No. 06-1993

In the United States Court of Appeals For the Seventh Circuit

DEBORAH A. MAYER, PLAINTIFF-APPELLANT

v.

MONROE COUNTY COMMUNITY SCHOOL CORPORATION, ET AL., DEFENDANTS-APPELLEES

On Appeal from the United States District Court for the Southern District of Indiana, No. 1-04-cv-1695 The Honorable Sarah Evans Barker, District Judge

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Brief of *Amici Curiae* National School Boards Association, American Association of School Administrators, Indiana School Boards Association, Illinois Association of School Boards, and Wisconsin Association of School Boards In Support of Defendants-Appellees

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Appellate Court No: 06-1993

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Attorney's Signature: _____ Date: _____

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INTERESTS OF THE *AMICI*

Founded in 1940, the National School Boards Association (NSBA) is a not-for-profit federation of 49 state associations of school boards across the United States, the Hawai‘i State Board of Education, and the boards of education of the District of Columbia, and the U.S. Virgin Islands. NSBA also represents the nation’s 95,000 school board members who, in turn, govern approximately 15,000 local school districts that serve more than 47 million public school students. NSBA is dedicated to the improvement of public education in America and has long been involved in advocating for a reasonable balance between the legitimate First Amendment rights of public employees to speak out on matters of public concern, and the obligation of schools as public employers, to promote the efficiency of the educational system.

The American Association of School Administrators (AASA), founded in 1865, is a professional organization representing over 14,000 educational leaders across America and in other countries. AASA’s mission is to support and develop school district leaders who are dedicated to the highest quality public education for all children.

The Indiana School Boards Association (ISBA) is a nonprofit association whose membership is composed of all 290 boards of school trustees in the state of Indiana. The purpose of the Association is to promote the efficient and effective administration and operation of the public schools. As part of its responsibilities, the Association advises it member school districts on legal issues pertaining to teacher dismissal and teacher speech rights under the First Amendment.

The Illinois Association of School Boards (IASB) is a voluntary non-profit association organized under Article 23 of the School Code, 105 ILCS 5/23-1 *et seq.*, to

assist and train school board members in performing their statutory functions and to promote, support, and advance the interests of public education throughout Illinois. The IASB currently has 852 members, representing more than 97.7% of all public school boards in Illinois. The IASB maintains and makes available school board policies and procedures to assist school officials in performing their leadership function and to ensure legal compliance across the gamut of school concerns, including those relating to curriculum content and discussions of controversial or sensitive topics in the instructional program.

The Wisconsin Association of School Boards (WASB) is a state-wide membership organization of public school boards in Wisconsin. The purposes of the WASB are to aid and assist public school boards and other educational agencies in the performance of their lawful functions and to otherwise support, promote, and advance the interests of public education throughout the state.

Amici file this brief with the consent of both parties. *Amici* have a direct and immediate interest in the clarity of the law recognizing the authority of school officials to develop and implement a school curriculum and to set standards for discussions of controversial or sensitive topics in the classroom. As organizations that exist to promote and improve the effectiveness of the entities and individuals charged with governing and managing public schools, the *Amici* are directly and immediately interested in this court's consideration and resolution of the issues underlying this matter. As national and state education organizations representing school leaders, *Amici* are in a unique position to inform this court concerning the issues presented as well as their potential impact on school districts in their states and across the nation.

SUMMARY OF THE ARGUMENT

School boards, as the governmental entity publicly accountable for ensuring students receive a high quality education, must be able to determine and implement curricula. By ensuring teacher classroom expression adheres to an established program of studies, a school board implements and promotes the educational mission of the school district. Where a teacher's classroom speech diverges from the selected curriculum, schools must be able to discipline the teacher, regardless of whether the expression pertains to an issue of public concern, without risk of a First Amendment challenge. Because all teacher classroom expression is spoken in fulfillment of a teacher's official job duties to impart knowledge and information to students, to imbue such speech with the same constitutional significance as citizen expression made in public discourse, is to strip the school board of its role in determining and implementing an established curriculum.

ARGUMENT

I. A public school teacher's curricular speech is *per se* not speech on a matter of public concern and therefore is not protected by the First Amendment.

This court should adopt the well-reasoned positions of the Fourth and Fifth Circuits in *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794 (5th Cir. 1989), and *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364 (4th Cir. 1998).[1] In both cases,

[1] In a recent case, *Lee v. York County Sch. Div.*, 418 F.Supp.2d 816, 821 (E.D. Va. 2006), the U.S. District Court for the Eastern District of Virginia describes how the federal courts of appeals have developed at least two tests for determining if and to what extent the First Amendment protects teacher speech in the public school setting. Apparently, some courts of appeals examine teacher speech by applying the U.S.

the courts held that a public school teacher's curricular speech does not touch on a matter of public concern and is not protected by the First Amendment. The courts reasoned in these cases that a dispute between a teacher and the school district over the content of curriculum is essentially an "ordinary employment dispute" and not a matter of public concern. *Kirkland,* 890 F.2d at 802 (upholding nonrenewal of teacher for failure to obtain district approval of world history supplemental reading list); *Boring*, 136 F.3d at 368 (finding school district did not violate First Amendment by transferring drama teacher who selected a play for students to perform without obtaining prior approval). Stated another way, a teacher who objects to, or teaches in contravention of, the curriculum is challenging both the school district's curricular choices and the teacher's job duties. However, since the school district has the final or sole authority to determine a curriculum and implement it through the establishment of job duties, the teacher's challenge amounts to little more than an employment dispute. Speech that amounts to an employment dispute is not a matter of public concern and receives no First Amendment protection. *Connick v. Myers*, 461 U.S. 138, 146-148 (1983).

Moreover, the reasoning of *Kirkland* and *Boring* applies to a teacher's classroom expression of personal views that conflict with the established curriculum. Appellant argues that the holdings of *Kirkland* and *Boring* do not apply to her because she was following, not diverging from, the curriculum. However, as the district court discusses,

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Supreme Court cases concerning student speech, the *Tinker-Hazelwood* standard, while other courts of appeals analyze teacher speech using the U.S. Supreme Court cases involving the First Amendment rights of government employees, the *Pickering-Connick* standard. In *Boring*, the Fourth Circuit adopted the *Pickering-Connick* approach and simplified the analysis by holding that in the context of a public school teacher, "curricular speech" does not touch on a matter of public concern and is not protected by the First Amendment. *Contra Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1048 (6th Cir. 2001)(finding teacher classroom speech on a matter of public concern merits First Amendment protection and employer must make strong showing to override employee's free speech rights); *Evans-Marshall v. Board of Educ. of the Tipp City Exempted Village Sch. Dist.*, 428 F.3d 223, 229 (6th Cir. 2005) (noting that in-class speech has not been removed from "its presumptive place within the ambit of the First Amendment").

part of a school district's curriculum includes how, if at all, teachers' personal views regarding controversial subjects can be expressed in the classroom. *Mayer v. Monroe County Comm. Sch. Corp.*, No. 04-1695, 2006 WL 693555, at * 12 (S.D. Ind. Mar. 10, 2006). Some school districts may disallow teachers from expressing personal opinions on controversial subjects, even if students ask about these opinions, while others may allow teachers to express personal opinions as long as they give a balanced view of the issue. Still other districts may allow teachers to express personal opinions without restriction. In the case at bar, the principal's memo makes clear the district chose not to permit teachers to express their personal "stance on foreign policy." *See id*. at * 3. As such, Appellant's speech was as much in contravention of the district's policy prohibiting teachers from expressing their personal opinions about foreign policy as the teacher's selection of his preferred book list in *Kirkland,* 890 F.2d at 796, and the teacher's selection of her preferred play in *Boring*, 136 F.3d at 366, were in contravention of their districts' respective curricula.

Strong public policy interests support withholding First Amendment protection from a public school teacher's classroom speech regardless of whether the topic discussed would otherwise relate to a matter of public concern. To grant such protection would make teachers, not school boards, the ultimate decision maker as to the curriculum. The Fourth Circuit explains in *Boring* that this result is problematic because school boards, not individual teachers, are the democratically elected body entrusted with deciding what a school district's curriculum will be:

> Someone must fix the curriculum of any school, public or private. In the case of a public school, in our opinion, it is far better public policy, absent a valid statutory directive on the subject, that the makeup of the curriculum be entrusted to the local school authorities who are in some sense responsible, rather than to the

> teachers, who would be responsible only to the judges, had they a First Amendment right to participate in the makeup of the curriculum.

136 F.3d at 371.

This court has likewise articulated in numerous cases that control over the curriculum resides with the school board as a democratically elected body responsive to the needs and expectations of the local community. For this reason, teachers do not have a First Amendment right to diverge from the curriculum. *See, e.g.*, *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004, 1007 (7th Cir. 1990) (stating in rebuff to teacher's claim of First Amendment right to teach creation theories not approved by the school district, "We have already confirmed the right of those authorities charged by state law with curriculum development to require the obedience of subordinate employees, including the classroom teacher."); *Zykan v. Warsaw Comm. Sch. Corp.*, 631 F.2d 1300, 1305 (7th Cir. 1980) ("The need for intellectual and moral guidance from a body capable of transmitting the mores of the community has led most state legislatures to lodge primary responsibility for secondary school education in local school boards, which generally have considerable authority to regulate the specifics of the classroom.").

A ruling by this court that the First Amendment protects teacher classroom speech—merely because the subject matter of the speech relates to an issue of public concern—would contravene this court's earlier rulings and compel school boards to cede control of the curriculum. Such a ruling would permit a rogue teacher under the cloak of free speech protection to use classroom discussions to promote a teacher's personal views on matters of public concern regardless of whether their perspectives are sanctioned by the school district. Such a teacher would also be free to discuss countless issues of public

concern that have *little* or *no* relevance to the curriculum mandated by the school board.[2] Allowing teachers to don the mantle of First Amendment protection to diverge from the established curriculum in either manner described above and espouse personal views on any subject related to a matter of public concern would minimize employee accountability and promote lack of uniformity. Such circumstances would severely hamper a school district's ability to fulfill its mission of educating students according to an established curriculum.

Fulfilling this mission is the fundamental purpose of school boards for which they are publicly accountable to the citizenry in general and to parents and students in particular. Failure to require teachers to follow the curriculum would ignore parents' vital interest in ensuring students are taught the prescribed curriculum necessary to prepare children to be productive and publicly engaged adults. *Palmer v. Board of Educ. of the City of Chicago*, 603 F.2d 1271, 1274 (7th Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980) (stating in support of board authority and obligation to determine and ensure delivery of established curriculum, "There is a compelling state interest in the choice to adhere to a suitable curriculum for the benefit of our young citizens and society. It cannot be left to the individual teachers to teach what they please.").

Beyond the question of parental accountability, federal regulatory and statutory requirements demand adherence to established curricula. In fact, ensuring teachers follow an established curriculum is critical for schools in the current era of standards and accountability under the No Child Left Behind Act, 20 U.S.C. § 6301 *et seq*. (2006) (NCLB). NCLB requires public schools to ensure that all students meet high academic

[2] For example, these issues might include the effectiveness of the district's discipline policy, fair teacher compensation, or which candidate deserves to be elected to the school board, etc.

standards by 2014. The standards are set by each state and are generally measured through student performance on standardized tests. Schools must show "adequate yearly progress" toward meeting the goal of universal student achievement or be subject to a number of penalties for failing to do so. Under such a regime, the need for rigorous curricula aligned with state standards makes it imperative for teachers to deliver instruction in accordance with the district's established educational program. The consequences to districts and students for allowing teachers to diverge from the curriculum are potentially severe.

To accomplish the paramount objectives of public education, school leaders require the discretion and authority both to select a curriculum and to hire employees to teach children according to an established program of studies. School districts, and the parents and communities they serve, expect teachers will deliver high quality instruction consistent and clearly aligned with the curriculum and state standards. Likewise, parents and communities hold boards and school administrators accountable for ensuring teachers' classroom speech is accurate, demonstrates sound judgment, promotes the school district's mission, and supports high student achievement.

But, risking penalties under the NCLB if students are not provided the instruction necessary to achieve state standards is not the only danger associated with failing to adhere to an established curriculum. When rogue teachers diverge from the curriculum, schools often must expend time and money to resolve resulting parental complaints and restore public confidence in the school system.[3] By holding that teacher classroom speech is *per se* not a matter of public concern, this court can ensure that schools

[3] For example, to address parental complaints in this case, the principal wrote a memo explaining proper teaching methods, cancelled Peace Month, and had a meeting with the Appellant and two parents to discuss the Appellant's comments about the Iraq war.

maintain control of their curriculum and focus their resources on educating children, rather than on resolving unnecessary disputes between parents concerned the curriculum has not been followed and errant teachers expressing their own personal viewpoints in the classroom.

Furthermore, the impressionability of students makes it particularly important that school boards retain the authority to control the curriculum and to regulate teachers' classroom speech. *Webster*, 917 F.2d at 1007 (citing students' immature intellectual development and teachers' position of influence as reasons for "concomitant power in school authorities to choose teachers and regulate their pedagogical methods"). The concern about the impressionability of children is particularly striking in this case where the Appellant was addressing a classroom of young students in grades 4-6, *i.e.*, students younger than the junior high students in *Webster*. The younger the students, the more susceptible they are to being influenced by a teacher commenting on controversial issues in class. Young students seeking to establish personal identities and trying to determine where they stand on controversial issues naturally would be interested in the opinions of their teacher, whom they view as a role model.

Precisely because of the authority and influence teachers wield, a school district may seek to limit a teacher from expressing personal opinions arising out of issues of public concern.[4] Merely because a controversial classroom discussion topic—the Iraq war, for example—is otherwise a matter of public concern, does not mean a teacher's personal opinions about the topic expressed in the classroom should be protected by the First Amendment. Giving constitutional protection to teacher classroom speech would

[4] A myriad issues can provide fertile ground for personal opinions. Immigration policy, abortion, police misconduct, abstinence, origins of life, and gay rights are but a few.

mean teachers would have wide discretion in the messages they present to impressionable school children. If teacher classroom speech is protected by the First Amendment merely because the topic of classroom discussion is a matter of public concern, schools will have little ability to control classroom discussion at the point at which students may be most vulnerable to undue persuasion by a rogue teacher interested in indoctrinating students in personal opinions at the expense of an established curriculum.

Finally, if this court were to hold that classroom speech is protected by the First Amendment, the prospect for increased litigation in many non-meritorious employment cases against school districts would be likely. Public school teachers and other school employees cannot fulfill their job duties without engaging in speech at work. Virtually all of them, especially teachers, at some point in the course of doing their jobs will discuss a matter of public concern, and many of those discussions will take place in the classroom. Extending constitutional protection to the inappropriate expression of personal opinions in the guise of curricular speech means almost every school employee facing discipline or termination for unrelated reasons will be able to assert a First Amendment claim that some expression he or she uttered in the past is in fact the basis for a subsequent adverse employment action, as long as the employee alleges a connection between the adverse action and the prior speech.

In many cases, a trial court will find sufficient disputed facts as to whether the subject speech was disruptive enough to justify the employment action in question so that the claim cannot be resolved until trial. The difficulties that school districts and other public employers will face in having these claims dismissed on summary judgment will, in turn, inflate the settlement value in almost every case. The unscrupulous employee

may manufacture First Amendment claims when they see "the writing on the wall" of an impending adverse employment action. In short, if the court extends First Amendment protection to teachers' classroom speech, an unprincipled, substandard employee wary of imminent, legitimate discipline or termination could attempt to save his or her job by deliberately speaking about matters of public concern before the employer takes official adverse employment action, in order to disingenuously argue that the speech was the "true" reason for discipline or termination.

II. A teacher's classroom speech is part of his or her official job duties and therefore is not protected by the First Amendment.

It is settled that the First Amendment does not insulate a public employee from discipline where the employee speaks on a matter of public concern while performing his or her official job duties. *Garcetti v. Ceballos*, __ U.S. __, 126 S. Ct. 1951, 1960 (2006)("[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.").

A teacher's classroom speech is, of course, a part of the teacher's official job duties. Teachers are employed to instruct students, which generally means lecturing on various topics included in the curriculum, encouraging classroom discussions, and asking and answering questions. In the case at bar, Appellant was responding to a student's question posed during a classroom discussion when she expressed her personal opinion about the Iraq war. The First Amendment simply offers no protection to this kind of speech. *Compare Wilcoxon v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, ___ F. Supp. 2d ____, 2006 WL 1793546 * 5 (D. Del. 2006) (concluding that a teacher who logged the

absences of a fellow teacher in a journal was not doing so as part of his official job duties. "He was not employed to monitor the absences of fellow teachers, and defendants do not allege that he was required to do so.").

A. Nothing in *Garcetti* supports extending First Amendment protection to teachers' classroom speech.

This court should reject an unduly narrow interpretation of *Garcetti* that limits employers to regulating only that employee expression which in substance originates directly from an employee's job duties and that gives constitutional shelter to all "personal" employee expression. Appellant argues that *Garcetti* does not apply here because the speech at issue in that case was informed by the employee's position as a deputy district attorney, whereas her speech was informed by personal opinions formed outside of the classroom. Unlike the employee in *Garcetti* who expressed an opinion about the accuracy of the warrant affidavit only because his official job duties required him to do so, Appellant alleges her opinions on the Iraq war did not derive from an on-the-job investigation, but from listening to current events and her son's enlistment in the military. By focusing on this distinction, Appellant urges the adoption of a new test for determining First Amendment protection premised entirely on whether or not the employee formed the views he or she expressed as a result of information obtained while performing his or her official job duties.

This proposed test is contrary to the standard established in *Garcetti*. The Court ruled that the employee's speech was not protected by the First Amendment because it was made pursuant to his official job duties. The Court made no distinction based on the source of the information underlying the employee's expression. *Garcetti*, 126 S.Ct. at 1960. The speech would not have been protected regardless of whether the employee's

views of the truthfulness of the affidavit were informed by reading the affidavit and comparing it with evidence he found at the location it described or by a suspicion he had about the honesty of police officers based on watching television shows about crooked cops. Speech is simply not protected if it is made as part of an employee's official job duties.

The flaws in a standard that grants or denies First Amendment protection based on whether an employee formed the views expressed because his job duties required him to do so are apparent when applied to the K-12 context. Under such a test, teachers would receive First Amendment protection to express whatever views he or she has on a subject, as long as the teacher's views are "personal to [him or] her" and not informed by his or her position as a teacher, making it absurdly possible that two teachers speaking the same words in front of their respective classes might have different constitutional protection depending on the subject each taught. For example, a health teacher would be bound to teach only the established sex education curriculum, but a science teacher could conceivably comment about human sexuality during physics class without repercussion; a social studies teacher could not discuss foreign policy except in keeping with the curriculum, but an English teacher would be able to express her views on situations in the Middle East without risking possible discipline. Under Appellant's view, the science and English teachers in these examples would be protected because their views are "personal to [the teacher]" and likely would not be formed because of "any on-the-job investigation." The result of redefining this speech as personal and non-work related would be that school districts would lose control of the curriculum as teachers cloak their speech in the protections afforded by the First Amendment to foist their own personal

views on students, regardless of whether or not those views are sanctioned by the legitimate school board curriculum selection process.

Appellant's assertions that *Garcetti* does not apply because her speech was only "her view as a private citizen," and that she was not speaking as an employee, plainly misconstrue *Garcetti*'s holding. As stated above, *Garcetti* explicitly holds "when public employees make statements pursuant to their official duties, the employees *are not speaking as citizens* for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* (emphasis added). In other words, when an employee speaks as part of his or her official job duties, he or she *cannot* be acting as a citizen.

Likewise, Appellant's assertion that the district court's holding "pretends that teachers are not also citizens," misconstrues the *Garcetti* decision. Under *Garcetti*, public employees including teachers may act as citizens and receive First Amendment protection in many contexts *other than speaking as part of their official job duties. Id.* ("Refusing to recognize First Amendment claims based on government employees' work product does not prevent them from participating in public debate.") Thus, this court need not fear that applying *Garcetti* in this case will diminish a teacher's right to have personal opinions about topics of public concern and express them "as a citizen." A teacher's speech would still garner First Amendment protection in numerous contexts—both in an out of school—that are not related to responsibilities the teacher has to a classroom of impressionable children. For example, Appellant may still "honk for peace" off school grounds, write editorials to the newspaper about the Iraq war, or discuss the war with other teachers during non-instructional time. *Id.* at 1961 (noting that public

employees, like all citizens, have First Amendment protection to write letters to the local newspaper or to discuss politics with a co-worker).

B. *Garcetti* supports school districts' managerial discretion to determine and implement curricula.

Misapplying the *Garcetti* decision in the public education context would have particularly negative consequences. The most detrimental result would be the deprivation of the managerial discretion school authorities need to carry out their governmental purpose. In *Garcetti* the Court stated:

> Employers have heightened interests in controlling speech made by an employee in his or her professional capacity. Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission.

Id. at 1967.

The need for managerial discretion to promote the employer's mission cannot be gainsaid in the context of public education, which the Supreme Court has recognized as the "most important function of state and local governments." *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) (recognizing public education as the foundation for citizenship, service in the armed forces, understanding of cultural values, later professional training, and preparation for life in democratic society). As discussed above, this managerial discretion must include school board control of the curriculum through establishment of a program of studies that teachers are required to follow. Without such control, school boards will not be able to meet their public obligations to help students reach academic proficiency in accordance with federal and state mandates nor to prepare students for the challenges and responsibilities of adulthood. Just as the Court recognized in *Garcetti* the need for supervisory authority to take "proper corrective action" for employee speech that

was "inflammatory or misguided," this court should preserve the managerial discretion school districts need to maintain control over the curriculum to ensure that students receive the high quality education they need to succeed in our complex society and globally competitive economy.

To do so, this court need only reaffirm its belief that a school district has the authority to hire teachers who share, and will follow, their educational philosophy both inside and outside the classroom. *See, e.g., Palmer*, 603 F.2d 1271 (7th Cir. 1979) (holding a teacher had no First Amendment right to refuse to participate in various patriotic activities included in the district's adopted curriculum); *Webster*, 917 F.2d 1004 (holding a teacher had no First Amendment right to teach non-evolutionary theories of creation not part of the district's curriculum); *Wales v. Board of Educ. of Comm. Unit Sch. Dist.*, 120 F.3d 82, 85 (7th Cir. 1997) (finding no First Amendment violation by district that non-renewed a teacher who complained to administration about lack of student discipline procedures because "[a] school district is entitled to put in its classrooms teachers who share its educational philosophy").

By reaffirming the principles underlying these decisions, this court will avoid the unnecessary judicial intervention into government operations that would ensue if teacher expression in the classroom were granted constitutional protection. If all speech made at work that touched on issues of public concern passed the first step of the balancing test, established in *Pickering v. Board of Educ. of Township High Sch. Dist. 205*, 391 U.S 563 (1968), federal and state courts would be committed to a "new, permanent, and intrusive role, mandating judicial oversight of communications between and among government

employees and their superiors in the course of official business." *Garcetti*, 126 S. Ct. at 1961.

> The underlying problem with this breadth of coverage is that the standard (despite predictions that the government is likely to *prevail* in the balance unless the speech concerns "official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety,"), does not avoid the judicial need to *undertake the balance* in the first place. And this form of judicial activity—the ability of a dissatisfied employee to file a complaint, engage in discovery, and insist that the court undertake a balancing of interests—itself may interfere unreasonably with both the managerial function (the ability of the employer to control the way in which an employee performs his basic job) and with the use of other grievance-resolution mechanisms, such as arbitration, civil service review boards, and whistle-blower remedies, for which employees and employers may have bargained or which legislatures may have enacted.

126 S.Ct. at 1975-76 (Breyer, J., dissenting).

Moreover, were judges required to apply the second prong of the *Pickering* balancing test—which under Appellant's view of this case would happen in every case where a teacher's classroom speech relates to an issue of public interest—their role in overseeing the speech of teachers would become particularly intrusive. To determine whether the school district's interests in efficiency and avoiding disruption outweigh the teacher's interest in expressing himself or herself in the classroom regardless of the curriculum's requirements, a court might consider the frequency and duration of the speech, whether and how many parents complained, how far the speech diverged from the curriculum, and whether the speech, in the court's opinion, had any merit. The school district—that has devised the curriculum, understands parents' expectations, and has training and first hand knowledge about how teachers influence students—is in a far better position than a court to determine the impact of a teacher's speech that deviates from the curriculum and how to address it.

If a school district is forced to tolerate such speech because a state or federal court decides the balancing test in a teacher's favor, ultimately a court, rather than the school board, is determining the permissible content of the school district's curriculum. Or, at minimum, the court is deciding when and how far a teacher can diverge from the school board's curriculum. This sort of judicial intrusion into school board policy making and school administrators' managerial discretion is precisely the kind of intrusion the Supreme Court was trying to avoid in *Garcetti*.

III. The Supreme Court articulated no exception to *Garcetti* based on academic freedom in the K-12 public school context.

Garcetti v. Ceballos created no exception for the K-12 public school context based on academic freedom rights. The majority in *Garcetti v. Ceballos* stated:

> . . . *Justice Souter* suggests today's decision may have important ramifications for academic freedom, at least as a constitutional value. See *post*, at 12-13. There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.

126 S. Ct. at 1962.

While Appellant reads this passage to mean that *Garcetti* exempts K-12 public school teachers from its ruling and that public school K-12 teachers have academic freedom rights, neither assertion is correct. The majority's reference to academic freedom directly and expressly responds to the following concern Justice Souter articulated in his dissent:

> This ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a *public university professor*, and I have to hope that today's majority does not mean to imperil First Amendment protection

> of *academic freedom in public colleges and universities*, whose teachers necessarily speak and write "pursuant to official duties."

Id. at 1969 (emphasis added).

Justice Souter's use of the terms *public university professor,* instead of public school teacher or elementary and secondary school teacher and *academic freedom in public colleges and universities,* instead of academic freedom in public elementary and secondary schools, clearly illustrates he was concerned about the implications of *Garcetti* for public college and university professors only. Likewise, every case Justice Souter cites to support his concern about the implications of *Garcetti* concerns higher education: *Grutter v. Bollinger,* 539 U. S. 306, 329 (2003); *Keyishian v. Board of Regents of Univ. of State of N. Y.,* 385 U.S. 589, 603 (1967). It defies reason to argue that the majority was indicating that *Garcetti* might not apply to public K-12 school districts when the majority was responding explicitly to the dissent's concerns that *Garcetti* should not apply to public college and university professors.

The policy underlying the law's grant of academic freedom[5] to university and college educators does not exist in the K-12 context. The concept of academic freedom at public colleges and universities was not developed to protect professors who express their personal opinions in class. Rather, it was intended to protect professors who have discovered new, innovative, and likely controversial ideas during their research and scholarship, and to allow them to publish and discuss their ideas without retribution. *See* W. Stuart Stuller, *High School Academic Freedom: The Evolution of a Fish Out of Water*, 77 NEB. L. REV. 301, 335 (1999). Unlike their counterparts at the post secondary

[5] "Academic freedom" is a term frequently used but rarely explained. In the narrowest sense, academic freedom is the right "to speak freely about political or ideological issues without fear of loss of position or other reprisal." BLACK'S LAW DICTIONARY, 11 (7th ed. 1999).

level, K-12 public school teachers are not required to produce scholarship and have no analogous need to have their ideas protected by academic freedom.

Contextual differences between higher education classrooms and K-12 classrooms also support the law's distinct treatment of academic freedom in each of these instructional settings. First, K-12 school children are young and impressionable and can be significantly influenced by the speech of a teacher. *Ambach v. Norwalk*, 441 U.S. 68, 78-79 (1979) (noting teacher's position as a role model and opportunity to influence students). For this reason, the speech of a professor who expresses a personal opinion in a college class has completely different consequences from the speech of a public K-12 teacher who expresses a personal opinion to a classroom of fourth to sixth graders. A college student hearing a professor express a personal opinion about the Iraq war has the mental cognitive development, knowledge (or the ability to conduct and understand research) and analytical skills to evaluate and process the professor's statements and relate to them accordingly. Conversely, a fourth grade student hearing the same personal opinion lacks both the cognitive development, knowledge and analytical skills to critically assess the teacher's personal opinion and separate it from the established program of instruction. Likewise, he or she is more likely to adopt the teacher's views as his or her own because the teacher is probably one of the most influential role models in the student's life. In sum, a teacher's classroom expression, which comes veiled with the mantle of school authority and credibility, cannot be subject to personal rather than school discretion.

School boards, rather than students or teachers, carefully select the appropriate curriculum taking into consideration students' stages of intellectual and cognitive

development. *See*, *Zykan*, 631 F.2d at 1304 (indicating that students' lack of intellectual skills necessary for taking full advantage of the marketplace of ideas requires more direction and guidance from school leaders responsible for making educational choices). If high school students are unable to take "full advantage of the marketplace of ideas," it is unlikely elementary and middle school students would be able to do so—especially if the "marketplace of ideas" only includes a teachers' personal opinions on a subject. For this reason, K-12 public school teachers—particularly elementary school teachers like the Appellant—should not have academic freedom rights to express their personal opinions on matters of public concern in class.

Permitting K-12 teachers to express personal opinions in class under the guise of academic freedom is less justifiable, because elementary and secondary students are more likely to be a captive audience with significantly less individual choice and control over the instruction to which they are exposed than college students. Stated more concretely, college students are better able to avoid through course selection and class attendance a professor who exercises his or her academic freedom rights in a manner the student finds offensive. In the public K-12 school district context, school boards consider parental input in setting curriculum and may allow parents to opt their children out of certain classes, such as sex education. But in general, parents and students who choose to attend public schools have more limited flexibility in selecting teachers and courses than college students. School boards and administrators assign teachers to teach specific subjects to specific grades at specific schools. In many instances, school administrators assign students to particular schools—and often particular classes and teachers. And, as the facts of this case illustrate, schools are not always able to grant parents' requests to

transfer their children from a particular teacher's class, regardless of the parents' reasons. It would be both impractical and impolitic for school districts to accommodate parental requests that their children only be taught by teachers who share the parents' ideology. Not only would school districts have to spend countless hours rearranging students' schedules, they might also be reduced to hiring teachers based on ideological viewpoint rather than professional competence. In short, a K-12 teacher deviating from the curriculum and injecting classroom discussion with personal opinions disregards parents' expectations and robs school boards of their authority to implement a uniform curriculum of their choosing.

To date, this court has not recognized any academic freedom rights for elementary and secondary school teachers. *Palmer*, 603 F.2d 1271 (holding a teacher had no First Amendment right to refuse to participate in various patriotic activities); *Webster*, 917 F.2d 1004 (holding a teacher had no First Amendment right to teach non-evolutionary theories of creation). Even in the higher education context, this court has stated that deviating from the curriculum is not protected by academic freedom rights. *Clark v. Holmes*, 474 F.2d 928, 931 (7th Cir. 1972) (denying college professor's claim that academic freedom allows him "to override the wishes and judgment of his superiors and fellow faculty members as to the proper content of the required health course"). This court should similarly decline to give constitutional significance to speech in the K-12 context where no academic freedom rights are established.

CONCLUSION

For the reasons explained above, *Amici* urge this court to affirm the district court decision and to preserve the authority and discretion of school boards to determine and

implement curricula and ensure that teacher expression advances the adopted program of studies.

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CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME LIMITATIONS

This certifies that this brief complies with the type-volume limitation of Fed.R.App.P (32(a)(7)(B) because this brief contains 6,326 words, excluding the parts of the brief exempted by Fed.R.App.P.32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on the below named persons by first class United States Mail, postage pre-paid, on this 6th day of September, 2006.

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