EMPLOYMENT LAW — FREE SPEECH RIGHTS — NINTH CIRCUIT FINDS *GARCETTI* OFFICIAL DUTY RULE INAPPLICABLE TO PROFESSORIAL SPEECH IN PUBLIC-UNIVERSITY CONTEXT. — *Demers v. Austin*, No. 11-35558, 2014 WL 306321 (9th Cir. Jan. 29, 2014).

In 2006, the Supreme Court held in *Garcetti v. Ceballos*[1] that public employees speaking "pursuant to their official duties" do not receive First Amendment protection from employer discipline.[2] Commentators have widely viewed *Garcetti*'s "official duty" rule as severely constraining the First Amendment rights of public employees to speak freely in the workplace.[3] But the *Garcetti* Court explicitly left unanswered the question of *Garcetti*'s applicability in the university context.[4] Recently, in *Demers v. Austin*,[5] the Ninth Circuit ruled that *Garcetti* does not apply to professorial "speech related to scholarship or teaching"[6] because extending the "official duty" rule to the university context would be inconsistent with First Amendment protections for academic freedom.[7] While the panel's reasoning may have merit as applied to classroom teaching and academic scholarship, the Ninth Circuit overzealously extended constitutional protection to internal administrative speech in conflict with both the employment law emphasis on the context of employee speech and the Supreme Court's deferential approach toward institutional academic freedom.

Plaintiff David Demers was a tenured associate professor at Washington State University (WSU) with the Edward R. Murrow College of Communication (Murrow School).[8] In early 2007, while serving on the Murrow School's Structure Committee,[9] Demers distributed a two-page pamphlet entitled "The 7-Step Plan" (the Plan).[10] He presented the Plan first to the Provost and the President of WSU, then "to members of the print and broadcast media in Washington [S]tate, to [other] administrators at WSU, to some of [his] colleagues, to the Murrow

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[1] 547 U.S. 410 (2006).

[2] *Id.* at 421.

[3] *See* Elizabeth Dale, *Employee Speech & Management Rights: A Counterintuitive Reading of* Garcetti v. Ceballos, 29 BERKELEY J. EMP. & LAB. L. 175, 176 & n.3 (2008) (noting courts' and commentators' recognition of *Garcetti* as a constraint on the First Amendment rights of public employees).

[4] *Garcetti*, 547 U.S. at 425.

[5] No. 11-35558, 2014 WL 306321 (9th Cir. Jan. 29, 2014).

[6] *Id.* at *1 (quoting *Garcetti*, 547 U.S. at 425) (internal quotation marks omitted).

[7] *Id.* at *7.

[8] *Id.* at *1. Demers joined the faculty in 1996 and was granted tenure in 1999. *Id.*

[9] The Structure Committee was responsible for considering, among other things, whether the Murrow School should be restructured and its two different faculties separated. *Id.* at *2.

[10] *Id.*

Professional Advisory Board, and [to] others."[11] According to the cover of the Plan, the proposed steps were circulated as a product of Marquette Books LLC, an independent publishing company owned and operated by Demers.[12] The Plan contained "broad proposals to change the direction and focus of the School,"[13] such as separating its two faculties and "giving more prominent roles to faculty members with professional backgrounds."[14] Many of these proposed steps addressed the very issues considered by the Structure Committee.[15] In addition to the Plan, Demers circulated working drafts of portions of a book entitled *The Ivory Tower of Babel*.[16] The book "criticize[d] [WSU] bureaucracies and the internal audit and question[ed] the significance of the social sciences as a force for public policy change."[17] Demers contended that university administrators retaliated against him for circulating the Plan and drafts of *The Ivory Tower of Babel* and argued that his speech should be shielded from retaliatory actions by First Amendment protections of academic freedom.[18] According to Demers, these retaliatory actions adversely affected his compensation and his reputation as an academic.[19]

The district court granted the defendants' motion for summary judgment.[20] Relying on Ninth Circuit precedent, the court focused its analysis on whether Demers was speaking as a private citizen on a matter of public concern.[21] The Ninth Circuit had previously applied

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[11] *Id.* (internal quotation marks omitted). Demers also made the Plan available to the public by posting it on his website. *Id.* at *12.

[12] *Id.* at *2. Demers signed a cover letter accompanying the Plan as publisher for Marquette Books LLC and not in his capacity as an associate professor at WSU. *Id.* However, the district court noted that Demers characterized his work on the Plan as "faculty service" in his 2007 activity report for his annual review by the university. Demers v. Austin, No. CV-09-334-RHW, 2011 WL 2182100, at *4 (E.D. Wash. June 2, 2011).

[13] *Demers*, 2014 WL 306321, at *11.

[14] *Id.* at *2.

[15] *Id.* at *11. As the district court noted, the Plan was developed in the context of an "ongoing faculty debate regarding the future of the journalism/communications studies department." *Demers*, 2011 WL 2182100, at *4.

[16] *Demers*, 2014 WL 306321, at *1. The book was not published until after the retaliatory actions that formed the basis of Demers's complaint. *Id.* at *3. However, university administrators Erica Austin and Frances McSweeney read draft portions of the book in their official capacities. *See id.*

[17] *Demers*, 2011 WL 2182100, at *3.

[18] *Id.* at *1. Demers claimed that "specific acts of retaliation included spying on his classes, preventing him from serving on certain committees, preventing him from teaching basic Communications courses, instigating two internal audits, sending him an official disciplinary warning, and excluding him from heading the journalism sequence at the Murrow School." *Demers*, 2014 WL 306321, at *3.

[19] *Demers*, 2014 WL 306321, at *3.

[20] *Demers*, 2011 WL 2182100, at *5.

[21] *See id.* at *2 (quoting Anthoine v. N. Cent. Cntys. Consortium, 605 F.3d 740, 748 (9th Cir. 2010)).

Garcetti's holding that "the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities."[22] Applying this precedent, the district court found that circulating the Plan within the university community was part of Demers's job responsibilities.[23] Therefore, under the framework established in *Garcetti*, Demers was not entitled to First Amendment protection from his employer's retaliatory actions.[24] The district court also determined that the Plan did not address matters of public concern.[25] Because it dealt with journalism education only at WSU, the Plan was "of no relevance to the public's evaluation of the performance of governmental agencies."[26]

The Ninth Circuit affirmed in part, reversed in part, and remanded.[27] Writing for the panel, Judge Fletcher[28] agreed with the district court's finding that Demers had engaged in speech as a public employee, not a private citizen.[29] Despite Demers's claim that the Plan was prepared through Marquette Books LLC and not the university, the panel determined that his actions fit sufficiently within the "pursuant to [his] official duties" standard articulated in *Garcetti*.[30] However, the panel then decided that *Garcetti* does not apply to teaching or scholarship by state-employed professors.[31] Extending that logic further, the

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[22] Garcetti v. Ceballos, 547 U.S. 410, 424 (2006); *see, e.g.*, Desrochers v. City of San Bernardino, 572 F.3d 703, 718–19 (9th Cir. 2009).

[23] *Demers*, 2011 WL 2182100, at *4. The court reached this conclusion based on its understanding that WSU faculty members' official duties extended beyond classroom instruction and research to also include "a wide range of academic, administrative and personnel functions in accordance with WSU's self-governance principle." *Id.*

[24] *See id.* The district court also rejected Demers's other First Amendment claims pertaining to his vocal support of a prior administrator and request for formal accreditation of the journalism program. *Id.* at *3.

[25] An employee's speech involves matters of public concern when it relates to "any matter of political, social, or other concern to the community." *Id.* at *2 (quoting Huppert v. City of Pittsburg, 574 F.3d 696, 703 (9th Cir. 2009)) (internal quotation mark omitted). Examples of "[s]ubjects of public concern include 'unlawful conduct by a government employee' and the 'misuse of public funds, wastefulness, and inefficiency in managing and operating government entities.'" *Id.* (quoting *Huppert*, 574 F.3d at 704).

[26] *Id.* (quoting Eng v. Cooley, 552 F.3d 1062, 1070 (9th Cir. 2009)); *see also id.* at *3–4. The court disagreed with Demers's assertion that his plan implicated broader concerns about the direction of journalism education in America. *See id.* at *4.

[27] *Demers*, 2014 WL 306321, at *13. The panel denied Demers's petitions for rehearing and rehearing en banc and withdrew an earlier opinion with an identical disposition. *Id.* at *1; *see also* Demers v. Austin, 729 F.3d 1011 (9th Cir. 2013).

[28] Judge Fletcher was joined by Judges Fisher and Quist. Judge Quist was sitting by designation from the United States District Court for the Western District of Michigan.

[29] *Demers*, 2014 WL 306321, at *5.

[30] *Id.* (alteration in original) (quoting Garcetti v. Ceballos, 547 U.S. 410, 421 (2006)) (internal quotation marks omitted). The opinion quickly dismissed the portion of Demers's claim based on *The Ivory Tower of Babel* drafts due to an inadequate showing in the record that those drafts reasonably could have played any role in the alleged retaliatory actions. *Id.* at *9.

[31] *Id.* at *7.

panel adopted the position that "protected academic writing is not confined to scholarship. . . . [A]cademics, in the course of their academic duties, also write memoranda, reports, and other documents addressed to such things as a budget, curriculum, departmental structure, and faculty hiring."[32] Echoing a major concern in Justice Souter's dissent in *Garcetti*,[33] the panel emphasized the importance of protecting academic freedom under the First Amendment and found that it would be inconsistent with the First Amendment to extend *Garcetti* into the university context.[34]

Rather, the court ruled that the two-part test established in *Pickering v. Board of Education*[35] and refined in *Connick v. Myers*[36] provides the appropriate analysis for academic speech cases.[37] First, "the employee must show that his or her speech addressed 'matters of public concern.'"[38] Then, the court must conduct a balancing test to determine whether the interests of the state as an employer outweigh the interests of the employee in commenting on public matters.[39] On this first question, the Ninth Circuit disagreed with the district court and found that Demers's pamphlet necessarily implicated matters of public concern as speech "related to scholarship or teaching"[40] by addressing the future direction and academic focus of the school.[41] After finding that Demers satisfied the first portion of the *Pickering-Connick* inquiry, the panel remanded the case to the district court to balance the interests of the parties involved.[42]

The circuit court opinion relies on its assertion that administrative speech in accordance with responsibilities on a university committee merits First Amendment protections on par with those afforded to core academic speech through classroom teaching and scholarship. However, given the values underlying the First Amendment interest in aca-

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[32] *Id.* at *11.

[33] Justice Souter, worried about the broad and potentially adverse consequences of extending the Court's rationale without exceptions, wrote, "I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to . . . official duties.'" *Garcetti*, 547 U.S. at 438 (Souter, J., dissenting) (alteration in original) (quoting *id.* at 421 (majority opinion)).

[34] *Demers*, 2014 WL 306321, at *7.

[35] 391 U.S. 563 (1968).

[36] 461 U.S. 138 (1983).

[37] *Demers*, 2014 WL 306321, at *7; *see also id.* at *7–8.

[38] *Id.* at *7 (quoting *Pickering*, 391 U.S. at 568).

[39] *Id.*

[40] *Id.* at *9 (quoting Garcetti v. Ceballos, 547 U.S. 410, 425 (2006)) (internal quotation marks omitted).

[41] *Id.* at *11–12.

[42] *Id.* at *12. Additionally, the panel held that the defendants were entitled to qualified immunity from liability for damages — although injunctive relief might still be available — due to the lack of clear circuit precedent on *Garcetti*'s applicability to professorial speech. *Id.* at *12–13.

demic freedom, the panel should have considered differentiating protection for these two types of expression. While a reasonable argument can be made for a narrow *Garcetti* exception for academic teaching and scholarship, the values motivating such an exception may not apply to broader protections inclusive of internal administrative speech that is merely "related to scholarship or teaching." An overinclusive interpretation of what constitutes protected academic speech is in tension with both the *Garcetti* focus on the context of public-employee speech and the Supreme Court's emphasis in other cases on the institutional academic freedom of universities. In its effort to create space in the current employee-speech doctrine for the First Amendment's protection of academic freedom, the Ninth Circuit strayed from the current model of strong deference to employers, including universities, to regulate and discipline internal employee speech.

Many commentators, extrapolating from language in a number of Supreme Court opinions that trumpet the importance of academic freedom, have argued for an exception to *Garcetti* in the university context. The Supreme Court has repeatedly stressed that academic freedom is "a special concern of the First Amendment"[43] because public universities play a critical role in fostering the "marketplace of ideas"[44] necessary for the discovery of truths and effective citizen participation in a democratic society.[45] To truly effectuate these values, faculty members need the liberty to experiment with new, sometimes controversial ideas in the pursuit of knowledge without the fear of retaliatory action for doing so.[46] For this reason, several commentators have suggested that academic speech ought to be viewed differently from typical employee workplace speech despite both types of speech being products of an employment relationship.[47] Because of the important societal function served by academic institutions, the Ninth Circuit's worry about *Garcetti*'s potentially chilling effect on scholarly pursuit supported the articulation of an exception.[48]

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[43] *E.g.*, Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

[44] *Id.* (internal quotation marks omitted).

[45] *See id.* (citing, among others, Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957)); *see also* ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM 72–73 (2012).

[46] *See* POST, *supra* note 45, at 73.

[47] *See, e.g.*, J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251, 254 (1989); Richard H. Hiers, *Institutional Academic Freedom vs. Faculty Academic Freedom in Public Colleges and Universities: A Dubious Dichotomy*, 29 J.C. & U.L. 35, 92 (2002); David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, LAW & CONTEMP. PROBS., Summer 1990, at 227, 242.

[48] *See* Leonard M. Niehoff, *Peculiar Marketplace: Applying* Garcetti v. Ceballos *in the Public Higher Education Context*, 35 J.C. & U.L. 75, 91 (2008); *cf.* Werkheiser v. Pocono Twp., No. 3:CV13-1001, 2013 U.S. Dist. LEXIS 111759, at *30–31 (M.D. Pa. Aug. 8, 2013) (declining to extend *Garcetti* to speech by elected officials because effective democratic governance requires such

However, even if the panel were committed to finding an academic freedom exception to *Garcetti*, the justifications for such an exception may not extend to internal administrative speech like Demers's pamphlet. Although the Supreme Court has left the scope of "academic freedom" relatively undefined,[49] the other circuits that have considered whether *Garcetti* should apply in the public-university context have acknowledged a distinction between First Amendment protections afforded to internal administrative responsibilities and those afforded to classroom teaching.[50] Regulation of a professor's expression in the performance of administrative duties, as opposed to teaching or scholarly research, would not clearly interfere with the truth-seeking or marketplace-of-ideas values used to justify protecting the individual academic freedom of professors.[51] Court opinions championing the "transcendent value" of academic freedom[52] have emphasized in dicta the peculiar value of new ideas in the unique context of classrooms and intellectual scholarship.[53] However, such a justification is lacking for Demers's administrative pamphlet, which was speech typical of employees in a variety of employment relationships outside the university setting. Absent these First Amendment interests, any exception to *Garcetti* for university professors should be limited to the core academic functions of teaching and producing scholarship and should not extend to administrative duties.

Furthermore, a restricted academic freedom exception aligns better with the judicial deference underlying the modern doctrines governing public-employee speech rights and institutional academic freedom. First, the Ninth Circuit's categorical dismissal of *Garcetti* for professorial speech on academic matters undervalues the heightened importance in current public-employee jurisprudence of the context from which the speech originated. The *Garcetti* "official duty" rule not only articulated a new legal standard[54] but also represented a value judgment: restraint on judicial interference with an employer's mana-

officials to explore controversial political ideas and allowing retaliatory actions would conflict with fundamental First Amendment values).

49 *See* Byrne, *supra* note 47, at 252–53.

50 *See* Adams v. Trs. of the Univ. of N.C.-Wilmington, 640 F.3d 550, 563 (4th Cir. 2011); Gorum v. Sessoms, 561 F.3d 179, 186 (3d Cir. 2009). Even the Fourth Circuit, which agreed with the Ninth Circuit that *Garcetti* should not apply to teaching and scholarship, was hesitant to extend this exception to "instances in which a public university faculty member's assigned duties include a specific role in declaring or administering university policy." *Adams*, 640 F.3d at 563.

51 *See* Rabban, *supra* note 47, at 243.

52 Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

53 *See, e.g.*, *id.*

54 Until the 2006 *Garcetti* opinion, the content-based *Pickering-Connick* analysis determined the scope of First Amendment protections for public-employee speech. *See* Carol N. Tran, Comment, *Recognizing an Academic Freedom Exception to the* Garcetti *Limitation on the First Amendment Right to Free Speech*, 45 AKRON L. REV. 945, 955–56, 959–60 (2012).

gerial control of employee speech promotes efficiency in public institutions.[55] Even though the *Pickering-Connick* test could still deny an employee's claim to First Amendment protection, simply conducting the balancing test impermissibly intrudes on this value judgment by replacing managerial discretion with judicial oversight.[56] Under *Garcetti*, the important component of Demers's speech is not the content, pertaining to the administrative governance of an academic institution, but the context, flowing from his responsibilities as part of the Structure Committee. Most courts that have declined to apply *Garcetti* to internal complaints have done so by narrowly finding particular speech to be outside the workers' duties, not by establishing a categorical job-specific exception.[57] But here, the panel found that Demers's pamphlet fit within his official duties, which should have triggered the strong employer autonomy interests articulated in *Garcetti*. Thus, the focus on the content and importance of professorial speech and the establishment of a sweeping exception conflict with the trend toward greater deference to government employers in controlling workplace speech.[58]

Second, carving out an exception that reaches both academic and administrative speech is inconsistent with institutional academic freedom and the Supreme Court's position of deference to internal university decisions. Justice Frankfurter's concurrence in *Sweezy v. New Hampshire*[59] presented an early conception of academic freedom that included not only liberty for professors but also liberty for the university to control its own affairs.[60] Since then, the Supreme Court, as well as many scholars,[61] has acknowledged academic freedom's dual, and at times conflicting, purposes of safeguarding both individual and institutional autonomy interests.[62] In protecting institutional academic freedom, the Supreme Court has adopted a "tradition of giving a de-

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[55] *See* Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 FORDHAM L. REV. 33, 48–52 (2008).

[56] *See* Garcetti v. Ceballos, 547 U.S. 410, 423 (2006).

[57] *See, e.g.*, Davis v. McKinney, 518 F.3d 304, 313–17 (5th Cir. 2008) (finding that *Garcetti* did not apply to an employee's complaints outside the chain of command despite being related to the employee's official duties); Freitag v. Ayers, 468 F.3d 528, 544–45 (9th Cir. 2006) (same).

[58] *Cf. Garcetti*, 547 U.S. at 447–49 (Breyer, J., dissenting) (recognizing virtues of judicial noninterference with government administration).

[59] 354 U.S. 234 (1957).

[60] *See id.* at 263 (Frankfurter, J., concurring in the judgment) ("It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university — to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." (quoting THE OPEN UNIVERSITIES IN SOUTH AFRICA 11–12 (1957)) (internal quotation mark omitted)).

[61] *See, e.g.*, Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 U. COLO. L. REV. 907, 919 (2006).

[62] *See, e.g.*, Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 226 n.12 (1985).

gree of deference to a university's academic decisions,[63] and lower courts have been reluctant to interfere with a university's essential right to self-governance in internal academic affairs.[64] The motivation behind this deference is the belief that school administrators, and not judges, are usually better suited to determine whether regulating professorial speech best serves the educational mission of the university.[65] However, this model of deference vanishes under the Ninth Circuit's holding where a *Pickering-Connick* balancing inquiry is not limited to core academic speech but extends to essentially all forms of professorial speech. The panel's broad exception leaves little room for the exercise of discretion and expertise by administrators without the fear of judicial second-guessing. Without differentiating academic and administrative speech, an expansive exception to *Garcetti* considerably infringes upon institutional autonomy and introduces the excessive judicial interference expressly disfavored in Supreme Court tradition.

Underlying both the Court's employment law and institutional–academic freedom doctrines is the belief that the employer — in this case the university — is in the best position to make decisions about internal governance and determine the appropriate scope of the regulation of professorial speech. But the Ninth Circuit's argument that constitutionally protected "academic writing" includes Demers's nonscholarly, administrative dialogue is seemingly not in line with the academic speech the Supreme Court has considered a "special concern" of the First Amendment. Other private contractual arrangements such as tenure systems can be relied on to provide some protection to faculty members in such circumstances.[66] A narrower holding — limiting the exception of *Garcetti* to classroom teaching and academic scholarship — would have struck a more appropriate balance between First Amendment protections of academic freedom and deference to public employers in regulating workplace speech.

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[63] Grutter v. Bollinger, 539 U.S. 306, 328 (2003).

[64] *See* Demers v. Austin, No. CV-09-334-RHW, 2011 WL 2182100, at *2 (E.D. Wash. June 2, 2011). Considerable deference has been shown to universities in personnel decisions, admissions policies, and curriculum setting. *See* Jeff Todd, Note, *State University v. State Government: Applying Academic Freedom to Curriculum, Pedagogy, & Assessment*, 33 J.C. & U.L. 387, 389–90, 397, 402–04 (2007).

[65] *See* PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS 90–91, 114 (2013); *cf. Grutter*, 539 U.S. at 328–29 (discussing deference to universities' admissions decisions); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (discussing deference to administration's decision to restrain school-sponsored student speech).

[66] *See* Niehoff, *supra* note 48, at 80 n.43. Some scholars have even argued that applying *Garcetti* to professorial speech is actually necessary where public universities have a tenure system in order for university committees and not judges to retain control over core academic personnel decisions. *See* Kermit Roosevelt III, *Not as Bad as You Think: Why* Garcetti v. Ceballos *Makes Sense*, 14 U. PA. J. CONST. L. 631, 658 (2012).