No. 23-2545

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LARS JENSEN,

Plaintiff-Appellant,

v.

NATALIE BROWN, ET AL.

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Nevada
No. 3:22-cv-00045-LRH-CLB
Hon. Larry R. Hicks

BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS AND THE NEVADA FACULTY ALLIANCE AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT AND IN FAVOR OF REVERSAL

Luke Busby, Esq.
316 California Avenue
Reno, Nevada 89509
Tel: 775-453-0112
Email: luke@lukeandrewbusbyltd.org
Attorney of Record for Amici Curiae

Risa Lieberwitz
Aaron Nisenson
Edward Swidriski
AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS
555 New Jersey Avenue NW, Suite 600
Washington, D.C. 20001
Tel: 202-737-5900
Email: legal.dept@aaup.org
Counsel for Amicus Curiae American Association of University Professors

DISCLOSURE STATEMENT

Pursuant to Rule 26.1, the American Association of University Professors and the Nevada Faculty Alliance make the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

   NO.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

   NO.

Date: February 25, 2024

Luke Busby, Esq.

/s/ Luke Busby
Luke Busby, Esq.

Attorney for Amici Curiae

TABLE OF CONTENTS

Page

DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. The First Amendment right of public university and college faculty to speak on matters related to teaching—including criticism of important changes to curriculum standards—is clearly established and has long been understood as being essential to academic freedom 5

II. The district court's decision is based upon an incorrect reading of *Demers* and *Garcetti* 10

III. Speech like Dr. Jensen's is "on a matter of public concern" and readily satisfies the *Pickering* balancing analysis 12

CONCLUSION 17

TABLE OF AUTHORITIES

Cases **Page(s)**

Adamian v. Jacobsen,
523 F.2d 929 (9th Cir. 1975)……..1,7

Adams v. Trs. of the Univ. of N.C.-Wilmington,
640 F.3d 550 (4th Cir. 2011)……...11

Bd. of Regents v. Roth,
408 U.S. 564 (1972)……...1,7

Browzin v. Catholic Univ. of Am.,
527 F.2d 843 (D.C. Cir. 1975)……...7

Castro v. County of Los Angeles,
833 F.3d 1060 (9th Cir. 2016) (en banc)……..13

Demers v. Austin,
746 F.3d 402 (9th Cir. 2014)…….1,3,6,10,11,13,14,15,16

Freyd v. Univ. of Oregon,
990 F.3d 1211 (9th Cir. 2021)……...1

Garcetti v. Ceballos,
547 U.S. 410 (2006)…….3,11

Heim v. Daniel,
81 F.4th 212 (2d Cir. 2023)…….…11

Keyishian v. Bd. of Regents,
385 U.S. 589 (1967)……...3,6

Mayberry v. Dees,
663 F.2d 502 (4th Cir. 1981)……7

McAdams v. Marquette University,
914 N.W.2d 708 (Wis. 2018)…….…1,7

Cases (cont.) **Page(s)**

Meriwether v. Hartop,
992 F.3d 492 (6th Cir. 2021)……...…11

Pickering v. Board of Education,
391 U.S. 563 (1968)……13

Sweezy v. New Hampshire,
354 U.S. 234 (1957)……..…6

Tilton v. Richardson,
403 U.S. 672 (1971)……...…1,7

Other Authorities

AAUP, *1915 Declaration of Principles on Academic Freedom and Academic Tenure*, AAUP POLICY DOCUMENTS AND REPORTS 3–12 (11th ed. 2015)……14

AAUP, *1940 Statement of Principles on Academic Freedom and Tenure*, AAUP POLICY DOCUMENTS AND REPORTS 14 (11th ed. 2015)……7,14

AAUP, *1966 Statement on Government of Colleges and Universities*, AAUP POLICY DOCUMENTS AND REPORTS 117 (11th ed. 2015)……..8

AAUP, *Endorsers of the 1940 Statement*,
https://www.aaup.org/endorsers-1940-statement.....7

AAUP, *The Freedom to Teach*, AAUP POLICY DOCUMENTS AND REPORTS 28 (11th ed. 2015)……..…7

AAUP, *On the Relationship of Faculty Governance to Academic Freedom*, https://www.aaup.org/report/relationship-faculty-governance-academic-freedom/……8,9

INTEREST OF *AMICI CURIAE*

The American Association of University Professors ("AAUP") is a non-profit organization that represents more than 40,000 faculty, librarians, graduate students, and academic professionals employed at institutions of higher education across the United States. Founded in 1915, the AAUP is committed to advancing academic freedom and shared governance, defining fundamental professional values and standards for higher education, promoting the economic security of faculty and other academic workers, and ensuring higher education's contribution to the common good. In furtherance of these ends, the AAUP has published numerous statements of principle and policy, which represent the collective experience and carefully considered judgment of the academic profession. These statements are widely respected and followed by American colleges and universities and have been recognized by the Supreme Court of the United States, as well as this and other courts. *E.g.*, *Bd. of Regents v. Roth*, 408 U.S. 564, 579 n.17 (1972); *Tilton v. Richardson*, 403 U.S. 672, 681–82 (1971); *Adamian v. Jacobsen*, 523 F.2d 929, 934 (9th Cir. 1975); *McAdams v. Marquette University*, 914 N.W.2d 708, 730, 733 (Wis. 2018). The AAUP frequently submits amicus briefs to this court and others in cases that implicate AAUP policies or that otherwise involve legal issues important to faculty members and the broader higher education community. *E.g.*, *Freyd v. Univ. of Oregon*, 990 F.3d 1211 (9th Cir. 2021); *Demers v. Austin*, 746 F.3d 402 (9th Cir.

2014).

The Nevada Faculty Alliance ("NFA"), founded in 1983, is the statewide association of faculty at the colleges and universities of the Nevada System of Higher Education ("NSHE"). NFA represents collective bargaining units at the College of Southern Nevada, Truckee Meadows Community College, and Western Nevada College. NFA maintains advocacy chapters at Great Basin College, Nevada State University, the University of Nevada, Las Vegas, and the University of Nevada, Reno ("UNR"). The NFA is affiliated with the American Association of University Professors and the American Federation of Teachers, which together represent over 300,000 higher education professional employees in North America. The organization advocates for academic freedom, shared governance, faculty rights, the common good, civil rights, and human rights.

By participating as *amici curiae* in the present case, the AAUP and NFA seek to demonstrate that the district court erred when it dismissed Plaintiff's First Amendment individual-capacity claims on qualified immunity grounds. The sole basis for the district court's decision on this point was its conclusion that Defendants did not violate "clearly established" law. As this brief explains, Plaintiff's right to speak critically about the lowering of curriculum standards—and the deterioration of processes of shared governance that accompanied those changes—is essential to academic freedom, a right the Supreme Court long ago established as being "a

special concern of the First Amendment." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). Pursuant to decisions of the Supreme Court and of this Court—including *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014)—the First Amendment right of faculty to engage in speech and writing about curriculum standards and related institutional governance matters was "clearly established" long before Defendants retaliated against Plaintiff. The district court's conclusion to the contrary resulted from its erroneous interpretation of *Demers* and *Garcetti v. Ceballos*, 547 U.S. 410 (2006). Although *Garcetti* may have created temporary uncertainty in 2006 about academic speech, this Court's decision in *Demers* in 2014 dispelled that uncertainty and clearly established that speech like Dr. Jensen's is protected by the First Amendment.

SUMMARY OF THE ARGUMENT

Defendants retaliated against Dr. Lars Jensen, a professor in the math and physical sciences division at Truckee Meadows Community College (the "College"), for criticizing the lowering of math curriculum standards and the deterioration of shared governance at the College. The district court dismissed Dr. Jensen's First Amendment claims against Defendants in their individual capacities, on the grounds that they were entitled to qualified immunity because Dr. Jensen's right to engage in such speech was not "clearly established." This Court should reverse the district court's error-riddled dismissal of those claims.

I. It is clearly established that the First Amendment protects the right of faculty members to engage in speech related to teaching, which includes speech critical of important changes to curriculum standards. Such speech implicates core elements of academic freedom, a value that the Supreme Court has long recognized as being a special concern of the First Amendment and that is clearly established in the academic profession—and in the law—as decades of AAUP statements attest.

II. The district court's erroneous conclusion that Dr. Jensen's constitutional right to engage in such speech was not clearly established resulted from a misreading of the Supreme Court's decision in *Garcetti* and this Court's subsequent decision in *Demers*. As this Court explained in *Demers*, the First Amendment right of faculty to engage in academic speech was recognized long before *Garcetti*, and *Garcetti* did nothing to alter that clearly established right. All that *Garcetti* did was, in 2006, to temporarily muddy the waters regarding the protection of academic speech engaged in pursuant to a faculty member's official duties. But *Demers* clarified the situation in 2014 by clearly and unequivocally affirming that such speech remains protected by the First Amendment.

III. The sole basis for the district court's dismissal of Dr. Jensen's First Amendment individual-capacity claims was its erroneous conclusion regarding the clearly established prong of qualified immunity. Once this Court reverses that error, the analysis will move to the question of whether the facts, as Dr. Jensen alleges

them, make out a violation of a constitutional right. That question is readily answered in the affirmative in this case because the speech at issue here involves "matters of public concern" and satisfies the *Pickering* balancing test. Dr. Jensen's speech addresses significant aspects of a public college's curriculum standards and of the college administration's disregard for shared governance in implementing those standards. The speech did not focus on a narrow personnel or internal dispute; rather, it was widely disseminated and concerned a matter of significant importance to the broader community. In addition, the interest of a professor in engaging in this sort of speech significantly outweighs a college's interest in restricting such speech. A faculty member has a compelling interest in speaking on important curriculum issues that are matters of public concern, and their right to do so falls squarely within the core of academic freedom. At the same time, a college has no legitimate interest in restricting such speech or punishing those engaged in such speech. On the contrary, the proper and effective functioning of colleges and universities requires that college administrators respect academic freedom, and any restrictions on such speech therefore ultimately undermine the functioning of the institution.

ARGUMENT

I. The First Amendment right of public university and college faculty to speak on matters related to teaching—including criticism of important changes to curriculum standards—is clearly established and has long been understood as being essential to academic freedom.

Public university and college professors have a clearly established First Amendment right to engage in "speech related to scholarship or teaching," *Demers v. Austin*, 746 F.3d 402, 406 (9th Cir. 2014) (internal quotation marks omitted) (quoting *Garcetti*, 547 U.S. at 425), even when such speech is made "pursuant to the [professor's] official duties," *id.* at 411. This right—which, as *Demers* demonstrates, encompasses speech like Dr. Jensen's—follows from longstanding decisions of the Supreme Court and from principles long established by the AAUP and adhered to by the academic profession.

The First Amendment protects faculty speech "related to scholarship or teaching"—i.e., "academic speech." *Demers*, 746 F.3d at 406, 411. As this Court recognized in *Demers*, this protection clearly and unmistakably follows from the Supreme Court's longstanding recognition that academic freedom is "a special concern of the First Amendment," *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967), and that "impos[ing] any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation," *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). *See Demers*, 746 F.3d at 411 (explaining that it "would directly conflict with the important First Amendment values previously articulated by the Supreme Court" if such speech were not protected).

An essential aspect of academic freedom is the faculty's freedom to teach. As the AAUP has long maintained, this freedom "is fundamental for the protection of

the rights of the teacher in teaching and of the student to freedom in learning." *1940 Statement of Principles on Academic Freedom and Tenure*, AAUP POLICY DOCUMENTS AND REPORTS at 14 (hereinafter, "*1940 Statement*"). The *1940 Statement* was jointly formulated by the AAUP and the Association of American Colleges and Universities and has been endorsed by more than 250 scholarly and educational organizations. AAUP, *Endorsers of the 1940 Statement*, https://www.aaup.org/endorsers-1940-statement. Courts have routinely looked to the *1940 Statement* for guidance in understanding and applying the principle of academic freedom.[1] The freedom to teach includes the right of the faculty to control many aspects of teaching, including "to select the materials, determine the approach to the subject, make the assignments, and assess student academic performance in teaching activities for which faculty members are individually responsible, without having their decisions subject to the veto of a department chair, dean, or other administrative officer." *The Freedom to Teach*, AAUP POLICY DOCUMENTS AND REPORTS at 28.

[1] *E.g.*, *Roth*, 408 U.S. at 579 n.17; *Tilton*, 403 U.S. at 681–82; *Adamian*, 523 F.2d at 934–35; *Mayberry v. Dees*, 663 F.2d 502, 513 (4th Cir. 1981) (noting that the AAUP was a framer of "the 1940 Statement of Principles on Academic Freedom and Tenure, the fundamental document on the subject"); *Browzin v. Catholic Univ. of Am.*, 527 F.2d 843, 848 & n.8 (D.C. Cir. 1975) ("[The *1940 Statement*] represents widely shared norms within the academic community, having achieved acceptance by organizations which represent teachers as well as organizations which represent college administrators and governing boards."); *McAdams*, 914 N.W.2d at 730, 733.

Academic freedom also includes the freedom of faculty to engage in intramural expression and action, which includes the freedom to speak and act as participants in the governance of the institution. AAUP, *On the Relationship of Faculty Governance to Academic Freedom*, https://www.aaup.org/report/relationship-faculty-governance-academic-freedom/ ("The academic freedom of faculty members includes the freedom to express their views . . . on matters having to do with their institution and its policies . . . ."). This freedom is closely tied to the principle of shared governance, which refers to the joint responsibility of a college's faculty, administration, and governing board to oversee the institution. The *1966 Statement on Government of Colleges and Universities*, AAUP POLICY DOCUMENTS AND REPORTS 117 (11th ed. 2015) (hereinafter, "*1966 Statement*")—the classic statement on shared governance that the AAUP played a key role in formulating—calls for shared responsibility among the different components of institutional government and specifies areas of primary responsibility for each. "[S]ince the faculty has primary responsibility for the teaching and research done in the institution, the faculty's voice on matters having to do with teaching and research should be given the greatest weight." *On the Relationship of Faculty Governance to Academic Freedom*; *accord 1966 Statement* ("[W]hen it comes to academic matters, a faculty decision should normally be the final decision."). Accordingly, "[s]ince such decisions as those involving choice of

method of instruction, subject matter to be taught, policies for admitting students, standards of student competence in a discipline, the maintenance of a suitable environment for learning, and standards of faculty competence bear directly on the teaching and research conducted in the institution, the faculty should have primary authority over decisions about such matters." *On the Relationship of Faculty Governance to Academic Freedom* (explaining that this primacy of faculty authority means that the administration should "concur with the faculty judgment except in rare instances and for compelling reasons which should be stated in detail").

The speech and writing of the sort engaged in by Dr. Jensen fall squarely within the category of "speech related to teaching" and are clearly protected by the First Amendment. Dr. Jensen's speech—including the emails he sent and the handout he distributed at the Math Summit—concerned core aspects of teaching, including the level of material taught in the College's math courses, the admission of students to math courses, and standards of competence for students enrolled in math courses. This conclusion necessarily follows from this Court's decision in *Demers*. There, a faculty member who taught in the area of communications claimed that college officials violated his First Amendment rights by retaliating against him for distributing a pamphlet outlining a plan that proposed reorganizing the communications faculty and strengthening the mass communications faculty by appointing a director with a strong professional background and giving more

prominent roles to faculty members with professional backgrounds. *Demers*, 746 F.3d at 407. The professor sent the plan to members of the media, to administrators at his university, to some colleagues, and to others. *Id.* This Court held that the professor's plan was "related to scholarship or teaching" and therefore protected by the First Amendment, explaining that "it was a proposal to implement a change at the [college] that, if implemented, would have substantially altered the nature of what was taught at the school, as well as the composition of the faculty that would teach it." *Id.* at 415.

II. The district court's decision is based upon an incorrect reading of *Demers* and *Garcetti*.

In holding that Dr. Jensen's claims did not implicate a "clearly established" First Amendment right, the district court rejected Dr. Jensen's reliance on this Court's decision in *Demers*. In the district court's view, *Demers* "applied the general rule established in *Garcetti* . . . to speech as academic teaching and writing for the first time." ER18.[2] The district court further emphasized that "*Demers* concluded that a professor's academic teaching and writing may be an exception to Garcetti's general rule, but ultimately held that the defendants were entitled to qualified immunity because the plaintiff had not shown that 'the contours of the right' were so 'sufficiently clear' that 'every reasonable official would have understood' their

[2] "ER" refers to the Excerpts of Record submitted by Appellant.

conduct violated that right." *Id.*

The district court's reading of *Garcetti*—and of *Demers*'s relation to it—is clearly erroneous. *Garcetti* did not create new law or modify existing law concerning the First Amendment's protection of academic speech. As the *Demers* opinion itself explained, and as other circuits have held, *Garcetti* did not change pre-*Garcetti* law holding that academic speech is protected. *Demers*, 746 F.3d at 411 (explaining that it "would directly conflict with the important First Amendment values previously articulated by the Supreme Court" if such speech were not protected); *Heim v. Daniel*, 81 F.4th 212, 226 (2d Cir. 2023) (same); *Meriwether v. Hartop*, 992 F.3d 492, 505 (6th Cir. 2021) (same); *Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 563 (4th Cir. 2011) (same).

The *Garcetti* decision did create a temporary cloud of uncertainty over what had previously been clear law. In 2006, the *Garcetti* Court set forth a new rule that speech made pursuant to a public employee's official duties is not protected by the First Amendment, but it declined to decide whether this new rule extended to academic speech. *Garcetti*, 547 U.S. at 425 ("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.").

Contrary to the district court's analysis, when this Court decided *Demers* in 2014, it did not apply *Garcetti*'s rule to academic speech for the first time. Instead,

this Court explicitly recognized that academic speech made pursuant to official duties *is not* subject to *Garcetti*'s rule, and that it falls within the scope of the First Amendment's protection, as had been clear before *Garcetti*. In so doing, *Demers* cleared up the uncertainty that *Garcetti* had created.

In *Demers*, this Court held that the defendants were entitled to qualified immunity, but in the course of doing so, it clearly removed any uncertainty created by *Garcetti*. Accordingly, after *Demers*, no reasonable university official could believe that it was constitutional to suppress speech such as Dr. Jensen's. The defendants in *Demers* were entitled to qualified immunity because that uncertainty had not been clarified when they engaged in their unconstitutional conduct. The ruling in *Demers* clearly established that defendants can no longer rely on *Garcetti* in order to be entitled to qualified immunity in cases involving the suppression of academic speech. In this case, the retaliatory actions that Defendants took against Dr. Jensen all occurred well after this Court's issuance of its decision in *Demers* on January 29, 2014.

III. Speech like Dr. Jensen's is "on a matter of public concern" and readily satisfies the *Pickering* balancing analysis.

The sole basis for the district court's dismissal of Dr. Jensen's First Amendment individual-capacity claims was its erroneous conclusion regarding the "clearly established" prong of the qualified immunity analysis. Once this Court

reverses that error, the *de novo* analysis moves to whether the facts, as Dr. Jensen alleges them, make out a violation of a constitutional right. *E.g.*, *Castro v. County of Los Angeles*, 833 F.3d 1060, 1066 (9th Cir. 2016) (en banc) (qualified immunity analysis consists of two prongs: the first asks whether the plaintiff has made out a violation of a constitutional rights, and the second asks whether that right was clearly established at the time the defendant acted). Dr. Jensen's allegations readily make out such a violation because his speech addressed a "matter of public concern" and also satisfies the balancing analysis set forth in *Pickering v. Board of Education*, 391 U.S. 563 (1968). *See Demers*, 746 F.3d at 412.

Speech 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.* at 415 (internal quotation marks and citations omitted). The "essential question is whether the speech addressed matters of public as opposed to personal interest." *Id.* Public interest is "defined broadly," and consideration is given to "the content, form, and context of a given statement, as revealed by the whole record." *Id.*

In *Demers*, this Court held that the plan proposed and publicized by the professor involved a "matter of public concern." It emphasized that the plan that "did not focus on a personnel issue or internal dispute of no interest to anyone outside a narrow 'bureaucratic niche.'" *Id.* at 416. This Court also noted that the importance

of the proposal was indicated by the fact that the university had appointed a committee, of which the professor was a member, "to address some of the very issues addressed in [the] [p]lan," as well as the fact that the plan was widely distributed—to numerous university administrators, faculty members, alumni, friends, newspapers, and to the public via its posting on the professor's website. *Id.* at 416–17.

As in *Demers*, Dr. Jensen's speech—i.e., speech critical of significant aspects of a public college's curriculum standards and of the college administration's disregard for shared governance in implementing those standards—directly involves a matter of public concern. Dr. Jensen's speech did not focus on a narrow personnel or internal dispute; it addressed a matter that the NSHE had addressed, and that the College made the subject of a summit open to the broader community; and it was widely distributed to faculty, administrators, and members of the community in attendance at the Math Summit. Moreover, foundational AAUP documents—including the *1915 Declaration of Principles on Academic Freedom and Academic Tenure*, AAUP POLICY DOCUMENTS AND REPORTS 3–12 (hereinafter, "*1915 Declaration*"), and the *1940 Statement*—affirm that "[i]nstitutions of higher education are conducted for the common good" and that the achievement of this public purpose "depends upon the free search for truth and its free exposition." *1940 Statement* at 14. The right of faculty to speak freely and critically about major

curriculum changes and a college's departure from norms of shared institutional governance is plainly tied to that public purpose. As Dr. Jensen expressed, he believed the Co-Requisite Policy[3] would result in math students learning less, to the detriment of the broader community. And as this Court observed in *Demers*, institutional-governance-related speech is not only protected by the principle of academic freedom but can also involve a matter of public concern. *Demers*, 746 F.3d

[3] In June of 2019, the NSHE Board of Regents passed the Co-Requisite Policy, which places students into college level math classes despite deficiencies they might have in basic subjects such as geometry or algebra 1 or 2. The handout that Dr. Jensen prepared and distributed at the Math Summit stated that the math department's response to the Co-Requisite Policy would be "to lower the academic level of Math 120 so students will be able to complete the course at current rates. (The department has allowed completion rates to dictate the academic level of an exit math course.)." ER 194, 213, 236. The handout also described the impact of the policy on degree and certificate programs, stating that it "will directly impact 31% of [those] programs by lowering the math and technical skills of graduates in these programs." *Id.* The handout concluded with a discussion of the impact of this policy on the broader community, stating:

> Employers in the community pays our salaries, and subsidizes students' education, through their taxes. What do they expect in return? Answer: Qualified graduates. It is well known that employers, including all the high-tech companies coming into our area, value math skills because the more math classes a student has taken, the higher the salary an employer will pay. Well, employers will soon get much less than they have been paying for. TMCC is planning to do the exact opposite of what the community wants: We are going to lower the level of our exit classes and the math skills of our graduates, in the name of preserving completion rates.

ER 194, 214, 236.

at 416 ("[P]rotected academic writing is not confined to scholarship. . . . [A]cademics, in the course of their academic duties, also write memoranda, reports, and other documents addressed to such things as a budget, curriculum, departmental structure, and faculty hiring. Depending on its scope and character, such writing may well address matters of public concern under *Pickering*.").

The balancing test set forth in *Pickering* asks whether the faculty member's "interest in commenting upon matters of public concern" outweighs "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Demers*, 746 F.3d at 412 (internal quotation marks and citations omitted). The requirement that the speech satisfy *Pickering* balancing is squarely met in the case of expression like Dr. Jensen's. A professor's interest in speaking on curriculum issues related to the subject they teach, and which involve a matter of public concern, could hardly be more compelling, as such speech falls within the core of academic freedom. Curriculum matters lie squarely within the faculty's core competencies and implicate their freedom to teach, meaning that the faculty is in the best position to judge changes in curriculum matters and to offer their opinion for the public's benefit. Indeed, Dr. Jensen's speech was at least as related to teaching as the speech at issue in *Demers*, and in many ways was even more closely linked to teaching because of its focus on the curriculum and standards of student competence.

At the same time, no college has a legitimate interest in restricting such speech, particularly when it is undertaken in a non-disruptive manner, as it was in Dr. Jensen's case. The proper and effective functioning of colleges requires faculty primacy over curriculum matters and requires respect for shared governance. Thus, preventing faculty from speaking or retaliating against them for their speech on such matters actively impedes the efficient and effective performance of faculty duties and hinders the college's overall mission.

CONCLUSION

For the reasons stated above, this Court should reverse the district court's dismissal of Dr. Jensen's First Amendment claims against Defendants in their individual capacities.

Dated: February 25, 2024

Respectfully submitted,

/s/ Luke Busby
LUKE BUSBY

Counsel of Record for Amici Curiae

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s): **23-2545**

I am the attorney or self-represented party.

This brief contains 5013 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[ ] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[x] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
- [ ] it is a joint brief submitted by separately represented parties;
- [ ] a party or parties are filing a single brief in response to multiple briefs; or
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature _/s/ Luke Busby, Esq.___ **Date** _**2/25/2024**_____

CERTIFICATE OF AUTHORSHIP

The undersigned counsel affirms that no counsel for any party authored this brief in whole or in part; no party or party's counsel contributed money to fund preparation or submission of the brief; and no one but Nevada Faculty Alliance and the American Association of University Professors contributed money to fund the preparation or submission of this brief. In the interest of full disclosure, the AAUP states that it may seek grant funding from the AAUP Foundation, a Delaware non-profit corporation, for costs associated with preparing and filing this brief. See Fed. R. App. P. 29(a)(4)(E).

/s/ Luke Busby

LUKE BUSBY

Counsel of Record for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Luke Busby

LUKE BUSBY

Counsel of Record for Amici Curiae