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## STANDING UP FOR FREE SPEECH

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*In a free society, all are involved in what some are doing. Some are guilty, all are responsible.*<sup>1</sup>

—Rabbi Abraham Joshua Heschel

#### INTRODUCTION

The Trump Administration and its allies have systematically attacked the First Amendment rights of higher education institutions and their students, faculty, and staff.<sup>2</sup> University leaders have not only largely failed to defend their constituents' freedom of speech against these attacks; in many cases, they have actively facilitated or participated in them. This Essay argues that students, faculty, and staff should pursue offensive litigation against those university administrators who have jointly participated with the Trump Administration in suppressing free speech. Further, this Essay contends that the chilling effect of widespread speech suppression at many universities is a sufficient present injury to confer standing for pre-enforcement suits to protect our free speech rights. This Essay also briefly discusses some of the substantive legal claims that could be pursued: particularly, litigation against university officials under federal civil rights laws that were forged in the fires of an earlier historical struggle against the suppression of anti-slavery and pro-equality speech.

#### I. UNDERSTANDING THE TRUMP ADMINISTRATION'S ATTACKS ON FREEDOM OF SPEECH

Before discussing why and how students, faculty, and staff can proactively assert their First Amendment rights, it must first be acknowledged that there are costs and risks to such an approach. Litigation itself can be quite costly, of course. Moreover, in the current environment, the risks attendant to such public acts of resistance—including possibly being deported, expelled from your university, or fired from your job—are quite real.

As a U.S. citizen and tenured professor, I stand in a relatively privileged position regarding such risks.<sup>3</sup> I therefore do not cast blame on anyone who

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<sup>1</sup> Abraham J. Heschel, *The Moral Outrage of Vietnam*, FELLOWSHIP, Sep. 13, 1966, at 24, 24 (emphasis omitted).

<sup>2</sup> For specific examples, see my forthcoming companion article, William M. Carter, Jr., *Universities, Free Speech, and Tyranny* 2-7 (Univ. of Pittsburgh Sch. of L. Working Paper, Paper No. 2026-08, 2026) [hereinafter Carter, *Universities and Free Speech*], [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=6359158](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6359158).

<sup>3</sup> To be clear: Neither tenure nor citizenship will fully protect a person from the Trump Administration's attacks. The Administration's policies have already resulted in immigration authorities detaining numerous U.S. citizens and killing at least two. See, e.g., Conor Friedersdorf, *A U.S. Citizen Detained by ICE for Three Days Tells His Story*, ATLANTIC (Sep. 10, 2025), <https://www.theatlantic.com/politics/archive/2025/09/george-retes-ice-detained-us-citizen/684152>; Joshua Barajas, *A Second U.S. Citizen Was Killed by Federal Forces in Minneapolis. Here's What We Know*, PBS (Jan. 27, 2026, at 16:04 ET), <https://www.pbs.org/newshour/nation/a-second-u-s-citizen-was-killed-by-federal-forces-in-minneapolis-heres-what-we-know>. As to tenure: Right-wing lawmakers are already seeking to dismantle it at the

believes that the costs of standing up to the Trump Administration and its university enablers are simply too high to bear. But I do believe that avoiding conflict in the hope that it will make you less of a target is unlikely to be effective. All of the available evidence indicates that if your views are not in conformity with the Administration's dogma, you are already a target: They just have not gotten to you yet.

Despite the risks, waiting to assert our First Amendment rights until after we are targeted would be a profound mistake. It would be a legal mistake, because the chilling effect of the Administration's war on free speech is already causing legally cognizable First Amendment injuries even to students, faculty, and staff whose own speech may not yet have been punished.<sup>4</sup> It would be a historical mistake, because it ignores the lessons from our prior free speech battles, especially the battle over free speech and slavery.<sup>5</sup> And it would be a strategic mistake, because the First Amendment can be a powerful driver of coalition building and interest convergence.<sup>6</sup>

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state level, and even where tenure protections continue to exist, the Administration and its allies have not hesitated to pressure universities to impose sanctions on tenured faculty for engaging in speech that is clearly protected by the First Amendment. *See, e.g.,* Ryan Quinn, *The Growing Trend of Attacks on Tenure*, INSIDE HIGHER ED (Aug. 5, 2024), <https://www.insidehighered.com/news/faculty-issues/tenure/2024/08/05/growing-trend-attacks-tenure> [<https://perma.cc/2ATE-GDX7>] (“Over the past two years, lawmakers in at least 10 states have pushed legislation that would weaken—or outright eliminate—tenure in public colleges and universities.”); *Clinical Legal Educators Condemn Political Attack on Professor Ramzi Kassem and CLEAR*, CLINICAL LEGAL EDUC. ASS'N: NEWS BLOG (July 17, 2025), <https://www.cleaweb.org/news-blog/um7zcpdwqyode1sj9f4dbit5xsuamb> [<https://perma.cc/AF6T-U2EG>] (stating Professor Ramzi Kassem at CUNY “has been singled out by members of Congress for his speech, advocacy, and zealous representation of clients,” and those Congresspeople “called for CUNY to fire him for his constitutionally protected legal work”).

<sup>4</sup> *See infra* Section II.B (arguing chilling effects and listeners' rights can establish standing).

<sup>5</sup> *See infra* Conclusion (discussing possible claims under 42 U.S.C. §§ 1983, 1985, and 1986).

<sup>6</sup> The backlash from public figures across the political spectrum against Attorney General Bondi's threats to “go after” “hate speech”—which she defined as any speech deriding slain conservative activist Charlie Kirk, and which she incorrectly claimed was legally distinct from “free speech”—provides a recent example. *See* Dareh Gregorian, *Attorney General Pam Bondi Says DOJ Will Be ‘Targeting’ People Who Use ‘Hate Speech,’* NBC NEWS (Sep. 16, 2025, at 12:49 ET), <https://www.nbcnews.com/politics/justice-department/attorney-general-pam-bondi-doj-hate-speech-rcna231633> [<https://perma.cc/5FBF-ZXXB>]. Notably, various Trump-aligned politicians and commentators publicly condemned or disagreed with Bondi's comments. *See, e.g.,* Matt Walsh (@MattWalshBlog), X, *There should be social consequences for people who openly celebrate the murder of an innocent man. But there obviously shouldn't be any legal repercussions for “hate speech,” which is not even a valid or coherent concept. There is no law against saying hateful things, and there shouldn't be.* (Sep. 15, 2025, at 23:12 ET), <https://x.com/MattWalshBlog/status/1967788760210321536> [<https://perma.cc/N7BW-4G6Y>], *quoted in* Giselle Ruhyyih Ewing, *‘That Is Not The Law’: Bondi Promised to Target ‘Hate Speech.’ She’s Facing Backlash from All Corners*, POLITICO

Finally, waiting to act misapprehends our current constitutional moment. The opening months of the Trump Administration have made two things abundantly clear:

- The cruelty is itself the point.
- Consequently, the Administration's war on freedom of speech has no logical stopping point.

Authoritarian regimes move inexorably from at first using anti-constitutional tactics in order to achieve specific policy outcomes to engaging in oppression for oppression's sake. In the authoritarian mindset, the point of power is to exercise power; to dominate for the sake of domination. The Administration's "Neanderthal realism"<sup>7</sup> rewards those that it sees as strong and punishes those it sees as weak because power is the only currency of value to the authoritarian, for whom power serves both as goal and justification. Thus, the point of the Administration's efforts to create and enforce an ideological monoculture is that its opposite—a culture of tolerating and learning from a multiplicity of viewpoints in a pluralistic society—risks placing power in the wrong hands, those hands being any other than their own.

If, as the evidence indicates, the Administration's goal in seeking ideological domination is to dominate, then that goal has no logical stopping point. The project of suppressing First Amendment rights will not be abandoned once some ideologically driven "compact"<sup>8</sup> has been agreed to or some "deal" has been reached to prevent "indoctrination" through "woke ideology."<sup>9</sup> There will always be new, constantly shifting rationales for why speech that does not conform to the Administration's *diktats* must be suppressed. Thus, appeasement or avoidance of conflict at best will only buy time. But each act of appeasement or avoidance will also further erode the First Amendment's bedrock, so that

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(Sep. 16, 2025, at 12:44 ET), <https://www.politico.com/news/2025/09/16/pam-bondi-first-amendment-hate-speech-prosecution-00566424>.

<sup>7</sup> See Farah Stockman, Opinion, *Trump's Foreign Policy May Be Crude, But It's Realist*, N.Y. TIMES (Mar. 7, 2025), <https://www.nytimes.com/2025/03/07/opinion/us-foreign-policy-realism.html> ("What matters most to Mr. Trump [in foreign policy] is . . . how powerful [a country] is. He believes in dominating the weak and giving deference to the strong. It's a strategy as old as time . . . a crude, unstrategic, 'Neanderthal realism' . . .") (quoting Stephen M. Walt, *Trump's Problem in Europe Isn't Optics*, FOREIGN POL'Y (Nov. 18, 2018, at 07:09 ET), <https://foreignpolicy.com/2018/11/14/trumps-problem-in-europe-isnt-optics>)).

<sup>8</sup> See, e.g., Erwin Chemerinsky, Opinion, *Trump's 'Compact' With Universities Is Just Extortion*, N.Y. TIMES (Oct. 2, 2025), <https://www.nytimes.com/2025/10/02/opinion/trump-compact-universities-constitution.html>.

<sup>9</sup> See, e.g., Collin Binkley, *Trump Wants to Change Colleges Nationwide. GOP-led States Offer a Preview*, ASSOCIATED PRESS (Jan. 9, 2025, at 10:44 ET), <https://apnews.com/article/college-dei-woke-trump-fe549f21b223ea9aa2a9f443470c593e> [<https://perma.cc/4BY2-LVHM>] (reporting President Trump vowed to end "wokeness" and "leftist indoctrination" in education and to impose fines on colleges "up to the entire amount of their endowment").

when and if we decide that it is time to take a stand, we will find no solid ground left upon which to do so.<sup>10</sup>

A key tool of authoritarianism is to make the people believe they are helpless; to make us believe that there is nothing we should do to fight back because there is nothing we *can* do to fight back.<sup>11</sup> And perhaps that will ultimately prove to be true; perhaps fighting to preserve the American free speech tradition is futile and ours will be the era in which it was lost. Even if so, it is better for the Administration and its allies to have to defend stripping our First Amendment rights from us in open court than for us to do their work for them by quietly acquiescing to their unlawful demands.

## II. UNIVERSITY ADMINISTRATORS' ROLE IN ENABLING TRUMP'S WAR ON FREEDOM OF SPEECH

The government's reach is long and its powers vast, and the Trump Administration's understanding and exercise of its powers have been capacious and capricious. But the government's powers are not unlimited: It cannot by itself suppress and control the free speech of the hundreds of millions of people in this country. The success of the Administration's project to suppress freedom of expression ultimately depends on our voluntary cooperation.<sup>12</sup> In the first instance, the Administration needs the voluntary cooperation of the persons and entities whose speech it targets. The suppression of free speech depends at least as much upon the "chilling effect" arising from the threat of sanctions as it does upon the government actually imposing sanctions.<sup>13</sup> When we silence ourselves, we have already lost.

Widespread suppression of free speech also requires nongovernmental persons and entities to actively participate in suppressing others' speech, making it possible for the government to identify and punish dissidents on a scale it could

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<sup>10</sup> See, e.g., David Pressman, Opinion, *I Watched It Happen in Hungary. Now It's Happening Here*, N.Y. TIMES (July 23, 2025), <https://www.nytimes.com/2025/07/23/opinion/hungary-viktor-orban.html> ("[Hungary's elite institutions] all made deals that Orban engineered: peace with the strongman, in exchange for subjugation and humiliation. *Going along* is what did them in."); Editorial, *A Playbook for Standing Up to President Trump*, N.Y. TIMES (Apr. 6, 2025), <https://www.nytimes.com/2025/04/06/opinion/trump-law-firms-universities.html> ("'Once you make concessions once, it's hard not to make them again,' [the president of Princeton University] said when discussing the attacks on higher education.").

<sup>11</sup> See HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 475 (new ed., Harvest 1973) (1951) ("Isolation may be the beginning of terror; it certainly is its most fertile ground; it always is its result. This isolation is, as it were, pretotalitarian; its hallmark is impotence insofar as power always comes from men acting together . . . isolated men are powerless by definition.").

<sup>12</sup> Cf. TIMOTHY SNYDER, *ON TYRANNY: TWENTY LESSONS FROM THE TWENTIETH CENTURY* 5 (2017) ("Most of the power of authoritarianism is freely given.").

<sup>13</sup> See, e.g., *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 38 (1999) (stating First Amendment overbreadth doctrine permits challenges where fear of sanctions may deter third parties' protected speech).

not achieve on its own.<sup>14</sup> Whether the reason for their cooperation is that they agree with the government's agenda or that they fear the potential consequences of noncooperation, the net effect is the same: They act as force multipliers for the government's efforts. Specifically, because the Trump Administration does not itself run our colleges and universities (at least, not yet), it needs the cooperation of university leaders to implement its anti-free speech vision. The Administration can threaten, sue, investigate, and withdraw federal funding all it wants, but it cannot directly implement any of the changes it seeks. That can only be done by the university itself.

In my experience, university administrators generally do not *sua sponte* set out to suppress their constituents' speech (with some notable exceptions).<sup>15</sup> They have, however, been all too willing to do so when pressed by the Trump Administration. In fact, many have done so even though the Administration has not yet taken any action against them. The next Section discusses some reasons why this has been the case.

A. *University Administrators' Decision-Making Processes and Priorities*

In my experience as a former law school dean, university leaders' decision-making in high-stakes scenarios tends to be driven primarily by a risk assessment that considers the potential financial, transactional, opportunity, and reputational costs. Financial and reputational costs tend to be the focus of administrators' discussions when they find themselves in the eye of a storm of public attention. For major research universities, reputational costs in particular are the subject of significant and constant concern. This is doubly true for public research universities, since they depend on political support for their funding to a far greater extent than most private universities. It is even more true for elite research universities, both public and private, since their reputation is at least as much their "product" as their teaching, research, and service.<sup>16</sup>

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<sup>14</sup> See, e.g., Press Release, Knight First Amendment Inst., Landmark Trial Ends, with Ct's Ruling to Come; Rec. Unveils New Details on Ideological-Deportation Pol'y and Its Effects on Acad. Life (July 20, 2025), <https://knightcolumbia.org/content/landmark-trial-ends-with-courts-ruling-to-come-record-unveils-new-details-on-ideological-deportation-policy-and-its-effects-on-academic-life> [https://perma.cc/Q6Q8-H2WC] (noting Immigration and Customs Enforcement officials targeted people for ideological deportation "by relying mainly on lists compiled by Canary Mission, a right-wing, pro-Israel website that catalogs [people] whom it deems to have engaged in anti-Israel speech").

<sup>15</sup> See, e.g., Press Release, James Miller, Vice President of Comm'n & Chief Mktg. Officer, New Coll. of Fla., New Coll. of Fla. Is Ready to Be the First to Sign President Trump's Higher Educ. Compact (Oct. 27, 2025, at 17:15 GMT), <https://www.einpresswire.com/article/861953402/new-college-of-florida-is-ready-to-be-the-first-to-sign-president-trump-s-higher-education-compact> [https://perma.cc/BU7M-3DJJ].

<sup>16</sup> See Harmeet Kaur, *Why We're Still Fascinated by College Rankings*, CNN (Sep. 20, 2022, at 16:21 ET), <https://www.cnn.com/2022/09/20/us/college-rankings-obsession-us-new-s-ccc> ("[G]etting a spot at [an elite university] is a status symbol . . . [that] comes with bragging rights, and opens doors to opportunities that might otherwise be out of reach.").

Universities' responses to the wave of campus protests concerning the war in Gaza provide an example where various reputational costs were at play and often in tension. Universities that used harsh punitive tactics to suppress the protests incurred substantial internal reputational costs among many of their own students, faculty, staff, and alumni.<sup>17</sup> They also faced significant external reputational costs, such as scholarly boycotts<sup>18</sup> and censure by advocacy groups and watchdog organizations for suppressing free speech.<sup>19</sup> Conversely, universities that were seen as insufficiently strict with protestors faced substantial internal reputational costs from other portions of their constituencies, particularly from those who personally experienced antisemitism on campus or believed the protests to be inherently antisemitic.<sup>20</sup> Such universities also incurred substantial external reputational costs, including government investigations, faculty publicly declining job offers, and other forms of public condemnation.<sup>21</sup> A lobbyist privy to the Trump Administration's thinking

<sup>17</sup> See, e.g., Jackson Walker, *Emory Students Back 'No Confidence' Vote Against School President After Encampment Cleared*, CBS AUS. (May 9, 2024, at 15:51 ET), <https://cbsaustin.com/news/nation-world/emory-students-back-no-confidence-vote-against-school-president-after-encampment-cleared-emory-universitys-student-government-association>; Jonathan Stein et al., Opinion, *Class of 1964 Alumni Urge University to Undo Coerced, Unconstitutional Agreement with Trump Administration*, COLUM. DAILY SPECTATOR (Oct. 1, 2025, at 15:21 ET), <https://www.columbiaspectator.com/opinion/2025/10/01/class-of-1964-alumni-urge-university-to-undo-coerced-unconstitutional-agreement-with-trump-administration> [<https://perma.cc/L88S-PX7H>].

<sup>18</sup> See, e.g., Matthew Connelly, Opinion, *I'm a Columbia Professor. Here's the Really Disheartening Part of This Mess*, N.Y. TIMES (Apr. 16, 2025), <https://www.nytimes.com/2025/04/16/opinion/columbia-university-boycott-trump.html> (noting "2,000 people and more than 75 organizations" joined boycott of Columbia events and scholars because they believed university was "fully capitulating to the conditions imposed by the Trump administration").

<sup>19</sup> See, e.g., SEAN STEVENS, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION, 2025 COLLEGE FREE SPEECH RANKINGS (2024), <https://www.fire.org/sites/default/files/2024/09/2025%20College%20Free%20Speech%20Rankings%20Report%20FINAL.pdf> (ranking Harvard, Columbia, and New York University as "abysmal" for free speech).

<sup>20</sup> See, e.g., NICOLE SAMUEL ET AL., BRANDEIS UNIV., CAMPUS VOICES: JEWISH STUDENTS' EXPERIENCES OF ANTISEMITISM AT US COLLEGES 1 (2024), <https://scholarworks.brandeis.edu/esploro/outputs/report/9924424895501921/filesAndLinks?index=0> ("Jewish students and Jewish campus professionals felt that university administrators were often ineffective in their responses to the events of October 7 and Jewish students' concerns about antisemitism.").

<sup>21</sup> See, e.g., Ronak D. Desai & Daniel Prince, *Trump Administration Investigates 60 Universities for Antisemitism amid Escalating Federal Oversight of Higher Education: Key Takeaways for Higher Ed Leaders*, PAUL HASTINGS (Mar. 12, 2025), <https://www.paulhastings.com/insights/client-alerts/trump-administration-investigates-60-universities-for-antisemitism-amid-escalating-federal-oversight-of-higher-education> [<https://perma.cc/A6PP-NTE6>] (alerting universities about Trump Administration investigations into alleged university failures to adequately protect Jewish students from antisemitism as well as alleged university policies encouraging antisemitism); Deborah Lipstadt, *Why I Won't Teach at Columbia*, FREE PRESS (Mar. 2, 2025), <https://www.thefp.com/p/why-i-wont-teach-at-columbia> (declining Columbia teaching post based on concerns about campus antisemitism, classroom disruption, and administrative inaction).

described its recent agreement with Columbia University as a model for pressuring other universities to do its bidding and put the issue bluntly in terms of reputational costs: The Administration's approach will essentially be to say to universities, "Do you want [us to do] a full investigation and humiliate you or do you want to reach this agreement?"<sup>22</sup>

When facing such competing pressures, university administrators must consider whether their decisions will advance or impede the university's mission. In my experience, two aspects of administrators' thinking are particularly relevant to understanding their decision-making. The first is that university administrators generally tend to be simultaneously highly ambitious and highly risk-averse. The second is that, although administrators sincerely value the collective contributions of students, faculty, and staff, the interests of any *individual* student, faculty, or staff are not the focus of administrators' decisions.

Most senior university leaders come from within academia.<sup>23</sup> By definition, most therefore made a much earlier decision to pursue and to remain in an academic career. Doing so is a values-driven decision, to be sure, but it also tends to be driven by the security that academia offers. And by the time they are positioned to become senior administrators, they will have spent years immersed in a professional milieu where nearly all their colleagues are of a similar inclination to themselves. They also must have both successfully navigated the many years of the tenure and promotion process and comported themselves thereafter in such a way to be seen as credible candidates for leadership. Given that academic culture tends not to reward risk-taking, most senior university leaders are likely to have largely "colored inside the lines" throughout their academic careers. Thus, the tendency of university administrators to be risk averse should not be surprising.

University administrators' tendency toward risk aversion is most often coupled with a high degree of professional ambition. They therefore keep a close eye on other leadership opportunities.<sup>24</sup> Those ambitions inevitably shape their decision-making in their current leadership roles. Too cautious an approach risks not being seen as the kind of "change agent" most constituents will say they

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<sup>22</sup> Emily Davies, *Trump Puts Pressure on Harvard and Others to Pay Up, After Columbia Deal*, WASH. POST (July 25, 2025), <https://www.washingtonpost.com/education/2025/07/25/harvard-columbia-university-trump-deal>.

<sup>23</sup> See, e.g., DANIELLE MELIDONA, BENJAMIN G. CECIL, ALEXANDER CASSELL & HOLLIE M. CHESSMAN, AM. COUNCIL ON EDUC., *THE AMERICAN COLLEGE PRESIDENT 9* (2023 ed., 2023), <https://www.luminafoundation.org/wp-content/uploads/2023/05/The-American-College-President-IX-2023.pdf> [<https://perma.cc/3M6Y-ZSK3>] (finding, based on survey data, only "[n]ine percent of [university] presidents . . . had an immediate past position outside of higher education").

<sup>24</sup> See, e.g., Andy Brantley, *A Call to Action Regarding Succession Planning and Sustainability*, HIGHER EDUC. TODAY (Aug. 5, 2019), <https://www.higheredtoday.org/2019/08/05/call-action-regarding-succession-planning-sustainability> [<https://perma.cc/FBQ5-WT82>] (reporting most college presidents followed academic administrative pathways through provost and dean roles).

want when the next leadership search comes around, but too risky or disruptive of an approach will alienate those who seek a steady hand at the wheel. Moreover, university administrators are highly attuned to the fact that their duty is to the university as an entity, not to any of its individual constituents, and that individual students, faculty, and staff (including administrators themselves) are temporary and largely fungible.<sup>25</sup>

The preceding generalizations about administrators' behavior and the competing imperatives they face are, of course, just that: generalizations. But they do help to explain why it would be a mistake to expect university leaders to be the primary protectors of their constituents' First Amendment rights. Changing that dynamic will require bringing to bear sufficiently strong financial, transactional, opportunity, and reputational risks so that university leaders believe the balance tilts toward standing firm in face of the Trump Administration's attacks. Litigation cannot be pursued solely for tactical gain,<sup>26</sup> but well-founded litigation that makes participating in or acquiescing to the Trump Administration's anti-free speech crusade more costly for university officials can be a key tool for protecting freedom of speech in the university setting.

#### B. *Chilling Effects, Listeners' Rights, and Standing Doctrine*

The "irreducible constitutional minimum" for federal court jurisdiction is that the plaintiff have standing to sue.<sup>27</sup> Pursuing litigation against university officials in federal court<sup>28</sup> would therefore require plaintiffs establish injury, causation, and redressability.<sup>29</sup> Thus, in order to pursue a First Amendment pre-enforcement challenge, plaintiffs would have to establish that they are presently suffering an injury to their free speech rights even prior to university officials actually imposing sanctions upon them. This Essay argues that for students, faculty, and staff at universities whose leaders have participated in or facilitated

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<sup>25</sup> See, e.g., Rafael Reif, President, Mass. Inst. of Tech., Inaugural Address (Sep. 21, 2012), <https://reif.mit.edu/speeches-writing/inaugural-address> [<https://perma.cc/AL6P-G2HW>] ("I humbly recognize that I am just the steward of something much bigger than myself, and much bigger than all of us. I am the temporary guardian of an institution that means so much to so many . . .").

<sup>26</sup> See, e.g., FED. R. CIV. P. 11(b) (requiring claims presented to be "warranted by existing law or by a nonfrivolous argument" and not be "presented for any improper purpose").

<sup>27</sup> *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

<sup>28</sup> Federal courts are not the only available venue for asserting claims against university officials, of course. State courts also provide an important forum. In particular, plaintiffs can assert state law claims against university trustees for breaching their fiduciary duties to the university by participating in or acquiescing to the Trump Administration's attacks on campus free speech. See ASS'N OF GOVERNING BDS. OF UNIVS. & COLLS., AGB STATEMENT ON THE FIDUCIARY DUTIES OF GOVERNING BOARD MEMBERS 2 (2015), [https://agb.org/wp-content/uploads/2019/01/statement\\_2015\\_fiduciary\\_duties.pdf](https://agb.org/wp-content/uploads/2019/01/statement_2015_fiduciary_duties.pdf).

<sup>29</sup> *Lujan*, 504 U.S. at 560.

the Trump Administration's suppression of free speech, the vast chilling effect of those actions satisfies the injury-in-fact requirement.<sup>30</sup>

Chilling effects happen when "persons whose expression is constitutionally protected . . . refrain from exercising their [First Amendment] right[s]" due to fear of punishment.<sup>31</sup> Chilling effects pose a grave threat to the First Amendment and to the rule of law itself. As the Supreme Court recently explained, a potential speaker "may be unsure about the side of a line on which his speech falls. Or he may worry that the legal system will err, and count speech that is permissible as instead not. Or he may simply be concerned about the expense of becoming entangled in the legal system."<sup>32</sup> When that occurs, "[t]he result is 'self-censorship' of speech that could not be proscribed—a 'cautious and restrictive exercise' of First Amendment freedoms."<sup>33</sup> Moreover, if a person refrains from speaking due to such fear and uncertainty, the government would never punish them because there would never be anything to punish, and because no punishment would be imposed, they could never demonstrate an injury-in-fact arising from being punished for their speech. Hence, the matter would never come before a court. Thus, a government bent on silencing large swaths of the population and on avoiding judicial review could achieve both by imposing draconian punishment on the few who have spoken, thereby inflicting sufficient terror on the many that they never speak at all.<sup>34</sup>

Fortunately, standing doctrine provides a way out of this Catch-22. Because chilling effects pose a unique danger to potential speakers and also harm society by depriving listeners of the opportunity to hear the speech, courts have recognized that a credible fear of punishment can satisfy the injury-in-fact requirement of standing. Thus:

In First Amendment cases, the injury-in-fact element is commonly satisfied by a sufficient showing of "self-censorship, which occurs when a claimant is chilled from exercising his right to free expression." . . . "[T]o demonstrate injury in fact, it is sufficient to show that one's First Amendment activities have been chilled."<sup>35</sup>

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<sup>30</sup> For the sake of brevity, this Essay does not address causation or redressability.

<sup>31</sup> *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 38 (1999) (quoting *Gooding v. Wilson*, 405 U.S. 518, 521 (1972)).

<sup>32</sup> *Counterman v. Colorado*, 143 S. Ct. 2106, 2115 (2023) (citation omitted).

<sup>33</sup> *Id.* (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)).

<sup>34</sup> The Supreme Court's recent holding in *Trump v. CASA, Inc.*, 145 S. Ct. 2540 (2025), that district courts generally cannot issue universal injunctions barring the government from violating the law as to any party (including those who have not yet sued), will only exacerbate this rule of law problem. *See id.* at 2553-54. As Justice Jackson explained in her dissent in *CASA*, "[t]he Court's decision to permit the Executive to violate the Constitution with respect to anyone who has not yet sued is an existential threat to the rule of law." *Id.* at 2596-97 (Jackson, J., dissenting).

<sup>35</sup> *Cooksey v. Futrell*, 721 F.3d 226, 235-36 (4th Cir. 2013) (citation omitted) (quoting *Benham v. City of Charlotte*, 635 F.3d 129, 135 (4th Cir. 2011)).

To be sure, the plaintiff still must have suffered an injury; hence, a plaintiff must show that they are actually engaging in self-censorship presently rather than merely speculating that they might do so in the future. Moreover, “[a]ny chilling effect must be objectively reasonable.”<sup>36</sup> The plaintiff, however, “need not show [he] ceased [his speech] altogether to demonstrate an injury in fact. Government action will be sufficiently chilling when it is likely to deter a person of ordinary firmness from the exercise of First Amendment rights.”<sup>37</sup>

No speculation is needed to conclude that universities’ actions have, as intended, had a profound chilling effect on students, faculty, and staff. A few examples:

- Faculty members are refraining from engaging in speech that would make them a target of the Trump Administration’s and their universities’ ire. For example, “[a]s the first lawsuit brought against President Donald Trump’s administration by faculty groups came to a close in trial in early July [2025], testimony from many noncitizen professors hailing from universities across the country highlighted a ‘chilling effect’ on free speech.”<sup>38</sup> Professor Megan Hyska, a professor at Northwestern University, for example, “testified during the trial . . . [that] she refrained from publishing an op-ed she had already written, and abstained from pursuing leadership at her local chapter for the Democratic Socialists of America, in fear of being targeted after the arrests of other noncitizen academics.”<sup>39</sup> Similarly, “Naima Mohammadi, a . . . professor . . . of Gender, Sexuality and Women’s Studies, said she fears teaching topics such as LGBTQ+ issues, women’s rights and human rights as an Iranian immigrant.”<sup>40</sup> Professor Mohammadi “said she is self-censoring controversial political topics such as pro-Palestine protests in her classroom to protect Muslim students from political backlash. She also must consider her own status as an immigrant while teaching political

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<sup>36</sup> *Id.* at 236 (quoting *Benham*, 635 F.3d at 135).

<sup>37</sup> *Id.* (first alteration in original) (quoting *Benham*, 635 F.3d at 135). Indeed, in *303 Creative LLC v. Elenis*, 143 S. Ct. 2298 (2023), the Supreme Court recently found standing to exist in a First Amendment case based on a far more speculative claim of chilling effects than those at issue in this Essay. *See id.* at 2308-10 (finding standing based on plaintiff’s stated intent to offer wedding-website services and fear Colorado would compel her to create speech celebrating same-sex marriages).

<sup>38</sup> Tulasi Cherukuri, ‘No Place in a Democracy’: Columbia, NYU, Harvard Faculty and Lead Attorney in AAUP Lawsuit Against Trump Warn of ‘Powerful Chill,’ COLUM. DAILY SPECTATOR (Aug. 8, 2025, at 15:15 ET), <https://www.columbiaspectator.com/news/2025/08/07/no-place-in-a-democracy-columbia-nyu-harvard-faculty-and-lead-attorney-in-aaup-lawsuit-against-trump-warn-of-powerful-chill> [<https://perma.cc/URM6-N5Y9>].

<sup>39</sup> *Id.*

<sup>40</sup> Amber Medved & Addison Quinn, *How Pitt Professors Respond to National Struggles in Higher Education*, PITT NEWS (Oct. 3, 2025), <https://pittnews.com/article/197590/featured/how-pitt-professors-respond-to-national-struggles-in-higher-education> [<https://perma.cc/B8TC-R7BJ>].

topics.”<sup>41</sup> Universities have played an active role in such chilling of faculty speech by investigating, suspending, and terminating faculty members who deviate from the Trump Administration’s dogma.<sup>42</sup>

- University staff have similarly described the enormous chilling effects they are experiencing. For example, in recent interviews with Columbia University’s student newspaper, “[sixteen staff members] described a climate of fear, isolation, and institutional neglect. . . . All of them said they were deeply disturbed by the University’s actions [regarding protests relating to the war in Gaza] and felt unsafe speaking out,” and “four [of those] staff members directly referenced the University’s terminations of staff who participated in pro-Palestinian activity as a basis for their fear of protesting or voicing their opinions in the office.”<sup>43</sup>
- Students are likewise engaging in unprecedented levels of self-censorship. Due to the Trump Administration’s ideological visa cancellations and deportations, foreign students have reported “scrubb[ing] or deactivat[ing] their social media feeds. Others have stopped leaving campus or attending demonstrations. And many fear speaking up in class, worried if they say the wrong thing, their ability to study in this country could suddenly be snatched away.”<sup>44</sup> Professor Veena Dubal, General Counsel for the American Association of University Professors, has noted that “[t]he feeling is that everyone could potentially be targeted, creating an extraordinary chilling impact across the U.S.” for foreign students.<sup>45</sup> Moreover, such chilling effects extend far beyond foreign and noncitizen students: Domestic students who are U.S. citizens have similarly reported their reluctance to

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<sup>41</sup> *Id.*

<sup>42</sup> See, e.g., Emma Whitford, *2 Texas A&M Administrators and Professor Out After Viral Video*, INSIDE HIGHER ED (Sep. 10, 2025), <https://www.insidehighered.com/news/faculty-issues/academic-freedom/2025/09/10/texas-am-professor-and-administrators-out-after> [https://perma.cc/A52L-N5WA] (reporting Texas A&M terminated professor and removed of dean and department head after student recorded dispute over whether teaching gender-identity-related material “violate[d] one of President Donald Trump’s executive orders”); Piper Hutchinson, *Gov. Landry Forced to Provide Text Messages About Sidelined LSU Law Professor*, LA. ILLUMINATOR (Feb. 10, 2025, at 19:43 ET), <https://lailluminator.com/2025/02/10/landry-lsu-law> (discussing Louisiana State University professor suspended in retaliation for classroom speech critical of President Trump and Louisiana governor).

<sup>43</sup> Esther Sun, *‘Fear and Silence’: Amid Campus Protests, Sympathetic Staff Report Stifled Dissent, University Retaliation, and Painful Exits*, COLUM. DAILY SPECTATOR (Aug. 8, 2025), <https://www.columbiaspectator.com/news/2025/08/08/fear-and-silence-amid-campus-protests-sympathetic-staff-report-stifled-dissent-university-retaliation-and-painful-exits> [https://perma.cc/8PNA-XH88].

<sup>44</sup> Dan Rosenzweig-Ziff & Susan Svrluga, *Some Foreign Students Fear Speaking Out as Visa Cancellations Rise*, WASH. POST (Apr. 12, 2025), <https://www.washingtonpost.com/education/2025/04/12/international-students-visas-revoke-fear>.

<sup>45</sup> *Id.*

express views—especially on certain topics, but increasingly, on any topic—that may make them targets of their universities’ suppression of free speech.<sup>46</sup> And they have good reason for worry, given universities’ increasing use of both physical and digital methods to surveil students’ speech.<sup>47</sup>

In addition to the chilling of their own speech, faculty and students are also suffering a second current injury: The suppression of other students’ and faculty members’ speech deprives their classmates and professors of the opportunity to hear it. It is well established that the First Amendment protects the rights of listeners as well as speakers. The Supreme Court has long held that there is a “First Amendment right to ‘receive information and ideas,’”<sup>48</sup> and the Court has specifically recognized that “this right is ‘nowhere more vital’ than in our schools and universities.”<sup>49</sup>

By suppressing student and faculty speech disfavored by the Trump Administration, university officials are depriving those students’ and professors’ classmates and colleagues of the right to receive such speech. Doing so causes a present injury for those listeners by diminishing the quality of classroom discussion, which is enhanced by the exchange of diverse ideas and viewpoints. The suppression of faculty speech also diminishes the quality of instruction that students receive from their professors. And like the chilling effects on their own speech, these violations of the right to receive information from others are a present, concrete, and nonspeculative injury.

#### CONCLUSION: A PATH FORWARD

University administrators acting at the behest of or to placate the Trump Administration have done enormous damage to the free speech rights of their students, faculty, and staff, and to the First Amendment itself. Yet we are not without the ability to fight back. University administrators can and should be held legally accountable. As discussed in much greater detail in my forthcoming

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<sup>46</sup> See, e.g., Elena Moore, *For Some Students Who Protested War in Gaza, Fear and Silence Is a New Campus Reality*, NPR (Apr. 12, 2025, at 06:01 ET), <https://www.npr.org/2025/04/11/nx-s1-5343940/college-students-say-trump-administrations-crackdown-on-activism-incites-fear> [https://perma.cc/DWQ5-9CAK] (quoting university student describing current “chilling effect on campus” by saying “[s]o many students are just terrified . . . [n]ot even protesting in support of Palestine, but protesting in support of anything”).

<sup>47</sup> See, e.g., Theia Chatelle, *How Corporate Partnerships Powered University Surveillance of Palestine Protests*, INTERCEPT (Nov. 24, 2025, at 05:00 ET), <https://theintercept.com/2025/11/24/gaza-student-protests-surveillance-uconn-houston> (describing “systematic pattern of surveillance by U.S. universities” after Gaza-war protests, including use of private-sector artificial intelligence companies to “scrap[e] students’ social media activity and chat logs and send[] what it learned to university administration”).

<sup>48</sup> *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976) (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972)).

<sup>49</sup> *Kleindienst*, 408 U.S. at 763 (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

companion article,<sup>50</sup> lawsuits under federal civil rights statutes are one important way of doing so.

Originally enacted during the Reconstruction Era following the Civil War, 42 U.S.C. §§ 1983, 1985, and 1986 provide civil remedies for violations of federally protected civil rights by governmental and nongovernmental actors alike. § 1983 is well known; §§ 1985 and 1986 are far less so.<sup>51</sup> All three statutes were originally enacted as part of the Enforcement Acts of 1870 and 1871, commonly known as the Ku Klux Klan Acts.<sup>52</sup> Congress originally adopted these statutes to address efforts by state and private actors to keep the newly-freed slaves in a de facto condition of servitude notwithstanding the abolition of de jure slavery.

Governmental and private actors' efforts to perpetuate racial subjugation were mutually reinforcing. The former slave states enacted Black Codes that, inter alia, created numerous race-based criminal offenses and imposed a wide variety of civil disabilities.<sup>53</sup> Private persons and organizations also enforced race control through their own methods, such as organized terrorist groups like the Klan, economic coercion, and individual violence and intimidation. State actors condoned, encouraged, and often participated in such activities.<sup>54</sup> Private parties' actions multiplied the government's effective authority and the government's authority amplified private parties' de facto power, creating a perverse feedback loop of oppression.

As was the case during the slave era with regard to abolitionist and anti-slavery speech, Black freedom of speech and speech about Black freedom were both seen as threats to continued white supremacy in the post-Civil War era. As Frederick Douglass noted of freedom of speech, "of all rights, [it] is the dread of tyrants. It is the right which they first of all strike down."<sup>55</sup> Just as pro-slavery

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<sup>50</sup> See generally Carter, *Universities and Free Speech*, *supra* note 2 (arguing students, faculty, and staff can use Reconstruction-era civil rights statutes to hold university administrators accountable for campus speech suppression).

<sup>51</sup> See William M. Carter, Jr., *The Anti-Klan Act in the Twenty-First Century*, 136 HARV. L. REV. F. 251, 266-69 (2023) (explaining §§ 1985 and 1986 lack "robust jurisprudential history [of] § 1983").

<sup>52</sup> Enforcement Act, ch. 114, 16 Stat. 140 (1870); Enforcement Act, ch. 99, 16 Stat. 433 (1871); Enforcement Act, ch. 22, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. §§ 1983, 1985, 1986); Senate Hist. Off., *The Enforcement Acts of 1870 and 1871*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/generic/EnforcementActs.htm> [<https://perma.cc/8PNT-P6FX>] (last visited May 26, 2026) (noting Enforcement Acts were "also known as Ku Klux Klan [A]cts").

<sup>53</sup> See ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877*, at 198-209 (1st ed. 1988).

<sup>54</sup> Indeed, the Klan's reach was so broad, and its members so pervasively entwined with the white supremacist political power structure, that it was effectively "a military force serving the interests of the Democratic [P]arty, the planter class, and all those who desired the restoration of white supremacy." *Id.* at 425-26.

<sup>55</sup> Frederick Douglass, *A Plea for Freedom of Speech in Boston: An Address Delivered in Boston, Massachusetts (Dec. 9, 1860)*, reprinted by FREDERICK DOUGLASS PAPERS, <https://www.fredouglasspapers.org/>

forces before the Civil War had brutally suppressed abolitionist and anti-slavery speech, the forces of white supremacy after the War likewise brutally suppressed speech advocating Black civil rights.<sup>56</sup>

The provisions of the Klan Acts accordingly addressed state action, private action, and the synthesis thereof, all of which operated both to oppress and to silence opposition to oppression. § 1983 applies to state actors' violations of federally protected civil rights.<sup>57</sup> § 1985 addresses conspiracies by private actors to interfere with civil rights, including "for the purpose of depriving . . . any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws."<sup>58</sup> § 1986 imposes an affirmative duty upon any person, governmental or private, to take action to prevent a § 1985 conspiracy of which they are aware.<sup>59</sup>

These civil rights statutes are powerful tools for holding university officials accountable for assisting, enabling, and failing to act to prevent the harms arising from the Trump Administration's war on freedom of speech in higher education. University administrators who have participated in the Trump Administration's crusade against freedom of speech can be held to account under § 1985 for their actions, and their fellow administrators who failed to act to prevent them from doing so can also be held to account under § 1986 for their inaction.<sup>60</sup> We need not wait for the judgment of history or their own consciences' reproach to hold them responsible. We can do so now.

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frederickdouglasspapersproject.com/s/ digitaledition/ item/ 9060 [https:// perma.cc/P329-NR 7B].

<sup>56</sup> See generally William M. Carter, Jr., *The Second Founding and the First Amendment*, 99 TEX. L. REV. 1065 (2021) (discussing postwar suppression of Black civil rights advocacy by private violence tolerated or enabled by state actors).

<sup>57</sup> 42 U.S.C. § 1983 ("Every person who, under color of [law] subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . .").

<sup>58</sup> *Id.* § 1985(3).

<sup>59</sup> *Id.* § 1986 ("Every person who, having knowledge [of a § 1985 conspiracy] and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do . . . shall be liable to the party injured . . .").

<sup>60</sup> As explained in my forthcoming companion article, §§ 1985 and 1986 can apply to the actions of both public and private university officials suppressing freedom of speech. See generally Carter, *Universities and Free Speech*, *supra* note 2.