

# **Academic Freedom and Public-Employee Speech Rights**

**Institute for Academic Leadership**

**Department Chairs Workshop**

**October 6, 2024**

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# Roadmap

- **Conceptions of Academic Freedom**
- **Flaws with Academic Freedom as a Legal Right**
- **Public-Employee Speech Rights**
- **Recent Faculty Cases at Public Universities**

# Academic Freedom

**Professional  
Norm**

**v.**

**Legal  
Right**

- **AAUP Statements**

- **Judicial Opinions**

- **CBAs (Contracts)**

“the freedom of a teacher or researcher in higher education to investigate and discuss the issues in his or her academic field, and to teach or publish findings without interference from political figures, boards of trustees, donors, or other entities.”

<https://www.aaup.org/programs/academic-freedom/faqs-academic-freedom>



# More from the AAUP

“Academic freedom . . . protects the right of a faculty member to **speak freely** when participating in **institutional governance**, as well as to speak freely as **a citizen.**”

# AAUP's 1940 Statement of Principles on Academic Freedom

“Teachers are entitled to freedom in the **classroom** in discussing **their subject**, but they should be careful not to introduce into their teaching **controversial matter** which has **no relation to their subject.**”

# Legal Perspectives on Academic Freedom

- **Rhetorically Rich, Doctrinally Deficient**
- **First Amendment Right *or* Value?**
- **Institutional Right *or* Individual Right?**

# Rhetorically Rich

Two aging “*subversive persons*” and  
“*loyalty oath*” cases involving  
Profs. Paul Sweezy (Marxist  
economist) & Harry Keyishian  
(English professor)





**Paul Sweezy (L, facing camera)  
& Harry Keyishian (R)**

## *Sweezy v. New Hampshire* (1957)

“The essentiality of freedom in the community of American universities is **almost self-evident**. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth.”

# *Sweezy v. New Hampshire* (1957)

**“To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.”**

# Justice Frankfurter's Concurrence

Four essential freedoms of a university are to determine for itself on academic grounds:

- 1) *who may teach;*
- 2) *what may be taught;*
- 3) *how it shall be taught; and*
- 4) *who may be admitted to study.*

# Good News & Bad News

- + Provides basis for **institutional right** of academic freedom
- Merely a concurring opinion
- Only quoting from a statement from a conference of scholars in South Africa in 1957

# *Keyishian v. Bd. of Regents*

(1967)

“Our Nation is deeply committed to safeguarding **academic freedom**, which is of **transcendent value** to all of us and not merely to the teachers concerned.”

# *Keyishian*

“That freedom is therefore a special concern of the First Amendment, which does **not tolerate** laws that cast a **pall of orthodoxy** over the classroom.”

Robert C. Post  
Former Dean, Yale Law School

*“At present . . . the doctrine of  
academic freedom stands in a state of  
shocking disarray and incoherence.”*



# Two Strands of Legal Doctrines

## I. Academic Freedom

- “special concern” of the First Amendment
- “constitutional value” + “transcendent value”
- “restrained judicial review” of decisions

## II. Freedom of Speech

- Public Institution v. Private Institution
- Professors & Public-Employee Speech Rights
- Speaking Inside the Classroom
- Speaking Outside the Classroom

# **Public-Employee Speech Rights:** *Pickering/Connick/Garcetti* Issues

- 1. Speaking as a:  
Private Citizen *or* Pursuant to Job Duties?\***
  - 2. Speaking about a matter of:  
Private Concern *or* Public Concern?**
  - 3. Balance Interests Depending on Answers to 1 & 2**
- \*Academic Freedom Exception/Carveout to No. 1?**

# Private Citizen / Public Concern

## When A Public Employee Is Most Protected

“So long as employees are **speaking as citizens** about **matters of public concern**, they must face only those speech restrictions that are necessary for their employers to operate **efficiently** and **effectively.**” *Garcetti v. Ceballos* (2006)

# Matters of Public Concern

- Speech that can “be **fairly considered** as relating to any matter of political, social, or **other concern** to the community”
- OR**
- is “subject of **legitimate news interest**; that is, a subject of general interest and of value and concern to the public.”

# *Garcetti v. Ceballos* (2006)

## Bad News:

“[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”

# *Garcetti*

**“Restricting speech that owes its existence to a public employee’s **professional responsibilities** does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.”**

*Garcetti*

**BUT the Good News for Profs:**

**The Court said it was NOT addressing how  
this principle applies in higher education  
in the context of teaching and scholarship.**

# *Garcetti*

“There is some argument that expression related to academic scholarship OR classroom instruction implicates **additional constitutional interests** that are not fully accounted for by this Court’s customary employee-speech jurisprudence.”



# *Garcetti*

“We need not . . . decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship OR teaching.”

# *What Have Lower Courts Said After Garcetti?*

**Good News for Profs:** Four federal appellate courts have held that *Garcetti's* rule does **NOT** apply to classroom teaching and academic writing at **public universities** (4th, 5th, 6th & 9th Circuits). Professors possess **qualified** First Amendment speech rights in these two specific contexts. Amounts to an academic freedom exception/carveout.

# Recent Public University Cases

*1. Gruber v. Tenn. Tech. Bd. of Trustees*

**(6th Cir. 2024)**

*2. Reges v. Cauce*

**(W.D. Wash. 2024)**

# Recent Public University Cases

3. *Porter v. Board of Trustees North Carolina State University*  
(4th Cir. 2023)
4. *Meriwether v. Hartop*  
(6th Cir. 2021)

# *Gruber v. Tennessee Tech.* (2024)

## Protagonist Professorial Plaintiffs

Julia Gruber & Andrew Smith



**HOLLER HOUR**

**TODAY AT 2 PM CT**

**DM US ON FB OR TWITTER AND WE WILL LET YOU HOLLER AT US!**

Prof. Andrew Smith

Dr. Julia Gruber

TN Tech Professors speak out about them being disciplined for anti-racist activism

© Facebook

Twitter, Facebook, YouTube icons

# *Gruber v. Tennessee Tech.* (2024)

## Target of Plaintiffs' Ire

**Professor Andrew “AJ” Donadio**



# *Gruber v. Tennessee Tech.* (2024)

## **What Did Gruber & Smith Do?**

- **Distributed flyers on campus**
- **Label Donadio a “racist college professor”**
- **Label Turning Point USA a “hate group” for “racist students”**



*Gruber v.  
Tennessee  
Tech.*  
(2024)

This racist college professor thought it would be a great idea to help start a Tennessee Tech chapter for this national hate group, where racist students can unite to harass, threaten, intimidate, and terrorize persons of color, feminists, liberals, and the like, especially their teachers. Their organization created a national "Professor Watchlist" to harass and intimidate progressive educators, including many women, African-American, and Muslim professors.



**Professor Donadio and Turning Point USA. You are on our list.  
Your hate & hypocrisy are not welcome at Tennessee Tech.**

**No Unity With Racists.  
Hate Speech Is Not Free Speech.**



# *Gruber v. Tennessee Tech.* (2024)

**“This racist college professor thought it would be a great idea to help start a Tennessee Tech chapter for this national hate group, where racist students can unite to harass, threaten, intimidate, and terrorize persons of color, feminists, liberals, and the like,**

# *Gruber v. Tennessee Tech.* (2024)

**especially their teachers. Their organization created a national ‘Professor Watchlist’ to harass and intimidate progressive educators, including many women, African-American, and Muslim professors.”**

# *Gruber v. Tennessee Tech.* (2024)

## **Gruber & Smith Are Disciplined**

**Violated policy re: “conduct[ing] themselves fairly, honestly, in good faith, and in accordance with the highest ethical and professional standards” and having “respect for all faculty, staff, students and the general public.”**

# *Gruber v. Tennessee Tech.* (2024)

Violated “**Free Speech on Campus**” policy providing that “free exchange of ideas is not to be suppressed because the ideas put forth are thought by some or even most members of Tennessee Tech’s community to be offensive, unwise, immoral, indecent, disagreeable, conservative, liberal, traditional, radical, or wrong-headed.”

# *Gruber v. Tennessee Tech.* (2024)

## **Punishment/Discipline**

- **cannot advise student organizations**
- **cannot participate in study abroad activities**
- **ineligible for non-instructional faculty assignments**
- **ineligible for salary increases for a year**

# *Gruber v. Tennessee Tech.* (2024)

## **Gruber & Smith File Lawsuit**

### **First Amendment Retaliation Claim**

- 1) Engaged in protected speech**
- 2) Suffered adverse employment action**
- 3) Protected speech was a substantial or motivating factor for the adverse employment action**

# *Gruber v. Tennessee Tech.* (2024)

## Was the Flyer Protected Speech?

**NO**: Although about a matter of public concern and not made pursuant to job duties, the *Pickering* balance step weighed against protecting it.

# *Gruber v. Tennessee Tech.* (2024)

## *Pickering* Balancing Analysis

“The plaintiffs’ distribution of the flyers was not protected speech because their speech interest was outweighed by TTU’s interest in preventing a disruption to its pedagogical and collegial environment.”



# *Gruber v. Tennessee Tech.* (2024)

## *Pickering* Balancing Analysis

“The balancing test considers the manner, time, and place of the expressive action, and the pertinent considerations include whether the action:

- (1) Impairs **discipline** by superiors OR **harmony** among coworkers;
- (2) Negatively affects **close working relationships** for which personal loyalty and confidence are **necessary**;

# *Gruber v. Tennessee Tech.* (2024)

## *Pickering* Balancing Analysis

- (3) Impedes performance of the **speaker's duties**  
OR interferes with the **employer's regular operations**; and
- (4) Undermines the **employer's mission.**

# *Gruber v. Tennessee Tech.* (2024)

## *Pickering* Balancing Analysis

### Manner and Time of the Speech

- decreased its expressive value
- increased university's operational interests

# *Gruber v. Tennessee Tech.* (2024)

## *Pickering* Balancing Analysis

“Plaintiffs did not speak in the classroom or through scholarship, where professors’ rights to academic freedom and freedom of expression are paramount.”

# *Gruber v. Tennessee Tech.* (2024)

## *Pickering* Balancing Analysis

“The plaintiffs posted flyers in **an academic building** at **a time** they knew students would be on campus for class and posted an additional flyer the next day. Those flyers were highly likely to cause disruption, and they did so in several ways.”

# *Gruber v. Tennessee Tech.* (2024)

## *Pickering* Balancing Analysis

“The dissemination of ‘disrespectful, demeaning, insulting, and rude’ messages **targeting a colleague and students**—regardless of whether some accusations may have had basis in fact—to the **entire university community** undoubtably threatened to **disrupt** TTU’s **learning environment** and **academic mission**.”

# *Gruber v. Tennessee Tech.* (2024)

## *Pickering* Balancing Analysis

“Flyers that publicly attack a colleague as racist and threaten that the colleague is on the anonymous author’s ‘list’ certainly ‘impairs . . . harmony among co-workers.”

# *Gruber v. Tennessee Tech.* (2024)

## *Pickering* Balancing Analysis

“Universities have an interest in maintaining a ‘hostile-free learning environment.’”



# *Gruber v. Tennessee Tech.* (2024)

## *Pickering* Balancing Analysis

“By **attacking students**, the flyers threatened the core of TTU’s **educational ‘mission’** and undermined the plaintiffs’ ability to perform **their teaching ‘duties.’** . . .

The flyers insinuated that, like Donadio, all students who were members of Turning Point USA were racist.”

# *Gruber v. Tennessee Tech.* (2024)

## *Pickering* Balancing Analysis

“The accusations **affected the plaintiffs’ effectiveness in the classroom.** Students in [Turning Point USA] or those considering joining [it] who were taking courses with Gruber and Smith might **reasonably fear the potential treatment** they would receive in class due to differing political views.”

# *Gruber v. Tennessee Tech.* (2024)

## *Pickering* Balancing Analysis

“Most basically, TTU has ‘an interest in fostering a collegial educational environment.’ . . . Permitting professors to circulate flyers with personal attacks on colleagues and students undoubtedly undermines that interest.”

# *Gruber v. Tennessee Tech.* (2024)

## *Pickering* Balancing Analysis

### Place of the Speech

- undermines the plaintiffs’  
“interests even further”

# *Gruber v. Tennessee Tech.* (2024)

## *Pickering* Balancing Analysis

“Even if they did not undertake this speech pursuant to their official duties . . . they also did not engage in it away from campus as private citizens. Rather than make their claims on their personal Facebook pages or in a local newspaper, they chose to use TTU’s own property as the billboard for their speech.”

# *Gruber v. Tennessee Tech.* (2024)

## *Pickering* Balancing Analysis

“Public employers have greater interest in regulating speech ‘at the office’ (or here on campus) than they do away from the public employers’ property. Indeed, the conclusion that the First Amendment protected the plaintiffs’ speech would mean that TTU remained powerless to remove the flyers off of its property.”

# *Gruber v. Tennessee Tech.* (2024)

## **Bottom Line Conclusion**

“The flyers, which attacked a professor and student organization and stated that they were not welcome on campus, created a reasonable threat of disrupting TTU’s academic mission and is the type of speech that a learning institution has a strong interest in preventing.”

*Reges v.  
Cauce  
(2024)*

**Protagonist  
Professorial  
Plaintiff**

**Stuart Reges**

**Teaching Professor  
Paul G. Allen School of  
Computer Science &  
Engineering  
University of Washington**





# *Reges v. Cauce* (2024)

## Target of Plaintiff's Ire

UW Allen School's Suggested Syllabus

“Indigenous Land Acknowledgment Statement”

# *Reges v. Cauce* (2024)

## Suggested (“Best Practices”) Syllabus “Indigenous Land Acknowledgment Statement”

**“The University of Washington acknowledges the Coast Salish peoples of this land, the land which touches the shared waters of all tribes and bands within the Suquamish, Tulalip and Muckleshoot nations.”**

# *Reges v. Cauce* (2024)

Statement Reges Includes in Syllabus  
(required course for some majors)

**“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.”**

# *Reges v. Cauce* (2024)

## Reaction to Syllabus Statement

**“Students, faculty, staff, and teaching assistants contacted UW administrators. . . The Allen School’s recruiter for diversity and access . . . expressed concern to Defendant Balazinska\* that Plaintiff’s statement undermined their function within the Allen School.”**

**\* Balanzinska: Director of the Allen School**

# *Reges v. Cauce* (2024)

## Reaction to Syllabus Statement

**“On the first day of class, a student in the course submitted an official complaint, expressing that they felt ‘intimidated’ and ‘already do not feel welcome in this class, nor do I feel like I will be supported and led to be successful in this required course for my major.’”**

# *Reges v. Cauce* (2024)

## Reaction to Syllabus Statement

**The next day, “six students representing the DEI Student Committee emailed . . . the school’s assistant director for DEI . . . [and] said that Plaintiff’s statement ‘clearly contradicts the Allen School’s promise for creating an inclusive environment.’”**

# *Reges v. Cauce* (2024)

## Reaction to Syllabus Statement

**“I am native, queer, female-presenting individual, and let me tell you this whole incident has made me feel so directly despised and unsafe that I’m certain if I hadn’t transferred in I wouldn’t be at the Paul Allen school right now, and I hate that.”**

# *Reges v. Cauce* (2024)

## Reaction to Syllabus Statement

**“Multiple Native American students expressed feelings of being targeted by the statement, and one felt compelled to drop out of UW.”**



# *Reges v. Cauce* (2024)

## **Reaction to Syllabus Statement**

**Union representing Allen School TAs files a complaint, alleging statement violates an antidiscrimination provision in the CBA.**

# *Reges v. Cauce* (2024)

## **Response for Administration**

- **Created alternative section with different instructor**
- **About 170 of about 500 students transfer to it (despite the alternative section meeting at 8:00 am)**
- **After formal investigation, Reges warned that if he includes his statement in the future, it will be treated as an intentional violation of UW faculty code.**
- **Reges intends to includes his statement again**

# *Reges v. Cauce* (2024)

## **Reges Files Lawsuit**

### **First Amendment Retaliation Claim**

- 1) Engaged in protected speech**
- 2) Suffered adverse employment action**
- 3) Speech was a substantial or motivating factor for the adverse employment action**

# *Reges v. Cauce* (2024)

- **Cauce: UW President Ana Mari Cauce**
- **Ninth Circuit recognizes academic freedom exception/  
carveout from *Garcetti***
- **Syllabus statement relates to classroom teaching**
- **Questions then become . . .**

# *Reges v. Cauce* (2024)

1) Is speech about a **matter of public concern**?

2) Does the **interest of UW** in promoting the efficiency of the public services it performs through its employees outweigh **Reges's interest** in commenting upon matters of public concern?

# *Reges v. Cauce* (2024)

## A Matter of Public Concern?

**YES**: Reges says he “presents a view on a social and political issue, a matter of public concern at UW and beyond: indigenous land acknowledgments and their meaning, purpose, appropriateness, effectiveness, or utility.” UW doesn’t dispute, and court agrees with Reges.

# *Reges v. Cauce* (2024)

## *Pickering* Balancing Analysis

- “fact-sensitive” analysis
- burden on govt (UW) to show its interests outweigh employee’s First Amendment interests
- disruption may be a valid governmental interest
- must be able to reasonably predict disruptions

# *Reges v. Cauce* (2024)

## *Pickering* Balancing Analysis

“While offense alone does not amount to a legitimate interest to justify limiting speech, mitigating interference with students’ studies and ability to learn can be such an interest.”



# *Reges v. Cauce* (2024)

## *Pickering* Balancing Analysis

“Promoting workplace efficiency and avoiding workplace disruption is a valid government interest that can justify speech restrictions.”

# *Reges v. Cauce* (2024)

## *Pickering* Balancing Analysis

“When a speaker’s statement impedes the performance of the speaker’s duties OR interferes with the regular operation of the enterprise, the court may restrict said speech.”

# *Reges v. Cauce* (2024)

## **Bottom Line Conclusion**

**“Here, the balance tips in favor of Defendants.”**

# *Reges v. Cauce* (2024)

## **Disruptions to:**

1. **Staff Functions**: Recruiter for Diversity and Access; harms in recruiting of “native students” (long a goal to increase recruitment of that group at UW and Allen School).

# *Reges v. Cauce* (2024)

## **Disruptions to:**

2. Teaching Assistants: Union expressed concerns from teaching assistants who no longer felt comfortable mentioning their own views on topics related to land acknowledgements and DEI, for fear of retaliation from Stuart Reges.

# *Reges v. Cauce* (2024)

## **Disruptions to:**

3. Students & UW Community: Complaints from students described earlier; 170 of 500 students switched to an 8:00 section; administrators received reports of students, including Native students, feeling “unwelcome” and “intimidated” in the course, feeling “despised,” feeling “targeted,” with one dropping out.

# *Reges v. Cauce* (2024)

## **Time, Place and Manner of Speech**

- **Syllabus for an introductory class that is mandatory for some majors.**
- **UW allowed him to post his statement next to his office door and in the signature block of his email.**

# *Reges v. Cauce* (2024)

## **Court's Conclusion**

**“The evidence here indicates actual and reasonably anticipated disruption of staff functions, teaching assistant cohesiveness, and students’ learning environment resulting from Plaintiff’s own acknowledgment statement in the syllabus.”**



# *Reges v. Cauce* (2024)

## **Court's Conclusion**

**The evidence “indicates that the statement interfered with the performance of Plaintiff’s duties as an instructor. Because promoting workplace efficiency and avoiding workplace disruption is a valid government interest that can justify speech restrictions . . . the Court concludes**

# *Reges v. Cauce* (2024)

## **Court's Conclusion**

**Defendants' interests in mitigating disruption outweighs Plaintiff's interest here."**

**Court grants UW defendants' motion for summary judgment against Reges's First Amendment retaliation complaint.**

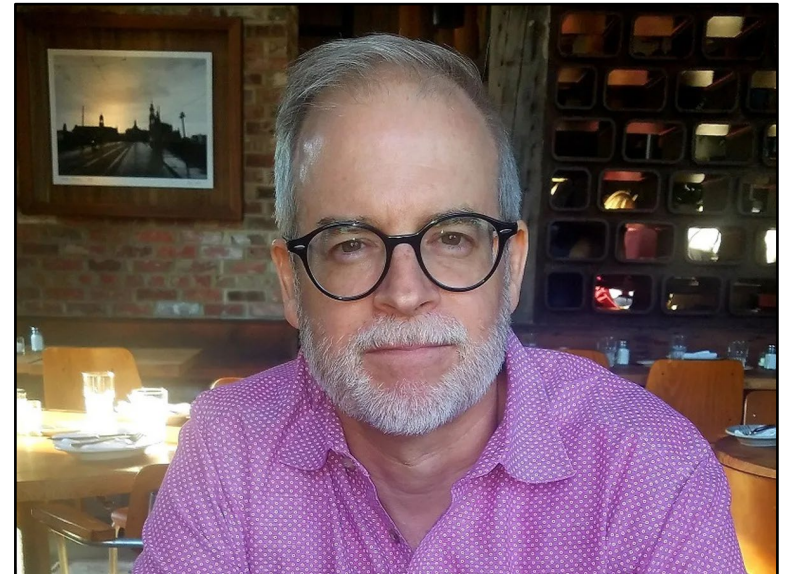
*Porter v.  
Board of  
Trustees  
N.C. State  
University  
(2023)*

**Protagonist  
Professorial  
Plaintiff**

**Stephen Porter**

**Tenured Professor of  
Higher Education**

**College of Education  
North Carolina State**



# *Porter v. Bd. Tr. N.C. State Univ.* (2023)

- **U.S. Court of Appeals for 4th Circuit (2023)**
- **First Amendment Retaliation Claim**
- **2–1 Ruling Against Prof. Stephen Porter**
- **Majority Dismisses His First Amend. Claims**
- **Involves a Public-Employee Speech Analysis**
- **U.S. Supreme Court Declines to Review (2024)**

# Gist of Porter's Claim

**Removed from home program because he criticized higher ed's increasing emphasis on "social justice" and "highly dogmatic" view of DEI while abandoning "rigorous methodological analysis."**

# Three Speech Incidents

- **Department Meeting** (Spring 2016)
- **Email to Colleagues** (April 2018)
- **Personal Blog Post** (Sept. 2018)

# 1. Department Meeting

## Survey Question Incident

- Proposal to add a **diversity question** to student course evaluations
- Porter questions colleague who proposed it about the **question's validity and reliability**

# Department Meeting

**Porter thought that “in response to social pressure, the department was rushing to include a question that had not been properly designed” and would not yield useful information.**



# Department Meeting

- Porter's comments reported to NC State's Office for Institutional Equity & Diversity
- OIED issues a report labeling Porter a "bully"
- Dept head emails Porter re: his "bullying," places her email in his personnel file

## **2. Email to Colleagues**

### **Inside Higher Ed Article Incident**

**Porter emails a link to an article criticizing another faculty member in his department re: conducting a faculty search.**

# Article Headline

## Questions About Job Candidate's Past

Anonymous faculty members at NC State object to candidate for professorship who was ousted from a prior position at Ohio State over financial misconduct and other concerns.

# Part of the Article

In March, faculty members at North Carolina State and elsewhere began to agitate -- quietly, denying immediate interview requests -- at the news that Strayhorn was being considered for a professorship on that campus. In so doing, they circulated an internal email from Alyssa N. Rockenbach, professor of higher education, announcing that Strayhorn was one of three candidates for an open associate professorship in the College of Education and would soon be speaking on campus.

# Porter's Email to Colleagues:

*“Did you all see this? . . . This kind of  
publicity will make sure we rocket to  
number 1 in the rankings. Keep up the  
good work, Alyssa!”*

# Email to Colleagues

Porter thought Alyssa Rockenbach “cut corners” in “vetting” the candidate because she wanted “to hire a Black scholar whose work focused on racial issues.”

# 3. Personal Blog Post

## Woke Joke Blog Post Incident

*“ASHE Has Become a Woke Joke”*

Association for the Study of Higher Education

# Personal Blog Post

**Email contended that an ASHE conference's focus shifted from general post-secondary research to social justice.**



# Personal Blog Post

*“I prefer conferences where 1) the attendees and presenters are smarter than me and 2) I constantly learn new things. That’s why I stopped attending ASHE several years ago.”*

# Personal Blog Post

- **Immediate stir online**
- **ASHE president addressed it in her conference keynote**

# Personal Blog Post

- **Zoom Faculty Meeting 5 Weeks Later**
- **Called by Department Head**
- **Meeting Ostensibly About Hiring a New Prof**
- **But Dept Head Shifted Focus to Porter**
- **Suggested He Leave Higher Ed Prog. Area**

# Porter's Comment at Meeting

*“Give me a fucking break folks. I was the one who said [the new professor] should come. And now I’m the bad guy because I don’t want to leave Higher Ed for a non-existent program area.”*

# Fallout

- **Dept Head Letter: Chastises Porter's Profanity**
- **Dept Head Second Letter (Nov. 2018):  
Criticizes Porter's Lack of "Collegiality"**
- **Second Letter: Promises to Remove Porter  
from HEPA Unless He "Repair[ed] the  
Relationships Among Faculty."**

# Fallout

- **Dept Head Email (Nov. 2018):**

**Wanted Porter to participate in a  
“community conversation about  
ASHE” blog post.**

# Fallout

- **Dept Head met with Porter in Feb. 2019, expressed frustration that Porter had not proactively addressed student and faculty concerns about what happened at ASHE.**
- **Dept Head removed Porter from his program area in July 2019**

# Fallout

- **Almost totally excluded from prior Ph.D.-related activities.**
- **Recruiting new doctoral advisees became nearly impossible.**
- **Tenure jeopardized because advising doctoral candidates is a key job description.**



# The Lawsuit

## First Amendment Retaliation Claim

**Porter suffered adverse job consequences for exercising protected speech rights.**

# Court's Analysis

Both the majority (two Obama nominees) and the dissent (a Trump nominee) applied a **public-employee speech analysis**, accounting for *Garcetti's* possible “academic freedom” exception for speech relating to scholarship and teaching. They reached **opposite conclusions**.

# Public-Employee Speech Framework (a Mini Review!)

1. Was Porter speaking as a:

**Private Citizen *or* Pursuant to Job Duties?\***

2. Was Porter speaking about a matter of:

**Private Concern *or* Public Concern?**

3. Balance Interests Depending on Answers to 1 & 2

**\*Academic Freedom Exception to No. 1?**

# Majority's Analysis

## Dept Meeting & Email to Colleagues:

- **NOT protected by First Amendment**
- **Made pursuant to job duties: “wholly internal communications”**
- ***Garcetti* exception doesn't apply because NOT products of Porter's teaching or scholarship**

# Majority's Analysis

Email Linking to Article + Sarcastic Comment

“it was an **unprofessional attack** on one of [Porter's] colleagues, sent only to other faculty members within the Department. And it plainly was unrelated to [Porter's] teaching or scholarship.”

# Majority's Analysis

## Personal Blog Post: ASHE "Woke Joke"

- Assumes for sake of argument that it is protected speech (i.e., private capacity about a matter of public concern)
- BUT Porter fails to show his post was causally connected to his removal from home program

# Majority's Analysis

- **Temporal Proximity Lacking:** 10 months between post and removal from Higher Ed Program Area is too much time to prove cause.
- **Post was NOT the “But For” Cause of Removal:** Was removed for “ongoing lack of collegiality,” citing Porter’s being labeled a “bully” by Office for Institutional Equity & Diversity

# Dissement's Analysis

All Three Incidents  
Involved Protected Speech

“Porter was . . . speaking as **a citizen on a matter of public concern**. And—based on his complaint’s allegations—it is **plausible** that the University retaliated against him because of it.”



# Dissement's Analysis

## Woke Joke Blog Post

**“Writing a post in your own time, on your personal blog, is speaking as a citizen rather than pursuant to your official duties as an employee.”**

# Dissement's Analysis

## Woke Joke Blog Post

“[T]he blog post’s subject was doubtless a **matter of public concern**. After all, Porter alleged that the blog post **generated controversy** on Twitter, at the conference that it criticized, and at the University itself.”

# Dissement's Analysis

**Faculty Meeting Comments  
Re: Diversity Survey Question**

**Dissenting judge considers “whether the speech at issue is itself ordinarily within the scope of an employee’s duties.”**

# Dissement's Analysis

## Faculty Meeting Comments Re: Diversity Survey Question

“Reading Porter’s complaint in the light most favorable to him—as we are required to do at this stage—it is *plausible* that he had **no official responsibility to lodge his objection. . .** [H]e was speaking as a citizen, not as an employee.”

# Dissement's Analysis

## Faculty Meeting Comments Re: Diversity Survey Question

“Unquestionably there has been a growing, and wide-ranging, **public debate** about how colleges ought to emphasize **diversity, equity, and inclusion.**”

# Dissement's Analysis

Email to Colleagues:

Inside Higher Ed Article + Sarcasm

“[T]here are **no grounds** to think that he had a **duty** to send this email; the very notion strains credulity. So, as with the faculty-meeting comment, he sent his email in his **capacity as a citizen, not as an employee.**”

# Dissemination's Analysis

Email to Colleagues:

Inside Higher Ed Article + Sarcasm

“[T]he very fact that the topic of Porter’s speech was the **subject of a news article** may alone render it a **matter of public concern**—after all, what media company would publish a news article about something that wasn’t newsworthy?”

# Dissement's Analysis

**Email to Colleagues:  
Inside Higher Ed Article + Sarcasm**

**“[N]ews that the University almost hired someone who faced these serious allegations would alone interest the public.”**



# Dissent's Analysis

- So . . . Dissent concludes **all three statements** were made in a **private citizen** capacity about matters of **public concern**.
- Then addresses **causation**: whether Porter had pled facts indicating he was removed from his program **because of** his protected speech.

# Dissement's Analysis

Porter “**easily satisfies** the causation requirement, since—according to his complaint—[his Dept Head] explicitly mentioned both his faculty-meeting comment and his faculty-hiring email **in her November letter** threatening to remove him.”

# Dissent's Analysis

“But for his blog post, [the Dept Head] would not have asked Porter to hold a ‘community conversation,’ and but for his hesitation to do so, she would not have removed him from his program area. That’s **but-for cause**, even with the blog post standing alone.”

# Dissent's Analysis

## Dissent Moves on to the Balancing-of-Interests Phase of the Analysis

Porter's First Amendment interest in speaking out (and the public's interest in hearing his views) vs. NC State's interest in efficiently and effectively providing its services to the public.

# Dissement's Analysis

## Rules for Porter's Interests at this Early Stage

- “[D]ispute and disagreement are integral, not antithetical, to a university’s mission”
- “[O]ccasional discord or even outright hostility among a few professors does not itself establish a strong governmental interest.”

# Disseent's Analysis

“[T]he university setting forms the stage on which we perform this balancing. And, at the university, the **scales are tipped in favor of more speech**: ‘Our Nation is deeply committed to safeguarding academic freedom.’” (*Keyishian v. Bd. of Reg.*, 1967)

**Reaction  
of the  
Foundation  
for Individ.  
Rights and  
Expression  
(FIRE)**

In hit to academic freedom, Fourth Circuit holds public universities can punish faculty for ‘lack of collegiality’

The troubling decision says faculty speech about institutional governance doesn’t get First Amendment protection, giving public universities broad power to oust faculty whistleblowers, dissenters.

# *Meriwether v. Hartop* (2021)

**Professor at Shawnee State University  
in Ohio who refuses to follow university  
policy requiring professors to address  
students by their preferred pronouns.**



# Nicholas Meriwether

**Title:** Professor  
**Area:** Philosophy  
**Office Location:** MAS  
407  
**Phone:** (740) 351-3447  
nmeriwether@shawnee.  
edu



# *Meriwether's Claim*

**First Amendment *right not to speak***  
**claim in the classroom (a right *not to be***  
***compelled by the government* to speak**  
**personally disagreeable messages).**

# **Similar Right Not to Speak Claim: *303 Creative v. Elenis***

**Supreme Court ruled 6-3 in 2023 that the First Amendment right against government-compelled expression protected Lorie Smith from having to create a wedding website for a same-sex couple (in the face of an anti-discrimination public accommodations law).**

# Threshold Issue

**Because Meriwether is teaching a class pursuant to his official job duties, the threshold issue becomes “whether the rule announced in *Garcetti* bars Meriwether’s free-speech claim. It does not.”**

# *Unanimous Ruling for Meriwether*

- **3–0 Ruling**
- **2 Trump Nominees to 6th Circuit**
- **1 Bush (43) Nominee to 6th Circuit**

**Opinion by Judge Amul Thapar (Trump's first federal appellate court nominee and second judicial nominee after Neil Gorsuch)**

# *Unanimous Decision in Favor of Meriwether*

**“Simply put, professors at public universities retain First Amendment protections, at least when engaged in core academic functions, such as teaching and scholarship.”**

# *Meriwether Opinion*

**“If professors lacked free-speech protections when teaching, a university would wield alarming power to compel ideological conformity.”**

# *Meriwether Opinion*

So . . . the Sixth Circuit recognizes *Garcetti's* “academic freedom” exception from the general rule that public-employees have no First Amendment speech rights when speaking pursuant to their official job duties.



# *Meriwether Opinion*

The next question then became whether the speech in question was about a matter of **private or public concern.**

# *Meriwether Opinion*

“The use of gender-specific titles and pronouns has produced a **passionate political and social debate**. All this points to one conclusion: Pronouns can and do convey a powerful message implicating a sensitive **topic of public concern**.”

# *Meriwether Opinion*

*“In short, when Meriwether waded into the pronoun debate, he waded into a matter of public concern.”*

# *Meriwether Opinion*

**Moving to the balancing-of-the-interests**

**step of the public-employee speech**

**analysis, the Sixth Circuit concluded the**

**“balance favors Meriwether.”**

# *Meriwether's Interests*

The “**robust tradition**” of **academic freedom** “alone offers a strong reason to protect Professor Meriwether’s speech.”

# *Meriwether's Interests*

“The First Amendment interests are **especially strong** here because

Meriwether's speech also relates to his **core religious and philosophical beliefs.**”

# *Shawnee State's Interests*

- **“comparatively weak”**
- **It had rejected Meriwether's proposed compromise of calling on student by her last name only**

# *Shawnee State's Interests*

**“no suggestion that Meriwether’s speech inhibited his duties in the classroom, hampered the operation of the school, or denied Doe any educational benefits.”**



# Conclusion

**“In sum, ‘the Founders of this Nation . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.’ Shawnee State allegedly flouted that core principle of the First Amendment. . . . we hold that the university violated Meriwether’s free-speech rights.”**

EDUCATION

# A university pays \$400K to professor who refused to use a student's pronouns

April 20, 2022 · 5:30 AM ET



Jonathan Franklin

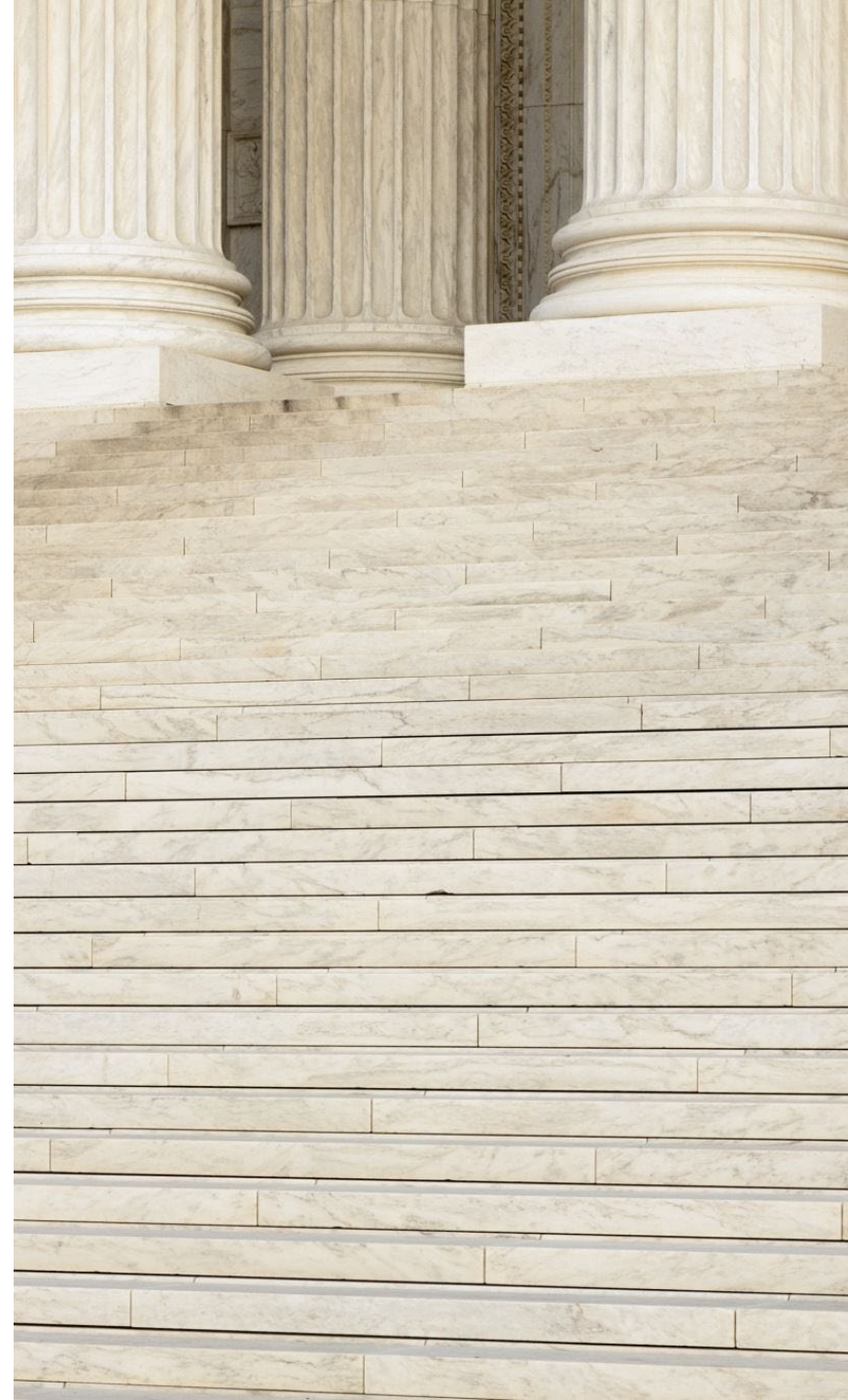


Shawnee State University in southern Ohio has agreed to pay philosophy professor Nick Meriwether \$400,000 after disciplining him for not using a transgender student's pronouns.

*Alliance Defending Freedom*

# A Penultimate Question

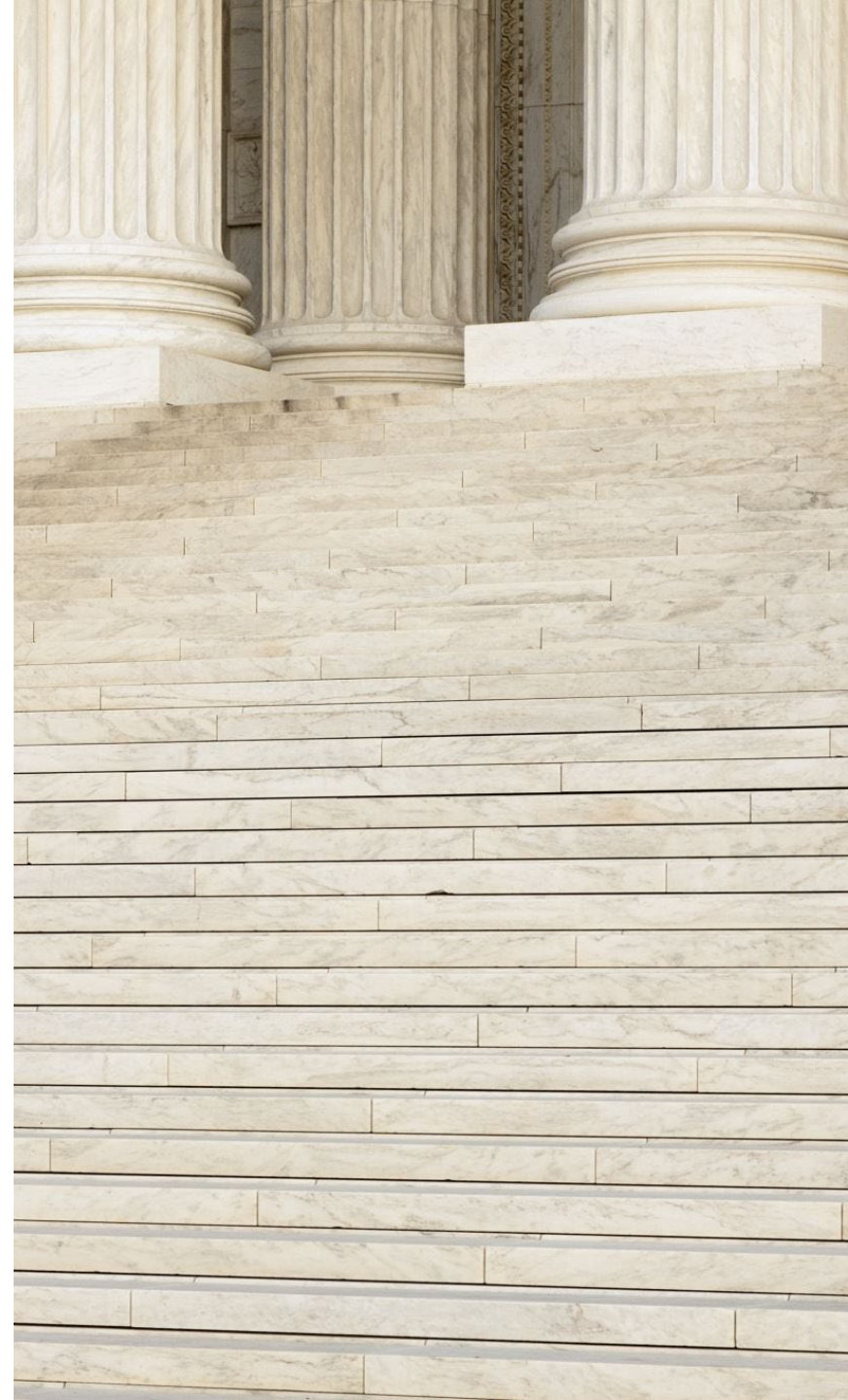
**Had the two  
Obama nominees  
who ruled  
against Stephen  
Porter in his case  
against NC State  
also been the  
judges who  
heard Nicholas  
Meriwether's  
case against  
Shawnee State,  
would the  
outcome have  
been different for  
Meriwether?**





# A Final Question

**Had the three Republican nominees who ruled in favor of Nicholas Meriwether against Shawnee State also been the judges who heard Stephen Porter's case against NC State, would the outcome have been different for Porter?**



**Thank You**

# Clay Calvert

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