Case No.:

in his individual capacity and his official capacity as the President of the State University of New York at Fredonia, and

DAVID STARRETT, in his individual capacity and official capacity as Executive Vice President and Provost of the State University of New York at Fredonia,

Defendants.

whose

underpinnings of morality and law. As an author, a public speaker, a columnist, and Distinguished Teaching Professor of philosophy at SUNY Fredonia, Kershnar uses a traditional philosophical method of Socratic inquiry, staking out provocative positions to question the core assumptions society makes about the role of morality and law.

- 3. SUNY Fredonia celebrated Professor Kershnar's scholarly examination of our society's moral commitments on a host of challenging issues, including abortion, slavery, and torture. In recognition of his stature in the field, the SUNY system named him SUNY Distinguished Teaching Professor, "SUNY's highest academic honor," and awarded Kershnar the "Chancellor's Award of Excellence in Teaching," noting his "superior professional achievement." Boasting about its award-winning professor, SUNY Fredonia issued a press release lauding Kershnar for his iron-sharpens-iron approach:
 - Dr. Kershnar has established a reputation as one of the most prolific authors on campus, having published four books and written dozens of articles for highly selective journals and book chapters and also presented in numerous conferences and philosophical forums. His works cover a wide spectrum, including politics, ethics, religion, law and sports. He is known for promoting unpopular or previously ignored positions that often leads those who disagree with him to sharpen their own views when reacting to his reasoning.
- 4. SUNY Fredonia was proud of Professor Kershnar's willingness to stake out unpopular positions—including his thought-provoking explorations of the moral status of adult-child sex, including when and why it should be criminalized. Proud, that is, until minute-long clips of his commentary on the subject, excerpted—without

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any context—from hours-long philosophy podcasts unrelated to the university, went viral on Twitter.

- 5. Within hours, SUNY Fredonia President Kolison denounced Kershnar and assured angry social media users that Kershnar would "not have contact with students" while university officials mounted an investigation. Kolison directed campus police to bar Kershnar from campus, to search his office, and to seize his computer and send it to an unknown third party for "analysis."
- 6. Four hundred and ninety-one days later (and counting), and long after the social-media tempest subsided, Kershnar remains exiled from the classroom on President Kolison's orders. He periodically receives an emailed letter from the university's provost, David Starrett, barring him from campus or teaching "due to ongoing concerns regarding your safety and the safety of others on campus should you return to the campus."
- 7. SUNY Fredonia has never said what the alleged threats to Professor Kershnar's safety are (and its daily crime log reflects no reported threats at all), what measures its purported "investigation" entailed, or whether the investigation ever concluded. If it is still ongoing, SUNY Fredonia's investigation has now outlasted the Warren Commission's investigation into the assassination of JFK, the U.S. Senate inquiry into the sinking of the *Titanic*, the Iran hostage crisis, and the federal government's investigation into the *Challenger* disaster.

8. SUNY Fredonia's investigation and claimed safety concerns were mere pretexts to mothball a professor whose questions earned the ire of state legislators, donors, the public, and the university's president.

- 9. Meanwhile, SUNY Fredonia continues to offer the classes Professor Kershnar normally teaches but is struggling to find an instructor to teach them. And although the pandemic showed the university is perfectly capable of online teaching, SUNY Fredonia flatly refused Kershnar's offer to teach online, where any legitimate safety concerns would be nonexistent.
- 10. Stephen Kershnar files this lawsuit to compel SUNY Fredonia to reject the heckler's veto—anathema to academia's special role in questioning the unquestionable—by restoring the First Amendment's protection on this public university campus.

Professor Kershnar

- 11. Plaintiff Stephen Kershnar, a Distinguished Teaching Professor at SUNY Fredonia, earned his undergraduate degree at Cornell University, his Juris Doctor degree at the University of Pennsylvania, and his Ph.D. in Philosophy from the University of Nebraska, Lincoln. In 1998, Kershnar joined the faculty of SUNY Fredonia, which awarded him tenure in 2002.
- 12. Kershnar's academic record at SUNY Fredonia is sterling. In the classroom, his teaching earned him the SUNY Chancellor's Award for Excellence in Teaching (in 2002) and the appointment of Distinguished Teaching Professor—the SUNY System's highest academic honor and rank.

- 13. Outside of the classroom, Kershnar is a prolific writer. He has published ten books, over one hundred articles and book chapters, and frequently gives presentations on complex philosophical questions in public appearances.
- 14. Despite this long record of distinguished scholarship, SUNY Fredonia's president and provost have exiled Distinguished Teaching

- c) The inheritance-based claim to reparations, 8 LEGAL THEORY 243, 243–267 (2002);
- d) A Liberal Argument for Slavery, 34 J. OF SOCIAL PHIL. 510, 510–536 (2003);
- e) Respect for Persons and the Harsh Treatment of Criminals, 18 INT'L J. OF APPLIED PHIL. 103, 103–121 (2004);
- f) A Promissory Theory of the Duty to Tip, 119 Bus. & Soc'y Rev. 2, 247–76 (2014); and
- g) The Paradox of Consent, 33 INT'L J. OF APPLIED PHIL. 305, 305–318 (2019).
- 27. Under the State University of New York Policies of the Board of Trustees

34. SUNY policy differentiates between "inquiry, teaching and research" (in which faculty have "full freedom, within the law") and faculty members' "role as citizens," in which they "have the same freedoms as other citizens."

SUNY Fredonia and the SUNY system praise, reward, and promote Kershnar for his provocative philosophical inquiry.

- 35. Professor Kershnar joined SUNY Fredonia's Department of Philosophy as an Assistant Professor in 1998.
 - 36. In 2005, SUNY Fredonia promoted Kershnar to full professor.
- 37. On June 3, 2011, SUNY Fredonia issued a press release announcing that Professor Kershnar had been bestowed with the Chancellor's Award of Excellence in Scholarship and Creative Activities, a "statewide honor that recognizes superior professional achievement throughout the State University of New York system."
- 38. The June 3, 2011 press release highlighted Kershnar's "prolific" work and the important role his pedagogical approach plays in the university's sifting-and-winnowing of ideas:

His works cover a wide spectrum, including politics, ethics, religion, law and sports. He is known for promoting unpopular or previously ignored positions that often leads those who disagree with him to sharpen their own views when reacting to his reasoning.

39.

SUNY Board of Trustees to be named SUNY Distinguished Teaching Professor,

"SUNY's highest academic honor."

41. The 2014 press release again touted Kershnar's Socratic approach to philosophy:

Dr. Kershnar is renowned on campus for his unique

Kershnar questions the moral status of adult-child sex.

- 47. For decades, Professor Kershnar has written and spoken extensively on the moral and legal issues implicated by sexual conduct involving adolescents and children.
- 48. For example, before SUNY Fredonia awarded him tenure, Kershnar's article, entitled *The Moral Status of Harmless Adult-Child Sex*, was published by Public Affairs Quarterly in 2001.
- 49. Kershnar argues that as a legal matter, adult-child sex should always be criminalized. He analyzes whether, as a moral matter, adult-child sex is always wrong, and why we should criminalize it. In analyzing the moral issues, he discusses consent, exploitation, harm, rights, and viciousness.
 - 50. Kershnar argues that it is important that

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476, 487 (1957) ("Sex is . . . one of the vital problems of human interest and public concern.")

Kershnar appears on philosophy podcasts to debate philosophy.

54. On December 5, 2020, Kershnar appeared on a two-

- 70. Kershnar's appearances on the podcasts were not part of his official duties.
- 71. Kershnar did not list the podcast appearances in his annual report concerning his research, publications, and academic presentations.
- 72. Kershnar did not distribute links to the podcasts to the broader campus community.

As viral Twitter clips lead to calls for Kershnar's termination and arrest, President Kolison denounces and suspends Kershnar, pending investigation.

73. On February 1, 2022, a Twitter account shared a 28-second video clip from Kershnar's *Brain in a Vat* appearance, captioned: "SUNY Frc



81. Over the next twenty-four hours, clips of Kershnar's commentaries continued to

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President Kolison removes Kershnar from campus and bars him from speaking to the campus community.

85.

- 93. Chief Isaacson never provided Kershnar with any information about specific threats.
- 94. On the morning of February 3, 2022, at the direction of President Kolison, campus police and university staff—including Chief Isaacson, along with a lieutenant of the SUNY Fredonia Police and several information technology staff members—searched Professor Kershnar's office.
- 95. At the direction of President Kolison and Chief Isaacson, the campus police seized Kershnar's desktop computer for "analysis" by an unidentified third party.
- 96. On February 3, 2022, at the direction of President Kolison, SUNY Fredonia's Director of Human Resources, Maria Carroll, sent Kershnar a letter stating that "[e]ffective immediately and until further notice, pursuant to Article 19.11(c) of" the university's collective bargaining agreement, Kershnar was "to perform an alternate work assignment from an alternate location."
- 97. Article 19.11(c) authorizes President Kolison to reassign faculty pending potential disciplinary action.
- 98. H.R. Director Carroll's letter directed Kershnar "not to be on college property, or have contact with the campus community" without her permission.

99.

100. H.R. Director Carroll also told Kershnar that the "duration of the directive and alternate assignment is unknown, because the safety concerns . . . remain ongoing."

101. In the afternoon of February 3, 2022,

104. When President Kolison separated Kershnar from the campus community, no student, faculty member, or staff member had, to Kershnar's knowledge, reported that Kershnar had engaged in misconduct.

President Kolison ignores admonitory letters from academic freedom groups and faculty members.

- 105. On February 3, 2022, the Foundation for Individual Rights in Expression (FIRE),¹ now counsel for Kershnar, sent President Kolison a letter explaining that Kershnar's extramural statements were protected by the First Amendment and SUNY Fredonia's commitment to academic freedom.
- 106. On the same day, the Academic Freedom Alliance, a coalition of faculty members from across the ideological spectrum committed to upholding the principles of academic freedom, sent a letter to President Kolison.
- 107. The Academic Freedom Alliance's letter cautioned that Kershnar's extramural speech was protected expression and that the university's responsibility is to "shelter" its faculty from harassment "and not add to it."
- 108. On February 4, 2022, some 158 university professors from around the world and across disciplines sent President Kolison a joint letter warning that the "philosophical enterprise" and the "scholarly enterprise broadly" require the "freedom to ask uncomfortable questions and explore unpopular arguments," and that if Kershnar's "ideas are wrong, then we all benefit from seeing those errors exposed through intellectual engagement."

¹ Formerly known as the Foundation of Individual Rights in Education, FIRE expanded its mission in June 2022 beyond campus to protect the First Amendment rights of all Americans.

109. The February 4, 2022 letter warned:

The tradition of Western philosophy famously begins with the example of Socrates being silenced and put to death for asking questions and pursuing

- 116. The first day of classes for the Fall 2022 semester at SUNY Fredonia began on August 22, 2022.
- 117. On August 24, 2022, Provost Starrett sent Kershnar a letter continuing Kershnar's banishment from campus and classes.
- 118. The August 24, 2022 letter stated that Kershnar's removal from "teaching or service obligations" for the semester was "due to ongoing concerns regarding your safety and the safety of others on campus should you return to the campus."
- 119. When students enrolled in these courses showed up for their first day of Kershnar's classes, they found a sign—falsely attributed to the "Philosophy Department"—affixed to the classroom door informing them that the class had been cancelled.
- 120. Defendants did not make the decision to renew Kershnar's suspension from teaching until August 24, 2022, after classes had already started.
- 121. SUNY Fredonia's administration did not inform the Philosophy Department of the classes' cancellation until ten minutes before the classes were scheduled to begin.
- 122. Just before midnight on August 26, 2022 (after the beginning of the fall semester), SUNY Fredonia's administration emailed students notifying them that their classes were "being cancelled," recognizing that this was "more than a minor inconvenience and requires you to rethink the composition of your fall schedule," and apologizing for the "last-minute notices you have found on the classroom's doors."

regional campuses and at least twelve other public universities, purportedly in order to consider what courses should be offered at SUNY Fredonia.

131. Kershnar has also been instructed to complete training required for instructors to teach online so that he could develop course materials for other instructors to teach two Philosophy courses (PHIL 115-04: Introduction to Philosophy; and PHIL 364-01: Justice, Law, and Economics) in an online format.

Kershnar's removal from teaching does not serve any disciplinary need or investigation

- 132. On information and belief, Defendants' choice to remove Kershnar from teaching is not because they are contemplating disciplinary action against him.
- 133. While the university's collective bargaining agreement authorizes temporary reassignment in anticipation of disciplinary action where the faculty member's "continued presence on the job represents a potential danger to persons... or would severely interfere with its operations," the university must serve a notice of discipline

137. As authority, the August 24, 2022, September 9, 2022, and November 1, 2022 letters

142. On April 27, 2023, the Chautauqua County Sheriff's Office responded to a FOIL request, stating that it had no records concerning Kershnar or communications with SUNY Fredonia since January 30, 2022.

143. The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, also known as the Clery Act, requires public universities to maintain a daily log of reports of any crime reported to campus police. 34 CFR 668.46(f)(1).

144.

the threat was not credible, identified the anonymous student, and arrested him that evening.

151.

SUNY Fredonia's sixteen-month investigation yields no charges or disciplinary action.

- 155. On February 3, 2022, President Kolison publicly announced that Kershnar would be barred from "contact with students while [an] investigation is ongoing."
- 156. During an August 29, 2022 appearance before the SUNY Fredonia University Senate, a philosophy professor asked President Kolison whether his publicly-announced investigation into Kershnar was still ongoing.
- 157. President Kolison refused to answer the philosophy professor's question, citing the need for privacy and due process.
- 158. During the same meeting, Provost Starrett confirmed that SUNY Fredonia had been considering whether to allow Kershnar to resume teaching as late as Wednesday, August 24, 2022—two days into the Fall 2022 semester.
- 159. During the meeting, Provost Starrett refused to state whether safety concerns were involved in the decision to continue Kershnar's suspension.
- 160. Although SUNY Fredonia's February 3, 2022 letter suspending Kershnar cited the potential for disciplinary action, its subsequent letters reassigning him have only cited safety considerations.
- 161. SUNY Fredonia has never notified Kershnar of the institution of formal disciplinary measures.
- 162. In responding to FOIL requests, the New York State Police, Chautauqua County Sheriff's Department, and Fredonia Village Police Department have each stated they have no records concerning Kershnar since the controversy.

163. Although FOIL permits a law enforcement agency to deny access to records that, if disclosed, would interfere with an investigation, none of these agencies (i.e., the New York State Police, Chautauqua County Sheriff's Department, and Fredonia Village Police Department) stated that they were denying access to any responsive record.

- 164. On this information and belief, no report concerning Kershnar or threats concerning Kershnar has been made to the New York State Police, Chautauqua County Sheriff's Department, or Fredonia Village Police Department.
- 165. Save for traffic infractions, Kershnar has never been cited, charged, or arrested by any law enforcement agency.

Kershnar turns down public speaking engagements and communication with campus community due to ongoing investigation, prior restraint.

- 166. President Kolison's public announcement that SUNY Fredonia was investigating Kershnar's extramural speech and the actions he took consistent with that announcement have chilled Kershnar's speech.
- 167. Kershnar has declined speaking engagements on subjects that may be controversial out of concern that his remarks will contribute to—or renew—the investigation into his January 2022 remarks.
- 168. Kershnar did not respond to media inquiries about the *Brain in a Vat* controversy out of concern that his arguments were under investigation by SUNY Fredonia.

169. Kershnar also did not personally respond to media inquiries from *The*Leader

Fall 2023 semester and has instead been asking faculty whether to reassign Kershnar's classes.

175. As of the date of this Complaint, the classes continued to be offered for registration.

176. Kershnar, a Distinguished Teaching Professor, has been constructively terminated as a teacher because President Kolison personally objects to Kershnar's expression. Kershnar—whose title is Distinguished *Teaching* Professor—has been exiled from the classroom for sixteen months after Kolison publicly announced an "investigation" into Kershnar.

177. Plaintiff Kershnar has been and continues to be injured because President Kolison and Provost Starrett are effectuating a social media heckler's veto, allowing momentary public and political reactions to dictate who may teach at a public university.

178. Defendants' repeated assertions that Kershnar's exile is mandated by safety concerns are purely pretextual. Although SUNY Fredonia claims it received threats, its police incident reports are barren of reports of threats, it has not reported them to local law enforcement, and the FBI says it is unaware of any specific threats to Kershnar. While SUNY Fredonia claims it was motivated by concern for Kershnar's safety, it refuses to tell him anything specific about any purported threats.

179. Kershnar has, since the first day he was removed from campus, been ready and able to teach his classes online, thus obviating any alleged potential threat, but SUNY Fredonia has refused to consider this narrower measure.

- 180. Yet, instead of allowing Kershnar to teach online—let alone in a classroom, where he belongs—Defendants are requiring him to design online teaching modules, adding insult to injury.
- 181. In addition to being expressly prohibited from teaching on campus, Kershnar has curtailed his extramural speech—his public speaking appearances and publications—because of concern that his speech will be used against him. President Kolison's sixteen-month investigation into Kershnar has placed him under a doud,

- 185. Plaintiff Kershnar re-alleges and re-incorporates paragraphs 1–184 as though fully set forth here.
- 186. In his appearances on the *Unregistered* and *Brain in a Vat* podcasts, Kershnar spoke as a private citizen.
- 187. Kershnar's comments on Unregistered and Brain in a Vat addressed matters of public concern.
- 188. Kershnar's interest in speaking as a private citizen on matters of public concern outweighs the public university's interests in advancing content- or viewpoint-discrimination.
- 189. Kershnar's interest in speaking as a private citizen on matters of public concern outweighs the public university's interests in imposing a heckler's veto.
- 190. Defendants suspended Kershnar from teaching his classes, from entering the Fredonia campus, and from communicating with the university community, because of President Kolison's opposition to Kershnar's message, or because of public reactions to Kershnar's message, or both.
- 191. Frustrating a faculty member's classroom teaching in the absence of a legitimate educational interest violates the First Amendment. *Levin v. Harleston*, 966 F.2d 85, 88 (2d. Cir. 1992).

- 192. Neither reason serves a legitimate educational interest.
- 193. Kershnar's speech did not materially disrupt SUNY Fredonia's operations.
- 194. On each date that Defendants decided to prevent Kershnar from teaching (including February 1–3, 2022, August 24, 2022, September 9, 2022, November 1, 2022, and when Defendants decided not to permit Kershnar to teach during the Fall 2023 semester), it was not reasonable to predict future disruption from Kershnar's speech.
- 195. SUNY Fredonia's invocation of safety is predicated on speech by outsiders—that is, people with little or no relationship to SUNY Fredonia—and imposes a heckler's veto. *Melzer v. Bd. of Educ.*, 336 F.3d 185, 199 (2d Cir. 2003).
- 196. Public reaction to speech is never a content-neutral basis for regulation. Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123, 134 (1992). A heckler's veto is a viewpoint-based limitation on expression and is impermissible under the First Amendment.
- 197. On each date that Defendants decided to prevent Kershnar from teaching (including February 1–3, 2022, August 24, 2022, September 9, 2022, November 1, 2022, and when Defendants decided not to permit Kershnar to teach

measures that would address any safety interest without burdening Kershnar's expression.

- 204. On information and belief, the narrower measures ignored or rejected by Defendants include, but are not limited to:
 - a) Permitting Kershnar to teach remotely;
 - b) Increasing police presence in the immediate vicinity;
 - c) Soliciting backup from external law enforcement agencies;
 - d) Reporting threats to external law enforcement; and
 - e) Seeking the arrest or prosecution of persons, if any, who made threats of violence.
- "#\$% Executive Vice President and Provost Starrett engaged in unconstitutional viewpoint discrimination by enforcing President Kolison's viewpoint-driven directive.!
- 206. SUNY Fredonia is offering the classes Kershnar teaches to undergraduate students in the Fall 2023 semester.
 - 207. SUNY Fredonia has no faculty member to teach these courses.

208.

nowhere more vital[.]" Healy v. James, 408 U.S. 169, 180 (197

- 221. President Kolison's and Provost Starrett's actions directly deprived Kershnar of his First Amendment rights.
- 222. Defendants' adverse action was in response to Kershnar's protected speech.
- 223. Kershnar's message was the motivating factor in President Kolison's decision to take retaliatory action against Kershnar. President Kolison immediately suspended Professor Kershnar and subjected him to a protracted banishment and investigation because of his extramural remarks on a matter of public importance.
- 224. President Kolison's and Provost Starrett's response to Kershnar's expression are sufficient to deter a person of ordinary firmness from continuing to engage in expressive activity.
 - 225. Defendants' actions have, in fact, chilled Kershnar's speech.
- 226. Kershnar has no adequate legal, administrative, or other remedy by which to prevent or minimize the immediate, irreparable, and ongoing harm to his First Amendment rights from Defendants' retaliatory conduct.
- 227. Absent preliminary and permanent injunctive relief enjoining Defendants from retaliating against Kershnar due to his protected expression, the public university will continue to violate Kershnar's First Amendment rights.
- 228. Because a justiciable controversy exists over Defendants' retaliation against Kershnar's protected expression, Kershnar also seeks declaratory relief against Defendants. A declaratory judgment will further resolve and clarify the parties' legal relationship.

- 239. Defendants' directive is not limited in subject matter, restraining Kershnar's speech even if it addresses matters of public concern.
- 240. Kershnar desires and has a strong interest in continuing to speak on matters of public concern, including defending, explaining, or elaborating on the comments he made in public debates.
- 241. The members of the public who make up the Fredonia "community" have a constitutionally recognized interest in having the opportunity to hear from a faculty member whose provocative views have caused controversy, even if they ultimately disagree with him.
- 242. Defendants' directive has prevented Kershnar from responding to criticisms of his remarks by colleagues, including on email discussion lists open to SUNY Fredonia faculty.
- 243. Defendants' directive has also inhibited Kershnar's ability to respond to inquiries from SUNY Fredonia's student newspaper, *The Leader*.
- 244. SUNY Fredonia has no interest sufficient to justify restraining a tenured faculty member from speaking on any subject to any member of a community of

247. Absent preliminary and permanent injunctive relief enjoining Defendants from enforcing their prior restraint on Kershnar's speech, the public university will continue to violate Kershnar's First Amendment rights.

260. Accordingly, punitive damages against President Kolison are appropriate and necessary to punish President Kolison for violating Kershnar's First

- 6. Award Kershnar his costs; and
- 7. Award such other relief as the Court may deem just and proper.

Dated: June 9, 2023

Respectfully submitted,

/s/ Barry N. Covert

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Counsel for Plaintiff

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