TABLE OF AUTHORITIES

INTEREST OF AMICI CURIAE

The James G. Martin Center for Academic Renewal is a nonprofit, nonpartisan organization that works to improve higher education. The purpose of the Martin Center is to discover and communicate ways to renew and fulfill the promise of higher education in North Carolina and across the country. Since 2003, the Martin Center has been a voice for excellence in higher education. The Center advocates responsible governance, viewpoint diversity, academic quality, cost-effective education solutions, and innovative market-based reform. It does this by studying and reporting on critical issues in higher education and recommending policies that can create change—especially at the state and local level.

Pursuant to Ninth Circuit Rule 29-2(a), amici state that all parties have consented to the filing of this brief.

the fact that Defendants invited political expression in one breath while punishing Plaintiff for taking up that invitation in the next. These are all factors relevant to the analysis; the district court considered none.

Public employees enjoy protection from retribution from their employers when speaking on issues of public importance. *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cnty., Illinois*, 391 U.S. 563, 574 (1968). Under *Pickering*,

the content of the statements, the form (i.e., the time, place, and manner) of the statements, and the context in which the statements were made. *Connick v. Myers*, 461 U.S. 138, 153 (1983). Also relevant are the public employer's mission and effective functioning of the employer's operations. *Id.* Essentially, courts are obligated to put pen to paper and grapple with all of unique facts of the particular case before them. The district court failed to do so in the following ways.

A. The District Court Failed To Qualitatively Evaluate The Alleged Disruption

The first issue with the district court's *Pickering* analysis is that it treats disruption as on-off switch; according to the district court, if the university demonstrates "disruption" in any capacity, it must prevail. See Order at 39:23, 40:15, 47:6. In contrast, a proper *Pickering* balancing assesses the *qualitative* significance of the disruption, not just uncritically accepts the government's contention that its functions were disrupted. *See Gilbrook v. City of Westminster*, 177 F.3d 839, 867 (9th Cir. 1999)("[T]he more tightly the First Amendment embraces the speech, the stronger the showing of workplace disruption must be"). It is undisputed that "disruption necessarily accompanies" speech, and a "nominal showing of potential disruption is plainly inadequate." *Id.* at 869. The university was required to "do more

[university] premises." *Id.* at 680. Contrast the Defendant's allegations to this court's finding of disruption in *Adamian v. Lombardi*, 608 F.2d 1224 (9th Cir. 1979), where a professor was involved with 1) unauthorized student protests and activities during school hours on school property, 2) raucous catcalling after the university president had requested silence, 3) halting the governor's motorcade, and 4) leading a charge onto a field, causing a safety hazard. *Id.* at 1228. The same level of material

Pickering balancing should not be "like performing rational basis review, where [courts] uphold government action as long as there is some imaginable legitimate basis for it." *Kinney v. Weaver*, 367 F.3d 337, 363 (5th Cir.2004). The district court inappropriately deferred to Defendants' unsupported beliefs instead of weighing the evidence.

The district court also cited the opinion of the University's diversity recruiter, who expressed frustration that it was more difficult to recruit more Native American students. Order at 38:16-39:10. The district court brushed aside Plaintiff's contention that this harm is speculative because under *Connick*, an employer can take action before disruption is manifested. *Connick*, *supra*, 461 U.S. at 152. But the district court does not seriously scrutinize the diversity recruiter's predictions, again uncritically adopting the beliefs of government personnel as evidence of disruption. In truth, the diversity recruiter's opinion is not evidence of disruption, nor is it evidence of future disruption; it is guesswork that individuals, who could potentially enroll at the University, will potentially

To that end, courts have historically demonstrated a protective jealousy over the speech of college and university professors. *See, e.g.*, *Bauer v. Sampson*, 261 F.3d 775 (9th Cir. 2001)(holding *Pickering* balancing favored community college professor's criticism of the college president in the college newspaper); *Johnson*, *supra*, 776 F.2d at 454 (holding *Pickering* balancing favored professor's scathing

12776507 (C.D. Cal. Feb. 14, 2014), and the ruling in that case does not support the district court's argument given the court held that the *Pickering* balancing favored the college professor since "none of the students in [p]laintiff's April 2010 class complained about his comments or conduct to Defendant[.] . . . Nor have these students complained that [p]laintiff's comments interfered with their ability to learn." *Id.* at 10. The district court derives a rule from this statement that disruption can consist of such complaints

limitation by Defendants." Order at 46:21-24. Neither Defendants nor the district court explained why inclusion of Plaintiff's statement in the syllabus was inherently disruptive whereas Plaintiff's statement in these other settings was not. In reality, the line drawn by Defendants is arbitrary; none of the evidence proffered by Defendants indicates that students or staff would be any less offended if the Plaintiff continued to offer his opinion in other contexts besides the syllabus.

Defendants' punishment for inclusion of the parody in the syllabus is entirely pretextual; the true impetus for the discipline is that Plaintiff picked the wrong position. *See Robinson v. York*, 566 F.3d 817, 825 (9th Cir. 2009)("Given the evidence that Defendants may have been more concerned with the nature and frequency of Robinson's reports of misconduct than his adherence to the formal chain of command, a fact-finder could conclude that Defendants' application of the chain of command policy was pretextual.") Under *Pickering* balancing, courts must consider that at some point, "concerns are so removed from the effective functioning of the public employer that they cannot prevail over the free speech rights of the public employee." *Rankin*, *supra*,

the alleged disruption themselves. Order at 1:19-21. Under *Pickering* balancing, Defendants cannot rely on disruption which they themselves instigated or exacerbated to outweigh Plaintiff's first amendment rights. *Zamboni v. Stamler*, 847 F.2d 73, 79 (3d Cir. 1988); *Czurlanis v. Albanese*, 721 F.2d 98, 107 (3rd Cir. 1983)

In this case, Defendants complained Plaintiff expressed a political opinion in the course syllabus at the same time they requested Plaintiff to express the opposite political opinion in the very same document. By opening the door to political expression on its syllabus, Defendants invited all of the downstream effects that inevitably follow such expression, which includes the alleged disruption Defendants now decry. Defendants cannot open Pandora's box and punish Plaintiff afterward for taking the opportunity to speak his conscience.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed, and the case remanded for trial to consider Plaintiff's claims on its merits.

Date: October 2, 2024

Respectfully submitted,
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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