FIRE

Foundation for Individual Rights in Education

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The Honorable Scott Walker
Office of the Governor
115 East Capitol
Madison, Wisconsin 53702

Sent via U.S. Mail and Facsimile (202-624-5871)

Dear Governor Walker:

The Foundation for Individual Rights in Education (FIRE) unites leaders in the fields of civil rights and civil liberties, scholars, journalists, and public intellectuals across the political and ideological spectrum on behalf of liberty, legal equality, academic freedom, due process, freedom of speech, and freedom of conscience on America's college campuses. Our website, thefire.org, will provide a greater sense of our identity and activities.

We write today to express our deep concern over the serious threats to the First Amendment and academic freedom presented by the Joint Finance Committee of the Wisconsin State Legislature's recent modification to the proposed state budget that would forbid University of Wisconsin faculty from working with the Wisconsin Center for Investigative Journalism (WCIJ), a nonpartisan, nonprofit journalism organization.

This is our understanding of the facts. Please inform us if you believe we are in error.

As reported on June 6 by *Inside Higher Ed* (Lauren Ingeno, "Journalism Center a Target"), University of Wisconsin–Madison provides WCIJ with two offices on campus per a "Facilities Use Agreement." In turn, WCIJ provides internships and other educational opportunities to students attending UW–Madison's School of Journalism and Mass Communication.

By a vote of 12–4 on the morning of Wednesday, June 5, the Joint Finance Committee passed a motion to include a series of modifications to the proposed state budget. The modifications included the following item:

> 2. *Center for Investigative Journalism.* Prohibit the Board of Regents from permitting the Center for Investigative Journalism to occupy any facilities owned or leased by the Board of Regents. In

> addition, prohibit UW employees from doing any work related to the Center for Investigative Journalism as part of their duties as a UW employee.

If the final budget passed into law includes this modification, it will violate the academic freedom rights of UW faculty.

Academic freedom is protected by the First Amendment, which is fully binding on public institutions of higher education—and, of course, state legislatures. The Supreme Court of the United States has repeatedly emphasized the primacy of the First Amendment on public college campuses, noting that "the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, 'the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" *Healy v. James*, 408 U.S. 169, 180 (1972) (internal citation omitted); *see also Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) ("With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities.").

The Court has further observed that academic freedom is a "special concern of the First Amendment," holding that "[o]ur nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). As the Court remarked in *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957):

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. … Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Forbidding UW faculty from "doing any work related to the Center for Investigative Journalism" imposes precisely such a strait jacket and is thus an unacceptable result at a public institution. Indeed, the Joint Finance Committee's proposed prohibition is extreme in its breadth, preventing faculty from performing any number of academic functions. For example, under the ban, faculty would be unable to read or discuss articles published by the WCIJ, to comment to WCIJ reporters on issues related to their scholarship or on matters of public concern, to assign WCIJ articles to students, or to cite WCIJ work in their research. The ban's vagueness is similarly problematic, as it forces faculty to guess at the precise boundaries of the ban on "any work related to the Center," no matter how seemingly remote. Laboring under the chilling effect engendered by such uncertainty, many faculty will rationally choose to self-censor—a deeply depressing outcome that contradicts the necessary function of our nation's public universities. For these reasons, the ban is flatly unconstitutional and must be rescinded.

The constitutional infirmity in the Committee's proposed restriction is not ameliorated by its limitation to work performed by UW faculty "as part of their duties as a UW employee." In *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006), the Supreme Court held that the First Amendment does not protect speech voiced by public employees "pursuant to their official duties"—but explicitly exempted academic work. Recognizing that the central holding in that case would have "important ramifications for academic freedom, at least as a constitutional value," the Court noted:

> There 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. **We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.**

Id. at 425 (emphasis added).

Lower courts have recognized and honored the Court's exception for academic speech in the university setting. For example, in reversing a federal district court's application of *Garcetti* to a university professor's scholarship and teaching in *Adams v. Trustees of the University of North Carolina-Wilmington*, 640 F.3d 550, 563 (4th Cir. 2011), the United States Court of Appeals for the Fourth Circuit relied on the fact that the "plain language of *Garcetti* thus explicitly left open the question of whether its principles apply in the academic genre where issues of 'scholarship or teaching' are in play." The Fourth Circuit elaborated upon the Court's caution in *Garcetti*:

> The Defendants nonetheless contend that because [Professor Michael] Adams was employed as an associate professor, and his position required him to engage in scholarship, research, and service to the community, Adams' speech constituted "statements made pursuant to [his] official duties." Cf., *Garcetti*, 547 U.S. at 421. In other words, the Defendants argue Adams was employed to undertake his speech. **This argument underscores the problem recognized by both the majority and the dissent in *Garcetti*, that "implicates additional constitutional interests that are not fully accounted for" when it comes to "expression related to academic scholarship or classroom instruction."** *Id*. at 425; *see also id*. at 438 (Souter, J., dissenting) ("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.'"). **Put simply, Adams' speech was not tied to any more specific or direct employee duty than the general concept that professors will engage in writing, public appearances, and service within their respective fields.** For all the reasons discussed above, that thin thread is insufficient to render Adams' speech "pursuant to [his] official duties" as intended by *Garcetti*.

Id. at 564 (emphases added).

This result reinforced the Fourth Circuit's earlier holding in *Lee v. York County School Division*, 484 F.3d 687, 695 (4th Cir. 2007), in which the appellate court rejected *Garcetti* in considering whether the First Amendment protected a high school teacher's bulletin board posts.

Other courts have reached similar conclusions. *See, e.g.*, *Lopez v. Fresno City College*, 2012 U.S. Dist. LEXIS 32846, *22–24 (E.D. Cal. Mar. 12, 2012) (rejecting application of *Garcetti* to classroom speech of community college professor); *Kerr v. Hurd*, 694 F. Supp. 2d 817, 843–44 (S.D. Ohio 2010) ("[T]his court would find an academic exception to *Garcetti*. Recognizing an academic freedom exception to the *Garcetti* analysis is important to protecting First Amendment values."); *Sheldon v. Dhillon*, 2009 U.S. Dist. LEXIS 110275, *11 (N.D. Cal. Nov. 29, 2009) ("*Garcetti* by its express terms does not address the context squarely presented here: the First Amendment's application to teaching-related speech."); *Evans-Marshall v. Board of Education of Tipp City Exempted Village School District*, 2008 U.S. Dist. LEXIS 58202, *7 (S.D. Ohio July 30, 2008) (rejecting application of *Garcetti* in a case involving a teacher's in-class speech because of "the explicit caveat in the majority opinion of *Garcetti* that the Court's decision therein did not necessarily apply 'in the same manner to a case involving speech related to scholarship or teaching'") (citations omitted).

As discussed above, the Committee's prohibition on faculty interaction with WCIJ necessarily reaches speech related to scholarship and teaching. As a result, the prohibition's vague limitation to only that work performed "as part of their duties as a UW employee" does not save its violation of the academic freedom enjoyed by UW faculty.

The Joint Finance Committee's proposed modification directly threatens academic freedom and would impermissibly chill the expression and scholarship the University of Wisconsin is intended to facilitate. The Committee's misguided and illiberal attempt to stifle faculty members spurns the Supreme Court's famous conception of the American college campus as being "peculiarly the 'marketplace of ideas.'" *Healy*, 408 U.S. at 180 (internal citation omitted).

In order to preserve the marketplace of ideas at Wisconsin's public campuses, renowned nationwide for their tradition of inquiry and debate, the Committee's modification must be rejected and removed immediately.

Sincerely,

William Creeley
Director of Legal and Public Advocacy

cc:
Governor Scott Walker
Senator Michael Ellis, President of the Senate
Senator Chris Larson, Senate Democratic Leader
Representative Robin Vos, Speaker of the Assembly
Representative Peter Barca, Assembly Democratic Leader
Senator Alberta Darling

Representative John Nygren
Senator Dale Schultz
Senator Timothy Cullen
President Kevin P. Reilly, University of Wisconsin–Madison
University of Wisconsin Board of Regents
Brent Smith, Regent President
Interim Chancellor David Ward, University of Wisconsin
Andy Hall, Executive Director, Wisconsin Center for Investigative Journalism
Professor Greg Downey, Director of the School of Journalism and Mass Communication
Professor Lewis A. Friedland, Director of the Center for Communication and Democracy
Professor Donald Downs