

No. 26-8

In the Supreme Court of the United States

KIMBERLY ANN POLK,

Petitioner,

v.

MONTGOMERY COUNTY PUBLIC SCHOOLS; MONTGOMERY COUNTY BOARD OF EDUCATION; SHEBRA L. EVANS, MONIQUE FELDER, LYNNE HARRIS, GRACE RIVERA-OVEN, KARLA SILVESTRE, REBECCA SMONDROWSKI, BRENDA WOLFF, AND JULIE YANG, individually & in their official capacities as Members of the Montgomery County Board of Education,

Respondents.

*On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit*

**BRIEF OF THE MANHATTAN INSTITUTE
AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

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QUESTION PRESENTED

After Petitioner Kimberly Polk completed her first year of substitute teaching for Maryland's Montgomery County Public Schools ("MCPS"), Respondents required her to confirm that she would comply with MCPS's Guidelines for Student Gender Identity. But Polk's deeply held Christian beliefs prevented her from complying with the Guidelines' requirements (1) compelling her to use "preferred" pronouns inconsistent with a student's biological sex, and (2) prohibiting her from telling parents that the school was helping their children transition genders.

This brief addresses question 2 of the Petition's questions presented:

Do public schools violate the Free Speech Clause when they compel objecting teachers to adhere to such a school policy?

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INTEREST OF *AMICUS CURIAE*¹

The Manhattan Institute (MI) is a nonprofit policy research foundation that works to keep America and its great cities prosperous, safe, and free. MI develops and disseminates ideas that foster individual freedom and economic choice across multiple dimensions. To that end, it produces scholarship and files briefs opposing regulations that violate constitutionally protected liberties, including in the marketplace of ideas.

This case concerns MI because the government can skew the marketplace of ideas when it favors one side of the debate over a controversial idea, such as gender identity. Kimberly Polk’s case merits the Court’s review because it is unclear how current doctrine should deal with the issues she raises.

SUMMARY OF ARGUMENT

“[T]eachers may [not] constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work.” *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). Instead, courts must balance the employee’s interest in engaging in that speech and the employer’s interest in preventing it. *Id.* Ignoring that rule, the Montgomery County Board of Education (the “Board”) promulgated guidelines that compelled its teachers to endorse one side of a matter of public interest by using students’ preferred names

¹ Rule 37 statement: All parties were timely notified of the filing of this brief. No part of this brief was authored by any party’s counsel; no person or entity other than *amicus* funded its preparation or submission.

and pronouns, even when those differed from students' natal sex. App. 4a–6a.

Kimberly Ann Polk, the Petitioner here, worked as a substitute teacher for Montgomery County Public Schools (MCPS). She is a Christian whose understanding of her religion and the Bible's view of sex and gender prevents her from endorsing the MCPS's ideology. App. 7a. After Polk's sincere efforts to design a mutually satisfactory accommodation were rebuffed, App. 7a–8a, she was forced unjustly to choose between her faith and the MCPS's contentious ideological commitments. She chose her faith. App. 8a.

When Polk sought to vindicate her constitutional right not to endorse the MCPS's message, the divided panel below rejected her claim because, it reasoned, using students' preferred pronouns and the names they have chosen for themselves—without their parents' consent—fell within Polk's ordinary job duties. App. 31a–32a. The lower court knew that was the case because the Board told it so. *Id.* And this Court has held that teachers' First Amendment protections do not extend to speech made as part of their ordinary job duties. *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006). Accordingly, the court below declined to apply *Pickering* balancing and affirmed the district court's dismissal of Polk's claims under the Free Speech Clause and Free Exercise Clause. App. 30a–32a, 37a–38a.

But the court below misapplied *Garcetti*. *Garcetti* does not instruct courts to determine whether the job duties of a plaintiff include certain speech. If it did, the public employer could, like MCPS did in this case, require affirmation of any views it likes by including them in its employees' job descriptions. *Garcetti* explicitly cautions courts against taking employers at their

word: “[T]he listing of a given task in an employee’s written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee’s professional duties for First Amendment purposes.” *Garcetti*, 547 U.S. at 424–25. Instead, *Garcetti* requires that courts ask whether certain speech is “ordinarily within the scope of an employee’s duties,” *Lane v. Franks*, 573 U.S. 228, 240 (2014)—not this particular employee as dictated by this particular employer.

The Fourth Circuit has thus opened a loophole for states to force their teachers to endorse all sorts of controversial ideas just by including them in guidelines or legislation as part of teachers’ job duties. The Eleventh Circuit opened the same loophole on the opposite side of this issue, holding that a Florida law *banning* the use of pronouns that do not correspond to natal sex was constitutional because it regulated speech within the scope of teacher’s job duties. *Wood v. Fla. Dep’t of Educ.*, 142 F.4th 1286, 1290–92 (11th Cir. 2025).

No circuit court has yet closed this loophole, but the Virginia Supreme Court has. *See Vlaming v. W. Point Sch. Bd.*, 895 S.E.2d 705, 741–42 (Va. 2023) (holding that a teacher could bring a claim under the state constitution’s freedom of religion provisions that mandatory pronoun use violated his sincerely held religious beliefs). And it is probably only a matter of time before a federal circuit court sees the wisdom of Virginia’s interpretation of *Garcetti*. This Court need not wait for that circuit split to develop. It should get ahead of it by making clear that, under *Garcetti*, referring to stu-

dents by pronouns that do not correspond to their natal sex is not part of a teacher’s ordinary job duties.

Once it does so, the rest of Polk’s case is clear: using pronouns that do not correspond to natal sex implicates a matter of public concern, *see Janus v. Am. Fed. of State, Cnty. & Mun. Emps., Council 31*, 585 U.S. 878, 913–14 (2018) (identifying “gender identity” as a “matter of profound value and concern to the public”), and MCPS and the Board cannot justify the compelled speech that adherence to its guidelines entails. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there are any circumstances which permit an exception [to the unconstitutionality of compelled speech], they do not now occur to us.”).

ARGUMENT

I. USE OF STUDENTS’ PREFERRED PRONOUNS IS NOT ORDINARILY PART OF A TEACHER’S JOB DUTIES

Pickering balancing applies unless a public employee “is simply performing his or her job duties.” *Garcetti*, 547 U.S. at 423. But the location where the speech occurs is not dispositive in determining whether the speech occurred as part of performance of job duties. *See, e.g., Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 530 (2022) (coach’s prayers on school-owned field); *Rankin v. McPherson*, 483 U.S. 378, 386–87 (1987) (statement made during office conversation); *Connick v. Myers*, 461 U.S. 138, 149 (1983) (questionnaire distributed within the office); *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 411–13, 415–16 (1979) (teacher’s speech in principal’s office).

Neither is the job description or requirements as written by the employer dispositive of the job-duties

question: “[T]he listing of a given task in an employee’s written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee’s professional duties for First Amendment purposes.” *Garcetti*, 547 U.S. at 424–25. If the public employer could write whatever it wanted into job descriptions to avoid *Pickering* balancing, it could bypass any First Amendment challenge by including overbroad descriptions of job duties. *See id.*

Instead, speech is a function of a public employee’s job duties only when the speech “owes its existence to a public employee’s professional responsibilities.” *Id.* at 421. “The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee’s duties,” *Lane*, 573 U.S. at 240—not whether *this* employer decides to put it within the scope of *this* employee’s duties. An employer cannot redefine an employee’s job duties to include engaging in speech that would otherwise be protected because engaging in such speech is not “ordinarily within the scope of an employee’s duties.” If it could, there would be no limit to its ability to dictate employees’ speech, making *Garcetti* an impossibly high threshold and *Pickering* a dead letter.

Polk’s job duties as a teacher certainly include addressing her students because doing so is “ordinarily within the scope” of a teacher’s job duties. But a teacher’s job duties do not “ordinarily” include a requirement to address students by pronouns that do not correspond to their natal sex and names that are different from those by which their parents registered them for school. Even in Montgomery County, a requirement to do so was codified in the Board’s guidelines only in 2019, App. 4a, and substitute teachers

were required to affirm that they would comply with those guidelines beginning only in 2022, after Polk had begun working in the district, App. 6a–7a.

Dictating the precise way in which Polk ought to refer to students, as MCPS sought to do, constitutes an overbroad employer-defined list of professional responsibilities against which *Garcetti* cautioned. *Garcetti*, 547 U.S. at 424–25. So does limiting all of Polk’s discretion by refusing reasonable accommodation requests. *See* App. 7a–8a. The district has effectively rewritten Polk’s job description to compel her speech in the classroom as it relates to the issue of gender ideology. Because teachers’ choice of pronouns is not “ordinarily” within the scope of their job duties, *Garcetti* poses no bar to Polk’s constitutional claim.

II. THIS COURT SHOULD ANTICIPATE A CIRCUIT SPLIT ON WHETHER PRONOUN CHOICE IS PART OF TEACHERS’ DUTIES

Referring to one’s students by specific pronouns has not “ordinarily” been a part of a teacher’s job duties. Yet two circuit courts have concluded that it is: the Fourth Circuit here and the Eleventh Circuit in *Wood*.

Although no circuit court has yet held that the use of pronouns does *not* fall within a teacher’s job duties, a split is likely to develop. First, the Sixth Circuit has already held that such use does not fall within a *college professor’s* duties. *Meriwether v. Hartop*, 992 F.3d 492, 504–06 (6th Cir. 2021). Second, the Virginia Supreme Court has held that pronoun use does not fall within a teacher’s duties. *Vlaming*, 895 S.E.2d at 741–42. This Court should grant cert. here to anticipate that split and decide the question in favor of the view that use of pronouns is *not* part of a teacher’s job duties.

A. The Fourth Circuit Held That Using Students’ Preferred Pronouns Is Part of Teachers’ Job Duties

In this case, a divided panel of the Fourth Circuit affirmed the district court’s conclusory determination that “[w]hen Polk uses pronouns to refer to students in the classroom setting, she is acting as a teacher, not as a citizen.” App. 31a–32a. The court concluded that referring to students by their preferred names and pronouns was part of Polk’s job description because the Board-written guidelines said so. App. 31a.

But if the constitutionality of the guidelines was at issue, then the guidelines could not decide for themselves that they were constitutional. If challenged employer-written guidelines could define any speech as part of one’s job duties, the employer could avoid any First Amendment claim. *Garcetti*, 547 U.S. at 424–25. A school district might state in its guidelines that not wearing black armbands to express opposition to a war is part of its teachers’ job duties—perhaps because it is the teacher’s duty is to support patriotism and civic unity—and the Fourth Circuit would apparently accept it as such. *But see Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–11 (1969).

Instead, some independent test is needed that doesn’t simply restate how a public school defines a teacher’s job duties. The lower court should have determined “whether the speech at issue is itself ordinarily within the scope of an employee’s duties,” without regard to whether this particular employer defined it as such. *Lane*, 573 U.S. at 240. As this brief has already demonstrated, a specific kind of pronoun usage is not ordinarily within the scope of a teacher’s duties absent a school district’s guidance to the contrary. To

mandate one kind of pronoun use is to mandate forced speech that takes a side on the contentious issue of gender identity—just as a school banning war-protesting armbands to support patriotism and civic unity took a side on a controversial issue.

The Court should use this case to clarify that *Garcetti* does not block a constitutional claim just because the defendant says it does.

B. The Eleventh Circuit Held That Using Pronouns That Correspond to Natal Sex Is Part of Teachers’ Job Duties

As is the case for many Free Speech claims, everyone benefits from more robust freedom of speech. *Cf. Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he ultimate good desired is better reached by free trade in ideas.”). Those teachers with views diametrically opposed to Polk’s and aligned with MCPS’s might soon find their own speech tightly controlled in states and school districts with different ideologies.

Such was the case for Katie Wood, a transgender teacher in Florida. *Wood*, 142 F.4th at 1288. State law banned Wood from using certain preferred pronouns, requiring instead the use of those that corresponded with Wood’s natal sex, which was male. *Id.*; Fla. Stat. § 1000.071(3). A divided panel of the Eleventh Circuit vacated a preliminary injunction in Wood’s favor because that use of pronouns was part of a teacher’s job duties. *Wood*, 142 F.4th at 1290–92.

That court held broadly that “when a public-school teacher speaking in the course of performing her job—*i.e.*, speaking to her class in her classroom during class hours—she does so pursuant to her official duties and

therefore speaks as a government employee, not a citizen.” *Id.* at 1291–92 (citation omitted). *But see id.* at 1299–1301 (Jordan, J., dissenting); *Kennedy*, 597 U.S. at 530; *Givhan*, 439 U.S. at 411–13, 415–16.

The Eleventh Circuit’s distinguishing of Wood’s circumstances from those of Joseph Kennedy, the high school coach in *Kennedy*, only begged the question. *See Wood*, 142 F.4th at 1292–93. Each of the court’s descriptions of Kennedy that ostensibly made his case different from Wood’s—Kennedy was speaking privately when he prayed; he was not “engaged in speech . . . the District paid him to produce” (quoting *Kennedy*, 597 U.S. at 530); and he prayed on his own time—could describe Wood had the panel not declared as self-evident that they did not.

That Kennedy was speaking privately is not a factual distinction; it was this Court’s legal holding based on the facts of that case by analogy to *Garcetti* and *Lane*. *Kennedy*, 597 U.S. at 528–30. The Court knew that Kennedy’s speech was “off the clock” and offered within discretionary time permitted by the school—the *Wood* court’s two other distinctions, *Wood*, 142 F.4th at 1293—only because it inquired into his actual job responsibilities based on the activities of other coaches. *Contrast Kennedy*, 597 U.S. at 527, 530 (noting with citation to record that “coaches were free to attend briefly to personal matters” during the time that Kennedy prayed) *with Wood*, 142 F.4th at 1293 (assuming without citation to record that, while in the classroom, “neither [Wood] nor her students were remotely at liberty to do whatever they wanted”).

The Court should use this case to reiterate that *Garcetti* demands a fact-intensive inquiry that cannot be resolved with mere conclusory assertions that eve-

rything that occurs in the classroom is ordinarily within the scope of a teacher’s job duties.

C. The Virginia Supreme Court Has Held That Use of Preferred Pronouns Is Not Within Teachers’ Duties Under *Garcetti*, Showing That a Circuit Split Is Likely to Develop on the Federal Level

In contrast to the Fourth Circuit and Eleventh Circuit, the Virginia Supreme Court held that *Garcetti* should not apply at all, or at least should apply differently, in a compelled-speech case like one that requires a teacher to use students’ preferred pronouns. *Vlaming*, 895 S.E.2d at 741 (citing *Janus*, 585 U.S. at 908). The court also held that an employer could not mandate as an “official duty” an employee’s adherence to an ideological viewpoint such as belief in gender identity distinct from natal sex. *Id.* at 741–42.

The court noted that, in applying the free speech provisions of the Virginia Constitution, Va. Const. art. I, § 12, it was not bound by this Court’s interpretation of the U.S. Constitution’s Free Speech Clause. *Vlaming*, 895 S.E.2d at 737. But it concluded that this Court’s interpretation of teachers’ free speech clauses would protect the teacher’s right not to be compelled to use students’ preferred pronouns anyway. *Id.*

It held so because *Garcetti*, unlike *Vlaming* and this case, did not involve compelled speech, *id.* at 741, which is “more pernicious than silencing dissent,” *id.* at 738. When compelling speech, the state can compel voicing an ideological viewpoint, and “no matter how acceptable to some, such interest cannot outweigh an individual’s First Amendment right to avoid becoming the courier for such message.” *Id.* at 742 (quoting

Wooley v. Maynard, 430 U.S. 705, 717 (1977)). Therefore, “[t]he School Board cannot avoid this constitutional prohibition by simply declaring it Vlaming’s ‘official duty’ to courier the School Board’s ideological view of gender identity.” *Id.* Moreover, the speech at issue in *Garcetti* was “routine,” unlike the use of pronouns that do not correspond to natal sex, which is “an ideological topic that has engendered fierce public debate.” *Id.* at 741. The court also noted that *Garcetti* itself cautioned against assuming that “all aspects of ‘classroom instruction’” were part of a teacher’s job duties. *Id.* at 742 (quoting *Garcetti*, 547 U.S. at 425). *Contra Wood*, 142 F.4th at 1291–92.

No federal circuit has yet adopted the Virginia Supreme Court’s interpretation. The Sixth Circuit held that pronoun use was not part of a professor’s official duties, but its reasoning relied on the academic freedom enjoyed by college professors (and not by teachers outside of higher education). *Meriwether*, 992 F.3d at 504–06. Still, the Virginia Supreme Court quoted *Meriwether* approvingly in the context of a high school teacher’s discretion over a noncurricular decision like pronoun usage, *Vlaming*, 895 S.E.2d at 741–42, 742 n.34, and it is likely only a matter of time before a federal circuit court comes to the same conclusion.

This Court should anticipate that split. And, when it does so, it should adopt the Virginia Supreme Court’s interpretation of *Garcetti*. By applying *Garcetti* to compelled speech, the Fourth Circuit effectively permitted states to compel teachers to affirm all sorts of beliefs just by including them in guidelines to which teachers must agree as a condition of employment. App. 4a–6a. *But see Barnette*, 319 U.S. at 642 (“If there is any fixed star in our constitutional constellation, it

is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”); *see also Tinker*, 393 U.S. at 506 (“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”); *Kennedy*, 597 U.S. at 527 (quoting *Tinker*).

The Court should confirm that a state cannot get around these important protections against compelled speech for state employees just by requiring affirmation of controversial ideologies in their job guidelines.

III. WHETHER TO USE PRONOUNS THAT DO NOT CORRESPOND TO NATAL SEX IS A MATTER OF PUBLIC CONCERN

Once a public employee clears the *Garcetti* threshold, as the Court should hold Polk has done in this case, the employee must show that her speech was on a matter of public concern. *Pickering*, 391 U.S. at 568. At that point, the state must prove that its interest in regulating that speech outweighs the employee’s First Amendment rights. *Id.*; accord *Kennedy*, 597 U.S. at 531–32 (clarifying that clearing the first prong of *Pickering* shifts the burden to the state).

Polk’s use or nonuse of pronouns that did not correspond to students’ natal sex was speech on a matter of public concern. “Whether an employee’s speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.” *Connick*, 461 U.S. at 147–48. And what one might think of Polk’s speech does not matter: “The inappropriate or controversial character of a statement is irrelevant to the question

whether it deals with a matter of public concern.” *Ran-kin*, 483 U.S. at 387. On the contrary, controversial issues are precisely the sort of issues that tend to concern the public. Finally, the speech must address a matter of public concern, but the speech itself can occur in private. *See, e.g., Givhan*, 439 U.S. at 415–16.

The record here shows that the “content, form, and context” of Polk’s refusal to use preferred pronouns regarded a matter of public concern. *Connick*, 461 U.S. at 147. Namely, her refusal was “based on her understanding of her Christian religion and the Holy Bible.” App. 7a (quoting Complaint ¶ 31). The use of pronouns that do not correspond to a child’s natal sex *ipso facto* affirms the ideological view that children can have a gender different from their natal sex. *See, e.g., Meriwether*, 992 F.3d at 508 (“Pronouns can and do convey a powerful message implicating a sensitive topic of public concern.”). Polk’s religious beliefs inform her disagreement with the concept of a gender identity distinct from natal sex, a concept that this Court has recognized as a matter of public concern. *Janus*, 585 U.S. at 913–14 (identifying “gender identity,” among other topics, as a “controversial subject,” a “sensitive political topic,” and “undoubtedly a matter of profound value and concern to the public”).² Forcing Polk to use

² That Polk’s beliefs are informed by her “sincerely held religious beliefs,” App. 7a (quoting Complaint ¶ 31), would be enough on its own. But it should be noted that this ideological dispute cannot be reduced to a clash between faith and reason.

Full social transition in childhood has been posited to lock in what could otherwise be a temporary phase of identity exploration or confusion. *See, e.g., Annelou L. C. de Vries & Peggy T. Cohen-Kettenis, Clinical Management of Gender Dysphoria in Children and Adolescents: The Dutch Approach*, 59 J. Homosexuality 301, 320 (2012). Decades of research have found that most children with gender identity issues—between 61 and 100 percent—

pronouns in a way that endorses that ideology thus compels her speech on a matter of public concern.

IV. STATE INTERESTS CANNOT JUSTIFY COMPELLING SPEECH—PARTICULARLY SPEECH THAT WOULD VIOLATE RELIGIOUS BELIEFS

Once an employee has shown that her speech regards a matter of public concern, as Polk has, “the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees” must be balanced. *Pickering*, 391 U.S. at 568.

MCPS is certainly right that it is entitled to take steps to ensure students’ “safety and equality.” App. 46a (Wilkinson, J., dissenting). But no balance can be struck in which it does so by compelling a teacher to endorse an ideology in which she does not believe. See *Barnette*, 319 U.S. at 642 (“If there are any circumstances which permit an exception [to the unconstitutionality of compelled speech], they do not now occur to us.”); see also *Vlaming*, 895 S.E.2d at 741–43 (noting

come to terms with their natal sex, typically during adolescence. James M. Cantor, *Transgender and Gender Diverse Children and Adolescents: Fact-Checking of AAP Policy*, 46 J. Sex & Marital Therapy 307, 313 (2019) (collecting 11 studies from 1972 to 2019). Social transition can hinder that development. Thomas D. Steensma et al., *Factors Associated with Desistence and Persistence of Childhood Gender Dysphoria: A Quantitative Follow-Up Study*, 52 J. Am. Acad. Child & Adolescent Psych. 582, 588 (2013).

Thus, a teacher without Polk’s religious convictions would still have reason to believe that it would be unethical to use her speech to interfere with children’s natural development.

that fact that teacher's speech would be compelled gave it special protection).

MSPS's attempt to compel Polk to affirm beliefs with which she disagrees is made only more egregious by the religious basis of her refusal. App. 7a. Even if a claim under the Free Exercise Clause alone would fail under *Employment Div. v. Smith*, 494 U.S. 872, 878–80 (1990) (holding that neutral law of general applicability that incidentally burdens religious practice is not reviewed with heightened scrutiny), the religious nature of Polk's belief is an additional reason for the Court to be wary of forcing her to speak. As the Court observed in *Kennedy*: “That the First Amendment doubly protects religious speech is no accident. It is a natural outgrowth of the framers’ distrust of government attempts to regulate religion and suppress dissent.” 597 U.S. at 523–24. One way to regulate religion is to dictate speech that contradicts religious beliefs, as the MCPS seeks to do in this case.

Moreover, even if the policy in question is neutral and generally applicable, Polk's Free Exercise claim is connected to a “communicative activity” and thus presents a “hybrid situation” under which a rule is reviewed under heightened scrutiny even according to *Smith*. See *Smith*, 494 U.S. at 882. As *amicus* has argued, a regulation that compels speech will not survive heightened scrutiny. *Barnette*, 319 U.S. at 642.

Because MCPS's rule compels speech—and especially because it compels speech in violation of Polk's religious beliefs—the Court should hold that it cannot be justified by the state's interest.

CONCLUSION

This Court should grant cert. to get ahead of a likely circuit split on the question of whether the use of preferred pronouns falls within a teacher's ordinary job duties—and then reverse the court below because specific pronoun usage (1) is not within a teacher's ordinary duties, (2) regards a matter of public concern, and (3) cannot be justified by state interests.

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