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Is *Garcetti* Too Cool for School?: Why *Garcetti v. Ceballos* Should Not Apply to School Teachers

Jordan Zaia*

The First Amendment is implicated by students and teachers every day in public schools. For years, courts followed the test established in Pickering v. Board of Education *to analyze free speech claims for public school teachers. However, teachers' protections were changed in 2006 when the U.S. Supreme Court decided* Garcetti v. Ceballos. *Since then, the circuits have inconsistently applied this test in cases relating to education. With the circuit split and high-profile cases rising in the federal circuits, the Supreme Court may have an opportunity to resolve the issue.*

This Note advocates for the Supreme Court to rule that Garcetti *does not apply to public school teachers. The Court should treat education differently than other occupations because teachers hold a special role in the development of students around the country, education is the cornerstone of a functioning society, and the education system allows students to develop their own thoughts within the "marketplace of ideas." This Note highlights how the Court should adopt the* Pickering-Connick *test to account for all these interests and adequately protect academic freedom.*

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INTRODUCTION

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[1] The First Amendment's freedom of speech is implicated every day in the United States when students and teachers go to school. With speech playing a vital role in schools, courts have confronted the issue throughout history.[2] Specifically, the Supreme Court held that students' and teachers' freedoms do not disappear "at the schoolhouse gate."[3] As education has grown throughout the United States, so has the jurisprudence about the constitutional protections in schools. The Supreme Court, on many occasions, has clarified the First Amendment protections students receive in school but has not confronted the issue as applied to teachers.[4]

The First Amendment is vital for educators, enabling them to perform their jobs without fear of reprisal.[5] To some degree, academic freedom emerged in this context and was recognized by the Supreme Court in response to many Cold War-era laws passed by states that restricted classroom discourse and teachers' associations.[6]

Around the same time, the Supreme Court clarified the First Amendment protections afforded to public employees and established a framework through the landmark decisions *Pickering v. Board of Education*[7] and *Connick v. Myers*.[8] Public school teachers are among those governed by this standard.[9] At that time, the Court used a two-step test when deciding whether a public educator should prevail on a First Amendment: first, the Court looked to whether the educator was speaking on a matter of public concern; and if so, then

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1 Shelton v. Tucker, 364 U.S. 479, 487 (1960).

2 *See* discussion *infra* Section I.A.

3 Tinker v. Des Moines, 393 U.S. 503, 506 (1969).

4 *See, e.g.*, *id.*

5 *See, e.g.*, Demers v. Austin, 746 F.3d 402, 412 (9th Cir. 2014).

6 *See* J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 YALE L.J. 251, 256 (1989); *see, e.g.*, Keyishian v. Bd. of Regents, 385 U.S. 589 (1967).

7 391 U.S. 563 (1968).

8 461 U.S. 138 (1983).

9 *See Pickering*, 391 U.S. at 568.

the Court would balance the interests of the employee against those of the employer.[10]

This remained the framework for over twenty years, until *Garcetti v. Ceballos* was decided.[11] *Garcetti* added a new first step to the analysis: if a public employee is speaking "pursuant to their official duties," they automatically received no First Amendment protection.[12] Justice Souter's dissent, emphasizing that educators are unique in that they are almost always speaking pursuant to their official duties, warned against applying *Garcetti* to "scholarship or teaching."[13] However, the majority opinion left that question unresolved.[14]

As a result, lower courts have inconsistently applied the *Garcetti* analysis to public educators.[15] For purposes of this Note, a finding of no protection in instances where teachers were found to be acting pursuant to their official duties will be referred to as "applying *Garcetti*." *Garcetti* has been applied in various contexts: classroom instruction, course materials, curriculum complaints, and scholarship.[16] However, content is not the only variable considered in applying *Garcetti*—grade level is too. Courts have applied it in both the K-12 settings and colleges.[17] This Note will discuss the developing jurisprudence throughout the circuits regarding how *Garcetti* is applied to education. With the issue at the forefront of the news and legal community, the Supreme Court may address it head-on.[18] This Note will advocate for the Supreme Court to recognize the unique role educators play in society by excluding them from the scope of *Garcetti*.[19]

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10 *See Connick*, 461 U.S. at 142.

11 547 U.S. 410, 421 (2006).

12 *See id.*

13 *Id.* at 438.

14 *See id.* at 425.

15 *See* discussion *infra* Part II.

16 *See* discussion *infra* Part II.

17 *See* discussion *infra* Part II.

18 *See* Christopher D. Thomas, *"Positively Dystopian":* Pernell v. Florida Board of Governors *and its Implications for Curricular Backlash Bills*, 406 ED. L. REP. 12, 21 (2023). This case is rising through the Eleventh Circuit Court of Appeals and confronts the *Garcetti* issue. *Id.*

19 There will still be the "public concern" and balancing test questions to consider, however, which are beyond the scope of this Note.

Part I explores the relevant history and jurisprudence of the First Amendment as applied in the educational context within the United States. It analyzes the cases creating the relevant test: *Pickering v. Board of Education*,[20] *Connick v. Myers*,[21] and finally, *Garcetti v. Ceballos*,[22] which is the primary focus of this Note. Part II delves into how different circuits have applied *Garcetti* to education. Finally, Part III advocates for the Supreme Court to affirmatively exclude *Garcetti* from the academic context and adopt an alternative test capable of adequately protecting the interests of both educators and the states.

I. BACKGROUND

To understand the effect of *Garcetti*, it is important to understand the development of the First Amendment and education within the United States. This Part will first discuss the development of education in the United States before highlighting general First Amendment jurisprudence. It will then discuss First Amendment precedent in educational settings, beginning with the two cases preceding *Garcetti* before analyzing *Garcetti* itself.

A. Public Education in the United States

Education plays a vital role in America today and has grown substantially throughout history.[23] The founders believed that an educated public would be vital to the survival of the republic.[24] However, access to education in early America was very limited.[25] While there were community schools in certain areas, they were not

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[20] 391 U.S. 563, 564 (1968).

[21] 461 U.S. 138, 140 (1983).

[22] 547 U.S. 410, 413 (2006).

[23] *See, e.g.*, David Denker, *American Education: A Brief History*, 29 CURRENT HIST. 145, 151 (1955).

[24] Derek W. Black, *America's Founders Recognized the Need for Public Education. Democracy Requires Maintaining That Commitment*, TIME (Sept. 22, 2020, 11:00 AM), https://time.com/5891261/early-american-education-history/ (last visited Jan. 23, 2024).

[25] *See* Robert Middlekauff, *Before the Public School: Education in Colonial America*, 62 CURRENT HIST. 279, 279 (1972).

widespread and were often unsupported by local taxes.[26] Access to schools was determined by class and geography.[27] However, President John Adams, alongside Thomas Jefferson, advocated for broader access to the public school system.[28] Their advocacy eventually led to the provision of federal resources for public education.[29] Congress passed the Land Ordinance of 1785 and the Northwest Ordinance of 1787, which "granted federal lands to new states and set aside a portion of those lands to be used to fund public schools."[30] These measures eventually laid the foundation for land grants and facilitated more equitable access to education.[31] Afterward, "common schools" began to spring up across the United States in the nineteenth century to promote cohesion among the social classes.[32]

Once public schools were established, education continued to grow in the United States. States began passing compulsory education laws in 1852, starting with Massachusetts after a push by Horace Mann.[33] By 1929, every state and territory of the United States had passed compulsory education laws.[34] These laws have since

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[26] *See* NANCY KOBER, HISTORY AND EVOLUTION OF PUBLIC EDUCATION IN THE US 2 (2020).

[27] *See id.* at 1.

[28] *See* Letter from John Adams to John Jebb, 10 September 1785, *in* 17 PAPERS OF JOHN ADAMS, APRIL–NOVEMBER 1785 (Gregg L. Lint et al. eds., Harv. Univ. Press. 2014) ("The Whole People must take upon themselves the Education of the Whole People and must be willing to bear the expenses of it. There should not be a district of one Mile Square, without a school in it, not founded by a Charitable individual, but maintained at the expense of the People themselves . . . .").

[29] *See* KOBER, *supra* note 26, at 2.

[30] ALEXANDRA USHER, PUBLIC SCHOOLS AND THE ORIGINAL FEDERAL LAND GRANT PROGRAM 2 (2011).

[31] *See id.* at 2.

[32] *See* KOBER, *supra* note 26, at 3 ("Common schools would teach the 'three R's' (reading, writing, arithmetic), along with other subjects such as history, geography, grammar, and rhetoric. A strong dose of moral instruction would also be provided to instill civic virtues.").

[33] *See* David E. Ramsey, A Historical Review of the Origins, Developments and Trends in Compulsory Education in the United States, 1642–1984 (1985) (Ed. D. dissertation, East Tennessee State University) (on file with the East Tennessee State University Library).

[34] *See* Wallace L. Jones Jr., A History of Compulsory School Attendance and Visiting Teacher Services in Louisiana (1967) (Ed.D. dissertation, Louisiana State University) (on file with the Louisiana State Scholarly Repository).

expanded and remain in effect today, mandating students in all states to attend school until they are at least sixteen years old.[35]

Compulsory education did not bring the access to education that was expected. While attendance was uniformly required, the quality of education varied significantly, particularly along racial lines.[36] In the Jim Crow south, schools remained segregated following the infamous *Plessy v. Ferguson* decision.[37] However, in 1954, the Supreme Court issued a unanimous ruling deeming the official segregation of public schools unconstitutional.[38] In this landmark decision, the Court laid out the evolution of public education and underscored its pivotal role in child development, deeming it "perhaps the most important function of state and local governments" and the "very foundation of good citizenship."[39]

In 1979, twenty-five years later, Congress made a significant investment in nationwide education by establishing the United States Department of Education.[40] As the Department has grown, so too has public education. In the fall of 2021, there were over forty-nine million K-12 students in public schools and over thirteen million post-secondary students.[41] These numbers demonstrate the critical

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[35] *See Compulsory School Attendance Laws, Minimum and Maximum Age Limits for Required Free Education, by State: 2017*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/programs/statereform/tab5_1.asp [https://perma.cc/6PFJ-GJFH] (last visited Feb. 4, 2024).

[36] *See* KOBER, *supra* note 26, at 5.

[37] 163 U.S. 537, 552 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[38] *See Brown*, 347 U.S. at 495 (1954) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."). This built off of a series of cases scaling back segregation in educational settings. *See, e.g.*, Sweatt v. Painter, 339 U.S. 629, 634 (1950) (finding unequal opportunity to attend top quality law schools as a result of segregation).

[39] *Brown*, 347 U.S. at 489–93.

[40] *See Overview: What We Do*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/overview/focus/what.html [https://perma.cc/J83A-ATRA] (last visited Feb. 4, 2024).

[41] *See Back-To-School Statistics*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/fastfacts/display.asp?id=372#:~:text=How%20many%20students%20attended%20school,and%20secondary%20schools%20 [https://perma.cc/CX37-ERE7] (last visited Feb. 4, 2024); *see also* Melanie Hanson, *College Enrollment & Student Demographic Statistics*, EDUC. DATA INITIATIVE (Oct. 1, 2023),

role education plays in the United States, showcasing the fundamental values held by the framers—that the survival of the republic depends on an informed electorate.[42]

B. Principles of the First Amendment

The First Amendment is a bedrock of the United States Constitution and broader American society, famously establishing that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . and to petition the Government for a redress of grievances."[43] It has conferred numerous freedoms upon citizens of the United States and has been coined "the matrix, the indispensable condition, of nearly every other freedom."[44] The Supreme Court has continuously found that this freedom empowers individuals to freely express themselves in a variety of ways.[45]

Through the Fourteenth Amendment's incorporation doctrine, the First Amendment extends its protections to both the states and the federal government.[46] The First Amendment protects not only the freedom to speak, but also the freedom not to speak.[47] Not all forms of speech enjoy the same level of protection, with courts

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https://educationdata.org/college-enrollment-statistics#:~:text=73.0%25%20of%20college%20students%20at,graduate%20students%20attend%20public%20institutions [https://perma.cc/YMS9-W37T] ("Since 1960, the rate of enrollment among high school graduates increased by 37% total.").

42 *See* Letter from James Madison to William T. Barry, 4 August 1822, *in* 2 THE PAPERS OF JAMES MADISON, RETIREMENT SERIES, 1 FEBRUARY 1820–26 FEBRUARY 1823 (David B. Mattern et al. eds., Univ. Va. Press 2013) ("What spectacle can be more edifying or more seasonable, than that of Liberty & Learning, each leaning on the other for their mutual & surest support?").

43 U.S. CONST. amend. I.

44 Curtis Pub. Co. v. Butts, 388 U.S. 130, 145 (1967) (quoting Palko v. Connecticut, 302 U.S. 319, 327 (1937)).

45 *See, e.g.*, Stromberg v. California, 283 U.S. 359, 369 (1931); United States v. O'Brien, 391 U.S. 367, 376 (1968); Texas v. Johnson, 491 U.S. 397, 399 (1989).

46 *See, e.g.*, Gitlow v. New York, 268 U.S. 652, 666 (1925).

47 *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

applying different tests depending on the "category" of speech.[48] The same distinction is true for government employers and employees.[49] While government employees do not lose their First Amendment protections by virtue of their employment, the extent of these protections varies.[50] For instance, in *McAuliffe v. Mayor and Board of Alderman of New Bedford*, the Massachusetts state court determined that an employee's speech can lawfully be limited while performing their duties as a public employee.[51] The Supreme Court later clarified these standards in a variety of decisions, particularly in the educational context,[52] as discussed further below.

C. First Amendment as Applied to Education

First Amendment jurisprudence within educational contexts has evolved alongside the expansion of education within society. In the landmark 1969 case of *Tinker v. Des Moines*, the Supreme Court found a First Amendment violation when three students were suspended for wearing black armbands to protest the Vietnam War.[53] The Court established that neither "students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[54] However, these freedoms were not without limits—students were entitled to them so long as their speech did not "forecast substantial disruption of or material interference with school activities."[55]

One such limitation was highlighted when the Supreme Court affirmed a school's decision to suspend a student in *Bethel School*

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[48] *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (incitement); Miller v. California, 413 U.S. 15, 21 (1973) (obscenity); Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (fighting words); New York Times Co. v. Sullivan, 376 U.S. 254, 264 (1964) (libel); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561 (1980) (commercial speech); Counterman v. Colorado, 600 U.S. 66, 69 (2023) (threats). These represent various contexts where the First Amendment was analyzed.

[49] *See, e.g.*, McAuliffe v. City of New Bedford, 29 N.E. 517, 517–18 (Mass. 1892).

[50] *See id.*

[51] *See id.*

[52] *See, e.g.*, Pickering v. Bd. of Educ., 391 U.S. 563, 563 (1968); Connick v. Myers, 461 U.S. 138, 138–39 (1983); Garcetti v. Ceballos, 547 U.S. 410, 410 (2006).

[53] 393 U.S. 503, 514 (1969).

[54] *Id.* at 506.

[55] *Id.* at 514.

Dist. No. 403 v. Fraser for using graphic and sexual language while nominating a fellow classmate for student government in front of 600 students.[56] The Court distinguished *Tinker*, asserting that unlike the silent protest, the student's speech disrupted the school's "basic educational mission."[57] The Court specifically determined it was within the school's authority to prohibit the "sexually explicit monologue directed towards an unsuspected audience of teenage students."[58] While considering the First Amendment implications, the Court ultimately held that the "undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against society's countervailing interest in teaching students the boundaries of socially appropriate behavior."[59]

This balancing test paved the way for further clarification from the Supreme Court in the case of *Hazelwood v. Kuhlmeier* a mere two years later.[60] There, the Court upheld the school district's decision to withhold two student-written articles from publication in a school-sponsored newspaper—one detailing three students' experiences with pregnancy and the other addressing the impact of divorce on students at the school.[61] The newspaper was part of the curriculum for a journalism class offered by the school.[62] Emphasizing state interests in curricular control, the Court ruled that schools could censor speech in school-sponsored activities "so long as their actions are reasonably related to legitimate pedagogical concerns."[63] The Supreme Court expanded the scope of what constitutes school-sponsored activity in *Morse v. Frederick*.[64] There, a student was suspended for displaying a sign reading "BONG HiTS 4 JESUS" during a class trip.[65] Because the Court deemed the sign to advocate for

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56 *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 675–76 (1986).

57 *Id.* at 685.

58 *Id.*

59 *Id.* at 681.

60 484 U.S. 260 (1988).

61 *See id.* at 273–74.

62 *See id.*

63 *Id.* The principal reasoned that the pregnancy article did not sufficiently protect the students' anonymity, while the divorce article explicitly mentioned parents' names without giving them a chance to defend their reputation. *See id.* at 263–64.

64 *See* Morse v. Frederick, 551 U.S. 393, 403 (2007).

65 *See id.* at 397.

illegal drug use during a school-sponsored event, it upheld the school's authority to restrict such speech and discipline the student.[66] This effectively extended a school's authority beyond the walls of the school building.

These decisions illustrate that students may receive less protection than adults in certain environments.[67] *Tinker* not only clarified the protections for students in school but also extended these protections to teachers.[68] However, teachers' First Amendment rights are similarly vulnerable to retaliatory actions, which can include job termination, denial of tenure, or other forms of discipline.[69] This implicates the notion of academic freedom, which grants teachers the ability to carry out their job responsibilities without the fear of being disciplined for their opinions.[70] The American Association of University Professors ("AAUP"), a group of professors who came together to "establish a type of procedural due process designed to protect faculty interests,"[71] published its 1915 Declaration of Principles on Academic Freedom and Academic Tenure as their first statement on the topic.[72] Later, the AAUP released its 1940 Statement of Principles on Academic Freedom and Tenure (and

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66 *See id.* at 410.

67 *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 656 (1995) ("Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere."); *see also* Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2046 (2021) ([T]hese three features of much off-campus speech mean that the leeway the First Amendment grants to schools in light of their special characteristics is diminished."); *cf.* New Jersey v. T.L.O., 469 U.S. 325, 342 (1985).

68 *See* Tinker v. Des Moines, 393 U.S. 503, 506 (1969).

69 *See, e.g.*, Dustin Jones, *A Texas A&M Professor was Suspended for Allegedly Criticizing Lieutenant Governor*, NAT'L PUB. RADIO (July 26, 2023, 3:30 PM), https://www.npr.org/2023/07/26/1190245518/texas-professor-joy-alonzo-investigation-freedom-speech [https://perma.cc/HVW3-B7NN].

70 *See Academic Freedom*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("the right (esp. of a university teacher) to speak freely about political or ideological issues without fear of loss of position or other reprisal."). This Note advocates for the notion to be expanded even further to protect teachers' First Amendment rights.

71 Harvey Gilmore, *Has Garcetti Destroyed Academic Freedom?*, 6 U. MASS. ROUNDTABLE SYMP. L.J. 79, 90 (2011).

72 *See* AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, 1915 DECLARATION OF PRINCIPLES ON ACADEMIC FREEDOM AND ACADEMIC TENURE (1915) [hereinafter 1915 AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS].

subsequently affirmed them in its 1970 interpretive comments) to establish a general standard of academic freedom.[73]

Academic freedom found its way into the Supreme Court during the Cold War era.[74] It was first mentioned in the 1952 case of *Adler v. Board of Education of the City of New York*.[75] There, the majority upheld the Feinberg Law, a statute rejecting employment for anyone deemed a "subversive person," asserting that state employment was a "privilege."[76] The Court contended that individuals have "no right to work for the State in the school system on their own terms" and said they could work elsewhere to retain their beliefs.[77] In his dissent, Justice Douglas cautioned that the arbitrary dismissal of teachers would "raise havoc with academic freedom," comparing the law to a police state, where "[a] pall [would be] cast over the classrooms."[78] In a contemporaneous case that struck down an Oklahoma statute mandating all state employees to swear to a loyalty oath, *Wieman v. Updegraff*, Supreme Court Justice Frankfurter elaborated on the notion of academic freedom in his concurrence.[79] He emphasized how faculty members "must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma."[80]

Five years later, the Supreme Court's jurisprudence on academic freedom grew with *Sweezy v. New Hampshire*.[81] There, the Court examined the New Hampshire Subversive Activities Act of 1951,

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[73] *See* AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE (1940).

[74] *See* Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945, 973 (2009).

[75] Adler v. Bd. of Educ., 342 U.S. 485, 509 (1952), *overruled by* Keyishian v. Bd. of Regents, 385 U.S. 589 (1967).

[76] *Id.* at 489–92.

[77] *Id.*

[78] *Id.* at 509–510 (Douglas, J., dissenting) ("Where suspicion fills the air and holds scholars in line for fear of their jobs, there can be no exercise of the free intellect.").

[79] *See* Wieman v. Updegraff, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring).

[80] *Id.* at 196–97. The Court clarified that *Adler* did not decide "whether an abstract right to public employment exists," but rather looked to the reasoning the statutes give for disallowing employment. *Id.* at 192.

[81] *See* Sweezy v. New Hampshire, 354 U.S. 234 (1957).

which rendered "subversive persons" ineligible for employment at state institutions (including public schools) and empowered the Attorney General to subpoena potential "subversive persons" for investigations.[82] Plaintiff Sweezy was incarcerated after refusing to disclose information about his lectures or potential associations with the Communist Party.[83] The Court determined a due process violation occurred because there were no discernible state interests underlying the action.[84] In a plurality opinion, Chief Justice Warren highlighted the professor's entitlement to "liberties in the areas of academic freedom," emphasizing that governments should be reluctant to infringe upon this domain.[85] Justice Frankfurter, once again, concurred and lamented about the concept of academic freedom by noting that some contend that academic institutions are "an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds who my teach, what may be taught, how it shall be taught, and who may be admitted to study."[86]

In the following years, the Supreme Court continued to emphasize the role of education in society.[87] Academic freedom was explicitly mentioned in a majority opinion authored by Justice Brennan in the 1967 case, *Keyishian v. Board of Regents*.[88] There, two professors were terminated for refusing to sign a statement affirming they were not and never had been Communists, as required by New York law at the time.[89] The Court emphasized the nation's deep commitment to "safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned.

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82 *Id.* at 245–56.

83 *See id.* at 244–45.

84 *See id.* at 254 ("[T]he lack of any indications that the legislature wanted the information the Attorney general attempted to elicit from petitioner must be treated as absence of authority."). The Court used the absence of authority to determine there were no state interests at play, leading to the violation. *See id.*

85 *Id.* at 250.

86 *See id.* at 263 (Frankfurter, J., concurring) (internal citations omitted).

87 *See, e.g.*, Shelton v. Tucker, 364 U.S. 479, 487 (1960) ("[T]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.").

88 *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 589 (1967).

89 *See id.* at 591–92.

That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."[90] Reasoning that *Adler* was not controlling and that the nation's "future depends upon leaders trained through wide exposure to that robust exchange of ideas," the Court deemed the statute unconstitutional.[91] *Keyishian* was a vital case for academic freedom as it underscored the school system's objectives as a "marketplace of ideas" and emphasized the Court's commitment to preserving it.[92] Since then, *Keyishian* has emerged as one of the most cited cases regarding education in the Supreme Court.[93]

D. Pickering v. Board of Education *and* Connick v. Myers

The Court confronted public employee free speech rights by creating a balancing test in both *Pickering v. Board of Education*[94] and *Connick v. Myers*.[95] In *Pickering*,[96] an Illinois public high school teacher was dismissed for criticizing the Illinois State Board of Education in a letter to the local newspaper.[97] The letter criticized how the School Board handled previous proposals to raise revenue and suggested tax increases.[98] A School Board hearing determined the letter contained false information, which cast doubt on "the motives, honesty, integrity, truthfulness, responsibility and competence of both the Board of Education and the school administration."[99] Pickering contested his termination in Illinois state court, which upheld his dismissal.[100] After an appeal from the Illinois Supreme Court, the Supreme Court granted certiorari and determined his rights had been violated.[101]

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90 *Id.* at 603.
91 *Id.*
92 *Id.*
93 *See, e.g.*, Bd. of Educ. v. Pico, 457 U.S. 853, 870 (1982); Grutter v. Bollinger, 539 U.S. 306, 329 (2003); Epperson v. Arkansas, 393 U.S. 97, 105 (1968).
94 *See* Pickering v. Bd. of Educ., 391 U.S. 563, 565 (1968).
95 *See* Connick v. Meyers, 461 U.S. 138, 147 (1983).
96 *Pickering*, 391 U.S. at 563.
97 *See id.* at 564.
98 *See id.*
99 *Id.* at 566–67.
100 *Id.* at 568.
101 *Id.* at 565.

In *Pickering*, the Supreme Court established a balancing test for protected speech, highlighting that the "problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[102] Essentially, the first step of the inquiry involved determining whether the employee was speaking "on a matter of public concern," followed by balancing the state's interests against the employee's at the second step.[103] Writing for the majority, Justice Marshall noted that teachers cannot be constitutionally compelled to "relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work."[104] While recognizing these First Amendment concerns, the Court adopted a balancing test because of the countervailing state interests as an employer.[105]

The Court underscored the importance of teachers in society, recognizing them as community members "most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent."[106] This observation, the Court determined, aligns with the public interest in fostering "free and unhindered debate" on matters of public importance.[107] The school district's use of taxpayer funds was deemed a matter of public concern.[108] Employing the balancing test, the Court determined the letter did not interfere with the district's functioning and concluded that Pickering's First Amendment rights were violated by his dismissal.[109]

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102 *Id.* at 568.

103 *Id.*

104 *Id.*

105 *Id.* ("At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.").

106 *Id.* at 572.

107 *Id.* at 573.

108 *See id.*; *see also* Garrison v. Louisiana, 379 U.S. 64, 77 (1964) (holding that public officials must be accorded First Amendment protection when speaking on matters of public concern).

109 *Pickering*, 391 U.S. at 574.

Despite not being a public education case, the Court added another layer to the *Pickering* test in 1983 when it decided *Connick v. Myers*.[110] Sheila Myers, an Assistant District Attorney in New Orleans, opposed her impending transfer to a new division within the criminal court.[111] She voiced her objections to her direct supervisors, including Harry Connick, the District Attorney.[112] Despite her objections, Myers was transferred, with supervisors saying that her concerns about the transfer were "not shared by others in the office."[113] Following this, Myers prepared a survey for her coworkers to solicit their views "concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns."[114] After another discussion with Connick, Myers distributed the survey to fifteen co-workers.[115] After learning this, Connick returned to the office and terminated Myers for her refusal to accept the transfer and for insubordination related to the survey.[116]

Myers filed suit under 42 U.S.C. § 1983 claiming wrongful termination for exercising her right to free speech.[117] The district court, guided by *Pickering* and *Givhan v. Western Line Consolidated School District*,[118] ruled in favor of Myers.[119] It determined that she was speaking on matters of public concern and that her interests outweighed the District Attorney's.[120] The Fifth Circuit affirmed this

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110 Connick v. Myers, 461 U.S. 138, 140 (1983).
111 *Id.*
112 *Id.*
113 *Id.* at 140–41.
114 *Id.* at 141.
115 *Id.*
116 *Id.*
117 *Id.*
118 439 U.S. 410 (1979) (holding that First Amendment protection applies when a public employee arranges to communicate privately with his employer rather than to express his views publicly).
119 *See* Myers v. Connick, 507 F. Supp. 752, 760 (E.D. La. 1981), *aff'd*, 654 F.2d 719 (5th Cir. 1981), *rev'd*, 461 U.S. 138 (1983).
120 *Id.*

decision[121] and the Supreme Court subsequently granted certiorari and reversed.[122]

The Supreme Court's decision in *Connick* introduced another layer to the *Pickering* balancing test.[123] Justice White's majority opinion acknowledged the protections *Pickering* established, while also clarifying that the state's interests as an employer may differ from its interests as a sovereign entity in its regulatory capacity.[124] Throughout the opinion, the Court emphasized the importance of free speech on public affairs.[125] However, it held that

> when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.[126]

The Court clarified that the determination of whether speech pertains to a matter of public concern "must be determined by the content, form, and context of a given statement, as revealed by the whole record."[127] The Court concluded that the content, form, and context of Myers' speech was not linked to "any matter of political, social, or other concern to the community."[128] However, Myers' question about the pressure to participate in campaigns satisfied step one of the analysis by being deemed a matter of public concern,

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121 *See* Myers v. Connick, 654 F.2d 719 (5th Cir. 1981), *rev'd*, 461 U.S. 138 (1983).

122 *Connick*, 461 U.S. at 142.

123 *Id.* at 147.

124 *Id.* at 140

125 *Id.* at 145 ("The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" (quoting Roth v. United States, 354 U.S. 476, 484 (1957))); *Id.* ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." (quoting Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964))).

126 *Id.* at 147.

127 *Id.* at 147–48.

128 *Id.* at 146.

while the other inquiries touched upon private interests and thus were *not* protected.[129]

Connick clarified that within the *Pickering* balancing test, not all issues within a government office are deemed to involve matters of public concern.[130] With that, courts were to follow the two-part test: to prevail in a First Amendment claim concerning the workplace, a government employee must first show they were speaking on a matter of public concern; if so, then the court should balance the employee's interests against those of the employer.[131] Courts used this standard in public education free speech cases for over twenty years.[132]

E. Garcetti v. Ceballos

The standard discussed above changed with the Supreme Court's 2006 decision in *Garcetti v. Ceballos*, introducing uncertainties regarding how "scholarship and teaching" are protected under the First Amendment.[133] There, Richard Ceballos, a deputy district attorney in Los Angeles County, discovered discrepancies in an affidavit from a sheriff concerning a search warrant in a pending case.[134] He wrote a memorandum to his supervisors detailing the inaccuracies and recommending the dismissal of the case.[135] Despite his recommendation, the office proceeded with the prosecution.[136] The defense called Ceballos as a witness during trial to testify about the inaccuracies in the affidavit.[137] Ceballos alleged that he faced retaliatory employment actions following his testimony.[138]

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129 *Id.* at 154.

130 *Id.* at 143 ("[G]overnment offices could not function if every employment decision became a constitutional matter.").

131 *Id.* at 142. The question about the campaigns was not protected, however, as Myers lost the balancing test in step two. *See id.* at 154.

132 *See id.* at 154.

133 Garcetti v. Ceballos, 547 U.S. 410, 425 (2006).

134 *Id.* at 413–14.

135 *Id.*

136 *Id.*

137 *Id.* at 414–15.

138 *Id.* at 415.

Ceballos sued in the Central District of California.[139] The court ruled against Ceballos, granting summary judgment and determining that he was *not* entitled to First Amendment protection for actions carried out as part of his employment duties.[140] The Ninth Circuit reversed the decision, holding that under *Connick*, government misconduct was "inherently a matter of public concern."[141] The court then followed *Pickering* and found that Ceballos' interests outweighed those of his supervisors.[142]

In a five-to-four decision, the Supreme Court reversed and ruled against Ceballos.[143] Justice Kennedy, writing for the 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."[144] Justice Kennedy concluded that because Ceballos was acting within the scope of his official duties, he was not protected by the First Amendment.[145] The Court reasoned that individuals who enter public service must accept certain limitations on their freedom,[146] and that government employers have the authority to regulate their employees.[147] Furthermore, the Court reasoned that because Ceballos was speaking pursuant to his official duties, his communication constituted government speech, which allows public employers significant control.[148]

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139 *Id.*

140 *See* Ceballos v. Garcetti, No. CV0011106AHMAJWX, 2002 WL 34098285, at *7 (C.D. Cal. Jan. 30, 2002).

141 Ceballos v. Garcetti, 361 F.3d 1168, 1174 (9th Cir. 2004).

142 *Id.* at 1180.

143 *Garcetti*, 547 U.S. 410, 412 (2006).

144 *Id.* at 421.

145 *Id.* at 423.

146 *Id.* at 418 ("When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." (citing *Waters v. Churchill*, 511 U.S. 661, 671 (1994))).

147 *Id.*

148 *Id.* at 421–22 (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)).

The *Garcetti* decision sparked dissent, with a five-to-four split along ideological lines.[149] In his dissent, Justice Souter criticized the standard established by the majority and argued that there was "no adequate justification for the majority's line categorically denying *Pickering* protection to any speech uttered 'pursuant to . . . official duties.'"[150] He emphasized the need to adjust the *Pickering* test to prevent further restriction on speech.[151] Souter also highlighted the potential impact the majority opinion could have on academic freedom, noting how teachers speak and write "pursuant to official duties."[152] He cited academic freedom cases to illustrate the potential infringement the *Garcetti* standard could impose on education.[153] Souter expressed concern that under the majority's new test, even the teaching activities of a public university professor could fall within the "ostensible domain beyond the pale of the First Amendment."[154]

The Court did not specify whether this new standard would apply to teachers.[155] Responding to the dissent, the majority recognized that "[t]here 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."[156] The Court concluded, however, that it was unnecessary to "decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching,"[157] thereby leaving the question open for lower courts.[158]

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[149] Justice Kennedy's majority opinion was joined by Chief Justice Roberts, Justice Scalia, Justice Thomas, and Justice Alito. *Id.* at 412. Justice Stevens, Justice Souter, Justice Ginsburg, and Justice Breyer were in dissent. *Id.* Every Justice in the majority opinion was appointed by a Republican President. *See Justices 1789 to Present*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx [https://perma.cc/6FMH-KGWW] (last visited Feb. 4, 2024).

[150] *Garcetti*, 547 U.S. at 430.

[151] *See id.* at 438–439.

[152] *Id.*

[153] *Id.*

[154] *Id.*

[155] *See id.* at 425.

[156] *Id.*

[157] *Id.*

[158] *See id.*

The aftermath of *Garcetti* resulted in a three-part inquiry to determine whether a public employee's speech is safeguarded by the First Amendment.[159] First, courts will determine if the employee was acting "pursuant to official duties."[160] If so, then there is no First Amendment protection.[161] If they are not, then the court goes to the *Pickering/Connick* test.[162] Using that test, the next inquiry is whether the employee was speaking on a "matter of public concern."[163] If they are not, then the employee loses and is not protected.[164] If they are, then the inquiry continues to the third part: balancing the employee's interests against the employer's.[165] While this is the public employee test, it remains uncertain whether the Supreme Court will apply this to academic speech.[166] This issue has sparked discussion among the circuits and commentators regarding whether *Garcetti* is the correct approach for courts to apply to public school teachers.[167]

II. CIRCUITS HAVE VARIED IN APPLYING *GARCETTI* TO THE EDUCATIONAL CONTEXT

The Supreme Court left the question of whether *Garcetti* applies to "scholarship or teaching" unresolved, leaving courts across the country to decide the issue.[168] *Garcetti* has been inconsistently

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159 *See id.* at 421.

160 *See* Burt v. Fuchs, No. 1:22CV75-MW/HTC, 2023 WL 4103942, at *5 (N.D. Fla. June 21, 2023).

161 *Id.*

162 *Id.*

163 *Id.*

164 *See id.*

165 *See id.*

166 *See* Garcetti v. Ceballos, 547 U.S. 410, 425 (2006).

167 *See, e.g.*, Martha M. McCarthy & Suzanne E. Eckes, *Silence in the Hallways: The Impact of Garcetti v. Ceballos on Public School Educators*, 17 B.U. PUB. INT. L.J. 209 (2008); David L. Hudson, Jr., *The Supreme Court's Worst Decision in Recent Years—Garcetti v. Ceballos, the Dred Scott Decision for Public Employees*, 47 MITCHELL HAMLINE L. REV. 375 (2020); Jessica Tully, *Garcetti Decision: The Greatest Threat to Free Speech?*, PENN ST. L. REV.: F. BLOG (Dec. 28, 2015), https://www.pennstatelawreview.org/the-forum/garcetti-decision-the-greatest-threat-to-free-speech/ [https://perma.cc/5Z2T-SKJ7].

168 *See* discussion *infra* Part II.

applied to teacher speech across the circuits.[169] As previously defined in this Note, "applied *Garcetti*" denotes instances where the court, at step one of the three-part inquiry, determined the teacher's speech to fall within their "official duties."

To assess this circuit split, this Part will first analyze the circuits that have consistently applied *Garcetti*. It will then analyze the circuits that have had mixed results before examining the circuits that have refused to apply it.

A. Circuits Consistent with Garcetti

The Seventh and Third Circuits have decided cases consistent with the reasoning in *Garcetti*.[170] This Section will discuss each in turn.

1. Seventh Circuit

The Seventh Circuit explicitly followed *Garcetti* one year after it was decided in *Mayer v. Monroe County Community School Corp.*[171] There, an elementary school opted not to renew a teacher's contract due to her taking a political stance during a current events session when she told students she opposed the military operations in Iraq.[172] Mayer did not contest that the current-events session which was conducted during class hours fell within her official duties.[173] The court determined the speech was indeed part of Mayer's official duties, and applied *Garcetti*, reasoning that "teachers hire out their own speech and must provide the service for which employers are willing to pay."[174] Furthermore, the court deemed this an "easier case for the employer than *Garcetti*," highlighting that teachers are paid to create speech and deliver it to a "captive audience"—elementary school students.[175] Thus, the court ruled in favor of the school, holding that *Garcetti* applies directly because

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169 *See* discussion *infra* Part II.
170 *See* discussion *infra* Section II.A.
171 *See* Mayer v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477, 480 (7th Cir. 2007).
172 *See id.* at 478.
173 *See id.* at 479.
174 *Id.*
175 *Id.*

"Mayer's current-events lesson was part of her assigned tasks in the classroom."[176]

Mayer was not the end of the inquiry in the Seventh Circuit.[177] In *Renken v. Gregory*, decided a year later, a university professor was disciplined by his employer after criticizing a university's management of a federal grant.[178] The court determined that Renken's complaints concerning the allocation of grant funds fell within his official duties as a university professor and were therefore unprotected.[179] Emphasizing that official duties extend beyond mere job descriptions, the court reasoned that Renken's speech was within his duties because "administering the grant as a [principal investigator] fell within the teaching and service duties that he was employed to perform."[180] Accordingly, the court concluded that Renken's speech did not merit First Amendment protection under *Garcetti*.[181]

Eight years after *Renken*, the court grappled with classroom speech in *Brown v. Chicago Board of Education*.[182] There, after discovering his students passing a note containing the "n-word" in class, Brown initiated a discussion on why such language is hurtful and unacceptable.[183] However, Brown did so in contravention of the Chicago Board of Education's policy forbidding "teachers from using racial epithets in front of students, no matter what the purpose."[184] Brown's suspension was then upheld by the court based on *Garcetti* principles.[185] Aligning with precedent from the Seventh Circuit and other jurisdictions, the court determined that to "the extent that Brown's discussion of racial slurs was an attempt to quell

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176 *Id.* at 480.

177 *See, e.g.*, McArdle v. Peoria Sch. Dist. No. 150, 705 F.3d 751, 754 (7th Cir. 2013) (summary judgment granted under *Garcetti* for principal's statements alleging financial misconduct in the district).

178 *See* Renken v. Gregory, 541 F.3d 769-70, 774 (7th Cir. 2008).

179 *See id.* at 773 ("Determining what falls within the scope of an employee's duties is a practical exercise that focuses on 'the duties an employee actually is expected to perform.'" (quoting *Morales v. Jones*, 494 F.3d 590, 596 (7th Cir. 2007))).

180 *Id.* at 774.

181 *See id.* at 775.

182 *See* Brown v. Chi. Bd. of Educ., 824 F.3d 713, 714 (7th Cir. 2016).

183 *See id.*

184 *Id.*

185 *See id.* at 715.

student misbehavior, it was still pursuant to his official duties," and thereby precluded any First Amendment protection.[186]

Based on the existing precedent, it seems that the Seventh Circuit will continue to apply *Garcetti* in the K-12 context. However, it is unclear how strictly it will be applied in the university setting.

2. Third Circuit

While the Third Circuit has not applied *Garcetti* directly, it has ruled consistent with *Garcetti*'s reasoning by asserting that teachers lack control over classroom content. *Edwards v. California University of Pennsylvania* established this stance prior to *Garcetti* and continues to shape the jurisprudence within the circuit.[187] There, a university professor teaching "Introduction to Educational Media," faced suspension after revising the syllabus to include required readings on bias, censorship, religion, and humanism.[188] His suspension followed numerous student and faculty complaints regarding his class curriculum and his focus on religion.[189] Justice Samuel Alito, then a circuit judge, delivered the opinion, affirming that "a public university professor does not have a First Amendment right to decide what will be taught in the classroom."[190] This ruling aligns with *Garcetti* because it determined what fell under the educator's "duties."[191] Alito's reasoning built off of past Third Circuit precedent emphasizing that "no court has found that teachers' First Amendment rights extend to choosing their own curriculum or classroom management techniques in contravention of school policy or dictates."[192]

The Third Circuit continues to follow this reasoning that First Amendment protections do not extend to teaching in cases after *Edwards*.[193] In 2020, the court found no genuine issue of material fact

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186 *Id.*

187 *See* Edwards v. California Univ. of Penn., 156 F.3d 488, 493 (3d Cir. 1998).

188 *See id.* at 490. The books were no longer allowed to use in the course as well. *See id.*

189 *See id.*

190 *Id.* at 491.

191 *See* Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

192 *Edwards*, 156 F.3d at 491 (citing *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172 (3d Cir. 1990)).

193 *See* Gorum v. Sessoms, 561 F.3d 179, 185 (3d Cir. 2009).

to survive summary judgment on a teacher's claims of First Amendment protection when she posted an article containing "alternative views" about the September 11, 2001 attacks on her course website.[194] While not explicitly citing *Garcetti*, the Third Circuit has continued to align with Judge Alito's decision in *Edwards*, employing similar reasoning to circuits directly applying *Garcetti*.[195]

It would not be surprising if the Third Circuit continued to apply reasoning consistent with *Garcetti*, barring First Amendment claims from teachers. If directly confronted with *Garcetti*, I predict a similar outcome at both the K-12 and college levels.

B. Circuits That Have Applied Garcetti *to a Lesser Degree*

There are circuits where *Garcetti* is applied in some classroom contexts, but not all. Most notably, the Fourth and Sixth Circuits have had such results.[196]

1. Fourth Circuit

The Fourth Circuit has applied *Garcetti* inconsistently.[197] Instead of directly applying the *Garcetti* analysis, which the Supreme Court left open for interpretation for "speech related to teaching," the Fourth Circuit in *Lee v. York County School Division*[198] opted for the *Pickering-Connick* standard only.[199] Under this standard, the court considers first whether speech is on a matter of public concern and then balances the interests involved.[200] The court ruled that a high school Spanish teacher's bulletin board materials outside his classroom were "curricular in nature."[201] These materials were

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194 *See* Ali v. Woodbridge Twp. Sch. Dist., 957 F.3d 174, 184 (3d Cir. 2020) (holding that "Ali did not have a right to decide what would be taught in the classroom").

195 *Cf. Garcetti*, 547 U.S. at 421.

196 *See* discussion *infra* Section II.B.

197 *See* discussion *infra* Section II.B.

198 *See* Lee v. York Cnty. Sch. Div., 484 F.3d 687, 689 (4th Cir. 2007).

199 *Id.* at 694.

200 *See Pickering*, 391 U.S. at 568.

201 *Lee*, 484 F.3d at 697. ("[I]n order to be considered curricular in nature, the speech must also be supervised by faculty members and designed to impart particular knowledge to the students."). Lee's bulletin board included religious references relating to missionary work and articles about government prayers. *See id* at 689.

unprotected because the Fourth Circuit determined that "if contested speech is curricular in nature," it is not addressing a matter of public concern.[202] The court determined this because "disputes over curriculum constitute ordinary employment disputes and do not implicate speech on matters of public concern."[203]

With this precedent, the Fourth Circuit addressed how *Garcetti* would affect disputes related to scholarship or teaching directly in *Adams v. Trustees of University of North Carolina-Wilmington*.[204] There, an associate professor at the University of North Carolina-Wilmington alleged his First Amendment rights were violated when he was not promoted due to Christian and conservative views expressed in his scholarship and remarks.[205] The court analyzed Adams' claims using with *Pickering* standard, consistent with its approach in *Lee*.[206] It highlighted that the "plain language of *Garcetti* . . . explicitly left open the question of whether its principles apply in the academic genre where issues of 'scholarship or teaching' are in play."[207] As an unresolved issue, the court declined to extend *Garcetti* to scholarship and teaching in the university setting.[208] However, the court did not completely rule out the application of *Garcetti* in a school setting, stating that "[t]here may be instances . . . [where] *Garcetti* may apply."[209] Following the *Adams* decision, it became established law in the Fourth Circuit that although *Garcetti* could

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202 *Id.* at 697 (quoting *Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364 (4th Cir. 1998) (en banc)).

203 *Id.* at 697 (quoting *Boring*, 136 F.3d at 369).

204 640 F.3d 550, 563 (4th Cir. 2011).

205 *Id.*

206 *See id.* at 563 ("Although *Lee* concerned a public high school teacher's First Amendment rights in the classroom, its basis for using the *Pickering-Connick* analysis as opposed to *Garcetti* is equally—if not more—valid in the public university setting.").

207 *Id.*

208 *See id.* at 564 ("Applying *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.").

209 *Id* at 563.

apply in schools, it would not apply to disputes related to teaching or scholarship.[210]

With the acknowledgment that *Garcetti* could apply in a university setting, the Fourth Circuit applied it in the 2023 case, *Porter v. Board of Trustees of North Carolina State University*.[211] There, Porter alleged that he faced an adverse employment action following three communications concerning "so-called 'social justice' affecting academia in general."[212] The court determined that these communications, despite being connected to his role as a teacher, were not related to "scholarship or teaching" and thus were not protected.[213] It concluded that as Porter's speech "was in his capacity as an employee, it was not a product of his teaching or scholarship," and therefore the court applied *Garcetti*.[214]

2. Sixth Circuit

The Sixth Circuit has also displayed inconsistency in applying *Garcetti*, with its most recent case bypassing it altogether.[215] Before *Garcetti*, the Sixth Circuit stressed the importance of First Amendment protections for academic freedom.[216] However, this was scaled

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[210] *See* Kashdan v. George Mason Univ., 70 F.4th 694, 702 (4th Cir. 2023) ("Finally, we address Kashdan's First Amendment claim. In the public-university context, we apply the *Pickering-Connick* framework to determine whether an employee was wrongly sanctioned for protected speech.").

[211] 72 F.4th 573, 582 (4th Cir. 2023).

[212] *See id.* at 577. The first communication was in 2016, when Porter expressed concerns about a proposal to add questions about diversity to course evaluations; the second was in 2018 when Porter emailed an article about the school criticizing hiring practices; and the third communication occurred later in 2018, when Porter published "ASHE Has Become a Woke Joke" on his personal blog, criticizing a colleague's research. *See id.* at 578–79.

[213] *See id.* at 582 ("As this Court has repeatedly recognized, the *Garcetti* rule does not extend to speech by public university faculty members, acting in their official capacity, that is 'related to scholarship or teaching.'" (quoting Garcetti v. Ceballos, 547 U.S. 410, 425 (2006))).

[214] *Id.* at 583.

[215] *See* Meriwether v. Hartop, 992 F.3d 492, 504 (6th Cir. 2021).

[216] *See, e.g.*, Hardy v. Jefferson Cmty. Coll., 260 F.3d 671, 680 (6th Cir. 2001) ("[T]he argument that teachers have no First Amendment rights when teaching, or that the government can censor teacher speech without restriction, is totally unpersuasive."); *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577, 582 (6th Cir. 1976) (holding that the "First Amendment's protection of academic freedom" applies to teachers' in-class discussions).

back after the Court applied *Garcetti* in the 2010 case of *Evans-Marshall v. Board of Education of Tipp City*.[217] There, a high school English teacher's contract was not renewed after complaints arose when she chose the books *Heather Has Two Mommies* and *Siddhartha* for her class.[218] Additionally, some disapproved of her other classroom assignments which led to disagreements with the principal.[219]

Despite Evans-Marshall's assertion of her right "to select books and methods of instruction for use in the classroom without interference from public officials," the court found that she *did not* enjoy these protections under the First Amendment.[220] It determined that she could not "overcome *Garcetti*" because she made these choices as part of her official duties as a teacher.[221] While the court acknowledges that teachers retain their constitutional rights in school, it emphasized that this "does not transform them into the employee *and* employer when it comes to deciding what, when and how English is taught to fifteen-year-old students."[222] Consequently, it did not afford protection for this speech, as doing so would "transform run-of-the-mine curricular disputes into constitutional stalemates."[223] For these reasons, the court held that the "First Amendment does not protect primary and secondary school teachers' in-class curricular speech," and thus found no violation.[224]

The Sixth Circuit continued to apply the principles from *Evans-Marshall* and *Garcetti* to other cases.[225] However, it refrained from

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217 *See* Evans-Marshall v. Bd. of Educ., 624 F.3d 332, 334 (6th Cir. 2010).

218 The students chose the books and would participate in a classroom debate. *See id.* at 335. A school board meeting was held where parents expressed concern about the content of the books. *See id.* Furthermore, in creative writing class, writing samples went against the principal's desires regarding "what [Evans-Marshall] was using in her classroom or the themes of her in-class discussions." *Id.* at 336.

219 *See id.* at 335. The assignments were from her creative writing class, where writing samples included "a first-hand account of a rape, [and] the other a story about a young boy who murdered a priest and desecrated a church." *Id.* at 336.

220 *Id.* at 341.

221 *Id.* at 340.

222 *Id.*

223 *Id.* at 341.

224 *Id.* at 342.

225 *See, e.g.*, Fox v. Traverse City Area Pub. Sch. Bd. of Educ., 605 F.3d 345, 348 (6th Cir. 2010).

extending these rulings to universities in *Meriweather v. Hartop*.[226] In that case, a philosophy professor was terminated after refusing to call a transgender student by their preferred pronouns.[227] Recognizing the significance of academic freedom in universities, the court asserted that "professors at public universities retain First Amendment protections at least when engaged in core academic functions, such as teaching and scholarship."[228] Concerned about the potential implications of granting universities the "alarming power to compel ideological conformity" the court created an academic freedom exception to *Garcetti* for university professors.[229] Then, the court conducted a *Pickering-Connick* analysis and overturned the district court's motion to dismiss, holding that professors may be entitled First Amendment protections during the core activity of teaching and potentially when deciding to use pronouns in the classroom.[230]

Indeed, the Fourth and Sixth circuits have demonstrated varied applications of *Garcetti*.[231] Ultimately, however, the prevailing trend across circuits suggests that *Garcetti* will not apply to cases involving "scholarship or teaching."[232]

Regarding the *Meriwether* case, it appears the Sixth Circuit will continue to apply the academic freedom exception to the *Garcetti* test. However, it remains uncertain whether this exception will be utilized in the K-12 context.

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[226] *See* Meriwether v. Hartop, 992 F.3d 492, 518 n.1 (6th Cir. 2021) ("We distinguished college and university professors and made clear that our holding was limited to schoolteachers.").

[227] *See* Hanna Diamond, Note, *The Sixth Circuit Joins the Split: Higher Education Freedom of Speech and the Breadth of Academic Freedom Remain in Limbo*, 12 WAKE FOREST L. REV. ONLINE 111, 123 (Nov. 22, 2022), https://www.wakeforestlawreview.com/wp-content/uploads/2022/11/12WakeForestLRevOnline111.pdf [https://perma.cc/P26U-57US] ("Meriwether addressed students in class by 'Mr.' or 'Ms.' and improperly called the student 'sir.' The student corrected Meriwether after class and requested to be called by female pronouns.").

[228] *Meriwether*, 992 F.3d at 505.

[229] *Id.* at 506.

[230] *Id.* at 505.

[231] *See* discussion *supra* Section II.B.

[232] *See Meriwether*, 992 F.3d at 504.

C. Circuits That Have Not Applied Garcetti

The Ninth, Tenth, and now most recently, the Second Circuit have refused to extend *Garcetti* to teacher speech.[233] Each are discussed below in turn.

1. Ninth Circuit

The Ninth and Tenth Circuits have predominantly addressed teacher speech by applying the *Pickering* standard rather than *Garcetti*.[234] However, the Ninth Circuit did apply *Garcetti* in a case involving a high school teacher who displayed religious messages in his classroom, ruling the teacher's actions fell within the scope of his job duties and were unprotected under the First Amendment.[235] The court determined that "Johnson spoke as an employee, not as a citizen" when deciding to apply the *Garcetti* standard to his claims.[236]

Despite this, three years later in *Demers v. Austin*, the Ninth Circuit explicitly stated that "*Garcetti* does not—indeed, consistent with the First Amendment, cannot—apply to teaching and academic writing that are performed 'pursuant to the official duties' of a teacher and professor."[237] David Demers, a tenured associate professor at Washington State University, alleged retaliation for distributing a pamphlet and draft chapter of an in-progress book including plans to improve the university.[238] The court, applying the *Pickering* balancing test, recognized "an exception to *Garcetti* for teaching and academic writing."[239] In doing so, the court acknowledged Souter's dissent in *Garcetti* to show that teachers should be treated

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233 *See* Diamond, *supra* note 227, at 120; *see also* Heim v. Daniel, 81 F.4th 212, 224 (2d Cir. 2023).

234 *See* Diamond, *supra* note 227, at 120.

235 *See* Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 967 (9th Cir. 2011) ("Johnson did not act as an ordinary citizen when 'espousing God as opposed to no God' in his classroom." (citing Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517, 522–23 (9th Cir. 1994))). Johnson's claims dealt with the Establishment Clause as well. *See id.* at 970.

236 *Id.* at 970.

237 Demers v. Austin, 746 F.3d 402, 412 (9th Cir. 2014).

238 *See id.* at 406.

239 *Id.* at 418. The court remanded the remaining questions back to the district court. *See id.* at 417.

differently.[240] This decision solidified the Ninth Circuit's stance that *Garcetti* does not apply to teaching and scholarship.[241]

It is likely that the Ninth Circuit will continue to adhere to this precedent and apply *Pickering* in university settings.

2. Tenth Circuit

After the *Garcetti* decision, the Tenth Circuit continued to apply the *Pickering* standard,[242] consistent with its pre-*Garcetti* precedent.[243] In *Reinhardt v. Albuquerque Public Schools Board of Education*, the court applied the *Pickering* standard rather than *Garcetti*.[244] Reinhardt, a special education teacher, criticized the school's handling of her students and claimed to have faced adverse employment actions as a result.[245] The Tenth Circuit disagreed with the district court's application of *Garcetti* to her speech.[246] It noted that Reinhardt had bypassed her chain of command by speaking to another agency and had exceeded her role, placing her outside the scope of her official duties and exempting her from *Garcetti*.[247] Instead, the court determined the test from *Pickering* and *Connick* was the appropriate framework for analyzing First Amendment claims like Reinhardt's.[248]

It appears the Tenth Circuit will continue applying the *Pickering* standard in cases involving public education in the future.

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240 *See id.* at 411 ("Demers presents the kind of case that worried Justice Souter.").

241 *See id.* The Ninth Circuit is the largest circuit in the federal court system. *See* 28 U.S.C. § 44 (directing that the Ninth Circuit Court of Appeals have twenty-nine judges). The next largest circuit court—the Fifth Circuit—has seventeen. *See id.*

242 *See e.g.*, Reinhardt v. Albuquerque Pub. Sch. Bd. of Educ., 595 F.3d 1126, 1135 (10th Cir. 2010) ("In determining whether APS impermissibly retaliated against Ms. Reinhardt in violation of her First Amendment rights, we apply the test from *Pickering v. Board of Education* and *Connick v. Myers*." (citations omitted)).

243 *See* Schrier v. Univ. of Colo., 427 F.3d 1253, 1262 (10th Cir. 2005) (Pre-*Garcetti* case applying *Pickering*).

244 *See* 595 F.3d at 1135.

245 *See id.* at 1130.

246 *See id.* at 1136.

247 *See id.* at 1136–37.

248 *See id.* at 1135.

3. Second Circuit

Most recently, the Second Circuit solidified its position that *Garcetti* does not apply to teacher academic freedom claims.[249] First, a breakdown of Second Circuit precedent on the issue is warranted. Before *Garcetti*, the Second Circuit applied the *Pickering-Connick* standard, emphasizing academic freedom while acknowledging that universities might have recognized "academic reasons" to act.[250] However, after *Garcetti*, the applicability of this standard to the academic setting remained uncertain,[251] leading to inconsistent application by district courts in the circuit.[252]

The Eastern District of New York notably extended the reach of *Garcetti* in *Weintraub v. Board of Education of City School District of New York*.[253] There, the court held that "speech can be 'pursuant to' a public employee's official job duties even though it is not required by, or included in, the employee's job description, or in response to a request by the employer."[254] This expanded interpretation meant that certain speech, such as teacher grievance complaints, would no longer be protected by the First Amendment.[255] The court cautioned against "construing a government employee's official duties too narrowly."[256] This decision, along with rulings from other circuits, set the stage for *Heim v. Daniel*.[257]

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249 *See* Heim v. Daniel, 81 F.4th 212, 224–26 (2d Cir. 2023).

250 Dube v. State Univ. of N.Y., 900 F.2d 587, 597–98 (2d Cir. 1990) (Universities could not deny tenure "in response to pressure exerted by government officials and community activists outraged by" that professor's controversial curriculum comparing "Nazism, apartheid, and Zionism" but could for "permissible academic reasons.").

251 *See, e.g.*, Lee-Walker v. N.Y.C Dep't of Educ., 712 F. App'x 43, 45 (2d Cir. 2017) ("It is an open question in this Circuit whether *Garcetti* applies to classroom instruction." (quoting Panse v. Eastwood, 303 F. App'x 933, 934 (2d Cir. 2008))).

252 *See* Caruso v. Massapequa Union Free Sch. Dist., 478 F. Supp. 2d 377, 384 (E.D.N.Y. 2007) (rejecting an application of *Garcetti* where a teacher had a portrait of a political candidate in her classroom); *but see* Schulz v. Commack Union Free Sch. Dist., 664 F. Supp. 3d 296, 306–07 (E.D.N.Y. 2023) (applying *Garcetti* to high school teacher's speech regarding book selection at school).

253 *See* Weintraub v. Bd. of Educ., 593 F.3d 196, 203 (2d Cir. 2010).

254 *Id.*

255 *See id.*

256 *Id.* at 202.

257 81 F.4th 212 (2d Cir. 2023).

Heim, the circuit's most recent precedent, was decided by a three-judge panel on August 30, 2023.[258] The case clarified the Second Circuit's stance on the application of *Garcetti* in academic freedom settings and aligned with other circuits that resisted applying *Garcetti* to scholarship and teaching in the university context.[259] Heim, an adjunct professor specializing in Keynesian macroeconomics at the State University of New York at Albany, claimed he was qualified for a tenured professor position but was not hired for this position due to the university deeming his theories "outdated."[260] He filed suit after he was denied the position and the district court ruled against him by applying *Garcetti*.[261]

On appeal, the court acknowledged the open question regarding whether *Garcetti* applied to academia.[262] Emphasizing the significance of academic freedom as "a special concern of the First Amendment," the court reasoned that academic speech is "anything but speech by an ordinary government employee."[263] Consequently, the court answered the *Garcetti* question negatively, asserting that speech relating to academic scholarship or teaching is "properly evaluated under *Pickering's* employer/employee interest-balancing framework irrespective of whether, under *Garcetti*, that speech was part of an employee's official duties."[264] While concluding that *Pickering-Connick* was the appropriate standard for assessing

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[258] *See id.* at 214. Heim argued that the "district court erred by . . . applying *Garcetti* to academic speech at all." *Id.* at 220–21.

[259] *See id.* at 226 ("We agree with those Circuits' treatment of *Garcetti*. It cannot reasonably be disputed that the Supreme Court reserved whether *Garcetti*'s 'official duties' framework applied to "case[s] involving speech related to scholarship or teaching" by public employees." (citations omitted)).

[260] *Id*. at 214–15. Heim was already employed as an adjunct professor, but that position did not include tenure. *See id.* at 217. He did not receive the tenured position because of his theories on economics. *See id.* at 219.

[261] *See* Heim v. Daniel, No. 1:18-CV-836, 2022 WL 1472878, at *12 (N.D.N.Y. May 10, 2022), *aff'd*, *Heim*, 81 F.4th 212 (2d Cir. 2023).

[262] *See Heim*, 81 F.4th at 224 ("This Court, however, has yet to decide whether *Garcetti* even applies in the 'special' context of academia." (citation omitted)).

[263] *Id.* (citing Meriwether v. Hartop, 992 F.3d 492, 507 (6th Cir. 2021)).

[264] *Id.* at 221. The court found in favor of the university at the *Pickering-Connick* balancing analysis. *See id.* at 234.

academic speech, the court left open the question about its extent.[265] Nonetheless, *Heim*'s main holding curtailed the reach of *Garcetti* and proved to be a victory for university professors.[266]

It seems likely that following the *Heim* decision, the Second Circuit will continue to rule consistent with it within the university context. However, without a Supreme Court, it is likely that the application of such standards will continue to vary across different circuits.

III. EDUCATION SHOULD BE BEYOND *GARCETTI*'S REACH

As the question has been left open by the circuits and the Supreme Court, this Part will advocate for academic speech to be excluded from *Garcetti*'s reach. Section A will highlight how academic freedom is under attack in the United States, with efforts in a majority of states to limit it. It will further explain how these circumstances should be considered a high-priority issue for the Supreme Court to grant certiorari. Section B will argue that because education has a special place in American society, it should therefore be treated differently by excluding it from *Garcetti*. Section C will argue that because some circuits have already refused to apply *Garcetti* in the academic context, the Supreme Court should not only follow suit but also go further and expand the protections to the K-12 level. Lastly, Section D will argue how the current *Pickering-Connick* framework is sufficient to maintain safeguards on what educators can say in the classroom without automatically taking away their First Amendment protections.

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[265] *Id.* at 228 n.13 ("We note that our discussion here focuses specifically on the public scholarship of university professors, and we express no view as to how or whether *Garcetti* might apply to, say, an elementary school teacher's speech, or speech unrelated to a professor's teaching or scholarship.").

[266] *See id.* at 228.

A. Legislation Around the United States Has Attacked Academic Freedom

Academic freedom has been under attack, evident in the many laws enacted across the United States.[267] This highlights the need for the Supreme Court to clarify the *Garcetti* decision, particularly as these laws face legal challenges. In Florida, several laws have been enacted to restrict classroom content, thereby limiting teachers' freedom of expression.[268] Florida is not alone; nearly twenty states nationwide have passed similar classroom censorship laws.[269] Additionally, over forty states have either adopted comparable measures or introduced similar bills in their legislatures.[270] These laws not only attack academic freedom, but as stated by the Supreme Court, also "cast a pall of orthodoxy over the classroom."[271] The Cold War era witnessed significant academic freedom precedents, recognizing the need to protect teachers during a time of censorship.[272] Given the extent of recent state legislation, the Court should seize the opportunity to address this issue. These "dystopian" laws impede teachers' freedom to conduct their classes and are a reminder of why academic freedom carries extreme importance in the United States.[273]

The recent threat to academic freedom has garnered attention not only within the courts and legal community, but also in the

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[267] *See* Susanna Granieri, *Three Laws Signed by DeSantis at the Center of Florida's Surge in Book Bans*, FIRST AMEND. WATCH (June 2, 2023), https://firstamendmentwatch.org/three-laws-signed-by-desantis-at-the-center-of-floridas-surge-in-book-bans/ [https://perma.cc/67BZ-MV3X].

[268] *See id.*

[269] *Pernell v. Lamb*, ACLU, https://www.aclu.org/cases/pernell-v-lamb [https://perma.cc/4VTW-MA7V] (last visited Feb. 4, 2024). Alabama, Arkansas, Florida, Georgia, Idaho, Iowa, Kentucky, Mississippi, Montana, New Hampshire, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, and Virginia have all passed similar laws. *See* Sarah Schwartz, *Map: Where Critical Race Theory is Under Attack*, EDUCATIONWEEK (June 13, 2023), https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06 [https://perma.cc/33RU-LEMQ].

[270] *See* Schwartz, *supra* note 269. Every state except for California, Delaware, Hawaii, Massachusetts, Vermont, and Nevada have taken such measures. *See id.*

[271] Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

[272] *See, e.g.*, *id.*; Sweezy v. New Hampshire, 354 U.S. 234, 248 (1957).

[273] *See* Pernell v. Fla. Bd. of Governors, 641 F. Supp. 3d 1218, 1230 (N.D. Fla. 2022) ("This is positively dystopian.").

mainstream news.[274] As much attention as the issue has received, the ones most affected by this are the millions of students across the country having their educational experiences hindered because of the attacks on academic freedom.

The Supreme Court may have the opportunity to address the pressing issue of academic freedom and whether *Garcetti* applies to the educational context. Notably, the District Court in *Pernell v. Florida Board of Governors* reviewed Florida's "Individual Freedom Act."[275] The Act prohibits "training or instruction that espouses, promotes, advances, inculcates, or compels . . . student[s] or employee[s] to believe [eight specified concepts]."[276] The prohibited concepts mentioned in the Act are:

> 1. Members of one race, color, national origin, or sex are morally superior to members of another race, color, national origin, or sex.
> 2. A person, by virtue of his or her race, color, national origin, or sex is inherently racist, sexist, or oppressive, whether consciously or unconsciously.
> 3. A person's moral character or status as either privileged or oppressed is necessarily determined by his or her race, color, national origin, or sex.
> 4. Members of one race, color, national origin, or sex cannot and should not attempt to treat others without respect to race, color, national origin, or sex.
> 5. A person, by virtue of his or her race, color, national origin, or sex bears responsibility for, or should be discriminated against or receive adverse

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[274] *See, e.g.*, Kiara Alfonseca, *Some Educators Slam DeSantis' War on 'Woke' in Education*, ABC NEWS (Jan. 18, 2023), https://abcnews.go.com/US/educators-students-slam-florida-gov-ron-desantis-battle/story?id=96491298 [https://perma.cc/4NWE-HTRV]; Tyler O'Neil, *DeSantis Takes Aim at CRT Training in Schools and Corporate America*, FOX NEWS (Dec. 15, 2021), https://www.foxnews.com/politics/desantis-critical-race-theory-training-schools-corporate-america [https://perma.cc/C2FW-32TR]; Chandelis Duster et al., *Florida Rejects Social Studies Textbooks That Mention Social Justice, Taking a Knee and Other Content of 'Concern,'* CNN (May 10, 2023), https://www.cnn.com/2023/05/10/us/florida-social-studies-textbooks-education-department/index.html [https://perma.cc/7WNG-4ZDP].

[275] *Pernell*, 641 F. Supp. 3d at 1231.

[276] *Id.* (citing Individual Freedom Act, FLA. STAT. § 1000.05(4)(a) (2022)).

> treatment because of, actions committed in the past by other members of the same race, color, national origin, or sex.
> 6. A person, by virtue of his or her race, color, national origin, or sex should be discriminated against or receive adverse treatment to achieve diversity, equity, or inclusion.
> 7. A person, by virtue of his or her race, color, sex, or national origin, bears personal responsibility for and must feel guilt, anguish, or other forms of psychological distress because of actions, in which the person played no part, committed in the past by other members of the same race, color, national origin, or sex.
> 8. Such virtues as merit, excellence, hard work, fairness, neutrality, objectivity, and racial colorblindness are racist or sexist, or were created by members of a particular race, color, national origin, or sex to oppress members of another race, color, national origin, or sex.[277]

Plaintiffs in this case are primarily professors from various Florida public colleges who allege the statute violates their First Amendment rights.[278] *Pernell* was a high profile case—multiple *amici curiae* briefs were filed on both sides, with the majority advocating for academic freedom.[279] The district court found that the law violated the First Amendment,[280] emphasizing academic freedom and referencing George Orwell and the impact of censorship.[281] The *Pernell*

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277 Individual Freedom Act, FLA. STAT. § 1000.05(4)(a) (2022).

278 *See Pernell*, 641 F. Supp. 3d at 1233.

279 *See generally id.*

280 *See id.* Specifically, the court held that students had coextensive rights to receive the information professors wanted to give, that the statute was impermissibly vague, and that the professors were likely to succeed on a First Amendment claim, thereby making them entitled to a preliminary injunction. *See id.* at 1243.

281 *See id.* at 1230 n.5 ("It is not lost on this Court that Mr. Orwell, in the original preface to his iconic political satire of the rise of Joseph Stalin, *Animal Farm*, was responding to the liberal elites of his time. According to Mr. Orwell, the censoring of *Animal Farm* was merely a symptom of the fashionable orthodoxy of that era—namely, an 'uncritical

decision is now on appeal to the Eleventh Circuit.[282] This presents an ideal opportunity for the Supreme Court to address the existing circuit split on the *Garcetti* issue and to exclude it from educational contexts completely. If the Eleventh Circuit upholds the decision, it would further strengthen the argument for the Supreme Court to rule that *Garcetti* does not apply to education.

B. Education Holds a Special Role in Society and Should Have an Exception to Garcetti

Education's important role in society warrants different treatment than other professions and contexts where *Garcetti* has been applied. Academic freedom enables educators to fulfill this unique role in shaping the next generation, notable for three special reasons: teachers influence students during class, education is the cornerstone of a successful and informed democracy, and academic freedom prevents the state from indoctrinating one viewpoint onto students.[283]

The role of educators is unique and special. They influence students' lives not only through their lectures and classroom discussions, but also by the examples they set. As the Ninth Circuit recognized, "teachers do not cease acting as teachers each time the bell rings or the conversation moves beyond the narrow topic of curricular instruction;" instead, they hold "positions of trust and authority" over impressionable young minds.[284] Education extends beyond the books, curriculum, and classes to instill "the shared values of a civilized social order."[285] Teachers, whether in K-12 or college, can be some of the most influential people in someone's life—they lead by example, they can introduce a student to a topic that turns into their

admiration of Soviet Russia.' . . . So too, here, the State has responded to fears of 'woke indoctrination' in university classrooms. But rather than combat 'woke' ideas with countervailing views in the 'marketplace of ideas,' the State has chosen to eliminate one side of the debate. This only highlights the problem with viewpoint discrimination—in the name of combatting 'indoctrination' of one perceived orthodoxy, the State allows for 'indoctrination' in its preferred orthodoxy." (citations omitted)).

282 *See* Pernell v. Fla. Bd. of Governors., No. 22-13992-J, 2023 WL 2543659, at *1 (11th Cir. Mar. 16, 2023).

283 *See* discussion *supra* Part I.

284 Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 967–68 (9th Cir. 2011).

285 Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

passion, and they often serve invaluable mentorship roles. These efforts change lives, and "there are few more qualified than a teacher to advance [these] effort[s]."[286] Millions of students are required to go to school throughout the United States, and millions more continue that pursuit of education at the college level.[287] This is different from any other profession. The Supreme Court even recognized that education is

> a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment . . . it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[288]

This interest alone is paramount for the success of the nation's youth, differentiating the teaching profession as a whole and serving as a compelling reason to exclude it from the reaches of *Garcetti*.

Education is not only crucial for the development of the next generation, but also for the preservation of a functioning government in the United States. It has been widely recognized as a "necessary condition of full freedom."[289] As discussed earlier, the Founding Fathers viewed education as essential for maintaining an informed electorate and upholding liberty.[290] Thomas Jefferson, in particular, advocated for expansive education to preserve the country's governance by the people.[291] In a democratic republic where

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[286] Alexander Wohl, *Oiling the Schoolhouse Gate: After Forty Years of Tinkering with Teachers' First Amendment Rights, Time for A New Beginning*, 58 AM. U.L. REV. 1285, 1318 (2009).

[287] *See* Hanson, *supra* note 41.

[288] Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

[289] Derek W. Black, *Freedom, Democracy, and the Right to Education*, 116 NW. U. L. REV. 1031, 1034 (2022).

[290] *See* Letter from Thomas Jefferson to Littleton Waller Tazewell, 5 January 1805 *in* 45 THE PAPERS OF THOMAS JEFFERSON 11 NOVEMBER 1804–8 MARCH 1805 (James P. McClure et al. eds., Princeton U. Press 2021) ("Convinced that the people are the only safe depositories of their own liberty, and that they are not safe unless enlightened to a certain degree, I have looked on our present state of liberty as a short-lived possession unless the mass of the people could be informed to a certain degree.").

[291] *See* Darrell D. Jackson, *Teaching Tomorrow's Citizens: The Law's Role in Educational Disproportionality*, 5 ALA. C.R. & C.L. L. REV. 215, 221 (2014).

citizens are entrusted with governing, education ensures that citizens make informed decisions. People cannot be "expected to choose soundly without at least a basic education that provides some level of information and training in rational thought processes."[292] This extends into civil society in countless ways: education empowers individuals to vote, run for office, and understand their freedoms. It lays the foundation for citizenship in the United States—restricting access to education would restrict the nation's development.[293] Schools hold a unique position as "symbol[s] of our democracy and the most pervasive means for promoting our common destiny."[294] Education's role as the cornerstone of a free republic underscores why *Garcetti* should not constrain schools' influence in educating the next generation of leaders.

Finally, academic freedom plays a crucial role in preventing state indoctrination of ideas fostering an environment where competing viewpoints can thrive. Teachers are hired to teach, which means their classroom speech and other related duties are inherently within their official duties, potentially subjecting them to *Garcetti* in nearly everything they do.[295] As a result, academic freedom is at risk, and the risk of indoctrination grows further. Some states have attempted to justify imposing their viewpoints, claiming they can "impose [their] own orthodoxy and can indoctrinate university students to [their] preferred viewpoint[s]."[296] However, schools are not meant to serve as advocates for the state's viewpoints; they are intended to be "marketplace[s] of ideas."[297] The schools should not be

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[292] Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62, 64–65 (2002).

[293] *See* Wohl, *supra* note 286, at 1291 ("[E]ducating the young for citizenship is reason for scrupulous protection of Constitutional Freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.").

[294] Edwards v. Aguillard, 482 U.S. 578, 584 (1987).

[295] *See* R. George Wright, *The Emergence of First Amendment Academic Freedom*, 85 NEB. L. REV. 793, 820–21 (2007) ("University professors are expected, as a matter of their standard employment responsibilities, to engage in a number of activities plainly implicating academic freedom.").

[296] Pernell v. Fla. Bd. of Governors, 641 F. Supp. 3d 1218, 1277 (N.D. Fla. 2022)

[297] Keyishian v. Bd. of Regents, 385 U.S. 589, 683 (1967).

instruments of Orwellian censorship.[298] Suppressing academic freedom would undermine the "principles of teaching, learning, and intellectual questioning that are central to a school environment and the development of young minds."[299] These principles are best upheld by safeguarding academic freedom for teachers to teach and for students to learn.[300] The First Amendment serves as the most effective mechanism to protect these interests, and applying *Garcetti* to teacher conduct would inherently suppress that freedom.[301]

Educational institutions hire various staff members and teachers with the common goal of educating students; censoring teachers or imposing designated viewpoints would hinder the realization of those goals. As Judge Learned Hand observed, the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."[302] Education does the same: a democracy would not be able to come to those correct conclusions simply by following the viewpoint of the state. Thus, preventing indoctrination provides another compelling reason why education should be treated differently concerning *Garcetti*.

C. The Supreme Court Should Go Even Further Than the Circuits and Exclude All Educational Contexts

The Supreme Court should follow the many circuits that have excluded educators from the scope of *Garcetti*. Despite some

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298 George Orwell's "1984" alludes to a dystopia where the government takes total control and censors ideas. *See* GEORGE ORWELL, 1984 (1949).

299 Wohl, *supra* note 286, at 1299.

300 *See* Wright, *supra* note 295, at 810 ("That the free speech values of the pursuit of truth and of collective self-development support academic freedom, even apart from the mission and policy statements cited above, should not be surprising."); *see also* Robert J. Tepper & Craig G. White, *Speak No Evil: Academic Freedom and the Application of Garcetti v. Ceballos to Public University Faculty*, 59 CATH. U. L. REV. 125, 127 (2009) ("Universities exist for the common good, which 'depends upon the free search for truth and its free exposition.' As a necessity to that search, academic freedom exists not only to protect the rights of faculty in teaching, but also the rights of students in learning." (citations omitted)).

301 *See* Tepper & White, *supra* note 300, at 179 ("The most well-known mechanism for the protection of academic freedom is the First Amendment.").

302 United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

inconsistencies, many circuits have refused to apply *Garcetti* to "scholarship or teaching."[303] This overwhelming support on how to address the "academic freedom" question the Supreme Court left open in *Garcetti* provides compelling evidence that should the issue resurface, the Court should align its resolution with the majority view of the circuit courts.[304]

The Court should take a more comprehensive approach and refrain from applying *Garcetti* in any educational contexts. It should extend protection not only to traditional academic freedom but also to encompass K-12 teachers and professors in a broader sense.[305] Currently, *Garcetti* is applied across various categories such as in-class speech, instructional materials, scholarship, and grievances related to the curriculum and funding.[306] While these areas directly influence the educator's ability to teach effectively, not all are exempt from *Garcetti*.[307] The best approach would be to adopt a broader definition of academic freedom that encompasses all of these categories, recognizing their collective impact on classroom dynamics.[308] The Court should therefore extend First Amendment protection to teachers in all of these contexts, both within and outside the classroom.[309]

Excluding *Garcetti* at the college level alone is not enough. While it is understandable for states to have stronger interests at the K-12 level, that is not a question for step one of the *Garcetti* analysis (i.e., whether this is pursuant to the official duties), as that will be

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303 *See* discussion *supra* Part II.

304 Notably, the Third Circuit has not explicitly applied *Garcetti* and has left the question open on whether it is applicable to scholarship or teaching. *See* Gorum v. Sessoms, 561 F.3d 179, 186 (3d Cir. 2009). The Seventh Circuit likewise limited *Garcetti* to only apply in the K-12 context. *See* Brown v. Chi. Bd. of Educ., 824 F.3d 713, 716 (7th Cir. 2016).

305 *See* 1915 AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *supra* note 72.

306 *See* discussion *supra* Part II.

307 *See* discussion *supra* Part II.

308 *See* Wright, *supra* note 295, at 821 ("Much of the speech we would wish to protect under the rubric of academic freedom thus does not fit neatly into either category of speech merely airing some personal employment grievance, or the more protectable category of speech that is genuinely on a subject of public concern.").

309 *See* Borden v. Sch. Dist. of Twp. of E. Brunswick, 523 F.3d 153, 172 (3d Cir. 2008) ("Although a teacher's out-of-class conduct, including her advocacy of particular teaching methods, is protected, her in-class conduct is not." (quoting Bradley v. Pittsburgh Bd. of Educ., 910 F.2d 1172, 1176 (3d Cir. 1990))).

considered at the subsequent steps (i.e., balancing the state and employer's interests). Automatically stripping First Amendment protections K-12 teachers would be misguided, as the justifications for excluding university professors are equally, if not more relevant at this level. These teachers are developing the youth and next generation in the United States. Academic freedom in K-12 classrooms fosters an environment where students can explore their own thoughts, develop critical thinking skills, and form their own perspectives—a cornerstone of a healthy democracy. The level of schooling should not dictate the level of protection for academic freedom. Therefore, the Supreme Court should not only align with the leading circuits but also go further and exclude all academic contexts from *Garcetti*.

D. An Existing Test Still Protects Schools' Interests

The Supreme Court could effectively exclude all academic speech from *Garcetti* while still protecting state interests through the *Pickering-Connick* framework, which was utilized before *Garcetti* was decided in 2006.[310] This framework follows a two-part test: for a government employee to prevail in a First Amendment claim regarding the workplace, they must first show that they were speaking on a matter of public concern; if so, then the court should balance the employee's interests against the employer's.[311] The public concern prong of the test is still operative without excluding the speech automatically at step one of *Garcetti*, allowing schools to prevail in certain cases.[312] Moreover, the balancing test under this framework still upholds the state's interests in regulating speech while considering the educators' interests in expressing themselves. This fact-intensive approach was successfully employed for over two decades without issue. When *Garcetti* was decided, the Court did not express a concern with this framework. Instead, it introduced an additional layer that has deprived many academics of First Amendment protections without adequately weighing their interests or those of the

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310 Garcetti v. Ceballos, 547 U.S. 410, 413 (2006).

311 *See* Connick v. Myers, 461 U.S. 138, 142 (1983).

312 *See* discussion *supra* Part II.

schools.[313] Every justification for applying the *Garcetti* rule remains supported by the different standards. If only the *Pickering-Connick* framework were applied, schools would retain the ability to take disciplinary actions while no longer benefiting from automatic immunity from First Amendment claims.

While judicial efficiency could justify the application of *Garcetti* if courts can dismiss cases at step one before making other inquiries, there are "additional interests" in the educational context noted by the *Garcetti* Court. This reasoning alone is sufficient for the Court to give these decisions extra attention. Additionally, the official duties analysis itself can be complex. For example, the *Garcetti* analysis has led to less consistency between circuits and cases than the *Pickering-Connick* test.[314] The lack of consistency in the application of *Garcetti* is an additional reason the Supreme Court should reconsider this issue—supplementing the affirmative arguments made earlier for the protection of academic freedom. The incorporation of the First Amendment into the states via the Fourteenth Amendment meant for it to apply evenly across the country.[315] The uncertainty surrounding *Garcetti* has effectively done the opposite, leading to some speech being protected and other speech unprotected without evaluation of interests due to differences among circuits.[316] This Note does not address how the *Pickering-Connick* analysis should be weighed at the other steps; however, the framework is sufficient to ensure teachers and states can have their interests protected. That is why the Supreme Court should clarify that *Garcetti* is inapplicable to teacher speech, inside or outside the classroom.

CONCLUSION

The question left open in *Garcetti* has created the potential for academic freedom to be infringed without a fact-intensive inquiry

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313 *See, e.g.*, Brown v. Chi. Bd. of Educ., 824 F.3d 713, 714 (7th Cir. 2016).

314 *See, e.g.*, Evans-Marshall v. Bd. of Educ., 624 F.3d 332, 334 (6th Cir. 2010); Reinhardt v. Albuquerque Pub. Sch. Bd. of Educ., 595 F.3d 1126, 1135 (10th Cir. 2010).

315 *See, e.g.*, Gitlow v. New York, 268 U.S. 652, 666 (1925).

316 *See, e.g.*, *Garcetti*, 547 U.S. at 424 (not getting to the balancing test because they were speaking "pursuant to their official duties.").

into the interests of the educators balanced against the states. This Note is not advocating for all speech to be allowed solely because it falls within the educational context; rather, it asserts that these claims are unique and should not be excluded from First Amendment protection at step one of the *Garcetti* analysis. After step one, many interesting questions remain: how should the court address claims regarding curriculum control, book selection, tenure decisions, and teacher scripting? This Note argues that because these all implicate academic freedom to some extent, they should be excluded from the scope of *Garcetti*. How they would be considered in the *Pickering-Connick* balancing test is a matter to be addressed another time.

Throughout history, the Supreme Court has emphasized the importance of free speech, education, and academic freedom. Many circuits have aligned with this perspective, refusing to apply *Garcetti* in the academic context. The Supreme Court should follow suit. Given the pressing nature of this issue, the Court may soon have the opportunity to address it. If it does, the Court should go beyond the decisions of the circuits—it should exclude all academic contexts from the reach of *Garcetti*. Education holds a special role in society; it should be treated accordingly by being excluded from *Garcetti*. It is crucial for maintaining an informed electorate and facilitating the exchange of free ideas. Teachers change the lives of millions of students each year, and the Supreme Court should recognize this and exclude *Garcetti* from schools, thereby allowing teachers to enjoy their First Amendment protections.