No. 23-363

IN THE
Supreme Court of the United States

STEPHEN R. PORTER,
Petitioner,
v.
BOARD OF TRUSTEES OF NORTH CAROLINA STATE UNIVERSITY, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION, KEITH E. WHITTINGTON, AND FIRST AMENDMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER AND REVERSAL

EDWARD S. RUDOFSKY
First Amendment Lawyers Association
5 Arrowwood Lane
Melville, N.Y. 11747

JOSHUA A. HOUSE
Counsel of Record
Foundation for Individual Rights and Expression
700 Pennsylvania Ave. SE, Ste. 340
Washington, D.C. 20003
(215) 717-3473
joshua.house@thefire.org

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to the freedoms of speech, expression, and conscience—the essential qualities of liberty. Because colleges and universities play an essential role in preserving free thought, FIRE places a special emphasis on defending these rights on our nation's campuses. To best protect professors' academic freedom and prepare students for success in our democracy, FIRE believes the law must remain unequivocally on the side of robust free speech rights on campus. Since 1999, FIRE has successfully defended First Amendment rights on campuses nationwide through public advocacy, targeted litigation, and *amicus curiae* filings in cases, like this one, that implicate faculty rights. *See, e.g.*, Brief for FIRE, et al. as *Amici Curiae* Supporting Plaintiff-Appellant, *Adams v. Trustees of Univ. of N.C.-Wilmington*, 640 F.3d 550 (4th Cir. 2011) (No. 10-1413); Brief for FIRE as *Amicus Curiae* Supporting Plaintiff-Appellant-Petitioner, *McAdams v.*

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* or their counsel contributed money intended to fund preparing or submitting this brief. Pursuant to Rule 37.2, *amici* affirm that all parties received timely notice to the intent to file this brief.

Marquette Univ., 914 N.W.2d 708 (Wis. 2018) (No. 2017AP1240).

Keith E. Whittington is William Nelson Cromwell Professor of Politics in the Department of Politics at Princeton University. He is the author of *Speak Freely: Why Universities Must Defend Free Speech* and has written or edited numerous books and casebooks on American constitutional theory and history. He has published widely on American constitutional theory, American political and constitutional history, the law and politics of impeachment, judicial politics, the presidency, and free speech. His work for a general audience has appeared in the *Washington Post*, *Wall Street Journal*, *The New York Times*, *The Atlantic*, *Reason*, and *Lawfare*. He blogs at the *Volokh Conspiracy* and can be found on X (formerly Twitter) at @kewhittington. He hosts *The Academic Freedom Podcast*. Professor Whittington is currently the chair of the Academic Committee of the Academic Freedom Alliance.

First Amendment Lawyers Association (FALA) is an Illinois nonprofit corporation with some 150 members throughout the United States, Canada, and Europe. Its membership consists of attorneys whose practice emphasizes the defense of First Amendment rights and related civil liberties. For more than half a century, FALA members have

litigated cases concerning a wide spectrum of such rights, including free expression, free association, defamation, and related privacy issues. FALA has frequently appeared as *amicus curiae* before numerous state and federal courts to provide its unique perspective on some of the most important First Amendment issues of the day.

SUMMARY OF ARGUMENT

Nearly two decades ago, this Court acknowledged its opinion in *Garcetti v. Ceballos* "may have important ramifications for academic freedom." 547 U.S. 410, 425 (2006). Those ramifications have been borne out: Public university faculty are increasingly punished for their speech, but the Courts of Appeals do not have a consistent framework with which to analyze professors' free-speech claims. By reserving the question of whether *Garcetti* applies to the academic speech of public university faculty, this Court recognized that employee speech doctrine must allow "[t]eachers and students . . . to inquire, to study and to evaluate, to gain new maturity and understanding[.]" *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). The Court's failure to explain the *Garcetti* carveout's contours, however, has confused courts and, as here, suppressed academic speech. This case is an opportunity to answer the question *Garcetti* left open and hold academic speech is a "special concern." It's time to clear the air.

Garcetti held that when public employees express ideas as part of their official duties—like a government lawyer producing a memorandum—those employees' expressions are not protected by the First Amendment. But the Court reserved the question of how *Garcetti*'s analysis applies to public university faculty members' speech "related to scholarship or teaching"—what courts have called "academic speech." That has left the circuit courts on their own to develop the academic speech doctrine and define when public university professors' speech is protected under the First Amendment. While several circuits have held that *Garcetti* does not apply to public university faculty's academic speech, they have differed on what exactly academic speech is. Some circuits have reasoned that academic speech relates only to classroom teaching; others have held it extends to off-campus advocacy.

This case is an opportunity to settle and clarify the question *Garcetti* left open. And this Court should take that opportunity. The circuits need guidance. The Fourth Circuit's decision in this case is a prime example. It called Porter's speech "plainly" non-academic, even though his speech appears no less academic than statements by professors deemed protected by other circuits. By deciding Porter's statements were protected academic speech, this Court will provide much needed clarity to lower courts.

This case is also a good vehicle for that clarification. Because it was decided on a motion to dismiss, the only question is whether Porter adequately alleged his speech was protected under the First Amendment. And, *Garcetti* aside, Porter sufficiently alleged that his speech is protected under this Court's existing public-employee speech precedent.

Now is the right time to clarify this rule. *Amici* are all too familiar with the rising threats to free speech on American campuses. Routine campus debates—in this case, for example, the inclusion of a question on a student survey—are now grounds for "cancellation" in the ongoing culture wars. Limiting First Amendment protection for professors will make them vulnerable to political pressure from right and left alike, "cast[ing] a pall of orthodoxy." *Keyishian v. Bd. of Regents of Univ. of N. Y.*, 385 U.S. 589, 603 (1967). To ensure our public colleges and universities remain the paradigmatic "marketplaces of ideas," this Court should say "enough."

ARGUMENT

I. This Court Should Clarify the Scope of the Academic Speech Exception to *Garcetti*.

In *Garcetti v. Ceballos*, this Court held that the First Amendment does not protect the speech of public employees if it is spoken as part of their official duties.

547 U.S. at 413, 426. It reserved, however, deciding how this rule would apply to one set of public employees: public university faculty. The circuit courts have since struggled to consistently apply the test to such faculty. Deciding that Porter's speech is protected will provide much needed clarity, as the following three points explain.

First, *Garcetti* itself recognized that its "official duties" framework did "not fully account[] for" the unique "constitutional interests . . . involving speech related to scholarship or teaching," *id.* at 425—speech that some courts have called "academic speech."[2] But the Court expressly reserved deciding "whether [*Garcetti*'s framework] would apply in the same manner to a case involving" academic speech. 547 U.S. at 425. That makes sense, given the strong First Amendment protections this Court has historically extended to public university professors. *E.g.*, *Keyishian*, 385 U.S. at 603. Since *Garcetti*, however, the Circuit Courts have been without guidance from this Court.

Second, without any guidance, the Circuits have begun to diverge. Taking this Court's hint, the Circuits agree that academic speech is excepted from

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[2] *See, e.g.*, *Heim v. Daniel*, 81 F.4th 212, 215 (2d Cir. 2023) (referring to *Garcetti*'s "teaching and scholarship" as "academic speech"); *Meriwether v. Hartop*, 992 F.3d 492, 503 (6th Cir. 2021) (same); *Demers v. Austin*, 746 F.3d 402, 408 (9th Cir. 2014) (same).

the *Garcetti* rule. But they disagree over the scope of that exception. This case is an opportunity to clarify the bounds of the academic speech exception to better protect free expression at our nation's public institutions of higher education.

And third, Porter's case tees up this very issue. His complaint details that all his statements were about higher education policy—a subject relevant to his academic expertise and on which he has strong opinions. Porter didn't speak in a classroom or in a formal publication, but he nonetheless spoke about a uniquely academic question in a uniquely academic context. Those allegations provide this Court an opportunity to hold that Porter's speech is academic speech and therefore not subject to *Garcetti*'s official duties analysis.

A. *Garcetti* recognizes that the First Amendment protects academic speech.

In *Garcetti v. Ceballos*, this Court explained its public-employee speech jurisprudence: When public employees speak not "as citizens" but instead "pursuant to their official duties," then "the Constitution does not insulate their communications from employer discipline." 547 U.S. at 421. Because any employer has "control over what the employer itself has commissioned or created," a government employee, "by necessity must accept certain

limitations on his or her freedom" when speaking in their official capacity. *Id.* at 418, 422.

The Court's holding in *Garcetti* impacts approximately twenty million public employees in the United States, ranging from desk clerks to microbiologists, from police officers to agency administrators.[3] But of this varied and sprawling workforce, the *Garcetti* Court recognized only one set of employees that merited careful consideration under the First Amendment: public college and university professors. 547 U.S. at 425.

Responding to Justice Souter's dissent, the opinion acknowledged "some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for." *Id.* at 425. The *Garcetti* majority left that issue for another day, reasoning it was unnecessary to decide whether or how *Garcetti*'s rule applied "to a case involving speech related to scholarship or teaching." *Id.*

This Court was right to recognize academic speech as a special case. The Court "ha[s] long recognized that . . . universities occupy a special niche in our constitutional tradition," in particular because of "the expansive freedoms of speech and thought associated

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[3] *See About Annual Survey of Public Employment & Payroll (ASPEP)*, U.S. Census Bureau, https://www.census.gov/programs-surveys/apes/about.html (last updated June 8, 2023).

with the university environment." *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003). "[Academic] freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian*, 385 U.S. at 603; *see also Healy v. James*, 408 U.S. 169, 180–81 (1972) ("reaffirming this Nation's dedication to safeguarding academic freedom").

So *Garcetti* did not modify the protection given to academic speech—indeed, it explicitly reserved the issue. And that makes sense. How can an analysis premised on an employer's power to "control" speech that "the employer itself has commissioned" apply to academics, whose official duties are to speak freely?

Picking up on this question, every Court of Appeals to have considered the issue has held that *Garcetti*'s "official duties" holding does not apply to academic speech. Academic speech is protected even if it is spoken as part of an academic's official duties. *Heim*, 81 F.4th at 224 ("*Garcetti* Does Not Apply Here"); *Meriwether*, 992 F.3d at 506–07 (declining to apply *Garcetti* to academic speech); *Demers*, 746 F.3d at 412 ("We conclude that *Garcetti* does not—indeed, consistent with the First Amendment, cannot—apply to teaching and academic writing . . . ."); *Adams v. Trustees of Univ. of N.C.-Wilmington*, 640 F.3d 550 (4th Cir. 2011) ("[W]e will not apply *Garcetti* to the circumstances of this case."); *see Buchanan v. Alexander*, 919 F.3d 847 (5th Cir. 2019)

(applying *Pickering* rather than *Garcetti* where tenured professor was fired for classroom comments).

B. But lower courts disagree on the scope of academic speech.

The question presented here isn't whether academic speech is exempt from *Garcetti*'s official duties analysis. Given our longstanding national commitment to academic freedom, it simply "cannot be" otherwise. *Heim*, 81 F.4th at 227. Rather, the question is what exactly constitutes "speech related to scholarship or teaching." *Garcetti*, 547 U.S. at 425.

Courts, recognizing the obvious, have held that academic speech includes in-classroom speech. *Meriwether*, 992 F.3d at 499, 507 (holding that mandating the use of certain pronouns "on all university property" infringed on academic speech"); *Buchanan*, 919 F.3d at 853 (applying *Pickering*, not *Garcetti*, to classroom speech). The Second Circuit held this includes the "methodological preference[s]" a professor brought to his teaching and writing. *Heim*, 81 F.4th at 215.

The Ninth Circuit defined academic speech to include on-campus advocacy for intra-university reform, even if advocated outside the classroom. *Demers*, 746 F.3d at 406 (distribution of a pamphlet was "related to scholarship and teaching"). And some

courts—including the Fourth Circuit—have held academic speech includes off-campus political and religious speech not within the professor's field of study. *Adams*, 640 F.3d 550 (holding professor's commentary on public political and religious issues—published in outside publications and submitted in his promotion application—was academic speech).

Yet in this case the Fourth Circuit took a different tack, "readily conclud[ing]" that Porter's statements regarding faculty hiring and student survey questions were not "related to scholarship and teaching." App. 17–18; *see also* App. 18 ("[I]t plainly was unrelated to Appellant's teaching or scholarship."). Because Porter was not "teaching a class" or "discussing topics he may teach or write about as part of his employment" when he made the statements at issue, the Fourth Circuit incorrectly concluded his speech was not academic speech.

The holding below is difficult to square with *Adams*, where the professor, as part of his application for a promotion, submitted his commentary on public issues that he made outside the classroom. 640 F.3d at 553. And it's difficult to square with other academic speech cases—in part because this Court has not defined the boundaries of academic speech.

C. This Court should clarify the law and hold that Porter's speech is academic speech.

This case demonstrates why academic speech needs clarification. Porter is a tenured professor at N.C. State. Compl. (Dkt. No. 1) ¶ 13, *Porter v. Bd. of Trs. of N.C. State Univ.*, No. 5:21-cv-365 (E.D.N.C. Sept. 14, 2021). He is a professor in the College of Education's Department of Educational Leadership, Policy, and Human Development. *Id.* His official duties include teaching, researching, publishing, supervising doctoral students, and participating in various academic committees. *Id.* ¶¶ 13, 18.

As an expert in higher education and methodological analysis, Porter recently became "concern[ed] that the field of higher education study is abandoning rigorous methodological analysis in favor of results-driven work aimed at furthering a highly dogmatic view of 'diversity,' 'equity,' and 'inclusion.'" *Id.* ¶ 19. Porter expressed his concern about those DEI policies in three statements relevant to this case.

First, at a department meeting, Porter criticized "a proposal by the [college's] Council on Multicultural and Diversity Issues to add a question on diversity to student course evaluations." *Id.* ¶ 20. "Survey methodology is one of [Porter's] areas of research, and he was concerned that in response to social pressure,

the department was rushing to include a question that had not been properly designed . . . ." *Id.* ¶ 22.

Second, Porter sent a sarcastic response to a department-wide email, in which he criticized a colleague who chaired the department's hiring committee. *Id.* ¶¶ 33, 37. The committee had been the subject of a news investigation because it considered a controversial candidate for an open position. *Id.* ¶ 37. Porter believed the committee had missed the candidate's notorious past only because it "cut corners on [its] vetting . . . in pursuit of a particular vision of social justice." *Id.* ¶ 36.

Third, Porter wrote a post on his personal blog criticizing the Association for the Study of Higher Education (ASHE). *Id.* ¶ 47. He called ASHE a "Woke Joke" and argued, citing a colleague's research, that "the focus of [its upcoming] conference had shifted from general post-secondary research to a focus on social justice." *Id.*

Taken in a light most favorable to Porter,[4] it is hard to see any of these statements as anything but academic speech. Porter is an academic specializing in higher education, and each statement criticizes higher education policies: the first, student course evaluations; the second, faculty hiring policies; and

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[4] This case is on appeal from the grant of respondents' motion to dismiss Porter's complaint. App. 50, 68.

the third, the agenda of an academic conference on higher education. Each statement "relate[s] to scholarship or teaching." That they occurred outside the classroom or off campus doesn't change that. *See Adams*, 640 F.3d at 553. That they may not be the exact topics of his current academic research doesn't change that. *See id.* That they advocated for changes in his own department's policies doesn't change that. *See Demers*, 746 F.3d at 406. Indeed, Porter's arguments for reform in his department—in particular changes regarding "the composition of the faculty," *id.* at 415—are exactly the sort of speech that "must be left to academics." *Heim*, 81 F.4th at 233.

Only if one strictly confines "academic speech" to the classroom and research publications can one doubt whether Porter's comments are academic speech. But doing so would remove the First Amendment's protections from a vast swath of typical academic speech: guest lectures, opinion writing, academic conferences, and far more. After all, there are a "range of scholarly-adjacent expressions that occur on a college campus," and taken in sum, they make the public university the marketplace of ideas it must be to fulfill its educational and social function.[5] What about meetings between professors and

[5] Keith E. Whittington, *What Can Professors Say on Campus? Intramural Speech and the First Amendment* 28 (August 2, 2023) (unpublished manuscript), https://ssrn.com/abstract=4551168.

students, or between professors and teaching assistants?[6] What about academic conferences, teaching workshops, or other professional development opportunities, each of which will may be rife with academic discussion and debate?[7] Real controversies have come out of academic conferences.[8] "The professor's First Amendment interest in the freedom to engage in such activities and have such conversations are as substantial as the professor's First Amendment interest in directly teaching the content of a course."[9] As this Court has wisely recognized: "To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation." *Sweezy*, 354 U.S. at 250.

This Court should take the opportunity to resolve these questions. Inconsistency among the Circuits, indeed even within a single circuit, demonstrates the need for clarity. Porter's case presents an opportunity

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[6] *Id.*

[7] *Id.*

[8] *See, e.g.,* Elizabeth Redden, *Georgetown Professor Fired for Statements About Black Students*, INSIDE HIGHER ED (March 11, 2021), https://www.insidehighered.com/news/2021/03/12/georgetown-terminates-law-professor-reprehensible-comments-about-black-students.

[9] Whittington, *supra* note 5, at 28.

to end the confusion and clarify the scope of the academic speech exception to its *Garcetti* framework.

II. This Is a Good Vehicle for Clarifying the Scope of Academic Speech Because Porter Sufficiently Alleged His Speech Is Protected Under *Pickering*.

This case is especially worthy of the Court's attention because, *Garcetti* aside, Porter's statements are in fact protected by the First Amendment.

Because Porter's statements are academic speech, they are not governed by *Garcetti*'s "official duties" analysis. There are, however, still governed by this Court's other public-employee speech cases. Those cases set forth a two-part test: *First*, the employee's speech must have concerned "matters of public concern." *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968); *see Connick v. Myers*, 461 U.S. 138, 145–46 (1983). *Second*, the employee's interest "in commenting upon matters of public concern" must outweigh "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. This test is commonly known as *Pickering* balancing.

Porter's allegations satisfy both prongs of this Court's *Pickering* balancing.

First, Porter's complaint alleges that his speech was a matter of public concern. The complaint alleges that each of his statements was concerned with "whether the field of higher education should sacrifice academic rigor in favor of furthering a particular view of 'social justice.'" Compl. (Dkt. No. 1) ¶ 118. That allegation is supported by others. Porter's comments on the student survey specifically criticized "a question on diversity[.]" *Id.* ¶ 20. Porter's sarcastic email to a colleague was intended to criticize her hiring committee "cut[ting] corners . . . in pursuit of a particular vision of social justice[.]" *Id.* ¶ 36. And Porter's third statement, a blog post calling the Association for the Study of Higher Education a "Woke Joke," *id.* ¶ 47, uses verbiage that is contested in public debate. In fact, the same term was used in response to Porter's post, with his critics saying "conferences where race, racism, blackness, and women were left off the agenda [are] still in abundance! . . . . As for ASHE we will be Woke!" *Id.* ¶ 48.

DEI policies, social justice, and the subject of "wokeness" are no doubt matters of public concern. *USA Today* reports that Americans are "deeply divided over DEI" policies.[10] *TIME* reports that the

[10] Jessica Guynn, *Culture wars are spreading to work: Republican and Democrat workers deeply divided over DEI*, USA TODAY (May 17, 2023), https://www.usatoday.com/story/money/

term "woke," referring to "an awareness of social injustices," is a key issue in the current political primaries; one candidate even wrote a book entitled *Woke, Inc*.[11] The precise policies that Porter criticizes "may strike outsiders as arcane, inconsequential, or even 'trivial.'" *Heim*, 81 F.4th at 229 (quoting *Demers*, 746 F.3d at 413). But those criticisms take place in the context of a wider debate on issues of DEI, social justice, and "woke," matters, very much the subject of public concern.

Second, Porter alleged that Respondents had no legitimate justification for retaliating against his speech. According to the Complaint, Respondents' only reason for taking adverse action against Porter was his "unpopular" yet "protected expressions of opinion on important societal issues." Compl. ¶¶ 1, 78. It may be that discovery reveals other justifications, which a trier of fact could then weigh. *Cf. Demers*, 746 F.3d at 417 (noting issue of material fact remained regarding "whether defendants had a sufficient interest in controlling or sanctioning" professor). But Porter's allegations—taken in the light most favorable to him—includes no justifications for Respondents' actions. Even Respondents' alleged concerns for

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2023/05/17/dei-workplace-divide-republicans-democrats/70225605007.

[11] Philip Elliott, *Some in GOP See 'Woke' Rhetoric as Lazy. Then There's Ron DeSantis*, TIME (June 7, 2023) https://time.com/6285681/woke-rhetoric-republicans-desantis-trump.

Porters' lack of "collegiality," Compl. ¶ 63, must yield to the high value this Court assigns to academic speech: "[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'" *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 670 (1973). As profiled by the Complaint, Respondents' actions against Porter were not the product of "*legitimate* academic decision making." *Univ. of Pennsylvania v. E.E.O.C.*, 493 U.S. 182, 198 (1990) (emphasis in original) (rejecting university's "academic freedom" arguments). Rather they were directly motivated by "direct retaliation for Plaintiff's expression of unpopular viewpoints." Compl. ¶ 78.

In sum, Porter alleges both that he spoke on matters of public concern and that Respondents had no justification for acting against him. His allegations therefore satisfy *Pickering* balancing, and sufficiently allege speech protected by the First Amendment.

III. With Academic Freedom Under Attack Nationwide, Now Is the Time to Clarify the Scope of Academic Speech.

Clarification on the boundaries of academic speech could not come at a better time. *Amici* are all too familiar with administrators responding to protected faculty speech with investigations, "shadow" courses, and suspensions—all of which chill discourse, harm

academic freedom, and quell public debate. These incidents have only increased in the decades since this Court's opinion in *Garcetti*, and they happen "more often at public institutions than at private ones."[12] Just consider these recent examples:

A retaliatory investigation. In December 2021, University of Washington professor Stuart Reges sent an email to other faculty criticizing the university's "land acknowledgment statements" and, the next month, added his diverging viewpoint to his course syllabus.[13] But rather than respect Reges's exercise of his First Amendment right to express a different viewpoint, the university ordered him to remove his statement from his syllabus, investigated him under threat of termination for eleven months, and withheld merit pay to which he was otherwise entitled. What's more, the university created a competing section of

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[12] Komi Frey & Sean T. Stevens, *Scholars Under Fire: Attempts to Sanction Scholars from 2000 to 2022* 14 (Foundation for Individual Rights and Expression, 2023), https://www.thefire.org/research-learn/scholars-under-fire-attempts-sanctionscholars-2000-2022 [https://perma.cc/DLJ2-8HNP]; *see also id.* at 2 ("The annual number of [sanction] attempts has increased dramatically over time, from four in 2000 to 145 in 2022.").

[13] *Amicus* FIRE is currently representing Reges in a lawsuit against the university. *LAWSUIT: Professor sues University of Washington after admins punish him for 'inappropriate' opinion*, FIRE (July 13, 2022), https://www.thefire.org/lawsuit-professor-sues-university-of-washington-after-admins-punish-him-for-inappropriate-opinion [https://perma.cc/V3RC-MNAY].

Reges's course and advised students that they could switch to this "shadow" course by watching another professor's pre-taped lectures. This move ultimately reduced Reges's class size by a full thirty percent.[14]

Canceling a class. In April 2021, Cypress Community College professor Faryha Salim argued against lionizing the police in response to a student's "persuasive presentation" assignment in a communications class.[15] Online backlash to a video recording of the exchange prompted Cypress to cancel Salim's online communications class and publicly announce Salim's involuntary leave of absence. The college cited public safety concerns. But it failed to explain how canceling Salim's online class made its community safer. This disparity suggests the college had succumbed to a "heckler's veto" instead of standing up for Salim's First Amendment rights and academic freedom.

Stifling academic research. In November 2021, the University of Texas at Austin forced three professors to pause a study they had launched, after

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[14] Complaint for Civil Rights Violations ¶¶ 47, 51, *Reges v. Cauce*, No. 2:22-CV-00964, ECF No. 1. (W.D. Wash., filed July 13, 2022),

[15] Sabrina Conza, *FIRE demands answers from Cypress College over cancelled professor*, FIRE (May 14, 2021), https://www.thefire.org/fire-demands-answers-from-cypress-college-over-cancelled-professor [https://perma.cc/3B6N-ME9U].

some complained that the research discriminated on the basis of race.[16] As *amicus* FIRE pointed out in a letter to the university, pausing the ongoing research risked irreparably harming the professors' work, including introducing unanticipated variables in their study design, or creating a stigma that would dissuade prospective subjects from participating.[17] Other faculty members also objected to the suspension of the research, explaining that the administrators' actions sent "a message that risks censoring and chilling professor speech based on viewpoint, running afoul of central tenants of the First Amendment."[18]

Publication rescissions. Bruce Gilley is a professor of political science at Portland State University. He has faced a sanction attempt *every year* since 2017, when he published a peer-reviewed paper called "The Case for Colonialism." In 2019 Portland State University rejected Gilley's request that his course on conservative political thought be given permanent status. In 2021 Portland State

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[16] Kate McGee, *UT-Austin professors criticize university for halting antiracism study with preschoolers,* TEXAS TRIBUNE (Nov. 22, 2021), https://www.texastribune.org/2021/11/22/university-texas-austin-antiracism-preschoolers [https://perma.cc/DZ93-B5HT].

[17] *FIRE Letter to the University of Texas at Austin*, FIRE (Nov. 24, 2021), https://www.thefire.org/fire-letter-to-the-university-of-texas-at-austin-november-24-2021 [https://perma.cc/GLL7-7S5A]

[18] McGee, *supra* note 16.

administrators filed a copyright strike against Gilley for sharing recordings from a Faculty Senate meeting during which the faculty resolved that public criticism of critical race theory curricula prompts bullying and intimidation. Along with these administrative actions, Portland State faculty, other public university faculties, and academic associations openly condemned Gilley. In response to these sanction attempts, journals and book publishers refused to publish Gilley's work, even works they had already accepted.[19]

Simply put, when universities and colleges impose these kinds of hardships, it signals to professors they should keep their mouths shut—not only for fear of losing their jobs, but also for fear of losing their courses, their students, and precious opportunities for research. And any chilling of faculty members' protected speech jeopardizes the vitality and diversity of our nation's public universities. As the Court explained in *Sweezy v. New Hampshire*: "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." 354 U.S. 234, 250 (1957).

[19] Frey & Stevens, *supra* n.12, at 35–37.

CONCLUSION

Academic speech, broadly defined, deserves full protection under the First Amendment. Accordingly, *Amici* ask this Court to grant the petition and reverse the Fourth Circuit's decision.

November 6, 2023

Respectfully Submitted,

JOSHUA A. HOUSE
Counsel of Record
Foundation for Individual Rights and Expression
700 Pennsylvania Ave. SE, Ste. 340
Washington, D.C. 20003
(215) 717-3473
joshua.house@thefire.org

EDWARD S. RUDOFSKY
First Amendment Lawyers Association
5 Arrowwood Lane
Melville, NY 11747

Counsel for Amici Curiae