IN THE SUPREME COURT OF THE STATE OF IDAHO

HABIB SADID, an individual	)	
	)	**Docket No. 37563-2010**
Plaintiff/Appellant/Cross-Respondent	)	
	)	**Bannock County Docket No. 2008-3942**
vs.	)	
	)	
IDAHO STATE UNIVERSITY, ROBERT WHARTON, JAY KUNZE, MICHAEL JAY LINEBERRY, MANOOCHEHR ZOGHI, RICHARD JACOBSEN, GARY OLSON, ARTHUR VAILAS and JOHN/JANE DOES I through X, whose true identities are presently unknown,	)	
	)	
Defendants/Respondents/Cross-Appellants.	)	
_____	)	

BRIEF OF THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION AND THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

_____

APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT FOR BANNOCK COUNTY
HONORABLE DAVID C. NYE, DISTRICT JUDGE, PRESIDING

_____

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STATEMENT OF THE CASE

Nature of the Case

The Appellant Dr. Habib Sadid Ph.D., P.E. (hereinafter Professor Sadid or Appellant) appeals from the DECISION ON MOTION FOR SUMMARY JUDGMENT, Case number CV-2008-3942, December 18, 2009.

Statement of the Facts and Course of Proceedings

The factual and procedural histories of this case were previously set forth in Appellant's brief filed with the Court on August 27, 2010; therefore, they are only briefly summarized herein.

Professor Sadid was an Associate Professor in the Department of Civil Engineering at Idaho State University ("ISU") who began working for ISU in 1991. Professor Sadid obtained full tenure in 1993 and he became a full Professor at ISU in 1999. (R., Vol. II, pp. 371 - 372) The appellant was a distinguished member of the Department of Civil Engineering at ISU. (R., Vol.'s I and II, pp. 3-4, and 344) Professor Sadid received numerous awards for his service to ISU and its students, including but not limited to being named a Distinguished Master Teacher and receiving the Distinguished Public Service Award and Excellence in Engineering Education for Idaho Professional Engineers. However, Professor Sadid had at times and in writing become publicly critical of ISU, which is by statute a public entity and governmental agency. (R., Vols. I and II, pp. 148, 153-155, 297, 300) As a result of Sadid's being openly critical of ISU, Sadid alleged that he was not provided with annual faculty evaluations, was denied an appointment to

become the Chair of the Department of Engineering, was defamed by being referred to as a "nut case," and was denied adequate pay increases. (R., Vol. II, pp. 372)

On September 25, 2008, the Appellant filed a complaint against ISU alleging a violation of Title 42, Section 1983 of the United States Code, and Article 1, Sections 9 and 10 of the Constitution of the State of Idaho, alleging that ISU unlawfully retaliated against Professor Sadid in violation of his First Amendment rights. Sadid subsequently amended the complaint. (R., Vol. I, pp. 42-203) ISU filed a motion for summary judgment with supporting memorandum and affidavit of counsel for ISU. (R., Vol., I, pp. 42-203) In granting the motion for summary judgment, and for purposes of this appeal, the court found that ISU did not violate the Appellant's First Amendment rights or breach its contract with Appellant. (R., Vol. II, pp. 381, 383, 387)[1]

On March 29, 2010, Professor Sadid through counsel filed an appeal of the decision of the court granting summary judgment in this case. (R., Vol. II, p. 361) The appeal was later amended on April 29, 2010, wherein the preliminary issues on appeal were as follows: "Did the court improperly dismiss the Appellant's claims of (1) Deprivation of Constitutional Rights and (2) Breach of Contract." On April 20, 2010, ISU through counsel filed both a Notice and an Amended Notice of Cross Appeal seeking attorney fees and costs. On August 27, 2010, the Appellant through counsel submitted his brief on appeal. On or about October 21, 2010, Respondent/Cross-Appellant filed its Respondent's brief. On November 17, 2010, Professor

[1] The court also granted summary judgment on the defamation claim brought by the appellant. (R., Vol. II, p.394)

Sadid through counsel filed a motion for an extension of time until December 17, 2010 to file his reply to Respondent's brief and his response to Respondent's/Cross-Appellant's brief on appeal. The Court granted the latter motion on November 17, 2010.

On November 16, 2010, A NOTICE OF LIMITED ENTRY OF APPEARANCE, a MOTION TO APPEAR AS FOREIGN COUNSEL, a MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* IN SUPPORT OF APPELLANT and an AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* IN SUPPORT OF APPELLANT were filed by local counsel in conjunction with and on behalf of the Thomas Jefferson Center for the Protection of Free Expression and the American Association of University Professors. On November 30, 2010, ISU submitted its RESPONDENTS' BRIEF OPPOSING THE MOTION TO APPEAR AS FOREIGN COUNSEL AND FOR LEAVE TO FILE *AMICI CURIAE* BRIEF along with an AFFIDAVIT supporting the motion. On December 3, 2010, a MOTION REQUESTING LEAVE TO FILE REPLY TO RESPONDENTS' BRIEF OPPOSING THE MOTION TO APPEAR AS FOREIGN COUNSEL AND FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF APPELLANT and a REPLY TO RESPONDENT'S BRIEF OPPOSING THE MOTION TO APPEAR AS FOREIGN COUNSEL AND FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANT were filed by local counsel in conjunction with and on behalf of the Thomas Jefferson Center for the Protection of Free Expression and the American Association of University Professors. On December 20, 2010, the Court issued its ORDER GRANTING MOTION TO FILE BRIEF OF *AMICI CURIAE*, such brief being due to twenty-eight (28) days from the date of the order which would be January 17,

2011. Because of the national holiday on January 17, 2011, *Amici's* brief is due no later than January 18, 2011.

SUMMARY OF ARGUMENT

In applying the principles of *Garcetti v. Ceballos*, 547 U.S. 410 (2006), as articulated in *Eng v. Cooley*, 552 F.3d 1062 (9th Cir. 2009), to Professor Sadid's speech, the court below failed to recognize both the proper application of *Garcetti*'s "official duties" analysis and the limits of *Garcetti*'s holding. Accordingly, the court resolved this case in a manner that varies sharply from applicable Supreme Court rulings on public employee speech generally, and more precisely the Supreme Court's explicit reservation in *Garcetti* for later resolution of the narrower question of protecting academic speech.

First, the district court erred in its application of the factors in the *Garcetti* "official duties" inquiry. By failing to attach proper significance to the matters on which Professor Sadid spoke or to recognize the low threshold for a "matter of public concern" finding, the district court erroneously held that the matter on which Professor Sadid spoke was of private rather than public concern. In addition, the district court improperly characterized Professor Sadid's speech as pursuant to his role as a public employee merely because he identified himself as, and spoke as, a professor. Instead, the proper analysis is whether the speech was required of him as part of his official duties – whether it was part of what Idaho State University (ISU) "commissioned and created" and part of the "tasks [Sadid] was paid to perform." *Garcetti*, 547 U.S. at 422. Professor Sadid's speech critical of the proposed merger and other aspects of the university's

decision-making was clearly not "commissioned and created" by ISU, and the district court therefore erred in finding that the expression was offered in his capacity as a public employee.

In addition, even if the district court properly concluded that Professor Sadid spoke pursuant to his official duties, the analysis that *Garcetti* articulated for the majority of governmental employees has no bearing on the academic-related speech of public employees who teach and conduct research at public colleges and universities, as Professor Sadid did. Academic speech is instead governed by cases that recognize the vital role that such speech plays in our society and the First Amendment interest in that speech. The district court erred in its failure to acknowledge this distinction and thus undermined the scope and purpose of First Amendment protection for academic speech.

For these reasons, *amici* respectfully request that this Court reverse the decision below and hold that Professor Sadid's speech is protected by the First Amendment as the speech of a public employee speaking outside the scope of his employment on matters of public concern; in the alternative, *amici* request that the Court hold that Professor Sadid's speech is protected by the First Amendment under long-standing principles of academic freedom.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT PROFESSOR SADID WAS SPEAKING AS A PUBLIC EMPLOYEE ON A MATTER OF PRIVATE CONCERN.

The court below focused its analysis on whether Professor Sadid spoke on a matter of public concern and whether he spoke as a public employee or a private citizen. The court applied the test from *Eng v. Cooley*, 552 F.3d 1062 (9th Cir. 2009), *cert. denied*, 130 S.Ct. 1047

(2010), which is the Ninth Circuit's restatement of the standard formulated by the Supreme Court in *Garcetti v. Ceballos*.

In *Garcetti*, the Supreme Court stated:

> When an employee speaks as a citizen addressing a matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences. When, however, the employee is simply performing his or her job duties, there is no warrant for a similar degree of scrutiny. . . . [T]he First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities.

547 U.S. at 423. After *Garcetti*, the Ninth Circuit in *Eng* set out the following analysis to determine whether a public entity has impermissibly violated an employee's First Amendment rights: (1) whether the employee spoke on a matter of public concern; (2) whether the employee spoke as a private citizen or public employee; (3) whether the employee's protected speech was a substantial or motivating factor in the adverse employment action; (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and (5) whether the state would have taken the adverse employment action even absent the protected speech. *Eng*, 552 F.3d at 1070. The district court concluded, on the basis of the first three *Eng* factors, that Professor Sadid's speech was unprotected by the First Amendment.[2]

A. Professor Sadid was clearly speaking on a matter of public concern.

Applying *Eng*, the court below first found that although Professor Sadid wrote to his colleagues and the community about the effect on students, local and state residents, and the

[2] *Amici* will be addressing only the first two prongs of this analysis: whether Professor Sadid spoke on a matter of public concern and whether he spoke as a private citizen or public employee.

university itself of a merger at one of the state's flagship public institutions, he was not speaking on a matter of public concern. Contrary to the district court's holding, under *Pickering v. Board of Education,* 391 U.S. 563 (1968), and subsequent case law, Sadid's expression was in fact on a quintessential matter of public concern.

In *Eng* itself, the Ninth Circuit observed that "[s]peech involves a matter of public concern when it can fairly be considered to relate to 'any matter of political, social, or other concern to the community.'" *Id*. (quoting *Johnson v. Multnomah County, Or.*, 48 F.3d 420, 422 (9th Cir. 1995) (quoting *Connick v. Myers*, 461 U.S. 138, 147-48 (1983))). "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Id.* (quoting *Johnson,* 48 F.3d at 422 (quoting *Connick*, 461 U.S. at 147-48) (internal quotation marks omitted))); *accord Totman v. E. Idaho Tech. Coll.*, 931 P.2d 1232, 1237 (Idaho Ct. App. 1997). Because the issue of whether a public employee's speech addresses a matter of public concern is a question of law, it is a question for this court to review *de novo*. *Brownfield v. City of Yakima*, 612 F.3d 1140, 1147 (9th Cir. 2010). One federal appeals court has emphasized that the "context" inquiry is particularly sensitive in the academic environment:

> It is particularly important that in cases dealing with academia, the standard applied in evaluating the employer's justification should be the one applicable to the rights of teachers and students "in light of the special characteristics of the school environment" . . . . In an academic environment, suppression of speech or opinion cannot be justified by an "undifferentiated fear or apprehension of disturbance", nor by "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."

Trotman v. Board of Trustees, 635 F.2d 216, 230 (3d Cir. 1980) (quoting *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506, 508, 509 (1969)); *see also Bonnell v. Lorenzo*, 241 F.3d 800, 816 (6th Cir. 2001) ("[T]here is a public interest concern involved in the issue of the extent of a professor's independence and unfettered freedom to speak in an academic setting.").

In addition, as one federal district court recently noted, "[a]s long as some portion of the employee's speech addresses a matter of public concern, it is protected." *Petrich v. City of Flint*, 2010 U.S. Dist. LEXIS 137231 at *8 (E.D. Mich. Dec. 29, 2010) (citing *Farhat v. Jopke*, 370 F.3d 580, 589 (6th Cir. 2004)); *see also Modica v. Taylor*, 465 F.3d 174, 180-82 (5th Cir. 2006) (holding that letter to state representative was speech on matter of public concern because it primarily addressed improper use of public funds and erroneous reporting to the state legislature, despite also discussing some private matters). Such topics as the "misuse of public funds, wastefulness, and inefficiency in managing and operating government entities are matters of inherent public concern." *Johnson*, 48 F.3d at 425.

In the context of public schools, the Supreme Court has held that "[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions" on matters of school funding, so "it is essential that they be able to speak out freely on such questions without fear of [retaliation]." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572 (1968); *see also Garcetti*, 547 U.S. at 419 (citing approvingly to *Pickering*). In *Pickering*, a public high school teacher, Marvin Pickering, wrote a letter to his local newspaper criticizing the way that a proposed tax increase had been handled by the Board of Education and the superintendent. He

also accused the superintendent of trying to prevent teachers from criticizing or opposing the proposed bond issue. Although Pickering stated at the end of the letter that he was signing the letter "as a citizen, taxpayer and voter… since that freedom had been taken from the teachers," 391 U.S. at 578, he identified himself in the letter as a high school teacher and suggested that he was able to provide information to the public as a result of his position; after describing statements made by the board and the school administration, he said, "I teach at the high school and I know this just isn't the case." *Id.* at 576. Pickering was dismissed on the basis of the letter and the Board of Education upheld the dismissal, finding that some statements in the letter were false and that it had insulted the integrity and competence of the Board and the school administration. The Illinois Supreme Court upheld the decision, and Pickering appealed to the U.S. Supreme Court.

The Supreme Court, rejecting the state supreme court's analysis, stated firmly that "[t]o the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court." *Id.* at 568. The Supreme Court went on to emphasize that Pickering's comments were on matters of public concern. The Court characterized Pickering's criticism of the school system's expenditure of money on athletics – even if false – as "a difference of opinion between Pickering and the Board as to the preferable manner of operating the school system, a difference of opinion that clearly concerns an issue of

general public interest." *Id.* at 571. The Court added that "[m]ore importantly, the question whether a school system requires additional funds" – or, analogously, whether a public university should undergo a substantial restructuring – "is a matter of legitimate public concern on which the judgment of the school administration … cannot … be taken as conclusive." *Id.* The Court was not troubled by the fact that Pickering identified himself in his letter as a public school teacher.

Seen in this light, it is clear that Professor Sadid addressed matters of public concern. In 2001, Professor Sadid published a letter to his fellow faculty members and to ISU administrators criticizing ISU's decision to merge the College of Technology with the College of Engineering. (R., Vol. I, p. 3) *Cf. Mumford v. Godfried*, 52 F.3d 756, 761 (8th Cir. 1995) (noting that speech need not "reach a public audience . . . in order for it to be upon a matter of public concern and thus protected under the First Amendment"). His contributions to the Idaho State Journal similarly focused on the public impact of the proposed merger. For instance, in his February 2003 guest column ("ISU administration hatches a secret plan," February 9, 2003) (R., Vol. II, p. 289), Professor Sadid asserted that the colleges being eliminated "are vital for serving local industry and attracting high-tech businesses to the region. . . . This restructuring will significantly fracture these units and will have an adverse impact on the region's economic growth. More importantly, it will hurt many of our students who are non-traditional with jobs in this area." Professor Sadid asserted that "as a community member," he was "appealing to the community to raise their voices" and ask the ISU administration about the merger plans and its consequences.

In his advertisement in the Idaho State Journal the following month ("Merger of Colleges is a symptom of deeper illness of ISU Administration," March 9, 2003) (R., Vol. II, p. 290), Sadid declared that the "tax-paying public . . . ought to be alarmed" by the process by which the merger decision was made. He expressed concern that the University of Idaho, a rival to Idaho State University, would increase its presence in the area to the detriment of ISU, and questioned whether Idaho State University would in fact benefit from the merger. Finally, he raised a number of budget-related concerns, including questioning the amount of the president's increased salary from the ISU Foundation, whether donors and benefactors were advised of the spending, and whether the salary enhancements were appropriate. These are issues of core importance to a tax-paying public. *See, e.g.*, *De Llano v. Berglund*, 282 F.3d 1031, 1037 (8th Cir. 2002) (noting, in context of professor's letters citing rising salaries of university administrators as evidence that money was being poorly spent, that "[w]e generally have held that speech about the use of public funds touches upon a matter of public concern" (additional citation omitted)). Professor Sadid again closed by stating, "As a community member, I am appealing to the public and to our elected state officials" to investigate the plans.

The content of Professor Sadid's speech can therefore "fairly [be] considered as relating to any matter of political, social, or other concern to the community." *Connick*, 461 U.S. at 146. Professor Sadid spoke about the many detrimental consequences he believed the university and the community would likely suffer as a result of the administration's determination to merge the College of Engineering and the College of Technology. These were clearly not "matters of only personal interest." *Connick*, 461 U.S. at 147. Like the plaintiff in *Pickering*, Professor Sadid

was one of "the members of [the] community most likely to have informed and definite opinions" on the use of the educational institution's funding, and that is precisely what he commented on in detail and in public. In addition, while the district court placed significant emphasis on the fact that Professor Sadid identified himself as a member of the faculty at ISU, Marvin Pickering identified himself in his letter as a teacher at the local high school, and the Supreme Court had little difficulty concluding that Pickering's speech was protected by the First Amendment. *See Pickering*, 391 U.S. at 576 (quoting Pickering's letter, in which he states, "I teach at the high school").

At least one other court has held that when a public employee criticizes a merger involving a public entity for reasons similar to those that Professor Sadid gave in opposition to the proposed merger of the colleges of Engineering and Applied Technology, the criticism addresses "a matter of public concern." In *Jackson v. Leighton*, the U.S. Court of Appeals for the Sixth Circuit held:

> [Professor Jackson's] comments regarding the merger proposal addressed a matter of public concern. The merger proposal threatened the very existence of MCO, a state-funded college created by the Ohio General Assembly. Presumably, the Ohio General Assembly welcomed commentary on the proposed merger, as it was ultimately responsible for the fate of the merger. Further, the continued existence of MCO was important to the locality due to the fact that MCO provides health care to area residents.

168 F.3d 903, 910 (6th Cir. 1999). Indeed, the *Eng* court itself recognized that speech about educational and financial matters is a matter of public concern, observing that "the leaking of information (whether true or false) about the school district's lease-purchase agreements to the

IRS was … a matter of public concern insofar as it led to the need for additional, more expensive financing for the public school complex." 552 F.3d at 1072-73.

Similarly, the Court of Appeals of Idaho has held that a faculty member and department chair's "speech to the press regarding ISU's financial policies and his petition letter to" ISU's president asking the president to reconsider an academic-related decision was related to "matters of public concern protected by the First Amendment." *Hale v. Walsh*, 747 P.2d 1288, 1297 (Idaho Ct. App. 1987); *see also Lytle v. Wondrash*, 182 F.3d 1083, 1089 (9th Cir. 1999) (noting that "speaking out against a school education program clearly constitutes a matter of public concern"); *Johnson v. Lincoln Univ. of Commonwealth System of Higher Education*, 776 F.2d 443, 453 (3d Cir. 1985) (observing that it "seems hardly open to question" that the plaintiff's "longstanding criticisms" of the university president's "administration on academic policy" "touch upon matters of public concern").[3]

Moreover, the fact that Professor Sadid's communications may have conveyed anger or frustration does not diminish the strength of their First Amendment protections. As the Supreme Court has observed, "[d]ebate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on

[3] The court below relied heavily on *Hong v. Grant*, 516 F. Supp.2d 1158 (C.D. Cal. 2007), in which the trial court concluded that a University of California professor's statements on a variety of hiring- and other faculty-related issues were not matters of public concern. *See Sadid v. Idaho State Univ., et al.*, CV-2008-3942-OC at 9-10 (Idaho Dist. Ct. 6th Judicial Dist., Dec. 18, 2009) (citing extensively to *Hong*). The Ninth Circuit recently released a ruling on Professor Hong's appeal, however, declining to endorse the district court's reasoning; the appeals court stated that it was "leav[ing] the question of whether faculty speech such as Hong's is protected under the First Amendment for consideration in another case." *Hong v. Grant*, 2010 U.S. App. LEXIS 23504 at *4 (9th Cir. Nov. 12, 2010).

government and public officials." *Rankin v. McPherson*, 483 U.S. 378, 387 (1987) (quoting *New York Times Co*. v. *Sullivan*, 376 U.S. 254, 270 (1964)) (internal quotation marks omitted); *see also Pickering*, 391 U.S. at 570 ("unequivocally reject[ing]" the suggestion that "comments on matters that are substantially correct…may furnish grounds for [retaliation] if they are sufficiently critical in tone").

That the dramatic change in institutional emphasis proposed for ISU was an issue of importance to the community is further supported by the fact that at least one newspaper published articles and an op-ed about it by Professor Sadid (as well as a paid advertisement).[4] *See Gustafson v. Jones*, 290 F.3d 895, 907 (7th Cir. 2002) (holding that it would be difficult to construe the particular incident at issue as not constituting a matter of public concern "given the high level of public interest this incident commanded in the Milwaukee press and among its elected officials"); *see also Petrich v. City of Flint*, 2010 U.S. Dist. LEXIS 137231 (E.D. Mich. Dec. 29, 2010) ("A matter is of public concern where it is the subject of legitimate news interest, and of value and concern to the public at the time of publication.") *(*citing *City of San Diego v. Roe*, 543 U.S. 77, 83-84 (2004)). "Short of racing to the nearest television or radio station," Professor Sadid "would have been hard-pressed to find a more public form of speech than" this. *Miller v. Jones*, 444 F.3d 929, 937 (7th Cir. 2006). Rather, Sadid's "actions explicitly . . . sought

[4] Habib Sadid, Op-Ed, *ISU Administration Hatches a Secret Plan*, IDAHO STATE J. Feb. 9, 2003 (page unknown)) (R. Vol. II, p. 289); Habib Sadid, *Merger of Colleges is a symptom of deeper illness of ISU Administration*, IDAHO STATE J., Mar. 9, 2003 (page unknown)) (R. Vol. II, p. 290); Dan Boyd, *Crisis of Confidence*, IDAHO STATE J., Sept. 20, 2005 (page unknown) (R. Vol. I, p.153-154); John O'Connell, *Valuing Freedom of Speech*; IDAHO STATE J., Aug. 28, 2007 (page unknown) (R. Vol. I, p.155 and Vol. II, p. 297); Habib Sadid, Op-Ed, *What's ISU need to do to improve research?*, IDAHO STATE J., Sept. 9, 2007, at C3 (R. Vol. II, p. 298).

to alert a greater audience of the possible harm at issue." *Id.* Respondents argue that the content of Professor Sadid's speech could not have addressed a matter of public concern because he did not provide any evidence to support his claim that the alterations, including the merger, would be harmful to the local economy. (Respondents' Br. 14) ("It is not the law that an employee, like Sadid, can cloak his complaints with First Amendment protection simply by adding unsupported claims that the public may be effected [sic] by the acts of his employers."). It is, however, well established that speech by a public employee can be of public concern if it is proffered without supporting evidence or even if it is factually untrue, provided that it was not knowingly false or recklessly made. *Pickering,* 391 U.S. at 574-75 (finding that even when some statements were false, "absent proof of false statements knowingly or recklessly made . . . a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment") (citation omitted); *see also Johnson,* 48 F.3d at 424 ("[R]ecklessly false statements are not per se unprotected by the First Amendment when they substantially relate to matters of public concern. Instead, the recklessness of the employee and the falseness of the statements should be considered in light of the public employer's showing of actual injury to its legitimate interests, as part of the *Pickering* balancing test.").[5]

[5] *See also, e.g., Farhat,* 370 F.3d at 591; *Chappel v. Montgomery Cty. Fire Prot. Dist. No. 1,* 131 F.3d 564, 575-76 (6th Cir. 1997) ("The defendants [argue that] . . . Chappel's speech . . . was not protected because he did not provide any evidence to substantiate the allegations contained in his speech . . . [S]uch evidence is not required."); *Williams v. Kentucky,* 24 F.3d 1526, 1535-36 (6th Cir. 1994) (rejecting defendants' argument that plaintiff's speech could not be on a matter of public concern because the plaintiff could not prove her allegations of unethical conduct).

In addition, Respondents assert that personal concerns were the impetus for Sadid's speech, arguing that Sadid's opposition to the merger may have been "because his own department [the College of Engineering] was involved . . . ." (Respondents' Br. 14.) This is nothing more than speculation. Sadid did not speak about his own job concerns at all in his e-mails, his op-ed, or his paid advertisement. "However, even assuming that" Sadid "was motivated by personal animus . . . the fact remains that in [speaking], he addressed a matter occurring at the college which was of public concern." *Bonnell v. Lorenzo*, 241 F.3d 800, 817 (6th Cir. 2001); *see also Bloch v. Temple Univ.*, 939 F. Supp. 387, 393 (E.D. Pa. 1996) (noting that fact that plaintiff had "personal stake" in substance of dispute "does not prevent some aspect of [statements on dispute] from touching upon matters of public concern" (quoting *Johnson v. Lincoln Univ.*, 776 F.2d 443, 451 (3d Cir. 1985))).[6]

In sum, Professor Sadid's many references to the effect of the proposed merger on the university, the community, and the students are more than sufficient to characterize his expression as relating to matters of public concern. *Amici* therefore respectfully submit that this Court should find that, pursuant to *Eng* and *Pickering* – which was repeatedly cited with approval by the Supreme Court majority in *Garcetti* – Professor Sadid spoke on a matter of public concern.

[6] *See also Farhat*, 370 F.3d at 592; *Fabiano v. Hopkins*, 352 F.3d 447, 453-455 (1st Cir. 2003); *Gustafson v. Jones*, 290 F.3d 895, 908 (7th Cir. 2002) ("Thus, even if [the plaintiffs] were advancing some private interests . . . their claim survives as long as they also intended to bring to light what they believed to be the negative law enforcement consequences of the new policy"); *Tompkins v. Vickers*, 26 F.3d 603, 606-07 (5th Cir. 1994).

B. Professor Sadid clearly spoke as a private citizen, not as a public employee.

The court below also ruled that Professor Sadid spoke as a public employee rather than as a private citizen. The court erred in both its analysis of the facts and its use of *Connick*'s "tone and language" test, and its decision should thus be overturned on this ground as well. Because "the determination whether the speech in question was spoken as a public or a private citizen presents a mixed question of law and fact," and because there appears to be a "genuine and material dispute as to the scope and content of plaintiff's employment duties," it may be appropriate to remand to the district court for further fact-finding. *Posey v. Lake Pend Oreille School District No. 84*, 546 F.3d 1121, 1123 (9th Cir. 2008).

In *Eng*, the Ninth Circuit indicated that "[s]tatements are made in the speaker's capacity as a citizen if the speaker 'had no official duty' to make the questioned statements, or if the speech was not the product of 'performing the tasks the employee was paid to perform.'" *Eng*, 552 F.3d at 1071 (quoting *Posey v. Lake Pend Oreille School Dist. No. 84*, 546 F.3d 1121, 1127 n.2 (9th Cir. 2008) (quoting, respectively, *Marable v. Nitchman*, 511 F.3d 924, 932-33 (9th Cir. 2007), and *Freitag v. Ayers*, 468 F.3d 528, 544 (9th Cir. 2006)) (some internal quotation marks and alterations omitted)). Under this analysis, Professor Sadid was not speaking as a public employee, and this Court should therefore reverse that element of the district court's decision as well.

1. Professor Sadid's speech was not the product of performing the tasks he was paid to perform, and it therefore was not part of his official duties. Furthermore, the district court erred in relying on the "tone and language" of the letters to conclude that they were a part of his official duties.

The court below found that under the second prong of the *Eng* test, Professor Sadid was speaking as a public employee rather than as a private citizen "due to the tone and language of [his] letter." *Sadid v. Idaho State Univ.*, Case No. CV-2008-3942-OC (Sixth Judicial District of the State of Idaho, December 18, 2009) (R., Vol II, p. 383). This appears to be a novel standard for determining whether a governmental employee is acting as a public employee or a private citizen, and the district court failed to cite any authority supporting its use. The form and content of a statement are properly taken into account in determining whether speech is *on a matter of public concern*, as they were above. *Connick*, 461 U.S. at 147-48. This is not, however, the correct standard for determining whether one speaks as a public employee or as a private citizen. Rather, the Ninth Circuit has consistently held that "[s]tatements are made in the speaker's capacity as citizen if the speaker 'had no official duty' to make the questioned statements, or if the speech was not the product of 'performing the tasks the employee was paid to perform.'" *Eng*, 552 F.3d at 1071 (citations omitted).

Under *Garcetti*, "the proper inquiry is a *practical* one" that turns upon an appraisal of whether the public employee was "fulfilling a responsibility" to his employer, whether the "employer itself has commissioned or created the speech," and whether the speech was part of "the tasks he was paid to perform." *Garcetti*, 547 U.S. at 424, 421-22 (emphasis added). Thus, public employers may not restrict an employee's First Amendment rights by creating excessively broad job descriptions. *Id*. at 421-22. Likewise, neither the fact that the speech's subject matter is related to the speaker's employment nor the circumstance that the speech occurs in the workplace is dispositive. *Id.* at 420 ("Many citizens do much of their talking inside their

respective workplaces, and it would not serve the goal of treating the public like 'any member of the general public' to hold that all speech within the office is automatically exposed to restriction" (quoting *Pickering*, 391 U.S. at 573)). Thus, the mere fact that Professor Sadid communicated with his fellow faculty members on a subject matter that was related to his employment is not dispositive.

The Ninth Circuit emphasized the practical nature of the inquiry in *State of Alaska v. EEOC*, 564 F.3d 1062 (9th Cir. 2009) (*en banc*). The case involved allegations of retaliation against a former employee of the then-governor of Alaska in violation of the employee's First Amendment rights. Margaret Ward claimed that after being interviewed in her workplace about an EEOC sexual harassment complaint that a colleague, Lydia Jones, had filed, she received phone calls threatening to fire her if she did not "back off." *Id.* at 1069. Instead, she held a press conference, publicly supporting Jones's allegations of sexual harassment in the governor's office. The Ninth Circuit, sitting *en banc*, observed:

> That Ward's statements arose out of Jones's employment grievance doesn't mean Ward wasn't speaking as a citizen on a matter of public concern. . . . Ward was not speaking about her personal employment dispute, nor were her comments directed solely at co-workers. Rather, Ward held a press conference to protest what she saw as sex discrimination in the Governor's Office. The Supreme Court has held that *such public criticism by government employees of their employers is protected speech*. . . . Ward's official duties didn't *require* her to complain about the conditions of Jones's employment, or to bring the alleged sexual harassment to the public's attention. *Her speech at the press conference was her own*.

Id. at 1070 (emphases added) (citations, internal quotation marks, and footnote omitted).

The Ninth Circuit has used a similarly practical inquiry in other cases. For example, in *Anthoine v. North Central Counties Consortium*, 605 F.3d 740, 745-46 (9th Cir. 2010),

Anthoine, a program analyst for a public entity created to enforce the Workforce Investment Act, discovered that his supervisor had made false reports to the public entity's governing board, and reported them directly to the chairman of the board. Because Anthoine learned about the alleged misrepresentation by reading generally distributed minutes of a board meeting, there was no indication that Anthoine had a duty to report misconduct regarding organizational compliance through proper channels; as the court explained, there was no evidence that his speech was "the product of performing the tasks [he] was paid to perform." *Id.* at 750 (citing *Eng*, 552 F.3d at 1071). Moreover, the court ruled, even if Anthoine had such a duty, there was no evidence that his speech directly to the chairman of the board was within the scope of his official duties. *Id.* Thus, even though Anthoine's speech occurred in a work context and regarded a subject matter that was related to his employment, the court could not conclude that he spoke as a public employee rather than as a private citizen. *Id*.

Similarly, in *Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006), a prison guard whose official complaints about inmates sexually harassing her were ignored took her complaints to a state Senator and subsequently to the state Inspector General. After being retaliated against for lodging her complaints, she sued, alleging that her First Amendment rights had been violated. The Ninth Circuit held that it was not part of her official duties to report sexual harassment to the Senator or the Inspector General. *Id* at 545. As the court observed, "[h]er right to complain both to an elected public official and to an independent state agency is guaranteed to any citizen in a democratic society regardless of his status as a public employee." *Id.* at 545 (citing *Pickering*, 391 U.S. at 568). The court further observed that under *Garcetti*, "Freitag does not lose her right

to speak as a citizen simply because she initiated the communications while at work or because they concerned the subject matter of her employment." *Id.* (citing *Garcetti*, 547 U.S. at 421). With respect to her complaints to the Senator and Inspector General, the court held that "it was Freitag's responsibility *as a citizen* to expose such official malfeasance to broader scrutiny." *Id.*

In *Marable v. Nitchman*, 511 F.3d 924 (9th Cir. 2007), the plaintiff, a chief engineer for the Washington State Ferries ("WSF"), complained to the State Executive Ethics Board about a "pay padding" scheme among WSF management. Relying in part on the WSF Human Resources and Training Manual, which it characterized as "informative" though not dispositive, the court determined that "[f]unctionally . . . [the plaintiff's] job was to do the tasks of a Chief Engineer on his ferry, and such tasks did not include pointing to corrupt actions of higher level officials." *Id.* at 932. The court also rejected the defendants' assertion that the fact that the Chief Engineer manual included catch-all provisions requiring Marable to "know and enforce all applicable federal and state rules and regulations" transformed Marable's speech about allegedly corrupt financial schemes into part of his "official duties." *Id.* at 933 n.13.

Thus, as the Ninth Circuit has made clear, the proper determination of a public employee's status under *Eng* does not rely on an interpretation of the "tone and language" of the employee's speech, as the district court erroneously held. Rather, a public employee speaks as a private citizen, and thus receives First Amendment protection, unless the speech in question is precisely what he is paid to do on behalf of his governmental employer. *Accord Miller v. Hamm*, 2011 U.S. Dist. LEXIS 141 (D. Md. Jan. 3, 2011) (noting that the Fourth Circuit has concluded that a public employee's dismissal is not warranted "where the plaintiff 'was not under a duty to

write the memorandum' that prompted his firing, 'had not previously written similar memoranda,' and 'would not have been derelict in his duties . . . had he not written the memorandum'" (quoting *Andrew v. Clark*, 561 F.3d 261, 264 (4th Cir. 2009)).

Indeed, the facts of *Garcetti* underscore the narrowness of the Supreme Court's holding in that case. In *Garcetti*, the plaintiff deputy district attorney, upon reviewing a case, determined that an affidavit contained serious misrepresentations. 547 U.S. at 413. He then prepared a memorandum to his supervisors summarizing his findings. *Id*. In holding that the deputy district attorney's speech was unprotected, the Court observed that he "spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case," and concluded that "[t]he significant point is that the memo was written pursuant to [plaintiff's] official duties." *Id.* at 421. Reviewing cases, making judgments about them, and writing memos to his supervisors were precisely the tasks that the plaintiff was paid to perform.

By contrast, Professor Sadid's official duties as a faculty member at ISU did not appear to include discussing his concerns about the institutional objectives or the merger. Although the description of faculty responsibilities in the ISU faculty handbook is not dispositive, it is, in the words of the *Marable* court, "instructive." The faculty handbook refers to the "major faculty responsibilit[ies]" as consisting of "teaching, service, [and] research." Idaho State University Faculty/Staff Handbook, Part IV, Section IV(B)(1)(a), http://www.isu.edu/fs-handbook/part4/4_4/4_4b.html#1 (last visited Dec. 7, 2010). The handbook also provides for periodic post-tenure performance reviews in which the performance categories to be considered are "(a) teaching effectiveness, (b) research or creative abilities, (c) professional related services,

(d) other assigned responsibilities, and (e) overall contributions to the department." *Id.* at Section IV (B)(7). Faculty members' assigned responsibilities, as set out in the ISU faculty handbook, clearly do not include speaking on administrative matters such as the proposed merger.

Moreover, to the extent that the faculty handbook – quite appropriately – contemplates commentary by ISU's faculty on institutional matters, it states that "[t]he Faculty *through the Faculty Senate* and associated councils, committees and boards *may* provide recommendations concerning . . . policies relevant to the academic welfare of the institution." *Id.* at Part 2, Section II(C)(1)(a), http://www.isu.edu/fs-handbook/part2/2_2/2_2c.html (emphasis added) (last visited Dec. 7, 2010). Thus, to the extent Professor Sadid had any responsibility to comment on the merger, it was permissive, not required, and was not among the responsibilities that he was paid to carry out. Any responsibility he could be said to have had would have been merely to express his concerns to the Faculty Senate (or its associated councils, committees, and boards) and nothing more. Although Professor Sadid's comments were appropriate in his role as a professor at an educational institution and thus warrant protection under the Supreme Court's academic freedom jurisprudence, described in Part II of this brief, it is clear that those statements were not made "pursuant to his official duties" in the sense envisioned by the *Garcetti* majority. [7]

[7] In addition, as *amici* argue in Part II, *supra*, many of those duties that faculty members *are* explicitly paid to do by their public sector university employers – such as engaging in research, inquiry, and teaching – should be protected by the First Amendment under what is referred to as the "academic speech reservation" to *Garcetti*. Moreover, faculty participation in shared governance, whether or not contemplated by a faculty handbook or other materials, is properly protected under *Garcetti's* academic speech reservation as well.

2. Professor Sadid's statements to the media were directed to an external audience rather than an internal one, further removing his speech from the context of his employment and implicating the public's First Amendment interests in receiving the information.

As described above, the fact that none of Professor Sadid's comments – neither the e-mails to his fellow faculty members nor his articles and comments to the media – were pursuant to his official duties is sufficient to protect them under the First Amendment. In addition, his expression in the Idaho State Journal warrants an extra layer of protection because of their importance to the public.

As the Supreme Court noted in *Garcetti*, where statements are made publicly, "the First Amendment interests at stake extend beyond the individual speaker." 547 U.S. at 419. Therefore, "[t]he Court has acknowledged the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion." *Id*. (citing *Pickering*, 391 U.S. at 572, 573). The *Garcetti* majority noted that its approach in *Pickering* "acknowledged the necessity for informed, vibrant dialogue in a democratic society." *Id.*

The majority also invoked a more recent case, *City of San Diego v. Roe*, 543 U.S. 77, 82 (2004) (*per curiam*), in which the Court observed that "were [public employees] not able to speak on [the operation of their employers], the community would be deprived of informed opinions on important public issues. *The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it*." *Id*. (emphasis added) (additional citation omitted); *see also United States v. Nat'l Treasury Emples. Union*, 513

U.S. 454, 470 (1995) ("The large-scale disincentive to Government employees' expression also imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said.").

Similarly, the Ninth Circuit has referred to "the public's interest in learning about illegal conduct by public officials and other conduct at the core of the First Amendment protection" as outweighing a governmental employer's interest in avoiding "a mere potential disturbance to the workplace." *Robinson v. York*, 566 F.3d 817, 824 (9th Cir. 2009) (quoting *Keyser v. Sacramento City Unified Sch. Dist.*, 265 F.3d 741, 747-48 (9th Cir. 2001)); *see also Khuans v. Sch. Dist. 110*, 123 F.3d 1010, 1016 (7th Cir. 1997) ("Government employees often are in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions."); *Speer v. City of Flint*, 2010 U.S. Dist. LEXIS 137228 at *11 (E.D. Mich. Dec. 29, 2010) (noting that plaintiff's comments on police department policy, which were found to be on matters of public concern, were "particularly relevant to outsiders, as they would be most affected by Defendant's decision to restrict statements to the media").

Thus, to the extent that Professor Sadid's comments were made to the citizens of Idaho, the public's right to be informed further enhances Professor Sadid's own First Amendment rights.

In sum, all of Professor Sadid's speech in this case – both the e-mail communications and his statements in the press – implicates his First Amendment interests, and it would be in profound conflict with *Garcetti* and its progeny to permit ISU to retaliate against him.

II. THE SUPREME COURT'S LONGSTANDING PROTECTION OF ACADEMIC FREEDOM AS A FIRST AMENDMENT INTEREST MANDATES HEIGHTENED PROTECTION FOR GOVERNMENT-FUNDED PROFESSORIAL SPEECH.

Even if Professor Sadid's speech was, under *Garcetti*, pursuant to his official responsibilities as a government employee, Supreme Court jurisprudence on academic freedom mandates heightened protection for professorial speech. This special solicitude for academic freedom counsels strongly in favor of finding that Professor Sadid's speech is protected under the First Amendment, and provides an additional justification to reverse the decision of the district court.

A. The Supreme Court has long recognized a special place in the First Amendment for speech arising in the academic context.

The court below looked only to the main holding in *Garcetti* (as interpreted in the Ninth Circuit by *Eng*), by which the Supreme Court restricted the speech of public employees that arises from their official duties. However, the Supreme Court in *Garcetti* also specifically reserved for a later date the question of whether the speech of a faculty member at public institution on academic-related issues is unprotected by the First Amendment. Specifically, the majority stated that "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. We need not, and for that reason *do not*, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching." 547 U.S. at 425 (emphases added).

Despite this clear language from the Supreme Court, and its invitation to lower courts to recognize the "additional constitutional interests" at play in the academic context, the district court made no distinction at all between the role of a university professor and that of any other public employee. The court failed to recognize either the *Garcetti* majority's reservation or the long-standing precedent involving academic speech, instead relying primarily (particularly in its discussion of Professor Sadid's role as a private citizen or public employee) upon cases reflecting the role of a government employee in the non-faculty context.

Such treatment of academic speech is at odds with the Supreme Court's repeated expression of heightened concern for academic freedom. In *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967), for instance, the Court proclaimed that "[o]ur nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned" and is thus "a special concern of the First Amendment." Indeed, the Court has "long recognized that . . . universities occupy a special niche in our constitutional tradition," *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003), and that as "a traditional sphere of free expression," universities play a role "fundamental to the functioning of society." *Rust v. Sullivan*, 500 U.S. 173, 200 (1991). As the American Association of University Professors said in its earliest statement on the matter, universities "promote inquiry and advance the sum of human knowledge," serving as "intellectual experiment station[s], where new ideas may germinate and where their fruit . . . may be allowed to ripen until finally . . . it may become a part of the accepted intellectual food of the nation or the world." American Association of University

Professors, *1915 Declaration of Principles on Academic Freedom and Academic Tenure*, POLICY DOCUMENTS AND REPORTS at 295-97 (10th ed.).

The Ninth Circuit has recently recognized that this intellectual freedom is one of a university's critical contributions to society:

> The right to provoke, offend and shock lies at the core of the First Amendment. This is particularly so on college campuses. Intellectual advancement has traditionally progressed through discord and dissent, as a diversity of views ensures that ideas survive because they are correct, not because they are popular. Colleges and universities—sheltered from the currents of popular opinion by tradition, geography, tenure, and monetary endowments—have historically fostered that exchange.

Rodriguez v. Maricopa County Cmty. Coll. Dist., 605 F.3d 703, 708 (9th Cir. 2010). The constitutional interests implicated in the academic environment demand that the university setting remain a "sphere of free expression" that tolerates and even encourages discord and contention. *Rust*, 500 U.S. at 200.

Indeed, a lower court has recently recognized that *Garcetti* established an academic freedom exception to the "official duties" analysis otherwise applicable to public employees. In *Kerr v. Hurd*, 694 F. Supp. 2d 817 (S.D. Ohio 2010), a medical professor alleged that he had been retaliated against for advocating certain medical procedures as part of his teaching duties. The court held:

> Recognizing an academic freedom exception to the *Garcetti* analysis is important to protecting First Amendment values. Universities should be the active trading floors in the marketplace of ideas. . . . At least where, as here, the expressed views are well within the range of accepted medical opinion, they should certainly receive First Amendment protection, particularly at the university level.

Id. at 844. The *Kerr* court, recognizing the Supreme Court's explicit exemption of academic speech from the application of the *Garcetti* framework, determined that the speech at issue was protected speech under the First Amendment. *Id*. Respondents even cited to *Kerr* but erroneously distinguished it on the grounds that *Kerr* involved classroom speech, failing to recognize that the primary significance of *Kerr* was its recognition that public faculty do in fact occupy a different position from the regular run of government employees.

A university professor enjoys a critical level of autonomy in her professional role that is very different from that of a government official who has a responsibility to avoid "express[ing] views that contravene governmental policies." *Garcetti,* 547 U.S. at 419. As the Supreme Court's academic freedom decisions make clear, university professors do not function professionally as mere mouthpieces of government agencies or superiors. Rather, they are tasked with the role of questioning accepted dogma and promoting impartial investigation. As the Supreme Court has recognized, "the university is a traditional sphere of free expression *so fundamental to the functioning of our society that the Government's ability to control speech within that sphere . . . is restricted*." *Rust v. Sullivan*, 500 U.S. 173, 199 (1991) (internal citations omitted) (emphasis added). A failure to recognize this or to distinguish between public faculty and other public employees could result in the denial of constitutional protection to statements made in class, in conferences, in publications, and even in relation to institutional matters, chilling the very expression that – as the Supreme Court has recognized – ensures higher education's continued contributions to society.

B. The academic speech reservation in *Garcetti* must be read broadly to include speech on institutional decisions affecting academic scholarship and classroom instruction.

To give full effect to the Supreme Court's longstanding solicitude for faculty members and their particular role, courts must give First Amendment protections to the entire range of speech encompassed within "expression *related to* academic scholarship and classroom instruction," as the *Garcetti* majority put it. 547 U.S. at 425 (emphasis added).

Faculty self-governance has historically been regarded as an indispensable aspect of academic freedom; self-governance mechanisms are designed to insulate faculty members from a top-down management structure and provide a method to ensure that academic considerations are the primary measure by which employment decisions are made. *See* Larry G. Gerber, "Inextricably Linked: Shared Governance and Academic Freedom," *Academe: The Bulletin of the American Association of University Professors* (May-June 2001), available at http://www.aaup.org/AAUP/pubsres/academe/2001/MJ/Feat/gerb.htm (last visited Jan. 7, 2011) ("It is hard to imagine effective governance if faculty do not enjoy the right to speak freely without fear of reprisal on issues relating to their own institutions and policies . . . ."); *see also* Kaplin & Lee, THE LAW OF HIGHER EDUCATION at 666 (4th ed. 2006) (observing that a faculty freedom of expression claim "may properly be characterized as an academic freedom claim, and the dispute as an academic freedom dispute, if the opinions and ideas the faculty member expresses implicate the academic operations of a program, department, or school").

As the AAUP has noted, "scholars in a discipline are acquainted with the discipline from within; their views on what students should learn in it . . . are therefore more likely to produce

better teaching and research in the discipline than are the views of trustees or administrators." American Association of University Professors, *1994 Statement On the Relationship of Faculty Governance to Academic Freedom*, POLICY DOCUMENTS AND REPORTS 141-44, 142 (10th ed.). Similarly, decision-making on the university's long-range planning "plainly can have a powerful impact on the institution's teaching and research." *Id*. As the 1994 Statement goes on to explain, faculty academic freedom must include the freedom for faculty to express their views "on matters having to do with their institution and its policies" because "grounds for thinking an institutional policy desirable or undesirable must be heard and assessed if the community is to have confidence that its policies are appropriate." *Id.* at 142-43. In addition, an earlier statement jointly authored by the AAUP, the American Council on Education (ACE) and the Association of Governing Boards of Universities and Colleges (AGB) observed that "[t]he right of a board member, an administrative officer, a faculty member, or a student to speak on general educational questions or about the administration and operations of the individual's own institution is a part of that person's right as a citizen and should not be abridged by the institution." American Association of University Professors, *1966 Statement on Government of Colleges and Universities*, POLICY DOCUMENTS AND REPORTS 135-40, 137 (10th ed.).

Indeed, the Ninth Circuit has recognized the critical connection between the faculty's ability to speak freely about institutional decision-making and its ability to carry out the core faculty functions of teaching and research. As the court explained:

> A college relies in large measure on faculty self-governance and its contributions to administrative decisions. . . . Although attenuated, an attack on those processes

> attacks the educational process as well. . . . Open channels of communications are necessary for scholarly research, for teaching, and for the self-governing system.

Mabey v. Reagan, 537 F.2d 1036, 1047 (9th Cir. 1976) (internal citation omitted). This echoes the Supreme Court's recognition decades ago that "teachers . . . must always remain free to inquire, to study and to evaluate . . . otherwise our civilization will stagnate and die." *Sweezy v. New Hampshire,* 354 U.S. 234, 250 (1957).

Subjecting professors to retaliation for the viewpoints they express in the self-governance process because their participation in institutional governance relates to their professional faculty role would effectively give the university administration a means of regulating viewpoints with no exposure to court review. Not only would a rule permitting such a system defeat the independence that self-governance is designed to produce, but it would make self-governance the very means of encouraging and enforcing viewpoint conformity. Speech on matters of faculty self-governance may be especially vulnerable to retaliation, since rigorous critique of other faculty members and administration policies that may affect the academic quality of the institution is the very product self-governance is designed to achieve. Thus, the potential chilling effect on this kind of speech is especially great if it is not accorded the protection it warrants.

Professor Sadid expressed concern about the administration's plans to merge two departments at Idaho State University on the grounds that the departmental reorganization would have a substantial impact on the university's educational mission and ability to obtain research funding, and would reduce the quality of instruction being offered to students in the classroom, among other issues. (R., Vol. II, pp. 289-290) By writing a letter to fellow faculty members (R.,

Vol. I, p. 3) and actively supporting a vote of no confidence for the university's former president (R., Vol. II, pp. 291-293), Professor Sadid was commenting not merely on personal matters or essentially administrative concerns but on matters affecting the integrity of the academic institution itself. This is paradigmatic "expression relevant to academic scholarship [and] classroom instruction," the category of speech explicitly set aside by the *Garcetti* majority.

C. Academic freedom inhering in the university does not "trump" the protection accorded to individual faculty speech.

Finally, Respondents claim that "[t]he United States Supreme Court has made clear that academic freedom inures to the university, not individual university professors" (Respondents' Br. 26) (emphasis in original). In support of their assertion, Respondents quote the following passage from *Regents of University of California v. Bakke*:

> Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body. Mr. Justice Frankfurter summarized the "four essential freedoms" that constitute academic freedom:
>
> > "It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."

438 U.S. 265, 312 (1978) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in result) (in Respondents Br. at 12). *Bakke*, however, dealt with the use of affirmative action criteria in university admissions, where the faculty played a critical role in developing the affirmative action plan, not with a dispute regarding the extent to which a

public university as employer may retaliate against the speech of a professor. Insofar as Respondents cite it as a basis for limiting the scope of academic freedom to the institution rather than to the professor, it has no application here.

Moreover, Respondents fail to note that in the passage immediately following the one they cite, the *Bakke* Court's explanation of the concept of academic freedom implies that academic freedom relates significantly, if not primarily, to teachers. The *Bakke* Court noted:

> Our national commitment to the safeguarding of these freedoms within university communities was emphasized in *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967):
>
> > Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and *not merely to the teachers concerned*. That freedom is therefore a special concern of the First Amendment . . . . The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection.

Bakke, 438 U.S. at 312 (emphasis added) (other quotation marks and citation omitted). In *Keyishian*, the Court applied principles of academic freedom to protect a teacher's speech, stating that "[i]t would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living." 385 U.S. at 601. Thus, the Court's protection of a university's academic freedom in *Bakke* must be understood in light of the overall context of the Supreme Court's academic freedom jurisprudence, rooted in the broader First Amendment concern for protecting robust debate among faculty and the public.

In addition, the very passage that Respondents cite from *Sweezy*, which might appear to give priority to the institution rather than the professor, identifies the proper basis for

institutional control: academic qualifications. The university must be allowed, Justice Frankfurter declared, "to determine for itself *on academic grounds* who may teach, what may be taught, [and] how it shall be taught." *Sweezy*, 354 U.S. at 263 (concurring in result) (emphasis added). Those academic grounds arise from the expertise and guidance of the faculty acting individually and as a whole. Faculty members guard the academic integrity of the institution by critiquing both the university's administration and the work of other faculty members. While there will be times when adverse employment actions are required in order to maintain academic integrity, appropriate insulation of academic professionals from retaliation for their promotion of vigorous debate demands that such employment decisions be subjected to scrutiny. By requiring that adverse employment actions be based on academic grounds, with due attention to the long-standing constitutional and professorial protections of academic freedom, courts can uphold the constitutional purposes of academic freedom doctrine.

Furthermore, courts are equipped to make such evaluations. When balancing the academic freedom interest of universities against the due process interests of a student facing academic sanctions, the Supreme Court has limited court review to the question of whether the faculty made the decision on academic grounds:

> When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the *faculty's professional judgment*. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.

Regents of Univ. of Michigan v. Ewing, 474 U.S. 214, 225 (1985) (emphasis added). In this context, one scholar has suggested that "[a] decision made by the administration or board should

not be granted judicial deference . . . if it was based on mere disagreement with the expression of a faculty member." Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L. J. 994, 996-97 (2009). Such an approach would be consistent with *Sweezy*'s expression of deference to university decision-making "on academic grounds."

Respondents' version of academic freedom instead envisions a publicly funded university as the private domain of its (often politically influenced) administrators. Protection of robust debate would, apparently, be limited to debate that takes place between various universities. Rendering academic freedom a special privilege of the university administration, while excluding faculty members from that protection, would stand First Amendment academic freedom jurisprudence on its head.

CONCLUSION

Professor Sadid shared with his colleagues and with the community as a whole his opinion on potential action by Idaho State University that was fundamentally academic in nature: the proposal to merge two colleges, and the effect of that merger on the students, the region, and the state. In doing so, he clearly spoke on a matter of public concern; because his speech did not arise as a consequence of what he was paid to do by the university, he also spoke as a private citizen. *Amici* therefore urge this Court to reverse the decision of the district court and, if necessary, remand for further fact-finding.

In addition, in the event that this Court concludes that Professor Sadid's speech was made pursuant to his duties as a public university professor, that speech was clearly related to

academic scholarship and classroom instruction – indeed, at its core it raised questions about the university's fulfillment of its academic mission. As such, it should receive protection under the Supreme Court's academic freedom jurisprudence and the Court's clear reservation for academic-related speech in *Garcetti*. *Amici* therefore respectfully urge this Court to reverse on that ground as well.

DATED this ____th day of January, 2011.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of January 2011, I caused to be served a true and correct copy of the foregoing by the following method to:

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