

Written Statement of

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For Hearing on

“First Amendment Protections on Public College and University Campuses”

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Chairman Goodlatte, Ranking Member Conyers and Distinguished Members of the Committee:

Thank you for the opportunity to share my thoughts about First Amendment protections on public college and university campuses. I address four areas that cause me concern: (1) censorship of students’ off-campus, online speech through the importation of K-12 legal standards; (2) the U.S. Supreme Court’s disastrous decision in *Garcetti v. Ceballos*; (3) the problem of the heckler’s veto and controversial speakers on campus; and (4) microaggressions and the chilling of speech.

Dangerous Pattern of Punishing Students for Off-Campus, Online Speech

Public and university students should not lose their First Amendment protections simply because they post material online that school administrators dislike. As federal district court judge Rodney W. Sippel wrote in a high school online speech case, “[d]isliking or being upset at the content of student speech is not an acceptable justification for limiting it...”¹ Yet, that is exactly what is occurring in the United States to graduate and college students.

Last year, the Eighth U.S. Circuit Court of Appeals upheld the dismissal of a nursing student for posts deemed unprofessional by administrators.² The court reasoned that college officials “have discretion to require compliance with recognized standards of the profession, both on and off campus, ‘so long as their actions are reasonably related to legitimate pedagogical concerns.’”³ This “reasonably related to legitimate pedagogical concerns” standard comes from the high school censorship case, *Hazelwood Sch. Dist. v. Kuhlmeier*.⁴ The *Hazelwood* standard

¹ *Beussink v. Woodland R-IV Sch. Dist.*, 30 F.Supp. 2d 1175, 1180 (E.D. Mo. 1998).

² *Keefe v. Adams*, 840 F.3d 523 (8th Cir. 2015).

³ *Id.* at 531.

⁴ 484 U.S. 260 (1988).

applies to school-sponsored student speech, such as a school newspaper or a school play. The decision is controversial and led to several states passing so-called anti-*Hazelwood* laws. As Rep. Jamie Raskin cogently observed, under *Hazelwood*, school principals enjoy “unbridled power” and “awesome sway to regulate political communication.”⁵

The extension of restrictions on high school students via *Hazelwood* to adults in college and graduate school programs is troubling. College students should not be subjected to the lower level of free-speech protections afforded high school students.⁶ Furthermore, recall that *Hazelwood* applies to school-sponsored speech, and the nursing student in *Keefe* engaged in off-curricular, off-campus expression.

Another dangerous aspect of this Eighth Circuit ruling is it empowers university officials to silence or punish speakers simply for expressing unpopular or unorthodox opinions. University officials should not be allowed to create a new, unprotected category of expression known as “unprofessional speech.”⁷ The nursing student may have shown a lack of professionalism, but the Eighth Circuit’s decision “shows little regard for college students’ rights to online expression.”⁸

Any legislation protecting university students First Amendment rights should consider some protections for off-campus, online expression.

⁵ Jamie B. Raskin, *No “Enclaves of Totalitarianism”: The Triumph and Unrealized Promise of the Tinker Decision*, 58 AM. U.L. REV. 1193, 1204 (2009).

⁶ David L. Hudson, Jr., *Federal Appeals Court Upholds Removal of College Students for Facebook Post*, NEWSEUM INSTITUTE (Nov. 7, 2016), <http://www.newseuminstitute.org/2016/11/07/federal-appeals-court-upholds-removal-of-college-student-for-facebook-posts/>

⁷ Amicus Brief of Cato Institute, Electronic Frontier Foundation, National Coalition Against Censorship, and Student Press Law Center, *Keefe v. Adams* (16-1035) at p. 10.

⁸ *Id.*

Limiting Garcetti

One of the most damaging and unfortunate First Amendment decisions from the United States Supreme Court is *Garcetti v. Ceballos*.⁹ In that decision, the Supreme Court erected a categorical rule that denied free-speech protection to any official job duty speech by a public employee. That breathtakingly broad standard means that “when public employees make statements pursuant to their official job duties”, they have zero First Amendment protection.¹⁰

Garcetti changed settled law. For decades, the Supreme Court used a two-part test, known as the *Pickering* test or the *Pickering-Connick* test, to evaluate public employee free-speech cases.¹¹ First, a court asked whether a public employee spoke more on a matter of public importance (called “public concern”) or about a private grievance. If the employee spoke on a matter of public concern, the court then balanced the employee’s right to free speech against the employer’s countervailing interests in workplace efficiency. In *Garcetti*, the Court erected an additional threshold requirement that has wreaked havoc on public employee free-speech claims.¹² Plaintiffs’ attorneys refer to the phenomenon of being “Garcettized.”¹³ The decision has chilled speech on the part of would-be whistleblowers and other employees who wish to speak out against corruption or wrongdoing.

The decision has impacted speech at the public college and university level. A professor’s job is to teach, write, and research. All of this could potentially fall under *Garcetti*’s long arm of

⁹ 547 U.S. 410 (2006).

¹⁰ *Id.* at 421.

¹¹ *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983).

¹² David L. Hudson, Jr., *The Garcetti Effect*, ABA JOURNAL (Jan. 1, 2008),

http://www.abajournal.com/magazine/article/the_garcetti_effect/

¹³ David L. Hudson, Jr., *Garcettized! 06 Ruling Still Zapping Speech*, NEWSEUM INSTITUTE (Jan. 15, 2010), <http://www.newseuminstitute.org/2010/01/15/garcettized-06-ruling-still-zapping-speech/>

“official job duty speech.” Professor Sheldon Nahmod warned: “If *Garcetti* is taken seriously and read broadly, then all such speech and scholarship, inherently made pursuant to official employment duties, is unprotected by the First Amendment from discipline imposed by elementary, secondary, and higher level educational officials.”¹⁴

Justice David Souter opined that *Garcetti* could cause damage to the speech rights of public university professors, writing: “I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write ‘pursuant to . . . official duties.’”¹⁵ In response, Justice Anthony Kennedy – the author of the majority opinion in *Garcetti* – avoided deciding the question: “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.”¹⁶

Garcetti threatens the speech of college and university employees. Only two circuit courts of appeals – the Fourth¹⁷ and the Ninth¹⁸ Circuits – have explicitly rejected *Garcetti* as applied to university professors. This necessitates something akin to the Academic Freedom and Whistleblower Protection Act offered previously by the Foundation for Individual Rights in Education.

Controversial Speakers and the Problem of the Hecklers’ Veto

Public universities have faced problems involving disruptive protests when they invite certain controversial speakers to campus. Students and others have the ability to protest and make known their opposition to speakers. However, some situations have devolved into violence

¹⁴ Sheldon Nahmod, *Academic Freedom and the Post-Garcetti Blues*, 7 FIRST AMEND. L. REV. 54, 56 (2008).

¹⁵ 547 U.S. at 438 (J. Souter, dissenting).

¹⁶ *Id.* at 425.

¹⁷ *Adams v. Tr. of the Univ. of N. Carolina-Wilmington*, 640 F.3d 550 (11th Cir. 2011).

¹⁸ *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014).

and the actual suppression of the invited lecturer's speech. This raises the problem of the "hecklers veto" – a term that arose out of so-called "hostile audience" cases.¹⁹

"Heckler's veto" refers to a situation involving a government official who allows a hostile audience's reaction to shut down or silence an unpopular speaker.²⁰ University officials should uphold the principle that even speakers with distasteful viewpoints should be heard. Professor Brett Johnson explains that "[c]olleges and universities (private or public, but especially public) should publish clear policies that welcome controversial viewpoints, encourage lively debate regarding those viewpoints, and establish that attempts to silence those viewpoints will be punished."²¹

One of the most venerated principles in First Amendment law is Justice Louis Brandeis' counter-speech doctrine. He wrote: "[I]f there be time to expose through discussion the falsehoods and fallacies, to avert the evil by the processes of education, the remedy to be applied, is more speech, not enforced silence. Only an emergency can justify repression."²² When dealing with controversial speakers who will offend others, college and university officials should embrace and advance the counter-speech principle rather than resort to silencing and disinviting controversial speakers. Only in a true emergency should they resort to more drastic measures.

Microaggressions

Another threat to free-speech on college campus concerns microaggressions – defined as unintentional, subconscious slights or insults often uttered by members of the majority race

¹⁹ Brett G. Johnson, *The Heckler's Veto: Using First Amendment Theory and Jurisprudence to Understand Current Audience Reactions Against Controversial Speech*, 21 COMM. L. & POL'Y 175, 180-81 (2016).

²⁰ *Zamecnik v. Indian Prairie Sch. Dist.* # 204, 636 F.3d 874, 879 (7th Cir. 2011).

²¹ Johnson, *supra* at 216.

²² *Whitney v. California*, 274 U.S. 357, 377 (J. Brandeis, concurring); see also David L. Hudson, Jr., 5 *Favorite First Amendment Passages*, NEWSEUM INSTITUTE (Mar. 8, 2011), <http://www.newseuminstitute.org/2011/03/08/5-favorite-first-amendment-passages/>

against racial minorities. A leading scholar in this area, Dr. Derald Wing Sue, has stated that “[m]icroaggressions for people of color are constant, continual, and cumulative.”²³ The problem is that microaggressions have been used to silence classroom discourse.²⁴ A leading defender of free-speech refers to this as “the most pressing issue with regard to campus speech in the U.S.”²⁵ For example, the University of California system identified as a micro-aggression the uttering of the statement – “I believe the most qualified person should get the job.”²⁶ This obsession with microaggressions should not be used to chill classroom speech. It can cause some professors to self-censor.²⁷ Self-censorship runs counter to the mission of universities as the quintessential marketplace of ideas. Almost anything could be interpreted as a microaggression by overly sensitive individuals.

Universities already have to confront palpable forms of racism on public and university campuses.²⁸ They have an obligation to protect students from discriminatory, intimidating harassment. There is a difference between direct, face-to-face harassing speech and a microaggression. Direct, face-to-face harassing speech may constitute “severe and pervasive harassment” and be punishable under a well-drafted anti-harassment policy. But, microaggressions could encompass well-intentioned speech where the speaker harbors no ill-will or does not possess any intent to harm or intimidate.

²³ Quoted in *How Unintentional But Insidious Bias Can Be the Most Harmful*, PBS NEWSHOUR (Nov. 13, 2015), <http://www.pbs.org/newshour/bb/how-unintentional-but-insidious-bias-can-be-the-most-harmful/>

²⁴ See Arthur Willner, *Microaggressions and the First Amendment*, LOS ANGELES DAILY JOURNAL, Jul. 6, 2015, http://www.leaderberkon.com/487DE1/assets/files/documents/Microaggressions_and_the_First_Amendment.pdf

²⁵ Robert Shibley, *Current Threats to Free Speech on Campus*, 14 FIRST AMEND. L. REV. 239, 255 (2016).

²⁶ *Id.* at 263.

²⁷ See Wilner, *supra* n. 19

²⁸ See Caitlin Dickerson and Stephanie Saul, *Campuses Confront Hostile Acts Against Minorities After Donald Trump's Election*, N.Y. TIMES, Nov. 10, 2016, https://www.nytimes.com/2016/11/11/us/police-investigate-attacks-on-muslim-students-at-universities.html?_r=0; Scott Jasnack, *The Incidents Since Election Day*, INSIDE HIGHER ED, Nov. 11, 2016, <https://www.insidehighered.com/news/2016/11/11/students-many-colleges-reporting-ethnic-or-racial-harassment-election-day>.