No. 11-910

In the Supreme Court of the United States

BRADLEY JOHNSON,
Petitioner,

v.

POWAY UNIFIED SCHOOL DISTRICT, et al.,
Respondents.

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

PETITIONER'S REPLY BRIEF

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The undisputed and material facts of this case, as found by the district court and confirmed by the Ninth Circuit,[1] include the following:

- "[Respondents] have a long-standing policy of permitting its teachers to express ideas on their classroom walls."

- "[Respondents'] policy grants its teachers discretion and control over the messages displayed on their classroom walls."

- "[Respondents'] policy permits teachers to display on their classroom walls messages and other items that reflect the teacher's personality, opinions, and values, as well as political and social concerns."

- "[Respondents'] policy permits teacher speech so long as the wall display does not materially disrupt school work or cause substantial disorder or interference in the classroom."

App. 70a-71a.

Based on these facts and consistent with this Court's established First Amendment jurisprudence, the district court concluded as follows: "As a result of

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[1] The Ninth Circuit panel acknowledged that there were no factual issues in dispute. App. 43a. ("[W]e agree with the district court that no genuine issue of material fact remains present in this case."). Nor could there be since the Ninth Circuit granted Respondents' motion for summary judgment. App. 43a-44a.

the [Respondents'] long-standing policy, a teacher's classroom walls serve as a limited public forum for a teacher to convey non-curriculum messages." App. 71a.

And when such a forum is created, the First Amendment does not permit government officials to restrict speech on the basis of viewpoint, as in this case. *See Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985). Viewpoint discrimination is prohibited in *all* forums because it is an egregious form of content discrimination. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

Respondents ask this Court to ignore the undisputed facts, discard decades of First Amendment jurisprudence, and shoe-horn this case into a *Pickering / Garcetti* analysis when it simply does not fit.[2]

Accepting Respondents' argument—and allowing the Ninth Circuit's decision to stand—essentially turns our public schools into "enclaves of totalitarianism," *see Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969) ("In our system, state-operated schools may not be enclaves of totalitarianism."), whereby government officials have plenary authority to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion," *W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642

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[2] The *Pickering / Garcetti* analysis refers to the analysis set forth in *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), and *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

(1943), in direct contravention of the First Amendment.

Indeed, Respondents do not refute Petitioner's contention that based upon the Ninth Circuit ruling, "Respondents now have the judicially-sanctioned authority to prescribe what 'shall be orthodox' in matters of opinion by permitting teachers to express personal, non-curricular messages that promote certain favored ideologies, religions, and partisan viewpoints on controversial political and social issues, while censoring certain disfavored viewpoints, such as Petitioner's 'Judeo-Christian' viewpoint." Pet. at 9.

Accepting Respondents' view would essentially immunize public school officials from the proscriptions of the First Amendment, contrary to this Court's precedent. *See* App. 66a ("But to assert that because Johnson was a teacher, he had no First Amendment protection in his classroom for his own speech would ignore a half-century of other Supreme Court precedent."). "It is well settled that 'a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression.'" *Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006) (quoting *Connick v. Myers*, 461 U.S. 138, 142 (1983)); *Rankin v. McPherson*, 483 U.S. 378, 383 (1987) ("[A] State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech."). "[T]he theory that public employment . . . may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 605-06 (1967). "A government employee does not relinquish all First Amendment rights otherwise enjoyed by citizens just

by reason of his or her employment." *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004); *Tinker,* 393 U.S. at 506 ("It can hardly be argued that . . . teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").

It is important to emphasize that this is *not* a case in which a school district is seeking to control its curriculum as in *Lee v. York Cnty. Sch. Divs.*, 484 F.3d 687, 694 (4th Cir. 2007) (holding that school officials did not violate the First Amendment because the teacher's "classroom postings [did] not constitute speech concerning a public matter, because they were of a *curricular* nature") (emphasis added) and *Evans-Marshall v. Bd. of Educ.*, 624 F.3d 332 (6th Cir. 2010) (ruling in favor of the school board and holding that "the First Amendment does not extend to the *in-class curricular speech* of teachers") (emphasis added).

Here, there is no dispute that Petitioner's banners are non-curricular. Moreover, Petitioner did <u>not</u> display the banners pursuant to any of his official duties,[3] unlike the legal memorandum prepared by the assistant district attorney in *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (holding that the employee's speech was not protected because it was made pursuant to his official duties).

Furthermore, Petitioner does not argue that the School District should surrender its curriculum

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[3] *See* App. 55a ("It is undisputed that Johnson did not hang the banners as part of the curriculum he teaches, nor did he use the banners during any classroom session or periods of instruction."); App. 89a ("This was not a case of the school district electing to speak for itself on a topic as part of its selected curriculum.").

decisions to its teachers. Petitioner has always taught his assigned math curriculum, and he has done so in an exceptional manner. And Petitioner has never used his banners as part of this curriculum, as Respondents acknowledged below. *See* App. 55a. Indeed, similar to the many other non-curricular banners, posters, and flags displayed by teachers in the School District, Petitioner's banners were displayed pursuant to the School District's policy of permitting teachers to display such items to express *personal* opinions and viewpoints on a wide range of subject matter. In sum, the displayed items are posted for non-curricular purposes.[4] Consequently, *this case is not about curriculum and who gets to control it*. *See* App. 55a, 89a, n.3, *supra*.

Petitioner also does not argue that the School District must surrender control of what is posted on its classroom walls. As noted throughout this litigation (and as permitted by the First Amendment), if Respondents wanted to remove all personal expressive items from the classroom walls, thereby closing the forum to *all* personal, non-curricular speech of its teachers, they could do so. *See* Pet. at 10, n.6. However, once Respondents create this forum, they cannot pick and choose based on viewpoint which messages are acceptable and which are not. *See Widmar v. Vincent*, 454 U.S. 263, 264-65, 267, n.5 (1981) ("Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups. Having done so, the University has assumed *an obligation to justify its*

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[4] This fact is further evidenced by the nature, types, and content of the posters, flags, and banners on display. *See* App. 56a-59a.

discriminations and exclusions under applicable constitutional norms . . . even if it was not required to create the forum in the first place.") (emphasis added). Such discrimination violates the First Amendment *and* the Equal Protection Clause. *See Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."); *see also Carey v. Brown*, 447 U.S. 455, 461-62 (1980).

As the district court noted below:

> Public schools play an important role educating and guiding our youth through the marketplace of ideas and instilling national values. One method used by the Poway Unified School District to accomplish this task is to permit students to be exposed to the rich diversity of backgrounds and opinions held by high school faculty. In this way, the school district goes beyond the cramped view of selecting curriculum and hiring teacher speech to simply deliver the approved content of scholastic orthodoxy. By opening classroom walls to the non-disruptive expression of all its teachers, the district provides students with a healthy exposure to the diverse ideas and opinions of its individual teachers. Fostering diversity, however, does not mean bleaching out historical religious expression or mainstream morality. By squelching only Johnson's patriotic and religious classroom banners, while permitting other diverse religious and anti-religious

> classroom displays, the school district does a disservice to the students of Westview High School and the federal and state constitutions do not permit this one-sided censorship.

App. 52a-53a.

This petition, therefore, presents a question of exceptional importance regarding the proper application of First Amendment principles in the public school context, particularly where the record demonstrates that the School District created a forum for the personal, non-curricular speech of its teachers. Neither *Pickering* nor *Garcetti* answers this question.

Similar to how *Garcetti* refined the application of First Amendment principles in the context of an employee speaking pursuant to his official duties, this case requires further refinement of those principles when the government has created a limited public forum for the expression of the personal opinions and views of its employees, yet prohibits certain disfavored opinions on the basis of viewpoint. And, based on this Court's prior precedent, the only way to safeguard the important First Amendment rights at issue is to employ a forum analysis, as was properly done by the district court in this case. *See* App. 68a-78a; *see also Cornelius*, 473 U.S. at 800 (noting that this Court "has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes"); *Perry Educ. Ass'n v. Perry Local Educators*, 460 U.S. 37, 44 (1983).

In sum, a forum analysis is the only way to properly safeguard important First Amendment

freedoms when the government has chosen to create a forum for its employees to express personal opinions and viewpoints on a wide range of subject matter, including controversial social and political issues. Neither *Pickering* nor *Garcetti* squarely addresses this important issue, which should be decided by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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