

No. 23-156

IN THE
Supreme Court of the United States

SPEECH FIRST, INC.,

Petitioner,

v.

TIMOTHY SANDS, individually and in his official
capacity as President of the Virginia Polytechnic Institute
and State University,

Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit**

**BRIEF OF *AMICI CURIAE*
ALLIANCE DEFENDING FREEDOM AND
THE MANHATTAN INSTITUTE
IN SUPPORT OF PETITIONER**

JAMES A. CAMPBELL
JOHN J. BURSCH
TYSON LANGHOFER
TRAVIS C. BARHAM
ALLIANCE DEFENDING
FREEDOM
440 First Street, NW
Suite 600
Washington, DC 20001
(616) 450-4235

GORDON D. TODD*
MACKENZI J.S. EHRETT
CODY L. REAVES
AARON P. HAVILAND
DREW K. CYPHER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
gtodd@sidley.com

Additional counsel on inside cover

Counsel for Amici Curiae

September 18, 2023

* Counsel of Record

ILYA SHAPIRO
TIM ROSENBERGER
MANHATTAN INSTITUTE
52 Vanderbilt Ave
New York, NY 20017
(212) 599-7000

TABLE OF CONTENTS

| | Page |
|--|------|
| TABLE OF AUTHORITIES | iii |
| INTERESTS OF <i>AMICI CURIAE</i> | 1 |
| INTRODUCTION AND SUMMARY OF ARGUMENT..... | 2 |
| ARGUMENT | 3 |
| I. UNIVERSITY POLICIES LIKE THOSE AT VIRGINIA TECH ARE CHILLING ACADEMIC SPEECH | 3 |
| A. Georgia Gwinnett College Illegally Restricted The Location and Content of Student Speech | 4 |
| B. The University of Idaho Used its Title IX Office to Silence the Christian Legal Society | 5 |
| C. Southern Illinois University, Edwardsville, Issued No-Contact Orders Based on Personal and Off-Campus Speech | 6 |
| D. Florida State University Failed To Protect the Religious Speech Of Its Student Senate President..... | 7 |
| II. THE SUPPRESSION OF ACADEMIC SPEECH HAS BEEN A STEPPING STONE FOR TOTALITARIAN REGIMES. | 10 |
| A. The Soviet Union Persecuted University Professors Through Investigations, Denunciations, and Deportations | 11 |
| B. The Nazi Party Took Over Germany’s University System Through Ideological Faculty Appointments and Denunciations | 15 |

(ii)

| | |
|---|----|
| C. The Chinese Cultural Revolution Began in Universities, Where Student Mobs Harassed, Imprisoned, and Tortured Their Professors | 17 |
| D. Other Totalitarian Regimes—Including Those in Cambodia, Venezuela, and Cuba—Suppressed Academic Speech to Shore Up Power | 19 |
| CONCLUSION | 24 |

TABLE OF AUTHORITIES

| | Page |
|--|---------|
| CASES | |
| <i>Adams v. Trs. of Univ. of N.C.-Wilmington</i> , 640 F.3d 550 (4th Cir. 2011)..... | 1 |
| <i>Bd. of Regents of Univ. of Wis. Sys. v. Southworth</i> , 529 U.S. 217 (2000) | 1 |
| <i>Coll. Republicans at S.F. State Univ. v. Reed</i> , 523 F. Supp. 2d 1005 (N.D. Cal. 2007) | 9 |
| <i>DeJohn v. Temple Univ.</i> , 537 F.3d 301 (3d Cir. 2008)..... | 1, 4, 9 |
| <i>McCauley v. Univ. of the Virgin Islands</i> , 618 F.3d 232 (3d Cir. 2010) | 9 |
| <i>Meriwether v. Hartop</i> , 992 F.3d 492 (6th Cir. 2021) | 1 |
| <i>Nat'l Inst. of Fam. & Life Advocs. v. Becerra</i> , 138 S. Ct. 2361 (2018)..... | 1 |
| <i>Obergefell v. Hodges</i> , 576 U.S. 644 (2015)... | 5 |
| <i>OSU Student All. v. Ray</i> , 699 F.3d 1053 (9th Cir. 2012)..... | 1 |
| <i>Reed v. Town of Gilbert</i> , 576 U.S. 155 (2015)..... | 1 |
| <i>Rosenberger v. Rector & Visitors of Univ. of Va.</i> , 515 U.S. 819 (1995) | 1 |
| <i>Speech First, Inc. v. Sands</i> , 69 F.4th 184 (4th Cir. 2023) | 3 |
| <i>Texas v. Johnson</i> , 491 U.S. 397 (1989)..... | 3, 4 |
| <i>Thompson v. Hebdon</i> , 140 S. Ct. 348 (2019) | 1 |
| <i>Uzuegbunam v. Preczewski</i> , 141 S. Ct. 792 (2021)..... | 1, 4 |
| STATUTE | |
| Fla. Stat. § 1004.26(1)..... | 7 |

TABLE OF AUTHORITIES—continued

| | Page |
|---|------------|
| OTHER AUTHORITIES | |
| Hannah Arendt, <i>The Origins of Totalitarianism</i> (Harcourt 1968) (1951) | 10 |
| John Bennett, <i>The Totalitarian Ideological Origins of Hate Speech Regulation</i> , 46 <i>Cap. Univ. L. Rev.</i> 23 (2018)..... | 11, 14, 15 |
| Bureau of W. Hemisphere Affs., U.S. Dep't of State, <i>Intellectual and Academic Freedom in Cuba</i> (Sept. 13, 2001), bit.ly/3RpiqeX | 21, 22 |
| Lesley Chamberlain, <i>Lenin's Private War: The Voyage of the Philosophy Steamer and the Exile of the Intelligentsia</i> (2006)..... | 11 |
| Maria Laura Chang, <i>All University Places Will be Assigned Via the National Admission System</i> , Efecto Cocuyo (Eng. Trans.), https://bit.ly/3PkKWM3 (last accessed Sept. 15, 2023)..... | 20 |
| George Chigas & Dmitri Mosyakov, Yale Univ., <i>Literacy and Education under the Khmer Rouge</i> , bit.ly/3PnmEB0 (last accessed Sept. 15, 2023) | 19 |
| Thomas Childers, <i>The Third Reich: A History of Nazi Germany</i> (2017)..... | 15, 16 |
| Robert Conquest, <i>The Great Terror: A Reassessment</i> (2008) | 11, 12 |
| Emily Crane, <i>Conservative Lawyer Slams Yale for 'Cowering to Mob' After Free Speech Panel Derailed</i> , <i>N.Y. Post</i> (Mar. 18, 2022), bit.ly/44USuuA | 23 |
| Areg Danagoulian, <i>My Soviet Past: Why We Need to be Vigilant About Academic Freedom</i> , <i>MIT Faculty Newsletter</i> (Nov./Dec. 2021), bit.ly/3RnA9U8 | 14 |

TABLE OF AUTHORITIES—continued

| | Page |
|--|--------|
| Paddy Dowling, <i>The Khmer Rouge Destroyed Education in Cambodia – Now the Country is Fighting Back</i> , <i>The Independent</i> (Dec. 6, 2019), bit.ly/46g1go3 | 20 |
| Stuart Kyle Duncan, <i>My Struggle Session at Stanford Law School</i> , <i>Wall St. J.</i> (Mar. 17, 2023), bit.ly/3Ziklnk | 23 |
| Richard J. Evans, <i>Coercion and Consent in Nazi Germany</i> , 151 <i>The British Acad.</i> 53 (2007), bit.ly/3PkXzXF | 16 |
| Richard J. Evans, <i>The Third Reich in Power 1933–1939</i> (2005) | 16 |
| Klaus P. Fischer, <i>Nazi Germany: A New History</i> (1995) | 15, 16 |
| Sheila Fitzpatrick, <i>The Nat’l Council for Soviet and E. European Rsch., The Practice of Denunciation in Stalinist Russia</i> , <i>The Independent</i> (Dec. 19, 1994), bit.ly/45RqNV6 | 12 |
| Fla. State Univ. News, <i>Statement from Florida State University Office of Communications</i> (May 26, 2021) https://bit.ly/31xpazX | 9 |
| Hugo Perez Hernaiz, <i>Higher Education in Venezuela: Skirting University Autonomy through the Creation of a Parallel System</i> , <i>Venezuelan Politics & Hum. Rts.</i> (July 19, 2018), bit.ly/44TIgeb | 20, 21 |
| Angelina Jaffé & Benjamin Scharifker, <i>Academic Freedom Under Threat in Venezuela</i> , <i>Scholars at Risk</i> (July 30, 2015), bit.ly/46i4EPz | 21 |
| Yang Jisheng, <i>The World Turned Upside Down: A History of the Chinese Cultural Revolution</i> (2016) | 17 |

TABLE OF AUTHORITIES—continued

| | Page |
|---|------|
| Gilbert King, <i>The Silence that Preceded China's Great Leap into Famine</i> , Smithsonian Magazine (Sept. 26, 2012), bit.ly/44UfTMP | 17 |
| Teeda Butt Mam, <i>Worms from Our Skin</i> , N.Y. Times (1997), nyti.ms/3PFcVYf | 20 |
| Czeslaw Milosz, <i>The Captive Mind</i> 76 (Jane Zielonko trans., Vintage Books ed. 1990) (1953)..... | 14 |
| George Orwell, <i>The Freedom of the Press: Orwell's Proposed Preface to Animal Farm</i> (1945), reprinted in <i>The Times Literary Supplement</i> (Sept. 15, 1972), bit.ly/45ZjYRu | 23 |
| Peking Rev., <i>Sweep Away All Monsters</i> (June 3, 1966), bit.ly/46a4CsT | 17 |
| Anna Petherick, <i>Chavez Squeezes Scientific Freedom</i> , Nature (Jan. 4, 2011), go.nature.com/45RGGed | 21 |
| Jaime Requena, <i>Venezuela's Scientist Drain</i> , N.Y. Times (Dec. 2, 2016), nyti.ms/3roP2e5 | 21 |
| Aleksandr I. Solzhenitsyn, I <i>The Gulag Archipelago, 1918–1956: An Experiment in Literary Investigation</i> (trans. Thomas P. Whitney) (1974)..... | 14 |
| Elliot Storm & Grace Karram, <i>A Post-Chavez Higher Education Conciliation?</i> , Univ. World News (Mar. 16, 2013), bit.ly/3RowAwN | 21 |
| U.S. Holocaust Mem'l Museum, <i>Request for the Investigation of Hans Peters</i> , bit.ly/3t0csHq (last accessed Sept. 15, 2023) | 16 |

TABLE OF AUTHORITIES—continued

| | Page |
|--|------------|
| Kelsey Vidaillet, <i>Literacy, Censorship and Intellectual Freedom: The Independent Library Movement in Contemporary Cuba</i> , Fla. Int'l Univ., bit.ly/46eubsH (last accessed Sept. 18, 2023) | 22 |
| David Curtis Wright, <i>The History of China</i> (3d ed. 2020) | 11, 17, 18 |
| Ji Xianlin, <i>The Cowshed: Memories of the Chinese Cultural Revolution</i> (trans. Chenxin Jiang) (2016 ed.)..... | 18, 19 |
| Mao Zedong, <i>Things Are Beginning to Change</i> (May 15 1957), bit.ly/46fRnqr | 17 |

INTERESTS OF *AMICI CURIAE*¹

Alliance Defending Freedom (ADF) is a not-for-profit, public-interest legal organization that protects speech, religious liberty, and the right to life. ADF regularly represents parties before this Court in cases involving free speech. *E.g.*, *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021); *Thompson v. Hebdon*, 140 S. Ct. 348 (2019) (per curiam); *Nat’l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361 (2018); *Reed v. Town of Gilbert*, 576 U.S. 155 (2015). Since its founding in 1994, ADF has participated in still other free speech cases. *E.g.*, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000).

ADF represents students and faculty who challenge threats to their free speech rights, often from officials who censor speech using vague “speech codes.” *E.g.*, *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008); *Adams v. Trs. of Univ. of N.C.-Wilmington*, 640 F.3d 550 (4th Cir. 2011); *OSU Student All. v. Ray*, 699 F.3d 1053 (9th Cir. 2012); *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021). ADF has a strong interest in ensuring that university policies that censor speech undergo the strictest scrutiny.

The Manhattan Institute (“MI”) is a nonprofit public policy research foundation whose mission is to develop and disseminate new ideas that foster economic choice and individual responsibility. To that end, it has historically sponsored scholarship supporting the rule of

¹ Counsel provided notice to all parties at least 10 days prior to the due date, and all parties granted consent. No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

law and opposing government overreach, including in the marketplace of ideas. Its scholars regularly speak on college and graduate-school campuses, and likewise have faced protest, shutdown, and cancelation. MI also runs the Adam Smith Society, which brings together business-school students and alumni for discussion and debate on how the free market has contributed to human flourishing and opportunity for all.

INTRODUCTION AND SUMMARY OF ARGUMENT

Virginia Tech’s Bias Intervention Response Team (BIRT) and “bias incident policy” are antithetical to free speech. The Fourth Circuit below joined the wrong side of a deep and mature circuit split. The Court should grant certiorari to resolve this split and reverse.

Virginia Tech’s “bias incident” policy allows anyone who witnesses a “bias incident”—an opaque term reflecting the listener’s subjective assessment of the speaker’s intent²—to report the event online. App. 4. Officials log these “bias incidents” and schedule interventions if they determine that “bias exists.” *Id.*

The decision below short-changed the First Amendment’s strong presumption in favor of more speech, not less, particularly in the university context. Vigilant defense of academic speech promotes vigorous exchange and truth-seeking, core First Amendment values. Instead, the court below perpetuated a policy that

² Bias incidents are defined as “expressions against a person or group because of the person’s or group’s age, color, disability, gender (including pregnancy), gender identity, gender expression, genetic information, national origin, political affiliation, race, religion, sexual orientation, veteran status, or any other basis protected by law.” App. 4.

discourages expression, disadvantages minority viewpoints, and detracts from the educational mission.

Virginia Tech’s policy is not an outlier—such policies are metastasizing across the country. These speech codes bear troubling implications for the rights of college students and of Americans generally. Indeed, history teaches that the suppression of university speech is a tactic routinely deployed by repressive regimes. This Court should grant certiorari to make clear that the First Amendment prohibits coercive policies that chill student speech.

ARGUMENT

I. UNIVERSITY POLICIES LIKE THOSE AT VIRGINIA TECH ARE CHILLING ACADEMIC SPEECH

Universities across the country have adopted policies intended to regulate perceived undesirable speech. But the “[c]hilling effects of even well-intended government policies present ‘an evil of constitutional proportions[.]’” *Speech First, Inc. v. Sands*, 69 F.4th 184, 204 (4th Cir. 2023) (Wilkinson, J., dissenting) (quoting Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 Wm. & Mary L. Rev. 1633, 1655 (2013)). The question presented—whether bias response teams objectively chill students’ speech—is accordingly of critical national significance.

ADF has represented hundreds of students and faculty whose First Amendment rights were violated by unlawful campus speech restraints. Courts have repeatedly affirmed “that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Indeed, “free

speech is of critical importance because it is the lifeblood of academic freedom.” *DeJohn*, 37 F.3d at 314. Nevertheless, university administrators repeatedly flunk this “bedrock principle.” *Johnson*, 491 U.S. at 414. Recently, universities have expanded censorial efforts to *off-campus* expression. ADF’s free speech cases illustrate the breadth of these suppression efforts and the importance of this petition.

A. Georgia Gwinnett College Illegally Restricted the Location and Content of Student Speech.

Georgia Gwinnett College twice violated the First Amendment: first, by restricting speech to “free speech expression areas,” and second, by silencing religious speech in those areas. *Uzuegbunam*, 141 S. Ct. at 797. As an evangelical Christian, student Chike Uzuegbunam believes in sharing his faith. *Id.* at 796. Consistent with this belief, Mr. Uzuegbunam distributed religious literature and invited discussions with interested students in an outdoor campus plaza. *Id.*

School officials first ordered him to desist for unpermitted speech outside designated “free speech expression areas.” *Id.* at 796–97. Mr. Uzuegbunam obtained a permit and continued his evangelism in a designated area. *Id.* College officials again ordered him to cease sharing his faith because it had generated complaints from other students, and threatened disciplinary action if he did not comply. *Id.* Mr. Uzuegbunam eventually filed a § 1983 action, culminating in this Court’s recognition that he had “experienced a completed violation of his constitutional rights.” *Id.* at 802.

B. The University of Idaho Used Its Title IX Office to Silence the Christian Legal Society.

On April 1, 2022, an anti-LGBT slur appeared on a whiteboard at the University of Idaho College of Law. Am. Compl. ¶ 3, *Perlot v. Green*, No. 3:22-cv-00183-DCN (D. Idaho May 17, 2022), ECF No. 17 (“Perlot Compl.”). In response, the law school held a “moment of community.” *Id.* ¶¶ 3–4. Several members of the law school’s Christian Legal Society (“CLS”), including its faculty sponsor, attended to denounce the slur. *Id.* ¶¶ 100–102. A student (“Ms. Doe”) approached the CLS members and asked why the CLS constitution states that marriage is between one man and one woman. *Id.* ¶ 105. Mark Miller, a CLS member, and Professor Richard Seamon, the CLS faculty sponsor, explained that this reflects the Biblical definition of marriage—which this Court has described as “decent and honorable.” *Id.* ¶¶ 108–109; *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015). The parties respectfully disagreed, and the conversation went no further. Perlot Compl. ¶¶ 110–111.

A few days later, at a panel hosted by the American Bar Association, Ms. Doe complained about CLS’s religious beliefs and claimed that some of her fellow students had told her to “go to hell,” though without attribution. *Id.* ¶¶ 121–125. Another CLS student, Ryan Alexander, expressed his concern about the ability of CLS members to live consistent with their religious beliefs while on campus. *Id.* ¶¶ 127–128. Three days later, and with no investigation, the law school’s Office of Civil Rights issued no-contact orders to three CLS members, prohibiting them from having any *on- or off-campus* contact with Ms. Doe and instructing them to “sit on opposite sides of the room” in any classes they may have together. *Id.* ¶¶ 133–137, 145–146.

“Contact” included written, verbal, and non-verbal communication, as well as “social media,” “videos,” and “music.” *Id.* ¶ 136.

Professor Seamon emailed Ms. Doe, reaching out as the CLS advisor and her constitutional law professor, to offer his support. *Id.* ¶¶ 158–159. Ms. Doe thanked him and indicated she would follow-up during his office hours. Rather than do so, however, Ms. Doe emailed Professor Seamon, copying the law school’s dean and associate dean, and stated that her experience at the community event “caused [her] to fear for [her] life, . . . [she was] scared to be on campus, [she was] scared to be in your class” and that she “fear[ed Professor Seamon]” and “the CLS.” *Id.* ¶¶ 161-163, 169.

Following this exchange, and again without investigation, the school prohibited Professor Seamon from contacting Ms. Doe “outside of what is required for classroom assignments, discussion, and attendance.” *Id.* ¶¶ 174, 179–180. This again applied to written, verbal, and non-verbal contact including social media. *Id.* ¶ 177.

As a result, CLS students and Professor Seamon were forced to self-censor speech reflecting their religious beliefs in fear that their expression may result in additional sanctions. *Id.* ¶¶ 186–189.

C. Southern Illinois University, Edwardsville, Issued No-Contact Orders Based on Personal and Off-Campus Speech.

Maggie DeJong was a graduate student at Southern Illinois University Edwardsville (“SIUE”). Compl. ¶ 4, *DeJong v. Pembroke*, No. 3:22-cv-0112-NJR (S.D. Ill. May 31, 2022), ECF No. 1. Ms. DeJong holds beliefs consistent with her Christian faith, which she ex-

pressed in-class and on her personal social media accounts. *Id.* ¶¶ 5, 61, 62, 73, 81, 83. In February 2022, SIUE issued orders prohibiting her from “any contact” including “indirect communication” with three other students. *Id.* ¶¶ 110–114. The University acknowledged that the orders were not due to “a violation of University policy,” but rather were “intended to prevent interactions that *could be perceived* . . . as unwelcome, retaliatory, intimidating, or harassing.” *Id.* ¶ 118 (emphasis added).

Ms. DeJong subsequently learned that the orders were based, in part, on posts from her personal social media accounts. *Id.* ¶¶ 169, 176. Those included her personal views on topics such as religion, politics, and COVID-19 regulations. *Id.* ¶ 285. Based on these posts, SIUE accused Ms. DeJong of “misconduct” and “oppressive acts,” *id.* ¶ 264, and threatened her with “disciplinary consequences.” *Id.* ¶ 276.

SIUE’s misconduct, punishing speech on personal social media because other students claimed to feel “threatened,” demonstrates how pervasive threats to free speech have become on university campuses.

D. Florida State University Failed to Protect the Religious Speech of Its Student Senate President.

A devout Catholic, Jack Denton was involved in religious groups and student government at Florida State University. See Am. Compl., *Denton v. Thrasher*, No. 4:20-cv-00425-AW-MAF (N.D. Fla. Feb. 11, 2021), ECF No. 69 (“Denton Am. Compl.”). The student body elected Mr. Denton to the student senate, part of the campus student government, *id.* ¶ 60, an entity created by Florida law as part of the state university and subject to school oversight. Fla. Stat. § 1004.26(1);

Denton Am. Compl. ¶ 37. The senate then elected Mr. Denton as its president. Denton Am. Compl. ¶ 62.

During the summer after his election, Mr. Denton participated in a private group chat for members of the Catholic Student Union. *Id.* ¶¶ 63–69. When another student shared a fundraising video, Mr. Denton noted that some of the organizations involved advocated causes that contravened the Catholic Church’s teachings. *Id.* ¶¶ 69–70. Recognizing that this was an “emotional topic” he nonetheless felt obligated to share his defense of core Catholic religious beliefs in a Catholic forum. *Id.* ¶ 71.

His religious expression was not universally appreciated. One student took a screenshot of the private messages and shared them on social media. *Id.* ¶ 80. Another student senator brought a motion of no confidence, which failed but generated a massive public campaign. *Id.* ¶¶ 83, 89–90. A petition calling for Mr. Denton’s removal garnered over 6,000 signatures in less than two days. *Id.* ¶ 91. In response, Mr. Denton convened a special session of the senate to entertain a second no-confidence motion. *Id.* ¶ 92. Fellow senators denounced his remarks as “abhorrent,” “demeaning,” and “disgraceful.” *Id.* ¶¶ 103, 104, 107. Other senators said they needed to remove him to “do right by the LGBTQ+ community” and not “enabl[e] bigotry.” *Id.* ¶¶ 108, 109. The second no-confidence vote passed, removing Mr. Denton from office based solely on his religious speech. *Id.* ¶ 119.

The university’s rules prohibited actions that violate a student’s constitutional rights. *Id.* ¶ 39. Although university administrators retained authority to require student government to comply with university policy or state or federal law, they took no action to prevent retaliation against Mr. Denton for his religious speech. *Id.* ¶¶ 37–39, 126–28. His appeals to the

university fell on deaf ears, *id.* ¶¶ 125–126, and he was forced to file a lawsuit to vindicate his rights. See generally *id.* Ultimately, the parties settled and the university affirmed its commitment “to protecting the rights of its students to hold and practice their religious beliefs free of persecution.” Fla. State Univ. News, *Statement from Florida State University Office of Communications* (May 26, 2021) <https://bit.ly/31xpazX>.

* * *

ADF’s legal work illustrates a disturbing trend in higher education. ADF successfully challenged a university’s requirement that students post what amounted to a “trigger warning” for their proposed pro-life display, causing the students to self-censor and not set up their display. See generally Compl., *Students for Life at Miami Univ. of Ohio v. Trs. of Miami Univ. of Ohio*, No. 1:17-cv-804-TSB (S.D. Ohio Nov. 29, 2017), ECF No. 1. In another matter, a student at State University of New York-Geneseo (“SUNY”) was banned from teaching and field work because school officials were offended by videos posted on his personal social media discussing his religious and political views. And in another, ADF successfully challenged overbroad policies prohibiting speech that may create a “hostile or offensive environment,” *DeJohn*, 537 F.3d at 320; see also generally *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1010 (N.D. Cal. 2007) (student group endured months of investigation under a speech code because of complaints about their speech).

Universities’ rush to regulate off-campus speech that others *might* find offensive is particularly alarming. A university’s discretion to regulate student speech is far more limited than in the K-12 context because university students are adults who engage in

mature debate on campuses where they live, without school authorities acting as *in loco parentis* to protect them from disfavored ideas. *E.g.*, *McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232, 242–47 (3d Cir. 2010). Unfortunately, the foregoing examples—and Virginia Tech’s BIRT policy—demonstrate that universities have not taken this admonition to heart.

The petition presents a question of grave national significance. The Court should grant the petition and clarify that, when a university’s effort to censor “threatening” speech results in silencing protected viewpoints, it runs afoul of the First Amendment.

II. THE SUPPRESSION OF ACADEMIC SPEECH HAS BEEN A STEPPING STONE FOR TOTALITARIAN REGIMES.

The spread of speech codes at American universities is disquieting. But even more alarming are its parallels to some of the world’s most oppressive regimes. Totalitarian movements invariably target universities because they recognize the threat that free thinking poses to their hold on power. As the political philosopher Hannah Arendt observed:

The consistent persecution of every higher form of intellectual activity by the new mass leaders springs from more than their natural resentment against everything they cannot understand. Total domination does not allow for free initiative in any field of life, for any activity that is not entirely predictable.

The Origins of Totalitarianism 339 (Harcourt 1968) (1951).

Concurrently, the radicalization of students against existing norms, including encouraging the reporting of “antisocial” expression, has been a powerful tool for

authoritarians. See, e.g., David Curtis Wright, *The History of China* 168–69 (3d ed. 2020) (Mao Zedong “told a generation of Chinese youth that it was acceptable for them to rebel against authority figures” who were “revisionist or counterrevolutionary”).

A. The Soviet Union Persecuted University Professors Through Investigations, Denunciations, and Deportations.

From its inception, the Soviet Union silenced its intellectual elite from opposing the regime:

The Russian intelligentsia had for over a century been the traditional repository of the ideas of resistance to despotism and, above all, to thought control. It was only natural that the Purge struck at it with particular force.

Robert Conquest, *The Great Terror: A Reassessment* 291 (2008 ed.). Victor Serge, a revolutionary who later became a critic of Stalin, “discerned within the Russian Revolution the seeds of such serious evils as intolerance and the drive toward the persecution of dissent. These evils originated in an absolute sense of possession of the truth, grafted upon doctrinal rigidity.” John Bennett, *The Totalitarian Ideological Origins of Hate Speech Regulation*, 46 *Cap. Univ. L. Rev.* 23, 26 (2018) (quoting Victor Serge, *Memoirs of a Revolutionary* 374–75 (Peter Sedgwick trans., Oxford University Press 1980) (1951)).

Lenin targeted the intellectual elite soon after his ascent to power. In May 1922, he ordered the State Political Directorate to investigate the backgrounds and political leanings of academics, writers, and students. Lesley Chamberlain, *Lenin’s Private War: The Voyage of the Philosophy Steamer and the Exile of the Intelligentsia* 2–3 (2006). This culminated in the deportation of 60 intellectuals, including cultural critics,

religious thinkers, authors, journalists, and teachers. *Id.* at 3.

The targeting of university professors and students continued under Lenin and Stalin.³ Between 1921 and 1938, the Kiev Academy of Sciences was headed by 13 different Secretaries, all of whom were arrested. Conquest, *supra* at 293. During that same period, Kiev University had seven different Principals, six of whom were arrested. *Id.*

These denunciations and arrests reached a fever pitch during Stalin's purge in the mid-1930s, the "Great Terror." "Professors were a convenient class of suspect because they were in a position to recruit plausible terrorists in the persons of students—also a much-arrested class." *Id.* at 291–92. Indeed, it was remarked at a 1937 trial that the anti-regime terrorists sent to Siberia sought their membership "chiefly among the young people in the universities." *Id.* at 292.

History professors were frequently targeted with denunciations. *Id.* Konstatin Shteppa, a professor of ancient history, was targeted after describing Joan of Arc as "high-strung." *Id.* Because Joan was the heroine of the French Popular Front, Shteppa's comment was construed as hostile to that group and the global workers' movement generally. *Id.* Suspicion of Shteppa grew when he expressed an opinion about people who live in rural areas that was shared by Leon Trotsky. *Id.* Shteppa was eventually charged with and convicted of espionage on behalf of Japan. *Id.* The only "evidence" was that he had served as the head of the

³ See generally Sheila Fitzpatrick, The Nat'l Council for Soviet and E. European Rsch., *Practice of Denunciation in Stalinist Russia* (Dec. 19, 1994), bit.ly/45RqNV6.

“Byzanatological” Committee of the Ukrainian Academy of Scientists—Byzantium, like Japan, is in the “East”—and, in that role, had occasionally met with foreigners. *Id.*

Unlike many others, Shteppa survived the labor camp. *Id.* at 293. After his release in 1939, he reflected on the mass arrests of his colleagues:

I was naturally sorry for my friends, but I was not only sorry for them. I was also afraid of them. After all, they could say things about conversations we had had, in which we had not always expressed the orthodox view. There had been nothing criminal in these conversations; they had contained no attacks on the Soviet power. But the trivial criticisms and grumbles and expressions of resentment and disappointment which occurred in every conversation forced every Soviet citizen to feel guilty.

Id. at 292 (quoting F. Beck & W. Godin, *Russian Purge and the Extraction of Confession* 154 (1951)).

Stalin’s purges extended to scientists. For example, the research team at the Kharkov Physics Institute—“one of the most important of its kind in Europe”—was decimated by the Great Terror. *Id.* at 293. Multiple department heads, as well as the founder and the director of the institute, were arrested. *Id.* at 293–94. At the Kiev Academy of Sciences, when one professor was denounced at a meeting with his colleagues, another scientist spoke up in his defense, arguing: “Where class instinct speaks, proof is unnecessary.” *Id.* at 293. That scientist was later also arrested. *Id.*

The fear of denunciation took a heavy toll on Soviet society. Solzhenitsyn observed that, in the wake of Stalin’s purges, the gulags could only metastasize because “there was no [remaining] public opinion in the

Soviet Union.” Aleksandr I. Solzhenitsyn, I *The Gulag Archipelago, 1918–1956: An Experiment in Literary Investigation* 473 (trans. Thomas P. Whitney) (1974). Czeslaw Milosz, the poet and Nobel laureate who escaped from Communist Poland, described the challenges of working under constant fear of denunciation: “Work in an office or factory is hard not only because of the amount of labor required, but even more because of the need to be on guard against omnipresent and vigilant eyes and ears.” Czeslaw Milosz, *The Captive Mind* 76 (Jane Zielenko trans., Vintage Books ed. 1990) (1953).

Although all publications in the Soviet Union were subject to official state censorship, with the successful co-opting of the academy “most of the censorship was done by editors and authors themselves.” Bennett, *supra* at 52 (quoting Archie Brown, *The Rise and Fall of Communism* 575 (2009)). Soviet academics were “trained to know what [was] politically ‘correct’” and self-censored their work accordingly. *Id.* (quoting Leszek Kolakowski, *Totalitarianism and the Virtue of the Lie*, in *1984 Revisited: Totalitarianism in Our Century* 122, 129 (Irving Howe ed., 1983)). Genetics, for example, was declared to be a “false ‘bourgeois’ science,” and, even as late as the 1980s, Soviet textbooks contained little discussion of DNA. Areg Danagoulian, *My Soviet Past: Why We Need to be Vigilant About Academic Freedom* MIT Faculty Newsletter (Nov./Dec. 2021), bit.ly/3RnA9U8. Serge observed:

I have seen the intellectuals of the Left, responsible for editing reputable review and journals, refuse to publish the truth, even though it was absolutely certain, even though they did not contest it; but they found it painful, they preferred to ignore it, it was in contradiction with their moral and material interests[.]

Bennett, *supra* at 52 (quoting Serge, *supra* at 376).

B. The Nazi Party Took Over Germany's University System Through Ideological Faculty Appointments and Denunciations.

When Hitler ascended to power, he immediately sought to instill ideological purity in German higher education. His government appointed Nazi rectors, who then appointed “politically correct” deans, who then appointed ideologically friendly department heads. Klaus P. Fischer, *Nazi Germany: A New History* 347–48 (1995). Faculty members were required to attend a course offered by the National Socialist Lecturers Association that included physical and military training and political indoctrination. Thomas Childers, *The Third Reich: A History of Nazi Germany* 298 (2017).

The takeover of German higher education was swift. *Id.* at 297–98. Although there were few members of the Nazi party among university faculties before 1933, many professors were ideologically predisposed to support Hitler. *Id.* Many also seized the opportunity to settle old scores or to advance their career ambitions by denouncing their colleagues for pre-Nazi activities. Childers, *supra* at 297–98.

Because University faculty were subject to the Aryan Paragraph of the Civil Service law of 1933, many professors were forced out soon after the Nazis came to power. *Id.* at 298. By 1934, approximately 1,600 out of 5,000 German university faculty members—about one third of whom were Jewish or had Jewish spouses—had been dismissed. *Id.* The result was a sharp decline in the quality of German education and scholarship. Fischer, *supra* at 348.

Following the Nazi takeover, German professors “conformed so well and toed the party line so obediently that the regime did not have to spy extensively on teachers.” Fischer, *supra* at 348. German students also became increasingly radicalized and regularly denounced both their professors and their peers for perceived failures to follow the Nazi Party’s ideology. *E.g.*, U.S. Holocaust Mem’l Museum, *Request for the Investigation of Hans Peters*, bit.ly/3t0csHq (last accessed Sept. 15, 2023). By 1936, denunciations had become so frequent that the German minister of education “was moved to warn students to relax their vigilance and not subject their professors to political reliability tests.” Childers, *supra* at 301–02.⁴

Fear of denunciation fostered a culture of distrust. Ordinary Germans “knew well that rash, politically unacceptable remarks and corresponding behavior could lead to serious punishment and possibly endanger their lives.” Richard J. Evans, *Coercion and Consent in Nazi Germany*, 151 *The British Acad.* 53, 70 (2007), bit.ly/3PkXzXF (quoting Erica A. Johnson & Karl-Heinz Reuband, *What We Knew: Terror, Mass Murder, and Everyday Life in Nazi Germany: An Oral History* 359–60 (2005)). “In the course of time, all people became cautious. They simply didn’t speak with people anymore.” *Id.*

⁴ See also Richard J. Evans, *The Third Reich in Power 1933–1939*, at 292 (2005) (discussing student protests and denunciations).

C. The Chinese Cultural Revolution Began in Universities, Where Student Mobs Harassed, Imprisoned, and Tortured Their Professors.

In China, Mao Zedong initially encouraged free expression. In the mid-1950s, he told Chinese intellectuals that he welcomed their honest opinions: “[L]et a hundred flowers bloom, ... let a hundred schools of thought contend.” Gilbert King, *The Silence that Preceded China’s Great Leap into Famine*, Smithsonian Magazine (Sept. 26, 2012), bit.ly/44UfTMP. Academics took him at his word; students at Beijing University erected a “[d]emocratic [w]all” critical of the Communist Party. *Id.* Predictably, this did not last. Mao reversed course, explaining that “poisonous weeds have been growing side by side with fragrant flowers.” Mao Zedong, *Things Are Beginning to Change* (May 15 1957), bit.ly/46fRnqr. He subsequently launched an Anti-Rightist Campaign in 1957 that resulted in hundreds of thousands of people being either executed or sent to reeducation camps. King, *supra*.

A decade later, Mao launched the Cultural Revolution, in which he turned China’s disaffected youth against their elders. In May 1966, a professor at Beijing University protested the university president by placing large posters written with bold Chinese characters—*i.e.*, “big-character posters”—around campus. Wright, *supra* at 169. Mao endorsed the professor’s actions and the posters, which set off a firestorm on university campuses. *Id.* Thousands of students turned on their professors, walked out of their classrooms, and began staging mass protests. *Id.* A newspaper editorial called on protestors to “clear away the evil habits of the old society” by launching an assault on the “horde of monsters that have entrenched themselves in ideological and cultural positions.” Peking

Review, *Sweep Away All Monsters* (June 3, 1966), bit.ly/46a4CsT (last accessed Sept. 15, 2023). Mao called these student protestors his “Red Guard[].” Wright, *supra* at 169. He endorsed their slogan “to rebel is justified.” *Id.* And he urged them to destroy the “four olds”—old thinking, old culture, old customs, and old habits. Yang Jisheng, *The World Turned Upside Down: A History of the Chinese Cultural Revolution* 121 (2016).

The Red Guard employed a variety of tactics against anyone viewed as counterrevolutionary. Professors suspected of having Western sympathies were subjected to “struggle sessions,” where they were physically and verbally abused. Wright, *supra* at 173. Ji Xianlin, a professor at Beijing University, described one struggle session against an elderly professor:

The corridors were plastered with caricatures that depicted him as a spear-wielding devil with blood dripping from his teeth. Inside the conference room, the mob directed its own bloodthirsty frenzy at a helpless old man who wasn’t allowed to speak. Spit flew, as did false accusations. Someone put a wastepaper basket on his head. A Red Guard splashed a full bottle of blue ink down his shirt, making it look like a military camouflage shirt. Eventually he was ordered to go home.

Ji Xianlin, *The Cowshed: Memories of the Chinese Cultural Revolution* 15–16 (trans. Chenxin Jiang) (2016 ed.).

Another tactic was to storm into professors’ homes to search for anything suggesting western sympathies. Wright, *supra* at 173. Ji Xianlin describes the experience of being woken up in the middle of the night in his own home by six of his students:

I was hustled into the kitchen before I could get

dressed. My wife and elderly aunt were being held there already. We shivered in the piercing draft. I couldn't tell what they were thinking because the men were waving cudgels in our faces and we weren't allowed to speak.

Xianlin, *supra* at 38–39. After searching his home, the students forced him to hand over his address book, which they could later use to track down his family and friends. *Id.* at 40.

The Red Guard also set up makeshift prisons on university campuses, where it incarcerated professors determined to be “class enemies.” *Id.* at xix. Each day, inmates were assembled in rows, forced to memorize and recite quotations from Mao, and slapped in the face if they made a mistake. *Id.* at 3.

D. Other Totalitarian Regimes—Including Those in Cambodia, Venezuela, and Cuba—Suppressed Academic Speech to Shore Up Power.

In pursuit of its aim to transform Cambodia into a classless agrarian utopia, the Khmer Rouge targeted intellectuals and academics. A “pure” revolutionary consciousness could be inculcated only with the elimination of such “new people” and their counterrevolutionary ideas. George Chigas & Dmitri Mosyakov, Yale Univ., *Literacy and Education under the Khmer Rouge*, bit.ly/3PnmEB0 (last accessed Sept. 15, 2023). To avoid detection, “new people” aimed to appear less educated. They removed their glasses and stopped reading novels, the latter considered a capital offense. Those who failed to evade detection were tortured and killed. *Id.*

By eliminating, or otherwise silencing, criticism from “new people,” the Khmer Rouge was able to transform education and consolidate power. They taught

that the correct way to read was as a “peasant.” That is, “one should read in an uncritical and passive way, taking things at face value and not questioning the meaning or source of the text.” *Id.* Any who dared think critically was considered dangerous, and the silent were reminded to remain silent: “To keep you is no benefit, to destroy you is no loss.” Teeda Butt Mam, *Worms from Our Skin*, N.Y. Times (1997), nyti.ms/3PFcVYf. In time, “old” books were burned and school yards were turned into killing fields for those who espoused dangerous ideas. By the end of the Khmer Rouge’s brutal reign, 90% of schools had been destroyed and only 87 of the initial 1,000 academics remained. Paddy Dowling, *The Khmer Rouge Destroyed Education in Cambodia – Now the Country is Fighting Back*, *The Independent* (Dec. 6, 2019), bit.ly/46g1go3.

In an effort to institute a socialist “Bolivarian Revolution,” Venezuela’s Hugo Chavez too suppressed academic speech. Recognizing that universities and students were an institutional barrier to one-party absolutism, Chavez’s hold on academic speech grew increasingly repressive during his tenure. Even before university- and student-led opposition to his regime, Chavez worked to transform schools into partisan arms of the state. In 2003, he founded the Bolivarian University of Venezuela (“UBV”). The state-controlled university dramatically undercut academic autonomy; even today, faculty are appointed by the government, and the content of courses is subject to government scrutiny. Hugo Perez Hernaiz, *Higher Education in Venezuela: Skirting University Autonomy through the Creation of a Parallel System*, *Venezuelan Politics and Hum. Rts.* (July 19, 2018), bit.ly/44TIgeb. In other state-controlled schools, the government plays a role in the admissions process. Maria Laura Chang, *All*

University Places Will be Assigned Via the National Admission System, Efecto Cocuyo (Eng. Trans.), <https://bit.ly/3PkKWM3> (last accessed Sept. 15, 2023). And by design, UBV and other state-controlled schools divert considerable resources from autonomous schools, the most important source of government criticism. Hernaiz, *supra*.

When students at autonomous universities led opposition to Chavez, his regime deliberately crippled them financially, leading to the exodus of more than 2,000 scientists from Venezuela. Elliot Storm & Grace Karam, *A Post-Chavez Higher Education Conciliation?*, Univ. World News (Mar. 16, 2013), bit.ly/3RowAwN; see also Jaime Requena, *Venezuela's Scientist Drain*, N.Y. Times (Dec. 2, 2016), nyti.ms/3roP2e5. The regime interfered with the governance of autonomous universities by, among other ways, interrupting the election of their authorities and student bodies. Angelina Jaffé & Benjamin Scharifker, *Academic Freedom Under Threat in Venezuela*, Scholars at Risk (July 30, 2015), bit.ly/46i4EPz. More than 3,000 students were prosecuted for protesting, and professors were dismissed from their posts for criticizing the government. *Id.*; see also Anna Petherick, *Chavez squeezes scientific freedom*, Nature (Jan. 4, 2011), go.nature.com/45RGGed.

In Cuba, Fidel Castro likewise coopted academia to bolster his Communist dictatorship, permitting intellectuals to produce only work that advanced state interests. In 1961, he defined the parameters for scholarly debate: “inside the revolution – everything; outside the revolution – nothing.” Bureau of W. Hemisphere Affs., U.S. Dep’t of State, *Intellectual and Academic Freedom in Cuba* (Sept. 13, 2001), bit.ly/3RpiqueX. Students were warned that “education

in Cuba was exclusively for supporters of the revolution.” Kelsey Vidaillet, *Literacy, Censorship and Intellectual Freedom: The Independent Library Movement in Contemporary Cuba* 15, Fla. Int’l Univ., bit.ly/46eubsH (last accessed Sept. 18, 2023).

The Cuban government sought to minimize access to “dangerous” ideas. University admissions included a test to assess the applicant’s “revolutionary” attitude. Bureau of W. Hemisphere Affs., *supra*. Students in turn could gain access to “sensitive” works only with approval from the Communist party. *Id.* Private libraries housing banned materials were shut down. *Id.* And intellectual dissidents were imprisoned or killed.

Even more sinister than the outright suppression of academic speech was pernicious self-censorship, which effectively stifled any further academic debate—as in countless other totalitarian regimes. Novelist Reinaldo Arenas, who was sentenced to a year in prison for “ideological diversionism,” reflected:

It would be almost naïve to analyze the repression only in terms of the people the system has decided to sentence to prison or shoot. More subtle, more sinister, more immoral, more impossible to verify and more terrible, is the repression of silence, of compulsion, of threats, of daily extortions, the unceasing official menace, the fear unleashed through the perfect mechanisms that make of man not only a repressed person, but also a self-repressed one, not only a censored person, but a self-censored one, not only one watched over, but one who watches over himself....

Vidaillet, *supra* at 6.

* * *

These examples cast recent events on American campuses in a particularly troubling light. At Stanford Law, a federal judge was accosted by jeering, stamping, and howling students. The alleged offense? Opinions that students derided as “crimes against women, gays, blacks and ‘trans people.’” Stuart Kyle Duncan, *My Struggle Session at Stanford Law School*, Wall St. J. (Mar. 17, 2023), bit.ly/3Ziklnk. And at Yale Law School, administrators allowed students to scream at, harass, and threaten ADF General Counsel Kristen Waggoner for daring to speak about the *Uzuegbunam* case discussed above. Emily Crane, *Conservative Lawyer Slams Yale for ‘Cowering to Mob’ After Free Speech Panel Derailed*, N.Y. Post (Mar. 18, 2022), bit.ly/44USuuA.

While American universities have traditionally been respected as bastions of free speech and intellectual rigor, today university administrators rank among the worst suppressors of speech. And many students sadly embrace the opportunity to censor rather than debate.

As the tragically prophetic George Orwell wrote in an unpublished preface to *Animal Farm*, in Western civilization it is chiefly “the literary and scientific intelligentsia, the very people who ought to be the guardians of liberty, who are beginning to despise it, in theory as well as in practice.” George Orwell, *The Freedom of the Press: Orwell’s Proposed Preface to Animal Farm* (1945), reprinted in *The Times Literary Supplement* (Sept. 15, 1972), bit.ly/45ZjYRu. But university administrators should take heed. Orwell also predicted that, “if you encourage totalitarian methods, the time may come when they will be used against you instead of for you.” *Id.*

CONCLUSION

The petition should be granted.

Respectfully submitted,

JAMES A. CAMPBELL
JOHN J. BURSCH
TYSON LANGHOFER
TRAVIS C. BARHAM
ALLIANCE DEFENDING
FREEDOM
440 First Street, NW
Suite 600
Washington, DC 20001
(616) 450-4235

GORDON D. TODD*
MACKENZI J.S. EHRETT
CODY L. REAVES
AARON P. HAVILAND
DREW K. CYPHER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000
gtodd@sidley.com

ILYA SHAPIRO
TIM ROSENBERGER
MANHATTAN INSTITUTE
52 Vanderbilt Ave
New York, NY 20017
(212) 599-7000

Counsel for Amici Curiae

September 18, 2023

* Counsel of Record