
United States Court of Appeals
for the
Third Circuit

Case No. 18-2174

FREDERICK F. FAGAL, JR.,

Plaintiff-Appellant,

– v. –

MARYWOOD UNIVERSITY,

Defendant-Appellee.

ON APPEAL FROM AN ORDER ENTERED IN THE UNITED STATES
DISTRICT COURT FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA IN CASE NO. 3:14-CV-02404-ARC
A. RICHARD CAPUTO, U.S. DISTRICT JUDGE

**BRIEF OF *AMICUS CURIAE* FOUNDATION FOR
INDIVIDUAL RIGHTS IN EDUCATION IN SUPPORT OF
PETITION FOR REHEARING AND REHEARING *EN BANC***

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26, Foundation for Individual Rights in Education states that it does not have a parent corporation, nor does any publicly held corporation own 10% or more of its stock.

Dated: November 19, 2019

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INTEREST OF AMICUS CURIAE¹

The Foundation for Individual Rights in Education (“FIRE”) is a nonpartisan, nonprofit, tax-exempt education and civil liberties organization dedicated to defending student and faculty rights at our nation’s institutions of higher education. Since its founding in 1999, FIRE has successfully defended fundamental liberties including free speech, legal equality, due process, religious liberty, and sanctity of conscience on behalf of students and faculty nationwide. FIRE believes that if our nation’s universities are to effectively prepare students for success in our democracy, the law must remain clearly on the side of student and faculty rights. We respectfully submit this brief in furtherance of that mission.

FIRE has a significant interest in the petition for rehearing and rehearing *en banc* because the panel decision, if allowed to stand, will have a significant impact on American higher education. The panel’s ruling significantly compromises faculty members’ free speech and academic freedom at a critical juncture, so a correction on rehearing or rehearing *en banc* that protects faculty rights and further develops the law in this area is needed. Because FIRE defends faculty from threats to academic freedom on a daily basis, we know faculty and administrators nationwide will closely watch this Court’s decision.

¹ *Amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The panel's ruling threatens professors' free speech and academic freedom. While this case may seem to present a relatively narrow contract dispute between a private university and a tenured faculty member, the core dispute between Professor Frederick Fagal and Marywood University must be viewed in the broader context in which it arose. Around the country, the free speech and academic freedom of faculty are being eroded by students, administrators, and members of the public demanding censorship and by administrations caving to those demands. This capitulation seriously harms American higher education and ultimately the health of our democracy.

If faculty are not free to speak out regarding efforts to suppress free speech, important institutional dialogues about teaching, scholarship, politics, and more will be deeply chilled. Faculty already express reluctance to speak out and even to teach about sensitive issues for fear of professional repercussions. If the panel's ruling stands, the increasing chill on faculty expression will only intrude further as administrators around the country seize on the decision to justify disciplining faculty for public dissent on topics both internal and external to the university.

Indeed, FIRE's archives are replete with recent examples of faculty who have faced discipline and termination for public expressions of opinion on controversial issues, and new calls for censorship arise on a near-daily basis. FIRE urges this Court to protect free speech and academic freedom before these crucial rights are irrevocably lost.

ARGUMENT

I. Introduction

By failing to apply long established rules of contract construction and appellate review and allowing Marywood University to use disciplinary policy as a weapon to wage academic war against a dissenting faculty member, the panel invites and encourages universities throughout the nation to use such means to establish and enforce academic orthodoxy. To prevent such suppression of academic freedom, the petition for rehearing and rehearing *en banc* should be granted.

American higher education is at a critical juncture. In recent years, faculty have increasingly faced investigation, discipline, and even termination both for speaking about matters of public concern and for classroom speech wholly germane to the subjects they are teaching. This trend is already having a significant chilling effect on professors' willingness to address challenging issues with students and to contribute to the broader national discourse on important topics. *See, e.g.*, Jeannie Suk Gersen, *The Trouble with Teaching Rape Law*, NEW YORKER, Dec. 15, 2014,

available at <https://www.newyorker.com/news/news-desk/trouble-teaching-rape-law>; Edward Schlosser, *I'm a Liberal Professor, and My Liberal Students Terrify Me*, VOX, June 3, 2015, <https://www.vox.com/2015/6/3/8706323/college-professor-afraid>.

Universities' internal disciplinary decisions have gone terribly awry in recent years. Too often, these decisions are informed less by genuine pedagogical concerns and more by a desire to protect the "brand" of the increasingly corporatized university by kowtowing to the demands of students and others who believe they should have the right to decide what is and is not taught – and how things are and are not taught – at our colleges and universities. *See, e.g.*, David Schultz, *The Rise and Coming Demise of the Corporate University*, ACADEME, Sept-Oct. 2015, available at <https://www.aaup.org/article/rise-and-coming-demise-corporate-university> ("The defining characteristic of higher education in the last forty years has been its corporatization, which has transformed the university from an educational community with shared governance into a top-down bureaucracy that is increasingly managed and operated like a traditional profit-seeking corporation."); *see also, e.g.*, Samantha Harris, *Are Universities Abdicating Their Responsibility to Educate Students for Fear of Offending Them?*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., Nov. 10, 2017, <https://www.thefire.org/are-universities-abdicating-their-responsibility-to-educate-students-for-fear-of-offending-them>.

To ensure the survival of the American academy as a true marketplace of ideas, courts must take a critical look at how universities handle discipline of professors stemming from their expressive activity. The Supreme Court of the United States has long held that professorial academic freedom “is of transcendent value to all of us and not merely to the teachers concerned.” *Keyishian v. Bd of Regents*, 385 U.S. 589, 603 (1967). It is a principle that “[o]ur Nation is deeply committed to safeguarding,” *id.*, and upon which universities “should be extremely reticent to tread.” *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). In a decision vacating the conviction of professors for refusing to answer questions about alleged Communist ties during the Red Scare, the Court extolled the profound importance of academic freedom:

To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Id. This Court has also recognized the importance of protecting academic freedom. *See DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008) (“free speech [at universities] is of critical importance because it is the lifeblood of academic freedom”). Echoing this national commitment to academic freedom, Marywood vows to protect the “freedom of inquiry, open discussion and unrestricted exchange

of ideas as essential to the pursuit of knowledge” Faculty Handbook - Academic Freedom Policy Statement, Marywood Univ. (last accessed Nov. 18, 2019), <http://www.marywood.edu/facultyhandbook/policy.html?id=166625>. This Court should grant rehearing to hold Marywood true to its word.

II. The panel’s ruling threatens free speech and academic freedom

The panel’s ruling threatens free speech and academic freedom by applying the rules of contract construction and appellate review in a way that strongly disfavors faculty members, thereby inviting pretextual terminations. Professor Fagal’s only “offense” was publicly criticizing University administrators for improperly removing flyers promoting an event featuring a purportedly controversial speaker — itself a blatant affront to the University’s own avowed support for free speech and academic freedom.²

In this way, faculty everywhere can be assured that universities will be able to use disciplinary policy to their maximum disadvantage whenever they engage in speech disfavored by the administration.

Nowhere is the impact of the panel’s thumb on this delicate balance laid out more plainly than in the dissenting opinion of Judge Stephanos Bibas:

² Professor Fagal expressed his frustration over the removal of the flyers by creating a satirical video using a widely parodied scene from the film “Downfall” by depicting University administrators as Nazi officers in Hitler’s inner circle.

Marywood wants to read a whole set of unwritten procedures into a single, arguably cryptic sentence. As the Supreme Court has noted, when interpreting statutes, we should not look for “elephants in mouseholes.” See *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001). Likewise, the Pennsylvania Supreme Court instructs us to avoid coming up with an “interpretation, which is based exclusively on the way one sentence in the [pol-icy] was written. Simply put, the parties’ contractual intent cannot be gleaned by ignoring all but one sentence in the [policy], and then reading that sentence out of context.” *Murphy v. Duquesne Univ. of the Holy Ghost*, 777 A.2d 418, 432 (Pa. 2001). And all the context here cuts against Marywood’s reading: the policy’s text, structure, interlocking provisions, and the Policy Statement’s repeated emphasis on creating a single set of “corrective and not punitive” procedures. App. 46.

Dissenting Op. at 6. Allowing this reading, as the panel did, effectively subjected Professor Fagal to the whim of the University administration — such whim being the sworn enemy of academic independence. If such summary termination is an acceptable consequence of public expression of dissent, then academic freedom is a dead letter. To protect academic freedom, presumptions governing the construction of employment contracts for tenured faculty must weigh in their favor, as both state law and the rules governing federal appellate review required here.

While this case may seem like a narrow state-law contract dispute between a private university and its employee, this Court’s decision will have far-reaching consequences beyond Marywood University and the state of Pennsylvania. Indeed, media outlets have closely followed the dispute. See, e.g., *Professor fired over Nazi satire video can proceed with suit.*, ASSOCIATED PRESS., Oct 13, 2017, available at <https://apnews.com/f722ec829f2745babad16bd9c39ec525>; Terrie Morgan-

Besecker, *Court Upholds Verdict Against Marywood Professor Fired For Creating Nazi Video*, THE TIMES-TRIBUNE, Oct. 22, 2019, available at <https://www.thetimes-tribune.com/news/court-upholds-verdict-against-marywood-professor-fired-for-creating-nazi-video-1.2548876>; Terrie Morgan-Besecker, *Judge Rules Marywood University Did Not Violate Professor's Contract*, THE TIMES-TRIBUNE, Apr. 26, 2018, available at <https://www.thetimes-tribune.com/news/judge-rules-marywood-university-did-not-violate-professor-s-contract-1.2329929>; Terrie Morgan-Besecker, *Trial starts for professor fired for posting offensive video*, THE CITIZENS' VOICE, Apr. 24, 2018, available at <https://www.citizensvoice.com/news/trial-starts-for-professor-fired-for-posting-offensive-video-1.2329045>. This case is being watched because faculty are increasingly facing calls for discipline over speech protected by the tenets of free speech and academic freedom.

While FIRE has received complaints of censorship from faculty since our founding in 1999, such cases have increased noticeably in recent years. In August 2017, the University of Tampa terminated visiting professor Ken Storey after he tweeted, from his personal account, that Hurricane Harvey may have been “instant karma” for Texas’ support of the Republican Party. A university spokesman stated that “Storey was fired after the school weathered an outpouring of online outrage over the comments.” Associated Press, *University Fires Professor Who Blamed Harvey on GOP Vote*, WASH. POST, Aug. 29, 2017, available at

<https://www.washingtonpost.com/nationallhigher-educationluniversity-fires-professorwho-blamed-harvey-on-gop-vote/2017/08/29/26296f7e-8cd4-11e7-9c53-6a169beb0953story.html>.

In June 2017, Trinity College placed Professor John Eric Williams on leave after Williams re-posted a controversial essay, titled “Let Them Fucking Die,” on his Facebook page. The essay — which was not written by Williams — discussed the actions of a “queer black woman” who saved the life of Rep. Steve Scalise, “one of the most anti-LGBTQ politicians in Washington,” after he was shot during a Congressional baseball practice. The piece urged that aid should not be offered to people “who practice bigotry” and advocated that when such people are in need of aid, the proper response is to “do nothing.” *See* Letter from Adam B. Steinbaugh, Senior Program Officer, Found. for Individual Rights in Educ., to Joanne Berger-Sweeney, President, Trinity Coll., July 3, 2017, *available at* <https://www.thefire.org/fire-letter-to-trinity-college-july-3-2017>.

That same month, Essex Community College suspended (and ultimately fired) communications professor Lisa Durden over comments she made during an appearance on Fox News, in which she argued in support of the right of Black Lives Matter organizers to establish black-only protest spaces. Colleen Flaherty, *Suspended for Standing Up to Fox News?*, INSIDE HIGHER ED, June 21, 2017, <https://www.insidehighered.com/news/2017/06/21/college-allegedly-suspends->

communications-adjunct-comments-about-race-fox-news. Essex's president announced that Durden's "employment with [Essex] and potential impact on students required our immediate review into what seemed to have become a very contentious and divisive issue," and that "[i]n consideration of the College's mission, and the impact that this matter has had on the College's fulfillment of its mission, we cannot maintain an employment relationship with the adjunct." Statement from Essex Community College President Anthony Munroe, June 23, 2017, *available at* <http://www.essex.edu/pr/2017/06/23/statement-from-essex-county-college-president-anthony-e-munroe-3>.

In March 2017, Evergreen State College professor Bret Weinstein sent an email to students and faculty objecting to a planned "Day of Absence" at the college that "invited" white students, staff, and faculty to voluntarily leave campus for a day. Bret Weinstein, *The Campus Mob Came for Me - and You, Professor, Could Be Next*, WALL ST. J., May 30, 2017, *available at* <https://www.wsj.com/articles/the-campus-mob-came-for-me-and-you-professor-could-be-next-1496187482>. The responses to his email were so vitriolic that the chief of police told Weinstein he was not safe on campus. Drew Mikkelson, *Professor Told He's Not Safe on Campus After College Protests*, KING 5 NEWS, May 27, 2017, *available at* <http://www.king5.com/news/local/olympia/professor-told-hes-not-safe-on-campus-after-college-protests/443098670>. Weinstein and his wife, also an Evergreen State

professor, resigned in September. Abby Spegman, *Evergreen Professor at Center of Protests Resigns; College Will Pay \$500,000*, SEATTLE TIMES, Sept. 16, 2017, available at <https://www.seattletimes.com/seattle-news/evergreen-professor-at-center-of-protests-resigns-college-will-pay-500000>.

The attack on professors' rights has also reached the classroom, where faculty are increasingly unable to tackle sensitive or difficult issues without facing calls for discipline.

In May 2017, Howard University law professor Reginald Robinson was deemed responsible for sexual harassment after two students complained about a test question involving a Brazilian wax and an upset client. After a 504-day investigation, administrators determined that Robinson would be required to undergo mandatory sensitivity training, prior administrative review of future test questions, and classroom observation. Robinson also received a stern warning that any further "violations" of the university's Title IX policies may result in his termination. See Press Release, Found. for Individual Rights in Educ., *Ouch! Brazilian Wax Test Question Nets Howard University Professor a 504-day Title IX Investigation, Sanctions*, July 6, 2017, available at <https://www.thefire.org/a-sticky-situation-at-howard-university-brazilian-wax-test-question-nets-professor-a-504-day-title-ix-investigation-sanctions>.

In November 2015, University of Kansas communications professor Andrea Quenette held an in-class discussion of a forum held the previous day about racial and cultural issues affecting the campus. Afterwards, eight graduate students — some of whom were not even in Quenette’s class — filed complaints against Quenette arguing that Quenette’s comments during the discussion were “unacceptably offensive” and violated KU’s Racial & Ethnic Harassment Policy. Quenette was subsequently placed on paid leave, pending the outcome of a university investigation. Letter from Peter Bonilla, Dir., Individual Rights Def. Program, Found. for Individual Rights in Educ., to Bernadette Gray-Little, Chancellor, Univ. of Kan., Feb. 3, 2016, *available at* <https://www.thefire.org/fire-letter-to-university-of-kansas>.

In the fall of 2014, Rowan College at Gloucester County terminated sociology professor Dawn Tawwater after students complained about her use of “indecent language” in the classroom. She was terminated after refusing to sign a "last chance agreement" that would have required her to publicly apologize to her classes and to refrain from using “indecent language” in the future. Letter from Peter Bonilla, Dir., Individual Rights Def. Program, Found. for Individual Rights in Educ., to Frederick Keating, President, Rowan Coll. at Gloucester County, Oct. 29, 2014, *available at* <https://www.thefire.org/fire-letter-to-rowan-college-at-gloucester-county-october-29-2014>.

In 2012, Appalachian State University sociology professor Jammie Price was put on administrative leave after students complained about her speech in the classroom. Among other things, several student-athletes complained after Price criticized student-athletes and referenced recent allegations of sexual assault at Appalachian State involving student-athletes. Letter from Peter Bonilla, Assoc. Dir., Individual Rights Def. Program, Found. for Individual Rights in Educ., to Michael A. Steinback, Chair, Bd. of Trustees, Appalachian State Univ., Mar. 19, 2013, *available at* <https://www.thefire.org/fire-letter-to-appalachian-state-university-board-of-trustees-chair-michael-a-steinback-march-19-2013>.

If allowed to stand, the panel's ruling will erode the already tenuous expressive rights of faculty at America's colleges and universities. By granting administrators judicial cover to discipline dissenting, outspoken, or simply controversial faculty for speaking their minds, letting the panel ruling stand would impoverish higher education.

CONCLUSION

The outcome of this case will have a significant impact on the rights of faculty nationwide. We urge this Court to grant the petition in order to consider these critical issues.

Respectfully submitted,

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Dated: November 19, 2019

CERTIFICATION OF ADMISSION TO BAR

I, Daniel L. Schmutter, certify as follows:

1. I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

By: /s/ Daniel L. Schmutter
Daniel L. Schmutter

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(b)(4) because this brief contains 2,597 words, excluding the parts of the brief exempted by the Local Rule 29.1(b) and Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using the 2008 version of Microsoft Word in 14 point Times New Roman font.

This brief complies with the electronic filing requirements of Local Rule 31.1(c) because the Vipre Virus Protection, version 3.1 has been run on the file containing the electronic version of this brief and no viruses have been detected.

Dated: November 19, 2019

By: /s/ Daniel L. Schmutter
Daniel L. Schmutter

CERTIFICATE OF FILING AND SERVICE

I certify that on this 19th day of November 2019, the foregoing brief was filed through CM/ECF system and served on all parties or their counsel of record through the CM/ECF system.

Dated: November 19, 2019

By: /s/ Daniel L. Schmutter
Daniel L. Schmutter