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 FOR *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutions

Rules

Other Authorities

BRIEF OF *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.3, Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of Petitioner.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. As part of this mission, it appears as *amicus curiae* before federal and state courts.

AFPF is committed to ensuring the freedom of expression guaranteed by the First Amendment for all Americans, including students and faculty. Campuses are not just a place where free expression and academic freedom should be protected; it is vital to their mission. And they are uniquely positioned to instill in the next generation an appreciation for free speech. This is why *"[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (citation omitted and emphasis added).

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[1] All parties have filed blanket consents to the filing of *amicus* briefs. No counsel for a party authored this brief in whole or in part and that no person other than *amicus* or its counsel made any monetary contributions to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Ninth Circuit's holding that a high school football coach's personal postgame prayer was regulable government speech has placed at risk the First Amendment rights of a much broader array of government employees. University faculty members are particularly at risk from any confusion about the scope of protections afforded them because they communicate ideas and engage in public debate about controversial topics for a living. As "liberty finds no refuge in a jurisprudence of doubt,"[2] inconsistent or unclear legal doctrines that can be manipulated to include or exclude their speech, risk chilling speech and discouraging thoughtful and civic-minded people from taking on that risk.

This Court has been clear that speech rights of public employees are protected by the First Amendment and has extended special solicitude to protecting constitutional freedoms for those who teach in our schools and universities. Of course, where an employee is speaking as the mouth of government, then government can dictate what is said. Likewise, when government purchases or delivers services, it can manage those operations. But the Ninth Circuit's holding blurs these lines and creates the risk that teachers or faculty members may be terminated for their own personal expression.

Under *Garcetti v. Ceballos*, 547 U.S. 410 (2006), government may regulate speech made pursuant to official duties. Under *Pickering v. Bd. of Education*, 391 U.S. 563, 573 (1968), government may not

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[2] *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 844 (1992).

regulate private speech on an issue of public concern, unless that speech imperils government operations. For government employees, these rules can be difficult to apply where it is unclear whether the speech was within or outside official duties. Here, the school board made abundantly clear that Kennedy did not speak for the school and instructed him to avoid even the possible perception of doing so. Such a disclaimer would apparently place Kennedy's speech outside the narrow confines in which *Garcetti* allows a government employer to regulate. But the Ninth Circuit held otherwise.

The Ninth Circuit's unnecessary confusion of the First Amendment's application to the speech of publicly employed faculty members is the latest of a series of conflicting decisions in the lower courts. At least four circuits have inverted the *Garcetti* rule to *protect* teachers' speech made pursuant to official duties—leaving teachers' private speech at greater risk than the speech they are paid to deliver. Having held that Kennedy's speech was "as a public employee," it would appear that the exemption for speech pursuant to academic duties should have been applied here. But it was not.

These conflicting doctrines degrade speech protections for the very government employees this Court has consistently found warrant the most vigorous protections: teachers and professors who not only research and publish, but also bear responsibility for fostering the habits of open-mindedness and critical inquiry that make for responsible citizens.

The Court should be clear. Nothing in its government employee speech jurisprudence should be read to restrict academic freedom or impose

extraordinary burdens on the speech of employees in public schools and universities.

ARGUMENT

I. GOVERNMENT AUTHORITY TO REGULATE EMPLOYEES' SPEECH IS NARROW.

Subject to certain narrow limitations, speech rights of public employees are protected by the First Amendment. The power of government to speak on its own behalf and the authority of a government employer to manage its own operations are cabined by the First Amendment's prohibition against conditioning public employment on surrendering constitutional protections.

This is particularly true for university faculty and teachers because the "vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Keyishian,* 385 U.S. at 603. Here, the Ninth Circuit placed a thumb on the scale in favor of speech regulation by eliminating the requirement that an employee speak as the government before his speech may be deemed government speech. Misapplication of this Court's precedent puts at risk First Amendment protections of any government employee whose job depends on communicating ideas that may differ from the government's message.

A. Employees' Speech May Be Regulated Only While Speaking for the Government or Imperiling Government Operations.

This Court has established the test for First Amendment protection of government employee speech in *Pickering*, 391 U.S. 563, and *Garcetti*, 547

U.S. 410. *Pickering* articulated two acceptable rationales for regulating an employee's speech: (1) where the employee speaks as the government rather than as a private citizen on a matter of public concern;[3] and (2) where the speech interferes with the government's ability to manage its own operations.[4] *Garcetti*, provided a streamlined test, holding that the First Amendment does not shield from discipline "expressions employees make pursuant to their professional duties." 547 U.S. at 426.

Pickering and *Garcetti* were decided on facts at extreme ends of the employee speech spectrum. The first, relating to publication of a teacher's personal letter to the editor discussing a bond issue, exemplified classic community discussion of a matter of public interest, which was protected. 391 U.S. at 566.[5] Were it otherwise, government employees would

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[3] *Garcetti*, 547 U.S. at 418 (The first *Pickering* factor "requires determining whether the employee spoke as a citizen on a matter of public concern.").

[4] *Garcetti*, 547 U.S. at 418 (The second *Pickering* factor "reflects the importance of the relationship between the speaker's expressions and employment . . . the restrictions [the government entity] imposes must be directed at speech that has some potential to affect the entity's operations.").

[5] The Court has since clarified that public expression is not a necessary element of protected speech. *Givhan v. Western Line Consol. School Dist.,* 439 U.S. 410, 414 (1979) ("This Court's decisions in *Pickering*, *Perry*, and *Mt. Healthy* do not support the conclusion that a public employee forfeits his protection against governmental abridgment of freedom of speech if he decides to express his views privately rather than publicly. While those cases each arose in the context of a public employee's public expression, the rule to be derived from them is not dependent on that largely coincidental fact.").

be required to sacrifice the rights of citizenship. The second, relating to drafting a requested legal memorandum by a supervising deputy district attorney as part of his ordinary work duties, epitomized speech made pursuant to official duties. There, the Court said, the speech was not protected. 547 U.S. at 414, 426.

Emergent from these fact-specific cases are two general precepts that, if applied consistently, would provide robust speech protection for government employees and much-needed clarity for when speech is protected. First, where government speaks for itself, it can control its own message. *Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017) ("The Free Speech Clause does not require government to maintain viewpoint neutrality when its officers and employees speak about that venture."); *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009) ("The Free Speech Clause . . . does not regulate government speech."); *Johanns v. Livestock Marketing Assn.*, 544 U.S. 550, 553 (2005) ("[T]he Government's own speech . . . is exempt from First Amendment scrutiny"). Where the employee's responsibility is to voice government's message, government can dictate what that message is.

Second, regarding activity that a government supervisor "reasonably believe[s] would disrupt the office, undermine his authority, and destroy close working relationships" government may exercise its managerial authority. *Connick v. Myers*, 461 U.S. 138, 154 (1983). Relatedly, "where the government is employing someone for the very purpose of effectively achieving its goals . . . restrictions may well be appropriate." *Waters v. Churchill*, 511 U.S. 661, 675

(1994). Thus, government may ensure employees perform the duties they are paid to perform and do not imperil operations.

But the bulk of government employee speech questions lie somewhere in between. And some employees, like public university faculty—paid to engage in public debate—raise unique challenges.

The Ninth Circuit's application of *Garcetti* here effectively undermined First Amendment protection for government employee speech by eliminating causation from *Garcetti*'s formulation and replacing it with a status-based test. Thus, *Garcetti*'s rigorous requirement that speech be "pursuant to official responsibilities" before it can be regulated was replaced by a status-based rule allowing regulation of speech "as a public employee."[6] Public employment became a proxy for proving the employee is paid to speak *these* words[7] on behalf of the government employer before the First Amendment may be avoided.

But, as this Court has made clear, public employee status does not displace speech rights. And the *Garcetti* test, despite the virtues of its simplicity, if read broadly, as the Ninth Circuit did, would appear to give government power to regulate constitutionally protected speech of government employees like faculty

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[6] This Court has warned against defining public employment so expansively that over-broad duties displace constitutional protections. *Garcetti*, 547 U.S. at 424 ("We reject, however, the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions.").

[7] *Meriwether v. Hartop*, 992 F.3d 492, 503 (6th Cir. 2021) ("government is doing the speaking").

members whose jobs require speaking on topics that may run counter to the government's position. Read narrowly, however, *Garcetti* can be applied to ensure full protection of faculty speech, in all but those limited number of cases where government has engaged the speaker to deliver its own message.

B. Government Speech Is Not All Speech Made in a Government Setting.

If "government speech" is an exception to the free speech rights of individuals, it must be carefully and narrowly defined. Government speech does not extend to all speech made within a government setting, even if that speech implicates some form of government action. For example, in *Matal v. Tam*, the Court rejected the contention that trademarks are government speech, even though "trademarks that are 'used in commerce' may be placed on the 'principal register,' that is, they may be federally registered." 137 S. Ct. at 1752. The government's acceptance of the trademark onto the register did not convert the mark to government speech.

The holding in *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, in which the Court held that specialty license plate designs are government speech, shows the hurdles that must be overcome to designate speech as government speech. 578 U.S. 200, 219 (2015).[8] Even so, the Court was clear that its

[8] The Court's conclusion rested on multiple factors, including: the history of license plates communicating messages from the states; license plate designs being "often closely identified in the public mind with the [State];" including the name Texas on every plate; regulations on plate disposal; the function of license plates as "essentially, government IDs;" and Texas law providing sole

"determination that Texas's specialty license plate designs are government speech does not mean that the designs do not also implicate the free speech rights of private persons." *Id*. at 219.

Even where the speaker is a government employee whose job duties include speech in a particular forum, it does not follow that all speech by such an employee in that forum is government speech. The Seventh Circuit's well-reasoned opinion in *Chrzanowski v. Bianchi*, is instructive. There, an assistant state's attorney was called to testify as an eyewitness in court. *Chrzanowski v. Bianchi*, 725 F.3d 734, 736 (7th Cir. 2013). The district court concluded that plaintiff's job duties included speaking in court and relied on that correlation between place and activity to hold plaintiff's speech to be part of his official duties. *Id.* at 739. But the Seventh Circuit disagreed, holding that testimony was not government speech subject to regulation by the State Attorney's Office simply because it took place in a courtroom. *Id.* at 740. The Seventh Circuit did not focus on the plaintiff's general job duties as a state's attorney, but rather on the specific speech at issue, holding that the "focus on Chrzanowski's general professional obligations is misguided; we are to look only at whether particular speech is 'made pursuant to official duties' (and, thus, not 'as a citizen') in a more limited sense." *Id*. at 741.

This admonition applies here, where, although "expression was Kennedy's stock in trade," and his speech took place "during a time when he was

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state "control over the design, typeface, color, and alphanumeric pattern for all license plates." *Id*. at 210–13.

generally tasked with communicating with students," Pet. App. 14, the school board did not show that *this speech* "was among the plaintiff's job duties." Nor could it, given its well-publicized position that post-game prayer is not among Kennedy's job duties. Pet. App. 8.

C. Government Cannot Condition Public Employment on Foregoing Constitutional Rights.

"Almost 50 years ago, this Court declared that citizens do not surrender their First Amendment rights by accepting public employment." *Lane v. Franks*, 573 U.S. 228, 231 (2014). This rule places a strict limit on the doctrine of government speech, prohibiting a broad reading of an employee's job duties to evade First Amendment protection.

The "First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." *Garcetti*, 547 U.S. at 419 (citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)). In his dissent below, Judge O'Scannlain emphasized that protection of an employee's First Amendment rights requires conflicts to be resolved in the employee's favor unless the speech was commissioned by the government.

> [A] public employer's special latitude to control its employees' speech extends only to speech "the employer itself has commissioned" or otherwise functionally "created." But when public employees' expression falls outside their official job duties, we must "unequivocally reject[]" any suggestion that they "may

> constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens."

Pet. App. 83 (citations omitted).

Contrary to this Court's admonition that the courts' "responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government." *Connick*, 461 U.S. at 147, the Ninth Circuit removed the tight coupling required by the second *Pickering* factor between the employee's speech and risk to government operations and replaced it with "adequate justification for treating Kennedy differently from other members of the general public." Pet. App. 17. Here, adequate justification included unfavorable publicity. This reading violently expands the scope of speech government can regulate simply because it receives complaints or negative exposure, placing at risk a wide range of protected behavior as well as imperiling the very public debate *Pickering* protects.

II. THIS COURT SHOULD ELIMINATE ANY DOUBT ABOUT THE FIRST AMENDMENT'S PROTECTION FOR ACADEMIC FREEDOM.

Vigorously enforcing the limits on regulation of government employees' speech takes on special urgency in educational settings where speech regulation not only threatens academic freedom but also teaches students a lesson in censorship that is anathema to self-government. For teachers and students at public schools and universities, the Ninth Circuit's application of *Garcetti* and *Pickering* sweeps far too broadly; and, while "academic speech" is not directly at issue here, the reasoning applied below to the high school setting sets a dangerous precedent for

advanced education as well. The Court should close the door on any application of *Garcetti* or *Pickering* that would allow government to threaten academic freedom or the speech of educators under the guise of "adequate justification."

A. Free Speech Rights Are Not Shed at the Schoolhouse Gate.

"It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Ind. Cmty School District*, 393 U.S. 503, 506 (1969). This proposition creates a fundamental tension with the Ninth Circuit's decision. "By assuming that teachers always act as teachers between the first and last bell of the school day (or that coaches always act as coaches from the time they arrive for work at the school's athletic office to the moment the stadium lights go out on the end of a game), the opinion . . . places itself in irreconcilable contradiction with the most basic, 'unmistakable' axiom of the past century of school-speech jurisprudence." Pet. App. 87 (O'Scannlain, J. dissenting). "For if, as the opinion declares, all 'demonstrative communication' in the presence of students were unprotected, there would be little left of the First Amendment—let alone *Tinker*'s landmark holding—for public school employees." *Id*. *Accord Texas State Tchrs. Ass'n v. Garland Indep. Sch. Dist*., 777 F.2d 1046, 1055 (5th Cir. 1985) (holding that "policies which purport to deny teachers the right to discuss [union] business during non-class time are unconstitutional.").

Tinker of course, as well as *Connick*, and *Garland* recognized that disruptive behavior can be addressed.

Tinker, 363 U.S. at 507; *Connick*, 461 U.S. at 154; *Garland*, 777 F.2d at 1055. But "disruption" must be something more than simple exercise of First Amendment rights. Even in cases of alleged subversive activity, First Amendment rights of teachers have prevailed. *See Connick*, 461 U.S. at 144 (collecting cases). If the First Amendment protects membership in subversive organizations, which by definition at least allegedly threaten the state, then how can it not protect teacher and student speech[9] that is not subversive and poses no such threat?

But here, the alleged disruptive behavior was allowing students, coaches and players from the opposing team, and members of the general public and media to exercise their own rights by joining Kennedy in prayer. Pet. App. 7–9. If this is "disruption," then one strains to imagine a limit on government employers' power to regulate employees' personal expression. And, if exercise of First Amendment rights by other people can be used to excuse regulation of a faculty member, then the exercise of First Amendment rights becomes the instrument of their own destruction.

Students, of course, have their own First Amendment rights, delimited by *Tinker*, which affirmed that "forbidding discussion . . . anywhere on school property except as part of a prescribed classroom exercise . . . would violate the constitutional rights of students, at least if it could not be justified by a showing that the students' activities would

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[9] Student speech is not directly implicated here except to the extent the holding may be applied to students who become government employees through work-study, teaching fellowships, etc.

materially and substantially disrupt the work and discipline of the school." 393 U.S. at 507, 513. There is no allegation here that the students were disruptive. But interpreting students' peaceful participation as a disruption that could justify silencing Kennedy threatens to grossly expand the "disruption" justification by which speech may be regulated in the public school setting

B. Public Schools Should Uphold Free Speech, Not Chill It, For Students Learn from Adults How to Treat Each Other.

"Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can even do much to help it."

—Judge Learned Hand[10]

The importance of speech in schools cannot be overstated as students learn from adults how to treat each other and absorb the habits of acquiescence that adults model. "Teachers and students 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). Thus, relegating speech "to an empty office or perhaps the teacher's lounge, . . . corrodes the civic virtues that underlie the First Amendment: We ask 'teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens … They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied

[10] Judge Learned Hand, *The Spirit of Liberty*, 1944, available at Digital History, http://bit.ly/3raLZQN.

to them.'" Pet. App. 90. (O'Scannlain, J. dissenting) (citing *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring)).

This Court has consistently recognized that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Tinker*, 393 U.S. at 512 citing *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). Regarding boards of education, the Court has said that because they "are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Tinker*, 393 U.S. at 507 (citing *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 637 (1943)). These stouthearted claims depart from school efforts to teach students that constitutional freedoms may be reclassified out of existence.

Curtailing teacher speech, contrary to the First Amendment, educates students in misunderstanding the American system that is repugnant to the rights secured by the Constitution; and educates the next generation that this is the kind of relationship citizens should expect with their government.[11] It is particularly important that schools bear in mind their duty to educate students in the protection of constitutional rights—wherever they are exercised.

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[11] The inclination toward a converse-Lotus principle, where everything that is not allowed is forbidden, is contrary to the American and English traditions and should be avoided. *See generally Everything which is not forbidden is allowed*, Wikipedia, http://bit.ly/2TgF5vB (last visited Feb. 22, 2022).

Consistent with *Barnette*, schools should teach students to carry with them the understanding that government must respect constitutional freedoms.

C. Academic Freedom is Fundamental to Civil Society and This Court Should Place it on Firmer Legal Footing.

This Court consistently has taken a protective stance toward academic freedom and "long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003). *Accord Keyishian*, 385 U.S. at 603 ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned.") (cleaned up). This concern has taken precedence even over government's right to decide how to spend its own money. *Rust v. Sullivan*, 500 U.S. 173, 200 (1991) ("[T]he university is . . . so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment.").

Notwithstanding this longstanding consensus, the wording of *Garcetti* opened the door to challenges to academic freedom. Justice Souter, in dissent, warned that *Garcetti* may have fashioned an "ostensible domain beyond the pale of the First Amendment . . . spacious enough to include even the teaching of a public university professor," *Garcetti*, 547 U.S. at 438 (Souter, J. dissenting). And thus, he "hope[d] that

today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to ... official duties.'" *Id.*

The Court acknowledged the risk: "Justice Souter suggests today's decision may have important ramifications for academic freedom, at least as a constitutional value. . . . There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence." *Id.* at 425. But, because *Garcetti* did not require the Court to reconcile those implications, it did not reach that question. *Id.*

Four Circuits, likewise recognizing the risk, have carved out an exception to *Garcetti* for speech by professors in an academic setting. *See Meriwether v. Hartop*, 992 F.3d 492, 505 (6th Cir. 2021) (joining "three of our sister circuits: the Fourth, Fifth, and Ninth" in reaffirming the conclusion that "professors at public universities retain First Amendment protections at least when engaged in core academic functions, such as teaching and scholarship"). The Ninth Circuit, in particular, has noted the risk *Garcetti* presents in the academic setting because "teaching and academic writing are at the core of the official duties of teachers and professors." *Demers v. Austin*, 746 F.3d 402, 411 (9th Cir. 2014) (cleaned up). Thus, in *Demers* the Ninth Circuit found that "if applied to teaching and academic writing, *Garcetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court," concluding "that *Garcetti* does not—

indeed, consistent with the First Amendment, cannot—apply to teaching and academic writing that are performed 'pursuant to the official duties' of a teacher and professor." *Id*. at 411–12.

This formulation, at first blush, would appear consistent with this Court's solicitude to academic freedom. But further examination shows that it is of limited application, being confined to *only* speech "pursuant to official duties," which the Ninth Circuit distinguished from other "academic employee speech."[12] *Id*. at 412.

Protection of academic employee speech "not covered by *Garcetti,"* is diminished by the Ninth Circuit's treatment of the *Pickering* factors, which discards disjunctive application and instead employs a newly-fashioned conjunctive:

> We hold that academic employee speech not covered by *Garcetti* is protected under the First Amendment, using the analysis established in *Pickering*. The Pickering test has two parts. First, the employee must show that his or her speech addressed 'matters of public concern.' . . . Second, the employee's interest 'in commenting upon matters of public concern' must outweigh 'the interest of the State, as an employer, in promoting the efficiency of the public

[12] Note, the terminology "academic employee speech" as used here is speech of academic employees, which may be "covered by *Garcetti*" if "pursuant to official duties", or "not covered by *Garcetti*" if outside official duties.

> services it performs through its employees.'

Demers, 746 F.3d at 412 (citing *Pickering*, 391 U.S. at 568). Thus, under *Demers*, an academic's speech rights can be limited even while speaking on matters of public concern if the state's interest exceeds the employee's interest. This is a lesser protection than *Pickering* provides, which includes an off-ramp to the speaker at the first step if the speech is on a matter of public concern. Coupled with *Demers*' recognition that "not all speech by a teacher or professor addresses a matter of public concern. Teachers and professors, like other public employees, speak and write on purely private matters," *Demers*, 746 F.3d at 415, what began as a general recognition of the importance of academic freedom, ended by curtailing protection of teachers' speech to matters of public concern that also outweigh the interest of the state. What it gives with one hand, the Ninth Circuit takes away with the other. Moreover, the decision below casts even the limited protection of *Demers* into doubt by recognizing negative publicity, public participation, or even *positive* commentary as a state interest sufficient to justify regulation—leaving the faculty member's speech rights subject to the whimsy of the public.

Other circuits have made more robust attempts to protect academic speech. The Sixth Circuit, for example, approached the question from the opposite side and instead of requiring the employee's interest to outweigh the interest of the state, focused first on the state's limited interest in controlling the teacher: "a school's interest in limiting a teacher's speech is not great when those public statements are neither shown nor can be presumed to have in any way either

impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally." *Meriwether*, 992 F.3d at 511 (cleaned up). Thus, without a showing that the challenged speech "inhibited [the teacher's] duties in the classroom, hampered the operation of the school, or denied [the student] any educational benefits" the school's interest in punishing the professor was not sufficient. *Id.* (cleaned up). The Sixth Circuit thus concluded that "[t]ogether, *Sweezy* and *Keyishian* establish that the First Amendment protects the free-speech rights of professors when they are teaching." *Meriwether*, 992 F.3d at 505. This, of course, flips the formulation of *Garcetti* because while teaching, a teacher's speech would—by definition—be "pursuant to official responsibilities."

How would such a Hall of Mirrors approach work here?

If Kennedy were deemed to be speaking "pursuant to official responsibilities" then under *Garcetti* his speech would be sanctionable, but under *Demers et al.* it would not. If Kennedy were deemed to be speaking outside his official responsibilities, then under *Garcetti* his private speech would be protected but under *Demers*, it would not qualify for the academic carve-out. Regardless whether his speech was pursuant to his official duties, it should have been protected under either *Garcetti* or *Demers* because it had to qualify for one or the other.

Under the Ninth Circuit's analysis it qualified for neither.

First, the Ninth Circuit concluded that "there is simply no dispute that Kennedy's position

encompassed his post-game speeches to students on the field" and thus "Kennedy spoke as a public employee when he kneeled and prayed on the fifty-yard line immediately after games." Pet. App. 15, 17. If so, then the *Demers* carve-out for teaching applied, affording him full First Amendment protection. Instead, the court applied *Garcetti* to justify regulation of a public employee's speech.

Applying this reasoning in a university setting, a public law school professor may comment in conversation at a university event on a colleague's recently published book, which is not in his field of study. A participant in the conversation may repeat the remark, noting favorably how well-read the professor is, to a member of the law school administration who takes offence at the remark, with which he disagrees. The administrator, repeating, amplifying, and characterizing the remark, creates a public furor both for and against the professor, to which the professor responds. Under the analysis below, the professor's comment could be sanctioned as "employee speech" under *Garcetti* because it was made within his status "as a public employee" at a university event. But what about *Demers et al.'s* protection for "teaching and academic writing . . . at the core of the official duties of teachers and professors"? The professor would have no recourse under *Demers* because his comment was not within his own teaching and academic writing, leaving him to show his remark was on a matter of public concern that outweighs the interest of the state. Relying on the ruling below, the school would then point to the public debate to allege "disruption" as justification for punishing the professor's speech.

This mix-and-match analysis shows the fragile ground on which academic speech stands if the current highly-flexible interpretations of *Garcetti* apply.

Being paid to write and speak, public university faculty are often at the center of firestorms over their expression. And social media makes virtually every statement made by a faculty member a potential "disruption" in the sense that the Respondents treated it here. In recent years faculty members have faced frequent efforts by both sides of the culture wars to have them fired or punished for their speech—often taken out of context and amplified on social media.[13]

If the Court's careful solicitude for academic freedom is to hold, it must be given stronger footing than *Garcetti*, which, if applied as the Ninth Circuit did here, would render the bulk of academic speech unprotected as government speech—uttered pursuant to official teaching duties. The Court must expressly protect the speech of publicly employed faculty members and students or the days are numbered for publicly-funded teaching and research that does not toe the party line.

D. Public Engagement Cannot Be Used to Excuse Punishing Speech on Topics of Public Interest.

Seriatim exercise of First Amendment rights should not be treated as compounding sin, as if each

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[13] *See also* James Hohmann, *The Daily 202: Koch network warns of 'McCarthyism 2.0' in conservative efforts to harass professors*, The Washington Post, August 1, 2018, available at https://wapo.st/3vtcQx7 (discussing recent on-campus attempts to limit speech on controversial topics).

additional exercise of speech rights somehow digs a deeper hole of infamy. Yet here, when Kennedy publicly discussed his dispute with the school board through "numerous appearances and announcements [on] various forms of media" Pet. App. 7, the Ninth Circuit characterized that public speech as "pugilistic efforts to generate publicity" that engendered First Amendment violations.[14] Pet. App. 19.

But the law strongly protects public speech on matters of public interest, and thus, if anything, the burgeoning public interest in Kennedy's plight should have expanded protection for Kennedy's speech, making it squarely "a matter of legitimate public concern" that *Pickering* found to be protected. 391 U.S. at 571. 575. That his public speech may have been critical of the School Board does not decrease the protection. 391 U.S. at 570 ("to the extent that the [School] Board's position here can be taken to suggest that even comments on matters of public concern that are substantially correct, . . . may furnish grounds for dismissal if they are sufficiently critical in tone, we unequivocally reject it.").

Yet, the Ninth Circuit took an adversarial stance toward public discussion of Kennedy's plight and other evidence of public interest, such as participation by third parties and students. Pet. App. 19. ("Kennedy actively sought support from the community in a manner that encouraged individuals to rush the field to join him and resulted in a conspicuous prayer circle that included students.").

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[14] The Ninth Circuit found that Kennedy's media appearances converted his religious exercise into an Establishment Clause violation. Pet. App. 18–19.

This gets the law backwards. *Pickering*, 391 U.S. at 568 (collecting cases). Public concern heightens First Amendment protection, requiring government to justify any restriction. 391 U.S. at 570, 573. Moreover, there is no basis for the Ninth Circuit's conclusion that Kennedy's media appearances precluded his on-field prayer from being personal and private. Pet. App. 20. If anything, the public dispute should dispel any lingering doubt that Kennedy was speaking in his personal capacity and not as the voice of the school, whose displeasure had been publicly disclosed.

CONCLUSION

The Court should reverse the Ninth Circuit and clarify that its precedents regarding public employment should not be read to diminish academic freedom or weaken First Amendment protection within public educational institutions.

Respectfully submitted,

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