No. 23-35288

In the United States Court of Appeals for the Ninth Circuit

RACHEL DAMIANO AND KATIE MEDART,
Plaintiffs-Appellants,

v.

GRANTS PASS SCHOOL DISTRICT NO. 7, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Oregon
Honorable Magistrate Judge Mark D. Clarke
(1:21-cv-00859-CL)

BRIEF OF FIRST LIBERTY INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amicus* certifies that *amicus* does not have any parent corporations, and no publicly held corporation owns 10% or more of its stock.

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INTEREST OF THE *AMICUS CURIAE*

First Liberty Institute ("First Liberty") is a nonprofit, public interest law firm dedicated exclusively to defending religious liberty for all Americans.[1] First Liberty provides pro bono legal representation to individuals and institutions of all faiths and has represented Catholic, Jewish, Muslim, Native American, Protestant, Falun Gong, and other practitioners.

First Liberty has an interest in preserving the freedom of individuals of all faith traditions to engage in religious speech and expression. First Liberty frequently represents public employees facing adverse employment actions because their supervisors or coworkers disliked their personal religious speech, much like the punishment Rachel Damiano and Katie Medart face in this case. First Liberty's clients include high-school football coach Joseph Kennedy, who was fired for praying quietly to himself after

[1] Attorneys from First Liberty Institute authored this brief as *amicus curiae*. *Amicus* states that no counsel for a party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

football games; Ron Hittle, a fire chief who was fired for attending a leadership conference at a church; Dr. Johnson Varkey, a college professor who was accused of "unacceptable religious preaching" and fired for teaching that sex is determined by the X and Y chromosomes in his biology class; and Jacob Kersey, a police officer who was placed on administrative leave for posting about his religious views of marriage on his personal Facebook page.

In our clients' experience, government employers are habitually eager to fire an employee whose private speech upsets that employee's coworkers. This heckler's veto nearly always leads to the cancellation of our client's religious expression, especially when the client is of a minority faith.

INTRODUCTION

The Supreme Court and this Court consistently reject the use of a "heckler's veto" to justify the suppression of speech. The First Amendment is doing its finest work when "the air may . . . seem filled with verbal cacophony" as "this sense is not a sign of weakness, but of strength." *Cohen v. California*, 403 U.S. 15, 24–25 (1949). This is why the First Amendment

tolerates "verbal tumult, discord, and even offensive utterance" as "necessary side effects of the broader enduring values which the process of open debate permits us to achieve." *Id.* at 24–25.

Building on a long line of important cases from the civil rights era, Supreme Court decisions in the last two years[2] have made clear that the First Amendment protects speech, especially religious speech, of employees in the workplace from targeting and silencing based on hostility from coworkers or government decisionmakers. In this case, the Plaintiffs were not merely fired because of a heckler's veto; their employer cultivated the hecklers. The district court's reliance on *Pickering* gave disproportionate power to naysayers, particularly school district leadership, who invited more hecklers to justify its silencing and targeting of Rachel and Katie based on their viewpoint.

[2] *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. at 2431 (2022); *Groff v. DeJoy*, 143 S. Ct. 2279, 2295 (2023).

ARGUMENT

I. The First Amendment has long prohibited a heckler's veto based on a speaker's viewpoint.

Among the most valued of the First Amendment's protections is a speaker's right to be free from a "heckler's veto," or a curtailment of his or her rights based on fear of how the listener might react. The Supreme Court implicitly disapproved of a heckler's veto as early as 1940, in *Cantwell v. Connecticut*. In *Cantwell*, the petitioner engaged in expression that was hostile toward Roman Catholicism. *Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940). The "hearers were in fact highly offended. One of them said he felt like hitting Cantwell and the other that he was tempted to throw Cantwell off the street." *Id.* Despite the hearers' negative reaction, the State could not "unduly suppress the free communication of views, religious or other, under the guide of conserving desirable conditions." *Id.* at 308.

The Supreme Court explicitly disapproved of a heckler's veto in 1949 in *Terminiello v. Chicago.* In *Terminiello*, the petitioner was cited with disorderly conduct after a crowd grew "angry and turbulent" outside the auditorium in which he was speaking. 337 U.S. 1, 2–3 (1949). Yet his citation

could not stand, as "a function of free speech under our system of government is to invite dispute." *Id.* at 4. The Court held that speech "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Id.* Although "[s]peech is often provocative and challenging . . . [it] is nevertheless protected against censorship or punishment." *Id.*

In the 1960's, amidst a backdrop of cultural revolution and the Civil Rights Movement, the Supreme Court doubled down against heckler's vetoes. In *Edwards v. South Carolina,* a group of African American high school and college students were arrested during a march to the South Carolina State House in 1963 to protest segregation, attracting a crowd of "some 200 to 300 onlookers." 372 U.S. 229, 230–32 (1963). Petitioners were arrested after they did not disperse the protest within the fifteen-minute deadline set by law enforcement. *Id.* at 233. This arrest was a "far cry from the situation in *Feiner*," but rather, "reflect[s] an exercise of . . . basic constitutional rights in their most pristine and classic form." *Id.* at 235.

Similarly wishing to protest segregation, in 1965, protesters in *Cox v. Louisiana* marched to a Louisiana courthouse, where the petitioner urged the crowd to "go uptown and sit in at lunch counters," leading to the petitioner's arrest. 379 U.S. 536, 545-46 (1965). Like *Edwards,* the "evidence 'showed no more than that the opinions which [the students] were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection.'" *Id.* at 551 (quoting *Edwards,* 372 U.S. at 237). Applying *Terminiello,* the Court reversed the conviction for disturbing the peace. *Cox*, 379 U.S. at 552.

A year later, the Court utilized the term "heckler's veto" to describe the growing body of law surrounding the impact of speech. *See Brown v. Louisiana*, 383 U.S. 131, 133 n.1 (1966). In *Brown,* the African American petitioner was arrested for his participation in a sit-in at a segregated library. *Id.* at 137. Citing *Cox, Terminiello,* and Professor Harry Kalven, Jr.'s term "heckler's veto", the Court reasoned that there was no "breach of the peace chargeable to the protesting participants." *Id.* at 133.

The Court rejected a heckler's veto in the secondary school context in 1969 in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 504–05 (1969). To protest the Vietnam War, three students attempted to wear black armbands to school. They were sent home and suspended until they were willing to return without the armbands. School officials cited quelling potential disturbance as the reason for banning the students' expression. *Id.* at 508. The Court ruled against the school district, holding that "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right of freedom of expression . . . Any word spoken, in class, in the lunchroom, or on the campus that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk." *Id.* (citing *Terminiello*, 337 U.S. 1). Likewise, in *Healy v. James*, in 1972, the Court found that unsubstantiated fear of "disruption" was not a valid reason for denying official recognition to a local student chapter of Students for a Democratic Society. 408 U.S. 169, 189–90 (1972).

Recently, Supreme Court decisions have rejected the heckler's veto and reaffirmed the important protections that the First Amendment extends to speech, particularly religiously motivated speech. In *Kennedy v. Bremerton School District*, the Court upheld Coach Kennedy's First Amendment right to say a brief prayer on the 50-yard line, holding that "[b]oth the Free Exercise and Free Speech Clauses of the First Amendment protect expressions like Mr. Kennedy's." *Kennedy*, 142 S. Ct. at 2416. The Court rejected the "modified heckler's veto, in which . . . religious activity can be proscribed' based on 'perceptions' or 'discomfort.'" *Id.* at 2427 (quoting *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001)). The Court added that "in no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights." *Kennedy,* 142 S. Ct. at 2432.

Last term, in *Groff v. DeJoy*, the Court held that Title VII required the U.S. Postal Service to accommodate Gerald Groff's Sabbath observance request unless it could show substantial increased costs. 143 S. Ct. 2279, 2295 (2023). The Court held that "employee animosity to a particular religion, to

religion in general, or to the very notion of accommodating religious practice cannot be considered 'undue,'" and that "bias or hostility to a religious practice or a religious accommodation" does not provide a defense to an employer's refusal to accommodate religion. *Id*. at 2296. The Court made clear that "a coworker's dislike of 'religious practice and expression in the workplace'" cannot justify religious discrimination. *Id.*

This Court just reaffirmed these important First Amendment principles in *Fellowship of Christian Athletes v. San Jose USD*, No. 22-15827 (Sept. 13, 2023) (*en banc*). The Court did not allow the critical reactions of some teachers and students against the Fellowship of Christian Athletes' ("FCA") statement of faith to justify revoking FCA's status as an official student club. On the contrary, the Court made clear that "the First Amendment's Free Exercise Clause guarantees protection of those religious viewpoints even if they may not be found by many to 'be acceptable, logical, consistent, or comprehensible.'" *Id.* at 58 (quoting *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021)).

II. Grants Pass School District should not be allowed to rely on a heckler's veto to justify adverse employment action against Rachel and Katie.

The district court impermissibly embraced a heckler's veto when it decided that "[t]he District has a legitimate interest in protecting the safety and wellbeing of its students that outweigh Plaintiffs' right to comment on matters of public concern." 1-ER-13. The district court found that "whether the disturbance was 'caused' by Plaintiffs' speech or by the staff, student, and community reaction to the speech is a distinction without difference;" that adverse employment action was appropriate regardless of the number of complaints; and that students may "no longer feel safe" at school because Rachel and Katie's speech. 1-ER-16. These reasons, together, amount to nothing more than a heckler's veto of Rachel and Katie's speech. What's more, the school district actually *invited* the hecklers to send emails (many of which were identical), which undeniably aimed to strengthen its argument under *Pickering* to support adverse employment action. Despite conceding that school operations continued to function effectively after spring break, 2-ER-81-82, Defendant-Appellee Kolb actively solicited

hecklers over email after condemning Rachel and Katie's speech to all Grants Pass School District staff, 2-ER-152, 220. This Court should not allow a heckler's veto—let alone one of the school district's own making—targeting Rachel and Katie's viewpoint to serve as a basis for adverse employment action. Doing so permits any official who disagrees with an employee's viewpoint to justify otherwise unconstitutional adverse employment action by fanning the flames of vitriol from a vocal public.

Allowing *Pickering* to justify a heckler's veto "creates a risk that fundamental constitutional precepts, articulated and defended over the course of generations, will lose their resonance for government employees nationwide." Randy J. Kozel, *Government Employee Speech and Forum Analysis*, 1 J. Free Speech L. 579, 580 (2022). "Tethering constitutional protection to the disruptiveness of employee speech runs counter to this core principle of expressive liberty." *Id.* at 590. To avoid this constitutional infirmity, "[s]ome courts . . . emphasiz[e] the relevance of an employee's speech to stakeholders with whom he interacts." *Id.* However, "[t]hat point is sound in so far as it goes, but it fails to alleviate the deeper concern: A

heckler's veto is no less a veto because the heckler was right to be upset." *Id.* at 590–91.

In *Flanagan v. Munger,* 890 F.2d 1557 (10th Cir. 1989), the Tenth Circuit declined to use *Pickering's* balancing test to "justify disciplinary action against plaintiffs simply because some members of the public find plaintiffs' speech offensive." *Id.* at 1566. Citing *Edwards v. South Carolina* and *Terminiello*, the court reasoned that doing so would amount to an unconstitutional heckler's veto. *Flanagan,* 890 F.2d at 1566. Further, it would be impermissible to silence the plaintiffs' speech over "potential problems," as the record was devoid of evidence of actual disruption. *Id.* at 1567; *see also Tinker*, 393 U.S. at 508 ("in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression"). For the Tenth Circuit, the "Supreme Court's rejection of the heckler's veto lends support to our holding that the defendants have only an attenuated interest in preventing plaintiffs' speech." *Flanagan*, 890 F.2d at 1567.

The Fourth Circuit similarly reasoned that "threatened disruption by others reacting to public employee speech simply may not be allowed to serve as justification for public employer disciplinary action directed at that speech." *Berger v. Battaglia,* 779 F.2d 992, 1001 (1985). A heckler's veto, "one of the most persistent and insidious threats to first amendment rights," cannot justify employee discipline, particularly when the "perceived threat of disruption" is to "external operations and relationships . . . caused not by the speech itself but by threatened reaction to it by offended segments of the public." *Id.*

This Circuit's decision in *Dodge v. Evergreen School District #114* likewise rejected the heckler's veto.[3] Where, despite the fact that teachers and staff felt "intimidated, shocked, upset, angry, scared, frustrated, and didn't feel safe" by the plaintiff's wearing a "Make America Great Again" hat, this Court found there was no evidence to justify the conclusion that this

[3] While *Dible v. City of Chandler*, 515 F.3d 918, 928–29 (9th Cir. 2008), took a more favorable view of heckler's vetoes, *Dodge* and *Fellowship of Christian Athletes,* which reject heckler's vetoes, reflect this Court's most recent jurisprudence.

interfered with the plaintiff's ability to complete his work. 56 F.4th 767, 782–83 (9th Cir. 2022). The requirement of actual disruption echoed this Court's decision in *Riley's American Heritage Farms v. Elsasser,* where two parent complaints about a field trip vendor's tweet was not enough to satisfy *Pickering*. *Riley's Am. Heritage Farms,* 32 F.4th 707, 726–27 (9th Cir. 2022).

The crux of these decisions is that the "insidious" heckler's veto is not a valid justification for adverse employment action under *Pickering. Berger,* 779 F.2d at 1001. Moreover, the simple act of public offense is not sufficient to outweigh a speaker's constitutional right; any threat of disruption as a justification must be actual—not speculative or potential; the threat cannot be from external parties; and it must be more than minimal.

Here, the school district has met none of these criteria that could justify speech restrictions. Feelings of "appall[]," "offen[se]," and "disgust[]," 2-ER-216, are insufficient. *See id.*

Much like the protest marches of previous decades that gave rise to important societal change, Rachel and Katie were simply attempting to use the modern-day avenue of social media to peacefully advocate for positions

they are uniquely qualified to understand. The district court's decision allows a constitutionally infirm heckler's veto based on viewpoint to justify adverse employment action and rejects the promise of *Tinker* for Rachel and Katie that "students or teachers [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker,* 393 U.S. at 506.

CONCLUSION

In light of these considerations, *Amicus* urges this Court to reverse and remand with instructions to enter summary judgment for Appellants on all claims.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this Brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it was prepared in 14-point Palatino, a proportionally spaced font. I further certify that this Brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(a) because the Brief contains 3,299 words, including footnotes, according to the count of Microsoft Word.

Dated: September 13, 2023

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CERTIFICATE OF SERVICE

I, Holly M. Randall, do hereby certify that I filed the foregoing Brief electronically with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system on September 13, 2023. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: September 13, 2023

/s/ Holly M. Randall
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