No. 10-1413

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MICHAEL S. ADAMS,

PLAINTIFF-APPELLANT,

v.

THE TRUSTEES OF THE UNIVERSITY OF NORTH CAROLINA - WILMINGTON– M. TERRY COFFEY, JEFF. D. ETHERIDGE, JR., CHARLES D. EVANS, LEE BREWER GARRETT, JOHN A. McNEILL, JR., WENDY F. MURPHY, LINDA A. PEARCE, R. ALLEN RIPPY, SR., GEORGE M. TEAGUE, KRISTA S. TILLMAN, DENNIS T. WORLEY, AND KATHERINE L. GURGAINUS; ROSEMARY DE PAOLO; DAVID P. CORDLE; KIMBERLY J. COOK; AND DIANE LEVY,

DEFENDANTS-APPELLEES.

On Appeal from the
United States District Court for the Eastern District of North Carolina
Case No. 7:07-cv-00064
The Honorable Malcolm J. Howard

AMICI CURIAE BRIEF FOR THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, THE FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (FIRE), AND THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION

IN SUPPORT OF PLAINTIFF-APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Only one form needs to be completed for a party even if the party is represented by more than one attorney. Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case. Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements. Counsel has a continuing duty to update this information.

No. 10-1413 Caption: Adams v. Trustees of the University of North Carolina--Wilmington

Pursuant to FRAP 26.1 and Local Rule 26.1,

AAUP (name of party/amicus) who is amici (appellant/appellee/amicus), makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
   If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
   If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
   If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
   If yes, identify any trustee and the members of any creditors' committee:

CERTIFICATE OF SERVICE

****

I certify that on JULY 2, 2010 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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/s/ Rachel Levinson
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July 2, 2010
(date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 10-1413 Caption: Adams v. Trustees of the University of North Carolina--Wilmington

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F.I.R.E. (name of party/amicus) who is amici (appellant/appellee/amicus), makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
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July 2, 2010
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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 10-1413 Caption: Adams v. Trustees of the University of North Carolina--Wilmington

Pursuant to FRAP 26.1 and Local Rule 26.1,

Thomas Jefferson Center (name of party/amicus) who is amici (appellant/appellee/amicus), makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
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/s/ J. Joshua Wheeler
(signature)

July 2, 2010
(date)

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CONSENT TO FILE AS *AMICI CURIAE*

This brief is filed with the consent of the parties pursuant to Rule 29 (a) of the Federal Rules of Appellate Procedure.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The American Association of University Professors ("AAUP"), founded in 1915, is a non-profit organization of over 48,000 faculty, librarians, graduate students, and academic professionals, a significant number of whom are public employees. Its purpose is to advance academic freedom and shared university governance, to define fundamental professional values and standards for higher education, and to ensure higher education's contribution to the common good. The AAUP's policies have been recognized by the Supreme Court and are widely respected and followed in American colleges and universities. *See*, *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). In cases that implicate AAUP policies, or otherwise raise legal issues important to higher education or faculty members, the

AAUP frequently submits *amicus* briefs in the Supreme Court and the federal circuits (including this Court). *See, e.g., Grutter v. Bollinger*, 539 U.S. 306 (2003); *Regents of Univ. of Michigan v. Ewing*, 474 (U.S. 214 (1985); *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000), *cert. denied* 531 U.S. 1070 (2001); *Columbia Union Coll. v. Oliver*, 254 F.3d 496 (4th Cir. 1999); *Smith v. Virginia Commonwealth Univ.*, 84 F.3d 672 (4th Cir. 1995). By participating as an *amicus* in this case, the AAUP seeks to demonstrate the harm the district court's holding would do to academic freedom, as well as highlight the danger inherent in treating public faculty the same as other public employees for First Amendment purposes.

The Foundation for Individual Rights in Education (FIRE) is a non-partisan, 501(c)(3) non-profit educational and civil liberties organization dedicated to defending and promoting individual rights at our nation's colleges and universities. These rights include freedom of speech, legal equality, due process, religious freedom, and sanctity of conscience-the essential qualities of individual liberty and

dignity. FIRE believes that, for our nation's colleges and universities to best prepare students for success in our modern liberal democracy, the law must remain clearly and vigorously on the side of academic freedom. During its more than ten years of existence, FIRE has advocated on behalf of academic freedom in multiple states and on multiple campuses.

The Thomas Jefferson Center for the Protection of Free Expression is a non-partisan, non-profit organization located in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of free speech and press. The Center has pursued that mission in various forms, including the filing of amicus curiae briefs in this and other federal courts, and in state courts around the country. A particular focus of the Center's litigation and program efforts has been the relationship between the First Amendment and academic freedom.

STATEMENT OF FACTS

A full and complete account of the facts of this case is set out in the opening Brief of Plaintiff-Appellant. The following more limited

statement sets forth the facts that are relevant to the arguments of *amici curiae*.

Dr. Adams is a tenured professor at the University of North Carolina-Wilmington's (UNCW) Department of Criminology and Sociology. At the beginning of his career at UNCW Adams identified himself as a secular liberal; in 2000 he became a self-identified Christian conservative, and in 2003, he began writing for the conservative website Townhall.com. His articles commented on the climate of university campuses including UNCW, and other topics such as religion and discrimination.

Adams applied for a full professorship position in July 2006, which involved evaluations of his research, service, and teaching. According to the faculty handbook of UNCW, a dossier for promotion must include two types of materials: "refereed publications," which include "juried or peer-reviewed . . . writings," and "publications . . . not listed in the refereed category (e.g. abstracts, book reviews)." Application for Reappointment, Tenure and/or Promotion, http://www.uncw.edu/fac_handbook/employment/RTP/rec_format.ht

m (last visited June 29, 2010). With the application, Adams submitted his outside columns, speeches, and a related book as part of the non-refereed materials. The result was a 7-2 faculty vote against granting Adams full professorship.

Adams filed suit against UNCW in 2007, claiming violations of the First and Fourteenth Amendments, as well as Title VII of the Civil Rights Act of 1964. The District Court granted UNCW's motion for summary judgment on March 15, 2010. It is this judgment from which Adams is appealing.

SUMMARY OF ARGUMENT

Without declaring a position on the University's decision to deny Adams tenure, *amici* seek to show that the District Court for the Eastern District of North Carolina incorrectly applied *Garcetti v. Ceballos*, 547 U.S. 410 (2006) to this case. In *Garcetti*, the Supreme Court held that public employees receive no First Amendment protection when speaking pursuant to their official capacities. *Id.* at 421. Although *Garcetti* limited First Amendment protection for much public employee speech, it specifically reserved for later

resolution the more complex question of protection of *academic* speech. *Id*. at 425. In fact, the Fourth Circuit (among other jurisdictions) has expressly relied upon this reservation.

Because academic speech under the First Amendment is neither governed by *Garcetti* nor susceptible to the "official duties" analysis reflected in *Garcetti*, the scope of First Amendment protection for academic speech should be governed by more than a half-century of decisions, beginning with *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), that recognize the vital role that academic speech by college and university professors plays in our society and the First Amendment interest in that speech. Further, granting the University of North Carolina-Wilmington summary judgment on Adams' First Amendment claims sets a dangerous precedent by prematurely judging the matter, a step that another appellate court has noted may be inappropriate in First Amendment retaliation cases.

The illogical application of *Garcetti* to this case undermines some of the basic principles of academic freedom, a freedom that is

"of transcendent value to all of us and not merely the teachers concerned." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). The district court's decision could destroy First Amendment protection for all speech made by university professors pursuant to what the court deems to be their official duties. This decision, if allowed to stand, would have a chilling effect on research, innovation, and discourse within a public university – a place whose primary purpose is the development of knowledge through discussion, debate and inquiry.

For these reasons, *amici* urge this court to hold that materials in a faculty member's promotion file are protected by the First Amendment and to remand the case to the district court with instructions to reconsider the case in light of the half-century of precedent described below.

ARGUMENT

I. THE DISTRICT COURT MISAPPLIED THE *GARCETTI* DECISION.

In considering Adams' claim that his columns and publications were protected by the First Amendment,[1] the district court relied upon the three-part test enunciated in *McVey v. Stacy*, 157 F.3d 271 (4th Cir. 1998) for First Amendment protection of public employee speech, which states:

> First, the public employee must have spoken as a citizen, not as an employee, on a matter of public concern. Second, the employee's interest in the expression at issue must have outweighed the employer's interest in providing effective and efficient services to the public. Third, there must have been a sufficient causal nexus between the protected speech and the retaliatory employment action.

Adams v. Trustees of the University of North Carolina-Wilmington, No. 7:07-CV-64-H, *33 (E.D.N.C. Mar. 15, 2010) (order granting

[1] Adams originally wrote a column "criticizing UNCW and the department for alleged religious intolerance." *Adams v. Trustees of the University of North Carolina- Wilmington, No.* 7:07-CV-64-H, *6 (E.D.N.C. Mar. 15, 2010) (order granting summary judgment). He then wrote a column for the website Townhall.com, where he critiqued the climate on university campuses, "including issues of academic freedom, constitutional abuses, discrimination, race, gender, homosexual conduct, feminism, Islamic extremism and morality." *Id.* The website also "showcased plaintiff's conservative religious beliefs." *Id.* His column commented on organizations such as the National Organization for Women's Orlando, Florida chapter, calling them "detached from reality," "irrational [and] hopelessly caught up in the past." *Id.* at 10. Adams also published a book related to his column, which he included in the application. *Id.* at 16.

summary judgment) (citations omitted) (the "*McVey* test"). The Supreme Court added a further wrinkle to *McVey* in *Garcetti*, holding that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes and the constitution does not insulate their communications from employer discipline." 547 U.S. at 421.

The district court in this case began by determining whether, under the first prong of *McVey*, Adams spoke as a citizen or an employee. Relying on the Supreme Court's analysis of "official speech" in *Garcetti*, the district court held that because the plaintiff included his online column and book in his application for promotion, he acknowledged that they were expressions made within his professional duties and were therefore created as an employee, not a citizen.[2] *Adams*, No. 7:07-CV-64-H at *33. The court claimed this trumped all earlier disclaimers by Adams and others that his included works were not related to his job. *Id*. Invoking *Garcetti*, the

[2] Adams asserts that he did not in fact include the materials in his application for promotion, and instead merely referenced them, as required, in a separate section on non-refereed materials. For the purposes of this brief, *amici* adopt the analysis of the court, which presumed that the materials were a part of his promotion materials.

district court concluded that Adams spoke as an employee, not as a citizen, and that his speech therefore lacked First Amendment protection under the first prong of *McVey*.

By doing so, the district court incorrectly construed the majority opinion in *Garcetti* to apply to academic speech, while the majority had in fact *specifically reserved* for resolution at a later date the question of the scope of speech in the public academy. In *Garcetti*, while holding that the First Amendment does not protect expressions made by employees "pursuant to their official duties," the Supreme Court added one vital caveat:

> There is some argument that expression related to academic scholarship or classroom instruction *implicates additional constitutional interests* that are not fully accounted for by this Court's customary employee-speech jurisprudence. *We need not, and for that reason do not*, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.

547 U.S. 410 at 425 (emphases added). Essentially, the Supreme Court in *Garcetti* reserved the very issue that the district court in this case prematurely resolved: First Amendment protection for academic speech by professors at public universities.

The Fourth Circuit itself has expressly taken a deferential view to that aspect of the Supreme Court's decision in *Garcetti*. In *Lee v. York County School Division*, a high school teacher claimed that his school board violated his freedom of speech after his posted materials were removed from a classroom bulletin board. 484 F.3d 687 (4th Cir. 2007). In deciding whether the teacher's speech was protected, the Fourth Circuit declined to apply *Garcetti*, noting that "[t]he Supreme Court in *Garcetti* . . . explicitly did not decide whether [the *Garcetti*] analysis would apply in the same manner to a case involving speech related to teaching." *Id.* at 695, n. 11.

Other jurisdictions have also followed this guidance as well. *See, e.g., Kerr v. Hurd*, 2010 WL 890638, *20 (S. D. Ohio Mar. 15, 2010) ("[T]his court would find an academic exception to *Garcetti*. Recognizing an academic freedom exception to the *Garcetti* analysis is important to protecting First Amendment values."); *Evans-Marshall v. Board of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 2008 WL 2987174, *8 (S. D. Ohio July 30, 2008) ("Based on the explicit caveat in the majority opinion of *Garcetti* that the Court's

decision therein did not necessarily apply 'in the same manner to a case involving speech related to scholarship or teaching,' this Court agrees with the Fourth Circuit that it is not clear that *Garcetti* necessarily applies to the facts of this case.") (citations omitted); *Johnson v. Poway Unified Sch. Dist.*, 2010 WL 768856, *14 (S. D. Cal. Feb. 25, 2010) ("All of the decisions of the Supreme Court touching on the subject acknowledge a teacher's right to engage in protected speech. No Supreme Court decision holds to the contrary."); *Sheldon v. Dhillon*, 2009 WL 4282086, *3 (N.D. Cal. Nov. 25, 2009) ("Thus, *Garcetti* by its express terms does not address the context squarely presented here: the First Amendment's application to teaching-related speech.").

The district court therefore acted in error when it disregarded the Supreme Court's clear reservation of speech related to scholarship or teaching and instead applied the Court's "official duties" analysis to Adams' speech, holding that his inclusion of controversial materials in the promotion application was an acknowledgment that the expressions were "made pursuant to [his]

official duties" as a faculty member. *Adams*, No. 7:07-CV-64-H at *34. The court claimed this inclusion trumped any earlier disclaimers that the speech was not made pursuant to official duties, and thereby transformed it into unprotected speech. *Id.* at 34-35.

The court's decision, while mistakenly relying upon *Garcetti*, simultaneously suggested that *all* materials included in a promotion or tenure packet would be unprotected by the First Amendment. A university could constitutionally penalize a faculty member not just for her extramural speech but for the content of all of her scholarly work; as the court noted:

> The court concludes, under *Garcetti*, that the columns, publications, and presentations plaintiff included in his application constituted – in the context of the promotion evaluation – expressions made pursuant to plaintiff's professional duties. The court further finds that the record contains *no evidence of other protected speech* (*i.e., speech not presented by plaintiff for review as part of his application*) playing any role in the promotion denial.

Adams, 7:07-CV-64-H at *35 (emphasis added). This analysis, if allowed to stand, would render the *entire* corpus of an application package unprotected under the First Amendment and faculty

members at public universities vulnerable to retaliation for the content of their speech, to the ultimate detriment of the public's interest in debate, discovery, and innovation.

Further, the district court confused the capacity in which the speech was *created* (a faculty member speaking on a variety of issues that captured his interest) with the purpose for which the speech was *submitted* (the promotion application) in holding that Adams' inclusion of the speech in his application *trumped* all earlier acts or statements characterizing the speech. The court also used different analyses of Adams' role as "citizen" or "employee" to evaluate different allegedly retaliatory actions, making the categorization of Adams as "citizen" or "employee" dependent upon the university's actions. *Id.* at *36 ("The court's analysis, *supra*, of whether plaintiff's speech was made as a citizen or as an employee, is therefore inapplicable here."). This approach has the potential to curb academic development by setting a precedent that protection for expression – whether spoken in an official capacity or in an unofficial capacity on matters of public concern – shifts depending upon the

circumstances under which it is later read. Moreover, the court's analysis does not even begin to address the complicated issues posed by the combination of materials submitted by Adams, such as how to characterize Adams' various forms of speech. The court's decision, if allowed to stand, would therefore create a chilling environment in which professors and students, unsure of the status of their communication, would be unable or unwilling to freely discuss and debate vital academic issues – a troubling and overbroad denial of protection of academic expression.

As the Fourth Circuit has previously recognized, this application cannot and does not accurately reflect the Supreme Court's understanding of the special nature of academic speech in *Garcetti* or in the Court's previous expressions of the importance of that speech over the last half century. This is especially so where that same court has recognized that our nation is "deeply committed to safeguarding academic freedom." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

In fact, the Fourth Circuit in *Lee* specifically invoked "special

considerations" to be assessed when determining whether speech is protected in the academic setting, a standard that would be completely eroded if courts were to follow a bright-line rule that any tenure or promotion submission is no longer safeguarded by the First Amendment. *See Lee*, 484 F.3d at 696. If other courts were to follow the court below, any statements made in class, in conferences or in publications could be unprotected as a part of a professor's apparent official duties. This standard simply cannot apply to those who are responsible for fostering knowledge, exploration, and even dissent.

Moreover, the district court in this case proceeded as if the final note about academia in the *Garcetti* decision were irrelevant. Had the court below even acknowledged the degree to which this case invited resolution of the issue *Garcetti* reserved, the rationale behind the district court's departure could have been addressed directly. By contrast, the court made an implicit and over-inclusive assumption that academic expression is no different from any other public employee speech, without discussing the reasoning behind its logic.

The district court erred in using the "official duties" analysis in *Garcetti* to analyze First Amendment protections for academic speech and granting summary judgment in favor of the university. This court should therefore acknowledge the Supreme Court's consistent recognition of the First Amendment protections for academic speech, as expressed most recently in the majority's reservation in *Garcetti*, and return the case to the district court for further analysis under the longstanding precedent described below.

II. THE DISTRICT COURT'S DECISION THREATENS THE BASIC PRINCIPLES OF ACADEMIC FREEDOM.

The district court's grant of summary judgment to the University of North Carolina-Wilmington also undermines some of the basic principles of academic freedom valued in American jurisprudence.

A half century of decisions by the United States Supreme Court have established that "academic freedom is of transcendent value to all of us and not merely to the teachers concerned" and for that reason is "a special concern of the First Amendment." *Keyishian v.*

Board of Regents, 385 U.S. 589, 603 (1967). The Court has "long recognized that . . . universities occupy a special niche in our constitutional tradition," *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003), and that as "a traditional sphere of free expression," universities play a role "fundamental to the functioning of society." *Rust v. Sullivan*, 500 U.S. 173, 200 (1991).

As the American Association of University Professors said in its initial seminal statement on the matter, universities "promote inquiry and advance the sum of human knowledge," serving as "intellectual experiment station[s], where new ideas may germinate and where their fruit . . . may be allowed to ripen until finally, perchance, it may become a part of the accepted intellectual food of the nation or the world." American Association of University Professors, *1915 Declaration of Principles on Academic Freedom and Academic Tenure*, POLICY DOCUMENTS AND REPORTS at 295-97 (10th ed.).

In order to ensure that universities fulfill this important function, "teachers must always remain free to inquire, to study and

to evaluate, to gain new maturity and understand; otherwise our civilization will stagnate and die." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). The ability of university professors to voice their academic views without fear of retaliation is essential. As one expert on academic freedom has noted, "[s]cholarly independence" must be protected and may "entitle[] the professor to more freedom from employer control than enjoyed by the typical employee." David M. Rabban, *Functional Analysis of "Individual" and "Institutional" Academic Freedom under the First Amendment*, Law and Contemporary Problems 242 (Summer 1990); *see also* Larry G. Gerber, "Inextricably Linked: Shared Governance and Academic Freedom, *Academe: The Bulletin of the American Association of University Professors* 22 (May-June 2001) ("[F]or institutions of higher education to fulfill their educational mission, teachers and researchers need protections that other citizens do not require").

This additional freedom is essential to fulfilling universities' purpose of serving the common good through the pursuit of knowledge:

> [T]he function of seeking new truths will sometimes mean . . . the undermining of widely or generally accepted beliefs. It is rendered impossible if the work of the investigator is shackled by the requirement that his conclusions shall never seriously deviate either from generally accepted beliefs or from those accepted by the persons, private or official, [who administer] universities.

Matthew W. Finkin and Robert C. Post, *For the Common Good: Principles of American Academic Freedom*, p. 34-35 (citing Arthur O. Lovejoy, *Academic Freedom,* in *Encyclopedia of the Social Sciences* 384, 384).

Indeed, another federal appellate court has recently recognized that this indelible function of the university is inseparable from the academy's critical contributions to society:

> The right to provoke, offend and shock lies at the core of the First Amendment. This is particularly so on college campuses. Intellectual advancement has traditionally progressed through discord and dissent, as a diversity of views ensures that ideas survive because they are correct, not because they are popular. Colleges and universities – sheltered from the currents of popular opinion by tradition, geography, tenure, and monetary endowments – have historically fostered that exchange. But that role in our society will not survive if certain points of view may be declared beyond the pale.

Rodriguez v. Maricopa County Cmty. Coll. Dist., 2009 U.S. App. LEXIS 29101 at *10-11 (9th Cir. May 20, 2010).

The district court's application of *Garcetti* would strip away First Amendment protection for speech made by university professors "pursuant to their 'official duties.'" *Adams*, No. 7:07-CV-64-H at*34. Such a ruling would eliminate the protections that are essential for university professors to properly contribute to academia and to society. At a fundamental level the "official duty" of a university professor is to express her academic opinion on any matter within her expertise without regard to the government's position on the subject. Holding that university professors are not entitled to First Amendment protection for speech made pursuant to their role as academics would silence the very speech for which they are recruited. *See* Rabban, *supra*, at 242 ("[I]t makes no sense to expect professors to engage in critical inquiry and simultaneously to allow punishment for its exercise.").

Both in practice and in constitutional law, the actual duties of state university professors implicate – indeed, demand – a broad

range of discretion and autonomy that find no parallel elsewhere in public service. Much of the controlling language of *Garcetti* implicitly recognizes the profound differences between academic speech by professors and other public employees, something which the court below declined to do. For example, the *Garcetti* majority's suggestion that most public employees are subject to "managerial discipline" on the basis of statements contrary to agency policy would be anathema in the academic setting; indeed, academic speech usually does not represent the official policy or view of the university. Further, although the *Garcetti* majority comfortingly referred to "whistle-blower protection laws and labor codes" as a parallel source of protection for public workers, such alternate recourses are unlikely to avail most state university professors.

Conflating professors and public employees for First Amendment purposes would stifle a professor's ability to speak candidly and fearlessly. The U.S. District Court for the Southern District of Ohio recently recognized this point, explicitly finding an academic freedom exception to *Garcetti*: "Recognizing an academic

freedom exception to the *Garcetti* analysis is important to protecting First Amendment values" because "[u]niversities should be the active trading floors in the marketplace of ideas." *Kerr v. Hurd*, 2010 WL 890638, *20 (S.D. Ohio Mar. 15, 2010). Because of the critical role that the academic community plays in educating the public and expanding the scope of human knowledge, the boundaries around protected speech must be broad so as to not chill the public discourse. These critical First Amendment rights can be vindicated only through access to the courts. *See, e.g., Posey v. Lake Pend Orielle School Dist. No. 84,* 546 F.3d 1121, 1123 (9th Cir. 2008) (stating that summary judgment is inappropriate in cases where the scope and duties of employment are not facially clear).

Amici fully endorse the district court's recognition of the critical role that faculty peer review plays in hiring and promotion decisions, and laud the court for its deference to properly-constituted faculty bodies. Where a faculty member charges that he or she has been the victim or target of retaliation in violation of his or her constitutional rights or rights to be free from discrimination, however, the courts

may appropriately play a limited role in assessing whether the faculty decision-making function has been impaired by impermissible considerations.

Amici also take no position on whether or not Adams actually suffered retaliation for his speech; that is a fact-oriented inquiry best entrusted to the district court, undertaken by appropriately considering the complex issues and implications of the case. This requires application of the correct analytic framework and proper consideration of all of the special issues in academia – a consideration that cannot be made properly through summary judgment or reliance upon the inapposite "official duties" framework articulated for most public employee speech in *Garcetti*.

Therefore, *amici* respectfully urge this court to recognize the Supreme Court's exception for academic speech, and to remand this case to the court below for a proper analysis of the unusually complicated facts in light of precedent, the longstanding principles of academic freedom, and the reservation for academic speech articulated in the majority's opinion in *Garcetti*.

CONCLUSION

For the foregoing reasons, *amici* respectfully request this Court remand the case to the court below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,108 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. R. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in fourteen point Century Schoolbook font.

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 31 and Fourth Circuit Rule 31(d), I hereby certify that on July 2, 2010, eight paper copies of the foregoing brief were sent via United States Postal Service, postage prepaid, to the Clerk of the Court of the United States Court of Appeals for the Fourth Circuit, a digital copy of the brief was uploaded to the Court's website, and two paper copies of the brief were mailed, postage prepaid, at the following addresses:

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