No. 21-418

IN THE

Supreme Court of the United States

JOSEPH A. KENNEDY,

Petitioner,

v.

BREMERTON SCHOOL DISTRICT,

Respondents.

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

BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AND AMERICAN FEDERATION OF TEACHERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

This brief is submitted on behalf of *Amici* National Education Association ("NEA") and American Federation of Teachers, AFL-CIO ("AFT").*

NEA is the nation's largest professional association, representing almost three million members—the vast majority of whom serve as educators, counselors, and education support professionals in our nation's public schools. NEA has a deep and longstanding commitment to ensuring that public schools are welcoming to all students. As part of that commitment, NEA's Resolution I-22 (entitled "Freedom of Religion") expresses the organization's fundamental belief that an individual's "choice of religion, including no religion, is an intensely personal decision," and that instruction on religious practice "is best provided within a family setting and/or by religious institutions"—not by public schools. Accordingly, NEA maintains that public schools must refrain from engaging in sectarian religious practices; must treat all religions, or the choice of none, on an equal basis; and must protect the rights of students and education employees. NEA also supports the rights of educators to express their personal views in public without fear of censorship or reprisal. NEA Resolution H-2 ("The Education Employee as Citizen").

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* Both parties have given blanket consent for the filing of *amicus* briefs. *Amici* state that no party's counsel authored the brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *Amici*—contributed money that was intended to fund preparing or submitting the brief.

AFT was founded in 1916 and today represents 1.7 million members in more than 3,500 local affiliates nationwide. AFT members include educators and educational assistants, higher education faculty and administrative staff, nurses and health care workers, and public employees. AFT's K-12 members are committed to providing their students the highest quality public education consistent with the standards set by the local, state, and federal government. In cases that directly impact public school education and public employees, AFT frequently submits *amicus* briefs in this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Children compelled by law to attend school should not have to a run a gauntlet of religious observances and indoctrinations, just to receive a public education. Yet that is precisely where Petitioner Joseph Kennedy's argument in this case could lead.

1. This is not a case about someone removed from public-school employment for engaging in "brief," "quiet," "personal," "solitary" prayer in a place "where no one joined him" and at a time when he and his students "were free to engage in activities of their own choosing." In reality, Petitioner repeatedly used the status and access of his job as a school employee to publicly stage sectarian prayers while on the job and in the spotlight of major, school-sponsored events. By Petitioner's own admission, these prayers were intended to be witnessed by impressionable school children and to influence their beliefs. The predictable result was that students joined in the prayers out of fear of being ostracized or excluded from play on the team.

The Establishment Clause squarely forbids this kind of governmental intrusion into students' rights of conscience and parents' rights to direct the religious upbring of their children. Not only did Petitioner's actions create the impression that his sectarian prayer had the imprimatur of the school, but he in fact coerced vulnerable schoolchildren into religious activity. Because Petitioner refused to stop conducting these coercive religious observances, the school was effectively given no choice but to remove Petitioner from his position. The need to protect the First Amendment rights of schoolchildren was more than enough justification for the school's action. The Ninth Circuit's decision to that effect should be affirmed.

2. If this Court rejects the Ninth Circuit's holding on the Establishment Clause issue, it must still decide whether the Petitioner had a First Amendment right to engage in highly public, on-the-job religious observances without interference from his employer. Under this Court's extant doctrine, the answer is plainly "no": Petitioner's religious speech was categorically unprotected by the First Amendment from employer sanction because it was made pursuant to his employment and because it involved only matters of personal and private concern. As a result, if this Court intends to rule in Petitioner's favor on his First Amendment claim—and do so on a principled basis that is consistent with its judicial obligation to do right to all manner of people—it must reformulate current precedent in a way that expands free speech protections for all public employees.

Such a reformulation of existing precedent would be more than justified. Under this Court's current case law, speech made pursuant to a public employee's job duties or on matters of private concern is considered categorically unprotected by the First

Amendment. Both of these exclusions rely on distinctions that are not tethered to the text of the First Amendment, and have proven in practice to be artificial and difficult to apply. Worse yet, these exclusions have robbed members of the public of valuable speech about the functioning—and sometimes malfunctioning—of their government, and they have deprived public employees of fundamental liberties designed to foster individuality and self-expression. The harmful effects of this Court's misguided case law in this area have fallen especially hard on the nation's public-school educators, who are increasingly threatened by efforts to stifle speech on a broad range of important topics.

If this Court goes on to consider the merits of Petitioner's First Amendment claim, there are three revisions to current doctrine that would begin to restore the promise of the First Amendment for public employees. First, this Court should abandon the categorical exclusion for speech pursuant to official duties and, instead, consider the capacity in which an employee speaks as a factor in the traditional balancing between the interest of the employee in speaking and the government employer's interest in promoting workplace efficiency. Second, this Court should abandon the categorical exclusion for speech on matters of private concern and, instead, allow the degree of public or private concern to be weighed in case-by-case balancing. Finally, this Court should recognize that public employees are generally entitled to notice of the kinds of speech their employers might seek to restrict. Such protection is particularly important for educators, who will fear teaching if they can be disciplined or discharged for every on-the-job utterance.

ARGUMENT

I. The Undisputed Facts Confirm that the School Lawfully Proscribed Petitioner's On-Duty Religious Activities Because They Created an Intolerable Risk of Violating the Establishment Clause

Petitioner tells this Court that he should prevail on his First Amendment claim because he was fired from public-school employment for engaging in "brief," "quiet," "personal," "solitary" prayer in a place "where no one joined him" and at a time when he and his students "were free to engage in activities of their own choosing." Pet. Br. at 12, 29. If those were indeed the facts of this case, Petitioner would likely be entitled to prevail, and the *Amici* on this brief would just as likely have filed in support of that result. After all, while *Amici* advocate for high-quality public schools that are free of religious endorsement or coercion, *Amici* are also champions of the First Amendment rights of their members and other public sector employees.

But the facts are not remotely as Petitioner presents them to this Court. On the contrary, the undisputed evidence submitted at summary judgment establishes a clear and escalating pattern of religious endorsement and coercion by Petitioner, which included leading sectarian prayers in the locker room with the entire football team, and culminated in Petitioner's public campaign to commandeer school property to stage overtly sectarian religious prayers while on duty, in full view of both his team and a crowd of spectators assembled to watch a school football game.

The undisputed facts further show that both students and staff at the school were adversely affected by Petitioner's activities. Members of the public rea-

sonably understood Petitioner's prayers as bearing the school's imprimatur, and students felt pressure to participate in the prayers on pain of being benched during games. All of this was in the face of the school's requests to cease the conduct, coupled with its repeated offers—all refused by the Petitioner—to accommodate him in a way that would respect both his religious freedom and the rights of others in the school community.

Petitioner has failed at every stage of the case to dispute these facts, which formed the basis for the district court's grant of summary judgment against him. Instead, his arguments to this Court are pinned to the hope that a majority of Justices will disregard the full record in favor of a skewed and sanitized version of events that includes *only* Petitioner's preferred facts. This Court should reject Petitioner's revisionist efforts.

The undisputed facts show that Petitioner was uncompromising in his pursuit of using the status and access that came with his position at a public school to stage sectarian prayers repeatedly while on the job and in the spotlight of major, school-sponsored events. The need to protect the rights of schoolchildren and the broader school community under the Establishment Clause provided ample justification for the school's decision to terminate the Petitioner. The Ninth Circuit's decision to that effect should be affirmed.

A. The parties present the Court with two distinct sets of facts, but the undisputed facts relied on by the district court and the Ninth Circuit are controlling

In his brief on the merits, Petitioner claims this case is about whether a public employee enjoys First Amendment protection for engaging in "brief," "quiet," "personal," "solitary" prayer in a place "where no one joined him" and at a time when he and his students "were free to engage in activities of their own choosing." Pet. Br. at 12, 29. The Ninth Circuit correctly explained that "the facts in the record utterly belie" Petitioner's framing of the case. *Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004, 1017 (9th Cir. 2021) (*Kennedy III*); see also *Kennedy v. Bremerton Sch. Dist.*, 4 F.4th 910, 912 (9th Cir. 2021) (*Kennedy IV*) (Smith, J., concurring in the denial of rehearing *en banc*) (identifying Petitioner's skewed recitation of the facts as a "deceitful narrative").

Rule 56 determines which version of the facts controls in this Court. A motion for summary judgment must prevail if the evidence adduced at that stage of the case "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In considering such a motion, this Court typically views facts in the light most favorable to the nonmoving party, but only when there is a *genuine* dispute as to those facts. See *Scott v. Harris*, 550 U.S. 372, 380 (2007). "When opposing parties tell two different stories, one of which is blatantly contradicted by the record so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Id.*

That is the case here. Petitioner's "version of events is so utterly discredited by the record that no reasonable jury could have believed him." *Id*. Where a summary judgment litigant's presentation is such a "visible fiction," this Court must—as the Ninth Circuit and district court properly did below—view the facts in the light depicted by the undisputed evidence. *Id*. at 380–81.

The most glaring discrepancy between the reality of the summary judgment record and Petitioner's revisionist version of the facts is his claim that "[t]here is *zero record evidence* that any student felt compelled to join . . . his quiet, personal post-game prayer." Pet. Br. at 44 (emphasis added). The record shows precisely the opposite. Several parents reported that their children "participated in the team prayers only because they did not wish to separate themselves from the team," JA 356, and at least one student reported participating in Petitioner's staged prayers out of "fear that declining to do so would negatively impact his playing time." *Kennedy III*, 991 F.3d at 1018. After the school eventually put a stop to Petitioner's displays, parents and students came forward to thank school officials for ending "awkward situations where they did not feel comfortable declining to join" in the prayers. JA 359.

These conflicts are all a predictable result of a school employee in a leadership role staging overtly sectarian prayers to maximize their exposure to students and the school community. These prayers were neither "quiet" nor "personal," as Petitioner claims before this Court. Pet. Br. at 44. Photographic and video evidence captured the very public nature of Petitioner's religious activity. See, e.g., JA 262–67, 318–19, 356. And letters and news reports depict Petitioner's public campaign to pressure the school district to

accede to his demands to lead public prayers, along with his refusal to consider reasonable accommodations from his employer. *Kennedy III*, 991 F.3d at 1012–13.

Furthermore, Petitioner candidly admitted that his prayers were not "personal," but rather a conscious effort to leverage his position of trust and authority to proselytize and influence students' beliefs. When the school instructed Petitioner to cease his public prayers, he demanded that he be allowed to "continue" the practice in order to "help[] these kids be better people." JA 69–74. Petitioner's counsel delivered the same message to the district court, stating: "The young men on the team are looking up to the coach. . . . That's precisely why Coach Kennedy wants to do what he does." JA 368. Petitioner's central role in this highly visible sectarian activity is underscored further by the fact that no students or community members took to the field for prayer during the period when Petitioner complied with the school's request to cease his on-field religious activity. JA 181.

On the occasions when Petitioner did engage in truly "personal" and "quiet" prayers while on the job, no issues ever arose. See *Kennedy IV*, 4 F.4th at 912 (Smith, J.). It was only when Petitioner's sectarian prayers became public, audible, and involved leading students in religious exercise that the school stepped in and asked him to stop. Even then, the school offered to accommodate his religious beliefs with precisely what he claims to want from this Court: the freedom to engage in "brief," "quiet," "personal," "solitary" prayer in a place where "where no one joined him" and at a time when he and his students are "free to engage in activities of their own choosing." JA 106; Pet. Br. at 12, 29. Yet Petitioner refused those

accommodations, *id.*, and made clear that he would only be satisfied with using his access and status as a coach to "pray in the middle of the football field immediately after the conclusion of games while the players were on the field, and the crowd was still in the stands." *Kennedy IV*, 4 F.4th at 912 (Smith, J.).

Petitioner then mounted a publicity campaign against the school, advertising the dispute in local newspapers, television, and social media, and notifying the entire community that he intended to defy the school and conduct his prayers publicly. *Id.* This publicity created a hostile and threatening atmosphere for school officials and staff and raised safety concerns about crowd control during games. *Kennedy III*, 991 F.3d at 1013–14. Ultimately, the school suspended Petitioner from his coaching duties—but only after it became clear there was no accommodation acceptable to Petitioner that did not also present an intolerable risk of violating the Establishment Clause. JA 106.

These facts are not just undisputed, they are indisputable, as no reasonable jury could have adopted the version of events peddled in Petitioner's brief to this Court. At any rate, Petitioner did not challenge these facts in the manner prescribed by Rule 56(c)(1). As such, they must be accepted as definitely established for purposes of summary judgment and this Court's review. See *Beard v. Banks*, 548 U.S. 521, 527 (2006).

B. Petitioner's dismissal was justified by the school's interest in avoiding the appearance of openly endorsing religion, as well as the actual coercion of school children in their religious views

In determining whether an unconstitutional endorsement of religion exists in the K-12 public school context, this Court considers whether an "objective observer," would perceive the state's involvement as "a state endorsement of prayer in public schools." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (cleaned up). That analysis "not only can, but must, include an examination of the circumstances surrounding" the action. *Id.* at 315. Here, the undisputed record of Petitioner's activities more than justifies the measures the school took to avoid a serious violation of students' and others' rights under the Establishment Clause.

An objective observer, aware of the surrounding facts, would have no choice but to conclude that Petitioner's conduct met the endorsement test. After all, Petitioner repeatedly used the status and access of his job as a school employee to publicly stage sectarian prayers while on the job and in the spotlight of major, school-sponsored events. See *supra* at 9. This religious expression enjoyed a privileged status because the school did not make the field available to other individuals or religious groups to engage in similar expression. Cf. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993). And Petitioner engaged in this activity, not merely knowing that students were present and likely to join him, but for the very purpose of influencing students' beliefs and in spite of the pressure some felt to join. See *supra* at 9. Viewing these post-game prayers in light of the undisputed facts concerning

the publicity around this case, there can be no question that, had the school capitulated to Petitioner's demands to continue staging prayers at school-sponsored football games, an objective observer would view the school's permission to continue the prayers as a "seal of approval" and "authorized by a government policy." *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 302, 308.

Furthermore, the school has a separate—and "heightened"—interest under the Establishment Clause in "protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *Lee v. Weisman*, 505 U.S. 577, 592 (1992). Research shows that children are susceptible to pressure from their peers towards conformity, such that even "subtle and indirect" pressure "can be as real as any overt compulsion." *Id.* at 593. A young person faced with a situation where most of her friends or teammates are joining in prayer may simply not feel free to dissent from the group in the same way an adult might. As a result, she may have "a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow." *Id.* Coercion concerns are further amplified where school staff or officials are the ones leading prayers, due to the compound effects of "students' emulation of teachers as role models and the children's susceptibility to peer pressure." *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987).

Nor has this Court ever said that coercion only exists in the K-12 public school context where a teacher explicitly "compels" students to pray. Such an argument would be "formalistic in the extreme," *Lee*, 505 U.S. at 595—it ignores the realities of the school environment and "minimizes the immense social pressure, or truly genuine desire, felt by many stu-

dents to be involved in the extracurricular event that is American high school football." *Santa Fe*, 530 U.S. at 292. The potential loss of playing time could hardly be a more coercive force for a high school athlete, even if the student is not verbally ordered or physically forced to bend a knee.

If this Court holds that the First Amendment allows the kinds of coercion or endorsement shown here, it could leave children in our K-12 public schools in a tug-of-war of religious instruction and indoctrination. Students will be caught, not only between schools and their parents, who have a fundamental right to direct their children's religious upbringing, *see Pierce v. Society of Sisters*, 268 U.S. 510, 532, 534–35 (1925), but also between educators within schools who undoubtedly hold different and conflicting views of which religious beliefs and observances will best (in Petitioner's words) "help[] these kids be better people." JA 73–74. The First Amendment would be turned on its head if this Court forced a young and impressionable schoolchild to run a gauntlet of Catholic confession at the close of Algebra, a short break for Buddhist meditation in Chemistry, and Evangelical prayer before Orchestra practice. Yet that is precisely the kind of result that a ruling in Petitioner's favor would allow.

There can be no question that the school's decision to remove Petitioner from his position was justified by an interest in avoiding potential violations of the Establishment Clause. The Ninth Circuit was therefore correct to affirm a grant of summary judgment in favor of the school and against Petitioner. This Court should affirm that result. If it does so, it need not reach the other arguments Petitioner raises.

II. Even if this Court Adopts Petitioner's View of the Facts, It Still Cannot Rule in His Favor While Remaining Faithful to Existing Precedent Concerning the First Amendment Rights of Public Employees

If this Court adopts Petitioner's framing of the facts and rejects the Ninth Circuit's holding on the Establishment Clause issue, there still remains the issue of whether the First Amendment affirmatively protects Petitioner from dismissal based on the speech and religious activity at issue in this case. See Caroline Mala Corbin, *Government Employee Religion*, 49 ARIZ. ST. L.J. 1193, 1205 (2017) (explaining that, "even if not forbidden by the Constitution," a public-employee's religious activity may still not be "protected by the Constitution"). And on that question, so long as this Court remains faithful to its current interpretation of the First Amendment rights of public employees as explicated in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), Petitioner's claim faces insurmountable obstacles.

In other words, if this Court intends to rule in Petitioner's favor on his First Amendment claim, it can do so only by (i) making an unreasoned, one-off departure from extant precedent or (ii) reformulating that precedent in a manner that expands the protections of the First Amendment for all public employees. It should go without saying that only the latter course is consistent with a judge's traditional obligation to "do right to all manner of people," *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 445 (2015) (quoting 10 ENCYCLOPAEDIA OF THE LAWS OF ENGLAND 105 (2d ed. 1908)), and to safeguard "public confidence in the fairness and integrity" of the judiciary, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009) (cleaned up).

Petitioner is wrong that the Establishment Clause allows him to use the status and access of his job as a school employee to publicly stage sectarian prayers while on duty and in the spotlight of major, school-sponsored events. But at the same time, he is entirely correct that "teachers and coaches remain people even on the school grounds, and as private individuals they have political views, sports allegiances, and religious beliefs that" that are entitled to a meaningful degree of First Amendment protection. Pet. Br. at 30. If this Court intends to rule in Petitioner's favor on his First Amendment claim, its ruling should also extend meaningful Free Speech protections to all educators—indeed, to all public employees—and not just the Petitioner or others who seek to engage in similar religious observances on the job.

A. Petitioner's claim fails under this Court's current precedent restricting the First Amendment rights of public employees

This Court's existing precedent establishes a two-step inquiry into whether a public employee's speech is entitled to First Amendment protection. The first step "requires determining whether the employee spoke as a citizen on a matter of public concern." *Garcetti*, 547 U.S. at 418. If the answer is no—because the employee was speaking either pursuant to his or her official responsibilities or on a matter of purely private concern—then "the employee has no First Amendment cause of action." *Id.* But if the answer is yes, then "the possibility of a First Amendment claim arises," *id.*, and the inquiry at the second step is whether the employee's interest in speaking outweighs the interest of the government employer in "promoting the efficiency of the public services it per-

forms through its employees." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

Here, even if one accepts the sanitized version of facts laid out in Petitioner's brief, his First Amendment claim fails under this Court's existing standards.

First, Petitioner has no claim that he engaged in his religious speech in his capacity as a citizen, rather than "pursuant to [his] employment responsibilities." *Garcetti*, 547 U.S. at 424. Although Petitioner asserted early in the litigation that he was off-duty during his prayers, the district court correctly concluded that "[a]ll of the evidence, including [Petitioner's] own testimony, confirms that his job responsibilities extended at least until the players were released after going to the locker room." *Kennedy v. Bremerton Sch. Dist.*, 443 F. Supp. 3d 1223, 1236 n.3 (W.D. Wash. 2020). As a result, there can be no question that Petitioner was both on-duty and carrying out his official responsibilities when he staged a sectarian prayer in the presence of students and the public at a school-sponsored sporting event. As even the Petitioner recognizes, "[p]ublic-school employees have no constitutional right to inject prayer or proselytization into their official duties." Pet. Br. at 2.

Nor is this a situation where an employer sought to "restrict employees' rights by creating excessively broad job descriptions," *Garcetti*, 547 U.S. at 424. Petitioner acknowledged in his deposition that "a coach's role extends far beyond merely teaching a sport." *Kennedy*, 443 F. Supp. 3d at 1228. And in any event, it is perfectly reasonable that the school would expect Petitioner to remain on-duty and interacting with players in an appropriate fashion until the field had cleared.

Indeed, it was very much *by virtue* of Petitioner's employment position and on-duty status that he was able to accomplish his preferred religious expression in the way that he did. Ordinary citizens were in no position to commandeer the school's property to stage sectarian prayers before crowds at major, school-sponsored events. When Petitioner undertook these activities using the status and access afforded by his position, there existed "no relevant analogue to speech by citizens who are not government employees." *Garcetti*, 547 U.S. at 424. Thus, under this Court's current controlling standards, Petitioner's speech is categorically without First Amendment protection because it was made pursuant to his official duties.

Second, even if one assumes that Petitioner expressed himself solely in his capacity as a citizen for purposes of *Garcetti*, his claim would nevertheless fail. That is because a public employee's speech as a citizen can only enjoy First Amendment protection if it is on a "matter of public concern." *Id.* at 418; see also *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 398 (2011) ("[O]n a matter of purely private concern, the employee's First Amendment interest must give way."). This Court has justified a categorial exclusion of protection for public-employee speech on matters of private concern on the ground that "government officials should enjoy wide latitude in managing their offices without intrusive oversight by the judiciary in the name of the First Amendment," even if the resulting discipline of the employee "may not be fair." *Connick v. Myers*, 461 U.S. 138, 146 (1983).

The religious expression at issue here plainly fails the "public concern" requirement. In fact, Petitioner has been steadfast throughout this litigation and in his brief before this Court that his expression

was strictly "personal" and "private." Pet. Br. at 8. "Although personal religious conviction—even the honestly held belief that one must announce such conviction to others—obviously is a matter of great concern to many members of the public, in this case it simply is not a matter of 'public concern' as that term of art has been used in the constitutional sense." *Daniels v. City of Arlington*, 246 F.3d 500, 504 (5th Cir. 2001); see also *Connick*, 461 U.S. at 147 ("[W]hen a public employee speaks . . . upon matters only of personal interest . . . , a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior."). Accordingly, Petitioner's personal and private expression of religious devotion was not protected from adverse action by his employer under current precedent. And it necessarily follows that, even if the school were wrong that the coach's prayers on the school football field created an impermissible impression that the school was endorsing religion, the school would still be well within its rights to decide that the activity was disruptive and should be stopped on school property.

B. The Court cannot rule in Petitioner's favor on his First Amendment claim while leaving extant precedent intact

As shown above, a ruling in Petitioner's favor would be incompatible with two categorical exclusions from First Amendment protection for speech by public employees under current precedent: one for "expressions made pursuant to official responsibilities," *Garcetti*, 547 U.S. at 424, and another for expression on matters of "purely private concern." *Borough of Duryea*, 564 U.S. at 398. If this Court nevertheless intends to hold Petitioner's speech protected, it should decline to do so in a way that undermines

broader principles of the sound administration of justice.

First, this Court should decline Petitioner's suggestion, implicit throughout his brief, that he be given a case-specific reprieve from the restrictions on First Amendment claims that apply to all other public employees. See generally Pet. Br. at 23–27 (misstating *Garcetti*'s pursuant-to-official-duties standard, failing to acknowledge the ramification under *Connick* of the private and personal nature of the speech at issue, and sidestepping entirely *Pickering*'s balancing of interests). The reasons for this Court to avoid departing from precedent for one particular litigant are obvious. "Courts, too, are bound by the First Amendment." *Citizens United v. FEC*, 558 U.S. 310, 326 (2010). And the judiciary—just like any other arm of government—risks committing a "constitutional wrong" when it operates in a manner that explicitly or implicitly "identifies certain preferred speakers" *Id.* at 340. A ruling that protects Petitioner's speech on terms not available to other public employees raises the specter of the government attempting to impose religious or ideological orthodoxy, which the Constitution does not permit. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992).

Moreover, any ruling that operates as a one-case-only relaxation of existing standards for public-employee First Amendment claims could undermine perceptions of the Court's integrity. "[I]t is not only important that the Government . . . in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in . . . Government is not to be eroded to a disastrous extent." *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973). As this Court has recognized, the "judiciary's authority

. . . depends in large measure on the public's willingness to respect and follow its decisions." *Williams-Yulee*, 575 U.S. at 445–46. In a case as ideologically freighted as this one, a ruling that does not faithfully apply previously-stated legal standards would give the public the harmful impression that the judiciary, when presented with a congenial set of facts, will simply "imbue authoritative texts with their own policy preferences." Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS xxviii (2012).

Second, this Court should reject the approach urged by *Amicus* America First Legal, which is to rule for Petitioner on Free Exercise grounds alone and without consideration of whether Petitioner's speech was pursuant to official duties or involved matters of public concern. See Br. of *Amicus* America First Legal at 4–5. *Amicus* America First Legal is blunt in its reasons for advocating this approach: it fears that a ruling in Petitioner's favor on Free Speech grounds would authorize public-employee speech on topics it would prefer to see governmentally suppressed. In particular, *Amicus* America First Legal expresses concern that a Free Speech ruling in Petitioner's favor would allow a coach who is "a homosexual activist" to "unfurl a rainbow flag" at "midfield after each game." *Id.* at 4.

Suffice it to say, this Court should reject this argument, which *Amicus* America First Legal advances for purposes that are openly disdainful of every principle the First Amendment embodies. In determining the standards for protecting the First Amendment rights of public employees, it would be a grave "constitutional wrong" for this Court to exalt the rights of "certain preferred speakers" while denigrating the rights of others. *Citizens United*, 558 U.S. at 340; see

also *R.A.V.*, 505 U.S. at 391. Likewise, this Court should not establish standards that draw lines among religious beliefs (which may include advocating for the rights of gay and transgender people) or that draw lines between deeply held religious convictions and secular ones. See *Welsh v. United States*, 398 U.S. 333, 356 (1970) (Harlan, J., concurring) (explaining that "such distinctions are not . . . compatible with the Establishment Clause of the First Amendment").

At any rate, this Court should reject the suggestion to apply different standards to public-employee claims under the Free Exercise Clause, because doing so would expose "public employers to intolerable legal uncertainty" and create "yet another speech-related puzzlement that government employers, judges, and juries must struggle to solve." *Waters v. Churchill*, 511 U.S. 661, 692 (1994) (Scalia, J., concurring). This Court has already recognized in *Borough of Duryea* that, in the context of public employment, the other protections of the First Amendment (in that case, the ones arising under the Petition Clause) are subjected to the same standards as Free Speech claims governed by *Garcetti*. See *Borough of Duryea*, 564 U.S. at 389. The rationale for that decision applies with equal force to any Free Exercise claim here. Just like petitions and non-religious speech, religious exercise "can interfere with the efficient and effective operation of government," affect "public confidence in the government and its employees," or undermine employee morale. *Id*. at 389–90. Likewise, "[a]rticulation of a separate test for the [Free Exercise Clause] would aggravate potential harm to the government's interests by compounding the costs of compliance with the Constitution." *Id*. at 393.

C. If this Court is intent on ruling for Petitioner on the First Amendment claim, it must modify existing precedent in a principled way that ensures the rights of all public employees

If this Court reverses the Ninth Circuit on the Establishment Clause issue, Petitioner's case may present an opportunity to revisit and modify its precedent restricting the First Amendment rights of public employees. In doing so, this Court should take account of the ways in which *Garcetti* and other precedents have become unworkable and inadequate. Ultimately, this Court should recognize a handful of changes to the prevailing standards that would be simple and easy to administer and would, most importantly, advance the public interest.

1. Modification of existing precedent would be appropriate because it has proven unworkable and inadequate for the protection of important First Amendment rights

This Court's decision in *Garcetti*—and its introduction of the "pursuant to official duties" standard—marked a sea change in the law that greatly restricted the First Amendment rights of public employees. Scholarly reaction to the decision has been overwhelmingly negative. See, e.g., Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing, and § 1983: A Critique of* Garcetti v. Ceballos, 42 U. RICH. L. REV. 561, 563 (2008) (describing *Garcetti* as "unsound as a matter of First Amendment policy"). These critiques have focused, not only on a significant diminution of personal autonomy for the millions of Americans who work in the public sector, but on the harm done to the public at large by stripping important

constitutional protections from employees who reveal information about governmental operations or expose governmental wrongdoing. See Erwin Chemerinksy, *The Rookie Year of the Roberts Court and a Look Ahead: Civil Rights*, 34 PEPP. L. REV. 535, 539 (2007) (*Garcetti* "is not only a loss of free speech rights for millions of government employees, but it is really a loss for the general public, who are much less likely to learn of government misconduct"); Cynthia Estlund, *Free Speech Rights that Work at Work: From the First Amendment to Due Process*, 54 UCLA L. REV. 1463, 1471 (2007) (criticizing *Garcetti* by asking, "why are public employees not acting as citizens when they speak out about government misconduct, waste, or dishonesty in the course of doing their jobs?"); Paul M. Secunda, Garcetti*'s Impact on the First Amendment Speech Rights of Federal Employees*, 7 FIRST AMEND. L. REV. 117, 117 (2008) (*Garcetti* makes "it nearly impossible for conscientious public servants to speak out in the best interests of the public without jeopardizing their careers.").

The harms predicted by these critiques have been borne out in the workplace and the courts. As one state supreme court has observed, *Garcetti*'s distinction between citizen and employee speech has not only proven "artificial and . . . difficult to apply," it also has the perverse effect of "reduc[ing] the likelihood that public employees would speak to their employers regarding corrupt practices, threats to the public safety[,] or other illegal or dangerous workplace practices." *Trusz v. UBS Realty Investors, LLC*, 123 A.3d 1212, 1224–25, 1230 (Conn. 2015). The same court also recognized that *Garcetti* is fundamentally incompatible with the promotion of "liberties designed to foster individuality," "vibrant public speech," and

"a minimum of governmental interference." *Id.* at 1229.

The effects of *Garcetti* have been especially baleful for *Amici*'s members and other educators in public schools. This Court's cases promise that, just like their students, teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969), and that they "must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). But, in the wake of *Garcetti*, the pages of the Federal Reporters tell a different story, in which courts have routinely upheld discipline or discharge for educators based on their classroom speech or whistleblowing on important public matters. See, e.g., *Evans-Marshall v. Bd. of Educ.,* 624 F.3d 332, 334–35 (6th Cir. 2010) (*Garcetti* doomed teacher's First Amendment claim when she was fired after a parent complained about the content of a book she assigned from the school's curriculum); *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 478 (7th Cir. 2007) (same with regard to teacher's claim challenging her dismissal for responding honestly to a student's question about whether she honked when she saw a "Honk for Peace" sign); *Mpoy v. Rhee*, 758 F.3d 285, 289 (D.C. Cir. 2014) (same with regard to a teacher who complained that his principal pressured him to falsify test scores); *Fox v. Traverse City Area Pub. Sch. Bd. of Educ.,* 605 F.3d 345, 348 (6th Cir. 2010) (same with regard to a special education teacher who complained to her supervisor that the size of her teaching caseload was above the legal limit). A 2016 analysis of federal circuit decisions concerning school employee

Free Speech claims found "a steady increase in voting tendencies" among federal appellate judges "favoring employers in K-12 free speech cases over the entire period of [the] analysis." Lewis M. Wasserman & John P. Connolly, *Unipolar Panel Effects and Ideological Commitment: An Analysis of U.S. Courts of Appeals Free Speech Decisions Involving K-12 Public Education Employees*, 31 ABA J. LAB. & EMP. L. 537, 541–42 (2016) (observing that, while 50% of votes favored employers before *Connick*, and just over 60% favored employers in the period between *Connick* and *Garcetti*, the post-*Garcetti* figure rose to over 80%).

Educators are particularly vulnerable at this very moment. State legislatures and local school boards across the country are considering and enacting vaguely-worded teaching restrictions that "target discussions of race, racism, gender, and American history." PEN America, *Educational Gag Orders: Legislative Restrictions on the Freedom to Read, Learn, and Teach* 4 (2022). The furor surrounding these issues has created deep concern among educators around the country about how to comply with new laws and how far educators must go in prophylactically censoring their own teaching and speech in order to avoid controversy that might endanger their jobs. See Laura Meckler & Hannah Natanson, *New Critical Race Theory Laws Have Teachers Scared, Confused and Self-Censoring*, WASH. POST (Feb. 22, 2022); Adrian Florido, *Teachers Say Laws Banning Critical Race Theory Are Putting a Chill on Their Lessons*, NPR (May 28, 2021). In some places, the creation of "hotlines" to report educators for teaching a proscribed topic have caused even greater concern. See Omar Abdel-Baqui & Jennifer Calfas, *New Virginia Hotline Lets Parents Report 'Divisive Teaching Practices'*, WALL ST. J. (Jan. 26, 2022) (noting that "educa-

tors in the state worry [the hotline] could be used to intimidate staff teaching historical fact"); Haley Yamada, *Teachers in New Hampshire Face New Legal Threats for Teaching So-Called 'Divisive Concepts' on Race: 'It's Psychological Warfare,'* ABC NEWS (Nov. 16, 2021).

Given the inadequate track record of this Court's current approach to protecting the First Amendment rights of public employees, the time has surely come—in this case or perhaps another in the near future—for a re-examination and revision of the Court's precedents in this area.

2. If this Court decides to re-examine its precedent in this area, it should establish clear rules protecting public-employee expression

There are three principal revisions to current precedent that would be consistent with the text and structure of the First Amendment and that would address the problems of unworkability and inadequate protection posed by existing case law.

First, this Court should abandon *Garcetti*'s categorical exclusion of speech "pursuant to official duties" from the protections of the First Amendment. As noted above, *Garcetti*'s pursuant-to-official-duties standard has, from its very inception, harmed employees and the public at large by chilling substantial amounts of speech on matters of urgent public concern—including corruption, abuse, and dangers to public safety. See *supra* at 23–25. Moreover, the imprecision of the pursuant-to-official-duties standard has sown confusion in the lower courts, leading to decisions that are impossible to square with any meaningful conception of the First Amendment. See, e.g., *Lane v. Franks*, 573 U.S. 228, 247 (2014) (reversing

the Eleventh Circuit's erroneous conclusion that a college employee's truthful sworn testimony, compelled by subpoena, was unprotected under *Garcetti* because it concerned information learned on the job); *Weintraub v. Bd. of Educ.*, 593 F.3d 196, 209 n.6 (2d Cir. 2010) (Calabresi, J., dissenting) (criticizing a panel majority's conclusion that an employee's union grievance is unprotected speech pursuant to official duties and noting the "distinct irony in the idea that unions, which so many employers seek to exclude from the workplace, are somehow transmuted into entities that promote the employer's mission" for purposes of *Garcetti*) (cleaned up).

Amici do not gainsay the reality that a citizen entering public employment "by necessity must accept certain limitations on his or her freedom" because "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions." *Garcetti*, 547 U.S. at 418. However, these concerns are better addressed—not with a categorical rule of exclusion for speech pursuant to official duties—but by incorporating the capacity in which an employee speaks as a factor in the traditional balancing of interests performed under *Pickering* to account for both the interest of the employee in speaking and the government employer's interest in "promoting the efficiency of the public services it performs through its employees." 391 U.S. at 569. Thus, to the extent an employee's speech is made pursuant to her duties as a government employee, she would have a correspondingly lighter interest to weigh against the government employer's interests—but her speech would not be categorically excluded from protection.

Second, this Court should abandon *Connick*'s categorical exclusion of speech on matters of "private"

concern from the protections of the First Amendment. The current categorical rule renders a vast swath of speech unprotected, including speech on the deepest and most private matters, even when they are discussed in an individual's personal capacity outside the workplace. Cf. *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2048 (2021) (extending First Amendment protection to a student's off-campus expression of personal frustration and observing that, while "[i]t might be tempting to dismiss [the student's speech as] as unworthy," it is "sometimes . . . necessary to protect the superfluous in order to in order to preserve the necessary"); see also Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1093 (2000) (explaining that "communication related to the real, everyday experience of ordinary people" is entitled to significant protection under the First Amendment because it "deeply affects the way we view the world, deal with others, evaluate their moral claims on us, and even vote; and its effect is probably greater than that of most of the paintings we see or the editorials we read"). Moreover, this Court's precedents attempting to separate matters of public and private concern have become increasingly confused and difficult to parse. Compare, e.g., *Connick*, 461 U.S. at 148 (holding that discussions among employees of ordinary workplace concerns do not involve matters of public concern), with *Janus v. AFSCME Council 31*, 138 S. Ct. 2448, 2475–77 (2018) (concluding that the presence of a union in such discussions converts them into matters of "overwhelmingly . . . substantial public concern").

To be sure, government employers have a strong interest in preserving "wide latitude in managing

their offices." *Connick*, 461 U.S. at 146. But the better approach, again, would be to allow the degree of public or private concern to be weighed in the balancing conducted under *Pickering*. Where an employee's speech is of relatively small importance to either the employee or the public, and the employer has a substantial reason for restricting the speech, balancing will favor the employers. See, e.g., *City of San Diego v. Roe*, 543 U.S. 77, 84 (2004) (per curiam) (rejecting a First Amendment claim where the employee's low-value speech—consisting of homemade pornography—was "detrimental to the mission and functions of the employer").

Finally, this Court should recognize that a significant factor in *Pickering* balancing is the extent to which an employer provided notice that the kind of speech at issue would be proscribed. The inclusion of such a factor would be particularly important for educators who carry out their duties in increasingly polarized and fractious environments. Such a requirement would ensure that local school boards can exercise their traditional authority to set the curriculum, while also recognizing that "[f]ew subjects lack controversy," and "[i]f teachers must fear retaliation for every utterance, they will fear teaching." *Ward v. Hickey*, 996 F.2d 448, 453 (1st Cir. 1993).

If this Court considers Petitioner's First Amendment claims, these refinements discussed above would be sensible improvements to the current state of the law. Implementing them would ensure the principled application of legal standards in this case and would provide millions of public employees with protections worthy of the First Amendment's principles.

CONCLUSION

For the reasons explained above, *Amici* submit that this Court should affirm the Ninth Circuit's judgment below on the Establishment Clause issue. If, however, this Court proceeds to Petitioner's Free Speech and Free Exercise claims, *Amici* submit that the Court should revisit its existing precedent in this area in accordance with the arguments made in this brief.

Respectfully submitted.

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