



FIRE

Foundation for Individual
Rights and Expression

June 8, 2023

Richard Corcoran
Interim President
New College of Florida
Cook Hall 110
5800 Bay Shore Road
Sarasota, Florida 34243

URGENT

Sent via Next Day Delivery and Electronic Mail (rcorcoran@ncf.edu)

Dear Interim President Corcoran:

FIRE¹ is deeply concerned by New College's decision not to renew Visiting Assistant Professor of History Erik Wallenberg's contract, apparently due to his teaching, views, and past criticism of university leadership.² Retaliating against public college faculty for their First Amendment-protected expression is unlawful. While a public institution may generally decline to renew a contract for a good reason, an unwise reason, or no reason at all, it cannot do so for a *retaliatory* reason—including for the expression of protected speech.³ And even if a faculty member is non-renewed for a viewpoint-neutral reason, state actors should avoid implying otherwise, lest students and faculty be chilled from exercising their constitutional right to free expression.

Yet statements by New College trustee Christopher Rufo this week about Wallenberg's non-renewal, as well as the circumstances surrounding his dismissal, strongly suggest that disagreement with Wallenberg's viewpoints in teaching and extramural speech were

¹ For more than 20 years, FIRE—the Foundation for Individual Rights and Expression—has defended freedom of expression, conscience, and religion, and other individual rights on America's college campuses. You can learn more about our recently expanded mission and activities at thefire.org.

² Christopher F. Rufo (@realchrisrufo), TWITTER (June 6, 2023, last edited 6:36 PM), <https://twitter.com/realchrisrufo/status/1666212614605799424>.

³ See, e.g., *Perry v. Sindermann*, 408 U.S. 593, 598 (1972) (“[T]he nonrenewal of a nontenured public school teacher's one-year contract may not be predicated on his exercise of First and Fourteenth Amendment rights.”) (internal citations omitted); see also *Jones v. Matkin*, ___ F.Supp.3d ___, 2022 U.S. Dist. LEXIS 153258 (E.D. Tex.) (institutions violate faculty members' First Amendment rights by non-renewing them for protected activity).

motivating factors in the decision not to renew his contract. At a very minimum, Rufo seems to want the public to believe New College is ousting Wallenberg precisely because of his views.

“New College of Florida has let the contract for visiting professor Erik Wallenberg expire,” Rufo tweeted on Tuesday.⁴ “I wish Professor Wallenberg well and hope his work on ‘radical theatre and environmental movements’ finds a more suitable home.”⁵

In a second tweet, Rufo wrote:⁶

It is a privilege, not a right, to be employed by a taxpayer-funded university. New College will no longer be a jobs program for middling, left-wing intellectuals. We are reviving the great classical liberal arts tradition and setting a new standard for public education.

Rufo linked his Tuesday tweets to an earlier series from March 7,⁷ in which he criticized a *Teen Vogue* op-ed Wallenberg co-authored with New College visiting English professor Debarati Biswas. In the piece, the professors harshly criticized both Rufo and Gov. Ron DeSantis, who had just appointed Rufo to the New College trusteeship in January.

“What the DeSantis administration is trying to do, in brief,” Biswas and Wallenberg wrote, “is force a conservative Christian model of education onto our public college, attempting to choke out hard-won academic freedom.”⁸

Rufo’s March 7 tweet included a screengrab of the op-ed, along with the following commentary:⁹

[T]wo New College professors take to the pages of *Teen Vogue* to criticize the higher education reform efforts in Florida. There is nothing that demonstrates more seriousness of purpose and dedication to dispassionate scholarship than writing for *Teen Vogue*.

He then tweeted screengrabs of the professors’ CVs, writing:¹⁰

⁴ Christopher F. Rufo, *supra* note 2.

⁵ *Id.*

⁶ Christopher F. Rufo (@realchrisrufo), TWITTER (June 6, 2023, 6:39 PM), <https://twitter.com/realchrisrufo/status/1666213227079041025>.

⁷ Christopher F. Rufo (@realchrisrufo), TWITTER (March 7, 2023, 1:03 PM), <https://twitter.com/realchrisrufo/status/1633166543281614850/photo/1>.

⁸ Debarati Biswas and Erik Wallenberg, *New College of Florida: The Conservative Christian Takeover by Ron DeSantis, Chris Rufo*, TEEN VOGUE (Mar. 6, 2023), <https://www.teenvogue.com/story/new-college-of-florida-ron-desantis>.

⁹ Christopher F. Rufo *supra* note 2.

¹⁰ Christopher F. Rufo (@realchrisrufo), TWITTER (March 7, 2023, 1:03 PM), <https://twitter.com/realchrisrufo/status/1633166544753819648>.

Let's look at their CVs. Oh: "How to Subvert the Capitalist White-Supremacist University," "radical Black feminism," "queer theory," "Staging Environmental Racism," "radical theatre and environmental movements." Pure left-wing Mad Libs. Luckily, both are visiting professors.

To the extent questions remain regarding whether New College's leadership intends to filter faculty appointments or classroom discussion based on its viewpoint, Rufo's assertion—that the college has taken adverse employment action against a public faculty member in retaliation for his constitutionally-protected views, teaching, and criticisms—is a disappointing answer.

New College administrators must first understand they are government actors, bound to uphold students' and faculty members' constitutional rights.¹¹ The "bedrock principle underlying the First Amendment . . . is that the government may not prohibit the expression of an idea simply because society"—or a public college administrator, for that matter—"finds the idea itself offensive or disagreeable."¹²

It is well-settled that faculty at public universities and colleges have expressive rights outside the classroom, including the right to criticize their institutions' leaders. New College faculty do not "relinquish [their] First Amendment rights to comment on matters of public interest by virtue of government employment,"¹³ instead retaining the right to speak as private citizens on matters of public concern,¹⁴ including on the functioning of a public college.¹⁵ Accordingly, a public college cannot penalize a faculty member for speaking as a private citizen on a matter of public concern unless it demonstrates that its interests "as an employer, in promoting the efficiency of the public services it performs through its employees" outweigh the interest of the employee, "as a citizen, in commenting upon matters of public concern[.]"¹⁶ And when a "public employee takes [their] concerns to persons outside the work place"—to the pages of *Teen Vogue*, for example—"those external communications are ordinarily not made as an employee, but as a citizen."¹⁷

The broad protections of academic freedom have also been found to encompass faculty's extramural speech. Courts have held "the doctrine of academic freedom comprises three elements: teaching; research; and extramural comments,"¹⁸ and extramural remarks—like Wallenberg's editorial—are protected by academic freedom unless the remark "clearly demonstrates the faculty member's unfitness for his or her position" in light of their "entire

¹¹ It has long been settled law that the First Amendment is binding on public universities. *See, e.g., Healy v. James*, 408 U.S. 169, 180 (1972).

¹² *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

¹³ *Connick v. Myers*, 461 U.S. 138, 140 (1983).

¹⁴ *Bradley v. James*, 479 F.3d 536, 538 (8th Cir. 2007).

¹⁵ *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) ("Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community[.]").

¹⁶ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

¹⁷ *Davis v. McKinney*, 518 F.3d 304, 313 (5th Cir. 2008).

¹⁸ *McAdams v. Marquette University*, 914 N.W.2d 708, 730-731 (Wis. 2018).

record as a teacher and scholar.”¹⁹ This “stringent standard” is “[s]o strict, in fact, that extramural utterances rarely bear upon the faculty member’s fitness for the position.”²⁰

Conversely, courts across the country have held that “retaliatory speech” by public university administrators violates the First Amendment²¹ where it “intimat[es] that some form of punishment or adverse regulatory action”²² may follow, and that the “mere *threat* of harm can be an adverse action, regardless of whether it is carried out because the threat itself can have a chilling effect.”²³

Rufo’s repeated assertions that decisions by New College’s administration take into consideration the public statements and viewpoints of faculty, coupled with subsequent action by New College, would chill any reasonable faculty member from expressing views, extramurally or in class, that might cost them their jobs.

This chilling effect is forbidden by the Constitution, which bars state officials from imposing the “pall of orthodoxy over the classroom.”²⁴

The First Amendment protects public faculty members’ expressive rights, including the right of academic freedom, which the Supreme Court has cited as of “special concern to the First Amendment,” a value “[o]ur Nation is deeply committed to safeguarding,” and a foundational principle “of transcendent value to all of us.”²⁵ Academic freedom, free from influence by powerful political forces, ensures the intellectual health of our nation. As the Court wrote in stark terms more than a half century ago:²⁶

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. ... 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.

¹⁹ *Id.* at 731–32, citing AAUP, Policy Documents and Reports, Committee A Statement on Extramural Utterances 31 (11th ed. 2014).

²⁰ *Id.* at 732 (cleaned up).

²¹ *Perry*, 408 U.S. at 598.

²² *Greisan v. Hanken*, 925 F.3d 1097, 1114 (9th Cir. 2019); *see also, Robles v. Aransas Cnty.*, No. 2:15-CV-495, 2016 U.S. Dist. LEXIS 103119, at *19 (S.D. Tex. Aug 5, 2016) (the “question is whether . . . the defendant made statements that could be interpreted as intimating that some form of punishment or adverse regulatory action would follow. . .”).

²³ *Brodheim v. Cry*, 584 F.3d 1262, 1970 (9th Cir. 2009) (emphasis in original).

²⁴ *Keyishian*, 385 U.S. at 603.

²⁵ *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

²⁶ *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

By non-renewing faculty with views they personally disfavor—or purporting to do so—Rufo and New College impose precisely that “pall of orthodoxy” forbidden by the First Amendment.²⁷ To the extent this ideological purge is an effort “reviv[e] the great classical liberal arts tradition,” doing so by expelling “left-wing intellectuals” is deeply illiberal. New College, in other words, is not restoring heterodoxy, but replacing one orthodoxy with another.²⁸

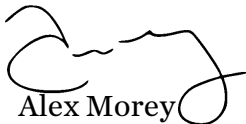
If public college trustees like Rufo disagree with the teaching, views, or criticisms of certain New College faculty, they may employ their own expressive rights to voice their concerns—an option with which Rufo is familiar and not hesitant to use, as indicated above. Criticism is a form of “more speech,” which the First Amendment enshrines as the antidote to state-sanctioned censorship.²⁹ Conversely, the Constitution forbids government actors from wielding the power of the state to ban ideas, words, or criticisms they personally dislike.

We remind you that public college administrators who display “reckless or callous indifference to the federally protected rights of others”³⁰ and violate clearly established law will not enjoy qualified immunity and can be personally liable for monetary damages for violating First Amendment rights.³¹

Given that Rufo has repeatedly expressed willingness to violate the First Amendment to force out New College faculty with views he disfavors, New College leadership must take swift action to ensure faculty are not punished or censored because of their views, and bring the college’s practices in line with its binding, unequivocal constitutional obligations.

We request a substantive response to this letter no later than the close of business on Thursday, June 15, 2023.

Sincerely,



Alex Morey
Director, Campus Rights Advocacy

Cc: Debra A. Jenks, Chair, Board of Trustees
Office of the General Counsel

²⁷ *Keyishian*, 385 U.S. at 603.

²⁸ *Id.*

²⁹ *Whitney v. California*, 274 U.S. 357, 377 (1927).

³⁰ *Smith v. Wade*, 461 U.S. 30, 56 (1983).

³¹ See *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Gerlich v. Leath*, 861 F.3d 697, 709 (8th Cir. 2017) (denial of qualified immunity to university administrators because First Amendment right was clearly established).