No. 22-2323

In The

Supreme Court of the United States

October Term 2022

Jonah Smith,

Petitioner

v.

Albert Hall, Sheila Barrett, and Westland Community College,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Thirteenth Circuit
No. 21-1122

Brief for Respondents

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2025-26 LAW WEEK AND LIBERTY BELL MOOT COURT COMPETITION

QUESTIONS PRESENTED

I. Does the First Amendment limit a public community college's power to discipline an instructor for in-class speech on a matter of public concern or is such speech excluded from First Amendment protection as official duty speech pursuant to *Garcetti* when the college retains the right to control what is taught in the classroom and hires the instructor to convey its intended message, and the in-class speech for which the instructor was disciplined for was unrelated to research or scholarship?

II. Does the First Amendment's prohibition against compelled speech limit a public community college's power to require an instructor to communicate a message that conflicts with the instructor's own academic views when the message was to be delivered pursuant to the instructor's official duties, the instructor was not required to communicate the message as that of his own, and the instructor was not barred from expressing criticism of the message in his capacity as a citizen?

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STATEMENT OF THE FACTS

Westland Community College (WCC) is a public community college that offers two-year degrees for students looking to transfer to a four-year university. R. at 4. Albert Hall is the Academic Dean of WCC, and Shelia Barrett is the Chair of WCC's Philosophy Department. Together with WCC, Hall and Barrett are Respondents in this matter. In recent years, WCC struggled to recruit and retain students due, in part, to on-campus student protests against WCC administration. *Id*. Petitioner Jonah Smith was a contract-based professor at WCC who was evaluated on a semester-by-semester basis. *Id.* In a given academic year, Smith typically taught four classes: two introductory and two specialized. *Id.* WCC did not require Smith to publish any academic work during his employment, but Smith often engaged in academic research and publishing on his own time. *Id.* at 5.

The Cancel Culture Controversy

In the 2019 spring semester, Smith taught his usual four courses, including two sections of a specialized Philosophy of Law course. *Id.* During one of the course sessions for Section A, where Smith was engaging students in a discussion regarding the ethics of attorneys representing clients, Smith used a fellow WCC colleague, Sally Sanders, as an example. *Id.* Sanders was of particular interest given she had recently represented Martin Michaelson, a local disgraced businessman who allegedly committed financial and sexual crimes. *Id.* The Michaelson case caused considerable controversy on WCC's campus, resulting in student-led outcry against Sanders. *Id.* Smith, however, used the controversy as the focal point of his lecture, presenting the arguments that. Sanders acted ethically and that Mr. Michaelson was wrongfully convicted. *Id.* Notably, Petitioner also lashed out against WCC students, stating that they were wrong for trying to "cancel" Sanders. *Id.* Many of the students became noticeably upset by Smith's comments as evidenced by one

student refusing to answer Smith's questions. *Id.* at 6. In response, Smith stressed to the students the importance of controlling their emotions when speaking on a sensitive topic. *Id.*

As a result of Smith's behavior, lecture topic, and in-class comments regarding cancel culture, Section A students spoke with Sheila Barrett, the Chair of the Philosophy Department. *Id.* The students complained about Smith, expressing that they felt personally attacked by his comments and stating their discomfort about cancel culture as a topic altogether. *Id.* The students went on to state they no longer felt safe in Smith's classroom. *Id.* In addition to addressing their concerns with Barrett, the students also took to social media, lambasting Smith. *Id.* Other WCC students joined in the discussion. *Id.*

After Barrett brought the issue to Dean Albert Hall's attention, the two met with Smith to discuss their concerns. *Id.* Despite Smith's assurance that he did not act inappropriately, Barrett and Hall directed Smith to avoid criticizing student protestors and cease any further discussion of cancel culture in his lectures. *Id.*

In direct opposition to the given orders, Smith delivered the same lecture the next day to his Section B students, using Ms. Sanders and the Michaelson case as an example. R. at 6-7. The Section B students had a similar reaction to that of the Section A students, becoming visibly upset with Smith's comments. *Id.* at 7. Several students interrupted Smith while others walked out of the class. *Id.* In response, Smith warned that the students needed to "get thicker skin." *Id.* Much like the previous day, Smith's comments sparked social media outcry. *Id.*

Following Smith's insubordination, Smith was immediately barred from teaching both sections of Philosophy of Law for the remainder of the spring semester. *Id.* Smith was allowed to continue teaching his two other courses while an investigation into the incident ensued. *Id.*

The NSE Stipulations and Petitioner's Refusal to Comply

Despite the cancel culture controversy, Smith was offered to teach four classes during WCC's fall 2019 semester, including two courses in WCC's "New Student Experience" (NSE) program. *Id.* As an NSE instructor, Smith was required to follow certain stipulations agreed upon by the NSE committee and WCC administration. *Id.* The stipulations included adding certain provisions in all NSE professor's course syllabi that were carefully selected by the NSE committee and WCC to address the ongoing problems at WCC and committing twenty minutes of class time per week to discuss WCC community values. *Id.* at 7-9. Further, Smith was required to lead a discussion each week regarding an NSE committee-selected reading and WCC value bullet point where he would read written student responses aloud. *Id.* at 9. Barrett, a member of the NSE committee, explained that these stipulations "were designed to build a shared set of community values among students, increase student engagement, and make students from a variety of backgrounds feel comfortable in the classroom." *Id.* Smith refused to teach any of the NSE courses and expressed his desire to continue in his traditional assignment, but his request was denied. *Id.* at 7.

Among the reasons for Smith's apprehension of the NSE program is that the required provisions ran contrary to his own academic thought. *Id.* at 9. In response, Dean Hall stressed that the mandatory provisions were WCC's, not Smith's views. *Id.* When Smith suggested he put a clarifying provision in his syllabi highlighting this disagreement, Dean Hall reminded Smith that he could not use his position as a WCC professor to undermine WCC's views. *Id.* Smith also disagreed academically with some of the required discussion bullet points and did not want to give the impression that he was adopting them as his own thought. *Id.* at 10.

Each of Smith's disagreements were dismissed by Barrett and Dean Hall who again stressed that while Smith was not required to agree with the syllabi provisions or discussion bullet points, as an employee of WCC it was his responsibility to convey them to the students. *Id.* When Smith suggested he present viewpoints during in-class discussion opposing WCC's, the suggestion was denied. *Id.* Once again, Barrett and Dean Hall stressed that it was Smith's duty as a WCC employee to expose students to WCC values, not his own. *Id.* Smith again stressed that he would not comply with the stipulations, and shortly after was informed by Dean Hall that he would not be offered a contract extension. *Id.* at 10. Dean Hall cited Smith's unwillingness to follow WCC's instructions and the disruption that stemmed from his cancel culture comments as justification. *Id.* at 10-11.

STATEMENT OF THE CASE

Smith filed suit in the Eastern District of Westland under 42 U.S.C. § 1983, *id.* at 4, 11, alleging that WCC violated his First Amendment rights by (1) retaliating against him for his classroom speech regarding cancel culture and (2) for compelling him to convey messages during his classes that support views contrary to his own academic beliefs, *id.* at 3, 11. WCC moved to dismiss the retaliation claim under Fed. R. Civ. P. 12(b)(6), asserting that Smith's speech, as a college professor, is excluded from First Amendment protection as "official duty" speech outlined in *Garcetti*. *Id.* at 11. WCC also argued that the First Amendment does not bar a college from dictating any "message that an instructor must convey while in the classroom." *Id*. Alternatively, WCC argued that even if there was some limit on what a college can require an instructor to say during class, that limit does not apply here because WCC did not require Smith to endorse the message as his own, and the messages were part of Smith's duty to carry out a WCC-endorsed program. *Id.* at 11-12. In response, Smith claimed that *Garcetti* does not cover classroom speech of a college professor via an "academic freedom" exception. *Id.* at 11.

The district court sided with WCC, concluding that Smith had no plausible retaliation or compelled speech claim, and reasoned "that the First Amendment did not limit a public college's ability to establish and implement curricular programs through its paid employees." *Id.* at 12. Smith timely appealed the district court's order to the United States Court of Appeals for the Thirteenth Circuit. *Id.* at 2. The circuit court affirmed the district court's order, holding that there was "no basis for carving out" an academic freedom exception "from the *Garcetti* rule for in-class speech of a public college professor," *id.* at 17, and that Smith failed "to allege a plausible compelled speech claim," *id.* at 18. Smith filed a timely petition for a writ of certiorari, which this Court granted. *Id.* at 30.

SUMMARY OF THE ARGUMENT

To ensure that public colleges and universities retain the power to make decisions in accordance with academic policymaking, Respondent respectfully requests that this Court affirm the ruling of the United States Court of Appeals for the Thirteenth Circuit. The protections afforded to citizens under the First Amendment should not extend to public college professors during classroom instruction because a professor's in-class speech constitutes official duty speech. Pursuant to *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006), and the government speech doctrine, speech made during classroom discussion by a professor can be regulated or compelled by the public college that employed him. Accordingly, this Court should deny Smith's First Amendment claims and hold in favor of Respondent.

I.

A Public College Professor's Classroom Speech is Not Entitled to First Amendment Protection Under Garcetti v. Ceballos, 547 U.S. 410 (2006).

Under *Garcetti*, 547 U.S. at 421, when public employees make statements pursuant to their official duties, "the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." The protection afforded to the government as an employer, is to ensure that when the government itself is speaking, it has the power to control the message it conveys. This Court initially declined to decide whether *Garcetti* applied in the same manner to cases involving speech related to scholarship or teaching. However, it should be held that a public college professor's classroom speech constitutes official-duty speech that is not entitled to First Amendment protection under *Garcetti.* When colleges, as government employers, enter into contracts of employment with qualified professors, it hires the professors for their speech. Thus, the college must be able to ensure that the professor delivers the speech for which the college is willing to pay.

Smith's In-Class Comments are Not Protected Under the Concept of Academic Freedom.

This Court has never found that a college professor's speech is constitutionally protected by the concept of academic freedom. To the extent the right to academic freedom exists, it is only a right of the college, as an institution, to control what may be taught in the classroom. Instilling a constitutional right to academic freedom onto an individual professor directly conflicts with a public college's ability to engage in academic policymaking and distorts the balance of interests inherent in an employer-employee relationship. In any event, this Court should not utilize the present case to determine whether a professor is afforded First Amendment protection via academic freedom because the speech at issue was unrelated to research or scholarship, a fundamental component of the concept's initial recognition as a professional norm.

II.

A Public College Has the Power to Compel its Professors to Communicate Information, via Syllabus or In-Class Instruction, Pursuant to the Government Speech Doctrine.

Under the government speech doctrine, the government may compel its employees to deliver its message pursuant to their official duties. Whether the message compelled to be conveyed is that of the government is dependent upon the history, endorsement, and control of the expression. In the present case, the statement at issue embodied a message from the college, and therefore, constituted government speech. WCC drafted the statement, thereby controlling its content. The statement indicated that it expressed the views of WCC, evidencing the college's endorsement of the message. Finally, statements of institutional values have historically been required to be incorporated in class syllabi and instruction by colleges and universities across the country. Therefore, WCC was entitled to compel Smith to convey the statement pursuant to his official duties, which include classroom discussion and syllabus dispersal.

Any Limitations Placed on a Public College's Ability to Compel the Speech of its Professors do Not Apply to this Case.

As a general matter, the government is barred from compelling a public employee to personally adopt and endorse the government's message as that of their own. However, this limitation does not raise First Amendment concerns in the present case because WCC did not compel Smith to personally endorse its statement, nor did it infringe on Smith's ability to criticize the school's message when acting in his capacity as a citizen. WCC took substantial efforts to ensure that the statement would be perceived as that of the college and only sought to discipline Smith after he categorically refused to incorporate the statement into his syllabus and classroom discussion, which was a duty of his employment.

ARGUMENT

Standard of Review

The first issue on appeal is whether a public community college professor's in-class speech on a matter of public concern is protected by the First Amendment or excluded as part of his "official duties" under *Garcetti*. R. at 30. The second issue on appeal is whether a public community college's requirement of a professor to communicate information that conflicts with his academic views through his syllabus and in-class instruction is a violation of the First Amendment's protection against compelled speech. *Id*. Both issues before this Court, being related to "the protected status of speech," are questions of law, not fact. *Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983). As such, this court may review the current issues on appeal using a *de novo* standard. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 503 (1984). Under this standard, this Court will "make an independent examination of the whole record" to ensure "the judgment does not constitute a forbidden intrusion on the field of free expression." *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964).

I. A PROFESSOR'S CLASSROOM SPEECH IS "OFFICIAL DUTY" SPEECH, WHICH IS CATEGORICALLY EXCLUDED FROM FIRST AMENDMENT PROTECTION UNDER *GARCETTI.*

The First Amendment protects the right to speak freely and the right to refrain from speaking at all. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Despite this general rule, a public employee's speech has traditionally received little First Amendment protection because "the government has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). Over time, however, the lack of protection afforded to public employees has been qualified in important respects and it is now apparent that public employees do not surrender all their First Amendment rights by reason of their

employment. *Garcetti*, 547 U.S. at 417. In *Pickering*, 391 U.S. at 568, for example, this Court crafted a balancing test to apply when a public employer takes an adverse employment action against a public employee based on the employee's speech as a citizen: the public employer's interest in promoting efficient services is balanced against the public employee's interest in commenting as a citizen on a matter of public concern. Almost forty years later, in *Garcetti*, 547 U.S. at 421, this Court narrowed the test, holding that "when employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes" and the interest of the public employer is per se superior to that of the public employee. Communication made by a public employee pursuant to their official duties is therefore not insulated from employer discipline under the guise of First Amendment protection. *Id.* In making this ruling, however, this Court declined to expressly consider whether *Garcetti* applied in the same manner to speech related to scholarship or teaching in the college setting because of the principle of academic freedom. *Id.* at 422. Nevertheless, this Court has declined to expressly recognize a separate First Amendment right to academic freedom. *Urofsky v. Gilmore*, 216 F.3d 401, 412 (4th Cir. 2000).

This Court should hold that the First Amendment does not limit Westland Community College's power to discipline its professor for in-class speech on a matter of public concern and that Smith's comments made during his February 2019 lecture embodied "official duty" speech under *Garcetti.* First, *Garcetti* should be held to apply to in-class speech made by public college professors because when speaking in-class, a professor is acting as a proxy of the college, which must be able to control the content of its intended message. Second, an academic freedom exception has never been recognized by this Court and it would be improper to utilize this case to

recognize such an exception because Smith's comments were wholly unrelated to research or scholarship.

A. *Garcetti* Applies to Classroom Activities Conducted in the Course of Employment by Public College Professors.

Statements made by public employees pursuant to their official duties are not protected by the First Amendment because the employees are not, in that instance, speaking as "citizens". *Garcetti*, 547 U.S. at 421. This Court has considered official duty speech to constitute speech "the government itself has commissioned or created and speech the employee was expected to deliver in the course of carrying out his job." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2424 (2022). Classroom speech made by a university professor inevitably encompasses part of the professor's official duties. *Piggee v. Carl Sandburg Coll.*, 464 F.3d 667, 671 (7th Cir. 2006). Here, this Court should find that Smith was acting pursuant to his official duties in February of 2019 when he made controversial comments surrounding "cancel culture" during classroom discussion.

A number of factors may indicate whether a public employee is speaking pursuant to their official duties, rather than as a citizen. *Bruce v. Worcester Reg'l Transit Auth.*, 34 F.4th 129, 136 (1st Cir. 2022). These factors include whether (1) the employee was paid by the employer to make the speech, (2) the employee spoke at her place of employment or elsewhere, and (3) the speech gave the impression that the employee represented the employer when she spoke. *Id.* at 136-37.

Classroom lecture and discussion is a paradigm example of what constitutes a teacher's official duties. *See Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 478 (7th Cir. 2007); *Brown v. Chi. Bd. of Educ.*, 824 F.3d 713, 714 (7th Cir. 2016). For example, in *Mayer*, the Seventh Circuit considered the claim of an elementary school teacher who alleged that her teaching contract was not renewed because she demonstrated her support for individuals protesting the Iraq War. *Id.* at 478. The teacher was permitted to discuss the controversy surrounding the War with her class

but had to keep her personal opinions to herself. *Id.* at 479-80. The court found that this was "an easier case for the employer than *Garcetti*" because of the fact that "teachers hire out their own speech and must provide the service for which employers are willing to pay." *Id.* at 479. The teacher's current events lesson was integral to her assigned classroom tasks, and therefore, *Garcetti* applied directly. *Id.* at 480. Similarly, in *Brown*, 824 F.3d at 714, a teacher sued Chicago Public Schools after he was suspended for giving an impromptu lesson on the use of racial slurs. The court noted that speech made by a teacher in class falls within the core of the teacher's official duties. *Id.* at 715. The fact that he deviated from the official curriculum of the school, which banned the use of racial epithets in front of students, did not characterize the teacher's speech as that of a citizen. *Id.* Because the teacher did not make his comments as a citizen, his suspension did not implicate his First Amendment rights under *Garcetti. Id.*

The Third Circuit's decision in *Edwards v. California University of Pennsylvania*, 156 F.3d 488, 491 (3d Cir. 1988), supports that the distinction between college and K-12 education has no bearing on whether an academic instructor is engaged in her official duties and acting outside of the realm of First Amendment protection.[1] There, a professor at California University began to introduce topics of religion, bias, and humanism into his Introduction to Educational Media course. *Id.* at 489. When students complained, the university ordered the professor to cease and desist using materials of a religious nature before he was ultimately suspended. *Id.* at 490. In analyzing the professor's First Amendment claim against the school, the Third Circuit found that "although

[1] Although the Court did not specify, it seems much more likely the *Garcetti* caveat applies, if at all, in the higher education context rather than in the elementary/secondary education context because courts historically have been extremely reluctant to recognize academic freedom rights for elementary and secondary teachers, while the concept of academic freedom has become fairly robust in the college and university settling." Kristi L. Bowman, *The Government Speech Doctrine and Speech in Schools*, 48 WAKE FOREST L. REV. 211, 254 (2013).

a teacher's out-of-class conduct, including her advocacy of particular teaching methods, is protected [by the First Amendment], her in-class conduct is not." *Id.* At 491. A public university professor's First Amendment protection does not yield a right to decide what will be taught in the classroom because classroom speech is inevitably a part of a professor's official duties. *See Piggee*, 464 F.3d at 671.

It cannot be said, however, that all speech made by a public college employee in relation to her employment constitutes unprotected "official duty" speech. *See Lane v. Franks*, 573 U.S. 228, 246 (2014). In *Lane*, a community director at Central Alabama Community College conducted an audit which revealed that a state representative on the college's payroll had likely been committing fraud. *Id.* At 232. When the director brought the allegations to the president of the college, he was advised against taking any adverse action. *Id.* Nevertheless, the director opted to fire the representative and testify before a federal grand jury regarding his knowledge of the fraud. *Id.* When the director was later terminated, he argued that the college violated his First Amendment rights by firing him in retaliation for his testimony, and this Court agreed. *Id.* At 234, 238. This Court held that testimony made by a college employee in judicial proceedings concerning matters discovered during the course of their employment does not constitute the employee's "official duties." *Id.* At 238. Further, sworn testimony in judicial proceedings is "a quintessential example of speech as a citizen." *Id.*

Speech related to issues of public concern and directed at a public audience is also generally protected and held to be unrelated to a college professor's official duties. *See Adams v. Trs. Of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 564 (4th Cir. 2011). In *Adams*, the Fourth Circuit considered whether the religious writings of a professor, which were included in his application for promotion, constituted unprotected speech made pursuant to the professor's official duties. *Id.*

at 554. The court rejected this analysis because the writings at issue were "directed at a national or international audience on issues of public importance unrelated to any of [the professor's] assigned teaching duties at the university." *Id.* at 564. The court concluded that applying *Garcetti* in this instance could garner a slippery slope in which many forms of advocacy or service a professor engaged in during his employment would be denied First Amendment protection. *Id.*

In the present case, Smith was acting pursuant to his official duties when he discussed "cancel culture" to his students during in-class instruction. R. at 5. Smith utilized his Philosophy of Law class to discuss the controversial representation of Martin Michaelson by local law professor, Sally Sanders. R. at 5. The discussion coincided with legal ethics, an essential aspect of the course curricula. *Id.* Smith's comments parallel the teacher's in *Mayer*, 474 F.3d at 480, whose lesson related to the Iraq War, which the Seventh Circuit held was integral to her teaching responsibilities, making her comments part of her official duties. Smith's discussion of Michaelson was similarly integral to his responsibility as a Philosophy of Law professor to introduce his students to the concept of legal ethics. R. at 5. This Court should find that, like in *Edwards*, 156 F.3d at 491, Smith had a right to advocate outside of the classroom that "cancel culture" should be incorporated into classroom instruction, but he did not have a right to continue to discuss cancel culture in the classroom at the behest of WCC.

The fact that Smith deviated from the curricula mandated by WCC does not re-characterize his comments as citizen speech, *see Brown*, 824 F.3d at 715, rather it evidences his insubordination. Smith's comments, unlike in *Lane*, 573 U.S. at 238, did not encompass a special circumstance in which his discovery of matters of crucial public importance, during the course of his employment, prompted him to speak out as a concerned citizen. Engaging in classroom speech is not a "quintessential example of speech as a citizen." *See id.* Classroom discussion is a prototypical

illustration of a college professor's employment responsibilities and denying such discussion First Amendment protection would not threaten a professor's ability to speak within the public forum.

By engaging in classroom discussion, Smith was acting pursuant to his official duties and as a "proxy of the college" *See Brown v. Armenti*, 247 F.3d 69, 75 (3d Cir. 2001). WCC had a right to discipline him without raising First Amendment concerns. Smith's comments were directed at his Philosophy of Law students, r. at 5, the pupils that Smith was contracted by WCC to educate. His speech was not intended for a larger public audience, nor was it based in his academic research or scholarship. R. at 5. Therefore, a finding that Smith was acting pursuant to his official duties would not "place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment," as was the concern in *Adams*, 640 F.3d at 564. It follows that Smith's comments should be deemed categorically unprotected by the First Amendment, and therefore, *Garcetti* should apply.

B. An "Academic Freedom" Exception Has Not Been, and Should Not Be, Recognized by this Court as it Would Interfere with Academic Policy Making and Distort the Balance of Existing Interests.

"Universities occupy a special niche in our constitutional tradition." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 724-25 (2007). In recognition of the important role universities play in society, the *Garcetti* majority refused to apply its holding to cases involving a university professor's speech related to scholarship or teaching, leaving open the possibility that academic freedom has some constitutional value. *Garcetti*, 547 U.S. at 425. This Court, however, has never found that a public college professor has a right to academic freedom. *See Urofsky* 216 F.3d at 412 ("[T]he Supreme Court has never set aside a state regulation on the

basis it infringed a First Amendment right to academic freedom.") This Court should continue with its precedent and decline to extend to professors a constitutional right to academic freedom.

1. This Court Has Never Expressly Recognized a Professor's Right to Academic Freedom.

The Supreme Court has never expressly recognized a First Amendment right to academic freedom. *Urofsky*, 216 F.3d at 412. To the extent that the right to academic freedom exists, it is simply an institutional right of the university to govern free from outside interference. *Minn. State Bd. of Cmty. Colls. v. Knight*, 465 U.S. 271, 287 (1984). It is not, however, a blanket protection of an individual faculty member's autonomy. *Id.* The concept of academic freedom does not, and has never been held to, extend First Amendment rights to professors for unyielding control over their in-class conduct. *Bradley v. Pittsburg Bd. of Educ.*, 910 F.2d 1172, 1176 (3d Cir. 1990). This Court should find that Smith's comments are not protected by the concept of "academic freedom."

There are two aspects of academic freedom: the first acknowledges a right of professors and faculty to immerse themselves in academic debates, pursuits, and inquiries; while the second protects the university's ability to set its own curriculum. *Webb v. Bd. of Trs.*, 167 F.3d 1146, 1149 (7th Cir. 1999). These two ideas are somewhat inconsistent. *See Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n. 12 (1985) ("Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decision-making by the academy itself.") The concept of academic freedom, as recognized by this Court, appears to have not been extended beyond a right of the institution to engage in self-governance over its academic affairs. *Urofsky*, 216 F.3d at 412. Any entitlement a teacher may have to academic freedom exists merely as a "professional norm," rather than a constitutional right. *Id.* at 411.

A court has never found that a teacher's First Amendment rights "extend to choosing their own curriculum or classroom management techniques in contravention of school policy or dictates." *Bradley*, 910 F.2d at 1176. In *Bradley*, for example, a tenured high school teacher sought an injunction from the lower court to prevent school officials from banning Learnball, a classroom management technique that embraced a sports format, and required dividing the students into teams and selecting student leaders. *Id.* at 1174. When the teacher continued to use and advocate for Learnball after the school banned the technique, the teacher was fired. *Id.* The teacher argued she could not be required to cease her use of Learnball, since the school board did not have a policy relating to general classroom management techniques that the teacher may employ. *Id.* The Third Circuit determined that the school board was entitled to find that Learnball was not an appropriate pedagogical method, and therefore, bar the teacher from using the classroom management technique. *Id.* at 1176. The lack of First Amendment protection afforded to teachers is warranted because every school must consider speech when deciding who to appoint to teach a particular class. *Webb*, 167 F.3d at 1150. A teacher's speech constitutes their "stock in trade, the commodity [they] sell to [their] employer in exchange for a salary." *Mayer*, 474 F.3d at 479.

The Eleventh Circuit mirrored the Third Circuit's approach to academic freedom in applying it to public university professors. *Bishop v. Aronov*, 926 F.2d 1066, 1069-70 (11th Cir. 1991). In *Bishop*, a public university required a professor to refrain from including religious messages during his in-class instruction. *Id.* at 1069-70. The professor sued and alleged, among other things, that the university infringed upon his First Amendment freedoms. *Id.* at 1070. The Eleventh Circuit disagreed, however, and underscored the importance of the employer-employee relationship in free speech cases where a public university is the employer. *Id.* at 1074. In its decision, the court noted that "a teacher's speech can be taken as directly and deliberately

representative of the school." *Id.* at 1073. The court further reasoned "where the in-class speech of a teacher is concerned, the school has an interest" in inhibiting disruptions to "day-to-day operations" and regulating expression the public might reasonably perceive to be the university's own. *Id.* In its discussion on academic freedom, the *Bishop* court, although mindful of the role of academic freedom for purposes of hiring and retaining productive educators, did not "find support to conclude that academic freedom is an independent First Amendment right." *Id.* at 1075. The court concluded that the university "as employer and educator can direct [the professor] to refrain from expressions of religious viewpoints in the classroom" regardless of whether the direction runs contrary to the professor's own academic views. *Id.* at 1077.

On the other hand, academic freedom as it applies to a university as an institution has been described as the right "to choose who may teach, what may be taught, how it may be taught, and who is admitted to study." *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring). Encompassed within this freedom is the right of the university to make its own determinations in relation to academic standards and discharges. *Ewing*, 474 U.S. at 225-26. When judges review the substance of academic decisions, "they should show great respect for the faculty's professional judgment." *Id.* at 225. It follows, therefore, that in the context of in-class curricular speech, a professor's appeal for academic freedom "does not warrant judicial intrusions upon an educational institution's decisions." *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 624 F.3d 332, 344 (6th Cir. 2010).

When a right to academic freedom has been conferred upon a college professor by the lower courts, the professor's interests did not conflict with that of the college he was employed by. *See Parate v. Isidor*, 868 F.2d 821, 827 (6th Cir. 1989) (holding that a professor's refusal to change his grading policy was protected by his right to academic freedom). The *Parate* court reasoned

that the grade assignment constituted "symbolic communication intended to send a specific message to the student" by the individual professor. *Id.* Importantly, the court found that the school could and should have administratively changed the grade itself if it so desired. *Id*. at 829. In other words, the right of the professor to administer his grading policy was not in direct conflict with the school's ability to make an institutional decision to modify a student's grade.

The comments Smith made during his "cancel culture" lecture in February of 2019 are not entitled to First Amendment protection under the concept of academic freedom. To the contrary, it is WCC that is afforded the institutional right to make decisions in relation to its academic affairs. *See Urofsky*, 216 F.3d at 412. Since the speech at issue was made in-class, Smith was acting "directly and deliberately as a representative of the school." *Bishop*, 926 F.2d at 1073. The in-class discussion was integral to the Philosophy of Law curriculum, evidencing that students in the class would likely perceive Smith's comments as sanctioned by the college. *Id.* WCC's mandate that Smith refrain from discussing cancel culture within the classroom, r. at 6, directly correlates to its freedom to choose what may be taught in the classroom, *see Sweezy*, 354 U.S. at 263. When Smith defied WCC's decision and proceeded to cover cancel culture in class the very next day, r. at 6, he acted in opposition to the academic decision making of WCC.

Any right to academic freedom conferred upon Smith to yield unrestrained control over the content of his lectures would be in direct conflict with WCC's right as an institution to "convey its own message" and control what may be taught in the classroom. *See Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 833 (1995) (holding that a university may regulate the content of expression when it is the speaker or enlists private entities to convey its own message); *Sweezy*, 354 U.S. at 263 (concurring that a university can itself decide "who may teach, what may be taught, how it shall be taught, and who is admitted to study"). This case is unlike *Parate*, 868

F.2d at 829, in that Smith cannot retain a right to academic freedom without infringing upon WCC's institutional interests. WCC had no reasonable manner with which it could ensure that its values were communicated to its students and incorporated into their learning environment without enlisting its professors to convey such information in the classroom. Professors play a key role in carrying out the institutional goals of the college or university that employ them and colleges must be able to channel the content of its professors in-class discussion. For this reason, this Court should be reluctant to intervene and override WCC's determination. *See Ewing*, 474 U.S. at 226.

2. Because Scholarship is Not at Issue, this Case is Not the Appropriate Vehicle for this Court to Recognize an Academic Freedom Exception.

The concept of academic freedom, as it applies to professors, was created and implemented out of concern for their research and scholarship. *Evans-Marshall*, 624 F.3d at 344. For society to flourish, professors must be free to engage in scholarship absent "an atmosphere of suspicion and distrust." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). However, to the extent a professor has a right to academic freedom, it does not require that a professor be made a sovereign unto himself. *Parate*, 868 F.2d. at 827. The instant case presents an improper opportunity for this Court to extend the right to academic freedom to university professors because Smith's comments were wholly unrelated to his research or scholarship.

The importance of research and scholarship prompted the need for recognition of a right to academic freedom. *Evans-Marshall*, 624 F.3d at 344. In *Evans-Marshall*, a public high school teacher used a controversial book to foster an in-class debate on the topic of government censorship. *Id.* at 334-35. The book and its associated topic led to disputes between the teacher and the school's principal. *Id.* at 336. When the school board unanimously elected not to renew the teacher's contract, she filed suit asserting that the school board "retaliated against her 'curricular and pedagogical choices,' infringing on her First Amendment right 'to select books and

methods for instruction for use in the classroom without interference from public officials.'" *Id.* The Sixth Circuit held that "[a]s with any other individual in the community, [the teacher] had no more free-speech rights to dictate the school's curriculum than she had to obtain . . . a teaching position in the first instance for communicating her preferred list of books and teaching methods." *Id.* Notably, however, the Sixth Circuit transitioned its discussion from high school teachers to nontenured public college professors, stating "in the university arena . . . a teacher's invocation of academic freedom does not warrant judicial intrusion upon an educational institution's decisions." *Id.* at 344.

The Seventh Circuit has also posited that any privilege of academic freedom applies only to a professor's scholarship or research and does not apply broadly to anything they may say. *Abcarian v. McDonald*, 617 F.3d 931, 934 (7th Cir. 2010). In *Abcarian*, a university professor and medical professional spoke out regarding the administration of university hospital's surgical department. *Id.* at 933. After the professor alleged the university took adverse action against him as a result of his comments and tried to justify those comments under the guise of academic freedom, the court stopped him in his tracks. *Id.* at 936. Shutting down the attempt by the professor, the *Abcarian* court held that the professor's "speech involved administrative policies that were more prosaic than would be covered by principles of academic freedom." *Id.* at 934 n.5. Similarly, in *Savage v. Gee*, 665 F.3d 732, 749 (6th Cir. 2012), a university employee argued that he was constructively discharged after recommending freshman students read a book that described homosexuality as "anti-human behavior." *Id.* at 734-36. The Sixth Circuit found that such a recommendation was loosely, if at all, related to scholarship, and therefore, the employee's speech claim did not fall outside of the realm of *Garcetti*'s reach. *Id.* at 749.

Smith's claim of a right to academic freedom should be denied because his conduct was unrelated to research and scholarship. *See Abcarian*, 617 F.3d at 934. There is no allegation that Smith was disciplined as a result of the content or viewpoint of his scholarship. R. at 17. While Smith engaged in academic research on his own time, Smith did not publish any academic work in his official capacity as a faculty member of WCC and WCC did not require Smith to publish any work during his employment. R. at 5. Any argument that Smith's cancel culture comments were somehow related to his scholarship should be rejected. *See Savage*, 665 F.3d at 749. A professor's choice to expose his students to controversial topics, whether humanism or cancel culture, is not entitled to the status of scholarship, without some showing that the professor engaged in efforts to advance the understanding of that topic. *See id.* Smith merely utilized a sensational story to force his students to play devil's advocate and engage in logical thinking. This teaching method is more emblematic of a family's Thanksgiving debate than it is the product of academic research. Since Smith's comments were unrelated to his scholarship, this Court should decline to utilize the present case to extend First Amendment protection to professors under the concept of academic freedom.

C. Even if this Court Recognizes an Academic Freedom Exception, the Application of *Pickering* in this Case Overwhelmingly Supports Respondent, and no Remand is Necessary.

When a public employer takes an adverse employment action against a public employee based on the employee's speech made not as part of their official duties, but rather, as a citizen, the *Pickering* balancing test applies. *Pickering*, 391 U.S. at 568. Under this test, the public employer's interest in promoting efficient services must be balanced against the employee's interest in commenting as a citizen on a matter of public concern. *Id.* In the event this Court recognizes an academic freedom exception and holds the Smith was not speaking pursuant to his

official duties, the application of *Pickering* in this case overwhelmingly supports Respondent, and no remand is necessary.[2]

The premise that teachers may be constitutionally compelled to relinquish their First Amendment rights when speaking as citizens on a matter of public concern has been unequivocally rejected by this Court. *Pickering*, 391 U.S. at 568. However, government offices could not function if every employment decision became a constitutional matter. *Connick*, 461 U.S. at 143. It remains true that the State has interests as an employer in regulating the speech of its employees that is drastically different from those it possesses in connection with the regulation of speech of the general citizenry. *Pickering*, 391 U.S. at 568. Therefore, pursuant to *Pickering*, "the interests of the teacher, as citizen, in commenting upon matters of public concern" and "the interests of the State, as employer, in promoting the efficiency of the public services it performs through its employees" must be balanced against each other. *Id.*

Although the *Pickering* balance must occur on a case-by-case basis, this Court has discussed a number of factors to be considered in the analysis. *Maples v. Martin* 858 F.2d 1546, 1554 (11th Cir. 1988) (citing *Rankin v. McPherson*, 483 U.S. 378, 388 (1987)). This Court reviews the time, place, and manner of the speech, as well as the context in which the dispute arose. *Rankin*, 483 U.S. at 388. Other factors to be considered are whether the statement impairs discipline by superiors or harmony among coworkers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise. *Id.* For example, in

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[2] Respondent acknowledges its prior concession that if *Garcetti* does not apply, then remand is necessary. R. at 14 n.1. However, once a case is properly before this Court, it is not required to follow the recommendations or concessions of the parties. *Utah Pub. Serv. Comm'n v. El Paso Nat. Gas Co.*, 395 U.S. 464, 468-69 (1969). This Court may, therefore, find in favor of Respondent on the *Pickering* balancing test.

Maples, 858 F.2d at 1554, the Eleventh Circuit found that the interference of an internal review prepared and distributed university-wide by faculty members of the mechanical engineering department at Auburn University was sufficient to justify the transfer of the university employees that took part in its making and distribution. The *Maples* court reasoned that the review "distracted both students and faculty from primary academic tasks of education and research." *Id.* Interference with work, personnel relationships, or the speaker's job performance can detract from the public employer's function and avoiding such interference can be a strong state interest. *Id.*

In the present case, WCC's interest in promoting an efficient academic learning environment outweighs any interest Smith had to engage in classroom discussion surrounding a public figure and cancel culture. Smith's comments had a "detrimental impact on close working relationships for which personal loyalty and confidence are necessary." *See Rankin*, 483 U.S. at 388. Smith was a direct subordinate of Barrett and the discussions between Dean Hall, Barrett, and Smith surrounding Smith's continued employment, the content of his lectures, and the NSE pilot program, r. at 6-7, indicate that the parties maintained a close working relationship. Smith's failure to follow Barrett and Dean Hall's orders to cease discussion of Michaelson and cancel culture in class, r. at 6-7, resulted in Barrett and Dean Hall's loss of confidence that Smith could effectively teach Philosophy of Law within the framework of WCC's values. Furthermore, Smith's conduct impeded his performance as a professor and "interfered with the regular operation" of WCC. *See Rankin*, 483 U.S. at 388. Like in *Maples*, 858 F.2d at 1554, Smith's classroom discussion posed a substantial distraction to his students, who veered away from their academic obligations to complain about Smith, post the controversy on social media, and plot to disrupt the course. R. at 6-7. The investigation promoted by Barrett and Dean Hall in response to Smith's actions, r. at 6, diverted their attention from their professional responsibility to engage in scholarship and make

determinations concerning the functioning of the school. Smith's lack of respect for this professional responsibility is clearly evident in his decision to continue to engage in the controversial topic despite the ongoing investigation. R. at 6-7. The factors enunciated by this Court to be used in balancing the interests under *Pickering*, weigh overwhelming in favor of WCC. Therefore, even if this Court finds Smith was entitled to academic freedom, no remand is necessary.

II. THE FIRST AMENDMENT DOES NOT RESTRICT A PUBLIC COLLEGE'S ABILITY TO REQUIRE ITS INSTRUCTORS TO CONVEY ITS MESSAGING TO STUDENTS IN THE CLASSROOM.

The First Amendment protects citizens against compelled speech under many circumstances. *See Wooley*, 430 U.S. at 714. However, when the government speaks, it is free to employ the assistance of those who convey its message and is not required to remain viewpoint neutral. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l*, 570 U.S. 205, 221-22 (2013) (Scalia, J., dissenting). This means that the government, as a public employer, can compel the speech of its public employees intended to be delivered as part of the employee's official duties. *Garcetti*, 547 U.S. at 422. Any skepticism expressed by this Court about the government's ability to compel the speech of its employees was in relation to speech outside of an employee's official duties. *See Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2473 (2018). When the government compels an employee to perform core job duties, rather than to speak as a citizen on a matter of public concern, the *Pickering* balancing test does not apply, and the government enjoys broad discretion.[3] *Garcetti*, 547 U.S. at 418, 422. Even if the government's power to compel

[3] Under *Pickering*, 391 U.S. at 568, when a public employer takes an adverse employment action against a public employee based on the employee's speech as a citizen, the public employer's interest in promoting efficient services must be balanced against the employee's interest in commenting as a citizen on a matter of public concern. Since Smith's comments were made pursuant to his official duties, no balancing is required. *Garcetti*, 547 U.S. at 422.

the speech of its employees is limited, that limitation does not apply when the government, as employer, does not infringe upon the employee's ability to express critical views as a citizen in the public forum and does not require the employee to convey the message as that of his own. *See Perry v. Sindermann*, 408 U.S. 593, 598 (1972); *All. for Open Soc'y Int'l. v. United States Agency for Int'l Dev.*, 651 F.3d 218, 234 (2d Cir. 2011).

This Court should find that the First Amendment's prohibition against compelled speech does not limit a public community college's power to require an instructor to communicate information—in a syllabus and through in-class instruction—that is contrary to the instructor's academic views. First, classroom speech is part and parcel of a professor's official duties, and therefore, the college may compel the professor to deliver certain messages in the classroom under the government speech doctrine. Second, a professor's termination after an outright refusal to perform a task pursuant to their official duties does not raise First Amendment concerns. Furthermore, although the college's ability to affect the content of substantive lectures may be limited, the college may compel its employee to communicate its institutional goals on its behalf.

A. The Government Speech Doctrine Governs Compelled Speech Delivered by Public University Professors in the Classroom as Part of Their Official Job Duties.

When the government conveys a message, it is not barred by the First Amendment "from determining the content of what [that message] says." *Walker v. Tex. Div., Sons of Confederate Veterans*, 576 U.S. 200, 207 (2015). The government, including its academic institutions, enjoys discretion to engage in policy making free from the requirement of viewpoint neutrality. *Chiras v. Miller*, 432 F.3d 606, 613 (5th Cir. 2005). Accordingly, the speech of government employees, which is delivered pursuant to the employees' official job duties, can be controlled by the government. *Garcetti*, 547 U.S. at 422. In the present case, this Court should find that WCC was

entitled to compel Smith to include the Land Acknowledgment Clause in his syllabus and during in-class instruction because such conduct embodied his official duties.

1. The Inclusion and Discussion of the Land Acknowledgement Clause Constituted Official Duty Speech.

A requirement that a university professor include certain clauses in his syllabus is a ministerial task, compelled by all universities, and any opposition to such a requirement is not deserving of First Amendment protection. *See Meriwether v. Hartop*, 992 F.3d 492, 507 (6th Cir. 2021) ("A university might, for example, require teachers to call roll at the start of class, and that type of non-ideological ministerial task would not be protected by the First Amendment.") Even if a university may have conveyed its message in a different manner, it is not required to do so, unless the *Pickering* balancing test applies. *Garcetti*, 547 U.S. at 421. Importantly, however, when the government is ordering an employee to speak pursuant to his official duties, the *Pickering* balancing test does not apply. *Id.* It is irrespective that the employee does not agree with the message that the university intended to compel the employee to convey. *See Agency for Int'l Dev.*, 570 U.S. at 222.

In *Janus*, 138 S. Ct. at 2463-64, this Court expressed skepticism towards the government's ability to compel the speech of its employees. There, it held that an Illinois law, which enforced a public sector collective bargaining arrangement, violated the First Amendment. *Id.* at 2460. This Court reasoned that "[c]ompelling individuals to mouth support for views they find objectionable violates [a] cardinal constitutional command." *Id.* at 2463, 2478. Nevertheless, this Court specifically noted that when a public employer "commands that its employees mouth a message on its own behalf, the calculus is very different." *Id.* at 2473. The government may insist that its employees "deliver any lawful message" pursuant to their official duties. *Id.*

When *Janus*, 138 S. Ct. at 2473, is applied to other cases, it could not be said that the public employee's compulsion by his employer was limited within the scope of his official duties. For example, in *Meriwether*, 992 F.3d at 498, a state college informed its faculty of its new gender identity policy, which required all faculty to refer to students by their preferred gender pronouns. The policy proscribed that it is applicable to all university faculty, at both academic and non academic events, at all times on campus, and even off campus under certain circumstances. *Id.* at 498-99. One devoutly religious professor was hostile towards the policy, and after several student complaints, a Title IX investigation was initiated, which determined that the professor violated the school's non-discrimination policy. *Id.* at 498-501. The professor filed suit against the school, alleging that his First Amendment rights were violated. *Id.* at 503. The Sixth Circuit held that *Janus* was applicable, *id.* at 510, and that the professor plausibly alleged a First Amendment violation, *id.* at 517.

As demonstrated in the discussion on issue one, *see infra* 12-16, classroom speech constitutes official duty speech pursuant to *Garcetti*, 547 U.S. at 422. The compelled speech at issue is similarly official duty speech because it was to be delivered during classroom instruction. *See Piggee*, 464 F.3d at 671. In fact, the requirement that Smith include the school's Land Acknowledgment Statement can be more easily deemed a part of Smith's official duties, and the speech of the school, than his in-class comments, given that the compelled inclusion of certain clauses in a professor's syllabus is a ministerial duty, undeserving of First Amendment protection. *See Meriwether*, 992 F.3d at 507.

This Court's holding in *Janus*, 138 S. Ct. at 2473, is inapplicable to the present case because the speech WCC compelled Smith to deliver was part and parcel to his official duties. The *Meriwether* facts are easily distinguished because Smith was compelled to convey the school's

Land Acknowledgment clause *solely* in his syllabus and in-class instruction. R. at 8. He was not bound to incorporate the policy into every activity he partook in while on campus, or even off campus, like in *Meriwether*, 992 F.3d at 517, solidifying that Smith's refusal to incorporate the policy into his syllabus and in-class instruction constituted a failure to perform his official duties. He was free to advocate for a viewpoint that conflicted with the Land Acknowledgment clause when he was not acting in his official capacity as a classroom instructor. R. at 8. Since the speech compelled to be delivered by Smith constituted official duty speech, WCC was entitled to terminate Smith for refusing to deliver its message.

2. The Government Speech Doctrine Permits a Public College to Compel the Speech of its Instructors Pursuant to Their Official Duties.

The First Amendment "works as a shield to protect private persons from encroachments by the government on their right to speak freely." *Leake v. Drinkard*, 14 F.4th 1242, 1247 (11th Cir. 2021). It does not, however, act as a "sword to compel the government to speak for them." *Id.* Thus, under the government speech doctrine, when the government speaks, it is not barred by the First Amendment from determining the content of its intended message. *Walker*, 576 U.S. at 207. The government cannot be compelled to be viewpoint-neutral because it must necessarily choose between competing ideas and adopt some as its own. *Agency for Int'l Dev.*, 570 U.S. at 221 (Scalia, J., dissenting).

There are three factors—history, endorsement, and control—used to distinguish government speech from citizen speech. *Cambridge Christian Sch. v. Fla. High Sch. Ath. Ass'n*, 942 F.3d 1215, 1230 (11th Cir. 2019). The history factor directs the court to determine whether the speech at issue has traditionally "communicated messages" in the name of the government. *Walker*, 576 U.S. at 211. The endorsement factor requires asking whether "observers reasonably believe the government has endorsed the message." *Mech v. Sch. Bd. of Palm Beach Cnty.*, 806

F.3d 1070, 1076 (11th Cir. 2015). The final factor, control, asks whether the government agency "maintains direct control over the messages conveyed." *Walker*, U.S. at 213. When properly invoked pursuant to the three preceding factors, the government speech doctrine allows the government to enlist the assistance of individuals who believe in its ideas to carry them to fruition. *Agency for Int'l Dev.*, 570 U.S. at 222 (Scalia, J., dissenting).

The Eleventh Circuit's decision in *Gundy v. City of Jacksonville*, 50 F.4th 60, 64 (11th Cir. 2022), provides a recent and proper analysis of these factors. There, the court denied the claim of a pastor who argued that the president of the city council violated his First Amendment rights by cutting off his politically charged speech during the council's opening prayer invocation because the prayer constituted government speech. *Id.* at 65-66. The court reasoned that legislative prayer is deeply rooted in our nation's history and embodied speech of the government. *Id.* at 72. Furthermore, the council's invocation could be closely identified in the public mind with the government because the council organizes the invocation and selects its speaking, satisfying the endorsement requirement. *Id.* at 78-79. Finally, the city council exerted control over the messages conveyed by the speakers because, in inviting and selecting certain speakers, the council inherently exhibits control. *Id.* at 79-80.

In the present case, the Land Use Acknowledgment clause prepared by WCC, and required to be included in Smith's syllabus, embodied government speech. First, course syllabi historically communicate messages on behalf of a school, *see Cambridge Christian Sch.*, 942 F.3d at 1232, and similar policies relating to disability, student discipline, and institutional values are required to be included in syllabi by universities across the country.[4] In addition, it cannot be contested that

[4] *See e.g.,* Western Kentucky University, https://www.wku.edu/cebs/peu/documents/course syllabi/sped/sped-418.pdf (last visited January 3, 2023); Kansas State University, https://www.k state.edu/provost/resources/teaching/course.html (last visited January 3, 2023); James Madison

students would find that WCC endorsed the message, *see Mech*, 806 F.3d at 1076, since the clause itself provided that it encompassed the views of WCC and requested that students contact WCC directly for more information.[5] In the past decade, this Court has placed increasing emphasis on whether members of the public reasonably perceive the relevant expression to be government speech. One Justice has gone so far as to suggest that this factor should be the sole criterion for distinguishing government speech from private expression. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 487 (Souter, J., concurring in the judgment). It is evident from the language of the clause that WCC intended for its students to perceive the clause as a message from the school, r. at 8, and it can be reasonably inferred that university-aged students would be capable of interpreting the clause as expressing a message from the school, or government speech. Finally, WCC "maintained direct control over the message," *see Walker*, 576 U.S. at 213, by drafting the policy, mandating administrative review of course syllabi to ensure its proper incorporation, and monitoring classroom instruction to ensure the policy was effectively communicated to WCC students, r. at 8-9. Therefore, because all three factors – and importantly the endorsement factor – evidence that the Land Acknowledgment clause constituted government speech, WCC rightfully compelled Smith to deliver the message pursuant to his official duties. *See Janus*, 138 S. Ct. at 2473. University, https://www.jmu.edu/syllabus/index.shtml (last visited January 3, 2023); Bates College, https://www.bates.edu/accessible-education/faculty/sample-syllabus-statement/ (last visited January 3, 2023).

B. Even if the First Amendment Does Impose Some Limit on a College's Ability to Compel Speech, Those Limits are Not Applicable Here.

This Court has expressed some skepticism about whether the government could ever

[5] The clause states, in relevant part, "At Westland Community College, we acknowledge that the territory on which our campus stands is the traditional homeland of Native and Indigenous communities. . . .You are encouraged to contact the Office of Diversity and Inclusion for more information." R. at 8.

compel a public employee to personally advocate the government's preferred viewpoint. *See Janus*, 138 S. Ct. at 2474. However, any such skepticism is unwarranted when the government does not require an employee to personally adopt and endorse the government's message. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 540-42 (2001). In addition, it cannot be said that speech compelled by a public employee generates First Amendment concerns when the employee refuses to convey the intended message and is not barred from expressing contrary views as a citizen in the public forum. *See Perry*, 408 U.S. at 598; *Johnson-Kurek v. Abu-Absi*, 423 F.3d 590, 594 (6th Cir. 2005).

1. The Government is Not Limited in its Ability to Compel an Employee to Communicate its Institutional Goals, so Long as it Does Not Require the Employee to Convey the Message as that of His Own.

When the government determines the content of the message it intends to convey, it is not barred from relying on the government-speech doctrine merely because it enlists private individuals to convey this message. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 574 (2005). It is only when the government seeks to affirmatively require that government-preferred speech be conveyed by individuals as their own that serious First Amendment concerns are raised. *See All. for Open Soc'y Int'l*, 651 F.3d at 234. In the present case, this Court should find that WCC had the power to compel Smith to deliver its message within his syllabus because it was not required that Smith adopt the message as that of his own.

The government's ability to compel private individuals to communicate a message as that of their own has long been prohibited by this Court. *See W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 634 (1943) (holding that the state cannot require schoolchildren to recite the Pledge of

Allegiance while saluting the American flag). Cases in which individuals were compelled to speak in exchange for a government subsidy properly reveal the limitations imposed on the government to recruit private individuals to convey a public message and is similarly applicable in the context of compelled speech of public employees. *See e.g.*, *Johanns*, 544 U.S. at 559 ("In all of the cases invalidating exactions to subsidize speech, the speech was, or was presumed to be, that of an entity other than the government itself.") For example, in *All. for Open Soc'y Int'l*, 651 F.3d at 223, 234, the Second Circuit found that Section 7631(f) of the Leadership Act, which intended to generate an international fight against diseases like HIV/AIDS, placed an impermissible condition on the receipt of government funds. The subsection provided that no funds made available to carry out the Leadership Act may be used to aid any group that "does not have a policy explicitly opposing prostitution." *Id.* at 234. The court reasoned that compelling speech of a private entity to be conveyed as that of their own places a condition on public funding that cannot be squared with the First Amendment. *Id.* The provision effectively required recipients of the Leadership Act funding to "take the government's side on a particular issue." *Id.* at 235. "Viewpoint-based funding decisions can be sustained" when the government enlists private speakers to convey the government's own message, "but not in instances where the private speakers are not speaking on behalf of the government." *Legal Servs. Corp.,* 531 U.S. at 540-42.

The Sixth Circuit's decision in *Parate*, 868 F.2d at 828, applies the same line of reasoning to instances of government-compelled speech of public employees. There, it was held that an individual professor may not be compelled by university officials to change a grade of a student. *Id.* Since assigning a letter grade constitutes "symbolic communication intended to send a message to the student," the professor's communication is deserving of First Amendment protection. *Id.* at

827. In other words, because the professor's actions could not be conveyed as a message from the school itself, the professor could not be compelled to modify the grade assignment.

The constitutional ramifications of a professor's refusal to comply with a university mandate to speak pursuant to their official duties has been addressed by the Tenth Circuit in *Johnson-Kurek*, 423 F.3d at 594. There, a part-time professor at the University of Toledo alleged that her First Amendment rights to free speech and academic freedom were violated when the English Department denied her a second class to teach after she refused to comply with a request that she communicate more clearly to her students what was required to complete her assigned coursework. *Id.* at 591. After refusing to comply, the professor ignored the second request for clarification made by her supervisor, failed to respond to a series of phone calls or emails, and ultimately never prepared the requested information. *Id.* at 592. The Sixth Circuit swiftly determined that the professor's First Amendment rights were not implicated, much less violated. *Id.* at 594. The court reasoned that the professor was simply required to detail the requirements that she had devised, as one might be in preparing a syllabus. *Id.* at 594. It was held that "[t]he freedom of a university to decide what may be taught in the classroom would be meaningless if a professor were entitled to refuse to comply with university requirements whenever they conflict with his or her teaching philosophy." *Id.* at 595. This Court denied granting the professor's petition for certiorari, *Johnson-Kurek v. Abu-Absi*, 546 U.S. 1175 (2006), evidencing its agreement with the Sixth Circuit's decision. In refusing to perform the tasks required by his employer, a public employee can legitimately lose access to his job without retaining a constitutional claim. *See Johnson-Kurek*, 423 F.3d at 594.

"A university's choice of curriculum qualifies as government speech" and universities are entitled to make content-based choices in restricting a professor's syllabus. *Edwards*, 156 F.3d at

491. In the case at bar, WCC was entitled to compel Smith to include the Land Acknowledgment clause in his syllabus because it did not require Smith to convey the statement as that of his own. *See* R. at 8. WCC adopted the Land Use Acknowledgment clause to embed its policies, such as diversity, into its student curriculum and thus the clause should be considered government speech. *Id.* Smith was simply required to spell out university policies and values in his syllabus, a traditional duty of employment, as evidenced in *Johnson-Kurek*, 423 F.3d at 594. Accordingly, Smith was not entitled to refuse compliance with WCC's mandate merely because it conflicted with his preferred theory of property law. *See id.* at 595.

When Smith made his opposition of the statement clear to Dean Hall, Smith was reassured that he was not required to personally adopt the views of WCC as that of his own. R. at 9. This scenario bears a significant difference to that in *All. for Open Soc'y Int'l*, 651 F.3d at 223, 234. Smith was not required to "take the government's side on a particular issue," *id.* at 235, he was merely required to incorporate the school's own message into his course syllabus, r. at 8. Furthermore, the clause states that it expresses the views of WCC, and WCC was clear that the clause "does not explicitly attach those views to Smith." R. at 9. This distinction casts this case apart from that of *Parate*, 868 F.2d at 827. It cannot be said that including the clause in Smith's syllabus would constitute "symbolic communication intended to send a message" by Smith to a particular student, so as to sustain any claim that compelled inclusion was prohibited. *See id.* The clause lacks any individualized message that is clearly present when, for example, a professor makes a grade assignment. *See id.* Furthermore, in reading the statement, each student would have been plenty capable of recognizing that it expressed the views of WCC, rather than Smith, because the statement itself makes note of this very fact and requested that students contact WCC, rather than their professor, for more information. R. at 8-9. Given that Smith was not required to

incorporate the Land Use Acknowledgment clause as part of his personal ideology and his students were unlikely to believe its inclusion was a product of Smith's own viewpoint, this Court should find that the statement constituted government speech and WCC was entitled to compel Smith to include it in his syllabus.

2. The Government May Compel an Employee to Deliver a Lawful Message as Part of the Employee's Official Duties, so Long as it Does Not Infringe on the Employee's Ability to Express Views, Including Critical Views, in Private Speech.

A public employee's criticism of his employer on matters of public concern may be protected by the First Amendment. *Perry*, 408 U.S. at 598. However, refusal by a public employee to communicate the ideas of his employer pursuant to his official duties does not implicate, much less violate, the First Amendment. *See Johnson-Kurek*, 423 F.3d at 594. This Court should find that WCC had the right to compel Smith to convey its message because it did not infringe on Smith's ability to criticize the school's message when acting in his capacity as a citizen.

Terminating a public employee for engaging in criticism of his employer, or the message the employer conveys, consistently raises First Amendment concerns. *See Perry*, 408 U.S. at 594- 95. In *Perry*, for example, a college professor was denied re-employment upon the termination of his one-year contract with the school after he publicly criticized the administration's policies. *Id.* In particular, the professor advocated that the college be elevated to a four-year status, a modification that the school Regents opposed. *Id.* at 595. The ongoing tension culminated when a newspaper ad criticizing the Regents appeared over the professor's name. *Id.* Following his termination, the professor sued, alleging that the school infringed upon his freedom of speech. *Id.* This Court found that these allegations presented a bona fide constitutional claim. *Id.* at 598. Referencing *Pickering*, it held that "a teacher's public criticism of his superiors on matters of

public concern may be constitutionally protected and may, therefore, be an impermissible basis for termination of his employment." *Id.* at 498.

The notion that a public employee may not be terminated for engaging in public criticism of his employer was reiterated by the Tenth Circuit in *Rampey v. Allen*, 501 F.2d 1090, 1098 (10th Cir. 1974). There, fourteen faculty members and administrative officers at the Oklahoma College of Liberal Arts were terminated from their employment for criticizing the school president's policies and statements. *Id.* at 1092. When the termination prompted the filing of a constitutional claim, the Tenth Circuit found that the college's employees made a substantial showing that they exercised their First Amendment rights when criticizing the president. *Id.* at 1098. Supporting their argument was a lack of evidence that the faculty members' speech was a threat to the college's operation. *Id.* at 1098.

The instant case presents a sharp distinction from *Perry*, 408 U.S. at 594-95, and *Rampey*, 501 F.2d at 1098, in that the actions taken by WCC to remove Smith as a faculty member were not the product of Smith's engagement in public criticism. When Smith first expressed his concern with the Land Use Acknowledgment clause, Dean Hall declared that "it was not appropriate for Smith to use his *official position* (as a representative of WCC) to explicitly undermine the views of WCC." R. at 9 (emphasis added). This limitation placed on Smith did not prevent him from advocating for a conflicting view of property theory within the public forum, unlike the professor in *Perry*, 408 U.S. at 594-95, who was terminated for his public advocacy. In any event, Smith did not engage in criticism of WCC's required statement. He outright refused to include the statement in his classroom syllabus. R. at 10. Because Smith refused to perform his duties of employment, rather than engaged in criticism or counter-speech as a citizen, this Court should find that WCC was entitled to terminate his employment.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court AFFIRM the ruling of the United States Court of Appeals for the Thirteenth Circuit.

Respectfully submitted,

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/s/ Team 730

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