The Thomas Jefferson Center for the Protection of Free Expression

Congress shall make no law... abridging the freedom of speech, or of the press... THE FIRST AMENDMENT

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March 17, 2008

Molly Dwyer
Clerk of Court
U.S. Court of Appeals
for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 9119-3939

Re: HONG v. GRANT, et. al.,
SACV 06-0134 CJC (RNBx)

Dear Ms. Dwyer:

Enclosed please find an original and fifteen copies of the Brief of *Amicus Curiae* submitted by The Thomas Jefferson Center for the Protection of Free Expression and The American Association of University Professors. This brief is filed with the consent of all parties to this matter.

Thank you very much

Sincerely,

J. Joshua Wheeler

Enclosure

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Case No.
SACV 06-0134 CJC (RNBx)

UNITED STATES COURT OF APPEALS
FOR THE
NINTH CIRCUIT

JUAN HONG,
Appellant,

v.

STANLEY GRANT, et. al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

AMICI CURIAE BRIEF OF THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION AND AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

IN SUPPORT OF APPELLANTS REQUEST FOR REVERSAL

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DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST

JUAN HONG,
Appellant,

v.

STANLEY GRANT, et. al.,
Appellees.

Pursuant to 9th Cir. R. 26.1, The Thomas Jefferson Center for the Protection of Free Expression makes the following disclosure:

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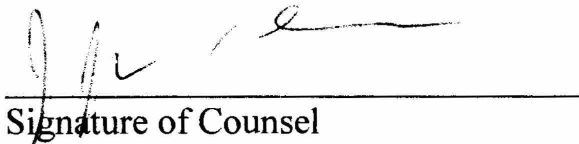

3/17/08

Signature of Counsel (Date)

DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST

JUAN HONG,
Appellant,

v.

STANLEY GRANT, et. al.,
Appellees.

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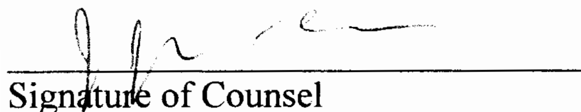

Signature of Counsel

3/17/08
(Date)

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David M. Rabban, *"Academic Freedom, Professionalism, and Intramural Speech": Academic Freedom, Governance, and Professionalism*, 82 NEW DIRECTIONS FOR HIGHER EDUCATION 88 (Winter 1994) 9, 10, 13

CONSENT TO FILE AS *AMICI CURIAE*

This brief is filed with the consent of the parties pursuant to Rule 29 (a) of the Federal Rules of Appellate Procedure.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of free speech and press. The Center has pursued that mission in various forms, including the filing of *amicus curiae* briefs in this and other federal courts, and in state courts around the country. A particular focus of the Center's litigation and program efforts has been the relationship between the First Amendment and academic freedom.

The American Association of University Professors (AAUP) is a non-profit organization consisting of approximately 45,000 college and university faculty, librarians, graduate students, and academic professionals, a significant number of whom are public employees. The AAUP's purpose is to advance academic freedom and shared governance, to define fundamental professional values and standards for higher education, and to ensure higher education's contribution to the common good. The AAUP frequently submits *amicus*

curiae briefs in cases implicating its policies and the interests of faculty members. The AAUP's policies — including the 1940 Statement of Principles on Academic Freedom and Tenure created by the AAUP and the Association of American Colleges and Universities, and endorsed by over 210 organizations — have been recognized by the Supreme Court as widely respected and followed as models in American colleges and universities. *See*, *e.g.*, *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 579 n. 17 (1972); *Tilton v. Richardson*, 403 U.S. 672, 681-82 (1971).

STATEMENT OF THE CASE

For nearly two decades, Dr. Juan Hong had been a Professor of Chemical Engineering at the University of California-Irvine. During the period 2000-04, he made critical comments regarding two personnel matters that were pending within his Department. He also expressed deep concern about what he believed was his Department's excessive reliance on part-time lecturers (rather than full-time faculty members) to instruct certain lower-division classes, thus in his view depriving students of educational opportunities to which they were entitled. On the basis of these statements, Professor Hong was denied a merit increase in salary.

Professor Hong filed suit in Federal District Court against several members of the university administration, claiming under 42 U.S.C. § 1983 an abridgement of his First Amendment rights. The defendant university officials moved for summary judgment, which the District Court granted, finding that Professor Hong's statements could no longer be deemed to address a "matter of public concern" in light of the Supreme Court's recent decision in *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951 (2006). Specifically, the Court below ruled that each of the statements for which Professor Hong had been faulted, and which allegedly warranted the denial of a merit increase, fell within the scope of his "official duties," and therefore were not a matter of public concern. The Court found that at an institution of higher learning (such as UC-Irvine) that "allows for expansive faculty involvement in [the university's] interworkings," it is "the professional responsibility of the faculty to exercise that authority." *Hong v. Grant*, 516 F. Supp. 2d 1158, 1167 (C.D. Cal. 2007). Professor Hong appeals from that ruling.

SUMMARY OF ARGUMENT

The District Court resolved a vital issue of constitutional law which the United States Supreme Court had expressly reserved in *Garcetti v. Ceballos*, and did so in a manner that is sharply at variance with decisions of the Supreme

Court and of this Court. *Garcetti*'s central premise is that for the general run of public employees, a distinction of constitutional stature can be drawn between statements that are made "as a citizen" and those that are uttered "pursuant to official responsibilities." Those statements made pursuant to official responsibilities are not considered a matter of public concern. Whatever may be the import of this distinction across the government workforce, it simply has no bearing on the core academic speech — including involvement in academic shared governance — of that segment of public employees who teach and conduct research at public colleges and universities.

Indeed, the Court below fundamentally misconceived the nature of university scholarship and the roles and responsibilities of those who educate the vast majority of this nation's college students. To equate faculty participation in matters of shared university governance with routine tasks that a conventional government worker "was employed to do," as the District Court clearly did in this case, disregards the clear import of a half century of constitutional judgments recognizing First Amendment protection for academic freedom. Moreover, and equally troubling to *amici curiae*, any attempt to apply the *Garcetti* standard to state university professors such as the appellant in this case would severely threaten basic principles of academic freedom and free expression within the university community. *Amici* therefore respectfully

request that this Court reverse the decision below, and hold not only that the District Court clearly erred in classifying "classroom instruction and professional research" as "official duties" under *Garcetti*, but also that the Court misconceived the nature of shared governance and its relationship to academic freedom in denying First Amendment protection to appellant's speech.

I. THE JUDGMENT OF THE DISTRICT COURT FUNDAMENTALLY MISAPPLIED THE SUPREME COURT'S *GARCETTI* DECISION.

In ruling that most government workers may no longer claim First Amendment protection for statements that are made within their "official responsibilities," the Supreme Court majority in *Garcetti* carefully reserved the very issue that the District Court in this case summarily resolved regarding academic freedom. Recognizing a half century of First Amendment rulings and the grave concerns of the dissenting justices in that very case, Justice Kennedy noted: "[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." *Garcetti*, 547 U.S. 410, 126 S. Ct. at 1962. On that basis, and without any ambiguity or uncertainty, the majority opinion

recognized that "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."[1] *Id.*

The Court below applied precisely that analysis, however, in rejecting appellant's claim for First Amendment protection — without any deference to or even recognition of the Supreme Court's sensitive reservation of that vital question. There can be no doubt that the expression for which appellant incurred a severe penalty fell clearly within the scope of Justice Kennedy's exception. Professor Hong's statement of professional concern about the qualifications of two candidates for faculty positions unmistakably reflected his academic experience and expertise as a scholar. Equally clearly, his critique of what seemed to him the department's excessive reliance on part-time teachers to staff undergraduate courses was a statement "related to academic scholarship or classroom instruction"—the very matters that the *Garcetti* Court recognized might "implicat[e] additional constitutional interests" not found in the general run of public-employee speech cases. *Id.* As the District Court itself acknowledged, Professor Hong's criticism of a potential faculty colleague

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[1] Indeed, as Justice Souter noted in dissent, "This ostensible domain [of controllable speech] beyond the pale of the First Amendment is spacious enough to include even the teaching of a public university professor, and I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to . . . official duties.'" *Garcetti*, 547 U.S. at ___, 126 S. Ct. at 1969.

"raised issue with her *academic integrity*." *Hong*, 516 F. Supp. 2d at 1167 (emphasis added).

The Court below held that "a faculty member's official duties are not limited to classroom instruction and professional research. . . . Mr. Hong's professional responsibilities . . . include a wide range of academic, administrative and personnel functions in accordance with UCI's self-governance principle." *Id.* at 1166. In doing so, the court erred, in failing to recognize not only the unique nature of academic speech, but also the connection between the criticism for which Professor Hong was punished and the academic mission. The court's assumption that "a faculty member's official duties" include "classroom instruction and professional research" for the purpose of post-*Garcetti* First Amendment protection (or lack thereof) is simply incorrect in light of Justice Kennedy's reservation of the issue of "speech related to scholarship or teaching." *Garcetti*, 547 U.S. at ___ 126 S. Ct. at 1962. Thus, the very premise for the District Court's denial of First Amendment protection to Professor Hong's speech relating to other academic functions was fatally flawed. And the District Court's extension of that erroneous reasoning to speech relating to shared governance — that is, to the "feedback, advice and criticism about his department's administration and

operation [provided] from his perspective as a tenured, experienced professor" (*Hong*, 516 F. Supp. 2d at 1167)— is therefore erroneous as well.

Had the District Court acknowledged the degree to which this case invited resolution of the very issue that was reserved in *Garcetti,* that would have been a different matter, for the rationale of the lower court's departure could then have been directly addressed and refuted. When, however, the District Court simply proceeded as though the concluding portion of Justice Kennedy's opinion never existed, a dramatically different situation is presented to this Court. On that basis alone, *amici* would urge a reversal of the judgment of which appellant seeks review. There are, however, equally compelling reasons for seeking a different outcome in this Court.

Even more troubling than the literal disregard of *Garcetti*'s reservation of the issue of academic expression is the District Court's implicit rejection of the rationale on which that exception rests. The Court below opined that "[i]nternal complaints and supervisory mismanagement are within an employee's official duties and not subject to First Amendment protection." *Hong*, 516 F. Supp. 2d at 1168. (citing *Freitag v. Ayers,* 468 F.3d 528, 546 (9th Cir. 2006)). The speech of state college and university professors differs however, from that of the general run of government workers in several respects that warrant a fundamentally different approach to First Amendment claims. Most basically,

Garcetti's core concept of "official responsibilities" that a public employee has been "employed to do" simply has no bearing upon the role of a state university teacher and scholar. "For our institutions of higher education to fulfill their educational mission, teachers and researchers need protections that other citizens do not require. In addition, they need affirmative authority to shape the environment in which they carry out their responsibilities." Larry G. Gerber, "Inextricably Linked": Shared Governance and Academic Freedom, *Academe: The Bulletin of the American Association of University Professors* 22 (May-June 2001). Both in practice and in constitutional law, the actual duties of state university professors implicate — indeed, demand — a broad range of discretion and autonomy that find no parallel elsewhere in the public service.

As one distinguished scholar of higher education has noted, "Governance — providing faculty participation in institutional decision making — merits the protection of academic freedom because faculty possess the expertise necessary to make informed decision about curricula and to evaluate students and peers based on that knowledge. Faculty participation in hiring, tenure, and promotion decisions is especially important given the necessity for detailed knowledge of specific fields in making these decisions." Sheila Slaughter, *"Dirty Little Cases": Academic Freedom, Governance, and Professionalism*, 59 NEW DIRECTIONS FOR HIGHER EDUCATION 88 (Winter 1994). *See also* David M.

Rabban, *"Academic Freedom, Professionalism, and Intramural Speech": Academic Freedom, Governance, and Professionalism*, 82 NEW DIRECTIONS FOR HIGHER EDUCATION 88 (Winter 1994). ("For peer review to operate effectively, faculty participants must be free to express their views on the professional merits of colleagues.")

The striking practical differences between academic and other employment have been recognized in several contexts. For example, the Court of Appeals for the Sixth Circuit recognized a state university professor's unique autonomy with respect to the evaluation and grading of student performance — against the administration's insistence that as his employer it held the authority to compel the reversal of a failing grade to which a student had objected. *Parate v. Isibor*, 868 F.2d 821 (6th Cir. 1989).

Much of the controlling language in *Garcetti* implicitly recognizes such profound differences, as the court below declined to do. For example, the majority's suggestion that most public employees are subject to "managerial discipline" on the basis of statements unwelcome to their superiors or contrary to agency policy would be anathema in the academic setting. Equally troubling, the crucial determination of an employee's "official duties" involves a judgment that simply cannot be made with regard to a professor's speech, either on or off campus. In *Garcetti*, the critical task facing a court was to assess

"what [Ceballos], as a calendar deputy, was employed to do." 547 U.S. at ___, 126 S.Ct. at 1960. Although a concluding paragraph cautioned against overly rigid reliance on "an employee's written job description," the *Garcetti* majority left no doubt of its focus on such desiderata in defining and applying the crucial term "official duties." *Id.* at ____, 126 S. Ct. at 1962. The preferred source of such guidance, said Justice Kennedy, should be "the duties an employee is expected to perform." *Id.* Finally, although the majority comfortingly referred to "whistle-blower protection laws and labor codes" as viable alternatives for public workers who expose "governmental inefficiency and misconduct," such alternate recourses are unlikely to avail most state university professors, even though they may offer a parallel source of protection for some outspoken critics elsewhere in the public sector. *Id.* Such references leave no doubt of the *Garcetti* Court's recognition that a process that was at least rational, if not desirable, in the conventional government workplace could have no application to a state university professor. Whether or not speech by faculty members at public institutions is likely to rise to the level of exposing "governmental inefficiency and misconduct," their speech is — as described herein — nevertheless protected by the First Amendment values that are indispensable to the functioning of the modern university.

Even more basic is the inapplicability of the *Garcetti* standard to a professor's participation in shared university governance. Central to the District Court's rejection of appellant's First Amendment claims was the premise that any activity in which Professor Hong was *entitled* to participate as a faculty member became, for that reason alone, one of his "official *duties*," about which he was accordingly not free to speak with impunity—no matter how potentially beneficial to public interest might be his unwelcome comments. *Hong*, 516 F. Supp. 2d at 1167-68. Such an equation gravely misconceives the very nature of a professor's role in the academic community. With remarkably few exceptions, a faculty member is entitled to speak publicly about and to take active part in virtually every facet of university life, and that crucial entitlement is vitally connected to the faculty member's exercise of academic freedom as well. As the AAUP has observed:

> [T]he protection of the academic freedom of faculty members in addressing issues of institutional governance is a prerequisite for the practice of governance unhampered by fear of retribution. . . . [D]ecisions about the institution's long-range objectives, its physical and fiscal resources, [and] the distribution of its funds among its various divisions . . . plainly can have a powerful impact on the institution's teaching and research . . . . The academic freedom of faculty members includes the freedom to express their views . . . on matters having to do with their institution and its policies. . . .

On the Relationship of Faculty Governance to Academic Freedom, in POLICY DOCUMENTS & REPORTS 141-142 (10th ed. 2006). *See also* Rabban, *supra*, at 83 ("Faculty expertise contributes to the critical search for knowledge that justifies academic freedom – not just through teaching and research, but also through the broader determination of educational policies on curriculum, the organization of academic departments, academic standards, [and] the educational implications of budgetary decisions . . . .")

Indeed, this Court recognized that principle when it noted, in *Mabey v. Reagan*, 537 F.2d 1036, 1047 (9th Cir. 1976), that "[a] college relies in large measure on faculty self-governance and its contributions to administrative decisions. . . . . [A]n attack on those processes attacks the educational process as well." If every such activity were deemed an unprotected "official duty" simply because it fell within the very broad range of professorial prerogatives, the scope of *Garcetti*'s curb on First Amendment protection would be far broader for professors than even for the general run of government workers.

In contrast, a clerical or custodial worker at a state university would presumably remain free under the District Court's analysis to speak with impunity "as a citizen" about a broad range of matters that did not fall within the defined tasks that he or she "was employed to do," while a professor at the same campus would enjoy such protection only with respect to activities in

which faculty participation was inappropriate or forbidden under principles of shared governance. Even among professors, one could envision that a much narrower standard than the one applied by the District Court might affect, and delimit protection for, statements about a specific task to which he or she had been assigned. But the facts of this case do not remotely suggest such a nexus: the appellant here was punished for speaking critically about matters that were no more his "official duties" than were any other facets of his role as a professor at a university that values participation in shared governance of the campus. Thus a host of practical considerations validate the distinction that Justice Kennedy recognized between speech of most government workers and "expression related to academic scholarship or classroom instruction." *Garcetti*, 547 U.S. at ____, 126 S.Ct. at 1962. The Court in *Garcetti* recognized that "[a] public employer that wishes to encourage its employees to voice concerns privately retains the option of instituting internal policies and procedures that are receptive to employee criticism." *Id.* at ____, 126 S. Ct. at 1961.

Indeed, public universities do routinely encourage faculty members to critique institutional operations in a myriad of ways, though the final decision on most issues rests with an administrator, the Board of Regents, or a similar decision-maker. It would be particularly unproductive, and counter to the

notion of a functioning, collegial academic workplace, for the university then to be able to punish faculty when they perform as invited.

II. THE DISTRICT COURT'S RULING DISREGARDS AND THUS UNDERMINES BASIC PRINCIPLES OF ACADEMIC FREEDOM.

A half century of decisions by the United States Supreme Court and by this Court have consistently recognized that "academic freedom is of transcendent value to all of us and not merely to the teachers concerned" and for that reason "is a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). Most recently, the Supreme Court insisted on a high degree of deference to "educational judgments" that li[e] primarily within the expertise of a university." *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003). This Court has on several occasions notably recognized the compelling force of academic freedom as a special value that merits distinctive First Amendment protection against repressive action from within or outside the campus community, in cases such as *Mabey v. Reagan*, 537 F.2d 1036, 1049 (9th Cir. 1976), *Adamian v. Lombardi*, 608 F.2d 1224, 1227 (9th Cir. 1979), and *Cohen v. San Bernardino Valley College*, 92 F.3d 968 (9th Cir. 1996). This Court's most recent decision on this subject came in *Brown v. Li*, 308 F.3d 939,

952–53 (9th Cir. 2002), which recognized the need for judicial deference to university faculty members' decisions on matters that are committed to professorial judgment and expertise.

The relevance to this case of the primacy of academic freedom should be readily apparent. The speech of university professors merits a special degree of protection not only to facilitate an uninhibited pursuit of truth and advancement of knowledge, but equally to encourage scholars to speak candidly and fearlessly as they convey sometimes unwelcome or unsettling truths to government and citizens. The critical statements for which Professor Hong was punished by his university meet such criteria.[2] If, for example, a potential colleague could be faulted for a possible conflict of interest, or if the scholarly qualifications of another putative colleague failed to meet the department's high standards, a prospective colleague should be free to convey publicly such concerns, not only for the immediate benefit of sound personnel judgments, but more broadly for the benefit of the academic community and those who look to and depend upon that community. Where a faculty member speaks out on matters such as the scholarly qualifications of a colleague, it is impossible to

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[2] It may also be worth noting that "[t]he possibility . . . that [faculty members punished for criticizing administrative policies] may have been . . . obstinate . . . does not derogate from the status of their expression as speech within the First Amendment." *Trotman v. Bd. of Trustees of Lincoln Univ.*, 635 F.2d 216, 226 (3d Cir. 1980).

decouple speech related to shared governance from speech directly related to the core academic mission that was set aside by the Court in *Garcetti*. And "academic freedom," as Justice Brennan so wisely observed four decades ago, "is of transcendent value to all of us . . . " *Keyishian*, 385 U.S. at 603.

The safeguards for academic freedom have special pertinence to another comment for which the District Court denied First Amendment protection: Professor Hong's lament that his department relied excessively on part-time teachers to staff undergraduate courses. *Hong*, 516 F. Supp. 2d at 1162-63. This concern was most clearly raised for the benefit of students studying in his field. Professor Hong insisted that these students were entitled to learn from full-time teachers and not from instructors who were likely less readily available for advice and guidance than their full-time colleagues, and less able to engage their students in challenging issues with the security that tenured or even tenure-track faculty enjoy. As Justice Frankfurter observed, the "four freedoms" of the university include the freedom to determine "who may teach"; while instructional decisions may therefore be insulated from *judicial* intrusion, faculty members must be engaged and involved in that decision-making process, as they are an inseparable part of the university itself. *Sweezy v. State of New Hampshire*, 354 U.S. 234, 255-56 (1957) (Frankfurter, J. concurring).

Indeed, the District Court's denial of First Amendment protection to this critical comment poses a special irony. Far from reflecting the sort of "personal grievance" or "special pleading" by public employees to which the Supreme Court has denied First Amendment protection, *Connick v. Myers*, 461 U.S. 138 (1983), Professor Hong's critique was arguably a statement *against* self interest since a congenial departmental response would likely have imposed *greater* teaching burdens upon him as a full-time professor. Yet the District Court ruled that since the quality of undergraduate instruction was a matter on which a senior professor might express views within the broad scope of shared governance, these concerns fell automatically within Professor Hong's "official duties" and were therefore unprotected. *Hong*, 516 F. Supp. 2d at 1167-68. This precisely illustrates the perverse nature of the District Court's ruling and the degree to which that ruling undermines and disserves the central values of academic freedom.

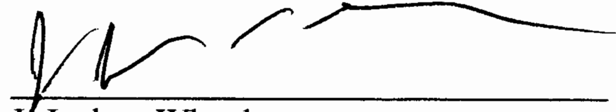
The counter-productive and illogical quality of the decision below further emerges from a different, but parallel, analysis. If the District Court's standard were to apply broadly to academic speech, it would provide First Amendment protection only for statements that fall so far beyond the speaker's field of expertise as to be valueless to the general public, lawmakers, and others who depend upon scholarly guidance and counsel. For example, even the District

Court would presumably have found Professor Hong entitled to First Amendment protection if he had been rebuked for making critical statements about the quality of restaurant fare near campus, the efficiency of Orange County's public transit system, or the medical care available at UC-I's hospital, since he could not claim expertise on such matters or any "responsibility" to address them within his professorial role. Yet, the closer Professor Hong's statements come to matters about which he has knowledge — and with respect to which he can make a genuine contribution — the more limited is the First Amendment protection for those statements. A directly inverse correlation between the potential value to society of a scholar's public statements and the degree of constitutional protection for those statements thus seems to be an inevitable result of the judgment from which this appeal seeks relief. This cannot be what Justice Kennedy intended when he expressly recognized in *Garcetti* the uniqueness of faculty speech and of the university community. Therefore, *amici* ask this Court to affirm the indivisibility of speech related to institutional governance and academic freedom. At a minimum, *amici* urge the Court to recognize that the District Court fundamentally erred by suggesting that "classroom instruction and professional research" are within the category of "official duties" left unprotected by the First Amendment after the Supreme Court's decision in *Garcetti*.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge this Court to reverse the judgment of the court below, and to remand this matter for further proceedings.

Respectfully submitted,



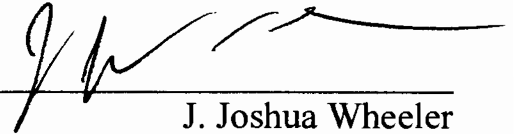
J. Joshua Wheeler
Robert M. O'Neil
Counsel for *Amici Curiae*

STATEMENT WITH RESPECT TO ORAL ARGUMENT

Counsel for *amici* may, by separate motion, seek the Court's permission to participate in oral argument. *Amici* believes that such participation would be particularly useful to the Court in this matter because appellant Juan Hong is not represented by legal counsel.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and (C), I certify that, according to the word processing system used to prepare this brief, there are 4,331 words in the brief.



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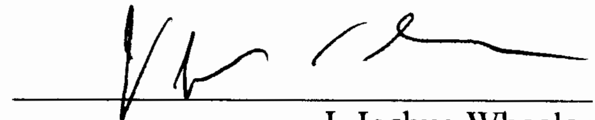

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