No. 00-466

IN THE

# Supreme Court of the United States

MELVIN I. UROFSKY, PAUL SMITH, BRIAN J. DELANEY, DANA HELLER, BERNARD H. LEVIN, and TERRY L. MEYERS,
*Petitioners*,

v.

JAMES S. GILMORE III,
*Respondent.*



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

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

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This brief is filed on behalf of the American Association of University Professors and The Thomas Jefferson Center for the Protection of Free Expression with the consent of both parties.[1]

## STATEMENT OF INTEREST

The American Association of University Professors ("AAUP") is an organization of approximately 43,000 faculty members and research scholars in all academic disciplines. Founded in 1915, the Association is committed to the defense of academic freedom and the free exchange of ideas in scholarly and creative work. AAUP has frequently participated before this Court in cases raising First Amendment issues in higher education. *See, e.g., Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Minnesota State Board of Community Colleges v. Knight*, 465 U.S. 271 (1984). This Court has cited AAUP policies in its decisions. *See, e.g., Tilton v. Richardson*, 403 U.S. 672, 681-82 (1971); *Board of Regents v. Roth*, 408 U.S. 564, 579 n.17 (1972).

The Association's *1915 Declaration of Principles*, issued by the AAUP in its founding year, is the seminal statement on academic freedom in America. AAUP, "General Report of the Committee on Academic Freedom and Academic Tenure

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

(1915)," *reprinted as* Appendix A, 53 LAW & CONTEMP. PROBS. 393 (1990) ("1915 Declaration"). The 1915 Declaration was issued in response to the widespread dismissal of faculty members by administrators and trustees who disagreed with the expression of professors, including professors teaching Darwinism and speaking out for free silver. Walter P. Metzger, ACADEMIC FREEDOM IN THE AGE OF THE UNIVERSITY 145-47 (1955).

The 1915 Declaration provides for "freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extra-mural utterance and action." 1915 Declaration, *supra*, at 393. It states: "The responsibility of the university teacher is primarily to the public itself, and the judgment of his own profession. . . ." *Id.* at 397.

The joint *1940 Statement of Principles on Academic Freedom and Tenure*, which was authored by the AAUP and the Association of American Colleges (now the Association of American Colleges and Universities), codified the 1915 Declaration and has been endorsed by 172 professional organizations and learned societies as well as incorporated into hundreds of university and college faculty handbooks. AAUP, *1940 Statement of Principles on Academic Freedom and Tenure,* AAUP POLICY DOCUMENTS & REPORTS 3 (1995 ed.) ("1940 Statement"). The 1940 Statement provides: "Freedom in research is fundamental to the advancement of truth." *Id.* The rationale underlying the 1915 Declaration and reiterated in the 1940 Statement is echoed in the repeated holdings of this Court that academic freedom is a "special concern of the First Amendment": the advancement of truth, the need for scholarly independence, and the university as a "market place of ideas." *See Keyishian,* 385 U.S. at 603.[2]

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[2] David M. Rabban, *"Individual" & "Institutional" Academic Freedom*, 53 LAW & CONTEMP. PROBS. 227, 240-41 (1990) (noting that

The Thomas Jefferson Center for the Protection of Free Expression ("The Thomas Jefferson Center") is a nonprofit, nonpartisan organization devoted solely to the protection of free speech and free press. Since its opening in 1990, the Center has pursued its mission in various forms, including the filing of *amicus curiae* briefs in both state and federal courts. A number of these cases have involved questions of academic freedom and free speech within the academic community. The Center has also filed briefs in cases involving the First Amendment rights of public employees and of Internet users.

Virginia Code § 2.1-804 impairs the academic freedom of professors by limiting their legitimate pedagogical and research use of the Internet in the pursuit of truth and knowledge. Petitioners' Appendix 112a-114a ("Pet.App.").

## SUMMARY OF ARGUMENT

The Fourth Circuit majority decision conflicts with the repeated holdings of this Court that academic freedom is a First Amendment right of professors. *See, e.g., Sweezy v. New Hampshire,* 354 U.S. 234 (1957); *Keyishian*, 385 U.S. 589 (1967). No other court of appeals has denied the existence of that individual academic freedom. In this case, the Fourth Circuit majority, unlike any other courts of appeals, also significantly misconstrues this Court's test on "matters of public concern" by asserting that the work-related speech of state employees, including professors, may never constitute a matter of public concern. *See, e.g., Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Board of Education*, 391 U.S. 563 (1968). Lastly, the Fourth Circuit majority contravenes this Court's controlling First Amend-

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the judicial opinions and "the 1915 Declaration . . . used similar metaphors," such as that "[t]he description of the university in the 1915 Declaration as an 'intellectual experiment station' closely resembles the description of the classroom in *Keyishian* as a 'marketplace of ideas.'").

ment rulings by upholding a Virginia law that discriminates based on sexually explicit content and imposes an impermissible prior restraint. *See, e.g., United States v. Playboy Entertainment Group, Inc.*, __ U.S. __, 120 S.Ct. 1878 (1999); *City of Lakewood v. Plain Dealer Publishing*, 486 U.S. 750 (1988).

## ARGUMENT

### I. THE FOURTH CIRCUIT MAJORITY CONFLICTS WITH THIS COURT'S AND OTHER CIRCUITS' CONSISTENT RECOGNITION OF ACADEMIC FREEDOM AS AN INDIVIDUAL RIGHT OF PROFESSORS.

This Court's precedents, which at least five federal courts of appeals have expressly followed, recognize that the First Amendment protects the academic freedom of state-employed professors. By asserting that academic freedom "inheres in the University, not in individual professors," Pet.App.15a, the Fourth Circuit majority dramatically departs from the established meaning of academic freedom under the First Amendment.

#### A. The Fourth Circuit Majority Repudiates This Court's Clear Recognition That the Academic Freedom of Professors Is a "Special Concern of the First Amendment."

This Court has consistently recognized that the First Amendment protects the academic freedom of professors. *Sweezy*, 354 U.S. 234; *Keyishian*, 385 U.S. 589. The Court has extended these holdings to institutions. *See Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214 (1985). Recognition of institutional academic freedom, however, "does not support the additional conclusion that the Court has rejected a constitutional right of individual professors to academic freedom . . . ." Rabban, *supra*, 53 LAW & CONTEMP.

PROBS at 280.[3] The Fourth Circuit majority's holding that only institutions have academic freedom contravenes this Court's individual First Amendment academic freedom rulings.

In *Sweezy*, 354 U.S. 234, the majority of this Court recognized a First Amendment right of academic freedom for university scholars. Sweezy was a lecturer at the University of New Hampshire who resisted state investigation into the content of his lectures. *Id.* at 236-38. The Court ruled that the government's inquiry into the subject matter of his lectures "unquestionably was an invasion of petitioner's [the lecturer's] liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread." *Id.* at 250. The Court in *Sweezy* emphasized the First Amendment values at stake in the state's investigation: "Scholarship cannot flourish in an atmosphere

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[3] Assertions of academic freedom under the First Amendment tend to arise in one of the following three ways: "claims of professors against faculty colleagues, administrators, or trustees; claims of professors against the State; and claims of universities against the State." *Id.* at 231. Occasionally, these claims may conflict. As the authors of a higher education treatise explain:

> Constitutional principles of academic freedom have developed in two stages, each occupying a distinct time period and including distinct types of cases. The earlier cases of the 1950s and 1960s focused on faculty and institutional freedom from external (political) intrusion. These cases pitted the faculty and institution against the State. Since the early 1970s, however, academic freedom cases have focused primarily on faculty freedom from institutional intrusion. In these latter cases, faculty academic freedom has collided with institutional academic freedom.

William A. Kaplin & Barbara A. Lee, THE LAW OF HIGHER EDUCATION 301 (1995 ed.). The present case harkens back to the earlier era: Virginia Code § 2.1-804 represents external interference by the state in the academic freedom of college and university faculty.

of suspicion and distrust. *Teachers* and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Id.* (emphasis added). The Court recognized the danger of infringing upon "such highly sensitive areas as freedom of speech . . . and freedom of communication of ideas, particularly in the academic community." *Id.* at 245.

A decade later, this Court struck down disclaimer and anti-subversion requirements placed on professors employed by the State University of New York. *Keyishian*, 385 U.S. 589. The Court warned that the "chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform *teachers* what is being proscribed," and recognized academic freedom as a "transcendent value to all of us *and not merely to the teachers concerned*." *Id.* at 603-04 (emphasis added). The Court found academic freedom to be "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Id.* at 603 (citations omitted).

Since *Sweezy* and *Keyishian*, this Court has consistently embraced the First Amendment right of individual academic freedom.[4] This academic freedom can be limited only when the State has clearly established a compelling and narrowly drawn interest.[5] *Sweezy*, 354 U.S. at 262 (Frankfurter, J., concurring); *Keyishian*, 385 U.S. at 604-05.

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[4] *See, e.g., Whitehill v. Elkins*, 389 U.S. 54, 59-60 (1967) ("We are in the First Amendment field. The continuing surveillance which this type of law places on *teachers* is hostile to academic freedom." (emphasis added)).

[5] The First Amendment protection of academic freedom is not absolute:

To reach its unsupported assertion that academic freedom applies only to administrative decisionmaking, the Fourth Circuit majority not only significantly distorts *Sweezy* and *Keyishian*, but also ignores *Ewing*, 474 U.S. 214. In *Ewing*, this Court observed: "Academic freedom thrives *not only* on the independent and uninhibited exchange of ideas among *teachers* and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself." *Id.* at 226 n.12 (emphasis added) (citations omitted).[6]

Courts of appeals have also recognized that institutional academic freedom supplements, but does not supplant, the First Amendment academic freedom of professors.[7]

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> There is, of course, nothing . . . that assumes that the First Amendment subset of academic freedom is a total absolute, any more than freedom of speech is itself an exclusive value prized literally above all else. Thus, the false shouting of fire in a crowded theater may not immunize a professor of psychology from having to answer for the consequences of the ensuing panic, even assuming that he did it in order to observe crowd reaction first-hand and solely to advance the general enlightenment we may otherwise possess of how people act under great and sudden stress.

William W. Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty*, *in* THE CONCEPT OF ACADEMIC FREEDOM 59, 78 (Edmond L. Pincoffs ed., 1972).

[6] This Court has recognized the concept of institutional academic freedom in other cases as well. *See, e.g., Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J., concurring) ("The [academic] freedom of a university to make its own judgments as to education includes the selection of its student body.").

[7] *See, e.g., Piarowski v. Illinois Comm. College*, 759 F.2d 625, 629 (7th Cir.), *cert. denied*, 474 U.S. 1007 (1985) (noting that academic freedom "is used to denote both the freedom of the academy to pursue its ends without interference from the government . . . and the freedom of the individual teacher . . . to pursue his ends without interference from the academy"); *Parate v. Isibor*, 868 F.2d 821, 826 (6th Cir.) ("Academic freedom thrives not only on the robust and uninhibited exchange of ideas

### B. The Fourth Circuit Majority Decision Clearly Conflicts with At Least Five Other Courts of Appeals' Decisions That Recognize an Individual Professor's First Amendment Right of Academic Freedom.

By limiting First Amendment academic freedom to institutions, the Fourth Circuit majority decision clearly conflicts with at least five other courts of appeals that have recognized professors' First Amendment right of academic freedom.

The Second, Sixth, and Ninth Circuits have applied the First Amendment right of academic freedom to protect professors' work in the classroom. The Second Circuit recognized as constitutionally protected a professor's academic freedom "based on [his] discussion of controversial topics in his classroom." *Dube v. State Univ. of N.Y.*, 900 F.2d 587, 597-98 (2d Cir. 1990). In *Parate*, 868 F.2d at 829, the Sixth Circuit found that a university violated a professor's "First Amendment right to academic freedom" when it ordered the professor to change a student's original grade. Similarly, the Ninth Circuit ruled that a professor's academic freedom was violated by the application of a college's vague sexual harassment policy to classroom speech. *Cohen v. San Bernardino Valley College*, 92 F.3d 968, 971-72 (9th Cir. 1996), *cert. denied*, 520 U.S. 1140 (1997).

The Seventh Circuit held that a professor's First Amendment right of academic freedom extends to research as well as teaching. Observing that "whatever constitutional protection is afforded by the First Amendment extends as readily to the scholar in the laboratory as to the teacher in the classroom," the court refused to issue a subpoena for materials based on

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between the individual professor and his students, but also on the 'autonomous decisionmaking [of] . . . the academy itself.'" (quoting *Ewing*)), *reh'g denied*, 1989 U.S. App. LEXIS 5203 (6th Cir. Mar. 16, 1989).

toxicity studies in a university laboratory. *Dow Chemical Co. v. Allen*, 672 F.2d 1262, 1275 (7th Cir. 1982). The Seventh Circuit agreed with the position of the professors that individual scholarly research "lies at the heart of higher education" and therefore "comes within the First Amendment's protection of academic freedom." *Id.* at 1274.[8]

The Eighth Circuit has ruled that the First Amendment also protects professors as scholars. In *Burnham v. Ianni*, 119 F.3d 668 (8th Cir. 1997) (*en banc*), the court ruled that a university violated the academic freedom of two history professors by removing from the history department display case photographs in which the professors were attempting "to convey and advocate their scholarly and professorial interests in military history and in military weaponry's part in their vocation." *Id.* at 674. The court noted that "professors' academic freedom" was "a 'special concern of the First Amendment.'" *Id.* at 680 n.19 (citations omitted).

The Fourth Circuit majority decision is a singular departure from the courts of appeals' recognition that constitutional academic freedom protects professors' work.

## II. THE FOURTH CIRCUIT MAJORITY OPINION SIGNIFICANTLY MISCONSTRUES THIS COURT'S TEST ON "MATTERS OF PUBLIC CONCERN," AND ITS DECISION CLEARLY CONFLICTS WITH AT LEAST FIVE COURTS OF APPEALS THAT RECOGNIZE THE PUBLIC INTEREST OF EMPLOYEE SPEECH.

The Fourth Circuit majority proclaims in this case that research and writing by university professors on sexual themes fail to involve matters of public concern and, therefore, are undeserving of First Amendment protection.

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[8] *See also Piarowski*, 759 F.2d at 629 (recognizing individual academic freedom).

Pet.App.12a-13a. The majority significantly misconstrues this Court's analysis in determining matters of public concern. *See Pickering,* 391 U.S. 563; *Connick*, 461 U.S. 138. No requirement exists under the *Connick-Pickering* test that speech related to professional concerns can never be a matter of public concern. Furthermore, professors are a different kind of state employee; they are not "state mouthpieces" of their institutions, Pet.App.53a (Wilkinson, C.J., concurring), but rather scholars hired to pursue their own research and ideas. The work-related speech by professors, including writing and research on sexual themes, is often a matter of public concern.

### A. The Fourth Circuit Majority in This Case Significantly Misconstrues the *Connick-Pickering* Test.

Employment-related speech by public employees, including professors, does not remove such expression from the ambit of First Amendment protection. This Court in *Connick* ruled that not all speech by public employees relates to matters of public concern; it did not rule as unprotected by the First Amendment the entire category of employment-related speech by public employees. 461 U.S. at 142-43.

In *Connick,* the Court examined an employee questionnaire to determine whether the employee speech involved a matter of public concern or one of private interest. The Court defined a matter of public concern—including that expressed by an employee—as speech "relating to any matter of political, social, or other concern to the community." *Connick,* 461 U.S. 146. It further explained: "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.* at 147-48. On balance, the Court found the employee survey in *Connick* to be speech by an employee addressing a matter of private interest because it was related primarily to a personal

grievance about a job transfer. At the same time, the Court found one survey question by the state employee—on whether employees felt pressured to work on political campaigns—to be of public concern. *Id.* at 149.

In this case the Fourth Circuit majority dramatically misreads *Connick* by ruling that speech related to employment cannot be a matter of public concern. The majority also reaches the unsupported conclusion that the Commonwealth may restrict public employee speech, including that of professors, because that speech is "purchased" by the state through the payment of salaries.[9] In so doing, the Fourth Circuit majority clearly ignores this Court's reasons for protecting socially important speech in the first place: to promote "unhindered debate on matters of public importance." *Pickering*, 391 U.S. at 573.

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[9] The Fourth Circuit majority's reliance on *Rust v. Sullivan*, 500 U.S. 173 (1991), is misplaced. The majority opines that "restrictions on speech by public employees in their capacity as employees are analogous to restrictions on government-funded speech." Pet.App.10a & n.6. It asserts that "the government is entitled to control the content of the speech because it has, in a meaningful sense, 'purchased' the speech at issue through a grant of funding or payment of a salary . . ." *Id.* (citation omitted). *Rust* involved a challenge to government regulations, under which the government refused to fund certain activities, including speech.

Academic freedom and the Fourth Circuit majority's notion of "purchased speech" are mutually exclusive. Chief Justice Rehnquist recognized in *Rust* that a different analysis would be necessary in the academic context, as in this case:

> [W]e have recognized that 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 by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment.

*Id.* at 200 (citations omitted).

This Court has recognized, moreover, that exploration of sensitive and controversial subjects, including sex, may constitute a matter of public concern.[10] As Judge Murnaghan noted in his Fourth Circuit dissent,

> [Under] [t]he Commonwealth's recent revision to the Act limiting the definition of "sexually explicit content" to materials and descriptions that are "lascivious" . . . [m]any works of public import could be classified as lascivious; in fact, many were specifically intended to have such an effect. For instance, the works of Toni Morrison and many themes found in Victorian poetry, including the material researched online by one of the plaintiffs, Professor Meyers, could be classified as lascivious.

Pet.App.72a (Murnaghan, J., dissenting). State-employed professors are "hired for the very purpose of inquiring into, reflecting upon, and speaking out on matters of public concern." Pet.App.52a. (Wilkinson, C.J., concurring).[11]

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[10] "Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and *public concern.*" *Roth v. United States*, 354 U.S. 476, 487, *reh'g denied*, 355 U.S. 852 (1957) (emphasis added). In distinguishing between "sex" and "obscenity," this Court noted: "[S]ex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press." *Id.*; *see also Reno v. ACLU*, 521 U.S. 844, 877 (1997) ("The general, undefined terms 'indecent' and 'patently offensive' cover large amounts of nonpornographic material with serious educational or other value."). The Virginia statute at issue here covers more than obscene speech.

[11] "A faculty . . . is employed professionally to test and propose revisions in the prevailing wisdom, not to inculcate the prevailing wisdom in others, store it as monks might do, or rewrite it in elegant detail. Its

State-employed university scholars are expected to pursue their own research and express their own views in the classroom and through publications, conferences, and research.[12] As part of their job responsibilities, professors conduct research, write, teach, publish, and debate with colleagues and students.[13] Much of the speech of state-

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function is primarily one of critical review: to check conventional truth, to reexamine ('re-search') what may currently be thought sound but may be more or less unsound." William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 LAW & CONTEMP. PROBS. 79, 87 (1990).

[12] *See Dambrot v. Central Michigan Univ.*, 55 F.3d 1177, 1187-89 (6th Cir. 1995) ("The analysis of what constitutes a matter of public concern and what raises academic freedom concerns is of essentially the same character . . . The linchpin of the inquiry is, thus, for both public concern and academic freedom, the extent to which the speech advances an idea transcending personal interest or opinion which impacts our social and/or political lives.").

[13] In this way professors are different from other state employees. As Chief Judge Wilkinson observed: "[S]tate university professors work in the context of considerable academic independence. The statute limits professors' ability to use the Internet to research and to write. But in their research and writing university professors are not state mouthpieces—they speak mainly for themselves." Pet.App.52a-53a (Wilkinson, C.J., concurring); *see also* Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty*, *supra*, at 71 ("Specifically, that which sets academic freedom apart as a distinct freedom is its vocational claim of special and limited accountability in respect to all academically related pursuits of the teacher-scholar: an accountability not to any institutional or societal standard of economic benefit, acceptable interest, right thinking, or socially constructive theory, but solely to a fiduciary standard of professional integrity.").

The academic freedom of professors promotes the public interest of society at large. *See* Rabban, *supra*, 53 LAW & CONTEMP. PROBS at 230 ("Asserting constitutional protection for professors and universities is not simply a form of special pleading to elevate the job-related concerns of a particular profession or the institutional interests of a particular

employed professors is likely to be matters of public concern, such as when a biologist writes a paper on the transmission of AIDS, or an English professor laments the declining attention to the traditional canon. In the end, "[i]t makes no sense to expect professors to engage in critical inquiry and simultaneously to allow punishment for its exercise." Rabban, *supra*, 53 LAW & CONTEMP. PROBS. at 242.

The professors' calling is to contribute to the robust exchange in the marketplace of ideas, which is part of "a tradition of thought and experiment that is at the center of our intellectual and philosophic tradition," *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 835 (1995), not to serve as "state mouthpieces," Pet.App.53a (Wilkinson, C.J., concurring).

### B. The Fourth Circuit Majority's *Connick-Pickering* Analysis in This Case Clearly Conflicts with At Least Five Courts of Appeals.

The Fourth Circuit majority decision in this case conflicts with other circuits when it rules that employment-related speech by public employees, including professors, cannot be a matter of public concern.

Five courts of appeals have found that the work-related expression of public employees can be matters of public concern protected by the First Amendment. For example, the Seventh Circuit stated, "[W]e commonly have found speech by public employees spoken pursuant to their employment duties to constitute speech on a public concern." *Bonds v. Milwaukee County*, 207 F.3d 969, 980 (7th Cir. 2000). Other circuits have also expressly followed this Court's *Connick-Pickering* analysis, including: the Second Circuit, *see*

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enterprise. Rather, constitutional academic freedom promotes first amendment values of general concern to all citizens in a democracy.").

*Harman v. City of New York*, 140 F.3d 111 (2d Cir. 1988) (protecting social workers' answers to job-related inquiries from the media as matter of public concern); the Sixth Circuit, *see Dambrot*, 55 F.3d at 1185 ("[A] government employee [as an employee] retains [the] First Amendment right to comment on matters of public concern without fear of reprisal from the government as employer."); the Ninth Circuit, *see Nunez v. Davis*, 169 F.3d 1222, 1226-29 (9th Cir. 1999), *cert. denied*, __ U.S. __, 120 S.Ct. 932 (2000) (finding speech of employee, criticizing limiting seminar attendees to judge's reelection volunteers, matter of public interest); and the Tenth Circuit, *see Koch v. City of Hutchinson*, 847 F.2d 1436, 1442 (10th Cir.), *cert. denied*, 488 U.S. 909 (1988) (rejecting blanket rule that "communications made in the course of an employee's official duties" fall outside First Amendment).

Another Second Circuit opinion specifically acknowledges that state-employed professors, because of the nature of their work, often speak on matters of public concern. In *Blum v. Schlegel*, 18 F.3d 1005 (2d Cir. 1994), the Second Circuit held as protected matters of public concern a law professor's discussion of the legalization of marijuana and criticism of national drug control policy in his classroom and writings. *Id.* at 1011-12. The court reasoned that "free and open debate on issues of public concern are essential to a law school's function" and that "the efficient provision of services by a State university's law school actually depends, to a degree, on the dissemination in public fora of controversial speech implicating matters of public concern." *Id.*[14]

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[14] *See also Scallet v. Rosenblum*, 911 F. Supp. 999, 1013 (W.D. Va. 1996) ("Scallet, as an educator, routinely and necessarily discusses issues of public concern when speaking as an employee. Indeed it is part of his educational mandate."), *aff'd on other grounds*, 106 F.3d 391 (4th Cir.), *cert. denied*, 521 U.S. 1105 (1997).

The Fourth Circuit majority's analysis of matters of public concern in this case clearly conflicts with other circuits.

## III. THE FOURTH CIRCUIT MAJORITY'S APPROVAL OF THE VIRGINIA STATUTE'S LICENSING SCHEME CONTRAVENES THIS COURT'S FIRST AMENDMENT RULINGS BECAUSE THE LAW DISCRIMINATES BASED ON CONTENT AND CONSTITUTES A PRIOR RESTRAINT.

Virginia scholars who seek to pursue research that involves sexually explicit subjects must now seek permission, for which no criteria are provided, from an "agency head." Pet.App.113a. The Virginia statute impermissibly limits—based on the content of the speech—access to state-owned computers for research purposes. These restrictions also constitute a prior restraint.

### A. The Fourth Circuit Majority Contravenes This Court's Rulings on Content Discrimination by Failing to Scrutinize Strictly Virginia's Statute.

The Fourth Circuit majority contravenes this Court's prohibition against content-based discrimination by failing to consider the impermissible content discrimination of Virginia's licensing scheme on state employees. Content-based restrictions are especially troubling when dealing with free expression and the Internet, as in this case: "Technology expands the capacity [for individuals] to choose [under the First Amendment]; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us." *Playboy*, 120 S.Ct. at 1889.

"Content-based burdens on speech raise . . . the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). Therefore, a statute that regulates content "must be

narrowly tailored to promote a compelling Government interest." *Playboy,* 120 S.Ct. at 1886; *see also Burnham,* 119 F.3d at 674 (applying strict scrutiny to professors' expression). "[C]ontent-based regulations are presumptively invalid," *R.A.V. v. City of St. Paul,* 505 U.S. 377, 382 (1992), and the government bears the burden of justifying its content-based restrictions, *Reno,* 521 U.S. at 879.

The Commonwealth failed to justify the licensing scheme of Virginia Code § 2.1-804, which constitutes a broad, content-based ban.[15] "The speech in question is defined by its content; and the statute which seeks to restrict it is content based." *Playboy,* 120 S.Ct. at 1885. If a statute prohibited the use of state-owned computers to access, for example, socialist materials, a court would immediately strike down the law as content-based, which is the case at hand.

The Fourth Circuit violates this Court's rulings because it fails to consider whether the Commonwealth had a narrowly drawn and compelling State interest to justify such a clear content-based restriction on the First Amendment academic freedom of professors.

### B. The Fourth Circuit Majority's Approval of the Waiver Provision Conflicts with This Court's Rulings on Impermissible Prior Restraints.

The Commonwealth's licensing scheme is clearly an impermissible prior restraint on serious inquiry into sexual matters. The Act's approval process requires professors to

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[15] Chief Judge Wilkinson, although recognizing constitutionalized academic freedom of professors, neither considered the availability of content neutral rules to regulate state employee computer use under strict scrutiny analysis, nor applied the rigorous standard of scrutiny required under *United States v. National Treasury Employees Union,* 513 U.S. 454 (1995) ("*NTEU*"). Accordingly, Chief Judge Wilkinson is mistaken that the Virginia statute protects institutional academic freedom. Pet.App.60a (Wilkinson, C.J., concurring).

seek permission to access sexually explicit materials "to the extent required in conjunction with a bona fide, *agency-approved* research project or other *agency-approved* undertaking." Pet.App.112a (emphasis added). As the Fourth Circuit dissent noted, "[t]he Act's prior approval process . . . has no check on the discretionary authority of State agencies," and "such grants of unbridled discretion to government agents invites arbitrary enforcement." Pet.App.77a (Murnaghan, J., dissenting).

In *City of Lakewood,* 486 U.S. at 750, 763-64 (1988), this Court ruled that

> [w]hen the determination of who may speak and who may not is left to the unbridled discretion of a government official . . . we have often and uniformly held that such statutes or policies impose censorship on the public or the press, and hence are unconstitutional, because without standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker.[16]

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[16] *See Thornhill v. Alabama,* 310 U.S. 88, 97 (1940) ("It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion."); *Sanjour v. EPA,* 56 F.3d 85, 97 (D.C. Cir. 1995) ("Far from being the saving grace of this regulatory scheme—as the government suggests—the broad discretion that the regulations vest in the agency reinforces our belief that they are impermissible."); *Harman,* 140 F.3d at 120 (striking down agency's policy requiring prior approval for employee statements to press, and noting that the potential for censorship by the government "justifies an additional thumb on the employees' side of [the] scales") (citations omitted); *see also* David M. Rabban, *Does Academic Freedom Limit Faculty Autonomy?*, 66 TEX. L. REV. 1405, 1418-19 (1988) (observing that a prior approval scheme for scholarly research "should strike virtually everyone as a violation of academic freedom," even absent "strong evidence of actual abuses").

A very exacting level of scrutiny is required where the government, as here, imposes a blanket prior restriction on the speech of professors and other State employees, thus creating a "wholesale deterrent to a broad category of expression by a massive number of potential speakers," and "chill[ing] potential speech before it happens." *NTEU*, 513 U.S. at 467-68.[17] That is especially true of professors as public employees, because "public debate may gain much from their informed opinions" as employees. *See Waters v. Churchill*, 511 U.S. 661, 674 (1994).

The Fourth Circuit majority heralds the fact that no public employee has been denied permission to access sexually explicit materials. Pet.App.6a. However, the "mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused." *Lakewood*, 486 U.S. at 757. And so, "[i]t is of no moment that the statute does not impose a complete prohibition." *Playboy*, 120 S.Ct. at 1886.

In the end, the Commonwealth has "strait jacket[ed]" state-employed professors by imposing this impermissible prior constraint. *See Sweezy*, 354 U.S. at 250.

## CONCLUSION

For the reasons states above, *amici* respectfully urge that the petition for a writ of *certiorari* be granted.

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[17] *See also Sanjour*, 56 F.3d at 94; *Harman*, 140 F.3d at 118.

Respectfully submitted,

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