No. 10-55445

In the United States Court of Appeals For the Ninth Circuit

BRADLEY R. JOHNSON, PLAINTIFF-APPELLEE

v.

POWAY UNIFIED SCHOOL DISTRICT, ET AL.,
DEFENDANTS-APPELLANTS.

On Appeal from the United States District Court
Southern District of California – San Diego
Case No. 3:07-cv-00783-BEN-WVG
Honorable Roger T. Benitez, District Judge

Brief of *Amici Curiae* National School Boards Association and California School Boards Association In Support of Defendants-Appellants Request for Reversal

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
July 23, 2010
Case Number 10-55445
Johnson v. Poway Unified School District, et al.

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Pursuant to FRAP 26.1 the National School Boards Association and the California School Boards Association, who are Amici Curiae, make the following disclosures:

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6. If case arises out of a bankruptcy proceeding, identify any trustee and the members of any creditors committee: N/A

/S/ Francisco M. Negrón, Jr. July 23, 2010

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Signature Date

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STATEMENT OF INTEREST

The National School Boards Association (NSBA) is a nonprofit organization representing state associations of school boards, as well as the Hawai‘i State Board of Education and the Board of Education of the U.S. Virgin Islands. With its member state associations, NSBA represents the interests of more than 14,000 local school districts before Congress and federal and state courts and has participated as *amicus curiae* in many cases involving constitutional law and public education. The California School Boards Association comprises nearly 1,000 school district governing boards and county boards of education throughout California.

This brief is filed with the consent of both parties pursuant to Fed. R. of App. P. 29(a).

Amici do not take positions on all of the factual and legal issues presented by this case. Their foremost concern is that this Court affirm that a free speech claim brought by a public school employee is to be evaluated in the same manner as is a free speech claim brought by any other public employee. The governing line of authority is set forth by the U.S. Supreme Court in *Pickering v. Board of Education*,[1] *Connick v. Myers*,[2] and *Garcetti v. Ceballos*.[3]

[1] 391 U.S. 563 (1968).

SUMMARY OF ARGUMENT

The confusion wreaked by the inconsistent application of various First Amendment doctrines in public school cases exacts an unnecessary toll on schools. Fortunately, the Supreme Court's 2006 decision in *Garcetti* has provided the way clear. This Court should reject the District Court's reliance on forum analysis to evaluate the Free Speech Clause claim brought by the public employee in this case, an approach neither dictated by precedent nor advisable as a policy matter. Instead, this Court should recognize that teacher speech in a public school classroom is presumptively curricular in nature and affirm that: 1) where a public employee speaks pursuant to his or her work responsibilities, the employee's free speech interests are not implicated; and 2) even where the employee speaks as a private citizen, those free speech interests must be balanced carefully against the public employer's legitimate needs. The Court also should recognize that the individual defendants in this case are entitled to qualified immunity from claims that were generated in a more chaotic legal environment.

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[2] 461 U.S. 138 (1983).
[3] 547 U.S. 410 (2006).

ARGUMENT

I. This Court should provide much needed legal clarity on free speech claims brought by public school employees.

This case concerns a variation on the theme this Court described as a public employer's need to navigate between "the Scylla of not respecting its employee's right to the free exercise of his religion and the Charybdis of violating the Establishment Clause of the First Amendment by appearing to endorse religion."[4] Here, the even more perilous Scylla to be avoided is an employee's asserted free speech interests. Adding to the difficulty school navigators always face wherever the conflicting imperatives of the First Amendment play out in public education, the courts have been inconsistent in evaluating free speech claims brought by public school employees.

This Court observed in 2001 that at that time at least three different tests were employed by the courts to evaluate teacher free speech claims:[5] 1) the test developed in the student speech context in *Hazelwood School District v.*

[4] *Berry v. Dept. of Soc. Serv.*, 447 F.3d 642, 646 (9th Cir. 2006).
[5] *California Teachers Assn. v. State Bd. of Educ.*, 271 F.3d 1141, 1149 n.6 (9th Cir. 2001).

Kuhlmeier;[6] 2) the *Pickering-Connick* test for public employee speech,[7] which this Court noted it had used;[8] and 3) the Supreme Court's then test for government speech,[9] which the Third Circuit had used in a professor speech case.[10] This third test anticipated *Garcetti*,[11] the Supreme Court's latest explication of *Pickering*.

The past uncertainty in the courts as to which First Amendment doctrine applies under which circumstances has required attorneys and judges to evaluate every scenario under a variety of alternative tests when advising clients, litigating cases, and issuing decisions. This adds needlessly to the complexity and the expense borne by all parties to disputes. For public school officials who are not attorneys, the judicial state of confusion contributes to uncertainty, error,

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[6] 484 U.S. 260 (1988) (restriction of student speech must be "reasonably related to a legitimate pedagogical interest").

[7] The First Amendment does not apply to a public employee's speech that does not involve a matter of public concern, and where it does, the court weighs whether the employee's interest in expression outweighs the employer's interest in workplace efficiency and avoiding disruption. *Connick*, 461 U.S. 138 (1983); *Pickering*, 391 U.S. 563 (1968).

[8] In *Nicholson v. Bd. of Educ., Torrance Unified Sch. Dist.*, 682 F.2d 858 (9th Cir. 1982) (ruling teacher's speech rights not infringed where interfered with smooth school operations).

[9] When public employer conveys its message through its employee, the employee's speech is not covered by the First Amendment. *Rust v. Sullivan*, 500 U.S. 173 (1991); *Rosenberger v. Rector & Visitors of Univ. of Va*., 515 U.S. 819 (1995).

[10] *Edwards v. Cal. Univ. of Pa*., 156 F.3d 488 (3d Cir. 1998) (rejecting asserted free speech right to decide university curriculum and inject personal religious beliefs into class).

[11] 547 U.S. 410 (2006) (ruling that public employee speaking pursuant to official duties is not speaking as private citizen, and First Amendment does not bar employer regulation of speech).

acrimony, and waste of scarce resources. When a difficult call must be made, a court's subsequent failure to acknowledge this uncertainty as it considers whether these public servants are protected by qualified immunity can subject them to personal liability.

This case presents an opportunity to provide much needed clarity to this area of the law by ruling that the Supreme Court's holding in *Garcetti* controls public schools' regulation of teacher classroom speech.

II. This Court should reject forum analysis in a public employee speech claim.

"First Amendment doctrines are manifold," and if it is true that "their diverse facts and analyses may reveal but one consistent truth with respect to the amendment—each case is decided on its own merits,"[12] this Court should not make a bad situation for schools worse by resorting to forum analysis or over-relying on student speech decisions in an employment case.

A. Precedent does not dictate the use of forum analysis in this case.

[12] *Tucker v. California Department of Education*, 97 F.3d 1204, 1209 (9th Cir. 1996) (quoting *Bishop v. Aronov*, 926 F.2d 1066, 1070 (11th Cir. 1991)).

"Since Johnson retains First Amendment speech rights as a public school teacher," the District Court declared in this case, "a First Amendment forum analysis is the next step."[13] This was a leap, one this Court should disavow.

Neither *Tinker v. Des Moines Independent Community School District*[14] nor its progeny dictate the use of forum analysis here. From the unremarkable observation in *Tinker* and other cases that public school teachers do have First Amendment rights,[15] it does not follow that forum analysis is the correct approach to evaluate the free speech claims brought by these public employees. The term "*Tinker's* First Amendment forum analysis"[16] coined by the District Court presumably is unfamiliar to courts in other jurisdictions that have addressed sharp disagreements over which alternative, *Tinker's* "material and substantial disruption" standard or the standards used in forum analysis, provides the authority for resolving a student speech matter.[17] In *California Teachers Association* this Court assumed *arguendo*, but did not decide, that *Hazelwood's* test for student speech also applied to the teacher speech in question, for the pragmatic purpose of

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[13] 1 ER 12.
[14] 393 U.S. 503 (1969).
[15] 1 ER 10-11 (quoting *Tinker*, 393 U.S. at 506 and *Morse v. Frederick*, 551 U.S. 393, 403 (2007)).
[16] 1 ER 21.
[17] *E.g.*, *Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740, 745-47 (5th Cir. 2009) (declining to apply *Tinker* material and substantial disruption standard to time, manner, and place restriction of student speech); *M.A.L. v. Kinsland*, 543 F.3d 841, 849-50 (6th Cir. 2008) (same).

upholding the challenged government regulation there even under what the Court viewed as the most speech-protective of the three alternative standards.[18]

It is telling that, with one exception, none of the decisions the District Court cited for the proposition that forum analysis was appropriate here involved employee speech.[19] In the one exception, *Downs v. Los Angeles Unified School District*, this Court held that forum analysis did not govern a teacher's claim against a school district over his desire to post materials contradicting district policy on a bulletin board.[20]

This Court generally has referred to the *Pickering* line of decisions in public employee speech cases.[21] In *Tucker v. California Department of Education*, the Court did rely on forum analysis to invalidate a public employer's prohibition on

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[18] 271 F.3d at 1148-49.

[19] 1 ER 12-13. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985) (involving organizational eligibility to make charitable solicitations); *Arizona Life Coalition v. Stanton*, 515 F.3d 956 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 56 (2008) (involving request for specialty license plates); *Truth v. Kent Sch. Dist.*, 542 F.3d 634 (9th Cir. 2008) (involving speech of students and student club); *Flint v. Dennison*, 488 F.3d 816 (9th Cir. 2007) (involving speech of student and campaign for student government); and *Hills v. Scottsdale Unified Sch. Dist. No. 48*, 329 F.3d 1044 (9th Cir. 2003), *cert. denied*, 540 U.S. 1149 (2004) (involving speech of non-employee adult interested in marketing to students).

[20] 228 F.3d 1003 (9th Cir. 2000), *cert. denied* 532 U.S. 994 (2001).

[21] *E.g., Berry*, 447 F.3d at 648-52, (discussing and applying *Pickering* balancing to reject employee's challenge to restriction of religious displays in office cubicle); *Nicholson v. Bd. of Educ., Torrance Unified Sch. Dist.*, 682 F.2d 858, 865-66 (9th Cir. 1982) (applying *Pickering* in pre-*Garcetti* case to reject journalism teacher's free speech claim relating to student newspaper).

the posting of religious materials throughout its premises.[22] An important factor in that decision was the fact that it concerned areas where the public did not venture.[23] The District Court failed to distinguish this important factor in *Tucker's* holding from the fact here that the posters were directed at students.[24] *Tucker* itself at least acknowledged both the heightened concern that might apply to teachers and the possible defensibility of a policy focused on areas outside employees' private office space.[25] Looking to the exception of *Tucker* to apply forum analysis rather than the rule of *Pickering* and its progeny in this case would create a legal anomaly with respect to this Court's decision in *Berry*: A non-school public employer would have more discretion to address a concern over an employee's personal religious displays that could be viewed by adult clients than would a public school to address displays directed at a captive audience of impressionable children.[26] This does not add up.

Importantly, all of these decisions predate *Garcetti*, the Supreme Court's clearest directive as to public employee free speech claims, the latest decision in the *Pickering* line and the ruling that most simplifies matters in public employee

[22] 97 F.3d 1204 (9th Cir. 1996).
[23] *Id.* at 1212.
[24] This Court did not overlook this point when it subsequently decided *Berry*. 447 F.3d at 652.
[25] *Id.* at 1213, 1216.
[26] 447 F.3d at 652.

speech cases in which the employee does not speak as a private citizen.[27] This Court should use this appeal to resolve any remaining uncertainty in favor of treating public employee speech cases as such.

B. Applying forum analysis to public employee speech claims is likely to have negative unintended consequences.

Forum analysis leaves little room for the deference to education officials on educational matters that the law calls for.[28] Rather than deferring to school officials' judgments when balancing employer and employee interests, and avoiding constitutional imbroglios over employees' professional duties altogether, forum analysis in the Ninth Circuit subjects school officials' decisions in a program or setting deemed a designated or limited public forum to strict scrutiny as to content-based rules, and it requires even a content-neutral rule in such a forum to be narrowly tailored to further a significant government interest and to leave open ample alternative channels of communication.[29] Where the school program or setting is designated a non-public forum, a rule must be viewpoint neutral and

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[27] *See infra* at III.B.

[28] *Christian Legal Society v. Martinez*, 2010 WL 2555187, *14 (U.S. June 28, 2010) (reciting Court's long series of admonitions that courts evaluating First Amendment claims arising in schools are not to substitute their judgment for that of school officials on educational matters (internal citations omitted)).

[29] *Flint v. Dennison*, 488 F.3d 816, 830 (9th Cir. 2007) (internal citations omitted).

reasonable.[30] Compounding the misapplication of forum analysis to this employment case in the first place is the District Court's conclusion that the school had opened a limited public forum, rather than a non-public forum.[31]

Applying forum analysis to these facts would open the prospect of complex legal questions on a range of ordinary classroom expression that one might assert fall into grey areas. Depending on where these lines are drawn, finding classroom to be limited public forums in employment matters would border on allowing teachers to determine the curriculum, a proposition the courts have correctly eschewed.[32] It would call into question whether and when *Pickering* still applies in schools. At a minimum, it would necessitate more fact-intensive inquiries into a district's formal policies, formal and informal practices, and enforcement activity in order to evaluate whether a forum has inadvertently been opened, to define the

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[30] *Id.*

[31] Where forum analysis is appropriate in school cases, courts have tended to find that a classroom is a non-public forum. *E.g*., *Busch v. Marple Newtown Sch. Dist.* 567 F.3d 89, 95 (3d Cir. 2009); *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004). Misapplying forum analysis is more consequential in the Ninth Circuit than elsewhere, because this Court has proscribed viewpoint discrimination even in a non-public forum. *See Downs*, 228 F.3d at 1010-11, n.2 (describing circuit split on this point).

[32] *See Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517 (9th Cir. 1994); *Lee v. York County Sch. Div.*, 484 F.3d 687 (4th Cir. 2007). In this era of educational accountability, the District Court's overarching language about going "beyond the cramped view" of "hiring teacher speech simply to deliver the approved content of scholastic orthodoxy" to expose students to "healthy diversity" of individual teachers' personal opinions and about teachers expressing personal opinions "while delivering curriculum" may induce alarm among publically accountable school officials. 1 ER 2, 10.

forum in question,[33] to identify the type of forum, and to ascertain the sometimes fuzzy line between viewpoint and content.[34]

The District Court's ruling flatly contradicts the well-established principle that public entities do not open a forum by accident but only by conscious design.[35] As this Court indicated in *Tucker*, "Assuming that Tucker and his co-workers … posted all sorts of materials on the walls, that still would not show that the government had intentionally opened up the workplace for public discourse."[36] In this regard, even some past decisions in favor of school districts in similar cases are problematic to the extent they are read to place much weight on whether the district exercised sufficient control over bulletin boards.[37] A school district's imperfect enforcement of its policies should not lead to the conclusion that it has inadvertently opened a public forum and surrendered its discretion.[38] The law

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[33] The District Court's approach of defining different forums for particular kinds of expression in the classroom setting would make this a more particular, and hence more complex, inquiry.

[34] See *Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 630-31 (2d Cir. 2005) (noting that this distinction "is, to say the least, a problematic endeavor.").

[35] *Cornelius v. NAACP Legal Defense Fund*, 473 U.S. 788, 802 (1985) ("The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.").

[36] 97 F.3d at 1209.

[37] *E.g.*, *Lee*, 484 F.3d at 698-99.

[38] *Downs*, 228 F.3d at 1011 ("That … principals do not spend the majority of their days roaming the school halls strictly policing … the school's bulletin boards does not weaken our conclusion that … [officials] had the authority to enforce and give voice to school district and school board policy. Inaction does not necessarily

affords better remedies for unfair application of a district's discretion. At any rate, it cannot be the case that the allegedly imperfect monitoring of those policies changes the applicable legal doctrine in this employment matter to forum analysis.

The most predictable consequence of affirming the District Court would be the most ironic. In order to avoid the risk that a court will deem the school district to have stumbled into exposing itself to liability by inadvertently creating a forum, the prudent risk management response will be for schools to adopt strict policies and practices to forestall this possibility. They are likely simply to close the forum. While many schools might feel forced to choose this route in an effort to retain control over teacher speech, few would view this course as optimal from an educational perspective to the extent it had a chilling effect on all creative classroom expression. Thus would yet another lawsuit brought in the name of freedom of expression have the opposite net effect.[39] More significantly for children, busy school officials will have to engage in exactly the kind of behavior

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demonstrate a lack of ability or authority to act."). School officials must be able to respond to concerns voiced by the school community without first traveling the maze of forum analysis.

[39] The response of many school districts to *Hazelwood* was to safeguard public resources by formally declaring all student publications to be curricular offerings subject to prior review.

this Court suggested in *Downs*, lest their lack of consistent oversight of school walls have consequences for the public fisc.[40]

III. A public school teacher's free speech claim is properly evaluated using the same legal authority that applies to free speech claims made by other public employees.

There is no compelling reason to afford public school employees greater speech protections than are afforded other public employees under the *Pickering* line of decisions. The special considerations of the school environment argue for relatively more employer discretion, not less. In favoring forum analysis over *Pickering*, the District Court incorrectly seemed to suggest (1) that *Pickering* applies only to government speech, and (2) that somehow *Pickering's* mere acknowledgment that public employees speaking as citizens may have free speech protections answers the question whether *Pickering* or forum analysis applies here—a leap akin to the jump from *Tinker's* dicta to forum analysis.[41]

Amici caution the Court against the messy consequences of deeming the employee speech here non-curricular. If this Court disagrees, *Amici* urge the Court

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[40] To the extent *Tucker* suggests a restriction is more likely to be deemed overbroad and unreasonable where the employer fails to utilize a less restrictive alternative, this means either that schools have an even more difficult path to avoiding liability from either direction, or that the only safe path will be the most restrictive. "The government may … close the fora whenever it wants." *Currier v. Potter*, 379 F.3d 716 (9th Cir. 2004).

[41] 1 ER 21-22.

to accord sufficient weight to a school district's interests when balancing them against those of the employee. Regardless of how the *Pickering-Connick-Garcetti* line is applied to this appeal, that line, and not forum analysis, is the proper framework for an employee claim.

A. Nearly all classroom expression by a teacher is unavoidably a curricular matter and is made in the role of employee.

A threshold question for the proper application of *Pickering-Connick-Garcetti* in this case is whether the speech at issue here is curricular[42] or, as the District Court concluded, non-curricular. Other courts have reasoned persuasively that a school educates in countless ways other than direct instruction and that these other means must be subject to school oversight.[43]

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[42] By "curricular," *Amici* refer not strictly to speech delivered as part of a school's formal instruction in core subjects but more broadly to speech made pursuant to school's full range of programs or activities. *See Downs*, 228 F.3d at 1015 ("Whether or not the bulletin boards by themselves may be characterized as part of the school district's "curriculum" is unimportant, because curriculum is only one outlet of a school district's expression of its policy."). *Accord Christian Legal Society*, 2010 WL 2555187, *14 ("A college's commission—and its concomitant license to choose among pedagogical approaches—is not confined to the classroom, for extracurricular programs are, today, essential parts of the educational process.").

[43] *E.g.*, *Lee v. York County*, 484 F.3d at 698-99 (finding that teacher's posters may bear school's imprimatur where "constantly present for review by students in a compulsory classroom setting" and that, "Classroom speech can impart particular knowledge if its purpose is to convey a specific message or information to students. That specific message need not relate to, for example, Spanish instruction, but could instead constitute information on social or moral values that the teacher believes the students should learn or be exposed to.").

In determining how broadly to construe what is curricular speech, this Court should consider carefully the disadvantages of parsing out in every case whether every particular form of teacher in-school speech relates sufficiently to the educational mission or to employee job duties so as to be deemed curricular. The essence of *Garcetti* was to spare public employers the "constitutionalizing" of routine employment matters.[44] That assurance cannot be realized where, on a variety of related issues, courts apply the ruling in a way that "does not avoid the judicial need to *undertake the balance* in the first place.[45] For example, does the status of classroom speech turn on what subjects the employee teaches, so the posters in question here would be protected in a math teacher's classroom but not in a civics teacher's?[46] What different rules would apply to a school's non-instructional staff, and under what circumstances?

Should this Court determine that two seven-by-two-feet banners posted by a teacher in a classroom for viewing by students can conceivably fall into the

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[44] "Underlying our cases has been the premise that while the First Amendment invests public employees with certain rights, it does not empower them to 'constitutionalize' the employee grievance.' " 547 U.S. at 420 (quoting *Connick*, 461 U.S. at 154).

[45] *Id.* at 449 (Breyer, J., dissenting).

[46] In *Amici*'s view, the banners here are curricular no matter who posts them. The classroom is by its very nature instructional and when a teacher affixes particular material to the walls that encompass that environment, students are exposed to the messages contained in that material on a daily basis. For example, a teacher's isolated comment on a religious matter may have less impact on students than a prayer imprinted on a poster that the students see every day. Classroom displays are quintessentially instructional.

category of purely personal teacher speech,[47] it becomes important when balancing employer and employee interests to recognize and account for the concerns a school district must have. *Amici* urge the Court to recognize the inherent tradeoff in this determination. The broader this Court's reading of "curricular" speech, the more clearly the Court must provide a great degree of employer discretion over the speech. Conversely, the narrower the reading, the more clearly the Court must raise a high barrier to any claim of liability based on the district's failure to regulate such speech.

B. A teacher's curricular speech is governed by *Garcetti v. Ceballos.*

Under *Garcetti*, if the teacher's speech is made pursuant to his or her professional duties, the First Amendment does not come into play.[48] This Court should put to rest any notion that *Garcetti* left for another day the question of its

[47] Appellants' Br. at 10.

[48] *See Mayer v. Monroe County Comm. Sch. Dist*., 474 F.3d 477, 479 (7th Cir. 2007) ("[I]f *Garcetti* supplies the rule of the decision, then the school district prevails without further ado."). While this Court in *Huppert v. City of Pittsburg*, 574 F.3d 696, 702-703 (9th Cir. 2009), surely got it right that whether an employee spoke pursuant to his or her official duties is the logical first inquiry in applying the *Pickering* line, whether this Court follows the sequence set out in *Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009), is of less moment than that the Court accord each of the Supreme Court's decisions its due. In that regard, certainly there is ample authority from other courts for the proposition that curricular speech does not touch on a matter of public concern for purposes of *Connick*. *See* Appellants' Br. at 25-26. But the whole point of *Garcetti* is to obviate the need for just this sort of inquiry: Curricular speech is the essence of a teacher's duty.

applicability to teacher speech in the K-12 context. *Garcetti's* academic caveat[49] was expressly the Court's response to Justice Souter's dissent, which solely addressed professors in public colleges and universities and cited cases exclusively from the post-secondary realm.[50]

K-12 schools are readily distinguished from the university world by legally significant factors including mandatory attendance laws, the greater impressionability of younger students, the instructional rather than scholarly role of teachers,[51] increasingly prescriptive and high-stakes state curricular standards, and even some teacher pay schemes linked to student performance. For that matter, the fact that at least some courts have not shied away from applying *Garcetti* even in the higher education context should afford this Court even greater certainty in acknowledging its applicability in school employee cases.[52]

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[49] "We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching." 574 U.S. at 425.

[50] *Id*. at 438-39 (Souter, J., dissenting). *See also Mayer*, 474 F.3d at 480 ("How much room is left for constitutional protection of scholarly viewpoints in *post-secondary* education was left open in *Garcetti* … and need not be resolved today.") (emphasis added).

[51] See W. Stuart Stuller, *High School Academic Freedom: The Evolution of a Fish Out of Water*, 77 NEB. L. REV. 301, 335 (1999) (describing the development of legal protection of academic freedom for professors as a means of protecting not opinions expressed in instruction but primarily of publication and discussion of controversial ideas in research and scholarship).

[52] *Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008); *Piggee v. Carl Sandburg Coll.*, 464 F.3d 667 (7th Cir. 2006); *Hong v. Grant*, 516 F. Supp.2d 1158 (C.D. Cal. 2007).

If *Garcetti* did not apply to K-12 employees, the implausible result again would be that public schools would enjoy less discretion over employee speech than do other public employers, despite the special characteristics of the school environment.[53] This cannot be correct. Again, these special characteristics argue for more employer discretion, not less.

C. A teacher's non-curricular speech made as a private citizen is governed by *Pickering v. Board of Education* and *Connick v. Myers.*

A school employee's non-curricular, personal speech at school is governed not by forum analysis but by the *Pickering-Connick* test this Court identified in *California Teachers Association*.[54] This includes *Connick's* inquiry into whether the employee's speech touched on matter of public concern, a question not addressed by the District Court.[55]

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[53] The same paradox would result, for that matter, from the District Court's theory that in school employment matters the road to forum analysis is paved specifically with *Tinker.*

[54] *Supra*, nn. 7-8. Beyond the obvious point that *Pickering* was a school employee case to begin with, this Court generally has applied the *Pickering* line to public employee speech.

[55] Again, other courts have found that curricular questions do not touch on a matter of public concern. *Supra*, n. 48. On the other hand, this Court observed in *Tucker* that, "This circuit and other courts have defined public concern speech broadly to include almost *any* matter other than speech that relates to internal power struggle within the workplace." 97 F.3d at 1210. If *Connick* is of so little weight, this only reinforces the centrality of the Supreme Court's ruling in *Garcetti*.

In balancing interests under *Pickering*, a court must recognize that when the public employer is a public school, on the employer's side of the ledger are strong interests in avoiding subjecting captive audience of children to the personal views of teachers on controversial subjects.[56] These interests include the need to preserve the district's neutrality on controversial matters and to avoid Establishment Clause violations.[57] School officials are entitled to judicial deference[58] on questions such as the likely perceptions of their students and parents.[59] Their reasonably anticipated concern should suffice for the court's consideration.[60]

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[56] Although the District Court addressed only the factors discussed by this Court in *Nicholson*, neither *Pickering* nor *Nicholson* suggested this list was exhaustive rather than illustrative. 1 ER 22-23. *See Pickering*, 391 U.S. at 569 ("[W]e shall indicate some of the general lines along which an analysis of the controlling interest should run."); *Nicholson*, 682 F.2d at 865.

[57] *Berry*, 447 F.3d at 650 ("The *Pickering* balancing test recognizes these important, but sometimes competing, concerns [of the employee's Free Exercise and Free Speech rights and employer's liability under the Establishment Clause] and allows a public employer to navigate a safe course."), n.9 (finding that employer's concern over presence of religious items on premises "finds some support in the Supreme Court recent opinions" over Ten Commandments displays) (internal citations omitted). *Accord Vasquez v. Los Angeles County*, 487 F.3d 1246, 1255-56 (9th Cir. 2007) (internal citations omitted); *Peloza*, 37 F.3d at 522.

[58] *Hazelwood* is relevant to the employment context in this sense: Any "legitimate pedagogical concern" under *Hazelwood* logically is an employer interest for *Pickering* balancing purposes.

[59] In fairness, a court could also evaluate the religious or non-religious character of the speech and factor that into the balancing. *See, e.g., Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1014 (9th Cir. 2010) (deeming recitation of Pledge of Allegiance a secular patriotic exercise). However, this Court should be skeptical of the District Court's suggestion that a school's alleged selectivity in safeguarding against a misperception of its imprimatur neutralizes this as a legitimate concern. 1 ER 19. Were a plaintiff to sue a school district over a teacher's religious displays

IV. Individual defendants are entitled to strong qualified immunity protection from free speech claims arising in public schools.

It is no surprise that courts so frequently employ metaphors like Scylla and Charybdis when discussing First Amendment issues in public schools. Such judicial acknowledgments[61] are more than colorful: They are an important and unavoidable backdrop to considerations of qualified immunity.

The school officials in this case were conscientiously addressing a concern brought to them with reference to district guidelines that never had left classrooms wide open to personal views.[62] The examples asserted of some other allegedly

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in the classroom, the district presumably would not defeat an Establishment Clause claim simply by noting that it also had tolerated other questionable practices.

[60] *Nurre v. Whitehead*, 520 F. Supp.2d 1222, 1237, n. 20 (W.D. Wash. 2007) (finding that defense "should not depend on a hindsight determination by the court, but rather on the reasonableness of the school district's belief at the time that an activity would violate the Establishment Clause.").

[61] *E.g.*, *Nurre v. Whitehead*, 580 F.3d 1087, 1102 (9th Cir. 2009) (M. Smith, J., dissenting in part and concurring in judgment) (school officials "in a Catch 22, subject to criticism and potential law suits regardless of the position they take"); *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. # 204*, 523 F.3d 668, 675 (7th Cir. 2008) ("a razor's edge" between being sued for violating free speech and being sued for failure to protect students from offensive comments); *Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 620 (2d Cir. 2005) ("the thorniest of constitutional thickets—among the tangled vines of public school curricula and student freedom of expression"); *Bauchman for Bauchman v. West High Sch.*, 132 F.3d 542, 561 (10th Cir. 1997) ("a morass of inconsistent Establishment Clause decisions").

[62] Appellants' Br. at 13-16.

questionable teacher speech not confronted by these busy officials come from the many classrooms of four high schools.

Where school officials and their legal counsel had an objectively plausible concern about an Establishment Clause problem, it simply will not do to dismiss that concern as subjectively implausible based on other speech that may have been overlooked—let alone to mischaracterize the concern as viewpoint discrimination or hostility toward religion. The tough calls made here do not even approach plain incompetence or knowing violations of the law, the appropriately narrow exceptions to the qualified immunity protection the law provides public servants.[63]

CONCLUSION

To put the free speech questions presented by this case into perspective, it may be helpful return to basic principles. In the first place, the Constitution treats a public employee's speech differently than the law treats any other employee's speech only under a narrow set of circumstances in which this is necessary to ensure that individuals do not, by entering public service, forfeit the rights their fellow citizens enjoy to participate in our public discourse. Within that first narrow

[63] *Malley v. Briggs*, 475 U.S. 335, 341 (1986). *See also Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S.Ct. 2633, 2643-44 (2009) (reversing denial of qualified immunity for school officials where courts so divided); *Morse v. Frederick*, 551 U.S. 393, 409 (noting even dissent's support for reversing denial of qualified immunity for principal).

set of circumstances, it is debatable whether there is an even narrower subset of circumstances under which the Constitution should treat the speech of the employee of a public educational institution any differently from the speech of any other public employee. If so, those circumstances most likely are unique to the post-secondary academy. Any of those circumstances found in elementary and secondary education most likely suggest the need not for less employer discretion, but for more. For these reasons, *amici* urge this Court to reverse the decision of the district court.

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Dated: July 23, 2010

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