No. 21-418

In The Supreme Court of the United States

JOSEPH A. KENNEDY,

Petitioner,

v.

BREMERTON SCHOOL DISTRICT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether a public-school employee who says a brief, quiet prayer by himself while at school and visible to students is engaged in government speech that lacks any First Amendment protection.

2. Whether, assuming that such religious expression is private and protected by the Free Speech and Free Exercise Clauses, the Establishment Clause nevertheless compels public schools to prohibit it.

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INTEREST OF *AMICUS CURIAE*[1]

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to promoting and protecting civil liberties at our nation's institutions of higher education. Since its founding in 1999, FIRE has successfully defended the rights of tens of thousands of students and faculty at colleges and universities nationwide. FIRE believes that if our educational institutions are to best prepare students for success in our democracy, the law must remain unequivocally on the side of robust free-speech protections for students and faculty.

FIRE has a direct interest in this case because this Court's jurisprudence on government-employee speech impacts the public university faculty FIRE defends. It files this brief to argue that the Ninth Circuit's ruling threatens public faculty's rights to academic freedom and freedom of expression.

SUMMARY OF ARGUMENT

This case requires the Court to revisit the contested boundary between the expressive rights of public employees and the interests of the government in efficiency as an employer. While the present matter concerns an assistant football coach at a public high school, the Court's decision here may impact other public employees involved in education, including

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[1] Pursuant to Rule 37.6, *amicus* FIRE affirms that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus* or their counsel contributed money intended to fund preparing or submitting this brief. Counsel for both parties have consented to the filing of this brief.

public university faculty. Because "[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 involved," matters that implicate the speech of public university faculty require particular judicial attention and care. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

Academic freedom—the right of university faculty to speak freely about matters related to scholarship and teaching—requires vigilant protection. "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." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). Accordingly, this Court has previously recognized the particular need to account for the academic freedom rights of public university faculty when addressing the expressive rights of government employees. In *Garcetti v. Ceballos*, this Court reserved the question of whether its holding "would apply in the same manner to a case involving speech related to scholarship or teaching." 547 U.S. 410, 425 (2006). Several circuits have since answered that question outright in favor of protecting academic freedom. The United States Courts of Appeals for the Fourth, Fifth, Sixth, and Ninth Circuits have explicitly declined to apply *Garcetti*'s broad rule to the academic expression of public university faculty. *See infra* Section I.C.

But here, the Ninth Circuit's ruling intrudes upon the expressive rights of government employees by conflating Coach Kennedy's expressions of faith with the official performance of his job duties. If allowed to stand, the Ninth Circuit's willingness to convert the

coach's prayer into government speech—*i.e.*, speech that the government could prohibit and punish—would set a dangerous precedent not only for grade-school teachers, but even more for professors at our public institutions of higher education. Because public university faculty make their living by engaging students and colleagues in discussion, they necessarily engage in job-related expression that may not communicate the views or bear the endorsement of their government employer. Allowing punishment for a professor's momentary asides or brief expressions of personal opinion, for example, would sound the death knell for academic freedom.

Compounding the threat posed by the decision below, courts often misapply this Court's rulings involving expression by K–12 teachers—who in the years since *Garcetti* have seen their expressive rights curtailed in the classroom—to cases concerning higher education. *See infra* Section II.A. And *amicus* FIRE's work demonstrates that university faculty already face regular discipline and censorship for controversial classroom expression. If allowed to stand, the Ninth Circuit's ruling would worsen the problem, giving public universities a freer hand to punish faculty for the exercise of their academic freedom and expressive rights.

The Ninth Circuit further erred by suggesting that Coach Kennedy's "pugilistic" defense of his First Amendment rights rendered his private expression more susceptible to misinterpretation as the speech of his employer, and thus more readily subject to censorship and punishment. Courts must not allow government employers to penalize employees for publicly

advocating for their First Amendment rights. In *amicus* FIRE's experience defending public university faculty, vindication of rights often relies upon vocal criticism in the court of public opinion. After all, colleges and universities are loath to publicly defend censorship. This Court must make clear that government employees, and particularly public university faculty, do not imperil their First Amendment rights by seeking to vindicate them.

ARGUMENT

I. Academic freedom is "a special concern of the First Amendment"—and it requires breathing room.

While this case concerns an assistant football coach at a public high school, its resolution requires the Court to revisit the First Amendment's protection of the expressive rights of all government employees—including public university faculty. In so doing, the Court must take care to recognize that when faculty members speak about matters related to scholarship and teaching, their speech is protected by academic freedom, "a special concern of the First Amendment." *Keyishian*, 385 U.S. at 603.

A. This Court has long recognized the importance of protecting academic freedom.

Academic freedom protects the rights of public university faculty members to speak freely about matters related to scholarship and teaching—and this Court has recognized the importance of protecting it in decisions dating back more than sixty years. "To impose

any strait jacket upon the intellectual leaders in our colleges and universities," the *Sweezy* Court wrote in 1957, "would imperil the future of our Nation." 354 U.S. at 250. Indeed, "[t]he Nation's future depends upon leaders trained through wide exposure to [a] robust exchange of ideas," and the college classroom is "peculiarly the 'marketplace of ideas.'" *Keyishian*, 385 U.S. at 603.

Protecting the rights of scholars and professors to speak freely ensures the continued vibrancy of "the vital centers for the Nation's intellectual life, its college and university campuses." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 836 (1995). This Court has consistently recognized "[o]ur national commitment to the safeguarding of these freedoms within university communities." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978).

Preserving this commitment to academic freedom requires particular judicial care. "Because First Amendment freedoms need breathing space to survive," *NAACP v. Button*, 371 U.S. 415, 433 (1963), the Court must account for academic freedom when deciding cases that might not immediately seem to implicate it—for example, cases involving assistant high school football coaches, like here, or deputy district attorneys, like in *Garcetti*.

B. In *Garcetti*, this Court recognized its public-employee speech exception to the First Amendment can imperil academic freedom of public university faculty.

In *Garcetti*, this Court carved out an exception to First Amendment protection for public-employee speech, and recognized that exception can imperil the academic freedom of public university faculty. 547 U.S. at 425. The plaintiff was a deputy district attorney who alleged that he was terminated for writing a memorandum concerning inaccuracies in an affidavit used to obtain a search warrant. *Id.* at 413–15. The Court held "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 421.

The Court's holding in *Garcetti* impacts approximately twenty million public employees in the United States, ranging from desk clerks to microbiologists, from police officers to agency administrators. *See* United States Census Bureau, Annual Survey of Public Employment & Payroll, About, https://www.census.gov/programs-surveys/apes/about.html (last visited Feb. 28, 2022). But of this varied and sprawling workforce, the *Garcetti* Court recognized only one set of employees that merited careful consideration under the First Amendment: public college and university professors. 547 U.S. at 425.

In dissent, Justice Souter warned that *Garcetti*'s holding could "imperil First Amendment protection of academic freedom in public colleges and universities,

whose teachers necessarily speak and write 'pursuant to . . . official duties.'" *Id.* at 438 (Souter, J., dissenting) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003)). Responding to Justice Souter's concern, the *Garcetti* majority explicitly acknowledged that its holding "may have important ramifications for academic freedom, at least as a constitutional value," and thus chose not to "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.

The Court reserved the question of whether *Garcetti*'s analysis properly applies to public university faculty, but several circuits have since answered it outright in favor of protecting academic freedom.

C. Four circuits have declined to apply *Garcetti*'s exception to public-faculty speech that implicates academic freedom.

Recognizing the incompatibility of *Garcetti*'s "official duties" rule with the First Amendment's protection of academic freedom, the Fourth, Fifth, Sixth, and Ninth Circuits have held that *Garcetti* does not apply to public-faculty speech related to scholarship or teaching.

In *Adams v. Trustees of the University of North Carolina-Wilmington*, the Fourth Circuit held that "*Garcetti* would not apply" because the facts concerned "the academic context of a public university." 640 F.3d 550, 562 (4th Cir. 2011). In *Adams*, the plaintiff was a professor who alleged he was retaliated against for the views he expressed in his scholarship

and teaching. *Id.* at 556. The Fourth Circuit explained that "[a]pplying *Garcetti* to the academic work of a public university faculty member under the facts of this case could place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment." *Id.* at 564. Accordingly, the Fourth Circuit held that *Garcetti* did not apply, and it analyzed the plaintiff's speech under *Pickering v. Board of Education*, 391 U.S. 563 (1968). *Id.*

Similarly, in *Demers v. Austin*, the Ninth Circuit held that *Garcetti* does not apply to speech related to scholarship or teaching. 746 F.3d 402, 406 (9th Cir. 2014). In *Demers*, the plaintiff was a professor who alleged retaliation for distributing a "pamphlet and drafts from an in-progress book." *Id.* The Ninth Circuit observed that applying *Garcetti* to the professor's speech "would directly conflict with the important First Amendment values previously articulated by the Supreme Court." *Id.* at 411. Following the Fourth Circuit's approach in *Adams*, the Ninth Circuit held that "academic employee speech not covered by *Garcetti* is protected under the First Amendment, using the analysis established in *Pickering*." *Id.* at 412.

The Fifth Circuit followed suit in *Buchanan v. Alexander*, recognizing that "[t]he Supreme Court has established that academic freedom is 'a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.'" 919 F.3d 847, 852 (5th Cir. 2019) (quoting *Keyishian*, 385 U.S. at 603). In *Buchanan*, the plaintiff was a professor who alleged retaliation after being terminated for using profanity and making jokes while teaching. *Id.* at 851. Like the Fourth and Ninth Circuits, the

Fifth Circuit applied the *Pickering* analysis to determine whether the professor's speech was protected. *Id.* at 853.

Most recently, in *Meriwether v. Hartop*, the Sixth Circuit declared that "the academic-freedom exception to *Garcetti* covers all classroom speech related to matters of public concern, whether that speech is germane to the contents of the lecture or not." 992 F.3d 492, 507 (6th Cir. 2021). In *Meriwether*, a public university professor alleged that his discipline for refusing to use a student's preferred pronouns violated the First Amendment. The Sixth Circuit reasoned that the "need for the free exchange of ideas in the college classroom is unlike that in other public workplace settings," concluding that "a professor's in-class speech to his students is anything but speech by an ordinary government employee." *Id.* at 507. Accordingly, the Sixth Circuit analyzed the professor's claim under *Pickering*. *Id.*

Recognizing that academic freedom requires specific judicial protection, the Fourth, Fifth, Sixth, and Ninth Circuits each concluded that *Garcetti* was inapplicable to the academic speech of public university faculty. Although the instant case does not involve public university faculty, its resolution will implicate their expressive rights, just as *Garcetti* did. To properly account for academic freedom and resolve the question reserved by the *Garcetti* majority, this Court should take the opportunity presented by this case to follow the circuits' lead, clarifying that *Garcetti* does not apply to speech related to scholarship or teaching in higher education.

II. If the Ninth Circuit's ruling is allowed to stand, *amicus* FIRE's experience demonstrates that public university faculty will be censored.

Courts often misapply this Court's rulings involving expression in the K–12 context to cases arising in colleges and universities. *Amicus* FIRE's work demonstrates that college and university faculty already regularly face discipline for controversial classroom expression. If allowed to stand, the Ninth Circuit's ruling would worsen the problem, giving public universities greater latitude to censor faculty, or punish them for exercising their academic freedom and expressive rights.

A. Restrictions on grade-school speech risk misapplication to higher education.

Despite this longstanding recognition of the importance of academic freedom in higher education, some federal circuit courts have misapplied K–12 precedent to First Amendment claims involving speech in the university setting. *See, e.g.*, *Doe v. Valencia Coll. Bd. of Trs.*, 838 F.3d 1207, 1211–12 (11th Cir. 2016) (applying K–12 precedents to First Amendment claim involving college student speech); *Ward v. Polite*, 667 F.3d 727, 733 (6th Cir. 2012) (same); *Hosty v. Carter*, 412 F.3d 731, 735 (7th Cir. 2005) (same).

But recently in *Mahanoy Area School District v. B. L.*, Justice Alito noted that university students differ from K–12 students for "several reasons," including their "age, independence, and living arrangements" and therefore "regulation of their speech may

raise very different questions" from those presented by that case, which involved the off-campus speech of a high-school student. 141 S. Ct. 2038, 2049 n.2 (2021) (Alito, J., concurring).

The Court should here follow Justice Alito's note regarding the differences between the university and K–12 settings, as the conditions that permit grade schools leeway to restrict First Amendment expression do not pertain to higher education. As the Ninth Circuit conceded, grade schools represent a uniquely coercive setting due to "mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure." *Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004, 1017 (9th Cir. 2021) ("*Kennedy II*") (quoting *Edwards v. Aguillard*, 482 U.S. 578, 583–84 (1987)).

As this Court noted in *Edwards*, "[t]he potential for undue influence is far less significant with regard to college students who voluntarily enroll in courses." 482 U.S. at 584 n.5. College students, not subject to the same coercive pressures as children in grade schools, do not need protection from their teachers' ideas—to the contrary, the college classroom is "peculiarly the 'marketplace of ideas.'" *Keyishian*, 385 U.S. at 603.

But in the years since this Court decided *Garcetti*, grade school teachers have seen their expressive rights curtailed in the classroom, even for fleeting comments made under circumstances where there is no reasonable risk of coercion of susceptible young minds. The test that the lower courts have fashioned out of *Garcetti* in the grade-school setting asks, in

essence, whether the speech occured in the classroom or other under circumstances where teachers are speaking to students. If yes, the courts have sided with the school districts over the teachers, no matter how fleeting their proscribed expression may have been.

For example, an elementary school student asked a teacher if she had ever participated in political demonstrations. The teacher told the students that while driving past a demonstration against war in Iraq, she saw someone holding a "honk for peace" sign, so she honked her horn. *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 478 (7th Cir. 2007). The Seventh Circuit held that the school district did not violate her First Amendment rights when it refused to renew her contract, as her speech occurred in the classroom. *Id.* at 478–80. Apparently, grade school teachers must be prevented from admitting to their students that they honked for peace.

A teacher of a high school creative writing class led a discussion of a curriculum-approved essay that described a Dutch holiday tradition of dressing up as Zwarte Piete, "a black man, who accompanies Santa Claus." *Melynk v. Teaneck Bd. of Educ.*, No. 16-0188, 2016 WL 6892077, at *1 (D.N.J. Nov. 22, 2016). The teacher—herself of Dutch ancestry with family then living in the Netherlands—mentioned the tradition persisted to that day and showed students photos from her phone of her relatives in blackface, inadvertently causing offense. *Id.* The school initiated an investigation into the teacher's conduct, and ultimately placed a letter of reprimand in her file. *Id.* The court

held that the teacher's expression failed the *Garcetti* test because it occurred in the classroom. *Id.* at *4.

As these examples demonstrate, under *Garcetti*, courts too easily misattribute to the school-district employer the speech of grade-school teachers. The speech is thus subject to restriction—and the employee to discipline. It would be one thing if these cases demarcated a bright line between the lack of academic freedom rights for grade school teachers on the one side and the enjoyment of such rights for university faculty on the other. But *amicus* FIRE's experience defending faculty speech, including in the university classroom, demonstrates the risk of allowing the Ninth Circuit's decision below to stand.

B. *Amicus* FIRE's experience demonstrates that faculty members face punishment for controversial or challenging classroom expression, properly protected by academic freedom.

Amicus FIRE's experience over more than twenty years demonstrates that professors across the country face discipline from their own colleges and universities for speech the institutions or their constituents find disagreeable, offensive, or merely uncomfortable. Recent controversies illustrate the ongoing problem.

In October 2020, Marshall University administrators fired a professor over a comment she made while students were still entering class.[2] While microbiology

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[2] Daniel Burnett, *A Marshall University professor criticized unmasked Trump supporters. Then censorship spread.*, FIRE

professor Jennifer Mosher waited for students to log in to her online lecture about COVID-19, one student made an offhand comment about "thinning the gene pool." Mosher replied, "without getting into politics, all the large gatherings of certain groups of people holding rallies [. . .] I'm like yeah, let Darwin [. . .] do its job [. . .] and hopefully they'll all be dead by the election. [laughing] I'm sorry, that's horrible." Shortly thereafter, Mosher began her lecture and the class proceeded without incident. However, someone had recorded that initial exchange, and the video found its way to Twitter. Two days later, after public backlash online, Marshall suspended Mosher pending an investigation. After half of the West Virginia state Senate signed a letter complaining that Marshall was using taxpayer dollars to fund "hate speech," the university fired her.

In January 2022, Ferris State University placed a professor on leave over a course introduction that interwove profane television references with syllabus topics.[3] History professor Barry Mehler had taught at Ferris State for thirty years, and given many an irreverent introductory lecture, at times with administrators in attendance and supportive of his colorful

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(Jan. 13, 2022), https://www.thefire.org/a-marshall-university-professor-criticized-unmasked-trump-supporters-then-censorship-spread [https://perma.cc/27Y3-MRQP].

[3] Sabrina Conza, *Ferris State cannot punish professor for comedic — and now viral — video jokingly referring to students as 'cocksuckers' and 'vectors of disease'*, FIRE (Jan. 17, 2022), https://www.thefire.org/ferris-state-cannot-punish-professor-for-comedic-and-now-viral-video-jokingly-referring-to-students-as-cocksuckers-and-vectors-of-disease [https://perma.cc/9G57-NJVE].

rhetoric.[4] Nevertheless, after an out-of-context video clip—that included Mehler calling students "vectors of disease" with reference to school policies addressing the ongoing COVID-19 pandemic—made its way online, the university removed the professor from the classroom for the remainder of the school year. To justify Mehler's removal, the administration cited a university policy requiring "all students and employees to conduct themselves with dignity and respect."[5]

In April 2021, Cypress Community College cancelled Faryha Salim's online communications class, simply for arguing against lionizing the police in response to a student's "persuasive presentation" assignment in a communications class.[6] Online backlash to a video recording of the exchange prompted Cypress to publicly announce Salim's involuntary leave of absence. The college cited public safety concerns, but its failure to explain how cancelling Salim's online class made its community safer suggests it had capitulated to a heckler's veto.

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[4] Adam Steinbaugh, *SAVE FERRIS PROF: Before it suspended tenured professor over profane syllabus skit, Ferris State praised it*, FIRE (Jan. 20, 2022), https://www.thefire.org/before-it-suspended-professor-over-profane-syllabus-skit-ferris-state-praised-it [https://perma.cc/MA8W-SSWE].

[5] Ferris State Univ., Employee Dignity/Harassment/Discrimination, Sec. 8-701, https://www.ferris.edu/administration/president/DiversityOffice/employee.htm [https://perma.cc/NYB7-7L67] (last visited Feb. 28, 2022).

[6] Sabrina Conza, *FIRE demands answers from Cypress College over cancelled professor*, FIRE (May 14, 2021), https://www.thefire.org/fire-demands-answers-from-cypress-college-over-cancelled-professor [https://perma.cc/9G8Z-YM6J].

As the above cases demonstrate, professors, like Kennedy, cannot escape observation by the public. *See Kennedy II*, 991 F.3d at 1010 ("Kennedy further acknowledged that, as a football coach, he was 'constantly being observed by others.'"). Some may react negatively to speech that is offensive, vituperative, provocative, or pedagogically challenging. Even so, the academic freedom necessary for a thriving system of higher education requires that faculty be free to engage in pedagogy as they see fit. As this Court correctly recognized, "[s]cholarship cannot flourish in an atmosphere of suspicion and distrust." *Sweezy*, 354 U.S. at 250.

III. Public university faculty must be able to vindicate their rights by exposing censorship to public scrutiny.

In dismissing Coach Kennedy's First Amendment claims, the Ninth Circuit panel relied, in part, on Kennedy's efforts to plead his case in the court of public opinion. The panel concluded that Kennedy's "pugilistic" public defense of his expression, and the ensuing public interest he generated, justified the Bremerton School District's decision to discipline him, holding that failing to do so would have been interpreted by observers as an institutional endorsement of his speech. *Kennedy II*, 991 F.3d at 1017.

The Ninth Circuit's rationale sends a dangerous message to government employees whose First Amendment rights are violated: Either suffer in silence, or risk discipline by daring to cast sunlight on censorship. Government employees—including the public university faculty that *amicus* FIRE defends—rely on public support to expose illiberal institutional

censorship and to vindicate their rights. If allowed to stand, the Ninth Circuit's reasoning will render that public support a liability, allowing administrators to argue that censorship was necessary to avoid public confusion about institutional endorsement of faculty speech.

A. The Ninth Circuit dangerously suggested that a vigorous public defense of First Amendment rights may justify discipline.

Censorship is newsworthy. When fellow citizens face punishment for the apparent exercise of their First Amendment rights, the public wants to know more.[7] Indeed, public scrutiny is a powerful antidote to rights violations that might otherwise have gone undetected and unanswered. Troublingly, however, the Ninth Circuit's decision effectively punished Coach Kennedy for the public's interest in his ordeal.

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[7] As one commentator observed: "What's the best way to make sure a message gets heard? Try to muzzle it." Catherine Rampell, *What Milo Yiannopoulos and Elizabeth Warren have in common*, Wash. Post (Feb. 9, 2017), https://www.washingtonpost.com/opinions/what-milo-yiannopoulos-and-elizabeth-warren-have-in-common/2017/02/09/ee5da942-ef0e-11e6-9662-6eedf1627882_story.html [https://perma.cc/4FEN-QNP5]. Generally speaking, Americans do not like censorship, trusting instead in the free exchange of ideas. *See, e.g.*, Emily Ekins, *The State of Free Speech and Tolerance in America: Attitudes about Free Speech, Campus Speech, Religious Liberty, and Tolerance of Political Expression*, Cato Institute (Oct. 31, 2017), https://www.cato.org/survey-reports/state-free-speech-tolerance-america [https://perma.cc/9JZJ-XTE5] ("Americans provide a strong endorsement of free speech with 67% who agree that 'free speech ensures the truth will ultimately win out.'").

The Ninth Circuit found that Kennedy spoke as a government employee, and not a citizen, in his post-game prayer. *Kennedy II*, 991 F.3d at 1016. Even assuming *arguendo* that Kennedy had spoken as a private citizen, the Ninth Circuit concluded that the school district's decision to treat him differently from other members of the general public was adequately justified by its compelling interest in avoiding an Establishment Clause violation. *Id.* at 1016–19. Due in significant part to the widespread attention Kennedy's expression had attracted, the Ninth Circuit found "no doubt" that his expression would be misinterpreted as bearing the school's imprimatur. *Id.* at 1019.

In other words, the Ninth Circuit held Kennedy's efforts to garner public attention against him. In the panel's telling, Kennedy wasn't standing up for his First Amendment rights; rather, he was engaging in "pugilistic efforts to generate publicity in order to gain approval" of his speech. *Id.* at 1017. Kennedy wasn't appealing to the court of public opinion; he "engaged in a media blitz." *Id.* Because Kennedy "actively sought support from the community" when attempting to vindicate his contested right to engage in a brief expression of faith, the Ninth Circuit found that the school district had all the more justification to take action. *Id.* at 1019. Had it not censored Kennedy, "an objective observer could reach *no other conclusion*" than that the school district actually "endorsed" his beliefs. *Id.*

By suggesting that a vigorous defense of First Amendment rights justifies a proportional administrative response, the Ninth Circuit's analysis

encourages heavy-handed censorship as a prophylactic measure: Censorship is warranted, lest an outside observer conclude that the speech has the institution's approval. It also discourages those censored from fighting back, as the more attention those threatened with censorship draw to their efforts to continue speaking, the greater the justification for institutional censorship to avoid the appearance of endorsement.

Not only does the Ninth Circuit's reasoning punish government employees who seek to marshal support for their expressive rights, it suggests that public institutions that decline to censor may be at risk of liability. But this Court noted three decades ago that "[t]he proposition that schools do not endorse everything they fail to censor is not complicated." *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 250 (1990). The panel's ruling thus has our longstanding national commitment to freedom of expression exactly backwards. As Circuit Judge Ryan D. Nelson asked, in dissenting from the denial of Kennedy's petition for rehearing *en banc*: "[W]ould we ever pejoratively refer to members of various civil rights movements as 'pugilistic' when they publicly, peacefully, and vocally tried to vindicate their rights? Absolutely not." *Kennedy v. Bremerton Sch. Dist.*, 4 F.4th 910, 953 n.10 (9th Cir. 2021) ("*Kennedy I*") (R. Nelson, J., dissenting from denial of rehearing *en banc*).

The Ninth Circuit's misguided emphasis on Coach Kennedy's "pugilistic" defense of his rights and the accompanying public attention is part of its Establishment Clause analysis. But if allowed to stand, it is unlikely to stay cabined to matters involving religious

expression. *Amicus* FIRE knows too well that colleges and universities regularly field demands to censor faculty members after their expression draws public attention—and regularly acquiesce. In the past year alone, academics have faced investigations and discipline for criticizing President Biden's criteria for a forthcoming Supreme Court nomination;[8] criticizing their institution's response to COVID-19 and former Vice President Mike Pence's debate performance;[9] criticizing their institution's response to allegations of

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[8] Neil Vigdor, *Georgetown Suspends Lecturer Who Criticized Vow to Put Black Woman on Court*, N.Y. Times (Jan. 31, 2022), https://www.nytimes.com/2022/01/31/us/ilya-shapiro-georgetown-biden-scotus.html [https://perma.cc/JJ7P-YBUL].

[9] Talia Richman, *Collin College again pushes out professor critical of administration's handling of COVID-19, free speech*, Dall. Morning News (Feb. 26, 2021), https://www.dallasnews.com/news/education/2021/02/26/collin-college-again-pushes-out-professor-critical-of-administrations-handling-of-covid-19-free-speech [https://perma.cc/KD2D-PNWM]; *see also* Talia Richman, *Former Collin College professor who claimed retaliation over tweets resolves lawsuit with school*, Dall. Morning News (Jan. 25, 2022), https://www.dallasnews.com/news/education/2022/01/25/former-collin-college-professor-who-claimed-retaliation-over-tweets-resolves-lawsuit-with-school [https://perma.cc/2GS4-QAUP] ("A former Collin College professor – who lost her job after tweeting messages critical of the school's COVID-19 protocols and of then-Vice President Mike Pence – resolved her lawsuit with the school Tuesday. Lora Burnett, who taught history, accepted the school's $70,000 offer to end the dispute.").

sexual abuse and anti-Semitism;[10] and criticizing the Chinese government.[11]

These faculty members—representing just a small sample of recent faculty speech controversies—faced repercussions because their speech garnered public attention. In each instance, the precipitating speech was protected by either the First Amendment or institutional promises of free expression.

But if, following the Ninth Circuit's ruling, colleges and universities may in the future cite unwanted public attention as a *justification* for punishing faculty speakers—positing censorship as a necessary measure to avoid misunderstandings about institutional endorsement of faculty expression—then academic freedom will be a dead letter. Neither faculty nor students can meaningfully engage in "that continual and fearless sifting and winnowing by which alone the truth can be found,"[12] in the University of Wisconsin's famously apt phrasing, if the fear of mistaken

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10 Michael Levenson, *Linfield University Fires Professor Who Spoke Out About Misconduct Cases*, N.Y. Times (May 1, 2021), https://www.nytimes.com/2021/05/01/us/Linfield-university-professor-fired.html [https://perma.cc/E2GZ-YKB6].

11 Eugene Volokh, *Univ. of San Diego Law School Investigating Professor for Post Critical of China*, Reason (March 20, 2021), https://reason.com/volokh/2021/03/20/univ-of-san-diego-law-school-investigating-professor-for-post-critical-of-china [https://perma.cc/7SKN-C8YA].

12 *See* Käri Knutson, *Sifting and winnowing turns 125: The tumultuous story of three little words*, Univ. of Wisconsin–Madison News (Sept. 17, 2019), https://news.wisc.edu/sifting-and-winnowing-turns-125 [https://perma.cc/A6PN-ZWJH].

institutional attribution is allowed to justify censorship of challenging, dissenting, or simply unpopular faculty speech.[13] As this Court has warned, the "danger" posed by "the chilling of individual thought and expression" is "especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." *Rosenberger*, 515 U.S. at 835.

Just as troublingly, by rendering public attention secured by the vigorous defense of one's rights a justification for censorship, the Ninth Circuit's decision denies to the faculty members *amicus* FIRE defends their most effective means of combating censorship.

B. In defending public university faculty, *amicus* FIRE relies on public attention to vindicate speech rights.

Since 1999, *amicus* FIRE has successfully vindicated the expressive rights of faculty at institutions nationwide by relying on the truth of Justice Brandeis's classic observation: Sunlight is "the best of disinfectants."[14] In FIRE's experience, the power of

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[13] Such a fear would be unfounded, too. Just as allowing a religious student organization to use public campus facilities on equal footing with secular groups does not violate the Establishment Clause because "an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices," *Widmar v. Vincent*, 454 U.S. 263, 276 (1981), neither does the speech of public university faculty as private citizens reasonably bear the presumption of institutional endorsement.

[14] Louis D. Brandeis, *What Publicity Can Do*, Harper's Weekly (Dec. 20, 1913), https://www.thefire.org/presentation/

public opinion is just as reliable a guarantor of faculty rights as the judiciary, and arguably more so.[15]

A recent controversy at the University of Florida offers an illustration of the immense value of public attention for faculty seeking to remedy a violation of First Amendment freedoms. On May 17, 2021, voting rights advocates filed a lawsuit against various Florida state election officials to block implementation of Senate Bill 90, a statute imposing new restrictions on voting in the state.[16] The plaintiffs' lawyers sought to hire three University of Florida political science professors as expert witnesses. Pursuant to the university's policy, all three faculty members filed disclosure forms with the institution concerning their planned participation in the lawsuit. But upon review, and despite having previously allowed one of the professors to testify in two voting rights lawsuits against Florida

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wp-content/uploads/2021/08/31120554/1913_12_20_What_Publicity_Ca.pdf [https://perma.cc/YH7A-5NK7].

15 *Fighting rights violations by going public*, FIRE, https://www.thefire.org/resources/submit-a-case/frequently-asked-questions-about-case-submissions/fighting-rights-violations-by-going-public/ [https://perma.cc/FSK2-QWL8] ("But after successfully defending campus rights for more than two decades, we have found that telling the story of how rights are being violated is usually the most effective way to encourage an institution to comply with its legal and moral obligation to protect student and faculty rights.").

16 Class Action Compl. for Injunctive and Declaratory Relief, *Fla. Rising Together v. Lee*, No. 4:21-cv-00201-AW-MJF (N.D. Fla. filed May 17, 2021), *available at* https://www.demos.org/sites/default/files/2021-05/FRT%20v.%20Lee%20-%20Complaint.pdf [https://perma.cc/YL3S-892Z].

in 2018, the university denied the faculty members' requests.

On October 29, 2021, *The New York Times* reported that the University of Florida was prohibiting three professors from testifying in a voting rights lawsuit brought against the state.[17] The denial quickly generated intense public interest and media attention.[18] On October 30, 2021, the university issued a statement in response, arguing that it had not violated the First Amendment rights of the professors.[19] In a subsequent statement, a university spokesperson said that "if the professors wish to do so pro bono on their own time without using university resources, they would be free to do so."[20]

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17 Michael Wines, *Florida Bars State Professors From Testifying in Voting Rights Case*, N.Y. Times (Oct. 29, 2021), https://www.nytimes.com/2021/10/29/us/florida-professors-voting-rights-lawsuit.html [https://perma.cc/F4FV-4HFN].

18 *See, e.g.*, Mike Schneider, *University of Florida prohibits professors from testifying*, Associated Press (Oct. 30, 2021), https://apnews.com/article/lawsuits-florida-ron-desantis-voting-rights-university-of-florida-f3b88f128a3175586fdc21b56a0a7132 [https://perma.cc/A97K-ZUHP].

19 *University Statement on Academic Freedom and Free Speech*, Univ. of Fla., http://statements.ufl.edu/statements/2021/october/university-statement-on-academic-freedom-and-free-speech.html [https://perma.cc/ZP83-RFW4].

20 Danielle Ivanov, *UF professors could testify in voting rights case if they are unpaid, spokeswoman says*, Gainesville Sun (Oct. 31, 2021), https://www.gainesville.com/story/news/education/campus/2021/10/31/university-of-florida-spokeswoman-three-professors-could-testify-if-unpaid/6223947001.

On November 1, FIRE wrote to the University of Florida, explaining that prohibiting professors from testifying in lawsuits as citizens speaking on matters of public concern violates the First Amendment.[21] Days later, following "blistering criticism"[22] and a "national outcry,"[23] the university reversed course, "[a]cceding to a storm of protest" and announcing it would allow the professors to testify—regardless of whether they received compensation.[24]

A subsequent First Amendment lawsuit filed by the professors against the University of Florida has resulted in a preliminary injunction barring the university from enforcing its revised conflict-of-interests policy against faculty seeking to provide expert testimony or consulting in litigation involving the State of Florida. *Austin v. Univ. of Fla. Bd. of Trs.*,

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[21] Letter from Aaron Terr, Program Officer, FIRE, to Dr. W. Kent Fuchs, President, University of Florida (Nov. 1, 2021), *available at* https://www.thefire.org/fire-letter-to-the-university-of-florida-november-1-2021 [https://perma.cc/T8H3-FGLQ].

[22] John Henderson, *Protest on the street and in writing show continued concern at UF over academic freedom*, Gainesville Sun (Nov. 12, 2021), https://www.gainesville.com/story/news/2021/11/12/university-florida-protest-professors-write-fuchs-over-free-speech-concerns/8589858002 [https://perma.cc/3YXC-47DK].

[23] Keith E. Whittington, *The intellectual freedom that made public colleges great is under threat*, Wash. Post (Dec. 15, 2021), https://www.washingtonpost.com/outlook/2021/12/15/academic-freedom-crt-public-universities [https://perma.cc/7GQF-VBAW].

[24] Michael Wines, *University of Florida Reverses Course to Allow Professors to Testify Against State*, N.Y. Times (Nov. 5, 2021), https://www.nytimes.com/2021/11/05/us/voting-rights-florida-professors-testify.html [https://perma.cc/HYG7-Z9LZ].

No. 1:21cv184-MW/GRJ, 2022 U.S. Dist. LEXIS 11733 (N.D. Fla. Jan. 21, 2022). But the immediate impact of the public scrutiny placed on the university's initial decision is undeniable. For faculty facing rights violations, public attention is invaluable.

Further examples abound.

As of July 1, 2021, Iowa state law required the state's public institutions of higher education to ensure that "any mandatory staff or student training provided by an employee of the institution or by a contractor hired by the institution does not teach, advocate, act upon, or promote specific defined concepts," including, for example, the notion that "the United States of America and the state of Iowa are fundamentally or systemically racist or sexist." Iowa Code § 261H.8. Both as written and as indicated by state lawmakers during legislative debate,[25] the law does not implicate classroom instruction.

While the University of Iowa made clear to faculty that the law has "zero impact within the classroom as academic instruction is specifically exempted from the legislation,"[26] Iowa State University incorrectly told

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25 FIRE, *Iowa Rep. Mary Lynn Wolfe Comments on HF802, March 16, 2021*, YouTube (July 27, 2021), https://www.youtube.com/watch?v=py3aWX_gC08&t=53s (explaining that bill "just affects diversity training" in higher education, and only reaches what teachers are "allowed to teach and curriculum" in K–12 classes).

26 *House File (HF) 802 Information*, Univ. of Iowa (July 27, 2021), https://diversity.uiowa.edu/house-file-hf-802-information [https://perma.cc/7AJE-62MU].

its faculty that the law required the university to police regular class instruction, including discussions, course materials, and invited speakers.[27] After faculty voiced concern, FIRE wrote Iowa State and issued a press release, explaining the threat to academic freedom and the First Amendment rights presented by Iowa State's erroneous warning to its faculty.[28] Only after the ensuing public scrutiny[29] did Iowa State reverse course and revise its guidance to better account for faculty rights.[30]

In September 2021, a visiting artist at Coastal Carolina University was working with two students of color after class when one student expressed that she

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[27] *Iowa House File 802 – Requirements Related to Racism and Sexism Trainings*, Iowa State Univ. (Aug. 5, 2021), https://www.provost.iastate.edu/policies/iowa-house-file-802---requirements-related-to-racism-and-sexism-trainings [https://perma.cc/M8AL-E7EP].

[28] *FIRE calls on Iowa State to reverse unconstitutional implementation of critical race theory law*, FIRE (July 27, 2021), https://www.thefire.org/fire-calls-on-iowa-state-to-reverse-unconstitutional-implementation-of-critical-race-theory-law [https://perma.cc/792H-ALNT].

[29] *See, e.g.*, Phillip Sitter, *Free speech advocacy group critiques ISU guidance on divisive concepts law as too broad — and it's not alone*, Ames Trib. (Aug. 4, 2021), https://www.amestrib.com/story/news/education/2021/08/04/iowa-state-university-critical-race-theory-foundation-individual-rights-education-critiques-isu/5415113001 [https://perma.cc/D5PD-VGWX].

[30] *After FIRE turns up the heat, Iowa State revises unconstitutional guidance for instructors to self-censor*, FIRE (Aug. 11, 2021), https://www.thefire.org/after-fire-turns-up-the-heat-iowa-state-revises-unconstitutional-guidance-for-instructors-to-self-censor [https://perma.cc/B6D9-4F94].

felt isolated and would like to get to know other non-white students in the department. The instructor and students wrote names of other students of color on the classroom whiteboard while brainstorming ideas. Students who later entered the classroom and saw the names protested what they interpreted to be the singling-out of non-white students.

After both a theater department committee and the visiting artist issued apologies over email, professor Steven Earnest suggested in reply that the protesting students were being overly sensitive.[31] Following student protests, Earnest was suspended. After FIRE alerted the media to Earnest's discipline,[32]

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[31] The professor wrote: "Sorry but I dont [sic] think its [sic] a big deal. Im [sic] just sad people get their feelings hurt so easily. And they are going into Theatre?" Eugene Volokh, *Theater Prof Facing Possible Firing for Not Being Sufficiently Outraged*, Reason (Nov. 9, 2021), https://reason.com/volokh/2021/11/09/theater-prof-facing-possible-firing-for-not-being-sufficiently-outraged [https://perma.cc/M7RX-F5RR] (quoting FIRE's letter).

[32] *A theater professor wasn't sufficiently outraged about a list of names on a whiteboard. The college's next act: probable termination.*, FIRE (Oct. 20, 2021), https://www.thefire.org/a-theater-professor-wasnt-sufficiently-outraged-about-a-list-of-names-on-a-whiteboard-the-colleges-next-act-probable-termination [https://perma.cc/4R83-XYMX].

garnering national attention,[33] the university reversed course.[34]

In 2017, Laurie Sheck, a professor at The New School, was charged with racial discrimination after quoting James Baldwin during a graduate seminar discussion of his 1962 essay "The Creative Process." Sheck noted how the title of an Oscar-nominated 2016 documentary based on Baldwin's writings, "I Am Not Your Negro," intentionally altered its quoted source, Baldwin's use of a racial slur as a guest on "The Dick Cavett Show." She asked her students what this change may reveal about Americans' ability to reckon with what Baldwin identified in his essay as "the darker forces of history."[35]

Months later, The New School notified Sheck that she was under investigation for allegedly violating the institution's discrimination policy in her classroom discussion, but provided her with no further details. After The New School failed to substantively respond to a letter from FIRE voicing concern about the investigation's violation of the academic freedom promised Sheck in institutional policy, FIRE issued a press release calling on the university to end the

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[33] *See, e.g.*, Brittany Bernstein, *A Theater Professor Suggested Students Should Have Thicker Skins, So They Demanded He Be Fired*, Nat'l Rev. (Nov. 7, 2021), https://www.nationalreview.com/news/a-theatre-professor-suggested-students-should-have-thicker-skins-so-they-demanded-he-be-fired [https://perma.cc/V849-MQQ6].

[34] FIRE, *supra* note 32.

[35] James Baldwin, *The Creative Process*, *in* Creative America (1962).

investigation.[36] Days later—and only after public scrutiny[37]—it finally did so.[38]

These controversies represent just a small sample of *amicus* FIRE's reliance on the power of public attention to vindicate faculty rights. To ensure that sunlight remains the best of disinfectants, this Court must reject the Ninth Circuit's flawed reasoning and make clear that a "pugilistic" defense of faculty rights may not justify censorship and punishment. This Court must make clear that faculty do not imperil their First Amendment rights by seeking to vindicate them.

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[36] *Academic freedom at The New School? Not if you quote an iconic black writer.*, FIRE (Aug. 7, 2019), https://www.thefire.org/academic-freedom-at-the-new-school-not-if-you-quote-an-iconic-black-writer [https://perma.cc/UJ9C-6DWR].

[37] *See, e.g.*, Colleen Flaherty, *N-Word at the New School*, Inside Higher Ed (Aug. 7, 2019), https://www.insidehighered.com/news/2019/08/07/another-professor-under-fire-using-n-word-class-while-discussing-james-baldwin [https://perma.cc/CAY4-AYFA].

[38] *VICTORY: Professor exonerated for quoting iconic black writer at The New School*, FIRE (Aug. 16, 2019), https://www.thefire.org/victory-professor-exonerated-for-quoting-iconic-black-writer-at-the-new-school [https://perma.cc/BJ5S-S8Z5].

CONCLUSION

For the above reasons, this Court should reverse.

March 2, 2022

Respectfully submitted,

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