No. 25-530

IN THE

Supreme Court of the United States

JAMES C. WETHERBE,

PETITIONER,

V.

TEXAS TECH UNIVERSITY SYSTEM, ET AL.,

RESPONDENTS.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Fifth Circuit

BRIEF OF THE CENTER FOR AMERICAN RIGHTS AS AMICUS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Is the First Amendment right to academic freedom for non-private speech by a public university employee clearly established for purposes of qualified immunity?

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INTEREST OF THE AMICUS CURIAE[1]

The Center for American Rights is a non-profit, non-partisan public-interest law firm based in Chicago. Its mission is to defend Americans' most fundamental constitutional rights through direct litigation, education, research, and advocacy. Its areas of interest include free speech, media accountability, educational freedom, and constitutional law.

The Center's president has previously represented students and teachers on questions of First Amendment free speech and academic freedom within the university and K-12 contexts. *See, e.g., Menders v. Loudoun Cnty. Sch. Bd.*, 65 F.4th 157, 159 (4th Cir. 2023); *Speech First, Inc. v. Sands*, 69 F.4th 184 (4th Cir. 2023) (amicus); *State of Arizona v. Tizon*, No. JC2022-109663 (University Lakes Justice Court, Maricopa County 2023); *Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180 (2021) (amicus).

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[1] No other counsel authored any part of this brief, and no other person or entity prepared or funded it. *R. 37.* Notice was provided sufficiently in advance to the Solicitor General of Texas on behalf of the Respondents.

SUMMARY OF ARGUMENT & INTRODUCTION

"America's public schools are the nurseries of democracy. Our representative democracy only works if we protect the 'marketplace of ideas.' This free exchange facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will. That protection must include the protection of unpopular ideas, for popular ideas have less need for protection. Thus, schools have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it.'" *Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180, 190 (2021).

If that is true of our high schools, how much more so is it true of America's universities? The concept of academic freedom has been a core part of our First Amendment jurisprudence since "*Sweezy* introduced the idea of academic freedom to the pages of the United States Reports." *Kilborn v. Amiridis*, 135 F.4th 1100, 1101 (7th Cir. 2025) (Easterbrook, J., concerning the petition for rehearing en banc) (citing *Sweezy v. New Hampshire*, 354 U.S. 234 (1957)). This was the beginning of "[a] long line of U.S. Supreme Court precedent [which] establishes a First Amendment right to free speech in academic contexts . . . " *Sullivan v. Ohio State Univ.*, 764 F. Supp. 3d 652, 669 (S.D. Ohio 2025).

In the subsequent six-plus decades since *Sweezy*, the exact contours or outer edges of academic freedom have remained fuzzy. *See, e.g., Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 528 (2022). But the core of the

right is clearly established: a professor enjoys substantial protection from retaliation for speaking on academic matters while employed at a public university.

The Court should grant this petition to remind courts that the level of generality associated with qualified immunity is not a free pass from accountability for university bureaucrats, and that the core right to academic freedom for professors is clearly established.

ARGUMENT

In a time where right-of-center students and faculty face increasing hostility on campus—a problem most starkly demonstrated by the murder of Charlie Kirk at Utah Valley University, but also evident in the antisemitic surge after October 7, 2023—this Court cannot allow university bureaucrats and courts to define academic freedom rights out of existence through an overly expansive view of the "clearly established" test for qualified immunity. The alternative is that many professors will be left without meaningful recourse when ideologically motivated administrators use political correctness to force them off campus.

"To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent." *District of Columbia v. Wesby*, 583 U.S. 48, 63, (2018). In other words, the principle "must be settled law," *i.e.*, "dictated by controlling authority or a robust consensus of cases of persuasive authority." *Id.*

There is a robust consensus of cases establishing *Pickering's* application on college campuses. *Pickering v.*

Board of Ed. of Township High School Dist. 205, Will Cty., 391 U. S. 563 (1968).

"It is, and has been, clearly established that public employees have a right to speak on a matter of public concern regarding issues outside of one's day-to-day job responsibilities, absent a showing that *Pickering* balancing favors the government's particular interest in promoting efficiency or public safety." *Josephson v. Ganzel*, 115 F.4th 771, 790 (6th Cir. 2024).

In that case, the Sixth Circuit held that a professor of psychiatry at a public university was protected from retaliation for remarks at a Heritage Foundation event on gender dysphoria. "[A] professor's rights to academic freedom and freedom of expression are paramount in the academic setting," the panel said, quoting *Bonnell v. Lorenzo*, 241 F.3d 800, 823 (6th Cir. 2001), as it held that his right to speak free from retaliation was clearly established. *Accord Hardy v. Jefferson Cmty. College*, 260 F.3d 671, 682 (6th Cir. 2001) ("For decades it has been clearly established that the First Amendment tolerates neither laws nor other means of coercion, persuasion, or intimidation 'that cast a pall of orthodoxy' over the free exchange of ideas in the classroom.").

The Seventh Circuit has similarly said, "Before *Garcetti* [*v. Ceballos*, 547 U. S. 410 (2006)], it was clearly established that the *Connick-Pickering* test offered qualified protection to public employees, including professors at public universities." *Kilborn v. Amiridis*, 131 F.4th 550, 558 (7th Cir. 2025). "[O]ur pre-*Garcetti* cases clearly establish a right to academic freedom in this context, and neither *Garcetti* nor our more recent

case law undermines that right, *Garcetti* does not supply a basis for granting qualified immunity." *Id.* "[W]here, like here, a plaintiff's speech falls comfortably within the core of what constitutes university teaching and scholarship, university officials cannot win on qualified immunity merely by proposing an extension to *Garcetti* that courts have not yet recognized or rejected." *Id. See also Mahoney v. Hankin*, 844 F.2d 64, 68 (2d Cir. 1988) ("There is little question that, in the abstract, the law of free speech, academic freedom and procedural due process was 'clearly established' at the time of the alleged violations."). These decisions collectively and correctly recognize that a "core" of university teaching and scholarship is clearly established.

The concept of "academic freedom" is historically associated with the left-leaning side of American politics, as universities have been long bastions of progressivism and academic freedom is seen as a tool to protect their institutional influence. *See generally* Corey Miller, *The Progressive Miseducation of America* (2025).

Yet right now, with diversity, equity, and inclusion (DEI) the dominant ideology on campus, it is conservatives who desperately need the protections of academic freedom. As Justice Breyer observed for the Court in *Mahanoy Area School District*, the First Amendment's "protection must include the protection of unpopular ideas, for popular ideas have less need for protection." *Mahanoy Area Sch. Dist.*, 594 U.S. at 190. Today, the unpopular ideas on campus are all too often held by conservatives who refuse to bend the knee to campus orthodoxy on controversial issues like transgender athletes or pronouns. *See, e.g., Meriwether v. Hartop,* 992 F.3d 492, 498 (6th Cir. 2021).

Judge Thapar opens *Meriwether*, the leading case on pronouns and academic freedom: "Traditionally, American universities have been beacons of intellectual diversity and academic freedom. They have prided themselves on being forums where controversial ideas are discussed and debated. And they have tried not to stifle debate by picking sides." *Id*.

That tradition is reflected in this Court's commitment to academic freedom as a component of free speech. But intellectual diversity does not define American higher education today. Instead, in a great irony, "diversity, equity, and inclusion" has meant a lessening of intellectual diversity as conservatives are driven off campus. In order to create a "safe space" for some students, other students and professors have to be forced to shut up or leave altogether. "Over time, academia has begun to abandon [its] Jeffersonian creed, replacing it with groupthink tribalism seeking to silence disfavored viewpoints." *McAdams v. Marquette Univ.*, 2018 WI 88, P98 (R.G. Bradley, J., concurring).

Every professor and student enjoys the same rights to academic freedom regardless of their ideology. It's just that in our current cultural moment, it is political conservatives and people of faith who most often hold the unpopular opinions on campus, and thus most find themselves in need of the First Amendment's protections. The core of these protections is clearly established, and this Court should grant this petition to send that clear message to university administrators nationwide: they cannot hide behind qualified immunity to purge conservatives without consequence.

CONCLUSION

The core of the First Amendment's protections for professors at public universities has long been clearly established. The *Pickering* analysis applies to them as it does to all public employees, but in a special way it respects and protects the right of professors to speak publicly on issues within their academic undertakings. Those protections are needed most urgently today, as campuses become increasingly intolerant of anyone willing to challenge the reigning liberal orthodoxy.

We live in an age where "the dominant academic culture of micro-aggressions, trigger warnings and safe spaces [] seeks to silence unpopular speech . . ." *McAdams*., 2018 WI 88, P97 (R.G. Bradley, J., concurring). As a result, "academic freedom, and concomitantly, free speech, is increasingly imperiled in America and within the microcosm of the college campus." *Id*. at P.100. This Court "has repeatedly recognized the importance of academic freedom and freedom of expression on America's college campuses…" *Id*. at P.106. It should do so once more by taking this case. These rights are clearly established; qualified immunity is not available to overzealous bureaucratic censors.

Respectfully submitted,

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