No. 21-418

IN THE

Supreme Court of the United States

JOSEPH A. KENNEDY,

Petitioner,

v.

BREMERTON SCHOOL DISTRICT,

Respondent.

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

BRIEF OF AMERICAN ATHEISTS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Amicus, American Atheists, Inc., is a national civil rights organization that works to achieve religious equality for all Americans by protecting what Thomas Jefferson called the "wall of separation" between government and religion created by the First Amendment. American Atheists strives to promote understanding of atheists through education, advocacy, and community-building; works to end the stigma associated with atheism; and fosters an environment where bigotry against our community is rejected.

American Atheists, a non-profit corporation, has been granted 501(c)(3) status by the IRS, has no parent company, and has issued no stock.

SUMMARY OF THE ARGUMENT

The freedom of speech is perhaps the most cherished right held by Americans. Its keystone is the principle that the government may not pick favorites and, in so doing, interfere in the "free trade in ideas." *Abrams v. United States*, 250 U.S. 616, 360 (1919) (Holmes, J., dissenting); *see also FCC v. Pacifica Found.*, 438 U.S. 726, 745-46 (1978). Despite this bedrock principle, the Petitioner asks this Court to declare a new, overriding doctrine that expressive activity motivated by religious belief is entitled to greater protection than all other forms of expressive activity and that those engaging in such activity

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[1] The parties have consented to the filing of *amicus curiae* briefs in this matter. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amicus* and its counsel made a monetary contribution to the preparation or submission of this brief.

therefore cannot be subjected to the regulations that govern all other forms of expressive activity.

Such a doctrine would undermine virtually every principle this Court has previously established to protect this cherished right. It would require the government to inquire into the beliefs and motivations of speakers in any conceivable context. Government employers' ability to control their public messages and manage their offices would be undermined. Such a doctrine would, by necessity, force the government to impose different content-based restrictions on any expressive activity, whether engaged in by government employees or not, explicitly engage in viewpoint discrimination, and establish regulatory and administrative schemes imposing prior restraints on speech.

The Petitioner propounds an interpretation of the First Amendment that has no basis in this Court's jurisprudence, and he neglects to mention to the Court the significant array of cases that are in direct opposition to such an interpretation. To establish such a doctrine would have widespread deleterious effects. The Court's jurisprudence regarding statements by government officials deemed to evince religious hostility would be thrown into even more chaos, and there would be no principled means of cabining the doctrine advanced by the Petitioner to the context of government employment. This doctrine would place the government in the position of selecting between speakers expressing mutually exclusive religious viewpoints.

Lastly, it must be acknowledged that, if such an unwise doctrine is to be manufactured by this Court, it necessarily protects the ability of atheists to express

their nontheistic beliefs commensurately with the ability of theists to express theirs.

ARGUMENT

This is an easy case. Setting aside the fact that it is moot,[2] this Court's long-standing jurisprudence demands a holding against the Petitioner from every conceivable angle. Must the government, when acting as an employer, tolerate an employee disregarding their occupational duties because the employee had religious reasons? No. Must the government provide a specific religious accommodation demanded by an employee when other reasonable accommodations are available? No. Must the government allow an employee to engage in unrestricted private speech while on duty? No. May the government exempt religious speech from reasonable and uniform time, place, and manner restrictions? No. May the government impose different requirements on those engaging in expressive activity based on their viewpoint? No. Yet the Petitioner claims this Court must answer "yes" to each of these questions purely because his expressive activity was motivated by his religious beliefs. Pet. Br. at 24.

Petitioner's request is absurd. It would destroy the government's ability to direct and supervise its employees. It would render any valid regulation of any public forum, be it traditional, limited, or designated, impossible to administer. It would *require* the

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[2] *See* Suggestion of Mootness at 4-6, Kennedy v. Bremerton Sch. Dist., No. 21-418 (U.S. Feb. 18, 2022); Brief of the Freedom From Religion Foundation, Center for Inquiry, American Humanist Association, and Secular Coalition for America as amici curiae in support of Respondent at 5-11, Kennedy v. Bremerton Sch. Dist., No. 21-418 (U.S. Apr. 1, 2022) ("Br. of Secular Groups").

government to engage in viewpoint discrimination. The Petitioner's arguments are, in short, ridiculous on their face and would wreak chaos and confusion, both in the law and in society more broadly. Yet the Petitioner seeks this incoherent outcome because his motivation is religious and, therefore, entitled to what amounts to absolute deference from the government.

Expressive activity arising from one's religious beliefs is not—and cannot be—privileged over expressive activity engaged in for any other reason. The limits placed on the speech of government employees are uniform regardless of the employee's motivations for engaging in speech. Judicially created exceptions for otherwise unprotected speech by government employees based on their beliefs and motivations would *demand* that government employers scrutinize the subjective intent of their employees. Such scrutiny would be necessary to determine whether the activity was genuinely motivated by a religious belief and therefore entitled to deference from the governmental employer, or not motivated by such belief and therefore subject to discipline by the employer.

Judge-made carve outs to free speech law would, by necessity, extend such governmental scrutiny to all expressive activity, not just that of government employees. Local, state, and federal agencies would be forced to inquire into the motivations of speakers when applying otherwise-content-neutral time, place, and manner restrictions on traditional public forums. The administration of limited and designated public forums would require the same searching examination of the speaker's motivations so that special access can be given to those who claim religious reasons for

speaking. The protection against viewpoint discrimination would be a thing of the past.

In advancing his arguments, the Petitioner misrepresents this Court's jurisprudence. Not only do the cases he cites not support his position, numerous other cases directly oppose his interpretation of the First Amendment. There is no basis in this Court's jurisprudence for the proposition that speech motivated by religious beliefs is entitled to more protection than speech a person engages in for any other reason. Suggesting otherwise does violence to this country's commitment to free expression and equal rights under law.

The Court must reject the Petitioner's tortured application of the First Amendment.

I. RELIGIOUSLY MOTIVATED SPEECH IS NOT "PREFERRED" OVER OTHER SPEECH.

Contrary to the Petitioner's primary assertion, Pet. Br. at 24, it is axiomatic that the government may not privilege one speaker over another based on the speaker's subjective motives.[3] Whether the speaker is a government employee or a private individual, to premise one's ability to engage in speech on their subjective motivations would transgress fundamental principles of the freedom of speech.

As a government employee when he engaged in the expressive activity at issue in this case—an expressive activity which he insists was private, rather than a matter of public concern—Petitioner's First Amendment rights were necessarily limited by

[3] Even the cases Petitioner cites in making his unfounded assertion demonstrate why he is incorrect. *See* Part II, below.

the employer-employee contract he voluntarily entered into with the government. *Waters v. Churchill*, 511 U.S. 661, 672 (1994). The government has the authority to control the expressive activities of its employees while on the job, and it cannot treat one employee's expressive activity differently from another based on each employee's religious beliefs. Though a government employer must make reasonable accommodations of employee's religious practices, it is under no obligation to accede to the employee's demands regarding the details of such accommodations. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 77-85 (1977).

The government's ability to subject speakers to differential treatment is even more restricted when the speaker is acting as a private citizen. Content-based restrictions of any kind on expressive activity are constitutionally suspect. Moreover, viewpoint discrimination by the government, which the Petitioner now asks this Court to endorse, is anathema to the fundamental principles on which the United States was founded.

A. An employee's subjective motivations cannot transform government speech into private, protected speech.

The Petitioner argues that his decision to engage in a prayer at the focal point of a stadium immediately following the conclusion of an athletic event, over which he continued to have a supervisory role, was speech his employer had no right to control. This argument flies in the face of principles laid out by this Court in *Pickering*, *Ceballos*, and their descend-

ants.[4] The scope of First Amendment protection afforded to a government employee's speech is defined by a two-stage, *objective* inquiry: First, did the employee speak as a citizen on a matter of public concern? If so, was there a sufficient nexus between the expressive activity and the individual's employment to give the government the authority to control the activity in its capacity as an employer, such as a disruption of the workplace? Neither stage of the inquiry permits or requires the government to scrutinize the employee's subjective beliefs or intentions, let alone treat employees differently based on those beliefs.

1. Whether a matter is of public concern is not contingent on the employee's subjective beliefs or motivations.

Where the speech of a government employee is at issue, the courts must "balance between the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[5] *Connick v. Myers*, 461 U.S. 138, 140 (1983), quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568

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[4] Moreover, the Petitioner's conception of private speech by government employees would seem to have no bound. *See* Part III, below.

[5] In the context of a public secondary school, there is a third, weighty interest to be balanced as well: that of the students' right to be free from the "subtle coercive pressure" to conform to the expectations of teachers, coaches, and other students. *Lee v. Weisman*, 505 U.S. 577, 592 (1992). Students' interests require special protection, given that their presence is not voluntary. *See* Br. of Secular Groups at 16-30; *see also* Resp. Br. at 13.

(1968) (cleaned up). Where a government employee speaks on a matter of public concern in a manner that neither impedes the employee's performance of their duties nor interferes with the proper functions of the employing agency, the employee's speech is afforded some degree of First Amendment protection. *Pickering*, 391 U.S. at 572-75.

This is an *objective* inquiry. "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Myers*, 461 U.S. at 147-48. Whether an employee's expressive activity impedes the performance of their duties or the functioning of the governmental body is likewise an objective analysis. *Pickering*, 391 U.S. at 570.

At no point in this stage of the inquiry are subjective factors like beliefs or motivations considered. If, as the Petitioner argues, the employee's religious beliefs or motivations are to come into play, it is unclear where in this stage of the inquiry that would even be possible. Are all matters arising from one's religious beliefs deemed to be matters of public concern and therefore protected? Not according to the Petitioner, who repeatedly states that his prayer was a private matter. The only remaining way to inject the employee's subjective beliefs and motivations into this stage of the inquiry is for an employee to be permitted to engage in expressive activity that *does hinder* the performance of their duties or the functioning of the governmental agency that employs them, so long as their reasons are religious. Putting aside, for the moment, the disruption this would cause to the functioning of government, *see* Part III, below, this would require the government employer

to inquire into the motivations of every employee who engages in speech that disrupts the workplace. It would also incentivize every employee subjected to such an investigation to claim religious motivations, in turn requiring the government to undertake more than a mere surface examination of the facts and instead devote precious resources to a searching inquiry into the sincerity of the employee's claimed beliefs.[6] Such a state of affairs is something that neither the government nor its employees would find tolerable.

As the Court made clear in *Connick v. Myers*, "the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch." *Myers*, 461 U.S. at 151 (quoting *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring)); *see also Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969). What the government manifestly *cannot* do is subject them to disparate treatment based on their different motivations.

The Petitioner's conception of the First Amendment rights of government employees, rather than the Ninth Circuit's application of this Court's jurisprudence, would result in disparate treatment of employees. Specifically, the Petitioner posits that the religiously motivated employee *must* be permitted to kneel when and where his religion demands it. The

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[6] Although the government may not pass judgment on the validity or orthodoxy of one's beliefs, it is able to reach a determination as to whether the claimed beliefs are sincerely held. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 651-52 (2000); *United States v. Seeger*, 380 U.S. at 184-85.

other employee? Let the courts balance their rights against the government's interest.

2. Employee speech in the course of their duties falls beyond the scope of the First Amendment, regardless of subjective beliefs or motivations.

In addition to disclaiming any public interest in his religious exercise, the Petitioner asserts that his expressive activity at issue here was not of the type "[t]he district may have commissioned [him] to engage in," Pet. Br. at 28, and therefore not squarely within the scope of this Court's holding in *Garcetti v. Ceballos*, 547 U.S. 410, 421-22 (2006). In *Ceballos*, the Court considered the scope of First Amendment protections to be afforded to government employees' expressive activity performed during the course of their duties and the outcome was quite clear: "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe *any liberties* the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Id.* at 421-22 (emphasis added). Once again, this Court's jurisprudence describes a purely *objective* inquiry. The subjective intent or beliefs of the employee are wholly irrelevant.

The Petitioner's attempts to wriggle out of this unequivocal holding, if adopted by this Court, would render it virtually impossible for any government agency to perform its functions and would invite what are otherwise blatant constitutional violations. At its core, the Petitioner's argument is that the school district hired him to train, mentor, and oversee student athletes but did not hire him to engage in religious activity. Pet. Br. at 28-29. And so, since he wasn't

hired to engage in religious activity while on the field or the sidelines or in the locker room with his students, it cannot discipline him for engaging in religious activity on the field or the sidelines or in the locker room with his students. *Id.* Such reasoning places the government in the untenable position of being constitutionally precluded from engaging in or endorsing religious exercise while also prohibited from disciplining employees for engaging in or endorsing religious exercise (even disruptive religious exercise) while performing their governmental duties. Such a paradoxical reading of the First Amendment would render every government employee a government unto themselves, only bound by the idiosyncrasies of their own individual beliefs. It may not be possible to comprehend the incredible breadth of harms that would result from such a holding. *See* Part III, below.

3. Expanding protection of government employees' speech to matters of public *or private* concern does not resolve the Petitioner's paradoxical theory.

Despite the Petitioner's repeated focus on the private nature of his expressive activity, the Court cannot resolve this matter in his favor merely by extending *Pickering* to include speech on private matters, as well as those of public concern. Government agencies would still need to police employee speech, particularly speech touching on religious matters, in order to prevent potential Establishment Clause violations. Furthermore, as will be discussed below, such a "solution" brings with it insurmountable problems when employees' religious beliefs conflict

or are outright hostile toward each other, or to those held by members of the public. *See* Part III(B-D)

B. Granting heightened protection to religiously motivated private speech undermines basic principles of the freedom of speech and expression.

Although the Petitioner makes his argument as a former government employee, his unfounded interpretation of the First Amendment, if adopted by this Court, would not be cabined to the context of speech by government employees. A doctrine that affords lesser protection to speech not motivated by religious beliefs would directly impact the freedom of speech of every American.

The First Amendment demands that government restrictions on expressive activity be content neutral unless the government's content-based restriction on expression can meet the stringent demands of strict scrutiny. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981). But a doctrine that privileges religious speech over all other forms of speech is no mere content-based restriction on nonreligious expression. It is nothing short of judicially imposed viewpoint discrimination, "an egregious form of content discrimination" which the government may not engage in. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). Further compounding the error of the Petitioner's interpretation of the First Amendment is the fact that a regime privileging religious speech necessarily means that existing restrictions on all other forms of speech will be greater than those imposed on religious speech. Complying with such a requirement would require the imposition of a prior restraint on speech

that this Court should not countenance. *Cantwell v. Conn.*, 310 U.S. 296, 306 (1940); *Kovacs v. Cooper*, 336 U.S. 77, 82 (1949) (a noise ordinance exempting speech on certain topics constituted a prior restraint).

1. Governmental examination of a speaker's motivations or beliefs has no place in the application of content-neutral restrictions on speech.

In general, the only restrictions the government may place on expressive activity in a traditional or designated public forum are content-neutral time, place, and manner restrictions, and even those are subject to intermediate scrutiny, requiring the government to justify the restriction by demonstrating that the regulation is narrowly tailored and aimed at achieving a significant government interest. *Perry Educ. Ass'n*, 460 U.S. at 45; *McCullen v. Coakley*, 573 U.S. 464, 476-77 (2014). Injecting an entirely subjective inquiry into the analysis would defeat the very purpose of a content-neutral restriction. *Cantwell*, 310 U.S. at 304.

The constitutional infirmity of Petitioner's contention is all the more troubling given that it would require this subjective examination of the speaker's motivations and beliefs for the *express purpose of enabling the government to treat some viewpoints more favorably than others.* "There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). Viewpoint discrimination inherently entails the government reaching a very visible hand into the free market of ideas, a proposition that "plainly offend[s]" the First Amendment. *First Nat'l Bank v.*

Bellotti, 435 U.S. 765, 785-86 (1978); *see also Rosenberger*, 515 U.S. at 828-29.

2. Petitioner's interpretation would require the government to impose a prior restraint on any and all expressive activity.

The Petitioner contends that the government must give greater leeway to speakers whose expressive activity is motivated by their religious beliefs. The only way for the government to accomplish that would be to review all expressive activity[7] in advance and either grant or deny exceptions to existing regulations governing the use of public forums based on an assessment of whether the speaker is motivated by sincerely held religious beliefs. Such a regime would "lay a forbidden burden upon the exercise of liberty protected by the Constitution" by imposing a prior restraint on speech. *Cantwell*, 310 U.S. at 307. Governmental bodies at the local, county, state, and federal level would have *no choice* but to place administrative officials in the position of differentiating expressive activity—permitting some while prohibiting others—based on "broad criteria," here, religion, "unrelated to proper regulation of public places." *Kunz v. New York*, 340 U.S. 290, 293-94 (1951). These administrators would necessarily be tasked with examining expressive activity before the fact in order to determine its religious character and

[7] Conceivably, the government could establish a system whereby prospective speakers first indicate whether their expressive activity is motivated by religion or not. This could limit the number of speakers seeking exceptions and reduce the burden of reviewing the requests. Nevertheless, such a system would remain an impermissible prior restraint on speech.

whether it should be subjected to greater or lesser regulation. This Court has long considered such systems to be "clearly invalid." *Id.* at 293.

II. EFFORTS TO GROUND A SPECIAL PROTECTION FOR RELIGIOUS SPEECH IN THIS COURT'S JURISPRUDENCE ARE FATALLY FLAWED.

There is nothing in this Court's jurisprudence to support the Petitioner's claim that his 50-yard-line, post-game prayer is entitled to greater deference from the government simply because it was motivated by his religious beliefs. In fact, the great weight of precedent lies directly contrary to that assertion.

Even the cases the Petitioner cites in making this argument speak forcefully against him. Justice Scalia, writing for a plurality of the Court in *Capitol Square Review & Advisory Board v. Pinette*, stated the principle quite directly: "Of course, giving sectarian religious speech preferential access to a forum close to the seat of government (*or anywhere else for that matter*) would violate the Establishment Clause (*as well as the Free Speech Clause, since it would involve content discrimination*)." 515 U.S. 753, 766 (1995) (emphasis added). Notably, although only a plurality of the Justices joined that section of Justice Scalia's opinion, six Justices agreed on this specific point, including Justices Thomas and Breyer.

Elsewhere in his brief, the Petitioner points to *Good News Club*, *Rosenberger*, *Lamb's Chapel*, and *Widmar*, perhaps hoping that this Court will not notice that each of these cases directly contradicts his central argument. Each of these cases turns on the principle that participants in a limited public forum,

both the sectarian and the secular speaker, are entitled to *equal* treatment.

The Petitioner points to *Widmar v. Vincent* to support his claim that the district's interest in avoiding an Establishment Clause violation does not necessitate a restriction on his public performance of a silent prayer on the 50-yard line in front of the students he was supposed to be supervising at that time. Pet. Br. at 38. He either failed to notice or chose not to draw the Court's attention to footnote 6, which directly contradicts his proposed reading of the First Amendment:

> [E]ven if the distinction drew an arguably principled line, it is highly doubtful that it would lie within the judicial competence to administer. Merely to draw the distinction [between religiously motivated speech and non-religious speech] would require the university—and ultimately the courts—to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases.

Widmar, 454 U.S. at 269 n.6.

In *Lamb's Chapel v. Center Moriches Union Free School District*, the Court examined a school district's program that opened school facilities for use by outside groups when those facilities are not in use for school purposes. 508 U.S. 384, 386-87 (1993). The Court repeatedly highlighted the importance of viewpoint neutrality to the administration of limited public forums like the one created by the district. *Id.*

at 392-93. Similarly, in *Rosenberger*, the Court addressed a program instituted by the University of Virginia to support student publications. *Id.* at 823-25. The University subsidized student expression by paying the printing costs of student newspapers. 515 U.S. at 840. In determining that the exclusion of religious student groups from participation in the program on equal footing with secular student groups violated the Free Speech Clause, the Court stated:

> When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant [than mere content-based restrictions]. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the *specific motivating ideology* or the opinion or perspective of the speaker is the rationale for the restriction.

Id. at 829 (emphasis added). In *Good News Club v. Milford*, this Court went further, first highlighting the importance of viewpoint neutrality as discussed in *Rosenberger* and *Lamb's Chapel*, 533 U.S. 98, 106-07 (2001), and then explicitly rejected the notion that speech rooted in religion somehow alters the First Amendment's command that the government not engage in viewpoint discrimination. *Id.* at 110-11; *see also Christian Legal Society v. Martinez*, 561 U.S. 661, 679 (2010) ("Any access barrier must be reasonable and viewpoint neutral.")

A number of cases ignored by the Petitioner further demonstrate that his interpretation of the First Amendment has no basis in this Court's jurisprudence. In *Cantwell*, this Court examined a

challenge to an ordinance placing restrictions on the solicitation of donations for religious or charitable purposes. 310 U.S. at 301-02. In concluding that the ordinance constituted a prior restraint in violation of the First and Fourteenth Amendments, the Court noted that its holding did not mean that the state could never place restrictions on religious speech. Quite the contrary:

> Even the exercise of religion may be at some slight inconvenience in order that the State may protect its citizens from injury. Without doubt a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent. The State is likewise free to regulate the time and manner of solicitation generally, in the interest of public safety, peace, comfort or convenience.

Id. at 306-07. If Petitioner's interpretation of the First Amendment were valid, *Cantwell* would have been a perfect opportunity for the Court to say so. It did not.

In *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), the Court addressed objections from Jehovah's Witness families to the requirement that students participate in a daily recital of the Pledge of Allegiance to the U.S. Flag. This Court prefaced its analysis by noting that the religious beliefs of the students and their families were irrelevant to the inquiry:

> Nor does the issue as we see it turn on one's possession of particular religious views or the

> sincerity with which they are held. While religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual.

Id. at 634-35.

Perhaps even more telling is the Court's decision in *Board of Regents v. Southworth*, 529 U.S. 217 (2000), wherein this Court rejected arguments forwarded by students challenging the University of Wisconsin at Madison's collection of a student activity fee to support student groups, some of which conflicted with the challenging students' personal beliefs. *Id.* at 232. The Court pointed to the viewpoint neutrality of the program as the safeguard of the student's personal beliefs: "The proper measure, and the principal standard of protection for objecting students, we conclude, is the requirement of viewpoint neutrality in the allocation of funding support." *Id*. at 233.

Although not a decision of this Court, amici supporting the Petitioner cite the Seventh Circuit's recent decision in *Illinois Republican Party v. Pritzker*, 973 F.3d 760 (2020). Mem. of Cong. Br. at 16.[8] Reliance on the Seventh Circuit's decision in that case is just as inapposite as Petitioner's reliance on this Court's cases already discussed. *Illinois Republican Party* concerned a political party's objections to COVID-19 restrictions on large gatherings. *Id.* at 761-62. The appellants argued that the executive order issued by

[8] If *Illinois Republican Party* were to stand for the proposition the amici claim, it would be a significant break with the aforementioned precedents of this Court.

the governor subjected houses of worship to less restrictive public health measures than other gatherings. *Id*. The Seventh Circuit held that the measure constituted a permissible accommodation of the free exercise of religion. *Id*. at 765. In Petitioner's case, the Respondent made multiple attempts to accommodate the Petitioner's religious exercise but, since none of the proposed accommodations allowed him to utilize the public school's facilities to engage in a *very public* expression of his religious beliefs (while he was on the job and supposed to be supervising students), he refused to accept any of the school's proposals. Resp. Br. at 10-12. That is a far cry from the facts and question at issue in *Illinois Republican Party*.

Each of these cases, both those relied on by the Petitioner and those he neglects to mention, expose the fatal flaws in his conception of how the First Amendment should be applied to speech motivated by religious beliefs.

III. PRIVILEGING RELIGIOUS SPEECH WOULD HAVE WIDESPREAD HARMFUL CONSEQUENCES.

Americans hold a multitude of religious beliefs that can intersect with virtually every element of public policy. A doctrine that affords religiously motivated expressive activity special status will manifest in unexpected ways. When faced with this prospect, the government will be forced to create mechanisms whereby religious speakers who intend to engage in expressive activity that falls outside the bounds the government places on speakers without religious motivations for their activity can seek advance approval. Not only would such a regime constitute a prior restraint on speech, see Part I(B), above, it would inevitably be wholly inadequate to the task. Each

request would require a government employee[9] to review it in order to determine, first, whether the anticipated activity is motivated by religious beliefs and, second, whether the government is able or required to allow the speaker to go beyond the established regulations on speech in the manner the speaker demands.[10] As the Petitioner's own choice of expressive activity demonstrates, there is simply no way for the government to anticipate every context in which such expression might arise. If a school district cannot discipline a teacher who disrupts the school environment by engaging in religious exercise while on duty in the presence of students and the public, there is little conduct on the part of an educator that could be considered "too far."

Setting aside that adopting the Petitioner's novel theory of law would fly in the face of longstanding First Amendment jurisprudence, privileging religiously motivated speech would create numerous challenges to the administration of basic government functions.

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[9] And if the government employee conducting that review encountered a situation which conflicts with their own religious convictions, presumably they will have to seek some dispensation of their own and the problem compounds itself.

[10] This presumes that the government even has the ability to accommodate the speaker's request. Notably, from the facts of the present case it appears that the Petitioner's conception of the First Amendment's protection of religiously motivated speech goes so far as to require the government to accede to the speaker's requests *in every respect*. The Respondent offered the petitioner several alternative means to accommodate the expressive activity motivated by his religious beliefs but none would suffice. Resp. Br. at 10-12. Only his preferred activity, at the time and place of his choosing, would satisfy him. *Id*. The Respondent was justly concerned that the requested accommodation impinged on the rights of others. *See Id*. at 34-39; Br. of Secular Groups at 20.

Beginning within the context of the school environment, it is unclear where the principle propounded by the Petitioner ends. As the following examples demonstrate, beyond its blatantly unconstitutional nature, the Petitioner's interpretation of the First Amendment is wholly unworkable in our pluralistic society.

A. Privileging government employees' religious speech would be harmful in numerous and unforeseeable contexts.

The Petitioner's expression of his private religious beliefs took the form of a very public prayer in the center of a high school football field, and he demanded that it take place while spectators and students were present, not after others had an opportunity to depart. Resp. Br. at 10-12. If a school is precluded from exercising control over its employees' speech in this context, that authority is also lacking in other substantially similar contexts. A teacher could assign students a test and, while the students are hard at work, listen to the audiobook of Christopher Hitchens' *God is Not Great: How Religion Poisons Everything* (2007), at low volume. A teacher could instruct the students to read an assigned passage silently to themselves and then unroll a prayer mat at the front of the classroom and offer *dua*. A teacher whose religious beliefs conflict with a state's laws or a district's policies requiring comprehensive, medically accurate sex education may simply remain silent when it comes to that element of the curriculum and deprive their students of the education other students are receiving.

Such intrusive expressions of religious belief are not limited to the school context. In 2018, *Amicus* received a complaint from a Los Angeles County

resident who reported that their local police station was suddenly playing host to a large, mixed-media display promoting Scientology. Hemant Mehta, "A Scientology Kiosk Was Installed (Then Removed) from a Hollywood Police Station," Friendly Atheist (Aug. 29, 2018), https://friendlyatheist.patheos.com/2018/08/29/a-scientology-kiosk-was-installed-then-removed-from-a-hollywood-police-station/. The display featured a large TV screen with an interactive system for learning about the tenets of Scientology. *Id*. The screen was flanked by racks of pamphlets promoting the Church of Scientology's perspectives on human rights, the care of children, drug addiction, and general happiness. *Id*. In response to a records request, the police department claimed to have no record of who authorized the display, who installed it, or when. *Id*. Under the currently prevailing understanding of First Amendment principles controlling government speech, this display was a clear violation of the Establishment Clause. Under the Petitioner's conception of the First Amendment, the constitutional status of the display is far less clear. If the precinct captain is a Scientologist and believes, for example, that the only true means of recovery for those who suffer from substance abuse is through the practice of Scientology, and the captain installed the display in the police station, then presumably the display would have to be permitted, regardless of the Establishment Clause's protection against the not-so-subtle coercive pressure this might put on those who interact with the precinct.

There is no limiting principle that precludes the Petitioner's theory from extending to other, even more disruptive expressive activity motivated by religious belief. In fact, imposing such a limitation would show

a preference for some religious views over others,[11] creating a religious gerrymander and, in so doing, violating both the Establishment and Free Exercise Clauses of the First Amendment. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532-534 (1993).

Applying the Petitioner's interpretation to verbal expressions of belief raises a slew of new conflicts: In a school district that mandates the teaching of abstinence-only sex education, a teacher whose beliefs compel them to provide comprehensive and medically accurate information, as is the case for members of Catholics for Choice, could not be subjected to discipline for following the dictates of their beliefs and actually teaching their students useful information.

Beyond the school context, in which the interests of students to be free from government-imposed religious exercise provide a weighty counterbalance to the free exercise and free speech rights of teachers, government employees would have even greater leeway to ignore the day-to-day duties of their employment and engage in religious expression. A judge, constitutionally precluded by the Establishment Clause from imposing religious exercise on a criminal defendant to engage in prayer, could nevertheless pause proceedings in order to pray while on the bench in the presence of the defendant, the prosecutor, or even the jury, disrupting the criminal justice process

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[11] For example, Christians disagree over whether prayer should be public, lest they hide their light under a bushel, Mark 4:21-22, or instead pray more privately, in keeping with Jesus' teaching to pray in private and "not be as the hypocrites are: for they love to pray standing in the synagogues and in the corners of the streets, that they may be seen of men." Matt. 6:3-6. Still others are perfectly content to do both.

and still placing considerable coercive pressure on a defendant (whose core liberties are in the hands of the court) to join in. It is unclear what limiting principle could intervene to prohibit these results while permitting the Petitioner's conduct.

These problems are by no means limited to the context of government employment. *Amicus* regularly receives complaints regarding outdoor religious events utilizing various methods of sound amplification that result in noise levels far in excess of those permitted by local ordinances. In many instances, these events last for hours on end, and the disturbance intrudes into people's homes, interrupting the peace and solitude they are entitled to expect. Noise ordinances are prototypical time, place, and manner restrictions on the use of traditional public forums. "The police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community." *Kovacs*, 336 U.S. at 83. Such ordinances, as well as other time, place, and manner restrictions, are permissible "provided that they are adequately justified 'without reference to the content of the regulated speech.'" *Cincinnati v. Discovery Network*, 507 U.S. 410, 428 (1993) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)). For the government to establish some sort of preclearance for religiously motivated violations of a noise ordinance would, on its face, depend on the content of the regulated speech, thereby requiring the state to meet strict scrutiny. How is the government to determine what decibel level, above and beyond that allowed for other speech, is narrowly tailored to achieve a compelling government interest? It cannot be arbitrary. That would not even pass muster under rational basis review. Yet the Petitioner's

argument would require the government to apply disparate standards.

B. Privileging religious speech inevitably forces the government to select between speakers expressing conflicting beliefs.

The Petitioner's interpretation of the First Amendment would also necessitate significant clarification of this Court's recent jurisprudence regarding the statements of government officials that exhibit hostility toward the religious beliefs of others. Government employees in public-facing positions regularly encounter individuals whose religious beliefs differ markedly from their own. Religious beliefs are often mutually exclusive and held with a conviction that their beliefs are the only way to salvation, enlightenment, happiness, or other personal ideals. Under the Petitioner's version of the First Amendment, it would violate the government official's free speech and free exercise rights to prohibit them from expressing their beliefs, yet doing so might be interpreted as hostility and could imperil, for example, a compliance review or administrative proceeding. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, ___ U.S. ___, 138 S. Ct. 1719 (2018). This paradox presents the government official's supervisor with an impossible dilemma: restrict the employee's expression of their religious beliefs, violating their free speech right, or let the employee express themselves and risk an Establishment or Free Exercise Clause lawsuit brought by the imposed-on private citizen.

The Petitioner's conception of the First Amendment raises additional issues for those who supervise government employees. If an employee is entitled to greater leeway to engage in speech when that speech is motivated by the employee's religious beliefs,

a supervisor would be prevented from intervening to stop employees from engaging in numerous forms of religiously motivated workplace discrimination. *See* Rachel C. Schneider, et al., "How Religious Discrimination is Perceived in the Workplace: Expanding the View," Socius: Sociological Research for a Dynamic World (Jan. 24, 2022), https://journals.sagepub.com/doi/pdf/10.1177/23780231211070920. *Amicus* recently received a complaint from a government employee who objected to a coworker's use of the agency's intra-office messaging system to send bulk messages to coworkers in which he expounded on his personal religious beliefs, to which she responded in kind. In such a situation, when two employees' religiously motivated expressions are in direct conflict, supervisors must determine whether they can intervene to resolve the conflict. Allowing the argument to continue and potentially grow ever more heated risks creating a breakdown of the entire workplace environment. Some action must be taken, yet restricting one employee but not the other risks an equal protection violation and a claim of religious employment discrimination. Restricting both employees only multiplies the potential lawsuits.

C. Privileging religious speech will conflict with other constitutional obligations.

Privileging religious speech also creates troubling conflicts with other constitutional protections. Relying on this Court's prior cases addressing speech in the context of elections, both Congress and the states have put various limitations on expressive activity relating to elections. Many states, for example, limit campaign activity within a reasonable distance from a polling place in order to provide voters with a degree of solicitude during the exercise of the fran-

chise. *Minn. Voters All. v. Mansky*, ___ U.S. ___, 138 S. Ct. 1876, 1887-89 (2018); *see generally Burson v. Freeman*, 504 U.S. 191 (1992). The Petitioner's theory of free speech would preclude the government from excluding campaign messages couched in or motivated by religious beliefs from polling places. Further compounding the problem is the government's frequent use of houses of worship *as polling places*, which would invite such proselytizing campaign messages and, since a community space's utility and appeal as a polling place is directly correlated to its capacity, would also give more populous religious sects unique opportunities to deliver their messages to the voting public, whether campaign related or not.

And this is merely the tip of the iceberg, as religiously motivated speech would quickly become the de facto form of expression during campaigns, freed as it would be from regulatory oversight. The conflicts created by the Petitioner's interpretation of the First Amendment multiply without end as one applies it to even mundane contexts. The First Amendment cannot be interpreted to require such absurd outcomes.

IV. HEIGHTENED PROTECTION FOR RELIGIOUSLY MOTIVATED SPEECH MUST NECESSARILY EXTEND TO THOSE EXPRESSING EQUIVALENT NONTHEISTIC WORLDVIEWS.

Finally, *Amicus* takes this opportunity to reiterate what this Court has previously indicated: the Free Exercise Clause protects the right of those who hold nontheistic beliefs to exercise them to the same extent as those who hold equivalent theistic beliefs. Although *Amicus* opposes any interpretation of the

First Amendment that enables the government to impose content-based restrictions on expressive activity, if this Court adopts Petitioner's novel interpretation of the First Amendment, *Amicus* cannot deny that it would redound to the benefit of atheists as well. *See Welsh v. United States*, 398 U.S. 333, 342-43 (1970); *Id.* at 356-57, (Harlan, J., concurring); *United States v. Seeger*, 380 U.S. 163, 176 (1965). It would enable the nontheistic community, commensurately with the theistic community, to express their beliefs in new and creative ways. Atheists have no holy book nor any orthodox tenets[12] beyond the lack of a belief in a deity or, for some, the affirmative belief that there are no deities. "What is Atheism?" American Atheists (accessed on Mar. 18, 2022), https://www.atheists.org/activism/resources/about-atheism/. Nevertheless, many atheists do share a number of beliefs that flow from the lack of belief in a deity. *See Bd. of Educ. v. Grumet*, 512 U.S. 687, 716 (1994) (O'Connor, J., concurring); *Welsh*, 398 U.S. at 342-43. Atheists in the United States predominantly believe that there is no afterlife; that the scientific method is the most, if not the only, reliable means of distinguishing truth from falsehood; that human beings (and, indeed, all life on Earth) descended from a common ancestor and therefore are entitled to the same dignity and respect we would demand for ourselves; and that citizens should be treated equally under law, regardless of their religious beliefs or lack thereof.

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[12] This Court has made clear that the government may not require an individual to justify their beliefs by pointing to scripture or orthodoxy. The Petitioner was not required to justify his beliefs and the government may not ask anyone else to do so either.

Although this Court should not adopt a doctrine that elevates certain speech or speakers above others based on the motivations or beliefs of the speaker, it must be recognized that such a doctrine, once established, would protect expressive activity motivated by theistic and atheistic beliefs alike.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that, if this Court does not dismiss this matter as moot, it should AFFIRM the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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