No. 17-1065

IN THE
Supreme Court of the United States

JEENA LEE-WALKER,
Petitioner,
v.
NEW YORK CITY DEPARTMENT OF EDUCATION, ET AL.,
Respondents.

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

BRIEF *AMICUS CURIAE* OF FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Foundation for Individual Rights in Education is a nonpartisan, nonprofit civil liberties organization dedicated to defending individual rights at our nation's colleges and universities through legal and public advocacy. Since its founding in 1999, FIRE has defended constitutional liberties including freedom of speech, legal equality, due process, religious liberty, and sanctity of conscience on behalf of students and faculty nationwide. The issue before the Court is of interest to *amicus* FIRE because of the profound impact the case would have on the expressive rights of public university faculty.

SUMMARY OF THE ARGUMENT

The First Amendment bears a special relationship to the classroom, where academic freedom is essential to facilitating the marketplace of ideas. Despite this important relationship between the First Amendment and academic freedom, the law

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[1] Pursuant to Rule 37.2, *amicus* notified counsel of record for all parties of their intent to file an *amicus* brief at least ten days prior to the due date for the brief. Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* and their counsel made a monetary contribution to its preparation or submission.

Pursuant to Supreme Court Rule 37.3, each party has consented to the filing of this brief.

governing the limits of public educators' freedom of speech in the classroom has been left in a state of uncertainty since this Court's decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

As lower courts are split over the very existence of First Amendment protection for in-class speech of public educators, teachers and professors are facing more complaints about their pedagogy. This confluence leaves public educators in a state of uncertainty over their legal recourse at a time where their academic freedom is under attack. Faced with the choice between losing their jobs or teaching with the goal of minimizing offense rather than maximizing learning, public educators are engaging in self-censorship, leading to the chilling effect this Court's First Amendment jurisprudence is meant to avoid.

ARGUMENT

I. The First Amendment Bears a Unique Relationship to Academic Freedom.

The First Amendment is intimately intertwined with academic freedom. Recognizing the fundamental importance of the First Amendment in the classroom, it has long been "the unmistakable holding of this Court" that neither "students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (citing *Meyer v. Nebraska*, 262

U.S. 390 (1923) and *Bartels v. Iowa*, 262 U.S. 404 (1923)).

This Court has also recognized the essential and necessary duty of an educator to prepare students for participation in the marketplace of ideas:

> "To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion."

Wieman v. Updegraff, 344 U.S. 183, 196 (1952) (Frankfurter, J. concurring); *see also Keyishian v. Bd. Of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) ("The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends on leaders trained through wide exposure to that robust exchange of ideas."); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("No one should underestimate the vital role in a democracy that is played by those who guide and train our youth").

Academic freedom of public educators must be preserved to ensure public schools and universities

can perform this vital function and foster new and innovative ideas. As this Court stated in *Keyishian*:

> "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 over the classroom."

385 U.S. at 603.

With those principles in mind, consider the uncertain state of the application of the First Amendment to public educators' teaching and research-related speech.

II. The Circuit Split over an Academic Exception to *Garcetti* Creates Uncertainty in the Security of Academic Freedom for Public Educators, Chilling Speech.

A. The Second Circuit's Decision in *Lee-Walker* Highlights the Fragile Status of Educators' First Amendment Rights in the Wake of *Garcetti*.

In this case, a New York City public school teacher was fired after teaching a lesson about racial issues in the "Central Park Five" case. The Second Circuit, in affirming the dismissal of the teacher's

complaint, noted that "[i]t is an open question in this Circuit whether *Garcetti* applies to classroom instruction." *Lee-Walker v. N.Y. City Dep't of Educ., et al.*, 2017 WL 4641250 at *1 (2d Cir. Oct. 17, 2017) (quoting *Panse v. Eastwood*, 303 Fed. Appx. 933, 934–35 (2d Cir. 2008)). The Second Circuit used this open question to justify application of qualified immunity to the individual defendants. *Id.* Indeed, despite the fundamental importance of academic freedom in First Amendment jurisprudence, the law governing the limits of public educators' freedom of speech in the classroom has been left in a state of uncertainty since this Court's decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

In *Garcetti*, this Court narrowed the scope of public employees' First Amendment rights, *see Connick v. Myers*, 461 U.S. 138, 143 (1983); *Pickering v. Bd. Of Educ.*, 391 U.S. 563, 568 (1968), holding 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." *Garcetti*, 547 U.S. at 421. Justice Souter dissented, expressing particular concern about the impact of the Court's decision on academic freedom. *Id.* at 438 (Souter, J., dissenting). In response to Souter's dissent, this Court explicitly left open the question of whether its *Garcetti* analysis applies to "speech related to scholarship or teaching." *Id.* at 425.

In carving out "speech related to scholarship or teaching" from its holding, however, this Court left the First Amendment rights of public educators in a state of uncertainty on a few fronts. In addition to leaving open *Garcetti*'s applicability to academic speech, the Court did not define what it means for speech to be "related to scholarship or teaching," nor did it clarify whether such speech includes scholarship or teaching at all levels of education, or only at the university level. In the twelve years since this Court decided *Garcetti*, lower courts have been left to answer these questions, and their varied conclusions have made the law even more uncertain.

B. Lower Courts Have Not Reached a Uniform Conclusion About Public Educators' First Amendment Rights.

Since the Court's explicit reservation of the question of *Garcetti*'s application to "teaching and scholarship," lower courts have split over whether and which public educators enjoy any First Amendment protections in the classroom.

The Ninth and the Fourth Circuits stand alone in expressly rejecting *Garcetti's* application to "teaching and scholarship" at the university level. *See Demers v. Austin*, 746 F.3d 402, 412 (9th Cir. 2014); *Adams v. Trustees of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 563 (4th Cir. 2011). At least one district court has found an academic exception to *Garcetti* in the university setting. *See Kerr v. Hurd*, 694 F.Supp.2d 817, 843–44 (S.D. Ohio 2010) ("Even without binding

precedent, this Court would find an academic exception to *Garcetti*.").

In addition to the existence of an academic exception, circuits vary on the scope of such an exception. Absent guidance from this Court, circuit courts disagree on whether "teaching and scholarship" includes speech by primary and secondary school teachers. The Sixth, Seventh, and Ninth Circuits have held that *Garcetti*'s carveout for teaching and scholarship does not apply to the in-class speech of primary and secondary school teachers, reasoning that the question left open applies only to educators at public universities. *See Brown v. Chicago Bd. of Educ.*, 824 F.3d 713, 715 (7th Cir. 2016)); *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 966 n.12 (9th Cir. 2011); *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 624 F.3d 332, 340 (6th Cir. 2010).

By contrast, the Fourth Circuit determined that in-class speech of primary and secondary school teachers falls within the Court's educational carveout. *Lee v. York County Sch. Div.*, 484 F.3d 687, 694 n.11 (4th Cir. 2007). The Fourth Circuit in *Lee* instead applied the *Pickering-Connick* analysis with an assessment of "special considerations" relating to curricular speech. *Id.* at 695–97.

These varying — or lack of — pronouncements regarding the existence and scope of an academic exception to *Garcetti* have left the existence and

scope of public educators' First Amendment rights in a state of great uncertainty.

C. Without Legal Recourse, the Classroom Speech of Public Educators is Impermissibly Chilled.

Public educators, uncertain of the scope of their First Amendment rights in the classroom and facing severe penalties for a miscalculation, will stifle their own speech, undermining the very concept of academic freedom.

Underlying much of this Court's First Amendment jurisprudence is its desire to avoid a "chilling effect" on otherwise protected speech. *See Speiser v. Randall*, 357 U.S. 513, 526 (1958) (noting that "[t]he man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone" and such a chilling effect is "especially to be feared" where the law "provide[s] but shifting sands on which the litigant must maintain his position"). The chilling effect is even stronger when the scope of the law's protection is uncertain. *See* Michael Coenen, *Of Speech and Sanctions: Toward a Penalty-Sensitive Approach to the First Amendment*, 112 COLUM. L. REV. 991, 1032 (2012). Particularly where the penalty for engaging in prohibited speech is potentially severe, individuals will engage in self-censorship due to this uncertainty-based chilling effect. *Id.*

Public educators face a high degree of uncertainty regarding their First Amendment rights in the classroom and a severe penalty for a miscalculation of those rights. As this Court noted in *Pickering*, "it is apparent that the threat of dismissal from public employment is … a potent means of inhibiting speech." 391 U.S. at 574.

1. Public Educators Routinely Face Complaints Over Their Pedagogy.

Post-*Garcetti* examples of public educators at all levels experiencing adverse employment action in response to their in-class speech are abundant. For example, Rowan College at Gloucester County terminated sociology professor Dawn Tawwater after several students complained about, among other things, her screening of a racy feminist parody of the music video for the Robin Thicke song "Blurred Lines" — a parody that was a critique of the original video's controversial messages regarding sexual consent and female objectification. Complaint at 7, 13, *Tawwater v. Rowan Coll. at Gloucester County*, No. L-000130-15 (N.J. Super. Ct. Law Div. Jan. 29, 2015); *see also* Letter from Peter Bonilla, Found. for Individual Rights in Educ., to Frederick Keating, President, Rowan Coll. at Gloucester County (Oct. 29, 2014), *available at* https://www.thefire.org/fire-letter-to-rowan-college-at-gloucester-county-october-29-2014. Tawwater explained to her dean that she had shown this video dozens of times to classes in her previous teaching positions, without incident or complaint, and that she had shown the video as part

of an introductory lesson on postmodern theory. Letter from Peter Bonilla, *supra.*

Tawwater's story was not an isolated incident. University of Colorado Boulder sociology professor Patti Adler was notified that her "Deviance in U.S. Society" course would be cancelled over a lecture on prostitution. Sarah Kuta, *CU-Boulder: Patti Adler Could Teach Deviance Course Again if it Passes Review*, DAILY CAMERA (Dec. 17, 2013), http://www.dailycamera.com/cu-news/ci_24738548/boulder-faculty-call-emergency-meeting-discuss-patti-adler?source=pkg; *see also University of Colorado at Boulder: Professor Threatened with Harassment Investigation, Forced Retirement Over Classroom Presentation*, Found. For Individual Rights in Educ., https://www.thefire.org/cases/university-of-colorado-at-boulder-professor-threatened-with-harassment-investigation-forced-retirement-over-classroom-presentation (last visited Feb. 26, 2018). A feature of the course for more than 20 years, the lecture included a skit involving teaching assistants voluntarily dressing as and portraying prostitutes. Kuta (Dec. 17, 2013), *supra*. The volunteers would portray their characters' lifestyles for the class, humanizing those society deems "deviant" — the whole point of the class. *Id.* Though no formal complaints about the class had been submitted, administrators worried the skit might make students uncomfortable. *Id.* Although the university eventually reversed its decision under pressure, Sarah Kuta, *Patti Adler Returning to Teach at CU-*

Boulder, 'Deviance Course Survives, DAILY CAMERA (Jan. 9, 2014), http://www.dailycamera.com/cu-news/ci_24868346/patti-adler-returning-cu-boulder?source=rss, the university's actions sent a chilling message to professors. Adler's colleague, environmental studies professor Roger Pielke Jr., wrote about his concern over his own course that touches on "potentially sensitive topics," asking, "Will I be at risk of losing my job if university officials don't like how I teach these issues? What if a student is 'uncomfortable' because of the material or exercises in the class?" Kuta (Dec. 17, 2013), *supra*.

Public educators are especially vulnerable to complaints if the subject matter they teach touches on worldviews some might find offensive. The University of Illinois at Urbana-Champaign dismissed adjunct professor Kenneth Howell following a student complaint about the content of Howell's teaching. Letter from Adam Kissel, Found. for Individual Rights in Educ., to Robert Easter, President, Univ. of Ill. at Urbana-Champaign (July 16, 2010), *available at* https://www.thefire.org/fire-letter-to-uiuc-chancellor-robert-a-easter. Howell had compared different criteria for judging the morality of sexual conduct in an email to his Introduction to Catholicism students, and the complaining student (who was not in Howell's class) had objected to Howell's elaboration of Catholic "Natural Moral Theory" criteria as it applied to homosexual sexual conduct. *Id.* Only after lawyers intervened on Howell's behalf, pointing out the obvious violations of

free speech and academic freedom, did the university reverse its decision and rehire him. *Id.*

More and more, public schools and universities are responding to complaints from students and parents by restricting educators' speech. Appalachian State University Professor Jammie Price was placed on administrative leave after students alleged that she had created a hostile environment and strayed from the syllabus in her introductory sociology class. Paul T. Choate, *ASU Professor Jammie Price Keeps Job; Letter from Provost Sets Series of Conditions To Be Complied With*, HIGH COUNTRY PRESS (May 1, 2012), https://www.hcpress.com/news/asu-professor-jammie-price-keeps-job-letter-from-provost-sets-series-of-conditions-that-must-be-complied-with.html; *see also* Letter from Adam Kissel, Found. for Individual Rights in Educ., to Kenneth Peacock, Chancellor, Appalachian State Univ. (May 8, 2012), *available at* https://www.thefire.org/letter-from-fire-to-appalachian-state-university-chancellor-kenneth-e-peacock-may-8-2012. The allegations included making negative comments about the university and its student athletes and showing a documentary that criticizes the pornography industry. Choate, *supra*. The university required Price to follow a development plan featuring "corrective actions," such as unique requirements for teaching "sensitive topics" and "controversial materials." *Id.* This is just one example of a university pressuring educators to tone down controversial materials instead of

requiring students to grapple with topics that might make them feel uncomfortable.

2. If Teachers Feel They Must Restrict Their Classroom Speech and Topics to Only the Most Bland and Inoffensive, Education Will Suffer Immeasurably as a Result.

The lesson for public educators from these examples is obvious: Restrict your classroom speech to only the most bland and inoffensive content or risk losing your job. Consider the ACLU's guidance to public educators wondering about the scope of free-speech protections for in-class speech. *Free Speech Rights of Public School Teachers in Washington State*, ACLU (Sept. 1, 2016), https://www.aclu-wa.org/docs/free-speech-rights-public-school-teachers-washington-state. Noting the applicable law "can be a murky area," the ACLU advises educators to "**exercise caution** so as not to give the appearance that you are advocating a particular religious or political view in the classroom." *Id.* (emphasis added). Educators across the country, and across the political spectrum, are changing their pedagogy to avoid employment consequences. *See* Douglas Belkin, *College Faculty's New Focus: Don't Offend*, WALL ST. J. (Feb. 27, 2017), https://www.wsj.com/articles/college-facultys-new-focus-dont-offend-1488200404; Jeannie Suk Gersen, *The Trouble With Teaching Rape Law*, THE NEW YORKER (Dec. 15, 2014),

https://www.newyorker.com/news/news-desk/trouble-teaching-rape-law.

Public educators who value their employment must choose the approach followed by politically diverse families at the Thanksgiving table, avoiding all controversial topics. Students are thus treated less to a marketplace of ideas than a wall of silence. This self-censorship undermines the relationship between the First Amendment and academic freedom, the importance of which this Court has repeatedly emphasized.

"Disciplined and responsible" discussion only happens "if habits of open-mindedness and of critical inquiry are acquired in the formative years of our citizens." *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring). Where else but the classroom can students learn to engage in such discussion guided by the moderating hand of a public educator?

It is especially important that students learn to discuss challenging and controversial topics considering the state of political and cultural discourse in this country today. It is not by chance that many cases dealing with free speech in the academic setting come from the mid-20th century, a time when the nation was also embroiled in political and social debate. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (involving students who wore arm bands in protest of the Vietnam war); *Keyishian v. Bd. Of Regents of Univ.*

of State of N.Y., 385 U.S. 589, 591–92 (1967) (ruling on case where university professors refused to sign a certificate that they were not Communists; *Wieman*, at 184–185 (ruling on case where faculty and staff of a university refused to take an oath of loyalty to the United States and against Communism). This Court recognizes that our democracy is dependent on academics fostering intellectual attitudes. "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

Recognizing and clearly delineating an academic exception to *Garcetti* would alleviate this chilling effect. Public educators must have clear guidance on what they can and cannot say in the classroom so that they can continue to engage and challenge their students.

CONCLUSION

Petitioner respectfully requests that the court issue a writ of certiorari.

Respectfully submitted,

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