

25-3047

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARISOL ARROYO-CASTRO,

Plaintiff-Appellant

v.

ANTHONY GASPER, in his individual and official capacity, Maryellen Manning, in
her individual and official capacity, Dario Soto, in his individual and official
capacity, Andrew Mazzei, in his individual and official capacity,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF
PLAINTIFF-APPELLANT AND URGING VACATUR AND REMAND

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INTEREST OF THE UNITED STATES

As the nation's largest public employer, the United States has a substantial interest in this appeal, which involves the standard for establishing violations of the First Amendment's Free Speech Clause and Free Exercise Clause in the context of public employment. The United States is permitted to file this brief without the consent of the parties or leave of the Court. Fed. R. App. P. 29(a)(2).

INTRODUCTION

The government needs some latitude to restrict its employees' expressive activity and religious exercise in the workplace. But it can't limit employees' personal, constitutionally protected speech unless necessary to avoid disruption or maintain safe, efficient, and effective operations. And as both the Supreme Court and this Court have explained, the government cannot rely on "excessively broad job description[s]" to "treat[] everything teachers and coaches say in the workplace as government speech subject to government control." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 530-531 (2022) (alteration and citation omitted). Similarly, the Supreme Court has made clear that, whatever test applies to free exercise claims in the public employment

context, the government may not restrict employees' religious exercise based on "phantom" Establishment Clause concerns that are far afield from the kind of coercion that the Establishment Clause prohibits. *Id.* at 543. This Court should vacate the district court's decision because it departed from those principles in ways that contradict governing Supreme Court precedent, and therefore the Court need not decide broader questions about the test that should govern free exercise claims in the public employment context.

First, the district court erred in concluding Ms. Castro's crucifix is government speech under the two-step *Pickering-Garcetti* framework. The court concluded that because the school has a policy governing classroom decoration, Ms. Castro's placement of a crucifix on the classroom wall was an act pursuant to her official duties, and therefore not entitled to First Amendment protection under step one. This holding unduly elevates the role of the employer's policy in the First Amendment analysis. An employee's expression is not automatically government speech simply because it touches on a general workplace policy, and here circumstances indicate that Ms. Castro's personal items on or near her work desk were personal speech.

A general policy's importance is especially limited under *Pickering-Garcetti* step one when, as here, it is not enforced even-handedly on religious speech and secular speech alike. Ms. Castro's crucifix is no different from other personal items teachers can place on their classroom walls. Invoking a general policy to transform the crucifix into the school's speech, and thus subject to censorship—while not censoring other personal expressive items in the classroom—could indicate a policy of content or viewpoint discrimination rather than one prescribing government speech pursuant to employees' official duties. In this context, the school's objections to the content of Ms. Castro's speech are questions more appropriately considered at the second step of the *Pickering-Garcetti* framework—when balancing the school's interests in censorship against Ms. Castro's expressive interests—rather than at the first step when deciding whether the crucifix is government speech.

When balancing these interests at step two, the school must focus its inquiry on avoiding disruption to the workplace and educational environment. It can't simply equate its discomfort with Ms. Castro's speech with workplace disruption, nor can concerns of disruption be purely speculative. Here, the fact that the crucifix hung on the wall in

various classrooms of Ms. Castro's for over a decade and resulted in only two student complaints suggests the disruption is minimal. Absent sufficient evidence that the crucifix disrupted, or in some other way undermined, a functioning workplace or educational environment, the school is unlikely to justify removing it. This Court should therefore vacate and remand for the district court to apply the correct analysis under *Pickering*'s second step.

Second, the district court erred in concluding that a government may justify a restriction on a public employee's religious exercise because of so-called "leeway" to address Establishment Clause concerns, even when the speech at issue would not itself violate the Establishment Clause. Relying on pre-*Kennedy* cases, the district court concluded employers must have ample "leeway" in regulating religious exercise to avoid an Establishment Clause violation. Because Ms. Castro's crucifix was visible to students during instruction time the district court concluded it was substantially likely to violate the Establishment Clause. To the court, the crucifix could subtly "coerce" students into religious observance because they are a "captive audience" while in the classroom.

The district court's analysis contravenes the Supreme Court's decision in *Kennedy*, which squarely held that a government may not rely on speculative Establishment Clause concerns that are far removed from the historical forms of coercion that the Establishment Clause prohibits, and which also rejected the same kind of subtle-coercion speculation that the district court relied on. *See Kennedy*, 597 U.S. at 532-543. When using the proper historical analysis, it is unlikely a small personal crucifix placed on the wall next to a teacher's desk would constitute "coercive" establishment of religion.

Finally, though the Supreme Court has yet to decide which test applies to free exercise claims brought by public employees, that debate is largely irrelevant to this appeal because Ms. Castro is entitled to vacatur and remand under any test. Under *Pickering*, the district court erred in concluding Ms. Castro's crucifix is government speech, and it further erred in applying the wrong Establishment Clause standard to justify the restriction on Ms. Castro's speech, without considering whether the speech would cause any disruption. If *Smith* applies instead, the school does not contest that the regulation of Ms. Castro's crucifix would be subject to strict scrutiny. And as discussed above, the district

court erred in applying an outdated Establishment Clause test to Ms. Castro's claims. Therefore, regardless of which test applies, Ms. Castro is entitled to vacatur and remand on her free exercise claim.

For these reasons, the district court erred in concluding Ms. Castro is not likely to succeed on the merits of her claims. The United States urges this Court to vacate and remand for further proceedings.

ARGUMENT

I. The district court erred in concluding that Ms. Castro's crucifix was government speech.

The district court erred in holding Ms. Castro's crucifix is not protected by the First Amendment. By concluding the crucifix is the school's speech, the district court effectively bypassed the balancing of interests required when regulating public employees' expression. If the court had engaged in the proper balancing analysis, the record even at this stage demonstrates that Ms. Castro's interest in displaying the crucifix likely outweigh the school's interest in censoring her.

A. Ms. Castro's passive display of a personal religious symbol on the wall by her desk is not the school's speech.

For a government employee to succeed in a First Amendment free-speech action against her employer, she must satisfy the *Pickering*-

Garcetti balancing test. See *Pickering v. Board of Educ.*, 391 U.S. 563 (1968); *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

This is a two-step framework. First, the plaintiff must show she is speaking in her personal capacity on matters of public concern. See *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 527-528 (2022) (applying *Pickering* and *Garcetti*). If so, then the government can overcome the claim by showing at the second step that its interest in restricting the protected speech “outweigh[s]” the employee’s interest in free expression. *Id.* at 528; see also *Heim v. Daniel*, 81 F.4th 212, 223-224 (2d Cir. 2023) (under step two the employer must provide “an adequate justification for treating the employee differently based on his or her speech from any other member of the general public” (citation omitted)). Here, the district court addressed only step one. And while the parties and the district court all agreed that Ms. Castro’s crucifix was “speech” addressing a “matter of public concern” (SPA18), the district court held that she was not speaking in her personal capacity under *Garcetti* (see SPA21, 27).¹

¹ “Doc. __, at __” refers to docket entries and the corresponding page on the district court’s docket, No. 3:25-cv-153-SFR (D. Conn.). “SPA__” refers to pages of the Special Appendix filed with appellant’s Opening Brief.

In *Garcetti*, the Supreme Court held that when the speech at issue “owes its existence” to the employee’s public position, then the speech is considered that of the government, not the employee. *Garcetti*, 547 U.S. at 421-422. In such situations, the government has nearly limitless authority to circumscribe the employee’s speech. *Kennedy*, 597 U.S. at 527 (“[T]he free speech clause generally will not shield the individual from an employer’s control and discipline because that kind of speech is—for constitutional purposes at least—the government’s own speech.”).

The Supreme Court refined the *Garcetti* test as applied to religious speech in *Kennedy*. There, the Court observed that when considering whether an educator’s speech occurs in his capacity as a public employee, courts must consider whether the government “commissioned or created” the speech, and whether it is speech the “employee was expected to deliver in the course of carrying out his job.” *Kennedy*, 597 U.S. at 529 (quoting *Garcetti*, 547 U.S. at 422). In determining whether the “speech at issue is itself ordinarily within the scope of an employee’s duties,” courts must undertake this inquiry “practically, rather than with a blinkered focus on the terms of some formal and capacious written job description.” *Ibid.* (citation modified).

The district court erred in concluding Ms. Castro’s crucifix is “[the school’s] speech.” SPA27. The district court’s conclusion hinges primarily on the fact that Ms. Castro decorated her classroom while fulfilling her duties as a teacher at the school pursuant to an official policy requiring her to create a positive educational environment. *Id.* at SPA20 (“I conclude Ms. Castro displayed items on the walls of the classroom in the course of performing one of her core duties as a teacher—creating a physical classroom conducive to learning.”). Under this rule, any personal decorative items are government speech, not the teacher’s personal speech.

Such an expansive view of *Garcetti* effectively eliminates the *Pickering* balancing test for any claim involving a teacher’s speech inside the classroom.² See *Kennedy*, 597 U.S. at 531 (“On this understanding, a school could [even] fire a Muslim teacher for wearing a headscarf in the classroom.”). Indeed, that appears to have been the district court’s express goal in reaching this conclusion. SPA27 (“[W]ith respect to

² The exception is for claims of academic freedom, see *Heim*, 81 F.4th at 226 (holding “*Garcetti*’s official duties framework” does not apply to “cases involving speech related to scholarship or teaching by public employees” (citation modified)), which the district court below concluded is not at issue in this case (SPA17).

[personal expressive] item[s] a teacher posted on the classroom wall, the District would need to engage in a *Pickering* balancing analysis and could prohibit only those items that are sufficiently disruptive.”). This rule eviscerates teachers’ free-speech rights because a school district could simply adopt any general policy that governs teachers’ conduct in the classroom and then claim teachers’ speech is subject to such a policy. The Supreme Court has repeatedly rejected such capacious reliance on a policy. *See Kennedy*, 597 U.S. at 529 (public employers cannot use “excessively broad descriptions” to render employee speech as that of the government (quoting *Garcetti*, 547 U.S. at 424)); *id.* at 530 (rejecting the argument that *Garcetti* automatically applies whenever the teacher’s speech takes place “within the [school]’ environment” (quoting *Garcetti*, 547 U.S. at 421)).

This Court has directly rejected such an application of *Garcetti* as well. *See Matthews v. City of New York*, 779 F.3d 167, 175 (2d Cir. 2015) (holding public employers cannot “simply prescribe similarly general duties, thereby limiting [constitutional] protection for wide swaths of employee speech”); *Montero v. City of Yonkers*, 890 F.3d 386, 394 (2d Cir. 2018) (holding *Garcetti* doesn’t apply simply because the employee’s

speech is “tangentially related to his job responsibilities”). In *Matthews*, this Court held that even if an employee’s speech “fall[s] within [a policy],” such a connection is “not . . . determinative of whether th[e] speech was protected by the First Amendment.” *Matthews*, 779 F.3d at 175. When the government merely points to a “general duty” the speech supposedly violates, such objections are more “properly considered as part of the *Pickering* balancing analysis in determining whether the government employer had an adequate justification for its actions.” *Ibid*.

Yet the district court adopted this argument wholesale in its attempt to distinguish the facts here from *Kennedy*. It concluded the “expression occurred in Ms. Castro’s role as a teacher—as Ms. Castro communicated the message to students on a classroom wall during instructional time.” SPA21. The fact that this speech occurs while Ms. Castro is “with students in the classroom for class,” while she is fulfilling “her core duties and act[ing] in her capacity as a teacher,” differentiates her speech from the speech in *Kennedy*, said the district court. SPA22. But like the speech at issue in *Kennedy*, Ms. Castro’s crucifix does not “seek[] to convey a government-created message,” she does not display it as part of her duties to “instruct[] [students],” nor is it connected to “any

other speech the District paid h[er] to produce as a [teacher].” *Kennedy*, 597 U.S. at 529-530. Instead, it is personal speech that she expresses in the workplace, and “both the substance of [her] speech and the circumstances surrounding it point to th[is] conclusion.” *Id.* at 530.

The *Pickering* balancing analysis must also “be undertaken ‘practical[ly].” *Kennedy*, 597 U.S. at 529 (citation omitted). Here, common sense and practical experience strongly suggest that small personal items on or near a work desk are not government speech. The crucifix was not placed in such a prominent position that it suggested it was school speech rather than a personal item. SPA56 (photo). As the plaintiff did in *Kennedy*, Ms. Castro also pointed out that others in the school were free to “engage in” secular “private speech” because they had similar personal items by their desks, like family photos or team pennants. *Id.* at 530; SPA18, 26. And there seems to be no reason why Ms. Castro’s crucifix was any different than her Yankees pennant or church calendar. SPA5. No one would confuse those items for the school’s speech. The school’s reliance on the policy cannot possibly be countenanced under step one where it “treat[s] religious expression as second-class speech.” *See Kennedy*, 597 U.S. at 531.

In any event, the school’s classroom decorations policy does not mean that teachers can *never* bring personal speech into the classroom in the form of a decoration, and here it does not turn the crucifix into government speech. The policy “specifically instructs teachers to consider the ‘physical aspects of [the] classroom’ with ‘both individual students’ needs and instructional goals in mind.” SPA20-21 (alteration in original) (quoting Doc. 50-4, at 9). The policy includes recommendations but does not prescribe everything teachers should place in their classroom, nor does it prohibit placement of teachers’ personal items on classroom walls. As stated above, if such a generalized policy is enough to dictate when private speech becomes government speech, then *Pickering* would be a nullity in the workplace because all employee speech is—or could be—regulated by an employer-imposed policy. See *Matthews*, 779 F.3d at 175; see also *Bevill v. Fletcher*, 26 F.4th 270, 277 (5th Cir. 2022) (rejecting argument that *Garcetti* applies simply “[b]ecause [the employer’s] policies controlled” the speech at issue).

The district court’s transformation of all personal decorations into government speech generates absurd outcomes and contravenes Supreme Court precedent on identifying government speech. Personal

decorations are not government speech because the school had no “meaningful involvement in the selection of [decorative items] or the crafting of their messages.” *Shurtleff v. City of Boston*, 596 U.S. 243, 258 (2022). Rather, teachers can hang nearly whatever non-profane items they please (except crucifixes, apparently). But under the district court’s rule, decorations such as photos of a teacher’s baby or a pennant expressing support for the Kansas City Royals would be government speech even though no reasonable person would believe a school in Connecticut “has endorsed th[ese] message[s].” *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 212 (2015).

The district court’s narrow read of *Kennedy* and expansive read of *Garcetti* wrongly limits the right of public employees to display personal speech in the workspace. The proper application of *Garcetti*—whether Ms. Castro’s speech “owe[s] [its] existence” to her public position—focuses on whether, in context, her speech “fulfill[ed] a responsibility imposed by h[er] employment” when she placed the crucifix on the classroom wall near her desk. *Kennedy*, 597 U.S. at 530 (citation omitted); *see also Lane v. Franks*, 573 U.S. 228, 240 (2014) (“The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an

employee's duties, not whether it merely concerns those duties."). If not, then it is subject to the normal *Pickering* balancing analysis that considers whether the employer's interest in regulating the speech outweighs the employee's interest in engaging in the speech.

Because Ms. Castro's placement of the crucifix on the wall next to her desk was not done in fulfillment of a specific responsibility imposed on her by the school, the crucifix is her personal speech. The school can prohibit this speech only if its interests in censorship outweigh Ms. Castro's expressive interests.

B. The *Pickering* analysis must focus on the reasonable likelihood of disruption and not whether the speech is merely disfavored by the government.

The district court did not engage in a *Pickering* balancing analysis because it concluded Ms. Castro's crucifix is the school's speech, so this Court should remand for the district court to conduct the analysis in the first instance. If this Court were to conduct the *Pickering* analysis in the first instance, it should find that the school likely could not satisfy its burden.

When balancing the interests of the employer against the interest of the employee, the court must consider whether the employer seeks to

advance a legitimate “need for orderly school administration” that outweighs the employee’s interest in expression. *Pickering*, 391 U.S. at 569. A “stronger showing may be necessary if the employee’s speech more substantially involve[s] matters of public concern.” *Connick v. Myers*, 461 U.S. 138, 152 (1983).

Employers cannot “use authority over employees to silence discourse . . . simply because superiors disagree with the content of employees’ speech.” *Rankin v. McPherson*, 483 U.S. 378, 384 (1987); *see also Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767, 787 (9th Cir. 2022) (holding school district cannot adopt censorship policy merely to silence “disfavor[ed]” views). Moreover, while an employer need not show “actual disruption to meet its burden,” *Davi v. Hein*, No. 21-719-cv, 2023 WL 2623205, at *2 (2d Cir. Mar. 24, 2023), it cannot silence employee speech based on “purely speculative” concerns about disruption, *MacRae v. Mattos*, 145 S. Ct. 2617, 2620 (2025) (Thomas, J., respecting the denial of certiorari). The feared harm from the speech ultimately must be “reasonable.” *United States v. National Treasury Emps. Union*, 513 U.S. 454, 476 (1995).

The school likely cannot satisfy its burden here. As explained below, the school's concerns about an Establishment Clause violation were unreasonable, and therefore an insufficient basis to silence Ms. Castro's speech. *See infra*, section II.B. Moreover, because the school can point to only two complaints about the crucifix over the course of a decade, neither of which explains how the passive display of the crucifix interfered with the school's mission of educating students, it would be improper to conclude, based on this record, that the school's fear of disruption was more than speculative. For these reasons, the school is not likely to meet its burden under the *Pickering* balancing test.

II. The district court erred in holding that a State may justify restrictions on free exercise through “leeway” to address Establishment Clause concerns.

The district court also erred in holding that the school likely could justify the restriction on Ms. Castro's religious exercise because of “leeway” to address Establishment Clause concerns.

The Supreme Court in *Kennedy* held that such reasoning cannot justify a burden on free exercise regardless of which test applies to free exercise claims in the public employment context. *See Kennedy*, 597 U.S. at 532-543; *id.* at 532 (“Ultimately, however, it does not matter which

standard we apply. The District cannot sustain its burden under any of them.”). The Court stated in no uncertain terms that public employers—particularly schools—cannot rely “on a mistaken view that it had a duty to ferret out and suppress religious observances even as it allows comparable secular speech.” *Id.* at 543-544. “[I]n no world may a government entity’s concerns about phantom constitutional violations justify actual violations of an individual’s First Amendment rights.” *Id.* at 543. And the government does not violate the Establishment Clause merely by allowing its employees to passively display religious items around students. *See id.* at 538 (quoting *Board of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 250 (1990) (observing “secondary school students are mature enough and are likely to understand that a school does not endorse or support . . . speech that it merely permits on a nondiscriminatory basis.”). This is especially true when the school effects a “modified heckler’s veto” by proscribing “religious activity” based solely on “perceptions” or “discomfort.” *Id.* at 534 (quoting *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001)).

Instead, some form of “coercion” must exist for the government to be considered to have “establish[ed]” a religion. *Kennedy*, 597 U.S. at

537. This includes “mak[ing] a religious observance compulsory” or requiring citizens “to attend church” or engage in a “formal religious exercise.” *Ibid.* (citation omitted). What constitutes impermissible coercion must be considered “in light of the original meaning of the Establishment Clause.” *Ibid.*

The district court failed to apply *Kennedy*’s Establishment Clause test. Instead of identifying whether the school’s actions were impermissibly “coercive” in light of the Establishment Clause’s historic meaning, the district court relied on outdated case law that says school districts must be given ample “leeway” in addressing Establishment Clause concerns under the now defunct *Lemon* regime, which asked whether a reasonable observer would think the government endorsed a particular religion. SPA50 (citing *Marchi v. Board of Coop. Educ. Servs.*, 173 F.3d 469, 476 (2d Cir. 1999)).

The district court asserted that Establishment Clause concerns here are more significant because students are a “captive audience” in the classroom that can see the crucifix during “instructional time.” SPA42, 50. But the school’s concerns here appear to have been premised on the “endorsement” methodology that *Kennedy* rejected. *See* SPA49;

Kennedy, 597 U.S. at 535 (citing *Lemon v. Kurtzman*, 403 U. S. 602 (1971)). And the district court’s Establishment Clause analysis also relied primarily on old *Lemon*-based cases (see SPA37-41), and its theoretical suggestion of subtle coercion (without any evidence to support it) essentially restated the same argument that *Kennedy* rejected, see *Kennedy*, 597 U.S. at 536-537.

Because that mistaken Establishment Clause analysis was the district court’s sole basis for concluding that the school had adequate justification for the restriction, this Court may vacate the district court’s decision on that ground alone. The district court failed to properly consider the school’s Establishment Clause concerns in view of historical context when considering whether Ms. Castro’s crucifix is “coercive.”

III. Ms. Castro is entitled to remand on her Free Exercise claim regardless of which standard applies.

Religious exercise in the form of communicative expression enjoys “double protection” through both the Speech Clause and Free Exercise clause of the First Amendment. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 540 (2022). But the appropriate test for free exercise claims brought by public employees based on religious expression is, in part, an open question.

In *Kennedy*, the Supreme Court declined to decide whether the *Pickering-Garcetti* standard or the standard from *Employment Division v. Smith*, 494 U.S. 872 (1990), governs in that context, instead holding that the plaintiff prevailed under either standard. *Id.* at 532; *see also id.* at 544-545 (Thomas, J. concurring) (“[T]he Court refrains from deciding whether or how public employees’ rights under the Free Exercise Clause may or may not be different from those enjoyed by the general public.”); *see id.* at 545 (Alito, J., concurring) (same); *see also Ermold v. Davis*, 130 F.4th 553, 570 (6th Cir. 2025) (Readler, J., concurring) (noting that “the exact bounds of [the free exercise] right in the public workplace are . . . less defined”); *cf. Jarrard v. Sheriff of Polk Cnty.*, 115 F.4th 1306, 1331 (11th Cir. 2024) (Rosenbaum, J., concurring in part) (explaining that the answer is not “clearly established”). And this Court has not decided the question either.

The district court incorrectly concluded that this Court’s precedent required it to apply the *Pickering-Garcetti* standard to both Ms. Castro’s speech and free exercise claims because “[they] fully overlap” with her speech claims. SPA31, 33. In particular, the district court asserted (SPA35-36) that this Court decided that question in *Knight v. Connecticut*

Dep't of Pub. Health, 275 F.3d 156 (2d Cir. 2001). That was mistaken. That case addressed an argument that a free exercise claim was entitled to *greater* protection than *both Smith and Pickering* because it was a so-called “hybrid” claim involving both free speech and free exercise. See *Knight*, 275 F.3d at 167. Like the Supreme Court, this Court has not yet decided the precise standard that should apply to a free exercise claim that arises in the context of public employment.

This Court need not decide that open question in this appeal, however, because Ms. Castro is entitled to vacatur and remand for the reasons explained above, regardless of which standard applies. The district court rejected Ms. Castro’s free exercise claim based on its incorrect view that the crucifix constituted government speech and that the school could justify the restriction based on an outmoded Establishment Clause analysis. Those holdings clearly departed from binding Supreme Court precedent no matter which standard applies, and therefore this Court may vacate and remand for the district court to reassess its analysis in the first instance.

In addition, Ms. Castro appears likely to prevail under either standard on remand. As to *Pickering*, as discussed above, Ms. Castro’s

claim appears likely to survive under proper *Pickering* balancing because the school has not identified any sufficient risk of disruption to justify its restriction.

As to *Smith*, the school has not contested that strict scrutiny would apply. *See* SPA29. The school's regulation of Ms. Castro's crucifix is not "neutral" because, as the district court found, it "is specifically directed at religious practice." *Kennedy*, 597 U.S. at 526 (alteration, citation, and internal quotation marks omitted). Like in *Kennedy*, "the District sought to restrict [Ms. Castro's] actions at least in part because of their religious character." *Ibid.*; *see also* SPA8 ("[A]ny permanent displays of religious symbols are prohibited from public schools, based on the First Amendment." (citation omitted)).

The school's actions are also not "generally applicable." The school favors secular personal speech over religious personal speech by allowing similarly sized and otherwise comparable non-religious personal items to be displayed on the wall near teachers' desks. *Kennedy*, 597 U.S. at 526-527 (holding the "challenged policies were neither neutral nor generally applicable" because "[p]rohibiting a religious practice was . . . the District's unquestioned 'object.'"); *see* SPA5-12. Unless the school allows

religious items in the same location the policy is not generally applicable. *See Fulton v. City of Philadelphia*, 593 U.S. 522, 534 (2021) (holding a law is not “generally applicable” when it “prohibits religious conduct while permitting secular conduct that undermines the government’s asserted interests in a similar way”).

Thus, if *Smith* applies, the school’s actions are subject to strict scrutiny. *Kennedy*, 597 U.S. at 526. And if the school likely cannot justify the restriction under the more lenient *Pickering* balancing test, it necessarily would not be able to satisfy the more demanding strict scrutiny standard.

Because the district court could potentially resolve this case without deciding the interplay between *Pickering* and *Smith* in this context, this Court need not reach out to decide that open constitutional question in this appeal.

CONCLUSION

For the foregoing reasons, the Court should vacate the district court's decision and remand for further proceedings.

Respectfully submitted,

s/ Eric Sell

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B)(i) because it contains 4707 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared in Century Schoolbook 14-point font using Microsoft Word for Microsoft 365.

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Date: March 25, 2026