

No. 26-8

**In The
Supreme Court of the United States**

◆

KIMBERLY ANN POLK,

Petitioner,

v.

MONTGOMERY COUNTY PUBLIC SCHOOLS;
MONTGOMERY COUNTY BOARD OF EDUCATION;
SHEBRA L. EVANS, MONIQUE FELDER, LYNNE HARRIS,
GRACE RIVERA-OVEN, KARLA SILVESTRE, REBECCA
SMONDROWSKI, BRENDA WOLFF, and JULIE YANG,
individually & in their official capacities as Members
of the Montgomery County Board of Education,
Respondents.

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

◆

**BRIEF OF *AMICI CURIAE*
ELIZABETH MIRABELLI AND LORI ANN WEST
IN SUPPORT OF PETITIONER**

◆

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QUESTION PRESENTED

Over the past decade, a debate has raged across the country regarding the nature of gender and its supposed malleability. That debate has led to dozens and dozens of First Amendment lawsuits from people of goodwill objecting to the new paradigm of “gender diversity” and refusing to participate in another’s gender transition by using preferred pronouns and an opposite-sex name. Before too long, young students also sought to transition genders, creating a new lens through which to view objections to gender theory: the Fourteenth Amendment. These two lenses, however, are but flip-sides of the same coin, safeguarding the right to decide for oneself, and one’s family, “what is right and just, decent, and respectable, and manly and noble in life.” *Soc’y of Sisters v. Pierce*, 296 F. 928, 936 (D. Or. 1924), *aff’d*, 268 U.S. 510 (1925). Most recently, this Court held that the government cannot condition participation in the public school system on waiver of the Fourteenth Amendment version of this. *Mirabelli v. Bonta*, 607 U.S. 492 (2026). Here, the questions presented are:

1. When public schools try to force teachers, over their religious objections, to use pronouns inconsistent with a student’s biological sex and to hide from parents information about their child’s gender expression at school, does *Smith* apply and foreclose heightened scrutiny under the Free Exercise Clause?
2. Do public schools violate the Free Speech Clause when they compel objecting teachers to adhere to such a school policy?

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INTEREST OF *AMICI* CURIAE¹

Elizabeth Mirabelli and **Lori Ann West** are California public school teachers and plaintiffs in the action *Mirabelli, et al. v. Olson, et al.*, No. 3:23-cv-768 (S.D. Cal. Apr. 27, 2023). In February 2022, they were informed of California’s new policy requiring teachers to facilitate a child’s gender transition without parental involvement or notice. They initially sought a religious accommodation under Title VII, which was denied. They then filed a 42 U.S.C. § 1983 action for violation of their Free Exercise and Free Speech rights and—alongside some parent co-plaintiffs—obtained a permanent injunction against its enforcement. *Mirabelli v. Olson*, 820 F. Supp. 3d 1123 (S.D. Cal. 2025). That permanent injunction was stayed by the Ninth Circuit, and re-instated in part by this Court—but only as to the parent co-plaintiffs. *Mirabelli v. Bonta*, 607 U.S. 492 (2026).

Mrs. Mirabelli and Mrs. West now wish to support Mrs. Polk who objected to her school district’s similar attempt to coerce her to both violate parental rights and her conscience. Teachers—those most likely to face swift retribution for standing up—must stand together.

¹ *Amici* provided 10 days advance notice of this brief to all parties. Per Rule 37.6, counsel affirms that no counsel for any party authored any portion of this brief and that nobody other than *amici* or counsel made a monetary contribution to fund this brief.

SUMMARY OF ARGUMENT

In *Mirabelli v. Bonta*, this Court explained that policies which require teachers to facilitate a child's gender transition during school hours without parental knowledge or consent likely violate parents' rights to direct the upbringing of their children. 607 U.S. 492, 497 (2026). In so doing, the Court reaffirmed, but only implicitly, its longstanding holding that neither "students or teachers 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).

Further explicit reaffirmation of this principle is needed in light of continued confusion among the lower courts. See *Tatel v. Mt. Lebanon Sch. Dist.*, 637 F. Supp. 3d 295, 316-18 (W.D. Pa. 2022) (discussing split at length). Which rights do parents and teachers necessarily waive as a condition of participation in public school, and which rights are preserved? *Amici* posit that the analysis is the same for both parents and teachers. Parents only "relinquish[] the measure of authority that the schools must be able to exercise in order to carry out their state-mandated educational mission." *Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180, 198-200 (2021) (Alito, J., concurring). Unless explicitly done (e.g., via a sports waiver), "[i]t is unreasonable to infer that parents who send a child to a public school thereby authorize the school to take away . . . critical right[s]." *Id.* at 206 (Alito, J., concurring).

Educating a child away from his or her parents' religious beliefs is outside this "state-mandated educational mission." See *Mahmoud v. Taylor*, 606 U.S. 522, 564 (2025). So is facilitating a child's gender transition, regardless of whether the parental objection is religious or secular. *Mirabelli*, 607 U.S. at 496. Neither is necessary to the school's true educational mission of providing "instruct[ion]," *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 529 (2022), or "impart[ing] particular knowledge or skills to student[s]." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988). And thus, parents do not waive their right to their religion or their personally held views on gender when they send their children to school.

For the same reason, teachers do not waive their rights to their faith or their conscience when they agree to serve as a public school teacher. They waive only so much of their rights as needed to accomplish the state-mandated educational mission. *Kennedy*, 597 U.S. at 530-31 (citing *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006)). And that mission itself must be defined within the limits of the First Amendment: The public school's role is primarily teaching "future generations [to] understand the workings in practice of the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it.'" *Mahanoy*, 594 U.S. at 190.

Here, the Montgomery County Board of Education views its pronoun and gender secrecy policies as uncontroversial anti-discrimination provisions. See App. 27a n.10. Many school districts across the country believe the same. See Pet. 5. But this Court

has long protected the rights of dissenting voices. One hundred years ago, the prevailing sentiment in response to objections to saluting the American flag was outright hostility. As stated by a California court, one such objection raised by a 13-year-old girl was “indeed repugnant to every idea and every consideration of the loyalty and love for our government and political institutions so essential to the maintenance thereof.” *Hardwick v. Bd. of Sch. Trustees of Fruitridge Sch. Dist.*, 205 P. 49, 55 (Cal. Ct. App. 1921).

In *Barnette*, this Court corrected that, see *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 625 (1943), and since then courts have applied its reasoning beyond students to government employees. See, e.g., *Wieman v. Updegraff*, 344 U.S. 183, 190-91 (1952) (government may not compel prospective employees to swear loyalty oaths as a condition of employment); *Shelton v. Tucker*, 364 U.S. 479, 489-90 (1960) (government may not compel teachers to disclose all of their recent associations in order to be hired at a public school); *Russo v. Cent. Sch. Dist. No. 1*, 469 F.2d 623, 633-34 (2d Cir. 1972) (state violated First Amendment for firing teacher who refused to salute the flag). The same result should occur here. The State cannot force parents to participate in a gender ideology repugnant to their faith or their conscience, *Mirabelli*, 607 U.S. at 496, and neither should it be able to force teachers to do so.



ARGUMENT

This Court has explained that, “[i]f a public employee speaks ‘pursuant to [his or her] official duties,’ . . . the Free Speech Clause generally will not shield the individual from an employer’s control and discipline because that kind of speech is—for constitutional purposes at least—the government’s own speech.” *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 527 (2022) (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006)). On the other hand, “when an employee ‘speaks as a citizen addressing a matter of public concern,’ . . . the First Amendment may be implicated and courts should proceed to a second step,” involving “a delicate balancing of the competing interests surrounding the speech and its consequences.” *Id.* at 528 (quoting *Garcetti*, 547 U.S. at 423). Despite this Court’s admonition that what *can be* “the government’s own speech” has limitations, see *id.* at 530-31, the Ninth Circuit has recently reaffirmed that all speech in the “presence of students” is government speech. *Theis v. InterMountain Educ. Serv. Dist.*, -- F.4th --, No. 25-5641, 2026 WL 2093895, at *3 (9th Cir. July 21, 2026).

Below, *amici* first provide background on the flip-sides of the same coin—Free Speech rights and Parental Rights—to show how the same interests are protected by both. *Amici* then apply this same reasoning to the traditional *Pickering-Garcetti* framework as reaffirmed in *Kennedy*.

I. Background Legal Principles: Both the First and Fourteenth Amendments Protect Liberty of Conscience.

A. Background on the Right to Freedom of Speech and Thought

“The Free Speech Clause of the First Amendment . . . protect[s] the ‘freedom to think as you will and to speak as you think.’” *303 Creative LLC v. Elenis*, 600 U.S. 570, 584 (2023) (quoting *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660-61 (2000)). Freedom of speech is both an end and a means. “An end because the freedom to think and speak is among our inalienable human rights. A means because the freedom of thought and speech is indispensable to the discovery and spread of political truth.” *Id.* at 584-85 (cleaned up). Thus, “speech concerning public affairs is more than self-expression; it is the essence of self-government.” *Snyder v. Phelps*, 562 U.S. 443, 452 (2011).

As stated by General George Washington, “if Men are to be precluded from offering their sentiments on a matter, which may involve the most serious and alarming consequences, that can invite the consideration of Mankind; reason is of no use to us—the freedom of Speech may be taken away—and, dumb & silent we may be led, like sheep, to the Slaughter.” Letter from George Washington to Officers of the Army (Mar. 15, 1783). Or as stated by Benjamin Franklin, “Freedom of speech is a principal pillar of a free government; when this support is taken away, the constitution of a free society is dissolved, and tyranny is erected on its ruins.” Benjamin

Franklin, *On Freedom of Speech and the Press*, Pa. Gazette (Nov. 17, 1737).

In light of this strong protection for freedom of thought, the government cannot “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). “Indeed, affirmative sponsorship of particular ethical, religious, or political beliefs is something we expect the State not to attempt in a society constitutionally committed to the ideal of individual liberty and freedom of choice.” *Bellotti v. Baird*, 443 U.S. 622, 638 (1979) (plurality).

The government’s role is primarily teaching “future generations [to] understand the workings in practice of the well-known aphorism, ‘I disapprove of what you say, but I will defend to the death your right to say it.’” *Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180, 190 (2021). Thus, a governmental “system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts.” *Vlaming v. W. Point Sch. Bd.*, 895 S.E.2d 705, 738 (Va. 2023) (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)). If certain speech “can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public,” it cannot be restricted by the government. *Snyder*, 562 U.S. at 453 (cleaned up); accord *Janus v. AFSCME, Council 31*, 585 U.S. 878, 913-14 (2018).

B. Background on the Right to Have a Family

Under the Fourteenth Amendment, “[n]o State shall . . . deprive any person of life, *liberty*, or property, without due process of law.” U.S. Const. amend. XIV, § 1 (emphasis added). “[T]he Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned.” *Griswold v. Connecticut*, 381 U.S. 479, 488 (1965) (Goldberg, J., concurring). Indeed, “the liberty interest in family privacy” is “older than the Bill of Rights” and “has its source . . . not in state law, but in intrinsic human rights.” *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 845 (1977) (cleaned up).

Under this protection of liberty, every American has the right “to marry, establish a home and bring up children.” *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). “Marriage and procreation are fundamental to the very existence and survival of the race” and thus “one of the basic civil rights of man.” *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). Because this constellation of rights complements each other, “[t]he Court has recognized these connections by describing the varied rights as a unified whole: ‘[T]he right to ‘marry, establish a home and bring up children’ is a central part of the liberty protected by the Due Process Clause.’” *Obergefell v. Hodges*, 576 U.S. 644, 668 (2015) (quoting *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978)) (original alterations). And although “[t]he relationship between parent and child is one of “[t]he three great relations in private life,” 1 William

Blackstone, *Commentaries on the Laws of England* 422 (1765), “[t]he relation of parent and child is the gravest of all.” John Alleyne, *The Legal Degrees of Marriage Stated and Considered* 8 (London, 1774).²

Strong protection of these rights is important because “evil or reckless hands” may wish to restrict them for the purpose of “caus[ing] . . . types which are inimical to the dominant group to wither and disappear.” *Skinner*, 316 U.S. at 541. The “fundamental theory of liberty” thus “excludes any general power of the state to standardize its children,” *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925), or to standardize “family patterns,” *Moore v. E. Cleveland*, 431 U.S. 494, 506 (1977) (plurality), or to standardize family “communication” dynamics. *Hodgson v. Minnesota*, 497 U.S. 417, 452 (1990) (plurality).

This Court has described “the interest of parents in the care, custody, and control of their children” as “the oldest of the fundamental liberty interests recognized by this Court.” *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality); see *id.* at 80 (Thomas, J., concurring). Indeed, “injuries in domestic relations are some of the greatest which man can possibly suffer,” for “what reparation can be made to him whose . . . child is taken from him?” Robert Chambers, *A Course*

² In its most recent major discussion of these rights, the Court reaffirmed them, stating that “our conclusion . . . does not undermine them in any way” since they did not concern “the critical moral question posed by” “what the law at issue in this case regards as the life of an ‘unborn human being.’” *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 256-57 (2022).

of *Lectures on the English Law* 18-19 (1767-1773, Thomas M. Curley ed., 1986).

C. Background on the Right to Raise Your Children

A necessary corollary of the right to *have* a family is that parents have “the right of control” over their children. *Meyer*, 262 U.S. at 400. “[C]onstitutional interpretation has consistently recognized that the parents’ claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.” *Ginsberg v. New York*, 390 U.S. 629, 639 (1968). Absent such control, parents would effectively lose their “natural and inherent right to the nurture, control, and tutorship of their offspring, that they may be brought up according to the parents’ conception of what is right and just, decent, and respectable, and manly and noble in life.” *Soc’y of Sisters v. Pierce*, 296 F. 928, 936 (D. Or. 1924), *aff’d*, 268 U.S. 510 (1925).

The tradition of parental authority extends back to the founding, and before. See *Tremain’s Case*, 1 Str. 168 (Ch. 1719) (“Being an infant, he went to Oxford, contrary to the orders of his guardian, who would have him go to Cambridge. And the court sent a messenger, to carry him from Oxford to Cambridge.”); accord *Hall v. Hall*, 3 Atk. 721 (Ch. 1749). As explained by John Locke,³ “Children, I confess, are not born in this full

³ The Court has often recognized that Locke’s writings inspired America’s founding principles. This applies especially in the context of parental rights: “In general, the most popular books in the Colonies on the eve of the American Revolution were not

state of equality, though they are born to it. Their parents have a sort of rule and jurisdiction over them when they come into the world, and for some time after.” John Locke, *Concerning Civil Government, Second Essay*, § 55 (1689); see also 1 Blackstone, *supra*, at 450-51.

This right of “parental control over children” flows from concomitant responsibilities: “those who nurture [the child] and direct his destiny have the right, *coupled with the high duty*, to recognize and prepare him for additional obligations.” *Bellotti*, 443 U.S. at 637 (plurality) (quoting *Pierce*, 268 U.S. at 535; emphasis added). “The duty to prepare the child for ‘additional obligations,’ referred to by the Court, must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship.” *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972). Control of “the child reside[s] first in the parents, whose *primary function and freedom* include preparation for obligations the state can *neither supply*,” in light of the First Amendment, “nor hinder.” *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (emphasis added).

Thus, this Court has explained, parental control is not a limit on the child’s liberty—but a *fulfillment of it*:

[T]he tradition of parental authority is not inconsistent with our tradition of individual

political discourses but ones concerned with child rearing.” *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 825 (2011) (Thomas, J., dissenting);

liberty [for a child]; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding.

Bellotti, 443 U.S. at 638-39 (plurality); accord Elizabeth Bristol, *The Laws Respecting Women* 426 (London, 1777). Indeed, “[c]hildren often misrepresent past and future Facts; their Memories are fallacious; their Discourse incoherent; their Affections and Actions disproportionate to the Value of the Things desired and pursued; and the connecting Consciousness is in them as yet imperfect.” David Hartley, *Observations on Man, his Frame, his Duty, and his Expectations* 391 (London, 1749).

II. The First Amendment Precludes Forcing Government Employees to Use Preferred Pronouns.

As stated, in balancing government-employer interests and citizen-employee interests under the First Amendment, this Court has explained that employees cannot be forced to engage in speech (1) about an issue of legitimate public concern, (2) that is unnecessary for their actual job duties (i.e., public v. private speech), (3) unless doing so is sufficiently necessary for the effective operation of the government as to outweigh First Amendment rights (i.e., *Pickering* balancing). *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 527-28 (2022).

Here, several courts have held that “the Constitution does not require government officials to use ‘preferred gender pronouns’ ‘in part because the speaker has a First Amendment right’ to even ‘the misuse of a pronoun.’” *Arkansas v. U.S. Dep’t of Educ.*, 742 F. Supp. 3d 919, 945 (E.D. Mo. 2024) (teachers and professors); *Vlaming v. W. Point Sch. Bd.*, 895 S.E.2d 705, 737-43 (Va. 2023) (public school teachers); *Geraghty v. Jackson Loc. Sch. Dist. Bd. of Educ.*, No. 5:22-cv-2237, 2024 WL 3758499, at *11 (N.D. Ohio Aug. 12, 2024) (public school teachers); *Meriwether v. Hartop*, 992 F.3d 492, 508-12 (6th Cir. 2021) (college professors). As explained below, these results were correct.

A. Gender Identity is a Matter of Public Concern

“[T]he boundaries of what constitutes speech on matters of public concern are not well defined.” *Snyder v. Phelps*, 562 U.S. 443, 452 (2011). The analysis requires an examination of “the content, form, and context of a given statement,” but is a matter of “law, not fact.” *Connick v. Myers*, 461 U.S. 138, 147-48 & n.7 (1983). However, “[s]peech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community.” *Snyder*, 562 U.S. at 453 (cleaned up). “[C]ontroversial subjects such as climate change, the Confederacy, sexual orientation and gender identity, evolution, and minority religions” are matters of public concern. *Janus v. AFSCME, Council 31*, 585 U.S. 878, 913-14 (2018) (footnotes omitted).

Further, the standard is the same as that “used to determine whether a common-law action for invasion of privacy is present.” *San Diego v. Roe*, 543 U.S. 77, 83 (2004) (per curiam). In this analysis, “content is king,” *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 965 & n.9 (9th Cir. 2011) (citing *Rankin v. McPherson*, 483 U.S. 378, 386-87 (1987); *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 414-16 (1979)), and the government may not “declare by ipse dixit that controversial ideas are now uncontroversial.” *Vlaming*, 895 S.E.2d at 740 (citing *Barnette*, 319 U.S. at 642). Thus, when the “content” “plainly relates to broad issues of interest to society at large,” the “context” “cannot by itself transform” the speech into “a matter of private rather than public concern.” *Snyder*, 562 U.S. at 454; accord *San Diego*, 543 U.S. at 84 (“certain private remarks” necessarily “touch on matters of public concern”).

Here, the specific speech at issue is speech to and from school districts (via teachers) to parents regarding their child’s gender identity. The general topic to which this speech “relates” is “gender identity”—a matter of public concern. See, e.g., *Janus*, 585 U.S. at 913-14; *Chiles v. Salazar*, 146 S. Ct. 1010, 1029 (2026); *Riley’s Am. Heritage Farms v. Elsassner*, 32 F.4th 707, 723 (9th Cir. 2022). Looking at the specific content of the speech (i.e., “your daughter” v. “your son” “is struggling to complete her English assignments on time”), is too granular. Rather, as explained by the Virginia Supreme Court, the focus must be on whether, in practical reality, the requirement is “‘an instrument for fostering public adherence to an ideological point of view [the individual] finds unacceptable,’ [citation] and to

compel him to ‘speak in ways that align with the government’s views in a manner that defies his conscience about a matter of major significance.’” *Vlaming*, 895 S.E.2d at 739-40 (quoting first *Wooley v. Maynard*, 430 U.S. 705, 715 (1977), and then *303 Creative LLC v. Elenis*, 600 U.S. 570, 602-03 (2023)). In undertaking that analysis, the Court cannot “ignore[] what anyone . . . can readily see”—“the messages that the [government] plainly intend[s] to convey.” *Mahmoud v. Taylor*, 606 U.S. 522, 556 (2025).

Because “gender identity” is perhaps the preeminent “controversial” issue of the day, see *Janus*, 585 U.S. at 913-14, the Court should grant certiorari to clarify that speech using (or refusing to use) preferred pronouns addresses a matter of public concern.

B. Parental Exclusion Policies Are Unnecessary for Education

The second *Kennedy* question is whether the speech is personal speech or government speech. As understood by the lower courts, this analysis has two parts. “First, a factual determination must be made as to the scope and content of a plaintiff’s job responsibilities”; “Second, the ultimate constitutional significance of those facts must be determined as a matter of law.” *Johnson*, 658 F.3d at 966 (cleaned up). This is a question of law. *Lee v. York Cty. Sch. Div.*, 484 F.3d 687, 697 (4th Cir. 2007); *Morgan v. Swanson*, 659 F.3d 359, 375 n.52 (5th Cir. 2011) (en banc) (collecting cases).

As most relevant here, in *Johnson*, the Ninth Circuit held that a math teacher's posting in his classroom of religious-patriotic banners was government speech. *Johnson*, 658 F.3d at 966-70. If he had been "running errands for the school in a car adorned with sectarian bumper stickers," that would have been private speech. *Id.* at 967. But the Court held that all of his speech "in the general presence of students, in a capacity one might reasonably view as official"—regardless of whether it was "curricular"—was government speech "because of the position of trust and authority [teachers] hold and the impressionable young minds with which they interact." *Id.* at 967-68 & n.13.

Later, however, this Court rejected this overbroad reasoning. *Kennedy*, 597 U.S. at 527-31. In *Kennedy*, a high school football coach was fired for praying in the presence of students. *Id.* at 515-20. In looking at those prayers, the Court stated that when praying, the coach "was not engaged in speech ordinarily within the scope of his duties as a coach. . . . He was not instructing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech the District paid him to produce as a coach." *Id.* at 530-31 (cleaned up).

The Court further rejected the Ninth Circuit's conclusion that it was dispositive that the prayers occurred in front of students, and the coach "served as a role model 'clothed with the mantle of one who imparts knowledge and wisdom.'" *Id.* at 530. This, the Court explained, would "commit[] the error of positing an 'excessively broad job description' [that] treat[s] everything teachers . . . say in the workplace as

government speech.” *Id.* at 530-31 (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006)) (cleaned up). Schools *cannot* require employees to “eschew any visible religious expression,” *Kennedy*, 597 U.S. at 540, because creating “[a] classroom environment that is welcoming to all students . . . cannot be achieved through hostility toward the religious beliefs of students and their parents.” *Mahmoud*, 606 U.S. at 568. Thus—following *Kennedy*’s correction of the Ninth Circuit’s departure from *Garcetti*’s admonition about “excessively broad job descriptions”—the question in the educational context must now focus on whether the speech is “curricular-speech,” *Vlaming*, 895 S.E.2d at 743, i.e., “impart[ing] particular knowledge or skills to student[s].” *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

Further, “[preferred] pronouns carry a message,” *Meriwether*, 992 F.3d at 507, communicating that “[p]eople can have a gender identity inconsistent with their sex at birth.” *Tennessee v. Cardona*, 737 F. Supp. 3d 510, 543 (E.D. Ky. 2024). So the question must not be whether a teacher is required to use pronouns generally—i.e., to engage in common speech—but whether her job duties include conveying the school’s message on gender identity, *Geraghty v. Jackson Loc. Sch. Dist. Bd. of Educ.*, No. 5:22-cv-2237, 2024 WL 3758499, at *13 (N.D. Ohio Aug. 12, 2024), while recognizing that the school cannot impose a “blanket requirement” that all employees be *de facto* spokespersons for the government’s message. *Janus*, 585 U.S. at 907.

The answer here is “no.” Teachers in general are paid to teach *subjects*, not to be spokespersons

“mouth[ing] a message on [the government’s] behalf,” *Janus*, 585 U.S. at 908. As the Virginia Supreme Court put it, “[t]he core of the teacher’s job is to speak in the classroom on the *subjects* she is expected to teach. Math teachers must teach math, science teachers must teach science, history teachers must teach history, and so on. But none of them can be compelled into the service of controversial religious, political, or ideological causes.” *Vlaming*, 895 S.E.2d at 739 (cleaned up).

**C. The Use of Preferred Pronouns Should
Be Adjudicated Using *Pickering*
Balancing in Individual Cases.**

The final question is whether the government nevertheless has a legitimate interest in its restriction on speech. *Kennedy*, 597 U.S. at 528 (citing *Pickering v. Bd. of Educ. of Township High Sch. Dist. 205*, 391 U.S. 563, 568 (1968)). Perhaps the quintessential example is a teacher exercising his First Amendment right to participate in a pedophilia association. Although protected at the first two steps of the above analysis, the severity of the disruption to the school (through the parents protesting) gave the school a sufficiently legitimate administrative interest to fire him. *Melzer v. Bd. of Educ. of City Sch. Dist.*, 336 F.3d 185, 199 (2d Cir. 2003). But the analysis has to focus on legitimate *administrative* interests. As a provider of services, the government’s primary administrative interest is preventing “disruption” of that provision of service. *Mahanoy*, 594 U.S. at 192-93. On the flip side, if the government’s interest is “related to the suppression of free expression,” “it is not valid, let

alone substantial.” *Moody v. NetChoice, LLC*, 603 U.S. 707, 740 (2024).

Indeed, “the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’” *Matal v. Tam*, 582 U.S. 218, 246 (2017) (quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)); accord *Beard v. Falkenrath*, 97 F.4th 1109, 1117 (8th Cir. 2024) (“If the Constitution offers no protection [to the offended individual] against an insult or vulgar language, then how can it extend to the misuse of a pronoun?”). Thus, *Pickering* balancing is the proper venue for adjudicating individual employee objections to the use of, or refusal to use, preferred pronouns. In individual cases, the school district’s interest may be sufficient to overcome the employee’s interest; in other cases, it might not. But only by requiring an actual balancing of interests, justified by an evidentiary record, can the court protect against “allow[ing] for one political ideology to dominate the educational landscape while either silencing the other or calling the other ‘harassment.’” *Louisiana v. Dep’t of Educ.*, 737 F. Supp. 3d 377, 400 (W.D. La. 2024).

CONCLUSION

For the foregoing reasons, this Court should grant the Petition and reverse the Fourth Circuit's ruling.

Respectfully submitted,

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