



# FIRE

Foundation for Individual  
Rights and Expression

October 27, 2022

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**URGENT**

*Sent via U.S. and Electronic Mail (ftg2@psu.edu)*

Dear Mr. Guadagnino:

We appreciate yesterday's response to our letter of October 25, which detailed our serious concerns about Penn State's cancellation of Monday's Uncensored America event and the concurrent protest outside. We also recognize the university's substantial and laudable efforts in advance of and during the event to protect students' expressive rights. However, the law provides very specific requirements about how government entities like public universities must respond when violence threatens to silence protected speech. With the law as our metric, Penn State came up short on Monday.

The Supreme Court has held in no uncertain terms that "a function of free speech under our system of government is to invite dispute," and that it "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."<sup>1</sup> In 2015, the United States Court of Appeals for the Sixth Circuit considered a scenario functionally identical to the one Penn State faced Monday, in which "a group of self-described Christian evangelists preaching hate and denigration to a crowd of Muslims, some of whom responded with threats of violence," prompted police to "remove[] the evangelists to restore the peace."<sup>2</sup>

The *Bible Believers* court clearly reaffirmed the speakers' right to express themselves "even when that speech is ... designed to cause offense, and, as a result of such offense, arouses violent retaliation."<sup>3</sup> The court also delineated the "obligations and duties of law enforcement

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<sup>1</sup> *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

<sup>2</sup> *Bible Believers v. Wayne Cty.*, 805 F.3d 228, 234 (6th Cir. 2015) (en banc).

<sup>3</sup> *Id.*

personnel or public officials who, in the exercise of the state’s police power, seek to extinguish any breaches of the peace that may arise when constitutionally protected speech has stirred people to anger, and even to violence,”<sup>4</sup> making clear that:

When a peaceful speaker, whose message is constitutionally protected, is confronted by a hostile crowd, the state may not silence the speaker as an expedient alternative to containing or snuffing out the lawless behavior of the rioting individuals. Nor can an officer sit idly on the sidelines—watching as the crowd imposes, through violence, a tyrannical majoritarian rule—only later to claim that the speaker’s removal was necessary for his or her own protection.<sup>5</sup>

Accordingly, state action limiting protected speech in the name of public safety will be deemed unconstitutional “unless the restriction is narrowly tailored to be the least-restrictive means available” to do so.<sup>6</sup> When balancing these important interests, “the scale is heavily weighted in favor of the First Amendment,” and shutting down events is almost never the least restrictive means of addressing potential disruptions.<sup>7</sup>

On Monday, Penn State did not meet this demanding standard.

You cite among the reasons for canceling the event that “an intense environment of anger and hostility” among protesters arose, and that the crowd was “significantly larger, more angry, and more unruly, than in 2021” during a similarly controversial campus event. Under the constitutional principles set out above, these facts cannot form a lawful basis for shutting down an expressive event.

Moreover, the First Amendment’s right of freedom of assembly protects students’ right to gather in large numbers, and its guarantee of free expression includes the right to express anger, hostility, or to be otherwise uncivil while doing so.<sup>8</sup> This is because speech serves not only to convey “ideas capable of relatively precise, detached explication,” but also a second, “communicative function” in the “emotive . . . force” conveying “otherwise inexpressible emotions.”<sup>9</sup> “Speech is often provocative and challenging,” and “may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.”<sup>10</sup>

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 252-53.

<sup>6</sup> *Id.* at 248.

<sup>7</sup> *Id.* at 252, 248 (“Punishing, removing, or by other means silencing a speaker due to crowd hostility will seldom, if ever, constitute the least restrictive means available to serve a legitimate government purpose.”).

<sup>8</sup> See *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1020 (N.D. Cal. 2007) (striking down university civility policy for “prohibiting the kind of communication that it is necessary to use to convey the full emotional power with which a speaker embraces her ideas or the intensity and richness of the feelings that attach her to her cause.”) Even to the extent that the college has an obligation to address harassment, its legal obligations do not impose a “general civility code.” *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

<sup>9</sup> *Cohen v. California*, 403 U.S. 15, 26 (1971).

<sup>10</sup> See *Terminiello*, 337 U.S. at 4.

Consider: While an anti-war protester could choose to give a measured, detailed speech about his opposition to the draft, the First Amendment also protects his right to wear a jacket emblazoned with the phrase “Fuck the draft.”<sup>11</sup> Determining whether a political issue, idea, or speaker deserves to be confronted with sober rhetoric or angry, screaming condemnation is a choice left to the individual—not the government. And when, as here, students engage in protest over political issues, the First Amendment’s protection is “at its zenith.”<sup>12</sup>

This principle is particularly applicable in a university setting where ideological conflict is not only expected, but encouraged. Certainly, the “wide latitude accorded by” the First Amendment to do so “is not without its costs in terms of the risks to the maintenance of civility and an ordered society,” and those risks have often been borne “on the campus and elsewhere.”<sup>13</sup> But the government is required to bear those costs. PSU had an obligation to the protesters to expend whatever resources necessary to remove the lawbreakers among them, and to the event-planners and -participants not to allow the vociferousness of the protestors to interfere with or preclude the event unless that was the only option.

On the subject of costs, we seriously question to what extent a multi-billion-dollar institution like Penn State,<sup>14</sup> combined with its “federal, state and local law enforcement partners” to whom your letter refers, can credibly claim to lack the resources and expertise to address (as you put it) “one known physical altercation” among a crowd of hundreds otherwise peaceful protesters. This is particularly questionable where video of the separate “chemical spray” incident you cite showed two uniformed police officers failing to react as the apparent assault unfolds from just a few feet away and while students scream for their help.<sup>15</sup> That incident also appears to have happened *after* the decision was made to cancel the event, in which case it should not have contributed to that decision.

Finally, the fact that “[o]ne of the invited speakers came out into the crowd” and thereby may have “played a role in inciting anger among the protestors” also cannot form a lawful basis for canceling an expressive event. Speech is presumptively protected unless it falls into one of the “historic and traditional categories” of unprotected speech, one of which is “incitement”—but that term has an exacting legal definition.<sup>16</sup> That one of the event’s speakers, Alex Stein, walked among the peaceful protesters and spoke to or laughed at them does not approach the definition of incitement, which requires “(1) the speech explicitly or implicitly encouraged the use of violence or lawless action, (2) the speaker intends that his speech will result in the use of

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<sup>11</sup> *Id.* at 16.

<sup>12</sup> *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 186–87 (1999) (quoting *Meyer v. Grant*, 486 U.S. 414, 425 (1988)).

<sup>13</sup> *Healy v. James*, 408 U.S. 169, 194 (1972).

<sup>14</sup> *Campaign surpasses goal, raises \$2.166 billion to create ‘A Greater Penn State,’* PENN. STATE UNIV. (April 23, 2022), <https://www.psu.edu/news/administration/story/campaign-surpasses-goal-raises-2166-billion-create-greater-penn-state>.

<sup>15</sup> Ford Fischer (@FordFischer), TWITTER VIA PERISCOPE (Oct. 24, 2022, 5:55 PM), <https://twitter.com/FordFischer/status/1584664950383206400?s=20&t=z8zomzsPv8U7hntdU46ppg> (Incident begins at approx. 55:15.)

<sup>16</sup> *United States v. Stevens*, 559 U.S. 460, 468–69 (2010) (quoting, in part, *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991)).

violence or lawless action, and (3) the imminent use of violence or lawless action is the likely result of his speech.”<sup>17</sup>

President Bendapudi’s statement posted Tuesday laments that after Penn State was “forced” to cancel the event, “the message too many people will walk away with is that one can manipulate people to generate free publicity, or that one can restrict speech by escalating protest to violence.” But had Penn State met its obligation to use the law enforcement resources at its disposal to counter the one or two isolated acts of violence among otherwise peaceful protesters, the event need not have been restricted at all. Because of Penn State’s failure to protect students’ First Amendment rights, students *will* walk away from Monday night with a message about what it means to express themselves on Penn State’s campus: that those who peacefully protest risk being assaulted while police stand idly by and watch, while those who threaten or engage in violence have ultimate control over which ideas are allowed on campus.

We trust this is not the message Penn State wants to send. We urge the university to look again at its First Amendment obligations, to learn from this experience to ensure Monday’s unfortunate events are never repeated, and to publicly assure students that their expressive events will not be canceled by the university or violence.

Sincerely,



Alex Morey  
Director, Campus Rights Advocacy

Cc: Neeli Bendapudi, President  
Charlie Noffsinger, Associate Vice President for University Police & Public Safety

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<sup>17</sup> See *Bible Believers*, 805 F.3d at 246 (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)) (footnote omitted).