Case No. 20-4059

In the

United States Court of Appeals

for the

Tenth Circuit

KEN PETERSON, an individual
Plaintiff-Appellant,

v.

RICHARD WILLIAMS, in his individual and official capacities;
DOAJO HICKS, in his individual and official capacities;
MICHAEL LACOURSE, in his individual and official capacities;
LYNN JOSEPH, in her individual and official capacities;
DIXIE STATE, a public collect of the State of Utah;
JOHN DOES I-X, in their individual and official capacities;
ROE ENTITIES I-X,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Utah (Salt Lake City), Case No. 4:19-CV-0062-DB-PK · Honorable Dee Benson, Senior U.S. District Judge

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION IN SUPPORT OF PLAINTIFF-APPELLANT, URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* certifies that it is a § 501(c)(3) nonprofit organization. It has no parent corporations and no publicly traded stock.

The Foundation for Individual Rights in Education (FIRE) respectfully seeks leave under Federal Rule of Appellate Procedure 29(a)(3) to file the accompanying brief as *amicus curiae* in support of Plaintiff-Appellant Ken Peterson urging reversal of the district court's order dismissing the case under Federal Rules of Civil Procedure 8 and 12. In support of this motion, FIRE states:[1]

1. FIRE is a nonpartisan, nonprofit organization dedicated to protecting civil liberties at our nation's institutions of higher education. Since 1999, FIRE has successfully defended the expressive rights and academic freedom of thousands of students and faculty members across the United States. FIRE defends these rights at both public and private institutions through public commentary and advocacy, litigation on behalf of students and faculty members, and participation as *amicus curiae* in cases that implicate student and faculty rights, like the one now before this Court. *See, e.g.*, *B.L. v. Mahanoy Area Sch. Dist.*, 964 F.3d 170, 183 (3d Cir. 2020) (citing with approval FIRE's *amicus curiae* brief in holding that a student's online speech was protected by the First Amendment); *see also* Brief for FIRE as *Amicus Curiae* Supporting Plaintiff-Appellant, *Kashdan v. George Mason Univ.*, No. 20-1509 (4th Cir. Aug. 19, 2020); Brief for FIRE as *Amicus Curiae* Supporting Plaintiff-Appellant-Petitioner, *McAdams v. Marquette Univ.*, 2018 WI 88 (2018);

[1] Peterson consented to the filing of the proposed brief. FIRE sought Defendants-Appellees' consent by electronic mail on September 24, 2020, but had not received a response at the time of the filing of this motion.

Brief for FIRE, et al. as *Amici Curiae* Supporting Plaintiff-Appellant, *Adams v. Trs. of the Univ. of N. Carolina-Wilmington*, 640 F.3d 550 (4th Cir. 2011). The faculty FIRE defends rely on the First Amendment's protection of expressive activity and academic freedom, which "is of transcendent value to all of us and not merely to the teachers concerned." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

2. For more than two decades, FIRE has closely monitored jurisprudential developments impacting faculty speech, and FIRE's advocacy work requires careful attention to emerging trends in both the type and frequency of instances of faculty censorship. Given FIRE's extensive experience defending university faculty at institutions across the country, FIRE is uniquely positioned to provide this Court with a valuable perspective on the threat to faculty expressive rights presented by the district court's ruling, beyond the arguments presented by the parties. *See* Fed. R. App. P. 29, 1998 advisory comm. note (quoting S. Ct. R. 37.1) ("'An *amicus curiae* brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court.'").

3. FIRE's brief is intended to provide this Court with a sense of the larger stakes of the matter now before it. For the benefit of all students, faculty, and the public at large, continued clarity regarding the vital importance of faculty

First Amendment rights is necessary. "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). As explained in the proposed *amicus curiae* brief, the district court's ruling, if allowed to stand, will endanger faculty rights, not only at Dixie State University, but at public colleges and universities nationwide.

4. For the foregoing reasons, FIRE respectfully requests that the Court grant this motion and permit leave to appear as *amicus curiae* and file the accompanying brief in support of Plaintiff-Appellant. *See Hydro Res., Inc. v. EPA*, 608 F.3d 1131, 1143 n.7 (10th Cir. 2010) (leave to file granted because *amici* showed "an adequate interest and present[ed] arguments that are useful to this court.").

Dated: October 5, 2020

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CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because this motion contains 626 words.

2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14-point Times New Roman font.

Dated: October 5, 2020

/s/ Darpana M. Sheth
Darpana M. Sheth
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CERTIFICATE OF DIGITAL SUBMISSION

Counsel for *Amicus Curiae* Foundation for Individual Rights in Education in support of Plaintiff-Appellant, urging reversal, hereby certifies that all required privacy redactions have been made, which complies with the requirements of Federal Rule of Appellate Procedure 25(a)(5).

Counsel also certifies that any and all hard copies submitted to the Court are exact copies of the ECF filing from October 5, 2020.

Counsel further certifies that the ECF submission was scanned for viruses with the most recent version of a commercial virus scanning program (Vipre software version 12.0.7874; Definitions version 87206 – 7.86132 [October 5, 2020]; Vipre engine version 3.9.2671.2 – 3.0), and, according to the program, is free of viruses.

Dated: October 5, 2020

/s/ Darpana M. Sheth
Darpana M. Sheth
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on October 5, 2020, which will automatically send notification to the counsel of record for the parties.

Dated: October 5, 2020

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FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION

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BRIEF OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION IN SUPPORT OF PLAINTIFF-APPELLANT, URGING REVERSAL

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INTEREST OF *AMICUS CURIAE*[1]

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to protecting civil liberties at our nation's institutions of higher education. Since 1999, FIRE has successfully defended the expressive rights and academic freedom of thousands of students and faculty members across the United States. FIRE defends these rights at both public and private institutions through public advocacy, litigation, and participation as *amicus curiae* in cases that implicate student and faculty rights, like the one now before this Court. *See, e.g.*, *B.L. v. Mahanoy Area Sch. Dist.*, 964 F.3d 170, 183 (3d Cir. 2020) (citing with approval FIRE's *amicus curiae* brief in holding that student's online speech was protected by the First Amendment); *see also* Brief for FIRE as *Amicus Curiae* Supporting Plaintiff-Appellant, *Kashdan v. George Mason Univ.*, No. 20-1509 (4th Cir. Aug. 19, 2020); Brief for FIRE as *Amicus Curiae* Supporting Plaintiff-Appellant-Petitioner, *McAdams v. Marquette Univ.*, 2018 WI 88 (2018); Brief for FIRE, et al. as *Amici Curiae* Supporting Plaintiff-Appellant, *Adams v. Trs. of the Univ. of N. Carolina-Wilmington*, 640 F.3d 550, 553 (4th Cir. 2011).

[1] Pursuant to Rule 29(a)(4) of the Federal Rules of Appellate Procedure, counsel for *amicus* FIRE states that no counsel for a party authored this brief in whole or in part and no person, other than FIRE, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. While Plaintiff-Appellant has consented to the filing of this brief, Defendants-Appellees did not respond to a request for consent.

SUMMARY OF ARGUMENT

Amicus FIRE's work demonstrates all too clearly that public faculty speech rights are under threat at institutions nationwide. The district court's flawed ruling dismissing the complaint for failure to plausibly allege a First Amendment claim ignores our national commitment to academic freedom and subverts decades of precedent recognizing the importance of robust First Amendment protection for faculty expression. Allowing it to stand will encourage campus censors and send a chilling message to faculty members who dare to voice critical, dissenting, unpopular, or merely inconvenient ideas that they may expect punishment or termination without recourse under the First Amendment. This result cannot be squared with the Supreme Court's longstanding conclusion that "[t]o impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation." *Sweezy v. N.H.*, 354 U.S. 234, 250 (1957). This Court should reverse the district court's dismissal and remand.

Dixie State University suspended Professor Ken Peterson for criticizing its leadership and controversial treatment of a faculty colleague, and then fired him for refusing to sign a "Last Chance Agreement" that would have restricted his speech in the future. In holding that Peterson failed to state a First Amendment claim, the district court erred in applying the "official duties" exception to the First Amendment set forth in *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

In *Garcetti*, the Supreme Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes." *Id.* The *Garcetti* exception impacts the expressive rights of more than 20 million government employees across a vast range of professions. But of this varied and sprawling workforce, the Court explicitly recognized that applying the *Garcetti* framework to just one particular sector—public university faculty—raised special First Amendment concerns. *Id.* at 425.

To account for the "important ramifications for academic freedom" recognized by the *Garcetti* Court, *id.*, other circuits have declined to apply the *Garcetti* exception to speech by faculty at public institutions. *Buchanan v. Alexander*, 919 F.3d 847, 853 (5th Cir. 2019); *Demers v. Austin*, 746 F.3d 402, 409–10 (9th Cir. 2014); *Adams*, 640 F.3d at 560–62. Instead, they apply the traditional *Pickering* balancing test for government employee speech. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). To protect expressive rights and academic freedom at public universities like Dixie State, this Court should take the opportunity presented by this case to follow their lead. Applying *Pickering*, this Court should find that Peterson sufficiently alleged facts demonstrating that his speech addressed a matter of public concern and Peterson's expressive interests outweighed Dixie State's interest in efficiency.

Even if this Court declines to follow its sister circuits, the *Garcetti* exception to the First Amendment is inapplicable to Peterson's speech because he spoke outside of his official duties. Peterson spoke his mind as a private citizen about matters of public concern he learned of through his employment and about university decisions that implicate his academic freedom. Contrary to the district court's cursory analysis, public employee speech does not lose protection simply because it concerns information related to a public employee's job, and the public employee speech doctrine cannot be read so broadly as to leave a public employee functionally unable to speak as a citizen about matters related to her employment. Because the district court's ruling ignores this nuance, this Court should reverse.

To prevent public universities from conditioning faculty employment on coercive waivers of First Amendment rights, this Court should further find the "Last Chance Agreement" that Dixie State fired Peterson for refusing to sign an unconstitutional prior restraint on speech. On its face, the Agreement imposed viewpoint-discriminatory conditions on Peterson's expressive rights, vesting unbridled authority in Dixie State administrators to police his expression both as a citizen and as an employee. Both the Agreement and Peterson's termination violate the First Amendment.

FIRE's defense of public university faculty members investigated, suspended, and fired for exercising their First Amendment rights illustrates the immediacy of

the threat to faculty speech rights. Allowing the district court's ruling to stand would grant public universities nationwide permission to punish faculty for speaking out on issues related to faculty governance and academic freedom. To stem the tide of campus censorship and protect faculty expression and academic freedom, this Court should reverse and remand to the district court to allow Peterson to prove his well-pled allegations.

ARGUMENT

I. Peterson's Speech Is Protected By the First Amendment.

More than a half-century ago, the Supreme Court recognized the importance of protecting the expressive rights of public university faculty, declaring that "[t]o impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation." *Sweezy*, 354 U.S. at 250. But this vital commitment is comprised when, as below, courts analyzing public employee speech fail to account for academic freedom and faculty speech rights.

The Supreme Court established modern public employment First Amendment analysis in *Pickering*, 391 U.S. 563, and *Connick v. Myers*, 461 U.S. 138 (1983). Under the well-established *Pickering/Connick* analysis, an employee's speech is protected if (1) the speech concerned a matter of public concern, and (2) the "employee'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." *Dill v. City of Edmond*, 155 F.3d 1193, 1201 (10th Cir. 1998) (internal quotation omitted).

More than two decades after *Connick*, the Supreme Court carved out an exception to First Amendment protection for public employee speech. In *Garcetti v. Ceballos*, a 5-4 majority held 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.

Applying *Garcetti*, the district court concluded that Professor Ken Peterson's speech was not protected by the First Amendment because his criticism of Dixie State's termination of a faculty colleague and the leadership of its theater department chair constituted speech pursuant to his official duties as a faculty member. *Peterson v. Williams*, No. 4:19-cv-00062-DB-PK, slip op. at 7 (D. Utah Apr. 15, 2020). This ruling threatens academic freedom and faculty speech rights by permitting public universities like Dixie State to fire tenured faculty simply for criticizing institutional decision-making that impacts scholarship and teaching.

Because Peterson spoke about university decisions that implicate academic freedom and faculty governance, this Court should follow the lead of its sister circuits by declining to apply *Garcetti,* and instead analyze Peterson's speech under the traditional *Pickering* balancing test. Under *Pickering*, Peterson's speech is

protected by the First Amendment because it addressed matters of public concern and his interests in doing so outweigh Dixie State's speculative interest in avoiding disruption to its operations. Even if this Court is unwilling to join other circuits in finding that *Garcetti* is unsuitable for analyzing public university faculty speech, *Garcetti* is still inapplicable to Peterson's speech, because he spoke as a private citizen, not pursuant to his official duties.

A. The District Court Erred By Applying the *Garcetti* Exception.

Because Peterson's speech concerned institutional decisions affecting academic freedom, the district court's application of *Garcetti* was incorrect. This Court should follow the lead of its sister circuits by recognizing the importance of academic freedom and foregoing *Garcetti* for *Pickering* analysis in cases involving public faculty speech that implicates academic freedom.

1. The *Garcetti* Court Recognized the Importance of Academic Freedom, a "Special Concern of the First Amendment."

There are approximately twenty million public employees in the United States, ranging from desk clerks to microbiologists. Despite the challenge of applying a single test across a broad range of jobs to determine when speech is made pursuant to job duties, the *Garcetti* Court recognized only one set of employees that merited careful consideration under the First Amendment: public university professors. 547 U.S. at 425.

The Court identified public university faculty as a potential exception to *Garcetti*'s holding because of the long-established importance of academic freedom, which protects the expressive rights of faculty members on matters related to scholarship and teaching and the right of colleges and universities to make academic decisions without undue interference from outside actors. Even though academic freedom is not a "specifically enumerated constitutional right," the Supreme Court has consistently recognized "[o]ur national commitment to the safeguarding of these freedoms within university communities." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978). In a line of decisions spanning more than a half-century, the Court has emphasized repeatedly that academic freedom "is of transcendent value to all of us and not merely to the teachers concerned"—and thus necessitates particular judicial care as a "special concern of the First Amendment." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

Accordingly, in his now-famous dissent, Justice Souter warned that applying *Garcetti* to faculty could "imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to . . . official duties.'" *Garcetti*, 547 U.S. at 438 (Souter, J., dissenting). Explicitly responding to Justice Souter's concern, the *Garcetti* majority acknowledged that its holding "may have important ramifications for academic freedom, at least as a constitutional value," and thus chose not to "decide whether

the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching." *Id.* at 425.

2. Three Circuits Have Declined to Apply *Garcetti*'s Exception to Public Faculty Speech That Implicates Academic Freedom, Instead Applying the Traditional *Pickering* Analysis.

Adopting Justice Souter's dissent, the Fourth, Fifth, and Ninth Circuits have held that the *Garcetti* exception does not apply to public faculty speech related to scholarship or teaching. *Buchanan*, 919 F.3d at 853; *Demers*, 746 F.3d at 409–10; *Adams*, 640 F.3d at 560–62. Correctly recognizing that the *Garcetti* "official duties" exception is incompatible with a faculty member's academic function, these circuits have protected academic freedom and simplified the analysis by returning to the traditional *Pickering* inquiry. *Id.*

In *Adams v. Trustees of the University of North Carolina-Wilmington*, the Fourth Circuit held that "*Garcetti* would not apply" because the facts concerned "the academic context of a public university." 640 F.3d at 562. In *Adams*, the plaintiff was a professor who alleged retaliation based upon the views he expressed in his scholarship and teaching. *Id.* at 556. The Fourth Circuit explained that "[a]pplying *Garcetti* to the academic work of a public university faculty member under the facts of this case could place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment." *Id.*

Accordingly, the Fourth Circuit held that *Garcetti* did not apply, and it analyzed the plaintiff's speech under *Pickering*. *Id.*

Similarly, in *Demers v. Austin*, the Ninth Circuit held that *Garcetti* does not apply to speech related to scholarship or teaching. 746 F.3d at 406. In *Demers*, the plaintiff was a professor who alleged retaliation for distributing a "pamphlet and drafts from an in-progress book." *Id*. The Ninth Circuit observed that applying *Garcetti* to the professor's speech "would directly conflict with the important First Amendment values previously articulated by the Supreme Court." *Id.* at 411. Following the Fourth Circuit's approach in *Adams*, the Ninth Circuit held that "academic employee speech not covered by *Garcetti* is protected under the First Amendment, using the analysis established in *Pickering*." *Id.* at 412.

Most recently, in *Buchanan v. Alexander*, the Fifth Circuit recognized that "[t]he Supreme Court has established 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.'" 919 F.3d at 852 (quoting *Keyishian*, 385 U.S. at 603). In *Buchanan*, the plaintiff was a professor who alleged retaliation after being terminated for using profanity and making jokes while teaching. *Id*. at 851. Like the Fourth and Ninth Circuits, the Fifth Circuit applied the *Pickering* analysis to determine whether the professor's speech was protected. *Id.* at 853 (citations omitted).

The Fourth, Fifth, and Ninth Circuits each concluded that *Garcetti*'s "official duties" exception cannot apply to speech related to scholarship or teaching in higher education because of First Amendment concerns about academic freedom. By removing the *Garcetti* exception, these circuits have made it easier for public universities and professors to understand what speech is protected. To protect academic freedom, this Court should follow their lead and hold that the *Garcetti* "official duties" exception to the First Amendment does not apply to speech related to scholarship or teaching in higher education.

3. Peterson's Speech Is an Exercise of His Right to Academic Freedom and Should Be Analyzed under *Pickering*.

Peterson's speech implicates the same concerns about faculty expressive rights and academic freedom recognized by the Supreme Court's reservation in *Garcetti* and the Fourth, Fifth, and Ninth Circuit's subsequent rulings. Just as the Fourth Circuit concluded in *Adams* that applying *Garcetti* to public faculty speech could endanger the "many forms of public speech or service a professor engaged in during his employment," so too should this Court find that Peterson's expression about his institution's decision-making and leadership—speech that serves faculty governance, a necessary component of academic freedom—should be analyzed under *Pickering*. 640 F.3d at 564.

The district court found that in addition to teaching and scholarship, Peterson's duties as a tenured professor included participation in faculty self-

governance, such as "membership on . . . faculty review committees, tenure review committees, disciplinary committees, and employment or academic search committees." *Peterson*, slip op. at 7. And again, the district court incorrectly drew a simple line from these duties to Peterson's speech, concluding that the "speech at issue—concerning [Dixie State's] discipline of Mr. Davenport and Mr. Houser's performance as chair of the theatre department—sufficiently fell within the scope" of Peterson's professional responsibilities as a faculty member. *Id*. But the district court failed to recognize the import of this connection: Because Peterson's speech concerned the academic life of his university, allowing Dixie State free rein to punish it under *Garcetti* imperils academic freedom.

Faculty participation in university governance is a vital component of academic freedom. *See* American Ass'n of Univ. Professors (AAUP), *On the Relationship of Faculty Governance to Academic Freedom* (1994), https://www.aaup.org/report/relationship-faculty-governance-academic-freedom. Involving faculty in "a sound system of institutional governance is a necessary condition for the protection of faculty rights and thereby for the most productive exercise of essential faculty freedoms." *Id*. This participation necessarily includes criticism regarding institutional decision-making or general departmental leadership, like the speech at issue here. As the AAUP explains, the "academic freedom of faculty members includes the freedom to express their views (1) on

academic matters in the classroom and in the conduct of research, (2) *on matters having to do with their institution and its policies*, and (3) on issues of public interest generally, and to do so even if their views are in conflict with one or another received wisdom." *Id*. (emphasis added). Peterson's speech concerned "matters having to do with" his institution and its policies, and thus implicated academic freedom. *Id.* Because "the protection of the academic freedom of faculty members in addressing issues of institutional governance is a prerequisite for the practice of governance unhampered by fear of retribution," Peterson's speech is properly understood as protected by his right to academic freedom and inextricably linked to the terms of Peterson and his peers' scholarship and teaching at Dixie State. *Id*.

By denying First Amendment protection to faculty speech that implicates academic freedom, the district court's decision exemplifies the precise result Justice Souter warned about in his *Garcetti* dissent. This Court should follow the lead of its sister circuits and decline to apply *Garcetti*'s exception to Peterson's speech. If left uncorrected, the district court's reasoning will allow public universities to punish faculty speech protected by academic freedom and the First Amendment.

B. Peterson's Speech Is Protected Under *Pickering*.

Applying the *Pickering* balancing test, Peterson's speech is protected by the First Amendment because Peterson addressed matters of public concern and his

interest in doing so outweighs Dixie State's speculative interest in avoiding disruption to its operations.

1. Peterson's Speech Addressed a Matter of Public Concern.

Despite holding that Peterson's speech was not protected by the First Amendment because he spoke pursuant to his official duties, the district court nevertheless proceeded to find that Peterson's "retaliation claim would still be subject to dismissal because none of Mr. Peterson's speech was on a matter of public concern." *Peterson*, slip op. at 7. Mischaracterizing Peterson's speech ("criticisms of his colleague's termination and the management of DSU's theatre department") as "internal in scope and personal in nature," the district court wrongly concluded that Peterson's "statements do not qualify as matters of public concern." *Id*. at 8.

Peterson's speech about both Professor Davenport's termination and the theater department involved matters of public concern. This Court has "defined matters of public concern as 'those of interest to the community, whether for social, political, or other reasons.'" *Lighton v. Univ. of Utah*, 209 F.3d 1213, 1224 (10th Cir. 2000) (quoting *Lytle v. City of Haysville*, 138 F.3d 857, 863 (10th Cir. 1998)).

First, Davenport's firing is a matter of public concern. Both Davenport's termination and his subsequent lawsuit against Dixie State attracted local and national media attention over a sustained period of several years, culminating with

the suit's settlement this January.[2] An online petition criticizing Davenport's termination and calling for his reinstatement garnered more than 1,300 signatures.[3] Given the substantial interest in the case, Peterson's criticism of Dixie State's handling of Davenport's termination would constitute commentary on a matter of public concern even if Peterson had not been a Dixie State employee. But as a tenured faculty member himself, Peterson possessed unique insight into Davenport's firing and its ramifications for the university, its faculty, and its students.

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[2] *See, e.g.*, Colleen Flaherty, *Dixie State Settles With Terminated Professor*, INSIDE HIGHER ED (Jan. 17, 2020), https://www.insidehighered.com/quicktakes/2020/01/17/dixie-state-settles-terminated-professor; Taylor Stevens, *In the last four years, four tenured professors at Dixie State University have been terminated or placed on administrative leave*, SALT LAKE TRIB. (Apr. 17, 2018), https://www.sltrib.com/news/education/2018/04/14/dixie-state-university-has-removed-four-tenured-professors-and-arts-students-say-their-education-is-being-disrupted; Julie Applegate, *Davenport files $20 million civil rights lawsuit against Dixie State president, others*, ST. GEORGE NEWS (Jan. 6, 2017), https://www.stgeorgeutah.com/news/archive/2017/01/06/jla-davenport-files-20-million-civil-rights-lawsuit-against-dixie-state-president-others; Cami Cox Jim, *Controversy, unrest persist over Dixie State firing professor; prosecutor reviews complaint*, ST. GEORGE NEWS (Mar. 22, 2015), https://www.stgeorgeutah.com/news/archive/2015/03/22/ccj-controversy-unrest-persist-over-dixie-state-firing-professor-prosecutor-reviews-complaint; Scott Jaschik, *Push to Reinstate Dixie State Theater Professor*, INSIDE HIGHER ED (Mar. 10, 2015), https://www.insidehighered.com/quicktakes/2015/03/10/push-reinstate-dixie-state-theater-professor; Kevin Jenkins, *Community rallies for dismissed DSU professor*, THE SPECTRUM (Mar. 7, 2015), https://www.thespectrum.com/story/news/local/2015/03/07/community-rallies-dismissed-dsu-theater-professor/24582101.

[3] Katie Whitmire, *Reinstate Varlo Davenport*, CHANGE.ORG, https://www.change.org/p/dixie-state-university-reinstate-varlo-davenport.

"Government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions." *Waters v. Churchill*, 511 U.S. 661, 674 (1994).

Second, Peterson's criticism of the leadership of the university's theater department also addressed a matter of public concern. As this Court has held, faculty criticism of the governance of a public university addresses a matter of public concern. *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1263 (10th Cir. 2005) (tenured faculty member's speech "addressing the use of public funds and regarding the objectives, purposes and mission of the University of Colorado and its medical school fall well within the rubric of 'matters of public concern.'"). This is particularly so when the speech concerns possible malfeasance on the part of public university administrators. *Hulen v. Yates*, 322 F.3d 1229, 1239 (10th Cir. 2003) (faculty member's allegations of administrative misconduct at public university "address a matter of public concern, not mere public interest, because they involve charges of wrongdoing and malfeasance."). Peterson's criticisms of Houser's leadership and his conduct in Davenport's controversial termination addressed alleged wrongdoing and thus qualify as a matter of public concern.

Although the district court conceded that "some of [Peterson's] criticisms of DSU and its administration may have been related to matters of public concern," it found that Peterson's speech "mainly constituted his individual grievances with

DSU's theatre and music departments and his personal criticism of Mark Houser" and thus did not "qualify as protected speech." *Peterson*, slip op. at 8. But "speech which touches on matters of public concern does not lose protection merely because some personal concerns are included." *Hulen*, 322 F.3d at 1238.

When confronting cases involving public employee speech that engaged with both matters of public concern and individual grievances, this Court has previously chosen to analyze each matter individually. *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1205–07 (10th Cir. 2007) (analyzing different instances of teachers' speech on different subjects and concluding that certain instances constituted speech on matters of public concern). As in *Brammer-Hoelter*, where this Court found that public school teachers' speech about, for example, the legality of an administrative effort to restrict freedom of expression engaged a matter of public concern, so too here should Peterson's expressions of concern about the termination of his colleague and the operations of a university department be reviewed in turn.

Because Peterson's speech "fairly relates to charges at a public university that plainly would be of interest to the public"—indeed, with regard to Davenport's treatment, charges that demonstrably *were* of interest to the public, as evidenced by media coverage—it relates to a matter of public concern. *Hulen*, 322 F.3d at 1238. The district court erred in finding otherwise. To protect public university faculty

who speak out about institutional decisions that impact the academic freedom rights they and their colleagues possess, this Court should reverse.

2. Peterson's Interest in Expressing His Views Outweighs Dixie State's Institutional Interests.

Because it incorrectly applied the *Garcetti* test, the district court did not address the second part of the *Pickering* analysis to be decided as a matter of law: "whether the government's interest, as employer, in promoting the efficiency of the public service are sufficient to outweigh the plaintiff's free speech interests." *Helget v. City of Hays*, 844 F.3d 1216, 1221 (10th Cir. 2017) (quoting *Dixon v. Kirkpatrick*, 553 F.3d 1294, 1302 (10th Cir. 2009)). In conducting its own analysis, this Court should find that Peterson pled facts sufficient to show that his expressive interest outweighs Dixie State's interest in efficiency.

This Court has made clear that "the *employer* bears the burden of justifying its regulation of the employee's speech." *Brammer-Hoelter*, 492 F.3d at 1207 (emphasis in original). Further, in assessing the balance between a public university's interest in maintaining an "efficient operation," including "the control of factions" within the community of faculty, this Court has recognized that "conflict is not unknown in the university setting given the inherent autonomy of tenured professors and the academic freedom they enjoy." *Hulen*, 322 F.3d at 1239. Mere disagreement is not enough, nor is mere speculation about the potential for disruption. *Dixon*, 553 F.3d at 1304 (government employer "cannot rely on purely

speculative allegations that certain statements caused or will cause disruption.") (quoting *Gardetto v. Mason*, 100 F.3d 803, 815 (10th Cir. 1996)); *Rampey v. Allen*, 501 F.2d 1090, 1098 (10th Cir. 1974) (termination of public university faculty violated First Amendment because there was "no evidence that the appellants constituted any threat to the operation of the college," and faculty fired for differences with president had "right to be free from this kind of personality control."). *See also Peacock v. Duval*, 694 F.2d 644, 647 (9th Cir. 1982) (public university "efficiency cannot be purchased at the expense of stifling free and unhindered debate on fundamental educational issues.").

The facts as alleged do not indicate that Peterson's speech presented any disruption to Dixie State's operations. To the contrary, as the district court notes, a Faculty Review Board determined that Dixie State had failed to provide evidence to support its disciplinary charges against Peterson. *Peterson*, slip op. at 2. Absent a showing of actual disruption, Peterson's interest in speaking about university decision-making outweighs Dixie State's speculative concerns about the impact of his protected speech.

Even if this Court declines to join other circuits in holding that the *Pickering* test governs faculty speech that implicates academic freedom, the district court still erred in its application of the *Garcetti* test.

C. Even Under *Garcetti*, Peterson's Speech Was Not Made Pursuant to His Official Duties.

Even under *Garcetti*, Peterson's speech was protected by the First Amendment as the speech of a private citizen. The district court erred in finding that, under *Garcetti*, Peterson's criticisms of Dixie State's decisions and Professor Houser's leadership were made pursuant to his official duties. *Id.* at 7. The district court's holding is in tension with binding precedent from the Supreme Court and this Court clarifying that public employees may still speak as private citizens even when addressing a matter of public concern that they learned about through their job. *Id.*

In *Lane v. Franks*, the Supreme Court considered the scope of the *Garcetti* exception to the First Amendment's protection. 573 U.S. 228, 238–41 (2014). In *Lane*, a public employee subpoenaed in a criminal fraud trial alleged retaliation for testifying about information he learned in the course of his employment. *Id.* at 232. The Eleventh Circuit had held that the employee's speech was not protected under *Garcetti* because he testified about information he learned during his employment. *Id.* at 238. The Supreme Court disagreed, criticizing the Eleventh Circuit for giving "short shrift to the nature of sworn judicial statements and ignor[ing] the obligation borne by all witnesses testifying under oath." *Id.* at 238. In addition to the special First Amendment concerns implicated by truthful testimony, the Court also criticized the Eleventh Circuit for "read[ing] *Garcetti* far too broadly" by reasoning

that because the plaintiff had learned about the subject of his speech through his employment, he spoke as an employee. *Id.* at 229.

In reversing, the Supreme Court reiterated that its "precedents dating back to *Pickering* have recognized that speech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment." *Id.* at 240. The Supreme Court concluded that "the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech. The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." *Id.* Based upon this reasoning, the Court held that the employee's testimony was citizen speech that did not lose its protection under the *Garcetti* "official duties" exception. *Id.* at 241.

This Court has deemed *Lane* to be consistent with its prior precedent applying *Garcetti*, as both determine "whether speech is employee speech or private citizen speech" by "focus[ing] on the job duty giving rise to the speech." *Holub v. Gdowski*, 802 F.3d 1149, 1155 (10th Cir. 2015). Echoing *Lane*, this Court "ultimately" asks "whether the employee was 'perform[ing] the task[] [they were] paid to perform' when they spoke." *Knopf v. Williams*, 884 F.3d 939, 946 (10th Cir. 2018) (quoting *Lane*, 573 U.S. at 239).

But the district court's understanding and application of "the Tenth Circuit's 'broad view' of speech pursuant to an employee's official duties" stands in tension with both *Lane* and this Court's precedent. *Peterson*, slip op. at 7. The district court found without further analysis that because Peterson's speech "concern[ed] DSU's discipline of Mr. Davenport and Mr. Houser's performance as chair of the theatre department," it "sufficiently fell within the scope of Mr. Peterson's duties at DSU" to lose First Amendment protection under *Garcetti*. *Id.* This is too broad of a view: *Lane* makes clear that a public employee's speech does not lose protection simply because it concerns information related to a public employee's job. "In other words, the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech." *Lane*, 573 U.S. at 240. More is needed. As this Court has put it, "speech may be entitled to constitutional protection even when it is made at work about work." *Chavez-Rodriguez v. City of Santa Fe*, 596 F.3d 708, 714 (10th Cir. 2010). The district court's cursory connection between the subjects of Peterson's speech and his employment as a faculty member ignores this crucial nuance.

Because "both *Lane* and *Garcetti* direct us to focus on whether the employee's speech was within the scope of the employee's usual duties," *Holub*, 802 F.3d at 1156, Peterson's criticisms of institutional decision-making and Hauser's leadership were not made pursuant to his official duties. Peterson was not paid to publicly

criticize university personnel. *See Brammer-Hoelter*, 492 F.3d at 1203 ("[S]peech is made pursuant to official duties if it is generally consistent with the type of activities [the employee] was paid to do.") (internal quotation omitted).

Peterson's speech involved information related to his job duties, but did not constitute the performance of those duties. Instead, his criticism of university leadership and the chair of another department more closely resembles the speech at issue in *Pickering*: remarks from a teacher that may be "critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally." 391 U.S. at 572–73. Reading *Garcetti*'s "official duties" exception so broadly as to render a public employee functionally unable to speak as a citizen about what he or she learns on the job threatens First Amendment rights. Because Peterson criticized Dixie State as a citizen addressing matters of public concern he learned about during the course of his employment, this Court should reverse.

II. Dixie State's "Last Chance Agreement" Is a Prior Restraint on Speech.

The district court rejected Peterson's claim that the "Last Chance Agreement" Dixie State presented him as a condition of reinstatement served as a prior restraint on speech in violation of the First Amendment, citing as justification its earlier conclusion that Peterson's "speech concerning faculty discipline and management

at DSU is not protected speech under the First Amendment." *Peterson*, slip op. at 8. The district court further reasoned that Peterson had not been harmed by the Last Chance Agreement because he refused to sign it. *Id*. at 8–9. These conclusions were in error and this Court should reverse.

"A government employer cannot 'condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression.'" *Finn v. N.M., State Pers. Office*, 249 F.3d 1241, 1247 (10th Cir. 2001) (quoting *Connick*, 461 U.S. at 142). Government employers may "impose restraints" on public employee speech "that would be plainly unconstitutional if applied to the public at large," but such restrictions must satisfy the *Pickering* balancing test. *Wolfe v. Barnhart*, 446 F.3d 1096, 1104 (10th Cir. 2006) (internal quotation omitted).

The *Pickering* analysis "may be affected, however, by whether the employer has applied a prior restraint." *Maldonado v. City of Altus*, 433 F.3d 1294, 1310 (10th Cir. 2006) (citing *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 466–67, & n.11 (1995) (a prospective ban on public employee speech "makes the Government's burden heavy" because it "deters an enormous quantity of speech before it is uttered, based only on speculation that the speech might threaten the Government's interests."). This Court has suggested that prior restraints on public employee speech are particularly suspect when the restriction at issue "would promote government censorship based on the employee's viewpoint." *Wolfe*, 446

F.3d at 1108 (cataloguing other circuit court's applications of *Nat'l Treasury Emps. Union* in striking down viewpoint-based prior restraints on public employee speech).

Dixie State's "Last Chance Agreement" was a viewpoint-based prior restraint on Peterson's speech. The Agreement expressly prohibited Peterson from, among other expressive activity, "damag[ing], undermin[ing], or sabotag[ing] DSU's Voice, Music, Theater, Art, and Dance programs or faculty"; "mak[ing] unfounded or untruthful derogatory statements about DSU and its faculty, staff, students or administration"; and "unprofessional behaviors." Complaint at 8–9, *Peterson*, (No. 4:19-cv-00062-DB-PK). The Agreement's operative terms are vague, subjective, and would vest unbridled authority in DSU administrators to punish Peterson for expressing his viewpoints on matters of public concern as a private citizen in the future. *See, e.g., Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 129–31 (1992).

The agreement is an unconstitutional prior restraint on speech. Both its terms and Dixie State's termination of Peterson for refusing to sign it violate the First Amendment. *See Barone v. City of Springfield*, 902 F.3d 1091, 1106 (9th Cir. 2018) ("Last Chance Agreement" that prohibited police department employee from engaging in "disparaging or negative" speech was "a posterchild of overt viewpoint discrimination" and unconstitutional prior restraint, and termination for refusing to sign it constituted First Amendment retaliation). This Court should make clear that

public employers like Dixie State University cannot fire employees for refusing to waive their First Amendment rights.

III. *Amicus* FIRE's Work Demonstrates that Faculty Speech and Academic Freedom are Under Threat Nationwide.

The case before this Court is important because faculty expressive rights and academic freedom are under siege at colleges and universities across the nation. A brief survey of FIRE's recent defenses of faculty rights illustrates the severity of the threat—and the corresponding need for clarity from this Court.

In May, Scottsdale Community College (Arizona) professor Nicholas Damask faced an investigation and a forced apology after the wording of three quiz questions about Islamic terrorism in his "World Politics" class offended a student and prompted criticism on social media.[4] The college promised in a social media post of its own that the professor would apologize, then sent the professor a pre-written apology to sign that promised the questions will be "removed from all further courses," along with any "additional insensitivities."[5] Only after an urgent letter from FIRE did the chancellor of the district apologize "for the uneven manner in

[4] Letter from Katlyn Patton, FIRE, to Christina M. Haines, Interim President, Scottsdale Community College (May 7, 2020), https://www.thefire.org/fire-letter-to-scottsdale-community-college-may-7-2020.

[5] *Id.*

which this was handled and for our lack of full consideration for our professor's right of academic freedom."[6]

In June, the University of California, Los Angeles removed adjunct professor Gordon Klein from his teaching post for three weeks after he declined a student request to alter exam dates and grading for black students following the killing of George Floyd, despite the fact that Klein's response was in line with UCLA policy.[7] In a letter sent to the campus community, a senior UCLA administrator characterized Klein's email to the student declining the request as an "abuse of power," claiming that Klein had demonstrated "a disregard for our core principles."[8] After an investigation into Klein's "offensive" comments, he was eventually reinstated.[9]

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[6] Lorraine Longhi, *District to investigate Islam quiz questions, criticizes Scottsdale college's 'rush to judgment'*, ARIZONA REPUBLIC (May 11, 2020), https://www.azcentral.com/story/news/local/scottsdale/2020/05/11/district-investigate-islam-quiz-questions-criticizes-scottsdale-college-criticism-nick-damask/3109055001.

[7] Press Release, FIRE, FIRE defends UCLA professor suspended for email on why he wouldn't change exam, grading for black students (June 10, 2020), https://www.thefire.org/fire-defends-ucla-professor-suspended-for-email-on-why-he-wouldnt-change-exam-grading-for-black-students.

[8] Colleen Flaherty, *Suspended: Professor Who Mocked Exam Request*, INSIDE HIGHER ED (June 11, 2020), https://www.insidehighered.com/quicktakes/2020/06/11/suspended-professor-who-mocked-exam-request.

[9] Colleen Flaherty, *Professor Who Questioned Student's Request Reinstated*, INSIDE HIGHER ED (Sept. 16, 2020), https://www.insidehighered.com/quicktakes/2020/09/16/professor-who-questioned-students-request-reinstated.

In August of 2019, Kirkwood Community College (Iowa) removed professor Jeff Klinzman from teaching for posts on his private Facebook page criticizing President Donald Trump and evangelical Christians.[10] After FIRE intervened, the college reached a $25,000 settlement with Klinzman to avoid a First Amendment lawsuit.[11] In April of 2019, Plymouth State University (New Hampshire) reached a $350,000 settlement with professor Nancy Strapko, who was fired by the university in 2018 for serving as an expert witness in a criminal trial.[12] FIRE had warned Plymouth State to respect Strapko's First Amendment rights.[13] In January of 2019, Chicago State University reached a $650,000 settlement with professors Phillip

[10] Adam Steinbaugh, *Kirkwood Community College parts ways with 'antifa' professor, raising First Amendment concerns*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (Aug. 27, 2019), https://www.thefire.org/kirkwood-community-college-parts-ways-with-antifa-professor-raising-first-amendment-concerns.

[11] Press Release, FIRE, VICTORY: College settles with 'antifa' professor fired for criticizing President Trump on Facebook, avoids First Amendment lawsuit from FIRE (Apr. 27, 2020), https://www.thefire.org/victory-college-settles-with-antifa-professor-fired-for-criticizing-president-trump-on-facebook-avoids-first-amendment-lawsuit-from-fire.

[12] Jason Schreiber, *Fired PSU lecturer who supported guidance counselor convicted of sex assault gets $350,000*, N.H. UNION LEADER (Apr. 30, 2019), https://www.unionleader.com/news/crime/fired-psu-lecturer-who-supported-guidance-counselor-convicted-of-sex-assault-gets-350-000/article_357b2667-0a1d-5abb-be28-4874fc8bf8ce.html.

[13] Press Release, FIRE, The cost of censorship: Plymouth State to pay $350,000 for firing professor over witness testimony (Apr. 30, 2019), https://www.thefire.org/the-cost-of-censorship-plymouth-state-to-pay-350000-for-firing-professor-over-witness-testimony.

Beverly and Robert Bionaz, who filed a First Amendment lawsuit against the institution in 2014 after administrators attempted to censor a faculty-run blog that criticized the perceived corruption of the university's senior leadership.[14] FIRE coordinated the professors' lawsuit.

These are just a few recent examples of instances of public colleges and universities punishing faculty for protected expression. FIRE's archives contain many more. Because of the frequency of institutional attempts to silence outspoken, dissenting, or critical faculty members in violation of the First Amendment, clarity is needed from this Court regarding the limits of a public institution's power to censor.

[14] Dawn Rhodes, *Chicago State to pay $650K to end lawsuit over faculty blog criticizing school leaders*, CHICAGO TRIB. (Jan. 8, 2019), https://www.chicagotribune.com/news/breaking/ct-met-chicago-state-university-faculty-blog-lawsuit-20190107-story.html.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand to the district court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member of the Bar of the United States Court of Appeals for the Tenth Circuit.

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CERTIFICATE OF COMPLIANCE

1) This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. Circ. R. 29(a)(5) because this brief contains 6,473 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2) This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14-point Times New Roman font.

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CERTIFICATE OF DIGITAL SUBMISSION

Counsel for *Amicus Curiae* Foundation for Individual Rights in Education in support of Plaintiff-Appellant, urging reversal, hereby certifies that all required privacy redactions have been made, which complies with the requirements of Federal Rule of Appellate Procedure 25(a)(5).

Counsel also certifies that any and all hard copies submitted to the Court are exact copies of the ECF filing from October 5, 2020.

Counsel further certifies that the ECF submission was scanned for viruses with the most recent version of a commercial virus scanning program (Vipre software version 12.0.7874; Definitions version 87206 – 7.86132 [October 5, 2020]; Vipre engine version 3.9.2671.2 – 3.0), and, according to the program, is free of viruses.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on October 5th, 2020, which will automatically send notification to the counsel of record for the parties.

Dated: October 5, 2020

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