No. _____

In The
Supreme Court of the United States

STEPHEN R. PORTER, PH.D.,

Petitioner,

v.

BOARD OF TRUSTEES OF NORTH CAROLINA STATE UNIVERSITY; W. RANDOLPH WOODSON, in his official capacity; MARY ANN DANOWITZ, in both her official and individual capacities; JOHN K. LEE in both his official and individual capacities; PENNY A. PASQUE, in both her official and individual capacities; and JOY GASTON GAYLES, in both her official and individual capacities,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

JONATHAN A. VOGEL
VOGEL LAW FIRM PLLC
6000 Fairview Road
South Park Towers, Suite 1200
Charlotte, NC 28210
Telephone: (704) 552-3750
Facsimile: (704) 552-3705
jonathan.vogel@vogelpllc.com

SAMANTHA K. HARRIS
Counsel of Record
ALLEN HARRIS PLLC
PO Box 673
Narberth, PA 19072
(610) 634-8258
sharris@allenharrislaw.com

Attorneys for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

I. Were Petitioner's statements about the role that diversity and equity considerations should play in faculty hiring and evaluation protected by the First Amendment?

   a. Was Petitioner speaking as a private citizen on a matter of public concern?

   b. Alternatively, were Petitioner's statements related to scholarship and teaching?

II. Should the Court resolve the question of whether its holding in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), applies in the same manner to cases involving speech related to scholarship or teaching?

III. Was there a causal connection between Petitioner's protected blog post and Respondents' adverse employment actions?

PARTIES TO THE PROCEEDING

Petitioner Stephen Porter was the plaintiff-appellant below. Respondents are the Board of Trustees of North Carolina State University in their official capacities, W. Randolph Woodson in his official capacity, and Mary Ann Danowitz, John K. Lee, Penny A. Pasque, and Joy Gaston Gayles, in their official and individual capacities. They were the defendant-appellees below.

RELATED CASES

Porter v. Bd. of Trs. of N.C. State Univ., No. 21-cv-365, U.S. District Court for the Western District of North Carolina. Judgment entered June 15, 2022.

Porter v. Bd. of Trs. of N.C. State Univ., No. 22-1712, U.S. Court of Appeals for the Fourth Circuit. Judgment entered July 6, 2023.

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The decision of the United States Court of Appeals for the Fourth Circuit is published at 72 F.4th 573 (4th Cir. 2023) and is reproduced at Pet. App. 1. The Opinion of the United States District Court for the Eastern District of North Carolina, Western Division, is published at 2022 U.S. Dist. LEXIS 108048 and is reproduced at Pet. App. 50.

JURISDICTION

The Fourth Circuit entered judgment on July 6, 2023. *See* Pet. App. 1. Petitioner's time within which to file a writ for certiorari is due on October 4, 2023. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Petitioner asserts he was subjected to retaliation for engaging in constitutionally protected expression in violation of 42 U.S.C. §§ 1983 and 1988.

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1988:

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses

against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or section 12361 of title 34, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) Expert fees

In awarding an attorney's fee under subsection (b) in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its

discretion, may include expert fees as part of the attorney's fee.

STATEMENT OF THE CASE

The court below ruled that a public university professor's statements criticizing the prioritization of racial diversity over academic rigor in faculty hiring and evaluation were unprotected by the First Amendment. Instead, it held that these statements were made pursuant to the professor's job duties and were thus unprotected under this Court's decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006). The court further held that because the professor's statements were not "a product of his teaching or scholarship," they were not entitled to protection under the Fourth Circuit's exception to *Garcetti* for speech related to scholarship and teaching. *Adams v. Trs. of the Univ. of N.C.—Wilmington*, 640 F.3d 550, 563 (4th Cir. 2011).

Resolving the uncertainty around the scope of public university professors' free speech rights is essential to ensuring that American academic institutions are not ruled by an ideological orthodoxy that ruthlessly eliminates dissent from its ranks. Public university professors who question the primacy of so-called Diversity, Equity, and Inclusion ("DEI") constantly find themselves subject to retaliation that must have a remedy at law. If this retaliation goes unchecked, public universities will rapidly lose any semblance of ideological diversity and will be unable to

function as the quintessential marketplace of ideas that is "one of the vital centers for the Nation's intellectual life," *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 836 (1995).

This Court should also grant review to clarify the connection between speech and action necessary to establish that an adverse employment action was retaliatory.

I. Factual Background

Stephen Porter has been a tenured professor in the College of Education at North Carolina State University ("NCSU") for over a decade. He is a professor of higher education whose courses focus primarily on educational statistics. In recent years, Porter has been increasingly critical of universities' prioritization of "Diversity, Equity, and Inclusion" over academic rigor. Porter's criticisms are part of a larger debate taking place within educational institutions around the country regarding the extent to which "social justice" concerns should take priority within academia.

In response to Porter's protected speech, NCSU retaliated against him by taking a series of actions to reduce his role within his department in a way that deliberately compromised his ability to perform essential elements of his job, putting his future at NCSU at risk—a risk his department chair explicitly acknowledged when Porter expressed this concern.

This case concerns three specific statements for which NCSU retaliated against Porter: (1) A post on Porter's personal blog referring to an academic conference as a "Woke Joke"; (2) Statements by Porter questioning the proposed addition of a racial diversity-related question to student course evaluations; and (3) an email Porter sent to his colleagues criticizing the abandonment of hiring standards in order to advance DEI goals during a faculty job search.

A. Porter's Speech on His Personal Blog

Porter maintains a personal blog where he frequently shares concerns regarding the national debate on DEI in education.[1] His personal blog has featured various posts related to his field of higher education such as "Why DEI Must Be Opposed in Education,"[2] and "The Social Justice Mob is Now Censoring Research."[3] In the fall of 2018, one of Porter's blog entries caught the attention of his colleagues in the field of higher education and the administrators at NCSU. On September 1, 2018, Dr. Porter published a blog post about the upcoming annual conference of the Association for the Study of Higher Education ("ASHE"), a conference Porter had regularly attended until it became dominated by the "social justice" ideology he

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[1] http://stephenporter.org.

[2] https://stephenporter.org/why-dei-must-be-opposed-in-education.

[3] https://stephenporter.org/the-social-justice-mob-is-now-censoring-research.

finds problematic. In this blog post, "ASHE Has Become a Woke Joke," Porter criticized the conference's focus on qualitative rather than quantitative research, drawing particular attention to how frequently certain words such as "white supremacy," "critical race," and "social justice" appeared on the conference agenda.[4]

Porter's blog generated backlash on social media and at the ASHE conference itself, where the ASHE president specifically addressed it in her keynote speech to educators from around the country, putting up a slide with Porter's name and photograph, along with a screenshot of his blog. Compl. at 16 ¶66, *Porter v. Bd. of Trs. of N.C. State Univ.*, No. 5:21-cv-365 (E.D.N.C. Sept. 14, 2021) (Dkt. 1). After two graduate students at NCSU expressed concern about Porter's blog following the ASHE conference, NCSU ordered Porter to address concerns about his post and repair the relationships his blog post had allegedly impacted. *Id.* at ¶¶67-70.

B. Porter's Speech Regarding Survey Methodology

The "Woke Joke" blog was not the first time Porter's speech created controversy within his department. During a faculty meeting in 2016, a faculty member who served on the College of Education's Council on Multicultural and Diversity Issues proposed adding a diversity question to student course evaluations. While reviewing course evaluation

[4] https://stephenporter.org/ashe-has-become-a-woke-joke.

questions is not a part of Porter's job responsibilities, he does study survey methodology, and he had concerns about the design of the question. In particular, Porter thought the department was rushing to respond to social pressure to include DEI in course evaluations. He expressed concern that the question "had not been properly designed and thus might be harmful to faculty without yielding useful information." *Id.* at 7 ¶22. He asked the presenter about "validity standards" and generally inquired about the work that went into the design of the question. *Id.* at 7 ¶23. The resulting discussion was "amicable in tone" but "perhaps embarrassing" for the presenter and the Council on Multicultural and Diversity Issues because the presenter's lack of "consideration or testing for validity and reliability . . . became apparent." *Id*. This led some of Porter's colleagues to refer to him as a "bully" in response to a spring 2017 departmental "climate check" survey. *Id.* at 8 ¶26.

C. Porter's Speech Regarding DEI and Hiring Faculty

Porter also spoke out when the College of Education made national news for selecting Terrell Strayhorn as a finalist for a job opening after Strayhorn left a previous position in the wake of allegations of financial misconduct and an alleged inappropriate relationship with a student. According to an article in *Inside Higher Ed*, the job search—chaired by Porter's colleague, Alyssa Rockenbach—had been run with "unusual secrecy." For the first time in the history of the

College of Education, resumes for the candidates were shielded from faculty review. Porter was concerned that Rockenbach cut corners on her vetting of Strayhorn, who is Black, out of a desire to hire a Black scholar whose work focused on racial issues. This tied into Porter's ongoing broader concerns about the focus on "social justice" over methodology and rigor in academia, including NCSU's willingness to overlook apparent financial and sexual misconduct to achieve a racially diverse hire. App. 53-54.

When the *Inside Higher Ed* article broke on April 11, 2018, making NCSU's hiring process national news, Porter sent an email to colleagues with a link to the article and sarcastically wrote, "Did you all see this . . . This kind of publicity will make sure we rocket to number 1 in the rankings. Keep up the good work, Alyssa!" *Id*. Porter's email angered his colleagues including Respondent Joy Gaston Gayles, who forwarded Porter's email to his then department chair, Penny Pasque, writing "NOT COOL!!!! I am so mad about all of this I could scream!! I can't stay silent about this. It's maddening!" App. 54.

D. NCSU'S Retaliation

1. Departmental structure

Because the structure of Porter's department is complex, a brief description will assist this Court in understanding the nature of the retaliation at issue in this case. Porter's department—Educational Leadership, Policy, and Human Development—is divided into

various "Program Areas," and all faculty members are part of a Program Area. Porter was a member of the Higher Education Program Area, through which he took on Higher Education Ph.D. advisees every year; served on Higher Education Ph.D. committees; recruited prospective Higher Education Ph.D. students; participated in the Ph.D. admissions review process; took part in the annual Open House and Recruitment Weekend activities; and engaged in various other activities to help Higher Education doctoral students. Compl. at 5-6 ¶¶15-18, *Porter v. Bd. of Trs. of N.C. State Univ.*, No. 5:21-cv-365 (E.D.N.C. Sept. 14, 2021) (Dkt. 1).

In the 2020-21 academic year, Porter's department began to shift some emphasis within the Ph.D. program away from the Program Areas and into the Program Areas of Study ("PAS"), which are essentially doctoral concentrations. The PAS were created as part of a departmental restructuring in 2015 and were intended to house the department's Ph.D. programs, but all significant Ph.D. business continued to be conducted within the Program Areas until the 2020-21 academic year. Porter belonged to the Higher Education PAS, but, until 2020-21, this was of little significance because of his exclusion from the Higher Education Program Area. Appellant's Opening Br. at 13, *Porter v. Bd. of Trs. of N.C. State Univ.*, No. 22-1712 (4th Cir. Aug. 29, 2022).

2. Retaliation

NCSU's retaliation against Stephen Porter took the form of "death by a thousand cuts," with administrators slowly and deliberately escalating their response to hollow out his career from the inside and put his future at NCSU in jeopardy. When Porter first expressed unpopular views over the diversity question on student course evaluations, he was labeled a "bully" for his protected speech. Compl. at 8 ¶26. After his email about the faculty job search, Porter was given a warning about "collegiality." *Id.* at 11-12 ¶46. His then-department head, Respondent Penny Pasque, also made explicit her desire to remove Porter from the Higher Education Program Area, an action that would severely limit Porter's ability to serve his existing Ph.D. advisees and to recruit new advisees. *Id.* at 11 ¶41. After his "Woke Joke" post and the controversy it caused at the ASHE conference, Pasque did remove him from the Higher Education Program Area, leading to a cascade of events that severely compromised Porter's ability to do his job and that put his future at NCSU in jeopardy. *Id.* at 18 ¶78.

After Porter's faculty-meeting comments about survey methodology for a diversity question on faculty course evaluations, he was labeled a "bully" in a departmental "Climate Check Report" conducted by NCSU's Office for Institutional Equity and Diversity (OIED). *Id.* at 8 ¶26. This "bully" label came up again during the fall semester of the 2017-18 academic year, when the new Department head, Penny Pasque, came by Porter's office under the guise of a "get to know you"

meeting. During that meeting, she informed Porter that he had been accused of "bullying" his colleagues. *Id.* She repeated this same allegation in an email just a few months later. *Id.* at ¶29. When Porter asked for examples of his alleged bullying behavior, however, Pasque provided just one: the discussion of the diversity question at the spring 2016 department meeting. *Id.* at ¶27.

A week after Porter sent his April 11, 2018 email about the *Inside Higher Ed* article, Pasque requested a meeting with Porter at which she repeatedly asked him about his intent in sending that email. *Id.* at ¶38. Two weeks later, at a follow-up meeting, she then threatened Porter's career, suggesting that he leave his Program Area within the Department.[5] *Id.* at ¶41. Pasque informed Porter that she had asked the administration whether Porter had to remain a member of the Higher Education Program Area or whether he could be a member of the department without a Program Area. *Id.* If he did not belong to a Program Area, Porter would effectively be excluded from all Higher Education Ph.D. activities. Porter was "dismayed" and "disturbed," as being removed from his Program Area would "severely marginalize" him from other faculty and his Ph.D. advisees. *Id.* at ¶¶41-45. Porter's annual

[5] Porter teaches and advises only Ph.D. students. At the time, discussions and decisions concerning Ph.D. students took place in departmental "program area" meetings. Participation in a program area was therefore essential for Porter to be able to function effectively as an advisor to his existing Ph.D. students and to attract new advisees.

evaluation then cautioned him to be "collegial." *Id.* at ¶46.

The following semester, in September 2018, Porter published his "ASHE Has Become a Woke Joke" blog post, which generated some backlash on social media. The following month, Pasque invited Porter to an online meeting with several colleagues to discuss a so-called "new and exciting opportunity." *Id.* at ¶55. As it turned out, the opportunity involved a proposal that Porter leave the Higher Education Program Area as part of a restructuring involving a potential new spousal hire. This was now the second time in six months that Pasque proposed Porter leave the Higher Education Program Area. *Id.* at ¶¶56-57. In frustration at this apparent ambush, Porter said "Give me a fucking break, folks. I was the one who said [the potential spousal hire] should come. And now I'm the bad guy because I don't want to leave Higher Ed for a nonexistent program area." *Id.* at ¶60.

After the meeting, Pasque sent Porter a letter expressing concern over his lack of "collegiality." She referenced: (1) the 2016 survey methodology question where Porter was labeled a "bully" for questioning the utility of a proposed faculty evaluation question on diversity; (2) the 2018 email about the *Inside Higher Ed* article; and (3) Porter's isolated use of profanity in the meeting where Pasque ambushed him with yet another request to leave the Higher Education Program Area following his "Woke Joke" blog. *Id.* at ¶¶62-63. This letter made yet another threat to remove Porter from the Higher Education Program Area. *Id.* at ¶64.

Porter's "Woke Joke" post created a yet bigger stir at the November 2018 ASHE conference when the ASHE president mentioned it in her keynote speech alongside a slide with Porter's photograph. *Id.* at ¶66. After the conference, Pasque informed Porter that graduate students were having "strong reactions" to his blog and implied that he would need to mollify them somehow. Pasque proposed a public meeting at which Porter would be expected to address graduate students' concerns about his blog. *Id.* at ¶67. When Porter inquired as to the number of students who had expressed concerns, he was informed it was only two out of sixty graduate students. As a result, Porter felt it would be more appropriate to meet privately with any students who had concerns. *Id.* at ¶¶68-70. He suggested the Department faculty discuss whether a public meeting was necessary at an upcoming faculty meeting in January 2019. *Id.* at ¶72.

But the faculty never discussed it, and, instead of moving forward, in February of 2019, Pasque met privately with Porter to reiterate her concerns about his blog post and response to the graduate students. Pasque "repeatedly expressed her frustration that [he] had not addressed student and faculty concerns about "'what happened at ASHE,'" the conference that highlighted Porter's blog post. She cited Porter's "lack of proactive action as a further example of" the "lack of collegiality" that she described in her November letter. *Id.* at ¶¶72-74.

Pasque made good on her repeated threats and removed Porter from the Higher Education Program

Area at her next opportunity: Porter's July 2019 annual evaluation. Pasque said she removed him because "'the Higher Education faculty were not able to make concerted progress' on resolving issues." *Id.* at ¶78. These "issues" were Porter's blog post and the controversy it generated. Porter's ability to work with his Ph.D. advisees and to recruit new advisees—key aspects of his job as a professor who works only with Ph.D. students—were immediately and severely compromised. In the fall of 2019, he was prohibited from attending Ph.D. recruiting events and the faculty Higher Education Retreat, where many important issues related to the Ph.D. program were discussed. *Id.* at ¶85. He was excluded from his advisees' important Diagnostic Advisement Procedure ("DAP") process, which significantly impacted his relationship with his Ph.D. advisees since the advisor normally plays a significant role in the process. *Id.* at ¶¶86-92.

Concerned, in September of 2019, Porter wrote to his new department head, John Lee, expressing concerns about his relationship with his advisees, because, while he "officially remain[ed] their advisor, in practice my relationship seems to be slowly and involuntarily eroded to the point where, perhaps, I will not be able to function as such in good faith." *Id.* at ¶94. Lee, rather than addressing the issue, further compromised Porter's ability to function as advisor by writing directly to Porter's advisees to inform them that Porter was "not participating" in certain key parts of their Ph.D. process. *Id.* at ¶95.

As a result of Porter's removal from the Higher Education Program Area, he experienced a near total exclusion from Ph.D. activities, which limited his ability to recruit new Ph.D. advisees. Because he was prohibited from participating in key evaluations for his current Ph.D. advisees, he was also at risk of losing his current advisees. Porter met with Lee to address the severe limitations placed on him as an advisor and to ask why any doctoral student would want to work with him as their advisor given NCSU's limitations. Lee replied, "I guess that'd have to be something you talk to the students about." *Id.* at ¶¶97-100. Porter then directly expressed the concern that "the process is being set up so that when I go for my post-tenure review a couple of years from now, I'm not going to have any advisees. And then you and Dean Danowitz can say well, we need to strip Dr. Porter of tenure and fire him because he's not fulfilling his job duties." Lee's response: "Right, I hear you." *Id.* at ¶¶101-102.

NCSU's retaliation continued when Porter's department began to shift Ph.D. activities from the Program Areas to the Program Areas of Study. In 2021, the department created a new PAS for doctoral students called the Higher Education Opportunity, Equity, and Justice PAS. At the time, Porter was a member of the Higher Education PAS. All the other faculty in the Higher Education PAS were invited to join the new PAS except for Porter. This ensured that, even as the department shifted Ph.D. activities from the Program Areas into the Program Areas of Study, Porter's ability to advise Ph.D. students would continue to be

compromised. NCSU even confirmed to Porter that, while he could make offers of admission to doctoral candidates, those candidates would be encouraged to switch away from him into the new program area. *Id.* at ¶¶114-115.

E. Procedural History

1. The District Court Decision

Porter filed suit in the Eastern District of North Carolina on September 14, 2021, under 42 U.S.C. § 1983, alleging that he had been subjected to unlawful retaliation for his constitutionally protected speech. Respondents moved to dismiss under both FRCP 12(b)(1) and FRCP 12(b)(6). On June 16, 2022, the district court granted Respondents' 12(b)(1) motion in part and their 12(b)(6) motion in full, dismissing Porter's complaint. On Respondents' 12(b)(1) motion, the district court held that while Dr. Porter's request to be reinstated to the Higher Education Program Area was prospective in nature, his request for declaratory relief, as well as his request to be permitted to join the new PAS and to be relieved of the requirement that he teach a fifth course, were retrospective and therefore barred by sovereign immunity. App. 61-62.

The district court then dismissed Porter's complaint in its entirety pursuant to 12(b)(6), holding that Respondents' employment actions were not "materially adverse" because their impact was "speculative," since "Plaintiff has not alleged that he does not currently have any advisees or that his tenure status is

now at risk." App. 64. The district court further held that Porter had failed to plead facts showing a causal connection between his speech and Respondents' employment actions. App. 64-66. Porter appealed to the Fourth Circuit.

2. The Fourth Circuit Decision

A divided panel of the Fourth Circuit affirmed, holding that only one of Petitioner's three statements—the blog post—was protected speech and that there was not a sufficient causal connection between the blog post and Respondents' actions to establish retaliation. While the panel was unanimous that the "*Garcetti* rule does not extend to speech by a public university faculty member acting in their official capacity that is 'related to scholarship or teaching,'" the majority held that two of Petitioner's statements, the survey methodology question and the faculty email, were "unprotected speech" because they were made within the scope of Petitioner's employment but were not related to "scholarship or teaching." App. 18-19. The majority held both the faculty email and faculty meeting questions to be "wholly internal communications" "addressing matter[s] of personal interest" rather than matters of public concern. *Id.* As to the survey methodology question, the majority held this question to be outside of "scholarship and teaching" because Petitioner "was not teaching a class nor was he discussing topics he may teach or write about as part of his employment" and so this was only a "personal area of study." App. 17-18. Likewise, the majority held

that Petitioner's faculty email linking to the *Inside Higher Ed* article was unprotected speech because it was "unrelated to Appellant's teaching or scholarship," and it was "sent only to other faculty members in the Department" and the "email expressed no viewpoint and made no mention of policy or anything else that might be of public concern." App. 18.

The panel unanimously agreed that Petitioner's "Woke Joke" blog post was protected speech, but the majority held that Petitioner failed "to allege a sufficient causal connection" between the "Woke Joke" blog post and the retaliation. App. 19. The majority held that, because NCSU removed Petitioner from his program area 10 months after his blog post, there was a lack of "temporal proximity" between the blog post and the retaliatory action. *Id.* The majority also found that Petitioner had failed to establish the blog post was the "but for" cause of the alleged adverse employment action. In so reasoning, the court held that Pasque removed Petitioner from his program area because of his "lack of collegiality." App. 19-20. The court distinguished between retaliation for the actual blog post and retaliation for Porter's failure to address the impact of his blog post on two graduate students: "Pasque's concerns were not with the content of the post, but rather with Appellant's failure to 'proactively address student and faculty concerns about 'what happened at ASHE.' " App. 20.

Dissenting, Judge Richardson argued that all three of Petitioner's statements were protected speech on matters of public concern. App. 34-39. Richardson

reasoned that "the mere fact that a plaintiff chooses to speak 'inside his office, rather than publicly,' does not mean that he is speaking as an employee instead of a private citizen." App. 35. "The "critical question" in distinguishing speech made as an employee from speech made as a citizen is "whether the speech at issue is itself ordinarily within the scope of an employee's duties." App. 35. Petitioner was not "fulfilling a responsibility imposed by his employment" when he objected to the diversity question at the faculty meeting. *Id.* And his faculty meeting comment addressed a matter of public concern as "[u]nquestionably there has been a growing, and wide-ranging, public debate about how colleges ought to emphasize diversity, equity, and inclusion." App. 36.

Likewise, Judge Richardson argued that Petitioner's faculty-hiring email was outside the scope of his employment duties, and thus that the speech therein was made as a citizen, not as an employee. His speech was also on a matter of public concern, as he linked to an *Inside Higher Ed* article criticizing a colleague's hiring decisions for their "unusual secrecy." "[N]ews that the University almost hired someone who faced these serious allegations would alone interest the public" as "public concern is something that is a subject of legitimate news interest." App. 38. Richardson reasoned that Petitioner's speech being "sent only to other faculty members" and being an "unprofessional attack on one of [his] colleagues" were not relevant as it "makes no difference whether the speech reached the public" and "[t]he inappropriate or

controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." App. 38-39. Richardson reasoned that "[a] message's form is distinct from its subject matter." And "it is canon that 'debate on public issues . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks.' " App. 39.

He further argued that even if only the "Woke Joke" blog post was protected speech, Petitioner had stated a plausible claim for retaliation due to the "ongoing controversy" over his "Woke Joke" blog post and the fact that Petitioner had been removed from his program area at his next annual review: "But for [Petitioner's] blog post, Pasque would not have asked Porter to hold a 'community conversation,' and but for his hesitation to do so, she would not have removed him from his program area. That's but-for cause, even with the blog post standing alone." App. 41.

Richardson concluded that, because Petitioner's statements were protected and were the but-for cause of NCSU's retaliation, NCSU must justify its decision to remove him from his old program area under the analysis set forth by this Court in *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983). App 42. Because there is "scant evidence to support the University's asserted interest" at the 12(b)(6) stage, App. 44, and "we must read those factual allegations in the light most favorable" to Petitioner, App. 44-45, "Porter's claims ought to survive,

and the district court's contrary decision ought to be reversed. This is not a close call." App. 48.

REASONS FOR GRANTING THE WRIT

I. The Scope of Public University Professors' Free Speech Rights is a Question of Extraordinary Public Importance

This Court has long recognized the unique role that colleges and universities play in serving as a "marketplace of ideas" where faculty and students are able to discuss and debate important societal issues. In *Healy v. James*, for example, this Court held that:

> [T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, 'the 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). The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.

Healy, 408 U.S. 169, 180 (1972). *See also Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 835 (1995) (holding that the danger "to speech from the chilling of individual thought and expression . . . is

especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition"); *Keyishian v. Bd. of Regents*, 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."); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation . . . 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.").

Unfortunately, the notion of the public university as a "marketplace of ideas" has been under assault for decades. The faculty of America's colleges and universities are already ideologically homogenous: according to a 2016-17 survey by the Higher Education Research Institute, only 11.7% of faculty identify as conservative, while 48.3% identify as liberal.[6] But recent data also shows that the already small number of conservative faculty are deeply fearful of expressing their views on campus. A 2022 survey of faculty attitudes towards free speech by the Foundation for Individual Rights and Expression found both that self-censorship

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[6] Ellen Stolzenberg *et al*., *Undergraduate Teaching Faculty: The HERI Faculty Survey 2016-2017*, p. 17, *available at* https://heri.ucla.edu/monographs/HERI-FAC2017-monograph-expanded.pdf.

is increasingly common among faculty, and that self-censorship varies dramatically by political affiliation: "Over half of conservative faculty (57%) indicated they self-censor often on campus, compared to a third of moderate faculty, and a fifth of liberal faculty."[7] This self-censorship by conservative faculty is more prevalent in official meetings—where more than 65% say they are "very or extremely likely to self-censor"—than in any other context, including email or social media.[8] The result is that important decisions about scholarship and pedagogy are being made without the input of the already small number of faculty who hold conservative views.

II. This Court Should Clarify What Falls Within the "Scope of Employment" for Public University Faculty

In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), this Court held that public employee speech made pursuant to one's employment duties was unprotected speech but left unanswered what fell within the scope of one's employment duties. In *Garcetti*, the Plaintiff wrote a memo as a prosecutor fulfilling his responsibility to advise his superior on how best to proceed with a case. *Id*. at 421. The parties "did not dispute that

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[7] Foundation for Individual Rights and Expression, *The Academic Mind in 2022: What Faculty Think About Free Expression and Academic Freedom on Campus*, p. 28, *available at* https://www.thefire.org/research-learn/academic-mind-2022-what-faculty-think-about-free-expression-and-academic-freedom.

[8] *Id.* at 29.

[Plaintiff] wrote his disposition memo pursuant to his employment duties" and so the Court "ha[d] no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate." *Id.* at 424. Giving limited guidance and erring on the side of protecting more speech, the Court "reject[ed], however, the suggestion that employers can restrict employee's rights by creating excessively broad descriptions." *Id.* at 424.

The Fourth Circuit panel rejected *Garcetti's* guidance and, instead, broadly defined the scope of one's official duties, resulting in less protection for faculty speech. The Fourth Circuit panel undertook no analysis of Porter's actual job duties, but it held that Porter's speech was made within the scope of his employment because the speech was "wholly internal communications" on "matter[s] of personal interest." App. 18-19. Unlike the prosecutor's memo in *Garcetti*, however, Porter was under no obligation to voice concerns about survey methodology for a proposed diversity question on student course evaluations, nor was he under an obligation to share his views with his colleagues on the faculty hiring process. He was not "fulfilling a responsibility imposed by his employment" when he objected to the diversity question or sent an email forwarding an article critical of the university hiring process. *See Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2425 (2022). Rather, he was speaking as a citizen about matters of intense public debate and concern—the extent to which colleges and universities should emphasize

diversity, equity, and inclusion in the classroom and in hiring.

III. This Court Should Resolve the Question, Left Open in *Garcetti*, of Whether Public University Faculty Speech Related to Scholarship and Teaching is Protected

Particularly since this Court reduced the scope of public employees' free speech rights in *Garcetti*, public university faculty have had limited recourse in the courts when they find themselves censored or punished for dissenting from the ideological orthodoxy that has unfortunately descended over many of this nation's academic institutions. In *Garcetti*, this Court held that when public employees speak pursuant to their official employment duties, they are not speaking as private citizens for First Amendment purposes even if their statements relate to matters of public concern. *Id.* at 421. In response to a concern raised by Justice Souter in dissent, however, this Court acknowledged the potential impact of its decision on the academic freedom rights of public university faculty and held that "We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching." *Id.* at 425.

In the wake of the Court's reservation of that question, the circuit courts have become divided both over whether *Garcetti* applies to "speech related to scholarship or teaching" and as to what constitutes "speech

related to scholarship and teaching." This Court should take the opportunity to resolve both of those questions in a manner that protects the academic freedom and free speech rights of public university faculty.

A. The Circuit Courts are Already Split on Whether Speech Related to Scholarship and Teaching is Protected by the First Amendment

Currently, the Courts of Appeals for the Second, Fourth, Fifth, Sixth, and Ninth Circuits have all held, to one extent or another, that *Garcetti* does not apply to speech related to scholarship and teaching.[9] The First, Third, Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits have not held that *Garcetti* applies in this context. The result is that, while public-university faculty in the five circuits to decide the issue enjoy at least limited protection for speech related to scholarship and teaching, public-university faculty in the other seven circuits truly teach and publish at their own risk.

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[9] *Heim v. Daniel*, No. 22-1135, 2023 U.S. App. LEXIS 22934 (2d Cir. Aug. 20, 2023); *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021); *Buchanan v. Alexander*, 919 F.3d 847 (5th Cir. 2019); *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014); *Adams v. Trs. of the Univ. of N.C.—Wilmington*, 640 F.3d 550 (4th Cir. 2011).

B. The Fourth Circuit's Decision Creates a Further Split Among the Circuits Concerning the Meaning of 'Related to Scholarship and Teaching'

The Fourth Circuit's ruling in this action created a further split among the five circuits that acknowledge a "scholarship and teaching" exception to *Garcetti* over what constitutes "speech related to scholarship and teaching." In *Demers v. Austin*, 736 F.3d 402 (9th Cir. 2014), Washington State University ("WSU") Communications professor David Demers alleged that WSU had retaliated against him for a "7-Point Plan" he distributed proposing a restructuring of the Communications faculty "and giving more prominent roles to faculty members with professional backgrounds." *Demers*, 736 F.3d at 407. The Ninth Circuit held that Demers' 7-Point Plan, while created pursuant to his official duties as a Communications professor, "was 'related to scholarship or teaching' within the meaning of *Garcetti*." *Id.* at 415. According to the Ninth Circuit, the speech related to scholarship or teaching because "In Demers's view, the teaching of mass communications had lost a critical connection to the real world of professional communicators. His Plan, if implemented, would restore that connection and would, in his view, greatly improve the education of mass communications students at the Murrow School." *Id.*

Like Demers' 7-Point Plan, Stephen Porter's views about the role that racial diversity considerations should play in the hiring and evaluation of faculty relate directly to what, how, and by whom students

should be taught in the College of Education at North Carolina State University. But faced with such a similar fact pattern, the Fourth Circuit narrowly defined "scholarship and teaching" to include only speech made while "teaching a class" or speech "discussing topics [one] may teach or write about as part of his employment." App. 17-18. It held that Porter's comments concerning the pedagogical direction of his department were not "a matter of scholarship" and were thus unprotected. App. 18. This excessively narrow interpretation of "related to scholarship and teaching" leaves much faculty speech on matters germane to their scholarship and teaching unprotected. In particular, it effectively prevents faculty with minority views from providing input on the overall pedagogical practices of their department, school, or university because, if such speech is not "related to scholarship and teaching," then it will be penalized, as Porter's speech was here. In order to prevent a further increase in the ideological homogeneity of America's colleges and universities, this Court must act to protect the rights of public university professors to advance views on departmental pedagogy by establishing both that there *is* an academic freedom exception to *Garcetti* and that the scope of speech "related to scholarship and teaching" is not as narrow as the Fourth Circuit has held.

IV. There is Broad Confusion Among the Lower Courts Concerning What Constitutes a 'Causal Connection' Between Protected Speech and Adverse Employment Actions

In recent years, universities have increasingly subjected dissenting faculty to the proverbial "death by a thousand cuts"—slowly ruining their careers through a series of smaller actions to avoid the scrutiny that would come with outright demotion or termination. Rather than clearly fire or discipline a professor for their expression, administrators instead quietly hollow a faculty member's career out from the inside until they are rendered useless, all the while saying "nothing to see here."[10]

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[10] When University of Washington professor Stuart Reges refused to put an indigenous land acknowledgment on his syllabus, for example, he alleged that the University of Washington retaliated by launching a protracted investigation and creating a "shadow" section of his class, taught by another professor, which his students were all invited to join. *See* Alec Schemmel, *Professor Sues University for Allegedly Violating his Free Speech Rights*, NEWS 4 SAN ANTONIO (July 15, 2022), https://news4sanantonio.com/news/nation-world/professor-sues-university-for-allegedly-violating-his-free-speech-rights-washington-indegenous-land-acknowlegement-stuart-reges. Similarly, after expressing a controversial view on the repatriation of indigenous remains, San Jose State University anthropology professor Elizabeth Weiss was removed from her role as curator of the university's collection of remains—something that was critical to her ability to carry out her research. *See* Colleen Flaherty, *Much More Than Bones*, INSIDE HIGHER ED (Feb. 15, 2022), https://www.insidehighered.com/news/2022/02/15/anthropologist-says-shes-being-punished-views-bones. University of North Texas music professor Timothy Jackson, meanwhile, was removed as head of the academic journal he founded after he

This practice is enabled by the widespread confusion among the lower courts about what is sufficient to establish a "causal connection" between protected speech and adverse employment actions. When analyzing whether there was temporal proximity between Porter's "Woke Joke" blog (which even the majority conceded was protected) and his removal from the Higher Education Program Area, the majority distinguished between the blog post itself and the controversy it caused on campus. The majority treated the date of the post, rather than the date that the post created a controversy on campus, as the operative date for analyzing temporal proximity. App. 19.

We live in an age where even years-old online content is often weaponized to discredit or damage political or ideological opponents. Say, for example, that a public university hires a professor with controversial political opinions, generating protest on campus. If a protestor digs up and re-shares an old post by the professor expressing a particularly strident view, and university administrators then retaliate against that professor, is the appropriate date for analyzing temporal proximity the date of the original post that virtually no one saw? Or is it the date that the protestor

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published an article in that journal critical of a speech by a Black music theorist about music theory's "white racial frame." *See* Lucinda Breeding, *Music Professor Files Suit Against UNT for Alleged Retaliation Over Racism Accusations*, DENTON RECORD-CHRONICLE (Feb. 7, 2021), https://dentonrc.com/education/higher_education/music-professor-files-suit-against-unt-for-alleged-retaliation-over-racism-accusations/article_3b78065d-d11e-5220-a77f-eb4274f1aa38.html.

publicized the post on campus, generating controversy? The Fourth Circuit's decision in the case below leaves professors in this situation with no legal recourse for such retaliation.

The Fourth Circuit also separated the content of Porter's blog post from the university's reaction to it, holding that he was removed from the Higher Education Program Area not because of his post, but because of his failure to "proactively address[] student and faculty concerns about" the post after it was publicly shared and criticized at the ASHE conference. App. 19-20. The Fourth Circuit panel erred in holding that NCSU could punish Porter for his failure to address concerns about his protected speech, and that this was distinct from punishing Petitioner for his protected speech. If this is the standard, then faculty with minority views will face the choice between engaging in compelled apologies for their protected speech or having no remedy when they suffer retaliation if they refuse to apologize.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

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Respectfully submitted,

SAMANTHA K. HARRIS
Counsel of Record
ALLEN HARRIS PLLC
PO Box 673
Narberth, PA 19072
(610) 634-8258
sharris@allenharrislaw.com

JONATHAN A. VOGEL
VOGEL LAW FIRM PLLC
6000 Fairview Road
South Park Towers, Suite 1200
Charlotte, NC 28210
Telephone: (704) 552-3750
Facsimile: (704) 552-3705
jonathan.vogel@vogelpllc.com

Attorneys for Petitioner Stephen Porter