THE FUTURE OF FREE SPEECH: THE IMPLICATIONS OF SILENCING EDUCATORS' SPEECH

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ABSTRACT

The fundamental purpose of the First Amendment's Free Speech Clause is to protect the free and robust exchange of ideas that facilitate a thriving democracy. Public educational facilities help foster and encourage an informed debate through their educators, who share their expertise with their students, stimulate conversation in classrooms, and conduct research that expands the societal understanding of their field. Yet, in the last several months, educators across the country have been fired after commenting on controversial political issues through online platforms. This paper returns to the United States Supreme Court's rulings in Pickering v. Board of Education *(1968) and* Garcetti v. Ceballos *(2006), where the Court established that public employees may have their First Amendment rights limited in certain circumstances. It then examines the potential implications of government regulation of educators' speech through a synthesis of the Circuit Courts' application of the* Pickering *and* Garcetti *standards and weighs in on the debate between the individual and institutional exercise of academic freedom to stimulate the robust exchange of ideas in classrooms, academic disciplines, and society at large.*

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I. INTRODUCTION

Central to a thriving democracy is the free and robust exchange of ideas protected by the First Amendment's Free Speech Clause. Public educational facilities are key to democratic institutions, as they help foster an informed debate through its educators, who share their expertise, stimulate conversation, and conduct comprehensive research on matters within their discipline. Their teaching and research contributions further the First Amendment principle of allowing true, superior, or valuable ideas to prevail through competition, rather than censorship.[1] Continuous critical thinking through proposals of new ideas or solutions propel the advancement of a given field, improving general understanding of the subject. Additionally, faculty members play an especially critical role in ensuring there is an environment conducive to analysis and new solutions. Not only do they instill upon their students the current understanding of their discipline, but they also contribute to the expansion of knowledge through conducting research. As such, the effectiveness of public universities in encouraging the free and robust exchange of ideas is contingent upon their employees' ability to speak.

Like all public employees, public university educators accept some degree of limitation on their First Amendment rights. As the Supreme Court emphasized in the landmark case, *Garcetti v. Ceballos*, 547 U.S. 410 (2006), speech made in the public employment context may be regulated to ensure the government is able to provide its public services efficiently and function effectively as an employer. Thus, there seems to be a general understanding that public university staff would also face some speech restrictions when working to ensure the institution can function properly. These limitations represent a compromise between individual expression and professional responsibility to contribute to academia. They may be accepted since being a

[1] *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting) (setting the groundwork for the marketplace of ideas theory for First Amendment free speech protection).

public university professor allows individuals to conduct research under the guarantees of professional autonomy and academic freedom, which means they can pursue their interests in their field with relative independence.[2] As such, public university professors can pursue their interests and fulfill professional responsibilities even if their conduct may be limited by their employers.

When public university professors began facing dismissal for their speech, however, the conversation shifted from speech limitations to speech protections. In 1990, Stanford professor Edward A. Ross faced administrative backlash after delivering anti-Asian remarks at a United Labor Organization meeting.[3] His eventual resignation–along with seven other professors–gave rise to concerns about when professors' speech would be protected from employer discipline and the constitutional interests implicated when such speech is restricted.[4] The Supreme Court only briefly recognized these interests for teaching- and scholarship-related speech in *Garcetti*.[5] As a result, the Circuit Courts have taken up the mantle to determine speech protections for professors by categorizing professors' speech into either administrative, teaching, or scholarship. For example, the Seventh Circuit, in *Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008), categorized complaints regarding a pending research grant as part of a professor's administrative duties. Likewise, the Second Circuit, in *Heim v. Daniel*, 81 F.4th 212 (2d Cir. 2023), categorized conversations regarding promotion opportunities and preferred methodology as part of teaching and scholarship responsibilities. The process of categorizing the speech into administrative,

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[2] George Fallis, *Professors as Public Intellectuals*, Academic Matters (Nov. 18, 2008), https://academicmatters.ca/professors-as-public-intellectuals/.
[3] Melisa De Witte, *Academic freedom's origin story*, Stanford Report (May 1, 2023), https://news.stanford.edu/stories/2023/05/origin-story-academic-freedom.
[4] *Id*.
[5] In *Garcetti*, 547 U.S. 410, the Court acknowledged Justice Souter's concern that its ruling may diminish First Amendment protection of academic freedom in public educational facilities, where professors' central duties involve verbal and written speech. However, the Court explicitly stated it would not address whether the *Garcetti* analysis would apply to speech related to scholarship or teaching.

teaching, or scholarship has been used by the appellate courts to select which legal analysis to apply and to determine whether or not the speech in question is protected. This existing process illustrates the current complexity of protecting public university educators' expression.

Simultaneously, First Amendment protections for professors are not firmly established because the Supreme Court has not articulated specific instructions for the lower courts. This is problematic since faculty members may feel the urge to self-censor to ensure they are not at risk for dismissal. In fact, research conducted in 2022 suggests that one-third of faculty already self-censor on campus and nearly all faculty do so on social media, in meetings, during presentations, or in publications.[6] This trend further intensified in September 2025 following the death of Charlie Kirk, who was well-known as a conservative proponent and founder of TurningPoint USA. By January 2026, USA TODAY identified at least 31 university employees who faced disciplinary action for criticizing Kirk online, most of whom made comments on personal social media accounts.[7] Additionally, at least 20 K-12 public teachers in school districts across the country lost their jobs after privately expressing their opinions on social media within weeks of his death.[8,9] Though some educators have been reinstated, there could be legal action concerning academic freedom that could make it all the way to the Supreme Court.

The trend of educator firings and disagreement in the lower courts regarding the

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[6] Nathan Honeycutt, et al., *The Academic Mind in 2022: What Faculty Think About Free Expression and Academic Freedom on Campus*, Foundation for Individual Rights and Expression (2023), https://www.fire.org/research-learn/academic-mind-2022-what-faculty-think-about-free-expression-and-academic-freedom.

[7] Chris Quintana, *Professors fired for criticizing Charlie Kirk are returning to work*, USA Today (Jan. 16, 2026), https://www.usatoday.com/story/news/nation/2026/01/16/professors-fired-rehired-charlie-kirk/88140680007/.

[8] Huo Jingnan, et al., *People are losing jobs due to social media posts about Charlie Kirk*, NPR (Sept. 13, 2025), https://www.npr.org/2025/09/13/nx-s1-5538476/charlie-kirk-jobs-target-social-media-critics-resign. *See also* Chris Quintana, *Professors fired for criticizing Charlie Kirk are returning to work*, *USA Today* (January 16, 2026), https://www.usatoday.com/story/news/nation/2026/01/16/professors-fired-rehired-charlie-kirk/88140680007/

[9] K-12 teachers are different from university professors because school districts may determine what materials they teach or study. However, firing them for speech poses a similar threat to the principles of free inquiry, as it may suggest to students that censoring unpopular, or disliked, opinions is culturally acceptable. Thus, the trend of educators in school districts being fired is also relevant when discussing the First Amendment.

appropriate degree of First Amendment protection for public university professors may also prompt the Court to step in. The Court may soon address the intersection between First Amendment protections for public employees, an educational institution's constitutional right to academic freedom, and the individual's professional norm to academic freedom. This article first discusses the Supreme Court's current standards of review for public employee First Amendment claims and defines the complex understandings of academic freedom in the context of expression. This article then synthesizes the rulings of the Circuit Courts in such cases before arguing that the *Pickering* analysis ought to be applied consistently for all speech conducted by a public university professor.

II. FREE SPEECH LIMITATIONS IN PUBLIC EMPLOYMENT

Public employees do not relinquish their rights simply because they work for the government. In *Pickering v. Board of Education*, 391 U.S. 563 (1968), the Supreme Court reaffirmed this principle by establishing that there must be a balance of interests between a private citizen and their public employer. Under the *Pickering* analysis, a government entity, acting in its role as an employer, can impose restrictions upon speech that has impacted, or has the potential to affect, their efficiency.[10] Forty years later, in *Garcetti*, 547 U.S. 410, the Court ruled that when speaking in their capacity as a public employee, an individual can be subject to employer discipline. The rationale was that when the government employer lacks a significant degree of control over their employees' actions and words, their policies may be contravened or public services may be impaired.[11] Furthermore, when public employees speak pursuant to their official duties, imposing restrictions would not violate the private exercise of the First

[10] The *Pickering* analysis is also known as the *Pickering*-*Connick* balancing test named after the Supreme Court's decisions in *Pickering*, 391 U.S. 563 and *Connick v. Myers*, 461 U.S. 138 (1983). While the former case laid the general groundwork for components of the test, the latter case established specific rules for fulfilling the prongs of the standard. For simplicity purposes, this balancing test would hereafter be referred to as *Pickering*.
[11] *Id*. at 418-419.

Amendment right to free speech. These landmark cases set the legal framework for cases involving a public employee and a First Amendment Free Speech Clause claim.[12]

In such a case, the Supreme Court emphasized that courts must engage in a two-step inquiry to determine whether the speech is protected from government action.[13] The first inquiry is whether the individual was speaking as a private citizen on a matter of public concern. If so, then their interests in speaking would be balanced against the interests of the government employer in performing efficient public services. Yet, if the individual was speaking pursuant to their official duties, then the speech would not be protected from employer discipline by the First Amendment. Restricting such speech would not be infringing upon the liberty of an individual to speak freely outside of the employment context.[14] Only when a public employee speaks as a private citizen on a matter of public concern does the court engage in a second inquiry of whether the speech could have or had impacted their government employer's efficiency of public services.[15] If the speech at hand disrupts or could disrupt the employer's efficiency, then the speech in question is not protected by the United States Constitution. In brief, only when an individual is speaking as a private citizen does the court analyze the interests; if an individual speaks as an employee, their speech is not protected. The *Pickering* and *Garcetti* frameworks work in conjunction with one another to determine whether a public employee's speech could be regulated by the government.

However, *Garcetti*'s official duty test suggests an absolute bar to First Amendment

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[12] The standard of review that the Supreme Court established in *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995), is not discussed in this article because this test involves a prior ban on speech, requiring the government to show a heavier burden to justify the restriction on speech. The *Pickering* and *Garcetti* standards apply for First Amendment claims by public employees who engaged in speech, faced some form of employer discipline following the speech, and filed suit.

[13] *Lane v. Franks*, 573 U.S. 228 (2014) (clarifying confusion of the structure in which the *Pickering* and *Garcetti* standards must be applied for First Amendment Free Speech Clause cases with public employees).

[14] *Garcetti,* 547 U.S. at 421-422.

[15] *Lane*, 573 U.S. 228.

protection, eliminating *Pickering*'s balancing of interests that requires an interference or likely disruption to the government to warrant a restriction on free speech. As such, articulating whether *Garcetti* or *Pickering* applies in the academic setting–where the free and robust exchange of ideas can be fostered–affects the degree to which educators' speech is protected from employer discipline. The Supreme Court explicitly left open this question for speech related to teaching or scholarship as the facts of the case did not reflect the additional constitutional interests of an educational setting.[16] The respondent in *Garcetti*, 547 U.S. 410, was a deputy district attorney who determined there were inconsistencies in an affidavit for a pending case, spoke with his supervisors regarding the case, and recounted his findings in court.[17] These speech instances could be clearly defined as employee speech because there was no similar, relevant comparison for citizen speech.[18] This does not apply for educators, who may speak privately on the same issue in which they teach or conduct research. The Court acknowledged that, given the importance of public education and free speech in the university environment, public educational facilities are considered a special niche in constitutional doctrine.[19] Thus, the Court did not rule officially whether the *Garcetti* standard would be appropriate in such cases. This meant federal courts at lower levels struggled to interpret First Amendment protections for public university educators, leading to rising debates about academic freedom and inconsistent protections across jurisdictions.

III. ACADEMIC FREEDOM

Before addressing academic freedom and its place in the First Amendment, establishing the appropriate definition of the term is necessary. Academic freedom is generally understood to

[16] *Garcetti*, 547 U.S. at 425 (acknowledging Justice Souter's concern about the implication for *Garcetti*'s official duty test on academic freedom).
[17] *Garcetti*, 547 U.S. 410.
[18] *Id.* at 424.
[19] *See, e.g.,* Grutter *v. Bollinger*, 539 U.S. 306, 329 (2003).

be fundamental to the growth of societal understanding for various fields of study. The Supreme Court, for example, has suggested that the nation's future depends upon the exercise of academic freedom in the classroom, which trains future leaders through wide exposure to such ideas.[20] Some individuals may even argue that academic freedom holds political value: its practice may strengthen democratic institutions by fostering critical thinking among members of the community and ensuring policy is informed by rigorous research. However, there is an ongoing debate regarding the definition of academic freedom in terms of who wields it and who may exercise it. These interpretations hold differing implications for the protection of scholarship and open inquiry in public-university settings.

One perspective is that universities hold the constitutional right to academic freedom. The Court first began formulating the institution-focused interpretation in *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957). In *Sweezy*, the state attorney general investigated a university lecturer to determine whether there were subversive organizations and individuals working within the state, and the lecturer refused to answer questions regarding his political affiliation and similar subjects discussed during class.[21] The plurality opinion for the Court did not explicitly frame *Sweezy* as a First Amendment case; however, Justice Frankfurter emphasized that universities play a critical role in the marketplace of ideas.[22] In *Keyishian*, 385 U.S. 589 (1967), the Court then specified that academic freedom is the university's constitutional right to determine for itself who may teach, what may be taught, how something shall be taught, and who may be admitted to study at the institution.[23] Since then, the Supreme Court has emphasized that the practice of academic freedom in the educational setting is crucial to democratic institutions.[24]

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[20] *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).
[21] *Id.*
[22] *Id.*
[23] *See also Keyishian*, 385 U.S. 589.
[24] *See, e.g., Grutter*, 539 U.S. 306. *See also Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023).

Not only does it translate into the occupational success of educators and students alike, but exercising academic freedom also advances the professional field through speculation and experimentation. Furthermore, it empowers public universities to foster an environment conducive to such speculation and creation, broadening societal understanding of a given field. While primarily fulfilling an educational role, public universities significantly contribute to society at large through exercising their constitutional right to academic freedom. Thus, academic freedom is an institutional constitutional right protected by the First Amendment.

The Supreme Court has also recognized that public university professors uniquely contribute to this environment, implying that the success of the free and robust debate underlying the First Amendment and academic freedom relies upon their freedom to engage in it. As Justice Frankfurter emphasized in his concurring opinion for *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952), educators are tasked to encourage their students to be open-minded and engage in critical inquiry, "which alone makes for responsible citizens… [and, therefore,] enlightened and effective public opinion" central to democracy. In other words, educators are responsible for maintaining the educational setting as an environment in which individuals may openly exchange ideas without feeling coerced to conform to the majority's perspective. As such, the *Sweezy* Court noted that educators must remain free to "inquire, to study and to evaluate, to gain new maturity and understanding," which could lead to beneficial advancements in a given field via research.[25] Limiting professors' ability to participate in such activities would impede their responsibility to nurture an educated, critical-thinking citizenry.[26] Members of the public may be easily swayed by disinformation or coercion, rendering the country's democratic structure moot.

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[25] *Sweezy*, 354 U.S. at 250.

[26] *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (explaining that the Founding Fathers believed that the freedom to "think as you will and to speak as you think" allow for political truth to be discovered and spread).

As a result, there is an accepted professional norm to academic freedom for public university educators to explore matters within their academic discipline without administrative influence.[27]

Discerning the interpretations of academic freedom allows for a rich understanding as to how the individual's professional norm and the institution's constitutional right of academic freedom have a symbiotic relationship. Public universities foster an environment where professors can engage in existing and new material through teaching and scholarship; in turn, this engagement advances societal understanding and fosters a more tolerant, resilient culture that perpetuates academic excellence. Academic freedom's purpose of contributing to the free and robust exchange of ideas would be difficult to fulfill without the institution and the individual actors. However, the Supreme Court has yet to address instances in which this professional norm may conflict with the constitutional right. As a result, the lower courts have taken up the mantle of determining when constitutional protections in the public-university setting exist and when they do not, leading to some inconsistency that must be resolved using the Supreme Court's *Pickering* analysis.

A. Academic Freedom in the First Amendment Context: Appellate Debate

Prior to *Garcetti*, there was some discussion in the Circuit Courts regarding academic freedom in the First Amendment context. The Fourth Circuit's discussion of academic freedom in *Urofsky v. Gilmore*, 216 F.3d 401 (2000)–a case about whether the First Amendment protects professors' ability to access sexually explicit material on state-owned computers–is particularly instructive. The Fourth Circuit analyzed academic freedom's historical context to determine that academic freedom is solely an institutional right.[28] Prior to the 1800s, higher education in the United States was marked by a more rigid structure in comparison to the current model: there

[27] *See* AAUP, General Report of the Committee on Academic Freedom and Academic Tenure (1915).
[28] *Id.*

had been an emphasis on teaching religious virtues; thoughts and behaviors of individuals had been controlled by the institution; and colleges had been known as disciplinary citadels.[29] However, as thousands of American scholars who had studied in Germany returned home, they introduced the German notion of academic freedom– Lehrfreiheit and Lernfreiheit– which helped shape institutional and intellectual reforms in the late 1800s.[30] While the former referred to professors' freedom to conduct research, publish research, and teach free from government or religious intervention, the latter term referred to students' freedom to determine the course of their studies.[31] Accordingly, the Fourth Circuit argued that such freedoms are simply professional norms, not protected rights, turning towards Justice Frankfurter's concurring opinion in *Sweezy*, 354 U.S. 234 and finding that universities may make decisions that interfere with a professor's work.[32] The Fourth Circuit demonstrates that there was already some concern regarding how the First Amendment protections may apply in the academic context before the Supreme Court's decision in *Garcetti*, 547 U.S. 410.

Following *Garcetti*, 547 U.S. 410, the Circuit Courts explored the implications of applying the *Garcetti* or *Pickering* frameworks in a nearly uniform way for academia-related cases. The Second, Third, and Seventh Circuits applied *Garcetti*'s official duty test to professors' administrative speech, suggesting it would be inapplicable for teaching or scholarship speech. A few years after *Garcetti*, the Seventh Circuit found that administrative speech falling within teaching and service-to-the-university duties of a professor are still official responsibilities that

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[29] Tetiana Zemliakova, *German-American Academic Migration and the Emergence of the American Research University, 1865-1910*, 1 Voprosy Obrazovaniya / Educational Studies Moscow 290-317 (2019) (describing the initial structure of American educational institutions).
[30] *Id*. at 296-304 (explaining why students sought educational opportunities outside the United States and how German principles influenced their advocacy for academic freedom). *See also Urofsky*, 216 F.3d at 410.
[31] *Urofsky*, 216 F.3d 401.
[32] *Id.* at 413 (explaining that Justice Frankfurter in *Sweezy*, 354 U.S. 234, did not enumerate an individual academic freedom, so constitutional harm in that case was solely on the university).

must be subject to the *Garcetti* test.[33] The Third Circuit–in analyzing a professor's guidance to students and student organizations–recognized that when speech relates to special knowledge and experience acquired through employment and the speech is unrelated to teaching or scholarship, *Garcetti* is the applicable standard.[34] In 2010, the Second Circuit directly applied *Garcetti* to a professor expressing an employee grievance with his union, finding such speech to be pursuant to his official duties without engaging in discussion regarding the *Garcetti* Court's concern for academic freedom.[35] Later, the Second Circuit would engage in such discussion for a professor's complaints regarding a university's preferred teaching methodology for economics.[36] These Circuits articulated that speech to a professor's responsibilities beyond teaching and scholarship would be analyzed under *Garcetti*'s official duty test.

Along the same lines, the Second, Fourth, Fifth, Sixth, and Ninth Circuits applied *Pickering* directly to speech related to teaching or scholarship. The Fourth and Fifth Circuit reasoned that the speech of public university professors is constitutionally protected, reasoning that academic freedom is of special concern to the First Amendment and, thus, claims involving this freedom must be viewed under *Pickering*.[37] Similarly, in a case regarding a professor's distribution of written materials on academic matters, the Ninth Circuit emphasized that applying *Garcetti* to teaching or scholarship speech would "directly conflict with the important First Amendment values" outlined by the Supreme Court.[38] The Sixth Circuit also emphasized the importance of protecting professors' speech in *Meriwether v. 992 F.3d 492, 503* (6th Cir. 2021), a case in which a devout Christian professor refused to use students' preferred pronouns. There,

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[33] *Renken*, 541 F.3d 769.
[34] *Gorum v. Sessoms*, 561 F.3d 179 (3d Cir. 2009). *See also Foraker v. Chaffinch*, 501 F.3d 231, 240 (3d Cir. 2007).
[35] *Weintraub v. Board of Education*, 593 F.3d 196 (2d Cir. 2010).
[36] *Heim*, 81 F.4th 212.
[37] *Adams v. Trustees of the University of North Carolina-Wilmington*, 640 F.3d 550, 562 (4th Cir. 2011); *Buchanan v. Alexander*, 919 F.3d 847, 852-853 (5th Cir. 2019).
[38] *Demers v. Austin*, 746 F.3d 402, 411 (9th Cir. 2013).

the court affirmed that public university professors retain First Amendment protections when engaged in core academic functions like teaching because otherwise "a university would wield alarming power to compel ideological conformity."[39] Most recently in 2023, the Second Circuit joined its sister courts by incorporating the same line of reasoning to restate that professors' free speech is crucial to improving societal understanding of academic disciplines.[40] Thus, there is a substantial amount of support in the Circuit Courts to establish that the speech of professors is exempt from the *Garcetti* framework, but only when their speech is related to teaching or scholarship.

The Circuit Courts' application of *Garcetti* and *Pickering* also demonstrates the complexity of establishing an exception to *Garcetti's* official duty test for speech solely related to teaching or scholarship. As teaching or scholarship speech intuitively are the official responsibilities of a public educator, the judicial branch would need to engage in a preliminary analysis for this specific profession. The courts would be required to determine whether the speech is part of their administrative, teaching, or research duties prior to applying the traditional standards set forth by the Supreme Court. In theory, drawing such a distinction seems feasible. In practice, it creates two issues: the first is other professions would petition the courts to request similar treatment, bogging down an already-inundated federal court system[41] by requiring them to engage in profession-dependent analysis; the second is it would lead to inconsistent protection of professors' expression.

This inconsistency is already observable in the Circuit Courts, where speech tangentially

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[39] *Id*. at 503. *See also Hardy v. Jefferson Community College*, 260 F.3d 671, 680 (6th Cir. 2001) (rejecting the argument that the government may censor teachers without restriction).

[40] *Heim*, 81 F.4th 212.

[41] Maya San, *Why federal courts are unlikely to save democracy from Trump's and Musk's attacks*, Harvard Ash Center (February 12, 2025), https://ash.harvard.edu/articles/why-federal-courts-are-unlikely-to-save-democracy-from-trumps-and-musks-attacks/ (commenting that, in the context of the Trump administration's recent actions, the judiciary's power to check executive overreach is limited due to speed differences and inability to compel government action).

related to one type of speech is interpreted as another. The Seventh and Ninth Circuits present two illustrative examples of how a court's interpretations may impact the degree of First Amendment protection a professor is granted. Turning first to the Seventh Circuit, in *Renken*, the appellate court looked at Dr. Kevin Renken's complaints about his university's use of grant funds in submitting a grant proposal for research to enhance the education of undergraduate students.[42] Although taken in the course to fulfill his scholarship duties, the complaints were considered part of the professor's administrative duties.[43] As a result, for educators residing in the Seventh Circuit, speech tangentially related to scholarship may be categorized as administrative and, therefore, may not be protected by the First Amendment. The Ninth Circuit has determined the opposite, suggesting that speech that is part of a professor's administrative duties is protected when tangentially related to their teaching responsibilities. In *Demers*, 746 F.3d 402, the Ninth Circuit examined Professor David Demers' proposal to strengthen the College of Communications faculty and reorient the college into a revenue-generating center for the university. The appellate court noted that such academic writings are actually part of his teaching responsibilities and *Garcetti* would directly conflict with the Supreme Court's emphasis on protecting academic freedom.[44] The Seventh and Ninth Circuits' conflicting findings demonstrate the potential consequence of a *Garcetti* exception for some professor speech categories: First Amendment protection would be dependent upon the court's categorization. An educator who files suit in one Circuit could potentially have more constitutional protections than another professor in a different Circuit because their speech is categorized where it must be analyzed under *Pickering*. Thus, drawing distinctions between categories of speech to determine whether it is analyzed under *Pickering* or *Garcetti* may perpetuate inconsistency.

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[42] *Renken*, 541 F.3d at 773-774.
[43] *Id*.
[44] *Demers*, 746 F.3d 402.

IV. *PICKERING* FOR PUBLIC EDUCATORS' SPEECH

Even if speaking as an employee, applying the *Pickering* framework to public university professors' speech would be more appropriate than creating a category-exception for *Garcetti*. Educators are arguably unique from other public employees due to the degree they contribute to the free and robust exchange of ideas through their speech in the classroom, research conducted, and professional collaborations with others on matters within their discipline. As the Second Circuit in *Heim* articulated, public university educators are "predominantly paid to speak and to speak freely…on matters within their academic discipline."[45] Speaking *is* their job. They are the principal agents by which academic freedom is exercised, sharing their area of expertise with their students and colleagues to advance further understanding of their field. The Supreme Court made a similar argument in *Sweezy*, 354 U.S. at 250 (plurality opinion), imposing a "strait jacket upon the intellectual leaders in our colleges and universities" would have a detrimental impact on democracy. If a public university interferes with professors' ability to express their viewpoint in the classroom setting, it would affect the ability of students to learn distinct perspectives and contribute to society through communicating opinions that arise from critical thought and careful consideration. The Circuit Courts' discussion of academic freedom and First Amendment protections for educators demonstrates that determining an exception to *Garcetti*'s official duty test for speech related to teaching or scholarship would require the courts to engage in an additional analysis based on profession. However, applying *Garcetti* would restrain First Amendment protections for educators as private citizens and would directly interfere with their responsibility to promote the free and robust exchange of ideas in the university setting. Thus, the Supreme Court should apply *Pickering* for First Amendment claims in the academic context, regardless of the category of speech.

[45] *Heim*, 81 F.4th at 246.

If the Supreme Court were to rule that an educator's speech could be subject to *Garcetti*'s official duty test, they would have less protection than other public employees because their speech as a private citizen would also not be protected. Take, for example, a political science professor who is passionate about private gun ownership and teaches a Civil Liberties course. If this professor were to make a social media post online stating he believes that all citizens should get a gun license, would the speech be of a public employee or a private citizen? Likewise, what if this professor were to attend a political rally on-campus, announce he was a professor at the university and a victim of gun violence, and argue for weapons to be allowed on campus for self-defensive purposes? The role of an educator, though seemingly restricted to pedagogical or administrative functions, can be ambiguous depending on the context and form in which they speak.[46] Furthermore, the content of their speech may be about issues in which they are an educated expert and are passionate about as a private citizen. In practice, applying *Garcetti* to all employees' speech would lead to a chilling effect in which educators are unable to speak on matters important to them while other public employees may continue to do so. Rather than being the harbingers of expertise and nurturers of speculation, educators would become the model for self-censorship and stagnation of the free and robust exchange of ideas.

It is undeniable that public universities may raise concerns if the Supreme Court's *Garcetti* test does not apply in the academic context. Institutions may be apprehensive regarding whether they will be able to maintain their efficiency without being able to regulate the speech of their public employees. As government employers, universities do need a significant degree of control over their employees' words and actions to ensure policies are not contravened and

[46] This phrasing, albeit similar, is not to be confused with the Supreme Court's holding that whether speech is on a matter of public concern is determined by the content, context, and form of a given statement. *Connick*, 461 U.S. 138. The role of the speaker and the category of their speech are distinct aspects of the *Pickering* analysis.

public services are not inhibited.[47] However, the Court noted that public employers may potentially use their authority to silence discourse in circumstances in which such conversation is crucial using the *Pickering* framework.[48] Applying the Court's *Garcetti* test in the academic setting would sanction such an effect on those who must be able to speak freely on matters within their academic discipline. Furthermore, even if *Garcetti* did not apply, the public university may regulate speech under the *Pickering* analysis.[49]

Through multiple inquiries, *Pickering* carefully considers unique facts of each case to balance expression and the call for public efficiency, both of which could prevail under the test. This framework requires that the speech in question to be on a matter of public concern and the interest in exercising a First Amendment right to free speech would be weighed against the interest of making managerial decisions for the benefit of the community.[50] When the speech resembles an employee grievance, it is automatically not protected from employer discipline.[51] Likewise, when the speech in question impedes the employee's performance of their job duties or interferes with the general operations of the office, then the employer may discipline the employee.[52] Under *Pickering*, when the speech impacts, or could impact, working relationships essential to the efficiency of public services, then the public employer may take action to avoid an interference with its function.[53] As public universities' function is to foster the free and robust exchange of ideas through the exercise of academic freedom, speech that interferes with a

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[47] *Garcetti*, 547 U.S. at 418-419.
[48] *Rankin v.* McPherson, 483 U.S. 378, 384 (1987).
[49] *Id.* at 384 (explaining that *Pickering*'s balancing of interests is necessary to accommodate the dual role of public employers as the provider of public services and a government entity operating under constitutional constraints).
[50] The *Pickering* analysis must first be triggered by the public employee speaking as a private citizen. However, since public university educators necessarily speak and write upon issues in which they are interested to promote debate, this prong intuitively cannot be fulfilled without additional categorization of their speech prior to engaging in the standards laid out by the Supreme Court. *See, e.g., Rankin*, 483 U.S. 378.
[51] *See, e.g., Connick*, 461 U.S. 138.
[52] *Pickering*, 391 U.S. at 572-573.
[53] *Connick*, 461 U.S. 138. *See also Rankin*, 483 U.S. 378.

university's decisions on classroom conduct or general content may not be protected. In short, there are many circumstances in which public universities may regulate the speech of their employees even without the application of *Garcetti*'s official duty test. Educational institutions would still be able to make managerial decisions to maintain public efficiency, exercise academic freedom, and foster the free and robust exchange of ideas through their employees. Applying *Pickering* for the speech of professors would not stifle the ability of public universities to act as employers; instead, it would protect the free and robust exchange of ideas facilitated by the exercise of academic freedom. As such, the Supreme Court should determine that the *Pickering* framework is more appropriate than *Garcetti*'s test for public university educators.

V. CONCLUSION

In short, the First Amendment Free Speech Clause ensures that the government does not stifle the free and robust exchange of ideas necessary for democratic institutions to succeed. Public universities, in exercising a constitutional right to academic freedom, work in conjunction with their employees, who teach and explore matters of personal interest within their own discipline, to foster an environment conducive to speculation and debate. As such, the academic context is distinct from traditional government structures because of its contribution to the marketplace of ideas, leading to some confusion in the appellate courts about how the *Pickering* and *Garcetti* standards would fit within academia. As *Garcetti* would result in an absolute bar on free speech by public educators who are primarily employed to speak freely, this article proposes that the *Pickering* framework should be applicable for any First Amendment Free Speech Clause case involving public educators. *Pickering* would protect educators' ability to speak as public employees and private citizens; ensure public universities could make employment decisions in pursuit of efficiency; and prevent intercircuit inconsistency of speech protection.

Looking prospectively, the intersection of First Amendment protections for public employees and academic freedom could be addressed by the Supreme Court as a result of the intensifying trend in unemployment for public educators who voice their opinions through online platforms. The Court's decision to apply *Garcetti* or *Pickering* for such a case would hold various implications for free speech in academia and its purpose of fostering free debate within the community. If the Court declines to grant *writ of certiorari*, further confusion may persist in the lower courts where protection currently depends on jurisdiction. Likewise, public university educators would continue to fear their speech being confined to what the government deems appropriate, regardless of their role as public employees or private citizens.