No. 21-418

IN THE

Supreme Court of the United States

JOSEPH A. KENNEDY,

PETITIONER,

V.

BREMERTON SCHOOL DISTRICT,

RESPONDENT.

On a Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

BRIEF OF THE LIBERTY JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE[1]

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation firm that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights.

The Liberty Justice Center represents Barton Thorne in *Thorne v. Shelby County Bd. of Educ.,* No. 2:21-cv-02110 (W.D. Tenn.), and Denise Foley in *Foley v. MassHealth,* No. 2182CV00678 (Mass. Superior Ct.), cases which concern the First Amendment rights of government employees. As such, the Liberty Justice Center is concerned that this Court might extend *Garcetti v. Ceballos,* and obviate *Pickering v. Board of Education,* in a way that undermines speech rights.

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[1] Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than Amicus funded its preparation or submission. Counsel for both Petitioner and Respondent have granted blanket consent for *amicus* briefs.

SUMMARY OF ARGUMENT & INTRODUCTION

Cancel culture is real, pervasive, and here to stay. And it is actively shutting down the speech of government employees who pray or say things that upset the self-appointed speech police in our midst. Everyday Americans are being disciplined and fired for private speech and personal views, and public employers are getting away with it under the guise of *Garcetti*.

But the First Amendment serves as a "shield" that protects public employees like Coach Kennedy "from retaliation — and their ideas from suppression — at the hand of an intolerant society." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995). That shield desperately needs some reinforcement from this Court if it is to survive the onslaught of cancel culture.

Citizens do not "shed" their First Amendment rights at their employer's door, even when the employer is the government. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. 503, 506 (1969). This question should have been settled in *Pickering v. Board of Education,* 391 U.S. 653 (1968), but *Garcetti v. Ceballos,* 547 U.S. 410 (2006) opened the door to the government speech doctrine.

In itself, *Garcetti's* doctrine makes sense: of course the government can direct the on-duty, at-work speech of its employees, whom it pays to deliver speech on behalf of the government. But the offspring now threatens to cannibalize the parent, as government employers use *Garcetti* as license to treat all speech by any

government employee at any time as official government speech that does not have the protection of the First Amendment.

This danger is far more pronounced in an era of cancel culture, as governmental employers are treated as responsible for the speech of all their employees at all times by activists and interests group looking to punish the wrongthink of others.

ARGUMENT

This case is one of several where a government employer attempts to frame all employee speech on any topic at any time into government speech to avoid First Amendment scrutiny.

The idea that government employees "may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with [the setting] in which they work" is based on "a premise that has been unequivocally rejected in numerous prior decisions of this Court." *Pickering,* 391 U.S. at 568, citing *Wieman v. Updegraff,* 344 U.S. 183 (1952); *Shelton v. Tucker,* 364 U.S. 479 (1960); *Keyishian v. Board of Regents,* 385 U.S. 589 (1967).

Garcetti, on the other hand, held that "when employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes." 547 U.S. at 421. The government employee in that case "did not act as a citizen when he went about conducting his daily professional

activities, such as supervising attorneys, investigating charges, and preparing filings. . . . When he went to work and performed the tasks he was paid to perform, [he] acted as a government employee." *Id.* at 422. The *Garcetti* Court explicitly said that it was addressing an "anomaly" that was "limited in scope," "relat[ing] only to the expressions an employee makes pursuant to his or her official responsibilities, not to statements or complaints . . . that are made outside the duties of employment." *Id.* at 424. *Garcetti* must not be expanded beyond that limited scope.

I. *Garcetti* must not be expanded, especially now when Americans are more stridently policing each other's speech.

This Court is already familiar with the "real and pervasive" threat of retaliation against supporters of controversial causes. *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2388 (2021). Any public attention to a person's association with a controversial cause "becomes a means of facilitating harassment that impermissibly chills the exercise of First Amendment rights." *See Doe v. Reed*, 561 U.S. 186, 207-08 (2010) (Alito, J., concurring).

Lower courts are recognizing the threat of cancel culture as well. Judge Brian Martinotti has written that we live in "a climate marked by the so-called cancel or call-out culture that has resulted in people losing employment, being ejected or driven out of restaurants while eating their meals; and where the Internet removes any geographic barriers to cyber harassment of others." *Ams. for Prosperity v. Grewal*, No. 3:19-cv-14228-BRM, 2019 U.S. Dist. LEXIS 170793, *61

(D.N.J. Oct. 2, 2019). Judge Stephen Wilson decided a company's concerns were "well-founded" that it would lose business if the City of Los Angeles forced it to expose that it sponsored the National Rifle Association. *NRA of Am. v. City of L.A.,* 441 F. Supp. 3d 915, 934 (C.D. Cal. 2019). And Judge Judith Herrerra concluded that the "evidence of threats, harassment, and retaliation against other persons affiliated with nonprofit free enterprise groups and media accounts of public persons encouraging reprisals for speech by those with opposing views is alarming." *Rio Grande Found. v. City of Santa Fe*, 437 F. Supp. 3d 1051, 1073 (D.N.M. 2020).

Equally alarming are two nationwide polls that confirm this pervasive cancel culture. Eric Kauffman, a professor and adjunct scholar at the Manhattan Institute, predicts based on his polling that "[t]he problem of cancel culture is going to get worse, not better."[2] He finds that "people 18–25 are 20 points more likely to back a firing or no-platforming campaign" than those over age 50. He asked respondents to consider a real-life example: the firing of Mozilla CEO Brandon Eich for a previous donation to California's Proposition 8 campaign on marriage. Kaufmann finds that "young people who are in the political center have a 50% chance of backing the firing of Eich, compared with centrist voters over 35 who have less than a 20% chance of doing so." He concludes, "As today's college

[2] Eric Kaufmann, "The Politics of the Culture Wars in Contemporary America," Manhattan Institute (Jan. 25, 2022), https://www.manhattan-institute.org/kaufmann-politics-culture-war-contemporary-america.

graduates enter large organizations, they will mount an increasing challenge to freedom of expression."

Professor Kaufmann's study confirms results from an earlier national poll by Emily Ekins for the CATO Institute. She learned that 42 percent of Democrats would support firing a business executive from their job if it became known that he or she had privately donated to Donald Trump's 2020 campaign for president. 26 percent of Republicans said they would support firing a Biden donor. Small wonder, then, that fully one-third of respondents overall were worried about losing their job if their political opinions became public, and two-thirds of respondents said they hold political views they are afraid to share out loud.[3]

The lesson from these polls is clear: a large segment of the American population supports firing someone for their political views, and a large segment of the American people fear getting fired for their political views.

Thus, the timing for a clear protection of government-employee speech cannot be more urgent, as "online mobs shut down speech" by pressuring the employers of disfavored speakers to punish unwanted speech by firing those disfavored speakers.[4]

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[3] Emily Ekins, "Poll: 62% of Americans Say They Have Political Views They're Afraid to Share," CATO Institute (July 22, 2020), https://www.cato.org/survey-reports/poll-62-americans-say-they-have-political-views-theyre-afraid-share.

[4] Danielle Kurtzleben, "When Republicans Attack 'Cancel Culture,' What Does It Mean?" *NPR* (Feb. 10,

These internet lynch mobs have cost non-public figures their careers, be they a Latino utility worker who innocuously copied an "okay" hand gesture, an election data analyst who made an untimely observation that race riots decrease the Democratic vote share, or a Middle Eastern immigrant whose daughter had made racist posts on social media as a teenager.[5] Employers are bullied into firing their thought-criminal employees lest those employees' (usually off-the-job) speech be attributed to their employer. When that employer is the government, any extension of *Garcetti* would be particularly invidious.

Amicus Liberty Justice Center represents two such parties in ongoing litigation, both of whom, like Coach Kennedy, where punished for speech because of their public employment. Denise Foley formerly served as Director of Internal and External Training and Communication at MassHealth, a Massachusetts state agency responsible for the state's Medicaid Program, and received glowing performance reviews and a gubernatorial citation. Her job was to train employees and contractors on administrative policies. Nevertheless, she was abruptly terminated for posting in a members-only Facebook group a comparison of turning in people for not wearing masks to Nazi Germany.

2021, 5:00 A.M.), https://www.npr.org/2021/02/10/965815679/is-cancel-culture-the-future-of-the-gop.

[5] Yascha Mounk, "Stop Firing the Innocent," *The Atlantic* (June 27, 2020), https://www.theatlantic.com/ideas/archive/2020/06/stop-firing-innocent/613615/.

She did not discourage people from wearing masks in her social media posts, and even stated that she wore one. For this, she lost her livelihood. *Foley v. MassHealth,* No. 2182CV00678 (Mass. Superior Ct.).

Her comments came to the attention of her public employer, ironically, because screen shots of her comments were sent with a complaint by another member of the private Facebook group. She was swiftly suspended and then dismissed because, she was told, her comments undermined the administration's message about masking, even though it occurred off site[6] and public health messaging was not part of her job. Yet the cornerstone of the government's defense is *Garcetti*, reasoning that because her job was listed on her Facebook profile, one could click through from her comments and eventually see where she worked, and that would undermine the administration's message on masking.

Another Liberty Justice Center client is Barton Thorne, the principal of Cordova High School, a large public high school in Tennessee. He delivered a message to his students about the importance of free speech in a democratic society. The following day, he was placed on administrative leave. Why? Because he delivered the address on January 11, 2021, one week after the riot at the Capitol. Principal Thorne stated at the beginning of his remarks that he does not get

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[6] A public employer, like a public school, surely has less interest in an employee's off-site speech. *See generally Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021).

into politics with his students, that he wanted his students to go to their parents when they had questions about their values and their politics, and that his remarks were not about the Capitol riot but rather the ability of private social media companies "to filter and to decide what you can hear and know about." Transcript at 1, Dkt. 10-1, *Thorne v. Shelby County Bd. of Educ.,* No. 2:21-cv-02110 (W.D. Tenn.).

Principal Thorne was immediately suspended after three complaints were filed by members of his school, utilizing the district's process for suspending employees accused of sexual assault and harassment. A school board member lambasted his comments on a local television station, and the district's director of equity told another local TV outlet that Thorne's comments lacked racial sensitivity. The school district "investigated" his message for six weeks, leaving him to languish on leave, until miraculously completing the investigation the day his lawsuit was filed.

Again, the public employer believes the motion to dismiss should be open and shut, that *Garcetti* gives it carte blanche to suspend or fire any employee for any speech, regardless of whether an employee has fair notice under any district ethics policy of what is or is not permissible speech.

In a third instance, Liberty Justice Center supported two West Virginia school bus drivers who were suspended and investigated for attending the January 6, 2022, rally on Washington's Mall. The women were never anywhere near the U.S. Capitol that day; after the organized rally ended they returned to their tour bus to head home. But because they were tagged in

social media posts as having been in D.C. that day, their mere attendance led to their suspension. *Renner v. Shay Gibson*, 3:21-cv-00005-GMG (D. W. Va. 2021).

These individuals, like Coach Kennedy, are or were government employees whose speech cancelled by overzealous officials responding to public pressure. Coach Kennedy's official duty is to be the football players' coach, not their chaplain. Denise Foley's official duties were to communicate policy to a state agency's employees and external affiliates, not to advise the public on mask policies. And Principal Thorne was teaching in line with state social studies standards.

Nevertheless, all three of them have lost or are in danger of losing their jobs thanks to an expanded reading of *Garcetti,* one that this Court should shut down.

One particularly noxious development is the transformation of *Pickering's* disruption standard into a heckler's veto. *Pickering* recognizes that employees may be disciplined when their speech creates disruption in the government workplace. *See United States v. Nat'l Treasury Emples. Union*, 513 U.S. 454, 470 (1995). Public employers who receive demands to fire or cancel an employee are now relying on this negative feedback as justification for disciplinary action. Public outcry against an employee's personal speech becomes justification for a public employer's retaliation. *See Tucker v. Atwater*, 303 Ga. 791, 792, 815 S.E.2d 34, 34 (2018) (Peterson, J., concurring) ("in other contexts, we'd dismissively label such disruption a heckler's veto and proudly disregard it.").

The Alliance Defending Freedom won an important recent case at the Virginia Supreme Court illustrating this danger. A high school gym teacher spoke in his capacity as a citizen during the public comment period of a Loudoun County School Board meeting. He explained why he opposed a proposed pronoun policy that would conflict with his religious faith. His remarks launched a firestorm of criticism from some parents, which the district called a "disruption" justifying his suspension. *Loudoun County School Board v. Cross*, CL21003254-00 (Va. Aug. 30, 2021).[7]

Finally, these examples, along with the story of Coach Kennedy, reveal another troubling reality: such censorship is generally one-sided in its ideological suppression. Principal Thorne, for instance, was suspended for six weeks even as other employees in his district expressed their support for illegal immigration, or their disdain for right-of-center causes and individuals, including former President Trump and former Secretary of Education Betsy DeVos. Though the government may advance its own viewpoint through its own speech, it should not be permitted to engage in viewpoint discrimination by balancing *Pickering's* scales differently based on the content of the employee's speech.

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[7] Unpublished order available at https://adflegal.org/sites/default/files/2021-08/Cross-v-Loudoun-County-Order-VSC-8-30-21.pdf.

II. The government speech doctrine has an obvious limit: *Garcetti,* and no further.

The Ninth Circuit "obliterate[d] such constitutional protections" as are found in *Pickering* and *Tinker* "by announcing a new rule that *any* speech by a public school teacher or coach, while on the clock and in earshot of others, is subject to plenary control by the government." *Kennedy v. Bremerton Sch. Dist.,* 4 F.4th 910, 930 (9th Cir. 2021) (O'Scannlain, J., dissenting). What would happen if *Garcetti* was consistently extended in this way? All speech by any public employee would be deemed government speech regardless of where and when that speech was made, regardless of whether that speech was made on the job or in private, and regardless of whether an employee was on fair notice about permissible speech at work.

Free speech needs room to breathe in government office buildings as much as any other space. An off-the-cuff joke by President Reagan about bombing Russia[8] was no more announcing official U.S. policy than Dr. Fauci or Mayor Garcetti appearing maskless meant an end to mask mandates.[9] Government employees

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[8] *History.com*, https://www.history.com/this-day-in-history/reagan-jokes-about-bombing-russia (last visited Feb. 18, 2022).

[9] Travis Pittman, "Fauci calls criticism over photo of him with mask down 'mischievous'," *WUSA9* (July 24, 2020, 10:19 P.M.), https://www.wusa9.com/article/news/health/coronavirus/anthony-fauci-face-mask-down-photo-coronavirus/507-e33379cb-d79e-479b-9960-13293c96572f; Devan Cole, "Newsom and

are both humans and citizens; they retain the right to talk politics at the water cooler, to attend a campaign rally on a vacation day, and to pray at the end of a football game.

This Court recently and rightly reminded public schools that they are expected to model "the marketplace of ideas," to "protect . . . unpopular ideas, for popular ideas have less need for protection," and to teach and practice that basic principle, "I disagree with what you say, but I will defend to the death your right to say it." *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046 (2021). Government employers, no less than public schools, are equally in need of a reminder that they have a responsibility to protect and model the marketplace of ideas, and to reject efforts by those who would cancel the speech they disagree with. In its discussion of Coach Kennedy's free speech rights, this Court should strongly admonish government employers not to use *Garcetti* as a license to cancel employee's legitimate, protected, personal speech.

CONCLUSION

"This Court certainly has never read *Garcetti* to go" so far as to hold that public employees "may be fired if they engage in any expression that [their employer] does not like . . . from the moment they report for

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other Democratic leaders seen maskless at Rams game despite LA restrictions," CNN (Jan. 31, 2022, 5:25 P.M.), https://www.cnn.com/2022/01/31/politics/gavin-newsom-eric-garcetti-london-breed-maskless-rams-game/index.html.

work to the moment they depart." *Kennedy v. Bremerton Sch. Dist.,* 139 S. Ct. 634, 636 (2019) (statement of Alito, J.). It should not do so now. This Court should affirmatively state that *Garcetti* means what it says, and nothing further: speech by government employees outside the scope of their official duties is *never* government speech, and the pressures of cancel culture cannot be allowed to transform private speech into government speech.

Respectfully submitted,

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