

Plaintiff-Appellant,

v.

ANA MARI CAUCE, in her official capacity as President of the University of Washington, MAGDALENA BALAZINSKA, in her official and individual capacities as Director of the Paul G. Allen School of Computer Science & Engineering, DAN GROSSMAN, in his official and individual capacities as Vice Director of the Paul G. Allen School of Computer Science & Engineering, and NANCY ALLBRITTON, in her official and individual capacities as Dean of the College of Engineering,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
No. 2:22-cv-00964-JHC. (Hon. John H. Chun)

**BRIEF OF AMICUS CURIAE PEN AMERICAN CENTER, INC.
IN SUPPORT OF PLAINTIFF-APPELLANT**

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Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel certifies that *amicus curiae* PEN American Center, Inc. has no parent corporation and that no publicly held corporation owns 10 percent or more of its stock.

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Table of Contents

Corporate Disclosure Statement	i
Table of Contents	ii
Table of Authorities	iii
Interest of Amicus Curiae	1
Introduction	2
Factual Background	3
Argument.....	4
I. The District Court Erred in Its <i>Pickering</i> Analysis	4
A. When considering a state’s interests in maintaining productive workplace environments, courts must be careful not to mistake discomfort for disruption.....	5
B. The discomfort caused by Professor Reges’ Statement does not constitute disruption sufficient to outweigh First Amendment interests.....	9
II. The University Has Better Means of Addressing Harm and Offense....	12
III. Upholding the District Court’s <i>Pickering</i> Analysis Would Have Disastrous Consequences for Academic Freedom.	14
Conclusion	17
Certificate of Compliance	18

TABLE OF AUTHORITIES

Cases

<i>Allen v. Scribner</i> , 812 F.2d 426 (9th Cir. 1987)	7
<i>Bauer v. Sampson</i> , 261 F.3d 775 (9th Cir. 2001)	6
<i>Connick v. Myers</i> , 461 U.S. 138 (1983).....	7
<i>Demers v. Austin</i> , 746 F.3d 402 (9th Cir. 2014).....	2, 5
<i>Dodge v. Evergreen Sch. Dist. #114</i> , 56 F.4th 767 (9th Cir. 2022)	5, 6, 7, 8
<i>Garcetti v. Ceballos</i> , 547 U.S. 410 (2006)	2
<i>Keyishian v. Bd. of Regents of Univ. of State of N. Y.</i> , 385 U.S. 589 (1967) .	2, 3, 16
<i>Pickering v. Bd. of Educ.</i> , 391 U.S. 563 (1968).....	<i>passim</i>
<i>Rankin v. McPherson</i> , 483 U.S. 378 (1987)	6
<i>Reges v. Cauce</i> , 2024 WL 2140888 (W.D. Wash. 2024)	<i>passim</i>

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<https://www.latimes.com/california/story/2023-11-26/a-usc-professor-called-for-hamas-to-be-killed-hes-now-banned-from-campus>.....16

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<https://www.anthropology->

Shanti Escalante-De Mattei, *Art Exhibit Canceled After State College of Florida Wants Words ‘Diversity’ and ‘Inclusion’ Banned*, Art News (Feb. 21, 2023), <https://www.artnews.com/art-news/news/state-college-of-florida-embracing-our-differences-exhibit-cancelled-ron-desantis-diversity-1234658516/>.....15

INTEREST OF AMICUS CURIAE

PEN American Center, Inc. (“PEN America” or “Amicus”) is a nonpartisan, not-for-profit organization with an abiding interest in protecting free expression as the cornerstone of a robust and healthy democracy.¹ PEN America has done extensive advocacy and rese8ddr0T3 (d)-8.7 (r)3.7 h nate (a)3.5 (d)8uc (ob)8.3 (us)8

INTRODUCTION

PEN America respectfully submits this brief to address a single issue³ with the District Court’s decision—namely, the way it applied the *Pickering* balancing test, giving insufficient weight to the considerable First Amendment protections due University of Washington Professor Stuart Reges’ (“Professor Reges”) speech on a matter of public concern.

The District Court specifically erred in treating offense as workplace disruption sufficient to outweigh the heightened First Amendment interests in this case. While offense may be real and deeply felt, causing distress and discomfort, such concerns cannot eclipse core personal liberties. *See Keyishian v. Bd. of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 602 (1967) (even if “the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that

³ Amicus will not focus on other points at issue, except to express agreement with the District Court’s finding that the government speech doctrine is Tc 0 Tw 12.2 (t)8.ds the

broadly stifle fundamental personal liberties when the end can be more narrowly achieved.”).

The District Court veered into the dangerous waters forewarned in *Keyishian*. The principles of free expression and academic freedom require a commitment to protecting unpopular and controversial ideas, which is especially true in higher education, the quintessential “marketplace of ideas.” *Id.* at 603. If left to stand, the District Court’s decision risks continuing a trend of justifying censorship in the name of preventing or redressing offense or harm, a trend which has become increasingly common in the higher education sector. Amicus urges this Court to reconsider.

FACTUAL BACKGROUND

The facts are relatively straightforward. The University of Washington’s Allen School (the “University”) invited faculty to include a Native American land acknowledgment on their syllabi. Professor Reges, who was teaching an introductory computer science course, included what he claims was a parody of the University’s sample acknowledgment (the “Statement”) on his syllabus.⁴ A number of teaching assistants, staff, and students responded with outrage, accusing Professor Reges’ Statement of creating a toxic school environment. Many of them spoke and

⁴ The text of the Statement read: “I acknowledge that by the labor theory of property the Coast Salish people can claim historical ownership of almost none of the land currently occupied by the University of Washington.” 2-ER-321.

Applying the first step of the *Pickering* test, the District Court appropriately found that Professor Reges was speaking on a matter of public concern, which this

[and] interferes with the regular operation of the enterprise.” *Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767, 782 (9th Cir. 2022).

Yet this is only the beginning of a court’s inquiry. The decision in *Dodge*, a case involving a middle school teacher who wore a MAGA hat to teacher trainings, is helpful here. In *Dodge*, this Court did not stop in its acknowledgement that disruption may be a valid state interest. Instead, it noted that these interests did *not* justify suppression of speech. *See id.*, 783-84. (finding that “it was patently unreasonable” for the school to suppress a middle school teacher’s speech “to quell what was, in reality, nothing more than the natural effect that disfavored political speech often has on those with different viewpoints.”).

This Court in *Dodge* understood that evaluating disruption must not be done in a vacuum—consideration of the specific facts and circumstances is critical. *See also Rankin v. McPherson*, 483 U.S. 378, 388 (1987). This is even more important in institutions of higher education. As this Court has repeatedly held, concerns of interpersonal harmony and other similar goals are not necessarily relevant in a university setting. In fact, discord and debate are often necessary for scholars, whether faculty, visitors, or students aspiring to scholarship, to effectively perform their duties. *See, e.g., Bauer v. Sampson*, 261 F.3d 775, 785 (9th Cir. 2001) (“Given the nature of academic life, especially at the college level, it was not necessary to enjoy a close working relationship requiring trust and respect...the vigorous

exchange of ideas and resulting tension between an administration and its faculty is as much a part of college life as homecoming and final exams.”) (cleaned up).

While vigorous debate and “resulting tension” *id.*, are essential parts of a university environment worthy of special consideration, so too is the nature of Professor Reges’ speech. When considering the University’s interests in regulating speech to “promote workplace efficiency and avoid workplace disruption,” *Dodge*, 56 F.4th at 781 (cleaned up), courts should carefully consider the particularly high bar set when the speech at issue involves matters of public concern, which “occupies the highest rung of the hierarchy of First Amendment values.” *Allen v. Scribner*, 812 F.2d 426, 430 (9th Cir. 1987); *see also Connick v. Myers*, 461 U.S. 138, 152 (1983) (holding that “a stronger showing may be necessary” if the speech involves matters of public concern).

Land acknowledgments have been the subject of much public debate, both in the larger public sphere and within academia. Some Native American and Alaskan Native scholars and groups, for example, have challenged the utility and widespread adoption of land acknowledgments, questioning if they in fact redress past ills and represent the present-day concern(n)8.3 (e)12.1 (i(y i)8.5 (n)0.5 (f)3.)8.5 (on)8.3 (i)8.5 (l)8..

This debate underscores that the Statement is one that regards an area of public

B. The discomfort caused by Professor Reges' Statement does not

creating another section of the course.^{6 7} The interests in protecting speech regarding matters of public concern should win the day over the speculative impact on the Recruiter's future ability to attract students to the University.

As institutions of higher education, universities are in a unique position to use controversial topics and heightened emotions as teachable moments about free speech and academic freedom. PEN America advocates for a number of different strategies to address complex and controversial issues, such as providing public fora for discussion and debate on the issue of land acknowledgments, creating spaces for students to be in community with one another and to share how difficult speech or experiences impacted them, and specific outreach and engagement with those most impacted.⁹ The University could have also provided information about how it weighs First Amendment protections with controversial or harmful speech and demonstrate how speech that some find harmful or offensive should be an entry point for dialogue, and an opportunity to have more speech and ideas brought into the conversation, not less. Finally, while protecting Professor Reges' free speech rights, the University could also have used its own speech and platforms to state that Professor Reges' Statement does not reflect its values, nor how it wishes to treat its community.

Defending academic freedom will often require defending speech that some find offensive, as well as making an investment in creating alternative ways of addressing and repairing harm that do not involve censorship. This is such a time.

⁹See PEN America, "Our Principles," *Campus Free Speech Guide*, <https://campusfreespeechguide.pen.org/pen-principles/>.

III. Upholding the District Court’s *Pickering* Analysis Would have Disastrous Consequences for Academic Freedom.

Academic freedom is under attack. This Court is one of many across the country grappling with questions of faculty free speech and state censorship. These controversies arise at the same time as censorship is more generally on the rise, particularly in public education. It is undeniable—and deeply challenging for universities—that these controversies often involve real and deeply felt offense and discomfort, and universities have struggled to respond to those reactions while upholding First Amendment principles.

The erosion of academic freedom is evidenced by the many university art exhibitions canceled due to offense taken over issues of religion,¹¹ DEI,¹² or the political views of the artist.¹³ Recently, the failure in higher education to appropriately and productively address faculty and student speech amid the heightened tensions surrounding the Israel-Palestine conflict have led many universities to turn to censorship, often in deference to heightened offense and

scaffold the pillars of the First Amendment – particularly where, as here, it is brought to bear on protected speech of public concern.

CONCLUSION

For the foregoing reasons, PEN America urges the Court to reverse the District Court’s decision.

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Respectfully submitted,

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