No. 25-5641

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RODERICK E. THEIS, II,

Plaintiff-Appellant,

v.

INTERMOUNTAIN EDUCATION SERVICE DISTRICT BOARD OF DIRECTORS, MARK S. MULVIHILL, Superintendent, and AIMEE VANNICE, Assistant Superintendent and Director of Human Resources,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Oregon
No. 2:25-cv-00865-HL

BRIEF OF *AMICUS CURIAE* LINDSAY AND MATT MOROUN RELIGIOUS LIBERTY CLINIC IN SUPPORT OF PLAINTIFF-APPELLANT

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Dated: October 24, 2025

/s/ Meredith H. Kessler
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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae is the Lindsay and Matt Moroun Religious Liberty Clinic within Notre Dame Law School.[2] As an academic institution and teaching law practice, the Clinic promotes and defends the freedom of religion for all people. It advocates for the right of all people to exercise, express, and live according to their beliefs. It defends individuals and organizations of all faiths against interference with these fundamental liberties and has represented an array of groups in cases to defend the right to religious exercise.

Among other things, the Clinic works to ensure that courts uphold meaningful constitutional protections to safeguard the rights of religious believers not only to worship and practice their religion at home, but also to participate fully, equally, and openly in public life.

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[1] Counsel for all parties consented to the filing of this brief. Counsel for Appellant consented via email on October 17, 2025. Counsel for Appellees confirmed during a phone call on October 23, 2025, that Appellees consent to the filing of this amicus brief.

No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29(a)(4)(E).

[2] The views expressed by the Clinic do not necessarily represent those of the University of Notre Dame or Notre Dame Law School.

INTRODUCTION

The First Amendment promises religious believers, of all faiths, the right "to participate on equal terms" in public life. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 852–53 (1995) (Thomas, J., concurring). The Supreme Court has repeatedly rejected the idea that individuals sacrifice those rights by accepting government employment. *See, e.g.*, *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968). So too for public school employees, who do not "shed their constitutional rights . . . at the schoolhouse gate." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 527 (2022) (quotation omitted).

Of course, even First Amendment rights are not boundless, and the government has certain leeway to regulate workplace expression to carry out the work it conducts. But the balance the Supreme Court has struck between employees' constitutional rights and the government's workplace interests requires a clear understanding of that speech which is the government's to control and that which isn't.

The decision below undermines these bedrock principles through a capacious theory of "government speech" that would subject nearly anything that is expressed openly in a public office to the government's total control. It invites censorship of personal expression and threatens to obliterate the First Amendment's protections for millions of public employees. And it defies a litany of recent cases safeguarding the right of religious expression in the public sphere. It must be corrected.

ARGUMENT

I. The government does not have free rein to censor everything its employees say while they are on the job.

Pickering sorts the government's impermissible restriction of employees' expression from its permissible regulation of speech on matters of workplace concern. Public employees are "paid in part to speak on the government's behalf and convey its intended messages," *Kennedy*, 597 U.S. at 527, and it is well understood that the First Amendment does not prevent the government from shaping its own messages, *see Shurtleff v. City of Boston*, 596 U.S. 243, 251–52 (2022). But, even in the workplace, the First Amendment safeguards an *employee's own* speech on a matter of constitutional value—and demands that the government actually justify any restrictions it imposes on that speech. *Kennedy*, 597 U.S. at 528; *Pickering*, 391 U.S. at 568.

A. The First Amendment protects employees' personal expression, even as they perform official duties.

In *Kennedy*, the Supreme Court made clear the controlling standard for speech by public employees: The First Amendment protects employees' expression of their own messages in the workplace, even if the government may control their delivery of "speech the government itself ha[s] commissioned or created." 597 U.S. at 529 (quotation omitted). Thus, the doctrine asks at the threshold whether an instance of speech *was the employee*'s (and thus protected) or *the government*'s (and thus

not).[3] The district court badly misunderstood the difference between the two.

As directed by *Kennedy*, the pertinent question is whether the relevant speech "owe[s its] existence to [the person's] responsibilities as a public employee." *Id.* at 530 (alterations and quotation omitted). Whether a public employee speaks "pursuant to [her] official duties" raises a "practical" question about what the employee is actually paid to do; it does not invite deference to "excessively broad" descriptions of her role. *Id.* at 529–31 (quotations omitted); *see also Lane v. Franks*, 573 U.S. 228, 240 (2014). Where the speech arises from the employee's duties, the First Amendment "generally will not shield [it] from an employer's control" because "that kind of speech is—for constitutional purposes at least—the government's own." *Kennedy*, 597 U.S. at 527. In other words, government employers can exercise control over an employee's "work product." *Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006). By contrast, an employee's speech is private and constitutionally protected if it "was not the product of performing the tasks [the employee] was paid to perform." *Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767, 778 (9th Cir. 2022)

[3] The district court's decision and this appeal turn on the first part of *Pickering*'s threshold inquiry: whether the employee spoke "pursuant to . . . official duties" or "as a citizen." *Kennedy*, 597 U.S. at 527–28 (quotation omitted). The parties do not dispute that Theis's speech satisfies the second part, which asks whether the employee's speech addressed "a matter of public concern." *Id.* at 528 (quotation omitted); ER-016.

(alterations and quotation omitted). The distinction "serve[s] the goal of treating public employees like 'any member of the general public.'" *Garcetti*, 547 U.S. at 420–21 (quoting *Pickering*, 391 U.S. at 573).

Here, the answer to the question *Kennedy* demands is plainly no—Theis's personal books were not a government-created message he was hired to deliver. As the district court itself observed, Theis's "job does not include decorating his office," nor do his "official job duties . . . include displaying certain books or instructing on them." ER-019. Indeed, the school district permits employees to decorate their offices with a wide variety of personal items and messages. ER-006 ("paintings, personal photos, . . . posters, inspirational quotes, books, and other items"). These varying and highly personal decorations are not the "work product" that the government commissioned them to produce. *Garcetti*, 547 U.S. at 422; *see also Burch v. City of Chubbuck*, 146 F.4th 822, 834–837 (9th Cir. 2025) (public employee's yard-sign display not government speech).

The district court, however, confused this inquiry for the more expansive question of whether Theis's expression *occurred while* he performed his job. It found that the exact same expression—Theis's selection of books displayed on his shelf—was his own "personal" message when alone in his office but became the "government's" message when he met with students and otherwise "engaged in speech that [his employer] paid him to produce as an Education Specialist." ER-019–20 (emphasis omitted). In other words, Theis's expression of other, unrelated messages

that he *was* hired to deliver somehow transformed any and all surrounding personal messages into the government's as well. On that view, Theis's personal book display was the "school's" message if—but only if—students working with Theis were present to see it. *Id.*

The district court's "speech while working" theory flouts the Supreme Court's direction in *Kennedy*. As the Court repeatedly emphasized, the question is not whether the employee's speech occurred *in relation* to his work, "touched on matters" relevant to his employment, or was expressed "within the office environment." *Kennedy*, 597 U.S. at 529–30 (quotation omitted); *see also Garcetti*, 547 U.S. at 420–21 (rejecting argument that "all speech within the office is automatically exposed to restriction"). The question is instead whether the employee spoke "pursuant to a government policy," "convey[ed] a government-created message," or delivered "speech the [government] paid him to produce." *Kennedy*, 597 U.S. at 529–30. Indeed, *Kennedy* soundly rejected the idea that a high school football coach's on-field prayer became the school's "message" simply because it was performed at the place and time of his job and in view of the players he was hired to coach. *Id.*[4]

[4] To be sure, the government may have different *reasons* to regulate the messages its employees express when others are present. But while sufficiently strong regulatory interests might *justify* a restriction on constitutionally protected speech, they do not transform private speech into "governmental speech" free from those protections in the first place. *See infra* Part I.C.

Nor does it matter, as the district court surmised, that Theis might select the particular decorations in his office with students in mind. *See* ER-019 (Theis decorated his office to be "kid friendly" (quotation omitted)). In *Kennedy*, the Supreme Court rejected the argument that everything teachers and coaches say while "on duty" loses its constitutional value and is "subject to government control" simply because their jobs include "serv[ing] as vital role models" to students who observe them. 597 U.S. at 530–31. And the district court's observation could be made about virtually any instance of personal expression in the workplace. What employee does not choose his words, his gestures, his office decor, or his style of dress with an eye toward how his colleagues or clients might react? Sensitivity to the opinions of others in a government office does not mean that every workplace expression is therefore the *product of* public employment. That logic would nullify, entirely, the idea of First Amendment protections within the office.

This Court must correct this errant course and reaffirm that the government cannot escape the mandates of the First Amendment by broadly defining "official duties" to encompass all workplace speech. *See id.*; *see also, e.g.*, *Hayes v. Metro. Gov't of Nashville & Davidson Cnty.*, Nos. 23-5027/5075, 2023 WL 8628935, at *1–2 (6th Cir. Dec. 13, 2023) (high school principal's testimony at misconduct hearing fell outside his official duties); *Heim v. Daniel*, 81 F.4th 212, 226–28 (2d Cir. 2023) (public-university professor's speech was not part of his official duties).

B. Employees' personal speech is protected even if outsiders mistake it for a governmental message.

The district court further erred in suggesting that an employee's personal expression might lose its First Amendment protections if outsiders *mistakenly perceive* that message to come from the government. In the district court's words, "in a school setting, when speech can be 'reasonably viewed by students and parents as officially promoted by the school' . . . it is properly considered" the school's own speech to control. ER-019 (quoting *Dodge*, 56 F.4th at 778). Again, this theory underlies the district court's perplexing view that the same book display is Theis's personal speech when alone yet the government's message when others are present. And it is, yet again, a theory of public-employee speech that is unmoored from the premises of *Pickering* and *Garcetti* and squarely contradicts *Kennedy*.

As recounted above, the question of employer versus employee speech asks from whom the speech effectively originated—the employee in his "personal capacity" or the government as a "product of . . . the tasks he was paid to perform." *Dodge*, 56 F.4th at 778 (alterations and quotation omitted). Or, as Justice Alito recently put it, "government speech occurs if—but only if—a government purposefully expresses a message of its own through persons authorized to speak on its behalf." *Shurtleff*, 596 U.S. at 267 (Alito, J., concurring). Accordingly, the Court's analysis of that question in *Kennedy* turned exclusively on whether the

coach's on-field prayer was done "pursuant to [his] official duties," giving no attention to how those in attendance might perceive it. 597 U.S. at 527–30. Most damning, the Court rejected the school district's argument that it could censor the prayer out of concerns that a "reasonable observer [might] (mistakenly) infer that . . . the District endorsed Mr. Kennedy's [religious] message." *Id.* at 533. The more salient point was that the government had not "actually endorsed" or created that "private" message. *Id.* Indeed, well before *Kennedy*, the Supreme Court cautioned that the First Amendment does not set forth a "heckler's veto" through which protected activity "can be proscribed on the basis of what . . . [onlookers] might misperceive." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001); *accord Kennedy*, 597 U.S. at 534.

More generally, the district court's focus on mistaken perceptions reflects an approach to governmental speech that has fallen out of favor in First Amendment law. In *Kennedy*, the Court declared its "abandon[ment]" of the much-derided *Lemon* test for Establishment Clause cases because its "estimations about whether a 'reasonable observer' would consider the government's challenged action an 'endorsement of religion'" had "'invited chaos' in lower courts" and "created a 'minefield'" for officials attempting to decide what could take place in settings like schools. 597 U.S. at 534 (citations omitted). Only weeks before, three members of the Court called for an end to similar inquiries in cases asking whether government-facilitated messages in

public spaces are "governmental" or "private" speech, complaining that "[u]nless the public is assumed to be omniscient, public perception cannot be relevant to whether the government *is* speaking, as opposed to merely *appearing* to speak." *Shurtleff*, 596 U.S. at 265 (Alito, J., concurring). And in addressing a challenge to a law that required certain manufacturers to subsidize government-created advertisements, the Court previously rejected the argument that the constitutionality of compelled support for government speech depends on whether a "reasonable viewer would identify the speech as the government's." *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 564 n.7 (2005).

In all of these areas, the constitutional point is the same: The First Amendment protects the right of private individuals to speak, whether or not others will correctly understand the source of the message they hear. *See, e.g.*, *Shurtleff*, 596 U.S. at 266 (Alito, J., concurring) ("[T]here is no obvious reason why a government should be entitled to suppress private views that might be attributed to it . . . ."). The same is true within the public workplace. *See* Randy J. Kozel, *Government Employee Speech and Forum Analysis*, 1 J. Free Speech L. 579, 590 & n.47 (2022) ("The Supreme Court is suitably skeptical of claims that audience reaction justifies the restriction of speech. . . . Nor may supervisors ban all religious speech by public employees based solely on concerns about perceived endorsement.").

C. The government may regulate personal speech in the workplace—but must justify its actions.

None of this is to say that personal speech in the workplace cannot be regulated. But the *Pickering-Garcetti* framework requires the government to *justify* its actions by showing that its legitimate interests "in promoting the efficiency of the public services it performs through its employees" outweigh the individual's interest in personal expression. *Pickering*, 391 U.S. at 568; *see also Kennedy*, 597 U.S. at 528 (test requires "a delicate balanc[e] of the competing interests surrounding the speech and its consequences" (quotation omitted)). Thus, for example, the government might regulate even protected employee speech that has proven detrimental to the employee's job. *See Dodge*, 56 F.4th at 781–83.

The district court erred by allowing concerns over such justified regulations of employee speech to infect the determination of whether that speech is entitled to constitutional protection *at all*. Of course, answers to questions like how Theis's office decorations actually affect students might matter to the ultimate conclusion on whether the school district's actions were permissible. But the district court wrongly treated that as a question for *Pickering*'s threshold inquiry—which determines only whether it was personal speech deserving of *any* constitutional protection. ER-019–20. And the consequence of finding that the speech is actually "the government's" is not that it can be regulated for good cause; rather, as supposedly the government's own speech, it risks being

wantonly, arbitrarily, and possibly even discriminatorily censored. *See Matal v. Tam*, 582 U.S. 217, 235 (2017) ("If private speech could be passed off as government speech[,] . . . government could silence or muffle the expression of disfavored view[s]."). This flies in the face of *Pickering*, which is meant to stop the government from "suppress[ing] the rights of public employees to participate in public affairs." *Connick v. Myers*, 461 U.S. 138, 144–145 (1983).

The need to allow room for appropriate regulations based on legitimate governmental interests cannot justify the lower court's move to nullify entirely the First Amendment's protections for wide swaths of private speech by declaring it "the government's" own.

II. Courts must be especially cautious in employing *Pickering* to restrict free exercise rights.

Because Theis's claim involves his personal religious practices, the application of the *Pickering*-*Garcetti* framework to this case also risks stifling public employees' First Amendment right to the free exercise of religion in the workplace. *Pickering* and its progeny focus on employees' free speech rights, and that inquiry does not translate well—indeed threatens great harm—to free exercise claims. For this very reason, the Supreme Court in *Kennedy* cautioned against a rote and mechanical application of *Pickering* and *Garcetti* to claims brought under the Free Exercise Clause. *Kennedy*, 597 U.S. at 531 n.2. This Court should heed that caution, and chart a more doctrinally sound course, now.

This is of greatest concern at the threshold inquiry, which sorts constitutionally protected expression from unprotected expression, based on some conception of its broader value. *See supra* n.3; *Connick*, 461 U.S. at 146; Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 Nw. U. L. Rev. 1007, 1025 (2005). To be sure, that values-driven inquiry has been criticized, even in speech cases.[5] But, for better or worse, free speech doctrine is littered with lines separating types of speech that enjoy different constitutional protections. *See generally, e.g.*, Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 Harv. L. Rev. 1765 (2004). Such lines make no sense for claims concerning personal religious exercise—an activity that *always* has constitutional value.

The notion of varying constitutional "value" for different forms of religious exercise is anathema to the First Amendment. Indeed, "laws [that] establish a preference for certain religions based on the content of their religious doctrine [or] how they worship" are "fundamentally foreign to our constitutional order." *Cath. Charities Bureau, Inc. v. Wisc. Lab. & Indus. Rev. Comm'n*, 605 U.S. 238, 248–49 (2025). This is because the promise of free exercise derives from the individual "conviction and conscience" of each citizen. James Madison, *Memorial and Remonstrance*

[5] *See, e.g.*, Kozel, *Reconceptualizing Public Employee Speech*, *supra*, at 1026; *Waters v. Churchill*, 511 U.S. 661, 692 (1994) (Scalia, J., concurring).

Against Religious Assessments, in The Separation of Church and State: Writings on a Fundamental Freedom by America's Founders (Forrest Church ed., 2004). That "unalienable right" is inherently personal: It both depends "only on the evidence contemplated by [one's] own mind[]" and reflects one's individual "duty towards the Creator." *Id.* The right to religious exercise has therefore long "enjoyed broad protection." *Fulton v. City of Philadelphia*, 593 U.S. 522, 574 (2021) (Alito, J., concurring). To be sure, the right is not absolute; the state's interest in ensuring public peace or safety may justify its infringement. *See id.* at 575. But that limitation does not reflect a judgment that the First Amendment places different value on different religious exercises. The First Amendment, manifestly, does not. *See, e.g.*, *Cath. Charities Bureau*, 605 U.S. at 248–49 (describing the "serious harm" of "differential treatment across religions"); *Larson v. Valente*, 456 U.S. 228, 245 (1982) ("Free exercise . . . can be guaranteed only when legislators—and voters—are required to accord [all] religions the very same treatment . . . ."); John Witte, Jr. et al., Religion and the American Constitutional Experiment 68–75 (5th ed. 2022) (discussing the Framers' interest in safeguarding religious pluralism and protecting against religious discrimination).

The *Pickering-Garcetti* threshold inquiry into "personal" versus "governmental" activity also makes little sense for religious exercise. Under longstanding First Amendment doctrine, there is no tenable

concept of the government's "own" religious exercise. *Cf. Kennedy*, 597 U.S. at 537. Indeed, a State would confront very different questions from those raised here if it were to hire employees to engage in or promote religious exercise that it "created" or "commissioned." *Cf. id.* ("Government may not coerce anyone to attend church nor may it force citizens to engage in a formal religious exercise." (citations and quotation omitted)); *Engel v. Vitale*, 370 U.S. 421, 425 (1962) ("[I]t is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.").

Unsurprisingly, then, the Supreme Court has questioned "whether the Free Exercise Clause may sometimes demand a different analysis at the first step of the *Pickering-Garcetti* framework." *Kennedy*, 597 U.S. at 531 n.2; *see also Borough of Duryea v. Guarnieri*, 564 U.S. 379, 406 (2011) (Scalia, J., concurring in part and dissenting in part). Indeed, other courts have skipped that threshold question entirely in free exercise cases. For example, in *Watts v. Florida International University*, 495 F.3d 1289 (11th Cir. 2007), a public-university counselor alleged that his rights to free speech and religious exercise were violated when he was fired for encouraging a Catholic patient to consider therapy options offered by a church. Despite rejecting his free speech claim at the threshold step of *Pickering-Garcetti*, the Eleventh Circuit allowed his free exercise claim to proceed without any application of the same. *See id.* at

1293–95. Similarly, in *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021), a public-university professor alleged that his university's communication policies concerning gender identity violated his free speech and religious exercise rights. The Sixth Circuit applied *Garcetti* and *Pickering* to the professor's free speech claim but not to his free exercise claim. *See id.* at 504–17. And in a similar vein, this Court and others have suggested that religious expression "is unquestionably of inherent public concern," and thus may easily surpass the threshold in any event. *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 966 (9th Cir. 2011); *accord Tucker v. Cal. Dep't of Educ.*, 97 F.3d 1204, 1210 (9th Cir. 1996); *see also*, *e.g.*, *Brown v. Polk County*, 61 F.3d 650, 658 (8th Cir. 1995); *Adams v. Trs. of Univ. of N.C.-Wilmington*, 640 F.3d 550, 565 (4th Cir. 2011).

This Court should heed the Supreme Court's warning and likewise reject the application of any "threshold" filtering for employee free exercise claims. Whatever the value of that threshold inquiry to sort between governmental, workplace speech and personal expression, it has no salience when the right at issue concerns actual religious exercise. That exercise is always constitutionally valuable and constitutionally protected. The Court should thus proceed directly to evaluating the government's supposed *justifications* for restricting Theis's religious exercise.

III. The Supreme Court has repeatedly rebuffed governmental overreach that suppresses religious expression in public life.

This Court and many others have warned against extending the *Pickering-Garcetti* framework beyond its core context.[6] Indeed, any effort to foster First Amendment "exceptionalism" for workplace speech "creates a risk that fundamental constitutional precepts . . . will lose their resonance for government employees nationwide." Kozel, *Government Employee Speech*, *supra*, at 580. The district court's ambitious expansion of *Pickering* and *Garcetti* not only threatens to do that, but also risks an even broader harm that the Supreme Court has repeatedly worked to prevent: the removal of religious expression from public life.

Our nation has a "long tradition of allowing religious adherents to participate on equal terms" in public life. *Rosenberger*, 515 U.S. at 852–53 (Thomas, J., concurring). The Founders' response to the occasionally violent religious conflicts of their time was not to relegate religion to the private sphere but instead to jealously guard the freedom to engage in public religious expression, regardless of belief or viewpoint. Indeed,

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[6] *See, e.g.*, *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 678–80 (1996) (*Pickering* applies with less force to government contractor's speech than an employee's); *Jarrard v. Sheriff of Polk Cnty.*, 115 F.4th 1306, 1317 (11th Cir. 2024) (declining to apply *Pickering* to religious speech by a volunteer minister); *CarePartners, LLC v. Lashway*, 545 F.3d 867, 881–82 (9th Cir. 2008) (collecting cases from First, Second, Third, Fifth, Sixth, Seventh, and Tenth Circuits).

"[t]he Religion Clauses of the Constitution aim to foster a society in which people of all beliefs can live together harmoniously." *Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29, 38 (2019). The Founders encouraged this diversity of religious expression because they "believed that the public virtues inculcated by religion are a public good." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 400–01 (1993) (Scalia, J., concurring); *see also* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2195 (2003). Religion—and a diversity of religious expression—was not to be quieted in public life; it was understood as a "unifying mechanism" to be welcomed there. *Lee v. Weisman*, 505 U.S. 577, 646 (1992) (Scalia, J., dissenting); *see also Town of Greece v. Galloway*, 572 U.S. 565, 584 (2014) (our political history "strive[s] for the idea that people of many faiths may be united in a community of tolerance and devotion").

In recent years, the Supreme Court has worked to safeguard these founding principles by repeatedly rejecting governments' attempts to carve out swaths of public life from which religious expression or religious believers were excluded. In a series of cases, the Court held that states may not bar religious schools from public programs offering valuable benefits to support the education of children enrolled in private schools. *See Carson v. Makin*, 596 U.S. 767 (2022); *Espinoza v. Mont. Dep't of Rev.*, 591 U.S. 464 (2020); *Trinity Lutheran Church of Columbia, Inc. v. Comer*,

582 U.S. 449 (2017). In *Fulton*, the Court rejected the argument that Philadelphia's "heightened powers when managing its internal operations" allowed it to discriminate against religious groups who wished to participate in the City's foster-care system. 593 U.S. at 535–36. In *Shurtleff*, the Court held that the City of Boston could not invite private groups to display any flag of their choosing—except a religious one—in front of City Hall. 596 U.S. at 259. In *Kennedy*, the Court rebuked a school district for censoring the on-field prayers of a high school football coach on the district's "view that the only acceptable government role models for students are those who eschew any visible religious expression." 597 U.S. at 540; *see also id.* at 531 ("On [the district's] understanding, a school could fire a Muslim teacher for wearing a headscarf in the classroom or prohibit a Christian aide from praying quietly over her lunch in the cafeteria."). And, just this year, in *Mahmoud v. Taylor*, the Court held that the government cannot effectively exclude families of certain religious beliefs from the public schools by imposing mandatory curricular material that "interferes with the religious development of their children." 145 S. Ct. 2332, 2353 (2025).

Each of these cases saw the government claiming some segment of public life for its own and then secularizing it in the name of official religious "neutrality." But "[o]ur Constitution was not designed to erase religion from American life." *Shurtleff*, 596 U.S. at 288 (Gorsuch, J., concurring). Our governments do not "roam[] the land, . . . scrubbing

away any reference to the divine." *Am. Legion*, 588 U.S. at 56. Indeed, as Justice Gorsuch observed in *Shurtleff*, throughout history "the suppression of unpopular religious speech and exercise has been among the favorite tools of petty tyrants. Our forebears resolved that this Nation would be different." 596 U.S. at 284–85 (Gorsuch, J., concurring) (citation omitted). Thus, the Supreme Court has taken great care to ensure that governments extend "mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike." *Kennedy*, 597 U.S. at 514. Far from "creat[ing] a secular public sphere," the First Amendment allows religious believers to "participate fully and equally with their fellow citizens in public life without being forced to shed their religious convictions and character." Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 117 (1992).

This case yet again asks the courts to prevent government officials from encroaching upon these central freedoms in public life. Cases like *Pickering* and *Garcetti* allow governments to impose certain rules for their employees' speech *as justified by* sufficient governmental interests. They do not, however, embrace the district court's capacious theory that essentially everything said in the course of public service is therefore the government's own speech to censor and control. Indeed, the decision below presents this Court with yet another "clear conflict with . . . decades of Supreme Court cases affirming the principle that the First Amendment *safeguards*—not banishes—private, voluntary

religious activity by public employees." *Kennedy v. Bremerton Sch. Dist.*, 4 F.4th 910, 931 (9th Cir. 2021) (O'Scannlain, J., respecting denial of rehearing en banc).

This Court must reverse the decision below to eliminate that conflict. As the Supreme Court warned in *Kennedy*, to hold any "differently would be to treat religious expression as second-class speech and eviscerate" fundamental constitutional rights that safeguard it. 597 U.S at 531.

CONCLUSION

The decision below rests on an overly broad understanding of government speech that would grant the government complete control over nearly everything that is publicly expressed in the workplace. That capacious theory cannot be squared with the Supreme Court's repeated defense of government employees' First Amendment rights while balancing governmental workplace interests. And it threatens to allow the government to unconstitutionally censor—or exclude—the religious from the public square. It must be corrected.[7]

[7] Notre Dame Law School's Lindsay and Matt Moroun Religious Liberty Clinic thanks students Blake Perry and Cameron Grinnell for their assistance in preparing this brief.

Dated: October 24, 2025

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CERTIFICATE OF COMPLIANCE

I hereby certify that this amicus brief complies with Federal Rule of Appellate Procedure 29(a)(5) as it contains 5,043 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(f).

The brief's typesize and typeface comply with Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared in 14-point Century Schoolbook, a proportionally spaced font.

Dated: October 24, 2025

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the Court's electronic filing system. I further certify that service was accomplished on all parties via the Court's electronic filing system.

Dated: October 24, 2025

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