No. 23-10332

In the United States Court of Appeals for the Eleventh Circuit

REVEREND 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* THE RELIGIOUS FREEDOM INSTITUTE AND THE JEWISH COALITION FOR RELIGIOUS LIBERTY

Corinne Snow
Vinson & Elkins, LLP
1114 Avenue of the Americas
32nd Floor
New York, NY 10036
212-237-0157

John D. Geilman
Kevin A. Moscon
Garrett T. Meisman
Vinson & Elkins, LLP
845 Texas Ave. Ste. 4700
Houston, TX 77002-2947
713-758-2559

Griffith Kimball
Vinson & Elkins, LLP
2001 Ross Ave. Ste. 3900
Dallas, TX 75201-2975
214-220-7886

Attorneys for Amici Curiae
Religious Freedom Institute; Jewish Coalition for Religious Liberty

CERTIFICATE OF INTERESTED PERSONS

No. 23-10332
Stephen Jarrard v. Sheriff of Polk County

Pursuant to Fed. R. App. P. 26.1(a) and 11th Cir. R. 26.1-2(b), amici curiae make the following disclosure. Religious Freedom Institute is organized and existing as a tax exempt organization chartered under Internal Revenue Code Section §501(c)(3) and issues no stock. The Jewish Coalition for Religious Liberty is organized and existing as a tax exempt organization chartered under Internal Revenue Code Section 501(c)(3) and issues no stock. Amici curiae hereby notify the Court that the Certificate of Interested Persons filed by Appellants is correct and complete with the following exceptions:

Geilman, John (Counsel for Amici)

Jewish Coalition for Religious Liberty

Kimball, Griffith (Counsel for Amici)

Meisman, Garrett (Counsel for Amici)

Moscon, Kevin (Counsel for Amici)

Religious Freedom Institute

Royer, Ismail (Director of the Islam and Religious Freedom Action Team for the Religious Freedom Institute)

Slugh, Howard (General Counsel, Jewish Coalition for Religious Liberty)

Snow, Corinne (Counsel for Amici)

Vinson & Elkins L.L.P. (Counsel for Amici)

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS C-1
TABLE OF CONTENTS i
TABLE OF CITATIONS ii
INTERESTS OF AMICI CURIAE 1
STATEMENT OF THE ISSUES 3
SUMMARY OF THE ARGUMENT 4
ARGUMENT 6
I. The Pickering framework is a bad fit for free exercise claims. 6
A. Pickering should not apply to free exercise claims at all. 6
B. If the Court does apply Pickering to free exercise claims, it should omit the "public concern" requirement. 9
II. Even if Pickering can apply both to free speech and free exercise claims, the district court misapplied it here. 10
A. The district court incorrectly relied on inapplicable out-of-circuit precedent. 10
B. The district court incorrectly held that religious speech is a matter of personal interest instead of a matter of public concern. 14
III. Prisons have historically done a poor job of understanding and respecting religious groups, especially minority religious groups. 17
IV. The district court's decision will negatively affect prison ministry efforts performed by many religious organizations 23
CONCLUSION 29
CERTIFICATE OF COMPLIANCE 30
CERTIFICATE OF SERVICE 31

TABLE OF CITATIONS

Cases

Alves v. Bd. of Regents of the Univ. Sys. of Georgia,
804 F.3d 1149 (11th Cir. 2015) 15

Ben-Levi v. Brown,
136 S. Ct. 930 (2016) 18, 19, 22

Ben-Levi v. Brown,
2014 WL 7239858 (E.D.N.C. Dec. 18, 2014) 18

City of San Diego v. Roe,
543 U.S. 77 (2004) 14

Connick v. Myers,
461 U.S. 138 (1983) 8, 14, 17

Daniels v. City of Arlington,
246 F.3d 500 (5th Cir. 2001) 10, 14

Dishnow v. Sch. Dist. of Rib Lake,
77 F.3d 194 (7th Cir. 1996) 14

Farmer v. Brennan,
511 U.S. 825 (1994) 13

Garcetti v. Ceballos,
547 U.S. 410 (2006) 12

Holt v. Hobbs,
574 U.S. 352 (2015) 19

Katz v. Singerman,
127 So. 2d 515 (La. 1961) 22

Kennedy v. Bremerton Sch. Dist.,
142 S. Ct. 2407 (2022) 6

Legal Servs. Corp. v. Velazquez,
531 U.S. 533 (2001) 13

Lovelace v. Lee,
472 F.3d 174 (4th Cir. 2006) 19

Maggio v. Sipple,
211 F.3d 1346 (11th Cir. 2000) 15

Mayfield v. City of Oakland,
2007 WL 2261555 (N.D. Cal. Aug. 6, 2007) 11, 12

Morgan v. Ford,
6 F.3d 750 (11th Cir. 1993) 15

Mustapha v. Monken,
2013 WL 3224440 (N.D. Ill. June 25, 2013) 11, 12

N.Y. Times Co. v. Sullivan,
376 U.S. 254 (1964) 14

O'Laughlin v. Palm Beach Cnty.,
30 F.4th 1045 (11th Cir. 2022) 9

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

Rankin v. McPherson,
483 U.S. 378 (1987) 14, 16, 17

Shahar v. Bowers,
114 F.3d 1097 (11th Cir. 1997) 6

United States v. Chansley,
518 F. Supp. 3d 36 (D.D.C. 2021) 20

Walden v. Ctrs. for Disease Control & Prevention,
669 F.3d 1277 (11th Cir. 2012) 6

Watts v. Florida International University,
495 F.3d 1289 (11th Cir. 2007) 7, 10

Widmar v. Vincent,
454 U.S. 263 (1981) 7

Rules

Fed. R. App. P. 29 1

Other Authorities

2015 Resolution: RCA Policy Concerning Women Rabbis, RABBINICAL COUNCIL OF AMERICA (Oct. 31, 2015), https://tinyurl.com/5axbz2m5 ..... 8, 22

About Us, REACHING OUT TO JEWISH PRISONERS,
https://tinyurl.com/y9aehuvb 24, 25

About, JEWISH PRISONER SERVICES INTERNATIONAL,
https://tinyurl.com/mrskj8wk 24, 25

All of Israel Are Responsible for One Another, MY JEWISH LEARNING, https://tinyurl.com/z57ny844 27

Brief for Islamic Law Scholars as Amici Curiae Supporting Petitioner, *Holt v. Hobbs*, 574 U.S. 352, 362 (2015) (No. 13-6827), 2014 WL 2465964).....19

Brownstein, Alan, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & Pol. 119 (2002).....7

Conservative Judaism, BBC, https://tinyurl.com/2csh24zc (July 24, 2009).....21

cRc Kosher, *Directory of Kosher Certifying Agencies*, CHI. RABBINICAL COUNCIL, https://tinyurl.com/yu335xz9.....21

Driving to Synagogue on Shabbat, Aish.com, https://tinyurl.com/y66xy6rd 21

Education, TAYBA FOUNDATION, https://tinyurl.com/mvykawz9 25

Foley, Ryan, *Virginia Gov. Glenn Youngkin Donates First Quarter Salary to Good News Prison Ministry*, THE CHRISTIAN POST (Apr. 17, 2023), https://tinyurl.com/4sv7aa8d 26

Gefen, Rabbi Yehonasan, *All Jews Are Bound Up With Each Other*, AISH https://tinyurl.com/7nj5z3k7 27

Home, LINK OUTSIDE, https://tinyurl.com/mrsmfa6e 26

Kahn, Paul W., *The Jurisprudence of Religion in a Secular Age: From Ornamentalism to* Hobby Lobby, 10(1) LAW & ETHICS OF HUMAN RIGHTS 1 (2016).....7

Modeling the Future of Religion in America, PEW RESEARCH CENTER (Sept. 13, 2022) https://tinyurl.com/2nuykb7j.....16

Mufti Faisal bin Abdul Hamid al-Mahmudi, *Interest and Mortgage in western countries. Should we revise our understanding of Riba?*, FATWA.CA (May 8, 2023), https://tinyurl.com/mr46yp8v.....23

Niqab, BBC (Sept. 22, 2011), https://tinyurl.com/4hfbhc3y.....22

Practices in Islam, BBC BITESIZE, https://tinyurl.com/2hzs57yy 22

Prison and detention center ministries forced to adapt during the pandemic, CATHOLIC EXTENSION (Apr. 23, 2020), https://tinyurl.com/bdd2mmab.....26

Prison Ministry, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, https://tinyurl.com/mr3pt57h.....26

Prison Programs, ALEPH INSTITUTE, https://tinyurl.com/ywcd4njw (last visited May 11, 2023) 24

QURAN, SURAH AN-NAHL 125 27

QURAN, SURAH YUSUF 108 27

Reyes, René, *The Fading Free Exercise Clause*, 19 WM. & MARY BILL RTS. J. 725 (2011) 7

Royer, Ismail, *There Is No Religious Freedom Argument for Abortion in Islam*, CANOPY FORUM (Sept. 23, 2022), https://tinyurl.com/9896z4sp 22

SAHIH MUSLIM BOOK 26, *Hadith 11* 27

Siddiqi, Muzammil, *Woman Imam Leading Men and Women in Salat*, ISLAMICITY (March 20, 2005), https://tinyurl.com/5dccut3z 9

Smith, Gregory A. et al., *Americans Have Positive Views About Religion's Role in Society, but Want It Out of Politics*, PEW RESEARCH CENTER (Nov. 15, 2019), https://tinyurl.com/2p8fxtkc 16

Spitzer, Jeffrey, *Kitniyot: Not Quite Hametz*, MY JEWISH LEARNING, https://tinyurl.com/bdfjpjs3 21

The Bible, Matthew 25:31–45 27

The Mechitzah: Partition, Chabad.org, https://tinyurl.com/4je64b35 21

Who we are, MUSLIM PRISONER PROJECT, https://tinyurl.com/37n6nvm3 26

INTERESTS OF AMICI CURIAE

Amici curiae are the Religious Freedom Institute, particularly its Islam and Religious Freedom Action Team ("IRF"), and the Jewish Coalition for Religious Liberty ("JCRL"), collectively, "Amici."[1]

IRF amplifies Muslim voices on religious freedom, seeks a deeper understanding of the support for religious freedom inside the teachings of Islam, and protects the religious freedom of Muslims. IRF engages in research, education, and advocacy on core issues like religious freedom and the freedom to live out one's faith. IRF translates Muslim resources on religious freedom, fosters inclusion of Muslims in religious freedom work both in places where Muslims are a majority and where they are a minority, and partners with the Religious Freedom Institute's other teams in advocacy. IRF believes that the Islamic faith teaches Muslims to want for others what they want for themselves, and that supporting the Reverend Stephen Jarrard in this case is in the interest of the common good.

JCRL is a non-denominational organization of Jewish communal and lay leaders who seek to protect the ability of all Americans to freely practice their faith

[1] Pursuant to Federal Rule of Appellate Procedure 29, Amici state that all parties have consented to their filing of this brief. Amici further state that (i) no party's counsel authored the brief in whole or in part; (ii) no party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and (iii) no person—other than the Amici, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

and to foster cooperation between Jewish and other faith communities in the public square. Representing members of the legal profession and as adherents of a minority religion, JCRL has a unique interest in ensuring that the First Amendment protects the diversity of religious viewpoints and practices in the United States.

As organizations dedicated to protecting religious freedom, Amici have a significant interest in ensuring that religious ministries are not encumbered by state oversight and censorship. With special interest in the respective minority religious traditions for which they advocate, Amici write to offer their perspective on the far reaching consequences of the district court's holding.

STATEMENT OF THE ISSUES

1. Does the framework for evaluating free speech claims by government employees set forth in *Pickering v. Board of Education*, 391 U.S. 563 (1968) and its progeny apply to claims under the Free Exercise Clause?

2. If the *Pickering* framework does apply to both free speech claims and free exercise claims, did the district court apply it correctly to Jarrard's claims here, especially considering that prison officials have historically failed to respect the rights of religious groups, particularly those in the minority, and the broad implications of the district court's application?

SUMMARY OF THE ARGUMENT

Amici raise four points for the Court's consideration. First, the district court improperly relied on the legal framework established in *Pickering v. Board of Education*, 391 U.S. 563 (1968) and its progeny (together, "*Pickering*") to determine that Appellant Stephen Jarrard is a government employee and consequently has less First Amendment protection. The *Pickering* test was designed for matters of free speech, not religious worship. This makes *Pickering* a poor fit for the matter at hand, and it should not be applied here.

Second, even if *Pickering* is applicable, it was misapplied here. In contrast to Reverend Jarrard's case, the out-of-Circuit cases that the district court relied on, in which chaplains were deemed to be government employees, did not involve matters of religious speech inextricably mixed with religious exercise. The district court also misapplied the public concern component, equating a religious ministry with the expression of one's own religious beliefs.

Third, prisons have historically done a poor job of understanding and respecting the religious beliefs of prisoners, particularly of minority groups. Case law is replete with examples. A determination that volunteer prison chaplains are government employees would only add to these honest mistakes or purposeful persecution, as those chaplains would lack their full First Amendment religious freedom protection. Prison officials' inability to understand and respect those beliefs

is compounded by the complexity and variability of religious beliefs, even within the same religious group. For example, Orthodox and non-Orthodox Jews disagree on how to determine if food is kosher and thereby religiously acceptable, while Shia and Sunni Muslims are split on how to properly pray five times a day.

Finally, because of the significant amount of religious ministering done in prisons by a variety of religions, this case would have far-reaching negative implications. Muslim and Jewish ministries have long played a role in meeting the spiritual needs of individuals in prisons, as have other religious organizations. This Court's ruling needs to be crafted with organizations and individuals in addition to Jarrard in mind.

ARGUMENT

I. The *Pickering* framework is a bad fit for free exercise claims.

The district court disposed of Jarrard's free exercise retaliation claim in a footnote, reasoning that this claim was "barred by the Court's adjudication of his free speech claim" under *Pickering*, and that Jarrard had abandoned any argument that a different standard should apply. Doc 75 at 35 n.15. If this Court determines that Jarrard preserved the issue of whether *Pickering* and its progeny apply equally to free speech and free exercise claims, it should conclude that they do not.

A. *Pickering* should not apply to free exercise claims at all.

As an initial matter, no binding authority requires this Court to apply *Pickering* to free exercise claims. The Supreme Court pointedly left this question open in *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2425 n.2 (2022). As Justice Thomas noted, a "government employer's burden . . . might differ depending on which First Amendment guarantee a public employee invokes." *Id.* at 2433 (Thomas, J., concurring).

And although this Court has twice stated that it would apply *Pickering* to free exercise claims, it did so in only dicta. *Walden v. Ctrs. for Disease Control & Prevention*, 669 F.3d 1277, 1286 (11th Cir. 2012) ("no need to engage in the *Pickering* balancing" because plaintiff's religious beliefs were not burdened); *Shahar v. Bowers*, 114 F.3d 1097, 1111 n.27 (11th Cir. 1997) (stating that *Pickering* would apply only "[a]ssuming *arguendo*" that plaintiff's free exercise rights were

implicated). To the opposite effect, in *Watts v. Florida International University*, this Court held that even though a free speech claim was foreclosed by *Pickering*, the plaintiff pleaded a valid free exercise claim based on the same underlying conduct. 495 F.3d 1289, 1294 (11th Cir. 2007).

Restrictions on religious observance should be analyzed differently from restrictions on speech—even in cases (unlike this one) where plaintiffs are public employees. Equating religious observance with speech "undermines our commitment to the idea that there is something unique and distinctive about religion in life and in constitutional law." Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & Pol. 119, 184 (2002). As Justice White put it, analyzing religious expression solely under a free speech paradigm would "empt[y] [the Religion Clauses] of any independent meaning in circumstances in which religious practice took the form of speech." *Widmar v. Vincent*, 454 U.S. 263, 284 (1981) (White, J., dissenting); *see also* Paul W. Kahn, *The Jurisprudence of Religion in a Secular Age: From Ornamentalism to* Hobby Lobby, 10(1) LAW & ETHICS OF HUMAN RIGHTS 1, 21 (2016) ("The claim that worship is speech would have struck most people as a distinctly odd proposition until quite recently."); René Reyes, *The Fading Free Exercise Clause*, 19 WM. & MARY BILL RTS. J. 725 (2011) (arguing for "reinvigorated" treatment of the Free Exercise Clause as having independent force).

Religious expression, particularly of the kind at issue here—which is properly considered a form of religious exercise—is meaningfully distinct from nonreligious expression otherwise protected by the Free Speech Clause. To be sure, prisoners would suffer some harm if a prison prevented a speaker from engaging in secular conversation with them. But that harm simply does not compare to depriving prisoners of the religious guidance and rituals that they desire.[2]

For example, Orthodox Judaism does not recognize female rabbis, while other denominations allow them. *See, e.g., 2015 Resolution: RCA Policy Concerning Women Rabbis*, RABBINICAL COUNCIL OF AMERICA (Oct. 31, 2015), https://tinyurl.com/5axbz2m5 (adopting a resolution affirming the Orthodox Jewish tradition of not recognizing female rabbis). Imagine an Orthodox Jewish prisoner being told that he can only have a reform female rabbi even though an Orthodox rabbi is willing to volunteer. The prison's decision to reject the Orthodox volunteer would deprive the prisoner of a religious connection that is an essential and deep part of his being in a way that would cause profound personal suffering.

[2] In its order dismissing Jarrard's free exercise claim based on the prison's baptism ban, the district court reasoned that Jarrard could not claim "derivative" standing based on harm to the prisoners' free exercise rights. Doc 34 at 23–24. But that standing analysis is irrelevant to an inquiry into the applicability of *Pickering*, which necessarily weighs the value of the plaintiff's conduct to third parties. *See Pickering*, 391 U.S. at 571–72; *Connick v. Myers*, 461 U.S. 138, 145–48 (1983).

Likewise, in orthodox Sunni Islam, women are not permitted to lead men in prayer. *See, e.g.*, Muzammil Siddiqi, *Woman Imam Leading Men and Women in Salat*, ISLAMICITY (March 20, 2005), https://tinyurl.com/5dccut3z. This classical position is adhered to today by the vast majority of Sunni and Shia Muslims, but it is rejected by some modernists who adopt the position that women can lead men in prayer. If prison officials refused to allow a male volunteer to lead the prayers of orthodox Muslim male prisoners, it would preclude them from participating in the prayer, one of the five pillars of Islam. Such restrictions are not comparable to being deprived of open discourse on other subject matter. This sort of harm can only be balanced by a government interest of the highest order, so the prison's restrictions should be subject to strict scrutiny.

B. If the Court does apply *Pickering* to free exercise claims, it should omit the "public concern" requirement.

But even if the Court chooses to apply the *Pickering* framework in some form, it should omit the "public concern" requirement with respect to free exercise claims.[3] Courts have typically evaluated this requirement by examining the "content, form, and context" of a government employee's speech. *O'Laughlin v. Palm Beach Cnty.*, 30 F.4th 1045, 1051 (11th Cir. 2022). But it is not clear how these criteria should

[3] Even if there are qualified immunity issues in applying a *Pickering* framework without the public concern requirement in this case, that does not preclude the Court from clearly articulating this as the standard for future cases.

apply to religious exercise, the value of which is easily underappreciated by outsiders to a given religious tradition. Perhaps this is why courts often treat religious observance (incorrectly) as a purely personal matter. *See* Doc 75 at 31 (concluding that Jarrard's "personal view of baptism" is not "a matter of political, social, or other concern to the community"); *Daniels v. City of Arlington*, 246 F.3d 500, 504 (5th Cir. 2001) (holding that public employee's conviction that he should wear a cross "simply is not a matter of 'public concern' . . . in the constitutional sense.").

Because of such mischaracterizations, the "public concern" requirement has rendered the *Pickering* framework significantly underprotective of free exercise rights in practice. So if the *Pickering* framework applies to free exercise claims at all, the Court should use a modified version that excludes the "public concern" requirement. *Cf. Watts*, 495 F.3d at 1293–1300 (holding that free speech claim failed under public concern requirement, but making no mention of that requirement as to validly pleaded free exercise claim).

II. Even if *Pickering* can apply both to free speech and free exercise claims, the district court misapplied it here.

A. The district court incorrectly relied on inapplicable out-of-circuit precedent.

The body of case law interpreting *Pickering* does not include the issue of retaliation for the religious speech of a religious minister engaged in a volunteer ministry program administered by the government. Even in the prior *Pickering* applications to volunteer chaplains, it was not religious speech inextricably linked

to religious exercise that was implicated by the rule. The district court pointed to two out-of-Circuit cases, *Mustapha v. Monken*, 2013 WL 3224440 (N.D. Ill. June 25, 2013) and *Mayfield v. City of Oakland*, 2007 WL 2261555 (N.D. Cal. Aug. 6, 2007), to support its determination that *Pickering* applies to volunteer ministers; however, neither case deals with religious speech as the cause of the alleged retaliatory firing. Instead, the cases merely present typical *Pickering* plaintiffs with volunteer titles of a religious nature. Doc 75 at 21.

First, in *Mustapha*, a volunteer chaplain with the state police force was *not* removed due to his sincerely held religious beliefs nor for his expression of those beliefs in the process of carrying out his duties as a volunteer chaplain. 2013 WL 3224440, at *6–7. Instead, he was disqualified from service due to his association with a criminal enterprise. Specifically, the background test identified that he had been named "an unindicted co-conspirator" in a criminal case against a "Specially Designated Terrorist" organization that was convicted of raising funds for the international terrorist organization Hamas. *Id.* at *2. Because the plaintiff was employed by the Specially Designated Terrorist organization and raised money for Hamas, he was unable to pass a background check that the state police required of all volunteer chaplains. *Id.* at *2, 4–5. The court found that the background check was reasonable, given the amount of access the chaplain would have to the department and its employees.

Similarly, in *Mayfield* the expression at issue was the complaints made by the chaplains to superiors and did not implicate their religious expression as chaplains. *See* 2007 WL 2261555 at *3–4. *Mayfield* dealt with the alleged retaliatory removal of volunteer police chaplains. *Id.* at *1–2. There, the court looked at whether the speech of multiple chaplains was protected when they spoke out against the actions of a superior who had allegedly harassed one or more of the volunteer chaplains through actions such as delaying application processing and refusing to provide the required building access badges. *Id.* The court explained that expression is not protected when "the speech merely involves a complaint over internal office affairs." *Id.* at *4. As a result, *Mustapha* and *Mayfield* are inapplicable as they do not deal with the government acting to suppress religious expression where other, state-favored religious expression *is* permitted.

If the court applies *Pickering* here, the test must be adapted to protect religious expression. The Supreme Court has acknowledged that *Pickering* does not apply to all government employee speech in the same way. *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006) (the Supreme Court's "customary employee-speech jurisprudence" does not fully account for expression related to classroom instruction). Justice Breyer further cautioned against the wholesale application of *Pickering* to speech by attorneys and doctors, two of the three traditional learned professions. *Id.* at 446–47, (Breyer, J., dissenting). Although he did not address the complication of applying

Pickering to the third learned profession—the clergy—the justifications for modifying the test are equally applicable. Justice Breyer suggested additional protections for government employee speech that is also covered by both professional obligations and constitutional obligations. *Id.* at 446–47. For example, government-paid attorneys representing indigent clients must not have their advocacy restricted by the state's interest merely because the state controls their employment. *Id.* at 447 (citing *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 544 (2001)). Such control would be at odds with their duties as counsel. A similar issue arises in the context of controlling the speech of government-employed doctors in the care of their patients. For example, the speech of prison doctors must not be hindered, even if it might trigger additional, unwanted duties for the state because a doctor has unique professional obligations separate from her duties to the state. *See id* at 447 (citing *Farmer v. Brennan*, 511 U.S. 825, 832 (1994)). The intersection of professional duties and government service requires an expansion of protected government employee speech. *See id.* In such an instance, "the need to protect the employee's speech is augmented, the need for broad government authority to control that speech is likely diminished, and administrable standards are quite likely available." *Id.* The same expansion of protected government speech should be available to the clergy, which possesses its own professional duties and constitutional relevance.

B. The district court incorrectly held that religious speech is a matter of personal interest instead of a matter of public concern.[4]

The Supreme Court has stated that expression rises to a matter of public concern when it "is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication." *City of San Diego v. Roe*, 543 U.S. 77, 83–84 (2004) (per curiam). This includes speech "relating to any matter of political, social, or other concern to the community." *Connick v. Myers*, 461 U.S. 138, 146–48 (1983). The Seventh Circuit determined that speech of public concern need not address "matters of transcendent importance, such as the origins of the universe," thus *a fortiori* suggesting that such matters must obviously be included. *Dishnow v. Sch. Dist. of Rib Lake*, 77 F.3d 194, 197 (7th Cir. 1996). As a general principal, areas of public debate, or topics on which there is public disagreement among parties or groups are also areas of public concern and an important part in balancing any government interest is understanding that "debate on public issues should be uninhibited." *Rankin v. McPherson*, 483 U.S. 378, 387 (1987) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

Although some courts have treated personal religious observance as a purely personal matter, *see, e.g., Daniels*, 246 F.3d at 504 (holding that public employee's conviction that he should wear a cross "simply is not a matter of 'public concern' . .

[4] We maintain that even if this Court holds that *Pickering* applies to religious speech, the public concern question should not apply. *See supra* Section I.B.

. in a constitutional sense"), a ministry program is not a matter of personal religious observance. The question is not whether there is a public interest in Reverend Jarrard's statements, but rather whether his expression "raise[s] issues of public concern." *Alves v. Bd. of Regents of the Univ. Sys. of Georgia*, 804 F.3d 1149, 1167 (11th Cir. 2015) (alleged retaliatory termination for submitting grievances about poor management) (citing *Maggio v. Sipple*, 211 F.3d 1346, 1353 (11th Cir. 2000) (speech relating to employee grievance not a matter of public importance)). Or as this Court has expounded, it must determine whether the speech "raise[s] issues of public concern, on the one hand, or to further [one's] own private interest, on the other." *Morgan v. Ford*, 6 F.3d 750, 754–55 (11th Cir. 1993) (determining that an internal sexual harassment complaint was not a matter of public concern because it "was driven by [the plaintiff's] own entirely rational self-interest in improving the conditions of her employment."). In contrast to the cases where courts have found religious expression was a private interest, such as in the context of wearing of a cross or a workplace harassment complaint, prison ministry is not a private, individual interest. Reverend Jarrard was necessarily motivated beyond his own self-interest in his personal salvation by teaching his sincerely held belief that baptism is required for salvation to those who have not yet received it. The fact that the ministry occurs within a prison, not a public space, and not involving the free public is also not a conclusive factor. *Alves*, 804 F.3d at 1162 ("Thus, whether the speech at issue

was communicated to the public or privately to an individual is relevant—but not dispositive.").

Finally, religion in general is certainly a matter of national public concern that can be said to influence other significant areas of public concern. Gregory A. Smith et al., *Americans Have Positive Views About Religion's Role in Society, but Want It Out of Politics*, PEW RESEARCH CENTER (Nov. 15, 2019), https://tinyurl.com/2p8fxtkc (discussing public sentiment about the role of religion in the United States, especially the role of religion in politics). And in a wholly separate manner, determining beliefs and the issue of salvation are also matters of public concern. *Modeling the Future of Religion in America*, PEW RESEARCH CENTER (Sept. 13, 2022) https://tinyurl.com/2nuykb7j (examining the religious makeup of the United States and projecting accelerating shifts in religious affiliation among the population). Thus, commenting on the process and manner of attaining salvation surely rises to a matter of public concern.

In considering the application of *Pickering* to religious speech, a comparison of the way courts have applied the test to political speech is instructive. In *Rankin v. McPherson*, the Supreme Court addressed the application of *Pickering* to political speech by a government employee. 483 U.S. 378 (1987). The case involved an alleged retaliatory firing for political speech between government employees. Applying *Pickering*, the Court noted that the political speech—in that case,

comments about the 1981 assassination attempt against Ronald Reagan—was speech of public concern after analyzing the "content, form, and context of [the] given statement." *Id.* at 384–86 (citing *Connick*, 461 U.S. at 147–48). Finding the speech a matter of public concern, the court looked at the disruption potentially caused by the speech in order to balance the state interest. Given the plaintiff's position as a clerical employee within the department, the Court determined that there was no danger that the plaintiff had discredited or interfered with the efficiency of the office, noting that where "an employee serves no confidential, policymaking, or public contact role, the danger to the agency's successful functioning from that employee's private speech is minimal." *Id.* at 390–91. In balancing the rights of the speaker and the rights of the government, the court must consider a sliding scale of value. Applying that same framework here, there is no indication that Reverend Jarrard's desire to perform baptisms would discredit or interfere with prison practices or otherwise endanger the prison's successful functioning.

III. Prisons have historically done a poor job of understanding and respecting religious groups, especially minority religious groups.

If volunteer prison ministers like Jarrard were considered government employees, then prison officials could permissibly restrict minsters' speech and deny individual inmates' rights of worship. There would be inadequate protection against uninformed, ignorant, or biased interpretations of religious practices impacting prison policies. In short, volunteer ministers' rights against First Amendment

retaliation would be neutered, giving prison officials free rein to determine which religious doctrines are taught. This risk of selective interpretation is particularly acute for members of minority religions where legal principles and practices are typically not well-understood among prison officials.

This risk is not speculative. Federal caselaw is replete with examples of prison officials selectively interpreting aspects of religious law in minority religions. For example, in *Ben-Levi v. Brown*, federal prison officials denied a request by a Jewish inmate seeking to study the Torah with two other Jewish prisoners because the prison policy, based on its interpretation of Jewish law, required a quorum of ten worshipers unless the group study was led by a volunteer Rabbi. 2014 WL 7239858, at *3 (E.D.N.C. Dec. 18, 2014). As Justice Alito recognized, the prison's policy "was based upon *its* understanding of the basic tenets of the Jewish faith," the accuracy of which "[was] not at all clear." *Ben-Levi v. Brown*, 136 S. Ct. 930, 933 (2016) (mem.) (Alito, J., dissenting) (emphasis added). The prison saw no distinction between individual/small-group Torah study and group communal prayers, the latter of which more clearly and decisively requires a quorum than the former. Indeed, the Jewish Coalition for Religious Liberty is aware of no Jewish tradition prohibiting individual or small-group Torah study. The nuanced difference between requiring ten men to recite some prayers or fulfill certain communal obligations, and the nonexistent quorum requirement for small-group Torah study is precisely why prison officials

should not have waded into the debate in the first instance. By applying a misguided understanding to Ben-Levi, prison officials denied the inmate's ability to study Torah based on *their* belief that the inmate's "proposed study group was not consistent with Jewish practice." *Id.* Notwithstanding the disputed accuracy of this interpretation, Justice Alito firmly noted that this practice is "foreclosed by [the Supreme Court's] precedents," which unequivocally state that "the government cannot define the scope of personal religious beliefs." *Id.* at 934.

In *Holt v. Hobbs*, the Supreme Court held that a prison burdened an inmate's free exercise rights with a grooming policy that prohibited the inmate from growing a 1/2-inch beard in accord with his Islamic faith. 574 U.S. 352, 362 (2015). Justifying its policy, the prison believed that "not all Muslims believe that men must grow beards," contradicting Islamic law scholars that recognized "hadith requiring beards . . . are widely followed by observant Muslims." *Id.* (quoting Brief for Islamic Law Scholars as Amici Curiae Supporting Petitioner at 2, *Holt v. Hobbs*, 574 U.S. 352, 362 (2015) (No. 13-6827), 2014 WL 2465964). By doing so, the prison not only contradicted Islamic law, but also "the guarantee of the Free Exercise Clause." *Id.* Other federal prisons have done the same. *See Lovelace v. Lee*, 472 F.3d 174, 188 (4th Cir. 2006) (ruling that a prison substantially burdened the religious freedom rights of a Muslim inmate by denying his ability to pray after breaking prison rules for Ramadan fasting because "[a]n inmate . . . could decide not to be religious about

fasting and still be religious about other practices, such as congregational services or group prayer"); *United States v. Chansley*, 518 F. Supp. 3d 36, 41–42 (D.D.C. 2021) (holding that a prison's argument about what is and what is not a tenet of Shamanism lacked evidence and legality because "binding Supreme Court precedent forecloses governmental attempts to impeach religious claimants' sincerity by introducing evidence that other followers of the same sect would perceive their religious obligations differently").

These precedents show that prison officials should not—and indeed cannot under the First Amendment—decide which religious doctrines are correct or acceptable. Yet this is precisely what will happen if this Court upholds the district court's ruling. If a volunteer prison minister like Jarrard were considered a government employee, then prison officials could subject him and others in his position to their whims and own interpretations of his own religion. Indeed, that is what happened here when Respondents refused to permit Jarrard to work in the prison based on their own understanding of baptism.

Specific internal doctrinal disputes in minority religions further compound the risk of harm to members of religious minority faiths when prison officials have power to choose certain religious principles. In Judaism, for example, some Middle Eastern and European Jewish communities are split over whether corn products can be eaten during Passover. *See, e.g.*, Jeffrey Spitzer, *Kitniyot: Not Quite Hametz*, MY

JEWISH LEARNING, https://tinyurl.com/bdfjpjs3 (last visited May 8, 2023) (discussing the Jewish Passover debate surrounding rice, millet, corn, and legumes). Orthodox and non-Orthodox Jews are also divided over how to determine whether the production of food is kosher, relying upon different certifications that apply the particular Jewish denomination's standard to determine if particular products are kosher. *See, e.g.*, cRc Kosher, *Directory of Kosher Certifying Agencies*, CHI. RABBINICAL COUNCIL, https://tinyurl.com/yu335xz9 (last visited May 2, 2023) (listing kosher certifying agencies) (noting differences between Magen Tzedek, the Jewish Conservative denomination's ethical kosher standard, and the Orthodox Jewish denomination's kosher standards).

The divisions do not end there. Orthodox Jews forbid driving to synagogue on the Sabbath, while non-Orthodox Jews permit it. *Compare Driving to Synagogue on Shabbat*, Aish.com, https://tinyurl.com/y66xy6rd (offering guidance on how to comply with a prohibition on driving on the Sabbath) *with Conservative Judaism*, BBC, https://tinyurl.com/2csh24zc (July 24, 2009) (describing various views on driving on the Sabbath). Jewish denominations are split on whether men and women may sit together within a synagogue, with Orthodox synagogues remaining sex separated and non-Orthodox allowing mixed seating. *The Mechitzah: Partition*, Chabad.org, https://tinyurl.com/4je64b35 (explaining the tradition of separating men and women in synagogues); *see also Katz v. Singerman*, 127 So. 2d 515, 532

(La. 1961) (observing there is a dispute among Jews regarding the question of mixed seating). As mentioned above, Orthodox Judaism does not recognize female rabbis, while other denominations allow them. *See, e.g.*, *2015 Resolution: RCA Policy Concerning Women Rabbis*, RABBINICAL COUNCIL OF AMERICA (Oct. 31, 2015), https://tinyurl.com/2yjhh7ms (adopting a resolution affirming the Orthodox Jewish tradition of not recognizing female rabbis). And as *Ben-Levi v. Brown* aptly demonstrated, Jewish individuals may want to study the Torah in a small group without seeking community prayer. *Ben-Levi*, 136 S. Ct. at 933. In such an instance, existing requirements for community prayers should be based on what the individual seeks, not on what a prison official believes is consistent with Judaism.

Such doctrinal disputes are not limited to Judaism. For example, in Islam, while all Muslims pray five times per day, Shia Muslims allow for the combination of the five daily prayers into three times, whereas Sunni Muslims generally do not. *See Practices in Islam*, BBC BITESIZE, https://tinyurl.com/2hzs57yy (last visited May 2, 2023). As yet another example, debates continue regarding the obligations of Muslim women to cover their heads with a hijab or a niqab. *See, e.g.*, *Niqab*, BBC (Sept. 22, 2011), https://tinyurl.com/4hfbhc3y. There also are questions about whether abortion is forbidden from conception, Ismail Royer, *There Is No Religious Freedom Argument for Abortion in Islam*, CANOPY FORUM (Sept. 23, 2022), https://tinyurl.com/9896z4sp, and if it is sinful to take out an interest-based mortgage

on a house, Mufti Faisal bin Abdul Hamid al-Mahmudi, *Interest and Mortgage in western countries. Should we revise our understanding of Riba?*, FATWA.CA (May 8, 2023), https://tinyurl.com/mr46yp8v.

These internal doctrinal disputes are just examples. Such divisions may manifest in prisons, leaving prison officials with undue discretion to impose certain interpretations on inmates. As noted above, the Supreme Court has recognized that government officials cannot define the scope of personal beliefs, yet upholding the district court's ruling would do just that. Besides impermissibly violating free exercise holdings, upholding the district court would unnecessarily entangle state and religion and burden prisons with wasted time and resources to sort out complex theological matters.

IV. The district court's decision will negatively affect prison ministry efforts performed by many religious organizations.

Ministering in general, and prison ministry in particular, is of the highest importance to Amici and other religious organizations. The district court's ruling could severely undermine many Jewish and Muslim organizations' sincere and constitutional efforts to provide critical and saving outreach to prisoners.

There are many Jewish and Muslim organizations solely dedicated to prison ministry. To highlight just a few:

- Jewish Prisoner Services International ("JPSI") was founded "to address the needs of Jewish prisoners and their families through chaplaincy, advocacy and

social services." *About*, JEWISH PRISONER SERVICES INTERNATIONAL, https://tinyurl.com/mrskj8wk (last visited May 11, 2023). Besides helping the prisoner's family and assisting with re-entry after release, JPSI works with institutions to provide for an inmates immediate religious needs while imprisoned—for example, providing a Seder in a box, Megillah readings, kippot, and tefillin.

- Reaching Out is an organization under the leadership of the Lubavitch denomination and "helps all Jews in confinement; regardless of a person's religious observances, affiliation, background or lack of one, [they] help all." *About Us*, REACHING OUT TO JEWISH PRISONERS, https://tinyurl.com/y9aehuvb (last visited May 11, 2023). Their work includes helping Jewish inmates with religious problems; sending free materials, literature and religious items; observing Jewish holidays; and assisting with daily Jewish practices.
- The Aleph Institute supports, advocates, and fights for prisoners' rights. They also visit inmates, offer holiday programs, and bring reading materials, spiritual guidance, "and life-saving hope." *Prison Programs*, ALEPH INSTITUTE, https://tinyurl.com/ywcd4njw (last visited May 11, 2023).

One need not even go past the home page on these organizations' websites to discover that they each highlight the obstacles to practicing Judaism in the

correctional setting. As JPSI notes, "[a]dvocacy is critical for the Jewish prisoner" because "[b]eing Jewish in a prison is not an easy thing." *About*, JEWISH PRISONER SERVICES INTERNATIONAL, https://tinyurl.com/mrskj8wk (last visited May 11, 2023); *see also id.* ("Sometimes it makes a person a target for proselytizing or violence . . . . Observance of Jewish practice in the correctional setting is also challenging. There are cases of non-kosher food being passed off as kosher, prohibition of religious items, and other issues that come up."); *About Us*, REACHING OUT TO JEWISH PRISONERS, https://tinyurl.com/y9aehuvb ("Jews in prisons face many challenges maintaining their Jewishness . . . . The prison system makes it very difficult to maintain one's sanity and even more difficult to observe one's religion properly."). Without a robust prison ministry, the difficulty of practicing Judaism morphs into near impossibility. The district court's ruling only adds upon that difficulty.

The same is true for Islamic faith and ministry organizations. The Tayba Foundation provides education to prisoners to support character reformation and to give inmates the tools they need to successfully reintegrate into society following parole. *Education*, TAYBA FOUNDATION, https://tinyurl.com/mvykawz9 (last visited May 11, 2023). Link Outside responds to inmates requesting spiritual support, provides prison visits, donates spiritual literature, and provides access to courses from the California Islamic University. *Home*, LINK OUTSIDE,

https://tinyurl.com/mrsmfa6e (last visited May 11, 2023). And Muslim Prisoner Project provides Islamic literature, gifts and visits to inmates. *Who we are*, MUSLIM PRISONER PROJECT, https://tinyurl.com/37n6nvm3 (last visited May 11, 2023).

Amici's coreligionists are not alone in this regard. The Church of Jesus Christ of Latter-Day Saints "donates more than 50,000 volumes of Church literature to prisons every year" and "collaborates with other faith groups to support worship and educational centers in prisons and community initiatives to help those who have recently been released." *Prison Ministry*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, https://tinyurl.com/mr3pt57h (last visited May 11, 2023). Several Catholic groups offer spiritual support and hygiene products to individuals in prison, while also offering assistance to those making the difficult transition from inmate to productive member of society. *Prison and detention center ministries forced to adapt during the pandemic*, CATHOLIC EXTENSION (Apr. 23, 2020), https://tinyurl.com/bdd2mmab. And the governor of Virginia donated part of his 2023 gubernatorial salary to the Good News prison ministry. Ryan Foley, *Virginia Gov. Glenn Youngkin Donates First Quarter Salary to Good News Prison Ministry*, THE CHRISTIAN POST (Apr. 17, 2023), https://tinyurl.com/4sv7aa8d.

This commitment by Amici's coreligionists and other organizations is more than mere organizational policy; it reflects a deep and sincere doctrinal commitment to minister to all, especially those in difficult circumstances. *See, e.g.*, Rabbi

Yehonasan Gefen, *All Jews Are Bound Up With Each Other*, AISH https://tinyurl.com/7nj5z3k7 (last accessed May 12, 2023) (teaching that "every single Jew is spiritually bound up with every other Jew" and has a doctrinal "responsibility for improving the spiritual lives" of fellow Jews); *All of Israel Are Responsible for One Another*, MY JEWISH LEARNING, https://tinyurl.com/z57ny844 ("The Talmud, in discussing the domino effect of sin, concludes with the Aramaic phrase, *Kol yisrael arevim zeh bazeh*, meaning all of Israel are responsible for each other. . . . If one Jew sees another Jew at the verge of sinning, he has an obligation to step in and help. Even more so, it implies an obligation on all Jews to ensure that other Jews have their basic needs for food, clothing, and shelter taken care of. Simply by virtue of being a Jew one is responsible for the well-being of other Jews, and vice versa."); QURAN, SURAH AN-NAHL 125 ("Invite (all) to the Way of your Lord with wisdom and beautiful preaching; and reason with them in ways that are best and most gracious: for your Lord knows best who have strayed from His path and who receive guidance."); QURAN, SURAH YUSUF 108 ("Say (O Prophet): 'This is my way: I invite unto God with sure knowledge, I and whoever follows me.'"); SAHIH MUSLIM BOOK 26, *Hadith 11* (teaching that the Prophet Muhammad ministered to a prisoner in need).

The New Testament's call to minister to prisoners is direct and specific. *See, e.g.*, Matthew 25:31–45 (teaching, in part, "Then shall the King say unto them on

his right hand . . . I was in prison, and ye came unto me . . . Inasmuch as ye have done it unto one of the least of these my brethren, ye have done it unto me"). Constitutional protections should allow ministers of every denomination and sect to answer their own faith's call.

These organizations' spiritual impact—in addition to the critical *earthly* impact of their outreach, education, and social services—is invaluable to these prisoners. The Court should be wary in reviewing precedent that restricts the singular pathway whereby inmates can receive spiritual essentials. As explained above, prisons and prison officials cannot be the ones selectively interpreting what those spiritual essentials are. Moreover, only by extending First Amendment protections to volunteer ministers and their speech can the Court avoid the unconstitutional restricting of prison outreach that Amici's coreligionists and other religious organizations perform so fervently.

In short, prison ministry is of vital importance to both the doctrinal teachings and organizational outreach of Amici and many religious faiths. Such work cannot be done with the heavy hand of governmental interference, and certainly cannot be done with the religious animosity displayed by Defendants. The district court's ruling threatens this vital work unnecessarily.

CONCLUSION

For the above stated reasons, Amici respectfully requests that this Court reverse the district court's decision and hold that a volunteer religious chaplain is not a government employee for First Amendment purposes.

Dated: May 19, 2023

Respectfully submitted,

/s/ Corinne Snow
Corinne Snow
Vinson & Elkins, LLP
1114 Avenue of the Americas
32nd Floor
New York, NY 10036
212-237-0157

John D. Geilman
Kevin A. Moscon
Garrett Meisman
Vinson & Elkins, LLP
845 Texas Ave. Ste. 4700
Houston, TX 77002-2947
713-758-2559

Griffith Kimball
Vinson & Elkins, LLP
2001 Ross Ave. Ste. 3900
Dallas, TX 75201-2975
214-220-7886

Attorneys for Amici Curiae
Religious Freedom Institute; Jewish Coalition for Religious Liberty

CERTIFICATE OF COMPLIANCE

1. This brief complies with the word limit of Federal Rule of Appellate Procedure 29(a)(5) because it contains 6,315 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

Dated: May 19, 2023

/s/ Corinne Snow
Corinne Snow
Counsel of Record
New York Bar No. 5364633
Vinson & Elkins LLP
1114 Avenue of the Americas
32nd Floor
New York, NY 10036
Phone: (202) 237-0157
Email: csnow@velaw.com

Attorney for Amici Curiae
Religious Freedom Institute; Jewish Coalition for Religious Liberty

CERTIFICATE OF SERVICE

Pursuant to Rule 25(d) of the Federal Rules of Appellate Procedure, I hereby certify that on May 19, 2023, I electronically filed the foregoing *Brief of Amici Curiae* with the Clerk of the Court for the U.S. Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system, and served copies of the foregoing via the Court's CM/ECF system on all ECF-registered counsel.

Dated: May 19, 2023

/s/ Corinne Snow
Corinne Snow
Counsel of Record
New York Bar No. 5364633
Vinson & Elkins LLP
1114 Avenue of the Americas
32nd Floor
New York, NY 10036
Phone: (202) 237-0157
Email: csnow@velaw.com

Attorney for Amici Curiae
Religious Freedom Institute; Jewish Coalition for Religious Liberty