No. _____

In The
Supreme Court of the United States

JEENA LEE-WALKER,

Petitioner,

v.

CITY OF NEW YORK DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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Dated: January 24, 2018

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QUESTIONS PRESENTED

Garcetti v. Ceballos, 547 U.S. 410 (2006) held that public workers speaking on job duties are not "addressing matters of public concern," *id.* at 407, thus are unprotected by the First Amendment. Justice Souter dissented, warning that *Garcetti* could extend to schools and universities, chilling academic freedom. *Id.*, at 431, n.2. Justice Kennedy agreed that "academic scholarship or classroom instruction implicates" constitutional concerns, but held this was not at issue in *Garcetti*, and disputed Justice Souter's contention. *Id.* at 425-26.

The Circuits handle academic speech in many ways:

- The Second and Seventh Circuits consistently dismiss teacher-speech actions on qualified immunity.
- The Fourth and Ninth Circuits read Justice Kennedy's exception broadly, allowing public professors relief if their job duties pertain to "scholarship or teaching."
- The Sixth Circuit applies *Garcetti* to all educational matters: free speech has no bearing on pedagogy. The Third Circuit has always so held.

This Petition presents these Questions:

1. Do state-employed pedagogues enjoy the protections of free speech in academia, given Justice Kennedy's response to Justice Souter's point on that issue in *Garcetti v. Ceballos*?

2. If not, does the First Amendment protect a teacher or professor in a public school or university?

PARTIES TO THE PROCEEDINGS BELOW

Appellant in the court of appeals was Jeena Lee-Walker, who was also the plaintiff in the district court.

Appellees in the court of appeals and the district court were respondents Department of Education of the City of New York, and Fred Walsh, Stephen Noonan, Christopher Yarmy, and Benny Ureana, employees of the Department.

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PETITION FOR WRIT OF CERTIORARI

Jeena Lee-Walker respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, which upheld the dismissal of her civil-rights complaint.

OPINIONS BELOW

The decision of District Judge John G. Koeltl (S.D.N.Y.) dismissing Petitioner's complaint under Fed. Rule Civ. Pro. 12(b)(6) is available at 220 F. Supp. 3d 484 (S.D.N.Y. 2016) and is reproduced herein as Appendix 7-28. The Second Circuit's affirmance is electronically published at 2017 U.S. App. LEXIS 20428 (2d Cir. Oct. 17, 2017). It is attached as App. 1-6.

JURISDICTION

The Second Circuit issued its opinion on October 17, 2017. Justice Ruth Bader Ginsburg granted petitioner's extension application on December 6, 2017, allowing this Petition to be filed on or before February 15, 2017. This Court has jurisdiction to hear the petition under 28 U.S.C. § 1254(1) and Supreme Court Rule 14(5).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Civil Rights Act of 1871, 42 U.S.C. § 1983, which provides that "[e]very person who under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law[.]"

Petitioner attempted to enforce her Constitutional Free Speech Rights under § 1983, as provided for in the First Amendment, which states "Congress shall make no law respecting . . . abridging the freedom of speech," and the Fourteenth Amendment, Section I, which applies the First Amendment to the individual states, signifying that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

1. This case asks the Court to affirm *Garcetti v. Ceballos*, 547 U.S. 410 (2006), does not apply to academic speech by teachers at public schools and

universities – and that the decision never contemplated such a holding.

2. *Garcetti* held that speech about an employee's job duties holds no free-speech protection. Justice Anthony Kennedy's majority opinion noted, however, that the opinion did not reach the question of speech by teachers at public schools and universities in response to criticism in the dissent. The Second Circuit, nevertheless upheld the dismissal of petitioner Lee-Walker's claim on under the doctrine of qualified immunity, as it has similar cases to come before it. According to that and the Seventh Circuits, the law is infirm on the question. Other Circuits have taken different approaches. There is a three-way circuit split for the Court to resolve: three methods in which six Circuits interpret the question.

3. Petitioner, a former New York City public school teacher, brought her action under 42 U.S.C. § 1983. She alleged violation of her right to free speech in discussing with her ninth-grade students two items that did not veer from the curriculum: their constitutional right to remain silent in the context of the case of the Central Park Five. Her superiors also chided her for teaching the short story "Nilda" by MacArthur Fellow Junot Diaz, a Dominican-American Pulitzer Prize-winning novelist, because he made use of a racial epithet in character dialogue.

4. A reader of this petition likely knows of The Central Park Five. They were teenagers on April 19, 1989, when accused of causing unruliness – termed "wilding" by the press – in Central Park.

That same evening and general location, a woman, Trisha Meili, the "Central Park Jogger", was brutally raped.

5. Ms. Meili (who later chose to identify herself and speak publically), was unable to identify any perpetrator; in fact, none of the teenagers had anything to do with the crime. Law enforcement officials, however, rounded up The Five and coerced them into inconsistent confessions. Each was convicted amid extensive press coverage. Separate juries convicted each young man of the crimes accused. They spent over a decade in prison.

6. Finally, the actual perpetrator, incarcerated on another charge, confessed to the crime; DNA evidence supported his confession. The Central Park Five had their convictions vacated and each left prison. *See generally*, Natalie Byfield, *Savage Portrayals: Race, Media, & the Central Park Jogger Story*, 2014.

7. The district court accepted as true the facts in Petitioner's complaint, which respondents moved to dismiss under Federal Rule of Civil Procedure 12(b)(6).

8. The complaint alleges that Jeena Lee-Walker, a graduate of Barnard College with graduate degrees from Harvard and Fordham, qualified to teach in New York State, and licensed in English Language Arts, lost her job for teaching issues she believed appropriate for her students.

9. She worked for the New York City Department of Education ("DOE"), beginning in 2011, assigned to

teach 9th-grade English at the "High School for Arts, Imagination and Inquiry" in Manhattan.

10. Petitioner's first performance evaluation was fully satisfactory. Her superiors rated her "effective," the highest rating, in all categories.

11. All was well until November 2013, when Assistant Principal Christopher Yarmy conducted a classroom observation of plaintiff's teaching. Lee-Walker included as part of that class and her English curriculum a critical look at the Central Park Five. She hoped this would bring to light a "societal tendency to rush to adverse legal conclusions against black males."

12. Yarmy, displeased, instructed plaintiff to be "way more balanced" in discussing that case. He feared that it would "rile up black students."

13. Plaintiff deferred to Yarmy's instruction. However, she made the point that her students – most black and Latino – should be "riled up" intellectually; and that a "good, engaged education" necessarily encourages students to re-examine and challenge conventions, yet simultaneously present a balanced viewpoint.

14. She contended that including the case in her lesson allowed students to place the warnings required under *Miranda v. Arizona*, 384 U.S. 436 (1966) in context, and understand *Miranda's* role in civil society.

15. Yarmy "angrily disagreed," asserting that there had not been any rush to judgment in the Central Park Five case and that *Miranda* warnings did not apply to those defendants.

16. He again suggested the lesson would "possibly create little 'riots' over concepts that the students "were unlikely to understand anyway." He repeated his instruction that Walker "balance" her presentation of the case as part of her lesson plan.

17. Petitioner contended that the lesson was appropriate and "balanced." A shrill verbal back and forth followed, after which plaintiff relented and promised to follow to be "more balanced." Later, she sought clarification as to this instruction.

18. Following the meeting, Yarmy informed Principal Stephen Noonan and another Assistant Principal about the inclusion of the Central Park Five in plaintiff's lesson, as well as the disagreement that followed.

19. There were no more complaints about Walker's discussion of the Central Park Five, but plaintiff nevertheless gained a reputation as obstinate and insubordinate.

20. She soon met with Principal Noonan and Yarmy, who reiterated his view that the presentation of the Central Park Five case was one-sided and that there had in fact been no "rush to judgment" as to the guilt of those teenagers. He asserted *Miranda* warnings were a "recent creation," and that Walker's lesson might create "riot-like" situations.

21. Petitioner again reiterated her views about the case, explained why she believed the lesson would be beneficial for her students, and argued that her presentation of the case was fair.

22. Noonan agreed with Yarmy and expressed disapproval of plaintiff's use of a short story published

in *The New Yorker*, "Nilda," by MacArthur Genius, Pulitzer Prize-winning author Junot Diaz. Noonan questioned the use of this piece of literature because the author used a racial epithet in a minority character's inner thoughts.

23. Plaintiff defended "Nilda," given its source and given that, overall, it allowed "students to re-examine assumptions and challenge" conventions. Noonan suggested she was naïve, ordering her to remove "Nilda" from her lessons. Plaintiff complied.

24. Defendants then labeled plaintiff as "antagonistic."

25. Plaintiff's relationship with the supervisory staff deteriorated. In 2013, plaintiff for the first time received below-average ratings in several performance categories. Her supervisors downgraded her "effective" ratings to "developing."

26. In January 2014, plaintiff received two evaluations from Assistant Principal Benny Ureana, both of which included some negative ratings. Although most of the ratings were "effective," three days later, Noonan sent the plaintiff a pretextual reprimand regarding late paperwork.

27. In the next schoolyear, plaintiff continued to receive negative evaluations and reprimands. Her ratings during her tenure had gone from "effective" to both "effective" and "developing" to wholly "ineffective" – the lowest rating.

28. On May 12, 2015, Superintendent Fred Walsh notified Ms. Lee-Walker that her appointment as a probationary teacher would end – that is, as a

non-tenured employee, she would be terminated – 9 days later.

29. The complaint alleges that the defendants' adverse evaluations and eventual termination of the plaintiff constituted retaliation in violation of her First Amendment rights and her attempt to defend their use in her teaching.

30. She argued in her complaint that the internally inconsistent nature of the evaluations, given the mission of the school, had been pretexts for her termination. After the Central Park Five lesson, before which a single evaluation was fully satisfactory, the bad evaluations were attempts to mask retaliatory animus against her because of protected activity. Specifically, defendants were averse to her lessons regarding the Central Park Five, *Miranda* warnings and Junot Diaz's story.

31. Defendants moved to dismiss the complaint, arguing that the plaintiff's speech was unprotected, and that the individual defendants were qualifiedly immune.

32. The district court, John G. Koeltl, J., agreed that there was a First Amendment violation, noting that state actors "cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." He cited *Connick v. Myers*, 461 U.S. 138 (1983), a case which holds that, generally, the First Amendment protects "a public employee's right to speak as a citizen addressing matters of public concern." *Id.* at 148.

33. He nevertheless granted the defendants' qualified immunity defense. In so doing, he noted Justice Souter's dissent as to academic freedom, and the majority's response that *Garcetti* did not apply to academic speech. App. 17.

34. The Court noted nevertheless that a Second Circuit decision had held academic speech to be an open question, i.e., "whether *Garcetti* applies to classroom instruction." (citing *Panse v. Eastwood*, 303 Fed. App'x 933, 934 (2d Cir. 2008)) (summary order, available electronically at 2008 U.S. App. LEXIS 25707 (December 19, 2008)). App. 18.

35. Petitioner plaintiff appealed. The Second Circuit affirmed in an unpublished decision. App. 1-7. The panel held that in *Panse*, "our only decision directly addressing the issue, we explicitly stated that '[i]t is an open question in this Circuit whether *Garcetti* applies to classroom instruction,' and we chose 'not [to] resolve the issue'" in *Panse*. App. 4.

36. Thus, the Circuit held that, given *Garcetti*, there was no clearly established law under which the defendants would understand that Lee-Walker's speech was protected by the First Amendment; the defendants could have believed that *Garcetti* stripped her of those protections. *Id.*

37. This judicial reluctance to decide Petitioner's question effectively applies *Garcetti* to precisely what Justice Kennedy held that case did not hold. It effectively strips teachers of free-speech protection until the Supreme Court resolves the question. She thus decided to request the grant of a writ of certiorari.

38. Petitioner sought an extension of time to file this petition until February 15, 2018. Circuit Justice Ginsburg granted the application on December 6, 2017.

39. This petition for certiorari followed.

REASONS FOR GRANTING THE WRIT

I. *Garcetti* Did Not Cover Free-Speech Rights in Academia, but the Circuits Are Split on this Issue of National Importance, Calling for Grant of the Writ.

For years, *Pickering v. Board of Educ.*, 391 U.S. 563 (1968) governed matters of free speech for public employees, including for teachers in (and out) of the classroom. "[A]bsent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." *Id.* at 574 (1968).

Connick v. Myers, 461 U.S. 138 (1983) modified *Pickering* insofar as it held that only questions of public concern were entitled to First Amendment protection. *Id.* at 148. *Garcetti* modified *Connick* a bit further, "eliminat[ing] hope for First Amendment protection in work-related matters for speech by most public employees[, though] the possibility remains that teachers' official speech on matters of public concern may qualify for protection" in the classroom. *Kramer v. N.Y. City Bd. of Educ.*, 715 F. Supp. 2d 335, 352-53 (E.D.N.Y.

2010) (Weinstein, J., citing *Garcetti* at 417-20, 425. Emphasis added.)

Garcetti, however, combined with this Court's decision in *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011) propelled the Second Circuit onto a different jurisprudential path that Judge Weinstein expected in *Kramer*. *Pickering* has thus essentially been overruled in the Second and Seventh Circuits, and there is veritably no academic free speech for public employees in those circuits because of qualified immunity.

However, the Second Circuit applies *al-Kidd* too strictly. That decision did not require a case be specifically on point for the law to be clearly established. It also did not suggest that noting an area of concern – such as Justice Souter did in dissent, which concern Justice Kennedy responded – should have been sufficiently enough on point to place the Government officials on notice that public school and university teachers have rights of free speech in the schoolroom. This Court held in *al-Kidd* that governmental conduct "violates clearly established law when . . . the contours of a right are *sufficiently* clear that every *reasonable* official would have understood that what he is doing violates that right." 563 U.S. at 741 (emphases added.) This Court does "not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (punctuation omitted and emphases added.))

The exchange in *Garcetti* between Justices Souter and Kennedy is not susceptible to a reading that teachers have no right to classroom free speech on matters of academics. Indeed, the logic of the exchange points "reasonably" and "sufficiently" in the direction of academic free speech. Justice Souter raised the specter of squelching such speech, and Justice Kennedy responded as if to say, "No, this case does not hold that." As such, Petitioner's claim should have been examined under *Pickering* and *Connick*.

These cases have been benched in all but two circuits. In *Panse v. Eastwood*, 303 F. App'x 933 (2d Cir. 2008), the Second Circuit held *Garcetti* upended the idea of clearly-defined law as it applied to academic speech. Thus, in any case brought under 42 U.S.C. § 1983, as it applies to the squelching of public teacher or professorial speech, qualified immunity will always prevail; the Circuit no longer applies earlier educational free-speech precedents. App. 3-5. Instead, even though *al-Kidd* did not require a case to be precisely on point to defeat qualified immunity, Justice Souter's mere mention of the subject explicitly rips open the question of academic speech, rendering the law perpetually unclear in the Second and Seventh Circuits. Other circuits take differing positions altogether – until this Court takes the writ and gives teachers free speech.

Pickering is the precursor to freedom of classroom speech, and *Garcetti* modified but did not overrule that case. *Pickering* recognizes that the state has an interest in protecting public employee speech, if not

defamatory, untrue and on a question of public importance. *Pickering* originally led the Second Circuit to adopt a balancing test that considers whether a teacher's "action is reasonably related to a legitimate pedagogical concern . . . the age and sophistication of the students, the relationship between teaching method and valid educational objective, and the context and manner of the presentation." *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 723-24 (2d Cir. 1994). But *Silano* is held in abeyance until *Garcetti* – and this entire question – is resolved by this Court.

The Second Circuit cited *Panse* in *Lee-Walker*, 2017 U.S. App. LEXIS 20428, *3. Now, in another Second Circuit unpublished disposition, another teacher denied academic free speech has lost under a strict application of qualified immunity, notwithstanding *Pickering* as clarified by *Connick*. *Garcetti* did not overrule either case, and Justice Kennedy's carve-out in response to Justice Souter's concern supports Lee-Walker's reasonable interpretation that *Garcetti* did not apply to her situation. It is as if, for the Second Circuit, the dissent's criticism – to which the majority responded "No" – swallowed the holding, allowing censorship of subjects pertinent to the curriculum and student needs.

This Court's constitutional decisions, previously protective of free speech rights, and never overruled are now in a state of liminality unless this Court illuminates. The Second Circuit holds that *Garcetti*, which merely harmonized *Pickering* and *Connick*, so

muddled the law such that no public official can ascertain where it stands as to academic free speech. *See Panse; Lee-Walker*. The case that *Lee-Walker* relies on in interpreting qualified immunity, *al-Kidd*, however, requires reasonably sufficient interpretations, not analyses beyond any doubt.

While *Garcetti* modified free-speech jurisprudence*, Pickering* stands and should have allowed Petitioner's case to proceed. Because the Second Circuit, as well as the Seventh, have held otherwise, this Court has every reason to accept this Petition.[1]

The Sixth Circuit takes a stricter approach to teacher speech. It does not bother with qualified immunity but holds that the micro-choices within the curriculum are per se unprotected given *Garcetti. Evans-Marshall v. Bd. of Educ. of the Tipp City Exempted Vill. Sch. Dist.*, 624 F.3d 332, 334 (6th Cir. 2010), *cert. denied*, 564 U.S. 1038 (2011). This is the same approach taken by the Third Circuit in the pre-*Garcetti* decision in *Edwards v. Cal. Univ. of Penn.*, 156 F.3d 488 (3d Cir. 1998) (Alito, J.).

Obversely, Fourth Circuit teachers have protections when speech touches upon ideas. *Adams v. Trs. of the Univ. of N.C.*, 640 F.3d 550 (4th Cir. 2011). The *Adams* court reversed a district court's misapplication of

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[1] The Seventh Circuit takes the same approach as the Second, noting the "question remains whether the *Garcetti* rule applies in the same way to 'a case involving speech related to scholarship or teaching.' " *Brown v. Chi. Bd. of Educ.*, 824 F.3d 713, 715 (7th Cir. 2016) (citing *Garcetti*).

Garcetti, noting that its "**clear language**" demonstrates the case does not apply "in the academic context of a public university." *Id.* at 561 (emphasis added). The Second Circuit overlooked *Adams* in *Lee-Walker*, and there is no end to qualified immunity there or in the Seventh Circuit. But, no reasonable person could anticipate that a non-binding, though legitimate, comment in the dissent – which the majority *rejected* – would make the law unclear. To so say ignores *Pickering*, not overruled in *Garcetti*. But alas the Sixth Circuit does precisely what Justice Souter feared: Deny any protections to a teacher's classroom speech. *Evans-Marshall*, 624 F.3d at 334.

When this Court seven years ago denied certiorari in *Evans-Marshall*, no Circuit split existed. Now six Circuits apply three differing standards. The Fourth Circuit's approach is friendly to plaintiffs, allowing academic speech claims to proceed, as is that of the Ninth Circuit. *Demeris v. Austin*, 748 F.3d 402 (2014) (reviving *Pickering*) *id.* at 411-19. The Second and Seventh Circuits – the latter of which rejected *Demers* – apply qualified immunity and dismiss on that defense, potentially *ad infinitum* until this Court holds otherwise. The Sixth Circuit overlooks Justice Kennedy's point and holds that no public teacher has free speech in the classroom because teaching is part of a teacher's duties. The Third Circuit, even before *Garcetti*, did not allow these claims.

These differing interpretations cry out for an explication of the Kennedy-Souter exchange in *Garcetti*,

which has effectively overruled *Pickering* on a question of national importance in at least three circuits.

II. Free Speech in Public Education Is a Matter of Nationwide Significance. This Court Should Grant the Writ Even In the Absence of the Circuit Splits.

Justice Byron White held in *Connick*:

> For at least 15 years, it has been settled that a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression. Our task . . . is to seek "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

Connick, 461 U.S. at 142 (citing *Pickering* and other free-speech jurisprudence). While *Connick* fine-tuned *Pickering* and other cases cited in *Connick*, and *Garcetti* fine-tuned *Connick*, neither limited the right of a public employee to free speech in the classroom on matters of public concern. However, anything reasonably taught within a curriculum is a matter of public concern – or at least presents a question of fact as to whether this is so. *Garcetti* applied to official job duties, but "reject[ed] the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions." 547 U.S. at 424.

Is it not a textbook definition of irony that a school named "High School for Arts, Imagination and Inquiry" would disfavor discussion of constitutional rights, the Central Park Five and the work of a literary genius? My attempt at humor aside, educational speech, which teachers use in imparting lessons to students in promoting knowledge, the exchange of ideas, independent thought and responsible citizenship, are matters of national importance. The Court should, therefore, grant certiorari for this reason alone. The effective loss of *Pickering* and the over-expansion of *Garcetti* should horrify anyone who embraces the ideals of the speech clause of the First Amendment, let alone in the context of the acquisition of knowledge.

Public-school teaching is one of the most important types of speech. Educational speech is arguably of greater importance than any other. In fact, teaching, at its heart, is speech – its delivery and reception – and the speaker, so long as he stays within the confines of the curriculum, is a public employee speaking on an issue of public importance. An educator is one who speaks with an ***independent*** point of view that approaches private citizenry. Think of the Art Historian who teaches 19th Century painting as embodying class struggle; the teacher of literature who decries the failure of the modern novel; the organizational behaviorist who views the workings of the corporation as inherently gender biased.

Pre-*Garcetti* protections still apply. This Court apparently needs to say so, affording public-school teachers First Amendment protection so they may speak

without fear of retaliation, allowing students to acquire knowledge, competencies and develop their own values. The best teachers do not teach merely to afford students an opportunity to pass a test but to help them to think for themselves. If public-school teachers cannot teach without fear of reprisal that what they say in class, within the prescribed subject, then teaching means little more than rote recitation and repetition.

The exchange of ideas goes to the heart of why society requires compulsory education, at least to a certain age, and why many adults continue their education beyond secondary school: To learn something by conversation, argument and the Professor's unique tutorial, all at the heart of the First Amendment. These classroom conversations cannot be micromanaged if they are to be effective.

Garcetti was not an exception swallowing a rule; it was an exception to what the Court believed was the overreach of *Pickering* and its progeny. But assuming a teacher complies with curricular and ministerial duties, the central tenet of her responsibilities pertains to sharing her ideas. A teacher without the protection of free speech is akin to a court without the power to issue reasoned decisions – or to pose a hypothetical question at oral argument. There can be no exchange of ideas in such a static setting. Therefore, students cannot learn as well as they should; the ministerial duties exception in *Garcetti*, when applied to the duties of teaching, swallow the speech rights of educators to communicate, and the learning rights of public-school students. At a minimum, they have fewer rights than students

who can afford private education, which cannot be fair in a democratic society.

Teaching *is* speech. To restrict the ideas imparted by teaching a strictly defined curriculum is what Justice Kennedy held *Garcetti* did not do: That would regulate the exchange of ideas that education promotes. Education is not a series of statements "pursuant to [a teacher's] official duties," *Garcetti*, 547 U.S. at 413, but an extensive set of spoken thoughts about readings, current events and intellectual inquiries engendered to provoke opinions and expand young (or older) minds. Micromanaging the content of statements that fall within the curriculum, or a failure at least to discuss these classroom exchanges from the teacher to allow her to defend them as promotion of student thought is precisely the opposite of academic freedom; it has little to do with the administrative duties at issue in *Garcetti*. A teacher is not a mere attendant to the state; she has a curriculum to teach, but within the confines of that curriculum, she uses her mind to provoke students to think independently and become productive citizens, in the attempt to maintain the nation's competitiveness worldwide.

In Jeena Lee-Walker's case, she taught her teenage students about one of the greatest miscarriages of justice in recent memory. It is not possible to talk about the Central Park Five without viewing it through the lens of race and the failures of the criminal justice system. The waiver of *Miranda* rights – which are not a "new thing" (as she alleges one of the respondents suggested) and the Central Park Five's inconsistent, false

confessions were central to their convictions. *See Savage Portrayals*, 188-87, 132-52. As to the teaching of Junot Diaz's short story "Nilda," which contains the n-word as part of the character's thoughts, Ms. Walker found the message of the story outweighed the minimal – if any – harm in the words of fictional dialogue. Indeed, if English teachers could not teach authors who used racial epithets, that would be the precise opposite of academic freedom, and would ban from the curriculum authors like Mark Twain, Ralph Ellison, and Joseph Conrad, plus contemporary writers like Alice Walker and Phillip Roth.

Renowned Architect Ludwig Mie's van der Rohe – he who coined the phrase "Less is More" – said about education that it "must lead us from the irresponsible opinion to true responsible judgment. It must lead us from chance and arbitrariness to rational clarity and intellectual order." (Quoted in *The Master Builders: Le Corbusier, Mies Van Der Rohe, Frank Lloyd Wright*, 1996 Peter Blake, 230-31.)

Therefore, this Court should lead us to a consistent application of *Garcetti*, one that is certain not to chill the exchange of opinion or the promotion of responsible judgement and intellectual clarity. The United States is already behind almost all "First-World" nations in its students' educational abilities. *Garcetti* had nothing to do with this, but has everything to do with why this Court should accept this petition. A recent snapshot performance ranking by The Programme for International Student Assessment showed the intellectual abilities of students in the

United States just below those of Slovakia – which was not even a country until after the fall of the Berlin Wall. The United States is as well behind China, Russia, Japan and nearly every country in Europe. *See* Julia Ryan, "American Schools vs. the World: Expensive, Unequal, Bad at Math," *The Atlantic*, December 3, 2013. This is disgraceful.

We can assume an overwhelming majority of students, high-school age and under, attend public, not private schools. Thus, their teachers are unprotected, at least in most Circuits, by the misinterpretation of Justice Kennedy's response to Souter's hypothetical in *Garcetti* dissent. However – and this is less well known – most students attending two and four-year colleges and universities attend schools operated by the state. Jeffrey Selingo, an editor at *The Chronicle of Higher Education*, recently published *There Is Life After College: What Parents and Students Should Know About Navigating School to Prepare for the Jobs of Tomorrow*, 2016. His thesis is not how to position oneself (or one's children) to gain admission to the Ivy League – whose graduates number less than one percent of students – but how a college graduate should position herself unsaddled with debt and land a job after graduation. He documents that some seventy-five percent of students attend public, not private universities. *See* Ben Casselman, "Shut Up About Harvard," *FiveThirtyEight*, March 30, 2016 (quoting Selingo).[2]

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[2] Available at https://fivethirtyeight.com/features/shut-up-about-harvard/, last visited January 7, 2018.

The decision that this Court reversed in *Garcetti* originated in the Ninth Circuit. *Ceballos v. Garcetti*, 361 F.3d 1168 (9th Cir. 2004), Judge Diarmuid F. O'Scannlain concurred in the result with reservations because of Ninth Circuit precedent. He noted, however, that while he applied binding precedent in the case, it was "inconsistent with *Connick*'s careful differentiation between public employees' speech as private citizens and speech in their role as employees." He called for the precedent to be overruled "to steer this court's drifting First Amendment jurisprudence back to its proper moorings." *Ceballos v. Garcetti*, 361 F.3d 1168, 1193-94 (9th Cir. 2004).

Judge O'Scannlain got his wish, at least with respect to Ninth Circuit precedent under *Connick*. But now academic speech has lost its moorings; except for two circuits. *Garcetti* corrected what this Court found had gone too far in the realm of free speech, but now it is time to correct what four circuits have inconsistently applied under *Garcetti* and give back to academic speech what a free society should have. With exception, the right of public, academic speech has completely lost the moorings Judge O'Scannlain feared had been lost in *Ceballos*. Now, academic free speech, unanchored to a consistent legal theory, has left the bay and floated into the sea.

CONCLUSION

For the foregoing reasons, the Court should grant this petition.

Dated: January 24, 2018

Respectfully submitted,

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