No. 21-418

In the Supreme Court of the United States

JOSEPH A. KENNEDY, PETITIONER

v.

BREMERTON SCHOOL DISTRICT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE WASHINGTON STATE SCHOOL DIRECTORS' ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

DOUGLAS HALLWARD-DRIEMEIER
Counsel of Record
ANDREW J. HOSEA
ROPES & GRAY LLP
2099 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 508-4600
Douglas.Hallward-Driemeier@ropesgray.com

SAMUEL L. BRENNER
EVA HELLWIG
SAVANNA ARRAL
ROPES & GRAY LLP
Prudential Tower
800 Boylston Street
Boston, MA 02199

ANI-RAE LOVELL
CAROLINE MCHUGH
ROPES & GRAY LLP
1211 Avenue of the Americas
New York, NY 10036

NICOLE G. BRAMBILA
ROPES & GRAY LLP
Three Embarcadero Center
San Francisco, CA 94111

Special Assistant Attorneys General and Counsel for The Washington State School Directors' Association

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INTEREST OF AMICUS CURIAE[1]

Founded in 1922, the Washington State School Directors' Association (WSSDA) is a statewide association of all 1,477 locally elected school board directors from Washington State's 295 public school districts, including the Respondent, Bremerton School District. Washington's school districts serve more than 1.1 million students and employ more than 110,000 people. Nationwide, school districts like those represented by WSSDA

[1] Both parties have filed blanket consent to the filing of amicus curiae briefs. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amicus curiae or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

employ over 6 million teachers and another approximately 6 million non-certificated staff, including paraprofessionals, custodians and other building maintenance personnel, school psychologists and social workers, bus drivers, and food service workers. Taken as a whole, public school districts are the nation's single largest government employer.

In 1947, the Washington State Legislature, recognizing "[t]he public necessity for the coordination of programs and procedures pertaining to policy making and to control and management among the school districts of the state," authorized WSSDA as a state agency. 1947 Wash. Sess., ch. 169, § 1. WSSDA is governed by a board of directors drawn from, and elected by, its statewide membership. Wash. Rev. Code Ann. §§ 28A.345.020-.030. WSSDA promotes efficient and effective school district governance by, among other things, providing Washington's elected school board directors with a broad array of trainings, leadership development, model policies and procedures, and policy and legal guidance.

WSSDA is dedicated to the improvement of public education in America and has long been involved in advocating for a reasonable balance between the obligation of public schools to promote the efficiency of the public education system and the private interests of employees affected by governmental action. WSSDA regularly represents its members' interests before legislatures and courts and has participated as amicus curiae in many cases involving all aspects of public education, including the Ninth Circuit's decision below.

Amicus submit this brief to emphasize the significant adverse impact that reversing the Ninth Circuit's

decision would have on the operation of our nation's public schools, including the schools in Washington State.

SUMMARY OF THE ARGUMENT

The framework established by this Court in *Garcetti* v. *Ceballos*, 547 U.S. 410 (2006), to balance the First Amendment interests of public employees with the needs of public employers to control their own messages, properly applies to this case. Petitioner's statements and communicative actions were spoken aloud, visible to and inclusive of students and other school community members while petitioner was on duty during a school-sponsored event held on school grounds. Petitioner therefore gained access, authority, and an audience only available to him because of his public employment; as a result, the school district—petitioner's employer—had both an interest and need to exercise control over his behavior. There can be little doubt that had petitioner, immediately after the game with players gathered around him, used his coaching position to advocate for drug use, or something else contrary to school policy, the school would have had authority under *Garcetti* to discipline him—even though such speech would be protected by the First Amendment were he speaking outside the context of his employment. The school district's interest in controlling the message of its employees within the scope of their employment remains the same regardless of the topic or motivation of that speech.

A public school district's instructional employees speak for their employer as part of their everyday duties. Unlike other public employees, moreover, they often speak to a captive student audience. While school district employers generally have no interest in regulat-

ing the religious or other constitutionally protected personal speech of their employees, that is not true when speech is communicated in conjunction with the employees' duties. Those duties, which include teaching the curricula set by school districts, are integral to the educational mission of public schools.

This Court in *Garcetti* created an effective and appropriate rule governing whether and when public employers can regulate the speech of public employees. *Garcetti* already applies to speech—including political and religious speech—that deserves the highest level of First Amendment protection. There is no basis for carving out a religious-speech exception to *Garcetti* to provide *more* protection for such speech than for all non-religious speech, no matter how important. Nor would it be useful to do so. To the contrary, preventing school districts from controlling what public employees teach and how they interact with students—whenever these employees articulate a religious basis for doing so—would create an unworkable system and expose school districts to liability for actions they are forbidden to control.

ARGUMENT

I. THE *GARCETTI* TEST APPROPRIATELY BALANCES FIRST AMENDMENT CONCERNS FOR PUBLIC EMPLOYEES ENGAGED IN PUBLIC DUTIES

In *Garcetti* v. *Ceballos*, 547 U.S. 410, 421-422 (2006), this Court created a test for all speech that appropriately balances the First Amendment concerns of public employees with the needs of their employers. This test already addresses the exact situation presented in this

case: when and how public employers, like school districts, may regulate the religious speech of public employees. Under that test, First Amendment protection applies only where public employees are speaking as private citizens, rather than as part of their official duties.

As this Court has made clear, the First Amendment's Free Speech Clause protects *all* speech, both religious and non-religious. "[P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Capitol Square Rev. & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 760 (1995) (citations omitted). Accordingly, "private religious speech [has been treated] on an equal basis with secular speech." *American Legion* v. *Am. Humanist Ass'n*, 139 S. Ct. 2067, 2093 (2019) (Kavanaugh, J., concurring) (noting religious and secular speech are treated equally in the context of public forums). Because highly protected speech, whether religious or non-religious, is treated the same, the constraints that apply to secular speech in a government-created context must also apply to religious speech.

Consequently, regardless of whether speech is political, religious, or something else, the First Amendment's free speech protections for public employees apply only when a public employee is engaged in speech as a private citizen, rather than as part of their public duties. *Garcetti*, 547 U.S. at 421-422; see also *Pickering* v. *Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968). This framework allows a public employer, like a school district, to control the messages of its employees within the context of their employment, which is critical for the employer's ability to perform its vital functions. After all, public employers "hire employees to help do

those tasks as effectively and efficiently as possible," and, therefore, when an employee "begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain [him or] her." *Waters* v. *Churchill*, 511 U.S. 661, 675 (1994) (plurality opinion). Critically, the *Garcetti* framework strikes an appropriate balance by preserving "the liberties [that] employees enjoy in their capacities as private citizens" while off-duty. *Garcetti*, 547 U.S. at 419.

In the context of our nation's public schools, the *Garcetti* test allows school districts to swiftly discipline or terminate employees who put student education at risk by failing to execute their responsibilities in the manner prescribed by public officials. Such authority is consistent with case law that has long recognized the power of school districts to control their policies and rules governing the employment and retention of teachers and school staff. See, *e.g.*, *Milliken* v. *Bradley*, 418 U.S. 717, 741 (1974) (Powell, J., concurring); *Arnett* v. *Kennedy*, 416 U.S. 134, 168 (1974). In fact, a school district's educational control is of such crucial importance that Justice Frankfurter noted that three of the four "essential freedoms" of a public educational institution were "to determine for itself on academic grounds who may teach, what may be taught, [and] how it shall be taught." *Sweezy* v. *New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring). Not only is the *Garcetti* test necessary for maintaining an appropriate degree of control by school districts over their employees, it protects school districts (and taxpayers) from undue First Amendment claims because school districts "could not function if every employment decision became a constitutional matter." *Connick* v. *Myers*, 461 U.S. 138, 143 (1983). The

authority and clarity offered by *Garcetti* and its progeny are therefore essential for school districts and other public employers nationwide.

The *Garcetti* framework, and the stability it provides, is even more important for public school districts in an era of budget shortfalls. Public school districts rely on limited governmental resources, which must be carefully allocated to pay for, among other things: safe and adequate educational facilities, quality instructional materials and programs, competitive compensation to attract qualified teachers and staff, and other operating expenses necessary for maintaining quality schools. Like all employers, public school districts incur significant legal expenses defending against employee lawsuits. For example, in 2019-2020, Seattle Public Schools, the largest public school district in Washington State, spent $4,878,654 on districtwide legal costs, including employee-related suits, despite having fewer than 11,000 public employees. Seattle Public Schools, *2021-2022 Adopted Budget* 58, 13 https://www.seattleschools.org/wp-content/uploads/2021/08/adopted22.pdf (last visited Mar. 22, 2022). Public school districts still expend substantial resources related to employee misconduct even when lawsuits fail to materialize.[2] Frequently, these funds come from a school district's general revenue treasury, the category of unrestricted mon-

[2] Washington State conducted approximately 207 investigations resulting in educators' licenses being surrendered, suspended, or revoked in the five-year period beginning in 2012. Washington Office of Superintendent of Public Instruction, *Notification of Discipline Actions*, https://www.k12.wa.us/educator-support/investigations/notification-discipline-actions (last visited Mar. 17, 2022).

ies usually directly tied to instructional resources, including textbooks, educational programming, and teacher salaries. See, *e.g.*, *id.* at 6, (noting that in 2021-2022 legal costs, in addition to other aspects of "Central Administration," amount to 6.1% of the Seattle Public School's General Fund, or roughly $68.5 million, while teaching activities and support amount to approximately 71% of the General Fund, or roughly $798 million).

School districts are also increasingly subject to higher expectations from both taxpayers and the federal government, further underscoring the need for public school districts to maintain control of their messages and their employees. See, *e.g.*, Frank T. Brogan, Assistant Sec'y for Elementary and Secondary Educ., U.S. Dep't of Educ., *Dear Colleague Letter: State Plan Amendments, School Identification, Reporting, and Technical Assistance* (Oct. 24, 2019), https://www2.ed.gov/admins/lead/account/stateplan17/schoolidandamendments102419.pdf. Every state has passed some form of performance-based accountability—setting the standards for content to be taught in the classroom, state-wide testing, targets for student outcomes, and critically, sanctions or remedial supports that are put in place if those outcomes do not meet expectations. See, *e.g.*, Wash. Rev. Code Ann. § 28A.305.130 (the Washington State Board of Education's purpose includes the "implement[ation of] a standards-based accountability framework"); The Washington State Board of Educ., *Update on School Recognition and Accountability* 20-30 (2019), https://www.sbe.wa.gov/sites/default/files/public/meetings/Nov-2019/1100s_SCHOOL%20RECOGNITION%20AND%20ACCOUNTABILITY_0.pdf (discussing accountability measures). Performance-based accountability at the state level is also a linchpin of the Every

Student Succeeds Act, 20 U.S.C. 6301 *et seq.* (2015). Because academic achievement is inextricably tied to classroom instruction, this accountability presumes that school districts can effectively manage employees and the messages conveyed to students.

Of course, teachers and coaches have the right to exercise their religious beliefs when they are acting privately and not in their roles as public employees in leading students. *Cf. Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Indeed, *Garcetti*, as well as the Ninth Circuit's decision below, permits public employees to engage in a robust range of religious expression while on campus. Among other things, employees may: discuss their religious views with colleagues near the water cooler in the teachers' lounge, verbally acknowledge their religious identities (*e.g.*, Catholic, Muslim, Jewish, atheist, etc.) to students if asked, pray privately before a meal or during a designated break from supervisory duties, or wear religious symbols that do not interfere with their duties.

Nonetheless, once an employee's speech becomes government speech that bears the government's imprimatur and influences students, such as when a teacher speaks in the classroom or a coach interacts with players on the football field, school districts must be able to regulate the employees' conduct in order to fulfill their educational mission. The Free Exercise rights of individual public employees should not be permitted to undermine a public institution's ability to carry out its mandate.

The *Garcetti* test therefore strikes an appropriate balance: teachers and coaches are entitled to exercise their personal religious beliefs when they are acting pri-

vately, but not when they are acting in their roles as public employees in leading and teaching students. Permitting teachers or coaches to lead prayers within the conduct of their public duties would frustrate the school district-employer's ability to communicate its own message, risk coercing students to participate, and potentially expose school districts to liability for religious discrimination.

II. WITHIN THE CONTEXT OF FIRST AMENDMENT SPEECH PROTECTION, THERE SHOULD NOT BE SPECIAL TREATMENT FOR RELIGIOUS SPEECH AS OPPOSED TO ALL OTHER SPEECH

This Court's jurisprudence has consistently treated all forms of highly protected speech, including religious and political speech, equally, providing each with the highest form of First Amendment protection. As this Court has explained, "[c]ore political speech occupies the highest, most protected position" under the First Amendment. See, *e.g.*, *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring). In turn, "private religious speech * * * is as fully protected under the Free Speech Clause as secular private expression." *Capitol Square Rev. & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 760 (1995) (citations omitted).

Creating a religious-speech exception to *Garcetti* would upset this longstanding balance by prioritizing religious speech over *all* other forms of speech, including the most highly protected political speech. Such a carveout would create an unworkable system that would unduly burden school districts across the United States. Among other things, this would prevent school districts from exercising control over what teachers teach and how public employees interact with students while on

campus or in the classroom. Such an exception would also put school districts at heightened risk of legal liability by constitutionalizing employment disputes and hampering the ability of school districts to police discriminatory conduct by public employees—so long as those employees claim to be engaged in religious exercise.

A. This Court has Wisely Provided Equal First Amendment Protection to All Forms of Highly Protected Speech, Including Both Political and Religious Speech

All forms of highly protected speech are entitled to equal protection under the First Amendment, particularly in the context of government employers (such as school districts) and employees. See pp. 4-9, *supra*.

This Court has long declined to prioritize certain First Amendment rights over others. For example, this Court has treated the Free Speech Clause and the Petition Clause "with equal force," even though these rights may differ "in their mandate or their purpose and effect." *Borough of Duryea, Pa.* v. *Guarnieri*, 564 U.S. 379, 388-389 (2011). Such equal treatment is based in part on the fact that the United States' different First Amendment rights were "inspired by the same ideals of liberty and democracy," which have made these rights "inseparable" from one another. See *McDonald* v. *Smith*, 472 U.S. 479, 485 (1985). These rights include "[t]he Free Exercise Clause[, which] embraces a freedom of conscience and worship * * * parallel[ed by] the speech provisions of the First Amendment." See *Lee* v. *Weisman*, 505 U.S. 577, 591 (1992). Accordingly, as this Court has recognized time and time again, "there is no sound basis for granting greater constitutional protection" to certain First Amendment clauses than "other

First Amendment expressions." See *McDonald*, 472 U.S. at 485. A different approach would establish, "among first amendment expression rights, a hierarchy of labels," something which "[t]he Supreme Court [has] emphatically eschewed establishing." *Griffin* v. *Thomas*, 929 F.2d 1210, 1213 (7th Cir. 1991).[3]

Protecting religious speech *more* than other speech, such as political speech, would contradict the longstanding understanding of this Court that political speech is at the core of the First Amendment, and thus entitled to the highest level of protection. As this Court observed in *William* v. *Rhodes*, 393 U.S. 23, 32 (1968), political debate "is at the core of our electoral process and of the First Amendment freedoms." And just this term, this Court reiterated that, "'[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement' that it was adopted in part to 'protect the free discussion of governmental affairs.'" *Houston Cmty. Coll. Sys.* v. *Wilson*, No. 20-804, 2022 U.S. LEXIS 1671, at *16 (2022) (quoting *Mills* v. *Alabama*, 384 U. S. 214, 218 (1966)). A religious-speech exception to *Garcetti* would instead mean that political speech is *not* entitled to the highest level of First Amendment protection. But there is no basis for

[3] Contrary to petitioner's claims, a majority of this Court has never held that religious speech should receive more protection than all non-religious speech—even speech, such as political speech, calling for the highest level of First Amendment protection. Compare *Capitol Square Rev. & Advisory Bd.* v. *Pinette,* 515 U.S. 753, 760 (1995) (majority opinion emphasizing that private religious speech is "as fully protected under the Free Speech Clause as secular private expression"), with *id.* at 767 (plurality opinion remarking that private religious expression may "receive preferential treatment under the Free Exercise Clause").

such a holding in the Constitution, this Court's case law, or even the understanding of the framers. *Cf. Federalist No. 51* (James Madison) ("In a free government the security for civil rights must be the same as that for religious rights.").[4]

Elevating certain First Amendment rights over others is not only unmoored from our Constitution's text and history, it would be impractical. After all, "[a] different rule for each First Amendment claim would * * * add to the complexity and expense of compliance with the Constitution" and "burden the exercise of legitimate authority." *Guarnieri*, 564 U.S. at 393, 391. Relevant here, requiring public employers to delineate between different First Amendment claims, tests, and types of speech would overburden public school districts, which are already struggling to manage daily operations and fulfill a multitude of public missions. School administrators are not "lawyers" and "the law should not demand that they fully understand the intricacies of our First Amendment jurisprudence." *Morse* v. *Frederick*, 551 U.S. 393, 427 (2007) (Breyer, J., dissenting in part). After all, even federal courts, including this one, have struggled to discern which First Amendment right specifically applies in some contexts. See, *e.g.*, *Widmar* v. *Vincent*, 454 U.S. 263, 269 n.6 (1981) (finding no clear line between religious speech under the Free Exercise and Free Speech clauses, and cautioning that doing so would "inevitably [] entangle the State with religion in a manner forbidden by our cases").

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[4] As discussed further below, such a distinction would not be administrable given that a speaker's position on almost any political topic can be informed or motivated by religious belief. See p. 17, *infra*.

Complicating matters, injecting additional judicial scrutiny into employment matters could "raise serious federalism and separation-of-powers concerns" if courts were routinely asked to intervene in the employment decisions of public entities such as school districts. *Guarnieri*, 564 U.S. at 391; see also Paul Forster, *Teaching in a Democracy: Why the* Garcetti *Rule Should Apply to Teaching in Public Schools*, 46 Gonz. L. Rev. 687, 700-701 (2011) ("The federal courts should not be made a 'super-personnel department' for teachers."). Public employers must "manage [their] internal affairs," "including working conditions, pay, discipline, promotions, leave, vacations, and terminations * * * [b]udget priorities, personnel decisions, and substantive policies," but cannot do so effectively if faced with "invasive judicial superintendence." *Guarnieri*, 564 U.S. at 390-391. A religious-speech exception to *Garcetti* would do just that by interfering with the efficient administration of public entities, unduly complicating (and constitutionalizing) employment disputes, and requiring school administrators (for example) to become adjudicators of multiple arenas of constitutional law.

The rule in *Garcetti*, which is appropriate to protect the First Amendment rights of public employees engaged in political speech at the core of the First Amendment, is similarly appropriate to protect the First Amendment rights of those same employees engaged in religious speech. Regardless of whether an employee's speech is religious or non-religious, school district employers should have the power to regulate that speech

while the employee is on duty, and when the speech is public, on campus, and involves students.[5]

B. Creating a Carve-Out to *Garcetti* Whenever a Public School Employee Claims to Be Engaged in Religious Exercise Would Be Unworkable

Carving out speech that an employee claims as religious exercise from *Garcetti* would be unworkable, for at least three reasons. First, school districts need to be able to exercise appropriate control over curricula, teachers, and coaches, so as not to muddy the district's own message. Second, school districts need to regulate employee speech to ensure that students are not exposed to religious coercion. And third, creating a *Garcetti* carve-out for religious speech would require school districts to permit all religious speech engaged in by public employees, regardless of the speaker or how inconsistent the speech is with the district's curriculum.

1. *School Districts Need to Be Able to Control Their Curricula and Message*

As this Court has recognized, the state "has a vital concern" in what teachers teach, as they are "shap[ing] the attitude of young minds towards the society in which they live." See *Shelton* v. *Tucker*, 364 U.S. 479, 485 (1960). States and school districts therefore unquestion-

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[5] Though the school district is correct that religious speech may violate the Establishment Clause (which political speech would not), this brief does not argue that a school district must regulate religious speech *more* heavily than other types of protected speech, only that schools must be able to regulate religious speech to the same degree as political speech.

ably have the right and responsibility to create curriculum guidelines governing "what may be taught" and "how it shall be taught." *Sweezy* v. *New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (concerning universities). But without the power to regulate the on-duty speech and expression of employees, school districts would lack the ability to dictate what is taught—and would thus be unable to carry out this vital function. Put simply, teachers and coaches, when engaged in public duties, must stick to and abide by the curriculum set by the school district, even though they retain their rights to speak freely in other contexts. See, *e.g.*, *Mayer* v. *Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 478-480 (7th Cir. 2007) (noting that the First Amendment does not entitle teachers to cover topics or advocate for views that depart from the curriculum).

Teachers, coaches, and other staff are the embodiments of the school district and thus convey the district's message in their work with students. When employees speak with students, they speak with the voice of the school district and they stand as the district's representatives in the everyday work of schools, as academic and life lessons are imparted in classrooms and on athletic fields. In other words, teachers and other school employees "necessarily act as teachers * * * when at school or a school function, in the general presence of students, [and] in a capacity one might reasonably view as official." *Johnson* v. *Poway Unified Sch. Dist.*, 658 F.3d 954, 968 (9th Cir. 2011) (citation omitted). Even apart from the need to control the curriculum itself, school districts need the authority to regulate employee speech that "bear[s] the imprimatur" of the school. See *Hazelwood Sch. Dist.* v. *Kuhlmeier*, 484 U.S. 260, 271 (1988); *Roberts* v. *Madigan*, 921 F.2d 1047, 1059 (10th Cir. 1990) (holding

that a school's ban of the fifth-grade teacher's display of religious décor and classroom reading of the Bible was proper because it might reasonably be perceived to bear the imprimatur of the school); *Ward* v. *Hickey*, 996 F.2d 448, 453 (1st Cir. 1993) ("Courts have long recognized the need for public school officials to assure that * * * the views of the individual speaker are not erroneously attributed to the school.").

A religious exercise carve-out to *Garcetti* would raise the prospect of teachers, coaches, and other school staff claiming a right to teach in accordance with their religious beliefs—regardless of what their school district actually requires. Under petitioner's view, a school would have to allow a football coach to engage in a religious prayer in the middle of the football field following a game even if students were participating. Nonetheless, if that same coach stopped praying and instead gave a political speech or held a political sign with students participating, the school could regulate that behavior to avoid "associat[ing] the school with any position other than neutrality on matters of political controversy." *Hazelwood Sch. Dist.*, 484 U.S. at 272. Yet if that same coach went to the middle of the field after the game and involved students in a *prayer* for a particular politician to win an election or for a particular political outcome, it would be entirely unclear which rule would apply. This lack of clarity is magnified by the fact that a person's faith likely informs that person's views on many important issues, including their political positions. Not only would this result in substantial disparities and confusion regarding the regulation of employee speech, school districts would lose control of their curricula and their educational messages. See *Lee* v. *York Cty. Sch.*

Div., 484 F.3d 687, 700 (4th Cir. 2007); see also *Sweezy*, 354 U.S. at 255, 263-264.

Though there are innumerable examples, contemplating a few more may be illustrative. For example, consider a science teacher who insists on questioning the scientific basis for the theory of evolution, though that is part of the curriculum.

Or imagine a comparative religion teacher who informs his students that only one faith is correct and that believers in all other faiths will go to hell. A student writing a research paper for that class will reasonably fear that failing to incorporate those views would risk their standing in the class.

In situations like these, promptly correcting or sanctioning employees who are unwilling to meet the heightened expectations of today's schools is imperative. But these functions would be severely impeded if public employees could assert that any employment or managerial decision they disagreed with was in retaliation for their on-duty religious expression involving students.

A *Garcetti* carve-out would do just that. If religious exercise was exempted from *Garcetti*, school districts would be unable to control what teachers and coaches are doing in these examples because the districts would be unable to draw the line between which employee speech may be regulated and which may not. Even if school districts could draw the line, districts may fear the operational disruptions and litigation costs arising from new and uncharted First Amendment claims. Should a school district seek to discipline any of these teachers for failing to follow the district's chosen curriculum, the teachers could assert costly claims against the

school. Even if such claims are unsuccessful, that prospect would necessarily impact the school district's behavior and the educational experience of students.

2. *School Districts Need to Be Able to Prevent Public School Students from Being Exposed to Religious Coercion*

Just as importantly, school districts must be free to control the speech of employees engaged in public duties to ensure that students are not exposed to religious coercion. What might be seen as personal religious expression for some may veer into proselytization for others, who feel compelled to go along with what their teachers and coaches say. Such situations would endanger the trust that families put in schools to educate their children "on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family." *Edwards* v. *Aguillard*, 482 U.S. 578, 584 (1987). At the very least, schools would no longer "retain the authority to refuse to * * * associate the school with any position other than neutrality" in sensitive or controversial matters such as religion. See *Hazelwood Sch. Dist.*, 484 U.S. at 272.

Of course, not all religious speech by public school employees engaged in their official duties is necessarily coercive—but it has the capacity to be. Because of compulsory attendance laws, impressionable students are a captive audience left vulnerable to the "great authority and coercive power" that teachers and coaches wield as the mouthpiece of the State. *Edwards*, 482 U.S. at 584. And importantly, they only have this authority "because they are acting as teachers and coaches, not because they are acting as private citizens." John Dayton et al.,

Protected Prayer or Unlawful Religious Coercion? Guarding Everyone's Religious Freedom in Public Schools by Understanding and Respecting the Difference, 358 Ed. Law Rep. 673, 688 (2018). The potential for coercion, as this Court has recognized, applies beyond the classroom due to the "immense social pressure, or truly genuine desire, felt by many students to be involved in extracurricular event[s] [such as] American high school football." *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 292 (2000) (citation omitted)).

The potential for coercion, and the school's need to properly regulate it, is particularly important for a school district's ability to safeguard the education of religious minorities in a pluralistic society. This Court has consistently noted that when "the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engel* v. *Vitale*, 370 U.S. 421, 431 (1962). While religious endorsement or coercion by public school employees may not be apparent to all, it is "obvious to members o[f] minority faiths who are made to feel like religious outsiders in their own schools and communities." Dayton, 358 Ed. Law Rep. at 692. These students "must choose between turning their backs on their own family faith or on their teacher/coach," "risking their relationship with the teacher/coach, their social standing, and even their safety." *Id.* at 692-693. To protect these students, schools must be able to prevent "students [from facing] the difficult choice between attending these [activities] and avoiding personally offensive religious rituals." *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 312 (citation omitted).

For these reasons, among others, this Court and the courts of appeals have wisely rejected on-campus religious expressions by public school employees towards students in order to avoid the inevitable disruptions and divisions that would result from these practices. See, *e.g.*, *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 316-317; *Lee*, 505 U.S. at 598-599; *Johnson* v. *Poway Unified Sch. Dist.*, 658 F.3d 954, 968 (9th Cir. 2011); *Borden* v. *Sch. Dist. of Twp. of E. Brunswick*, 523 F.3d 153, 174-179 (3d Cir. 2008); *Peloza* v. *Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522-523 (9th Cir. 1994); *Roberts*, 921 F.2d at 1059.

3. *A Religious Speech Carve-Out to* Garcetti *Would Require Allowing All Religious Speech, No Matter How Inconsistent with the District's Curriculum*

If this Court creates a religious-speech carve-out to *Garcetti* for public employees, public school districts will have to permit almost all religious speech—regardless of how antithetical it is to the school's curriculum or policies. After all, the government cannot "prefer one religion over another." See, *e.g.*, *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 15 (1947). Schools would undoubtedly face additional litigation costs and difficulties if they permit some religious expressions and not others.

But some religious speech is, at the very least, seriously in tension with, if not directly contrary to, the school's educational mission. For example, certain groups claiming to be religious state that some races are superior to others. See, *e.g.*, Daryl Johnson, *Hate In God's Name*, Southern Poverty Law Ctr. (Sept. 25, 2017), https://www.splcenter.org/20170925/hate-god%E2%80%99s-name. As Justice Thomas has observed, the

Ku Klux Klan itself cloaks its racial bigotry in a religious message, claiming "to establish a Christian government in America." *Capitol Square Rev.*, 515 U.S. at 771 (Thomas, J. concurring). Indeed, throughout history, many religions have advocated for the persecution of or violence towards those who refuse to subscribe. Many religions may advocate other positions—such as the use of psychedelic drugs, or even the worship of evil—that are directly antithetical to a school district's mission, policies, and curriculum. See, *e.g.*, *Gonzales* v. *O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418 (2006) (concerning ritual use of a Schedule I controlled substance by a religious organizations); *Cutter* v. *Wilkinson*, 544 U.S. 709 (2005) (holding that facilities that accept federal funds cannot deny prisoners accommodations necessary to engage in "nonmainstream" religions, including Satanism).

With respect to at least one such example, this Court has concluded that schools may penalize a student's speech "promoting illegal drug use," notwithstanding a potential religious association. See *Morse*, 551 U.S. at 403 (upholding punishment for student who displayed banner reading "BONG HiTS 4 JESUS"). While a school could undoubtedly order teachers or coaches engaged in their duties to refrain from promoting illegal drug use, if there was a *Garcetti* carve-out for religious speech, the school could no longer do so if those teachers or coaches were promoting illegal drug use as a matter of religious expression. The same would presumably hold true for religious speech expressing other ideas antithetical to the district's policies and curriculum. A religious-speech exception to *Garcetti* would

therefore prevent school districts from regulating harmful speech and further jeopardize a school district's ability to regulate its own message.

As a further complication, additional religious expression on campus runs the risk of community members of all religions claiming school grounds as a public forum where they can make similar demonstrations of their faith.[6] That is just what happened in this case, when Satanists sought to engage in religious demonstrations after the football games at question. J.A. 99-100, 181. The administrative burden of fielding such requests, along with ensuring the safety and constitutionality of such demonstrations, is an unwarranted interference with the school district's mission.

C. Weakening or Creating a Religious Exception to *Garcetti* Would Both Put School Districts at Risk of Liability under Discrimination Laws and Harm Students

Given that public institutions are liable for the actions of their employees, the *Garcetti* standard recognizes that school districts must be able to control the distasteful speech of their employees. *Garcetti* thus provides valuable guidance and a clear framework for school

[6] If the government opens the school for private expression, it risks becoming a "limited" public forum, at which the school would have a more difficult time justifying any regulation of speech. See *Perry Educ. Assoc.* v. *Perry Local Educators' Assoc.*, 460 U.S. 37, 46-47 (1983). If, as petitioner asserts, the speech of public school employees is private expression, the government risks converting the football field to a public forum at which other private individuals may consequentially be entitled to speak. See *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828-831. (1995); *Widmar* v. *Vincent*, 454 U.S. 263, 267-268 (1981).

districts that must police the discriminatory remarks of those employees or face legal liability.

As employers, school districts may be subject to liability when their employees engage in discriminatory behavior within the scope of their employment, including for religious discrimination. See, *e.g.*, *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 807 (1998) ("employer is subject to vicarious liability" under Title VII); *EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 771 (2015) (employers may be sued for religious discrimination); *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998) (school can be liable for sexual harassment by teacher with actual notice). This liability is consistent with this Court's recent observation that, "[w]hen an employee engages in speech that is part of the employee's job duties, the employee's words are really the words of the employer." *Janus* v. *Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2474 (2018). For example, if a coach, still present on the field with at least some players following a game, were to use racially derogatory or sexually explicit language towards a student, the school district—and not just the employee—could be subject to liability.

As *Garcetti* recognizes, school districts would be well within their rights to discipline employees for such speech, even if that same speech, spoken off campus, might be protected. In fact, the school would likely be subject to liability for *not* responding to the coach's speech, given that the coach was within the scope of his or her employment. The same liability concerns would be present when a coach engages in discriminatory behavior or speech during a prayer. What if the coach engaged in a prayer saying his or her God is the one true

god and the believers of other faiths are doomed to eternal damnation? What if the prayer proclaimed that Jews killed Jesus? What if a coach said one race was superior to another, but claimed it was part of his religious expression? See pp. 21-22, *supra*.

A weakened *Garcetti* framework, such as a *Garcetti* carve-out for religious expression, would treat discriminatory conduct differently based on whether an employee claims it was rooted in religious exercise.[7] This would put school districts in the untenable position of choosing between their legal responsibility to protect students and employees from the discriminatory speech of public employees and unlawfully punishing discriminatory speech by those same public employees when the speech is part of a claimed exercise of religion. Apart from the unfairness and unworkability of such a situation, school districts would waste their limited resources on strenuous line-drawing exercises and lengthy legal battles.

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[7] It would be no answer to permit school districts to discipline religious expression that is discriminatory, because some core religious tenets necessarily discriminate between those who (in the eyes of that religion) adhere to the true faith and those who do not. Regardless, such a rule would require schools and courts to evaluate the contents of an employee's religious speech, thus presenting additional and inappropriate grounds upon which to litigate. See generally *United States* v. *Ballard*, 322 U.S. 78, 87-88 (1944) (concluding that the government lacks power to judge the truth of religious beliefs); see also *Cloutier* v. *Costco Wholesale Corp.*, 390 F.3d 126, 132 (1st Cir. 2004) ("Determining whether a belief is religious is more often than not a difficult and delicate task, one to which the courts are ill-suited." (internal quotation marks and citation omitted)).

Diminishing the ability of school districts to police religious discrimination would also further expose students to religious harassment—already a problem in our nation's public schools. In a 2016 Department of Justice report, the Department found that "teachers may play [a role] in contributing to or otherwise perpetuating student harassment." U.S. Dep't of Just., *Combating Religious Discrimination Today* 13 (July 2016), https://www.justice.gov/crt/file/884181/download. Among other things, the report recognized that "promot[ing] one or more religions as being superior could foster an environment in which harassment of students based on their religion or perceived religion was deemed acceptable." *Ibid.* This is all the more problematic given that religious minorities are already subjected to substantial harassment in public schools. For example, the Department intervened in a lawsuit in 2003 brought by a father against a school district for allegedly suspending a sixth-grader for wearing a hijab in school. Consent Order, *Hearn* v. *Muskogee Pub. Sch. Dist. 020*, No. 03-cv-598 (E.D. Okla., May 2004), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/hearnokor2.pdf. This resulted in a six-year consent order and confidential damages settlement. *Ibid.* In 2012, the Department investigated a complaint alleging that a middle school student in Atlanta, Georgia had been repeatedly targeted with verbal and physical harassment because of his Sikh faith. U.S. Dep't of Just., *Resolution Agreement Between U.S. and DeKalb County School District* (May 2013), https://www.justice.gov/sites/default/files/crt/legacy/2013/05/09/dekalbagree.pdf. As a result, the Department entered into a resolution agreement with the school district. *Ibid.*

A *Garcetti* carve-out for religious expression would exacerbate instances of religious harassment like those detailed above and make it harder for school districts to prevent such harassment in the first place. Not only would this hamper the ability of school districts to maintain a welcoming educational atmosphere, it would upset the trust that students, parents, and taxpayers place in our public school systems.

* * * * *

The *Garcetti* standard provides school districts and public employees with a clear set of standards for managing employee speech on campus, whether such speech is religious or secular. A religious exception to *Garcetti* would prioritize religious speech above all other speech, prevent public schools from fulfilling their educational missions, and potentially subject students to additional religious coercion, discrimination, and harassment. Such an exception would also inject schools into new legal battlegrounds and thrust courts into endless employment disputes that school districts are better equipped to handle. See *Christian Legal Soc. Chapter of the Univ. of Calif., Hastings Coll. of the L.* v. *Martinez*, 561 U.S. 661, 686 (2010) (stating "judges lack the on-the-ground expertise and experience of school administrators"). This Court should therefore preserve its ruling in *Garcetti*, which already appropriately balances when public employers may regulate employee speech.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

DOUGLAS HALLWARD-DRIEMEIER
SAMUEL L. BRENNER
ANI-RAE LOVELL
ANDREW J. HOSEA
NICOLE G. BRAMBILA
CAROLINE MCHUGH
EVA HELLWIG
SAVANNA ARRAL
ROPES & GRAY LLP

Special Assistant Attorneys General and Counsel for The Washington State School Directors' Association

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