A BILL

STATE OF [Name of State]

In the Year of Our Lord Two Thousand Fifteen

To amend [Name of Higher Education Code], by adding a section to clarify that it is unlawful for a publicly operated institution of higher education to take adverse employment action, or otherwise retaliate against a faculty member or graduate student instructor for expression related to academic scholarship, academic research, or classroom instruction.

Be it Enacted by the Senate and House of [Name of the Legislature] convened:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Academic Freedom and Whistleblower Protection Act of 2015."

SEC. 2. DEFINITIONS

(A) Except as otherwise provided, the term "institution of higher education" refers only to public institutions that are part of the [Name of State University System] defined by [Citation to the State's Higher Education Code] and any amendments to it hereto as well as to community colleges established pursuant to [Citation to State's Higher Education Code].

(B) Except as otherwise provided, the term "faculty" refers to any person, whether or not they are compensated by an institution of higher education, who is tasked with providing scholarship, academic research, or teaching. For purposes of this statute, the term "faculty" shall include tenured and non-tenured professors, adjunct professors, visiting professors, lecturers, graduate student instructors, and those in comparable positions, however titled. For purposes of this statute, the term "faculty" shall not include persons whose primary responsibilities are administrative or managerial.

SEC. 3. FINDINGS.

The [Name of Legislature] finds the following:

(1) The Supreme Court of the United States has long emphasized and understood the importance of free and open expression on our nation's public campuses, proclaiming more than a half-century ago that the "essentiality of freedom in the community of American universities is almost self-evident." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). In *Keyishian v. Board of Regent*s, 385 U.S. 589, 603 (1967), the Supreme Court explained that academic freedom is a "special concern of the First Amendment," stating 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."

(2) Despite these and other long-established precedents, the Supreme Court placed academic freedom in our nation's public colleges and universities in jeopardy when it held that that a public employee's speech made pursuant to official duties is not protected by the First Amendment in *Garcetti v. Ceballos*, 547 U.S. 410 (2006). The Court acknowledged that its decision "may have important ramifications for academic freedom," but declined to decide whether an exception for the academic setting was warranted ("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.").

(3) The Court's *Garcetti* decision has created considerable confusion at universities and in the lower courts. In *Demers v. Austin*, 746 F.3d 402, 412 (9th Cir. 2014), the United States Circuit Court of Appeals for the Ninth Circuit decided, "*Garcetti* does not—indeed, consistent with the First Amendment, cannot—apply to teaching and academic writing that are performed 'pursuant to the official duties' of a teacher and professor." Similarly, the United States Circuit Court of Appeals for the Fourth Circuit concluded in *Adams v. Trustees of the University of North Carolina-Wilmington*, 640 F.3d 550 (4th Cir. 2011), that *Garcetti* did not apply to academic speech submitted as part of a professor's application for a full tenure professorship. However, in *Savage v. Gee*, 665 F.3d 732 (6th Cir. 2012), the United States Circuit Court of Appeals for the Sixth Circuit expressed skepticism about any exception to *Garcetti* for academic speech. The United States Circuit Court of Appeals for the Seventh Circuit failed to find an academic freedom exception in *Renken v. Gregory*, 541 F.3d 769, 774 (7th Cir. 2008), in which it dismissed the First Amendment claims of a professor who complained of difficulties in administering a grant because "the proper administration of an educational grant fell within the scope of Renken's teaching duties."

(4) Universities frequently ask courts to apply *Garcetti* to faculty expression. At the University of North Carolina-Wilmington, university defendants argued, on a motion for summary judgment, that *Garcetti* precluded a public university professor's First Amendment claim that the university had retaliated against him for conservative, Christian writings. Similarly, in 2008, a professor brought a First Amendment retaliation claim against officials at Northeastern Illinois University, arguing that the university took adverse action against her because of her comments about the low number of Latino faculty at the university and advocacy on behalf of students arrested at a political protest. The university argued that under *Garcetti*, the First Amendment did not protect the professor's expression.

(5) By leaving unanswered the question of whether an academic freedom exception applies to public employee speech doctrine following *Garcetti*, the Supreme Court's decision threatens academic freedom and free speech.

SEC. 4. ACADEMIC FREEDOM AND WHISTLEBLOWER PROTECTION

(A) No publicly operated institution of higher education shall take adverse personnel action, or maintain a policy that allows it to take adverse personnel action, against a faculty member in retaliation for:

(i) expression related to scholarship, academic research, or teaching, except as provided in subsection (B), herein; or

(ii) expression related to any matter of institutional policy or action that is of public concern; or

(iii) public expression related to any matter of social, political, economic, or other interest; or

(iv) disclosure, whether formal or informal, of information the faculty member reasonably believes evidences—

a. any violation of any law, rule, or regulation; or

b. gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(B) It shall not be unlawful under this Act for a publicly operated institution of higher education to take adverse personnel action, or to maintain a policy that allows it to take lawful adverse personnel action, against a faculty member for classroom expression that—

(i) is not reasonably germane to the subject matter of the class, broadly construed; and

(ii) comprises a substantial portion of classroom instruction.

(C) Any person whose rights under this Act have been violated may bring an action in any state court of competent jurisdiction. In an action brought under this Act, if the court finds that protected expression, as defined in this Act, was a significant motivating factor behind the institution of higher education's decision to take an adverse personnel action, the court shall award the aggrieved person compensatory damages, reasonable court costs, and attorney's fees, including expert fees, or any other relief in equity or law as deemed appropriate, unless the institution of higher education can demonstrate that it would have taken the same personnel action in absence of the protected activity.

(D) In a suit against the State for a violation of this Act, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in a suit against any public or private entity other than the State.

(E) A person must bring suit for violation of this Act not later than one year after the day the cause of action accrues. For purposes of calculating the one-year limitation period, the cause of action shall be deemed accrued on the date that the person receives final notice of discipline from the institution of higher education or the date in which the act of retaliation occurred, whichever date is later.

SEC. 5. EXEMPTIONS

This Act shall not apply to any privately operated institution of higher education or to any institution of higher education whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine.

SEC. 6. EFFECTIVE DATE

This Act is effective immediately when it becomes law.