

No. 26-8

In the Supreme Court of the United States

KIMBERLY ANN POLK,
Petitioner,

v.

MONTGOMERY COUNTY PUBLIC SCHOOLS, ET AL.,
Respondents.

*ON PETITION FOR WRIT OF CERTIORARI TO THE
U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT*

**BRIEF FOR AMERICA FIRST LEGAL
FOUNDATION AS *AMICUS CURIAE* IN
SUPPORT OF PETITIONER**

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INTEREST OF *AMICUS CURIAE* AND SUMMARY OF THE ARGUMENT

America First Legal Foundation (AFL) is a nonprofit organization dedicated to promoting the rule of law in the United States and defending individual rights guaranteed by law. AFL has a substantial interest in this case because it regularly protects citizens' speech rights from overbearing government regulation.*

Especially relevant to this case, AFL represents Patrick Hogarty, who was a Dean of Students at a Colorado public school. In a breakout room of an equity training, he was asked, "How do you identify?" Hogarty answered that he "identifies as an American, that he loves his country, and that he believes it is the greatest country ever founded." The school had promised the training was confidential and that employees could speak freely without risking their jobs. Yet the district's Equity Director complained to the principal that Hogarty failed to acknowledge "what people of color go through" or admit that America is "systemically racist." The school invented a pretextual budget excuse and fired Hogarty.

That firing violated the First Amendment in two ways: the district sought to compel Hogarty to speak contrary to his conscience, and it punished him for his viewpoint. "[T]he proudest boast of our free speech jurisprudence is that we protect the freedom to

* Under Rule 37.2, the parties' counsel of record received timely notice of the intent to file this brief. Under Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

express ‘the thought that we hate.’” *Matal v. Tam*, 582 U.S. 218, 246 (2017) (plurality opinion). And the “government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment.” *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 902 (2018) (citation modified). “Compelling individuals to mouth support for views they find objectionable” “plainly violates the Constitution.” *Id.* at 892. And “[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning.” *Id.* at 893. Hogarty’s life and career have been upended because he refused to mouth a certain ideology through speech that was not part of his duties as Dean of Students.

Yet—committing many of the same errors as the Fourth Circuit here—the district court held that Hogarty had failed even to state a claim for compelled speech or viewpoint discrimination. The district court applied a test derived from *Pickering v. Board of Education of Township High School District 205*, which involves weighing a public employer’s interest in avoiding direct disruption of the workplace against an employee’s speech rights. 391 U.S. 563, 568 (1968). But in *Janus*, this Court warned that it had “never applied *Pickering*” to a compelled speech claim, where it would “fit[] much less well” than for an ordinary speech claim and thus “would certainly require adjustment”—“[i]f [it] applies at all.” 585 U.S. at 908. The district court, however, refused to adjust *Pickering*—as the Fourth Circuit did here—then applied it to subordinate Hogarty’s allegations to

evidence-free assumptions about the district's interests.

Hogarty's case is now pending before the Tenth Circuit. No. 25-1387 (argued May 12, 2026). That case underscores the need for this Court's review of the important free speech issues presented here. Too many lower courts are simply ignoring this Court's instruction that "[i]f *Pickering* applies at all to compelled speech," "it would certainly require adjustment in that context." *Janus*, 585 U.S. at 908. The required "adjustment" is "more rigorous" scrutiny than *Pickering*'s balancing test. *Id.* at 915. But rather than making this adjustment, lower courts are seizing on *Janus*'s observation that "if the speech in question is part of an employee's official duties, the employer may insist that the employee deliver any lawful message" (*id.* at 908) to simultaneously (1) pretend that *Janus* changes nothing about *Pickering* and (2) expand the scope of purported "duties" to encompass every message demanded by public employers—thereby making even the usual *Pickering* analysis wholly unprotective.

That is what the district court did in *Hogarty*, disregarding *Janus* and asserting that speech about personal identification in an internal training breakout session was somehow the employer's own. And that is what the Fourth Circuit did here, applying *Pickering* without adjustment and then expanding job duties to ideological demands of the employer. These moves would practically eliminate public employee speech rights.

As this Court has emphasized, "the purpose behind the Bill of Rights, and of the First Amendment in

particular[,] [is] to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society.” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995). Both Hogarty’s case and this one involve egregious forms of compelled speech by government employers. This Court should grant certiorari.

REASONS FOR GRANTING THE WRIT

I. Lower courts are disregarding this Court’s compelled speech instructions.

In *Janus* and other compelled expression decisions, this Court has repeatedly rejected applying *Pickering* balancing, explaining that if *Pickering* ever applies in such cases, it would “certainly require adjustment.” *Janus*, 585 U.S. at 908. Yet too many courts—including the district court in Hogarty’s case and the courts below here—are ignoring these decisions and applying *Pickering* without adjustment.

A. In *Janus*, this Court said that *Pickering* must, at minimum, be adjusted for compelled speech claims.

The First Amendment, applicable through the Fourteenth Amendment, prohibits government action “abridging the freedom of speech.” U.S. Const. amend. I. This Court has “held time and again that freedom of speech ‘includes both the right to speak freely and the right to refrain from speaking at all.’” *Janus*, 585 U.S. at 892 (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)). The government may not compel a citizen “to utter what is not in his mind.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943). “Compelling individuals to mouth support for views

they find objectionable violates that cardinal constitutional command” and “plainly violates the Constitution.” *Janus*, 585 U.S. at 892.

Though First Amendment values are undermined “[w]henever the [government] prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree,” “additional damage is done” “[w]hen speech is compelled.” *Id.* at 893. “In that situation, individuals are coerced into betraying their convictions,” and “[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning.” *Id.*

This right against compelled speech extends to public employees. “[C]itizens do not surrender their First Amendment rights by accepting public employment.” *Lane v. Franks*, 573 U.S. 228, 231 (2014). Under “decades of landmark precedent,” *Janus*, 585 U.S. at 902, the government “cannot condition public employment on a basis that infringes the employee’s constitutionally protected interest in freedom of expression.” *Connick v. Myers*, 461 U.S. 138, 142 (1983).

In *Pickering*, this Court “held that a school district violated the First Amendment by firing a teacher for writing a letter critical of the school administration.” *Janus*, 585 U.S. at 905. “Under *Pickering* and later cases in the same line,” employee speech may be “unprotected if it is part of what the employee is paid to do.” *Id.* (citing *Garcetti v. Ceballos*, 547 U.S. 410, 421–22 (2006)). This first step of *Pickering* is *Garcetti*’s official duties test.

Assuming the employee speech is outside official duties, it may still be unprotected “if it involved a matter of only private concern.” *Id.* This second step of *Pickering* is the matter of public concern test.

But “when a public employee speaks as a citizen on a matter of public concern, the employee’s speech is protected unless ‘the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees outweighs the interests of the employee, as a citizen, in commenting upon matters of public concern.’” *Id.* (citation modified). This third step of *Pickering* is the balancing test.

In *Janus*, this Court rejected applying *Pickering* to mandatory public employee union dues, emphasizing that it had “never applied *Pickering* in” a public employee compelled speech case. *Id.* at 908. And the Court treated these dues as akin to compelled speech. *See id.* at 893. Thus, the Court in *Janus* rejected applying *Pickering* to compelled expression.

Explaining this rejection, the Court said that “*Pickering* is based on the insight that the speech of a public-sector employee may interfere with the effective operation of a government office.” *Id.* at 908. “When a public employer does not simply restrict potentially disruptive speech but commands that its employees mouth a message on its own behalf, the calculus is very different.” *Id.* Other than when “the speech in question is part of an employee’s official duties,” “it is not easy to imagine a situation in which a public employer has a legitimate need to demand that its employees recite words with which they disagree.” *Id.*

In short, “the *Pickering* framework fits much less well where the government compels speech” than in other speech contexts. *Id.* The Court concluded that “[i]f *Pickering* applies at all to compelled speech—a question that we do not decide—it would certainly require adjustment in that context.” *Id.*

The Court in *Janus* went on to lay out the minimal adjustments necessary for compelled speech claims “[e]ven if we were to apply some form of *Pickering*.” *Id.* at 909. Before it did that, though, it rejected a broad reading of *Garcetti*’s official duties analysis. “When an employee engages in speech that is part of the employee’s job duties, the employee’s words are really the words of the employer.” *Id.* at 910. In other words, “[t]he employee is effectively the employer’s spokesperson.” *Id.*

The Court then turned to *Pickering*’s other two steps, matter of public concern and balancing. At a minimum, the Court explained, a “more rigorous form of *Pickering* analysis . . . would apply” to compelled speech. *Id.* at 915. That “more rigorous” analysis was (at least) an “exacting scrutiny standard.” *Id.* at 908, 915–16; *see id.* at 894–95 (reserving strict versus exacting scrutiny); *see also Harris v. Quinn*, 573 U.S. 616, 648 (2014) (“[I]t is arguable that the [exacting scrutiny] standard is too permissive.”).

This adjustment makes sense. *Pickering*’s premise is that the government has an interest in limiting employee speech that directly disrupts government operations, and that interest can suffice to negate an employee’s First Amendment rights. *See Connick*, 461 U.S. at 150–52. But for compelled speech claims, the threshold question is whether the government has any

interest in forcing employees to speak a message *outside their official job duties* with which they disagree. As the Court said in *Janus*, “it is not easy to imagine a situation in which a public employer has a legitimate need to demand that its employees recite words with which they disagree” outside their official duties. 585 U.S. at 908; *cf. Vaughn v. Lawrenceburg Power Sys.*, 269 F.3d 703, 718 (6th Cir. 2001) (“We hesitate to approve a rule that allows a government official to interrogate [employees] about their mental adherence to government policies.”).

Whether the government can show a sufficiently important interest in such a situation should depend on the same analysis that applies to compelled speech claims generally. “[C]ompelling individuals to speak a particular message” “alter[s] the content of their speech,” and content-based speech regulations “are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *Nat’l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 766 (2018) (citation modified).

The lesson from all this is that *Pickering* cannot be applied without adjustment to compelled speech claims. And *Janus* is not the only precedent that refutes such an application. The Court has rejected *Pickering* in compelled *association* challenges by public employees. And the First Amendment right against compelled association is “a corresponding right” of—and implicitly derived from—its protection of speech. *Americans for Prosperity Found. v. Bonta*, 594 U.S. 595, 606 (2021).

In *Rutan v. Republican Party of Illinois*, for instance, the Court invalidated party membership requirements for state jobs because the “First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees’ freedom to believe and associate, or to not believe and not associate.” 497 U.S. 62, 76 (1990). The Court applied strict scrutiny to this compelled “association and speech,” refusing the dissent’s invitation to apply *Pickering*’s lower standard. *Id.* at 70 n.4, 74; *id.* at 97–101 (Scalia, J., dissenting).

The Court emphasized that other political-patronage cases involving compelled expression likewise applied strict scrutiny rather than a more lenient balancing test. *See id.* at 74 (majority opinion) (citing *Elrod v. Burns*, 427 U.S. 347, 362–63 (1976) (plurality opinion); *id.* at 375 (Stewart, J., concurring in judgment); *Branti v. Finkel*, 445 U.S. 507, 515–16 (1980)).

Thus, this Court has repeatedly rejected *Pickering* in public employee compelled expression cases.

B. Lower courts are ignoring *Janus*.

Despite the clear instruction in *Janus* and the Court’s other precedents, too many lower courts are simply applying *Pickering* to compelled speech claims. Even worse, they are using a passing sentence in *Janus* to dilute the *Garcetti-Pickering* test even further—the opposite of *Janus*’s instruction.

Both the courts below and the district court in Hogarty’s case made the same moves. When the plaintiffs invoked *Janus*, the courts plucked this

sentence out of *Janus*: “[I]f the speech in question is part of an employee’s official duties, the employer may insist that the employee deliver any lawful message.” 585 U.S. at 908. Then they used that sentence to apply a supercharged *Garcetti* bar, reading the scope of “official job duties” broadly. The Fourth Circuit thus asserted that *Janus* “actually bolsters the Board’s argument.” Pet. 34a.

The district court likewise announced that “under *Janus* and *Garcetti*, the Board may ‘dictate’ or ‘insist’ that Polk, as part of her official duties as a substitute teacher, speak in accordance with the Guidelines.” Pet. 91a. The magistrate judge in Hogarty’s case relied on the district court’s decision here to transform *Janus* from a decision requiring more protection against public employee compelled speech to one giving the government added leeway to force its employees to speak against their consciences. Appellant’s App’x 38–39, *Hogarty v. Cherry Creek Sch. Dist.*, No. 25-1387, Doc. 13 (10th Cir. Dec. 18, 2025) (“*Hogarty* Appellant’s App’x”).

When confronted with compelled speech claims, many courts post-*Janus* have negated the speech claim (and *Janus*’s instruction) by invoking the official duties bar. See, e.g., *Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Trs.*, 680 F. Supp. 3d 1250, 1287 (D. Wyo. 2023) (“the Court applies the standard *Pickering* framework”); *Kluge v. Brownsburg Cmty. Sch. Corp.*, 432 F. Supp. 3d 823, 839 (S.D. Ind. 2020) (same, ignoring *Janus*’s instructions); *Ramirez v. Oakland Unified Sch. Dist.*, 2025 WL 1507092, at *8 (N.D. Cal. May 27, 2025) (“While the Supreme Court has suggested that compelled speech outside of an

employee’s official duties warrants heightened protection, the government may insist that the employee deliver any lawful message when the speech is part of the employee’s official duties.”).

After misreading *Janus* to ramp up the *Garcetti* bar, courts have ignored *Janus*’s instruction to adjust *Pickering*’s two steps—matter of public concern and balancing of interests. The district court in Hogarty’s case did not even cite *Janus*, stating that this Court has not “considered” what analysis “applies in the case of compelled speech involving public employees.” *Hogarty* Appellant’s App’x 52. So, invoking other courts applying “the *Garcetti/Pickering* framework” “to cases involving compelled employee speech,” the court concluded that route “makes sense.” *Id.* at 53 (citing, among others, the district court’s decision in this case); *see also Gwinnett v. Sw. Fla. Reg’l Plan. Council*, 407 F. Supp. 3d 1273, 1278–79 (M.D. Fla. 2019) (dismissing *Janus*’s compelled speech analysis as “dicta” and claiming that “[i]n the next breath, *Janus* applied the *Pickering* framework to the agency fees at issue all the same”).¹

Along similar lines, the Fourth Circuit and the district court here said that even if the speech was outside official duties and the court were to apply “the

¹ *Janus*’s statement that *Pickering* “would certainly require adjustment” if it could *ever* be applied to compelled speech claims (585 U.S. at 908) cannot reasonably be characterized as dicta. This Court’s decision to use heightened scrutiny rather than ordinary *Pickering* balancing for a claim that it considered equivalent to a compelled speech claim was a crucial part of its reasoning. *See id.* at 893, 908–09, 915–16. And “just as binding as [a] holding is the reasoning underlying it.” *Bucklew v. Precythe*, 587 U.S. 119, 136 (2019).

Pickering-Connick framework here, Polk would still lose for a simple reason—individual student pronoun preferences are simply not a matter of ‘public concern.’” Pet. 33a n.12; *see* Pet. 94a n.11. The courts did not appear to recognize that, if the speech was outside official duties, *Janus* requires *adjustment* of the *Pickering* framework, not its rote (and, as discussed below, incorrect) application. *See also* Pet. 30a–31a (articulating *Pickering*’s standard three steps).

Even opinions that are otherwise sound glide over the interplay between *Janus* and *Pickering*. *See, e.g.*, Pet. 46a (Wilkinson, J., dissenting) (explaining that “the exact formulation of the *Pickering* balancing test need not beleaguer us,” because the “preferred-pronoun policy fails the least-demanding version, let alone the most strenuous one”); *Meriwether v. Hartop*, 992 F.3d 492, 504–12 (6th Cir. 2021) (applying standard *Garcetti/Pickering* to a similar claim).

Whatever the merits of that minimalist approach to decisionmaking, it only encourages district courts to gloss over the issue, too.² More dangerously, it “leave[s] [public employees] in limbo” when it comes to their core right not to be compelled to speak against

² *Hiers v. Bd. of Regents of the Univ. of N. Tex. Sys.*, 2022 WL 748502, at *14 n.8 (E.D. Tex. Mar. 11, 2022) (noting “deep skepticism” “that the standard *Pickering* test applies to a public-employee compelled-speech claim,” but declining to decide because the plaintiff stated a claim under *Pickering*); *Gala v. City of New York*, 525 F. Supp. 3d 425, 430–31 (E.D.N.Y. 2021) (similar); *Geraghty v. Jackson Loc. Sch. Dist. Bd. of Educ.*, 2024 WL 3758499, at *13 (N.D. Ohio Aug. 12, 2024) (similar).

their consciences. *Trump v. Cook*, No. 25A312, 2026 WL 1855613, at *15 (U.S. June 29, 2026).

II. Ignoring *Janus* shortchanges public employee speech protections.

Allowing lower courts to continue disregarding *Janus* means that public employers can unlawfully compel public employees to speak against their own beliefs. Recent decisions, including the ones below and in *Hogarty*, show this danger. Too many courts combine an expansive view of official duties, a crabbed understanding of public concern, and a lopsided *Pickering* balancing test to deprive public employees of First Amendment rights—particularly the right against compelled expression.

A. Employers should not be able to transform ideological speech into official duties.

Under *Janus*, the initial question is whether “the speech in question is part of an employee’s official duties.” 585 U.S. at 908 (citing *Garcetti*, 547 U.S. at 421–22). But courts are letting public employers “adopt an institutional viewpoint on the issues of the day and then, when faced with a dissenting employee,” transform that viewpoint into a job duty to justify driving out dissenters. *MacRae v. Mattos*, 145 S. Ct. 2617, 2620 (2025) (Thomas, J., respecting the denial of certiorari). That trend shows the need for this Court to reiterate the limited bounds of the official duties exception to employee speech rights.

Start with this case, in which the Montgomery County Public Schools inserted its ideological preferences—that pronouns be based on gender identity and parents be kept in the dark about their

children’s gender identity—into its teacher guidelines. Pet. 4a–5a. Putting aside whether elements of those preferences are otherwise unlawful, *see Mirabelli v. Bonta*, 607 U.S. 492, 497 (2026), they are not longstanding duties of substitute schoolteachers. The Fourth Circuit believed it sufficient that the district’s guidelines “place official requirements on how teachers interact with students,” Pet. 31a, but that cannot be sufficient; otherwise, a public employer could compel any speech by adding it to an “official requirement” of employment.

The Fourth Circuit should have looked to *Janus*, where this Court explained that the test for official duties is whether “the employee’s words are really the words of the employer,” such that “[t]he employee is effectively the employer’s spokesperson.” 585 U.S. at 910. And when it comes to personal teacher interactions like pronoun usage, no one would reasonably see the teacher’s choice of pronouns as an official message on the school’s behalf. It is “[e]ssential” for speech within official duties “that individuals compelled to express messages . . . are readily understood to be play-acting,” “not to be expressing sincerely held beliefs.” Keith Whittington, *Diversity Statements, Academic Freedom, and the First Amendment*, 103 Neb. L. Rev. 643, 681 (2025). And again, it cannot be enough that the employer imposes an official requirement, for that circular justification would eliminate public employee speech rights.

Similar problems infected Hogarty’s case. There, the district court held that, in the context of a virtual training breakout session where individuals were told

to speak their own views freely and confidentially, Hogarty’s answer to the question of “how do you identify?”—and the school’s desired answer to that question—were somehow within his official duties. The district court came to that conclusion for much the same reason the courts here did—“participation in the Training and related equity pod breakout sessions was a requirement of Plaintiff’s position.” *Hogarty Appellant’s App’x* 57.

That misses the point of the internal training, which was for employees to provide their own views—not to serve as “the employer’s spokesperson.” *Janus*, 585 U.S. at 910. The speech had nothing to do with Hogarty’s school administration duties. Though district policy required attendance at the “Courageous Conversations” training, Hogarty’s speech within that training was not an “[o]fficial communication[]” with “official consequences.” *Garcetti*, 547 U.S. at 422. The training made clear that employees responding to the prompts “w[ere] free to engage in all manner of private speech.” *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 530 (2022). No part of Hogarty’s job duties involved reciting in a virtual training room how the school believes he should “identify.” “He did not speak pursuant to government policy,” “[h]e was not seeking to convey a government-created message,” and “[h]e was not instructing [students] . . . or engaged in any other speech the [d]istrict paid him to produce.” *Id.* at 529–30.

Under the district court’s logic—and the Fourth Circuit’s similar logic here—any speech that occurred at a workplace would be unprotected, simply because an employee must go to the workplace (and follow

whatever “requirements” the employer imposes). But as this Court has said, “[m]any citizens do much of their talking inside their respective workplaces, and it would not serve the goal of treating public employees like ‘any member of the general public’ to hold that all speech within the office is automatically exposed to restriction.” *Garcetti*, 547 U.S. at 420–21 (citation omitted); see *Kennedy*, 597 U.S. at 530 (that speech “took place ‘within the office’ environment” is not “dispositive”).

What’s more, whether an employer *likes* an employee’s speech is not the test of whether speech is within the employee’s official job duties. As the Court has emphasized, “[v]igilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees’ speech.” *Rankin v. McPherson*, 483 U.S. 378, 384 (1987). The *typical* case under *Pickering* involves an employer taking adverse action against an employee because of “a difference of opinion” about the employee’s speech. *Pickering*, 391 U.S. at 571. But if that speech is outside official job duties, it is presumptively protected.

That is true no matter what the employer thinks about the speech, or even if the employer demands a different message—if that message is outside the employee’s official duties. Under *Janus*, “if the speech in question is part of an employee’s official duties, the employer may insist that the employee deliver any lawful message.” 585 U.S. at 908. That does not imply the converse, that any insistence on a lawful message becomes an official job duty. *Cf. Dalton v. Ashcroft*, 257

F.3d 200, 207 (2d Cir. 2001) (noting the “logical fallacy” of the converse). “To proceed otherwise would be to allow public employers to use ‘excessively broad job descriptions’”—including whether they “like” certain speech or desire other speech—“to subvert the Constitution’s protections” and relabel all employee speech as part of the employee’s official job duties. *Kennedy*, 597 U.S. at 529. Educators would “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).

But the entire line of employee speech cases rejects that proposition. Schools may not “treat[] everything teachers . . . say in the workplace as government speech subject to government control.” *Kennedy*, 597 U.S. at 530–31. Courts have held that educators cannot be forced to reveal organization memberships, *Shelton v. Tucker*, 364 U.S. 479, 488–90 (1960), say the Pledge of Allegiance, *Russo v. Cent. Sch. Dist. No. 1*, 469 F.2d 623, 633–34 (2d Cir. 1972), or be limited in their religious expression outside official job duties, *Kennedy*, 597 U.S. at 531.

Indeed, in *Kennedy*, this Court held that a football coach’s prayers were outside his official duties even though the school district had issued him repeated formal directives about when and where to conduct any prayers while on the job. *See id.* at 515–19, 529–31. The critical point was that the coach “was not seeking to convey a government-created message.” *Id.* at 529.

In sum, schools cannot transmogrify their speech demands into official job duties without nullifying the

First Amendment. “[T]he point of all speech protection is to shield just those choices of content that in someone’s eyes are misguided, or even hurtful.” *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (citation modified). But the Fourth Circuit took a different approach: barring individuals with Petitioner’s views from public employment. According to that court, “no one forced Polk to become a substitute teacher in Montgomery County,” and if she “had wished to express her ‘more socially conservative positions,’ there were other avenues available.” Pet. 37a (citation modified). Letting public employers impose ideological preferences, as Montgomery County has, would eviscerate public employee speech protections—forcing a choice between serving the public and keeping the right against compelled speech. When nearly 15% of jobs are governmental,³ the threat to the First Amendment is substantial.

B. Artificially narrowing public concerns also threatens employee speech.

As noted, courts that disregard *Janus* often compound the problem by minimizing what speech counts as on a matter of public concern. It makes little sense to apply this element of *Pickering* to compelled speech, for if employees are speaking outside their official duties, “it is not easy to imagine a situation in which a public employer has a legitimate need to demand that its employees recite words with which they disagree.” *Janus*, 585 U.S. at 908. If this element

³ Bureau of Lab. Stat., U.S. Dep’t of Lab., *The Employment Situation—June 2026*, tbl. B-1 (July 2, 2026), <https://perma.cc/3EM7-4XPG>.

applies at all, it certainly should not be read more narrowly than in ordinary speech cases.

Speech on a matter of public concern is any speech “fairly considered as relating to any matter of political, social, or other concern to the community.” *Connick*, 461 U.S. at 146. This Court’s precedents interpret public concern broadly, for instance extending to “a memorandum relating to teacher dress and appearance.” *Id.*

Yet below, the courts decreed that “student pronoun preferences are simply not a matter of ‘public concern.’” Pet. 33a n.12; *see* Pet. 95a n.11 (“using a child’s preferred pronouns in the classroom . . . is very much a matter of private concern”). The magistrate judge in Hogarty’s case likewise concluded that speech about privilege and systemic racism was not of public concern—though the district court rightly rejected that finding, considering it “a stretch to hold that matters of race and systemic oppression in the United States are not of political, social, or other concern to the community, particularly within the current political climate.” *Hogarty* Appellant’s App’x 57–58.

That narrow reading of public concern cannot be right. Especially in “the current political climate,” *id.*, it is obvious that pronoun usage implicates a matter of public concern. One need only observe the ideological signaling that routinely accompanies email signatures under the guise of pronouns. *See* Pet. 45a (Wilkinson, J., dissenting) (“If this issue is not one of public concern, I cannot think of an issue that would be.”); *see also Janus*, 585 U.S. at 913–14 (recognizing “gender identity” as “undoubtedly [a] matter[] of

profound value and concern to the public” (citation modified)).

Beyond that, even the defendants in these cases do not actually believe that the relevant speech is unrelated to any public concern. The Montgomery County Public Schools argued below that the speech compelled was tied to “student safety” and “discrimination against students”—both obviously matters of public concern. 4th Cir. Br. for Appellees 50. The school district in Hogarty’s case likewise argued that the statements (or lack thereof) implicated matters of public concern—nondiscrimination, equity, and racism.

Especially when the defendants themselves contend that the speech has an inherent connection with significant public issues, they should not be able to hide behind *Pickering*’s public concern element to excuse speech compulsion.

C. The right against compelled speech should not be easily balanced away.

Last, though the courts below did not reach *Pickering* balancing, other courts have continued to (mis)apply that balancing to compelled speech claims. *Pickering* balancing generally weighs the employee’s speech interest against the employer’s interest in avoiding disruption. “[P]ertinent considerations” on the employer’s side are “whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance

of the speaker’s duties or interferes with the regular operation of the enterprise.” *Rankin*, 483 U.S. at 388.

That balancing should not apply at all in compelled speech cases, as *Janus* held. “When a public employer does not simply restrict potentially disruptive speech but commands that its employees mouth a message” *outside* of official job duties on a *public* issue, the thumb on the scale should be against the government—not in its favor. *Janus*, 585 U.S. at 908. But even in “*Pickering* cases, the particular facts would be very important,” *id.* at 915 n.23, and many Courts of Appeals accordingly hold that “application of the *Pickering* balancing test will be possible only after the parties have had an opportunity to conduct some discovery.” *Brown v. City of Tulsa*, 124 F.4th 1251, 1270 (10th Cir. 2025); *see also, e.g., Gustafson v. Jones*, 117 F.3d 1015, 1019 (7th Cir. 1997).

Yet in Hogarty’s case, the district court conducted *Pickering* balancing to reject Hogarty’s claim at the motion-to-dismiss stage—even though there was no cognizable evidence of disruption from his answer, given in a purportedly confidential internal training breakout session. The district court simply assumed that Hogarty’s statements “could bear negatively on his ability to do his job effectively.” *Hogarty* Appellant’s App’x 60. According to the court—which cited nothing for these conclusions—the school district “has a role in preparing students to create a better tomorrow and certainly has a legitimate interest in promoting equity,” and “part of this is acknowledging ‘what people of color go through’ and recognizing the systemic racism in the United States.” *Id.* “If [Hogarty] is unwilling to even acknowledge these

important issues, then the District would surely be justified in having doubts about [his] ability to effectively do his job.” *Id.*

Putting aside that the district court relied on no cognizable evidence and identified no disruption, the court did not explain how a person’s identification as an American precludes them from “teach[ing] students how to be understanding, accepting, and caring citizens.” *Id.* One might consider the district’s action—pretextually firing a person because it disliked his ideas, shared by a substantial portion of Americans—to fatally undermine any interest it might claim in modeling “understanding” and “accepting” behavior. “[T]he school’s actions mandate orthodoxy, not anti-discrimination, and ignore the fact that tolerance is a two-way street.” *Meriwether*, 992 F.3d at 511 (citation modified).

The great danger of the court’s analysis is that it could be used to justify speech compulsion against any public employee. Fail to toe an ideological line, and the employer can assume you are, in essence, a bad person who cannot be trusted to interact with others. Because of the danger this mode of analysis poses to speech rights—and the disregard of *Janus*’s instruction to treat compelled speech with greater care—this Court’s review is needed.

CONCLUSION

For these reasons, this Court should grant certiorari.

Respectfully submitted,

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