No. 23-10332

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Rev. Stephen Jarrard,

Plaintiff-Appellant,

v.

Sheriff of Polk County et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

No. 4:20-cv-00002-MLB

BRIEF OF *AMICI CURIAE* PROFESSORS MICHAEL W. MCCONNELL, RICHARD W. GARNETT, AND EUGENE VOLOKH IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Circuit Rule 26.1-2(b), I certify that the following persons and entities may have an interest in the outcome of this case:

1. Association of County Commissioners of Georgia (insurer for Defendants and Appellees);
2. Barclay, Stephanie (counsel for Plaintiffs and Appellant);
3. Claypool, MaKade (counsel for *Amici Curiae*);
4. Covington & Burling LLP (law firm of counsel for *Amici Curiae*);
5. Garnett, Richard (*Amicus Curiae* in support of Appellant);
6. Greenamyre, Zack (counsel for Plaintiffs and Appellant);
7. Henley, Andrew (counsel for *Amici Curiae*);
8. Jarrard, Stephen (Plaintiff-Appellant);
9. Kessler, Meredith (counsel for Plaintiff-Appellant);
10. King, Kevin (counsel for *Amici Curiae*);
11. Law Offices of Gerry Weber, LLC (law firm of counsel for Plaintiffs and Appellant);
12. Mason, Brock (counsel for *Amici Curiae*);
13. McConnell, Michael (*Amicus Curiae* in support of Appellant);

14. Meiser, John (counsel for Plaintiff-Appellant);
15. Mitchell, Shapiro, Greenamyre & Funt LLP (law firm of counsel for Plaintiffs and Appellant);
16. Moats, Johnny (Defendant-Appellee);
17. Morris, Ollie "Mitchell" (Plaintiff);
18. Notre Dame Law School Religious Liberty Clinic (counsel for Plaintiff-Appellant);
19. Polk County, Georgia (potential indemnitor of Defendants and Appellees);
20. Polk County Sheriff's Office (employer and potential indemnitor of Defendants and Appellees);
21. Sharp, Al (Defendant-Appellee);
22. Stroup, Dustin (Defendant);
23. The Honorable Michael L. Brown (United States District Court Judge);
24. Volokh, Eugene (*Amicus Curiae* in support of Appellant);
25. Waymire, Jason (counsel for Defendants and Appellees);
26. Weber, Gerald (counsel for Plaintiffs and Appellant);
27. Williams, Terry (counsel for Defendants and Appellees);
28. Williams, Morris & Waymire, LLC (law firm of counsel for Defendants and Appellees).

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Undersigned counsel is aware of no publicly traded company or corporation with an interest in the outcome of this case.

May 19, 2023

/s/ MaKade C. Claypool
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INTEREST OF *AMICI CURIAE*

Professor Michael W. McConnell is the Richard and Frances Mallery Professor and Director of the Constitutional Law Center at Stanford Law School, and a Senior Fellow at the Hoover Institution. Professor McConnell served as a Circuit Judge on the United States Court of Appeals for the Tenth Circuit from 2002 to 2009. He is an editor of a leading casebook on the Religion Clauses, RELIGION AND THE CONSTITUTION, now in its fifth edition. He teaches courses on constitutional law, constitutional history, and the First Amendment and has published many articles and books on the subjects.

Professor Richard W. Garnett is the Paul J. Schierl/Fort Howard Corp. Professor of Law and the Director of the Program on Church, State & Society at Notre Dame Law School. He is a co-author of RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT, now in its fifth edition. Professor Garnett teaches and writes in many areas, including constitutional law, the First Amendment, and law and religion.

Professor Eugene Volokh is the Gary T. Schwartz Distinguished Professor at the UCLA School of Law. He teaches many courses, including First Amendment Law, and he oversees a First Amendment amicus brief clinic at the UCLA School of Law. Professor Volokh is the author of THE FIRST AMENDMENT AND RELATED

STATUTES, now in its seventh edition. He also frequently publishes articles and blog posts on the First Amendment and other issues.

By virtue of their scholarship, *amici* have an interest in the proper application of the First Amendment, including the doctrines raised in this case. In particular, they are concerned that the district court's application of public employee speech doctrines would lead to a degradation of First Amendment rights, especially the right to religious expression. *Amici* are authorized to file this brief as all parties have consented to its filing. *See* Fed. R. App. P. 29(a)(2).[1]

STATEMENT OF THE ISSUES

Appellant raises three issues for this Court's review, but *amici*'s arguments relate only to the first: whether the retaliatory exclusion of a religious minister from Polk County Jail's volunteer ministry program violates the Free Speech and Free Exercise Clauses of the First Amendment.

[1] Undersigned counsel also certifies that counsel for the parties have not authored this brief in whole or in part. The parties and their counsel have not contributed money that was intended to fund preparing or submitting the brief. No person other than the *amici curiae* and their counsel contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF THE ARGUMENT

For four decades, courts have applied a threshold requirement before protecting public employee speech under the First Amendment: the speech will only receive protection if it touches on "matters of public concern." *See Connick v. Meyers*, 461 U.S. 138, 142 (1983) (quoting *Pickering v. Bd. of Educ. of Twp. High Sch.*, 391 U.S. 563, 568 (1968)). This public concern requirement has met some criticism in the free speech context. Jurists and scholars have criticized it as standardless, subject to bias, a form of content-based discrimination, an unconstitutional condition, and an act of ceding to courts the people's ability to determine what matters are important to the public. *See infra* Part I.

The public concern requirement has also recently been questioned in the context of religious expression. *See Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2425 n.2 (2022) (leaving open "whether the Free Exercise Clause may sometimes demand a different analysis"); *see also id.* at 2433 (Thomas, J., concurring). These concerns are especially valid, and the district court's decision in this case provides a powerful illustration of the reasons why. The district court applied a muscular version of the public concern requirement, holding that Plaintiff-Appellant Stephen Jarrard's religious expression was ineligible for First Amendment protection because it was not "a subject of legitimate news interests or a matter of political, social, or other concern to the community." *Jarrard v. Moats*, No. 4:20-

cv-00002-MLB, 2022 WL 18586257, at *10 (N.D. Ga. Sept. 27, 2022). In other words, the district court thought Jarrard's religious expression deserved no protection because it involved only "personal view[s]" rather than public value. *See id.* If left to stand, the district court's application of the public concern requirement would create serious Free Exercise and Establishment Clause concerns.

First, conditioning the protection of religious expression on its public value, as the district court did, contradicts the Free Exercise Clause, which protects religious expression no matter its social utility. The Founding generation understood free exercise to be a natural and inalienable right protecting personal conscience—a right that preceded the state and was not justified by its contributions to civil society. Yet the district court's interpretation of the public concern requirement stands to limit constitutional protections precisely because religious expression is personal. *See infra* Part II.A.

Second, the public concern requirement assumes it is constitutionally permissible to afford protection to some speech (and not other speech) based on content—an assumption that neither Religion Clause allows. The Free Exercise Clause generally demands the equal protection of all religious beliefs, and the Establishment Clause forbids differential treatment among religious beliefs. The public concern requirement runs headlong into these principles because it results in courts protecting some, but not all, religious expression based on the message's

content. The Court can ameliorate these concerns by treating religious expression as inherently a matter of public concern, as other circuits have. *See infra* Part II.B.

If the Court were to reject the district court's approach and treat religious expression this way, an employee's rights would not be unfettered; courts would still balance those rights against the public employer's efficiency interests. The Supreme Court's recent decision in *Kennedy v. Bremerton School District*, provides the appropriate framework. Under this framework, the district court wrongly held that Appellees did not violate Jarrard's First Amendment rights. *See infra* Part III.

In sum, *amici* urge the Court to reverse the district court's judgment and grant public employees' religious expression the full constitutional protection to which it is entitled.[2]

ARGUMENT

I. The *Pickering* Test Limits Constitutional Protections for Public Employee Speech to Matters of Public Concern, Raising Serious Free Speech Concerns.

In the late Nineteenth Century, Justice Holmes expressed what was then the accepted view of public employee speech rights: employment could be conditioned on their relinquishment. *See McAuliffe v. City of New Bedford*, 29 N.E. 517, 517–18 (1892); *see also, e.g.*, *Adler v. Bd. of Educ.*, 342 U.S. 485, 492–93 (1952).

[2] The Court need not reach these issues if it agrees with Jarrard that the *Pickering* test does not govern this case.

Eventually, however, the Supreme Court rejected "the theory that public employment … may be subjected to any conditions, regardless of how unreasonable." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 605–06 (1967).

Then in *Pickering v. Board of Education of Township High School*, 391 U.S. 563 (1968), the Court echoed this rejection, affirmed the constitutional rights of public employees, and laid the groundwork for the current doctrine governing public employee speech. The Court recognized that public employees cannot be "compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens." *Id.* at 568. But it also recognized the government's often competing "interests as an employer in regulating the speech of its employees." *Id.* Rather than "lay down a general standard against which all [employee] statements may be judged," *id.* at 569, the Court opted for a balancing test. The public employer's interest "in promoting the efficiency of the public services it performs through its employees" would be balanced against the employee's right to speak "as a citizen, in commenting upon matters of public concern." *Id.* at 568. Early cases applying *Pickering* maintained this focus on balancing. *See, e.g.*, *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 284 (1977); *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 414–15 (1979).

In *Connick v. Meyers*, 461 U.S. 138 (1983), however, the Court underscored a threshold inquiry. Before a court could balance speech rights and efficiency

interests, the employee would first need to prove that the speech at issue "comment[ed] upon matters of public concern." *Id.* at 143. In other words, if the employee was not speaking on a "matter of political, social, or other concern to the community," the speech would not be protected—it would be "unnecessary for [courts] to scrutinize the reasons for [the employee's] discharge," giving "government officials … wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Id.* at 146.

The Court gave two justifications for limiting protection to speech on "matters of public concern." First, the Court was concerned that too much protection would hinder efficiency: "government offices could not function if every employment decision became a constitutional matter." *Id.* at 143; *see also id.* at 149 ("To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case."). And second, the Court sought to protect a category of speech that "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Id.* at 145 (cleaned up).

Connick's effects have been clear. Courts, including this one, have repeatedly applied the public concern "threshold question," *Rankin v. McPherson*, 483 U.S. 378, 384–85 (1987), and have declined to apply the First Amendment's protections

when the answer to that question is "no"—i.e., when the speech does *not* involve a "matter of public concern." *See, e.g.*, *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1293 (11th Cir. 2007); *Morgan v. Ford*, 6 F.3d 750, 754 (11th Cir. 1993).[3] In theory, *Connick* assured that speech falling short of this standard would not be "wholly without First Amendment protection." 461 U.S. at 143; *accord Watts*, 495 F.3d at 1293. But in practice, if speech is not on matters of public concern, it receives no protection at all. *See Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) ("[T]he employee has no First Amendment cause of action based on his or her employer's reaction to the speech."); *Borzilleri v. Mosby*, 874 F.3d 187, 194 (4th Cir. 2017); Genevieve Lakier, *The Invention of Low-Value Speech*, 128 Harv. L. Rev. 2166, 2229 (2015).

The public concern requirement is not without its skeptics. Some jurists and scholars have criticized it as standardless and subject to judicial bias.[4] Others

[3] Later in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Supreme Court underscored an additional threshold question, namely, whether the employee spoke as a citizen or "pursuant to their official duties." *Id.* at 421. If the latter, "the Constitution does not insulate their communications from employer discipline." *Id.* *Amici* address *Garcetti* and its implications in the religious expression context in Part III below.

[4] *See, e.g.*, *Waters v. Churchill*, 511 U.S. 661, 692 (1994) (Scalia, J., concurring); Stephen Allred, *From* Connick *to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 Ind. L. J. 43 (1988); Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. Cal. L. Rev. 1, 27–33 (1987); Rodric B. Schoen, Pickering *Plus Thirty Years: Public Employees and Free Speech*, 30 Tex. Tech L. Rev. 5, 29 (1999); Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 Nw. U. L. Rev. 1007, 1026–27

question whether there is anything that goes on within a public employer that is not at least arguably of interest to the public.[5] Some have also pointed out that the public concern requirement effectively blesses content-based restrictions on speech, making the requirement antithetical to the Free Speech Clause.[6] There is also a danger that the public concern requirement, while protecting some speech, nonetheless violates the unconstitutional conditions doctrine because it effectively allows public employers to require employees to relinquish some speech rights as a condition of employment. *See Sherbert v. Verner*, 374 U.S. 398, 404 (1963) ("It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."). Justice Brennan, dissenting in *Connick*, expressed yet another salient critique: he rejected the majority's aggrandizement of the judiciary as arbiters of public issues because "the citizenry is the final judge of the proper conduct of public business" and because "the First Amendment protects the dissemination of such information

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(2005); Robert C. Post, *The Constitutional Concept of Public Discourse*, 103 Harv. L. Rev. 601, 667–69 (1990).

[5] *See, e.g.*, *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 79 (1971) (Marshall, J., dissenting); Rosalie Berger Levinson, *Silencing Government Employee Whistleblowers in the Name of "Efficiency,"* 23 Ohio N.U. L. Rev. 17, 23 (1996); Kozel, *supra*, at 1025–26.

[6] *See, e.g.*, Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 Geo. Wash. L. Rev. 1 (1990); Lawrence Rosenthal, *Permissible Content Discrimination Under the First Amendment: The Strange Case of the Public Employee*, 25 Hastings Const. L. Q. 529 (1998); Kozel, *supra*, at 1025.

so that the people, not the courts, may evaluate its usefulness." *Connick*, 461 U.S. at 164–65.

Whether one or a combination of critiques is right, this much is clear: the constitutional vitality of the public concern requirement is anything but certain.

II. The District Court's Application of the Public Concern Requirement Raises Especially Troublesome Implications for Religious Expression.

The district court interpreted the public concern requirement to protect only speech that has public value, *see Jarrard*, 2022 WL 18586257, at *10, and *Connick* assumed that it is permissible to protect only a subset of speech based on its content, *see* 461 U.S. at 144–47. But, when applied to a public employee's religious expression, both understandings run headlong into bedrock Free Exercise and Establishment Clause principles: religious expression is protected no matter its public value, and the protection afforded religious expression does not depend on its content.

A. The Free Exercise Clause Protects Religious Expression Regardless of Its Public Value.

As discussed in greater detail below, free exercise protections at the Founding were not based on their perceived social utility. Of course, many did believe that religion furthered public virtue. But it was the insistence that free exercise was a natural and unalienable right protecting individual conscience that drove its protection. The district court's application of the public concern requirement is

antithetical to this understanding—it conditioned protections on public value, which is incongruent with the original meaning of the Free Exercise Clause.

Before getting to the historical justifications for protecting free exercise, contrast one of *Connick*'s justifications for the public concern requirement: protecting speech because of its public value.[7] *Connick* explained that the public concern requirement "is grounded in our long-standing recognition that the First Amendment's primary aim is the full protection of speech upon issues of public concern." 461 U.S. at 154. It further observed that the First Amendment was "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Id.* at 145 (cleaned up). It then underscored speech that is "more than self-expression" and is "the essence of self-government." *Id.* (cleaned up). Last, *Connick* acknowledged that "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Id.* (cleaned up).

These passages in *Connick* could thus be read as furthering two of the classic justifications for free speech (encouraging a marketplace of ideas and facilitating democratic self-governance), but not the third (promoting autonomy and self-

[7] *Amici* recognize that Appellant reads *Connick* to protect more than just speech with public value or speech that is newsworthy. *See* Appellant's Opening Br. at 33–38. *Amici* are not saying that public value was the *only* justification for the public concern requirement in *Connick*; instead, *amici* highlight these passages to illustrate the issues that would arise if courts interpreted the public concern requirement in the same narrow fashion as the district court did here.

expression). *See* W. Robert Gray, *Public and Private: Toward a Practice of Pluralistic Convergence in Free-Speech Values*, 1 Tex. Wesleyan L. Rev. 1, 7–26 (1994); *see also* Robert C. Post, *The Constitutional Concept of Public Discourse*, 103 Harv. L. Rev. 601, 626 (1990). Or as the Court suggested in *Garcetti*, the public concern requirement serves, in part, to protect "interests … beyond the individual speaker," "promoting the public's interests in receiving the well-informed views of government employees engaging in civic discussion." 547 U.S. at 419; *see also id.* at 422 (highlighting the Court's "attention to the potential societal value of employee speech" in *Pickering* and subsequent cases).

The district court seems to have seized upon this justification, as evidenced by its decision to protect speech only if it has public value. *See Jarrard*, 2022 WL 18586257, at *10. That focus on public value, however, stands in stark contrast to the Founding generation's understanding of why free exercise warranted constitutional protection.

By 1789, all but one state had a constitutional provision protecting the natural right of religious liberty because "the right 'was universally said to be an unalienable right.'" *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1900 (2021) (Alito, J., concurring) (quoting Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1456 (1989)). New Hampshire's Constitution of 1784, for example, provided that "[e]very

individual has a natural and unalienable right to worship GOD according to the dictates of his own conscience, and reason."[8] Likewise, Pennsylvania's Constitution of 1776 provided that "all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding."[9] The North Carolina Constitution of 1776 similarly proclaimed "[t]hat all men have a natural and unalienable right to worship."[10] Other state constitutional provisions reflected a similar view.[11]

These constitutions all reflected the same understanding: free exercise was protected because it was a natural right rooted in individual conscience, not because it yielded social benefits. The federal constitutional protection for the free exercise of religion should be understood in light of that backdrop. *See Fulton*, 141 S. Ct. at 1901 (Alito, J., concurring) ("[T]hese state constitutional provisions provide the best evidence of the scope of the right embodied in the First Amendment."); *see also* RICHARD W. GARNETT ET AL., RELIGION AND THE AMERICAN CONSTITUTIONAL

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[8] N.H. CONST. of 1784, pt. I, art. V, *in* 2 FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 1280, 1281 (B. Poore 2d ed. 1878) [hereinafter FEDERAL AND STATE CONSTITUTIONS].

[9] PA. CONST. of 1776, art. II, *in* 2 FEDERAL AND STATE CONSTITUTIONS, at 1540, 1541.

[10] N.C. CONST. of 1776, art. XIX, *in* 2 FEDERAL AND STATE CONSTITUTIONS at 1409, 1410.

[11] *See, e.g.*, McConnell, *supra*, 103 Harv. L. Rev. at 1456–58 (compiling provisions); VINCENT PHILLIP MUÑOZ, RELIGIOUS LIBERTY AND THE AMERICAN FOUNDING: NATURAL RIGHTS AND THE ORIGINAL MEANINGS OF THE FIRST AMENDMENT RELIGION CLAUSES 32–33 (2022) (same).

EXPERIMENT 60–61, 66–68 (5th ed. 2022) (discussing how liberty of conscience held central importance at the Founding).

One core consequence of being a natural right is that free exercise was not a gift from the state but a precursor to it. James Madison made this point clear, explaining that the "unalienable right" of religious liberty stems from "the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him." *Memorial and Remonstrance Against Religious Assessments* (1785), *in* 2 THE WRITINGS OF JAMES MADISON (1783–1787) 183, 184 (Gaillard Hunt ed. 1901). That duty, Madison wrote, "is precedent both, in order of time and degree of obligation, to the claims of Civil Society." *Id.* Thus, "in matters of Religion, no man's right is abridged by the institution of Civil Society" because religion was understood to be "wholly exempt from its cognizance." *Id.* And because religious rights were viewed as a precursor to civil society, their recognition and protection at the time of the Founding did not turn on the public benefits religion was expected to create. So it is today. All individuals—whether a public employee or private citizen—can claim free exercise protections not by showing public gain, but because that right is inherent to the individual.

Given this understanding, it is clear why the district court's application of the public concern requirement to religious expression contravenes the Free Exercise Clause. The district court decided not to protect a right rooted in individual

conscience unless its exercise had public value. *Connick* may have justified the public concern requirement for free speech in terms other than individual autonomy, *see* Gray, *supra*, at 7, but the protection of an individual's conscience was and is the core justification of the Free Exercise Clause. Accordingly, it was a fundamental mismatch for the district court to hold that Jarrard's religious views were unprotected simply because they were "personal" and not on "a subject of legitimate news interest or a matter of political, social, or other concern to the community." *Jarrard*, 2022 WL 18586257, at *10 (cleaned up). Put differently, the district court erroneously refused to protect Jarrard's religious rights precisely for the reason those rights are protected. For the Founding generation, the public utility of Jarrard's speech would have been irrelevant. But by using public value as a litmus test for protecting religious expression, the district court ignored that reality.

B. The Religion Clauses Mandate the Equal Protection of Religious Expression.

The public concern requirement also reflects a value judgment that some speech merits constitutional protection while other speech does not. *See Connick*, 461 U.S. at 145–46. As noted above, there is a question whether the requirement condones impermissible content-based discrimination, or, more charitably, whether it instead reflects the principle that not all classes of speech fall within the First Amendment's protective scope. *See United States v. Stevens*, 559 U.S. 460, 468–69 (2010); *see also* Massaro, *supra*, at 25; *but see Connick*, 461 U.S. at 147. Regardless

of the correct categorization, the basic takeaway is the same: the public concern requirement assumes that it is constitutionally permissible to protect some kinds of speech but not other kinds. This assumption is not only absent from the Free Exercise and Establishment Clauses as originally understood, but it is expressly refuted by that understanding.

The Free Exercise Clause embodies the principle that all religious expression is protected equally. In the decades preceding our Nation's founding, religious intolerance was the common baseline. Coming from an already intolerant Europe, religious minorities in early colonial America such as Catholics, Quakers, and Protestant nonconformists were stamped out with few exceptions. McConnell, *supra*, 103 Harv. L. Rev. at 1421–24. Eventually, tolerance began to emerge in the colonies formed by religious dissenters, netting greater protections for differences. These newfound protections largely came without limitations based on religious "opinion, speech and profession, or acts of worship." *Id.* at 1424–27.

Following our revolutionary disassociation with England and a religious revival grounded in disestablishment, the national mindset shifted further from tolerance to free exercise. *Id.* at 1430–32, 1436–44. Integral to that notion of free exercise was the understanding that the right was not limited to certain beliefs or categories of beliefs. James Madison succinctly summarized this understanding: "Above all are [men] to be considered as retaining an '*equal* title to the free exercise

of Religion according to the dictates of Conscience.' … [W]e cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us." Madison, *supra*, at 186; *see also* GARNETT ET AL., *supra*, at 61 ("[L]iberty of conscience prohibited religiously based *discrimination* … against individuals. Persons could neither be penalized for the religious beliefs they chose, nor compelled or induced to make certain choices because of the civil advantages or disadvantages attached to them." (emphasis added)); *see also id.* at 71–75 (discussing the ubiquity of support for equality among religions at the Founding).

There wwere, of course, limits on religious exercise that infringed the private rights of others or threatened public safety. *See* McConnell, *supra*, 103 Harv. L. Rev. at 1461–66. But for the vast majority of religious exercise that did not fall within those narrow exceptions, equally protecting all religious exercise was, and continues to be today, a lodestar of historically grounded Free Exercise jurisprudence. *See, e.g.*, *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532–33 (1993) ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some … religious beliefs."); *see also Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728 (1871) ("In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all.").

The Establishment Clause complimentarily cements that commitment to equal protection. During the Founding, federal disestablishment engendered support because many thought the best way to ensure the vitality of all religious beliefs was to avoid governmental preference among religions or coercion in favor of a particular sect. *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I*, 44 Wm. & Mary L. Rev. 2105, 2206–07 (2003); *see also* Stephanie Barclay et al., *Original Meaning and the Establishment Clause: A Corpus Linguistics Analysis*, 61 Ariz. L. Rev. 505, 554 (2019). Scholars may disagree over the original meaning of "establishment," but this point—that one religion or set of beliefs cannot be officially preferred over another—remains uncontroverted. *See, e.g.*, Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 Wm. & Mary L. Rev. 875, 877–78 (1985). And while the Supreme Court's Establishment Clause jurisprudence is undergoing significant shifts, *see, e.g.*, *Kennedy*, 142 S. Ct. at 2426–28, it has remained, and likely will remain, constant on this historically supported point: "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) ; *see also* Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 Notre Dame J.L. Ethics & Pub. Pol'y 341, 367 (1999).

To put it mildly, the public concern requirement conflicts with these principles. It requires courts to look at the "content, form, and context of a given statement" to determine "[w]hether an employee's speech addresses a matter of public concern." *Connick*, 461 U.S. at 147–48. A court would thus need to evaluate the content of a particular religious message and determine whether it deserved protecting—whether it "relat[ed] to any matter of political, social, or other concern to the community" or was of mere "personal interest." *Id.* at 146, 147. But the very exercise of deciding whether a particular religious message is protected based on its content contradicts the Free Exercise Clause, which uniformly protects religious expression despite its content, and the Establishment Clause, which proscribes such governmental protection of only some religious messages based on content.

To be sure, courts have found particular religious expressions to be on matters of public concern. *See, e.g.*, *Tucker v. State of Cal. Dep't of Educ.*, 97 F.3d 1204, 1210 (9th Cir. 1996). But some courts have also gone the other way, as the district court did here with Jarrard's merely "personal" religious views. *See Jarrard*, 2022 WL 18586257, at *10; *see also, e.g.*, *Daniels v. City of Arlington*, 246 F.3d 500, 504 (5th Cir. 2001). By weighing in on whether the content of a particular religious expression involves a matter of public concern, courts are effectively distinguishing between religious beliefs that will receive protection and those that will not, an

exercise forbidden by the Religion Clauses. That a person's religious views are "personal" does not diminish their claim to constitutional protection.

* * *

To fix these problems, the Court should decide that religious expression is inherently a matter of public concern and thus always merits the fullest protection. *See, e.g.*, *Johnson v. Poway United Sch. Dist.*, 658 F.3d 954, 966 (9th Cir. 2011); *cf. Connick*, 461 U.S. at 148 (racial discrimination is "inherently of public concern"). This approach would remediate the concerns discussed above, and it would certainly afford religious expression just as much protection as political speech—a parity unquestionably supported by precedent and the historical record. As Justice Scalia rightly quipped:

> [P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince.

Cap. Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) (cleaned up).

III. Without the Public Concern Requirement Improperly Restricting Religious Expression, There is Still the Need to Adjudicate Between the Employee's Rights and the Employer's Efficiency Interests

Were courts to treat all religious expression as inherently involving a matter of public concern, the *Pickering* framework would remain a meaningful tool for balancing the rights of public employees and the governments they serve. The

Supreme Court's recent decision in *Kennedy v. Bremerton School District* outlines the relevant framework.

An employee would first need to show "an infringement of his rights." 142 S. Ct. at 2421. This initial showing would depend on the type of constitutional violation alleged.

If claiming a Free Exercise violation, the employee would need to show a burden on "sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable.'" *Id.* at 2422 (cleaned up). A plaintiff could make that showing if the adverse employment action was undertaken "at least in part because of [the] religious character" of the employee's speech or expressive activity. *Id.* Such governmental conduct is not shielded from scrutiny because it is not neutral—discrimination against religious expression *because of* its religiosity necessarily constitutes a Free Exercise violation. *See id.*

If alleging a Free Speech violation, however, the employee would not have any particular burden under the public concern requirement—his religious expression would inherently be a matter of public concern. Instead, the employee would need to show he spoke as a "citizen" rather than "pursuant to his official duties." *Id.* at 2424 (cleaned up) (quoting *Garcetti*, 547 U.S. at 421). At base, this "citizen" inquiry focuses on whether the speech was the employee's or the government's. *See id.* Indicia of government speech include whether the

government "commissioned or created" the speech; "expected" the employee "to deliver" the speech "in the course of carrying out his job"; "paid [the employee] to produce" the speech; placed the speech "within the scope of [the] employee's duties"; or established employee "responsibilities" to which the speech "owe[d] its existence." *Id.* (cleaned up).

The *Garcetti* inquiry also ameliorates Establishment Clause concerns with public employees engaging in religious expression. The Establishment Clause forbids the government from engaging in what was historically understood to be an establishment of religion. *See* McConnell, 44 Wm. & Mary L. Rev. at 2205–08; GARNETT ET AL., *supra*, at 76–91. It therefore follows that the government should be able manage its own conduct and speech to avoid such violations. *See Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000) ("When the government speaks … to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy."); *see also Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 832 (1995). *Garcetti* safeguards that ability, ensuring government "control over what the employer itself has commissioned or created." 547 U.S. at 422.

This is not to say that all public employee religious expression should be attributed to the government employer, or that Establishment Clause concerns vest government with the right to censor what it fears would be perceived as an

endorsement of religion. *See Kennedy*, 142 S. Ct. at 2426–28. Rather, the *Garcetti* analysis can facilitate the government's efforts to prevent *actual* Establishment Clause violations based on "historical practices and understandings." *See id.* at 2428 (cleaned up).

If the employee succeeded in showing a Free Exercise or Free Speech violation, the burden would then "shift[] to the [government employer] to show that its actions were nonetheless justified and tailored consistent with the demands of [the Court's] caselaw." *Id.* at 2421. Normally, that step would involve "showing that … restrictions on the plaintiff's protected rights serve a compelling interest and are narrowly tailored to that end." *Id.* at 2426. But the Court left open the possibility that "the more lenient" *Pickering* balancing test or "intermediate scrutiny" would apply. *Id.* This brief does not evaluate the justifications for lowering the government's burden, to the extent any exist. *See Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 n.7 (3d Cir. 1999) (per Alito, J.). At the very least, employees who speak as private citizens should only be limited by "those speech restrictions that are necessary for their employers to operate efficiently and effectively." *Garcetti*, 547 U.S. at 419.

In the present appeal, there is no need to apply any of this analysis to Jarrard because he was not a government employee, and there is no reason to extend the *Pickering* test to the volunteer jail ministry context. But if the Court were to apply

the *Pickering* framework, it would still cut powerfully in Jarrard's favor when properly applied. To start, there is not the slightest suggestion that Jarrard's particular views on baptism were "commissioned," "created," or otherwise dictated by the jail, nor was there any other indication that his views were instead government speech. *See Kennedy*, 142 S. Ct. at 2424. Further, the evidence shows that Appellees denied Jarrard's application to preach precisely because they disagreed with the content of his religious message—a prototypical example of infringing both free speech and free exercise rights. *See, e.g.*, *Jarrard*, 2022 WL 18586257, at *3–4. And as to balancing, there was no legitimate government interest to outweigh Jarrard's constitutional rights: Appellees' admitted interests were nothing more than pretextual religious discrimination that could not pass muster under even the lowest level of scrutiny. *See id.* Simply put, Appellees violated Jarrard's right to religious expression without a defensible reason for doing so.

CONCLUSION

Jarrard has argued why the *Pickering* test does not govern this case. But even if it did, Jarrard would still prevail because the public concern requirement, understood in light of longstanding Free Exercise and Establishment Clause principles, does not stand in the way of his claim. *Amici* urge reversal.

May 19, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 5,299 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 11th Cir. R. 32-4.

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May 19, 2023

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on May 19, 2023. Participants in the case are registered CM/ECF users, and service will be made through the CM/ECF system.

May 19, 2023

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