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No.

ORIGINAL

In the Supreme Court of the United States

Bruce Committe, Petitioner

v.

Vickie Gentry, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Bruce Committe, Pro Se.
Appellant, Unlicensed Lawyer
1341 Marlowe Ave
Apt #209
Lakewood, OH 44107.

Primary Question Presented for Review

What are the contours and principles of the First Amendment's free speech and freedom of the press protections (a/k/a Academic Freedom) in the academic setting?

Other Question Presented For Review

1. Whether a fair trial occurs when a U.S. U.S. District court judge in a civil case:
    a. Accepts an award, prior to trial, from a local professional organization of which a defendant party's trial attorney is a member but of which the pro se plaintiff is not; and
    b. Denies a plaintiff's motion to disqualify the magistrate when:

(1) the magistrate himself sua Sponte advises defendant to invoke the qualified immunity defense in a civil rights case, (2) but when the defendant fails to do that the magistrate himself invokes the defense in his report and recommendation to the District Judge, (3) and then the magistrate recommends in that same report and recommendation document dismissal of the case on the bases of the qualified immunity defense raised by the magistrate.

List of Parties to the Proceedings

Bruce Committe, Plaintiff/Appellant

Vickie Gentry, Defendant/Appellee

Corporate Disclosure Statement

At times relevant *Committe* was an assistant professor in the School of Business in the College of Business and Technology at Northwestern State University in Natchitoches, Louisiana.

At times relevant *Gentry* was the Provost and VP of Academic Affairs at Northwestern State University. Committe believes Gentry is no longer in that position nor employed by the University.

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Citation of Opinions Below

Bruce Committe v Vicki Gentry, Case No 19-cv-0122, US District Court of Louisiana, Western District, Alexandria Division, Judge Dee Drell, Magistrate Judge Hornsby. Filed 6/23/20. Doc 46.

Bruce Committe v. Vicky Gentry, United States District Court of Appeals for the Fifth Circuit, Case No. 20-30456, Summary Calendar, Circuit Judges Southwick, Oldham, and Wilson, Filed 24 November 2021.

Statement of the Basis for Jurisdiction

The court of appeals below affirmed the District Court's decision to dismiss the civil complaint for failure to state a valid claim. The complaint alleges that the state university employee Defendant/Appellee Gentry, acting under color of law, violated Appellant's right to Academic Freedom protected by the free speech and freedom of the press clause of the First Amendment and by the Fourteenth Amendment. 28 USC 1254(1).

Constitutional Provisions and Statutes

1. U.S. Constitution, First Amendment, free speech and freedom of the press clause.
2. U.S. Constitution, Fourteenth Amendment privileges, immunities, and due process clauses.
3. 42 United States Code 1983.

Statement of the Case

This civil case comes to the Court upon the U.S. Fifth Circuit's affirmance of the District Court's dismissal, of the Appellant's 42 USC 1983 Academic Freedom violation complaint, for failure to state a cause of action. See opinion of the Fifth Circuit Court of Appeals at Exhibit A. See District Court Final Judgment at Appendix B. See Magistrate's Recommendation at Appendix C. See *Meriwether v Hartop, et al* Case No 20-3289, 6th Cir., filed 26 Mar. 2021 at Appendix D.

The controversy began when Defendant/Appellee Gentry, Provost and VP of Academic Affairs at Northwestern State

University in Louisiana, orally stated to Appellant at a meeting she called, but did not notice as to its purpose or content, that she was removing Appellant from his four accounting class teaching assignments for the Spring, 2019 semester. Appellee's statement at the meeting occurred just 30 minutes before Appellant's first class of the semester was to begin. Appellant was given other non-teaching assignments, then terminated as of May, 2019.

Appellee complained in the District Court that the reason for the removal was, as she indicated at the meeting, her (1) disapproval of the textbook Appellant had chosen to use for one of his classes and (2) disapproval of the content of his class syllabi, apparently for all of his accounting classes, which describe the planned week by week class subject matter, weekly

reading and homework problem assignments, midterm exam dates, how final grades would be determined, etc.

In granting Appellant's motion to file a second amended complaint, with the proposed second amended complaint attached, the magistrate informed the parties in his that if the Appellee wanted to invoke a qualified immunity defense she should do so in her response to the complaint and not later in the case. Appellee's response to the complaint was a motion to dismiss for failure to state a valid claim, but it did not raise the qualified immunity defense even though the magistrate had invited her to do so.

In response to the complaint and motion to dismiss, the magistrate recommended to the District court judge that the case be dismissed on the basis of the affirmative defense which the magistrate himself invoked within his written report &

recommendation to the District judge. See report & recommendation at Exhibit C hereto.

In his report and recommendation, the magistrate noted that the magistrate himself invoking the defense in his recommendation to the judge did not give Appellant an opportunity to respond to it before the magistrate wrote his report and recommendation; so, the magistrate stated that Appellant could respond in the ten day period allowed for objections to the magistrate's report and recommendation.

Appellant timely filed his substantive objection which included a review of the extensive US Supreme Court ruling case law discussing Academic Freedom and its importance to a democratic society. Appellant also moved for disqualification of the magistrate for stepping into the shoes of the defendant by invoking the affirmative defense on Appellee's behalf and then

recommending that the case be dismissed on the basis of that defense. Appellant believed the magistrate doing that was actual bias by becoming an advocate for the Appellee in the case.

The magistrate's recommendation of dismissal did not address whether the complaint stated a valid claim of Academic Freedom; it concluded that the court need not address that issue since the court could find that the affirmative defense was effective because any Academic Freedom—which he did not define-- protections the Constitution provides, for the particular facts describing the alleged denial in this case, were not clearly established by precedent or otherwise. In other words, the magistrate was able to recommend dismissal of the case without himself ever deciding whether a legal complaint for a violation of Academic Freedom had been stated; thus, the magistrate did

not state any contours and principles for protection of free speech in the academic setting a/k/a Academic Freedom.

The District judge denied the motion to disqualify the magistrate, and he called the motion "silly." See District court judgment at Exhibit B.

Notwithstanding Appellant's written objection to the magistrates report and recommendation which objection described the many US Supreme Court cases discussing Academic Freedom and giving clear notice that the facts of the case at bar were a violation of that right, the District Judge granted Appellee's motion to dismiss but not on the basis recommended by the magistrate; instead, the District judge dismissed it on the basis that any Academic Freedom existing in the academic setting (again the contours and principles of that

right were not state) was the right of the state university and not of a faculty member (bottom of p.1, Exhibit B):

> "To the extent the Constitution recognizes any right of 'academic freedom' above and beyond the First Amendment rights to which every citizen is entitled, the right in[ures] to the university, not the individual professors." "*Urofsky v. Gilmore* 216 F. 3d 401, 409 (4th Cir. 2000." [Brackets in original district court order.]

Appellant timely appealed the district court judgment filed 6/23/20. Appellee filed for attorneys fees which were granted, after Appellant's objection to them, after the 5th Circuit affirmed. The Defendant's attorney is a private attorney appointed for this case as a special attorney general.

The appeal to the Fifth Circuit resulted in an opinion affirming the District court judgment; it was filed with the court on 24 November 2021. See judgment at Exhibit A. Justice

Alito granted Appellant until 15 April to file his Petition for a Writ of Certiorai.

The judgment of the Circuit court does not mention any, nary a one, US Supreme Court cases on the subject of Academic Freedom (or judicial bias which motion to disqualify the appellate court summarily dismissed) notwithstanding that Appellant's initial brief describes many of the Supreme Court's cases favorably discussing the free speech and freedom of the press clause which are the basis for the Academic Freedom right.

The only US Supreme Court case mentioned in the appellate court's judgment is *Harlow v Fitzgerald*, 457 US 800 (1982) which addresses the affirmative defense issue which is whether Academic Freedom of a state university faculty member was clearly established for the conduct alleged to have occurred

in this case. In other words, the Fifth Circuit ignored the many opinions of this Court on the subject. See judgment at Appendix A attached hereto.

Reason for Granting the Writ

-Diversity & Importance-

The Fifth and Sixth Circuit Courts of Appeal differ on the free speech protection jurisprudence which applies in the academic setting. See the Fifth Circuit's opinion in this case (Exh A) and the 6th Circuit's opinion in *Meriwether* (Exh D).

Free Speech is important, especially now, to maintaining a democracy and thwarting anti-democratic movements towards unconstitutional authoritarianism. The politics in the country now have state governments enacting laws to limit speech (Critical Race Theory, LGBT ideas) in the academic setting and boards of education banning books on subjects the boards do not

want discussed in the schools, like Critical Race Theory, LBGQ subject matter, etc..

In the case at bar, the 5th Circuit failed, at p. 4 of its opinion, to recognize the *Garceti* Carve Out for academic speech protection. The 5th Circuit instead applied the *Garceti* non-academic public employee free speech rule to the academic speech circumstances in this case. Below is where the 5th Circuit wrongly applied the non-academic public employment free speech protection standard, at p. 4 (note that the 5th circuit made the same error in its previous *Buchanan* case cited), to the academic public employment free speech situation in the case at bar:

> 'First, Committe argued that he sufficiently pleaded violations of his First Amendment rights to free speech and academic freedom. "To establish a [] 1983 claim for violation of the First Amendment right to free speech, [public university professors] must show that (1) they were disciplined or fired for speech that is a matter of public

concern, and (2) their interest in the speech outweighed the university's interest in regulating speech." *Buchanan v. Alexander*, 919 F 3d 847, 853 (5th Cir. 2019).' [Brackets in original.]

In *Garceti v. Ceballas* 547 US 410, 425 (2006) this Court stated the rules for protecting a public (state) employee's free speech in the non-academic setting via the free speech clause of the First Amendment; however, it noted and thus carved out an exception for public employee's free speech protections in the academic setting. See pp. 29-30 below for a statement of the *Garceti* carve out.

Note in the block quote above from the 5th Circuit's opinion in the case at bar that that court inserts the bracketed words to change the original meaning of the quote; the bracketed insertion violates the Supreme Court's *Garceti* cave out for Academic speech.

In the *Garceti* carve out, the Court cites favorably at p. 425 of *Garceti* Justice Sourter's citations, at pp. 438-439, to previous Supreme Court recognizing academic speech deserving special protection beyond that to which non-academic public employees are entitled under the First Amendment protections:

> *Grutter v. Bollinger*, 539 U. S. 306, 329 (2003) ("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"); *Keyishian v. Board of Regents of Univ. of State of N. Y.*, 385 U. S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy Cite as: 547 U. S. ____ (2006) 13 SOUTER, J., dissenting over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools'" (quoting *Shelton v. Tucker*, 364 U. S. 479, 487 (1960))); and *Sweezy v. New Hampshire*, 354 U. S. 234, 250 (1957).

Thus, at page 425 of *Garceti,* this Court specifically carved out space for a future rule pronouncement for public employee speech in the academic setting from the rule it applied in *Garcetti* to public employee speech in the non-academic setting. The 5th Circuit in the case at bar ignored that exception which causes its opinion below to conflict not only with the U.S. Supreme Court's *Garceti* case carve out but also with this Court's many prior Academic Freedom case opinions as well as the recent *Meriwether* case in the 6th Circuit. *Meriwether v. Hartop et al* (No 20-3289, filed March 26, 2021, US Court of Appeals, 6th Circuit, see at Appendix D) as well as Appellants objections to the magistrate's report and recommendations and Appellants Initial Brief in his appeal to the 5th Circuit all three review the Court's plerthora of prior *Garceti* Academic Freedom cases.

In *Meriwether the 6th Circuit* recognized the *Garceti* carve out, unlike the 5th Circuit in the case at bar which ignored it. Because the Supreme Court had not yet fulfilled its *Garceti* promise to opine in a future case on the contours and principles of free speech in the academic setting, and left the federal courts to rely on the Supreme Court's extant prior Academic Freedom cases prior to *Garceti* and addressing Academic Freedom, the *Meriwether* court found in those opinions writings which clearly established that Meriwether's classroom speech Academic Freedom was violated by the punishment heaped upon him by his University.

In *Meriwether*, the professor's true religious views prohibited him from using, in class communications and discussions, the pronoun of the new gender of a transgender student. The professor could not, because of his religious

beliefs, use the pronoun which represented the student's new gender. The professor had offered several alternative ways that he could address the student, but the student refused to accept the offered compromises and complained of sex discrimination to the university's administration. The university heaped punishment on the professor for not meeting the student's demand that his professor use the student's new gender pronoun during class even though the professor had offered alternatives such as using the student's last name.

At pages 11-12 of *Meriwether* the court there, unlike the 5th circuit in the case at bar, recognizes the *Garceti* Carve Out rule:

> Here, the threshold question is whether the rule announced in *Garceti* bars Meriwether's free-speech claim. It does not.

> *Garceti* set forth a general rule regarding government employee's speech. But it expressly declined to address whether its analysis would apply "to a case involving speech related to scholarship or teaching." 547 US at 425; *see also Adams v. Trs. F the Univ. of N.C.-Wilmington*, 640 F 3d 550, 563 (4th Cir. 2011)*("The plain language of Garceti thus explicitly left open the question of whether its principles apply in the academic genre where issues of 'scholarship or teaching' are in play.")*. *Although Garceti declined to discuss the question, we can turn to the Supreme Court's prior decisions for guidance.* Those decisions 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). [Emphasis added].

Thus, in *Meriwether,* the court found enough guidance in prior U.S. Supreme Court cases discussing the essentiality of Academic Freedom in teaching to conclude that the discipline which professor Meriwether's University heaped upon him for his classroom speech was a violation of the professor's

Academic Freedom, and that those opinions provided adequate notice to Meriwether's university for the facts in that case.

Although prior cases of Academic Freedom were sufficient for the 6th circuit to find that Meriwether's speech was protected, obviously the 6th Cicruit could have benefited from the Supreme Court providing more guidance as it promised it would in stating the *Garceti* carve out.

In the case at bar the violation of Committe's Academic Freedom was extreme enough for the court to have opined that Gentry should have known, if in fact she did not know, that her actions violated Committe's Academic Freedom. If the case at bar had occurred in the 6th Circuit, Appellant's case would not have been dismissed for failure to state a legal claim. The violation was just that extreme.

In the case at bar, however, it is important to note that the complaint alleges in the alternative that Gentry *knew* that her conduct violated Plaintiff's Academic Freedom, not just that she should have known.

It is hard to imagine a more clear case of Academic Freedom violation, given the U.S. Supreme Court's many prior cases on the subject, than that occurring in the case at bar where the Appellant was removed from teaching all of his classes because the provost Appellee did not like the text book the professor had chosen for one of his classes nor liked the professor's plans for teaching his classes which appeared in his class syllabi. This is a case of academic gross censorship and academic speech gross prior restraint, pure and simple. The complaint in this case alleges explicitly that there was no

compelling reason for Plaintiff to be prohibited from teaching his classes as he planned.

Reason Appellant/Plaintiff Was Removed

From His Teaching Assignments

The 5th Circuit opines in gross error that Apellant's complaint consists of conclusionary statements, meaning sufficient details are not stated to support a valid claim: "Committe's conclusory claim was properly dismissed." This statement of opinion is not warranted by the content of the complaint and is on par with the proverbial law enforcement self-defense statements " I shot him because he was reaching for my gun" and " I stopped the car because its tail light was out and not because the driver was a black man." In the case at bar we have the complaint which does not support the 5th Circuit's opinion. See content from the complaint immediately below.

As the complaint alleges in relevant parts, including the paragraph numbers of the complaint quoted below, Appellee/ Defendant removed Appellant/ Plaintiff from all of his four teaching assignments (classes) before the first day of class, Spring semester, 2019 for the following alleged reasons (these paragraphs are from the second amended complaint):

> "13. The reasons stated by Gentry were that (1) Plaintiff had chosen to use a self published book for his Accounting class #1040 which was not a book that the other accounting faculty had approved for use in that class and thus was a book she objected to Plaintiff using and (2) Defendant objected to Plaintiff's self-published syllabi for his classes which syllabi describe Plaintiff's basic plans for how he would be conducting all of his assigned courses, including accounting #1040, how he would be measuring students' performances, and objectives of the courses none of which contradicted the university catalogue description of the course."
>
> ...
>
> "18. The self-published text book Plaintiff had published and selected for accounting #1040 and of which Defendant was aware because she had access to its contents, is a book (free to Plaintiff's students) written and published by the Plaintiff which teaches the basics of

introductory accounting, but, as no other introductory text does, includes existing political dimensions of financial accounting procedures, principles, and rules employed in the financial accounting profession."

"19. Financial Accounting rules which students learn to apply, to financial transactions, in their financial accounting classes arise and exist in a heavily politicized setting and have significant economic and social impact."

Paragraphs 20 through 29 of the complaint continue describing the unique and innovative economic and social concern content of Plaintiff's introduction-to-accounting textbook (written by the Appellant/professor) which is not present in other accounting texts for new accounting students.

The Academic Freedom Carve Out In *Garceti v. Ceballas*, 547 US 410 (2006).

The US Supreme Court states the rule for deciding whether the speech of a [non-academic] government employee is

protected by the First Amendment, or rather, the extent to which it is protected. The rule is:

> "*Pickering [v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563 (1968)] and the cases decided in its wake identify two inquiries to guide interpretation of the constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. See id., at 568. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. See *Connick [v. Myers*, 461 U.S. 138, 142 (1983)], supra, at 147. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. See *Pickering*, 391 U. S., at 568."

Garcia, p. 6.

The Fifth Circuit , in its judgment at page 4, fails to recognize the *Garceti* carve out for free speech in the academic setting; instead, it employs the *Garceti* non-academic public

employment free speech protection rule, begun in *Pickering* and continued in *Garceti,* by citing its own earlier wrong opinion in *Buchanan v. Alexander*, 919 F 3d 847, at 853 (5th Circuit 2019):

> "'To establish a 1983 claim for violation of the First Amendment right to free speech, [public university pressors] must show that (1) they were disciplined or fired for speech that is a matter of public concern, and (2) their interest in the speech outweighed the university's interest in regulating the speech.'"

Below is where the Court in *Garceti* carved out the exception for academic speech (*Garceti* (547 US 410, 425 (2006):

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

The phrase italicized immediately above is the *Garceti* carve out, and it is the question stated above for decision in this case. This is a clean case for that question to be resolved. This is a pure case of censorship and prior restraint where an administrator, the Appellee/Defendant, told a faculty member, BA, MA, and PhD qualified in his subject matter, that he could not teach his accounting classes in the manner of his choosing.

An academic's exercise of Academic Freedom is not just of benefit to the faculty member and students (students too have a right to academic freedom in their speech) but is critically fundamental to obtaining and maintaining a democracy and democratic republic. It is indeed sufficiently important for this Court to give it its attention. Our society needs the Court to address the promise it made in *Garceti* to rule on Academic Freedom in a future case.

Conclusion

The Court should grant this petition for a writ of certiorari to resolve the diversity between at least the 5th and 6th Circuits as well as to full the promise the court made in *Garceti* to established further guidance (in cases even less extreme than the facts in the case at bar) regarding the free speech and freedom of the press expressions in the academic setting.

Respectfully submitted by

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