No. 26-475

In the Supreme Court of the United States

FLORIDA BOARD OF GOVERNORS, ET AL.,
Petitioners,
v.
LEROY PERNELL, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF OF ALABAMA, KENTUCKY, AND 11 OTHER STATES AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

Amici are the States of Alabama, Kentucky, Arkansas, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Montana, Nebraska, South Carolina, and Texas.

Like all States, *amici* operate public universities. And like Florida did here, *amici* exercise control over the kinds of educational experiences they offer at taxpayer expense. Sometimes that is through legislation setting forth broad curricular requirements or standards. *E.g.*, Ky. Rev. Stat. Ann. § 164.302. Other times it is through safeguards guaranteeing freedom of expression for professors and students. *E.g.*, Ala. Code § 16-68-3.

And sometimes it is by putting guardrails on what professors may compel their students to believe or parrot back. Alabama, for instance, expressly protects student speech and expression, Ala. Code § 16-68-1 *et seq.*, and therefore prohibits professors from "[d]irect[ing] or compel[ing] a student . . . to personally affirm, adopt, or adhere" to certain concepts at odds with our Nation's promise of equality. Ala. Code § 41-1-91. Those concepts include "[t]hat any race, color, religion, sex, ethnicity, or national origin is inherently superior or inferior" and "[t]hat individuals should be discriminated against or adversely treated because of their race, color, religion, sex, ethnicity, or national origin." *Id.* § 41-1-90(2). Professors may still "teach[]" and "discuss[]" these concepts "as part of a

[1] Under Supreme Court Rule 37.2, *amici* timely notified counsel of record of their intent to file this brief.

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larger course of academic instruction," but they may "not compel assent" to them. *Id.* § 41-1-93(3)(b). In this way, the State assures that those in authority over students do not "cast a pall of orthodoxy over the classroom." *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967).

To do all this, however, *amici* must have "the right to insist that professors provide the sort of education that [they] promise[] to students but can deliver only through agents." *McDonald v. Trs. of Indiana Univ.*, 186 F.4th 917, 930 (7th Cir. 2026) (Easterbrook, J., concurring). The Eleventh Circuit's decision infringes on that right and reverses it, granting *professors* the power to decide for themselves how and what to teach as part of their official duties as public employees. Under the rule below, States are "powerless" to deliver on their promises because "[f]aculty may choose to provide tendentious screeds instead, denying their institutions the ability to provide students with a particular kind of educational experience." *Id.* at 931. The Constitution grants to no other public employee such a right over his employer. Indeed, it grants to no other citizen the expansive rights the Eleventh Circuit enshrined for professors.

Amici thus have a significant interest in this case. The Eleventh Circuit's rule is wrong, and courts elsewhere are also confused. Courts and States are in desperate need of this Court's guidance. *Amici* respectfully ask the Court to grant certiorari and reverse.

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SUMMARY OF ARGUMENT

Public university professors are citizens, not sovereign citizens. That is not a put down, but it is a serious distinction. Citizens—speaking as citizens—have First Amendment rights, and they do not lose those rights by setting foot on campus. But university professors are also public employees, paid by a State to teach specific classes in specific ways. Were university professors any other public employee, courts would apply the general framework from *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Garcetti v. Ceballos*, 547 U.S. 410 (2006), and ask whether the employee's speech is "made pursuant to [her] official duties." *Id.* at 413. If it is, "this Court has said the Free Speech Clause generally will not shield the individual from an employer's control and discipline because that kind of speech is—for constitutional purposes at least—the government's own speech." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 527 (2022). Otherwise—if the employee "speaks as a citizen"—the First Amendment is implicated and courts proceed to *Pickering* balancing. *Id.* at 528.

But in *Garcetti*, this Court reserved ruling on whether this general framework—which applies to every other public employee—would apply to a public university professor in "a case involving speech related to scholarship or teaching." 547 U.S. at 425. The Court reserved ruling on that question because, it said, "[t]here 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." *Id.*

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It is time for this Court to answer the question it left unanswered in *Garcetti*, and it should answer it by holding that public university professors do not have special First Amendment rights that no other American has. This Court's "customary employee-speech jurisprudence," *id.*, applies to professors just as it applies to every other public employee.

First, the decision below is itself a warning not to depart from the general rule. The Eleventh Circuit's contrary holding intrudes on state sovereignty and makes federal judges ersatz deans charged with determining whether restrictions on a professor's in-class curricular speech are "reasonable" and fall within "well-understood" (but never defined) "parameters." Pet. App. 37a, 39a. Such a "judge-made test" is "unworkable and . . . reduces the First Amendment to a reflection of judicial preference." Pet. App. 53a (Lagoa, J., dissenting).

To craft its carveout, the decision also had to make a mess of this Court's existing jurisprudence. Most obvious is its departure from the general official-unofficial distinction of *Garcetti*, *Kennedy*, *Pickering*, and the like, which the Eleventh Circuit said works fine for every public employee except professors. But the First Amendment says nothing about treating professors differently. And while members of the Court have recognized the importance of norms of academic freedom for "a *university*[] to determine for itself" "who may teach, what may be taught, [and] how it shall be taught," *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (emphasis added), the Court has never suggested that the First Amendment protects and prioritizes the "academic freedom"

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of *professors* over and against that of their university—even if that university is a public one subject to direction from the Legislature. That makes sense: "academic freedom" as a concept did not come to America until "the turn of the twentieth century." Pet. App. 62a. It forms no part of the original public meaning of the First Amendment as incorporated against the States, and it certainly does not make public university professors a law unto themselves.

Second, while the court below worried that applying the general rule to professors "would leave no room—none at all—for the traditional value of academic freedom," Pet. App. 14a, such hyperbole cannot support its sui generis rule. For one, the Eleventh Circuit's ruling runs roughshod over the academic freedom of everyone else but professors—of institutions, who now take second seat to their employees, and of students, who now may be "compel[ed]" by their professors to believe that "[a] person's moral character . . . is necessarily determined by his or her race." Pet. App. 5a. *That* is not hyperbole; it is—remarkably—the very reason the professors in this case sued Florida.

For another, the Eleventh Circuit's worry blinks reality. Academic freedom, though not part of the original meaning of the First Amendment, is a deeply ingrained norm in our society. Private universities, which could get rid of it, generally have not. States have protected it, too, even though this Court "has never set aside a state regulation on the basis that it infringed a First Amendment right to academic freedom." *Urofsky v. Gilmore*, 216 F.3d 401, 412 (4th Cir. 2000) (en banc). That States may occasionally adjust

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how academic freedom works in practice—here, by enacting safeguards to bolster students' freedom of thought—is something "the marketplace of ideas" may judge. *McDonald*, 186 F.4th at 931 (Easterbrook, J., concurring). Not every norm must be constitutionalized and made subject to judicial review.

Third, the Eleventh Circuit is not the only court that is confused. As the petition explains (at 16-25), courts are deeply split about whether and how the First Amendment applies to speech by public university professors in the course of their official duties. And the split has resulted in many follow-on questions that States and courts are now confronting. The Court should grant certiorari to provide the guidance that is so needed.

ARGUMENT

I. The question presented is important and the Eleventh Circuit got it wrong.

A. This case begins where *Garcetti* left off. In that case, the Court considered the claim of a deputy district attorney who alleged that he was disciplined for writing a disposition memorandum disagreeing with a deputy sheriff's assertion of probable cause in a warrant affidavit. 547 U.S. at 413-15. He argued that the discipline was unconstitutional because the memo he wrote was protected speech. *Id.* at 415.

In reviewing his claim, the Court began by surveying settled law, beginning with its decisions in *Pickering* and *Connick v. Myers*, 461 U.S. 138 (1983). In *Pickering*, the Court explained, "the relevant speech was a teacher's letter to a local newspaper addressing issues including the funding policies of his school."

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547 U.S. at 417. The Court identified "two inquiries to guide interpretation of the constitutional protections accorded to public employee speech." *Id.* at 418. The first requires determining whether the employee spoke as a citizen on a matter of public concern." *Id.* (citing *Pickering*, 391 U.S. at 568). "If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech." *Id.* (citing *Connick*, 461 U.S. at 147). "If the answer is yes, then the possibility of a First Amendment claim arises." *Id.* Only at that point does the question become "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Id.* (citing *Pickering*, 391 U.S. at 568).

The Court thus summarized the *Pickering-Connick* rule this way: "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." *Id.* at 419 (citing *Connick*, 461 U.S. at 147). "[W]hile the First Amendment invests public employees with certain rights," the Court concluded, "it does not empower them to 'constitutionalize the employee grievance.'" *Id.* at 420 (quoting *Connick*, 461 U.S. at 154).

Having set forth the legal landscape, the *Garcetti* Court turned to the case before it, holding "that when 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." *Id.* at 42. That holding resolved

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the issue at hand because the plaintiff "did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case." *Id.* at 422. Rather, when "he went to work and performed the tasks he was paid to perform," the plaintiff "acted as a government employee," and "[t]he fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance." *Id.*

The Court made one caveat to its ruling. Responding to Justice Souter's concern in his dissenting opinion that the Court's decision "may have important ramifications for academic freedom, at least as a constitutional value," the Court reserved ruling on that question: "We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching." *Id.* at 425.

But while *Garcetti* purported to leave this question unresolved, as Justice Souter recognized in dissent, the Court's reasoning could not be so artificially confined. *See id.* at 438 (noting that the Court's reasoning would apply to "even the teaching of a public university professor" because "teachers necessarily speak and write 'pursuant to . . . official duties'" (alteration in original)). There is nothing in the Court's opinion suggesting that a different rule should apply to university professors. And the Court's review of established caselaw confirms that such a carve out would require a massive rewriting of First Amendment jurisprudence because *Pickering* balancing necessarily entails determining at step one whether the employee—in *Pickering*, a teacher; here, a professor—

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spoke "as a citizen on matters of public concern," or, instead, "as an employee upon matters only of personal interest." *Connick*, 461 U.S. at 147; *see Garcetti*, 547 U.S. at 418. That rule is no invention of the *Garcetti* Court, but the longstanding test set forth over forty years ago in *Pickering* and *Connick* and reaffirmed ever since. *E.g.*, *Kennedy*, 597 U.S. at 527.

B. Given that the "teaching of a university professor" is clearly governed by the reasoning of *Garcetti*, *see* 547 U.S. at 438 (Souter, J., dissenting), the only way such conduct can escape review under the *Pickering-Connick-Garcetti* framework is if the Court follows the Eleventh Circuit's lead and crafts a new rule just for professors. But neither this Court's precedents nor the text of the First Amendment warrants such a departure.

1. Start with this Court's precedents. The court below noted the tension: This Court has been both "unsparing in its praise for academic freedom" and "stingy about the details" about how it relates to the First Amendment. Pet. App. 23a-24a. As the panel recognized, this "Court's discussions of the nature of academic freedom are murky at best: 'Lacking definition or guiding principle, the doctrine floats in the law, picking up decisions as a hull does barnacles.'" Pet. App. 24a (quoting J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 Yale L.J. 251, 253 (1989)). Nevertheless, the panel concluded from these discussions that the First Amendment must protect public university professors from State oversight in "at least some core aspects of teaching and scholarship." Pet. App. 24a.

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This Court's discussions about academic freedom cannot bear the weight the Eleventh Circuit and other courts have put on them. The two primary cases are *Sweezy* and *Keyishian*. Notably, the court below crafted its rule from out-of-context statements from both decisions while not once acknowledging their actual holdings. *See* Pet. App. 12a, 15a, 23a, 33a, 42a, 43a.

Sweezy came first, in 1957. The Court reversed the conviction of a Marxist economist for refusing to answer questions by the State attorney general, including some questions regarding a guest lecture he had given at the University of New Hampshire. 354 U.S. at 248, 254-55. The plurality found fault with the breadth of the investigative powers delegated to the attorney general by the state legislature and held that his questioning violated the Due Process clause. *Id.* at 254-55.

In a concurring opinion, Justice Frankfurter, joined by Justice Harlan, grounded his vote on the principle of academic freedom. *See id.* at 255-67 (Frankfurter, J., concurring). He wrote "of the dependence of a free society on free universities" and relied on "A Statement of a Conference of Senior Scholars from the University of Cape Town and the University of the Witwatersrand" to urge "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." *Id.* at 262-63 (Frankfurter, J., concurring).

The Court decided *Keyishian* ten years later, holding that the "regulatory maze created by New York" that required state employees to aver that they had

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never "been a Communist" or a member of another "subversive organization[]" was unconstitutionally vague and risked "chilling . . . the exercise of vital First Amendment rights." 385 U.S. at 592, 596, 604. Unlike here, the case involved only "the right of a professor to speak and associate in his capacity as a private citizen," *Urofsky*, 216 F.3d at 414—an inquiry that is now typically resolved at *Pickering* step 2. But in the course of discussing the chilling effect of New York's enforcement "machinery," the Court noted that "precision of regulation" was particularly important in the educational context because "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. 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." 385 U.S. at 603 (cleaned up). Other than a couple more sentences on the virtues of "[t]he classroom" as "the marketplace of ideas," *id.*, "th[e] opinion, which voided a statute as unduly vague, is itself extraordinarily vague about the dimensions of the right of academic freedom," Byrne, *supra*, at 295.

And that's about it. The Court has discussed the value of academic freedom in a handful of other opinions, *see* Pet. App. 23a n.8, but it has "never recognized that professors possess a First Amendment right of academic freedom to determine for themselves the content of their courses and scholarship, despite opportunities to do so," *Urofsky*, 216 F.3d at 414; *see id.* at 411-15 (discussing cases). Instead, the concept the Eleventh Circuit relied on to chart a new course

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"flowered in dicta and rhetoric more than in holdings and rules." Byrne, *supra*, at 312.

2. As Judge Lagoa explained in her dissent, the original public meaning of the First Amendment did not imbue public university professors with special rights. *See* Pet. App. 61a-64a. Indeed, "prior to the Civil War, the concept of academic freedom was literally inconceivable" and "academic freedom as we know it simply had no meaning." Byrne, *supra*, at 269. That is because the job of the professor was not to "produc[e] scholarship" or "criticiz[e] prevailing dogma," but to teach students "the rudiments of ancient languages and mathematics" and the like. *Id.* "Faculty performed essentially fixed if learned operations within a traditional curriculum under the sanction of established truth." *Id.*

Things began to change in the late 19th century. *See id.* at 269-72. Universities began to shift their focus toward science and research, "more practical courses of study," and ever-greater specialization. *Id.* at 270. As the responsibilities and prestige of university professors grew, so did their desire to be free from interference from "their lay employers." *Id.* at 276. Still, "[p]rofessors were virtually the only spokespersons for academic freedom" in the late 1800s, *id.* at 273, and, "[i]n some ways, [their] legal rights were diminished" as "[c]ourts generally permitted colleges to dismiss professors at will, even during the term of a contract," if a statute or college by-laws "gave schools the power to dismiss faculty at their discretion," *id.* at 272 n.81.

By the turn of the 20th century, the "structure of the modern university had become clear," *id.* at 272

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n.82, much of it driven by "Americans who had studied at German universities" and returned seeking "to remodel American universities in the German image," *Urofsky*, 216 F.3d at 410 (citation omitted). It was in Germany that these Americans first encountered the three principles of academic freedom: (1) *Lerhfreiheit*, or "teaching freedom" for professors; (2) *Lernfreiheit*, or "learning freedom" for students, and (3) *Freiheit der Wissenschaft*, which included the university's right to control its internal affairs. Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 Tex. L. Rev. 1265, 1269-70 (1988).

In 1915, the newly formed American Association of University Professors (AAUP) released a Declaration of Principles adopting its own form of academic freedom. Notably, it dropped two of the three pillars of the German model (student freedom and university control) and *expanded* the rights of professors. *See id.* at 1275. The Association stated that academic freedom for professors included not just the "freedom to teach and to inquire (the German two-part convention), but also 'extramural freedom,' by which it meant . . . freedom to speak without the warranty of a professional task or an acknowledged expertise." *Id.* "[T]he report provided in effect that academic freedom applied to a certain class of persons, no matter how they chose to express themselves, rather than to certain types of expression found in the repertory of that class." *Id.* This definition of academic freedom "has been endorsed by every major higher education organization in the nation." Byrne, *supra*, at 279.

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The majority below whisked away this history by (1) blaming this Court's "extremely cramped view" of the First Amendment in the early 20th century as the reason there are no cases discussing academic freedom until the Cold War, and (2) citing actions by Daniel Webster to keep Dartmouth College private and by Thomas Jefferson to encourage truth-seeking at the University of Virginia as evidence of "early sources" that "reflect a respect for keeping politics out of teaching and scholarship." Pet. App. 49a-50a.

These rejoinders miss the point. If the question is what the First Amendment was understood to mean when it was ratified in 1791 and incorporated against the States in 1868, then it matters that the concept of academic freedom for professors the Eleventh Circuit relied on did not come to the United States until later. The court erred by reading into the First Amendment a German theory of higher education as modified by the AAUP in the 20th century and granting to professors First Amendment rights that no one else has.

II. Although the First Amendment does not protect public university professors' official speech, academic freedom remains important.

If this Court grants review and correctly holds that the First Amendment does not protect a public university professor's official speech, that ruling would not convey that academic freedom is not otherwise worth protecting. With or without constitutional protection, academic freedom at our Nation's college and universities is not going anywhere.

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An issue can be of surpassing importance to a free society but not be constitutionally protected. For example, providing a quality public education plays a "vital role" in a "free society." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30 (1973). It is "perhaps the most important function of state and local governments." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). Yet there is no fundamental right to education under the Constitution. *Rodriguez*, 411 U.S. at 35. That the Constitution lacks such a right, this Court has emphasized, does not "in any way detract[]" from "the grave significance of education both to the individual and to our society." *Id.* at 30 (cleaned up). The same is true here. Academic freedom for public university professors can be simultaneously outside the First Amendment's protections while still of "transcendent value to all of us and not merely to the teachers concerned." *See Keyishian*, 385 U.S. at 603.

That an issue is important is not a reason to constitutionalize it. Stated differently, the importance of an issue is not cause to question the States' ability to protect it. After all, "virtually every state statute affects important rights." *Rodriguez*, 411 U.S. at 31 (cleaned up). But if importance to society were the test for whether an issue merits constitutional protection, the Court would "be assuming a legislative role and one for which the Court lacks both authority and competence." *Id.* at 31 (citation omitted). Courts accordingly must always "guard against the natural human tendency to confuse what [the Constitution] protects with our own ardent views about the liberty that Americans should enjoy." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 239 (2022). It follows that

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the Court should not confuse the importance of academic freedom with the separate question of whether the First Amendment, as interpreted by its text and history, protects the official speech of public university professors.

Although the Constitution leaves academic freedom to the people to protect through their elected representatives, there is no reason to think that the States are eager to cast aside academic freedom at their public universities. For one thing, this Court "has never set aside a state regulation on the basis that it infringed a First Amendment right to academic freedom." *Urofsky*, 216 F.3d at 412. That means that public universities, and by extension the States that created them, today protect academic freedom in the absence of binding precedent from this Court. Indeed, this Court expressly reserved the academic-freedom question two decades ago. *Garcetti*, 547 U.S. at 425. If States were rushing to undercut academic freedom, they surely would have taken advantage of *Garcetti*'s reservation much sooner than now. In fact, the *Garcetti* dissent worried that might happen. *Id.* at 438 (Souter, J., dissenting). To be sure, several courts of appeals have held that the First Amendment protects certain official speech of public university professors. But as Florida's petition points out (at 2-4), the circuits are hardly uniform on this issue. Judicial rulings, then, cannot alone account for the reality that public university professors across the country currently enjoy protections for academic freedom. More to the point, many public universities are now committed to academic freedom in large measure because

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they and the States that created them think it is a worthwhile value.

The same is even more true for our Nation's private colleges and universities. Despite the First Amendment generally not applying on those campuses, *see Rendell-Baker v. Kohn*, 457 U.S. 830, 837-43 (1982), there is a proud tradition of academic freedom at private colleges and universities. The University of Chicago is perhaps the exemplar with its *Chicago Principles*. University of Chicago, *Report of the Committee on Freedom of Expression* (2015), available at https://perma.cc/D7MQ-VT63 ("[W]ithout a vibrant commitment to free and open inquiry, a university ceases to be a university."). Many other private colleges and universities similarly protect their professors' academic freedom. For example, Harvard's relevant policy provides that "[t]he University places special emphasis . . . upon certain values which are essential to its nature as an academic community," which include "freedom of speech and academic freedom." Harvard University, *University-Wide Statement on Rights & Responsibilities* (adopted Sept. 20, 1970), available at https://perma.cc/9LGP-NVHP. And Notre Dame "is a university committed to the pursuit of truth through teaching, learning, inquiry, and dialogue" and is "committed fully to the academic freedom of scholars to research and publish the results of their research and to teach in accord with their obligations and training." University of Notre Dame, *Statement on Freedom of Expression* (Aug. 27, 2024), https://perma.cc/CY4D-33QZ. These robust guarantees of academic freedom at private colleges and

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universities demonstrate that academic freedom does not need constitutional protection to flourish.

Along the same lines, many States protect academic freedom as a matter of state law. Take Kentucky law for example. It requires each public post-secondary institution in the Bluegrass State to grant "students and faculty the broadest possible latitude to speak, write, listen, challenge, learn, and discuss any issue." Ky. Rev. Stat. § 164.348(2)(b). And every public university must "commit[] to maintaining a marketplace of ideas where the free exchange of ideas is not suppressed because an idea put forth is considered by some or even most of the members of the institution's community to be offensive, unwise, disagreeable, conservative, liberal, traditional, or radical." *Id.* at (2)(c). Although state-law protections for academic freedom do not exist everywhere, Kentucky is not an outlier. And the other States with laws that safeguard academic freedom bridge the red-state-blue-state divide. *E.g.*, Ala. Code §§ 16-68-1(5), 16-68-3; Ariz. Rev. Stat. Ann. § 15-1866; Cal. Gov't Code § 3561(c); Ind. Code 21-39.5-2-2(a)(1) & (d); Md. Code Ann., Educ. § 10-204(4); Tenn. Code Ann. § 49-7-1907. On top of these state laws, almost all post-secondary institutions have their own policies protecting academic freedom. AAUP, *Policies on Academic Freedom, Dismissal for Cause, Financial Exigency, and Program Discontinuance* at 4 (July 2020), available at https://perma.cc/3HEP-8F5C.

Respondents no doubt will counter that the Florida law at issue demonstrates that some States are not committed to academic freedom. But that different States think differently about a matter is a feature,

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not a bug, of federalism. *See New State Ice. Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). In any event, the *amici* States are not convinced that Florida's law demonstrates hostility toward academic freedom. In the main, Florida's law simply prohibits instruction at its public universities that "espouses, promotes, advances, inculcates, or compels" students to believe certain things that the State deems discriminatory, such as that "[m]embers of one race, color, national origin, or sex are morally superior to members of another race, color, national origin, or sex." Fla. Stat. Ann. § 1000.05(4)(a)1. Importantly, the law makes clear that its prohibitions "may not be construed to prohibit discussion of the concepts listed therein as part of a larger course of training or instruction, provided such training or instruction is given in an objective manner without endorsement of the concepts." Fla. Stat. Ann. § 1000.05(4)(b). So Florida's law is not a broadside attack on academic freedom. It is Florida ensuring that its commitment to nondiscrimination carries through to all possible corners of the Sunshine State.

Even if Florida's law can be said to undermine academic freedom, Florida has done so with eyes wide open. In the modern world, the States compete against each other on virtually everything. In this Court's words, the States are "in competition for a mobile citizenry." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). This no doubt carries over to attracting professors and students. Every State wants its public universities to be world-class institutions that draw and retain first-rate professors and the best and brightest students. If a State's laws undermine academic freedom, public

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universities in other States with better academic-freedom protections may well be the beneficiaries, which might prompt the original State to rethink its decision. Or Florida's law might accomplish the opposite of what its critics predict. It might make Florida's public universities more attractive to current and prospective faculty and students who desire to avoid the invidious indoctrination that Florida's law prohibits. Thus, while Florida "could not compel a private university to follow the approach laid out in [its] statute," Florida "may choose to offer it for itself and see how it fares in the marketplace of ideas." *McDonald*, 186 F.4th at 931 (Easterbrook, J., concurring). Whatever the outcome, the Constitution leaves such a choice to Florida.

III. The *amici* States need this Court's guidance on the question presented.

Whether the First Amendment protects the official speech of public university professors is a question on which the *amici* States and their public universities need guidance.

It has been two decades since this Court declined to decide whether its holding that public employees' official speech is not protected by the First Amendment "would apply in the same manner to a case involving speech related to scholarship or teaching." *Garcetti*, 547 U.S. at 425. Both before and after *Garcetti*, the courts of appeals have debated the First Amendment's protections for the official speech of public university professors. Pet. 1-2. And the answers have not been consistent. *See, e.g.*, *Gorum v. Sessoms*, 561 F.3d 179, 186 n.6 (3d Cir. 2009) ("The full implications of the Supreme Court's statements in

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Garcetti regarding 'speech related to scholarship or teaching' are not clear," so "[a]s a result, federal circuit courts differ over whether (and, if so, when) to apply *Garcetti*'s official-duty test to academic instructors.").

Even though several circuits have concluded that the First Amendment protects some official speech by public university professors, that has only intensified the confusion. Courts in those circuits are now grappling with messy follow-on questions about the extent of the First Amendment's protections. For example, to what extent can a public university establish course content consistent with the First Amendment? *Johnson-Kurek v. Abu-Absi*, 423 F.3d 590, 593-95 (6th Cir. 2005). Can public universities restrict off-topic speech by professors in the classroom, as the opinion below allows? Pet. App. 39a (saying that a university can ensure classroom speech is "germane" and "professionally competent" (citation omitted)). Can public universities require professors to say certain things in the classroom? *Meriwether v. Hartop*, 992 F.3d 492, 506-07 (6th Cir. 2021). Can public universities discipline a professor for official speech unrelated to teaching or scholarship? *Porter v. Bd. of Trs. of N.C. State Univ.*, 72 F.4th 573, 583 (4th Cir. 2023). And can public universities discipline a professor for official speech made off campus? *Josephson v. Ganzel*, 115 F.4th 771, 786 (6th Cir. 2024). These are only a few of the many questions courts have grappled with about the scope of a First Amendment right to academic freedom.

Consider amicus Kentucky's recent experience working through some of these issues. The rule in the Sixth Circuit is that "professors at public universities

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retain First Amendment protections at least when engaged in core academic functions, such as teaching and scholarship." *Meriwether*, 992 F.3d at 505. And under Sixth Circuit precedent, off-campus speech by a professor can qualify as protected official speech. *Josephson*, 115 F.4th at 786. Based on these holdings, a law professor who is an antitrust scholar sued the University of Kentucky for violating his First Amendment rights. The antitrust professor believes that Israel is "a Western colony that [is] committing genocide" and that Israel "should be brought to an end," and he has shared his views about Israel all over the place, including during an optional lecture on campus and from the stage while speaking at off-campus conferences. *Woodcock v. Univ. of Ky.*, 820 F. Supp. 3d 555, 561-63, 565 (E.D. Ky. 2026), *rev'd* 188 F.4th 969 (6th Cir.). The professor's position is that the First Amendment leaves the University of Kentucky essentially no room to discipline, or even investigate, him for what he contends is his official speech.

Litigation like Kentucky's shows what inevitably happens after a court concludes that the First Amendment protects some official speech by university professors. Such a threshold holding makes courts line-drawers about a host of topics, including how far a university can go to establish curriculum and ensure that a professor's classroom instruction and academic speaking and writing are on topic, effective, and professional. The opinion below did not hide from this reality. It openly embraced judicial oversight of issues like these by adopting a balancing test under which a public university can restrict a professor's official speech if its actions are "reasonable and related to

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legitimate pedagogical concerns," considering "the context of the speech[,] the state's position as a public employer[,] and the strong predilection for academic freedom as an adjunct of the free speech rights of the First Amendment." Pet. App. 37a. This amorphous balancing test cannot help but substitute the judgment of courts for universities and the States that created them. As the dissent below summed up, the majority's rule empowering federal courts to superintend a university's decisions "reduces the First Amendment to a reflection of judicial preference, regardless of the State's interests in its classroom." Pet. App. 53a.

The Eleventh Circuit's approach also introduces a stark contradiction into First Amendment doctrine in which the Constitution protects the official speech of just one class of government employees. Under *Garcetti*, the government employees who authored this brief receive no First Amendment protection for their official speech. Yet under the decision below, government employees who are academics receive expansive protection for their official speech. To state the obvious, nothing in the text or history of the First Amendment draws such a line between government employees. As the dissent below explained without contradiction, "there is no serious dispute that, before the twentieth century, no one believed that the First Amendment enshrined a professorial right to freedom of speech in the classroom." Pet. App. 61a. The Court should grant certiorari to say so.

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CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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