No. 22-2323

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2022

Jonah Smith,
Petitioner,

v.

Albert Hall, Shelia Barrett, and Westland Community College, *Respondents*.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRTEENTH

CIRCUIT BRIEF FOR PETITIONER

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San Francisco
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Jonah Smith

2025-26 LAW WEEK AND LIBERTY BELL MOOT COURT COMPETITION

STATEMENT OF THE ISSUES

I. Whether the First Amendment protects an instructor's in-class speech on a matter of public concern by limiting a public college's disciplinary power or whether academic speech is categorically unprotected by the First Amendment as official duty speech under *Garcetti*.

II. Whether the government speech doctrine allows a public college to compel a professor to communicate certain information endorsing a viewpoint in conflict with the professor's deeply held academic views or whether the well-established *Pickering-Connick* balancing test should continue to apply in the academic setting.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the decision of the Thirteenth Circuit Court of Appeals upon the grant of a petition for writ of certiorari. 28 U.S.C. § 1254. Petitioner brought suit under 42 U.S.C. § 1983 for violations of his First Amendment rights.

STANDARD OF REVIEW

This Court reviews questions of law de novo. *Elder v. Holloway*, 510 U.S. 510, 516 (1994). Because this case is on appeal from a dismissal for failure to state a claim under Federal Rules of Civil Procedure 12(b)(6), the facts alleged in the complaint are considered true. *O'Hare Truck Services, Inc. v. City of Northlake*, 518 U.S. 712, 715 (1996).

STATEMENT OF THE CASE

1. Statement of Facts

Jonah Smith ("Smith") was a non-tenured professor for over ten years in the Philosophy Department at Westland Community College ("WCC") in the State of Westland. R. at 4. Smith completed a PhD program while teaching at WCC about "elevating civility as a value" and how "push[ing] important voices out of the dialogue . . . improperly places an advantage on the status quo." R. at 10. He also engaged in research and scholarship about property rights and criminal law. R. at 5. Smith was a popular professor who pushed his students to think critically. R. at 5. He often used the Socratic method during class and chose controversial topics to engage his students. R. at 5. He usually taught four classes at WCC: two introductory courses and two specialized "200-level" courses. R. at 4.

WCC offers two-year degree programs in various career-focused fields. R. at 4. WCC has recently struggled to recruit and retain students, partly because of conflicts between the

administration and the student body. R. at 4. The WCC administration made several changes they claimed would help to improve student retention, engagement, and campus culture. R. at 4. As a result, WCC implemented the "New Student Experience" ("NSE") program. R. at 7. NSE instructors must complete an orientation session and adhere to department-mandated guidelines. R. at 7. Furthermore, once a week, class periods were twenty minutes longer to allow time to introduce students to WCC community values. R. at 8, 9. The instructor is required to assign and discuss NSE readings using bullet points created by the NSE committee. R. at 9. The bullet points explain the value of the week, direct students to campus and community resources related to the value, and require students to write reflections using writing prompts on how they would embody the value while at WCC. R. at 9. Professors were required to read the writing reflection prompts aloud to students during class, which included phrases like "our campus values include . . ." and "at WCC, we value . . . ." R. at 9.

In the spring 2019 semester, Smith taught two introductory Formal Logic courses and two 200-level Philosophy of Law courses. R. at 5. In February 2019, Smith led a discussion about a local law professor and former WCC professor, Sally Sanders ("Sanders"). Sanders was recently in the news for representing a controversial client, Martin Michaelson ("Michaelson"). R. at 5. Smith intentionally selected this controversial example to engage his students. R. at 5. He posited that Sanders acted ethically in representing Michaelson and that WCC students acted unethically by trying to "cancel" Sanders. R. at 5. Several students were upset during the discussion, and one refused to answer questions requiring her to defend Sanders and argue against Michaelson's imprisonment. R. at 5, 6. Smith talked to the class about the importance of controlling emotions and engaging in logical reasoning. R. at 6. After class, students went to Shelia Barrett's ("Barrett") office—the Chair of the Philosophy Department—to complain about Smith's statements. R. at 6. Specifically, the students complained about Smith's comments on "cancel culture" and his questioning of a student who was visibly upset during the discussion. R.

at 6. Later that day, the students posted on WCC's social media pages about Smith's statements. R. at 6.

After reviewing the social media posts, Barrett met with Dean Albert Hall ("Hall") and Smith. R. at 6. Smith stated his comments were a valid part of his lesson, his tone and language were not inappropriate, and his students must have rational discussions on controversial issues. R. at 6. Barrett and Hall advised Smith not to discuss Sanders, Michaelson, or cancel culture anymore. R. at 6. The next day, Smith had the other section of Philosophy of Law, which covered the same material, and he used the same examples. R. at 6, 7. Students who had previously seen the social media posts became upset, interrupted Smith to voice their dissatisfaction, and walked out of class. R. at 7. Smith discussed the need for philosophy students to get "thicker skin" and be rational instead of reactive. R. at 7. Students again posted on social media and threatened to disrupt his classes if he continued to teach. R. at 7. WCC removed Smith from teaching his Philosophy of Law courses. R. at 7.

At the end of the spring 2019 semester, Hall told Smith he would be offered a contract to teach four courses in the fall 2019 semester: two introductory Formal Logic courses and two introductory survey NSE courses. R. at 7. Smith told Hall he was not interested in teaching NSE courses and would prefer to keep his traditional teaching assignment. R. at 7. Hall explained to Smith that this was the only option for employment in the fall and advised him to attend an orientation session for NSE instructors. R. at 7. Hall, Barrett, and other members of the NSE committee led the orientation session and discussed the goals, objectives, and specific requirements of the NSE program. R. at 7, 8. Although course syllabi are typically discretionary and not subject to administrative review, the NSE program requires professors to include a list of pre-approved provisions. R. at 8. These provisions include paragraphs discussing WCC resources and campus information on diversity, accessibility, civility policies, and the WCC Land Acknowledge Statement—all of which are also posted on WCC's website. R. at 8. Hall

stated that these mandatory syllabus components would help increase student engagement and retention. R. at 8. The NSE program also requires a professor to lead discussions on WCC community values, including the importance of tradition and civility in discourse. R. at 10.

After orientation, Smith met with Barrett and Hall to discuss his concerns about the NSE program. R. at 9. Smith objected to the inclusion of the Land Acknowledgment Statement in his syllabus because it advocates for a view of property contravening his deeply held academic beliefs. R. at 10. Hall told Smith the Land Acknowledgement Statement was mandatory but that the statement expressed WCC's views and not necessarily Smith's personal beliefs. R. at 10. Smith then asked if he could: (1) put a statement on his syllabus qualifying that these views were not his own or (2) put a link to the WCC website rather than the full text of the statement. R. at 10. Hall rejected these suggestions. R. at 10. Smith told Hall and Barrett that he also objected to several required "bullet points" in the NSE courses. R. at 9, 10. Smith explained that the bullet points concerning the importance of tradition conflicted with his deeply held academic views. R. at 10. He also disagreed with the bullet points regarding the importance of civility in discourse. R. at 10. Smith reminded Hall and Barrett that he published a thesis elevating civility as a value and how it pushes important voices out of the dialogue and improperly places an advantage on the status quo. R. at 10.

Hall and Barret dismissed Smith's concerns and restated that he did not have to agree with WCC values personally. R. at 10. Smith asked if he could present his views and engage the class in a discussion recognizing multiple viewpoints on contested issues. R. at 10. Hall and Barrett again rejected Smith's suggestion. R. at 10. Smith reiterated that he would not be willing to include the Land Acknowledgment Statement and bullet points as written because of his deeply held disagreements with those viewpoints. R. at 10. Smith stated that it would create an impression that he was adopting those viewpoints. R. at 10. He felt this would be misleading to his students. R. at 10. Smith offered to work with WCC to find an acceptable alternative

approach. R. at 10. However, Hall informed Smith that WCC would not offer him a teaching contract for the fall 2019 semester because he was unwilling to fulfill the requirements of the NSE courses and because of the disruption in his spring 2019 courses. R. at 10, 11. Smith would not be allowed to continue to teach his Formal Logic courses or any other courses outside the NSE program. R. at 11.

2. Procedural History

Smith filed this complaint under 42 U.S.C. § 1983 in the Federal Eastern District Court of Westland, alleging two violations of his First Amendment rights. R. at 3. Respondents filed a motion to dismiss the suit pursuant to the Federal Rules of Civil Procedure 12(b)(6). R. at 11. The district court erroneously granted the motion to dismiss both claims. R. at 3. First, the district court held under *Garcetti* that the First Amendment does not apply to a public college's regulation of an instructor's in-class speech. R. at 11. The district court reasoned that *Garcetti* bars an instructor's claim regardless of whether the college's regulation consists of disciplining the instructor or requiring the instructor to convey certain information to his students. R. at 11. On the second claim, the district court held that the First Amendment does not limit a public college's ability to compel certain curricular speech through its paid employees. R. at 12.

Following the district court's order of dismissal, Smith timely appealed to the Thirteenth Circuit Court of Appeals. R. at 12. The Thirteenth Circuit affirmed the district court's dismissal of Smith's First Amendment claims. R. at 22.

This Court granted review of this case specifically to address two issues. R. at 30. First, whether the First Amendment protects an instructor's in-class speech on a matter of public concern by limiting a public college's power to discipline or whether academic speech is categorically unprotected by the First Amendment as official duty speech under *Garcetti*. Second, whether the First Amendment's prohibition against compelled speech limits a public

college's power to require an instructor to communicate information endorsing a viewpoint conflicting with the instructor's deeply held academic views. R. at 30.

SUMMARY OF ARGUMENT

This case is about preserving the sanctity of our academic institutions by upholding constitutional protections for an instructor's pedagogical speech, which is necessary to promote democracy and combat government censorship.

First, this Court should find that Smith has stated a First Amendment retaliation claim against all Respondents because this Court expressly declined to extend *Garcetti* to academic speech. This Court engages in a two-part inquiry to evaluate a public employee's right to First Amendment protection. First, whether the employee spoke as a citizen on a matter of public concern and, if so, whether the government entity had a sufficient justification for treating the employee differently from any other member of the general public. Although this Court recognizes that an employee does not normally speak as a citizen when the employee makes statements pursuant to his official duties, this Court declined to extend that standard to speech related to academic scholarship or teaching. A plurality of circuit courts recognizes an academic speech exception to *Garcetti* because this Court has traditionally extended broad First Amendment protections to teaching and academic writing. Even if this Court declines to adopt an academic speech exception here, Smith's speech is still protected by the First Amendment because it was not made "pursuant to his official duties" as intended by this Court. Because *Garcetti* does not apply, Smith's retaliation claim must be remanded for evaluation of the speech at issue under the *Pickering-Connick* balancing test.

Second, a bright-line rule providing no First Amendment exceptions is inappropriate when determining whether WCC impermissibly compelled Smith to communicate information to his students. The Thirteenth Circuit improperly applied the government speech doctrine, granting

WCC unlimited power to compel Smith's speech. Given the imprecise and inconsistent applications of the government speech doctrine, it should not be applied in academic settings. Further, the doctrine cannot be used to justify requiring the speaker to affirmatively adopt and endorse specific viewpoints in conflict with deeply held academic views, nor is university professor speech equivalent to government speech. Because the government speech doctrine does not apply, Smith's compelled speech claim must be evaluated under the *Pickering-Connick* balancing test.

Third, both of Smith's First Amendment claims must be evaluated under the *Pickering Connick* balancing test. A balancing test is the only appropriate measure to assess the competing interests of academic institutions and their instructors. Under the *Pickering-Connick* balancing test, this Court weighs the instructor's interests in speaking as a citizen on matters of public concern against the interests of the institution in promoting the efficiency of its services. Smith spoke as a citizen on matters of public concern during his February 2019 classes and his meetings with Hall and Barrett about the NSE program. Smith's interests in academic freedom and expressing his deeply held academic ideologies outweigh WCC's interest.

Accordingly, this Court should REVERSE the decision of the Thirteenth Circuit and hold (1) an instructor's First Amendment retaliation claim is not barred by *Garcetti* because there is a categorical exception to the rule for academic speech and (2) an instructor's compelled speech claim should be evaluated under the *Pickering-Connick* balancing test because the First Amendment limits a public college's ability to compel an instructor's speech.

ARGUMENT

I. *GARCETTI* DOES NOT BAR SMITH'S FIRST AMENDMENT RETALIATION CLAIM BECAUSE THIS COURT EXPRESSLY DECLINED TO EXTEND THE RULE TO SPEECH RELATED TO SCHOLARSHIP OR TEACHING.

The government "shall make no law . . . abridging the freedom of speech." U.S. Const.

amend. I. Under this Court's precedent, "two inquiries . . . guide interpretation of the constitutional protections accorded to public employee speech": (1) "whether the employee spoke as a citizen on a matter of public concern" and, if so, (2) "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). In *Garcetti*, this Court created a threshold test for determining whether the employee spoke as a "citizen." 547 U.S. at 421. This Court held that normally "when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* However, this Court expressly declined to extend the rule to academic speech, recognizing "there is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence." *Garcetti*, 547 U.S. at 425.

A. A Plurality of Circuit Courts Recognize an Exception to the *Garcetti* Rule for Speech Related to Scholarship or Teaching in Post-Secondary Education.

Since this Court's decision in *Garcetti*, whether the rule applies to academic speech has been an open question in the circuits. R. at 24. However, the majority of circuits that have decided cases implicating *Garcetti* and academic speech have either qualified or eliminated its application to post-secondary education. *See infra* Sections I.A.1, I.A.II. This Court's precedent strongly favors the adoption of the majority's consensus. *See New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2175 (2022) (Breyer, J., dissenting) ("We do not normally disrupt settled consensus among the Courts of Appeals, especially not when that consensus approach has been applied without issue for over a decade.").

Four circuits hold that *Garcetti* categorically does not apply to academic speech. *Adams*

v. Trs. Of Univ. of N.C.-Wilmington, 640 F.3d 550, 562 (4th Cir. 2011); *Buchanan v. Alexander*, 919 F.3d 847, 852–53 (5th Cir. 2019); *Meriwether v. Hartop*, 992 F.3d 492, 498 (6th Cir. 2021); *Demers v. Austin*, 746 F.3d 402, 411 (9th Cir. 2014). Three circuits have applied *Garcetti* to academic classroom speech in post-secondary institutions. *Lyons v. Vaught*, 875 F.3d 1168, 1174 (8th Cir. 2017); *Duvall v. Putnam City Sch. Dist., Indep. Sch. Dist. No. 1 of Oklahoma Cnty.*, 530 F. App'x 804, 814 (10th Cir. 2013); R. at 14 (Thirteenth Circuit holding "*Garcetti* applies to speech given while teaching in a college classroom"). Four circuits have declined to decide whether an academic speech exception to *Garcetti* applies in lieu of a decision by this Court, instead deciding applicable cases on other grounds. *See Alberti v. Carlo-Izquierdo*, 548 F. App'x 625, 639 (1st Cir. 2013) (internal citations omitted) ("[A]cademic freedom protects only speech in the context of classroom teaching that communicates 'an idea transcending personal interest or opinion . . .' This protection is far removed from [this] teacher's administrative complaints."); *Panse v. Eastwood*, 303 F. App'x 933, 934–35 (2d Cir. 2008) ("It is an open question in this Circuit whether *Garcetti* applies to classroom instruction."); *Gorum v. Sessoms*, 561 F.3d 179, 186 (3d Cir. 2009); *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 480 (7th Cir. 2007) (reasoning the speech made to a captive audience of high school students was an "easier case" than *Garcetti*, but "how much room is left for constitutional protection of scholarly viewpoints in post-secondary education was left open in *Garcetti* and need not be resolved"); *Emergency Coal. to Defend Educ. Travel v. U.S. Dept. of the Treasury*, 545 F.3d 4, 8 (D.C. Cir. 2008). The remaining circuit—the Eleventh Circuit—has yet to hear a case in which the question of *Garcetti*'s application to academic speech in a classroom has been at issue. *But see Pernell v. Fla. Bd. of Governors of State Univ. Sys.*, No. 4:22CV304-MW/MAF, 2022 WL 16985720, at *10 (N.D. Fla. Nov. 17, 2022) (concluding there is no "authority—binding or persuasive—holding that *Garcetti* applies to university professors' in-class speech such that it amounts to government speech outside the First Amendment's protection").

The plurality of circuit courts declining to extend *Garcetti* to academic speech approach the issue differently. The first approach applies a categorical exception to *Garcetti* for academic speech because of the teacher's "unique status as an educator employed by the state." *Demers*, 746 F.3d at 411. The second approach argues that academic speech is not within this Court's meaning of speech "pursuant to official duties." *Adams*, 640 F.3d at 563. However, under either approach, the argument retains the same predicate: "[t]he proper answer to the question 'whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties,' is '[s]ometimes,' not '[n]ever.'" *Garcetti*, 547 U.S. at 426 (Stevens, J., dissenting) (internal citations omitted).

1. Smith's claim is not subject to *Garcetti* because academic speech at colleges and universities receives categorical protection under the First Amendment.

This Court should rely on its own precedent, support the decisions of the Fifth, Sixth, and Ninth Circuits, and recognize an academic freedom exception to *Garcetti* because of the broad protection academic speech receives under the First Amendment. *See Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (teaching and academic writing are a "special concern of the First Amendment"). Moreover, this Court has consistently recognized the importance of free speech in the academic setting. *See Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (noting an investigation into the contents of a professor's lectures is an area "in which the government should be extremely reticent to tread"); *Garcetti*, 547 U.S. at 425 ("expression related to academic scholarship or classroom instruction implicates additional constitutional interests"); *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) ("We have long recognized that . . . universities occupy a special niche in our constitutional tradition.").

Critically, this Court must recognize that First Amendment protections apply not just to academic institutions but also extend to individual instructors. In *Pickering*, this Court recognized a "balance between the interests of the teacher, as a citizen, in commenting upon

matters of public concern and the interest of the State . . . in promoting the efficiency of the public services it performs through its employees." 391 U.S. at 568. This balancing necessarily rests on the presumption that the First Amendment protects the individual teacher, not just the academic institution. *See Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2411 (2022) (internal citations omitted) ("neither teacher nor students 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate'").

This Court should accept a categorical exception to the *Garcetti* rule for speech related to scholarship or teaching, following in the footsteps of the Fifth, Sixth, and Ninth Circuits. In *Meriwether*, the Sixth Circuit concluded that "the academic-freedom exception to *Garcetti* covers all classroom speech related to matters of public concern, whether that speech is germane to the contents of the lecture or not." 992 F.3d at 507. In *Meriwether*, the plaintiff was a philosophy professor at a small public college and a devout Christian. *Id.* at 498. The college instituted a new pronoun policy to ensure a student's "self-asserted gender identity." *Id.* The plaintiff's views as a Christian conflicted with the new pronoun policy, and he brought his concerns to his superiors at the university. *Id.* at 499. It was also the plaintiff's practice to employ the Socratic method in his classes, addressing his students as "Mr." or "Ms." *Id.* Following several instances in which the plaintiff repeatedly misgendered the same student during Socratic discussions, the college dismissed the plaintiff for creating a hostile environment. *Id.* at 501. The court of appeals held an academic speech exception to *Garcetti* applied reasoning that "the First Amendment protects the free-speech rights of professors when teaching." *Id.* at 505; *see also Sweezy*, 354 U.S. at 250 (emphasizing "[t]he essentiality of freedom in the community of American universities"); *Keyishian*, 385 U.S. at 603 (Teaching and academic writing are a "special concern of the First Amendment"). The Fifth and Ninth Circuits reached the same conclusion. *Buchanan*, 919 F.3d at 852 (holding the speech of a public university professor is constitutionally protected speech because "academic freedom is a special concern of the First Amendment"); *Demers*, 746

F.3d at 412 (concluding "*Garcetti*, . . . consistent with the First Amendment, cannot . . . apply to teaching and academic writing that are performed 'pursuant to the official duties' of a teacher and professor").

Here, the academic speech exception must apply to permit Smith's First Amendment retaliation claim to proceed. Smith explicitly referenced Sanders's representation of Michaelson and cancel culture twice in class as a valid part of the lesson on legal ethics. R. at 6. Smith made it his practice to employ the Socratic method and to flush out controversial philosophical issues. R. at 5. During the class discussions in February 2019, Smith never used inappropriate language or raised his voice. R. at 6. Smith *did* express opinions on subject matters his students disagreed with. R. at 5, 7. However, Smith's presentation of his viewpoint involving ethics and criminal law was consistent with his research and pedagogy, which WCC had not taken issue with before February 2019. R. at 5. Even though Smith intended to provide a well-rounded academic discussion on a controversial topic, for First Amendment purposes, it matters only that Smith expressed his ideological opinions as a teacher to his students in an academic environment. R. at 5. The academic speech exception applied by the plurality of circuit courts is categorical, and any speech by a teacher or student in the classroom should be excluded from analysis under *Garcetti*. *Meriwether*, 992 F.3d at 498 (holding the academic-speech exception applies to a professor misgendering a student in class).

2. Alternatively, this Court should find that Smith's speech was not speech "pursuant to his official duties" as intended by this Court in *Garcetti*.

If this Court is unwilling to accept a categorical exception to *Garcetti* for academic speech, this Court should still find that Smith's First Amendment retaliation claim is not subject to *Garcetti* because the speech at issue was not made pursuant to his official duties. In *Adams*, the Fourth Circuit concluded, "*Garcetti* would not apply in the academic context of a public university." 640 F.3d at 562; *see also Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 695 (4th Cir.

2007) ("The Court explicitly did not decide whether [*Garcetti*] would apply in the same manner to a case involving speech related to teaching. Thus, we continue to apply the *Pickering Connick* standard."). Adams had been a long-standing assistant professor in the Department of Sociology and Criminal Justice when he converted to Christianity. *Adams*, 640 F.3d at 553. His religious conversion transformed his ideological views, leading to increasing vocalizations of Adams's political and socially conservative viewpoints on issues arising in the college community and society at large. *Adams*, 640 F.3d at 553. Despite receiving strong teaching reviews from faculty and students, Adams was denied a promotion to the position of full-time professor. *Id.* The district court concluded that the controversial publications Adams attached to his application "implicitly acknowledge that they were expressions made pursuant to his professional duties." *Id.* at 561.

The Fourth Circuit reversed, asserting "the district court misread *Garcetti*" by failing to account for the "clear language in that opinion that casts doubt on whether the *Garcetti* analysis applies in the academic context of a public university." *Adams*, 640 F.3d at 561. In *Garcetti*, the plaintiff, an assistant district attorney, asserted he was retaliated against for writing a memo criticizing an investigation in an ongoing prosecution. 547 U.S. at 563. This Court concluded that the plaintiff's claim failed because he was not speaking as a citizen when he wrote the memo, reasoning, "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen." *Id.* In contrast to the speech at issue in *Garcetti*, which depended directly on the plaintiff's role as an assistant district attorney, "Adams' speech was not tied to any more specific or direct employee duty than the general concept that professors will engage in writing, public appearances, and service within their respective fields." *Adams*, 640 F.3d at 564; *see also* Robert M. O'Neil, *Academic Speech in the Post-Garcetti Environment*, 7 First Amend. L. Rev. 1, 18 (2008) ("When it comes . . . to 'official duties,' the clarity with which a court can determine the

responsibilities of an assistant district attorney simply does not apply to college professors"). The Fourth Circuit narrowed the definition of speech "pursuant to official duties" to encompass *only* speech directly pursuant to official responsibilities "as intended by *Garcetti*." *Adams*, 640 F.3d at 564. Just last year this Court implicitly adopted the Fourth Circuit's narrowed definition in *Kennedy*, holding that the plaintiff-coach's sideline prayers were not government speech because they "did not 'owe their existence' to his responsibilities as a public employee." 142 S. Ct. at 2424 (internal citations omitted).

The Fifth Circuit applied a similar logic in *Buchanan* and declined to extend *Garcetti*. 919 F.3d at 852. In *Buchanan*, the plaintiff used profanity and a discussion of her students' sex lives in her instruction of Pre-K-Third grade teachers. *Id.* at 853. Because the speech was so distant from the plaintiff's official duties as a professor instructing teachers in Pre-K-Third grade education, the Fifth Circuit concluded that it never triggered *Garcetti*'s application at all. *Id.* at 854. Although the Third Circuit in *Gorum v. Sessoms* held the plaintiff did *not* speak as a citizen under *Garcetti*, the Third Circuit reached that conclusion only because his actions "so clearly were not related to 'speech related to scholarship or teaching' and because . . . such a determination here does not 'imperil First Amendment protection of academic freedom in public colleges and universities.'" 561 F.3d at 186 (internal citations omitted). The Third and Fifth Circuits decisions in *Buchanan* and *Gorum* illustrate *Garcetti*'s limits and narrowly confine its application in the academic classroom.

Here, like the plaintiff in *Adams*, Smith's speech was only tangentially related to his duty as a public educator. A professor is hired for his expertise and to teach from a variety of perspectives. Martin H. Malin, Janus *and the First Amendment in the Workplace*, 24 Emp. Rts. & Emp. Pol'y J. 9, 41 (2020) ("[N]o reasonable person would attribute the teacher's approach to the topic as the government's speech."). Smith's role as a public educator was to lecture on legal philosophy and ethics. R. at 4. Smith has frequently researched, written, and published about the

theories of criminal law and legal philosophy, which he posed to his Philosophy of Law classes in fall 2019. R. at 5. When Smith spoke about Sanders's representation of Michaelson, it was not directly pursuant to the official responsibilities Smith held as an employee of the university but rather to express his own ideological views on professional ethics. R. at 5. He did not use an inappropriate tone or language. R. at 6. Smith had an interest in advocating his ideological views beyond just his capacity as an instructor. R. at 6; *see Garcetti*, 547 U.S. at 432 (Souter, J., dissenting) ("As for the importance of such speech to the individual, it stands to reason a citizen may well place a very high value on a right to speak on the public issues he decides to make the subject of his workday after day.").

The speech at issue here can be contrasted to speech concerning class administration, which does not warrant the same exclusion under *Garcetti*. *See Meriwether*, 992 F.3d at 507 ("[S]ome classroom speech falls outside the exception: A university might, for example, require teachers to call roll at the start of class."). As this Court stated in *Garcetti*, "the restrictions [the government] imposes must be directed at speech that has some potential to affect the entity's operations." 547 U.S. at 418. Smith's speech to his Philosophy of Law classes in February 2019 was not administrative. R. at 5. The speech concerned various perspectives on ethics in the legal profession, which are only tangentially related to Smith's operation as a government employee. Unlike taking attendance or instructing students in case of an emergency, raising his own ideological views about the subject material is not "government speech" because it is not directly tied to Smith's official duties as a government employee and presents the exact situation this Court had reservations about applying *Garcetti*.

B. The Eighth, Tenth, and Thirteenth Circuits Misapply *Garcetti* to Post-Secondary Academic Speech, Categorically Silencing Dissenters and Unnecessarily Threatening Academic Freedom.

Three circuits erroneously apply *Garcetti* to post-secondary classroom speech. *Brown*,

824 F.3d at 715; *Lyons*, 875 F.3d at 1174; *Duvall*, 530 F. App'x at 814; R. at 14 (Thirteenth Circuit holding "*Garcetti* applies to speech given while teaching in a college classroom"). However, each circuit applying *Garcetti* fails to discuss with any depth why this Court left open the question of an academic speech exception in *Garcetti* nor the impact the holding has on free speech at colleges and universities.

The Eighth and Tenth Circuits fail to address this Court's concern about *Garcetti*'s application to the academic setting in its entirety. In *Lyons v. Vaught*, the Eighth Circuit chose not to find a distinction between the speech of a college professor and the speech of an ordinary government employee, applying *Garcetti* to bar the professor's retaliation claim. 875 F.3d at 1174. In *Brammer-Hoelter v. Twin Peaks Charter Academy*, the Tenth Circuit also declined to address any special categorization of academic speech under the First Amendment. 492 F.3d 1192, 1204 (10th Cir. 2007). Instead, the court of appeals incorporated *Garcetti* into its generic, five-prong test for a retaliation claim. *Id.*; *see also Duvall*, 530 F. App'x at 813 (internal citations omitted) ("We have previously 'taken a broad view of the meaning of speech that is pursuant to an employee's official duties.'"). In both *Brammer-Hoelter* and *Duvall*, the Tenth Circuit categorically failed to address any of this Court's concerns about *Garcetti*'s application to academic speech.

The Thirteenth Circuit acknowledged this Court's apprehension to apply *Garcetti* to academic speech but nonetheless applied the rule to Smith's case. R. at 19. The court concluded that in-class speech categorically excluded his First Amendment claim as official duty speech under *Garcetti*. R. at 19. However, the Thirteenth Circuit's holding is predicated on the incorrect assumption that the First Amendment protects only the institution, not the individual instructor. R. at 16. That assumption conflicts with this Court's precedent. *See Kennedy*, 142 S. Ct. at 411 (internal citations omitted) ("[N]either teacher nor students 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'"). Critically, the Thirteenth

Circuit's analysis ignores the dangerous consequences of categorically stifling a professor's speech. *Keyishian*, 385 U.S. at 603 (reasoning the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom"); *Meriwether*, 992 F.3d at 506 ("If professors lacked free-speech protections while teaching, a university would wield alarming power to compel ideological conformity . . . . That cannot be."); *Demers*, 746 F.3d at 411 ("If applied to teaching and academic writing, *Garcetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court.").

If academic institutions can categorically dictate what ideas a professor is permitted to speak on, there is a grave risk of silencing alternative perspectives and conflicts with the fundamental understanding of our post-secondary institutions under the First Amendment. *Grutter*, 539 U.S. at 331 (internal citations omitted) ("[W]e have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society."). Students should have the opportunity to learn from diverse perspectives, especially in courses in philosophy and law, aiming to produce students who can think critically. *See Sweezy*, 354 U.S. at 250 ("Particularly in the social sciences . . . [t]eachers and students must always remain free to inquire, to study and to evaluate, gain new maturity and understanding."). Here, this Court is presented with a situation in which WCC, a public college, attempts to stifle an opinion *WCC* deems inappropriate. WCC's determination is arbitrary, and the consequences of that determination are weighty. It is certainly not within WCC's right to censor the valid academic perspective of a professor WCC specifically hired *for* his unique perspective and expertise in legal philosophy. As this Court has observed, "[t]he right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002).

For these reasons, academic freedom and this Court's precedent demand a categorical

exception for academic speech under the *Garcetti* framework. Accordingly, Smith's First Amendment retaliation claim should be remanded for a *Pickering*-*Connick* balancing.

II. THE GOVERNMENT SPEECH DOCTRINE DOES NOT EXCLUDE SMITH'S COMPELLED SPEECH CLAIM BECAUSE IT IS INAPPROPRIATE TO APPLY A BRIGHT-LINE RULE TO THE CLASSROOM WITHOUT *ANY* FIRST AMENDMENT PROTECTION.

Central to First Amendment freedom of speech is "the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *see also Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256–57 (1974); *Pac. Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 9 (1986) (plurality opinion); *Riley v. Nat'l Fed'n of the Blind of N. C., Inc.*, 487 U.S. 781, 796–97 (1988) ("in the context of protected speech, the difference [between compelled speech and compelled silence] is without constitutional significance"). When genuine freedom of speech is threatened, "the search for truth is stymied, and the ideas and debates necessary for the continuous improvement of our republic cannot flourish." *Meriwether*, 992 F.3d at 503. Support for free speech protections dates to this Nation's Founders, who "believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660–61 (2000) (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)); *see also Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council*, 138 S. Ct. 2448, 2471 (2018) ("prominent members of the founding generation condemned laws requiring public employees to affirm or support beliefs with which they disagreed").

Compelled speech requires an individual to betray their truly held beliefs. *Janus*, 138 S. Ct. at 2464. Compelled speech is particularly damaging because "[f]orcing free and independent individuals to endorse ideas they find objectionable is *always* demeaning." *Id.* (emphasis added).

Importantly, the government "may not compel affirmance of a belief with which the speaker disagrees." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995); *see also West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943) ("[I]nvoluntary affirmation could be commanded only on even more immediate and urgent grounds than silence."). When the government "compel[s] individuals to mouth support for views they find objectionable[, the government] violates [their] cardinal constitutional command." *Janus*, 138 S. Ct. at 2463.

A. The Government Speech Doctrine Should Not Apply in Academic Settings.

Generally, government speech is immune from free speech challenges. *See Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 550 (2005). This Court has recognized various situations where the government speech doctrine barred scrutiny under the First Amendment. *See, e.g.*, *Rust v. Sullivan*, 500 U.S. 173, 203 (1991) (upholding regulation prohibiting employees from providing abortion counseling in federally-funded family planning program); *Johanns*, 544 U.S. at 561–62 (upholding statute requiring beef producers to fund generic beef advertisements); *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 470 (2009) (holding permanent monuments at public parks convey government speech); *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 208 (2015) (holding specialty license plates pursuant to state statutes represent government speech). *But see Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 549 (2001) (reversing law prohibiting attorneys who received federal funding from bringing welfare claims against the government because the lawyers were speaking on behalf of their clients, not the government).

Government speech is not without limitation. When an individual is compelled to "affirmatively adopt the government's preferred viewpoint," the government has exceeded its immunity and is subject to scrutiny under the First Amendment. R. at 25–26; *see, e.g.*, *Barnette*,

319 U.S. at 642 (reversing School Board resolution requiring children in public schools to salute the American flag); *Tornillo*, 418 U.S. at 241 (reversing Florida statute requiring newspapers to publish responses of the political candidates they criticized); *Wooley*, 430 U.S. at 713 (reversing New Hampshire statute requiring individuals to display "Live Free or Die" motto on car license plates); *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2378 (2018) (reversing California statute requiring certain disclosures to women at pregnancy crisis centers).

Members of this Court and scholars alike question the use of the government speech doctrine. For example, Justice Souter expressed, "[t]he government-speech doctrine is relatively new, and correspondingly imprecise," *fourteen* years after this Court first applied the doctrine in *Rust v. Sullivan*, 500 U.S. 173 (1991). *Johanns*, 544 U.S. at 574 (Souter, J., dissenting); *see also Griswold v. Driscoll*, 616 F.3d 53, 59 n.6 (1st Cir. 2010) (providing the government speech doctrine is "still at an adolescent stage of imprecision"). Following *Summum*, scholars described the government speech doctrine as "[s]loppy, and ultimately incoherent," warning it "encourage[s] official misconduct using [the doctrine] as a cloak." Steven G. Gey, *Why Should the First Amendment Protect Government Speech When the Government Has Nothing to Say*, 95 Iowa L. Rev. 1259, 1302 (2010).

The imprecision and incoherence of the government speech doctrine are particularly dangerous if applied in the academic context. This Court has long recognized the importance of education and exposing students to *all* viewpoints. *See, e.g.*, *Keyishian*, 385 U.S. at 603 (internal citations omitted) (The "classroom is peculiarly the 'marketplace of ideas.'"); *Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503, 511 (1969) ("[S]tudents may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) ("The vigilant protection of constitutional freedom is nowhere more vital than in . . . schools"). Moreover, this Court appreciates the "expansive freedoms of speech and thought associated with the university environment," as well as the "special niche"

post-secondary education occupies in this Nation's constitutional history. *Grutter*, 539 U.S. at 329. Broadly, there is a concern that "viewing government as a First Amendment right holder is . . . inconsistent with[] the text of the First Amendment and the purposes underlying the text." Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 Iowa L. Rev. 1377, 2001 (2001).

1. University professor speech is not government speech.

"[A] professor's in-class speech to his students is anything but speech by an ordinary government employee." *Meriwether*, 992 F.3d at 507; *see also* R. at 26 ("The quintessential example of a public employee hired for specialized expertise and independent judgement is a college professor."). To ensure universities remain the "beacons of intellectual diversity and academic freedom," there exists "three critical interests . . . supporting robust speech protection[]: (1) the students' interest in receiving informed opinion, (2) the professor's right to disseminate his own opinion, and (3) the public's interest in exposing our future leaders to different viewpoints." *Id.* To that end, professor speech in the classroom undeniably merits some constitutional protection. *Hardy v. Jefferson Cmty. College*, 260 F.3d 671, 680 (6th Cir. 2001); *see also Sweezy*, 354 U.S. at 250 ("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."); *Bonnell v. Lorenzo*, 241 F.3d 800, 823 (6th Cir. 2001) ("[A] professor's rights to academic freedom and freedom of expression are paramount in the academic setting."). As described above, this Court should accept a categorical academic freedom exception to the *Garcetti* rule because academic speech receives broad First Amendment protections under this Court's precedent. *See supra* Section I.A.1. If professors are denied First Amendment protections in the classroom and are instead subject to unlimited government power, the consequences would be untenable:

> If professors lacked free-speech protections when teaching, a university would wield alarming power to compel ideological conformity. A university president could require a pacifist to declare that war is just, a civil rights icon to condemn the Freedom Riders, a believer to deny the existence of God, or a Soviet émigré to address his students as "comrades." That cannot be.

Meriwether, 992 F.3d at 506.

This is not to say that *all* classroom speech is subject to the academic freedom exception. For example, public colleges can require professors to perform incidental, "non-ideological ministerial task[s]," or "communicate administrative information to students" without giving rise to constitutional concern. *Meriwether*, 992 F.3d at 507; R. at 26. Administrative duties may include requiring a professor to take attendance at the start of class. *See supra* Section I.A.2; *Meriwether*, 992 F.3d at 507.

WCC went beyond simply asking Smith to engage in incidental speech and instead required him to affirmatively adopt viewpoints contrary to his own deeply held academic beliefs. This is evident through WCC's dismissal of Smith's concerns and alternative methods of relaying the NSE program curriculum. R. at 9, 10. On multiple occasions, Smith worked to compromise with WCC to separate his deeply held academic viewpoints from those of the college. R. at 9, 10. Smith suggested including a link to the WCC website instead of the full text of the Land Acknowledgement Statement or a disclaimer on the NSE syllabus qualifying that WCC views were not his own. R. at 9. Both suggestions were rejected. R. at 9. As for the required classroom discussions, Smith did not object to including the subject matter in the course or even assigning the WCC-selected readings. R. at 10. Smith did, however, suggest that he be allowed to present his own views and engage the class in a discussion on varying viewpoints. R. at 10. R. at 10. Smith's efforts were to no avail. R. at 10.

By dismissing Smith's concerns, particularly regarding the weekly community value bullet points and required classroom discussion, WCC inhibited the "critical interests" necessary to ensure college classrooms remain the "beacons of intellectual diversity and academic

freedom." *Meriwether*, 992 F.3d at 507. Specifically, "the students' interest in receiving informed opinion," "the professor's right to disseminate his own opinion," and "the public's interest in exposing our future leaders to different viewpoints." *Id.* This cannot stand. For example, during weekly classroom discussions on WCC community values, NSE professors must read reflection prompts to the students. R. at 9. The language included in the prompts is as follows: "*our* campus values include . . ." and "at WCC, *we* value . . . ." R. at 9 (emphasis added). Without the opportunity for Smith to "disseminate his own opinion" on tradition and civility in discourse, students are denied exposure to alternative perspectives and are at risk of applying "unwarranted weight to [WCC's] preferred message as the result of a false impression" that Smith endorsed the views. R. at 27; *see also Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503, 511 (1969) (providing students cannot be "confined to the expression of [only] those sentiments that are officially approved").

2. The distinctions between secondary and post-secondary education are weighty.

The First Amendment broadly protects the speech of post-secondary education. This Court has recognized that students in secondary education classrooms are "impressionable and their attendance is involuntary." *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987). Simply put, the students are "captive audiences." *Mayer*, 474 F.3d at 480; *see also Johnson v. Poway Unified School Dist.*, 658 F.3d 954, 957 (9th Cir. 2011) (holding school district did not violate public high school teacher's First Amendment right to free speech by preventing him from preaching his religious views to "captive students" in math classroom). In contrast to secondary education, attendance at a community college is entirely voluntary. *United States v. Fordice*, 505 U.S. 717, 757 (1992) (Scalia, J., concurring) ("[A]ttending college is voluntary, not a legal obligation."). As such, this Court should not be concerned with WCC students being "captive audiences" to Smith's speech. R. at 4; *Mayer*, 474 F.3d at 480.

Additionally, while "schools have a legitimate pedagogical interest in shaping their own secondary school curricula," the same cannot be said of post-secondary educational institutions. *Kirkland v. Northside Indep. School Dist.*, 890 F.2d 794, 795 (5th Cir. 1989). In *Demers*, for example, the Ninth Circuit decided that "the degree of freedom an instructor should have in choosing what and how to teach will vary depending on whether the instructor is a high school teacher *or a university professor*." 746 F.3d at 413 (emphasis added). Unsurprisingly, teachers in secondary education classrooms are subject to stricter guidelines and penalized if they "cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system." *Mayer*, 474 F.3d at 480; *see also School Dist. of Abington Twp., Pa v. Schempp*, 374 U.S. 203, 253 (1963) (Brennan, J., concurring) (emphasizing the distinction between secondary and post secondary schooling "warrants a difference in constitutional results").

B. The Thirteenth Circuit's Unduly Broad Application of the Government Speech Doctrine Impermissibly Requires Smith to Affirmatively Adopt and Endorse WCC's Viewpoints in Conflict with His Deeply Held Academic Beliefs.

The Thirteenth Circuit's application of the government speech doctrine is inappropriate. Laws are "not free to interfere with speech for no better reason than promoting an approved message or discouraging a favored one, however enlightened [the] purpose." *Hurley*, 515 U.S. at 579. Furthermore, "[t]he right to speak and the right to refrain from speaking are complimentary components of the broader concept of 'individual freedom of mind.'" *Wooley*, 430 U.S. at 714 (quoting *Barnette*, 319 U.S. at 637).

For example, a New Hampshire statute in *Wooley* required passenger vehicle license plates to bear the motto, "Live Free or Die." 430 U.S. at 707. The plaintiffs, followers of the Jehovah's Witness faith, considered the motto "repugnant to their moral and religious beliefs" and covered it. *Id.* at 707–08. After receiving various citations for covering the license plate motto, the plaintiffs sued. *Id.* at 709. In holding that the New Hampshire statute violated the

plaintiffs' First Amendment rights, this Court provided that "where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *Id.* at 717. Similarly, in *Barnette*, this Court held that compelling students to salute the American flag violates First Amendment guarantees because it "require[d] affirmation of a belief and an attitude of mind." 319 U.S. at 633; *see also id.* at 642 ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

Here, Smith's continued employment at WCC as a non-tenured instructor hinged on his agreement to teach two introductory survey courses in the NSE program. R. at 7. In doing so, WCC impermissibly compelled Smith to affirmatively adopt WCC's stance on several topics in conflict with his deeply held academic beliefs. R. at 11. By prioritizing its own views and forcing Smith to affirmatively adopt them as his own, WCC acted contrary to this Court's precedent. *See Wooley* 430 U.S. at 717; *Barnette*, 319 U.S. at 633; *Hurley*, 515 U.S. at 579 (emphasizing laws are "not free to interfere with speech for no better reason than promoting an approved message or discouraging a favored one, however enlightened [the] purpose"). Smith taught at WCC for over ten years and, during that time, completed a PhD program. R. at 4, 5. Significantly, many of Smith's scholarly publications focused on theories of property—like the Lockean Theory—and the dangers of elevating civility in discourse. R. at 5, 10. It should have come as no surprise to WCC that Smith took issue with the inclusion of a Land Acknowledgment Statement in the NSE course syllabus and several of the required classroom discussion points on the importance of tradition and civility in discourse. R. at 9, 10. Importantly, Smith was not opposed to teaching the NSE courses altogether but instead including the syllabus clause and bullet points "*as written*." R. at 10 (emphasis added). In other words, if WCC *had* allowed Smith to qualify both

the statement in the syllabus and the required classroom discussion points as viewpoints of the school and not his own, Smith would have complied. R. at 9, 10.

A review of the relevant interests of all parties is necessary to ensure appropriate consideration is given to colleges *and* professors. Accordingly, Smith's First Amendment compelled speech claim is not excluded by the government speech doctrine and must be evaluated under the *Pickering-Connick* balancing test.

III. BOTH OF SMITH'S FIRST AMENDMENT CLAIMS MUST BE EVALUATED UNDER THE *PICKERING-CONNICK* BALANCING TEST.

The First Amendment protects academic freedom and "the decision of both what to say and what not to say." *Riley*, 487 U.S. at 797. The First Amendment "creates an open marketplace" where different social, political, and economic ideas can compete without inappropriate government interference. *Knox v. SEIU, Local 1000*, 567 U.S. 298, 309 (2012) (citing *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51 (1988); *Mills v. Alabama*, 384 U.S. 214, 218–19 (1966)); *Keyishian*, 385 U.S. at 603 (internal citations omitted) (The "classroom is peculiarly the 'marketplace of ideas.'"). Furthermore, the government cannot "prohibit the dissemination of ideas that it disfavors nor compel the endorsement of ideas that it approves." *Knox*, 567 U.S. at 309 (citing *R. A. V. v. St. Paul*, 505 U.S. 377, 382 (1992); *Brandenburg v. Ohio*, 395 U.S. 444, 447–48, (1969)*; Barnette*, 319 U.S. at 663; *Wooley*, 430 U.S. at 713–15. Here, the government is attempting to violate both prohibitions—first, by stifling Smith's alternative but valid academic viewpoints, and second, by mandating the inclusion of speech Smith could not agree with.

The First Amendment bars state action that restricts free expression and which compels individuals to express a particular viewpoint. *See Wooley,* 430 U.S. at 714. Accordingly, this

Court developed the principle that the government "cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick v. Myers*, 461 U.S. 138, 142 (1983) (citing *Keyishian*, 385 U.S. at 605–06; *Pickering*, 391 U.S. at 563; *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Branti v. Finkel*, 445 U.S. 507, 515–16 (1980)). Furthermore, "vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse" when they disagree with the speech's content. *Rankin v. McPherson*, 483 U.S. 378, 384 (1987).

Conversely, this Court has also recognized in *Pickering* that the government's interests in regulating its employee's speech differ from its interests in regulating the speech of its citizens. 391 U.S. at 568. This Court in *Pickering* held that a teacher's "right to speak on issues of public importance" cannot be the basis for termination "absent proof of false statements knowingly or recklessly made." *Id.* at 574. To determine whether an employee's speech warrants constitutional protection, this Court articulated the well-established test for evaluating an instructor's claim for First Amendment protection. *Id*.

> The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

Id.

In *Connick*, this Court affirmed a qualified use of the *Pickering* balancing test, tailoring its application to circumstances where an employee speaks on a "matter of public concern." 461 U.S. at 143. The plaintiff in *Connick* opposed her transfer to a different department and distributed a questionnaire to her co-workers asking questions about the transfer practices, office morale, supervisor relationships, and whether employees felt pressured to work in political campaigns. *Id*. at 140–41. She was subsequently terminated. *Id*. at 141. This Court held that most of the plaintiff's questionnaire primarily aimed to address internal office affairs and were

not matters of public concern. *Id*. at 149. However, the part of the questionnaire that asked about the pressure to work for a political campaign qualified as a matter of public concern, and the balancing test applied to that speech. *Id*. at 149–50. This Court must first determine whether Smith spoke as a citizen on matters of public concern before balancing the competing interests of Smith and WCC.

A. A Balancing Test Is the Only Appropriate Measure for Assessing Whether First Amendment Exceptions Apply in a College Classroom.

This Court should continue to apply the *Pickering-Connick* balancing test and weigh the college's interest in speech regulation against the interests of the individual professor. The Thirteenth Circuit unpersuasively adopts a bright-line rule permitting colleges to compel classroom speech without any First Amendment limitations. However, a balancing test is the only appropriate method to account for valid but competing First Amendment interests in the academic setting. *See e.g.*, *Mailloux v. Kiley*, 448 F.2d 1242, 1243 (1st Cir. 1971) ("[W]e see no substitute for a case-by-case inquiry into whether the [school's interests] are demonstrably sufficient to circumscribe a teacher's speech."). Here, this Court must weigh WCC's interests in attempting to compel Smith's speech, other available alternatives in conveying the message, Smith's interests in speaking or not speaking, and "the interests of the students in *not* being misled about the nature of their instructor's academic views." R. at 28. The Thirteenth Circuit's preference for a bright-line rule is inappropriate when this Court has clear competing interests to weigh. The *Pickering-Connick* balancing test weighs Smith's interest in speaking—or not speaking—and WCC's interest in regulating his speech. The balance weighs in Smith's favor.

1. Smith spoke as a citizen on matters of public concern in February 2019 and during the meetings about the NSE program.

Smith spoke as a citizen on a matter of public concern in February 2019 when he

addressed Sanders's representation of Michaelson and cancel culture. At the heart of the First Amendment is "the public interest in having free and unhindered debate on matters of public importance." *Pickering*, 391 U.S. at 573. Whether speech addresses a matter of public concern is determined considering the "content, form, and context of a given statement." *Connick*, 461 U.S. at 147–48. Since a teacher's job is to prepare students for society, "classroom instruction will often fall within the Supreme Court's broad conception of public concern." *Hardy*, 260 F.3d at 679.

If speech does not relate to a matter of public concern, the government is given broad deference. *Connick*, 461 U.S. at 151–52. However, if the speech *does* relate to a matter of public concern, a balancing test must be applied. *See Id.* In contrast to *Connick*, where the plaintiff was primarily motivated by a personal agenda and not a matter of public concern, Smith is an intellectual leader in his community. He has an interest as a citizen in discussing topics not only of public concern but also at the core of his professional scholarship. R. at 5. In accordance with his regular class structure, Smith challenged his students to think critically and to practice advocating for a perspective contrary to their own. R. at 5. Smith gave his class an academic perspective on Sanders's controversial representation of Michaelson that had been in the local news and hotly debated on WCC's campus. R. at 5. The broad coverage of Michaelson's criminal case was a matter of public interest. R. at 5.

There is also increasing public concern surrounding cancel culture, which has recently become a part of the public discourse. Gabrielle Brill, *Cancel Culture: Inciting Corporate Social Accountability*, U. Rich. L. Rev. Web Forum (Jan. 25, 2021), https://lawreview.richmond.edu/2021/01/25/cancel-culture-inciting-corporate-social-accountability/. Smith presented an ethical argument about cancel culture stemming from the class's discussion of Sanders and Michaelson. R. at 5. Students even acknowledged that this topic was brought up because certain WCC students protested Sanders's continued employment at WCC. R. at 6. There is public concern

surrounding cancel culture generally and within the WCC community.

Smith also spoke as a citizen on a matter of public concern during his meeting with Hall and Barrett. The public concern over WCC's values started years before the statements at issue and has led to WCC's struggle to recruit and retain students. R. at 4. In fact, the record indicates that WCC made many administrative changes and consulted local government officials to improve student engagement and retention. R. at 4. WCC's resulting Land Acknowledgment Statement demonstrates its values because it was newly implemented for the NSE program specifically. R. at 8.

2. Smith's interest in expressing his deeply held ideologies outweighs WCC's interest in "promoting the efficiency of the public services it performs through its employees."

The *Pickering*-*Connick* test next requires this Court to balance Smith's First Amendment right to academic free speech with WCC's interest in "promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. This part of the balancing test "focuses on the effective functioning" of the employer. *Rankin*, 483 U.S. at 388. Several factors may affect the balance of interests. *See Pickering*, 391 U.S. at 568–73. Importantly, this Court should consider whether the statements at issue impeded "the teacher's proper performance of his daily duties in the classroom" or "interfered with the regular operation of the schools generally." *Id.* at 572–73. This Court must also examine whether the speech adversely affected the "harmony among coworkers," the degree of public interest, the context and purpose of the speech, and "the manner, time, and place" in which the speech was delivered. *Connick*, 461 U.S. at 166 (quoting *Pickering*, 391 U.S. at 570); *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415 (1979); *Pickering*, 391 U.S. at 568–73. However, this Court in *Pickering* also recognized the difficulty of articulating "a general standard against which all . . . statements may be judged." *Id.* at 569.

The First Amendment guarantee of academic freedom rests on a recognition of "the vital role in a democracy that is played by those who guide and train our youth." *Sweezy*, 354 U.S. at 250. This Court has proclaimed that "to impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation." *Id.* Furthermore, this Court has also made clear that "our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us.'" *Keyishian*, 385 U.S. at 603. Smith's interest in free academic expression exceeds any interest WCC may have in promoting institutional efficiency. The First Amendment limits the ability of a public college to compel a professor to promote a viewpoint contrary to his deeply held academic beliefs and its ability to punish the professor for refusing to compromise those beliefs. This Court in *Janus* even stated, "it is not easy to imagine a situation in which a public employer has a legitimate need to demand that its employees recite words with which they disagree." 138 S. Ct. at 2473. Additionally, the *content* of a teacher's statements "must be assessed to determine whether they 'in any way either impeded the teacher's proper performance of his daily duties in the classroom or . . . interfered with the regular operation of the schools generally.'" *Givhan*, 439 U.S. at 415 (quoting *Pickering*, 391 U.S. at 572–73). Furthermore, "any word spoken, in class . . . that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk." *Tinker*, 393 U.S. at 508–09 (quoting *Terminiello v. Chicago*, 337 U.S. 1 (1949)).

Speaking about controversial public figures in a college-level philosophy course aligns with Smith's proper performance of his classroom duties.[1] R. at 5. WCC continually renewed

[1] Because this appeal is based on a motion to dismiss under FRCP 12(b)(6), this Court must accept all allegations in the complaint as true and construe the facts in the light most favorable to Smith. *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986).

Smith's contract every semester, knowing his academic perspective and that he would occasionally stir controversy in class because of it. R. at 4, 5. Additionally, before February 2019, Smith was generally considered a popular professor whose class was regarded as engaging and thought-provoking. R. at 5. There are no facts in the record to indicate any specific guidelines for Smith to follow in his classes prior to fall 2019. In fact, instructors at WCC typically had complete discretion over their syllabi content. R. at 8. When Smith made the statements at issue, he was teaching his class the way he always did. The content of Smith's statements did not impede his lecture but instead furnished an additional perspective for students to consider. Although Smith was removed from teaching the course for the rest of the semester after he made his statements, the record does not indicate that his removal interfered with WCC's regular operation. Under the *Pickering-Connick* balancing test, these facts weigh in favor of Smith.

In post-secondary education, professors are hired based on their subject matter expertise. *See Meriwether*, 992 F.3d at 507; *see also* R. at 26. Here, WCC knew Smith engaged in research and scholarship on property rights, including published work advocating for the Lockean theory of property. R. at 5. WCC still required Smith to include the Land Acknowledgement Statement in his syllabus. R. at 8. Smith wanted to work with WCC to find an acceptable qualifier, but WCC offered no alternatives to placate Smith's objections. R. at 10. Smith's suggested alternatives were dismissed. R. at 10. By requiring Smith to include the Land Acknowledgement Statement, students would have a false impression of his academic views. WCC compelled Smith to contradict his deeply held beliefs about property rights and under the balancing approach, these facts again weigh in Smith's favor.

WCC's interest in silencing Smith's speech is weak. WCC's censorship of an alternative viewpoint actually inhibits the efficiency of the college's objective to "prepare students for work and citizenship" by promoting a singular way of thinking about a complex situation. *Grutter*,

595 U.S. at 331. In other words, WCC's actions inhibit the values and messages post-secondary institutions strive to convey. Although some students were upset by Smith's comments in class, it certainly does not impede WCC as an academic institution.

The success of the NSE program did not depend on Smith's participation. However, Smith nonetheless made multiple attempts to arrive at a compromise with WCC. R. at 10. His compliance with every aspect of the NSE program was not necessary to continue the program. Even with Smith's suggested alternatives, he still could have successfully fulfilled his professional duties as an instructor at WCC without interfering with regular operations, just as he had been doing for the past ten years. R. at 4. The factors discussed above weigh in Smith's favor under the *Pickering-Connick* balancing test.

B. Alternatively, Even if Not All First Amendment Speech in the Classroom Is Subject to the *Pickering-Connick* Balancing Test, Smith's Classroom Speech Is.

Not all classroom speech is equally protected by the First Amendment. However, granting the government unlimited power to compel classroom speech infringes on the instructor's autonomy and impairs the students' interests. It would create the risk that students would assign unwarranted weight to the government's preferred message because of professor "endorsement." *Meriwether*, 992 F.3d at 507 ("[P]ublic universities do not have a license to act as classroom thought police."). Students have an interest in not being misled about their instructor's views. While some students may stop to ponder whether their instructor's statements reflect their professional judgment, it is more likely that the students will accept their statement to reflect their personal dogma. Therefore, students in post-secondary institutions should be allowed to learn about controversial viewpoints and to examine academic concepts from a variety of perspectives. This is exactly what Smith aimed to do.

Respondents may assert that Smith was not required to adopt the viewpoints personally,

as articulated in the Land Acknowledgement Statement and the bullet points on civility and discourse. But Smith *was* required to affirmatively take a stance. The language, "at WCC, we value . . .", is inclusive of all faculty at WCC, implicating Smith—as a faculty member—with WCC's values. R. at 9. Students should not be responsible for separating their instructor's perspectives.

Although the law affords provides greater protections to tenured instructors, non-tenured instructors still have successfully advanced First Amendment claims. William H. Daughtry Jr., *The Legal Nature of Academic Freedom in United States Colleges and Universities*, 25 U. Rich. L. Rev. 233, 251–55 (1991). Smith's non-tenured status is not dispositive under the *Pickering Connick* balancing test. Even though Smith is a non-tenured professor, he has taught at WCC for ten years. R. at 4. The longevity of his teaching career at WCC weighs in his favor. *See Sindermann*, 408 U.S. at 595, 599–600. In *Sindermann*, this Court concluded that the district court erred in granting summary judgment to a community college system because the non tenured plaintiff-professor should have been afforded the opportunity to prove his claims because of his longevity in the same educational system. *Id.*

The Thirteenth Circuit erroneously concluded that "Smith was not coerced into adopting the government's views as his own [and] instead, he simply faced the natural consequence of being unwilling to perform the duties of a specific job: loss of access to that job." R. at 20. This conclusion implies that Smith was not willing to perform his position's essential administrative or managerial duties—but this is not true. The speech at issue exceeds Smith's managerial duties as a public educator. Smith did not inhibit his job duties like taking attendance or providing students with college-wide information. Smith simply wanted to qualify issues contravening his own academic perspectives. Accordingly, Smith's job loss and subsequent lawsuit hinge on the statements made during his February 2019 classes and his objections to certain portions of the NSE program.

Given the high value this Court places on academic freedom as a vital part of our democracy and its strong commitment to safeguarding that freedom, Smith's suit goes to the heart of First Amendment protection. *Sweezy,* 354 U.S. at 250; *Keyishian*, 385 U.S. at 603. Smith is an intellectual leader in his community, acting in his capacity to further the objectives this Court has recognized as fundamental to post-secondary education. *Grutter*, 539 U.S. at 331 (internal citations omitted) (describing "education as pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society.")

Imposing the NSE standards on Smith without the opportunity to qualify or discuss his philosophical differences with his class creates the very "strait jacket" this Court vowed to avoid. *Sweezy,* 354 U.S. at 250. It is imperative that this Court apply the *Pickering*-*Connick* balancing test to Smith's First Amendment claims and find that the facts of this case weigh heavily in favor of Smith's interest in expressing his true and deeply held academic beliefs.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court REVERSE the Thirteenth Circuit's decision on both First Amendment issues. Petitioner seeks compensatory damages, reinstatement of his full teaching load, and a declaratory judgment in his favor on the compelled speech claim.

Dated: January 9, 2023 Respectfully Submitted,

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