No. 10-55445

In the United States Court of Appeals For the Ninth Circuit

BRADLEY R. JOHNSON, PLAINTIFF-APPELLEE

v.

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

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

Brief of *Amici Curiae* National School Boards Association and California School Boards Association In Support of Defendants-Appellants Request for Reversal of Judgment in Favor of PLAINTIFF-APPELLEE

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

Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation

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

1. Is party a publicly held corporation or other publicly held entity?
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Morse v. Frederick,
551 U.S. 393 (2007) 6, 21

Newdow v. Rio Linda Union Sch. Dist.,
597 F.3d 1007 (9th Cir. 2010) 19

Nicholson v. Bd. of Educ., Torrance Unified Sch. Dist.,
682 F.2d 858 (9th Cir. 1982) 4, 7, 19

Nurre v. Whitehead,
520 F. Supp.2d 1222 (W.D. Wash. 2007) 20

Nurre v. Whitehead,
580 F.3d 1087 (9th Cir. 2009) 20

Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. #204,
523 F.3d 668 (7th Cir. 2008) 20

Peck v. Baldwinsville Cent. Sch. Dist.,
426 F.3d 617 (2d Cir. 2005) 11, 20

Peloza v. Capistrano Unified Sch. Dist.,
37 F.3d 517 (9th Cir. 1994) 10, 19

Pickering v. Board of Education,
391 U.S. 563 (1968) ..... passim

Piggee v. Carl Sandburg Coll.,
464 F.3d 667 (7th Cir. 2006) 17

Renken v. Gregory,
541 F.3d 769 (7th Cir. 2008) 17

Rosenberger v. Rector & Visitors of Univ. of Va.,
515 U.S. 819 (1995) 4

Rust v. Sullivan,
500 U.S. 173 (1991) 4

STATEMENT OF INTEREST

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

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

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

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

ARGUMENT

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

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

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

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

acrimony, and waste of scarce resources. When a difficult call must be made, a

“Since Johnson retains First Amendment speech rights as a public school

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

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

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

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

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

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

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

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

affords better remedies for unfair applicati

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

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

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

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

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

[41] 1 ER 21-22.

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

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

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

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[42] By "curricular," *Amici* refer not strictly to speech delivered as part of a school's formal instruction in core subjects but more broadly to speech made pursuant to school's full range of programs or activities. *See Downs*, 228 F.3d at 1015 ("Whether or not the bulletin boards by themselves may be characterized as part of the school district's "curriculum" is

category of purely personal teacher speech,[47]

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

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

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

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

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

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

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

CONCLUSION

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

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App.P. 28.1(e)(2) or 32(a)(7)(B) because:

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Dated: July 23, 2010

/S/ Francisco M. Negron, Jr.
Amici Curiae

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