TANG MOOT COURT COMPETITION

FALL 2023

(ORDER LIST: 599 U.S.)

FRIDAY, AUGUST 11, 2023

CERTIORARI GRANTED

23-0777 APALSA STATE UNIVERSITY, Petitioner, V. LIAO, SADIE, Respondent

The petition for writ of certiorari before judgment is granted limited to the following questions:

1) Whether this Court's decision in Garcetti v. Ceballos bars claims under the Free Speech Clause of the First Amendment by public university professors related to speech undertaken as part of their official teaching duties.

2) Whether a public university's placement of the negative reasons for a professor's termination in a private personnel record constitutes a deprivation of liberty under the Due Process Clause of the Fourteenth Amendment, where that record is potentially accessible to the public under a state open records statute.

Appendix A – Opinion of the 13th Circuit Court of Appeals

United States Court of Appeals
For the Thirteenth Circuit

SADIE LIAO
Plaintiffs-Appellants

v.

APALSA STATE UNIVERSITY
Defendant-Appellee

Appeal from the United States District Court for the
District of Apalsa

Decided: March 13, 2022

Before TAMURA, LEE, and PATEL, *Circuit Judges.*

ANNA TAMURA, *Circuit Judge.*

Plaintiff-Appellant Sadie Liao ("Dr. Liao" or Plaintiff), a professor at Apalsa State University ("ASU" or "the University"), appeals from dismissal of her claims against the University following termination of her employment for refusing to include a mandatory diversity statement in her course syllabus. Plaintiff asserts two claims in her Complaint: violation of her right of free speech under the First Amendment and her due process rights under the Fourteenth Amendment to the U.S. Constitution. After answering and engaging in a limited exchange of documents, the University moved for summary judgment as to both claims in the Complaint pursuant to Federal Rule of Civil Procedure 56.

The District Court granted the University's motion for summary judgment as to Plaintiff's first claim for violation of her First Amendment rights, determining that Dr. Liao's refusal to include the diversity statement in her syllabus was not a scholarship or teaching activity protected under the First Amendment. The Court also found that Dr. Liao's due process claim was not viable because the negative information placed in her employment record was not published.

We reverse the District Court's decision granting Defendant's motion for summary judgment and remand the case for further proceedings consistent with this Opinion.

FACTUAL ALLEGATIONS

Plaintiff Sadie Liao was employed by Defendant, Apalsa State University ("ASU" or "the University"), as a professor in the College of Education specializing in curriculum studies from August 2008 until February 2021. ASU is a public university. Throughout her employment at ASU, Professor Liao was acknowledged to be a highly regarded scholar, an excellent classroom teacher, and a dedicated mentor to her students. ASU granted Professor Liao tenure in 2015.

In the summer of 2020, ASU adopted a formal policy ("the Policy") requiring that all faculty include in their syllabi the following Diversity Statement beginning in the 2020–21 academic year:

> The University, each of its faculty, and each of its employees are committed to the notion of intellectual community, which is enriched and enhanced by diversity along a number of dimensions, including race, ethnicity and national origin, gender and gender identity, sexuality, class, and religion.

The Policy further states that faculty members who intentionally do not include the Diversity Statement on their syllabi will be automatically found to have engaged in "conduct that conflicts with the University's fundamental vision and values" and will be subject to "potential sanctions from the University, including but not limited to warnings, suspensions, and terminations of their employment."

Professor Liao believes strongly that diversity is an important value in higher education and does not disagree with the sentiments expressed in the Diversity Statement. However, she also believes that professors at higher education institutions should have the freedom to determine the content, scope, and style of their courses, including the content of their syllabi and other course materials. Long before ASU adopted its Policy, Professor Liao had criticized mandatory diversity pledges in general, comparing them to loyalty oaths during the McCarthy era. In one published article, Professor Liao wrote:

> Every professor and every student should be able to think, believe, and say what they want about the importance of diversity. The true importance of diversity and inclusion can only be taught and learned if its value is openly debated in thoughtful public discourse. In fact, mandatory diversity pledges may actually be counterproductive, and may cause a backlash and create greater resistance to important diversity and inclusion initiatives.

Immediately after ASU adopted the Policy, ASU's Provost distributed a memo to all full-time faculty advising that they must comply with the Policy and include the Diversity Statement verbatim on all course syllabi. Professor Liao communicated her disagreement with the Policy in a private email message to ASU's Provost, informing him that she would not be including the Diversity Statement in the syllabus for her Fall 2020 Semester class, Emerging Issues for Marginalized Persons in Higher Education. In October 2020, the Provost notified Professor Liao in a private memorandum that she was out of compliance with the Policy. The Provost warned her that "you have 30 days to amend your syllabus to comply with the Policy, otherwise the

University may begin disciplinary proceedings against you." Professor Liao ignored the memorandum and continued teaching for the remainder of the semester without incident.

In December 2020, the Provost sent Professor Liao a notice that the University was initiating disciplinary proceedings against her for "Intentional Violation of the University Diversity Statement Policy." The notice indicated that, "In your defense, you may provide reasons for your violation of the Policy, such as lack of knowledge about the Policy's requirements. Intentional violations of the Policy may subject you to more serious sanctions than inadvertent violations."

At a disciplinary hearing (which was not open to the public) later that month, Professor Liao, represented by her own lawyer, appeared before a University Disciplinary Committee, and testified that she intentionally violated the Policy. She stated:

> Consistent with my prior academic writings, I believe mandatory diversity statements such as those required by the Policy are both a violation of academic freedom and are counterproductive to the goal of promoting diversity and inclusion. I therefore openly and intentionally violated the Policy by not including a Diversity Statement on my syllabus. I stand by that decision.[1]

Professor Liao was scheduled to teach two classes in the Spring 2021 Semester. When the semester began, she distributed syllabi for both of those classes, neither of which contained the Diversity Statement. In February 2021, the University informed Professor Liao that her employment was terminated on the ground that she "openly and intentionally failed to comply with a direct curricular requirement that she include a Diversity Statement in her course syllabi." The decision also stated the following:

> The University concludes that Professor Liao's blatant and admittedly intentional violation of the Policy demonstrates that she either has no commitment or a very poor commitment to diversity and inclusion, which reflects that her values are in direct conflict with the University's fundamental vision and values. Upon her termination, this decision will become a part of her permanent personnel record, but will not be otherwise disseminated, unless otherwise required by law.

In addition to objecting to her termination, Professor Liao strongly objects to the statement about her commitment to diversity and inclusion, which she believes is not true and will adversely affect her future employment opportunities.

Although ASU's personnel records are generally not available to the public, the State of Apalsa had enacted the Apalsa Open Public Records Act (AOPRA) in 2001. Under this Act, "any person" may apply to the State for the disclosure of government documents, "including personnel records," created by any state-funded university upon a showing that such disclosure is

[1] The parties agree that the University provided Professor Liao with notice and a full opportunity to be heard at the disciplinary proceeding regarding her violation of the University's policy. Therefore, there are no due process issues related to the conduct of the hearing itself.

"in the public interest." Apalsa Rev. Code, Title 8, §2554. The statute specifies that "any university covered by this Act must disclose a personnel record upon request unless there is a compelling interest in nondisclosure." *Id*. It is undisputed that ASU is covered by AOPRA and that at the time the Complaint was filed and currently, no person had requested a copy of Professor Liao's personnel record under AOPRA and there is no evidence that any member of the public or future employer has had access to that record.

Pursuant to ASU's personnel procedures, Professor Liao appealed the decision to the ASU Board of Trustees, but the Board affirmed the decision to terminate her, and she was immediately dismissed from her position as a professor. The University announced publicly only that "Professor Liao is no longer employed by ASU as of this date. Other faculty will complete the teaching of her Spring Semester classes." ASU did not otherwise indicate the reasons that Professor Liao was no longer in her position and Professor Liao said nothing publicly.

PROCEDURAL HISTORY

In March 2021, Professor Liao commenced an action against ASU pursuant to 42 U.S.C. § 1983 in the U.S. District Court for the District of Apalsa. In her Complaint, she alleges as to her first claim that "ASU's Policy requiring all faculty to include a Diversity Statement on every course syllabus directly infringed on Professor Liao's right to academic freedom and her right to be free from compelled speech in violation of the First Amendment to the U.S. Constitution."[2] Second, she alleges that the University "violated [her] due process rights under the Fourteenth Amendment by depriving her of her liberty by placing, and thereby publishing, a finding in her personnel record that Professor Liao 'either has no commitment or a very poor commitment to diversity and inclusion. . . .' Such statements are damaging to her reputation and were accompanied by the termination of her employment." The lawsuit seeks a permanent injunction directing ASU to restore Professor Liao to her position as a full professor and to expunge the decision regarding her termination from her employment record.

In May of 2021, ASU answered Dr. Liao's Complaint. Following ASU's Answer, Dr. Liao properly served Requests to Admit pursuant to Rule 36. The University subsequently answered the requests to admit. The Parties then entered into certain stipulations about the facts of the case.

In August 2021, ASU filed a motion for summary judgment under Federal Rule of Civil Procedure 56 on both claims in the Complaint. With respect to Plaintiff's first claim, ASU argued that under current First Amendment doctrine, a professor's speech in the classroom, including statements on her syllabus, are not the professor's private speech, but are the *university's* speech. Therefore, Professor Liao's compelled speech claim cannot be sustained. Second, ASU contended that because the University's employment records are not publicly

[2]The First Amendment right of free speech technically applies to state and local government actors only as incorporated through the Due Process Clause of the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

available, any statements by the University in Professor Liao's employment record do not constitute a deprivation of her liberty without due process of law.

On February 3, 2022, the district court granted ASU's motion under Federal Rule of Civil Procedure 56. Professor Liao filed a timely notice of appeal in the Thirteenth Circuit.

DISCUSSION

Under Federal Rule of Civil Procedure 56, "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). Our review of the district court's decision to grant summary judgment is de novo, applying the same standard as the district court. *King v. Ill. Cent. R.R.*, 337 F.3d 550, 553 (5th Cir. 2003). Summary judgment may only be granted if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Quigg v. Thomas Cnty. Sch. Dist.* 814 F.3d 1227, 1235 (11th Cir. 2016). A genuine issue of material fact exists when there is evidence that would allow a reasonable jury to return a verdict for the non-movant. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). In ruling on a motion for summary judgment, facts must be viewed in the light most favorable to the non-movant only if there is a genuine dispute as to those facts. *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009).

I. FIRST AMENDMENT CLAIM

Under the First Amendment, there is no difference between compelled speech and compelled silence. *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 796–97 (1988). Because compelled speech forces a speaker to convey the government's chosen message, such regulations are content-based. *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018). Indeed, compelled speech is abhorrent because the government coerces individuals "into betray[ing] their convictions." *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2464 (2018). An example would be forcing an atheist muralist to create an image of "Evangelical zeal." *See also 303 Creative v. Elenis*, 600 U.S. ___, ___ (2023) (slip op., at 23-24) (providing the example of a government forcing an atheist to make an evangelical image). Therefore, rules compelling speech are presumptively unconstitutional unless they are narrowly tailored to serve a compelling government interest. *Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. at 2371.

In accordance with these principles, the Supreme Court has directed that when the government attempts to make private speakers the conduit for its messages, the government must avoid "burdening a speaker with unwanted speech." *Riley,* 487 U.S. at 800. The Court has already applied these principles in a wide range of contexts. *See, e.g., Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (striking down a state law requiring licensed crisis pregnancy centers to post certain notices at their facilities); *Janus,*138 S. Ct. 2448 (striking down state law requiring public employees to pay agency fees to government employee unions regardless of whether they join); *but see Rumsfeld v. F. for Acad. & Inst. Rts., Inc*., 547 U.S. 47, 61–62 (2006) (rejecting the application of the compelled speech doctrine to law requiring law schools to allow military recruiters on campus).

In contrast, when the government speaks, it is generally not barred from determining the content of its messages in order to carry out its functions. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015). Thus, in *Walker,* the Supreme Court held that because specialty license plates are government speech, the state could control their content without violating the Free Speech Clause of the First Amendment. *See id.* at 219–20; see also *Pleasant Grove City v. Summum*, 555 U.S. 460, 464 (2009) (a city's choice of which monuments to place in a park was government speech); *but see Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1587 (2022) (city's program allowing groups to raise their flag in front of city hall was not government speech).

However, because both the government and its employees have a right to speech as private citizens, the Supreme Court has sought to strike a balance between these interests. *See Rankin v. McPherson*, 483 U.S. 378, 384 (1987) (". . . [B]alancing is necessary in order to accommodate the dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the First Amendment"). Government employees do not sign away their free speech rights when accepting employment. *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006). Indeed, a government may not condition employment on an individual surrendering his or her constitutionally-protected interest in free expression. *Connick v. Myers*, 461 U.S. 138, 143 (1983). Simply put, the concern animating this area of law stems from the recognition that the government should not be allowed "to suppress the rights of public employees to participate in public affairs." *Connick*, 461 U.S. at 144–45. The right to participate and comment—or not comment—on matters of public concern is the most sacrosanct under the Free Speech Clause, not matter how offensive the speech. See, e.g., *Snyder v. Phelps*, 562 U.S. 443 (2011) (permitting offensive and abhorrent speech made by protesters outside of a private funeral); *Tex. v. Johnson*, 491 U.S. 397, 420 (1989) (finding that burning the flag is political expression not punishable under criminal laws).

The Supreme Court in *Pickering v. Board of Education*, 391 U.S. 563 (1968), sought to find a balance between the "interests of the [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." *Id.* at 568. As the Court in *Connick* clarified, when an employee's speech cannot be characterized as "speech on a matter of public concern," then no further scrutiny is necessary under the First Amendment. *Connick*, 461 U.S. at 146. Accordingly, when an employee speaks pursuant to his or her official duties, his or her speech is the government's own, and the First Amendment generally does not apply. *Kennedy v. Bremerton School Dist.,* 142 S. Ct. 2407, 2423 (2022). On the other hand, when an employee speaks as a private citizen on a matter of public concern, the employee's interest in speech may still be outweighed by the government's interest in promoting the efficiency of public services it performs through its employees. *Id.* If Dr. Liao were a government clerk or in a city marketing department who refused to place the required language on a form or pamphlet, this case would likely be resolved in the government's favor.

However, Dr. Liao is not just any public employee but also a professor at a public university. Teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist*., 393 U.S. 503, 506 (1969). Nonetheless, their rights are circumscribed by their dual role as private citizens and

government employees, who are paid to convey the government's intended message. *Kennedy*, 142 S. Ct. at 2423. Because courts generally defer to teachers on academic matters, teachers are not subject to the same level of restrictions as other government employees, though still subject to restrictions greater than private citizens. *See Garcetti v. Ceballos,* 547 U.S. 410, 425 (2006) (refusing to determine whether the *Garcetti* exception applies to the context of school employees). On the other hand, the government as employer has broader powers than the government as sovereign. *Id.* at 418.

As the Court explained in *Garcetti,* "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." *Garcetti*, 547 U.S. at 421. In addition, the Court observed that expression relating to academic scholarship and instruction could implicate First Amendment concerns "not fully accounted for by this Court's customary employee-speech jurisprudence." *Id.* at 425. Because the Court declined to address the issue of academic speech in the decision, *Id.*, this Court must determine the extent to which academic speech by public university professors should be exempted from the broader canon of precedent on government employee speech. Academic freedom is an essential right under the First Amendment. As noted by one commentator:

> For nearly fifty years, the Supreme Court sporadically has made compelling statements about the importance of academic freedom, yet, it has been either unable or unwilling to develop a coherent framework for assessing the scope of constitutional academic freedom rights. Indeed, more often than not, its decisions in this area are not even about academic freedom *per se*. …. [T]he extant law can best be described as a set of context-specific legal standards loosely connected by some common principles. As a consequence, courts and commentators alike find it difficult to articulate the most basic doctrinal precepts of academic freedom law.

Alan K. Chen, *Bureaucracy and Distrust: Germaneness and the Paradoxes of the Academic Freedom Doctrine*, 77 U. COLO. L. REV. 955, 959–60 (2006).

While the Supreme Court has never articulated a formal doctrine regarding academic freedom, it has acknowledged that:

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

Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967). Indeed, although the Court has acknowledged its "responsibility to safeguard . . . academic freedom," it also has recognized that it is ill-suited "to evaluate the substance of . . . academic decisions that are made daily by faculty members of public educational institutions . . . ." *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985).

A.

A number of courts have determined that the rule set forth in *Garcetti* does not apply to academic scholarship or instruction. The most analogous case involved a university policy requiring faculty to refer to students by their preferred pronouns. *Meriwether v. Hartop*, 992 F.3d 492, 498 (6th Cir. 2021). A philosophy professor brought a free speech claim based on the university's decision to discipline him for refusing to refer to students by their preferred pronouns. *Id.* at 501–02. The Sixth Circuit held that "the First Amendment protects the free-speech rights of professors when they are teaching." *Id.* at 505. It reached this conclusion based on *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (*plurality opinion*), and *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). *Meriwether,* 992 F.3d at 504–05.

In reaching this conclusion, the Sixth Circuit cautioned that if faculty members such as Dr. Liao did not have free speech protections when teaching, nothing could stop the university from enforcing strict ideological conformity. *Id*. It could force "a pacifist to declare that war is just, a civil rights icon to condemn the Freedom Riders, a believer to deny the existence of God, or a Soviet émigré to address his students as 'comrades.'" *Id.* at 506. The university would cease to be a marketplace of ideas, rendering the guarantees of the First Amendment hollow. *See Bd. of Educ. v. Pico*, 457 U.S. 853, 866–67 (1982)(*plurality opinion*) (banning certain books from the school library "directly and sharply implicated" the First Amendment rights of students to receive information and ideas [without which the school] "would be a barren marketplace of ideas that had only sellers and no buyers."); *see also Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969) ("[S]tate operated schools may not be enclaves of totalitarianism. . . . and students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate.").

Other courts have joined the Sixth Circuit in declining to apply *Garcetti* to cases involving teaching and scholarship. In *Demers v. Austin,* 746 F.3d 402 (9th Cir. 2014), the Ninth Circuit expressly held that *Garcetti* does not apply to "speech related to scholarship or teaching." *Id.* at 406. Similarly, the Fourth Circuit in *Adams v. Trs. of the Univ. of N. Carolina-Wilmington*, 640 F.3d 550 (4th Cir. 2011) reversed the district court's decision to apply *Garcetti* to a teacher's academic speech. *Id.* at 561. The court determined that applying *Garcetti* to such speech would "place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment." *Id.* at 564. Such a holding would conflict with the longstanding precedent that individuals do not lose their rights to speak as private citizens by virtue of public employment. *Id.*

We decline to follow the circuits that have determined that *Garcetti* does apply to classroom teaching. The University cites *Brown v. Chicago Board of Education*, 824 F.3d 713 (7th Cir. 2016), for the proposition that Dr. Liao's speech is not protected because she was speaking as an employee in the classroom. *Id.* at 715. However, *Brown* involved a grammar school teacher's lesson on racial epithets. *Id.* It did not involve the speech of a college or university professor. *Id.* Indeed, the Seventh Circuit in *Demers* found *Brown* unpersuasive for this reason. *Id.* at 716. On that fact alone, the case is distinguishable.

But even if we assumed, as the University argues, that *Brown* does apply to a university setting, we find the reasoning of *Brown* unpersuasive. In *Brown*, a teacher's in-classroom instruction was determined not to be the speech of a citizen for the purposes of the First Amendment. *Id.* The University argues that applying such a rule properly balances its need to manage the school and promote its important goals of diversity, while allowing it to be a marketplace for ideas to thrive on campus.

However, the in-classroom setting is just as important for academic freedom as other settings. If students are not exposed to new and controversial ideas in the classroom, society loses out because those students may never later encounter such ideas and the role of the University being marketplace of ideas is undermined. The University's argument doubly burdens the marketplace because the University is empowered to enforce orthodoxy upon teachers and students while requiring them to seek out and create opportunities for challenging these ideas outside of the classroom. How students are supposed to encounter heterodox ideas in the absence of guidance and instruction is never addressed. In other words, applying *Garcetti* in a manner that limits protection of in-classroom speech at the college and university level does not address the concerns relating to academic freedom.

Finally, we find the analysis of the marketplace of ideas in *Pico* particularly persuasive for why *Garcetti* should not apply. Although *Pico* involved a school library, the Court's concerns were much broader. The Court observed that the First Amendment protects the right to receive information. *Pico*, 457 U.S. at 866–67. Thus, not only did the banning of books from a school library implicate the student's right to receive information, it also implicated the rights of others to share information. *Id.* The Court expressed this concern through a metaphor: a marketplace of ideas where there are only sellers and no buyers. *Id.* Allowing *Garcetti* to apply to professors raises the same concerns. If banning books with "dangerous" ideas denies access, preventing academic teaching and scholarship that confronts university orthodoxy also prevents access.

Having determined that Dr. Liao's claim is not barred by *Garcetti*, we next analyze Dr. Liao's speech under *Pickering*.

B.

Under *Pickering*, Dr. Liao's interest as a private citizen speaking on a matter of public concern must be balanced against the University's interest in promoting efficient public services. *Pickering*, 391 U.S. at 568. In doing so, we must determine whether: (1) Dr. Liao's speech was on a matter of public concern and (2) whether her interest is greater than the university's interest in the efficient rendering of its services through Dr. Liao. *Meriwether*, 992 F.3d at 507–08. As other courts have recognized, the *Pickering* balancing process in the context of academic speech is particularly challenging. *See Demers*, 746 F.3d at 413 ("The Pickering balancing process in cases involving academic speech is likely to be particularly subtle and 'difficult.'").

1.

The University first argues that Dr. Liang did not speak on a matter of public concern because she chose to stay silent rather than express a point of view. We disagree. On the surface, the issue before the Court in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943) was a refusal to say the pledge of allegiance. *See id.* at 626–29. But as the Court observed, what was truly before the Court was the elimination of dissent. *Id.* at 641. As the Court eloquently wrote, "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard." *Id.* Similarly, the Court's refusal to permit that a particular message be put on a license plate served to protect "the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable." *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

Both *Barnette* and *Wooley* demonstrate that sometimes silence is a powerful message especially when challenging the orthodox point of view. Dr. Liao's intentional silence on diversity is speech because it communicates a message. Her syllabus raises the important question of the necessity of diversity-related pledges. Accordingly, we disagree with the University and find that her refusal to include the statement is speech.

We also find the University's reliance on *Rumsfeld* misplaced. The University argues that like the Solomon Amendment at issue in *Rumsfeld*, its requirement that a faculty member include a diversity statement in a syllabus is conduct and not speech. At issue in *Rumsfeld* was a requirement in the Solomon Amendment that denied federal funding to institutions that refused to permit military recruiters on campus to the same extent the institution allowed other employers to recruit students. *Rumsfeld*, 547 U.S. at 55. The Court concluded that the Solomon Amendment did not compel speech because it did not interfere with any message of the school. *Id.* at 64. In arguing that its syllabus requirement is similar to conduct addressed in the Solomon Amendment, the University overlooks some critical details in *Rumsfeld*. In finding that the requirement of hosting military recruiters did not send a message, the Court reasoned that a law school's choice of recruiters is not inherently expressive. *Id.* at 64–65. In contrast, we find that what a professor chooses to include or exclude in a syllabus is inherently expressive. A professor's syllabus includes what the professor will teach and what students will learn. This situation is more akin to that of the parade organizer forced to host floats that he or she disagrees with, rather than the bureaucratic and economic choices of a career services office. *See id.* at 64 ("A law school's recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper[.]"). *Rumsfeld* is neither persuasive nor applicable because it deals with regulation of conduct rather than speech, which is what is involved in the syllabus at issue.

The University next argues that even if Dr. Liao's refusal to include the diversity statement was expressive, it was not a matter of public concern. The University points to *Connick*'s reference to matters of "purely academic interest." *See Connick*, 461 U.S. at 153. The University also characterizes the debate over diversity statements as the kind of "academic inside baseball" that is more a curricular squabble rather than an actual political disagreement. From the University's perspective, the diversity statement stems from an internal policy discussion applicable only in an administrative context. However, the very reasons for the diversity statement that the University raises, such as the need to diversify the student body or to create safe spaces, are political. Further, we should be cautious about labeling academic debates

as solely academic. As the Ninth Circuit observed, disputes over the canon of literature in an English department are not trivial because of "the importance to our culture not only of the study of literature, but also of the choice of the literature to be studied." *Demers*, 746 F.3d at 413. The *Demers* court thus concluded that courts should "hesitate before concluding that academic disagreements about what may appear to be esoteric topics are mere squabbles over jobs, turf, or ego." *Id.* Heeding the warning of the *Demers* court, we note that even though the debates over syllabi and diversity statements may appear to be trivial bickering arising in idiosyncratic academic environments, such issues have been the subject of political debates in legislatures throughout the country. Moreover, Dr. Liao's dissenting voice on the subject is tied to broader questions of how this country should navigate current questions of racial and ethnic diversity. Therefore, we find that Dr. Liao's refusal to include the diversity statement was speech on a matter of public concern.

2.

The University also argues that its interest in providing services outweighs Dr. Liao's interest in refusing to include the diversity statement in the syllabus. First, the University maintains that, unlike *Pickering*, Dr. Liao's refusal to include the diversity statement did impede her teaching duties. *See Pickering*, 391 U.S. at 572–73 (determining that statements at issue could neither be "shown nor . . . presumed to have in any way . . . impeded the teacher's proper performance of his daily duties in the classroom[.]"). The University further contends that creating a safe learning environment for students from all backgrounds is an essential duty for teachers.[3] Relatedly, the University argues that creating a safe learning environment is the industry standard for universities, citing a guide for writing syllabi from other universities. But the mere fact that a syllabus can be a tool and serves an important function does not grant the University *carte blanche* in how it regulates the First Amendment protected speech of teachers.

Under the *Pickering* balancing test, we find that the University has failed to articulate any governmental interest tipping the balance in its favor. *See Lane v. Franks*, 573 U.S. 228, 242 (2014) (court determining that "the employer's side of the *Pickering* scale is entirely empty [since]Respondents do not assert, and cannot demonstrate, any government interest that tips the balance in their favor.") Certainly, there may be instances when a university's interest in providing educational services outweighs a faculty member's interest in speech. However, this is not such a case here. Therefore, Dr. Liao's right to engage in political speech outweighs the University's interest in providing services.

II. DUE PROCESS CLAIM

We next address the District Court's dismissal of Dr. Liao's due process claim based on the University's placement of negative conclusions relating to its finding that Professor Liao violated the University's Diversity Statement policy in her employment record. Claiming that her refusal to abide by the Policy was related to her support for diversity initiatives, she contends that the University's statement that she "either has no commitment or a very poor commitment to

[3] The University cites language in its faculty handbook that emphasizes the importance of creating a learning environment that is welcoming to a diverse array of learners.

diversity and inclusion" impairs her liberty interests, in that it may damage her professional reputation and thereby diminishes her ability to obtain other employment. The parties have stipulated that the disciplinary hearing conducted by the parties is not an adequate substitute process for a name-clearing hearing.[4]

Procedural due process applies only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. *Bd. of Regents v. Roth,* 408 U.S. 564, 569 (1972). The Supreme Court has recognized that the property interests protected go beyond ownership of real estate, chattels, or money. *Id.* at 571. It also has recognized that liberty interests encompass more than formal restraints arising in the criminal process. *Id.* However, because the "range of interests protected by procedural due process is not infinite," *id.* at 570, the Supreme Court has cautioned that "[t]he Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions." *Bishop v. Wood*, 426 U.S. 341, 350 (1976). Determining what deprivations fall under the Fourteenth Amendment remains a complex issue to be determined on a case-by-case basis.

In its procedural due process jurisprudence, the Supreme Court has recognized that in certain circumstances where governmental action may damage a person's reputation, that action may constitute a deprivation of liberty protected under the Fourteenth Amendment if accompanied by some sort of tangible consequence. *See Wisconsin v. Constantineau*, 400 U.S. 433, 435 (1971). For example, in *Constantineau*, a police chief acting pursuant to a state law posted a sign in all local liquor stores instructing sellers not to sell liquor to the plaintiff, a local citizen. *Id.* at 435. The Court thus held "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Id.* at 437.

After *Constantineau*, the Supreme Court appeared to narrow the scope of protections for damage to reputation in *Paul v. Davis*, 424 U.S. 693, 712 (1976). *Paul* involved a flyer distributed to businesses identifying Edward Charles Davis III as a known active shoplifter. *Id.* at 695–96. Mr. Davis brought a § 1983 action alleging violation of his constitutional rights. *Id.* at 696. The Court warned that *Constantineau* did not transform "every defamation by a public official into a deprivation of liberty." *Id.* at 702. Rather, the *Paul* Court emphasized that the stigma from defamation by a government official is not sufficient to trigger the procedural due process guarantees of the Fourteenth Amendment. *Id.* at 709. Instead, an individual must also allege that the governmental publication significantly alters that individual's standing as a matter of law. *Id.* at 708–09. One example cited by the Court was *Roth*, which involved the defamation of a university employee, which triggered due process considerations. *Id.* at 709 (*citing Roth*, 408 U.S. at 577). The Court reasoned that outside of the employment context, governmental action defaming an individual would not give rise to due process concerns under the Fourteenth Amendment. *Id.* at 710.

The Circuit Courts attempting to fashion a rule to determine when an individual has a right of action for governmental defamation have disagreed on their approaches. The District

[4] The University admitted in its answer to Dr. Liao's Request to Admit that "Apalsa State University did not provide a name clearing hearing."

Court relied on the First, Third, Fifth, and Seventh Circuits in concluding that only actual disclosure of stigmatizing information in a personnel record gives rise to a due process claim. *See Dasey v. Anderson*, 304 F.3d 148, 156 (1st Cir. 2002) (without actual dissemination, plaintiff has no right to name-clearing hearing); *Hughes v. City of Garland*, 204 F.3d 223, 228 (5th Cir. 2000) (where there exists a dispute about the likelihood that stigmatizing information in a personnel file would be disclosed, there is not a sufficiently triable issue of fact);[5] *Olivieri v. Rodriguez*, 122 F.3d 406, 408–09 (7th Cir. 1997) (even where disclosure of information from personnel record is "highly likely," there is no due process violation until there has been actual disclosure); *McMath v. City of Gary, Ind.*, 976 F.2d 1026, 1035 (7th Cir. 1992) (the "mere existence of a 'likelihood of disclosure'" is not sufficient to count as publication of damaging information for a due process claim); *Copeland v. Philadelphia Police Dep't*, 840 F.2d 1139, 1148 (3d Cir. 1988) (where plaintiff has not shown evidence of public disclosure, the presence of harmful information in his personnel file does not raise inference that the defendant intends to communicate such information to prospective employers). Applying these cases, the District Court determined that Dr. Liao's claim fails. The University urges us to adopt the reasoning of these courts.

However, Dr. Liao contends that we should adopt the law established by the Second, Fourth, Ninth, and Eleventh Circuits. Those circuits have found that a person's liberty interests are implicated when a state public disclosure law creates at least some likelihood of disclosure. *See Cox v. Roskelley*, 359 F.3d 1105, 1112 (9th Cir. 2004) (where state law requires public disclosure of personnel files upon request, placement of stigmatizing information in such files constitutes publication sufficient to trigger liberty interest); *Buxton v. City of Plant City, Fla.*, 871 F.2d 1037, 1042–46 (11th Cir. 1989) (same); *Donato v. Plainview–Old Bethpage Cent. Sch. Dist.*, 96 F.3d 623, 631–32 (2d Cir. 1996) (liberty interest implicated when personnel file containing damaging information that is likely to be disclosed to prospective employers); *Ledford v. Delancey*, 612 F.2d 883, 886–87 (4th Cir. 1980) (plaintiff had a protected liberty interest in the contents of personnel file "when that file may be the subject of inspection by prospective employers" although noting that record indicated disclosures could be inferred).

First, we agree with the approach of the Second, Fourth, Ninth, and Eleventh Circuits in applying the test set forth in *Paul*. Contrary to the University's argument that those courts disregarded *Paul*, we agree with those courts and hold that allowing for plaintiffs to bring a due process claim when stigmatizing information is likely to be disclosed strikes the proper balance between limiting the range of claims and protecting individuals' liberty interests. For example, in *Donato*, the Second Circuit determined that a plaintiff could establish a public disclosure by showing that stigmatizing information was placed into a personnel file and the contents are likely to be disclosed to a prospective employer. *Donato,* 96 F.3d at 631. At the core of the Second Circuit's decision was the well-established notion that due process protects the freedom to engage in particular professions. *Id.* at 632. We also find the Ninth Circuit's analysis in *Cox* persuasive. The *Cox* court held that the placement of stigmatizing information into a person's personnel file when a state law exists that mandates disclosure of such information upon request

[5] Interestingly, the *Hughes* court identifies another related circuit split in this area: whether the plaintiff's own disclosure of the reputation-harming facts might be sufficient to show a due process violation on the government's part. *Hughes*, 204 F.3d at 228.

constitutes sufficient publication to trigger an individual's liberty interest under the Fourteenth Amendment. *Cox*, 359 F.3d at 1112. One concern supporting this conclusion was the fact that a public access law could allow for information to be published years after it was placed into the employee's file. *Id.* at 1111.

Based on the persuasive authority raised by Dr. Liao, we hold that where publication of stigmatizing information in a personnel file is likely, an individual has a liberty interest under the Fourteenth Amendment, even if actual publication does not occur. Viewing the facts in the light most favorable to Dr. Liao, she has alleged sufficient facts for her Complaint to survive Defendant's motion for summary judgment. AOPRA allows for individuals to request governmental records and requires production if it is in the "public interest." The University argues that even under a likely publication standard, Dr. Liao's claim fails. However, the University fails to consider the fact that Dr. Liao has been the target of discussion and debate in the local media and online. Dr. Liao argues that many of those critics on both sides of the political spectrum could seek her personnel file on the basis that her position deals with central political debates and discussions.[6] Based on the controversy surrounding diversity-related issues, we determine that, viewing the facts in the light most favorable to the non-movant, Dr. Liao has alleged sufficient facts to support likely publication.

Second, we decline to follow the First, Third, Fifth, and Seventh Circuit's requirement of actual disclosure. The Fifth Circuit's decision in *Hughes* typifies this approach. Under *Hughes*, a plaintiff must establish: (1) that she was terminated; (2) stigmatizing charges were made against her; (3) such charges were false; (4) she was not provided notice or an opportunity to be heard prior to her discharge; (5) the publication of the charges; (6) that she requested a hearing to clear her name; and (7) that the employer refused her request for a hearing. *Hughes,* 204 F.3d at 226. The *Hughes* court relied on the Fifth Circuit's decision in *Blackburn v. City of Marshall*, 42 F.3d 925 (5th Cir. 1995). In *Blackburn*, the Fifth Circuit determined that the Supreme Court's decision in *Paul* required stigma plus violation of another interest test. *Id.* at 935–36. In applying the test, the Fifth Circuit required the state actor to communicate concrete, false assertions of wrongdoing. *Id.* at 936. The court expressed skepticism towards transforming every defamation by a public official into a deprivation of liberty. *Id.* at 935. Similarly, the Seventh Circuit's decision in *Olivieri* is equally unpersuasive. In *Olivieri*, the Seventh Circuit relied on *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951), for the proposition that defamation by a public official is not a constitutional tort because reputation does not constitute a liberty or property interest. *Olivieri,* 122 F.3d at 407–08. But the Seventh Circuit acknowledged that when such defamation impedes the ability to seek employment, the defamed individual can bring suit for interference or diminishment of his liberty and property interests. *Id.* at 408. Based on this interpretation of the Supreme Court's precedent, the Seventh Circuit determined that when no disclosure of the stigmatizing information is made, a plaintiff cannot bring a due process claim. *Id.*

[6] Indeed, during discovery, the University produced a letter from a donor threatening to stop funding "this woke university."

We decline to follow the requirements of publication imposed by these four Circuit Courts. A major concern is that this will risk leaving plaintiffs without an adequate remedy. While we recognize the danger of converting every defamation into a due process claim, requiring actual publication places too stringent a burden on potential plaintiffs. Indeed, if a plaintiff can only bring a suit once defamed, plaintiffs will be deprived of the best possible remedy: preventing publication. Moreover, in the internet age, where information can circulate almost instantaneously and is impossible to remove, greater consideration must be paid to the potential harm to Dr. Liao's reputation. Therefore, we find that a terminated employee's due process rights are violated if she is denied a name-clearing hearing and publication is likely to occur under a state public records law. While Dr. Liao has alleged sufficient facts to survive Defendant's motion, whether the publication was likely is a question of fact for the trier of fact to decide.

CONCLUSION

For the foregoing reasons, the district court's decision granting Defendant Apalsa State University's motion for summary judgment is REVERSED. This case is REMANDED to the district court for further proceedings consistent with this opinion.

IT IS SO ORDERED.

/s/ Hon. Anna Tamura
JUDGE ANNA TAMURA
13th Circuit Court of Appeals Judge

LEE, *Circuit Judge,* dissenting.

The majority's decision threatens the academic freedom of universities across this country. It also threatens to mire government agencies and state universities in litigation over personnel decisions due to its failure to set clear standards for due process claims. I would hold that *Garcetti* applies to the in-classroom activities of university professors such as Dr. Liao. I would also hold that actual publication is required to bring a due process claim based on negative employment decisions contained in a personnel file.

I.

While the majority focuses on Dr. Liao's right of academic freedom, it ignores the equally important deference that must be given to schools and universities on matters of curriculum. Indeed, the Supreme Court has recognized this inherent tension when it observed, "[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decision making by the academy itself[.]" *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 226 n.12 (1985) (internal citation omitted). The University as an institution has four essential academic freedoms: what to teach, who will teach it, how the material will be taught, and who shall be allowed to study. *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 312 (1978) *(plurality opinion)*. In particular, a university's decision that diversity is of importance for its educational mission is due substantial deference. *See Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

The goal of the university is to foster an environment that allows for the diverse exchange of ideas from a multitude of tongues. *Bakke*, 438 U.S. at 312. Accordingly, the issue before us is not a simple battle between academic freedom and institutional tyranny as portrayed by the majority. Rather, this case involves two conflicting forms of academic freedom in the university setting. I believe the majority fails to account adequately for the important role of the university in fostering academic freedom in the broadest sense and the university's need to have some power to shape the university environment. Therefore, I would hold that *Garcetti* applies in matters of classroom teaching.

First, the rule announced by the majority effectively gives veto power over university decisions about the goals and shape of the academic institution vis-a-vis single faculty members. The University, like any other government entity, "need[s] a significant degree of control over" the speech of its employees to ensure the efficient provision of public services. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). Part of the public service provided by a university is creating an environment where the free exchange of ideas can thrive. *See Bakke*, 438 U.S. at 312. A university cannot foster such an environment when it is deprived of the ability to determine and enforce policies that it believes promote such an exchange of ideas. In this case, the University believed that requiring the inclusion of diversity statements in the syllabi of all classes would show its commitment to diversity. It determined that showing a commitment to diversity would increase the participation of minority students. In turn, it believed this would foster a wider range of perspectives. Without the ability to require compliance with its policies, the University loses its ability to shape the educational environment. Given the importance of fostering a diversity of opinions and beliefs, *Garcetti* is important to the university environment—at least within the classroom.

Second, the cases cited by the majority are a cautionary tale on the issues regarding a *Garcetti* exception, rather than a resounding endorsement. For example, in *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021), the university had an important policy objective: it wanted to foster academic freedom for students of diverse gender identities by requiring faculty to use preferred pronouns. That university's decision is no different than the University of California's determination in *Bakke* that diversity was important to support its educational mission. But the Sixth Circuit's deference to faculty academic freedom undermines this determination. In so holding, the majority, like the Sixth Circuit, essentially allows individual faculty members to veto university policies.

I agree that the Seventh Circuit's approach in *Brown v. Chicago Board of Education,* 824 F.3d 713 (7th Cir. 2016), strikes the proper balance. That Court concluded that in-classroom speech by a teacher is not the speech of a citizen for First Amendment purposes. *Id.* at 715. The court emphasized that one of the central duties of the teacher was to maintain classroom order. *Id.* This properly addresses and frames the conflict before this Court. Certainly, the university should not be allowed to influence or restrict the speech of professors in their scholarly work. Nor should the university be allowed to dictate the research agenda or demand ideological orthodoxy. But on manners that determine institutional policy and classroom instruction, university pedagogical employees are no different from any other. To allow for an exception to *Garcetti* invites chaos in the classroom. While Dr. Liao can and should be allowed to research and produce scholarship in whatever manner she chooses, the syllabus and university policy are essential to maintaining order in the school and providing governmental services. To allow Dr. Liao and other professors to select which items in the University policy they choose to follow or disregard would create an exception that swallows the rule in *Garcetti.*

I am sympathetic to Dr. Liao's argument that loyalty pledges are improper under the First Amendment. *See Baggett v. Bullitt*, 377 U.S. 360, 366–70 (1964) (invalidating loyalty oath provisions for public university employees as unconstitutionally vague); *Shelton v. Tucker*, 364 U.S. 479, 487–88 (1960) (invalidating state law requiring teachers to provide information about organizational memberships as unconstitutionally overbroad); *Wieman v. Updegraff*, 344 U.S. 183, 190–91 (1952) (invalidating law requiring public employees to take oath swearing that they were not members of the Communist Party or any group that advocated violent overthrow of the government). However, the University's diversity statement policy simply does not amount to such an incursion on First Amendment freedoms. There may be other situations in which a university may go too far in its directives, but the University in this matter has not exceeded the bounds of the First Amendment in this case.

II.

While I agree with my colleagues that the First, Third, Fifth, and Seventh Circuit's actual disclosure requirement for defamation is too narrow, I believe that the majority's approach is too broad. Notably absent from their opinion is an acknowledgment of the contrary rulings of the Second, Fourth, Ninth, and Eleventh Circuits. I would narrowly decide this issue and hold that Fourteenth Amendment due process concerns are triggered when a state public records law mandates disclosure of personnel files containing stigmatizing information and the individual is not given the opportunity to have a name-clearing hearing. In *Cox v. Roskelley*, 359 F.3d 1105

(9th Cir. 2004), a case the majority discusses, the state disclosure statute **mandated** the release of records upon request. *Id.* at 1112. This language is essential to the court's conclusion because the court reasoned, "absent expungement, placement of stigmatizing information in an employee's personnel file **constitutes publication** when the governing state law **classifies** an employee's personnel file as a public record." *Id.* (emphasis added). The court's ruling is focused on the effect of the state disclosure law rather than its mere existence. The effect of the law in *Cox* was to transform the personnel file into a public record. Similarly, in *Buxton v. City of Plantation City, Florida*, 871 F.2d 1037 (11th Cir. 1989), the personnel file was a public record under Florida law. *Id.* at 1045. Thus, the court concluded that when stigmatizing information is placed into a public record personnel file, an individual must be afforded a name-clearing hearing. *Id.* In states where the public disclosure laws mandate the release of records, all governmental records including employee records are essentially public. Thus, the mere act of placing a document into the employee file is tantamount to publishing it.

The Ninth and Eleventh Circuits' approach strikes the proper balance between protecting the constitutional liberties of individuals and preventing excessive litigation on shaky constitutional grounds. In those cases, because of disclosure laws mandating release, that there would be release of the records to the public was essentially a foregone conclusion. No such facts exist in this case. The AOPRA does not mandate release. Rather, it requires release upon a showing of "public interest." The undisputed record reflected in Defendant's answer shows that the University regularly opposes all requests for employment files under the AOPRA.[7] Given these allegations in the pleadings, Dr. Liao's personnel file cannot be considered a public record by virtue of AOPRA. Accordingly, Dr. Liao has no due process claim.

In sum, I would affirm granting Defendant's motion for summary judgment as to both of Plaintiff's claims.

s/ Hon. Walter Lee
JUDGE WALTER LEE
13th Circuit Court of Appeals Judge

[7] However, the University stated in a sworn answer to Dr. Liao's Interrogatories, that in the last five years, the AOPRA has been used to request faculty records 21 times.