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 CITY, COUNTY, AND LOCAL PUBLIC EMPLOYER ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

The First Amendment's free-speech guarantee does not protect employee speech made pursuant to official duties. And even when speech falls outside of those duties, governments have independent constitutional obligations to avoid endorsement of religion or coercion of others that would violate the Establishment Clause. *Amici* will address those principles as applied to the specific factual context of this case:

1. Whether petitioner, a high-school football coach, spoke pursuant to his official duties by audibly praying at midfield after games, where he had engaged in a consistent years-long practice of delivering inspirational religious speeches to players at the same time and location.

2. Whether, assuming that the coach's expression was private, the school district acted permissibly to avoid an Establishment Clause violation, where the coach's expression would implicate both endorsement and coercion concerns if the district allowed the coach's expression to continue.

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INTEREST OF *AMICI CURIAE*

Amici are organizations that represent the interests of city, county, and local public employers.[1] As public employers, the entities represented by *amici* have a substantial interest in the outcome of this case, which implicates the ability of public employers to ensure the efficient and effective functioning of their workplaces while respecting free-speech and free-exercise rights of public employees.

Amici organizations are:

The National League of Cities ("NLC") is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans.

The U.S. Conference of Mayors ("USCM") is the official nonpartisan organization of the more than 1,400 United States cities with a population of more than 30,000 people. Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association ("ICMA") is a nonprofit professional and educational organization of more than 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's

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[1] Letters from both parties providing blanket consent for the filing of amicus briefs in this case are on file with the Clerk's office. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association ("IMLA") has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

The National Public Employer Labor Relations Association ("NPELRA") is a national organization for public sector labor relations and human resources professionals. NPELRA is a network of state and regional affiliations, with more than 2,300 members, that represents agencies employing more than four million federal, state, and local government workers in a wide range of areas. NPELRA strives to provide its members with high quality, progressive labor relations advice that balances the needs of management and the public interest, and to promote the interests of public sector management in the judicial and legislative areas.

The International Public Management Association for Human Resources ("IPMA-HR") represents human resource professionals and human resource departments at the federal, state, and local levels of government. IPMA-HR was founded in 1906 and currently has more than 6,000 members. IPMA-HR promotes public sector human resource management excellence through research, publications, professional development and conferences, certification, assessment, and advocacy.

INTRODUCTION AND SUMMARY OF ARGUMENT

City, county, and local governments deeply respect public employees' interest in personal expression, including religious expression. At the same time, these governments have duties to their constituents to carry out their institutional missions and to maintain neutrality on matters of religion. The public expects governments to carry out their responsibilities by implementing the policy choices of democratically elected officials—not the personal choices of individual employees who have varied agendas and policy preferences. As a result, governments need a degree of flexibility in determining how to manage employees in order to run efficient and effective workplaces. The respondent school district's actions accorded with the Constitution on both the free-speech and free-exercise issues in this case, and the court of appeals' judgment should be affirmed.

I. Balancing governments' managerial interests and employees' expressive interests entails sensitive judgments. This Court has articulated the principles that governments must use to strike that balance. When employees act as employees, their personal beliefs and expression cannot take precedence over their official duties. And the metes and bounds of an employee's official duties cannot be reduced to a script of specific tasks: employees perform many tasks during the workday that form part of their unwritten duties. Nowhere is that more true than with teachers and coaches, who are role models, mentors, and leaders, and whose conduct has great capacity to influence impressionable students.

This case illustrates the complex judgments that public employers must make to honor personal beliefs while carrying out public duties. *Amici* do not question petitioner's sincere religious beliefs or his desire to express them. But petitioner's conduct in this case crossed the line from private to official and inextricably intertwined his personal beliefs with his public role as coach. For years, petitioner delivered motivational prayer-speeches to players on the field, immediately after games, while players were still in his charge. Although he later stated that he wished only to say a prayer at midfield following games, his players would not have divorced his conduct from his prior student-facing practice of delivering religious speeches at the same time and location. Rather, the players would have viewed petitioner's prayers as a continuation of his coaching and mentoring duties, even if he subjectively intended them not to be.

A public employer cannot ignore the full context, including past conduct, in assessing whether an employee's behavior in the workplace while on duty is official conduct. No categorical rules can answer this question. An employee's conduct, viewed in isolation, may seem personal. But where it bears a sufficiently integral relationship to official duties, it is properly viewed as being pursuant to those official duties. That is the case here. Petitioner's prayers of course reflect personal belief. And the school district, like *amici*'s members, sought to accommodate those beliefs. But his choice to pray in the course of his duties as coach implicated his public-employee responsibilities. And governments have the authority and responsibility to prevent employees from using their official position to pursue personal tasks

that interfere with their duties. Because petitioner used his official position to pursue a private agenda in the course of his duties as a coach, the school district's suspension of petitioner did not infringe his free-speech or free-exercise rights.

II. Even assuming that petitioner prayed outside of his official duties and that the school district's actions are subject to strict scrutiny, its actions would still be justified because they were narrowly tailored to achieving the district's compelling interest in avoiding an Establishment Clause violation. Governments have a responsibility to refrain from giving official approval to their employees' religious expression, in order to avoid the appearance of favoring some religions over others (or religion over nonreligion) and to avoid placing coercive pressure on others to participate. Those concerns are especially acute for supervisors' and leaders' religious practices while on duty and in the workplace. The applicable Establishment Clause test turns on a reasonable observer's objective understanding—not on government employees' subjective intent.

In many circumstances—*e.g.*, a teacher briefly bowing his head in prayer before meals—a reasonable observer would understand that the conduct is personal and not attributable to the public employer. But the conduct here is different. In the specific factual context of this case, if the school district had allowed petitioner's public, postgame, midfield prayers to continue, it would have triggered the endorsement and coercion concerns that underpin the Establishment Clause. That is why the school district made every effort to resolve the issue through accommodation. Having exhausted efforts to resolve endorse-

ment and coercion concerns through reasonable accommodations of petitioner's beliefs, the school district's suspension of petitioner was a permissible measure to prevent a constitutional violation.

ARGUMENT

I. PETITIONER'S RELIGIOUS EXPRESSION LACKS FIRST AMENDMENT PROTECTION BECAUSE IT OCCURRED IN THE COURSE OF HIS OFFICIAL DUTIES AS COACH

This Court's cases hold that when a public employee speaks pursuant to his official duties, that speech lacks First Amendment protection. The official-duties test is met if the employee speaks while on duty in a context aligning with the employee's written or unwritten responsibilities and objective factors do not make it evident that the employee is speaking in his private capacity. That is true even when the employer disagrees with or disapproves of the employee's speech, and even when the employee subjectively intends his speech to further private aims.

Here, while petitioner's midfield, postgame prayers reflected his personal convictions, they occurred pursuant to his official duties. He prayed on duty while players were still in his charge, and contextual factors show that players would have reasonably viewed petitioner's prayers as a continuation of his earlier practice of delivering motivational religious speeches at the same time and location. And employees who take action integrally related to their duties, even if motivated by personal reasons, remain subject to managerial supervision. The First Amendment does not require public employers to

treat speech as private when objectively it is part and parcel of employees' official duties.

A. Expression In the Course Of A Public Employee's Official Duties Is Unprotected

1. In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), this Court held that when government employees speak "pursuant to their official duties," they are "not speaking as citizens for First Amendment purposes." *Id.* at 421. "When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her." *Waters v. Churchill*, 511 U.S. 661, 675 (1994) (plurality opinion). These "[r]estraints are justified by the consensual nature of the employment relationship and by the unique nature of the government's interest." *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 386-87 (2011).

a. *Garcetti* and *Lane v. Franks*, 573 U.S. 228 (2014), set forth a general standard for determining when a public employee speaks "pursuant to his official duties" and thus outside the First Amendment's ambit. "The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." *Lane*, 573 U.S. at 240.

While *Garcetti* and *Lane* do not establish a "comprehensive framework for defining the scope of an employee's duties," 547 U.S. at 424, the broad outlines of the inquiry are clear. A court must, first, discern the relevant employee's duties, and second,

determine whether the speech at issue is ordinarily within the scope of those duties. On the one hand, "[f]ormal job descriptions" are often narrower than "the duties an employee actually is expected to perform." *Id.* But on the other hand, a public employer may not define official duties so broadly that they embrace all expression or conduct during the workday. *Id.* Ultimately, the *Garcetti* inquiry is a "practical one" requiring a context-specific examination of the particular employee's role and responsibilities, with written duties being neither "necessary nor sufficient" to resolve the issue. *Id.* at 424-25.

b. The facts of *Garcetti* and *Lane* allowed for a straightforward application of this framework. In *Garcetti*, the speech at issue—writing a "memo that addressed the proper disposition of a pending criminal case"—fell within the plaintiff prosecutor's express duties. *Id.* at 422. And in *Lane*, the speech at issue—testimony at a trial—fell "outside the scope of [the] ordinary job duties" of the plaintiff youth-programming director. 573 U.S. at 238.

Lower courts applying *Garcetti*, however, have encountered more nuanced fact patterns, where the relevant employee speech occurs on the job in a context generally aligned with—though "not necessarily required by"—the employee's job duties. *Nixon v. City of Houston*, 511 F.3d 494, 498 (5th Cir. 2007) (internal quotation marks omitted). In these cases, the employee's speech is often "unauthorized by [his employer]," "in contravention of the wishes of his superiors," and designed to pursue personal expressive aims. *Id.* at 499. And courts have held that this type of speech is "pursuant to [an employee's] official duties." *Id.* at 498.

In *Nixon*, for instance, a police department disciplined a police officer for critical statements he made about the department "during media interviews" at the "scene of [an] accident." *Id.* at 496. The officer had not been asked to be present at the scene of the accident, "was not designated as [a department] spokesperson[,] and was not authorized to make statements to the media at the scene." *Id.* at 496-97. Nonetheless, the court held that the officer made his statements "pursuant to his official duties" because he did so "while on duty, in uniform, and while working at the scene of the accident." *Id.* at 498. Even when the officer later made further statements to "radio talk shows and television news programs" when "*off-duty*," the court reasoned that "these statements are seemingly controlled by *Garcetti*" because they "constitute[d] a continuation of [the officer's] accident-scene statements the previous day." *Id.* at 499 (emphasis added).

Similarly, in *Green v. Board of County Commissioners*, 472 F.3d 794 (10th Cir. 2007), a drug-lab technician disagreed with her employer's rules for confirming test results, obtained a confirmation test for a client outside of official channels, and then told her employer that the test had revealed a false positive. *Id.* at 799. The court held that the employee acted "as a public employee" because "even if not explicitly required as part of her day-to-day job responsibilities, her activities stemmed from and were the type of activities that she was paid to do." *Id.* at 799, 800-01. According to the court, the employee's "disagreement with her supervisors' evaluation of the need for a formal testing policy, and her unauthorized obtaining of the confirmation test to prove her

point, inescapably invoke *Garcetti*'s admonishment that government employees' First Amendment rights do 'not invest them with a right to perform their jobs however they see fit.'" *Id.* (quoting 547 U.S. at 422).

Numerous other courts of appeals have reached the same conclusion. In a variety of contexts, they have held that "speech can be 'pursuant to' a public employee's official job duties even though it is not required by, or included in, the employee's job description, or in response to a request by the employer," as long as the speech is "in furtherance of" job duties or "undertaken in the course of performing one's job."[2]

These applications of *Garcetti* accord with *amici*'s experience in carrying out public-employer duties. And they establish the following basic principle: an employee speaks pursuant to his official duties if he speaks while on duty in a context aligning with his written or unwritten responsibilities, and objective

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[2] *Weintraub v. Bd. of Educ.*, 593 F.3d 196, 202-03 (2d Cir. 2010) (citing cases) (internal quotation marks omitted); *see, e.g.*, *Foley v. Town of Randolph*, 598 F.3d 1, 7 (1st Cir. 2010) (fire-department chief spoke pursuant to his official duties at a "press conference" at "the scene of a fatal fire," even though he "was not required to speak to the press as part of his job" and his employer disagreed with his comments); *Renken v. Gregory*, 541 F.3d 769, 773 (7th Cir. 2008) (professor spoke pursuant to his official duties when complaining to university officials about difficulties he experienced administering a grant, even though grant administration was not a formal job requirement); *Phillips v. City of Dawsonville*, 499 F.3d 1239, 1242 (11th Cir. 2007) (city clerk spoke pursuant to her official duties when reporting "misconduct by the Mayor," even though doing so was not part of "her enumerated duties").

factors do not make it evident that he is speaking in his private capacity. The employee's subjective intent that his speech further private aims is not controlling. Nor is the fact that the employee's speech expresses private beliefs that contradict the employer's desired message.

These principles are consistent with *Garcetti*'s rationale. Just as "a public employer [may not] leverage the employment relationship to restrict … the liberties employees enjoy in their capacities as private citizens," *Garcetti*, 547 U.S. at 419, a public employee may not leverage his official speech to promote his own personal agenda in contravention of his employer's "important public functions," *id.* at 420. And the First Amendment does not "invest [public employees] with a right to perform their jobs however they see fit." *Id.* at 422.

2. The Court's interpretation of *Garcetti* will apply across the widely varied range of government jobs—from law-enforcement officers, to city-hall administrative staff, to public-hospital nurses. But *Garcetti*'s recognition that employee speech can implicate important managerial responsibilities of public employers has particular salience in the primary and secondary-school setting. In that context, the main responsibility of teachers and coaches is communication, and they speak to captive and impressionable audiences.

When a teacher teaches or a coach coaches, "the school system does not 'regulate' [that] speech as much as it hires that speech. Expression is a teacher's [or coach's] stock in trade, the commodity she sells to her employer in exchange for a salary." *May-*

er v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477, 479 (7th Cir. 2007) (Easterbrook, J.). So when a school district hires a teacher or coach to speak, "it can surely regulate the content of what is or is not expressed." *Evans-Marshall v. Bd. Of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 624 F.3d 332, 340 (6th Cir. 2010) (Sutton, J.) (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995)).

Petitioner does not contend otherwise; rather, he expressly recognizes that teachers and coaches do not have freedom to carry out their duties through expression of their choosing. Pet. Br. 26. And the courts of appeals have unanimously held "that the curricular and pedagogical choices of primary and secondary school teachers exceed the reach of the First Amendment." *Evans*, 624 F.3d at 342 (citing cases). As Judge Easterbrook has put the point, "[a] teacher hired to lead a social-studies class can't use it as a platform for a revisionist perspective that Benedict Arnold wasn't really a traitor." *Mayer*, 474 F.3d at 479-80.

3. At the same time, as government employers, *amici* recognize that public employees "remain people even on school grounds" and bring their religious beliefs with them to work. Pet. Br. 30. And *amici* of course do not seek to "rid the [workplace] of any private religious speech." *Id.* at 2. While at work, public employees may bow their heads in prayer before meals; wear yarmulkes, crosses, or other symbols of faith; and engage in worship activities that are distinct from their official duties. Government employers should and do negotiate appropriate accommodations with their employees to ensure that their reli-

gious beliefs are honored. Many written policies of public employers reaffirm their commitment to accommodate religious beliefs and practices. *See* App. A-E, *infra*, 1a-55a (collecting policies). These accommodations—such as providing free space and time for worship when the employee is not in the midst of working—provide means for employees' religious expression to occur *outside* the employees' official duties, and thus avoid constitutional disputes.

B. Petitioner Prayed At Midfield In The Course Of His Official Duties As Coach

This case illustrates the principles outlined above. *Amici* readily acknowledge that much speech by government employees at the workplace warrants First Amendment protection, and *amici* respect government employees' rights to pray and speak as they see fit outside of their official duties. By the same token, governments have a mission to serve the public interest. And when carrying out that mission "in its role as employer," the government must sometimes restrict speech that may detrimentally "affect the entity's operations." *Garcetti*, 547 U.S. at 418.

Here, petitioner's sincerely held religious beliefs led him to pray at the 50-yard line after football games, but that practice cannot be divorced from his prior conduct. For years, these prayers took the form of motivational religious speeches directed toward the players who surrounded him. Petitioner unquestionably delivered these motivational prayer-speeches to players in the course of performing his official duties, and petitioner no longer contends otherwise. *See* Pet. Br. 27 ("While [petitioner] used prayer or religious content in … post-game speeches … that is not what this case is about").

Petitioner maintains that after the school district's September 17 letter objecting to this practice, *see* JA40-45, he no longer intended to give motivational prayer-speeches to players at midfield, Pet. Br. 9, 31. Instead, he says he intended only to engage in private, personal prayer there. *Id.* at 8, 31; JA62. Yet this Court's assessment of his conduct cannot isolate with freeze-frame precision only one moment while overlooking the overall history and context of petitioner's actions.

Petitioner concedes that he was on duty as a coach during his prayers. Pet. App. 150 n.3. He does not deny that he had privileged access to the field only because of his status as coach—no member of the public would be permitted there to pray or engage in any other expressive activity. *See id.* at 151-152. And he had a history of delivering motivational religious speeches at midfield while fulfilling his duties as a leader, role model, and mentor to his players. Given petitioner's prior practice of delivering these speeches, the track record of players (and opposing teams) joining him, and his disavowal of any intent to keep them from doing so, he could not realistically step outside of his role as coach when praying at midfield after games. Unlike a private phone call, the single act of bowing one's head before a meal, or a coach's proposal to his significant other on the field, Pet. Br. 33, petitioner's midfield prayers were inherently communicative to his team of an established postgame religious ritual.

Recognizing the inextricable link between petitioner's midfield, postgame prayer practice and his coaching responsibilities, the school district sought to accommodate petitioner's sincerely held religious

beliefs by offering him ways to privately pray immediately after games. But petitioner rejected the district's efforts and offered no alternative accommodations of his own. Under these particular facts and circumstances, petitioner's expressive conduct—although animated by his personal religious beliefs—falls within the scope of his official responsibilities and thus lacks First Amendment protection.

1. The *Garcetti* inquiry begins with a "practical" examination of the employee's written and unwritten duties. 547 U.S. at 424. Petitioner was an assistant varsity football coach and head junior-varsity football coach. In addition to providing football instruction, petitioner's position "required him to act as a 'mentor and role model for the student athletes, … exhibit sportsmanlike conduct at all times, … [and strive to] create good athletes and good human beings.'" Pet. App. 133. "In [petitioner's] own estimation, a coach's role extends far beyond merely teaching a sport and often involves a large amount of influence over student athletes." *Id.*

Petitioner's postgame religious expression evolved over the course of his tenure at Bremerton High School. When petitioner began his postgame prayer ritual in 2008, he "pray[ed] alone." *Id.* at 134. At that point, petitioner's prayers appear to have been "private communications with God" that only happened to sometimes take place in the presence of his players. *Id.* Because nothing in the record suggests that these communications involved instructing or influencing students, they would not have fallen within the scope of petitioner's coaching responsibilities. Rather, they were akin to a teacher "folding [his] hands or bowing [his] head[] in prayer"

before lunch in the cafeteria. *Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 636 (2019) (mem.) (Alito, J., concurring in the denial of certiorari).

But petitioner's speech later evolved in ways that directly implicated his duties as coach. As the district court found and petitioner now concedes (Pet. Br. 5), petitioner "began delivering inspirational speeches with religious references after games." Pet. App. 134. "Although the number of participating players varied from game to game, [petitioner] recalls that a majority of the team eventually took part." *Id.* Some players joined in despite being atheists and would not "have done so if [petitioner] were not a coach." *Id.* at 152. In September 2015, "a coach from an opposing team informed [Bremerton's principal] that [petitioner] had asked his team to join him in prayer on the field." *Id.* at 134-35.

Once petitioner moved from engaging in private prayer that only happened to occur in the presence of players to "delivering inspirational speeches with religious references," *id.* at 134, his expression became part of his official responsibilities because he was on duty and communicating directly with his players. Contrary to petitioner's suggestion that football coaches' official duties exclusively involve "talk[ing] gridiron strategy" or "calling plays," Pet. Br. 2, 26, delivering inspirational speeches to players is in fact a key aspect of coaching. Indeed, "[j]ust as famous as some great upsets in sports history are the motivational speeches [by coaches] that inspired them." *Bell v. Eagle Mtn. Saginaw Indep. Sch. Dist.*, 27 F.4th 313, 318 (5th Cir. 2022) (citing Knute Rockne "ask[ing] his Notre Dame players at halftime to 'win one for the Gipper,'" and "Herb Brooks convinc[ing] a

group of American college players that for one night they could be 'the greatest hockey team in the world'"). And the school district here fully encouraged petitioner's postgame inspirational speeches *except for* their religious content. Pet. App. 15-16; JA44, 94. If postgame motivational speeches fell outside of petitioner's job duties altogether, then the district would not have encouraged them at all.

Correspondingly, once petitioner began "delivering inspirational speeches with religious references," Pet. App. 134, he was no longer speaking as a private citizen. It is true that he was expressing his personal and sincere religious convictions. But in so doing, he used his platform and stature as a coach in a manner that his players would reasonably view as an attempt to instruct or influence them. Petitioner gave his inspirational prayer-speeches immediately following games, at the 50-yard line, in close proximity to players—a prominent place to which he had privileged access only because of his official role as coach. No private citizen had similar access to the impressionable and captive minds of high schoolers. And the evidence shows that petitioner's speeches significantly affected the team: some players felt compelled to join the prayers, contrary to their own religious beliefs. *Id.* at 157. Were petitioner speaking as a private citizen, it is doubtful that the players would have experienced such compulsion.

2. The district objected to Kennedy's prayer-speeches in a September 17, 2015 letter, while also explaining that he could freely engage in religious expression "so long as it does not interfere with job responsibilities," *id.* at 135, and offering him guidelines to avoid implicating student activity or the

"perception of [school] endorsement," *id.* at 136. "Some students and parents expressed thanks for the District's directive that [petitioner] cease praying after games, with some noting that their children had participated in the prayers to avoid being separated from the rest of the team or ensure playing time." *Id.* In response to the district's letter, petitioner did not ask to continue his religious speeches to players. But he did, through a letter from his lawyers, inform the district that he intended to "continue his practice of saying a private, post-game prayer at the 50-yard line," and he asked the district to "rescind the directive" in its September 17 letter. JA62, 71-72; Pet. App. 137.

Given petitioner's pattern of prior conduct, however, saying a "post-game prayer on the 50-yard line" could not in fact be "private"—even if petitioner subjectively intended it to be. *Contra* Pet. Br. 27. No objective observer—especially not petitioner's players—would have viewed his prayers that way. His prayers would still be "verbal" and "audibl[e]." JA63-64.[3] And players and coaches would still surround him during the prayers. Petitioner anticipated this type of response: according to the district's superintendent, petitioner "had specifically expressed his intention to pray with students on the field." JA354.

The context of this case—specifically, petitioner's longstanding practice of delivering postgame, mid-

[3] Petitioner states that his prayers were "quiet," Pet. Br. 1, and some of his *amici* even claim they were "silent," *Amicus* Br. of Coach Tommy Bowden 4. But in petitioner's own letter to the district, he admitted that he "audibly spoke" the prayers. JA63.

field prayer-speeches to students—distinguishes it from situations where a public employee prays during the workday but outside of his job duties.[4] Reasonable observers (including students) are fully capable of understanding when a government employee's expression is genuinely private. But here, given petitioner's prior conduct and influence as a coach on the field in the game's immediate aftermath, petitioner could not abandon his coaching role through his mere subjective intent to momentarily shed it. *See* Pet. App. 150-51 (district court finding that because of "contextual cues," students would "feel implicated" by petitioner's prayers even if he did not "*intend* to direct [his] actions at the students"); *see id.* at 157 (finding petitioner's prayers would have been viewed as "continuing [the] tradition" of his "religious inspirational talks after games"); *id.* at 158 ("[Petitioner] may have tried to deliver his prayers in late 2015 while players were distracted, but this does not mean the athletes were unaware of [petitioner's] actions or could not have joined him."). Recognizing this fact does not require applying an "excessively broad job description," Pet. Br. 29; it simply requires viewing the whole context with a modicum of common sense.

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[4] Petitioner's past practice also distinguishes this case from the hypothetical offered by petitioner's *amici* concerning a coach "tak[ing] a knee to protest racism during the National Anthem." *Amici* Br. of Kirk Cousins, et al. 26. In that hypothetical, reasonable observers would view the coach's expressive conduct as private—unless the coach had, for instance, previously given pregame motivational speeches to his players about racial injustice.

3. As will almost always be the case, reasonable accommodations existed that would have allowed petitioner to exercise his religion, while ensuring that his religious exercise did not interfere with his official responsibilities. And the school district "follow[ed] the best of our traditions" by "affirmatively" seeking to "accommodate[]" petitioner's "religious exercise" here. Pet. Br. 25 (internal quotation marks omitted). After the October 16 homecoming game, for instance, the district sent petitioner a letter stating that the "[d]evelopment of accommodations is an interactive process" and suggesting alternative options for petitioner's prayer, "such as a private location at the field." Pet. App. 139. The district also invited petitioner to propose alternative accommodations of his own. *Id.* at 10. But petitioner "did not take the District up on its offer to keep discussing religious accommodations." *Id.* at 139. "Instead, [he] continued his practice of praying at the 50-yard line in the next two games." *Id.* Only at this point did the district "place[] [petitioner] on paid administrative leave." *Id.* at 140. And still then, the district "renewed [its] invitation to discuss alternative accommodations," but petitioner "did not respond." *Id.*

The First Amendment does not guarantee a public employee the right to engage in conduct that interferes with his official duties under the guise of personal expression when objective circumstances paint a different picture. Tellingly, after the season ended, the head football coach "gave [petitioner] low marks for putting his own interests over those of the team." *Id.* at 141. The "drama that had played out" led the head coach to resign after eleven years on the job. *Id.* And petitioner "was one of four assistant

coaches who did not reapply for their jobs." *Id.* These events underscore the adverse consequences that government employers experience when a public employee uses his official position to further a private expressive mission that contravenes the policy choices of accountable leaders.

II. THE DISTRICT PERMISSIBLY LIMITED PETITIONER'S RELIGIOUS EXPRESSION IN ORDER TO AVOID AN ESTABLISHMENT CLAUSE VIOLATION

Even if this Court were to accept petitioner's position that his prayers occurred outside his official duties, *but see* Part I, *supra*, the district's actions were nonetheless permissible. Whether analyzed under the deferential framework of *Pickering v. Board of Education*, 391 U.S. 563 (1968), or under strict scrutiny, the outcome is the same. The district's conduct was justified by the need to avoid an Establishment Clause violation—a paradigmatic compelling interest.

A. Public Employers Acting In Their Managerial Roles Have Flexibility To Restrict Religious Expression

1. In *Pickering*, this Court established a balancing test for evaluating First Amendment claims of public employees who express themselves in their capacity as citizens, as opposed to their capacity as employees. *Pickering* recognized that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." 391 U.S. at 568. Accordingly, in the public-employment context, the Court called for "a balanc[ing] between the interests of the [employee], as a citizen, in commenting upon mat-

ters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* Under this balancing test, if the employer has an "adequate justification for treating the employee differently from any other member of the general public," the restriction is valid. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). *Pickering* thus affords "substantial deference" to the public employer's decisions. *Bd. Of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 678 (1996).

Here, the outcome under *Pickering* would be clear.[5] The district's stated interest in avoiding an Establishment Clause violation, rooted in its concerns about a perceived school endorsement of religion and coercive pressure on students, is a compelling managerial interest. *See infra* at 24-29. And the district also had a host of efficiency-based considerations on which it could have relied, since petitioner's actions adversely affected school operations in various ways. Petitioner's insistence on praying at midfield after the October 16 homecoming game inspired spectators to rush the field to join him, trampling band members and forcing the school to engage security. Pet. App. 138. The intense contro-

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[5] *Amici* recognize that religious expression does not naturally fit with *Pickering*'s threshold requirement—that the employee spoke as a citizen on a "matter[] of public concern." 391 U.S. at 568; *see Connick v. Myers*, 461 U.S. 138, 147 (1983). Much private religious expression is not easily characterized as a "matter of public concern." But it is still a protected form of speech. To the extent that the Court applies *Pickering* in cases like this one, the threshold question should be whether the employee engaged in religious expression as a citizen.

versy generated by petitioner's prayers caused the head coach to become concerned for his and his players' safety—particularly after an adult approached him at a game and "cursed [him] in a vile manner." *Id.* at 11. And as noted, essentially the entire coaching staff left the team after the season. *Id.* at 141; *cf. Rankin v. McPherson*, 483 U.S. 378, 388 (1987) (government has interest under *Pickering* in restricting employee speech that has "a detrimental impact on close working relationships"). Under *Pickering*, the district had substantial leeway to prevent these consequences by limiting the time, place, and manner of petitioner's religious expression.

2. The courts below applied a different analysis in this case because of their determination that the school district expressly relied upon the religious nature of petitioner's expression to justify its actions. *See* Pet. App. 23, 140. In general, neutral and generally applicable managerial concerns and the rationale underlying *Pickering* remain applicable in the Free Exercise Clause context. *Cf. Borough of Duryea v. Guarnieri*, 564 U.S. 379, 390 (2011) (holding that the *Pickering* framework applies equally to public employees' First Amendment Petition Clause claims). Religious expression by public employees—just like secular expression—can sometimes "interfere with the efficient and effective operation of government." *Id.* at 389. And the government's interest in maintaining efficient and effective operation "requires proper restraints on the invocation of rights by employees when the workplace or the government employer's responsibilities may be affected." *Id.* at 392-93. Thus, "[t]he substantial government interests that justify a cautious and restrained approach

to the protection of speech by public employees are just as relevant" when public employees proceed under the Free Exercise Clause. *Id.* at 389.

If this case were viewed as implicating a neutral, generally applicable managerial interest, the *Pickering* framework would apply here. The lower courts took a different approach, however. Based on their determination that the school district ultimately cited "the risk of constitutional liability associated with [petitioner's] religious conduct []as the 'sole reason'" for its actions, both lower courts applied strict scrutiny.[6] Pet. App. 12, 23, 140, 160. But even on the view that strict scrutiny applies here, for the reasons stated below, the school district's actions satisfied that standard.

B. The District's Actions Satisfy Strict Scrutiny

1. Governmental action satisfies strict scrutiny when it is "narrowly tailored to advanc[ing]" a compelling interest. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531-32 (1993).

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[6] One of the district's pre-suspension letters to petitioner stated that petitioner's "duties as an assistant coach did not cease immediately after games" and that petitioner's "current practices drew him away from [his] work." Pet. App. 139 (quoting October 23 letter); JA90-95 (complete letter); *see also* Resp. Br. 43 n.4 (arguing that "the record shows reasons beyond the Establishment Clause that also fully justified the District's actions"). But in granting summary judgment to respondent, the district court stated that "the risk of constitutional liability associated with [petitioner's] religious conduct was the 'sole reason' the District ultimately suspended him," Pet. App. 140, and the court of appeals accepted that holding as a predicate for its application of strict scrutiny, *id.* at 12, 32. *Amici* therefore analyze the case on the basis that the lower courts decided it.

Where a reasonable observer would conclude that governmental inaction in the face of employees' religious acts reflects an endorsement of religion or coercion of others to practice religion, in violation of the Establishment Clause, the government may take narrowly tailored measures to avoid those harms. *See Widmar v. Vincent*, 454 U.S. 263, 271 (1981) (school's interest "in complying with its constitutional obligations may be characterized as compelling"). Nowhere is that more true than "in elementary and secondary schools"—where "[t]he Court has been particularly vigilant in monitoring compliance with the Establishment Clause." *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987); *see Lee v. Weisman*, 505 U.S. 577, 592 (1992) (same).

An Establishment Clause analysis "not only can, but must, include an examination of the circumstances surrounding" the relevant conduct. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000). Under this context-specific inquiry, much religious expression on school grounds will not violate the Establishment Clause. For instance, where a school permits nongovernmental actors to use generally available school property for religious expression, there is little risk that observers would attribute that expression to the government. *See, e.g.*, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 113 (2001). And so too where a school employee engages in genuinely private religious expression on school grounds—such as a teacher praying alone in her classroom during a free period, or a coach crossing himself before kickoff. But where a teacher or coach engages in more public religious expression at school that reasonable observers would view as "stamped

with [the] school's seal of approval," *Santa Fe*, 530 U.S. at 308, that expression violates the Establishment Clause—even if the teacher or coach is speaking outside of his official duties and subjectively intends the expression to be private. *See id.* (finding Establishment Clause violation based on "pregame message" by students "delivered with the approval of the school administration").

Petitioner contends that *Santa Fe* does not apply because the Court there deemed the pregame prayers at issue to be "government, not private speech." Pet. Br. 43. But in *Santa Fe*, high-school *students*—not public employees—delivered the pregame prayers. 530 U.S. at 298 (student body "selected a student to deliver the prayer at varsity football games" (internal quotation marks omitted)). And the Court held that the school's policy of allowing these prayers violated the Establishment Clause because "an objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval." *Id.* at 308.

2. The Ninth Circuit employed this same logic here. It assumed *arguendo* that petitioner was speaking outside of his official duties as a public employee, Pet. App. 17, just as the students in *Santa Fe* were speaking outside of any official governmental capacity. And then it cataloged the various reasons why an objective observer would still view petitioner's prayers as being "stamped with [the] school's seal of approval," *id.* at 19 (quoting *Santa Fe*, 530 U.S. at 308), just as the Court did in *Santa Fe*. The Ninth Circuit's decision thus rests on a legal principle grounded in this Court's precedent: even if a

coach's midfield, postgame prayer occurred outside his official duties, a school's approval of that prayer—as determined from the perspective of a reasonable observer—would produce the endorsement and coercion concerns animating the Establishment Clause.

On the facts found by the district court, reasonable observers would have believed that the district approved of petitioner's public prayers had it allowed them to persist. As explained above, petitioner for years delivered prayer-speeches to players at midfield following games. *See supra* at 13-14, 16-17. After the district objected, petitioner insisted that he must continue praying at midfield following games in a highly visible fashion. *See supra* at 18. At the October 16 homecoming game, individuals stampeded onto the field to join petitioner in a conspicuous prayer circle. *See supra* at 22. If the district had permitted petitioner's prayers to continue at the 50-yard line of the school's stadium after every game, it is likely that his prayers would have drawn in students, the opposing team, and other coaches—just as they had before. *See* Pet. App. 158-59. In turn, reasonable observers would have thought that petitioner was leading these prayers "with the approval of the school administration," *Santa Fe*, 530 U.S. at 308, especially since security concerns prevented the district from allowing anyone else onto the field for prayer or other private expression, Pet. App. 138. Petitioner alone would have the privilege of praying on the field because of his status as a government employee, and the years-long pattern of petitioner's midfield prayers would reinforce the impression that he did so with the district's endorsement. According-

ly, as the district court found, "[a]nyone familiar with [the] history [of petitioner's conduct] would view [petitioner's] prayer at the 50-yard line as continuing [his] tradition of injecting religious undertones into BHS football events." *Id.* at 157.

The district's approval of a government employee's religious expression at high-school football games would not only have raised significant endorsement concerns, but it would have also had "the improper effect of coercing those present to participate in an act of religious worship." *Santa Fe*, 530 U.S. at 312. High-school students face "immense social pressure" in the context of "the extracurricular event that is American high school football." *Id.* at 311. Allowing a high-school football coach—an influential leader of impressionable students—to engage in highly visible on-field prayer after years of delivering motivational prayer-speeches to his team would place coercive pressure on players to join in. Indeed, some of petitioner's players "reported feeling compelled to join [petitioner] in prayer to stay connected with the team or ensure playing time, and there is no evidence of athletes praying in [petitioner's] absence." Pet. App. 157. Although petitioner claims that these concerns related only to "team prayers in the locker room," Pet. Br. 44-45, neither the district court's decision nor the record supports that limitation, *see* Pet. App. 157; JA233-34, 356. And that limitation would also be irrelevant because petitioner's locker-room prayers were part of the same course of conduct, and players would not distinguish between petitioner's prayers based on their precise location. This history of coercive pressure on players supports the reasonable inference that fur-

ther coercion was inevitable if the district had allowed petitioner's prayers to persist.

Petitioner argues that the district could have simply disclaimed petitioner's religious expression by labeling it private speech of which the district did not approve. Pet. Br. 33-34, 39. But governments cannot cure Establishment Clause problems through artificial disclaimers that are belied by the real-world context. Even assuming that petitioner's prayers fell outside his official duties, the fact remains that he prayed while on duty as a coach, in a place he had access to only because of his status as a coach, and under circumstances that communicated—to the public, players, and opposing teams—that he was extending a prior postgame ritual of delivering prayer-speeches to players. Disclaiming official approval in this setting would have contradicted the facts on the ground and persuaded no one.

While students surely understand that a school district does not approve everything it does not condemn, *see* Pet. Br. 2, 22, 38; *see also Bd. of Educ. of Westside Cmty. Sch. v. Mergens ex rel. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion), they also understand that actions can speak louder than words. And if the district had dropped its concerns, stepped aside, and allowed petitioner to use his special status as coach to engage in on-field religious expression, in a context that had previously drawn team participation and would likely do so again, students would have reasonably believed that the school endorsed petitioner's expression—and some would have felt pressured to participate. These effects would violate the Establishment Clause, as both

courts below correctly perceived. Pet. App. 22-23; Pet. App. 160.

3. Finally, the district's actions were narrowly tailored to achieving its compelling interest in avoiding an Establishment Clause violation. As explained above, the district tried in good faith to work with petitioner to accommodate his sincere religious beliefs. *See supra* at 14-15, 20. By offering petitioner private areas in which to pray after games, the district adhered to government-employer best practices designed to strike the appropriate balance between allowing freedom of religion and avoiding Establishment Clause harms. *See, e.g.*, White House Off. of Commc'ns, *Guidelines on Religious Expression in the Workplace*, 1997 WL 475412, at *2 (Aug. 21, 1997) ("Employees should be permitted to engage in private religious expression in personal work areas not regularly open to the public to the same extent that they may engage in nonreligious private expression," but government employers need not "permit employees to use work time to pursue religious or ideological agendas").

Offers of accommodation, in *amici*'s experience, generally resolve the issues raised in this case. For all that appears, the school district and petitioner came to impasse only because of petitioner's intransigence and inflexibility. Respect for religious expression in the workplace, however, does not mandate governmental acquiescence. Only after petitioner rejected the district's offers and refused to suggest any accommodations of his own did the district place him on administrative leave. *Amici* believe that petitioner left the district with little choice if it wished to avoid an Establishment Clause viola-

tion. Accordingly, the district's narrowly tailored actions satisfy strict scrutiny.

CONCLUSION

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

Respectfully submitted,

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APPENDIX

APPENDIX A

Procedures for Implementing Reasonable Accommodation of Religious Observance or Practices for Applicants and Employees

* * *

INTRODUCTION

New York State has long been committed to the proposition that every individual in the State has an equal opportunity to enjoy a full and productive life. This commitment to equal opportunity extends to the workplace. Under New York State law, employees are protected from acts of bias, harassment, prejudice or discrimination. This protection extends to those individuals who observe sabbath or holy days, or who observe a particular manner of dress, hairstyle, beard, or other religious practice, in accordance with their religious beliefs. To enable qualified employees and applicants who engage in such observances or practices to contribute to the State's workforce, the State has a uniform policy to ensure the provision of reasonable accommodation to such individuals.

SECTION 1: UNIFORM STATE POLICY

A. Policy Statement

Each agency, department, office and facility shall follow the Statewide Reasonable Accommodation Policy and Procedures, as set forth below, and communicate its commitment to provide reasonable

accommodation to employees and applicants who engage in religious observances or practices.

> The State of New York is committed to assuring equal employment opportunity for persons who engage in religious observances or practices. To this end, it is the State's policy to provide reasonable accommodation for religious observances or practices. This policy is based on the New York State Human Rights Law, the federal Civil Rights Act of 1964, Title VII, and all applicable Executive Orders and Memoranda. The policy applies to all employment practices and actions. It includes, but is not limited to, recruitment, the job application process, examination and testing, hiring, training, disciplinary actions, rates of pay or other compensation, advancement, classification, transfer and reassignment, promotions, and other terms, condition or privileges of employment.

By providing reasonable accommodations of religious observances or practices, the State and agency, as the employer, can:

- avoid requiring its employees to forego the observance of sabbath or holy days, in accordance with the requirements of their religious beliefs;
- avoid requiring its employees to unnecessarily compromise their observance of particular manners of dress, hairstyle, beard, or other religious practices, in accordance with the requirements of their religious beliefs; and

- enhance the retention and upward mobility of qualified employees without regard for their religious observances or practices.

Reasonable accommodation must be considered in all employment decisions. The employer may not deny any employment opportunity to a qualified employee or applicant who is religiously observant, thus attempting to avoid the need to make a reasonable accommodation, unless the accommodation would impose an undue hardship. This protects the individual's right to equal job opportunity regardless of creed.

B. Employee Access to Information on Reasonable Accommodation

Every agency must periodically inform its employees of the Reasonable Accommodation Policy and Procedures. Acceptable means of communicating this information include distributing a copy of the policy and procedures to all employees annually via email; referring to the policy on an annual basis in the agency's newsletter and advising employees of where the policy is available both in hardcopy and electronic format; and having division or program directors remind staff of the policy and procedures on an annual basis.

Information on reasonable accommodation is included in New York State's Employee Handbook, titled, "Equal Employment Opportunity in New York State, Rights and Responsibilities" ("Employee Handbook"). Information on the agency's internal discrimination complaint procedure, along with information on an employee's right to file a complaint under the Human Rights Law or the federal Civil Rights Act of 1964,

Title VII, for alleged discriminatory acts is also included in the Employee Handbook.

The Reasonable Accommodation Policy should be made available at interviews.

The names and office phone numbers of key personnel involved in providing accommodation, including the agency's Designee for Reasonable Accommodation (DRA) shall be posted and the listing maintained by the agency's DRA. This listing shall also be provided to and made available from personnel offices and EAP coordinators.

SECTION II: NEW YORK STATE HUMAN RIGHTS LAW PROVISIONS

Section 296 of the New York State Human Rights Law contains the following provisions regarding the accommodation of religious observances and practices.

10. (a) It shall be an unlawful discriminatory practice for any employer, or an employee or agent thereof, to impose upon a person as a condition of obtaining or retaining employment, including opportunities for promotion, advancement or transfers, any terms or conditions that would require such person to violate or forego a sincerely held practice of his or her religion, including but not limited to the observance of any particular day or days or any portion thereof as a sabbath or other holy day in accordance with the requirements of his or her religion, unless, after engaging in a bona fide effort, the employer demonstrates that it is unable to reasonably accommodate the employee's or prospective employee's sincerely held religious observance or practice without undue hardship on the conduct of the

employer's business. Notwithstanding any other provision of law to the contrary, an employee shall not be entitled to premium wages or premium benefits for work performed during hours to which such premium wages or premium benefits would ordinarily be applicable, if the employee is working during such hours only as an accommodation to his or her sincerely held religious requirements. Nothing in this paragraph or paragraph (b) of this subdivision shall alter or abridge the rights granted to an employee concerning the payment of wages or privileges of seniority accruing to that employee.

(b) Except where it would cause an employer to incur an undue hardship, no person shall be required to remain at his or her place of employment during any day or days or portion thereof that, as a requirement of his or her religion, he or she observes as his or her sabbath or other holy day, including a reasonable time prior and subsequent thereto for travel between his or her place of employment and his or her home, provided however, that any such absence from work shall, wherever practicable in the reasonable judgment of the employer, be made up by an equivalent amount of time and work at some other mutually convenient time, or shall be charged against any leave with pay ordinarily granted, other than sick leave, provided further, however, that any such absence not so made up or charged, may be treated by the employer of such person as leave taken without pay.

(c) It shall be an unlawful discriminatory practice for an employer to refuse to permit an employee to utilize leave, as provided in paragraph (b) of this subdivision, solely because the leave will be used for

absence from work to accommodate the employee's sincerely held religious observance or practice.

(d) As used in this subdivision:

(1) "undue hardship" shall mean an accommodation requiring significant expense or difficulty (including a significant interference with the safe or efficient operation of the workplace or a violation of a bona fide seniority system). Factors to be considered in determining whether the accommodation constitutes an undue economic hardship shall include, but not be limited to:

(i) the identifiable cost of the accommodation, including the costs of loss of productivity and of retaining or hiring employees or transferring employees from one facility to another, in relation to the size and operating cost of the employer;

(ii) the number of individuals who will need the particular accommodation to a sincerely held religious observance or practice; and

(iii) for an employer with multiple facilities, the degree to which the geographic separateness or administrative or fiscal relationship of the facilities will make the accommodation more difficult or expensive.

Provided, however, an accommodation shall be considered to constitute an undue hardship if it will result in the inability of an employee to perform the essential functions of the position in which he or she is employed.

(2) "premium wages" shall include overtime pay and compensatory time off, and additional remuneration for night, weekend or holiday work, or for standby or irregular duty.

(3) "premium benefit" shall mean an employment benefit, such as seniority, group life insurance, health insurance, disability insurance, sick leave, annual leave, or an educational or pension benefit that is greater than the employment benefit due the employee for an equivalent period of work performed during the regular work schedule of the employee.

In the case of any employer other than the state, any of its political subdivisions or any school district, this subdivision shall not apply where the uniform application of terms and conditions of attendance to employees is essential to prevent undue economic hardship to the employer. In any proceeding in which the applicability of this subdivision is in issue, the burden of proof shall be upon the employer. If any question shall arise whether a particular position or class of positions is excepted from this subdivision by this paragraph, such question may be referred in writing by any party claimed to be aggrieved, in the case of any position of employment by the state or any of its political subdivisions, except by any school district, to the civil service commission, in the case of any position of employment by any school district, to the commissioner of education, who shall determine such question and in the case of any other employer, a party claiming to be aggrieved may file a complaint with the division pursuant to this article. Any such determination by the civil service commission shall be reviewable in the manner provided by article seventy-eight of the civil practice law and rules and any such

determination by the commissioner of education shall be reviewable in the manner and to the same extent as other determinations of the commissioner under section three hundred ten of the education law.

SECTION III: DEFINITIONS AND PROCEDURES FOR HANDLING REQUESTS FOR REASONABLE ACCOMMODATION OF RELIGIOUS OBSERVANCES OR PRACTICES IN NEW YORK STATE AGENCIES

A. Definitions and Legal Standards

1. Creed

"Creed" encompasses belief in a supreme being or membership in an organized religion or congregation. A person is also protected from discrimination because of having no religion or creed, or being an atheist or agnostic.

2. Religion

"Religion" means an individual's self-identification with a particular creed or religious tradition.

3. Sabbath or Holy Day Observance

"Sabbath or holy day observance" means refraining from normal employment, and/or attending religious services, in accordance with the requirements of the individual's religion.

An employee is entitled to time off for religious observance of a sabbath or holy day or days, in accordance with the requirements of his or her religion, provided it does not impose an undue hardship to his or her employer, as explained below.[1] Time off shall also be granted to provide a reasonable

[1] Human Rights Law § 296.10(a).

amount of time for travel before and after the observance.

The Human Rights Law provides that any such absence from work shall, wherever practicable in the reasonable judgment of the employer, be made up by an equivalent amount of time and work at a mutually convenient time, or shall be charged against any available personal, vacation or other paid leave; or provided however that any such absence not so made up or charged may be treated by the Employer as leave without pay.[2]

Leave that would ordinarily be granted for other non-medical personal reasons shall not be denied because the leave will be used for religious observance.[3] Under no circumstances may time off for religious observance be charged as sick leave.[4]

The employee is not entitled to premium wages or benefits for work performed during hours to which such premium wages or benefits would ordinarily be applicable, if the employee is working during such hours only to make up time taken for religious observance. Human Rights Law § 296.10(a). "Premium wages" include "overtime pay and compensatory time off, and additional remuneration for night, weekend or holiday work, or for standby or irregular duty." § 296.10(d)(2). "Premium benefit" means "an employment benefit, such as seniority, group life insurance, health insurance, disability insurance, sick leave, annual leave, or an educational or pension benefit that is greater than the employment benefit due to the employee for an

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[2] Human Rights Law § 296.10(b).
[3] Human Rights Law § 296.10(c).
[4] Human Rights Law § 296.10(b).

equivalent period of work performed during the regular work schedule of the employee." § 296.10(d)(3).

Civil Service Law § 50(9) provides that candidates who are unable to attend a civil service examination because of religious observance can request an alternate test date from the Department of Civil Service without additional fee or penalty.

4. Religious Observance or Practice

"Religious observance or practice" includes sabbath or holy day observance, and the observance of a particular manner of dress, hairstyle, beard, or other religious practice, which is a sincerely held practice of the individual's religion.

An employee who, in accordance with his or her religious beliefs, observes a particular manner of dress, hairstyle, beard, or other religious practice, should not be unreasonably required to compromise his or her practice in the workplace. The employer is required by law to make a bona fide effort to accommodate an employee's or prospective employee's sincerely held religious observance or practice.[5]

5. Reasonable Accommodation of Religious Observance or Practice

"Reasonable accommodation of religious observance or practice" means refraining from imposing upon a person as a condition of obtaining or retaining employment, including opportunities for promotion, advancement or transfers, any terms or conditions that would require such person to violate or forego a sincerely held practice of his or her religion, unless,

[5] Human Rights Law § 296.10(a).

after engaging in a bona fide effort, the employer demonstrates that it is unable to reasonably accommodate the employee's or prospective employee's sincerely held religious observance or practice without undue hardship on the conduct of the employer's business.

6. Undue Hardship

"Undue hardship" means an accommodation requiring significant expense or difficulty. Significant difficulty includes significant interference with the safe or efficient operation of the workplace or a violation of a bona fide seniority system.

Factors to be considered in determining whether the accommodation constitutes an undue economic hardship shall include, but not be limited to:

(i) the identifiable cost of the accommodation, including the costs of loss of productivity and of retaining or hiring employees or transferring employees from one facility to another, in relation to the size and operating cost of the employer;

(ii) the number of individuals who will need the particular accommodation to a sincerely held religious observance or practice; and

(iii) for an employer with multiple facilities, the degree to which the geographic separateness or administrative or fiscal relationship of the facilities will make the accommodation more difficult or expensive.[6]

An accommodation also constitutes an undue hardship if it will result in the inability of an employee to perform the essential functions of the

[6] Human Rights Law § 296.10(d)(1).

position in which he or she is employed. In positions that require coverage around the clock or during particular hours, being available even on sabbath or holy days may be an essential function of the job. Also, certain uniform appearance standards may be essential to some jobs.

B. Uniform Procedures for Processing Reasonable Accommodation Requests

This section describes the procedures for handling reasonable accommodation requests with respect to religious observance from applicants and State employees. It also articulates the role of the agency's DRA - the individual identified by the agency head to coordinate agency compliance obligations arising from the New York State Human Rights Law, and the federal Civil Rights Act of 1964, Title VII. This section identifies the options that are available to employees when an accommodation has been denied.

Many religious accommodations may occur without any formal request, or any discussion. For example, the wearing of religious headgear should be permitted, without discussion, in nearly all circumstances, unless it creates a specific concern, such as a safety concern or a conflict with an essential appearance standard. Likewise, time off for religious observance should be granted, where reasonable, through the normal process for requesting time off. Frequently, the religious nature of a request for occasional time off will require no discussion, unless the time off requires special consideration due to agency staffing needs.

Whenever a difficulty arises regarding an accommodation, the employee should clearly state the religious nature of the request. The supervisor should

always consult with the agency's DRA before denying a request for reasonable accommodation of religious observance or practice.

Where a religious accommodation request cannot be resolved informally between the employee, the supervisor, and the agency's DRA (or where the request is of a type that should always be documented as noted below), a written request for accommodation should be submitted to the agency's DRA, to assure that the issue is reviewed, documented, and resolved in accordance with agency policy and the governing statutes.

Written requests for accommodation should be made using the "Request for Reasonable Accommodation of Religious Observance or Practice" form (see Appendix). These forms are provided by the agency and will be available from the DRA, as well as available online. Applicants, employees and other personnel are encouraged to make copies of the completed form for their records. At the end of the process, the original form is filed by the agency's DRA.

Certain types of requests for religious accommodation should always be documented using the formal "Request for Reasonable Accommodation of Religious Observance or Practice" form. This applies even if the request is easily granted. Documentation is important to assure fairness and uniformity in the responses to such requests. These include:

- long term, seasonal or permanent schedule changes, to provide time off for sabbath or other religious observance;
- specific scheduled work breaks for prayer or other religious observances;

- use of state facilities (e.g. a private office or conference room) for prayer or other religious purpose; or
- *any* informal request that has been denied should be documented by the DRA.

The agency's DRA is responsible for maintaining records regarding the number of accommodations that involved a written request, and the outcome of those requests.

To request an accommodation, an individual need not mention the Human Rights Law, the Civil Rights Act, or use the phrase "reasonable accommodation". Rather, the individual need only let the employer know that s/he needs a change or adjustment related to a religious observance or practice.

The accommodation process should not be adversarial in nature.

1. Who May Request a Reasonable Accommodation of Religious Observance or Practice?

Employees or applicants who wish to engage in a sincerely held practice of the individual's religion, may request a reasonable accommodation, regardless of title, salary grade, bargaining unit, employment status (permanent, contingent, temporary or provisional) or jurisdictional classification (exempt, non-competitive, competitive or labor class). An employee may request a religious accommodation at any time, regardless of prior non-observance.

a. Applicants

The agency must provide a reasonable accommodation of religious observance during the

application process to applicants who request such accommodation. For example, an interview date may fall on a holy day that is observed by the applicant, requiring that an alternate date be arranged. Reasonable accommodation requests may be received by agency personnel and/or the agency's DRA.

b. Current Employees

Current employees may request a religious accommodation through either their first-line supervisor or the agency's DRA. If an employee makes his or her request through the supervisor, the supervisor may handle and approve the request, with consultation with the agency's DRA as needed. However, when the request cannot be granted, the supervisor shall forward the request to the DRA, to assure that the request is reviewed, documented, and resolved in accordance with agency policy and the governing statutes. (See further, information above on certain types of requests that must be documented in writing.)

2. Processing a Request for Reasonable Accommodation

Many religious accommodations require no discussion or formal approval, as noted above with regard to, for example, the wearing of religious headgear. Many other requests for religious accommodation can be approved without a formal written accommodation request, particularly those of a minor or routine nature, such as occasional time off for religious holidays. Others may require a more extensive review and discussion, and certain requests, as noted above, should always be formally documented. The various steps to be followed in handling a formal Request for Reasonable Accommodation of Religious Observance

or Practice are set forth in detail, below. We recommend that you refer to the Appendix, which contains the Sample Forms referred to below, as you review the following information.

a. Request for Reasonable Accommodation of Religious Observance or Practice

This section serves as an initial application form, and asks for basic information needed to consider and act upon the request, such as the name of the applicant/employee; title information; office or unit; work location (for current State employees); and contact information, along with a description of the reasonable accommodation being requested and the reason for the accommodation.

If the individual is unable to complete, sign and date the application, the DRA, an employee's supervisor, or whoever is assisting the individual to complete the form can provide assistance.

b. Acknowledgement of Request for Reasonable Accommodation of Religious Observance or Practice

This section, once completed, either provides confirmation to the individual that the requested accommodation has been approved, or advises the individual that the request is undergoing further review. It must be signed and dated by the agency's DRA and a copy provided to the employee, with the original retained for record keeping purposes.

The following steps should be followed:

- If the application has been submitted directly to the agency's DRA, he or she must consult with the employee's supervisor before granting

an accommodation, to ensure that it is operationally feasible.

- In all cases of formal request for reasonable accommodation of religious observance or practice, the DRA must consult with the agency's Counsel, whether granting or denying such request.
- In all cases of formal request for reasonable accommodation of religious observance or practice, the DRA *must* consult with the agency's labor relations representative prior to granting or denying the accommodation to determine whether the request implicates an agency's collective bargaining agreements, and if so, to resolve any conflicts with collectively bargained rights of other employees. While the employer is not obliged to initiate adversarial proceedings against a union when the seniority provisions of a collective bargaining agreement limit its ability to accommodate any employee's religious observance or practice, the employer is required to take reasonable steps short of labor litigation to demonstrate that it has made a good faith attempt at accommodating the employee. For example, the employer may satisfy its duty by seeking volunteers willing to waive their seniority rights in order to accommodate their colleague's religious observance or practice. This waiver must be sought from the union that represents the employees covered by such agreement and not from the individual employees. An employer cannot simply rely upon the seniority provisions of a collective bargaining agreement

to deny an accommodation request. The union must be engaged.

- If the reasonable accommodation proposed to be provided may require more than a de minimis expenditure or utilization of agency resources, the DRA must confer with the agency's administration and/or fiscal office(s)

c. Status Update/Notification of Need for Additional Information

This section is used to provide an update to the applicant/employee or to request additional information/supporting documentation, which is necessary before a decision regarding a reasonable accommodation can be made. No later than two weeks after providing a completed Section B to the employee, the DRA must provide this form to the individual who has requested the reasonable accommodation of Religious Observance or Practice, specifying the additional information or documentation that is required to continue with the review and assessment process. Such additional information must truly be necessary to complete the process, and includes, but is not limited to, the exact nature and extent of the religious requirement, and/or information regarding specific type or types of accommodations that might be effective in meeting the religious requirements.

The agency's DRA signs and dates the form, and the employee is provided with a copy of Section C, with the original filed for recordkeeping purposes.

d. Notification of Agency Determination

A final review process takes place once adequate information/documentation has been provided.

During the final review, the agency's DRA, in consultation with agency Counsel, must determine whether or not the accommodation should be granted, denied, or if there is an alternate accommodation that should be offered. Accommodation of a sincerely held practice of the individual's religion must be granted unless the accommodation would constitute an undue hardship, as explained above in section A.

If the agency will provide the employee with the reasonable accommodation that the employee requested, the DRA will so note in Section D. Before the employee is notified of the approval of the accommodation, the DRA should first notify the employee's supervisor.

If the agency determines that it will offer an accommodation different from the one requested, then the supervisor should be consulted about the proposed accommodation before the employee is advised of the offer. Section D of the Application shall be completed and sent to the employee, to inform the employee of the agency's determination. If the employee does not accept the offered accommodation, Section D of the Application should be returned to the DRA, with the employee's signature, denoting that s/he rejects the accommodation that has been offered.

If the agency denies the request for reasonable accommodation, the DRA will so note in the latter portion of Section D. A reason for the denial must be given to the employee. The employee is also given information on additional alternatives which include the filing of a discrimination complaint if the employee feels that the agency's denial of the accommodation was unlawful. At this point, the employee may elect to accept the agency's decision

and end the process; to file an internal discrimination complaint under the State's Equal Employment Opportunity Policy, as set forth in the Handbook of Rights and Responsibilities for New York State agency employees; or to pursue various other remedies, as set forth in Section D. If pursuing an outside complaint, the employee should consult with the appropriate antidiscrimination agency regarding the time limitations for initiating an action. Although these time limitations vary, the time for filing a complaint pursuant to all the alternatives begins to run at the time of the agency's first denial of the accommodation request.

C. Maintenance of Records and Data Collection

To the extent that any applicable laws, Executive Orders or Memoranda, rules, regulations, or policies require the maintenance of records regarding requests for reasonable accommodation of religious observance or practice, it shall be the DRA's responsibility to maintain such records.

Appendix: Sample Forms, Sections A through D

Application to Request Reasonable Accommodation of Religious Observance or Practice

Application for reasonable accommodation may be made to the supervisor or the *[Agency's Designee for Reasonable Accommodation (DRA)]*. If the request is made to the supervisor, the supervisor will forward the request to the DRA.

Section A
(To be completed by employee and returned to supervisor or DRA)

Name	Civil Service Title	Job Title (if different)
Office/Unit	Work Location	Telephone Numbers (s)
E-mail address:	Preferred method of communication:	

I am requesting the following reasonable accommodation(s) of my religious observance or practice:
It is necessary for me to have this accommodation for the following reason(s):

Employee Signature	Date

The employee should retain a copy of this form. The original is filed by the *DRA*.

Application to Request Reasonable Accommodation of Religious Observance or Practice

Section B

Initial Response to Request for an Accommodation of Religious Observance or Practice (To be completed by DRA)

Name of Employee:

We have reviewed your application for an accommodation.

□ Your request has been approved

Comments:

□ No decision as been made at this time. We will continue to assess your request. The (*Agency's designated responsible person*] will contact you within the next two weeks.

Comments:	
Agency's DRA's Signature	Date
DRA's name:	

The employee should retain a copy of this form. The original is filed by the *DRA*.

Application to Request Reasonable Accommodation of Religious Observance or Practice

Section C

Notification of Need for Additional Information

(To be completed by the DRA and returned to the employee)

Name of Employee:

We are continuing to assess your request for accommodation of religious observance or practice. To make a determination, we need the following information:

Explain:

The *[Agency]*'s review process will include an evaluation of all relevant information. This may include an interview with you and/or your supervisor. After completion of the review, you will be informed in writing by the *[Head of Agency or designee]* regarding the *[Agency]*'s decision.

We anticipate that the decision will be made by (date): _____.

If you have any questions, please call [*DRA*].

Signature of *DRA*	Date

The employee should retain a copy of this form. The original is filed by the [*Agency's designee*].

Application to Request Reasonable Accommodation of Religious Observance or Practice

Section D

Notification of Agency Determination: (To be completed by the DRA and returned to the employee.)

Name of Employee:

Based on the information you provided, the [*Agency*] is able to provide you with a reasonable accommodation, as follows:

□ The accommodation of religious observance or practice is granted as you requested in your application.

□ The accommodation granted differs from the accommodation you requested, as follows:

Please discuss this with your supervisor. A letter from the [*Head of Agency or DRA*] confirming this decision will be sent to you within the next week once you accept the accommodation. If you have any questions, please call [*DRA*]. The employee should retain a copy of this form, and return the original with his or her signature to be filed by the [*Agency's DRA*].

I accept ___/reject ___ the above reasonable accommodation.	
Employee Signature	Date

-or-

Based on the information you provided, the [*Agency*] is unable to provide you with a reasonable accommodation, as you requested on

We are denying your request for accommodation of religious observance or practice for the following reason(s):

Signature of [*DRA*]	Date

If you have any questions, please call the *[Agency's designee]*. The employee should retain a copy of this form. The original will be filed by the *[Agency's designee]*.

Remedies relating to Dissatisfaction with Agency's Reasonable Accommodation Determination

A letter from the *[Head of Agency or DRA]* confirming the decision will be sent to you within the next week after you receive the Notification of Agency Determination. If you are dissatisfied with the determination, you now have several options:

1. You may choose to accept this decision and end the process; or

2. You may choose to file an internal discrimination complaint at this time if you feel that the *[Agency]*'s determination is unlawful.

3. In addition to the options stated above, other alternatives may also be available. These include, but are not limited to:

- filing a complaint with the New York State Division of Human Rights;
- filing a complaint with the Equal Employment Opportunity Commission or any appropriate federal oversight agency under the Civil Rights Act of 1964, Title VII; and
- filing a private right of action to challenge the alleged discriminatory act, under the New York State Human Rights Law, or any applicable statute.

You may initiate these alternatives after the first denial by the *[Agency]* of your request for an accommodation. Although these time limitations vary, the time for filing a complaint pursuant to all the alternatives begins to run when the *[Agency]* first denies your request for an accommodation. However, you should consult with the appropriate anti-discrimination agency as to the time limitations for initiating such an action.

APPENDIX B

	CITY OF PORTLAND HUMAN RESOURCES ADMINISTRATIVE RULES	**EQUAL EMPLOYMENT**

2.06 REASONABLE EMPLOYMENT ACCOMMODATIONS

Purpose

The City of Portland is dedicated to providing an equitable employment environment for all job applicants, job candidates, employees, interns, and elected officials (collectively, "Workers"). As part of this commitment, the City provides reasonable accommodations for qualifying people with disabilities, people who are pregnant or have related conditions, and people who have religious customs and/or beliefs (a "Protected Status") to enhance workplace productivity and facilitate equal employment opportunities. The goal of this Rule is to ensure all Workers can readily and efficiently request and receive reasonable accommodations necessary to help them perform their essential job functions.

This Rule facilitates the City's compliance with Title I of the Americans with Disabilities Act (ADA) of 1990 as amended and Title VII of the Civil Rights Act of 1964 as amended. The Rule also facilities compliance with Oregon state law, namely ORS 659A.112 and ORS 659A.033.

It is the City's policy that reasonable accommodation requests are processed without regard to the requestor's race, color, ethnicity, religion, gender, marital status, familial status, national origin, age,

disability status, sexual orientation, gender identity, source of income, veteran status, or other protected status.

Definition of Disability

As defined by the ADA, "disability" means a physical or mental condition that substantially limits one or more major life activities, or there's a record of such a substantially limiting condition.

Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working.

A major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, special sense organs and skin, normal cell growth, digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions.

Definition of Religion

As defined by the Civil Rights Act, "religion" includes all aspects of religious observance and practice, as well as beliefs. The Equal Employment Opportunity Commission (EEOC) further defines "religious beliefs" to include theistic beliefs (i.e. those that include a belief in God) as well as non-theistic moral or ethical beliefs about right and wrong that are sincerely held with the strength of traditional

religious views. Social, political, and/or economic philosophies and personal preferences are not considered religious beliefs.

Definition of Pregnancy

As described by Oregon state law and for the purposes of this Rule, "pregnancy" means pregnancy, childbirth, or a related medical condition, including but not limited to lactation.

Note: For nursing City employees who have a need to express milk for a child 18 months of age or younger, Oregon state law (ORS 653.077) provides such employees a reasonable rest period to express milk each time the employee has a need to express milk and requires the City to make reasonable efforts to provide a private location for nursing other than a public restroom or toilet stall. For more information, please speak with a Human Resources Business Partner.

Definition of Reasonable Accommodation

A reasonable accommodation is a change in the work environment or in the way job duties are typically performed that provides an equal employment opportunity. It is provided when:

- A qualifying applicant or candidate with a Protected Status needs an accommodation to have an equal opportunity to apply for a job with the City of Portland.
- A qualifying City of Portland elected official or employee with a Protected Status needs an accommodation to perform the essential

functions of their job or to gain access to the workplace.

- A qualifying elected official or employee at the City of Portland who has a Protected Status needs an accommodation to enjoy equal access to benefits and other privileges of employment (e.g. trainings).

The City is not required to provide accommodations that would pose an undue hardship (e.g. too costly or disruptive to City operations), that fundamentally change the essential functions of a job, that violates an applicable collective bargaining or other agreement, or that might threaten the health and safety of the employee who made the request or the health and safety of other employees. However, in these cases, the City of Portland may discuss whether some other form of workplace modification may be effective.

Responsibilities

It is the responsibility of the Worker to request a reasonable accommodation. Read the "Initiating a Reasonable Accommodation" section for more information on requesting an accommodation.

Recruiters, hiring managers, supervisors, and other City staff must notify the Bureau's assigned Human Resources Business Partner of any reasonable accommodation request they receive from a Worker. Managers and supervisors normally participate in the interactive process with both the Business Partner and the Worker to fulfill an accommodations request.

The Bureau's assigned Human Resources Business Partner is responsible for initiating the interactive

process with the person who requests an accommodation and to involve any person who the Business Partner deems necessary to ensure an effective and timely accommodation is provided. The Business Partner must ensure the Worker is informed of the outcome of the accommodations request. Business Partners are also responsible for tracking data related to their Bureaus' accommodations requests.

The Bureau of Human Resources (BHR) is responsible for coordinating and monitoring the reasonable accommodations system at a Citywide level. This includes providing technical assistance and appropriate training to all Business Partners, managing the appeals process for reasonable accommodations, and Citywide recordkeeping on reasonable accommodations.

Role of Business Partners

Each City of Portland Bureau or Office has a designated Human Resources Business Partner to oversee the reasonable accommodation process. All reasonable accommodation requests are handled by or in conjunction with the Business Partner. When a determination of reasonable accommodation is made, the Business Partner will work with managers and/or recruiters to ensure the accommodation provided is appropriate to meet the Worker's needs and enables the person to perform the essential functions of their position. Business Partners may work with Operating Bureau Personnel Administrators (OBPAs) or other administrative staff to facilitate implementation of reasonable accommodations as needed.

Confidentiality

The City will ensure the confidentiality of all medical information obtained regarding a request for reasonable accommodation as well as the confidentiality of all associated communications during the interactive process. Both Bureaus and Business Partners must keep all medical documentation they receive in a file separate from an individual's personnel file. Non-medical information obtained during this process is shared on an as-needed basis with those involved in providing a reasonable accommodation.

Initiating a Reasonable Accommodation Process

The reasonable accommodations process begins when the City of Portland becomes aware that a Worker may need an adjustment or change concerning some aspect of the application process, the job, or a benefit of employment for a reason related to a Protected Status. This may occur when:

- A Worker requests a reasonable accommodation;
- A Worker discloses a Protected Status;
- A recruiter, manager or Business Partner recognizes an obvious challenge of a Worker due to a Protected Status; or
- A Worker returns to work after a leave of absence with a Protected Status.

Important Note: At times, the City of Portland may provide work modifications regardless of whether a Protected Status exists when permitted under the

law. For example, the City of Portland has an ergonomic program available to all employees who may seek special equipment to address or prevent various injuries and conditions. Under the ergonomic program, an employee with carpal tunnel syndrome may request an ergonomic chair, stand/sit desk, or wrist pad. Requests under the ergonomic program, or other employee wellness programs may not require medical documentation. For more information on the ergonomic program, please contact the City of Portland's Risk Management division by calling (503) 823-5101. Additional contact information is available at the Risk Management website.

Requesting a Reasonable Accommodation

A request is any communication in which a Worker asks or states that they need an accommodation because of a Protected Status.

A request may be made directly to a Business Partner, manager, supervisor, or (if applicable) a recruiter. A request does not have to include any special words, such as "religious accommodation," "pregnancy accommodation," "reasonable accommodation," "disability," or "ADA."

A recruiter, manager, or the Business Partner may ask for clarification if they are unsure if the Worker is requesting a reasonable accommodation.

Upon being notified of an accommodation request, the Business Partner will provide the Worker with the appropriate Accommodation Request intake form.

If a Worker discloses a Protected Status, returns to work with a Protected Status (usually an ongoing disability); or if a recruiter, manager, or Business

Partner recognizes an obvious challenge of a Worker due to a Protected Status, then the recruiter, manager, or Business Partner may proactively inquire if a reasonable accommodation would be helpful. If the Worker states they do not need an accommodation, the offer will be documented in writing by the Business Partner and no further action will be taken. If the Worker states that they do need an accommodation, the Business Partner will provide an Accommodation Request intake form.

Important Note for Workers with Disabilities: While a Worker does not have to disclose their disability until they feel they need an accommodation, it is recommended that Workers not wait until their performance appraisal meeting or during a disciplinary proceeding to disclose a disability and request an accommodation. The City of Portland does not have to rescind disciplinary actions administered prior to a request for an ADA accommodation. Any prospective discipline after disclosure will be administered as appropriate under the circumstances.

Interactive Process

The interactive process is a collaborative effort between the Worker, the manager, and the Business Partner to discuss the need for an accommodation as well as identify effective accommodation solutions.

It is expected that in the case of accommodations for applicants, the timing of the interactive process would be a priority so the applicant does not lose out on the opportunity to compete for a job.

Generally, an interactive process will be initiated as soon as feasible but no later than three (3) business days of the original accommodation request being made.

If an accommodation request is made to a recruiter, manager, supervisor, or other City staff person, the Business Partner must be notified within one (1) business day. Upon notification of an accommodation request, the Business Partner has two (2) business days to initiate the interactive process with the Worker.

An interactive process includes, but is not limited to:

- Understanding the job-related challenge that is generating the request;
- Learning more about the Worker's a Protected Status is prompting the need for an accommodation, including the Worker's ability to perform essential functions of the job and what options are available to accommodate the Worker; and
- Determining the reasonable accommodation solution(s) that may be effective in meeting the Worker's needs.

Depending on the type of accommodation requested, an interactive process may require input from City Attorneys, the Disability Resources and Employment Specialist, other Human Resources staff members, or other relevant Bureaus. A third-party vendor or community partner may also be consulted depending on the type of request sought.

A Worker's failure to cooperate with or participate in the interactive process could result in delayed

consideration of a request or in its denial. If this occurs, the Worker may initiate a new accommodation request and interactive process at any time.

Medical Documentation for Workers with Disabilities

If the disability or need for accommodation is obvious or adequate medical documentation has already been provided for other reasons (e.g. a Family Medical Leave file or a Workers Compensation record may suffice), medical documentation may not be required.

When the disability or need for accommodation is not obvious, or further information is required as part of the interactive process, a Worker may be asked to sign a release form authorizing the Business Partner to secure additional job-relevant information from the Worker's health care provider as to the nature of the Worker's medical condition and/or whether the requested accommodation is necessary. The Business Partner may also give the Worker a list of questions to give to the health care provider or other appropriate professional to answer.

The Worker's cooperation in this process is necessary. A failure to cooperate with this process could result in delayed consideration of a request or in its denial.

Important Note: Medical information will be disclosed only on a need-to- know basis. Accommodations may be provided without informing the Worker's manager of the Worker's diagnosis or disability type.

Determination

When all necessary information is received from the Worker (including medical documentation, if needed) and the manager or supervisor, the Business Partner will assess the accommodation request and determine whether to approve or deny the request.

The Business Partner may consult with key advisors on a need-to-know basis (e.g. City Attorneys, the Bureau of Technology Services, Facilities staff, the Disability Resources and Employment Specialist) for input on the proposed accommodation, including whether an alternative modification or accommodation may be available.

When a decision has been made, the Business Partner will communicate the decision to the Worker and discuss the Worker's questions or concerns, if any, about that decision. The decision will also be communicated to the Worker's manager or supervisor, as well as any relevant stakeholders.

When the City of Portland grants an accommodation, the Business Partner will provide an Approval of Accommodation letter to the Worker. The letter will include next steps for implementation, as well as any training that may be needed.

A decision to provide an accommodation other than the one specifically requested will still be regarded as a decision to grant an accommodation. If an alternative accommodation is offered but declined by the Worker, the Business Partner will note the Worker's rejection of the alternative accommodation on the Approval letter.

If the City of Portland denies a request for accommodation, the Business Partner will provide a Denial of Accommodation letter to the Worker and discuss the reason for the denial. The letter will explain both the reasons for the denial of the accommodation request and the process for appealing this decision. If appropriate, the Worker will be informed of alternatives that could be explored.

When there are multiple accommodation options available to allow the performance of essential job functions, the City retains its right to select which one to implement.

Important Note: A Worker's receipt or denial of an accommodation does not prevent them from making another request if they believe an additional or different accommodation is needed due to changing workplaces or job expectations (e.g. an employee is assigned new duties or works in a new building location). City of Portland managers and Business Partners cannot refuse to process a request for a reasonable accommodation, and a reasonable accommodation request may not be denied based on a belief that the accommodation should have been requested earlier (e.g. during the application process or before the Worker returned from a leave of absence).

Time Frame for Processing Requests

The City of Portland will process requests and, where appropriate, provide accommodations in as short a period as reasonably possible. While the City will facilitate providing reasonable accommodations to the best of its ability, individual cases may be more time

consuming or challenging than others. Accordingly, all timelines specified in this Rule are aspirational.

The time frame for processing a request for job applicants and candidates (including providing accommodation, if approved) is as soon as possible but generally no later than 15 business days from the date the Business Partner received the initial accommodation request. This 15-day period includes the two (2) -day period in which the Business Partner must contact the applicant or candidate after being notified of a request for a reasonable accommodation.

The time frame for processing a request for employees, interns, and elected officials (including providing accommodation, if approved) is as soon as possible but generally no later than 30 business days from the date that the Business Partner received the initial accommodation request. This 30-day period includes the 2-day period in which the Business Partner must contact an employee, intern, or elected official after being notified of a request for a reasonable accommodation.

For disability-related accommodation requests, if the Business Partner must request medical documentation from the Worker's health care provider, the time frame will stop on the day the Business Partner makes a request to the Worker to obtain medical information or sends out a request for documentation and resumes on the day the Business Partner receives all needed documentation. It is therefore recommended that the Worker work closely with their health care provider to expedite their response to the City of Portland's inquiry, ideally within 1-2 weeks.

An extension of the time frame for providing an accommodation will be considered when circumstances come up that could not have been anticipated or avoided in advance of the request for accommodation or are beyond the City of Portland's ability to control. This may include times when the purchase, testing, and installation of software or hardware for approved accommodations requires additional time. When these circumstances are present, the time for processing a request for reasonable accommodation will be extended as reasonably needed by the Business Partner, in consultation with appropriate stakeholders. In these cases, the Worker, manager, and other need-to-know individuals will be notified as to the revised timeline, the reason for the additional time, and when the solution is expected to be ready.

Expedited Processing

In certain circumstances, a request for reasonable accommodation may require an expedited review and decision. This includes times when a reasonable accommodation is needed:

- To enable an applicant to apply for a job.
- To enable an applicant to participate in an interview or selection process.
- To enable an employee to attend a last-minute meeting or training.
- To address a safety-related concern in the workplace.

If the modification is approved, all reasonable efforts will be made to provide the modification in as short a timeframe as possible.

Temporary or Trial Accommodations

Many accommodations are implemented long-term, while some accommodations last for only a temporary period. Every situation is unique and requires case-by-case analysis of the Worker's limitations, restrictions, specific accommodation needs, and the impact accommodation will have on job performance and City operations.

Implementing a temporary change offers an opportunity to evaluate an accommodation for effectiveness before making the decision to implement the change long-term. Situations that can warrant provision of a temporary or trial accommodation may include, but are not limited to:

- When time is needed to research a permanent accommodation solution, to acquire equipment, or to arrange a service;
- When it is necessary to test an accommodation to determine if it is effective and/or compatible with existing City technology;
- When the medical condition is temporary but sufficiently severe enough to entitle the Worker to accommodation;
- When it is necessary to avoid temporary adverse conditions in the work environment; or
- When an accommodation can currently be provided but may eventually pose an undue hardship if provided long-term.

If a trial accommodation is found to be ineffective, then the Business Partner will contact the Worker to

restart the interactive process.

Reassignment

If a Worker with a Protected Status cannot be accommodated in the Worker's current class or assignment in the current Bureau, the Bureau will refer the employee to the Business Partner and the Bureau of Human Resources for consideration of a permanent or temporary reassignment as appropriate and if possible.

Monitoring an Accommodation

It is the responsibility of the Worker to monitor the effectiveness of the accommodation. If an accommodation is no longer effective, then the Worker should notify the Business Partner or manager and the interactive process should be revisited.

Appeals

To appeal an ADA accommodation determination: A Worker who disagrees with the outcome of an ADA accommodation request may send an appeal request to the Bureau of Human Resources by email to ADATitleI@portlandoregon.gov where it will be reviewed by the Disability Resources & Employment Specialist. The appeal must be requested by email within 10 business days from the date of the Denial of Accommodation form. This deadline is strictly enforced.

To appeal a religious or pregnancy accommodation determination: A Worker who

disagrees with the outcome of a religious or pregnancy accommodation request may send an appeal request to the Bureau of Human Resources by emailing the Employee and Labor Relations Team Manager. The appeal must be requested by email within 10 business days from the date of the Denial of Accommodation form. This deadline is strictly enforced.

Complaints

A Worker with a Protected Status who believes they have been discriminated against in an employment action or reasonable accommodation request (including any form of retaliation) may file a complaint with the Bureau of Human Resources. For more guidance on the complaint process, read HRAR 2.02 Prohibition Against Workplace Harassment, Discrimination and Retaliation.

Tracking and Record Keeping for Audit Purposes

To ensure compliance with this Rule, as well as relevant U.S. federal and Oregon state laws, the Human Resources Business Partners are responsible for tracking and recording all accommodation requests that occur within their assigned Bureau(s).

Inquiries

Any employee wanting further information concerning these procedures may contact their Human Resources Business Partner.

References

Title I of the Americans with Disabilities Act (ADA) of 1990, as amended

Title VII of the Civil Rights Act of 1964, as amended

ORS 659A.112

ORS 659A.033

Administrative Rule History

Adopted February 13, 2019

Revised January 1, 2020

APPENDIX C

RELIGIOUS ACCOMMODATION POLICY

EFFECTIVE DATE: September 1, 2021

Objective

The City of Pittsburgh respects the religious beliefs and practices of all employees and will make, on request, an accommodation for such observances when a reasonable accommodation is available that does not create an undue hardship on the City's business.

Scope

This Policy applies to employees, which shall include full-time and part-time employees, temporary employees, probationary employees, seasonal employees, contractual employees, and applicants.

Definitions

Religion: Religion is defined by Title VII of the Civil Rights Act of 1964. Religion includes traditional, organized religions as well as religious beliefs that are new, uncommon, not part of a church sect, or only held by a small number of people. Religion typically concerns "ultimate ideas" about "life, purpose, and death". Social, political, or economic philosophies, as well as personal preferences, are not considered "religion".

Undue Hardship: Significant difficulty and expense based on the City's resources and circumstances in relationship to the cost or difficulty of providing a specific accommodation. Undue hardship may refer to financial difficulty in providing an accommodation or accommodations that are unduly expensive, substantial, or disruptive, or that would

fundamentally alter the nature or operation of the City's business or the essential functions of a job. The determination of what constitutes an undue hardship is made on a case-by-case basis, but a few common examples include: jeopardizing health or security, causing a lack of necessary staffing, violating a seniority system, costing the employer more than a minimal amount, infringing on the rights of other employees, requiring other employees to do more than their share of potentially hazardous or burdensome work, decreasing workplace efficiency, and violating a collective bargaining agreement.

Requesting a Religious Accommodation

1. An employee whose religious beliefs or practices conflict with his or her job, work schedule, or with other aspects of employment, and who seeks a religious accommodation should submit a written request via the **City of Pittsburgh Religious Accommodation Request** form for the accommodation to his or her department director or supervisor.
2. The written request will include the type of religious conflict that exists and the employee's suggested accommodation.
3. If an oral request is made, the department director or supervisor should direct the employee to submit a written Religious Accommodation form. Any oral request should be treated as a formal request, and the department director or supervisor should follow the same procedures set forth in this policy for written requests.

Providing Religious Accommodation

1. The Department Director or Bureau Chief will contact the Director of Human Resources and Civil Service (HRSC), who will evaluate the request considering whether a work conflict exists due to a sincerely held religious belief or practice and whether an accommodation is available that is reasonable and that would not create an undue hardship on The City of Pittsburgh's business.
2. An accommodation may be a change in job, using paid leave or leave without pay, allowing an exception to the dress and appearance code that does not affect safety requirements, or allowing an exception or alternative for other aspects of employment. Depending on the type of conflict and suggested accommodation, the HRSC Director may confer with the Law Department and with the Department Director or Bureau Chief, and review any applicable collective bargaining agreements.
3. In some cases, as permitted by applicable law, the employee may be asked to provide additional supporting information, documentation, or other authority about the employee's religious belief, practice, or requirement to establish whether the belief or practice is protected by law and/or to determine whether/what types of accommodations would be effective.
4. The Department Director or Bureau Chief and employee will meet to discuss the request and decision on an accommodation. After discussion, HRCS will provide the employee with a written response setting out how the

accommodation request has been resolved. If the employee accepts the proposed religious accommodation, the Department Director or Bureau Chief will implement the decision.

Retaliation is Prohibited

The City prohibits retaliation against an employee for requesting a religious accommodation, participating in an approved accommodation, or otherwise engaging in protected conduct under this policy. Any person who violates this anti-retaliation provision may be subject to disciplinary and/or corrective action.

Questions about this policy may be directed to the HRSC Director. This Policy is subject to change.

APPENDIX D

City of Portland
Religious Accommodation Policy

Overview:

The City of Portland will make reasonable accommodations on the basis of a sincerely held religious belief or practice for qualified employees, so long as the reasonable accommodation does not impose an undue hardship on the City.

Applicability:

This policy applies to all qualified employees who require a reasonable accommodation for a sincerely held religious belief or practice.

Policy:

Qualified employees who are hindered in the practice of their religion by workplace policies may request reasonable accommodations of their religious beliefs or practices. Some examples of potentially reasonable accommodations may include:

- Modifying work schedules, for example to allow for required prayers,
- Allowing voluntary shift swaps, for example to allow for attendance at religious services,
- Modifying dress code, such as to allow special head coverings, facial hair, etc.

The City will engage in the interactive process with employees to determine if there is a reasonable

accommodation available that will not impose an undue burden on the City, but is not obligated to grant all requests for accommodation. Employees who are granted a reasonable religious accommodation must be able to perform all essential functions of their position.

Request Process:

An employee who requires a reasonable accommodation should complete the City of Portland's Request for Religious Accommodation Form and discuss the request with their department's HR Liaison or the City of Portland's Human Resources Department. It is the employee's responsibility to disclose the existence of the religious belief or practice to be accommodated.

If an employee is dissatisfied with the decision regarding their request for a religious accommodation, the employee may request that the Human Resources Director or their designee review the decision.

The City does not discriminate or retaliate against an employee for requesting or utilizing a reasonable accommodation. An employee who believes that they have been discriminated or retaliated against should report to Human Resources. An employee may also file a complaint with the Equal Employment Opportunity Commission ("EEOC") or the Maine Human Rights Commission by contacting:

EEOC
John F. Kennedy Federal Building
475 Government Center
Boston, MA 02203
1-800-669-4000

Fax 617-565-3196
TTY 800-669-6820

or

Maine Human Rights Commission
51 State House Station
Augusta, Maine 04333
207-624-6050,
TTY 207-624-6064
http://www.state.me.us/

Signed by Jon P. Jennings
Jon P. Jennings, City Manager

APPENDIX E

DISTRICT OF COLUMBIA
FIRE AND EMERGENCY MEDICAL SERVICES DEPARTMENT

BULLETIN NO. 28 **May 2013**

RELIGIOUS ACCOMMODATION POLICY

The D.C. Fire and Emergency Medical Services Department ("Department") respects the religious beliefs and practices of all employees and may make, upon request, an accommodation for such observances when a reasonable accommodation is available that does not create an undue hardship on the Department's business.

An employee whose religious beliefs or practices conflict with his/her job, work schedule, or with the Department's policy or practice on dress and appearance, or with other aspects of employment, and who seeks a religious accommodation, must submit a Special Report entitled "Request for Religious Accommodation" along with the Religious Accommodation Request Form to the Department's EEO & Diversity Manager. The written request will identify the type of religious conflict that exists and the employee's requested accommodation.

The EEO & Diversity Manager and the respective Assistant Fire Chief will evaluate the request to (1) consider whether a work conflict exists due to a sincerely held religious belief or practice, and (2) whether a reasonable accommodation is available provided it will not create an undue hardship on the Department's business. If granted by the Department, an accommodation may involve a

change in job functions, require the use of paid leave or leave without pay, allow an exception to the dress and appearance code provided it does not impact safety or uniform requirements, or modify some other aspects of employment.

The EEO & Diversity Manager and the employee may meet to discuss the request as well as the Department's decision regarding whether to grant or deny the accommodation. If the employee accepts the proposed religious accommodation, the Department will implement the decision. If the employee is not satisfied with the Department's final decision, he/she may file a complaint with the D.C. Office of Human Rights or the U.S. Equal Employment Opportunity Commission.

RELIGIOUS ACCOMMODATION REQUEST FORM

In accordance with federal and D.C. laws, the Department prohibits discrimination on the basis of religion. The Department provides reasonable accommodations for sincerely held religious beliefs or practices unless doing so would impose an undue hardship on the Department. A reasonable religious accommodation is any adjustment to the work environment that will allow the individual to practice his/her religion. "Undue hardship" is a practice, procedure, or financial cost that unreasonably interferes with business operations.

This form is to be filled out by the person requesting a reasonable religious accommodation and submitted along with a Special Report to the EEO & Diversity Manager. **This information will be maintained confidentially to the extent practicable under the circumstances.**

Name:_____ **Title**: _____

Assignment: _____ **Phone:** _____

1. Please identify the religious belief or practice you have for which you are requesting an accommodation.

_____
_____
_____

2. What workplace accommodation do you request?

_____
_____
_____

3. How often do you need the accommodation?

_____
_____

4. Identify your religious practice or belief and state how this accommodation enables you to participate in your religious belief or practice without impacting your ability to meet the required functions of your position.

_____
_____
_____

5. If you have requested this religious accommodation before, please state approximately when the request was made, the name of the individual who responded to the request, and the outcome of the request.

_____
_____
_____

IF NECESSARY, PLEASE USE ADDITIONAL SHEETS FOR ANY OF THE INFORMATION REQUESTED ABOVE

Religion Tenet(s) Documentation

Please provide documentation or other authority to support the need for an accommodation based on your religious belief or practice.

Please Note: *In some cases, the Department will need to obtain documentation or other authority regarding your religious belief or practice. The Department may need to discuss the nature of your religious belief(s), practice(s) and accommodation with your religion's spiritual leader (if applicable) or religious scholars to address your request for an accommodation.*

I verify that the above information is complete and accurate to the best of my knowledge and I understand that any intentional misrepresentation contained in this request may result in disciplinary action.

Signature:_____

Date: _____

Summary of Next Steps

This request will be reviewed by the EEO & Diversity Manager.

The EEO & Diversity Manager will discuss your request with the appropriate Assistant Fire Chief.

You will be notified of the outcome of the determination and/or proposed accommodation.