

CASE NO. 243518

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STUART REGES,

Plaintiff-Appellant,

v.

ANA MARI CAUCE, et al,

DefendantsAppellees.

On Appeal from the United States District Court
for the Western District of Washington
CASE NO. 2:22cv-00964JHC

BRIEF OF AMICUS CURIAE MANHATTAN INSTITUTE
SUPPORTING PLAINTIFF- APPELLANT

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September 30, 2024

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Dated: September 30, 2024

s/Ilya Shapiro
Ilya Shapiro

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INTEREST OF AMICUS CURIAE¹

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SUMMARY OF ARGUMENT

Free speech and open inquiry are central tenets of any educational institution, especially your nation's universities. Retaliatory investigations and punishment of faculty who express unpopular opinions undermine First Amendment rights and deter students, faculty, and administrators from expressing themselves freely. Yet that's precisely what happened at the University of Washington when Professor Stuart Reges was persecuted for inserting into his syllabus a parody of the "land acknowledgement"

ARGUMENT

I. The District Court Failed to Properly Consider the University’s Adverse Employment Actions

Retaliation is a pervasive tactic used by universities to silence professors who voice opinionsthe administration dislikes. This Court has thuspheld the right of university faculty to criticize their administrations on topics that deal with public issuesSee, e.g., Demers v. Aust729 F.3d 101,1102022 (9th Cir. 2013). Indeed, asthe Supreme Court has made clear, there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics.” W.Va. State Bd. of Educ v. Barnette319 U.S. 624642(1943).

Yet the district courthere failed to properly consider theUniversity of Washington’s adverse employment actions, which amount to a retaliatory investigation and withholding of pay for parodyingone of the school’s political initiatives. Investigatinga professor who fails to toe the schoolline when it comes to politicalized land acknowledgments is amblematic infringement of First Amendment free speech rights. Prof. Reges sufferedjust such retaliation for statements he made in his syllabus.

A. The First Amendment ProtectsProfessors from University Retaliation for Their Speech

This Courthas taken steps to defend faculty specifically when they criticize their own university administration. In Demeritsyindicated the right of a teacher

of a land acknowledgement in his syllabus.

Counsel of record has experienced this dynamic personally. In January 2022, he tweeted in opposition to President Biden's decision to limit consideration of potential Supreme Court nominees based on race and sex. A backlash emerged among faculty and students at Georgetown University, where Counsel Shapiro was due to start a new job less than a week later. Although Counsel Shapiro's contract was not rescinded, he was immediately placed

crisis in higher education, it is imperative that the Court consider the role that adverse employment actions play in undermining and eroding the First Amendment rights of professors like Stuart Reges.

II. The District Court Failed to Properly Consider the Professor's Free Speech Rights

Given the centrality of freedom of expression in educational environments, the Supreme Court has long repeatedly emphasized the importance of First Amendment protections on university campuses. Nearly 70 years ago, the Court wrote: "Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy v. New Hampshire*, 354 U.S. 234 (1957). Indeed, as a public university, the University of Washington has a unique responsibility to guarantee the faculty's free speech rights. These sentiments lay behind the Court's ruling in *Demers v. Austin*, which protected the speech even of faculty at public universities. In *Demers*, the Court found that faculty speech is protected when it (1) relates to matters of "public concern," and (2) it outweighs any administrative interests in regulating speech. *Demers v. Austin*, 729 F.3d 1011, 1012 (9th Cir. 2013) (quoting *Pickering v. Bd of Educ*, 391 U.S. 563 (1968)).

Here, the district court agreed with Prof. Reges that his words related to a public concern, namely the appropriateness of indigenous land acknowledgments.

Yet it decided that the University of Washington had a greater interest in silencing Reges because of concerns raised by students and administrators about his comments. But the Defendants could not show that Reges' comments caused any actual disruption on campus or inhibited his students from learning the course material. None of his classes were cancelled or disrupted. Indeed, even when an alternative section was opened for Reges' class, very few students switched into the new section. So the university's concerns, regardless of their validity, were overblown.

The district court devoted much of its opinion to a discussion of *Garcetti v. Ceballos*, 547 U.S. 410 (2006). As one scholar has noted, however, *Garcetti* "did not explicitly involve academic freedom." Sheldon Nahmod, *Academic Freedom and the Post-Garcetti Blues*, 7 First Amend. L. Rev. 54, 56 (2008). Many other scholars have noted that a misapplication of *Garcetti* can lead to egregious results, particularly when it comes to retaliation against professors who speak their minds. See e.g., Matthew Jay Hertzog, *The Misapplication of Garcetti in Higher Education*, 2015 BYU Educ. & L.J. 203 (2015); Thomas E. Hudson, *Talking Drugs: The Burdens of Proof in Post-Garcetti Speech Retaliation Claims*, 87 Wash. L. Rev. 777 (2012); Harvey Gilmore, *Has Garcetti Destroyed Academic Freedom?* U. Mass. Roundtable Symp. L.J. 79 (2014). And the *Garcetti* Court itself noted that "expression related to academic scholarship or classroom instruction implicates

additional constitutional interests that are fully accounted for by this Court's customary employee speech jurisprudence. Garcetti, 547 U.S. at 425.

Indeed the lower court wholly failed to consider the countervailing interests and special protections due to First Amendment free speech rights on a university campus. Teaching and writing are "a special concern of the First Amendment." Keyishian v. Bd. of Regents of the Univ. of the State of N.Y., 385 U.S. 589, 63 (1967). "Although the protections awarded the professoriate through academic freedom and freedom of speech were clearly established in Keyishian. . . these principles are once again being challenged within the U.S. legal system." Hertzog, supra at 223.

The district court considered the interests and opinions only of a handful of students and faculty who were disappointed with Reges's views. Given that Reges was participating in the nationwide debate about land acknowledgments, however, his speech interests are very high. The Court said in Sweezy: "To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation." 354 U.S. at 250.

Moreover, the University of Washington itself has an interest in protecting free speech which promotes inquiry and the creation and dissemination of knowledge. As John Stuart Mill wrote in criticizing those who would silence unpopular opinions: "If the opinion is right, they are deprived of the opportunity of

exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth produced by its collision with error.” John Stuart Mill, On Liberty 31 (1859).

CONCLUSION

For the foregoing reasons, and those stated by the Plaintiff, this Court should reverse the judgment below.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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I hereby certify that on September 30, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit for filing and transmittal of a Notice of Electronic Filing to the participants in this appeal who are registered CM/ECF users.

DATED: September 30, 2024

s/ Ilya Shapiro
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