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NOTES

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INTRODUCTION

In June 1943, the U.S. Supreme Court birthed the "compelled speech doctrine" when it struck a school board rule requiring students to salute the American flag.[1] Rooted in the First Amendment, the compelled speech doctrine generally bars the government from forcing an individual to express an idea or viewpoint that they oppose.[2] "The right to speak" or to "refrain from speaking are," according to the Supreme Court, "complementary components of the broader concept of 'individual freedom of mind.'"[3]

Despite these foundational principles of self-governance and individual autonomy, the Court's application of the compelled speech doctrine often creates more confusion than clarity. Some scholars have argued that the Court's compelled speech cases are decided "haphazardly and inconsistently," characterizing the doctrine as an "all-or-nothing domain of constitutional decision-making."[4] Take, for example, the Court's most recent compelled speech case, *303 Creative LLC v. Elenis*, in which the Court held that Colorado could not use its public accommodation law to compel a Christian business owner to design wedding websites for same-sex couples.[5] The Court reasoned that when the government requires a business owner to produce expression that contradicts their individual conscience, this infringes on their First Amendment rights.[6]

Justice Sonia Sotomayor, in her dissenting opinion, warned that the majority's broad interpretation of compelled speech risked overextending the doctrine.[7] Specifically, Justice Sotomayor observed that "[o]nce you look closely, 'compelled speech' (in the majority's facile understanding of that concept) is everywhere."[8] Before the Court issued its ruling, some predicted that there would be a "Pandora's

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[1] *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[2] *See* Charlie Savage, *What Is the Compelled Speech Doctrine?*, N.Y. TIMES (Dec. 5, 2022), https://www.nytimes.com/2022/12/05/us/politics/compelled-speech-first-amendment.html [https://perma.cc/7TQ8-CWLR].

[3] Wooley v. Maynard, 430 U.S. 705, 714 (1977).

[4] *See* Vikram David Amar & Alan Brownstein, *Toward a More Explicit, Independent, Consistent and Nuanced Compelled Speech Doctrine*, 2020 U. ILL. L. REV. 1, 6.

[5] 600 U.S. 570, 603 (2023).

[6] *Id.* at 602–03 ("[T]olerance, not coercion, is our Nation's answer.").

[7] *Id.* at 638–39 (Sotomayor, J., dissenting).

[8] *Id.* at 639 n.16 (Sotomayor, J., dissenting).

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box of religious exemptions."[9] Now, that box seems to have opened.[10] Further, some questions posed in the wake of the *303 Creative* decision relate to how broadly state courts should interpret the compelled speech doctrine and whether context should matter in adjudicating such claims.

Public education is a fertile ground for these debates. In recent years, school boards have disciplined public school teachers for refusing to use transgender students' preferred pronouns, citing conflicts with religious beliefs and individual conscience.[11] These claims highlight the potential tension between compelled speech principles and public employee speech regulations.[12]

This Note examines the Virginia Supreme Court case of *Vlaming v. West Point School Board* to explore how one state court analyzed a compelled speech claim raised by a teacher.[13] In *Vlaming*, the Virginia Supreme Court held that Peter Vlaming pled a viable compelled speech claim after the School Board fired him for refusing to use a transgender student's preferred pronouns.[14] Typically, public employee speech challenges are analyzed under the *Garcetti v. Ceballos* and *Pickering v. Board of Education* framework.[15] Under *Garcetti*, courts first assess

[9] Pauline Jones & Andrew Murphy, *Supreme Court Is Increasingly Putting Christians' First Amendment Rights Ahead of Others' Dignity and Rights to Equal Protection*, THE CONVERSATION (Oct. 5, 2023, 8:34 AM), https://theconversation.com/supreme-court-is-increasingly-putting-christians-first-amendment-rights-ahead-of-others-dignity-and-rights-to-equal-protection-210220 [https://perma.cc/5DCD-HHCY].

[10] *Id.*

[11] *See, e.g.*, Denise Lavoie, *Virginia Court Revives Lawsuit by Teacher Fired for Refusing to Use Transgender Student's Pronouns*, AP (Dec. 14, 2023, 6:12 PM), https://apnews.com/article/teacher-fired-transgender-student-pronouns-6fd28b4172fb5fca752599ae2adfb602 [https://perma.cc/L8P5-HVR4]; Kathleen Foody, *Court Backs Teacher Firing over Transgender Students' Names*, AP (Apr. 8, 2023, 12:46 PM), https://apnews.com/article/indiana-teacher-lawsuit-transgender-student-names-883b50e19088614d71df25f0f835ed08 [https://perma.cc/7VTL-FN6W]; Minyvonne Burke, *Ohio Teacher Told Principal Using Students' Preferred Pronouns Violated Her Religion. She Was Forced to Resign, Lawsuit Says*, NBC NEWS (Dec. 20, 2022, 11:45 AM), https://www.nbcnews.com/news/us-news/ohio-teacher-told-principal-using-students-preferred-pronouns-violated-rcna62237 [https://perma.cc/7R67-R27Y].

[12] In examining these specific compelled speech claims, this Note neither endorses nor advocates for any particular social, political, or religious stance on transgender students' rights or the broader topic of gender identity.

[13] 895 S.E.2d 705 (Va. 2023).

[14] *Id.* at 737.

[15] *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 527 (2022) (citing Garcetti v. Ceballos, 547 U.S. 410 (2006); Pickering v. Bd. of Educ., 391 U.S. 563 (1968)).

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whether a public employee spoke "as a citizen" or as an employee "pursuant to their official duties."[16] If the employee spoke pursuant to their official duties, the First Amendment claim fails.[17]

The Virginia court, however, denied application of *Garcetti*'s official duties test because the School Board sought to compel speech on an "ideological" matter.[18] In other words, under the Virginia court's logic, *Garcetti* does not bar a free speech claim when the speech compulsion is ideological in nature. This approach effectively creates a "categorical" exception to *Garcetti* that could supply teachers with an "absolute right to refrain from speaking if [a school's] 'interest is to disseminate an ideology.'"[19] Ultimately, the Virginia court's rejection of *Garcetti* in cases involving ideological speech compulsion presents important legal implications for school boards and their management of public employees.

Part I of this Note traces the development of the compelled speech doctrine. Part II then analyzes the *303 Creative LLC v. Elenis* decision, with a focus on Justice Neil Gorsuch's framework for evaluating compelled speech claims and the debate over whether the decision establishes a broad or narrow precedent. Finally, in Part III, the *Vlaming* decision is analyzed and discussed. This last section provides a detailed explanation of public employee speech under the *Garcetti* and *Pickering* framework, followed by the *Vlaming* court's rejection of this framework for compelled speech claims. I conclude this final Part by briefly sampling other jurisdictions' treatment of compelled speech claims in public education.

I. THE EVOLUTION OF THE COMPELLED SPEECH DOCTRINE

A. Foundational Principles

The First Amendment has been referred to as the "blueprint of personal liberty."[20] It explicitly states that "Congress shall make no law . . . abridging the freedom of speech."[21] On its face, this language seems to impose a categorical ban

[16] *Garcetti*, 547 U.S. at 418, 421.

[17] *See id.* at 418 (explaining if the employee spoke as a citizen and not pursuant to their official duties, "then the possibility of a First Amendment claim arises").

[18] *Vlaming*, 895 S.E.2d at 741–42.

[19] *Id.* at 776 (Mann, J., dissenting) (quoting Wooley v. Maynard, 430 U.S. 705, 717 (1977)).

[20] DAVID L. HUDSON, JR., THE FIRST AMENDMENT: FREEDOM OF SPEECH § 1:1 (2012).

[21] U.S. CONST. amend. I.

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on governmental restrictions of free expression. But despite this seemingly bright-line prohibition of restricting free expression, the U.S. Supreme Court has never embraced an absolutist interpretation of the First Amendment.[22]

The Supreme Court's first compelled speech case, *West Virginia State Board of Education v. Barnette*, involved a challenge to a mandatory flag salute policy.[23] In *Barnette*, the West Virginia School Board adopted a resolution that required teachers and students to salute the American flag and recite the Pledge of Allegiance.[24] Refusal resulted in discipline.[25] This school policy created a conflict for two Jehovah's Witnesses students whose religious beliefs forbade the worshiping of images other than God.[26] Their refusal to salute led to expulsion.[27]

Just three years earlier, the Court upheld a similar flag salute policy in *Minersville School District v. Gobitis*.[28] Like *Barnette*, Jehovah's Witnesses students were expelled for refusing to salute the American flag, citing their belief that "such a gesture of respect for the flag was forbidden by command of Scripture."[29] The Court's opinion emphasized the importance of fostering national unity in schools, which it viewed as vital to safeguarding national security.[30] According to Justice Felix Frankfurter, someone's "[c]onscientious scruples" did not "relieve[] the

[22] *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942) ("Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances.").

[23] 319 U.S. 624, 626 (1943).

[24] *Id.* at 626–29. Students and teachers were required to "stiff-arm salute" the American flag, which involved raising the right hand with the palm turned up. *Id.* at 628–29.

[25] *Id.* at 629. If students refused, they were labeled insubordinate and expelled, with their return conditional upon compliance with the salute policy. *Id.*

[26] *Id.* The *Barnette* plaintiffs had a religious belief grounded in a literal reading of *Exodus*, Chapter 20, verses 4 and 5: "Thou shalt not make unto thee any graven image . . . thou shalt not bow down thyself to them nor serve them." *Id.* And as the *Barnette* Court noted, the Jehovah's Witnesses considered the flag as an "image," thus giving them a basis for refusing to salute. *Id.*

[27] *Id.*

[28] 310 U.S. 586, 591, 599–600 (1940). The students were Lillian and William Gobitis, who were twelve and ten, respectively. Their father brought this suit against the Minersville School District after sending the children to a private school. *Id.* at 591–92.

[29] *Id.* at 591–92.

[30] *Id.* at 595. In upholding the flag salute mandate, the Supreme Court explained that "[n]ational unity is the basis of national security," and requiring students to salute was a permissible means to ensure national security. *Id.*

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individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs."[31]

Although *Gobitis* seemed to foreclose challenges to mandatory flag salutes, its logic was short-lived. In *Barnette*, the Court reversed course, holding that the West Virginia School Board could not force students to stand and salute the flag because the First Amendment prohibits "[c]ompulsory unification of opinion."[32] By ruling in favor of the students, the Court not only vindicated their First Amendment rights but also expressly overruled its earlier decision in *Gobitis*, signaling a critical shift in free speech and individual liberties.[33]

Justice Robert H. Jackson's majority opinion in *Barnette* provides several First Amendment principles embodied in the compelled speech doctrine. First, compelled speech inflicts a First Amendment injury by undermining individual autonomy.[34] Specifically, it requires an individual to make an involuntary "affirmation of a belief and an attitude of mind."[35] The First Amendment grants individuals the right to speak their own mind, thereby limiting governmental efforts to compel someone to "utter what is not in his mind."[36] The flag salute policy, the Court explained, undermined the students' autonomy by "invad[ing] the sphere of intellect and spirit," which the First Amendment seeks to "reserve from all official control."[37] Thus, the First Amendment safeguards an individual's right to hold beliefs, even those in opposition to the government.

Second, the compelled speech doctrine serves as a barrier against government-imposed orthodoxy.[38] Justice Jackson's most striking line from *Barnette* underscores

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[31] *Id.* at 594.

[32] *Barnette*, 319 U.S. at 633–34, 641.

[33] *Id.* at 642. For an overview on how often the Supreme Court overturns precedent, see David Schultz, *The Supreme Court Has Overturned Precedent Dozens of Times, Including Striking Down Legal Segregation and Reversing* Roe, THE CONVERSATION (June 30, 2022, 8:22 AM), https://theconversation.com/the-supreme-court-has-overturned-precedent-dozens-of-times-including-striking-down-legal-segregation-and-reversing-roe-185941 [https://perma.cc/NA5W-HZVH] (noting that the Supreme Court has reversed only 145 cases, which is barely 0.5% of the cases decided from 1789 to 2020).

[34] *Barnette*, 319 U.S. at 630–31.

[35] *Id.* at 633.

[36] *Id.* at 634.

[37] *Id.* at 642.

[38] *See* Alexander Tsesis, *Compelled Speech and Proportionality*, 97 IND. L.J. 811, 813 (2022).

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the importance of restricting such impositions: "[i]f 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."[39] Professor Tsesis notes that "early compelled speech cases . . . relied on anti-autocratic principles" and interpreted "the Free Speech Clause as a safeguard of self-government and personal expression against state-imposed orthodoxy."[40] In striking down the flag salute policy, the Court prevented West Virginia from imposing its own version of patriotism onto its citizens.[41]

Finally, the compelled speech doctrine protects dissenting and minority opinions, including those that may be unpopular.[42] As Justice Jackson wrote, the First Amendment prohibits a "[c]ompulsory unification of opinion."[43] This restriction prevents the government from compelling "[d]issenters and those with minority opinions and belonging to minority religions . . . to espouse or project the same views."[44] In sum, the compelled speech doctrine furthers First Amendment interests by safeguarding individual autonomy, guarding against government-imposed orthodoxy, and ensuring protection for minority viewpoints.

B. The Great Expansion of Barnette

The following cases illustrate the extension of the compelled speech doctrine beyond the school setting. A notable starting point is *Wooley v. Maynard*, in which Jehovah's Witnesses challenged a New Hampshire law requiring vehicles to display the State's motto, "Live Free or Die," on license plates.[45] George Maynard and his wife refused to comply, believing that the motto was "repugnant to their moral, religious, and political beliefs."[46]

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[39] *Barnette*, 319 U.S. at 642.

[40] Tsesis, *supra* note 38.

[41] *Id.* at 814.

[42] Erica Goldberg, *"Good Orthodoxy" and the Legacy of* Barnette, 13 FIU L. REV. 639, 639–40 (2019).

[43] *Barnette*, 319 U.S. at 641.

[44] Goldberg, *supra* note 42.

[45] 430 U.S. 705, 707 (1977). Another statute made it a misdemeanor offense "knowingly [to obscure] . . . the figures or letters on any number plate." *Id.* (citation omitted).

[46] *Id.* Mr. Maynard also filed an affidavit statement: "I refuse to be coerced by the State into advertising a slogan which I find morally, ethically, religiously and politically abhorrent." *Id.* at 713.

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The Supreme Court held that New Hampshire could not compel the couple to disseminate "an ideological message by displaying it on his private property."[47] Chief Justice Warren Burger explained that the statute effectively forced unwilling drivers to use their private property as a "mobile billboard" or as an "instrument for fostering public adherence to an ideological point of view he finds unacceptable."[48] This decision reaffirmed the principle that the compelled speech doctrine acts as a safeguard against government-imposed orthodoxy. The Court concluded that New Hampshire's interest in "disseminat[ing] an ideology" did not outweigh the "First Amendment right to avoid becoming the courier for such message[s]."[49] Ultimately, *Wooley* reinforced the precedent set in *Barnette*, making it clear that the State "cannot force its political, cultural, or otherwise ideological message on unwilling parties."[50]

In more recent years, the Supreme Court has further expanded the scope of the compelled speech doctrine, as seen in decisions from its 2017–2018 Term.[51] For example, in *Janus v. American Federation of State, County, and Municipal Employees Council 31*, the Court ruled that union agency fees collected from non-unionized public employees violated the First Amendment.[52] Mark Janus, a child support specialist for the Illinois Department of Healthcare and Family Services, refused to join the American Federation of State, County, and Municipal Employees, Council 31.[53] Mr. Janus opposed many of the union's public policy positions, such as its stances on collective bargaining, but was nonetheless required to pay an agency

[47] *Id.* at 713.

[48] *Id.* at 715 ("In doing so, the State 'invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.'" (quoting *Barnette*, 319 U.S. at 642)).

[49] *Id.* at 717. No matter how mainstream the slogan was to some, the Court sided with individual autonomy and political personhood values. *See* Tsesis, *supra* note 38, at 814.

[50] Tsesis, *supra* note 38, at 814.

[51] Between *Wooley* and the 2017–18 term, the Court also held that Massachusetts could not use public accommodation laws to compel the South Boston Allied War Veterans Council to permit a gay, lesbian, and bisexual group to march in the Boston St. Patrick's Day parade. *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 559–61 (1995). The Court reasoned that the inclusion mandate requires the Council "to alter the expressive content of their parade," and the First Amendment gives a speaker "the autonomy to choose the content of his own message." *Id.* at 572–73.

[52] 585 U.S. 878, 929–30 (2018).

[53] *Id.* at 888–89.

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fee of $44.58 per month.[54] Accordingly, Janus argued that the arrangement was unconstitutional compelled political speech.[55]

The Court agreed, finding that the agency fees amounted to a form of compelled speech.[56] Writing for the majority, Justice Samuel Alito noted that "[w]hen speech is compelled . . . individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning."[57] Applying "exacting scrutiny," the Court evaluated whether the compelled subsidy "serve[d] a compelling state interest that [could not] be achieved through means significantly less restrictive of associational freedoms."[58] Ultimately, the Court determined that the union's interest in promoting labor peace and preventing "free riders" failed to meet this standard.[59] In essence, the agency fees were unconstitutional because they "force[d] an unwilling party to adopt arguments of a state-sponsored union."[60]

Just one day prior to *Janus*, the Court delivered its opinion in *National Institute of Family and Life Advocates v. Becerra*.[61] The petitioners in *Becerra* were pro-life crisis pregnancy centers that offered limited assistance services that "aim[ed] to discourage and prevent women from seeking abortions."[62] Under California's Freedom, Accountability, Comprehensive Care, and Transparency Act ("FACT Act"), clinics providing pregnancy-related services were required to post notices to

[54] *Id.* at 889.

[55] *Id.*

[56] *Id.* at 893, 901 ("Compelling a person to *subsidize* the speech of other private speakers raises . . . First Amendment concerns.").

[57] *Id.* at 893.

[58] *Id.* at 894 (citations and internal quotation marks omitted).

[59] *Id.* at 895–901. *See* Abood v. Detroit Bd. of Ed., 431 U.S. 209 (1977) (upholding agency-fee arrangement because it served the State's interest in "labor peace."). The *Janus* Court, however, overruled *Abood*, which previously found no First Amendment violation with agency fees to promote labor peace. *See* Tsesis, *supra* note 38, at 827 (discussing the factual similarities between *Janus* and *Abood*).

[60] Tsesis, *supra* note 38, at 828.

[61] 585 U.S. 755 (2018).

[62] *Id.* at 761 (citation omitted).

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clients.[63] One notice required posting a sign in the waiting room to inform clients of California's public programs that offered free and low-cost access to abortions.[64]

The Court held that the FACT Act's notice requirements violated the First Amendment.[65] Writing for the majority, Justice Clarence Thomas categorized the notice requirements as a "content-based regulation of speech" that "compel[ed] individuals to speak a particular message."[66] Because the clinics were opposed to abortion, the notice requirements effectively "'alter[ed] the content' of petitioners' speech," thereby functioning as compelled speech.[67]

Additionally, Justice Thomas rejected treating professional speech as a distinct category of speech.[68] He argued that government regulation of professional speech undermines "an uninhibited marketplace of ideas," because "[p]rofessionals might have a host of good-faith disagreements . . . on many topics in their respective fields."[69] Part II of this Note turns to the *303 Creative LLC v. Elenis* decision and its implications for the compelled speech doctrine.

II. *303 CREATIVE LLC V. ELENIS*

A. Factual Background

The *303 Creative LLC v. Elenis* decision revolved around a conflict between a business owner's free speech rights and Colorado's interest in preventing discrimination in commerce.[70] Colorado's Anti-Discrimination Act ("CADA")

[63] *Id.* at 762–63.

[64] *Id.* at 763.

[65] *Id.* at 779.

[66] *Id.* at 766. *See* Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) (explaining that a content-based speech regulation is one that "target[s] speech based on its communicative content," and therefore is subject to strict scrutiny.).

[67] *Becerra*, 585 U.S. at 766.

[68] *Id.* at 767.

[69] *Id.* at 772.

[70] *See* 600 U.S. 570, 577–79.

> [I]n this particular case Colorado does not just seek to ensure the sale of goods or services on equal terms. It seeks to use its law to compel an individual to create speech she does not believe. The question we face is whether that course violates the Free Speech Clause of the First Amendment.

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applies to any "place of public accommodation," encompassing businesses engaged in sales of offering services to the public.[71] The law prohibits businesses from "directly or indirectly" refusing services based on a customer's identity, including characterizations such as race, creed, or sexual orientation.[72]

Lorie Smith, the owner of a small website design business called 303 Creative LLC, sought to expand her services by offering wedding websites for engaged couples.[73] These websites would include details about the couple, their backgrounds, families, future plans, and wedding information.[74] However, Smith delayed launching this new service, fearing that Colorado might compel her to create content that conflicted with her religious belief that "marriage should be reserved to unions between one man and one woman."[75] Accordingly, Smith filed a preliminary injunction, seeking to enjoin the Colorado Civil Rights Commission from applying CADA to her proposed wedding websites.[76]

Both the District Court and the Tenth Circuit denied the injunction request.[77] The Tenth Circuit applied a strict scrutiny standard and concluded that Colorado *could* compel Smith to create speech she disagreed with due to the state's "compelling interest" in ensuring "equal access to publicly available goods and services."[78] The Tenth Circuit further reasoned that this compelling interest was pursued through "narrowly tailored" means because "no option short of coercing speech from Ms. Smith" could achieve the desired outcome, as her services were "unique" and "unavailable elsewhere."[79]

Id. at 578–79.

[71] COLO. REV. STAT. § 24-34-601(1) ("[A]ny place of business engaged in any sales to the public and any place offering services . . . to the public.").

[72] *Id.* § 24-34-601(2)(a).

[73] *303 Creative*, 600 U.S. at 579.

[74] *Id.* Each website would also indicate "that the websites are [Ms. Smith's] original artwork." *Id.*

[75] *Id.* at 580.

[76] *Id.* A preliminary injunction would require Smith to show that a "credible threat existed that Colorado" sought to "compel speech from Smith that she did not wish to produce." *Id.*

[77] 303 Creative LLC v. Elenis, 405 F. Supp. 3d 907, 912 (D. Colo. 2019); 303 Creative LLC v. Elenis, 6 F.4th 1160, 1168 (10th Cir. 2021).

[78] *303 Creative*, 600 U.S. at 583–84.

[79] *Id.* at 584.

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B. Justice Gorsuch's Majority Opinion

The *303 Creative* decision can be summarized as follows: the First Amendment prohibits Colorado from "forc[ing] an individual to speak in ways that align with [the State's] views but [defies an individual's] conscience about a matter of major significance."[80] Justice Gorsuch's opinion identifies several free speech principles served by the compelled speech doctrine.[81]

First, Justice Gorsuch explained that the First Amendment safeguards "an individual's right to speak his mind" regardless of whether the speech is "sensible and well intentioned or deeply 'misguided' and likely to cause 'anguish' or 'incalculable grief.'"[82] This focus on individual autonomy emphasizes the importance of protecting minority viewpoints, even when unpopular. Second, the compelled speech doctrine restricts state-imposed orthodoxy. Justice Gorsuch affirmed that "the government may not compel a person to speak its own preferred messages," highlighting that the freedom to think and speak independently is one of the "most cherished liberties and part of what keeps our Republic strong."[83]

Turning to the Court's analysis, several observations stand out. First, the Court concurred with the Tenth Circuit's determination that the wedding websites qualified as "pure speech."[84] Second, the Court also agreed with the Tenth Circuit's analysis that the proposed wedding websites involved Ms. Smith's speech.[85] While the client's input may merge with Ms. Smith's expression in designing websites, the Court emphasized that "[a]n individual 'does not forfeit constitutional protection simply by combining multifarious voices' in a single communication."[86] The Court, however, diverged from the Tenth Circuit's ultimate conclusion. According to the Court, Colorado imposed an unconstitutional restriction on Ms. Smith: "[i]f she wishes to speak, she must either speak as the State demands or face sanctions for

[80] *Id.* at 602–03.

[81] *Id.* at 586–87.

[82] *Id.* 586 (citations omitted). This compelled speech principle mainly stems from *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 574 (1995); *see* Tsesis, *supra* note 38, at 814.

[83] *303 Creative*, 600 U.S. at 586, 603.

[84] *Id.* at 587.

[85] *Id.* at 588.

[86] *Id.* (citing *Hurley*, 515 U.S. at 569).

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expressing her own beliefs."[87] This mandate, the Court concluded, constituted "an impermissible abridgement of the First Amendment's right to speak freely."[88]

Before addressing the scope of the Court's holding, it is useful to consider Professor Kenji Yoshino's perspective.[89] Yoshino characterized Justice Gorsuch's opinion as adopting a "categorical approach," reminiscent of Justice Jackson's reasoning in *Barnette*.[90] By rejecting a strict scrutiny framework, Gorsuch's approach posits that "if the conduct is speech, government compulsion is absolutely forbidden."[91] As discussed in Part III, this categorical approach may create more confusion than clarity for lower courts handling compelled speech claims.

C. A Broad or Narrow Holding?

The *303 Creative* decision was a significant victory for Ms. Smith's website expansion plans. However, as some legal scholars have observed, "[i]n resolving one question, the [C]ourt opened the door to many more."[92] Academic commentary on the decision offers arguments for both broad and narrow interpretations of its scope. On the broader side, Professor Michael L. Smith argues that the Court's "assurances of a limited holding are groundless."[93] He critiques the Court's reasoning, warning that it could extend to a wide range of cases, including those where "a business argues that its goods or services are expressive," as well as "cases involving free exercise claims by individuals and businesses seeking to discriminate on religious grounds."[94]

Justice Sonia Sotomayor, in her dissent, also raised concerns about the potential for the holding to be applied more broadly than the specific facts of *303 Creative*.[95]

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[87] *Id.* at 589.

[88] *Id.* (citing *Hurley*, 515 U.S at 574).

[89] *See generally* Kenji Yoshino, Comment, *Rights of First Refusal*, 137 HARV. L. REV. 244 (2023) (discussing civil rights law in light of the *303 Creative* case).

[90] *Id.* at 280.

[91] *Id.* at 280–81.

[92] Duncan Hosie, *303 Creative Channels LGBTQ Rights Debate to Health and Education*, BLOOMBERG L. (July 14, 2023, 9:58 AM), https://news.bloomberglaw.com/us-law-week/303-creative-channels-lgbtq-rights-debate-to-health-and-education.

[93] *See* Michael L. Smith, *Public Accommodations Laws, Free Speech Challenges, and Limiting Principles in the Wake of* 303 Creative, 84 LA. L. REV. 565, 566 (2024).

[94] *Id.*

[95] 303 Creative LLC v. Elenis, 600 U.S. 570, 603–04 (2023) (Sotomayor, J., dissenting).

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In her final footnote, she remarked that "[o]nce you look closely, 'compelled speech' (in the majority's facile understanding of that concept) is everywhere."[96] Potentially, the decision could pave the way for broader exemptions from anti-discrimination laws, extending beyond religious objections.[97]

Conversely, some argue that the *303 Creative* decision represents a narrower holding, confined to specific circumstances.[98] This interpretation rests on two key principles. First, a business owner cannot be compelled by the government "to create customized *and* expressive products (whether goods or services) that constitute the vendor's own expression."[99] Second, a business owner cannot be compelled to speak "where the vendor's objection is to the *message* contained in the product itself, not to the identity or status of the customer."[100] Regardless of whether *303 Creative* is ultimately interpreted as a broad or narrow precedent, it is likely that the Court's reasoning will be tested in future cases.

The reasoning behind the Supreme Court's *303 Creative* decision is increasingly shaping debates over compelled speech in public education, particularly regarding preferred pronoun requirements. In recent years, some public school teachers have claimed that the First Amendment grants them the right to refuse to use a student's preferred pronouns or even "a right to intentionally misgender students."[101] Since the *303 Creative* decision, organizations like Alliance Defending

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[96] *Id.* at 639 n.16.

[97] *Id.* at 638.

> Yet the reason for discrimination need not even be religious, as this case arises under the Free Speech Clause. A stationer could refuse to sell a birth announcement for a disabled couple because she opposes their having a child. A large retail store could reserve its family portrait services for "traditional" families. And so on.

Id.

[98] *See* Dale Carpenter, *How to Read* 303 Creative v. Elenis, REASON: THE VOLOKH CONSPIRACY (July 3, 2023, 2:11 PM), https://reason.com/volokh/2023/07/03/how-to-read-303-creative-v-elenis/ [https://perma.cc/ZC9P-5CKH]. The author of this article, Professor Dale Carpenter, filed an amicus brief arguing that the CADA as applied to Ms. Smith was speech compulsion. *See id.*; Brief for Dale Carpenter et al. as Amici Curiae Supporting Petitioner 303 Creative LLC v. Elenis, 600 U.S. 570 (2023 (No. 21-476).

[99] Carpenter, *supra* note 98.

[100] *Id.*

[101] *See* Hosie, *supra* note 92. For an analysis on the incompatibility of the First Amendment and intentional misgendering, see Molly Dower, Note, *Beyond Offense: Why the First Amendment Does Not Protect Deliberate Misgendering*, 44 CARDOZO L. REV. 2103 (2023).

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Freedom have supported lawsuits from teachers claiming a constitutional right to refuse compliance with such policies.[102] These lawsuits often argue that school regulations compel teachers to express beliefs "about the ontology of gender identity, a question of obvious religious and political significance."[103] To date, the Supreme Court has not ruled on whether preferred pronoun policies or directives constitute compelled speech.[104] However, given the Court's current inclination toward favoring religious freedom, it's possible that the Court would side with teachers in such cases.[105]

III. *GARCETTI* AND COMPELLED SPEECH

This final Part examines the application of *Garcetti* to compelled speech claims raised by public school teachers. It begins with an in-depth analysis of *Vlaming v. West Point School Board* and how the Virginia Supreme Court treated "ideological" speech as an exception to the *Garcetti* official duties test. It then discusses the regulation of public employee speech, and the driving policy reasons for treating speech by public employees differently than speech by private citizens. Finally, it reviews how other jurisdictions have addressed *Garcetti* in compelled speech cases.

A. Vlaming v. West Point School Board

The *Vlaming* case raises complex and contentious questions about "whose rights take precedence" when a public school teacher's deeply held beliefs conflict with a workplace directive.[106] In *Vlaming*, a high school student, referred to as "John Doe" in court documents, enrolled in Peter Vlaming's French II class during the fall semester.[107] The student was a biological female, but requested to be addressed "by

[102] *See* Hosie, *supra* note 92.

[103] *Id.*

[104] *See, e.g.*, Suzanne Eckes, *Public School Teachers Who Refuse to Use Preferred Names and Pronouns: A Brief Exploration of the First Amendment Limitations in K-12 Classrooms*, 14 CONLAWNOW 159, 164 (2023) ("There is no U.S. Supreme Court case that has analyzed a matter involving preferred names or pronouns in K-12 public schools.").

[105] "Since Justice Roberts became [C]hief [J]ustice in 2005, the Supreme Court has ruled in favor of [religion around] 83[%] of the time." Ian Prasad Philbrick, *A Pro-Religion Court: What the 6-3 Conservative Supreme Court Majority's Latest Ruling Means*, N.Y. TIMES: THE MORNING (June 22, 2022), https://www.nytimes.com/2022/06/22/briefing/supreme-court-religion.html [https://perma.cc/9Z2J-CQ6T].

[106] *See* Suzanne E. Eckes, *Pronouns and Preferred Names: When Public School Teachers' Religious Beliefs Conflict With School Directives*, 50 EDUC. RESEARCHER 65, 67 (2021).

[107] Vlaming v. W. Point Sch. Bd., 895 S.E.2d 705, 713 (Va. 2023).

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a more culturally masculine name instead of [Doe's] culturally female names (both Doe's given and French names)."[108] Vlaming honored the request.[109] However, by mid-semester, Doe further requested Vlaming to refer to them using masculine pronouns.[110] Vlaming declined, claiming that this request "asked him to violate his conscience" and his "religious and philosophical convictions that reject the idea that 'gender identity, rather than biological reality, fundamentally shapes and defines who we truly are as humans.'"[111] To be clear, Vlaming did not object to using Doe's preferred names; his refusal pertained solely to the use of preferred pronouns.[112]

This disagreement led to a series of meetings between Vlaming and school officials.[113] In the first meeting, the assistant principal provided Vlaming with documents prepared by the National Center for Transgender Equality, which explained that transgender students have the "legal 'right to be addressed by the names and pronouns that they use.'"[114] Vlaming reiterated that his pronoun-use refusal was rooted in his religious beliefs.[115] The assistant principal responded by stating that "'personal religious beliefs end at the school door' to the extent that they conflict with School Board policy."[116] The School Board policy explicitly prohibited discrimination, harassment, or mistreatment based on sex or gender identity. It stated:

> The West Point School Board is committed to nondiscrimination with regard to race, color, religion, national origin, ancestry, political affiliation, sex, sexual orientation, gender, gender identity, age, marital status, genetic information or disability as defined by law. This commitment will prevail in all division policies

[108] *Id.*

[109] *Id.* To accommodate Doe and to avoid drawing "unwanted attention," Mr. Vlaming required all French II students to pick new names for French II, different from the names that previous students used in French I. *Id.*

[110] *Id.* Masculine pronouns are he/him/his in English, and il/lui in French.

[111] *Id.*

[112] *Id.* at 739. Vlaming also avoided using third-person pronouns altogether, instead choosing to refer to students by their preferred name. *Id.*

[113] *Id.* at 714.

[114] *Id.*

[115] *Id.* ("Saying 'he,' 'him,' or 'his' objectively expresses the message that a person is, or the speaker believes [the person] to be, male.").

[116] *Id.*

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> and practices concerning staff, students, educational programs and services, and with individuals/entities whom the Board does business.
>
> . . .
>
> It is a violation of this policy for any student or school personnel to harass a student or school personnel based on . . . sex, sexual orientation, gender, gender identity . . . .[117]

In a subsequent meeting, the school principal warned Vlaming that continued noncompliance with the policy could lead to disciplinary action, including termination.[118] The conflict escalated further during a classroom activity, when Doe, who was wearing virtual-reality goggles, was navigating around the room based on verbal instructions given by another student.[119] In a moment of urgency, Vlaming yelled out "Don't let *her* hit the wall!"[120]

Following this event, the superintendent suspended Vlaming, and the principal issued a final directive ordering him to use Doe's preferred pronouns to comply with the nondiscrimination policy.[121] Once again, Vlaming refused, maintaining his stance on religious and conscience grounds.[122] The School Board ultimately voted to terminate his employment.[123]

Vlaming responded by filing a lawsuit, alleging, among other claims, that the School Board violated his First Amendment right to free speech by compelling him to speak in ways inconsistent with his beliefs.[124] While the lower court dismissed

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[117] Vlaming v. W. Point Sch. Bd., 10 F.4th 300, 304 n.1 (4th Cir. 2021).

[118] *Vlaming*, 895 S.E.2d at 714.

[119] *Id.*

[120] *Id.* (emphasis added).

[121] *Id.* at 715.

[122] *Id.*

[123] *Id.*

[124] *Id.* The free speech claim was based on the Constitution of Virginia, which provides:

> That the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; that the General Assembly shall not pass any law abridging the freedom of speech or of the press, nor the right of the people peaceably to assemble, and to petition the government for the redress of grievances.

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Vlaming's free speech claims, the Virginia Supreme Court reversed.[125] The court held that Vlaming's "principal theory of recovery assert[ed] a 'compelled speech' claim," citing *303 Creative* to define such speech as "an attempt by the government to 'compel an individual to create speech [he] does not believe' and to 'utter what is not in [his] mind' about a question of political and religious significance."[126]

Drawing from precedents like *Wooley v. Maynard, West Virginia State Board of Education v. Barnette*, and *Janus v. AFSCME*, the court emphasized that "the right to freedom of expression is at its apogee in compelled-speech cases."[127] Justice Thomas Mann dissented, arguing in part that relying on *Wooley v. Maynard*—a case involving private citizens—was misplaced in a dispute involving a public employee.[128] Nevertheless, the court, invoking *303 Creative*, maintained that "the freedom to speak or not speak generally endures 'regardless of whether the government considers [the] speech sensible and well intentioned or deeply "misguided" and likely to cause "anguish" or "incalculable grief."'"[129] Ultimately, the court appeared to prioritize the principle that speech compulsion is inherently suspect, downplaying the significance of context when evaluating the constitutionality of such speech.

B. Ideological Speech Compulsion and Garcetti

The *Vlaming* Court also declined to apply *Garcetti v. Ceballos* to Vlaming's free speech claim, reasoning that the School Board sought to compel speech on an

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VA. CONST. art. 1, § 12. Virginia case law has recognized that the protections given to free speech by the Constitution of Virginia are often "coextensive with the free speech provisions of the federal First Amendment." *See* Elliott v. Commonwealth, 593 S.E.2d 263, 269 (Va. 2004).

[125] *Vlaming*, 895 S.E.2d at 748.

[126] *Id.* at 737–38 (citing *303 Creative*, 600 U.S. at 578–79, 596).

[127] *Id.* The principle from *Wooley v. Maynard* is that free speech "includes both the right to speak freely and the right to refrain from speaking at all." 430 U.S. 705, 714 (1977). As for *Janus*, the Virginia Court included the following quote: "[i]t is a 'cardinal constitutional command' that government coercion, even when indirect, cannot constitutionally compel individuals to 'mouth support' for religious, political, or ideological views that they do not believe." *Vlaming*, 895 S.E.2d at 738 (quoting Janus v. AFSCME, Council 31, 585 U.S. 878, 892 (2018)).

[128] *Vlaming*, 895 S.E.2d at 777 (Mann, J., dissenting). *Wooley* was a case where *private* individuals refused to display an ideological slogan on their private vehicle; *Vlaming* is a case where a *public* employee refused to speak as demanded by their employer. *Compare Wooley*, 430 U.S. 705, *with Vlaming*, 895 S.E.2d at 738.

[129] *Vlaming*, 895 S.E.2d at 738.

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"ideological" issue.[130] For background, the U.S. Supreme Court has long recognized that students *and* teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[131] But public school teachers, like all government employees, must "by necessity" accept some "limitations on his or her freedom" to maintain workplace efficiency.[132] Employers need to exert a "significant degree of control" over the words and actions of their employees to provide the services that society expects from government entities.[133] Additionally, public employees are viewed as having a "trusted position[] in society," and their speech can potentially "contravene governmental policies."[134] The government, therefore, has an interest in regulating the speech of its employees to prevent workplace disruptions and uphold job fitness.[135]

Free speech violation claims by government employees are usually subject to a three-step analysis that combines elements from *Garcetti v. Ceballos* and *Pickering v. Board of Education*.[136]

The first two steps, derived from *Garcetti*, act as a screener test that may lead to a possible First Amendment claim.[137] The first question is whether the employee spoke "as [a] citizen" or as an employee "pursuant to their official duties."[138] In *Garcetti*, a deputy district attorney, Ceballos, wrote a memo questioning a prosecution, but his supervisors rejected recommendations to dismiss the case.[139]

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[130] *Id.* at 742.

[131] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S 503, 506 (1969). *Tinker* did not involve a restriction on teacher speech; instead, the case involved a First Amendment challenge to the suspension of two students for wearing arm bands to protest the Vietnam War. *Id.* at 504.

[132] Garcetti v. Ceballos, 547 U.S. 410, 418 (2006).

[133] *See id.* ("Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services."). *See also* Connick v. Myers, 461 U.S. 138, 150 (1983) (explaining that the government as an employer has an interest in "effective and efficient fulfillment of its responsibilities to the public.").

[134] *Garcetti*, 547 U.S. at 418.

[135] *See* Ofer Raban, *The Free Speech of Public Employees at a Time of Political Polarization: Clarifying the* Pickering *Balancing Test*, 60 HOUS. L. REV. 653, 672–74 (2023).

[136] *See Garcetti*, 547 U.S. 410; Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

[137] *See Garcetti*, 547 U.S. at 418 (if the answer to the screener test is yes, then the "possibility of a First Amendment claim arises").

[138] *Id.* at 421.

[139] *Id.*

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Ceballos challenged a series of position changes as retaliatory for the contents of the memo, but the Supreme Court held that the deputy's memo was not protected by the First Amendment since "the memo was written pursuant to [his] official duties" as a calendar deputy.[140] The Court later clarified in *Lane v. Franks* that "official duties" pertain to speech "ordinarily within the scope of an employee's duties."[141] The official duties test serves two purposes: recognizing that public employees are "nonetheless a citizen" and "promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion."[142]

The second step assesses whether the speech involves a "matter of public concern," meaning that it relates to "any matter of political, social, or other concern to the community."[143] The Court has emphasized that public employees do not forfeit their First Amendment rights upon obtaining employment. According to Justice Sotomayor, "employees do not renounce their citizenship when they accept employment, and this Court has cautioned time and again that public employers may not condition employment on the relinquishment of constitutional rights."[144]

If the screener test isn't satisfied, the employee's free speech claim fails. In other words, if the employee spoke pursuant to their official duties and not on a matter of public concern, *Garcetti* would bar the employee's claim.[145] If the screener test is satisfied, then courts move to the *Pickering* balancing test.[146] The *Pickering* balancing test weighs "the interests of the [employee], 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."[147] In *Pickering*, a public high school teacher was fired after writing a letter to a local

[140] *Id.*

[141] 573 U.S. 228, 240 (2014). *See also* De Ritis v. McGarrigle, 861 F.3d 444, 453 (3d Cir. 2017) (noting that the Third Circuit engages in a "'practical' inquiry . . . and assess[es] 'whether the speech at issue is itself ordinarily within the scope of an employee's duties.'" (citation omitted)).

[142] *Garcetti*, 547 U.S. at 419.

[143] *Id.* at 418; *Lane*, 573 U.S. at 241. *See also* Munroe v. Cent. Bucks Sch. Dist., 805 F.3d 454, 467 (3d. Cir. 2015) (explaining that speech is not considered a matter of public concern when it relates "solely to mundane employment grievances").

[144] *Lane*, 573 U.S. at 236.

[145] *See Garcetti*, 547 U.S. at 418.

[146] *See id.* The screener test would be satisfied if the employee spoke on a matter of public concern and not pursuant to their official duties.

[147] Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

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newspaper that was critical of the School Board's tax policies.[148] The Supreme Court, applying the above balancing test, struck the balance in the teacher's favor because the teacher's opinion on school funding was especially important for the public to hear, and the School Board didn't have a "close working relationship" with the teacher.[149]

Given the above explanation of public employee speech, one would suspect that a compelled speech claim by a public employee would likely be dismissed because a court would interpret a speech directive as an employee's official duties. But the *Garcetti* Court, in dicta, left open whether the official duties test applied to speech related to teaching or scholarship.[150] This dicta has led to a host of arguments on applying *Garcetti* to public school teachers. Some argue for an "academic freedom exception" to *Garcetti*, but only for public universities and not lower levels of education.[151] Some, on the other hand, argue that *Garcetti* should apply to primary and secondary public school teachers.[152] Compelled speech claims are a new consideration.

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[148] *Id.* at 564.

[149] *Id.* at 570.

> Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.

Id. at 572. The School Board didn't have a "close working relationship[]" because the statements weren't directed to someone the teacher would be in contact with daily and maintaining discipline; therefore, wasn't a concern. *Id.* at 570.

[150] *Garcetti*, 547 U.S. at 425.

> There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.

Id.

[151] *See, e.g.*, Carol N. Tran, Note, *Recognizing an Academic Freedom Exception to the* Garcetti *Limitation on the First Amendment Right to Free Speech*, 45 AKRON L. REV. 950, 984 (2012).

[152] *See, e.g.*, Paul Forster, Note, *Teaching in a Democracy: Why the* Garcetti *Rule Should Apply to Teaching in Public Schools*, 46 GONZ. L. REV. 687 (2010).

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As stated, the *Vlaming* majority entirely denied application of *Garcetti*'s official duties test because the School Board sought to compel speech on an ideological topic.[153] In other words, Vlaming pled a viable compelled speech claim that wasn't barred by *Garcetti*. The majority denied application of *Garcetti* because *Garcetti* "was not a compelled-speech case," and instead involved discipline for what an employee said rather than what an employee refused to say.[154] The *Vlaming* majority relied on *Wooley v. Maynard* and *Janus v. AFSCME* to conclude that the School Board could not disseminate an ideology by using Mr. Vlaming as their "courier" and to claim that pronouns were an "official duty" of teaching.[155]

Importantly, the *Vlaming* ruling did not hold that teachers are categorically exempt from compelled speech. The court clarified that schools can still require teachers to convey curriculum-related messages—"[m]ath teachers must teach math, science teachers must teach science, history teachers must teach history, and so on."[156] To summarize, the *Vlaming* majority held that Mr. Vlaming pled a viable compelled speech claim that was not subject to *Garcetti* because compelling speech on an ideological topic like gender identity is not pursuant to an official duty.[157] This means that a public school teacher can potentially have a free speech claim against a school board that is insulated from the *Garcetti/Pickering* framework.

This line of thinking also influenced the unreported Ohio case of *Geraghty v. Jackson Local School District Board of Education*.[158] In this case, a seventh-grade English teacher, Ms. Geraghty, refused to use two students' preferred names and pronouns due to religious beliefs.[159] After resigning under pressure, Geraghty sued

[153] Vlaming v. W. Point Sch. Bd., 895 S.E.2d 705, 742 (Va. 2023).

[154] *Id.* at 741.

[155] *Id.* at 742 ("The 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."). As for *Wooley*, the *Vlaming* majority stressed that teachers cannot be "compelled into the service of controversial 'religious, political, [or] ideological causes,'" whereas for *Janus*, the court used this case to observe that employees cannot be compelled to "mouth support" for ideological beliefs like gender identity. *Id.* at 738, 739, 742 (quoting Wooley v. Maynard, 430 U.S. 705, 714 (1977); Janus v. AFSCME, 585 U.S. 878, 892 (2018)).

[156] *Id.* at 739.

[157] *Id.*

[158] No. 5:22-cv-02237, 2024 WL 3758499 (N.D. Ohio, Aug. 12, 2024).

[159] *Id.* at *1.

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the school district, arguing that the district compelled "her to express personal agreement with their preferred message on a matter of public concern."[160]

The court concluded that "compelling Geraghty to use students' preferred names and pronouns" was not barred by *Garcetti*.[161] Citing *Vlaming*, the court rejected *Garcetti*'s applicability, observing that "*Garcetti* only applies to situations where public employees '*make statements*.'"[162] The school district defended the name and pronoun request as necessary for a safe learning environment and for Title IX compliance.[163] However, the court adopted a narrow view of the official duties test, reasoning that Geraghty's "job was to teach English to the appropriate state standards" and compelling the "use of students' preferred names and pronouns had nothing to do with 'when and how English [was] taught to [her] students.'"[164]

C. Alternative Approaches

The *Vlaming* majority's conclusion that *Garcetti*'s official duties test was inapplicable for the compelled speech claim was especially troubling for Justice Thomas Mann. Notably, Justice Mann accused the majority of "effectively prescrib[ing] a categorical rule which gives [teachers] an absolute right to refrain from speaking if 'the State's interest is to disseminate an ideology.'"[165] Rather than classify this as a case about "compelling adherence to a particular 'ideology,'"

[160] *Id.* at *2–5, 10. The school principal stressed that using the preferred names and pronouns was necessary to "accommodate the students." *Id.* at *4. Geraghty found this problematic: "I don't think I can work for Jackson [School District] anymore. I guess I'll resign." *Id.* There also was no school board policy in place that obligated employees to use a student's preferred name; instead, it was common "'practice' to address a student consistent with their request." *Id.* at *7.

[161] *Id.* at *11.

[162] *Id.* (quoting Garcetti v. Ceballos, 547 U.S. 410, 421 (2006)). The Ohio District Court included a single parenthetical to *Vlaming*, "(rejecting the view that *Garcetti* applies to compelled-speech cases)." *Id.*

[163] *Id.* at *12. The school district argued "its 'impetus' was 'to create a safe, secure, and welcoming learning environment' and to comply with . . . Title IX" because "its audience was students and not the general public." *Id.*

[164] *Id.* at *13. The court did not rule on which party succeeded under the *Pickering* balancing test. *Id.* at *16.

[165] Vlaming v. W. Point Sch. Bd., 895 S.E.2d 705, 776 (2023) (Mann, J., dissenting) (quoting Wooley v. Maynard, 430 U.S. 705, 717 (1977)).

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Justice Mann framed the free speech claim as an employee simply refusing to follow a reasonable workplace directive.[166]

According to Mann, public schools may compel a teacher to speak because they have "an interest in shaping and pursuing their educational goals."[167] As such, *Garcetti*'s official duties test *should* apply because the teacher is compelled to "speak on matters pertaining to the school's curriculum and policies," which falls squarely "within [the] teacher's official duties."[168] What's more, "[c]ommunicating with students is expected of teachers as a part of their ordinary job duties."[169] Since Vlaming's compelled speech claim was refusal to implement the School Board's anti-discrimination policy, Justice Mann concluded that *Garcetti* should have been applied and resulted in dismissal of the free speech claim.[170]

Consider *Willey v. Sweetwater County School District No. 1 Board of Trustees*, a factually similar case that applied *Garcetti*'s official duties to a teacher's compelled speech claim.[171] In *Willey*, a policy required teachers to "use a student's preferred/chosen name or pronoun in verbal, written, and electronic communications."[172] Mrs. Willey, a special education math teacher, sought an injunction to prevent enforcement of the policy, arguing that it was compelled speech.[173]

The Wyoming District Court identified two ways in which the policy affected Mrs. Willey's speech. First, it potentially punished non-compliance, and second, the policy "trie[d] to *compel* her to speak something [that was] not on her mind—i.e., calling a student by pronoun or name she believes to be inaccurate either in the

[166] *Id.* at 771 ("The School Board enacted reasonable directives as an expression of its will that students would be treated with dignity and respect by school employees.").

[167] *Id.* at 775.

[168] *Id.* (quoting Janus v. AFSCME, 585 U.S. 878, 910 (2018)) (explaining that in public institutions "the employee is effectively the employer's spokesperson").

[169] *Id.*

[170] *Id.*

[171] 680 F. Supp. 3d 1250 (D. Wyo. 2023).

[172] *Id.* at 1265.

[173] *Id.* at 1264.

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classroom or when communicating with parents."[174] But the court then applied *Garcetti*'s official duties test:

> At the first step, the Court has little trouble concluding that Mrs. Willey was being asked—indeed compelled—to speak pursuant to her official duties as a teacher, and not as a citizen on a matter of public concern. The Policy only implicates Mrs. Willey's interactions with students inside her classroom, and the communications she has pursuant to those duties with parents.[175]

Applying *Garcetti*'s official duties component, the court concluded that Mrs. Willey was unlikely to succeed on the merits of her compelled speech claim.[176] Notably, the court treated the official duties component of *Garcetti* for compelled speech claims raised by teachers as a practical analysis rather than a rigid examination of formal job descriptions: "[t]he critical question is whether the speech at issue is normally within the scope of an employee's duties, an inquiry that should be undertaken practically rather than with a 'blinkered focus on the terms of some formal and capacious written job description.'"[177] Ultimately, Justice Mann's interpretation along with the Wyoming court's application of *Garcetti* demonstrate that the official duties test is subject to different interpretations with respect to compelled speech claims by public educators.

CONCLUSION

The *Vlaming* decision marks a notable departure from traditional public employee speech doctrine by creating an exception to *Garcetti*'s official duties test in cases where an employer compels ideological speech. As this Note has explored, the compelled speech doctrine safeguards individual autonomy, limits government-imposed orthodoxy, and protects dissenting viewpoints. In the realm of public employment, compelled speech presents complex questions that often depend heavily on context. Although the U.S. Supreme Court has not yet ruled on whether mandatory use of preferred pronouns qualifies as unconstitutional compelled speech, some lower courts have held that such mandates fall outside *Garcetti*'s scope. As a result, public school teachers may assert valid free speech claims against school boards in these cases. Going forward, school board nondiscrimination policies are

[174] *Id.* at 1286.

[175] *Id.* at 1287.

[176] *Id.* at 1287–88.

[177] *Id.* at 1285 (citing Lane v. Franks, 573 U.S. 228, 233 (2014)).

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likely to come into conflict with teachers who decline to use preferred pronouns based on religious beliefs or matters of conscience.

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