FIRE
Foundation for Individual Rights in Education

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Sent via Electronic Mail (amlee1@arizona.edu)

Dear Vice President Lee:

FIRE appreciates your response to our letter of November 29 concerning Professor Samantha Harris. We also value your kind acknowledgement of FIRE's work on behalf of student and faculty speech rights, as well as U of A's ongoing, positive working relationship with FIRE. As a former Wildcat myself (Bear Down!), it is a bright spot of my work at FIRE to boast that I attended a "green light" university that has adopted the Chicago Statement and whose policies advance an attendant free speech culture.

We write again in response to your characterization of Dr. Harris' expression as unprotected speech by a public employee under the *Garcetti/Pickering* line of cases. You are, of course, correct that *Garcetti* stands for the broad principle that public employers like U of A may regulate employee speech pursuant to their employment. However, *Garcetti* has limited—if any—application to university faculty and academic speech. Because Harris is a faculty member and her speech concerns academic scholarship and classroom instruction, and because U of A's civility policies directly impact faculty members' academic speech, *Garcetti*'s broad strokes are not the applicable legal principle to evaluate the constitutional limitations on the regulation of her speech or those of her colleagues.

In *Garcetti v. Ceballos*, the United States Supreme Court expressly reserved the question of whether limits on employee speech would extend to expression "related to academic scholarship or classroom instruction" voiced by faculty at colleges and universities, as such speech may "implicate[] additional constitutional interests . . . not fully accounted for by

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this Court's customary employee-speech jurisprudence."[1] Lower courts, too, have recognized *Garcetti's* reservation with respect to faculty speech on academic matters.

In *Demers v. Austin,* the United States Court of Appeals for the Ninth Circuit, whose decisions are binding on the university, held plainly that "*Garcetti* does not apply to 'speech related to scholarship or teaching.'"[2] This is because, as the Fourth Circuit explained in recognizing a corresponding limitation, "[a]pplying *Garcetti* to the academic work of a public university faculty member . . . could place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment[,]" which was not "what *Garcetti* intended[.]"[3] Instead, "academic employee speech not covered by *Garcetti* is protected under the First Amendment, using the analysis established in *Pickering*[.]"[4]

Pickering, likewise, holds that government employers may not broadly restrict their employees' rights to speak on matters of public concern in their capacity as private citizens.[5] This remains true even if the matter of public concern *relates* to their employment. For example, in *Pickering*, the speaker was a teacher whose "erroneous" public criticism of his employer remained protected by the First Amendment.[6]

Indeed, in the public university context, courts construe whether speech is of public concern very broadly to include almost any issue that is not a purely personal, private grievance. The Ninth Circuit holds that "speech involves a matter of public concern when it can fairly be considered to relate to 'any matter of political, social, or other concern to the community,'"[7] that the "essential question is whether the speech addressed matters of public as opposed to personal interest,"[8] that "public interest is 'defined broadly,'"[9] and while the analysis hinges on "the content, form, and context of a given statement, as revealed by the whole record,"[10] the content of the speech "is the most important factor."[11]

Harris' speech in this case — expressing dissenting views about the management of an academic department and the development of faculty bylaws, and questioning whether faculty were receiving appropriate information on a department listserv — is academic in nature pursuant to U of A's own Academic Freedom policy, which states plainly that "[a]cademic freedom extends to expressing opinions concerning matters of shared governance, leadership, or the functioning of the University and the units within," that "[a]cademic freedom includes the right to criticize existing institutions (including

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[1] *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006).
[2] *Demers v. Austin,* 746 F.3d 402, 406 (9th Cir. 2014).
[3] *Adams v. Trs. of the Univ. of N. Carolina Wilmington*, 640 F.3d 550, 564 (4th Cir. 2011).
[4] *Demers v. Austin*, 746 F.3d 402, 412 (9th Cir. 2014).
[5] *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).
[6] *Id.* at 573–74.
[7] *Demers* at 415 (quoting *Johnson v. Multnomah Cnty.*, 48 F.3d 420, 422 (9th Cir. 1995).
[8] *Desrochers v. City of San Bernardino*, 572 F.3d 703, 709 (9th Cir. 2009).
[9] *Demers* at 415. ("Public interest is defined broadly." Internal citation omitted).
[10] *Connick v. Myers*, 461 U.S. at 147-48.
[11] *Desrochers* at 710.

leadership, professions, paradigms and orthodoxies)."[12] By the university's own metric, Harris' speech is well within the Ninth Circuit's exclusion of "speech related to scholarship or teaching" from the *Garcetti* framework.

Likewise, the Pickering balancing test would not reach Harris' speech, and the civility policies we have flagged reach beyond any cognizable institutional interest of the university. The Supreme Court clarified in *Pickering* that, in order for an employer to regulate a public school teacher's speech, the negative impact of the employee's expression must be substantial and material: If the speech of the employee is "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," then "the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public," and the employee's speech is protected by the right to freedom of expression.[13]

Expressive rights are even broader when the relevant employee is a member of a public university faculty. Because faculty members are employed for the very purpose of speaking, because of the critical importance of academic freedom to public knowledge and debate, and because of the role faculty members play in institutional self-governance, faculty members enjoy broad rights to speak on matters of public and institutional concern, including when they discuss matters related to their employment. [14]

While, again, we appreciate the institution's interest in encouraging collegial discussion, those interests are not sufficient to override individual faculty members' interests in expression. The Ninth Circuit has also established a strong right for university faculty to express even offensive viewpoints, or to express non-offensive views in an unpleasant manner, where the expression pertains to matters of public concern. For example, in *Rodriguez v. Maricopa County Community College District*, the court ruled that a math professor's "racially-charged" emails sent to a listserv that reached every employee in the district did not amount to actionable workplace harassment.[15] The court, crucially, distinguished between protected expression and targeted harassment that lacks an expressive quality:

> Harassment law generally targets conduct, and it sweeps in speech as harassment only when consistent with the First Amendment. For instance, racial insults or sexual advances

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[12] UNIV. OF ARIZ., FACULTY GOVERNANCE, *Academic Freedom and Freedom of Expression, available at* https://facultygovernance.arizona.edu/find-policy/faculty-senate-actions/academic-freedom-freedom-expressionconduct (last visited Jan. 6, 2022.).

[13] *Pickering* at 568, 573.

[14] UNIV. OF ARIZ., FACULTY GOVERNANCE, *Academic Freedom and Freedom of Expression, available at* https://facultygovernance.arizona.edu/find-policy/faculty-senate-actions/academic-freedom-freedom-expressionconduct (last visited Jan. 6, 2022.). ("Academic freedom is one of the primary ideals upon which The University of Arizona was founded and continues to be a core value. The major premise of academic freedom is that open inquiry and expression by faculty and students is essential to the University's mission.")

[15] *Rodriguez v. Maricopa County Cmty. College Dist.*, 605 F.3d 703, 710 (9th Cir. 2009).

> directed at particular individuals in the workplace may be prohibited on the basis of their non-expressive qualities, as they do not "seek to disseminate a message to the general public, but to intrude upon the targeted [listener], and to do so in an especially offensive way[.]"[16]

The *Rodriguez* court was particularly concerned that limitations on faculty members' expression would cast a chilling effect on higher education, which has "historically fostered" the exchange of views.[17] "The desire to maintain a sedate academic environment," the court held, "does not justify limitations on a teacher's freedom to express himself on political issues in vigorous, argumentative, unmeasured, and even distinctly unpleasant terms."[18]

While Harris' concerns about her department's academic shortcomings may have been advanced in a manner her superior found "vigorous, argumentative, unmeasured, and even distinctly unpleasant," the law—including the cases of *Garcetti*, *Pickering*, and their progeny—protects the ability of all U of A faculty to express criticism in precisely those ways.

And although you suggest that the civility policies FIRE has flagged are somehow tempered or superseded by the university's other speech-protective policies, and are, in any event, "aspirational language," they have been incontrovertibly applied in this case as black-letter law to punish the same faculty expression U of A claims to protect. Without further clarification by U of A that these civility policies (including Liesl Folks' memo) are indeed aspirational and will not be further used to silence protected expression, this language will continue to chill faculty speech and leave U of A vulnerable to claims that it is breaching its duties under the First Amendment.

As always, FIRE is here to assist in refining policy language to ensure U of A can meet its important obligations of assuring the university's proper functioning without unduly restricting faculty rights.

We request receipt of a response to this letter by Tuesday, January 11, in advance of Dr. Harris' hearing before the Committee on Academic Freedom and Tenure (CAFT) on January 12-13. FIRE looks forward to an amicable resolution of this issue and our continued strong working relationship with U of A.

Sincerely,

Alex Morey
Program Officer, Individual Rights Defense Program

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[16] *Id.* (cleaned up).

[17] *Id.* at 708.

[18] *Id.* at 708–09 (cleaned up).