Case No. 11-01952

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

TURKISH COALITION OF AMERICA, INC. and SINAN CINGILLI,

Plaintiffs-Appellants,

v.

ROBERT BRUININKS, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Minnesota

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AMICUS CURIAE BRIEF OF THE RUTHERFORD INSTITUTE SUPPORTING THE APPELLANTS AND REVERSAL

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INTEREST OF *AMICUS CURIAE*

Since its founding over 29 years ago, The Rutherford Institute has emerged as one of the nation's leading advocates of civil liberties and human rights, litigating in the courts and educating the public on a wide variety of issues affecting individual freedom in the United States and around the world. The Institute's mission is twofold: to provide legal services in the defense of civil liberties and to educate the public on important issues affecting their constitutional freedoms. *Amicus curiae* is interested in this case because it involves fundamental rights of expression, thought and academic freedom and is concerned that the District Court's decision below endorses and approves the establishment of an "academic orthodoxy" at the expense of individual freedom of thought and expression.

A motion for leave to file this brief is filed contemporaneous with this brief and is the source of the authority of *amicus curiae* to file this brief. No counsel for any party authored this brief in whole or in part or contributed money intended to fund preparation or submission of this brief, nor did any other person (other than *amicus curiae*, its members or counsel) contribute money intended to fund preparation or submission of this brief.

SUMMARY

Although the District Court wrote that this case "is properly viewed in the context of academic freedom" (Add. 12), it apparently viewed academic freedom as a one-way street, allowing academic freedom only as a defense available to the university actors. The District Court's decision dismissing the Complaint for failing to state a claim gave no recognition to the equally important academic freedom of Appellant Sinan Cingilli, who received implicit threats of academic reprisal if he had the temerity to use the website of Appellant Turkish Coalition of America, Inc. ("TCA"), which had been unilaterally deemed illegitimate by the Appellees.

The Appellees' enforcement of their politically correct dogma, while labeled an exercise of academic freedom, was in fact antithetical to the principles of freedom of inquiry, thought and exploration that are the foundation of academic freedom. Stigmatizing the views expressed on the TCA's website in such a way as to threaten students who wish to address those views in the context of academic exercises imposes an orthodoxy that is fundamentally inconsistent with academic freedom and the First Amendment's guarantee to freedom of speech.

ARGUMENT

I. ACADEMIC FREEDOM IS A WELL-RECOGNIZED ASPECT OF THE FREEDOM GUARANTEED BY THE FIRST AMENDMENT

"Academic freedom," as such, was first recognized as an aspect of the liberty guaranteed by the First Amendment in *Sweezy v. State of New Hampshire*, 354 U.S. 234 (1957), which reversed a university professor's contempt conviction that was based upon his refusal to answer questions about his knowledge of a political party deemed "subversive" posed by a committee of the state legislature. The Supreme Court ruled that Sweezy's rights to lecture and associate were constitutionally protected freedoms, and to summon him and question him about those matters was "unquestionably . . . an invasion of petitioner's liberties in the areas of academic freedom and political expression--areas in which government should be extremely reticent to tread." *Id.* at 250. Explaining the policies underlying the idea of academic freedom, the Court wrote as follows:

> 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. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. 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. Although the controlling opinion in *Sweezy* was of a plurality of the Court members, the concurrence of Justice Frankfurter, *id.* at 262-63 (Frankfurter, J., concurring), left little doubt that academic freedom and the need for universities to remain enclaves of open and unfettered inquiry were crucial bases for the decision.

This aspect of liberty was reaffirmed in a majority opinion in *Keyishian v. Bd. of Regents of the University of State of N.Y.*, 385 U.S. 589 (1967), where members of the University of Buffalo faculty challenged a law which conditioned their employment upon them certifying in writing that they had never been members of the Communist Party. Although the Supreme Court had upheld the law 15 years earlier, *Adler v. Bd. of Educ. of the City of N.Y.*, 342 U.S. 485 (1952), it found the law unduly vague and unconstitutional. The vagueness ruling was premised upon the Court's conclusion that the law impinged upon the First Amendment rights of the faculty members, which the Court described as follows:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.". . . . The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, (rather) than through any kind of authoritative selection."

Keyishian, 385 U.S. at 603 (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960), and *United States v. Associated Press*, 52 F. Supp. 362, 372 (D.D.C. 1943)).

Since then, the Supreme Court has cited academic freedom as an important principle in connection with various rulings involving public universities. Thus, in *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985), the Court referred to academic freedom as a factor in deferring to a university's decision concerning a student's qualifications for continuing in a particular degree program. In *Bd. of Regents of Univ. of Wisc. Syst. v. Southworth*, 529 U.S. 217, 232-33 (2000), a university's imposition of a student activity fee was upheld over objections that the fee compelled support of speech by students, the Court stressing that the goal of a university is to "facilitate a wide variety of speech." Concurring in the result, Justice Souter specifically identified academic freedom and the goal of fostering "liberty from restraints on thought, expression and association in the academy[.]" *Id.* at 237 (Souter, J., concurring). And in *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Court looked to academic freedom as the basis for upholding a university law school's race-conscious admissions policy. Endorsing Justice Powell's views as set forth in his opinion for a fractured Court in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), the *Grutter* decision noted that Justice Powell grounded his ruling that racial diversity may be a proper basis for university admission decisions on academic freedom. "Justice Powell emphasized

that nothing less than the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Grutter*, 539 U.S. at 324 (quoting *Bakke*, 438 U.S. at 313).

The key and fundamental element underlying these decisions is the idea that academic freedom has as its animating principle the need to assure that inquiry at educational academies remains unfettered and is not constrained by the "pall of orthodoxy" warned against in *Keyishian*, 385 U.S. at 603. As Justice Frankfurter wrote in *Sweezy*:

> Progress in the natural sciences is not remotely confined to findings made in the laboratory. Insights into the mysteries of nature are born of hypothesis and speculation. The more so is this true in the pursuit of understanding in the groping endeavors of what are called the social sciences, the concern of which is man and society. The problems that are the respective preoccupations of anthropology, economics, law, psychology, sociology and related areas of scholarship are merely departmentalized dealing, by way of manageable division of analysis, with interpenetrating aspects of holistic perplexities. For society's good--if understanding be an essential need of society--inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling.

Sweezy, 354 U.S. at 261-262 (Frankfurter, J., concurring).

II. STUDENTS ARE FULLY PROTECTED BY ACADEMIC FREEDOM AND HAVE THE RIGHT TO FULLY PARTICIPATE IN THE "MARKETPLACE OF IDEAS" THAT EXISTS AT COLLEGES AND UNIVERSITIES

Although the above-cited Supreme Court academic freedom cases were decided in the context of academic freedom for universities as institutions or for their faculty members, there can be little doubt that the freedom of thought, inquiry and expression articulated and described by the Supreme Court applies with full force to the activities of a university's students. Thus, *Sweezy*, 354 U.S. at 250 (emphasis added), held that "[t]eachers ***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." And *Keyishian*, 385 U.S. at 603, held that the nation's future depends upon leaders "trained through wide exposure to that robust exchange of ideas," pointedly indicating that the academic freedom it was recognizing extends to students.

Recognition of a right of academic freedom for students finds even more explicit recognition in other Supreme Court cases. In *Widmar v. Vincent*, 454 U.S. 263, 267 n. 5 (1981) (quoting *Healy v. James*, 408 U.S. 169, 180-82 (1972)), the Court wrote that "'[t]he college classroom with its surrounding environs is peculiarly the marketplace of ideas.' . . . Moreover, the capacity of a group or individual to participate in the intellectual give and take of campus debate . . . would be limited by denial of access to the customary media for communicating

with the administration, faculty members and other students." *See also Ewing*, 474 U.S. at 226 n. 12 (academic freedom thrives on the "independent and uninhibited exchange of ideas among teachers and students[.]")

Even more to the point is the decision in *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), where the Court struck down a public university's decision to deny funding to a student publication because of the religious viewpoint expressed by the publication. Citing the decisions in *Sweezy* and *Keyishian*, the Court wrote as follows:

> Vital First Amendment speech principles are at stake here. The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition. . . . In ancient Athens, and, as Europe entered into a new period of intellectual awakening, in places like Bologna, Oxford, and Paris, universities began as voluntary and spontaneous assemblages or concourses for students to speak and to write and to learn. *See generally* R. Palmer & J. Colton, *A History of the Modern World* 39 (7th ed. 1992). The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment. ***For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses***.

Rosenberger, 515 U.S. at 835-836 (emphasis added).

In light of the Supreme Court precedent, it is not surprising that student academic freedom is recognized and enforced in the lower courts as well. It was relied upon in *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989), as a basis for invalidating a university's policy on harassment which broadly prohibited student speech that could be considered "stigmatizing," "victimizing" or "demeaning" of individuals belonging to protected classes. The plaintiff in *Doe* was a psychology student who desired to openly discuss theories positing biologically-based differences between sexes and races; he contended that this academic position could be perceived as racist or sexist in violation of the harassment policy. In response to the university's contention that his speech would not be sanctioned under the policy, the plaintiff was able to show that there were at least three incidents of disciplinary actions brought against students for comments made in a classroom setting, including one student who was charged for expressing the belief in his psychology class that homosexuality was a disease that could be treated psychologically. *Id.* at 861. The court held that the policy was overbroad and vague, ruling that speech may not be sanctioned or suppressed by the government authorities because of disagreement with the ideas or message conveyed, and that officials may not "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion[.]" *Id.* at 863 (quoting *West Virginia St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Moreover,

"[t]hese principles acquire special significance in the university setting, where the free and unfettered interplay of competing views is essential to the institution's educational mission." *Doe*, 721 F. Supp. at 863.

Other courts similarly have struck down similar "speech codes" adopted by universities, relying at least in part upon the academic freedom students are supposed to enjoy at public institutions of higher education. *See College Republicans at San Francisco St. University v. Reed*, 523 F. Supp. 2d 1005, 1014 (N.D. Cal. 2007) and *Bair v. Shippensburg University*, 280 F. Supp. 2d 357, 370 (M.D. Pa. 2003) ("Communications which provoke a response, especially in the university setting, have historically been deemed an objective to be sought after rather than a detriment to be avoided."). And as Judge Posner wrote in *Piarowski v. Illinois Comm. Coll. Dist. 515*, 759 F.2d 625, 629 (7th Cir. 1985), academic freedom denotes "the freedom of the individual teacher (or in some versions—indeed in most cases—the student) to pursue his ends without interference from the academy."

Student academic freedom also has been recognized by the Department of Education, even with respect to secondary school students, in its advice to schools on respecting the rights of students. In a guidance letter issued pursuant to the No Child Left Behind Behind Act, the Department noted that students have First

Amendment rights to express themselves in connection with curricular assignments, including the right to include expression of religious beliefs:

> Students may express their beliefs about religion in homework, artwork, and other written and oral assignments free from discrimination based on the religious content of their submissions. Such home and classroom work should be judged by ordinary academic standards of substance and relevance and against other legitimate pedagogical concerns identified by the school. Thus, if a teacher's assignment involves writing a poem, the work of a student who submits a poem in the form of a prayer (for example, a psalm) should be judged on the basis of academic standards (such as literary quality) and neither penalized nor rewarded on account of its religious content.

"Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools," U.S. Department of Education, February 7, 2003 (available at http://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html).

Indeed, the University of Minnesota itself has adopted these principles in its policy on academic freedom. After recognizing that the foundation for academic freedom is rooted in the belief that the mind is ennobled by the pursuit of understanding and the search for truth, the Board of Regents set forth the following policy: "Academic freedom is the freedom, without institutional discipline or restraint, to discuss all relevant matters in the classroom, to explore all avenues of scholarship, research, and creative expression, and to speak or write on matters of public concern as well as on matters related to professional duties and the functioning of the University." University of Minnesota Board of Regents,

Academic Freedom and Responsibility Policy, adopted September 8, 1995 (available at http://www1.umn.edu/regents/policies/academic/Academic_Freedom.pdf). Nothing in this policy indicates the principles expressed do not extend to students. Moreover, a 2004 report of a University of Minnesota task force appointed to examine current issues in academic freedom set forth the following statement on academic freedom:

> Knowledge that invigorates and sustains a free and open society is precious and elusive. The serendipity of its emergence compels a dialogue guided by open and critical inquiry of the broadest scope among students and faculty. It is subject to revision through processes of careful scrutiny and reasoned debate, and it is always tentative, even while based on demonstrated truth. Academic freedom means that all wisdom must be abundantly challenged. Nothing that purports to be knowledge is sacred. Students who will surpass their teachers must be exposed to an unrestrained flow of ideas, guided by the capacity to logically dissect an argument, project its implications, and grasp its emotional appeal. ***Knowledge that is not tested through disciplined dissent becomes an article of faith, surviving not because of its demonstrable truth, but because of appeals to authority and enshrined orthodoxy***.

Report of the Task Force on Academic Freedom, University of Minnesota, April 2004 (available at http://wwww1umn.edu/usenate/fcc/acadfreedomreport.html) (emphasis added).

Indeed, the idea and principle of student academic freedom must carry at least as much weight as the kind of faculty academic freedom found to justify the threat to Appellant Cingilli in this case. Faculty members are employees, and as employees their First Amendment right of expression is subject to qualifications.

See United States v. National Treasury Employees Union, 513 U.S. 454, 466 (1995) (public employees do not enjoy the same First Amendment freedoms as private citizens). Although there is some indication that academic freedom allows university faculty greater speech rights than other public employees, *see Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006) (indicating that academic scholarship and classroom instruction may implicate constitutional interests that are not fully accounted for in the customary employee speech jurisprudence), the courts have not appeared to have embraced the idea that university faculty are a unique kind of public employee entitled to enhanced First Amendment protection. *See generally* Bauries, Scott R. and Schach, Patrick, *Coloring Outside the Lines: Garcetti v. Ceballos in the Federal Appellate Courts*, 262 Ed. Law Rep. 357, 372-81 (2010). By contrast, academic speech by students is not subject to the same limitation because students plainly are not public employees.

III. ACADEMIC FREEDOM IS ESSENTIAL TO THE CONTINUING SEARCH FOR TRUTH

The opinions cited above make clear that the policy behind incorporating protection of academic freedom as part of the protections afforded by the First Amendment is the "self-evident" principle that knowledge and truth flourish in a society where inquiry is free and open. *Sweezy*, 354 U.S. at 250. The business of a university is to provide that atmosphere that is most conducive to speculation,

experiment and creation. "A university is characterized by the spirit of free inquiry, its ideal being the ideal of Socrates--'to follow the argument where it leads.' This implies the right to examine, question, modify or reject traditional ideas and beliefs. Dogma and hypothesis are incompatible, and the concept of an immutable doctrine is repugnant to the spirit of a university." *Id.* at 262-63 (quoting *The Open Universities in South Africa*) (Frankfurter, J., concurring).

The principle was recognized long ago by John Milton in his classic response to Parliament's Licensing Order of 1643, under which many prior restraints upon publication were reinstated in Britain. Milton wrote in *Areopagitica* as follows:

> And though all the windes of doctrin were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licencing and prohibiting to misdoubt her strength. Let her and Falshood grapple; who ever knew Truth put to the wors, in a free and open encounter.

Areopagitica; A Speech of Mr. John Milton, for the Liberty of Unlicenc'd Printing to the Parliament of England (available at http://www.dartmouth.edu/~milton/reading_room/areopagitica/).

The need to ensure academic freedom and the ability of persons at universities to question dogma is far from an "academic" exercise. History shows that a "pall of orthodoxy" of the kind at issue in this case can have dire consequences for society and its ability to address its problems.

For example, the Soviet Union suffered a disastrous impact upon its agriculture as a result of Stalin's enforcement of the biology orthodoxy of Trofim Denisovich Lysenko. Lysenko, the dictator of "communistic" biology during the Stalin period, hindered the science of genetics in the U.S.S.R. for at least a generation, imposing (with the help of government autocrats) the idea that environmentally acquired characteristics of an organism could be transmitted to the offspring through inheritance. *See People v. Privitera* 23 Cal.3d 697, 725 n. 5, 591 P.2d 919, 936 n. 5 (1979). His rejection of Mendelian genetics was consistent with Soviet dogma that heredity played only a limited role in human development and that man could be purged of undesirable instincts by living under socialism, and so was embraced and imposed as a scientific orthodoxy by the Stalin regime. The study of genetics was kept out of Soviet biology and agriculture for 30 years and "the result was the hijacking of science to support an ideology that limited the biological sciences in the Soviet Union for decades and contributed to widespread famine and crop failures." *See* Gross, Katherine L. and Mittelbach, Gary G., *What Maintains the Integrity of Science: An Essay for Nonscientists*, 58 Emory L.J. 341, 353 (2008).

Historical knowledge has similarly been subjected to conformist tendencies that have stifled the search for truth and attempts for understanding within society. One example is the Brownsville, Texas, incident of 1906 where the shooting of

two local white persons was blamed on the African-American soldiers of the 25th Regiment stationed at nearby Fort Brown. For years it was considered established as fact that the soldiers were responsible for the violence after President Teddy Roosevelt decided to dishonorably discharge 167 soldiers and a Senate investigation supported the decision. However, in 1970 a book with an in-depth investigation of the incident concluded that the soldiers were innocent, prompting a new investigation by the Army. As a result, the soldiers' discharges were overturned and the previous orthodoxy, which tended to reinforce false and malicious racial stereotypes, was rejected. *See* http://en.wikipedia.org/wiki/Brownsville_Affair#References.

These are but two instances illustrating the harm that can be caused if government is allowed to impose a straitjacket on thought, learning and expression. Clearly, society depends upon a system which invites challenges to prevailing wisdom and allows freedom of inquiry to flourish. Academic freedom is central to the goal of assuring knowledge and progress is not repressed by a "foolish consistency" of prevailing wisdom.

IV. THE DECISION BELOW IS INCONSISTENT WITH THE GOALS OF ACADEMIC FREEDOM

Although the District Court purported to be enforcing academic freedom, its ruling is not consistent with the fundamental purpose of academic freedom, i.e., to

allow those in the academic community the liberty to question and dissent from the "knowledge" that is treated as an article of faith. As ably argued in the Appellants' Brief, Appellant Cingilli was for all practical purposes censored by the "scarlet letter" placed upon the TCA website and the view it expressed concerning Armenian genocide. Cingilli was told he "should not" cite to the TCA website, thereby closing off to him an area of inquiry, analysis and discussion. Indeed, the warning given to Cingilli was at least a tacit threat that his use of information on the website and challenge to the university's orthodoxy on genocide would result in academic reprisal. Cingilli certainly had grounds to fear not only that his academic work would be rejected, but that he would suffer continuing stigmatization within the academic community.

This treatment is wholly at odds with the university's own statement of academic freedom principles that "[k]nowledge that is not tested through disciplined dissent becomes an article of faith, surviving not because of its demonstrable truth, but because of appeals to authority and enshrined orthodoxy." Report of the Task Force on Academic Freedom, *supra*. Academic freedom is not served by prejudging the views expressed on the TCA website as illegitimate and warning students that the topic is banned and "should not" be promoted or discussed. This action by a public university prevents opportunities for critical thinking and stymies the search for truth that must remain ongoing.

Moreover, the District Court's decision is erroneous to the extent it holds that it was necessary to dismiss the First Amendment claims in order to uphold the Appellees' interest in academic freedom (Add. 12). The Appellees were and are free to hold and express their views concerning genocide and its application to Turkish treatment of Armenians. Additionally, faculty encountering work by Cingilli concerning this issue remain free to judge that work according to academic and pedagogical standards and determine whether the work has merit. But in exercising that freedom, it was and is not necessary that the Appellees abridge Cingilli's academic freedom by placing certain information and certain issues off-limits. The District Court treated academic freedom as a one-way street open only to the Appellees, and failed to recognize that the Appellees' exercise of that freedom would not be curtailed by recognizing Cingilli's claim to that freedom.

CONCLUSION

Amicus respectfully requests that this Court recognize the countervailing academic freedom interest of Appellant Cingilli which was ignored by District Court in its decision below. In doing so, the Court should reverse the decision to dismiss the Complaint for failure to state a claim and remand the case to the District Court.

Respectfully submitted,

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s/ Douglas R. McKusick
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Dated: July 20, 2011