) (arguing that anti-CRT laws violate the First Amendment’s academic freedom doctrine).

¹⁰⁷ *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in the result).

¹⁰⁸ Michael T. Nietzel, *Half of Big Ten Faculty Senates Have Voted for a Mutual Defense Compact*, FORBES (Apr. 26, 2025, 14:10 ET), <https://www.forbes.com/sites/michaelt Nietzel/2025/04/26/half-of-big-ten-faculty-senates-have-voted-for-a-mutual-defense-compact/> [<https://perma.cc/4ULX-25KF>].