No. 11-1473

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Loretta Capeheart, Plaintiff-Appellant, v. Sharon K. Hahs, Lawrence P. Frank, in their official capacities as Northeastern Illinois University Administrators, and Melvin C. Terrell, individually, Defendants-Appellees.	On Appeal from the U.S. District Court For The Northern District of Illinois No. 08 C 1423 Hon. Blanche M. Manning *Judge Presiding*

BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 11-1473

Short Caption: Loretta Capeheart v. Melvin Terrell, et al

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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American Association of University Professors

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Mayer Brown LLP

Stephen Sanders (faculty member, University of Michigan Law School)

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

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Attorney's Signature: s/ Stephen Sanders Date: 8-4-11

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INTEREST OF THE *AMICUS CURIAE*[1]

The American Association of University Professors (AAUP) is a nonprofit organization consisting of approximately 48,000 college and university faculty, librarians, graduate students, and academic professionals, a significant number of whom are public employees. The AAUP's purpose is to advance academic freedom and shared governance, to define fundamental professional values and standards for higher education, and to ensure higher education's contribution to the public good. The AAUP frequently submits *amicus curiae* briefs in cases implicating its policies and the interests of faculty members. 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 of State Colls. v. Roth*, 408 U.S. 564, 579 n.17 (1972); *Tilton v. Richardson*, 403 U.S. 672, 681-82 (1971).

STATEMENT OF THE CASE

Dr. Loretta Capeheart is a professor in the Department of Justice Studies and the faculty advisor to the campus Socialist Club at Northeastern Illinois University ("NEIU"). She is also an outspoken critic of the Iraq war. In April 2006, Professor Capeheart agreed to help two students from the campus Anti-

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[1] Counsel for *amicus curiae* hereby certify, pursuant to Fed. R. App. P. 29(c)(5), that no party's counsel has authored any part of this brief, and that no person other than *amicus curiae* or its counsel have contributed any money toward the preparation or filing of this brief. Pursuant to Fed. R. App. P. 29(b), this brief is conditionally filed and accompanied by a motion for leave to file the brief. Professor Capeheart has consented to the filing of this brief but the appellees have refused to consent.

War club distribute leaflets containing "information about the injustice of the war in Iraq" at a campus job fair. One of the students was also a member of the Socialist Club. In February 2007, two members of the Socialist Club were arrested by the campus police for protesting at a CIA recruitment event. The protest was not organized or sponsored by the Socialist Club, and Professor Capeheart was not present, but she did "advocat[e]" for the arrested students in the campus community by calling and e-mailing university administrators, soliciting support from the faculty union, and, along with other members of the Justice Studies faculty, sending a university-wide e-mail expressing deep concern about the arrests. This e-mail was also published by the NEIU student newspaper, and the arrests garnered substantial local media attention.

Professor Capeheart alleges that on the basis of this speech, she was denied an appointment as the chair of Justice Studies, even though her colleagues in the department had elected her to the position, and that she was also denied a faculty excellence award. She filed suit in the U.S. District Court for the Northern District of Illinois, claiming under 42 U.S.C. § 1983 that the NEIU administration abridged her First Amendment rights. The district court granted summary judgment in favor of the defendant administrators, holding under *Garcetti v. Ceballos*, 547 U.S. 410 (2006), that Professor Capeheart's speech was pursuant to her "official duties" as the Socialist Club advisor, and that *Garcetti* applies to an academic's speech just as it does to any other public employee's speech. *Capeheart v. Hahs*, No. 08-1423, 2011 U.S. Dist. LEXIS

14363 (N.D. Ill. Feb. 14, 2011). Professor Capeheart appeals from that ruling.[2]

SUMMARY OF ARGUMENT

The message of the district court's ruling is chilling and clear: university administrators need not tolerate outspoken faculty dissent on matters of broad public concern *or* on the university's institutional response to those concerns. The district court arrived at this distressing resolution of Professor Capeheart's First Amendment claim by misapplying *Garcetti*'s "official duties" analysis and disregarding the express limits of *Garcetti*'s holding. Either of these errors warrants reversal of the judgment below.

First, the district court's implausible conception of Professor Capeheart's official duties extends this concept well beyond the narrow limits envisioned by the *Garcetti* majority. Neither joining in antiwar protests nor soliciting support for students arrested by the campus police was among Professor Capeheart's official responsibilities as the faculty advisor to the Socialist Club or as an NEIU professor more generally. The district court's sweeping application of the official duties analysis heightens the already grave dangers to academic freedom inherent in applying that analysis – against the Supreme Court's clear reservation of the issue – to our public university faculties.

Second, in applying the official duties analysis to Professor Capeheart's

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[2] *Amicus* takes no position as to whether Professor Capeheart's speech was a but-for cause of the adverse actions she alleges. For this reason, *amicus* will not address her speech at the Illinois Legislative Latino Caucus in September 2006. The district court ruled that although this speech was not pursuant to Professor Capeheart's official duties, it could not have been a but-for cause of the alleged adverse actions because too much time had elapsed in the interim.

First Amendment claim, the district court decided a vital and nuanced question of constitutional law that the Court expressly reserved in *Garcetti*. And it did so without analysis or even cognizance of over a half-century of Supreme Court precedents recognizing First Amendment protection of academic freedom. *Garcetti*'s core distinction between the protected statements a public employee makes "as a citizen" and the unprotected statements she makes "pursuant to [her] official duties" cannot sensibly be applied to academic speech because of essential differences between academic and other public-sector employment that the *Garcetti* Court – unlike the district court – was well aware of.

By applying *Garcetti*'s official duties analysis where it does not properly apply, and by misapprehending that analysis in any event, the district court failed, twice over, to resolve this case under the controlling legal principle: When public employees speak as citizens addressing matters of public concern, the First Amendment protects their expression from reprisal by the government unless that expression unduly interferes with the government's ability to conduct public business. *Garcetti*, 547 U.S. at 423; *Connick v. Myers*, 461 U.S. 138, 150-51 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). *Amicus* respectfully urges this Court to reverse the judgment below and remand the case to the district court to be resolved properly under the *Pickering-Connick* framework.

ARGUMENT

I. The District Court Misapplied *Garcetti*'s Official Duties Analysis And Failed To Acknowledge The Academic Speech Reservation.

A. Overbroad conceptions of "official duties" threaten the First Amendment freedoms of all public employees.

In ruling that most public employees may no longer claim First Amendment protection for statements they make pursuant to their official duties, the *Garcetti* majority stressed that this rule is quite "limited in scope." *See* 547 U.S. at 424. A public employee speaks pursuant to her official duties only when she is "fulfilling a responsibility" to her employer, or when the "employer itself has commissioned or created" the speech, or when the speech is part of "the tasks [the employee is] paid to perform." *Id.* at 424, 421-22. In addition to the Court's pointedly narrow expressions of the controlling standard, at least three aspects of *Garcetti* – all of which the district court ignored in this case – highlight the narrow contours of the concept of a public employee's "official duties."

First, the facts of *Garcetti* illustrate the limited scope of an employee's official duties. The plaintiff, a deputy district attorney, prepared a memo to his supervisor detailing his finding that an affidavit had been based on serious misrepresentations. *Id.* at 413. In holding that this speech was unprotected, the Court explained that the plaintiff "spoke as a prosecutor fulfilling a responsibility to advise his superior about how best to proceed with a pending case." *Id.* at 421. Reviewing evidence and advising his supervisors about the merits of a case – in a word, exercising prosecutorial judgment – was precisely what he was paid to do as a deputy district attorney and precisely what he was doing

when he wrote the unprotected memo. His unprotected speech could be traced directly to his fulfillment of a specific job responsibility. *Id.* at 421-23; *Andrew v. Clark*, 561 F.3d 261, 264 (4th Cir. 2009) (reversing dismissal under *Garcetti* where plaintiff "was not under a duty to write the memorandum" that prompted his firing and "would not have been derelict in his duties . . . had he not written the memorandum").

Second, the *Garcetti* majority's admonition that the "proper inquiry is a *practical* one" into "the duties an employee *actually* is expected to perform" was meant to ensure that courts and public employers respect the narrow limits of a public employee's official duties. *See Garcetti*, 547 U.S. at 424-25 (emphases added). Justice Souter warned in his dissent that under the majority's new rule, public employers could place their employees' speech beyond the reach of the First Amendment and the protections long afforded under *Pickering* simply by expanding their employees' job descriptions to include ever more "official duties." *Id.* at 431 n.2 (Souter, J., dissenting). Justice Souter was especially concerned about the danger in applying the official duties analysis to teachers:

> Now that the government can freely penalize the school personnel officer for criticizing the principal because speech on the subject falls within the personnel officer's job responsibilities, the government may well try to limit the English teacher's options by the simple expedient of defining teachers' job responsibilities expansively, investing them with a general obligation to ensure sound administration of the school.

Id. Responding specifically to Justice Souter's prescient warning, the majority stressed that employers may not fashion excessively broad job descriptions as a means of curtailing their employees' First Amendment rights. *Id.* at 424-25.

That would give employers far too much power to "leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." *Id.* at 419 (citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)).

Courts must be vigilant against public employers' attempts to render their employees' speech ineligible for protection under *Pickering* on the basis of overbroad, unrealistic, or downright specious job descriptions – for instance, labeling a professor who writes and teaches about socially progressive issues an "activist" and therefore unprotected when engaging in any speech that can be categorized as activism. (R.136, at 8); *see Connick*, 461 U.S. at 147 (courts have a responsibility "to ensure that citizens are not deprived of fundamental rights by virtue of working for the government"). The "practical" inquiry required by *Garcetti*, which the district court in this case completely failed to undertake, is accordingly designed to root out public employers' attempts to inflate their employees' "official duties" to undue proportion.

Third, the *Garcetti* majority stressed that its ruling leaves only a narrow class of speech unprotected by the First Amendment because a substantial amount of speech in public workplaces is – and is expected to be – outside the ambit of the employees' official duties. *See id.* at 420-21 ("Many citizens do much of their talking inside their respective workplaces, and it would not serve the goal of treating public employees like 'any member of the general public' to hold that all speech within the office is automatically exposed to restriction" (quoting *Pickering*, 391 U.S. at 573)). That is why neither the fact that a public

employee's speech "concerned the subject matter of [her] employment" nor the circumstance that she "expressed [her] views inside [the] office" is dispositive. *Id.* at 420-21.

Much of what public employees say at the office or about their jobs, including speech critical of their employers, has "no official significance" and is the kind of speech that citizens engage in every day. A public employee who, *e.g.*, writes a letter to a local newspaper or discusses politics with a coworker – or who protests against the war in Iraq – speaks *as* a citizen. *Id.* at 424 (citing *Pickering*, 391 U.S. 563, and *Rankin v. McPherson*, 483 U.S. 378 (1987)). The plaintiff in *Garcetti*, in contrast, spoke "*as* a prosecutor." *Id.* at 421. Reviewing evidence and advising the district attorney not to proceed with a prosecution is obviously not "the kind of activity engaged in by citizens who do not work for the government," and it has no "relevant analogue to speech by citizens who are not government employees." *Id.* at 423-24. Remarkably, the district court in this case failed to recognize Professor Capeheart's antiwar speech as the stuff of everyday protests by ordinary citizens, *i.e.*, as an exercise of precisely the "liberties [she] might have enjoyed as a private citizen" to speak candidly and publicly on a matter of pressing social and political concern. *See id.* at 422.

The Fourth Circuit recently confirmed that public university professors are protected by the First Amendment when, like Professor Capeheart, they speak with a citizen's interest on political and social issues that arise within the campus community or society at large. *Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550 (4th Cir. 2011). After his religious and political

conversion, Adams (an associate professor of sociology and criminal justice) began to cultivate his newfound conservatism by speaking and writing about "academic freedom" in various nonscholarly fora; by "informal[ly] advising" student Christian groups; and by being "an activist in the campus free speech movement." *Id.* at 553-54. Adams was soon denied a promotion from associate to full professor, and he sued, claiming that the adverse decision was impermissibly based on his postconversion speech. There was no dispute that "none of Adams' speech was undertaken at the direction of UNCW, paid for by UNCW, or had any direct application to his UNCW duties." *Id.* at 564.

The university argued that because professors are required to engage in "scholarship, research, and service to the community," Adams' speech, though "not primarily devoted to purely academic subjects in his field," was nonetheless pursuant to his official duties and so was unprotected. *Id.* at 555, 564. The Fourth Circuit rejected this argument and held that a faculty member's speech is not "pursuant to [his or her] official duties" where it is "not tied to any more *specific or direct employee duty* than the general concept that professors will engage in writing, public appearances, and service within their respective fields." *Id.* at 564 (emphasis added). The fact that a professor's "public speech [and] service" may have "involve[d] scholarship and teaching" in a broad and general sense does not render it ineligible for protection under *Pickering*. *Id.* at

563-64.[3] Indeed, in this case, the district court's confused application of the official duties doctrine to a university professor sweeps even more broadly and indiscriminately than the misconception rejected in *Adams*.

B. *Garcetti* took care not to disturb longstanding principles of academic freedom.

The *Garcetti* majority also recognized that academic speech implicates unique and vital First Amendment values that the official duties analysis fashioned in that case did not "fully accoun[t] for." 547 U.S. at 425. In his dissent, Justice Souter forcefully observed that the majority's new rule threatened to "imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to . . . official duties.'" *Id.* at 438. In response to Justice Souter, the majority unambiguously reserved the question "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. *Amicus* refers to this express limit on the Court's holding as *Garcetti*'s "academic speech reservation."

The district court decided this case without acknowledging the academic speech reservation, much less undertaking the "nuanced consideration of the range of issues that arise in the unique genre of academia" that both the majority and the dissent in *Garcetti* clearly called for. *See Adams*, 640 F.3d at

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[3] As the *Adams* court recognized, however, faculty speech that falls within the scope of this "general concept" of faculty service but outside the narrow scope of a faculty member's official duties will in many instances be protected under *Garcetti*'s academic speech reservation. *See id.* So too will much of the speech that faculty members *are* explicitly paid for, *i.e.*, research and teaching. *Amicus* explains the contours of the academic speech reservation in Part I.B, *infra*.

564. This disregard for the limits of *Garcetti*'s holding alone warrants reversal of the district court's judgment, but it is also critical that this Court reaffirm the longstanding constitutional principles of academic freedom that *Garcetti* took special care not to disturb.

First, the *Garcetti* majority implicitly recognized the essential differences between academics and other public employees that lie at the heart of the First Amendment's special concern for academic freedom. This is shown most clearly in the majority's assumption that public employees are generally hired to speak *on behalf of* the government: their speech is "commissioned" by the government in the sense that they are hired to advance a particular government agenda or viewpoint. These "[o]fficial communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications . . . *promote the employer's mission*." *Garcetti*, 547 U.S. at 422-23 (emphasis added). In this narrowly defined sense, public employees speaking pursuant to their official duties are subject to "managerial discipline" when their speech is unwelcome to their superiors or contrary to official policy.

This framework is fundamentally at odds with the professoriate's unique role in the advancement of human knowledge – a "transcendent value" not only for a community of scholars and students, but, as the Supreme Court has long recognized, for society as a whole. *Keyishian v. Bd. of Regents of the Univ. of N.Y.*, 385 U.S. 589, 603 (1967) ("academic freedom . . . is of transcendent value

to all of us").[4] As the AAUP first observed in its *1915 Declaration of Principles on Academic Freedom and Academic Tenure*, "[t]he responsibility of the university teacher is primarily to the public itself, and to the judgment of his own profession," for the mission of a public university – uniquely among agencies of state government – is to "promote inquiry and advance the sum of human knowledge" by serving as an "intellectual experiment station, 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" (*in* POLICY DOCUMENTS AND REPORTS 291, 295, 297 (10th ed. 2006)).

Faculty members, in other words, are not hired to speak *for* the state or *on behalf of* a government agenda; they are hired "to produce and disseminate new knowledge and to encourage critical thinking, not to indoctrinate students with ideas selected by the government." Judith Areen, *Government As Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945, 991-92 (2009). Enforced obedience to a government agenda or an official viewpoint – however necessary "substantive consistency" may be for the orderly functioning of other government offices – would endanger the academy's mission and its distinctive contribution to the

[4] *See also Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) ("universities occupy a special niche in our constitutional tradition"); *Rust v. Sullivan*, 500 U.S. 173, 200 (1991) (as "a traditional sphere of free expression," universities are "fundamental to the functioning of society"); *Healy v. James*, 408 U.S. 169, 180-81 (1972) ("the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools" (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960))); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("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").

public good:

> [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* 1 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 384, 384-85 (E.R.A. Seligman & Alvin Johnson eds., 1930)). Thus, as the U.S. District Court for the Southern District of Ohio has aptly noted, "[r]ecognizing an academic freedom exception to the *Garcetti* analysis is important to protecting First Amendment values. . . . The disastrous impact on Soviet agriculture from Stalin's enforcement of Lysenko biology orthodoxy stand[s] as a strong counterexample to those who would discipline university professors for not following the 'party line.'" *Kerr v. Hurd*, 694 F. Supp. 2d 817, 844 (S.D. Ohio 2010).

The First Amendment, with its "special concern" for academic freedom, wisely "does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian*, 385 U.S. at 603. *Garcetti*'s official duties framework, in contrast, is rooted in the government's need – in particular contexts – to insulate its official policies against dissent from the employees who are paid to implement them. Because academics are not paid to implement official policies or speak on the government's behalf, *Garcetti*'s official duties framework cannot sensibly be applied to them when their "speech relate[s] to scholarship or teaching."

Second, in contrast to his consistently narrow formulations of the official duties standard, Justice Kennedy expressed the academic speech reservation in broad terms. Speech "related to" scholarship or teaching comprises far more than a faculty member's official classroom teaching and academic publications. Confining the academic speech reservation – or the proper sphere of academic freedom – to these narrow duties would enforce an impoverished conception of a faculty member's role in both the academic and the broader community.

Many aspects of university governance require the faculty to apply its unique expertise as scholars and teachers. These governance activities involve "speech related to scholarship and teaching" and thus fall within the scope of *Garcetti*'s academic speech reservation. "Faculty expertise contributes to the critical search for knowledge that justifies academic freedom – not just through teaching and research, but also through the broader determination of educational policies." David M. Rabban, *"Academic Freedom, Professionalism, and Intramural Speech": Academic Freedom, Governance, and Professionalism*, 82 NEW DIRECTIONS FOR HIGHER EDUCATION 83 (Winter 1994). Faculty hiring and tenure decisions, scholastic standards, and curricular requirements are among the most obvious contexts in which informed university governance depends on the faculty's use of its expert judgment as scholars and teachers.

More broadly, however, decisions regarding a university's institutional objectives or use of resources can "have a powerful impact on the institution's teaching and research;" the AAUP therefore has observed that "[t]he academic freedom of faculty members includes the freedom to express their views . . . on

matters having to do with their institution and its policies." *On the Relationship of Faculty Governance to Academic Freedom*, *in* POLICY DOCUMENTS & REPORTS 141, 141-42 (10th ed. 2006). The Ninth Circuit has also recognized that because a "college relies in large measure on faculty self-governance and its contributions to administrative decisions . . . an attack on those processes attacks the educational process as well." *Mabey v. Reagan*, 537 F.2d 1036, 1047 (9th Cir. 1976). For example, faculty members – particularly those who advise students or campus organizations – will often be more in touch than administrators with prevailing campus realities and the likely effects of university policies on the education and day-to-day lives of students.

Faculty members are strongly encouraged to speak publicly about and take active part in virtually every facet of university life – whether or not they are members of an official agency of institutional governance, and hence whether or not their official duties, in the sense intended by *Garcetti*, require them to do so. The breadth of faculty engagement with all aspects of academic life that is so essential to a vibrant academy demands a range of autonomy and discretion that has no parallel elsewhere in public service. "For our institutions of higher education to fulfill their educational mission, teachers and researchers need protections that other citizens do not require. In addition, they need affirmative authority to shape the environment in which they carry out their responsibilities." Larry G. Gerber, *"Inextricably Linked": Shared Governance and Academic Freedom*, ACADEME: BULL. AM. ASS'N UNIV. PROFESSORS 22 (May-June 2001). Indeed, "employee criticism that might seem insubordinate in

other public agencies may be a necessary part of fulfilling the governance responsibilities of a faculty member in a college or university." Areen, *supra*, 97 GEO. L.J. at 990. Academic freedom safeguards the indispensible benefits of robust participation, candid judgment, and fearless dissent in all matters of university life that implicate the faculty's expertise as scholars and teachers.

In the broader community, faculty members can serve a particularly valuable role as concerned citizens who will bring their distinctive intellectual capacities and training to bear on issues of public concern. Scholars must be free to serve as public intellectuals without fear of institutional reprisal, subject only to professional norms of academic responsibility and the constitutional norms embodied by *Pickering*. The Fourth Circuit grasped this point clearly in declining to apply *Garcetti* to Adams' speech on the grounds that it "involve[d] scholarship and teaching" that was "intended for and directed at a national or international audience on issues of public importance." *Adams*, 640 F.3d at 563-64 (*Pickering-Connick* balancing, rather than *Garcetti*, applies to Adams' public speech). Displacing our commitment to the principles of academic freedom, as the district court did in this case, would deprive our public discourse of intellectual rigor and shut off our scholarly discourse from broader societal relevance. Small wonder, then, that placing a faculty member's "public speech or service" beyond the reach of First Amendment protection "would not appear to be what *Garcetti* intended." *Id.* at 564.

II. The District Court's Ruling Undermines The Academy's Educational Mission And Inhibits Its Service To The Broader Community.

A. The district court gave university administrators carte blanche to stifle faculty dissent on matters of public concern.

Professor Capeheart was an outspoken critic of the Iraq war and of the NEIU administration's treatment of student protestors. In ruling that this so-called activism was unprotected by the First Amendment, the district court compounded its error of applying *Garcetti* in the context of faculty speech by failing to see through the patently inflated job description "activist." As a result, the district court granted university administrators nearly unfettered power to silence faculty dissent on matters of obvious public concern. Public university faculty members will no longer feel free to engage candidly in public discourse *or* to critique openly the decisions of university administrators and their effects on the day-to-day lives of students.

The district court attributed Professor Capeheart's speech to her role as an "activist," which Professor Capeheart and the appellees both emphasized in the proceedings below. *See Capeheart*, 2011 U.S. Dist. LEXIS 14363, at *3-5, *11-12. Professor Capeheart testified at her deposition that activism was a "stated requirement" of the job when she interviewed for a faculty position in the Justice Studies Department. (R.163, at 63:3-12.) On its own, this vague "requirement" may well be unobjectionable. Direct engagement with the social realities and broader public discourse surrounding progressive social causes (*e.g.*, Professor Capeheart's study of social inequality and its impact on the incarceration of Latinos) may enrich the reflections of a scholar studying those

causes and help her bring the issues to life in the classroom. None of this, of course, means that "activism" in the service of scholarship and teaching is a faculty member's official duty – and even then, such "activism" would still fall within scope of *Garcetti*'s academic speech reservation.

The appellees nonetheless argued in the proceedings below that Professor Capeheart's "opposition to the Iraq war on campus" was unprotected on the grounds that it was "undertaken pursuant to her self-described 'stated' duty as a Justice Studies faculty member to be an activist." (R.136, at 8.) The district court apparently was persuaded by this transparent attempt to "restrict [her] rights by creating [an] excessively broad job descriptio[n]." *See Garcetti*, 547 U.S. at 419; *id.* at 431 n.2 (Souter, J., dissenting) (warning of the "regrettable prospect that protection under *Pickering* may be diminished by expansive statements of employment duties"). Accordingly, the district court held that all of the speech attributed to Professor Capeheart's role as an "activist" – none of which was directly related to the subject matter of her teaching and research – was part of her unprotected official duties.

The vague and overbroad labels "activist" and "activism" pose a unique threat to the First Amendment protections long afforded under *Pickering*. While activists may find their cause in any number of issues – religious liberties, the environment, government spending, the war in Iraq, or a university's abuse of police power against its students – it is a basic truth about activists that they speak out on matters of *public* concern. Advocating for one's private interests is not ordinarily counted as "activism," however vigorous or public the advocacy

may be. And it is precisely speech on matters of *public* concern that *Pickering* protects. 391 U.S. at 568; *Garcetti*, 547 U.S. at 423; *Connick*, 461 U.S. at 145. Given how easy it is to characterize speech on a matter of public concern as "activism," as the opinion below clearly illustrates, saddling a professor with an "official duty" to be an "activist" will leave her with *no* meaningful First Amendment protection when she speaks as a citizen addressing the public issues of the day.

By ignoring the academic speech reservation, and then by failing to heed *Garcetti*'s warning about the dangers of inflated job descriptions, the district court turned *Pickering*, for all practical purposes, into a dead letter at public universities – precisely where the need to protect diverse and dissenting voices is most urgent, as the "Nation's future depends upon leaders trained through wide exposure to [a] robust exchange of ideas." *Keyishian*, 385 U.S. at 603. But far from encouraging scholars to speak candidly and fearlessly to the academic and the broader community, as our society depends upon them to do, the district court sent a clear message that university administrators are free to silence dissenting faculty voices in favor of the party line. They need only characterize unwelcome or unsettling speech under the dubious rubric of official activism.

B. The district court's ruling will discourage professors from serving as faculty advisors.

The district court's sweeping misconception of the official duties analysis will also deter faculty from serving as advisors to campus organizations like the

Socialist Club. The district court ruled that a faculty advisor's service may leave her unable to claim First Amendment protection when she speaks as a citizen on potentially divisive matters of public concern. "It would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living." *Keyishian*, 385 U.S. at 601. Very few faculty members (Professor Capeheart included) are required to serve as advisors to campus organizations, and in light of the district court's dangerously overbroad ruling, too many will be reluctant, or will simply decline, to do so.

Campus organizations offer students an invaluable forum for exchanging ideas, challenging each other to think critically, and exploring the worldly implications of their views on issues of mutual concern. Student participation in campus organizations is not compulsory; it is born of their own intellectual curiosity, "a vital measure of a school's influence and attainment." *See Rosenberger v. Rectors & Visitors of the Univ. of Va.*, 515 U.S. 819, 836 (1995). By engaging students in these formative discussions – as Professor Capeheart did with the Socialist Club – faculty advisors enhance the students' educational experience and help them cultivate the intellectual and personal qualities essential to democratic citizenship. On a vibrant university campus, education does not end at the classroom door. *See Healy v. James*, 408 U.S. 169, 180-81 (1972) ("[t]he college classroom *with its surrounding environs* is peculiarly the 'market-place of ideas'") (emphasis added). Yet the district court's ruling leaves faculty members unprotected whenever they speak out on issues that might bear even the most tenuous relationship to their role as advisors. A strong

disincentive to serve in that role will impoverish students' education and their intellectual relationship with their teachers to no good end.

This disservice to the academy's educational mission manifests precisely the kind of error that *Garcetti*'s "practical" inquiry is meant to avert. The district court, however, did not even attempt to trace Professor Capeheart's speech to her fulfillment of any specific job responsibility as the Socialist Club advisor. In any event, the record contains no hint – and it is entirely unrealistic to suppose – that faculty advisors at NEIU were expected to participate in anti-war protests, or advocate on behalf of students arrested by the campus police, or criticize the university administration for a perceived abuse of its police power.

The NEIU Advisor Manual confirms that an advisor is an "educator," a "mentor," and a "reflective agent" responsible for facilitating "learning in 'out of classroom activities,'" "giv[ing] the students a safe place to reflect on their experiences," and serving as "a sounding board for [the students'] ideas." American College Personnel Association Commission For Student Involvement, ADVISOR MANUAL 2-3, *available at* http://www.neiu.edu/~deptsao/advres/advisorhandbook.pdf. Professor Capeheart's uncontroverted deposition testimony further establishes that in addition to serving as an intellectual mentor, her role as advisor to the Socialist Club was limited to helping the students secure sponsorship, space on campus, and speakers for the club's meetings. (R.163, at 90:7-24.) There is no evidence to suggest that faculty advisors were expected to engage in anything like the speech at issue in this case.

The district court also ignored the even more basic fact that Professor Capeheart never spoke in connection with a Socialist Club initiative in the first place. The Socialist Club did not sponsor or organize either the leafleting event or the CIA protest. Professor Capeheart first learned of the former event when two members of the Anti-War Club – only one of whom was even a member of the Socialist Club – passed her on the street and asked her to help them distribute their antiwar leaflets. (R. 146 ¶ 5; R. 161 ¶ 1; R. 162 ¶ 3.) The facts of record, in short, do not bear out the district court's implausible ruling that Professor Capeheart spoke *as* the Socialist Club advisor in any context relevant to this case.

The district court simply assumed that Professor Capeheart spoke *as* the Socialist Club advisor whenever she spoke in concert with or in support of any student who happened to belong to the club. But the fact that her speech arguably bore some vague and tenuous relation to the "subject matter" of her position as advisor does not show that she spoke *as* a government employee rather than *as* a citizen. *See Garcetti*, 547 U.S. at 421. Had the district court heeded *Garcetti*'s directive to undertake a "practical" inquiry into the duties Professor Capeheart "actually [was] expected to perform," *see id.* at 424-25, the court would have recognized that she was not fulfilling the pedagogical function of a faculty advisor or executing any administrative task she was officially charged with in that capacity. Rather, she was joining with likeminded citizens

in common cause.[5]

CONCLUSION

For the foregoing reasons, *amicus* respectfully urges this Court to vacate the judgment below and remand this matter to this district court for further proceedings.

Dated: August 11, 2011

Respectfully submitted.

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[5] To the extent the district court thought that Professor Capeheart *was* acting in her role as a faculty advisor, the court should have recognized that speech pursuant to that role is protected under the principles of academic freedom insofar as it is "speech related to scholarship or teaching." *See Garcetti*, 547 U.S. at 425.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(c), the undersigned attorney hereby certifies that the foregoing brief for The American Association of University Professors as *Amicus Curiae*

(i) complies with the type-volume limitation in Fed. R. App. P. 29(d) and 32(a)(7)(B)(i) because it contains 6,031 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii);

(ii) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32(b), and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 12-point Bookman Old Style font.

Dated: August 11, 2011 s/ David M. Berger

CERTIFICATE OF SERVICE

I, the undersigned attorney, hereby certify that on August 11, 2011, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system.

I further certify that some of the participants in the case are not CM/ECF users. I have mailed the foregoing brief by First-Class Mail, postage prepaid, to the following participants in the case:

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