No. 23-3196

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JASON J. KILBORN,

Plaintiff-Appellant,

v.

MICHAEL AMIRIDIS, CARYN A. BILLS, JULIE M. SPANBAUER, DONALD KAMM, and ASHLEY DAVIDSON,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division, No. 1:22-cv-00475.
The Honorable Sara L. Ellis, District Judge

RESPONSE OF PLAINTIFF-APPELLANT JASON J. KILBORN TO PETITION FOR REHEARING EN BANC

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Appellate Court No: 23-3196

Short Caption: Jason Kilborn v. Michael Amiridis, et al.

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Jason Kilborn

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Vitale, Vickrey, Niro, Solon & Gasey LLP

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(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

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(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Paul K. Vickery Date: December 4, 2023

Attorney's Printed Name: Paul K. Vickrey

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes ☐ No ☑

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N/A

Attorney's Signature: /s/ Patrick F. Solon Date: November 16, 2023

Attorney's Printed Name: Patrick F. Solon

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N/A

Attorney's Signature: /s/ Dylan M. Brown Date: December 4, 2023

Attorney's Printed Name: Dylan M. Brown

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes ☐ No ☑

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INTRODUCTION

Jason Kilborn, a tenured professor at the University of Illinois Chicago School of Law ("University"), sparked an unexpected furor in December 2020 with a question on his civil-procedure exam:

> For the past decade, he has included the same question on the final exam. The question concerns a fictional former employee who says she "quit her job at Employer after she attended a meeting in which other managers expressed their anger at Plaintiff, calling her a 'n__' and 'b__' (profane expressions for African Americans and women) and vowed to get rid of her." The exam question appears exactly like this, with the racial and gender slurs expurgated.

Kilborn v. Amiridis, 131 F.4th 550, _, 2025 U.S. App. Lexis 5767 *2–*3, 2025 WL 783357, slip op. at 2 (7th Cir. Mar. 12, 2025). (Dist. Ct. Doc. 47 ¶¶ 7, 15 (Second Amended Complaint)).

This case arises from the ensuing controversy about the exam question. Defendant University officials, including administrators in the Office for Access and Equity ("OAE"), punished Kilborn for his teaching-related speech, by: suspending him and cancelling his classes for two semesters; declaring him ineligible for a raise; and requiring him to complete an eight-week diversity course before returning to classes, including self-reflection papers and meetings with a trainer to gauge Kilborn's engagement and commitment to the goals of the program. *Kilborn*, 2025 U.S. App. Lexis 5767 *4, *6–*7, slip op. at 3, 5. (Doc. 47 ¶¶ 23–24, 28, 46–47, 49–51).

OAE investigated Kilborn and issued a findings letter (Dist. Ct. Doc. 47-1 at 1–5), concluding that he had violated the harassment aspect of the University's nondiscrimination policy. OAE made findings—disputed by Kilborn—about four

instances of Kilborn's teaching-related speech: (1) that Kilborn's exam question included a "racial epithet" (Doc. 47-1 at 4); (2) that Kilborn, in one classroom lecture two semesters earlier, used "cockroaches" to refer to racial minorities, which is plainly contradicted by the transcript of that lecture (Doc. 47-1 at 3, 6), referred to "lynching", and used an accent to repeat lyrics of a Jay-Z song (Doc. 47-1 at 3–4); (3) that Kilborn, in a cordial, four-hour Zoom meeting with a member of the Black Law Students Association ("BLSA") about the exam question, "discussed the concept that [he] might become 'homicidal'" (Doc. 47-1 at 4), based on a remark made in jest in the middle of that meeting, where the student asked why the law school dean had not shown Kilborn a BLSA letter criticizing his exam question, and Kilborn responded: "I suspect she's [the Dean's] afraid if I saw terrible things said about me in that letter, I would become homicidal" (Doc. 47 ¶ 38); and (4) that Kilborn, in emails with a white former student, "express[ed] anger and displeasure with students' objections" to the exam question "in a manner that created retaliation concerns for Black students" (Doc. 47-1 at 4), although the email said: "I admire your support of your colleagues. I support them too" and "it hurts that anyone would even dream that I would seek retribution against anyone about all of this—all of these people are and will always be welcome in my classes." (Doc. 47-1 at 9–10). See *Kilborn*, 2025 U.S. App. Lexis 5767 *3–*6, slip op. at 2–5. Kilborn's complaint alleges facts properly disputing the OAE findings. *Id.*, 2025 U.S. App. Lexis 5767 *21–*22, slip op. at 16–17. (Doc. 47 ¶¶ 15–17, 37, 62–66 (exam), ¶¶ 34–36, 61 (classroom), ¶¶ 19–21, 38, 59–60 (Zoom), ¶¶ 37, 58 (email)).

The case is in this Court on a motion to dismiss, so the Court accepts all well-pleaded facts in the complaint and draws all reasonable inferences in Kilborn's favor. *Kilborn*, 2025 U.S. App. Lexis 5767 *2, *21, slip op. at 2, 16. Defendants' petition for rehearing is expressly premised on improper factual assumptions that find no support in the Court's opinion or the controlling facts. As a basis for rehearing, Defendants assert: that Kilborn made "threats" to students (Petition at 3, 6, 14); that Kilborn engaged in "harassment" and "harassing speech" (Petition at 7, 14–15, 17, 21); that the claimed threats and harassment occurred in merely "private" conversations (Petition at 9, 17); and that the disputed conclusions of OAE's findings letter are established fact. (Petition at 6–8, 20). The opinion views the facts correctly. E.g., *Kilborn*, 2025 U.S. App. Lexis 5767 *17, slip op. at 13 ("Although Kilborn's remarks were made to individual students, even the University recognized that they were directed at a broader group of people."); 2025 U.S. App. Lexis 5767 *21, slip op. at 16–17 ("it is reasonable to infer from the well-pleaded facts in Kilborn's complaint that University officials punished him for the controversial exam question and used the investigation to establish a pretext for their actions."). Defendants must try to prove their theory of the case on remand, not rehearing.

Defendants' petition only takes issue with the Court's decision on Kilborn's claim that University officials violated the First Amendment when they retaliated against him for protected, academic speech. *Kilborn*, 2025 U.S. App. Lexis 5767 *9, slip op. at 7; 42 U.S.C. §§ 1983, 1988; *Kristofek v. Village of Orland Hills*, 832 F.3d 785, 792 (7th Cir. 2016) (elements of retaliation claim). The retaliation claim is supported by long-

established law, which the Court applied to determine that Kilborn's complaint alleges protected speech to support the claim. The Court applied Supreme Court precedents *Connick v. Myers*, 461 U.S. 138 (1983), *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Garcetti v. Ceballos,* 547 U.S. 410 (2006):

> [T]he Supreme Court established a two part test in *Connick* and *Pickering* to determine whether a public employee's speech is protected by the First Amendment. First, we determine whether the employee is speaking as a citizen on a matter of public concern. *Connick*, 461 U.S. at 147. If so, we balance the employee's interests against the government's interests. *Pickering*, 391 U.S. at 568. In *Garcetti*, the Supreme Court clarified that public employees are not speaking as citizens when they make statements pursuant to their official duties. 547 U.S. at 421. We consider whether the rule in *Garcetti* applies to Kilborn's speech before applying the public concern analysis and balancing test laid out in *Connick* and *Pickering*.

Kilborn, 2025 U.S. App. Lexis 5767 *9–*10, slip op. at 7–8.

First, the Court declined Defendants' invitation to extend *Garcetti* and strip university teaching and scholarship of First Amendment protection. *Id.*, 2025 U.S. App. Lexis 5767 *10–*11, slip op. at 8–9. Under existing law, university-level academic speech is strongly protected by the First Amendment. *Id.* Defendants, not Kilborn, needed a change in established law to prevail on their argument that Kilborn's speech should not be protected. "The Supreme Court made clear that its decision did not extend to cases 'involving speech related to scholarship or teaching.'" *Id.*, 2025 U.S. App. Lexis 5767 *10, slip op. at 8 (quoting *Garcetti*, 547 U.S. at 425). The Court noted that circuit decisions on this issue uniformly support Kilborn. *Id.*, 2025 U.S. App. Lexis 5767 *11, slip op. at 9.

Having declined Defendants' invitation to extend *Garcetti* and remove protection from Kilborn's teaching-related speech, the Court properly rejected Defendants' argument for qualified immunity. *Id.*, 2025 U.S. App. Lexis 5767 *11–*13, slip op. at 9–10. The Court's conclusion is straightforward:

> But where, like here, a plaintiff's speech falls comfortably within the core of what constitutes university teaching and scholarship, university officials cannot win on qualified immunity merely by proposing an extension to *Garcetti* that courts have not yet recognized or rejected.

Id., 2025 U.S. App. Lexis 5767 *13, slip op. at 10. The Court fully addressed Defendants' short argument for qualified immunity on the retaliation claim, found on page 70 of their Appellees' Brief. (App. Doc. 39). The Court also had the benefit of Defendants' citation of *Sabo v. Erickson*, 128 F.4th 836 (7th Cir. 2025) (en banc), as supplemental authority under Fed. R. App. P. 28(j). (App. Doc. 52).

Second, the Court applied established law to determine that the four instances of Kilborn's speech addressed a "matter of public concern," applying the requirement to consider the content, form, and context of the speech and look to its overall objective or point. *Id.*, 2025 U.S. App. Lexis 5767 *13–*14, slip op. at 11 (citing *Connick*, 461 U.S. at 147–48, and *Kristofek v. Village of Orland Hills,* 712 F.3d 979, 985 (7th Cir. 2013)). The district court's dismissal was based solely on this issue. *Id.*, 2025 U.S. App. Lexis 5767 *14, slip op. at 11. Citing cases reflecting a consensus view of settled law, the Court noted two errors by the district court:

> First, the district court did not give adequate weight to the academic context of Kilborn's speech. In this setting, speech may not inform broader public discourse because it is directed narrowly at students or other scholars, but that does not detract from its public importance.

Id.

> Second, the district court's analysis focused too narrowly on particular words (and accents) Kilborn used rather than considering whether the "overall thrust and dominant theme" of his speech "spoke to broader public issues."

Id., 2025 U.S. App. Lexis 5767 *17, slip op. at 13–14 (quoting *Snyder v. Phelps*, 562 U.S. 443, 454 (2011)).

Applying settled law correctly to the facts, the Court determined that all the speech was "academic speech" that readily met the "public concern" standard:

> Kilborn's exam question, out-of-class statements, and in-class remarks are all academic speech that address matters of public concern, notwithstanding the limited size of Kilborn's audience. The exam question was designed to give students experience confronting a highly charged situation that they may encounter in real-life practice and to be a continuation of the learning that occurred in the classroom.
>
> * * *
>
> The dominant theme of Kilborn's in-class speech concerned pretextual police stops and the relationship between frivolous litigation, plaintiff incentives, and media coverage. These are undeniably matters of public concern.
>
> * * *
>
> Similarly, Kilborn made his out-of-class statements in the context of a public discussion that was occurring at the University. Although he expressed his personal reaction to the controversy with individual students, the overall thrust of his speech addressed a matter of public concern: the propriety of using expurgated slurs in exam questions.

Id., 2025 U.S. App. Lexis 5767 *16–19, slip op. at 13–14.

Third, the Court determined that it could not, on a motion to dismiss where Kilborn's complaint properly disputes Defendants' claims about "harassment," engage in *Pickering* balancing of Kilborn's academic-freedom interest against the University's interest in ensuring its students can learn free of harassment. *Kilborn*, 2025 U.S. App. Lexis 5767 *19–*22, slip op. at 15–17; *Pickering*, 391 U.S. at 568. As

a result, Defendants need to present their disputed claims about "harassment" and "threats" in the district court on remand.

EN BANC REVIEW IS NOT WARRANTED

I. The Denial of Qualified Immunity Was Routine

Defendants' petition is inconsistent with the controlling facts and the contents of the Court's opinion. Those improper premises pervade the petition. Defendants claim that the Court applied a "generalized" right to academic freedom and extended it to "antagonistic comments made in private conversations outside the classroom." (Petition at 9). The Court denied qualified immunity because Kilborn's "speech falls comfortably within the core of what constitutes university teaching and scholarship …" *Kilborn*, 2025 U.S. App. Lexis 5767 *13, slip op. at 10. Defendants' assertion of "antagonistic" and "private" out-of-class statements also is refuted by the opinion:

> Kilborn's exam question, **out-of-class statements**, and in-class remarks **are all academic speech that address matters of public concern**, notwithstanding the limited size of Kilborn's audience. … Kilborn's **out-of-class remarks also contributed to a public discussion, initiated by members of the BLSA community, on the propriety of using expurgated slurs in a law school exam**. Although Kilborn's remarks were made to individual students, even the University recognized that they were directed at a broader group of people.

Id., 2025 U.S. App. Lexis 5767 *16–*17, slip op. at 13 (emphasis added).

Defendants claim that the Court "did not even attempt to explain how Kilborn's threats to students fall within the realm of 'university teaching and scholarship' …" (Petition at 14). Claims about "threats" (and "harassment") contradict Kilborn's complaint, so they cannot be credited. *Id.*, 2025 U.S. App. Lexis 5767 *21, slip op. at

16–17 ("it is reasonable to infer from the well-pleaded facts in Kilborn's complaint that University officials punished him for the controversial exam question and used the investigation to establish a pretext for their actions."). Also, the Court determined that it could *not* do any *Pickering* balancing of the University's claimed "harassment" interest against Kilborn's clearly established right to free academic speech. *Id.*, 2025 U.S. App. Lexis 5767 *22, slip op. at 17; *Pickering*, 391 U.S. at 568. Defendants need to pursue that defense on remand, not on rehearing.

Viewed properly, the Court's opinion correctly applied First Amendment and qualified-immunity law in determining that clearly established rights protected Kilborn's teaching-related speech. Defendants make no argument that qualified immunity should extend to retaliation against a professor's academic speech falling "comfortably within the core of what constitutes university teaching and scholarship," so the petition fails to address what the Court decided. *Kilborn*, 2025 U.S. App. Lexis 5767 *13, slip op. at 10. Defendants' petition also raises no issue at all about Kilborn's exam question and in-class remarks. Defendants try to draw a distinction between Kilborn's in-class exam and his out-of-class conversations about that exam, but that also is inconsistent with the opinion:

> Similarly, Kilborn made his out-of-class statements in the context of a public discussion that was occurring at the University. Although he expressed his personal reaction to the controversy with individual students, the overall thrust of his speech addressed a matter of public concern: the propriety of using expurgated slurs in exam questions.

Id., 2025 U.S. App. Lexis 5767 *18–*19, slip op. at 14.

1. The Court's refusal to apply *Garcetti* to Kilborn's teaching-related speech did not change established law. *Kilborn*, 2025 U.S. App. Lexis 5767 *11–*12, slip op. at 9. Here, Defendants were trying to change the law by stripping professors of their First Amendment protection for academic speech. Defendants cite no case applying *Garcetti* to university academic speech. (Petition at 14–17). Defendants cite *Piggee v. Carl Sandburg Coll.*, 464 F.3d 667 (7th Cir. 2006), but *Garcetti* did not apply there: "[*Garcetti v.*] *Ceballos* is not directly relevant to our problem, but it does signal the Court's concern that courts give appropriate weight to the public employer's interests." *Id.* at 672. *Piggee* turned on *Pickering* balancing of interests. *Id. Wozniak v. Adesida,* 932 F.3d 1008 (7th Cir. 2019), applied *Garcetti* to a professor who was disciplined for using his position to harass students for not granting him a teaching award, where the conduct at issue was *not* part of any "core academic duties" and was a private matter. *Id.* at 1010. See also *Hatcher v. Board of Tr. of S. Ill. Univ.*, 829 F.3d 531, 539 (7th Cir. 2016) (*Garcetti* applied to professor's reporting of sexual harassment of a colleague).

2. The Court cited the line of Supreme Court cases establishing the undeniable principle that university teaching speech is strongly protected. *Kilborn*, 2025 U.S. App. Lexis 5767 *10–*11, slip op. at 8 (citing *Garcetti,* 547 U.S. at 425; *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("The essentiality of freedom in the community of American universities is almost self-evident.")).

3. The Court noted that "it was clearly established that the *Connick-Pickering* test offered qualified protection to public employees, including professors at public universities." *Kilborn*, 2025 U.S. App. Lexis 5767 *11–*12, slip op. at 9. The Court also cited Seventh Circuit decisions that acknowledged a professor's First Amendment right to academic and teaching-related speech *before* proceeding to *Pickering* balancing of the university's own interest. See *Keen v. Penson*, 970 F.2d 252, 257–58 (7th Cir. 1992) (holding that university's interest in fair grading outweighed any assumed academic speech in professor's giving an unfair failing grade); *Piggee*, 464 F.3d at 671–72 (college's interest in having a cosmetology instructor focus on cosmetology outweighed instructor's right to distribute religious pamphlets). Defendants argue that the cited cases rejected First Amendment claims (Petition at 13), but that was only *after* full *Pickering* balancing. See also *Pugel v. Board of Tr. of Univ. of Ill.*, 378 F.3d 659, 668 (7th Cir. 2004) (graduate student's First Amendment speech rights in presenting her research were outweighed by university's right to take measures against false data).

Here, disputes about *Pickering* balancing can only be addressed on remand. The Court correctly denied qualified immunity based on Kilborn's clear right to free academic speech as alleged in his complaint. *Kilborn*, 2025 U.S. App. Lexis 5767 *13, slip op. at 10. Kilborn's First Amendment rights also clearly extend beyond the classroom. See, e.g., *Pickering*, 391 U.S. at 574 (teacher could not be fired for letter to newspaper on issue of public interest); *Meade v. Moraine Valley Cmty. Coll.,* 770 F.3d

680, 686 (7th Cir. 2014) (adjunct faculty member's letter to a community-college organization was protected speech).

4. The Court's decision is in line with precedents denying qualified immunity in First Amendment retaliation cases, particularly at the pleading stage. *Miller v. Jones,* 444 F.3d 929, 939 (7th Cir. 2006) (denying qualified immunity; "It is well established by the Supreme Court and this circuit that a public employer may not retaliate against an employee who exercises his First Amendment speech rights."); *Delgado v. Jones*, 282 F.3d 511, 521 (7th Cir. 2002) (denying qualified immunity at pleading stage, where "a public official knowledgeable about relevant case law could not have reasonably believed that he was free to retaliate"); *Gustafson v. Jones*, 117 F.3d 1015, 1021 (7th Cir. 1997) (denying qualified immunity at pleading stage).

5. *Sabo v. Erickson* is readily distinguished. Defendants cited *Sabo* as supplemental authority before the decision. *Sabo* involved a novel type of claim under the Eighth Amendment. The plaintiff wanted to hold clerks liable for not correcting a judge's sentencing error, where the clerks did not know that the plaintiff's particular sentence was unlawfully long. 128 F.4th at 841. The plaintiff was alleging the violation of an "abstract right," precedents required heightened factual specificity in Fourth Amendment and Eighth Amendment cases, and there was no precedent where the defendant did not know about the affected plaintiff. *Id.* at 845–46.

Defendants' petition approves the decision affirming qualified immunity for Kilborn's separate claim for compelled speech during the diversity course. (Petition at 12). The compelled-speech claim and the retaliation claim were decided

consistently under principles of qualified immunity. The Court stated that "it is questionable whether Kilborn has done enough to make out a compelled speech claim." *Kilborn*, 2025 U.S. App. Lexis 5767 *24, slip op. at 19. Qualified immunity applied because Kilborn had to support a claim *as a public employee* not to be compelled to speak, but the existing precedents for compelled speech "involve the government acting in its sovereign capacity, not as an employer." *Id.*, 2025 U.S. App. Lexis 5767 *25, slip op. at 19.

Kilborn's retaliation claim does not require more factually specific precedent. Kilborn's retaliation claim is not based on an "abstract right." *Sabo*, 128 F.4th at 845. Defendants' argument is premised on the false assumption that Kilborn's out-of-class speech was not teaching-related, that it was private, and that it was threatening and harassing. The record establishes that Kilborn's out-of-class speech was not threatening or harassing, and it was clearly a protected, public discussion of his teaching speech. *Kilborn*, 2025 U.S. App. Lexis 5767 *17–*19, slip op. at 13–15.

In sum, Kilborn's retaliation claim rests on a university professor's academic freedom under the First Amendment, in the specific context of Kilborn's substantive speech while teaching and while participating in public discussion of his teaching. That right has long been recognized as fundamental to the First Amendment and is a clearly established right requiring denial of qualified immunity.

II. The Court Fully Decided the Questions Presented

Defendants' second argument also relies on the same improper view of the record. The Court ruled on the specific instances of speech at issue: the exam question; the

in-class lecture remarks; and the out-of-class Zoom meeting and emails. *Kilborn*, 2025 U.S. App. Lexis 5767 *3–*4, *16–*19, slip op. at 3, 13–15. Here, there is no meaningful distinction between the in-class and out-of-class speech. *Id.*, 2025 U.S. App. Lexis 5767 *16–*17, slip op. at 13. The Court cannot rule on Defendants' disputed version of that speech—such as disputed assertions that Kilborn might "go after students" (Petition at 20) and that Kilborn "violated a clear anti-harassment policy" (Petition at 22)—because Defendants opted below for a motion to dismiss. Kilborn's complaint establishes, with supporting facts, that "University officials punished him for the controversial exam question and used the investigation to establish a pretext for their actions." *Kilborn*, 2025 U.S. App. Lexis 5767 *21, slip op. at 16–17.

Finally, there are no open legal questions that could appropriately be answered at this stage. The opinion is necessarily specific to the facts and issues presented. See *Kilborn*, 2025 U.S. App. Lexis 5767 *12–*13, slip op. at 10 ("In some cases, there may be genuine uncertainty about whether the speech at issue falls within *Garcetti*'s exception for university teaching or scholarship."); 2025 U.S. App. Lexis 5767 *16, slip op. at 12 ("We do not mean to suggest that a university professor's speech addresses a matter of public concern whenever it is directed toward students or other scholars."). See also *Flynn v. FCA US LLC*, 39 F.4th 946, 953 (7th Cir. 2022) ("Our task is to review the district court's decision as the issue was presented by the litigants."); *Sweeney v. Raoul*, 990 F.3d 555, 561 (7th Cir. 2021) ("federal courts do not deal in advice").

CONCLUSION

For the foregoing reasons, the Court should deny the petition for rehearing en banc.

Respectfully submitted,

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