No. 19-274

In The Supreme Court of the United States

TERESA BUCHANAN,

Petitioner,

v.

F. KING ALEXANDER, DAMON ANDREW, A.G. MONACO, AND GASTON REINOSO,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF THE NATIONAL COALITION AGAINST CENSORSHIP, THE WOODHULL FREEDOM FOUNDATION, THE DKT LIBERTY PROJECT, PROFESSOR RICHARD FOSSEY, & PROFESSOR DAVID BLOOMFIELD AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

The National Coalition Against Censorship, The Woodhull Freedom Foundation, The DKT Liberty Project, Professor Richard Fossey, and Professor David Bloomfield move the Court for leave to file an *amicus* brief in support of Petitioner, Teresa Buchanan.

In support of their motion, *Amici* assert that the Fifth Circuit ruling raises meaningful concerns among *Amici* about the First Amendment right to free speech, particularly by professors at public institutions of higher education, and the brief they would jointly submit would highlight those concerns.

Pursuant to Supreme Court Rule 37.2, Counsel for *Amici* gave notice to counsel of record for all parties more than 10 days prior to the due date. Counsel for Petitioner has granted consent to file a brief. Counsel for Respondents, however, have not responded to the notice mentioned above or to the other attempts to reach them both by telephone and by email.

Amici believe that the implications for academic freedom and freedom of speech warrant permission to be heard as *Amici* on the issues in this case and request

their motion to file the attached *amicus* brief be granted.

Respectfully submitted,

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STATEMENT OF INTEREST[1]

The National Coalition Against Censorship ("NCAC") is an alliance of more than 50 national nonprofit literary, artistic, religious, educational, professional, labor, and civil liberties groups that are united in their commitment to freedom of expression. (The views presented in this brief are those of NCAC and do not necessarily represent the views of each of its participating organizations.) Since its founding, NCAC has worked to protect the First Amendment rights of artists, authors, teachers, students, librarians, readers, and others around the country. NCAC has a longstanding interest in protecting the free speech rights of members of university communities, and joins this brief to urge the Court to preserve the distinction between offensive speech that is protected under the First Amendment, and the unlawful harassment that Title IX proscribes.

The Woodhull Freedom Foundation ("Woodhull") is a 501(c)(3) human rights organization whose work focuses on the intersection of freedom of speech and sexual expression. Founded in 2003, Woodhull advocates for the First Amendment and has testified before

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received notice of the intent to file this brief at least 10 days before it was due. The petitioner has consented to the filing, but the respondents have not responded.

Congress on the censorship of pornography. Woodhull fights attempts to censor free speech in locations ranging from campuses to the adult entertainment industry, from social media to libraries. Protecting the free exchange of ideas is central to Woodhull's mission of encouraging positive social change. Woodhull advocates for education on issues of gender, sex work, and pornography, sometimes requiring the use of language that may offend some listeners' or readers' sensibilities. The decision in the lower courts threatens this educational process.

The DKT Liberty Project ("Liberty") is a non-profit organization based in Washington, D.C. Its mission is to protect and defend the civil liberties of citizens against government overreach. It often provides *amicus* briefs as well as direct representation in cases raising civil liberties issues, especially those involving the First Amendment. Because the Liberty Project has a strong interest in protecting the rights of citizens, it is well-situated to provide this Court with additional insight into the issues presented in this case.

Mr. Richard Fossey is the Paul Burdin Endowed Professor of Education at the University of Louisiana at Lafayette and Policy Director of the Picard Center for Child Development and Lifelong Learning. He is lead editor of Contemporary Issues in Higher Education Law and a member of the Editorial Advisory Board of Education Law Reporter and Teachers College Record. He has written extensively about academic freedom of university faculty members.

Mr. David Bloomfield, J.D., M.P.A., is Professor of Educational Leadership, Law & Policy at Brooklyn College, CUNY and The City University of New York Graduate Center. A lifelong practitioner of Education Law, Prof. Bloomfield has served as General Counsel to the New York City Board of Education, was the Brooklyn College Faculty Grievance Counselor, and currently serves on the Brooklyn College Committee on Academic Freedom. He is the author of American Public Education Law, and many other published works in the field of education practice, law, and policy.

SUMMARY OF ARGUMENT

For more than half a century, this Court has repeatedly discussed the importance of academic freedom to our nation as a whole, and specifically within the framework of First Amendment jurisprudence. The Court has highlighted the importance of providing professors the pedagogic freedom to educate students at our nation's colleges and universities. Nevertheless, there have been regular attempts on college campuses, both public and private, to filter speech some listeners would prefer not to hear. The phenomenon is not exclusive to any particular viewpoint, and should be viewed as a concern by all perspectives.

Dr. Teresa Buchanan was a tenured Professor of Education at Louisiana State University, a public institution of higher education. She was fired because of a handful of words and phrases she used that some

found to be offensive. The speech for which she was dismissed was designed to expose future educators to coarse language and paradigms some may not regularly interact with.

Amici respectfully request that this Court grant Professor Buchanan's writ of certiorari and explicitly state that academic free speech "implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence." *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006). In doing so, it should clarify that when professors at state universities are sanctioned for academic speech, reviewing courts must scrutinize the constitutional validity of the applicable regulations, which must satisfy First Amendment standards governing vagueness and overbreadth.

REASONS TO GRANT THE PETITION

SAFEGUARDING ACADEMIC FREEDOM IS OF TRANSCENDENT VALUE TO OUR NATION AS A WHOLE.

Stanford University Professor Edward A. Ross was known to take positions Jane Lathrop Stanford abhorred. Ross opposed using Chinese migrant labor to build the western railroads, going so far in one speech as to state that "it would be better . . . to turn our guns upon every vessel bringing Japanese to our shores rather than permit them to land." Musa Al-Gharbi, *Too*

Noxious for Tenure?, THE CHRONICLE OF HIGHER EDUCATION, Sept. 6, 2019, at B19.

Mrs. Stanford, who co-founded the University and whose husband was involved in the construction of the Union Pacific Railroad, was outraged. She sought Professor Ross's dismissal, and University President David Starr Jordan fulfilled her request. In protest, seven other professors either resigned or were fired. American Sociological Association, Edward A. Ross (March 27, 2018), available at https://www.asanet.org/edward-ross. This incident, which occurred in 1900, was a galvanizing event in the history of academic freedom.

Following continued concern over the dismissal of Professor Ross, Johns Hopkins Professor Arthur Lovejoy, along with John Dewey, fostered the establishment in 1915 of the American Association of University Professors ("AAUP"). American Association of University Professors, History of the AAUP, available at https://www.aaup.org/about/history-aaup. In 1940, after having previously issued various statements regarding academic freedom, the AAUP formulated the highly influential 1940 Statement of Principles on Academic Freedom and Tenure. American Association of University Professors, 1940 Statement of Principles on Academic Freedom and Tenure, available at https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure. The Statement was amended to adopt comments in 1970, when it was jointly adopted by the Association of American Colleges ("AAC"). The organizations recognize that, "[a]cademic freedom in its teaching aspect is fundamental

for the protection of rights of the teacher in teaching and of the student to freedom in learning." According to the Statement, "[t]eachers are entitled to freedom in the classroom in discussing their subject."

The AAUP Standard applies to both private and public institutions of higher education. But where a public institution is concerned, as is true here, the First Amendment protection against "abridging the freedom of speech" provides additional, legal guarantees.

Despite the strong statements of AAUP and AAC, challenges to freedom in the classroom continue today. In 2012, for example, Appalachian State University sociology Professor Jammie Price was put on administrative leave after students complained about her classroom speech. Among other things, several student-athletes complained after Price criticized them, referencing recent allegations of sexual assault involving student athletes. Letter from Peter Bonilla, Assoc. Dir., Individual Rights Def. Program, Found. for Individual Rights in Educ., to Michael A. Steinback, Chair, Bd. of Trustees, Appalachian State Univ., Mar. 19, 2013, available at https://www.thefire.org/fire-letter-to-appalachian-state-university-board-of-trustees-chair-michael-a-steinback-march-19-2013/.

In November 2015, University of Kansas communications professor Andrea Quenette conducted an in-class discussion of a forum held the previous day about racial and cultural issues affecting the campus. Afterwards, eight graduate students—some of whom were

not even in Quenette's class—filed complaints against her, arguing that her comments (in particular, her noting of academic performance issues among African American students) during the discussion were "unacceptably offensive" and violated the University's Racial & Ethnic Harassment Policy. Quenette was subsequently placed on paid leave, pending the outcome of a university investigation. Letter from Peter Bonilla, Dir., Individual Rights Def. Program, Found. for Individual Rights in Educ., to Bernadette Gray-Little, Chancellor, Univ. of Kan., Feb. 3, 2016, available at https://www.thefire.org/fire-letter-to-university-of-kansas/.

Virtually every day, new challenges to academic free speech appear on college campuses. Dr. Teresa Buchanan's petition for writ of certiorari encapsulates the issue this Court should address. This Court's previous decisions on the First Amendment rights of public employees are not dispositive because this case arose in an academic setting, and, as the Court has noted, "a case involving speech related to scholarship or teaching" may lead to a different analysis. *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006). Professor Buchanan's certiorari petition presents a clear "case involving speech related to scholarship or teaching." *Id.* *Amici* urge the Court to grant the petition to clearly reinforce that the academic mission of a public university is "a special concern of the First Amendment," *Fisher v. Univ. of Texas*, 570 U.S. 297, 308 (2013) quoting *Regents of University of California v. Bakke*, 438 U.S. 265, 312 (1978), by holding that the First

Amendment requires examination of the regulations applied to punish Dr. Buchanan's speech.

For over half a century, the Court has made clear that "[t]he essentiality of freedom in the community of American universities is almost self-evident," *Sweezey v. State of New Hampshire*, 354 U.S. 234, 250 (1957), and even noted that "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned." *Keyishian v. Board of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603 (1967). Yet, despite this Court's strong statements that defend academic freedom, public institutions of higher education continue to develop creative schemes that strike at the ability of professors to speak freely on campus, even in classroom settings.

Pedagogical flexibility undergirds academic freedom. Knowing that the robust exchange of ideas is vital to the education of our future leaders, it should come as no surprise that this Court has stated that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). To that end, the Court has made clear that academic freedom is "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian*, 385 U.S. at 603.

* * *

Louisiana State University fired Dr. Buchanan from her tenured professorship due to words she uttered as a professor in service of pedagogical ends. According to a local public school superintendent, while Dr. Buchanan conducted site visits at one of his schools as part of a student-teaching program, she "talked awful about our schools" and said the word "pussy three times," albeit not in a sexual manner, but instead to refer to a weak or ineffectual person. Indeed, the complaining superintendent himself claimed the phrase "was used as part of Plaintiff's instruction to student teachers regarding coping with parents who may use different vocabularies." Pet. App. 21a. Professor Buchanan also made what LSU called "inappropriate statements" while teaching, including references to her sex life and comments that students should use birth control to remain competitive in what she believed to be a rigorous academic program.

Dr. Buchanan's teaching methods, though perhaps not suited to a polite, high society setting, are well within the bounds of instructive discourse as part of the Professor's "overall pedagogical strategy." Pet. App. 29a. The LSU Faculty Committee impaneled to review the complaint against Dr. Buchanan, even employing a standard of "offensiveness," found that she should be censured but not terminated. LSU President F. King Alexander disagreed. Instead of following the finding of Dr. Buchanan's peers or considering First Amendment standards governing academic freedom, President Alexander recommended to the governing board that she be terminated for her speech. The board

followed suit and terminated Professor Buchanan from her tenured professorship.

The court below failed even to apply the balancing test of *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), in conflict with the Sixth Circuit's approach in *Bonnell v. Lorenzo*, 241 F.3d 800, 816-17 (6th Cir. 2001) ("[T]he subject of profane classroom language which precipitates a sexual harassment complaint . . . as well as the sanctity of the First Amendment in preserving an individual's right to speak, involves a matter of public import.") Instead, the Fifth Circuit simply concluded that "Dr. Buchanan did not speak as a citizen on a matter of public concern[.]" Pet. App. 10a. In so ruling, however, the court failed to consider the ramifications of its decision on "academic freedom . . . as a constitutional value," *Garcetti*, 547 U.S. at 425.

Critically, the court below upheld the firing of a university professor for her academic speech without any review of the constitutionality of the policies that were brought to bear. Entirely apart from the balancing approach in *Pickering* (which did not involve a policy designed to regulate speech), this case raises the question of whether universities may impose such regulations free from First Amendment review. Other circuits have held they cannot. *See*, *e.g.*, *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968 (9th Cir. 1996); *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008).

The lower court's reliance on the complaints about Dr. Buchanan's speech, to conclude that she had created a "hostile learning environment," Pet. App. 4a, is

erroneous under both the First Amendment and the federal civil rights laws. There is no "harassment exception" to the First Amendment's Free Speech Clause. *See Saxe v. State College Area School District*, 240 F. 3d 200, 204, 211 (3d Cir. 2001) (Alito, J.).

To the contrary, academic freedom "is an aspect and measure of society's basic commitment to liberty, dissent, and freedom of debate, and it reflects the increasingly complex relationship between the university and society." Julius G. Getman & Jacqueline W. Mintz, *Foreword: Academic Freedom in a Changing Society*, 66 TEX. L. REV. 1247, 1264 (1988). Or, as this Court has written, "We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003). Yet, as universities increasingly police pedagogic approaches, whether in the name of protecting against harassment, offensiveness, or other concerns, academic freedom will continue to be endangered.

"[I]nhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of [the Bill of Rights] vividly into operation. Such unwarranted inhibition upon the free spirit of teachers affects not only those who, like the appellants, are immediately before the Court. It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers." *Wieman v. Updegraff*, 344 U.S.

183, 195 (1952) (Frankfurter, J., concurring). Those words, written almost 70 years ago regarding an anti-communist front organization loyalty oath, remain equally applicable today. Professor Buchanan's writ of certiorari should be granted so that this Court can say, once and for all, that the First Amendment academic freedom at public institutions of higher education is a "special concern," and to clarify the proper analysis for adjudicating public employee free speech claims that arise in an academic setting. *See Bakke*, 438 U.S. at 312.

CONCLUSION

To protect academic freedom at public institutions of higher education, this Court should review and reverse the Fifth Circuit's decision.

Respectfully submitted,

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