No. 11-35558

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID K. DEMERS,
Appellant,

vs.

ERICA AUSTIN, ERICH LEAR, WARWICK M. BAYLY
AND FRANCES McSWEENEY
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON (SPOKANE)
No. 2:09-cv-00334-RHW
HONORABLE ROBERT H. WHALEY

AMICI CURIAE BRIEF OF AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS AND THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION

IN SUPPORT OF APPELLANT'S REQUEST FOR REVERSAL

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

DAVID K. DEMERS,
Appellant,

vs.

ERICA AUSTIN, ERICH LEAR, WARWICK M. BAYLY AND FRANCES McSWEENEY
Appellees.

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/s/ Robert M. O'Neil
Signature of Counsel

February 14, 2012
(Date)

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

DAVID K. DEMERS,
Appellant,

vs.

ERICA AUSTIN, ERICH LEAR, WARWICK M. BAYLY AND FRANCES McSWEENEY
Appellees.

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   If the answer is YES, list the identity of such corporation and the nature of the financial interest:

/s/ J. Joshua Wheeler
Signature of Counsel

February 14, 2012
(Date)

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CONSENT TO FILE AS *AMICI CURIAE*

This brief is filed with the consent of the parties pursuant to Rule 29 (a) of the Federal Rules of Appellate Procedure.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The American Association of University Professors ("AAUP"), founded in 1915, is a non-profit organization of over 48,000 faculty, librarians, graduate students, and academic professionals, a significant number of whom are public employees. Its purpose is to advance academic freedom and shared university governance, to define fundamental professional values and standards for higher education, and to ensure higher education's contribution to the common good. The AAUP's policies – including the 1940 Statement of Principles on Academic Freedom and Tenure created by the AAUP and the Association of American Colleges and Universities, and endorsed by over 210 organizations – have been recognized by the Supreme Court as widely respected and followed as models in American colleges and universities. *See, e.g., Bd. of Regents v. Roth*, 408 U.S. 564, 579 n. 17 (1972); *Tilton v. Richardson*, 403 U.S. 672, 681-82 (1971).

In cases that implicate AAUP policies, or otherwise raise legal issues important to higher education or faculty members, the AAUP frequently submits amicus briefs in the Supreme Court and the federal circuits. *See, e.g., Grutter v.*

Bollinger, 539 U.S. 306 (2003); *Regents of Univ. of Michigan v. Ewing*, 474 (U.S. 214 (1985); *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967); *Adams v. Trs. of the Univ. of N.C.- Wilmington*, 640 F.3d 550 (4th Cir. 2011); *Crue v. Aiken*, 370 F.3d 668 (7th Cir. 2004); *Hong v. Grant*, 403 Fed. Appx. 236 (9th Cir. Cal. 2010); *Ass'n of Christian Schs. Int'l v. Stearns*, 362 Fed. Appx. 640 (9th Cir. Cal. 2010). By participating as an amicus in this case, the AAUP seeks to demonstrate the harm the district court's holding would do to academic freedom, as well as highlight the danger inherent in treating public faculty the same as other public employees for First Amendment purposes.

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of free speech and press. The Center has pursued that mission in various forms, including the filing of *amicus curiae* briefs in this and other federal courts, and in state courts around the country. A particular focus of the Center's litigation and program efforts has been the relationship between the First Amendment and academic freedom.

STATEMENT OF THE FACTS

Plaintiff David Demers, a tenured associate professor at the Murrow College

at Washington State University, claimed that four university administrators retaliated against him for speaking out on how to improve the communications school. Specifically, he noted a drop in the ratings in his annual job evaluations, including untruthful evaluations. He also was subjected to an internal audit that he believed was unwarranted. His speech comprised:

1. Repeatedly requesting formal accreditation of the journalism program from the Accrediting Council on Education in Journalism and Mass Communication;
2. Vocally supporting Dr. Tan, a prior administrator who Defendant Dr. Austin replaced;
3. Expressing concern over the journalism programs' de-emphasis on student professional training and its emphasis instead on theoretical research;
4. Suggesting how to re-structure Murrow to address his concerns, including removing the Communications Studies sequence;
5. Writing a *7-Step Plan for Improving the Quality of the Edward R. Murrow School of Communication* and distribution within WSU and to media and other external recipients;
6. Writing *The Ivory Tower of Babel* while on sabbatical, which criticized University bureaucracies and questioned the significance of social sciences as a force for public policy change.

Demers v. Austin, No. CV-09-334-RHW, 2011 U.S. Dist. LEXIS 60481, at *2-3 (E.D. Wash. June 2, 2011).

SUMMARY OF ARGUMENT

The District Court for the Eastern District of Washington incorrectly applied *Garcetti v. Ceballos*, 547 U.S. 410 (2006), to this case. In *Garcetti*, the Supreme

Court held that public employees receive no First Amendment protection when speaking in their official capacities. *Id.* at 421. Although *Garcetti* limited First Amendment protection for much public employee speech, it specifically reserved for later resolution the more complex question of protection of *academic* speech. *Id.* at 425. In this case, Demers' speech was related to academic concerns and scholarship; therefore *Garcetti* may not be applied without further inquiry into the interests at stake.

This inquiry must be undertaken against the constitutional backdrop that speech is presumptively protected unless it falls within one of several carefully prescribed exceptions. *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729, 2733 (2011); *see also United States v. Stevens*, 130 S. Ct. 1577, 1585 (2010). While the U.S. Supreme Court has stated that there may be some historically unprotected categories of speech that have yet to be "indentified or discussed" in its case law, the Government cannot establish an exception to First Amendment protection "without persuasive evidence that a novel restriction on content is part of a long tradition of proscription." *Brown*, 131 S Ct.. at 2734 (internal citations omitted). Although there is indeed persuasive evidence involving restrictions on academic speech, a historical review presents a long tradition characterized by protection rather than prohibition.

Because academic speech under the First Amendment is neither governed by *Garcetti* nor susceptible to the "official duties" analysis reflected in *Garcetti*, the scope of First Amendment protection for academic speech should be governed by more than a half-century of decisions, beginning with *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), that recognize the vital role that academic speech by college and university professors plays in our society. Further, granting Washington State University summary judgment on Demers' First Amendment claims sets a dangerous precedent by resolving the issue of *Garcetti*'s impact on academic speech without sufficient consideration of the Supreme Court justices' concerns regarding this decision. In fact, the Fourth Circuit (among other jurisdictions) has expressly reversed attempts by a trial court to establish such precedent. *See Adams v. Trs. of the Univ. of N. C.-Wilmington*, 640 F.3d 550 (4th Cir. 2011).

The illogical application of *Garcetti* to this case undermines some of the basic principles of academic freedom, a freedom that is "of transcendent value to all of us and not merely the teachers concerned." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). The district court's decision could cripple First Amendment protection for all speech made by university professors pursuant to what the court deems to be their official duties. This decision, if allowed to stand, would have a chilling effect on research, innovation, and discourse within a public university – a

place whose primary purpose is the development of knowledge through discussion, debate and inquiry.

For these reasons, *amici* urge this court to hold that the First Amendment protects faculty speech, and to remand the case to the district court with instructions to reconsider the case in light of the precedents cited below.

ARGUMENT

I. THE DISTRICT COURT MISAPPLIED THE *GARCETTI* DECISION.

A. THE DISTRICT COURT ERRED IN ITS REFUSAL TO APPLY AN ACADEMIC EXCEPTION TO *GARCETTI*.

In *Garcetti v. Ceballos*, the Supreme Court held that public employees receive no First Amendment protection when they speak pursuant to their official duties. 547 U.S. 410, 421 (2006). Although *Garcetti* limited First Amendment protection for a range of public employee speech, it specifically reserved for later resolution the question of protection of *academic* speech. The Court held:

> There is some argument that 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. 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.

The district court in this case employed a *Garcetti* type inquiry to determine if the plaintiff's speech was entitled to constitutional protection. This determination rested on whether the plaintiff spoke on a matter of public concern and whether the plaintiff was speaking pursuant to his official duties as a public servant. *See Demers v. Austin*, No. CV-09-334-RHW, at *4-5 (E.D. Wash. June 2, 2011) (order granting motion for summary judgment). The district court did not consider the possibility of an academic exception for public employee speech—prematurely resolving the very issue the Supreme Court reserved in *Garcetti*. Because the district court failed to properly consider the First Amendment implications of applying *Garcetti* to speech related to scholarship and teaching, this case should be remanded and re-assessed with these concerns in mind.

Several courts have recognized an academic freedom exception to *Garcetti*. The Southern District of Ohio held that a medical school professor's proclamations about the benefits of vaginal delivery of infants as opposed to Caesarean sections qualified for the academic freedom exception to *Garcetti*. *Kerr v. Hurd*, 694 F. Supp. 2d 817, 843-44 (2010). As an alternative to *Garcetti*, the court looked to whether the professor was speaking on a matter of public concern, in order to determine if the professor's speech was constitutionally protected. *Id.* at 841-43. Similarly, the Northern District of California held that a biology professors'

classroom commentary about the relationship between homosexuality and genetics fell within the range of speech that was potentially excepted from the *Garcetti* holding. *Sheldon v. Dhillon*, 2009 U.S. Dist. LEXIS 110275 at *11 (N.D. Cal. Nov. 25, 2009). The court therefore denied the defendants' motion to dismiss the professor's First Amendment retaliation claim. *Id.*

The Fourth Circuit, evaluating UNC-Wilmington's failure to promote an outspoken professor, held that *Garcetti* was, in the academic context of a public university, potentially inapplicable. *Adams v. Trs. of the Univ. of N. C.-Wilmington*, 640 F.3d 550, 562. The court remanded the case, ordering the district court to review the professor's speech using analysis similar to that used in *Pickering v. Board of Education*, 391 U.S. 563 (1968): (1) whether the professor was speaking as a citizen upon a matter of public concern or as an employee about a matter of personal interest; and (2) whether the professor's interest in speaking upon the matter of public concern outweighed the government's interest in providing effective and efficient services to the public. *Id.* at 560-61 (citing *McVey v. Stacy*, 157 F.3d 271, 277-78 (4th Cir. 1998)).

The district court in this case, therefore, erred when it disregarded the Supreme Court's clear reservation of the status of speech related to scholarship or teaching and instead applied an analysis of whether the employee was acting

pursuant to his official duties as a public servant. Given that the plaintiff's speech concerned his scholarship as a communications professor in the Edward R. Murrow School of Communications, the *Pickering* balancing test, rather than *Garcetti*, should be used, as in other circuits, to determine if his speech is entitled to constitutional protection.

B. AFFIRMING THE DISTRICT COURT'S OPINION WILL DIMINISH OPEN AND HONEST DEBATE IN PUBLIC UNIVERSITIES.

The Supreme Court has consistently recognized academic freedom as "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian*, 385 U.S. at 603 (1967). The Court has "long recognized that . . . universities occupy a special niche in our constitutional tradition," *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003), and that as "a traditional sphere of free expression," universities play a role "fundamental to the functioning of society." *Rust v. Sullivan*, 500 U.S. 173, 200 (1991).

As the American Association of University Professors declared in its initial seminal statement on the matter, universities "promote inquiry and advance the sum of human knowledge," serving as "intellectual experiment station[s], where new ideas may germinate and where their fruit . . . may be allowed to ripen until finally, perchance, it may become a part of the accepted intellectual food of the

nation or the world." American Association of University Professors, *1915 Declaration of Principles on Academic Freedom and Academic Tenure*, *in* POLICY DOCUMENTS AND REPORTS 295-97 (10th ed. 2006). In order to ensure that universities fulfill this important function, "teachers must always remain free to inquire, to study and to evaluate, to gain new maturity and understand; otherwise our civilization will stagnate and die." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). The ability of university professors to voice their academic views without fear of retaliation is essential. As one expert on academic freedom has noted, "[s]cholarly independence" must be protected and may "entitle[] the professor to more freedom from employer control than enjoyed by the typical employee." David M. Rabban, *Functional Analysis of "Individual" and "Institutional" Academic Freedom under the First Amendment*, 53 Law & Contemp. Prob. 227, 242 (1990); *see also* Larry G. Gerber, *Inextricably Linked: Shared Governance and Academic Freedom*, 87(3) Academe: Bulletin of the American Association of University Professors 22 (2001) ("[F]or institutions of higher education to fulfill their educational mission, teachers and researchers need protections that other citizens do not require.").

Both in practice and in constitutional law, the actual duties of state university professors implicate – indeed, demand – a broad range of discretion and

autonomy that finds no parallel elsewhere in public service. The fact that a professor's job requires this kind of discretion and personal judgment makes it analogous to limitations on exceptions to sovereign immunity. The holding in *Garcetti* essentially allows government employers to behave the same way toward their employees as they could if they were private employers. In other areas where the government has clarified that its actors are to be treated the same way as private individuals, it has carved out an exception for cases where the state actor is performing a discretionary function. For example, the Federal Tort Claims Act makes state actors liable for a wide range of wrongs, in the same way that a private actor would be. 28 U.S.C. § 1346. However, state actors are exempt from this liability when performing a discretionary, as opposed to ministerial, function. 28 U.S.C. 2680(a). That is to say, when a person is hired specifically in order to act based on his personal or subjective judgment, that judgment must be protected under the law. Similarly, where professors are hired to speak based on their personal judgment, and where ministerial functions are incidental to the job, their judgment should be protected.

Furthermore, a professor's job is different from most in that his primary responsibility is to communicate ideas, including his own opinions and viewpoints. Most jobs, even if they involve speech, are designed to effect a physical goal.

However, any concrete goals that a professor may have—awarding grades for students, for example—are incidental to a professor's main mission to speak to students and to teach them to speak back. Essentially, while many people's work would be made less efficient by restrictions on his speech, a professor's job would be made impossible.

It is for this reason that additional freedom is essential to fulfilling universities' purpose of serving the common good through the pursuit of knowledge:

> [T]he function of seeking new truths will sometimes mean . . . the undermining of widely or generally accepted beliefs. It is rendered impossible if the work of the investigator is shackled by the requirement that his conclusions shall never seriously deviate either from generally accepted beliefs or from those accepted by the persons, private or official, [who administer] universities.

Matthew W. Finkin and Robert C. Post, *For the Common Good: Principles of American Academic Freedom* 34-35 (2009) (citing Arthur O. Lovejoy, *Academic Freedom*, *in* ENCYCLOPEDIA OF THE SOCIAL SCIENCES 384, 384 (Edwin R.A. Seligman & Alvin Johnson eds., 1930)).

As discussed above, circuit courts have applied an academic exception to *Garcetti* without hesitation to cases regarding professors' classroom speech. The Ninth Circuit has not ruled on the issue of whether this exception applies to a professor's speech outside of the classroom, but clearly having to do with school

matters. Practical concerns necessitate that a professor's speech be protected to the extent that he has been hired to share his own viewpoint on a given topic.

As suggested by the Supreme Court's reference to "academic scholarship" in addition to "classroom instruction," an exception to *Garcetti* should also apply to certain types of research, particularly where it is clearly in the academic setting. In cases where an employee is hired to explore new and controversial topics, punishment for a researcher's ideas would defeat the purpose of his employment. And although private employers may fire employees merely for doing their jobs as they see fit, it would be proper for government employees to be afforded a higher degree of protection when their job consists of creating speech that is likely to earn retaliation based on viewpoint. Even if Demers' speech was determined to be pursuant to his official duties as a professor, *The Ivory Tower of Babel* would constitute the sort of "academic scholarship" that should be excepted from ordinary *Garcetti* analysis. It is a product of Demers' academic research, and therefore warrants the same heightened protection as classroom speech.

In addition to sharing their viewpoints in the classroom and as a product of scholarly research, professors are encouraged to share their opinions on how the school runs, and what can be done to improve academic institutions. Most of Demers' speech relates to these topics, and the court below concluded that they

were part of Demers' job duties. Because these statements, like in-classroom discussion, are part of the viewpoint-centered speech in which professors appropriately engage, they should fall under the academic exception to *Garcetti*. Although they arguably deal with administrative concerns, Demers was not an administrator and therefore his job duties do not include actual administrative acts—only speech. An administrator who may share an unpopular opinion regarding administration could be validly fired for creating some concrete negative effect based on the speech. But where Demers—a professor, not an administrator—could not create such an effect, any punishment for his speech would be only that—punishment for *speech* only.

Allowing Washington State University administrators to retaliate against Demers in this case would undermine the very purpose of Demers' job as a professor and a scholar. Challenging the status quo and speaking candidly about the world and the systems in it, as Demers has done here, are precisely the activities that courts have been careful to protect in academic settings even more so than in other settings. This is what allows professors to serve their most essential function—not just to teach students to memorize information, but to teach them how to think for themselves in order to better society.

II. THE DISTRICT COURT MISAPPLIED THE "PUBLIC CONCERN" INQUIRY.

A. THE DISTRICT COURT'S INTERPRETATION OF "PUBLIC CONCERN" DID NOT FOLLOW PROPER FIRST AMENDMENT ANALYSIS.

The district court was unduly narrow in their definition of public concern. The Ninth Circuit has interpreted "scope of the public concern element . . . broadly, and adopted a liberal construction of what an issue of public concern is under the First Amendment." *Desrochers v. City of San Bernardino,* 572 F. 3d 703, 709-10 (9th Cir. 2009) (internal citations and quotations omitted). Furthermore, the Ninth Circuit has stated:

> We have not articulated a precise definition of public concern, recognizing instead that such inquiry is not an exact science. Accordingly, we have forsworn rigid multi-part tests that would shoehorn communication into ill-fitting categories, and relied on a generalized analysis of the nature of the speech. Perhaps unsurprisingly, courts have had some difficulty deciding when speech deals with an issue of public concern.

Id. at 709 (internal citations omitted). The *Desrochers* court also held that determining whether speech addresses a matter of public concern requires an analysis "based on the content, form, and context of a given statement, as revealed by the whole record." *Id.* (citing *Connick v. Myers*, 461 U.S. 138, 147-48 (1983)).

Here, the district court did not follow precedent set by the Ninth Circuit, applying instead a narrow, rigid framework. A reading of the case law reveals that

the facts in the present case easily met the public concern inquiry standard. Courts have found that employee speech touches on public concern in a wide variety of cases, including cases where speech related to personnel matters is involved. These cases include *Greer v. Amesqua*, 212 F.3d 358 (7th Cir. 2000), where a male firefighters' news release that criticized the fire chief for favoring homosexuals and female firefighters was regarded as speech related to a public concern; and *Schultea v. Wood*, 27 F.3d 1112 (5th Cir. 1994), which held that a police chief's letters alleging possible criminal acts by a city council member were protected speech. The Sixth Circuit has also held teachers' complaints on school policies to have touched on a matter of public concern. *Leary v. Daeschner*, 349 F.3d 888 (6th Cir. 2003).

Cases where courts have not found a public concern often involve personal grievances. *See De Llano v. Berglund* (involving speech about "private disputes that were unique to" the speaker), 282 F.3d 1031, 1037 (8th Cir. 2002). However, under the Ninth Circuit's liberal construction of public concern, even cases tinged with personal grievances have been determined to have speech that reaches the level of public concern. In *Lambert v. Richard*, 59 F.3d 134 (9th Cir. 1995), a librarian's appearance before city council where she criticized a library director's management practices was held to be of public concern. In *Thomas v. City of*

Beaverton, the Ninth Circuit held that personnel-based complaints relating to others could be protected speech, writing, "[T]he type of personnel matters that we have deemed unprotected under the public concern test are employment grievances in which the employee is complaining about her *own* job treatment, not personnel matters pertaining to others." 379 F.3d 802, 808 (9th Cir. 2004) (emphasis in the original). Demers' speech in this case dealt with either the structure of the journalism program, or with Dr. Tan, an administrator—not Demers' own employment.

Furthermore, the district court erroneously held that Demers' speech was not of public concern despite the fact that the speech was consistent with the definition of public concern that the district court *itself* provided. Specifically, the district court noted that the public concern inquiry is a question of law, relying on *Huppert v. City of Pittsburg*, 574 F.3d 696, 702 (9th Cir. 2009), in writing, "Speech involves a matter of public concern when it fairly can be said to relate to any matter of political, social, or other concern to the community." *Demers,* No. CV-09-334-RHW at *4. The speech in question in this case is exactly that. The organization and curriculum of a state university's journalism department touches on numerous important political, social and community concerns. *See infra* Part II.B.

Even under the district court's limiting view of public concern, which includes the "misuse of public funds, wastefulness, and inefficiency in managing and operating government entities," Demers' speech in this case fits the *Huppert* definition. *Demers,* No. CV-09-334-RHW at *4. Only one of the instances of speech noted in the *Order on Summary Judgment*—the support of a prior administrator—is even tangentially related to personnel issues, and when viewed in context, it is clear that Demers' speech is entirely related to the issue of how to run a public journalism school, which is very much a matter of public concern.

Further, the district court noted that at the heart of the public concern inquiry is the "the essential question [of] whether the speech addressed matters of 'public' as opposed to 'personal' interest." *Desrochers*, 572 F.3d at 709. This is not a case where the plaintiff was acting pursuant to some petty personal squabble, but rather was acting in accordance with his well-articulated vision of how journalism schools should function. As an active participant in the journalism school, he is uniquely qualified to assess how the school functions. An assessment of his own personal employment situation would not be entitled to the same deference or protection, since this is the sort of "personal" expression which is meant to be left unprotected by the first Amendment, post-*Garcetti*.

B. THE EDUCATION AND DEVELOPMENT OF FUTURE JOURNALISTS IS MOST APPROPRIATELY A MATTER OF PUBLIC CONCERN.

Although there are certain limits as to what is considered "public concern" for the purposes of First Amendment employee speech protection, the district court erred in its failure to find Demers' speech regarding the direction and nature of journalism education at Washington State University to be a public concern. The Supreme Court has noted throughout its First Amendment jurisprudence the central role of a free press in American society. The Founding Fathers understood the importance of the press early on in our history. As Thomas Jefferson noted, "The only security of all is in a free press. The force of public opinion cannot be resisted when permitted freely to be expressed. The agitation it produces must be submitted to. It is necessary, to keep the waters pure." Letter from Thomas Jefferson to Lafayette, 1823. ME 15:491. Given the liberal construction of "public concern," *see supra* Part A, the manner in which our nation's future journalists and guardians of our constitutional system are educated is surely a concern to the public.

Furthermore, the United States Supreme Court has held:

> [A]n untrammeled press [is] a vital source of public information. The newspapers, magazines, and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the

> publicity afforded by a free press cannot be regarded otherwise than with grave concern.

Grosjean v. Am. Press Co., 297 U.S. 233, 250 (1936). American media organizations are considered to have a special role in the constitutional order of the United States because "[i]n seeking out the news the press . . . acts as an agent of the public at large," each individual member of which cannot obtain for himself "the information needed for the intelligent discharge of his political responsibilities." *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 398 (1979) (Powell, J., concurring) (citations omitted).[1] The Supreme Court has also noted:

> Our society depends heavily on the press for . . . enlightenment. Though not without its lapses, the press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences . . . .

Houchins v. KQED, Inc., 438 U.S. 1, 17 (1978) (internal citations omitted).

Given the importance and difficulty of accurately reporting the vital news of the country, debate, discussion, and speech regarding the education of future journalists is an essential "public concern" within free speech jurisprudence. Due to recent scandals within the journalism community and the advent of new

[1] *See also Mills v. State of Ala.*, 384 U.S. 214, 219 (1966) ("The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars, to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.") (internal citations omitted).

technologies that have challenged all forms of media, the manner in which our schools educate and prepare the next generation of reporter, broadcaster, or blogger will in no small part determine how healthy American democracy remains in the Twenty-first Century. *See Correcting The Record; Times Reporter Who Resigned Leaves Long Trail of Deception*, N.Y. TIMES, May 11, 2003, *available at* http://www.nytimes.com/2003/05/11/national/11PAPE.htmlex1367985600 (noting that a pattern of "widespread fabrication and plagiarism [in journalism] represent a profound betrayal of trust and a low point in the 152-year history of the newspaper."); *see also* Joe Flint, *Local news coverage is at risk, FCC says*, L.A. TIMES, June 11, 2011 at B3 (relaying concerns from the FCC that the "independent watchdog function that the founding fathers envisioned for journalism is at risk" because of a "shortage of local, professional, accountability reporting" that would make it "less likely [that we will] learn about government misdeeds.").

As appellant noted in Plaintiff's Response to Motion for Summary Judgment, there are significant conflicts within the journalism educational community regarding the direction of the field in light of these new challenges.[2] The outcome of debates regarding the future of journalism education will have a significant impact on the press, specifically, and American democracy, more

[2] *See* Plaintiff's Response 7.

generally. As such, ongoing debate by concerned parties, including professional and amateur journalists, journalism students and educators, and the public at large is of "public concern" within the employee free speech context. Demers' journalism education-related speech takes on an even greater importance in light of the fact that Washington State University is the only full journalism program in Washington State. Plaintiff's Response 8.

The speech in question in this case is consistent with speech related to the direction of journalism education in the United States. As noted by the district court, Demers' speech "regard[ed] accreditation, whether the college should emphasize professional training or theoretical research, and suggestions regarding the restructuring of the college." *Demers,* No. CV-09-334-RHW at *9. In addition, Demers published, both internally and externally, his *7-Steps for Improving the Quality of the Edward R. Murrow School of Communications* and authored a book concerning the role university bureaucracies can play stifling the mission of educational institutions.

Each instance of expression by Demers at issue in this case represents a good faith effort to engage university administrators, his academic colleagues, and the public at large on his views on a matter of considerable public concern: the education of future journalists. The quality of faculty and programs (implicated by

the question of accreditation), the nature of the education provided (implicated in the question of the academic approach of the school), and inefficiencies in institutional structuring all have significant impacts on the quality of the journalists produced by Washington State University and should be debated openly under the protection of the First Amendment.

C. THE SPEECH OF UNIVERSITY PROFESSORS MERITS EXTRA PROTECTION BECAUSE PROFESSORS' EXPERTISE ADDS SPECIAL VALUE TO THE MARKETPLACE OF IDEAS.

The speech of university professors merits a special degree of protection not only to facilitate an uninhibited pursuit of truth and advancement of knowledge, but equally to encourage scholars to speak candidly and fearlessly as they convey sometimes unwelcome or unsettling truths to government and citizens. The critical statements for which Professor Demers was punished by his university meet such criteria. Doubtless, other professors who desire to blow the whistle on ineffective or corrupt administrative practices may similarly be silenced by the district court's decision.

The Court in *Garcetti* correctly noted that their decision not to insulate the communication of public employees while "mak[ing] statements pursuant to their official duties" could "imperil First Amendment academic freedom in public colleges and universities, whose teachers necessarily speak and write pursuant to

'official duties.'" *Garcetti*, 547 U.S. at 438. In *Pickering*, the Supreme Court stressed that "[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." *Pickering*, 391 U.S. at 572. The *Garcetti* standard, taken to the extreme and without acknowledgement of an academic exception, would fail to protect speech of university professors at all.

The counterproductive and illogical quality of the decision below further emerges from a different, but parallel, analysis. If the district court's standard were to apply broadly to academic speech, it would provide First Amendment protection only for statements that fall so far beyond the speaker's field of expertise as to be valueless to the general public, lawmakers, and others who depend upon scholarly guidance and counsel. For example, even the district court would presumably have found Professor Demers entitled to First Amendment protection if he had been rebuked for making critical statements about the quality of restaurant fare near campus, or the medical care available at the Washington State University's veterinary hospital, since he could not claim expertise on such matters or any "responsibility" to address them within his professorial role. Yet, the closer

Professor Demers' statements come to matters about which he has knowledge – journalism and the value of social science – the more limited is the First Amendment protection for those statements under the district court's reasoning.

A directly inverse correlation between the potential value to society of a scholar's public statements and the degree of constitutional protection for those statements thus seems to be an inevitable result of the district court's judgment from which this appeal seeks relief. This cannot be what Justice Kennedy envisioned when he expressly recognized in *Garcetti* the uniqueness of faculty speech and of the university community.

Therefore, *amici* ask this Court to affirm the indivisibility of speech related to scholarship and teaching that is inclusive of institutional governance as well as pure academic instruction. At a minimum, *amici* urge the Court to remand the case and instruct the district court to properly analyze Demers' speech in a manner that recognizes the long standing principles of academic freedom and the reservation applicable to academic speech articulated in the majority's opinion in *Garcetti.*

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge this Court to reverse the judgment of the court below, and to remand this matter for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing brief of Amici Curiae complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,512 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 word processing software, in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 14, 2012.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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