

No. _____

IN THE
Supreme Court of the United States

BRYAN J. PESTA,
Petitioner,

v.

LAURA BLOOMBERG, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

Whether in government employee speech cases the State must clear the *Sullivan* malice hurdle before proceeding to balancing, as this Court originally held in *Pickering*?

Whether the *Sullivan* malice standard answers the question left open in *Garcetti* regarding academic freedom in a state university?

Whether balancing was properly weighed here under any conceivable test, where no consideration was given to the fact that petitioner had produced a landmark scientific study within his field, but was stripped of tenure and fired anyway, allegedly for breaking obscure research rules for which respondents themselves were equally at fault, and for which violation no real disruption was demonstrated?

PARTIES TO THE PROCEEDING

Petitioner is Bryan J. Pesta (“Pesta”).

Respondents are Cleveland State University President Laura Bloomberg in her individual and official capacities, Harlan M. Sands, Benjamin Ward, Christopher Mallett, Conor McLennan, and Wendy Regoecki in their individual capacities.

Cleveland State University is not a party to this proceeding; and in any event, pursuant to Rule 12.6, does not have any interest in the outcome of the petition because it has no interest that differs from that of Laura Bloomberg in her official capacity, which is already accounted for.

The Cleveland State Board of Trustees in their official capacities (being the natural persons David M. Reynolds, Timothy J. Cosgrove, Patricia M. DePompeii, Paul J. Dolan, Lisa K. Kunkle, Alan G. Sarkoff, Nikki C. Byrd, P. Kelly Tompkins, and Vanessa L. Whiting) are not parties to this proceeding; and in any event, pursuant to Rule 12.6, do not have any interest that differs from that of Laura Bloomberg in her official capacity, which is already accounted for.

STATEMENT OF RELATED CASES

The following proceedings are directly related to this case:

- *Bryan J. Pesta v. Laura Bloomberg, et al.*, No. 23-cv-00546-DAP, United States District Court for the Northern District of Ohio, Eastern Division. Judgment entered October 7, 2024.
- *Bryan Pesta v. Cleveland State University, et al.*, No. 24-3947, United States Court of Appeals for the Sixth Circuit. Judgment entered November 4, 2025; rehearing en banc denied December 29, 2025.

TABLE OF CONTENTS

Questions Presented	i
Parties to the Proceeding and Statement of Related Cases	ii
Table of Contents	iii
Table of Authorities	iv
Petition for a Writ of Certiorari	1
Opinions Below	1
Jurisdiction	1
Constitutional Provisions Involved	2
Summary	2
Statement of the Case	3
Procedural History	8
Reasons for Granting the Writ	9
I. THIS COURT ADOPTED THE <i>SULLIVAN</i> MALICE STANDARD IN <i>PICKERING</i> , WHICH HAS BEEN MYSTERIOUSLY DROPPED IN SUBSEQUENT CASES WITHOUT EXPLANATION, LEADING IT TO BE APPLIED INCONSISTENTLY OVER THE SUBSEQUENT DECADES	9
II. THE PROPER APPLICATION OF <i>PICKERING</i> ANSWERS AND RESOLVES THE QUESTION LEFT OPEN BY <i>GARCETTI</i>	12
III. FRCP 56 REVIEW AFFORDS THE OPPORTUNITY TO CLARIFY THE <i>PICKERING</i> - <i>GARCETTI</i> FRAMEWORK - EVEN IF THE COURT WOULD AFFIRM THE COA	15
Conclusion	19

TABLE OF AUTHORITIES

Cases

<i>Amalgamated Transit Union Local 85 v. Port Auth. of Allegheny Cnty.</i> , 39 F.4th 95 (3d Cir. 2022).....	10, 12
<i>Arnett v. Kennedy</i> , 416 U.S. 134 (1974)	11
<i>Connick v. Myers</i> , 461 U.S. 138 (1983)	11
<i>Counterman v. Colorado</i> , 600 U.S. 66 (2023) ..	14, 17
<i>Garcetti v. Ceballos</i> , 547 U.S. 410 (2006).....	2, 9, 13
<i>Givhan v. Western Line Consol. Sch. Dist.</i> , 439 U.S. 410 (1979).....	11
<i>Healey v. James</i> , 408 U.S. 169 (1972).....	10
<i>Hernandez v. City of Phoenix</i> , 43 F.4th 966 (9th Cir. 2022)	11
<i>Hussey v. City of Cambridge</i> , 149 F.4th 57 (1st Cir. 2025).....	11
<i>Hyland v. Wonder</i> , 972 F.2d 1129 (9th Cir. 1992).....	17
<i>In re Fosamax Products Liab. Litig.</i> , 707 F.3d 193 (2d Cir. 2013).....	17
<i>Johnson v. Multnomah Cnty., Or.</i> , 48 F.3d 420 (9th Cir. 1995).....	12
<i>Jorjani v. New Jersey Inst. of Tech.</i> , 151 F.4th 135 (3d Cir. 2025).....	11
<i>Keyishian v. Bd. of Regents</i> , 385 U.S. 589 (1967).....	13, 15, 18
<i>Kubala v. Smith</i> , 984 F.3d 1132 (6th Cir. 2021)....	16
<i>Levin v. Harleston</i> , 966 F.2d 85 (2d Cir. 1992).....	11
<i>Lyons v. Sullivan</i> , 602 F.2d 7 (1st Cir. 1979)	11
<i>MacRae v. Matthews</i> , 606 U.S. ____ (2025)	16
<i>Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle</i> , 429 U.S. 274 (1977).....	11
<i>Murthy v. Missouri</i> , 603 U.S. 43 (2024)	17
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964).....	10
<i>Perry v. Sindermann</i> , 408 U.S. 593 (1972)	11

<i>Pickering v. Bd. of Ed.</i> , 391 U.S. 563 (1968)...	2, 9-11
<i>Rankin v. McPherson</i> , 483 U.S. 378 (1987)	11, 15
<i>Snyder v. Phelps</i> , 562 U.S. 443 (2011)	14
<i>Speiser v. Randall</i> , 357 U.S. 513 (1958)	16
<i>Springer v. Henry</i> , 435 F.3d 268 (3d Cir. 2006).....	11
<i>St. Amant v. Thompson</i> , 390 U.S. 727 (1968)	10
<i>Townsend v. Sain</i> , 372 U.S. 293 (1963)	16
<i>United States v. Alvarez</i> , 567 U.S. 709 (2012)	17
<i>Whitney v. California</i> , 274 U.S. 357 (1927)	18

Constitutional and Statutory Provisions

U.S. Const. Amend. I.....	2
28 USC §2201.....	1
28 USC §2202	1
28 U.S.C. § 1254(1).....	1
28 U.S.C. § 1291.....	1
28 U.S.C. § 1331.....	1, 8
42 U.S.C. § 198.....	1, 8

Other Authorities

David A. Anderson, “Wechlser’s Triumph,”	
66 ALA. L. REV. 229 (2014)	10 n.2
Elena Kagan, “ <i>A Libel Story: Sullivan Then and Now</i> ,”	
18 L. & Soc. Inquiry 197 (1993).....	13

PETITION FOR A WRIT OF CERTIORARI

Pesta respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit ("COA").

OPINIONS BELOW

The opinion of the COA ("COA Opinion") is published at 2025 WL 3094128 (6th Cir. Nov. 4, 2025).

The opinion of the United States District Court for the Northern District of Ohio ("District Court") is published at 2024 WL 4434788 (N.D. Ohio Oct. 7, 2024).

JURISDICTION

The district court had original jurisdiction under 28 U.S.C. §1331 because petitioner's claim involves constitutional rights and is brought pursuant to 42 U.S.C. §1983, as well as 28 USC §§2201-2202. *Appx. 42a-43a.*

The court of appeals had jurisdiction over the appeal under 28 U.S.C. § 1291 because the appeal was from a final judgment entered on October 7, 2024. A timely notice of appeal was filed on October 29, 2024, in compliance with Rule 4(a) of the Federal Rules of Appellate Procedure. The judgment of the COA was entered on November 4, 2025. *Appx. 39a.*

Appellant timely moved for *en banc* review on November 17, 2025, which was denied with an order entered on December 29, 2025. *Appx. 59a.* Ninety days from December 29, 2025 will expire on Sunday, March 29, 2026 and the time to petition for *certiorari* will expire on Monday, March 30, 2026.

This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . .".

SUMMARY

Professors at a public university are the only state employees who should clearly carry the shield of the *Sullivan* malice standard with them into work bent on a kind of "disruption" of the status quo.

But they do not have it. That shield has not been furnished to them by this Court, although it should have been placed firmly within their grasp by the original holding in *Pickering v. Bd. of Ed.*, 391 U.S. 563 (1968). Professor Bryan J. Pesta's case offers the opportunity to clarify the law and secure that crucial protection for professors at state sponsored universities. In the process the Court will answer the question on academic freedom left open in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), and perhaps offer more robust protection to all government employees when they speak as citizens on matters of public concern.

Moreover, review is fruitful whether the Court affirms or reverses the COA. The Court can review and hold that *Pickering* balancing was properly applied, with or without the *Sullivan* malice standard, because Professor Pesta's alleged "research misconduct" was too egregious to outweigh his interest in speaking. Or it can hold that any alleged missteps were simply too insignificant in comparison with the weight accorded core speech in the *Pickering-Garcetti* framework. Either way, the Court will have done yeoman's work in clarifying the application of *Pickering* in the realm of academic freedom.

STATEMENT OF THE CASE

This is a First Amendment retaliation case where a tenured professor employed by a public university produced what has been conceded to be a landmark scientific study. But that very research quickly rendered him a target of politically motivated attacks.

The landmark study is known as “Global Ancestry and Cognitive Ability” and was published by Professor Bryan J. Pesta, a formerly tenured research psychologist at Cleveland State University (“CSU”) with an academic interest in human intelligence. Far from offering a redoubt against attacks, CSU welcomed the incursions against free speech as political activists outside the university (who turned out to be rival scientists advocating opposing viewpoints) made common cause with like-minded academics within to discourage and discredit legitimate, albeit controversial, scientific inquiry.

Professor Pesta’s landmark study required him to access a database maintained by the National Institutes of Health (NIH). Consistent with the applicable regulations, Professor Pesta submitted three relevant applications for restricted access to the NIH. In each application he had proposed to study different aspects of racial, ethnic, or sexual differences in genetics and psychology. *Appx. 4a-6a.*

Both CSU and the NIH itself approved Professor Pesta’s applications — at least until detractors of his study, particularly Mr. Kevin Bird (“Bird”) and his colleagues, began to complain after its publication. All three requests were separated by mere months, such that they overlapped in time and were thus approved during the same periods, *viz.* Professor Pesta was at various times approved to study all three subject matters simultaneously.

Under the somewhat obscure regulations by which the NIH grants access, a three-way contract was created between the NIH, CSU, and Professor Pesta that allowed Pesta to conduct his research. Notably, that contract placed ultimate responsibility with CSU and its Office of Research Integrity, not Professor Pesta, to maintain the integrity of the restricted access data. But when what were at worst questionable mistakes were discovered — really a single minor regulatory mistake involving the use of a Dutch server ¹ that other researchers had been permitted to use — no one else who bore responsibility at CSU’s Office of Research Integrity appears to have even been questioned, let alone disciplined, let alone terminated.

That is the true state of affairs, although it has been obscured by the relentless misstatement of the record in the decisions below.

Almost immediately after publication of “Global Ancestry and Cognitive Ability” on August 31, 2019, Pesta was met with controversy. Thus, at some point in September of 2019, both CSU and the NIH were beset by a group of academic activists and rival scientists led by Bird who were angered by Pesta’s conclusions in “Global Ancestry.” These individuals sent an undated letter (the “September 2019 letter”) to both CSU and the NIH alleging that Professor Pesta had violated numerous regulations associated with the data access requests for “Global Ancestry.”

A full factual recitation of the abusive proceedings by both the NIH and CSU is beyond the scope of this petition, but the following is representative.

¹ This was the “HIrisPlex-S” server mentioned among other places at *Appx. 6a*.

After receipt of the September 2019 letter, the NIH sent Professor Pesta an inquiry asking how his “Global Ancestry” paper was consistent with his Third Request for data. This occurred on September 19, 2019. The very next day, Professor Pesta answered the NIH, copying CSU on the correspondence.

After receiving the September 2019 letter and the resulting NIH inquiry, both CSU and the NIH continued to renew Professor Pesta’s applications for the restricted data. In doing so, CSU was explicitly attesting to the fact that all “relevant institutional policies and applicable federal, state, or local laws and regulations (if any) have been followed” by Professor Pesta. CSU made these representations numerous times for well over a year, which the NIH, likewise, continued to accept, thus allowing renewed access to the data.

However, almost two full years later, on May 27, 2021, the NIH finally reacted to the explanation that Professor Pesta had supplied back on September 20, 2019. *Appx. 9a*. The NIH reasoned that although Pesta’s Third Request had cleared him to study racial differences in intelligence, that kind of research was not cleared by his Second Request and thus he was in violation of their regulations.

In effect, the NIH found Pesta guilty of violating the research purposes of the Second Request by conducting research it had cleared him to do under the Third Request. And when Pesta appealed and reminded the NIH that the Third Request had permitted him to do research on racial differences in intelligence, the NIH simply doubled down, hence its curious fixation on the Second Request and the odd phrasing that read, “regardless of what was proposed in other research projects.” *Appx. 11a*.

Although its findings were cloaked in dense bureaucratic jargon, everyone understood that the NIH was punishing Professor Pesta for performing research he had been cleared to undertake in his Third Request, hence Respondent Ward's reluctant admission at deposition, "under the new DAR [*viz.* the data access request for the Third Request], he could conduct that research then." Respondent McLennan was even blunter in his testimony:

Q. Dr. McLennan, do you still stand by the notion that Dr. Pesta violated the DUC for the second request by doing research under the third request?

A. Yes.

So much for the NIH investigation. Meanwhile, CSU had swung into action. Based solely on the NIH's findings against Professor Pesta, CSU issued sanctions of its own, including a formal letter of reprimand, the need to undergo additional training on data access requests, and a three year denial of faculty merit raises in salary. But CSU was not done with Professor Pesta yet, not by a long shot.

CSU began a research misconduct inquiry that would ultimately result in stripping Professor Pesta of tenure and firing him.

The research misconduct committee was unquestionably and hopelessly biased against Professor Pesta. For example, discovery revealed the Investigative Committee were writing amongst themselves of the purported need "to more directly address the point about the harm done by his research (without stating it as our opinion)" and to "bolster the point that the subject matter of his research is unethical." To that end, they added language to their report on research misconduct that would serve as a dog whistle signaling their condemnation of Professor

Pesta's research. (The COA reviewed this language and solved the problem by directly misstating the evidence and denying that such language had been added to the report on research misconduct, which is simply incorrect. *Cf. Appx. 23a and 62a-64a.*)

Behind the scenes, Respondents McLennan and Regoeczi even expressed frustration that their punitive investigation had not led Professor Pesta to condemn his own research as unethical, writing, for example, "all Committee members condemn Dr. Pesta's harmful research and regret that such research is connected to CSU — an institution with which all Committee members are otherwise proud to be affiliated" and "Furthermore, throughout the entire investigation, Dr. Pesta has failed to acknowledge that his research agenda is harmful." Additionally, Respondents McLennan and Regoeczi stated that "[t]he findings of [Pesta's] studies have negative impacts on the community in general as well as CSU specifically." *Appx. 67a.* The COA solved this problem of bias and retaliatory motive against Professor Pesta by passing over such evidence entirely. *See Appx. 2a-38a.*

Yet the evidence of malice was so overwhelming that Respondent Mallett, who sat on the Investigative Committee, simply admitted under oath that the committee did not proceed against Professor Pesta fairly and impartially, even as he admitted later in deposition that Professor Pesta had answered honestly and forthrightly in defending himself against the charges of research misconduct.

One last point bears stressing. Very early on in CSU's misconduct investigation, a crucial question arose: had Professor Pesta deliberately or recklessly falsified his research conclusions? But that question was quickly abandoned without adequate explanation

in the administrative proceeding within CSU. Thus, no one even tried to demonstrate that Professor Pesta intentionally or recklessly falsified his research conclusions.

It is undisputed that the questions Professor Pesta investigated as part of his landmark study have long bedeviled scientists within his discipline for purely scientific and statistical reasons. Furthermore, the record here showed that science in this field has long been susceptible to all sorts of political pressures that discourage scientists from exploring all points of view. Noted author and researcher Charles Murray, for example, gave testimony concerning his travails within academia ever since he co-published *The Bell Curve* several decades ago, which included being the victim of an outright riot on March 2, 2017, while attempting to speak at his daughter's *alma mater*, Middlebury College. In another example, a brilliant scientist, Dr. Stephen Hsu, testified that he was driven from the administration of Michigan State University for merely discussing other scientist's research on racial differences in intelligence. Notably, one of the censors at work against Dr. Hsu was Bird, the same who spurred both the NIH and CSU to act against Professor Pesta.

PROCEDURAL HISTORY

The district court had jurisdiction under 28 U.S.C. § 1331 because the claims arise under the First and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 1983. *Appx. 42a-43a*. At the close of discovery, both parties moved for summary judgment. The district court denied Pesta's motion, but granted Respondent's motion, reasoning that Pesta was terminated for research misconduct, not for the content of his speech in his paper. *Appx.*

55a. But in the alternative, the district court held that even if Pesta had been terminated for the content of his paper, Respondents would have been within their rights to do so under *Garcetti v. Ceballos*, 547 U.S. 410 (2006). *Appx. 55a.*

The court of appeals had jurisdiction over the appeal under 28 U.S.C. § 1291 because the appeal was from a final judgment entered on October 7, 2024. A timely notice of appeal was filed on October 29, 2024, in compliance with Rule 4(a) of the Federal Rules of Appellate Procedure. The COA affirmed the district court, holding that Pesta had failed to show causation because he had been terminated for research misconduct, not the content or viewpoint of his paper. The COA did not explicitly address the district court's alternative holding under *Garcetti v. Ceballos*, *supra*. *Appx. 2a-38a.*

REASONS FOR GRANTING THE WRIT

I. THIS COURT ADOPTED THE *SULLIVAN* MALICE STANDARD IN *PICKERING*, WHICH HAS BEEN MYSTERIOUSLY DROPPED IN SUBSEQUENT CASES WITHOUT EXPLANATION, LEADING IT TO BE APPLIED INCONSISTENTLY OVER THE SUBSEQUENT DECADES.

Pickering v. Bd. of Ed. incorporated the *Sullivan* malice standard into its very holding:

In sum, *we hold that*, in a case such as this, *absent proof of false statements knowingly or recklessly made by him*, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.”

Pickering v. Bd. of Ed., 391 U.S. 563, 574 (1968) (emphasis supplied); see also, *Id.* at 573–74 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *St. Amant v. Thompson*, 390 U.S. 727 (1968)).

This fact is underappreciated. Yet the advantages of adopting the *Sullivan* malice standard, particularly in this context, are clear. *Pickering* itself was fashioned to furnish a wide berth for speech. See *Amalgamated Transit Union Local 85 v. Port Auth. of Allegheny Cnty.*, 39 F.4th 95, 110 (3d Cir. 2022) (Porter, J., concurring) (citing *Connick v. Myers*, 461 U.S. 138, 144 (1983)) (“*Pickering* itself is ‘rooted’ in cases rejecting the rule that the First Amendment did not protect government-employee speech.”). It therefore made sense to incorporate the *Sullivan* malice standard, designed, in Justice Brennan/Stephen Barnett’s phrase², to encourage “uninhibited, robust, and wide-open debate.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). And the First Amendment’s protection of open debate is perhaps nowhere more important than within public universities. See *Healy v. James*, 408 U.S. 169, 180–81 (1972) (citing *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)) (“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.”).

But, although central to *Pickering*’s holding, from the very beginning application of the *Sullivan* malice standard has been applied unevenly, a point noted by Justice White in his concurrence and dissent to

² The talismanic phrase is properly credited to Justice Brennan’s law clerk, Mr. Barnett. See David A. Anderson, Wechsler’s Triumph, 66 ALA. L. REV. 229, 252 (2014).

Pickering itself. See *Pickering v. Bd. of Ed.*, 391 U.S. at 582–84 (White, J., *concurring and dissenting*). In the next sequence of government employee speech cases that came before this Court application of the *Sullivan* malice rule was mysteriously dropped without explanation. See *Perry v. Sindermann*, 408 U.S. 593 (1972); *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979), *Connick v. Myers*, 461 U.S. 138 (1983); *Rankin v. McPherson*, 483 U.S. 378 (1987).

This inconsistency has left lower courts in a state of confusion. Sometimes they apply the *Sullivan* malice standard in a *Pickering* balancing case. See, e.g., *Levin v. Harleston*, 770 F.Supp. 895, 898, 921 (S.D.N.Y. 1991); *Lyons v. Sullivan*, 602 F.2d 7, 10 (1st Cir. 1979) (noting that *Pickering* “may not furnish the basis for dismissal from public employment absent proof the statements were false and knowingly or recklessly made”); see also *Springer v. Henry*, 435 F.3d 268, 278–79 (3d Cir. 2006) (“The issue is not falsity vel non but whether such statements, even if untrue, were knowingly or recklessly made.”).

And sometime they refuse to apply it entirely, even on dubious grounds See, e.g., *Jorjani v. New Jersey Inst. of Tech.*, 151 F.4th 135, 141 (3d Cir. 2025) (flatly rejecting application of the *Sullivan* malice rule for a professor’s retaliation case, although ultimately balancing against the state university, under the reasoning that *Pickering* was a case involving defamation).³ Most often, courts confronting the *Pickering* balance fail to mention it at all. See, e.g.,

³ Which is not quite true. To be sure, *Pickering* involved a letter to the editor, but there was no cause of action for defamation.

Hussey v. City of Cambridge, 149 F.4th 57 (1st Cir. 2025); *Hernandez v. City of Phoenix*, 43 F.4th 966 (9th Cir. 2022) (no application of *Sullivan* malice in either case).

But in *Johnson v. Multnomah Cnty., Or.*, 48 F.3d 420, 423 (9th Cir. 1995) the Ninth Circuit noted a split in the circuits as to how to address the *Sullivan* malice issue in applying *Pickering*.

And even there, the split in question is not quite posed as it is here. Pesta maintains that before balancing can even begin, the state must clear the *Sullivan* malice hurdle. That is to say, the state must demonstrate at the outset that the speech in question exhibits intentional falsity or reckless disregard of the truth.

If that hurdle is not cleared, the case is over because, as Judge Porter noted in his concurrence to *Amalgamated Transit Union*, the government employer’s defense “fails before balancing even begins.” 39 F.4th at 110.

If the state does clear that hurdle, the Court can decide which circuits are appropriately following the *Pickering* rule: those, like the First, Fifth, and Ninth Circuits which hold that the extent of intentional falsity or recklessness are factors to be weighed in the *Pickering* balance, or those like the Seventh and Tenth Circuits which hold that once *Sullivan* malice has been demonstrated the state simply prevails on the balance. See *Johnson v. Multnomah Cnty., Or.*, 48 F.3d at 423-24.

II. THE PROPER APPLICATION OF *PICKERING* ANSWERS AND RESOLVES THE QUESTION LEFT OPEN BY *GARCETTI*.

The confusion is so great that it has ensnared even justices of this Court. Thus, in the seminal case

Garcetti v. Ceballos, 547 U.S. 410 (2006), Justice Kennedy and Justice Souter held a notable debate over whether “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.” *Compare* 547 U.S. at 425, *with id.* at 438-39 (Souter, J., *dissenting*). No one, however, thought of reaching for the *Sullivan* malice rule (which lay close at hand) to shed light on this important issue.

This is not surprising. After decades of neglect, neither side in *Garcetti* had briefed the *Sullivan* malice rule for the benefit of the Court. *See Garcetti* Pet’r’s Br. on the Merits (dated May 27, 2005); Resp’t’s Br. on the Merits (filed July 23, 2005); Pet’r’s Reply Br. (dated August 25, 2005). Neither did any *amici*.

We respectfully submit that the answer to Justice Kennedy’s debate with Justice Souter is that academic freedom is adequately accounted for if professors are afforded the protections of the *Sullivan* malice rule, but inadequately protected without it.

While the *Sullivan* malice rule has come in for a good deal of criticism when deployed in its original context, the “very facts that make *Sullivan* an oddity in libel law place it in the mainstream of First Amendment law generally.” Elena Kagan, “A *Libel* Story: *Sullivan Then and Now*,” 18 L. & Soc. Inquiry 197, 215 (1993). One cannot be any more within the mainstream of First Amendment law than when exercising one’s academic freedom. *See, e.g. Keyishian v. Bd. of Regents*, 385 U.S. at 603.

It is said that “*Sullivan* has served an utterly reliable source not of libel doctrine but of broad First Amendment principle.” Kagan, *supra*, at 215. But as things stand now, the Ray Countermands of the world

- strange men who are cyber stalking women with odd posts on the internet, or worse - are cloaked with the mantle of *Sullivan* malice (*Counterman v. Colorado*, 600 U.S. 66, 75–76 (2023)), while university professors, even university professors producing landmark scientific research, go naked. It does no good to make a show of protecting marginal speech (*e.g.* *Counterman v. Colorado*, *supra*; *Snyder v. Phelps*, 562 U.S. 443 (2011)) while the courts sit back and countenance censorship in the hard sciences.

Whether we turn toward the research conclusions or the alleged research missteps, the *Sullivan* malice standard should have put a firm stop to the abuse in this case. It would forbid a more open and honest frontal assault on Professor Pesta's research because no one could show that he had intentionally or recklessly falsified his research conclusions. Thus, if the CSU respondents had frankly taken issue with the content and conclusions of Professor Pesta's research (as they were clearly doing behind the scenes, *e.g.*, *Appx. 62a-67a*, a crucial fact the COA misstated), the issue would have been laid to rest.

But *Sullivan* malice would also stand athwart the perverse attempt to hide behind obscure rules to effect censorship. Under the regulations at issue CSU's Office of Research Integrity bore primary responsibility for the manner in which Professor Pesta accessed the data sets in question and conducted his research.

Thus, when Respondents balked at clearly asserting they were concerned with Pesta's conclusions, and instead claimed they objected to his data access requests and methods of research, the response should have been: what of it? No one could demonstrate intentional or reckless statements there either. CSU's own Office of Research Integrity had

passed on the data requests and other practices⁴ for months and even years after being alerted to the potential problems raised by Pesta's detractors and rivals in September of 2019. What was, at worst, negligence on the part of CSU could not be transformed into a hanging offense for Professor Pesta and his tenured career at CSU.

Holding universities to the standard of *Sullivan* malice would therefore augment the protections afforded academic freedom by this Court in *Keyishian*, and elsewhere, which deplored the abuse of "a profusion of statutes, regulations, and administrative machinery, and . . . manifold cross-references to interrelated enactments and rules" to stifle free inquiry. *Keyishian v. Bd. Of Regents*, 385 U.S. at 603. (citations omitted).

As this Court observed in *Rankin v. McPherson*: "Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech." *Rankin v. McPherson*, 483 U.S. at 384. *Sullivan* malice keeps watch in the night when university officials insist they must sleep.

III. FRCP 56 REVIEW AFFORDS THE OPPORTUNITY TO CLARIFY THE *PICKERING-GARCETTI* FRAMEWORK - EVEN IF THE COURT WOULD AFFIRM THE COA.

Finally, even if the Court prefers to avoid wrestling with the strange disappearance of the *Sullivan* malice

⁴ Those other practices included Professor Pesta's use of the Dutch Server, which was called to the NIH and CSU's attention in the September 2019 Letter. Both CSU and the NIH continued to see no problems for almost two years.

standard from its government employee speech jurisprudence, a writ of *certiorari* permits the Court to squarely review the application of the existing *Pickering-Garcetti* framework. *MacRae v. Matthews*, 606 U.S. ____ (2025) (Thomas, J., respecting the denial of certiorari). Although that inquiry is necessarily fact driven, “[i]t is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues.” *Townsend v. Sain*, 372 U.S. 293, 312 (1963).

Moreover, the COA has buried its abuse of the *Pickering-Garcetti* framework under a faulty factual analysis. The results underscore a crucial observation made in *Speiser*: “...it is commonplace that [the vindication of legal rights]... depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents.” *Speiser v. Randall*, 357 U.S. 513, 520 (1958).

The Court will need to address the facts to reach the weighty constitutional issues above because the COA has in effect balanced against Professor Pesta -a question of law which is supposed to be raised under the first prong of retaliation analysis used by the COA’s existing precedent (*see Kubala v. Smith*, 984 F.3d 1132, 1139 (6th Cir. 2021)), while purporting to address the causation issue under the third prong of the retaliation analysis.

This is legal legerdemain. The facts showing alleged disruption - Pesta’s supposed research misconduct - are the very same facts the COA stood on to show that Pesta could not show causation.

Of course, like a Potemkin village, the litany of outrages recited by both lower courts relies on false fronts. These include the erroneous consideration of an expert opinion that directly conflicts with party

admissions on the import of the Third Request. *In re Fosamax Products Liab. Litig.*, 707 F.3d 193, 193–94 (2nd Cir. 2013); *Cf. Appx. 33a*. But that a scientific agency within the federal government would resort to the Soviet-style logic of “you violated the Second Request by conducting research we had cleared you for under the Third Request,” betrays totalitarian thinking. That a state university endorsed such a rationale to deprive a tenured professor of his position should send chills down the spine of anyone concerned with free speech.

But a *certiorari* petition is no place to wrestle with that overwrought record. In any event, let us say that the Court ultimately disagrees and decides the COA correctly assessed the record.

Review is still warranted.

It was undisputed that Professor Pesta had produced a landmark scientific study within his field, one that apparently answers long disputed questions within his discipline. This is speech at the very highest rung of the First Amendment. *Murthy v Missouri*, 603 U. S. 43, 77 (2024) (Alito, J., dissenting) (citing, *inter alia*, *Snyder v. Phelps*, 562 U. S. 443, 451–52 (2011)). Only an exceptionally strong showing of disruption could counter speech which is so clearly a matter of public concern. *Connick*, 461 U.S. at 152; *see also Hyland v. Wonder*, 972 F.2d 1129, 1139 (9th Cir. 1992) (“The more tightly the First Amendment embraces the speech the more vigorous a showing of disruption must be made.”).

Therefore, had Professor Pesta in fact engaged in research misconduct, such evidence would weigh in the *Pickering* balance against his and the public’s extremely compelling interest in his speech. If some false statements are inevitable in free speech (*United States v. Alvarez*, 567 U.S. 709, 718 (2012)), this is

especially so where the professor himself must negotiate an inconsistently applied “profusion of statutes, regulations, and administrative machinery” in the course of conducting his research. *Keyishian*, 385 U.S. at 603.

But when and how is a tenured professor’s interest in producing landmark scientific research outweighed by assertions of research missteps? It is a question the COA refused to candidly answer, but it is surely a question worthy of this Court’s resolution.

CONCLUSION

To many, the results of Professor Pesta’s research are about as welcome as the devil at prayers. But the sky will not fall if such research turns out to be true. In any event, “It is the function of speech to free men from the bondage of irrational fears.” *Whitney v. People of State of California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

There are simply too many important issues here - the role of *Sullivan* malice and the original holding of *Pickering v. Board of Education*, the proper application of the *Pickering-Garcetti* framework to professors in a state sponsored university, the protection of landmark scientific research, and the abuse of regulations in a state school to effect viewpoint discrimination - to permit the case to be confined to oblivion in a series of unpublished opinions rife with glaring misstatements of the record. For those reasons, we respectfully request the Court to grant *certiorari*.

Respectfully submitted,

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