

HIGHER EDUCATION INFORMATION MEMO

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The De-Evolution of Post-Garcetti Public Employee Speech Regulation in Higher Education

In 2006, the Supreme Court’s decision in *Garcetti v. Ceballos* granted public employers’ broad discretion in regulating their employees’ work-related speech.¹ Before 2006, under the so-called Pickering Connick test, employees who were speaking as citizens about “matters of public concern” were only subject to limited restrictions when the government employer’s interest in effective workplace operations outweighed the employee’s free speech rights.²

In *Garcetti*, the Supreme Court placed an additional requirement to the public employee freedom of speech analysis. The *Garcetti* Court established that, for First Amendment purposes, public employees are not speaking as citizens when they make statements pursuant to their official duties and therefore the First Amendment does not insulate their speech from employer regulation—i.e., public employees must be speaking outside of their professional duties for the speech to be protected.³ However, the *Garcetti* Court explicitly recognized that the new precedent may not adequately address expression related to scholarship or teaching in the higher education setting.⁴ As a predictable result, circuit courts split on whether and how the *Garcetti* rule applies to college and university faculty.

On July 6, 2023, the Fourth Circuit furthered the evolution (or perhaps de-evolution) of the employee free speech doctrine as applied to scholarship and teaching in the higher education setting. In *Porter v. Board of Trustees*,⁵ a 2-1 majority held that a faculty member who had been an outspoken critic of “social justice” in academia—which included his own field of higher education studies—did not engage in protected speech when he challenged colleagues in a departmental meeting and ridiculed them via email. The majority declined to determine whether a blog post that Porter authored was protected speech and instead relied on a determination that it was not a clear cause of any retaliatory action by the university.⁶

Perhaps the most interesting aspect of *Porter* is the majority’s assertion that “this Court has repeatedly recognized, the *Garcetti* rule does not extend to speech by public university faculty members, acting in their official capacity, that is ‘related to scholarship or teaching.’”⁷ Although the court claimed to have “repeatedly recognized” this rejection of the *Garcetti* rule in the higher education context, *Porter* goes beyond more tepid past precedent and for the first time enunciates a two-step analysis to determine whether a state university professor’s statements were protected by the First Amendment.

¹ See *Garcetti v. Ceballos*, 547 U.S. 410, 424 (S. Ct. 2006).

² See *Pickering v. Board of Ed. of Township High School Dist.*, 391 U.S. 563, 568 (S. Ct. 1968); *Connick v. Myers*, 561 U.S. 138, 147 (S. Ct. 1983).

³ See *Garcetti* at 425.

⁴ *Id.*

⁵ *Porter v. Board of Trustees of North Carolina State University*, No. 22-1712, 2023 WL 4359474, at *13-14 (4th Cir. July 6, 2023).

⁶ *Id.*

⁷ *Id.*

In its analysis, the court first examined whether the appellant spoke as a public employee or as a citizen on a matter of public concern.⁸ After determining that the appellant spoke as a public employee, the court then analyzed whether his speech related to scholarship and teaching.⁹ Based on the facts of the case, the court reasoned the appellant's speech was not protected because it was not related to his scholarship or teaching and therefore held that the appellant's speech lacked First Amendment protection.¹⁰ Had the speech been deemed scholarship, the appellant would have likely prevailed.

Prior to *Porter*, the Fourth Circuit had explained it would not extend the principles of *Garcetti* to certain faculty speech, but only utilized the Pickering-Connick analysis to review professors' First Amendment claims.¹¹ The additional step of specifically questioning whether the speech related to scholarship or teaching as articulated in *Porter* establishes a new analysis to protect public employee free-expression rights in the higher education setting.

While *Porter* is only binding precedent in the Fourth Circuit,¹² the case joins other circuit court decisions granting faculty greater free-speech protections when engaged in teaching and scholarship. Notably: The Sixth Circuit held in *Meriwether v. Hartop* that "professors at public universities retain First Amendment protections at least when engaged in core academic functions, such as teaching and scholarship";¹³ the Ninth Circuit held in *Demers v. Austin* that *Garcetti* conflicts with the First Amendment and, "cannot—apply to teaching and academic writing that are performed 'pursuant to the official duties' of a teacher and professor";¹⁴ and the Fifth Circuit recognized in *Buchanan v. Alexander* that the First Amendment may provide additional protection to the speech of public university professors.¹⁵

Previously, these circuit courts¹⁶ ignored *Garcetti* and applied the Pickering-Connick analysis, but the clarity of the standard set in *Porter* may prompt other circuits to adopt a more concrete analysis for speech related to teaching and scholarship in the higher education setting.

If you have any questions about the information provided above, please contact [Seth Gilbertson](#), any attorney in Bond's [higher education practice](#) or the attorney at the firm with whom you are regularly in contact.

8 Id. at *6.

9 Id.

10 Id.

11 See *Adams v. Trustees of the University of N.C.-Wilmington*, 650 F.3d 550, 561 (4th Cir. 2011).

12 The Fourth Circuit encompasses Maryland, Virginia, West Virginia, North Carolina, and South Carolina.

13 *Meriwether v. Hartop*, 992 F.3d 492, 505 (6th Cir. 2021).

14 *Demers v. Austin*, 746 F.3d 402, 4011 (9th Cir. 2014).

15 See generally *Buchanan v. Alexander*, 919 F.3d 847, 852–54 (5th Cir. 2019).

16 Together, these circuit courts oversee many of the largest and most prestigious public universities in the country—e.g., University of Michigan, University of North Carolina, The Ohio State University, University of Virginia, University of Texas, and the University of California System.

