

The Climate Science Legal Defense Fund produced this guide to help scientists understand their First Amendment rights. This guide concerns only U.S. laws, and nothing in it should be construed as legal advice for any individual situation.

We provide free counsel to scientists with legal questions about their work. Contact us at **(646) 801-0853** or email lawyer@csldf.org to arrange a free, confidential meeting with an attorney.



The Climate Science Legal Defense Fund (CSLDF) works to protect the scientific endeavor by helping defend climate scientists against politically and ideologically motivated attacks. CSLDF is a non-profit organization under section 501(c)(3) of the Internal Revenue Code.

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A POCKET GUIDE FOR SCIENTISTS

The First Amendment



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the Climate Science
Legal Defense Fund

INTRODUCTION

The First Amendment protects scientists who engage in the political process and express their views as private citizens in various ways, even if they work for a federal, state, or local government entity.

Scientists should understand their First Amendment rights so they can make informed decisions about when and how to use their voices. The location and subject of their speech, their employer, and other factors can have implications for whether and how the First Amendment protects scientists against government action.

The Climate Science Legal Defense Fund (CSLDF) wrote this guide to help scientists navigate these questions and participate in activism and political engagement, especially around issues affecting science.

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I. OVERVIEW OF THE FIRST AMENDMENT

The First Amendment to the United States Constitution prohibits the government from “abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

First Amendment law has a rich history that is beyond the scope of this guide. We focus on the elements of First Amendment law that are most likely to be relevant to scientists, including the right to free speech and the right to free assembly.

Freedom of Speech

What Constitutes Speech

Courts have held that the First Amendment protects spoken words and other types of expression, including:¹

- Online posts, books, leaflets, and other forms of the written word
- Various art forms, such as movies, theater, dance, and visual arts
- Clothing
- Symbolic speech and expressive conduct, such as flag-burning and boycotting
- Donations to political campaigns
- Yard signs, including those that support or oppose a political candidate

The First Amendment can also protect a person’s refusal to speak, such as refusing to recite the Pledge of Allegiance.²

But not all speech is protected. For example, First Amendment protection does not extend to defamation (see page 5), perjury, true threats, incitement, obscenity, or child pornography.³

The Government Must Regulate the Speech

The First Amendment only regulates the behavior of government actors. In other words, it only protects speech from censorship or punishment by the government and not by private actors.

Government actors include lawmakers, public officials, and actors at other government or government-funded entities such as federal and state agencies, police forces, public schools, and publicly-funded universities.⁴

As we describe in detail in sections II and III, the relevant legal questions and requirements can differ. They depend on whether the government is acting in its role as an employer (such as a state university) or a different capacity, like its role as law enforcement (such as a police officer).

The First Amendment applies to all levels of government: federal, state, and local. State constitutional rights may also play a role in regulating free speech at the state and local levels.

The First Amendment does not govern (and in fact often protects) private actors like private schools and businesses. Such entities can punish or censor speech, for example by suspending a student or firing an employee, without implicating the First Amendment.

The Nature of the Restriction Matters

Even when the First Amendment protects speech, that protection may not be absolute. There are circumstances where government actors can restrict protected speech without violating the First Amendment. The extent to which this is true depends on the kind of speech involved, the nature of the restriction, the reasons for that restriction, and the role the government plays vis-à-vis the speaker.

For example, a government restriction on speech is more likely to pass constitutional muster if it is “content neutral”⁵—in other words, if the government can demonstrate that the restriction is applied uniformly regardless of the speech’s content or the view expressed. The restriction is also more likely to stand up to constitutional scrutiny if the government can tie the restriction to a reasonable government interest, such as the need to provide public safety or prevent excessive traffic disturbances.

The location where the speech is expressed can also matter. Free speech rights are most robust when the speech happens in a “traditional public forum,” including streets, sidewalks, and parks.⁶ However, the First Amendment doesn’t protect actions like blocking access to a government building or trespassing on private property.

II. WHEN THE GOVERNMENT ACTOR IS AN EMPLOYER: THE FIRST AMENDMENT AND PUBLIC EMPLOYEES

Public employees do not lose all of their free speech rights by having a publicly-funded job.⁷ When determining whether a public employee’s free speech rights are being violated, courts typically balance the employer’s interest in promoting an effective and efficient workplace with the employee’s right to comment on public issues.⁸

Public employees are typically not protected by the First Amendment when speaking in their official capacity or as part of their official job duties.

But public employees are generally protected by the First Amendment if they speak as private citizens about a matter of public concern, and the speech does not interfere with their official responsibilities.

Note: What’s considered a matter of public concern?

Speech that relates “to any matter of political, social, or other concern to the community” is typically a matter of public concern.⁹

Scientists should understand there are exceptions to this rule:¹⁰

High-level Employees

Political appointees and other employees with broad responsibilities relating to policy development may not be protected by the First Amendment, even when they are speaking as private citizens.

Classified Information

Courts generally find that the First Amendment does not protect speech involving the release of classified or other sensitive information.

Other Limitations

A government employee's speech may still be subject to other limitations even if the First Amendment protects it. For example, the Hatch Act may limit a federal employee's speech; see our resource on the Hatch Act, [Participating in Political Activities: Guidelines for Federally Employed and Federally Funded Scientists](#).¹¹ In other instances, a public employer may have additional rules or policies governing employee speech that scientists employed by that institution should understand. For example, many institutions have policies that regulate employees' use of social media.

III. SCIENTISTS AS CITIZENS: THE FIRST AMENDMENT AND FREEDOM OF ASSEMBLY

Freedom of assembly considerations are somewhat different in the context of a government actor regulating or restricting the right to assemble, such as a municipality requiring demonstrators to obtain a permit or police officers arresting protestors.

The First Amendment guarantees the right to protest. Government actors face a high bar in attempting to restrict protests, parades, or other lawful assemblies because of the view or message expressed.

Nonetheless, content-neutral restrictions on the time, place, and manner of lawful assemblies may pass constitutional muster if they are tied to reasonable government objectives, such as managing traffic congestion or ensuring that government buildings can continue to serve their functions.¹² For example, many municipal governments require permits for parades. This requirement is likely to be constitutional as long as it's applied uniformly to all parades regardless of their purpose, and officials do not withhold a permit because of the

speakers' views. When applying such restrictions, government actors must also leave open ample alternative means for people to communicate their message.

Government actors may require that those organizing a march or protest pay a fee to receive a permit, although the government must ensure that people who can't afford the fee do not have to pay it.¹³ Such fees are likely to be constitutional as long as they are reasonable, evenly applied, and not based on the message expressed or the audience's anticipated reaction.

Free assembly rights are strongest in "traditional public forums" like parks and streets. A permit shouldn't be required to march on public streets or sidewalks, as long as the march does not obstruct pedestrian or vehicular traffic or violate other applicable laws, like noise ordinances.¹⁴

Law enforcement should not break up a gathering unless there is a clear and present danger of riot, disorder, traffic interference, or other immediate threat to public safety. If law enforcement issues a dispersal order, they must provide clear instructions and allow those gathered a reasonable amount of time to comply with their order.¹⁵

More information about scientists' right to protest is in the free guide CSLDF wrote with the ACLU, [Know Your Rights: Scientific Activism and Protests](#).¹⁶

IV. DEFAMATION

The First Amendment does not protect defamatory speech, which can ruin an individual's reputation. But defamation lawsuits are sometimes used to try to silence critics who have not crossed the line into unprotected speech.

It's not unusual for scientists to encounter defamation issues. There are numerous instances where scientists have threatened or brought defamation suits against their detractors, including colleagues and pundits. Scientists have also had to defend against defamation claims by politicians, scientific peers, and other critics.

Such cases raise questions about what constitutes fair criticism and valid scientific debate and what crosses the line into defamation.

To bring a successful defamation claim, a plaintiff must generally prove that the defendant:

- Publicly made a false statement of fact about the plaintiff (which can be verbal, and need involve only one other person) that was defamatory or negative,
- Acted negligently in doing so if the plaintiff is not well-known, or acted with actual malice or reckless disregard of the falsity of the statement if the plaintiff is a public figure, and
- Damaged the plaintiff as a result.¹⁷

Defamation can be challenging to prove, and defamation cases are generally difficult to win in the U.S.; other countries, such as the United Kingdom, have lower thresholds. The First Amendment protects statements of opinion, so these cannot form the basis of a defamation claim unless the opinion suggests that it is based on undisclosed facts.

In addition to the protections afforded by the First Amendment, many states also have laws against Strategic Lawsuits Against Public Participation (SLAPP). Anti-SLAPP laws are designed to prevent individuals or organizations from using lawsuits—especially defamation suits—or threats of such lawsuits to intimidate or silence someone exercising their First Amendment right to free speech. Anti-SLAPP laws make it harder for plaintiffs to win defamation suits and can result in punitive damages if a plaintiff’s case is dismissed on anti-SLAPP grounds.

V. ACADEMIC FREEDOM

Academic freedom is another relevant concept that intersects with First Amendment protections. A court’s willingness to recognize academic freedom as an enforceable legal right as distinct from the First Amendment is variable, but it is a valuable concept for scientists to understand.

Academic freedom is relatively broad and applies in academic settings. It includes, among other things, the freedom to:¹⁸

- Conduct research
- Select course materials and content
- Assess student performance
- Communicate relevant expertise to the public about matters of social, political, or economic interest

While many of these items are most relevant for teachers, academic freedom can also apply to students.

The concept of academic freedom as a legal right has multiple sources. One is the First Amendment. But in articulating academic freedom as a concept, courts have also pointed to:¹⁹

- Contractual rights and institutional policies, such as faculty and student handbooks, and
- What’s known as a body of “academic common law”—practices developed by academic institutions that have gradually acquired legal weight.

A scientist’s speech is most likely to be protected by an academic freedom right if that speech is:²⁰

- Germane to the subject matter of the scientist’s institutional work,
- Reasonably related to a legitimate educational interest, and
- A matter of public concern.

Because academic freedom rights have sources beyond the First Amendment, individuals at private educational institutions may have academic freedom rights even when the First Amendment doesn't protect their speech. In this sense, academic freedom rights can be broader than First Amendment rights.

VI. RECOMMENDATIONS

Taking these simple steps can increase the likelihood that your speech will be protected. They'll also help reduce the risk of unwanted negative repercussions to your professional life.

- Use disclaimers that make it clear when you are speaking as a private citizen and not in your official capacity or on behalf of your employer
- Make clear when you are expressing an opinion
- Understand your employer's social media and communications policies
- Consult our other resources, [available for free download from our online library](#), that cover navigating anti-lobbying restrictions, Hatch Act compliance, handling harassment, and various other topics²¹

Endnotes

- ¹ Lata Natt, *Is Your Speech Protected by the First Amendment?*, Freedom Forum Institute, <https://perma.cc/3D5S-W4M3>
- ² *Id.*
- ³ *Id.*
- ⁴ *Id.*
- ⁵ David L. Hudson Jr., Content Neutral, Free Speech Center, Middle Tennessee State University, <https://perma.cc/4WL3-BWBQ>
- ⁶ Know Your Rights Guide: Speech in Public Places, American Civil Liberties Union of Washington, <https://perma.cc/CVK2-MUQW>
- ⁷ David L. Hudson Jr., *Public Employees*, Free Speech Center, Middle Tennessee State University, <https://perma.cc/5NZ6-NT9E>
- ⁸ Federal Employee Speech & the First Amendment: A Know Your Rights Guide, American Civil Liberties Union District of Columbia, <https://perma.cc/SJ43-LJHG>
- ⁹ *Connick v. Myers*, 461 U.S. 138, 146 (1983).
- ¹⁰ Federal Employee Speech & the First Amendment, *supra* note 8.
- ¹¹ <https://www.cslfd.org/resource/participating-in-political-activities-guidelines-for-federally-employed-and-federally-funded-scientists/>
- ¹² American Civil Liberties Union, *Know Your Rights: Protesters' Rights*, <https://perma.cc/XNA9-APDL>
- ¹³ *Id.*
- ¹⁴ *Id.*
- ¹⁵ *Id.*
- ¹⁶ <https://www.cslfd.org/resource/know-your-rights-scientific-activism-and-protests/>
- ¹⁷ *See generally* Restatement (Second) of Torts § 558 (Oct. 2020).
- ¹⁸ Academic Freedom Guidelines and Best Practices, Organization of American Historians Committee on Academic Freedom, <https://perma.cc/BVE8-GVRF>
- ¹⁹ Donna R. Euben, *Academic Freedom and Professorial Speech*, Presentation to the 25th Annual Conference on Law & Higher Education, Stetson University College of Law (Feb. 2004), <https://perma.cc/RLN9-956Q>
- ²⁰ *Id.*
- ²¹ <https://www.cslfd.org/resources/>