Exhibit A

No. 23-3196

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JASON J. KILBORN,

Plaintiff-Appellant,

v.

MICHAEL AMIRIDIS, CARYN A. BILLS, JULIE M. SPANBAUER, DONALD KAMM, and ASHLEY DAVIDSON,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division,
No. 1:22-cv-00475
Hon. Sara L. Ellis

BRIEF OF *AMICUS CURIAE* THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS IN SUPPORT OF PLAINTIFF-APPELLANT AND IN FAVOR OF REVERSAL

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Appellate Court No: 23-3196

Short Caption: Kilborn v. Amiridis et al.

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INTEREST OF *AMICUS 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 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 in cases that implicate AAUP policies or that otherwise involve legal issues important to faculty members and the broader higher education community. *E.g.*, *Pernell v. Lamb*, No. 22-13992 (11th Cir. 2023); *Wortis v. Trustees of Tufts College*, No. SJC-13472 (Mass. 2023);

Capeheart v. Terrell, 695 F.3d 681 (7th Cir. 2012).

By participating as *amicus curiae* in the present case, the AAUP seeks to defend the principle of academic freedom, particularly the freedom of university faculty to teach without undue interference from the state or the university administration. To that end, this brief demonstrates that the district court erred when it dismissed Appellant Jason Kilborn's First Amendment retaliation claim. As explained below, Professor Kilborn's speech falls within the academic speech exception to *Garcetti v. Ceballos*, 547 U.S. 410 (2006)—an exception that numerous circuits have already recognized and that this Court should now join in recognizing in light of the vital importance of academic freedom, "a special concern of the First Amendment." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). Furthermore, Kilborn's speech addressed matters of public concern, both because it falls within the academic speech exception to *Garcetti* and because it was directed to issues of significant public discussion.

Counsel for *amicus* are the sole authors of this brief. No party or counsel to a party authored the brief in whole or part, nor has any party, counsel to a party, or any other person or entity contributed money to fund the preparation of or submission of the brief; nor has counsel for *amicus* represented any party in this or any other legal transaction that is at issue in this appeal.

SUMMARY OF THE ARGUMENT

Professor Kilborn, a member of the law school faculty at the University of Illinois Chicago ("UIC"), alleged that university administrators retaliated against him for speech in which he engaged in connection with his teaching duties. The targeted speech included a civil procedure final exam question concerning race and gender discrimination that contained abbreviated profane expressions for African-Americans and women, and several instances of classroom speech involving objectionable (to some) references to frivolous litigation and abusive, race-based pretextual traffic stops. The district court erroneously concluded that Professor Kilborn's speech did not involve a matter of public concern and was therefore not protected by the First Amendment.

I. This Court should expressly recognize that the holding of *Garcetti v. Ceballos*, 547 U.S. 410 (2006), does not apply to "speech related to scholarship or teaching," *id.* at 425. In *Garcetti*, the Supreme Court held that the First Amendment does not protect the speech of government employees when it is made "pursuant to their official duties," *id.* at 421. But the Court, citing concerns relating to academic freedom "as a constitutional value," expressly declined to decide whether its holding would apply to "expression related to academic scholarship or classroom instruction." *Id.* That question remains undecided in this circuit, but every other court of appeals to directly consider the issue has held that *Garcetti* does not apply to academic speech. This Court

should join its sister circuits in so holding. The ability of public university faculty to engage in scholarship and teaching without interference from their government-employer is an essential component of academic freedom, which the Supreme Court has long recognized as being "a special concern of the First Amendment." *Keyishian*, 385 U.S. at 603. Moreover, the basic policy rationale underlying the *Garcetti* decision—that government control over public employee speech is necessary to ensure the efficiency of government programs—does not apply to the scholarship or teaching-related speech of public university faculty. As foundational AAUP statements explain, academic freedom is essential to the functioning of the university as an institution, and a university cannot function if university officials are permitted to censor academic scholarship, teaching and related instructional speech, or engage in after-the-fact retaliation.

II-A. The district court erred when it concluded that Professor Kilborn's speech did not involve a "matter of public concern." A university's adherence to the principle of academic freedom is essential to the fulfillment of its public mission, and the subjects of academic scholarship and teaching are inherently of public concern. Accordingly, any speech that falls within the academic speech exception to *Garcetti*—which Professor Kilborn's speech plainly does—also involves, at least presumptively, a matter of public concern. In any event, Professor Kilborn's speech directly related to subjects that are matters of

concern to the broader community—racial discrimination and frivolous litigation—and therefore addressed "matters of public concern."

II-B. Speech that falls within the academic speech exception to *Garcetti* and that addresses a matter of public concern can only be restricted if the restriction satisfies the analysis set forth in *Pickering v. Bd. of Education*, 391 U.S. 563, 568 (1968), which balances "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* In the context of a public university's restriction of a faculty member's academic speech, *Pickering* balancing overwhelmingly favors the faculty member. Because the speech falls within *Garcetti*'s academic speech exception, the faculty member's interest in engaging in the speech is particularly strong, while the state's interest in restricting the speech is minimal in light of the fact that the effective functioning of universities requires that they adhere to the principle of academic freedom.

ARGUMENT

I. This Court should expressly recognize that Garcetti's holding does not apply to speech related to academic scholarship or teaching.

In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Supreme Court held that the First Amendment does not protect the speech of government employees if it is made "pursuant to their official duties," *id.* at 421. The particular facts of *Garcetti*, which concerned speech by an assistant district attorney, did not implicate academic freedom and did not involve circumstances remotely analogous to faculty speech in a public university classroom. Even so, the Court was sufficiently concerned that its decision might be unduly applied to academic speech that it went out of its way to note that it would not decide whether "customary employee-speech jurisprudence" would apply to "academic scholarship or classroom instruction." *Id.* at 425. The reason given by the Court was the concern about the ramifications that extending its holding to "speech related to scholarship or teaching" would have for academic freedom "as a constitutional value." *Id.*

Since the decision in *Garcetti*, four courts of appeals—the Second, Fourth, Sixth, and Ninth Circuits—have all declined to apply *Garcetti*'s holding on employee speech to speech related to academic scholarship or teaching (which this brief will alternatively refer to as "academic speech" for conciseness). *Heim v. Daniel*, 81 F.4th 212, 226 (2d Cir. 2023); *Meriwether v. Hartop*, 992 F.3d

492, 505 (6th Cir. 2021); *Demers v. Austin*, 746 F.3d 402, 411 (9th Cir. 2014); *Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 563 (4th Cir. 2011). In addition, the Fifth Circuit, in *Buchanan v. Alexander*, 919 F.3d 847 (5th Cir. 2019), applied *Pickering* and *Connick* rather than *Garcetti*—without mentioning *Garcetti*—to a university professor's First Amendment claim concerning classroom speech and conduct, *id.* at 852–53 (emphasizing that "academic freedom is a special concern of the First Amendment" (internal quotation marks omitted)); *see Heim*, 81 F.4th at 225. As the district court noted, the question remains open in this circuit.[1]

Like every other circuit to decide the question has done, this Court should hold that *Garcetti* does not apply to academic speech in the higher education

[1] This circuit applied *Garcetti* in two university cases that did not involve academic speech related to teaching or scholarship. *Burton v. Bd. of Regents of the Univ. of Wis. Sys.*, No. 20-2910, 2022 U.S. App. LEXIS 31520, at *10 (7th Cir. Nov. 15, 2022) (applying *Garcetti* to First Amendment claim of professor who asserted that she was fired for reporting sexual harassment, criticizing the university's handling of the case, and exposing corruption within her department and the administration), and *Renken v. Gregory*, 541 F.3d 769, 770, 773 (7th Cir. 2008) (applying *Garcetti* to a First Amendment claim brought by a university professor who alleged he was retaliated against after he "complained about the University's use of grant funds"). In *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 478–80 (7th Cir. 2007), this circuit applied *Garcetti* to a First Amendment claim brought by an elementary school teacher who claimed she was fired after she "took a political [anti-Iraq war] stance during a current-events session in her class," but added the caveat that "[h]ow much room is left for constitutional protection of scholarly viewpoints in post-secondary education was left open in *Garcetti* . . . and need not be resolved today."

context. The district court sidestepped this issue by relying entirely on its flawed "matter of public concern" analysis, but this Court should decide the *Garcetti* question first. As explained in Part II, below, the "matter of public concern" analysis must take into account whether the speech at issue implicates academic freedom, and speech that falls within the academic speech exception to *Garcetti* unequivocally does.

A. The freedom of college and university faculty to engage in academic speech—including speech related to teaching—is an essential component of academic freedom, which the Supreme Court has recognized as a special concern of the First Amendment.

An essential aspect of academic freedom is the freedom of college and university faculty to engage in scholarship and teach a given subject without undue interference, including from the government or university administration. The AAUP has long maintained that "teachers are entitled to freedom in the classroom in discussing their subject" and has stressed that 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 13, 14 (11th ed. 2015) (hereinafter, "*1940 Statement*"). A foundational statement that courts have routinely looked to for guidance in understanding and applying the principle of academic freedom, 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.[2] AAUP, *Endorsers of the 1940 Statement*, https://www.aaup.org/endorsers-1940-statement.

At its core, the freedom to teach means that, just as "scholars must be free to examine and test, they must also be free to explain and defend their results, and they must be free to do so as much before their students as before their colleagues or the public at large." *Freedom in the Classroom*, ACADEME, September–October 2007, 54–61, *available at* https://www.aaup.org/report/freedom-classroom.

The Supreme Court has long recognized that academic freedom is "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). The Court has also warned that "impos[ing] any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation," and that "[t]eachers and students must always remain

[2] *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.

free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

The Supreme Court's landmark decisions in *Sweezy* and *Keyishian* underscore the constitutional necessity of safeguarding academic freedom by protecting the university classroom from government interference. The issue in *Sweezy* was the constitutionality of a state government's investigation of a scholar who had delivered a lecture to a class of students at a state university. 354 U.S. at 235, 243–44. The Court held that the state's efforts to compel the scholar to answer questions about the lecture—including its subject and whether he had "advocated Marxism" or expressed the opinion that "Socialism was inevitable" in the United States—violated his rights under the Due Process Clause of the Fourteenth Amendment. *Id.*at 243–44, 254–55.

In doing so, the Court recognized that the scholar's "right to lecture" was "safeguarded by the Bill of Rights and the Fourteenth Amendment," adding that the state's investigation "unquestionably was an invasion of [his] liberties in the areas of academic freedom and political expression." *Id.* at 243–44, 250. The Court also explained that the protection of academic freedom was a matter of national life and death and warned of the dangers 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. In a widely cited

concurring opinion, Justice Frankfurter similarly stressed "the dependence of a free society on free universities," concluding that "[t]his means the exclusion of governmental intervention in the intellectual life of a university." *Id.* at 262.

In *Keyishian*, the Supreme Court again underscored the constitutional importance of academic freedom in colleges and universities. There, the Court sustained a challenge, brought by faculty members employed at a state university, to New York state's teacher loyalty laws—a set of statutes and administrative regulations aimed at preventing the employment of "subversive" persons. 385 U.S. at 591–92. Among the parts of the law being challenged was a provision requiring the removal of employees for "treasonable or seditious" utterances or acts, and a provision barring the employment of any person who "wilfully and deliberately advocates, advises or teaches the doctrine of forceful overthrow of government." *Id.* at 597–98 (internal quotation marks omitted). In striking down these provisions due to their unconstitutional vagueness, the Court emphasized their incursion upon academic freedom, "a special concern of the First Amendment." *Id.* at 603. The Court pointed, in particular, to the law's unconstitutional abridgement of academic freedom in classroom instruction, asking whether "the teacher who informs his class about the precepts of Marxism or the Declaration of Independence" would be in violation of the statute. *Id.* at 600. The Court also stressed that its decision was rooted in the constitutional necessity of preserving the freedom of teachers to

teach and of students to learn, stating that the Constitution "does not tolerate laws that cast a pall of orthodoxy over *the classroom*" and stressing that "[*t*]*he classroom* is peculiarly the 'marketplace of ideas.'" *Id.* at 603 (emphasis added).

The Supreme Court's repeated recognition that efforts to restrict teaching at public colleges and universities are antithetical to the ultimate purpose of higher education echoes longstanding AAUP statements, which affirm that "[i]nstitutions of higher education are conducted for the common good" and that the achievement of this purpose "depends upon the free search for truth and its free exposition." *1940 Statement* at 14. As the AAUP's *1915 Declaration of Principles on Academic Freedom and Academic Tenure*, AAUP POLICY DOCUMENTS AND REPORTS 3–12 (11th ed. 2015) (hereinafter, "*1915 Declaration*"), issued at the Association's founding,[3] explains, academic freedom is essential to the university's three essential functions: promoting inquiry and advancing the sum of human knowledge; providing instruction to students; and developing experts for public service. *Id.* at 7. In the absence of academic freedom, a university cannot fulfill these core functions and instead becomes a "proprietary institution," whose "purpose is not to advance knowledge by the unrestricted research and unfettered discussion of impartial

[3] The *1915 Declaration* was the first authoritative statement concerning academic freedom in the United States. William A. Kaplin & Barbara A. Lee, THE LAW OF HIGHER EDUCATION 706–07 (5th ed. 2013).

investigators," but rather to promote the "particular opinion[s]" of those who control it. *1915 Declaration* at 5. Adherence to academic freedom is critical for all universities, which, as public trusts, "have no moral right to bind the reason or the conscience of any professor," any "claim to such right [having been] waived by the appeal to the general public for contributions and for moral support in the maintenance, not of a propaganda, but of a non-partisan institution of learning." *Id.* at 5.

The essential role that academic freedom plays in the functioning of the university as an institution lies at the core of the reason why university faculty are unlike other public employees, especially when they engage in academic scholarship or speech related to teaching. As the Sixth Circuit has explained, "[t]he need for the free exchange of ideas in the college classroom is unlike that in other public workplace settings," "[a]nd a professor's in-class speech to his students is anything but speech by an ordinary government employee." *Meriwether v. Hartop*, 992 F.3d 492, 507 (6th Cir. 2021).

The importance of academic freedom to the effective functioning of the university as an institution also demonstrates why the policy rationale underlying *Garcetti* does not apply to academic scholarship or teaching-related speech in the university setting. The rationale for *Garcetti*'s rule exempting certain speech of public employees from First Amendment protection is that such a rule is necessary for the government to function effectively. The *Garcetti*

Court reasoned that "[w]ithout a significant degree of control over its employees' words and actions, a government employer would have little chance to provide public services efficiently." 547 U.S. at 418. The Court explained that public employees' speech can "contravene governmental policies or impair the proper performance of governmental functions." 547 U.S. at 419.

Unlike other types of public employment, the efficient accomplishment of university-level teaching or scholarship emphatically does *not* require that the government be permitted to exercise a "significant degree of control" over faculty speech. On the contrary, the "proper performance" of the government function at issue, namely instruction in the university classroom, demands that the government *not* be allowed to exercise such control, in order that the "free play of ideas" can take place in an atmosphere free from government-imposed orthodoxy of thought. *See Meriwether*, 992 F.3d at 507. As the Second Circuit explained in *Heim*, "professors at public universities are paid—if perhaps not exclusively, then predominantly—to speak, and to speak freely, guided by their own professional expertise, on subjects within their academic disciplines." 81 F.4th at 226–27. "And their university's 'governmental function[]' is to provide them a forum to do so." *Id.* This distinguishes them from "the typical government hierarchy, where the purpose of an employee's speech is to further the ends of the employer, on a course charted by someone higher up the chain-of-command, and where the wrong word at the wrong time

risks 'contraven[ing] governmental policies' or 'impair[ing] . . . governmental functions." *Id.* (citation omitted).

Thus, *Garcetti*'s efficiency-centered rationale is consistent with recognizing that the First Amendment protects academic scholarship and speech in the public university classroom. *See Demers*, 746 F.3d at 411-12 ("[G]iven the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, . . . *Garcetti* does not—indeed, consistent with the First Amendment, cannot—apply to [a public university professor's] teaching and academic writing." (internal quotation marks and citation omitted)).

Undergirded by the principle of academic freedom, the First Amendment protects speech in the university setting even if—in some respects, *especially* if—the speech involves controversial or divisive ideas or viewpoints. *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1126 (11th Cir. 2022) ("The Supreme Court has reiterated time and again—and increasingly of late—the 'bedrock First Amendment principle' that '[s]peech may not be banned on the ground that it expresses ideas that offend.'" (alterations in original) (quoting *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017))); *Meriwether*, 992 F.3d at 507 ("[P]ublic universities do not have a license to act as classroom thought police. They cannot force professors to avoid controversial viewpoints altogether in deference to a state-mandated orthodoxy."); *Papish v. Bd. of Curators of the*

Univ. of Mo., 410 U.S. 667, 670 (1973) (per curiam) ("[T]he mere dissemination of ideas . . . on a state university campus may not be shut off in the name alone of 'conventions of decency.'"); *Blum v. Schlegel*, 18 F.3d 1005, 1012 (2d Cir. 1994) (observing that "the efficient provision of services" by a state university "actually depends, to a degree, on the dissemination in public fora of controversial speech implicating matters of public concern"). In *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021), for example, the Sixth Circuit relied upon academic freedom in upholding the First Amendment claim of a public university professor who faced discipline for refusing to comply with a university policy requiring faculty to refer to students by their preferred pronouns. *Id.* at 507 (stating that "public universities do not have a license to act as classroom thought police" and "cannot force professors to avoid controversial viewpoints altogether in deference to a state-mandated orthodoxy"); *see also McAdams*, 914 N.W.2d at 712 (concluding that a university violated academic freedom by suspending a tenured faculty member for comments made on a personal blog that criticized an instructor for refusing to allow a student to debate gay rights).

Nor—to anticipate a potential argument that Appellees may make in this appeal—can limitations on faculty scholarship or teaching be justified on the grounds that such speech is "the government's speech" and therefore exempt from the protections of the First Amendment. That argument fails for a simple

reason: faculty speech related to academic scholarship or to teaching cannot reasonably be understood to be the government's speech. *See Heim*, 81 F.4th at 226–27. In *Shurtleff v. City of Boston*, 142 S. Ct. 1583 (2022), the Supreme Court identified three types of evidence used in "determin[ing] whether the government intends to speak for itself or to regulate private expression": (1) "the history of the expression at issue"; (2) "the public's likely perception as to who (the government or a private person) is speaking"; and (3) "the extent to which the government has actively shaped or controlled the expression." *Id.* at 1589–90. Given the strong tradition of academic freedom in American universities, exemplified by AAUP statements and the Supreme Court's foundational caselaw, the first and third factors strongly favor the conclusion that scholarship and the teaching-related speech of public university faculty is not "the government's speech." Indeed, Professor Kilborn had used the same exam question for ten years, without objection or interference from university administrators, before he was subjected to retaliation. Doc. 47 ¶ 16.

As for the second factor—the public's perception of who is speaking when academic scholarship or classroom teaching occurs—it is not at all evident how anyone could reasonably understand a faculty member's scholarship or teaching-related speech as representing the views of the university, let alone of the state government. Other types of faculty speech, such as administrative announcements and notifications required by law or university policy (e.g.,

notices regarding reasonable accommodations for persons with disabilities) serve as a useful contrast, as students and others could well understand those communications as conveying messages on behalf of the university or the state. *See Meriwether*, 992 F.3d at 507 ("Of course, some classroom speech falls outside the exception [to *Garcetti*]: A university might, for example, require teachers to call roll at the start of class, and that type of non-ideological ministerial task would not be protected by the First Amendment."). But common sense dictates that no one reasonably understood Professor Kilborn's speech as reflecting the views of UIC as an institution or the State of Illinois.

B. Every other court of appeals to squarely face the issue has correctly declined to extend the *Garcetti* rationale to university-level academic speech, and the facts of this case call for the same result.

As previously noted, every federal court of appeals to have directly considered the question has held that *Garcetti* does not extend to academic speech in the university setting. That alone is a compelling reason for this Court to reach the same result. *United States v. Tuggle*, 4 F.4th 505, 522 (7th Cir. 2021) (creating a circuit split "generally requires quite solid justification; we do not lightly conclude that our sister circuits are wrong") (quoting *Andrews v. Chevy Chase Bank*, 545 F.3d 570, 576 (7th Cir. 2008)).

Two aspects of those decisions' reasoning are also compelling. First, as the Ninth Circuit in *Demers* explained, it "would directly conflict with the

important First Amendment values previously articulated by the Supreme Court" if academic speech were not protected from the reach of *Garcetti*'s rule. 746 F.3d at 411. Those fundamental values are the ones acknowledged by the Supreme Court in *Sweezy* and *Keyishian* and articulated by AAUP statements. The Sixth Circuit in *Meriwether*, 992 F.3d at 506, and the Second Circuit in *Heim*, 81 F.4th at 226–28, applied similar reasoning, concluding that the *Garcetti* Court's refusal to expressly include academic speech within the reach of its holding, coupled with the impossibility of squaring such a result with decades of Supreme Court First Amendment caselaw, militated against extending *Garcetti*'s holding. *E.g.*, *Heim*, 81 F.4th at 227 (applying *Garcetti* to academic speech "certainly cannot be squared with the Supreme Court's long-professed, deep[] commit[ment] to safeguarding academic freedom as a special concern of the First Amendment." (internal quotation marks omitted) (collecting cases)).

Second, the speech at issue in the present case falls squarely within the *Garcetti* caveat because Professor Kilborn's speech plainly "related to . . . classroom instruction . . . or teaching." *Garcetti*, 547 U.S. at 425. The exam question and Professor Kilborn's in-class remarks related to the subject of instruction, and the exam question was designed to further engage and assess student understanding of the material. By comparison, the speech at issue in cases including *Meriwether* (a professor's refusal to use a student's preferred

pronouns), *Demers* (a professor's proposal to split the university's communication school into two separate units), and *Adams* (a professor's political discussions with other faculty and his public political commentary, which he included in an application for promotion), were all less closely connected to the core concerns of academic freedom than Professor Kilborn's speech, and yet in each case the court held that the speech came within the scope of the academic speech exception to *Garcetti*.

II. Because of their intimate connection to academic freedom, academic scholarship and teaching-related speech involve a "matter of public concern," and any permissible limitations on such speech must be narrowly drawn in conformance with *Pickering* balancing.

Recognizing that *Garcetti* does not apply to the academic scholarship and teaching-related speech of public university faculty leaves two further questions to be resolved under the *Pickering-Connick* framework, only the first of which this Court must resolve in this appeal. *Meriwether*, 992 F.3d at 507–08; *Demers*, 746 F.3d at 415. The first question is whether the speech at issue involves "a matter of public concern." *Meriwether*, 992 F.3d at 508; *Demers*, 746 F.3d at 415. The second—which the district court did not reach and which need not be decided here— is whether the interest of the faculty member in speaking on the matters outweighs the state's interest in restricting such expression. *Meriwether*, 992 F.3d at 508.

A. The ability of university faculty to freely engage in academic scholarship or teaching-related speech is essential to academic freedom, and thereby furthers the public purpose of higher education; accordingly, any speech that falls within *Garcetti*'s academic freedom exception involves "a matter of public concern."

In concluding that Professor Kilborn's speech did not involve a "matter of public concern," the district court relied on strands of caselaw that, crucially, did not involve teaching-related speech or other speech essential to academic freedom. Doc. 62 at 10–11. When the academic freedom related to his speech is properly taken into account, the erroneous nature of the district court's analysis becomes evident.

Speech addresses a matter of public concern if it "relates 'to any matter of political, social, or other concern to the community.'" *Meriwether*, 992 F.3d at 508 (quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983)). As explained in Part I, both the AAUP and the Supreme Court have long recognized that academic freedom is essential to the functioning of the university as an institution charged with furthering the common good. Because of its linkage to academic freedom and the public purpose of higher education, any speech that falls within the academic speech exception to *Garcetti* relates—presumptively at least—to "a matter of public concern." For, as the Sixth Circuit cogently explained in *Meriwether*, "what constitutes a matter of public concern and what raises academic freedom concerns is of essentially the same character." 992 F.3d at 507; *accord Heim*, 81 F.4th at 228 (recognizing that "underlying

Pickering's 'public concern' requirement is 'the principle that debate on public issues should be uninhibited, robust, and wide-open'" (citations omitted)).

Moreover, this is so regardless of "whether that speech is germane to the contents of the lecture or not." *Meriwether*, 992 F.3d at 507 ("[T]he academic-freedom exception to *Garcetti* covers all classroom speech related to matters of public concern, whether that speech is germane to the contents of the lecture or not."). Because the question of whether speech falls within the academic speech exception to *Garcetti* and whether the speech involves a "matter of public concern" are inextricably intertwined, the analysis provided in Part I of this brief counsels strongly in favor of deeming Professor Kilborn's speech to involve a matter of public concern.

In any event, the teaching-related speech at issue in the present case related to racial discrimination and frivolous litigation—issues germane to the subject matter of the class Professor Kilborn taught and that lie at the center of ongoing public debates—and thereby plainly involved matters of public concern. *See id.* (noting that "a teacher's in-class speech about 'race, gender, and power conflicts' addresses matters of public concern") (quoting *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 679 (6th Cir. 2001)); *Heim*, 81 F.4th at 229 (academic work that "may perhaps be unlikely to attract a broad audience" may nonetheless serve "a broad 'public purpose,' targeting matters of political,

social, and public policy salience," and "[t]hat is more than sufficient to clear, with plenty of room to spare, the 'public concern' bar").

B. Teaching-related speech may be subject to restriction in certain narrow circumstances, but that question must be considered at the *Pickering* balancing stage of the analysis.

It is possible that a public employee's speech that falls outside of *Garcetti*'s holding and that involves a matter of public concern may nonetheless be permissibly restricted by the government-employer, provided that the government establishes "an adequate justification for treating the employee differently from any other member of the public based on [its] needs as an employer." *Lane v. Franks*, 573 U.S. 228, 242 (2014) (internal quotation marks omitted) (quoting *Garcetti*, 547 U.S. at 418). This requires that the government's speech restriction satisfy the analysis set forth in *Pickering v. Bd. of Education*, 391 U.S. 563, 568 (1968), which balances "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.*; *accord Heim*, 81 F.4th at 228; *Meriwether*, 992 F.3d at 509.

In the context of a public university's restriction of a faculty member's academic speech, *Pickering* balancing overwhelming tends to favor the conclusion that the speech is protected by the First Amendment. Indeed, by

the time that such speech arrives at the *Pickering* balancing stage, the vast majority of the relevant analysis has already been done. Because the speech falls within *Garcetti*'s academic speech exception, the faculty member's interest in engaging in the speech is particularly strong, encompassing as it does all of the broader interests that academic freedom serves, as explained in Parts I and II-A of this brief. *See Heim*, 81 F.4th at 230; *Meriwether*, 992 F.3d at 509–10. On the other side of the ledger, the state's interest in restricting such speech in order to promote the efficient performance of the university as a public institution is minimal. As explained above, for universities to function effectively, administrators cannot be permitted to control faculty speech that relates to teaching or scholarship.

As the Second Circuit in *Heim* observed, the "typical" case in which university administrators seek to restrict a faculty member's academic speech involves the university's attempt "to discipline a college teacher for expressing controversial, even offensive views, or for criticizing their employer, or for speaking in a way that may upset or disturb their students." 81 F.4th at 230. Restrictions falling into any of those categories violate "the wealth of authority championing individual educators' interest in academic freedom and establishing, broadly, that the First Amendment tolerates neither laws nor other means of coercion, persuasion or intimidation that cast a pall of orthodoxy over the free exchange of ideas in the classroom." *Id.* (internal

quotation marks and citations omitted) (ultimately quoting *Keyishian*, 385 U.S. at 603). And in *Meriwether*, the Sixth Circuit described the interests favoring the faculty member's speech as being particularly powerful "in the context of the college classroom, where students' interest in hearing even contrarian views is also at stake." 992 F.3d at 510.

This Court should articulate these guiding principles in its opinion in this case, but it need not apply the *Pickering* balancing analysis to Professor Kilborn's speech. Appellees did not raise the issue of *Pickering* balancing in either of their motions to dismiss Professor Kilborn's complaints, and the district court did not perform that analysis. Should the issue be properly raised at a later stage of the proceedings, the above-stated principles will serve as an adequate guide to the district court.

CONCLUSION

For the reasons stated above, *amicus* AAUP urges this Court to reverse the district court's judgment with respect to Professor Kilborn's First Amendment retaliation claims.

Respectfully submitted,

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Respectfully submitted,

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DATED: February 22, 2024

CERTIFICATE OF FILING AND SERVICE

I, the undersigned attorney, hereby certify that on February 22, 2024, I filed the foregoing Brief of Amicus Curiae The American Association of University Professors in Support of Plaintiff-Appellant and in Favor of Reversal with the Clerk of the Circuit Court for the United States Court of Appeals for the Seventh Circuit via the Court's CM/ECF electronic filing system, and that all participants in this case are registered CM/ECF users, and that service will be accomplished electronically through the CM/ECF system.

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