No. 23-1989

IN THE

SUPREME COURT OF THE UNITED STATES

SHREY CAMERON,

Petitioner,

v.

BACALL TOWNSHIP SCHOOL DISTRICT,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PRINCETON UNIVERSITY MOOT COURT TOURNAMENT
SPRING 2024

Oral Argument Scheduled for April 20-21, 2024.

Important Notes/Trigger Warning:
The following document contains content with mention of drug use and sexual harassment.

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No. 23-1989

SUPREME COURT OF THE UNITED STATES

ORDER LIST

Certiorari Granted

September 21, 2023

23-1989

The petition for writ of certiorari is granted on the following two questions:

1. Whether the search conducted by Bacall Township School District violates the Fourth Amendment.

2. Whether the firing of Mr. Cameron because of his statements violates the First Amendment.

FACT PATTERN

On Thursday, November 10, 2022, Dolan Memorial High School suspended Rory "Ro" Anne for smoking marijuana during school-hours while on school property. Under Dolan Memorial High School's code of conduct, there is a no-tolerance policy for illegal drug use and possession on school grounds. In response to Ms. Anne's suspension, 30 students walked out of class and through the hallways on Friday, November 11, chanting slogans against the administration's decision to suspend Ms. Anne. The school's principal, Mr. Desmond Rogers, approached the group and asked them to return back to their classes. The entire group followed the principal's instructions.

Mr. Shrey Cameron is an AP US History teacher who has taught at Dolan Memorial High School for 15 years. He has an excellent reputation, both among his students and colleagues, for his teaching skills and his involvement in the school community. He also coaches Dolan Memorial's mock trial team, which consists of approximately 20 students. On November 12, the weekend following Ms. Ro Anne's suspension, Mr. Cameron was supervising the team's trip to a regional mock trial competition. After the conclusion of the tournament, fourteen of the twenty students attended an optional, unscheduled celebratory dinner at a local diner. The school did not fund the dinner, and everyone paid for their own meal. During the dinner, the students began to discuss the recent suspension and protest, in which a few students present participated. Mr. Cameron expressed his support for the protest and student Ms. Anne, saying: "I think what those students did was totally correct, and people need to do what it takes to express what they believe in. I don't think Ro Anne should have been suspended. History tells us that misguided zero-tolerance marijuana policies harm students, rather than addressing the root of the issue. This policy is old-fashioned and ignores the reality of modern-day marijuana use. It's not something to be villainized. Not talking about it only ignores what students need to know and could very well encounter in their day-to-day lives." Nothing else of note was said or occurred during the dinner.

The following Monday, November 14, graffiti of a cannabis leaf was found on the outside wall of the school. In addition, the words "Bring Back Ro" were spray-painted onto the wall, which was one of the chants that the protesters had shouted the previous week. A large crowd of students gathered around the vandalism, taking photos and talking amongst themselves, and several were late to class. School administrators had to intervene to direct students to their first period rooms. The school was in the process of investigating who vandalized school property.

On Monday morning, one student who attended the dinner went to Principal Rogers' office and told him about what Mr. Cameron said. During lunch period, Principal Rogers and the school security guard went to Mr. Cameron's classroom to investigate whether the teacher had any illicit drugs or evidence indicating he was involved with the earlier vandalism, given his prior remarks. In the classroom, they searched the entire room, including Mr. Cameron's

personal bag that was on top of his desk and his desk drawers. The school's code of conduct and employee contract neither discouraged nor encouraged teachers from bringing their personal belongings and storing them in the classroom. Principal Rogers and the guard did not find any evidence during their search. As the search was concluding, Mr. Cameron entered the room and asked what was going on. The principal explained that they'd been made aware of his comments to students over the weekend, and told him the reasons for the search.

Later, school officials were able to determine the identity of the two students who had vandalized school property from the school's security camera footage. These two students were on the school's mock trial team, and had been present at the dinner with Mr. Cameron on November 12. The students were suspended in violation of the school's code of conduct, which prohibits destruction or damage to school property.

As a result, the school district decided to fire Mr. Cameron because of his comments at the dinner. The school cited its code of conduct on illegal drug use and possession, which is a serious public health concern in Bacall Township and the school itself. In recent years, the school district has taken several steps to combat illicit drug use by students, citing statistics that 1 in 10 of its students have used illegal drugs in the past year.

Mr. Cameron brought suit against Bacall Township School District, where Dolan Memorial High School is located, in the United States District Court for the District of New Jersey under 42 U.S.C. § 1983 alleging violations of his First and Fourth Amendment rights. District Court Judge Burke-Lee ruled against the teacher. Mr. Cameron appealed to the United States Court of Appeals for the Third Circuit, which also ruled against Mr. Cameron. Mr. Cameron appealed to the United States Supreme Court, and the Supreme Court granted his writ of certiorari.

AUTHOR'S NOTE

The following suggestions will help you navigate the case packet and form your arguments.

– Read the fact pattern carefully, making note of key details that will be useful to each side.

– Develop a succinct explanation of both the fact pattern and your argument. While judges do receive basic information about the case packet, they might not be as familiar with the materials as you.

– Prepare enough material to fill most of the 20-minute oral argument, but make sure to allow enough time to answer judges' questions fully.

– Pay attention to each of the theories presented in the case law, even ones you do not plan to present. Judges might bring up such theories in their questions.

– Pay special attention to tensions, inconsistencies, or problems in the case law, and consider how the decision in the present case might resolve them. Try to see if you can draw distinctions that make seemingly contradictory decisions appear consistent.

– Consider the precedent that you're asking the judges to set. Does your argument rely on reaffirming established legal principles or the setting of new precedent? If your argument is adopted, how will it affect legal arguments in future cases?

– Consider the breadth of the ruling that you're asking the judges to make. Do you want the judges to make a sweeping ruling or to rule narrowly in favor of your client?

ACKNOWLEDGEMENTS

Special thanks to our head case writers (Desmond Lam and Sophie Glaser), to our case-writing team (Akash Bhowmick, Frances Brogan, Shailee Desai, Jimmy Fraley, Haley Hoffman, Aidan Moes, Josh Rogers, Sophia Vernon, and Riley Yowell), and to this year's tournament planning team (Abby Bacall, Akash Bhowmick, Frances Brogan, My Charles, Aum Dhruv, Jimmy Fraley, Sophie Glaser, Carson He, Haley Hoffman, Charlotte Selover, Rohan Sykora, Sophia Vernon, and Riley Yowell).

RELEVANT STATUTES

42 U.S. Code § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

CONSTITUTIONAL AMENDMENTS

Amendment I

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The following opinions are brief excerpts from the lower opinions written in the Third Circuit. We expect students to be familiar with the arguments made by both the majority and dissenting opinions. These opinions can serve as a starting point for students, but students are expected to go beyond the arguments in the opinions. These opinions are not binding, and if students wish to make completely different arguments not made here, students are free to do so and encouraged to think creatively.

No. 23-1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SHREY CAMERON, **Appellant,** **v.** **BACALL TOWNSHIP SCHOOL DISTRICT,** **Appellee.**	**Docket No. 23-123**

Before LAM, GLASER, DESAI, *Circuit Judges*.

LAM delivered the opinion of the Court, which was joined by DESAI.

Mr. Shrey Cameron was fired from his position as a teacher at Dolan Memorial High School. He brought suit under 42 U.S.C. § 1983 that Bacall Township School District violated his Fourth and First Amendment rights. The District Court ruled against him on both claims. For the reasons below, we affirm the District Court's ruling.

I

The Fourth Amendment protects people from unreasonable searches. These rights extend to government workplaces. *O'Connor v. Ortega* (1987). In *O'Connor*, whose holding was reaffirmed in *City of Ontario v. Quon* (2010), the plurality established a two-part test to determine whether the Fourth Amendment rights of a public employee are violated. First, we must determine whether the employee has a reasonable expectation of privacy. Second, we must determine if the search was conducted for a "noninvestigatory, work-related purpos[e]" or "investigatio[n] of work-related misconduct." If either of these conditions are present, we must determine whether the search was (1) "justified at its inception" and (2) "the measures adopted

are reasonably related to the objectives of the search and not excessively intrusive in light of the circumstances giving rise to the search."

Mr. Cameron did not have a reasonable expectation of privacy in the classroom generally. *O'Connor* recognized that "some government offices may be so open to fellow employees or the public that no expectation of privacy is reasonable." Students, teachers, and staff all freely enter and exit classrooms such as Mr. Cameron's classroom. Therefore, his Fourth Amendment claim fails as to the general search of his classroom.

O'Connor did recognize that when employees bring their own personal bags, "[t]he appropriate standard for a workplace search does not necessarily apply to a piece of closed personal luggage." Assuming that Mr. Cameron had a reasonable expectation of privacy to his own bag, we may turn to the second step of the analysis. The bag search was conducted to investigate work-related misconduct – the potential possession of illicit drugs in violation of the school's code of conduct. First, it was justified at its inception. The school had received information about Mr. Cameron's statements on drugs, and there had also been a recent graffiti of a cannabis leaf on school walls shortly thereafter. Although the search did not yield anything, they still had "reasonable grounds for suspecting that the search will turn up evidence." Second, the measures adopted were reasonably related to the objectives of the search and not excessively intrusive. To search for drugs, the school needed to search the bag, where drugs can commonly be hidden. Searching a bag on a desk, in public-view, is not excessively intrusive. In conclusion, the school district did not violate Mr. Cameron's Fourth Amendment rights.

II

The First Amendment protects the freedom of speech. But protections afforded to speech made by public employees are not unlimited. Under *Pickering v. Board of Education* (1968) and

Connick v. Myers (1983), we must follow a two-part test to determine whether a public employee's speech is protected. First, we must determine whether the employee "spoke as a citizen on a matter of public concern." Second, we must determine whether "the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public."

In this case, Mr. Cameron did not speak as a citizen on a matter of public concern. Under *Garcetti v. Ceballos* (2006), when statements are made "pursuant to official duties, the employees are not speaking as citizens for First Amendment purposes." Mr. Cameron made the offending statements during his official duties while acting as the supervisor of a school club during a school-sponsored trip. Although the statements were made at a non-school-sponsored and optional dinner where not all students of the club were in attendance, he was still supervising the students at the dinner. Therefore, his speech is not protected under the First Amendment.

Additionally, the school district has an adequate justification for treating the employee differently from any other member of the general public because of the dangers posed by drug use. *Morse v. Frederick* (2007) recognized that schools may punish student speech at school events when "that speech is reasonably viewed as promoting illegal drug use." Because teachers are even more likely to "bear the imprimatur of the school" than students, schools have even more of a reason to punish employee speech that promotes drug use. Not only did Mr. Cameron express his opposition to the suspension of a student who used illegal drugs, but he also opposed the school's code of conduct that prohibited illegal marijuana use. Because his pro-drug statements were made in the presence of students during a school-sponsored trip, the school was justified in treating him differently and therefore did not violate the First Amendment.

The judgment of the District Court is AFFIRMED.

GLASER, dissenting.

Mr. Shrey Cameron worked as a history teacher at Dolan Memorial High School and additionally coached its mock trial team. When his personal effects and desk were searched and he was subsequently fired for his comments pertaining to school policy, the school violated both his Fourth and First Amendment rights. For these reasons, I respectfully dissent.

I

Turning to the Fourth Amendment issue and the test established in *O'Connor v. Ortega*, I echo the majority opinion's conclusion that Mr. Cameron did not have an expectation of privacy in his classroom generally. However, Mr. Cameron had a reasonable expectation of privacy to his own bag, and a reasonable expectation of privacy to the drawers of his desk and their contents. Mr. Cameron did not share this desk with any other government employees or teachers, and Dolan Memorial High School did not present any evidence of a policy that discouraged their employees from keeping personal belongings and effects within their desks. Nothing about the school's "operational realities" suggests a decreased expectation of privacy in these two areas.

Addressing the second element of the *O'Connor* test, I find that the search by school officials of Mr. Cameron's desk and personal belongings was not justified at its inception. In order to meet this standard, the school must have had "reasonable grounds for suspecting that the search [was] necessary for a noninvestigatory work-related purpose." Although school officials had been made aware of Mr. Cameron's previous comments regarding the school's code of conduct and his opinion on the recent suspension of a student, nothing in the statements of Mr. Cameron themself suggested illicit drug use at school or intentions to later vandalize school property. For the majority to suggest that a teacher's comments and opinions at an informal dinner warranted this later intrusion into Mr. Cameron's privacy is to fully misconstrue past

decisions by this Court that have upheld the rights of public employees. In addition, the school's actions fail the second element of the test, as the measures adopted were not reasonably related to the objectives of the search. Had the school wished to determine whether Mr. Cameron had previously vandalized the school, they would have reasonably searched for video surveillance evidence (which was later collected) or questioned whether he had been seen earlier in the day near the school's outside walls. Searching one's personal bag without independent evidence that Mr. Cameron had brought illicit substances to school grounds, or had participated in the vandalism, is unnecessarily intrusive and cannot be found to be reasonably related. For these reasons, Bacall Township School District violated the Fourth Amendment.

II

Mr. Cameron was subsequently fired, not for any wrongdoing illuminated via the school's invasive search, but rather for statements made while at an informal, non-school-sanctioned dinner to students about a recent community event. The majority's assessment of the two-part test in *Pickering v. Board of Education* (1968) is tenuous at best. To begin with, Mr. Cameron was no longer acting in his official capacity as a teacher, nor a chaperone, at the dinner where the statements in question were made. His official duties at the tournament had concluded, and the event itself was not sanctioned or funded by the school. Nor did he employ official school-sanctioned methods of communication, such as a school-issued email address or by circulating a memo, as was the case in *Garcetti.* To follow the majority's logic would be to argue that teachers, whenever in the mere presence of students, are always acting in an official capacity. This goes beyond *Pickering* and expands the law beyond any reasonable enforceability.

Moreover, the comments themselves were of public concern. Mr. Cameron was speaking on a recent controversy in the community and commenting on recent school policy. *Pickering*

weighs the value of teacher opinions on statements concerning school policy. Although in *Pickering,* the issue at hand dealt with school board fund allotments, the logic follows. Justice Marshall wrote that "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 operations 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." In this case, teachers are likely to have informed and definite opinions on school policy and treatment of students by administrators. Thus, it is essential that they "speak out freely on such questions without fear of retaliatory dismissal." Mr. Cameron's comments referenced both school policy itself and historical context for drug laws, two issues both of public concern.

Following the precedent clarified in *Garcetti v. Ceballos* (2006), if the employee spoke as a citizen on a matter of public concern, we must turn to whether the "relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." In this case, school administrators did not have adequate justification. Mr. Cameron's comments need only face speech restrictions that are "necessary for their employers to operate efficiently and effectively." Nothing about the separate comments that Mr. Cameron made at a non-sponsored informal dinner directly prevents the efficient functioning of the school. Although the majority aims to apply the precedent in *Morse v. Frederick* (2007) to the actions of the school, namely that "schools may punish student speech at school events when 'that speech is reasonably viewed as promoting illegal drug use,'" its rationale is unfounded. Mr. Cameron's comments are required to be held to the standard of a public employee of the state, not the standard of students entrusted in a school's care. Without a direct causal link between Mr. Cameron's comments and damages to the efficient functioning of the school, the school has no

reason for treating Mr. Cameron like a student or for treating him differently than any member of the general public.

Mr. Cameron's statements themselves may have even had educational merit, in which case *Garcetti* would not apply and the school would have violated Mr. Cameron's First Amendment rights by terminating his employment. The 9th Circuit Court held that "Garcetti does not apply to "speech related to scholarship or teaching." If the majority believes that Mr. Cameron was acting in his capacity as a teacher during this informal dinner, then it is possible his statements had some educational value and purpose. His references to historical drug policy support this claim. I note that the speech of Mr. Cameron in discussing recent actions taken by school administrators and past historical drug policies in the United States is markedly different from the student speech present in *Morse*, and as such has educational merit.

In summary, the school was not justified in treating Mr. Cameron differently than members of the general public, nor was it justified in restricting his speech to a similar extent as it is permitted to restrict student speech. Thus, Bacall Township School District violated Mr. Cameron's First Amendment rights.

For these reasons, I respectfully dissent.

No. 23-1989

105 S.Ct. 733
Supreme Court of the United States

NEW JERSEY
v.
T.L.O.

No. 83–712.
|
Decided Jan. 15, 1985.

Opinion

Justice WHITE delivered the opinion of the Court.

We granted certiorari in this case to examine the appropriateness of the exclusionary rule as a remedy for searches carried out in violation of the Fourth Amendment by public school authorities. Our consideration of the proper application of the Fourth Amendment to the public schools, however, has led us to conclude that the search that gave rise to the case now before us did not violate the Fourth Amendment. Accordingly, we here address only the questions of the proper standard for assessing the legality of searches conducted by public school officials and the application of that standard to the facts of this case.

I

On March 7, 1980, a teacher at Piscataway High School in Middlesex County, N.J., discovered two girls smoking in a lavatory. One of the two girls was the respondent T.L.O., who at that time was a 14-year-old high school freshman. Because smoking in the lavatory was a violation of a school rule, the teacher took the two girls to the Principal's office, where they met with Assistant Vice Principal Theodore Choplick. In response to questioning by Mr. Choplick, T.L.O.'s companion admitted that she had violated the rule. T.L.O., however, denied that she had been smoking in the lavatory and claimed that she did not smoke at all.

Mr. Choplick asked T.L.O. to come into his private office and demanded to see her purse. Opening the purse, he found a pack of cigarettes, which he removed from the purse and held before T.L.O. as he accused her of having lied to him. As he reached into the purse for the cigarettes, Mr. Choplick also noticed a package of cigarette rolling papers. In his experience, possession of rolling papers by high school students was closely associated with the use of marihuana. Suspecting that a closer examination of the purse might yield further evidence of drug use, Mr. Choplick proceeded to search the purse thoroughly. The search revealed a small amount of marihuana, a pipe, a number of empty plastic bags, a substantial quantity of money in one-dollar bills, an index card that appeared to be a list of students who owed T.L.O. money, and two letters that implicated T.L.O. in marihuana dealing.

Mr. Choplick notified T.L.O.'s mother and the police, and turned the evidence of drug dealing over to the police. At the request of the police, T.L.O.'s mother took her daughter to police headquarters, where T.L.O. confessed that she had been selling marihuana at the high school. On the basis of the confession and the evidence seized by Mr. Choplick, the State brought delinquency charges against T.L.O. in the Juvenile and Domestic Relations Court of Middlesex County.[1] Contending that Mr. Choplick's search of her purse violated the Fourth Amendment, T.L.O. moved to suppress the evidence found in her purse as well as her confession, which, she argued, was tainted by the allegedly unlawful search. The Juvenile Court denied the motion to suppress. *State ex rel. T.L.O.,* 178 N.J.Super. 329, 428 A.2d 1327 (1980). Although the court concluded that the Fourth Amendment did apply to searches carried out by school officials, it held that

> "a school official may properly conduct a search of a student's person if the official has a reasonable suspicion that a crime has been or is in the process of being committed, *or* reasonable cause to believe that the search is necessary to maintain school discipline or enforce school policies." *Id.,* 178 N.J.Super., at 341, 428 A.2d, at 1333 (emphasis in original).

Applying this standard, the court concluded that the search conducted by Mr. Choplick was a reasonable one. The initial decision to open the purse was justified by Mr. Choplick's well-founded suspicion that T.L.O. had violated the rule forbidding smoking in the lavatory. Once the purse was open, evidence of marihuana violations was in plain view, and Mr. Choplick was entitled to conduct a thorough search to determine the nature and extent of T.L.O.'s drug-related activities. *Id.,* 178 N.J.Super., at 343, 428 A.2d, at 1334. Having denied the motion to suppress, the court on March 23, 1981, found T.L.O. to be a delinquent and on January 8, 1982, sentenced her to a year's probation.

On appeal from the final judgment of the Juvenile Court, a divided Appellate Division affirmed the trial court's finding that there had been no Fourth Amendment violation, but vacated the adjudication of delinquency and remanded for a determination whether T.L.O. had knowingly and voluntarily waived her Fifth Amendment rights before confessing. *State ex rel. T.L.O.,* 185 N.J.Super. 279, 448 A.2d 493 (1982). T.L.O. appealed the Fourth Amendment ruling, and the Supreme Court of New Jersey reversed the judgment of the Appellate Division and ordered the suppression of the evidence found in T.L.O.'s purse. *State ex rel. T.L.O.,* 94 N.J. 331, 463 A.2d 934 (1983).

The New Jersey Supreme Court agreed with the lower courts that the Fourth Amendment applies to searches conducted by school officials. The court also rejected the State of New Jersey's argument that the exclusionary rule should not be employed to prevent the use in juvenile proceedings of evidence unlawfully seized by school officials. Declining to consider whether applying the rule to the fruits of searches by school officials would have any deterrent value, the court held simply that the precedents of this Court establish that "if an official search violates constitutional rights, the evidence is not admissible in criminal proceedings." *Id.,* 94 N.J., at 341, 463 A.2d, at 939 (footnote omitted).

With respect to the question of the legality of the search before it, the court agreed with the Juvenile Court that a warrantless search by a school official does not violate the Fourth Amendment so long as the official "has reasonable grounds to believe that a student possesses evidence of illegal activity or activity that would interfere with school discipline and order." *Id.,* 94 N.J., at 346, 463 A.2d, at 941–942. However, the court, with two justices dissenting, sharply disagreed with the Juvenile Court's conclusion that the search of the purse was reasonable. According to the majority, the contents of T.L.O.'s purse had no bearing on the accusation against T.L.O., for possession of cigarettes (as opposed to smoking them in the lavatory) did not violate school rules, and a mere desire for evidence that would impeach T.L.O.'s claim that she did not smoke cigarettes could not justify the search. Moreover, even if a reasonable suspicion that T.L.O. had cigarettes in her purse would justify a search, Mr. Choplick had no such suspicion, as no one had furnished him with any specific information that there were cigarettes in the purse. Finally, leaving aside the question whether Mr. Choplick was justified in opening the purse, the court held that the evidence of drug use that he saw inside did not justify the extensive "rummaging" through T.L.O.'s papers and effects that followed. *Id.,* 94 N.J., at 347, 463 A.2d, at 942–943.

We granted the State of New Jersey's petition for certiorari. 464 U.S. 991, 104 S.Ct. 480, 78 L.Ed.2d 678 (1983). Although the State had argued in the Supreme Court of New Jersey that the search of T.L.O.'s purse did not violate the Fourth Amendment, the petition for certiorari raised only the question whether the exclusionary rule should operate to bar consideration in juvenile delinquency proceedings of evidence unlawfully seized by a school official without the involvement of law enforcement officers. When this case was first argued last Term, the State conceded for the purpose of argument that the standard devised by the New Jersey Supreme Court for determining the legality

of school searches was appropriate and that the court had correctly applied that standard; the State contended only that the remedial purposes of the exclusionary rule were not well served by applying it to searches conducted by public authorities not primarily engaged in law enforcement.

Although we originally granted certiorari to decide the issue of the appropriate remedy in juvenile court proceedings for unlawful school searches, our doubts regarding the wisdom of deciding that question in isolation from the broader question of what limits, if any, the Fourth Amendment places on the activities of school authorities prompted us to order reargument on that question.[2] Having heard argument on the legality of the search of T.L.O.'s purse, we are satisfied that the search did not violate the Fourth Amendment.[3]

II

In determining whether the search at issue in this case violated the Fourth Amendment, we are faced initially with the question whether that Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials. We hold that it does.

It is now beyond dispute that "the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers." *Elkins v. United States,* 364 U.S. 206, 213, 80 S.Ct. 1437, 1442, 4 L.Ed.2d 1669 (1960); accord, *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); *Wolf v. Colorado,* 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949). Equally indisputable is the proposition that the Fourteenth Amendment protects the rights of students against encroachment by public school officials:

> "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *West Virginia State Bd. of Ed. v. Barnette,* 319 U.S. 624, 637, 63 S.Ct. 1178, 1185, 87 L.Ed. 1628 (1943).

These two propositions—that the Fourth Amendment applies to the States through the Fourteenth Amendment, and that the actions of public school officials are subject to the limits placed on state action by the Fourteenth Amendment—might appear sufficient to answer the suggestion that the Fourth Amendment does not proscribe unreasonable searches by school officials. On reargument, however, the State of New Jersey has argued that the history of the Fourth Amendment indicates that the Amendment was intended to regulate only searches and seizures carried out by law enforcement officers; accordingly, although public school officials are concededly state agents for purposes of the Fourteenth Amendment, the Fourth Amendment creates no rights enforceable against them.[4]

It may well be true that the evil toward which the Fourth Amendment was primarily directed was the resurrection of the pre-Revolutionary practice of using general warrants or "writs of assistance" to authorize searches for contraband by officers of the Crown. See *United States v. Chadwick,* 433 U.S. 1, 7–8, 97 S.Ct. 2476, 2481, 53 L.Ed.2d 538 (1977); *Boyd v. United States,* 116 U.S. 616, 624–629, 6 S.Ct. 524, 528–531, 29 L.Ed. 746 (1886). But this Court has never limited the Amendment's prohibition on unreasonable searches and seizures to operations conducted by the police. Rather, the Court has long spoken of the Fourth Amendment's strictures as restraints imposed upon "governmental action"—that is, "upon the activities of sovereign authority." *Burdeau v. McDowell,* 256 U.S. 465, 475, 41 S.Ct. 574, 576, 65 L.Ed. 1048 (1921). Accordingly, we have held the Fourth Amendment applicable to the activities of civil as well as criminal authorities: building inspectors, see *Camara v. Municipal Court,* 387 U.S. 523, 528, 87 S.Ct. 1727, 1730, 18 L.Ed.2d 930 (1967), Occupational Safety and Health Act inspectors, see *Marshall v. Barlow's Inc.,* 436 U.S. 307, 312–313, 98 S.Ct. 1816, 1820, 56 L.Ed.2d 305 (1978), and

even firemen entering privately owned premises to battle a fire, see *Michigan v. Tyler,* 436 U.S. 499, 506, 98 S.Ct. 1942, 1948, 56 L.Ed.2d 486 (1978), are all subject to the restraints imposed by the Fourth Amendment. As we observed in *Camara v. Municipal Court, supra,* "[t]he basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." 387 U.S., at 528, 87 S.Ct., at 1730. Because the individual's interest in privacy and personal security "suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards," *Marshall v. Barlow's, Inc., supra,* 436 U.S., at 312–313, 98 S.Ct., at 1820, it would be "anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." *Camara v. Municipal Court, supra,* 387 U.S., at 530, 87 S.Ct., at 1732.

Notwithstanding the general applicability of the Fourth Amendment to the activities of civil authorities, a few courts have concluded that school officials are exempt from the dictates of the Fourth Amendment by virtue of the special nature of their authority over schoolchildren. See, *e.g., R.C.M. v. State,* 660 S.W.2d 552 (Tex.App.1983). Teachers and school administrators, it is said, act *in loco parentis* in their dealings with students: their authority is that of the parent, not the State, and is therefore not subject to the limits of the Fourth Amendment. *Ibid.*

Such reasoning is in tension with contemporary reality and the teachings of this Court. We have held school officials subject to the commands of the First Amendment, see *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), and the Due Process Clause of the Fourteenth Amendment, see *Goss v. Lopez,* 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975). If school authorities are state actors for purposes of the constitutional guarantees of freedom of expression and due process, it is difficult to understand why they should be deemed to be exercising parental rather than public authority when conducting searches of their students. More generally, the Court has recognized that "the concept of parental delegation" as a source of school authority is not entirely "consonant with compulsory education laws." *Ingraham v. Wright,* 430 U.S. 651, 662, 97 S.Ct. 1401, 1407, 51 L.Ed.2d 711 (1977). Today's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies. See, *e.g.,* the opinion in *State ex rel. T.L.O.,* 94 N.J., at 343, 463 A.2d, at 934, 940, describing the New Jersey statutes regulating school disciplinary policies and establishing the authority of school officials over their students. In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment.

III

To hold that the Fourth Amendment applies to searches conducted by school authorities is only to begin the inquiry into the standards governing such searches. Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place. The determination of the standard of reasonableness governing any specific class of searches requires "balancing the need to search against the invasion which the search entails." *Camara v. Municipal Court, supra,* 387 U.S., at 536–537, 87 S.Ct., at 1735. On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order.

We have recognized that even a limited search of the person is a substantial invasion of privacy. *Terry v. Ohio,* 392 U.S. 1, 24–25, 88 S.Ct. 1868, 1881–1882, 20 L.Ed.2d 889 (1967). We have also recognized that searches of closed items of personal luggage are intrusions on protected privacy interests, for "the Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view." *United States v. Ross,* 456 U.S. 798, 822–823, 102 S.Ct. 2157, 2171, 72 L.Ed.2d 572 (1982). A search of a child's person or of a closed purse

or other bag carried on her person,[5] no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy.

Of course, the Fourth Amendment does not protect subjective expectations of privacy that are unreasonable or otherwise "illegitimate." See, *e.g., Hudson v. Palmer,* 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984); *Rawlings v. Kentucky,* 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980). To receive the protection of the Fourth Amendment, an expectation of privacy must be one that society is "prepared to recognize as legitimate." *Hudson v. Palmer, supra,* 468 U.S., at 526, 104 S.Ct., at 3200. The State of New Jersey has argued that because of the pervasive supervision to which children in the schools are necessarily subject, a child has virtually no legitimate expectation of privacy in articles of personal property "unnecessarily" carried into a school. This argument has two factual premises: (1) the fundamental incompatibility of expectations of privacy with the maintenance of a sound educational environment; and (2) the minimal interest of the child in bringing any items of personal property into the school. Both premises are severely flawed.

Although this Court may take notice of the difficulty of maintaining discipline in the public schools today, the situation is not so dire that students in the schools may claim no legitimate expectations of privacy. We have recently recognized that the need to maintain order in a prison is such that prisoners retain no legitimate expectations of privacy in their cells, but it goes almost without saying that "[t]he prisoner and the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration." *Ingraham v. Wright, supra,* 430 U.S., at 669, 97 S.Ct., at 1411. We are not yet ready to hold that the schools and the prisons need be equated for purposes of the Fourth Amendment.

Nor does the State's suggestion that children have no legitimate need to bring personal property into the schools seem well anchored in reality. Students at a minimum must bring to school not only the supplies needed for their studies, but also keys, money, and the necessaries of personal hygiene and grooming. In addition, students may carry on their persons or in purses or wallets such nondisruptive yet highly personal items as photographs, letters, and diaries. Finally, students may have perfectly legitimate reasons to carry with them articles of property needed in connection with extracurricular or recreational activities. In short, schoolchildren may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds.

Against the child's interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds. Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems. See generally 1 NIE, U.S. Dept. of Health, Education and Welfare, Violent Schools—Safe Schools: The Safe School Study Report to the Congress (1978). Even in schools that have been spared the most severe disciplinary problems, the preservation of order and a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult. "Events calling for discipline are frequent occurrences and sometimes require immediate, effective action." *Goss v. Lopez,* 419 U.S., at 580, 95 S.Ct., at 739. Accordingly, we have recognized that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship. See *id.,* at 582–583, 95 S.Ct., at 740; *Ingraham v. Wright,* 430 U.S., at 680–682, 97 S.Ct., at 1417–1418.

How, then, should we strike the balance between the schoolchild's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place? It is evident that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject.

The warrant requirement, in particular, is unsuited to the school environment: requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools. Just as we have in other cases dispensed with the warrant requirement when "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search," *Camara v. Municipal Court,* 387 U.S., at 532–533, 87 S.Ct., at 1733, we hold today that school officials need not obtain a warrant before searching a student who is under their authority.

The school setting also requires some modification of the level of suspicion of illicit activity needed to justify a search. Ordinarily, a search—even one that may permissibly be carried out without a warrant—must be based upon "probable cause" to believe that a violation of the law has occurred. See, *e.g., Almeida-Sanchez v. United States,* 413 U.S. 266, 273, 93 S.Ct. 2535, 2540, 37 L.Ed.2d 596 (1973); *Sibron v. New York,* 392 U.S. 40, 62–66, 88 S.Ct. 1889, 1902–1904, 20 L.Ed.2d 917 (1968). However, "probable cause" is not an irreducible requirement of a valid search. The fundamental command of the Fourth Amendment is that searches and seizures be reasonable, and although "both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, ... in certain limited circumstances neither is required." *Almeida-Sanchez v. United States, supra,* 413 U.S., at 277, 93 S.Ct., at 2541 (POWELL, J., concurring). Thus, we have in a number of cases recognized the legality of searches and seizures based on suspicions that, although "reasonable," do not rise to the level of probable cause. See, *e.g., Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *United States v. Brignoni-Ponce,* 422 U.S. 873, 881, 95 S.Ct. 2574, 2580, 45 L.Ed.2d 607 (1975); *Delaware v. Prouse,* 440 U.S. 648, 654–655, 99 S.Ct. 1391, 1396, 59 L.Ed.2d 660 (1979); *United States v. Martinez-Fuerte,* 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976); cf. *Camara v. Municipal Court, supra,* 387 U.S., at 534–539, 87 S.Ct., at 1733–1736. Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard.

We join the majority of courts that have examined this issue[6] in concluding that the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider "whether the ... action was justified at its inception," *Terry v. Ohio,* 392 U.S., at 20, 88 S.Ct., at 1879; second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place," *ibid.* Under ordinary circumstances, a search of a student by a teacher or other school official[7] will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.[8] Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.[9]

This standard will, we trust, neither unduly burden the efforts of school authorities to maintain order in their schools nor authorize unrestrained intrusions upon the privacy of schoolchildren. By focusing attention on the question of reasonableness, the standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense. At the same time, the reasonableness standard should ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools.

IV

There remains the question of the legality of the search in this case. We recognize that the "reasonable grounds" standard applied by the New Jersey Supreme Court in its consideration of this question is not substantially different from the standard that we have adopted today. Nonetheless, we believe that the New Jersey court's application of that standard to strike down the search of T.L.O.'s purse reflects a somewhat crabbed notion of reasonableness. Our review of the facts surrounding the search leads us to conclude that the search was in no sense unreasonable for Fourth Amendment purposes.[10]

The incident that gave rise to this case actually involved two separate searches, with the first—the search for cigarettes—providing the suspicion that gave rise to the second the search for marihuana. Although it is the fruits of the second search that are at issue here, the validity of the search for marihuana must depend on the reasonableness of the initial search for cigarettes, as there would have been no reason to suspect that T.L.O. possessed marihuana had the first search not taken place. Accordingly, it is to the search for cigarettes that we first turn our attention.

The New Jersey Supreme Court pointed to two grounds for its holding that the search for cigarettes was unreasonable. First, the court observed that possession of cigarettes was not in itself illegal or a violation of school rules. Because the contents of T.L.O.'s purse would therefore have "no direct bearing on the infraction" of which she was accused (smoking in a lavatory where smoking was prohibited), there was no reason to search her purse.[11] Second, even assuming that a search of T.L.O.'s purse might under some circumstances be reasonable in light of the accusation made against T.L.O., the New Jersey court concluded that Mr. Choplick in this particular case had no reasonable grounds to suspect that T.L.O. had cigarettes in her purse. At best, according to the court, Mr. Choplick had "a good hunch." 94 N.J., at 347, 463 A.2d, at 942.

Both these conclusions are implausible. T.L.O. had been accused of smoking, and had denied the accusation in the strongest possible terms when she stated that she did not smoke at all. Surely it cannot be said that under these circumstances, T.L.O.'s possession of cigarettes would be irrelevant to the charges against her or to her response to those charges. T.L.O.'s possession of cigarettes, once it was discovered, would both corroborate the report that she had been smoking and undermine the credibility of her defense to the charge of smoking. To be sure, the discovery of the cigarettes would not prove that T.L.O. had been smoking in the lavatory; nor would it, strictly speaking, necessarily be inconsistent with her claim that she did not smoke at all. But it is universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed.Rule Evid. 401. The relevance of T.L.O.'s possession of cigarettes to the question whether she had been smoking and to the credibility of her denial that she smoked supplied the necessary "nexus" between the item searched for and the infraction under investigation. See *Warden v. Hayden,* 387 U.S. 294, 306–307, 87 S.Ct. 1642, 1649–1650, 18 L.Ed.2d 782 (1967). Thus, if Mr. Choplick in fact had a reasonable suspicion that T.L.O. had cigarettes in her purse, the search was justified despite the fact that the cigarettes, if found, would constitute "mere evidence" of a violation. *Ibid.*

Of course, the New Jersey Supreme Court also held that Mr. Choplick had no reasonable suspicion that the purse would contain cigarettes. This conclusion is puzzling. A teacher had reported that T.L.O. was smoking in the lavatory. Certainly this report gave Mr. Choplick reason to suspect that T.L.O. was carrying cigarettes with her; and if she did have cigarettes, her purse was the obvious place in which to find them. Mr. Choplick's suspicion that there were cigarettes in the purse was not an "inchoate and unparticularized suspicion or 'hunch,' " *Terry v. Ohio,* 392 U.S., at 27, 88 S.Ct., at 1883; rather, it was the sort of "common-sense conclusio[n] about human behavior" upon which "practical people"—including government officials—are entitled to rely. *United States v. Cortez,* 449 U.S. 411, 418, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981). Of course, even if the teacher's report were true, T.L.O. *might* not have had a pack of cigarettes with her; she might have borrowed a cigarette from someone else or have been sharing a cigarette with another student. But the requirement of reasonable suspicion is not a requirement of absolute

certainty: "sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment ...." *Hill v. California,* 401 U.S. 797, 804, 91 S.Ct. 1106, 1111, 28 L.Ed.2d 484 (1971). Because the hypothesis that T.L.O. was carrying cigarettes in her purse was itself not unreasonable, it is irrelevant that other hypotheses were also consistent with the teacher's accusation. Accordingly, it cannot be said that Mr. Choplick acted unreasonably when he examined T.L.O.'s purse to see if it contained cigarettes.[12]

Our conclusion that Mr. Choplick's decision to open T.L.O.'s purse was reasonable brings us to the question of the further search for marihuana once the pack of cigarettes was located. The suspicion upon which the search for marihuana was founded was provided when Mr. Choplick observed a package of rolling papers in the purse as he removed the pack of cigarettes. Although T.L.O. does not dispute the reasonableness of Mr. Choplick's belief that the rolling papers indicated the presence of marihuana, she does contend that the scope of the search Mr. Choplick conducted exceeded permissible bounds when he seized and read certain letters that implicated T.L.O. in drug dealing. This argument, too, is unpersuasive. The discovery of the rolling papers concededly gave rise to a reasonable suspicion that T.L.O. was carrying marihuana as well as cigarettes in her purse. This suspicion justified further exploration of T.L.O.'s purse, which turned up more evidence of drug-related activities: a pipe, a number of plastic bags of the type commonly used to store marihuana, a small quantity of marihuana, and a fairly substantial amount of money. Under these circumstances, it was not unreasonable to extend the search to a separate zippered compartment of the purse; and when a search of that compartment revealed an index card containing a list of "people who owe me money" as well as two letters, the inference that T.L.O. was involved in marihuana trafficking was substantial enough to justify Mr. Choplick in examining the letters to determine whether they contained any further evidence. In short, we cannot conclude that the search for marihuana was unreasonable in any respect.

Because the search resulting in the discovery of the evidence of marihuana dealing by T.L.O. was reasonable, the New Jersey Supreme Court's decision to exclude that evidence from T.L.O.'s juvenile delinquency proceedings on Fourth Amendment grounds was erroneous. Accordingly, the judgment of the Supreme Court of New Jersey is *Reversed.*

Footnotes

1 T.L.O. also received a 3-day suspension from school for smoking cigarettes in a nonsmoking area and a 7-day suspension for possession of marihuana. On T.L.O.'s motion, the Superior Court of New Jersey, Chancery Division, set aside the 7-day suspension on the ground that it was based on evidence seized in violation of the Fourth Amendment. *(T.L.O.) v. Piscataway Bd. of Ed.,* No. C.2865–79 (Super.Ct.N.J., Ch.Div., Mar. 31, 1980). The Board of Education apparently did not appeal the decision of the Chancery Division.

2 State and federal courts considering these questions have struggled to accommodate the interests protected by the Fourth Amendment and the interest of the States in providing a safe environment conducive to education in the public schools. Some courts have resolved the tension between these interests by giving full force to one or the other side of the balance. Thus, in a number of cases courts have held that school officials conducting in-school searches of students are private parties acting *in loco parentis* and are therefore not subject to the constraints of the Fourth Amendment. See, *e.g., D.R.C. v. State,* 646 P.2d 252 (Alaska App.1982); *In re G.,* 11 Cal.App.3d 1193, 90 Cal.Rptr. 361 (1970); *In re Donaldson,* 269 Cal.App.2d 509, 75 Cal.Rptr. 220 (1969); *R.C.M. v. State,* 660 S.W.2d 552 (Tex.App.1983); *Mercer v. State,* 450 S.W.2d 715 (Tex.Civ.App.1970). At least one court has held, on the other hand, that the Fourth Amendment applies in full to in-school searches by school officials and that a search conducted without probable cause is unreasonable, see *State v. Mora,* 307 So.2d 317 (La.), vacated, 423 U.S. 809, 96 S.Ct. 20, 46 L.Ed.2d 29 (1975), on remand, 330 So.2d 900 (La.1976); others have held or suggested that the probable-cause standard is applicable at least where the police are involved in a search, see *M. v. Board of Ed. Ball-Chatham Community Unit School Dist. No. 5,* 429 F.Supp. 288, 292 (SD Ill.1977); *Picha v. Wielgos,* 410 F.Supp. 1214, 1219–1221 (ND Ill.1976); *State v. Young,* 234 Ga. 488, 498, 216 S.E.2d 586, 594 (1975); or where the search is highly intrusive, see *M.M. v. Anker,* 607 F.2d 588, 589 (CA2 1979).

The majority of courts that have addressed the issue of the Fourth Amendment in the schools have, like the Supreme Court of New Jersey in this case, reached a middle position: the Fourth Amendment applies to searches conducted by school authorities, but the special needs of the school environment require assessment of the legality of such searches against a standard less exacting than that of probable cause. These courts have, by and large, upheld warrantless searches by school authorities provided that they are supported by a reasonable suspicion that the search will uncover evidence of an infraction of school disciplinary rules or a violation of the law. See, *e.g., Tarter v. Raybuck,* 742 F.2d 977 (CA6 1984); *Bilbrey v. Brown,* 738 F.2d 1462 (CA9 1984); *Horton v. Goose Creek Independent School Dist.,* 690 F.2d 470 (CA5 1982); *Bellnier v. Lund,* 438 F.Supp. 47 (NDNY 1977); *M. v. Board of Ed. Ball-Chatham Community Unit School Dist. No. 5, supra; In re W.,* 29 Cal.App.3d 777, 105 Cal.Rptr. 775 (1973); *State v. Baccino,* 282 A.2d 869 (Del.Super.1971); *State v. D.T.W.,* 425 So.2d 1383 (Fla.App.1983); *State v. Young, supra; In re J.A.,* 85 Ill.App.3d 567, 40 Ill.Dec. 755, 406 N.E.2d 958 (1980); *People v. Ward,* 62 Mich.App. 46, 233 N.W.2d 180 (1975); *Doe v. State,* 88 N.M. 347, 540 P.2d 827 (App.1975); *People v. D.,* 34 N.Y.2d 483, 358 N.Y.S.2d 403, 315 N.E.2d 466 (1974); *State v. McKinnon,* 88 Wash.2d 75, 558 P.2d 781 (1977); *In re L.L.,* 90 Wis.2d 585, 280 N.W.2d 343 (App.1979).

Although few have considered the matter, courts have also split over whether the exclusionary rule is an appropriate remedy for Fourth Amendment violations committed by school authorities. The Georgia courts have held that although the Fourth Amendment applies to the schools, the exclusionary rule does not. See, *e.g., State v. Young, supra; State v. Lamb,* 137 Ga.App. 437, 224 S.E.2d 51 (1976). Other jurisdictions have applied the rule to exclude the fruits of unlawful school searches from criminal trials and delinquency proceedings. See *State v. Mora, supra; People v. D., supra.*

3 In holding that the search of T.L.O.'s purse did not violate the Fourth Amendment, we do not implicitly determine that the exclusionary rule applies to the fruits of unlawful searches conducted by school authorities. The question whether evidence should be excluded from a criminal proceeding involves two discrete inquiries: whether the evidence was seized in violation of the Fourth Amendment, and whether the exclusionary rule is the appropriate remedy for the violation. Neither question is logically antecedent to the other, for a negative answer to either question is sufficient to dispose of the case. Thus, our determination that the search at issue in this case did not violate the Fourth Amendment implies no particular resolution of the question of the applicability of the exclusionary rule.

4 Cf. *Ingraham v. Wright,* 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977) (holding that the Eighth Amendment's prohibition of cruel and unusual punishment applies only to punishments imposed after criminal convictions and hence does not apply to the punishment of schoolchildren by public school officials).

5 We do not address the question, not presented by this case, whether a schoolchild has a legitimate expectation of privacy in lockers, desks, or other school property provided for the storage of school supplies. Nor do we express any opinion on the standards (if any) governing searches of such areas by school officials or by other public authorities acting at the request of school officials. Compare *Zamora v. Pomeroy,* 639 F.2d 662, 670 (CA10 1981) ("Inasmuch as the school had assumed joint control of the locker it cannot be successfully maintained that the school did not have a right to inspect it"), and *People v. Overton,* 24 N.Y.2d 522, 249 N.E.2d 366, 301 N.Y.S.2d 479 (1969) (school administrators have power to consent to search of a student's locker), with *State v. Engerud,* 94 N.J. 331, 348, 463 A.2d 934, 943 (1983) ("We are satisfied that in the context of this case the student had an expectation of privacy in the contents of his locker.... For the four years of high school, the school locker is a home away from home. In it the student stores the kind of personal 'effects' protected by the Fourth Amendment").

6 See cases cited in n. 2, *supra.*

7 We here consider only searches carried out by school authorities acting alone and on their own authority. This case does not present the question of the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies, and we express no opinion on that question. Cf. *Picha v. Wielgos,* 410 F.Supp. 1214, 1219–1221 (ND Ill.1976) (holding probable-cause standard applicable to searches involving the police).

8 We do not decide whether individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities. In other contexts, however, we have held that although "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure[,] ... the Fourth Amendment imposes no irreducible requirement of such suspicion." *United States v. Martinez-Fuerte,* 428 U.S. 543, 560–561, 96 S.Ct. 3074, 3084, 49 L.Ed.2d 1116 (1976). See also *Camara v. Municipal Court,* 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where "other safeguards" are available "to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.' " *Delaware v. Prouse,* 440 U.S. 648, 654–655, 99 S.Ct. 1391, 1396–1397, 59 L.Ed.2d 660 (1979) (citation omitted). Because the search of T.L.O.'s purse was based upon an individualized suspicion that she had violated school rules, see *infra,* at 745 – 746, we need not consider the circumstances that might justify school authorities in conducting searches unsupported by individualized suspicion.

9 Our reference to the nature of the infraction is not intended as an endorsement of Justice STEVENS' suggestion that some rules regarding student conduct are by nature too "trivial" to justify a search based upon reasonable suspicion. See *post,* at 762–765. We are unwilling to adopt a standard under which the legality of a search is dependent upon a judge's evaluation of the relative importance of various school rules. The maintenance of discipline in the schools requires not only that students be restrained from assaulting one another, abusing drugs and alcohol, and committing other crimes, but also that students conform themselves to the standards of conduct prescribed by school authorities. We have "repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 507, 89 S.Ct. 733, 737, 21 L.Ed.2d 731 (1969). The promulgation of a rule forbidding specified conduct presumably reflects a judgment on the part of school officials that such conduct is destructive of school order or of a proper educational environment. Absent any suggestion that the rule violates some substantive constitutional guarantee, the courts should, as a general matter, defer to that judgment and refrain from attempting to distinguish between rules that are important to the preservation of order in the schools and rules that are not.

10 Of course, New Jersey may insist on a more demanding standard under its own Constitution or statutes. In that case, its courts would not purport to be applying the Fourth Amendment when they invalidate a search.

11 Justice STEVENS interprets these statements as a holding that enforcement of the school's smoking regulations was not sufficiently related to the goal of maintaining discipline or order in the school to justify a search under the standard adopted by the New Jersey court. See *post,* at 765. We do not agree that this is an accurate characterization of the New Jersey Supreme Court's opinion. The New Jersey court did not hold that the school's smoking rules were unrelated to the goal of maintaining discipline or order, nor did it suggest that a search that would produce evidence bearing directly on an accusation that a student had violated the smoking rules would be impermissible under the court's reasonable-suspicion standard; rather, the court concluded that any evidence a search of T.L.O.'s purse was likely to produce would not have a sufficiently direct bearing on the infraction to justify a search—a conclusion with which we cannot agree for the reasons set forth *infra,* at 745–746. JUSTICE STEVENS' suggestion that the New Jersey Supreme Court's decision rested on the perceived triviality of the smoking infraction appears to be a reflection of his own views rather than those of the New Jersey court.

12 T.L.O. contends that even if it was reasonable for Mr. Choplick to open her purse to look for cigarettes, it was not reasonable for him to reach in and take the cigarettes out of her purse once he found them. Had he not removed the cigarettes from the purse, she asserts, he would not have observed the rolling papers that suggested the presence of marihuana, and the search for marihuana could not have taken place. T.L.O.'s argument is based on the fact that the cigarettes were not "contraband," as no school rule forbade her to have them. Thus, according to T.L.O., the cigarettes were not subject to seizure or confiscation by school authorities, and Mr. Choplick was not entitled to take them out of T.L.O.'s purse regardless of whether he was entitled to peer into the purse to see if they were there. Such hairsplitting argumentation has no place in an inquiry addressed to the issue of reasonableness. If Mr. Choplick could permissibly search T.L.O.'s purse for cigarettes, it hardly seems reasonable to suggest that his natural reaction to finding them—picking them up—could be a constitutional violation. We find that neither in opening the purse nor in reaching into it to remove the cigarettes did Mr. Choplick violate the Fourth Amendment.

No. 23-1989

107 S.Ct. 1492
Supreme Court of the United States

Dennis M. O'CONNOR, et al., Petitioners
v.
Magno J. ORTEGA.

No. 85–530
||
Decided March 31, 1987.

O'CONNOR, J., announced the judgment of the Court and delivered an opinion in which REHNQUIST, C.J., and WHITE and POWELL, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, *post,* p. ——. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post,* p. ——.

Opinion

Justice O'CONNOR announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE, Justice WHITE, and Justice POWELL join.

This suit under 42 U.S.C. § 1983 presents two issues concerning the Fourth Amendment rights of public employees. First, we must determine whether the respondent, a public employee, had a reasonable expectation of privacy in his office, desk, and file cabinets at his place of work. Second, we must address the appropriate Fourth Amendment standard for a search conducted by a public employer in areas in which a public employee is found to have a reasonable expectation of privacy.

I

Dr. Magno Ortega, a physician and psychiatrist, held the position of Chief of Professional Education at Napa State Hospital (Hospital) for 17 years, until his dismissal from that position in 1981. As Chief of Professional Education, Dr. Ortega had primary responsibility for training young physicians in psychiatric residency programs.

In July 1981, Hospital officials, including Dr. Dennis O'Connor, the Executive Director of the Hospital, became concerned about possible improprieties in Dr. Ortega's management of the residency program. In particular, the Hospital officials were concerned with Dr. Ortega's acquisition of an Apple II computer for use in the residency program. The officials thought that Dr. Ortega may have misled Dr. O'Connor into believing that the computer had been donated, when in fact the computer had been financed by the possibly coerced contributions of residents. Additionally, the Hospital officials were concerned with charges that Dr. Ortega had sexually harassed two female Hospital employees, and had taken inappropriate disciplinary action against a resident.

On July 30, 1981, Dr. O'Connor requested that Dr. Ortega take paid administrative leave during an investigation of these charges. At Dr. Ortega's request, Dr. O'Connor agreed to allow Dr. Ortega to take two weeks' vacation instead of administrative leave. Dr. Ortega, however, was requested to stay off Hospital grounds for the duration of the investigation. On August 14, 1981, Dr. O'Connor informed Dr. Ortega that the investigation had not yet been completed, and that he was being placed on paid administrative leave. Dr. Ortega remained on administrative leave until the Hospital terminated his employment on September 22, 1981.

Dr. O'Connor selected several Hospital personnel to conduct the investigation, including an accountant, a physician, and a Hospital security officer. Richard Friday, the Hospital Administrator, led this "investigative team." At some point during the investigation, Mr. Friday made the decision to enter Dr. Ortega's office. The specific reason for the

entry into Dr. Ortega's office is unclear from the record. The petitioners claim that the search was conducted to secure state property. Initially, petitioners contended that such a search was pursuant to a Hospital policy of conducting a routine inventory of state property in the office of a terminated employee. At the time of the search, however, the Hospital had not yet terminated Dr. Ortega's employment; Dr. Ortega was still on administrative leave. Apparently, there was no policy of inventorying the offices of those on administrative leave. Before the search had been initiated, however, petitioners had become aware that Dr. Ortega had taken the computer to his home. Dr. Ortega contends that the purpose of the search was to secure evidence for use against him in administrative disciplinary proceedings.

The resulting search of Dr. Ortega's office was quite thorough. The investigators entered the office a number of times and seized several items from Dr. Ortega's desk and file cabinets, including a Valentine's Day card, a photograph, and a book of poetry all sent to Dr. Ortega by a former resident physician. These items were later used in a proceeding before a hearing officer of the California State Personnel Board to impeach the credibility of the former resident, who testified on Dr. Ortega's behalf. The investigators also seized billing documentation of one of Dr. Ortega's private patients under the California Medicaid program. The investigators did not otherwise separate Dr. Ortega's property from state property because, as one investigator testified, "[t]rying to sort State from non-State, it was too much to do, so I gave it up and boxed it up." App. 62. Thus, no formal inventory of the property in the office was ever made. Instead, all the papers in Dr. Ortega's office were merely placed in boxes, and put in storage for Dr. Ortega to retrieve.

Dr. Ortega commenced this action against petitioners in Federal District Court under 42 U.S.C. § 1983, alleging that the search of his office violated the Fourth Amendment. On cross-motions for summary judgment, the District Court granted petitioners' motion for summary judgment. The District Court, relying on *Chenkin v. Bellevue Hospital Center, New York City Health & Hospitals Corp.,* 479 F.Supp. 207 (SDNY 1979), concluded that the search was proper because there was a need to secure state property in the office. The Court of Appeals for the Ninth Circuit affirmed in part and reversed in part, 764 F.2d 703 (1985), concluding that Dr. Ortega had a reasonable expectation of privacy in his office. While the Hospital had a procedure for office inventories, these inventories were reserved for employees who were departing or were terminated. The Court of Appeals also concluded—albeit without explanation—that the search violated the Fourth Amendment. The Court of Appeals held that the record justified a grant of partial summary judgment for Dr. Ortega on the issue of liability for an unlawful search, and it remanded the case to the District Court for a determination of damages.

We granted certiorari, 474 U.S. 1018, 106 S.Ct. 565, 88 L.Ed.2d 551 (1985), and now reverse and remand.

II

The strictures of the Fourth Amendment, applied to the States through the Fourteenth Amendment, have been applied to the conduct of governmental officials in various civil activities. *New Jersey v. T.L.O.,* 469 U.S. 325, 334–335, 105 S.Ct. 733, 738–739, 83 L.Ed.2d 720 (1985). Thus, we have held in the past that the Fourth Amendment governs the conduct of school officials, see *ibid.,* building inspectors, see *Camara v. Municipal Court,* 387 U.S. 523, 528, 87 S.Ct. 1727, 1730, 18 L.Ed.2d 930 (1967), and Occupational Safety and Health Act inspectors, see *Marshall v. Barlow's, Inc.,* 436 U.S. 307, 312–313, 98 S.Ct. 1816, 1820–1821, 56 L.Ed.2d 305 (1978). As we observed in *T.L.O.,* "[b]ecause the individual's interest in privacy and personal security 'suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards,' ... it would be 'anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.' " 469 U.S., at 335, 105 S.Ct., at 739 (quoting *Marshall v. Barlow's, Inc., supra,* 436 U.S., at 312–313, 98 S.Ct., at 1820 and *Camara v. Municipal Court, supra,* 387 U.S., at 530, 87 S.Ct., at 1731). Searches and seizures by government employers or supervisors of the private property of their employees, therefore, are subject to the restraints of the Fourth Amendment.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...." Our cases establish that Dr. Ortega's Fourth Amendment rights are implicated only if the conduct of the Hospital officials at issue in this case infringed "an expectation of privacy that society is prepared to consider reasonable." *United States v. Jacobsen,* 466 U.S. 109, 113, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85 (1984). We have no talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable. Instead, "the Court has given weight to such factors as the intention of the Framers of the Fourth Amendment, the uses to which the individual has put a location, and our societal understanding that certain areas deserve the most scrupulous protection from government invasion." *Oliver v. United States,* 466 U.S. 170, 178, 104 S.Ct. 1735, 1741, 80 L.Ed.2d 214 (1984) (citations omitted).

Because the reasonableness of an expectation of privacy, as well as the appropriate standard for a search, is understood to differ according to context, it is essential first to delineate the boundaries of the workplace context. The workplace includes those areas and items that are related to work and are generally within the employer's control. At a hospital, for example, the hallways, cafeteria, offices, desks, and file cabinets, among other areas, are all part of the workplace. These areas remain part of the workplace context even if the employee has placed personal items in them, such as a photograph placed in a desk or a letter posted on an employee bulletin board.

Not everything that passes through the confines of the business address can be considered part of the workplace context, however. An employee may bring closed luggage to the office prior to leaving on a trip, or a handbag or briefcase each workday. While whatever expectation of privacy the employee has in the existence and the outward appearance of the luggage is affected by its presence in the workplace, the employee's expectation of privacy in the *contents* of the luggage is not affected in the same way. The appropriate standard for a workplace search does not necessarily apply to a piece of closed personal luggage, a handbag or a briefcase that happens to be within the employer's business address.

Within the workplace context, this Court has recognized that employees may have a reasonable expectation of privacy against intrusions by police. See *Mancusi v. DeForte,* 392 U.S. 364, 88 S.Ct. 2120, 20 L.Ed.2d 1154 (1968). As with the expectation of privacy in one's home, such an expectation in one's place of work is "based upon societal expectations that have deep roots in the history of the Amendment." *Oliver v. United States, supra,* 466 U.S., at 178, n. 8, 104 S.Ct., at 1741, n. 8. Thus, in *Mancusi v. DeForte, supra,* the Court held that a union employee who shared an office with other union employees had a privacy interest in the office sufficient to challenge successfully the warrantless search of that office:

> "It has long been settled that one has standing to object to a search of his office, as well as of his home.... [I]t seems clear that if DeForte had occupied a 'private' office in the union headquarters, and union records had been seized from a desk or a filing cabinet in that office, he would have had standing.... In such a 'private' office, DeForte would have been entitled to expect that he would not be disturbed except by personal or business invitees, and that records would not be taken except with his permission or that of his union superiors." 392 U.S., at 369, 88 S.Ct., at 2124.

Given the societal expectations of privacy in one's place of work expressed in both *Oliver* and *Mancusi,* we reject the contention made by the Solicitor General and petitioners that public employees can never have a reasonable expectation of privacy in their place of work. Individuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer. The operational realities of the workplace, however, may make *some* employees' expectations of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement official. Public employees' expectations of privacy in their offices, desks, and file cabinets, like similar expectations of employees in the private sector, may be reduced by virtue of actual office practices and procedures, or by legitimate regulation. Indeed, in *Mancusi* itself, the Court suggested that the union employee did not have a reasonable expectation of privacy against his union supervisors. 392 U.S., at 369, 88 S.Ct., at 2124. The employee's

expectation of privacy must be assessed in the context of the employment relation. An office is seldom a private enclave free from entry by supervisors, other employees, and business and personal invitees. Instead, in many cases offices are continually entered by fellow employees and other visitors during the workday for conferences, consultations, and other work-related visits. Simply put, it is the nature of government offices that others—such as fellow employees, supervisors, consensual visitors, and the general public—may have frequent access to an individual's office. We agree with Justice SCALIA that "[c]onstitutional protection against *unreasonable* searches by the government does not disappear merely because the government has the right to make reasonable intrusions in its capacity as employer," *post,* at 1505, but some government offices may be so open to fellow employees or the public that no expectation of privacy is reasonable. Cf. *Katz v. United States,* 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection"). Given the great variety of work environments in the public sector, the question whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis.

The Court of Appeals concluded that Dr. Ortega had a reasonable expectation of privacy in his office, and five Members of this Court agree with that determination. See *post,* at 1504 (SCALIA, J., concurring in judgment); *post,* at 1506 (BLACKMUN, J., joined by BRENNAN, MARSHALL, and STEVENS, JJ., dissenting). Because the record does not reveal the extent to which Hospital officials may have had work-related reasons to enter Dr. Ortega's office, we think the Court of Appeals should have remanded the matter to the District Court for its further determination. But regardless of any legitimate right of access the Hospital staff may have had to the office as such, we recognize that the undisputed evidence suggests that Dr. Ortega had a reasonable expectation of privacy in his desk and file cabinets. The undisputed evidence discloses that Dr. Ortega did not share his desk or file cabinets with any other employees. Dr. Ortega had occupied the office for 17 years and he kept materials in his office, which included personal correspondence, medical files, correspondence from private patients unconnected to the Hospital, personal financial records, teaching aids and notes, and personal gifts and mementos. App. 14. The files on physicians in residency training were kept outside Dr. Ortega's office. *Id.,* at 21. Indeed, the only items found by the investigators were apparently personal items because, with the exception of the items seized for use in the administrative hearings, all the papers and effects found in the office were simply placed in boxes and made available to Dr. Ortega. *Id.,* at 58, 62. Finally, we note that there was no evidence that the Hospital had established any reasonable regulation or policy discouraging employees such as Dr. Ortega from storing personal papers and effects in their desks or file cabinets, *id.,* at 44, although the absence of such a policy does not create an expectation of privacy where it would not otherwise exist.

On the basis of this undisputed evidence, we accept the conclusion of the Court of Appeals that Dr. Ortega had a reasonable expectation of privacy at least in his desk and file cabinets. See *Gillard v. Schmidt,* 579 F.2d 825, 829 (CA3 1978); *United States v. Speights,* 557 F.2d 362 (CA3 1977); *United States v. Blok,* 88 U.S.App.D.C. 326, 188 F.2d 1019 (1951).

III

Having determined that Dr. Ortega had a reasonable expectation of privacy in his office, the Court of Appeals simply concluded without discussion that the "search ... was not a reasonable search under the fourth amendment." 764 F.2d, at 707. But as we have stated in *T.L.O.,* "[t]o hold that the Fourth Amendment applies to searches conducted by [public employers] is only to begin the inquiry into the standards governing such searches.... [W]hat is reasonable depends on the context within which a search takes place." *New Jersey v. T.L.O.,* 469 U.S., at 337, 105 S.Ct., at 740. Thus, we must determine the appropriate standard of reasonableness applicable to the search. A determination of the standard of reasonableness applicable to a particular class of searches requires "balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *United States v. Place,* 462 U.S. 696, 703, 103 S.Ct. 2637, 2642, 77 L.Ed.2d 110 (1983); *Camara v. Municipal Court,* 387 U.S., at 536–537, 87 S.Ct., at 1734–1735. In the case of searches conducted by a public employer, we must balance the invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control, and the efficient operation of the workplace.

"[I]t is settled ... that 'except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant.' " *Mancusi v. DeForte,* 392 U.S., at 370, 88 S.Ct., at 2125 (quoting *Camara v. Municipal Court, supra,* 387 U.S., at 528–529, 87 S.Ct., at 1731). There are some circumstances, however, in which we have recognized that a warrant requirement is unsuitable. In particular, a warrant requirement is not appropriate when "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." *Camara v. Municipal Court, supra,* at 533, 87 S.Ct., at 1733. Or, as Justice BLACKMUN stated in *T.L.O.,* "[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." 469 U.S., at 351, 105 S.Ct., at 749 (concurring in judgment). In *Marshall v. Barlow's, Inc.,* 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978), for example, the Court explored the burdens a warrant requirement would impose on the Occupational Safety and Health Act regulatory scheme, and held that the warrant requirement was appropriate only after concluding that warrants would not "impose serious burdens on the inspection system or the courts, [would not] prevent inspections necessary to enforce the statute, or [would not] make them less effective." 436 U.S., at 316, 98 S.Ct., at 1822. In *New Jersey v. T.L.O., supra,* we concluded that the warrant requirement was not suitable to the school environment, because such a requirement would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools.

There is surprisingly little case law on the appropriate Fourth Amendment standard of reasonableness for a public employer's work-related search of its employee's offices, desks, or file cabinets. Generally, however, the lower courts have held that any "work-related" search by an employer satisfies the Fourth Amendment reasonableness requirement. See *United States v. Nasser,* 476 F.2d 1111, 1123 (CA7 1973) ("work-related" searches and seizures are reasonable under the Fourth Amendment); *United States v. Collins,* 349 F.2d 863, 868 (CA2 1965) (upholding search and seizure because conducted pursuant to "the power of the Government as defendant's employer, to supervise and investigate the performance of his duties as a Customs employee"). Others have suggested the use of a standard other than probable cause. See *United States v. Bunkers,* 521 F.2d 1217 (CA9 1975) (work-related search of a locker tested under "reasonable cause" standard); *United States v. Blok, supra,* at 328, 188 F.2d, at 1021 ("No doubt a search of [a desk] without her consent would have been reasonable if made by some people in some circumstances. Her official superiors might reasonably have searched the desk for official property needed for official use"). The only cases to imply that a warrant should be required involve searches that are not work related, see *Gillard v. Schmidt, supra,* at 829, n. 1, or searches for evidence of criminal misconduct, see *United States v. Kahan,* 350 F.Supp. 784 (SDNY 1972).

The legitimate privacy interests of public employees in the private objects they bring to the workplace may be substantial. Against these privacy interests, however, must be balanced the realities of the workplace, which strongly suggest that a warrant requirement would be unworkable. While police, and even administrative enforcement personnel, conduct searches for the primary purpose of obtaining evidence for use in criminal or other enforcement proceedings, employers most frequently need to enter the offices and desks of their employees for legitimate work-related reasons wholly unrelated to illegal conduct. Employers and supervisors are focused primarily on the need to complete the government agency's work in a prompt and efficient manner. An employer may have need for correspondence, or a file or report available only in an employee's office while the employee is away from the office. Or, as is alleged to have been the case here, employers may need to safeguard or identify state property or records in an office in connection with a pending investigation into suspected employee misfeasance.

In our view, requiring an employer to obtain a warrant whenever the employer wished to enter an employee's office, desk, or file cabinets for a work-related purpose would seriously disrupt the routine conduct of business and would be unduly burdensome. Imposing unwieldy warrant procedures in such cases upon supervisors, who would otherwise have no reason to be familiar with such procedures, is simply unreasonable. In contrast to other circumstances in which we have required warrants, supervisors in offices such as at the Hospital are hardly in the

business of investigating the violation of criminal laws. Rather, work-related searches are merely incident to the primary business of the agency. Under these circumstances, the imposition of a warrant requirement would conflict with "the common-sense realization that government offices could not function if every employment decision became a constitutional matter." *Connick v. Myers,* 461 U.S. 138, 143, 103 S.Ct. 1684, 1688, 75 L.Ed.2d 708 (1983).

Whether probable cause is an inappropriate standard for public employer searches of their employees' offices presents a more difficult issue. For the most part, we have required that a search be based upon probable cause, but as we noted in *New Jersey v. T.L.O.,* "[t]he fundamental command of the Fourth Amendment is that searches and seizures be reasonable, and although 'both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, ... in certain limited circumstances neither is required.' " 469 U.S., at 340, 105 S.Ct., at 742 (quoting *Almeida-Sanchez v. United States,* 413 U.S. 266, 277, 93 S.Ct. 2535, 2541, 37 L.Ed.2d 596 (1973) (POWELL, J., concurring)). Thus, "[w]here a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard." 469 U.S., at 341, 105 S.Ct., at 742. We have concluded, for example, that the appropriate standard for administrative searches is not probable cause in its traditional meaning. Instead, an administrative warrant can be obtained if there is a showing that reasonable legislative or administrative standards for conducting an inspection are satisfied. See *Marshall v. Barlow's, Inc.,* 436 U.S., at 320, 98 S.Ct., at 1824; *Camara v. Municipal Court,* 387 U.S., at 538, 87 S.Ct., at 1735.

As an initial matter, it is important to recognize the plethora of contexts in which employers will have an occasion to intrude to some extent on an employee's expectation of privacy. Because the parties in this case have alleged that the search was either a noninvestigatory work-related intrusion or an investigatory search for evidence of suspected work-related employee misfeasance, we undertake to determine the appropriate Fourth Amendment standard of reasonableness *only* for these two types of employer intrusions and leave for another day inquiry into other circumstances.

The governmental interest justifying work-related intrusions by public employers is the efficient and proper operation of the workplace. Government agencies provide myriad services to the public, and the work of these agencies would suffer if employers were required to have probable cause before they entered an employee's desk for the purpose of finding a file or piece of office correspondence. Indeed, it is difficult to give the concept of probable cause, rooted as it is in the criminal investigatory context, much meaning when the purpose of a search is to retrieve a file for work-related reasons. Similarly, the concept of probable cause has little meaning for a routine inventory conducted by public employers for the purpose of securing state property. See *Colorado v. Bertine,* 479 U.S. 367, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987); *Illinois v. Lafayette,* 462 U.S. 640, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983). To ensure the efficient and proper operation of the agency, therefore, public employers must be given wide latitude to enter employee offices for work-related, noninvestigatory reasons.

We come to a similar conclusion for searches conducted pursuant to an investigation of work-related employee misconduct. Even when employers conduct an investigation, they have an interest substantially different from "the normal need for law enforcement." *New Jersey v. T.L.O., supra,* 469 U.S., at 351, 105 S.Ct., at 748 (BLACKMUN, J., concurring in judgment). Public employers have an interest in ensuring that their agencies operate in an effective and efficient manner, and the work of these agencies inevitably suffers from the inefficiency, incompetence, mismanagement, or other work-related misfeasance of its employees. Indeed, in many cases, public employees are entrusted with tremendous responsibility, and the consequences of their misconduct or incompetence to both the agency and the public interest can be severe. In contrast to law enforcement officials, therefore, public employers are not enforcers of the criminal law; instead, public employers have a direct and overriding interest in ensuring that the work of the agency is conducted in a proper and efficient manner. In our view, therefore, a probable cause requirement for searches of the type at issue here would impose intolerable burdens on public employers. The delay

in correcting the employee misconduct caused by the need for probable cause rather than reasonable suspicion will be translated into tangible and often irreparable damage to the agency's work, and ultimately to the public interest. See 469 U.S., at 353, 105 S.Ct., at 749. ("The time required for a teacher to ask the questions or make the observations that are necessary to turn reasonable grounds into probable cause is time during which the teacher, and other students, are diverted from the essential task of education.") Additionally, while law enforcement officials are expected to "schoo[l] themselves in the niceties of probable cause," *id.,* at 343, 105 S.Ct., at 743, no such expectation is generally applicable to public employers, at least when the search is not used to gather evidence of a criminal offense. It is simply unrealistic to expect supervisors in most government agencies to learn the subtleties of the probable cause standard. As Justice BLACKMUN observed in *T.L.O.,* "[a] teacher has neither the training nor the day-to-day experience in the complexities of probable cause that a law enforcement officer possesses, and is ill-equipped to make a quick judgment about the existence of probable cause." *Id.,* at 353, 105 S.Ct., at 749. We believe that this observation is an equally apt description of the public employer and supervisors at the Hospital, and we conclude that a reasonableness standard will permit regulation of the employer's conduct "according to the dictates of reason and common sense." *Id.,* at 343, 105 S.Ct., at 743.

Balanced against the substantial government interests in the efficient and proper operation of the workplace are the privacy interests of government employees in their place of work which, while not insubstantial, are far less than those found at home or in some other contexts. As with the building inspections in *Camara,* the employer intrusions at issue here "involve a relatively limited invasion" of employee privacy. 387 U.S., at 537, 87 S.Ct., at 1735. Government offices are provided to employees for the sole purpose of facilitating the work of an agency. The employee may avoid exposing personal belongings at work by simply leaving them at home.

In sum, we conclude that the "special needs, beyond the normal need for law enforcement make the ... probable-cause requirement impracticable," 469 U.S., at 351, 105 S.Ct., at 748 (BLACKMUN, J., concurring in judgment), for legitimate work-related, noninvestigatory intrusions as well as investigations of work-related misconduct. A standard of reasonableness will neither unduly burden the efforts of government employers to ensure the efficient and proper operation of the workplace, nor authorize arbitrary intrusions upon the privacy of public employees. We hold, therefore, that public employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances. Under this reasonableness standard, both the inception and the scope of the intrusion must be reasonable:

> "Determining the reasonableness of any search involves a twofold inquiry: first, one must consider 'whether the ... action was justified at its inception,' *Terry v. Ohio,* 392 U.S. [1], at 20 [88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968)]; second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place,' *ibid.*" *New Jersey v. T.L.O., supra,* at 341, 105 S.Ct., at 742–743.

Ordinarily, a search of an employee's office by a supervisor will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a noninvestigatory work-related purpose such as to retrieve a needed file. Because petitioners had an "individualized suspicion" of misconduct by Dr. Ortega, we need not decide whether individualized suspicion is an essential element of the standard of reasonableness that we adopt today. See *New Jersey v. T.L.O., supra,* at 342, n. 8, 105 S.Ct., at 743, n. 8. The search will be permissible in its scope when "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of ... the nature of the [misconduct]." 469 U.S., at 342, 105 S.Ct., at 743.

IV

In the procedural posture of this case, we do not attempt to determine whether the search of Dr. Ortega's office and the seizure of his personal belongings satisfy the standard of reasonableness we have articulated in this case. No evidentiary hearing was held in this case because the District Court acted on cross-motions for summary judgment, and granted petitioners summary judgment. The Court of Appeals, on the other hand, concluded that the record in this case justified granting partial summary judgment on liability to Dr. Ortega.

We believe that both the District Court and the Court of Appeals were in error because summary judgment was inappropriate. The parties were in dispute about the actual justification for the search, and the record was inadequate for a determination on motion for summary judgment of the reasonableness of the search and seizure. Petitioners have consistently attempted to justify the search and seizure as required to secure the state property in Dr. Ortega's office. Mr. Friday testified in a deposition that he had ordered members of the investigative team to "check Dr. Ortega's office out in order to separate the business files from any personal files in order to ascertain what was in his office." App. 50. He further testified that the search was initiated because he "wanted to make sure that we had our state property identified, and in order to provide Dr. Ortega with his property and get what we had out of there, in order to make sure our resident's files were protected, and that sort of stuff." *Id.,* at 51.

In their motion for summary judgment in the District Court, petitioners alleged that this search to secure property was reasonable as "part of the established hospital policy to inventory property within offices of departing, terminated or separated employees." Record Doc. No. 24, p. 9. The District Court apparently accepted this characterization of the search because it applied *Chenkin v. Bellevue Hospital Center, New York City Health & Hospitals Corp.,* 479 F.Supp. 207 (SDNY 1979), a case involving a Fourth Amendment challenge to an inspection *policy.* At the time of the search, however, Dr. Ortega had not been terminated, but rather was still on administrative leave, and the record does not reflect whether the Hospital had a policy of inventorying the property of investigated employees. Respondent, moreover, has consistently rejected petitioners' characterization of the search as motivated by a need to secure state property. Instead, Dr. Ortega has contended that the intrusion was an investigatory search whose purpose was simply to discover evidence that would be of use in administrative proceedings. He has pointed to the fact that no inventory was ever taken of the property in the office, and that seized evidence was eventually used in the administrative proceedings. Additionally, Dr. O'Connor stated in a deposition that one purpose of the search was "to look for contractural [*sic*] and other kinds of documents that might have been related to the issues" involved in the investigation. App. 38.

Under these circumstances, the District Court was in error in granting petitioners summary judgment. There was a dispute of fact about the character of the search, and the District Court acted under the erroneous assumption that the search was conducted pursuant to a Hospital policy. Moreover, no findings were made as to the scope of the search that was undertaken.

The Court of Appeals concluded that Dr. Ortega was entitled to partial summary judgment on liability. It noted that the Hospital had no policy of inventorying the property of employees on administrative leave, but it did not consider whether the search was otherwise reasonable. Under the standard of reasonableness articulated in this case, however, the absence of a Hospital policy did not necessarily make the search unlawful. A search to secure state property is valid as long as petitioners had a reasonable belief that there was government property in Dr. Ortega's office which needed to be secured, and the scope of the intrusion was itself reasonable in light of this justification. Indeed, petitioners have put forward evidence that they had such a reasonable belief; at the time of the search, petitioners knew that Dr. Ortega had removed the computer from the Hospital. The removal of the computer—together with the allegations of mismanagement of the residency program and sexual harassment—may have made the search reasonable at its inception under the standard we have put forth in this case. As with the District Court order, therefore, the Court of Appeals conclusion that summary judgment was appropriate cannot stand.

On remand, therefore, the District Court must determine the justification for the search and seizure, and evaluate the reasonableness of both the inception of the search and its scope.*

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

Justice SCALIA, concurring in the judgment.

Although I share the judgment that this case must be reversed and remanded, I disagree with the reason for the reversal given by the plurality opinion, and with the standard it prescribes for the Fourth Amendment inquiry.

To address the latter point first: The plurality opinion instructs the lower courts that existence of Fourth Amendment protection for a public employee's business office is to be assessed "on a case-by-case basis," in light of whether the office is "so open to fellow employees or the public that no expectation of privacy is reasonable." *Ante,* at 1498. No clue is provided as to how open "so open" must be; much less is it suggested how police officers are to gather the facts necessary for this refined inquiry. As we observed in *Oliver v. United States,* 466 U.S. 170, 181, 104 S.Ct. 1735, 1743, 80 L.Ed.2d 214 (1984), "[t]his Court repeatedly has acknowledged the difficulties created for courts, police, and citizens by an ad hoc, case-by-case definition of Fourth Amendment standards to be applied in differing factual circumstances." Even if I did not disagree with the plurality as to what result the proper legal standard should produce in the case before us, I would object to the formulation of a standard so devoid of content that it produces rather than eliminates uncertainty in this field.

Whatever the plurality's standard means, however, it must be wrong if it leads to the conclusion on the present facts that if Hospital officials had extensive "work-related reasons to enter Dr. Ortega's office" no Fourth Amendment protection existed. *Ante,* at 1498. It is privacy that is protected by the Fourth Amendment, not solitude. A man enjoys Fourth Amendment protection in his home, for example, even though his wife and children have the run of the place—and indeed, even though his landlord has the right to conduct unannounced inspections at any time. Similarly, in my view, one's personal office is constitutionally protected against warrantless intrusions by the police, even though employer and co-workers are not excluded. I think we decided as much many years ago. In *Mancusi v. DeForte,* 392 U.S. 364, 88 S.Ct. 2120, 20 L.Ed.2d 1154 (1968), we held that a union employee had Fourth Amendment rights with regard to an office at union headquarters that he shared with two other employees, even though we acknowledged that those other employees, their personal or business guests, and (implicitly) "union higher-ups" could enter the office. *Id.,* at 369, 88 S.Ct. at 2124. Just as the secretary working for a corporation in an office frequently entered by the corporation's other employees is protected against unreasonable searches of that office by the government, so also is the government secretary working in an office frequently entered by other government employees. There is no reason why this determination that a legitimate expectation of privacy exists should be affected by the fact that the government, rather than a private entity, is the employer. Constitutional protection against *unreasonable* searches by the government does not disappear merely because the government has the right to make reasonable intrusions in its capacity as employer.

I cannot agree, moreover, with the plurality's view that the reasonableness of the expectation of privacy (and thus the existence of Fourth Amendment protection) changes "when an intrusion is by a supervisor rather than a law enforcement official." *Ante,* at 1498. The identity of the searcher (police v. employer) is relevant not to whether Fourth Amendment protections apply, but only to whether the search of a protected area is reasonable. Pursuant to traditional analysis the former question must be answered on a more "global" basis. Where, for example, a fireman enters a private dwelling in response to an alarm, we do not ask whether the occupant has a reasonable expectation of privacy (and hence Fourth Amendment protection) vis-à-vis firemen, but rather whether—given the fact that the

Fourth Amendment covers private dwellings—intrusion for the purpose of extinguishing a fire is reasonable. Cf. *Michigan v. Tyler,* 436 U.S. 499, 509, 98 S.Ct. 1942, 1949, 56 L.Ed.2d 486 (1978). A similar analysis is appropriate here.

I would hold, therefore, that the offices of government employees, and *a fortiori* the drawers and files within those offices, are covered by Fourth Amendment protections as a general matter. (The qualifier is necessary to cover such unusual situations as that in which the office is subject to unrestricted public access, so that it is "expose[d] to the public" and therefore "not a subject of Fourth Amendment protection." *Katz v. United States,* 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967).) Since it is unquestioned that the office here was assigned to Dr. Ortega, and since no special circumstances are suggested that would call for an exception to the ordinary rule, I would agree with the District Court and the Court of Appeals that Fourth Amendment protections applied.

The case turns, therefore, on whether the Fourth Amendment was violated—*i.e.,* whether the governmental intrusion was reasonable. It is here that the government's status as employer, and the employment-related character of the search, become relevant. While as a general rule warrantless searches are *per se* unreasonable, we have recognized exceptions when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable...." *New Jersey v. T.L.O.,* 469 U.S. 325, 351, 105 S.Ct. 733, 749, 83 L.Ed.2d 720 (BLACKMUN, J., concurring in judgment). Such "special needs" are present in the context of government employment. The government, like any other employer, needs frequent and convenient access to its desks, offices, and file cabinets for work-related purposes. I would hold that government searches to retrieve work-related materials or to investigate violations of workplace rules—searches of the sort that are regarded as reasonable and normal in the private-employer context—do not violate the Fourth Amendment. Because the conflicting and incomplete evidence in the present case could not conceivably support summary judgment that the search did not have such a validating purpose, I agree with the plurality that the decision must be reversed and remanded.

Footnotes

* We have no occasion in this case to reach the issue of the appropriate standard for the evaluation of the Fourth Amendment reasonableness of the seizure of Dr. Ortega's personal items. Neither the District Court nor the Court of Appeals addressed this issue, and the *amicus curiae* brief filed on behalf of respondent did not discuss the legality of the seizure separate from that of the search. We also have no occasion in this case to address whether qualified immunity should protect petitioners from damages liability under § 1983. See *Davis v. Scherer,* 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984); *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). The qualified immunity issue was not raised below and was not addressed by either the District Court or the Court of Appeals. Nor do we address the proper Fourth Amendment analysis for drug and alcohol testing of employees. Finally, we do not address the appropriate standard when an employee is being investigated for criminal misconduct or breaches of other nonwork-related statutory or regulatory standards.

1 Although there has been some development on these issues in federal courts, see *ante,* at 1500, this Court has not yet squarely faced them.

363 F.3d 177
United States Court of Appeals,
Second Circuit.

William R. SHAUL, Plaintiff–Appellant,
v.
CHERRY VALLEY–SPRINGFIELD CENTRAL SCHOOL DISTRICT, Thomas E. Marzeski, Superintendent, Charles W. Strange, Secondary Principal, Charles F. Culbert, Elementary Principal, John Does 1–4, Custodians Defendants–Appellees.

Docket No. 02–9082.
||
Decided March 25, 2004.

Before: B.D. PARKER, Jr., RAGGI, Circuit Judges, and GOLDBERG, Judge.

Opinion

GOLDBERG, Judge.

Plaintiff William R. Shaul filed suit against defendants, the Cherry Valley–Springfield School District ("the School District"), Superintendent Thomas E. Marzeski, Secondary Principal Charles W. Strange, Elementary Principal Charles F. Culbert, and four John Doe custodians, pursuant to 42 U.S.C. § 1983, in the United States District Court for the Northern District of New York (Hurd, J.). Defendants were responsible for sorting and removing items from plaintiff's classroom following his suspension from the school. At the time plaintiff was a teacher employed by the School District. Plaintiff alleges that defendants' actions constituted an illegal search and seizure of his property in violation of his rights under the Fourth Amendment to the U.S. Constitution. Plaintiff asserts that the School District is also liable because its actions were in furtherance of a municipal custom, policy, or practice. Defendants deny plaintiff's allegations. In addition, Superintendent Marzeski, Secondary Principal Strange, and Elementary Principal Culbert argue that they are entitled to qualified immunity from suit.

By memorandum-decision and order dated August 20, 2002, the district court awarded summary judgment in favor of defendants and dismissed plaintiff's complaint, ruling that Shaul could not challenge defendants' search of the classroom because, at the relevant time, he had no reasonable expectation of privacy in the room or its contents. The district court further concluded that Shaul could not complain of an unlawful seizure because he forfeited any possessory interest he may have had in various items by failing to retrieve them on the opportunities afforded. *See Shaul v. Cherry Valley–Springfield Central School Dist.,* 218 F.Supp.2d 266, 269–72 (N.D.N.Y.2002).

Shaul now appeals this ruling, challenging the district court's conclusion about his expectation of privacy in his classroom generally and in the locked file cabinet in particular. He further argues that defendants' failure to afford him sufficient time to retrieve his property precluded a finding that he had surrendered his privacy or possessory interests in his property.

We consider the following issues: (1) whether Shaul had a reasonable expectation of privacy in his assigned classroom and if so, whether defendants' challenged search of the classroom and removal of Shaul's personal property was constitutionally reasonable; and (2) whether defendants' failure to return all of Shaul's personal property was a separate unreasonable seizure.

For the reasons stated herein, we affirm the district court's decision.

BACKGROUND

Shaul has been a high school mathematics teacher employed by the School District since 1969. During his tenure, he has been subject to two separate disciplinary proceedings. In 1990, Shaul was found guilty of having an inappropriate relationship with a female student. In November 1998, Shaul was accused of sexually harassing another female student, a sophomore then assigned to his homeroom and math class. On or about January 13, 1999, Shaul was arrested for stalking the first female student, with whom he had later become romantically involved. In a letter dated January 14th, Superintendent Marzeski requested that Shaul provide any documents associated with the January 13th arrest. On January 15th, Shaul was suspended with pay and subsequently reassigned to an administrative position in the School District. On March 10, 2000, a hearing officer found Shaul guilty of the alleged misconduct in the November 1998 incident and suspended him without pay for the remainder of the 1999–2000 academic year. In the fall of 2000, Shaul resumed his teaching duties and continues to be employed as a teacher in the School District.

Plaintiff's cause of action arises from defendants' actions immediately following his suspension on January 15, 1999. In his suspension letter, Shaul was instructed to meet Superintendent Marzeski on January 19th to return school-owned property and remove his personal belongings from the assigned classroom that he had used since 1991. Upon the advice of a representative of the New York State United Teachers Union, Shaul chose not to attend this meeting. He did deliver the school property in his possession—including keys to the classroom—to a fellow teacher, who returned them to the School District.

On January 29th, Shaul returned to the school to collect his personal belongings. These items were scattered throughout the classroom in boxes, a desk, and three filing cabinets, one of which was locked. The room, as described by both Shaul and school administrators, was extremely cluttered and messy. He did not remove all of his belongings from the classroom in the hour-and-a-half he had before being asked to vacate the premises.

The following day, January 30th, Secondary Principal Strange and Elementary Principal Culbert began cleaning the classroom to prepare it for a new teacher who was to replace Shaul and use the same working space. School administrators, including Superintendent Marzeski, and custodians returned twice, on or around February 4th and 18th, to finish preparing the room. In the process of sorting through items left in the room, they drilled out the lock of one of the filing cabinets so that it could be accessed. A photo album containing pictures of the student involved in the 1990 incident was found in the room. At Shaul's disciplinary hearing, the school district attempted to introduce the photo album along with a car phone, personal correspondence, a notebook, and various photographs. The hearing officer refused to enter these items into evidence.

On February 19th, Shaul came to the school to retrieve personal items that had been found in his former classroom. He claims that a number of items belonging to him were never returned, including two laser pens, several books, personal letters, and various teaching materials, including tests, quizzes, and homework problems.

Shaul filed suit in federal district court against defendants, alleging violation of his Fourth Amendment rights with the illegal search and seizure of the items in the classroom. Shaul also sought punitive damages against the individual defendants. In addition, Shaul claimed that the School District showed deliberate indifference to his constitutional rights in its attempt to introduce as evidence in his disciplinary hearing the personal items found in the classroom. The United States District Court for the Northern District of New York (Hurd, J.) found that there was no genuine issue for trial on plaintiff's illegal search and seizure claims and dismissed plaintiff's complaint in its entirety. Plaintiff appeals.

DISCUSSION

This Court has jurisdiction to hear this appeal under 28 U.S.C. § 1291. This Court reviews the district court's grant of summary judgment for defendants *de novo. Leventhal v. Knapek,* 266 F.3d 64, 71 (2d Cir.2001). Summary judgment is appropriate where " 'there is no genuine issue as to any material fact ... the moving party is entitled to a judgment as a matter of law,' Fed.R.Civ.P. 56(c), and therefore, 'the record taken as a whole could not lead a rational trier of fact to find for the non-moving party.' *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)." *Id.* We conclude that this is such a case.

I. *Plaintiff's Claim of Unreasonable Search and Seizure on January 30, 1999*

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...." U.S. Const.amend. IV. Shaul alleges that on January 30, 1999, defendants unreasonably searched his former classroom and seized personal property.

A. *Plaintiff's Reasonable Expectation of Privacy*

To prove an illegal search claim, a party must demonstrate (1) that he had an expectation of privacy that society is prepared to consider reasonable and (2) that he had acted in a way with respect to the property in question that indicated a subjective expectation of privacy. *United States v. Perea,* 986 F.2d 633, 639 (2d Cir.1993). In *O'Connor v. Ortega,* the Supreme Court recognized that public employees frequently have "substantial" privacy expectations in private property maintained at their workplaces. 480 U.S. 709, 721, 107 S.Ct. 1492, 94 L.Ed.2d 714 (O'Connor, J., plurality opinion); *see id.* at 730, 107 S.Ct. 1492 (Scalia, J., concurring in the judgment); *id.* at 737, 107 S.Ct. 1492 (Blackmun, J., dissenting). At the same time, however, the Court acknowledged that "[t]he operational realities of the workplace ... may make *some* employees' expectations of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement official." *Id.* at 717, 107 S.Ct. 1492 (plurality opinion) (emphasis in original); *see also id.* at 737, 107 S.Ct. 1492 (Blackmun, J., dissenting). As the plurality observed, some workplaces "are continually entered by fellow employees and other visitors during the workday for conferences, consultations, and other work-related visits," under which circumstances "no expectation of privacy is reasonable." *Id.* at 718, 107 S.Ct. 1492; *accord Leventhal,* 266 F.3d at 73; *see also Katz v. United States,* 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."); *United States v. Buettner–Janusch,* 646 F.2d 759, 766 (2d Cir.1981) (holding that a professor has no reasonable expectation of privacy in enclosed areas of a university lab that are shared with another professor and a student research assistant).

As the district court observed, many persons—"students, colleagues, custodians, administrators, parents, and substitute teachers"—had access to Shaul's classroom, *Shaul,* 218 F.Supp.2d at 270, and Shaul himself acknowledges that his personal possessions were largely commingled with school materials in a haphazard fashion throughout the room. Brief of Appellant at 8. But nothing in the record on appeal indicates that school administrators, custodians, parents, or students routinely looked through these materials or through Shaul's desk or file cabinets, particularly not his locked file cabinet, for which it appears he had the only key. Apparently, fellow teachers may have sought necessary supplies and instructional materials when using the classroom, but such occasional access, by itself, does not lead to a conclusion as a matter of law that a teacher in good standing retains absolutely no privacy interest in the desk and files in his classroom. *See Leventhal,* 266 F.3d at 74 (holding that co-workers' occasional retrieval of documents from plaintiff's computer did not extinguish a reasonable expectation of privacy in the contents of the machine; employer searches must be frequent and extensive or employer must have a stated policy notifying employee that he can have no privacy expectation). As this Circuit has noted in *Leventhal,* the " '[c]onstitutional protection against *unreasonable* searches by the government does not disappear merely because the government has the right to make reasonable intrusions in its capacity as employer.' " *Id.* (quoting *O'Connor,* 480 U.S. at 717–18, 107 S.Ct. 1492 (plurality opinion quoting concurring opinion of Scalia, J.)).

Whatever reasonable expectation of privacy Shaul may have had in his classroom while he was a teacher in good standing, we nevertheless agree with the district court that he had no such expectation on January 30, 1999, by which date Shaul had (1) been suspended from teaching and barred from his classroom, (2) surrendered the key to the classroom's locked file cabinet at the same time that he declined to retrieve his personal property from the classroom, and (3) been afforded a second opportunity to spend an hour and a half removing personal items from the classroom.

Certainly, the discharge or suspension of an employee greatly reduces—if not eliminates—his reasonable expectation of privacy in his former workplace. This conclusion is particularly warranted on the facts of this case where on January 19, 1999, Shaul was asked to surrender any school keys in his possession at the same time that he was given the opportunity to remove any personal belongings from his classroom. Taken together, the demand and the invitation served as constructive notice that Shaul could have no reasonable expectation of privacy in anything that he did not remove from his former classroom after that date. *Cf. Leventhal,* 266 F.3d at 74 (noting that employee had been given no notice that he had no reasonable expectation of privacy in the contents of his office computer). By deliberately declining to retrieve his belongings on January 19th, while at the same time surrendering the key to his locked file cabinet, Shaul relinquished whatever expectation of privacy he formerly had in the materials contained in the classroom, including those in the locked file cabinet. *See generally United States v. Jimenez,* 789 F.2d 167, 170 (2d Cir.1986) (holding that defendant who relinquished key to apartment upon termination of each use had no reasonable expectation of privacy and hence no Fourth Amendment seizure claim); *United States v. Blanco,* 844 F.2d 344, 349 (6th Cir.1988) (holding that renter who gives up his only set of keys without taking any steps to maintain control thereby gives up expectation of privacy in premises).

B. *The Reasonableness of the January 30, 1999 Search and Seizure*

Despite Shaul's failure to retrieve his belongings on January 19, 1999, defendants afforded him a second opportunity. Shaul now asserts that the hour and a half afforded him on January 29th was insufficient for this task, that his expectation of privacy continued until full retrieval was made, and, therefore, that defendants removal of his belongings from the classroom on January 30, 1999 was an unreasonable search and seizure. We disagree.

Preliminarily, we observe that Shaul's insufficient time claim, even when viewed in the light most favorable to him, is unconvincing. Notably, Shaul makes no claim that he attempted on January 29th to retrieve any personal effects from the locked file cabinet, wherein he presumably had the greatest expectation of privacy. Neither does he claim that he could not empty the contents of his desk—the room's next most private area—into a box or bag within the allotted time. To the extent there was a problem with timely removal, it stemmed largely from the fact that Shaul had made little attempt to maintain privacy of large quantities of his personal materials, intermingling sports memorabilia, yearbooks, and personal correspondence throughout the classroom with school property. Brief of Appellant at 6.

Even if we were to assume that Shaul had a reasonable expectation of privacy that continued after January 29, 1999, Shaul would not be entitled to reversal of the district court judgment because by January 30th, it was certainly reasonable for defendants themselves to remove Shaul's personal belongings from the classroom.

As the Supreme Court has recognized, government offices are not provided to employees for the maintenance of personal effects. They are provided "for the sole purpose of facilitating the work of an agency." *O'Connor,* 480 U.S. at 725, 107 S.Ct. 1492. Thus, the government interest in "the efficient and proper operation of the workplace" will often require intrusions on employee privacy. *Id.* at 723, 107 S.Ct. 1492. Such intrusions, whether "for noninvestigatory, work-related purposes," or "for investigations of work-related misconduct" do not require either a warrant or probable cause; rather, their constitutionality is "judged by the standard of reasonableness under all the

circumstances." *Id.* at 725–26, 107 S.Ct. 1492 (plurality opinion); *see id.* at 732, 107 S.Ct. 1492 (Scalia, J., concurring in the judgment).

The reasonableness standard must be satisfied both at the inception of an employer's intrusion and throughout its scope. The first requirement is satisfied if "there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct or that the search is necessary for a noninvestigatory work-related purpose such as to retrieve a needed file." *Id.* at 726, 107 S.Ct. 1492 (plurality opinion); *see Leventhal,* 266 F.3d at 75. The second requirement is met when " 'the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light ... the nature of the [misconduct].' " *O'Connor,* 480 U.S. at 726, 107 S.Ct. 1492 (quoting *New Jersey v. T.L.O.,* 469 U.S. 325, 342, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985)).

In this case, there is no question that defendants' January 30th search of Shaul's former classroom and the removal of his personal belongings therefrom were reasonably necessary for a non-investigatory work-related purpose—that is, to clean and organize the classroom so that a new teacher could have the materials, equipment, and space necessary to assume Shaul's responsibilities for the remainder of the school year.

Shaul does not dispute this fact. Instead, he asserts that this avowed non-investigatory purpose was a subterfuge for defendants' real investigatory goal: the procurement of evidence of misconduct that could be used against him at his disciplinary hearing. To support this argument, Shaul observes that defendants unsuccessfully attempted to offer into evidence at the disciplinary hearing one item found while searching his locked file cabinet, i.e., a photograph of the former student whom he allegedly stalked. But even if we assume that defendants' search was motivated, at least in part, by an investigatory purpose, the search would not have been unreasonable. By January 30, 1999, defendants certainly possessed individualized suspicion that Shaul had recently engaged in professional misconduct. *Id.* (discussing "individualized suspicion" standard without holding it essential to a reasonable investigatory workplace search). Their challenged search was prompted by Shaul's suspension for alleged sexual harassment of a sophomore student in his homeroom class. Thus, it was entirely reasonable for defendants to think that evidence relating to Shaul's dealings with the student—which had included written correspondence—might be found in the classroom where much of their interaction had occurred.

In sum, we agree with the district court that defendants were entitled to summary judgment on Shaul's claim of unreasonable search and seizure of his property on January 30, 1999. Whatever reasonable expectations of privacy Shaul may have had in personal property maintained in his classroom while he was a teacher in good standing, that expectation ended when, after being suspended for professional misconduct and barred from his classroom, he surrendered all school keys, including a key to a locked file cabinet in his classroom, at the same time that he failed to avail himself of an opportunity to retrieve his personal belongings. To the extent Shaul complains that defendants did not give him enough time to remove all his belongings on a subsequent occasion, we hold that even if that were the case, by January 30th defendants had reasonable investigatory and non-investigatory grounds for searching the classroom and removing plaintiff's personal property so that a new teacher could complete the school year.

[OMITTED]

CONCLUSION

For the aforementioned reasons, the district court's grant of summary judgment for defendants and dismissal of plaintiff's complaint is *AFFIRMED.*

No. 23-1989

130 S.Ct. 2619
Supreme Court of the United States

CITY OF ONTARIO, CALIFORNIA, et al., Petitioners,
v.
Jeff QUON et al.

No. 08–1332
|
Decided June 17, 2010.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C.J., and STEVENS, THOMAS, GINSBURG, BREYER, ALITO, and SOTOMAYOR, JJ., joined, and in which SCALIA, J., joined except for Part III–A. STEVENS, J., filed a concurring opinion, *post*, pp. 2633 – 2634. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post*, pp. 2634 – 2635.

Opinion

Justice KENNEDY delivered the opinion of the Court.

This case involves the assertion by a government employer of the right, in circumstances to be described, to read text messages sent and received on a pager the employer owned and issued to an employee. The employee contends that the privacy of the messages is protected by the ban on "unreasonable searches and seizures" found in the Fourth Amendment to the United States Constitution, made applicable to the States by the Due Process Clause of the Fourteenth Amendment. *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). Though the case touches issues of far-reaching significance, the Court concludes it can be resolved by settled principles determining when a search is reasonable.

I

A

The city of Ontario (City) is a political subdivision of the State of California. The case arose out of incidents in 2001 and 2002 when respondent Jeff Quon was employed by the Ontario Police Department (OPD). He was a police sergeant and member of OPD's Special Weapons and Tactics (SWAT) Team. The City, OPD, and OPD's Chief, Lloyd Scharf, are petitioners here. As will be discussed, two respondents share the last name Quon. In this opinion "Quon" refers to Jeff Quon, for the relevant events mostly revolve around him.

In October 2001, the City acquired 20 alphanumeric pagers capable of sending and receiving text messages. Arch Wireless Operating Company provided wireless service for the pagers. Under the City's service contract with Arch Wireless, each pager was allotted a limited number of characters sent or received each month. Usage in excess of that amount would result in an additional fee. The City issued pagers to Quon and other SWAT Team members in order to help the SWAT Team mobilize and respond to emergency situations.

Before acquiring the pagers, the City announced a "Computer Usage, Internet and E–Mail Policy" (Computer Policy) that applied to all employees. Among other provisions, it specified that the City "reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources." App. to Pet. for Cert. 151, 152. In March 2000, Quon signed a statement acknowledging that he had read and understood the Computer Policy.

The Computer Policy did not apply, on its face, to text messaging. Text messages share similarities with e-mails, but the two differ in an important way. In this case, for instance, an e-mail sent on a City computer was transmitted

through the City's own data servers, but a text message sent on one of the City's pagers was transmitted using wireless radio frequencies from an individual pager to a receiving station owned by Arch Wireless. It was routed through Arch Wireless' computer network, where it remained until the recipient's pager or cellular telephone was ready to receive the message, at which point Arch Wireless transmitted the message from the transmitting station nearest to the recipient. After delivery, Arch Wireless retained a copy on its computer servers. The message did not pass through computers owned by the City.

Although the Computer Policy did not cover text messages by its explicit terms, the City made clear to employees, including Quon, that the City would treat text messages the same way as it treated e-mails. At an April 18, 2002, staff meeting at which Quon was present, Lieutenant Steven Duke, the OPD officer responsible for the City's contract with Arch Wireless, told officers that messages sent on the pagers "are considered e-mail messages. This means that [text] messages would fall under the City's policy as public information and [would be] eligible for auditing." App. 30. Duke's comments were put in writing in a memorandum sent on April 29, 2002, by Chief Scharf to Quon and other City personnel.

Within the first or second billing cycle after the pagers were distributed, Quon exceeded his monthly text message character allotment. Duke told Quon about the overage, and reminded him that messages sent on the pagers were "considered e-mail and could be audited." *Id.,* at 40. Duke said, however, that "it was not his intent to audit [an] employee's text messages to see if the overage [was] due to work related transmissions." *Ibid.* Duke suggested that Quon could reimburse the City for the overage fee rather than have Duke audit the messages. Quon wrote a check to the City for the overage. Duke offered the same arrangement to other employees who incurred overage fees.

Over the next few months, Quon exceeded his character limit three or four times. Each time he reimbursed the City. Quon and another officer again incurred overage fees for their pager usage in August 2002. At a meeting in October, Duke told Scharf that he had become " 'tired of being a bill collector.' " *Id.,* at 91. Scharf decided to determine whether the existing character limit was too low—that is, whether officers such as Quon were having to pay fees for sending work-related messages—or if the overages were for personal messages. Scharf told Duke to request transcripts of text messages sent in August and September by Quon and the other employee who had exceeded the character allowance.

At Duke's request, an administrative assistant employed by OPD contacted Arch Wireless. After verifying that the City was the subscriber on the accounts, Arch Wireless provided the desired transcripts. Duke reviewed the transcripts and discovered that many of the messages sent and received on Quon's pager were not work related, and some were sexually explicit. Duke reported his findings to Scharf, who, along with Quon's immediate supervisor, reviewed the transcripts himself. After his review, Scharf referred the matter to OPD's internal affairs division for an investigation into whether Quon was violating OPD rules by pursuing personal matters while on duty.

The officer in charge of the internal affairs review was Sergeant Patrick McMahon. Before conducting a review, McMahon used Quon's work schedule to redact the transcripts in order to eliminate any messages Quon sent while off duty. He then reviewed the content of the messages Quon sent during work hours. McMahon's report noted that Quon sent or received 456 messages during work hours in the month of August 2002, of which no more than 57 were work related; he sent as many as 80 messages during a single day at work; and on an average workday, Quon sent or received 28 messages, of which only 3 were related to police business. The report concluded that Quon had violated OPD rules. Quon was allegedly disciplined.

B

Raising claims under Rev. Stat. § 1979, 42 U.S.C. § 1983; 18 U.S.C. § 2701 *et seq.,* popularly known as the Stored Communications Act (SCA); and California law, Quon filed suit against petitioners in the United States District Court for the Central District of California. Arch Wireless and an individual not relevant here were also named as

defendants. Quon was joined in his suit by another plaintiff who is not a party before this Court and by the other respondents, each of whom exchanged text messages with Quon during August and September 2002: Jerilyn Quon, Jeff Quon's then-wife, from whom he was separated; April Florio, an OPD employee with whom Jeff Quon was romantically involved; and Steve Trujillo, another member of the OPD SWAT Team. Among the allegations in the complaint was that petitioners violated respondents' Fourth Amendment rights and the SCA by obtaining and reviewing the transcript of Jeff Quon's pager messages and that Arch Wireless had violated the SCA by turning over the transcript to the City.

The parties filed cross-motions for summary judgment. The District Court granted Arch Wireless' motion for summary judgment on the SCA claim but denied petitioners' motion for summary judgment on the Fourth Amendment claims. *Quon v. Arch Wireless Operating Co.,* 445 F.Supp.2d 1116 (C.D.Cal.2006). Relying on the plurality opinion in *O'Connor v. Ortega,* 480 U.S. 709, 711, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987), the District Court determined that Quon had a reasonable expectation of privacy in the content of his text messages. Whether the audit of the text messages was nonetheless reasonable, the District Court concluded, turned on Chief Scharf's intent: "[I]f the purpose for the audit was to determine if Quon was using his pager to 'play games' and 'waste time,' then the audit was not constitutionally reasonable"; but if the audit's purpose "was to determine the efficacy of the existing character limits to ensure that officers were not paying hidden work-related costs, ... no constitutional violation occurred." 445 F.Supp.2d, at 1146.

The District Court held a jury trial to determine the purpose of the audit. The jury concluded that Scharf ordered the audit to determine the efficacy of the character limits. The District Court accordingly held that petitioners did not violate the Fourth Amendment. It entered judgment in their favor.

The United States Court of Appeals for the Ninth Circuit reversed in part. *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892 (2008). The panel agreed with the District Court that Jeff Quon had a reasonable expectation of privacy in his text messages but disagreed with the District Court about whether the search was reasonable. Even though the search was conducted for "a legitimate work-related rationale," the Court of Appeals concluded, it "was not reasonable in scope." *Id.,* at 908. The panel disagreed with the District Court's observation that "there were no less-intrusive means" that Chief Scharf could have used "to verify the efficacy of the 25,000 character limit ... without intruding on [respondents'] Fourth Amendment rights." *Id.,* at 908–909. The opinion pointed to a "host of simple ways" that the chief could have used instead of the audit, such as warning Quon at the beginning of the month that his future messages would be audited, or asking Quon himself to redact the transcript of his messages. *Id.,* at 909. The Court of Appeals further concluded that Arch Wireless had violated the SCA by turning over the transcript to the City.

The Ninth Circuit denied a petition for rehearing en banc. *Quon v. Arch Wireless Operating Co.,* 554 F.3d 769 (2009). Judge Ikuta, joined by six other Circuit Judges, dissented. *Id.,* at 774–779. Judge Wardlaw concurred in the denial of rehearing, defending the panel's opinion against the dissent. *Id.,* at 769–774.

This Court granted the petition for certiorari filed by the City, OPD, and Chief Scharf challenging the Court of Appeals' holding that they violated the Fourth Amendment. 558 U.S. 1090, 130 S.Ct. 1011, 175 L.Ed.2d 617 (2009). The petition for certiorari filed by Arch Wireless challenging the Ninth Circuit's ruling that Arch Wireless violated the SCA was denied. *USA Mobility Wireless, Inc. v. Quon,* 558 U.S. 1091, 130 S.Ct. 1011, 175 L.Ed.2d 618 (2009).

II

The Fourth Amendment states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ...." It is well settled that the Fourth Amendment's protection extends beyond the sphere of criminal investigations. *Camara v. Municipal Court of City and County of San Francisco,* 387 U.S. 523, 530, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). "The Amendment guarantees the privacy,

dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government," without regard to whether the government actor is investigating crime or performing another function. *Skinner v. Railway Labor Executives' Assn.,* 489 U.S. 602, 613–614, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989). The Fourth Amendment applies as well when the Government acts in its capacity as an employer. *Treasury Employees v. Von Raab,* 489 U.S. 656, 665, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989).

The Court discussed this principle in *O'Connor.* There a physician employed by a state hospital alleged that hospital officials investigating workplace misconduct had violated his Fourth Amendment rights by searching his office and seizing personal items from his desk and filing cabinet. All Members of the Court agreed with the general principle that "[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer." 480 U.S., at 717, 107 S.Ct. 1492 (plurality opinion); see also *id.,* at 731, 107 S.Ct. 1492 (SCALIA, J., concurring in judgment); *id.,* at 737, 107 S.Ct. 1492 (Blackmun, J., dissenting). A majority of the Court further agreed that " 'special needs, beyond the normal need for law enforcement,' " make the warrant and probable-cause requirement impracticable for government employers. *Id.,* at 725, 107 S.Ct. 1492 (plurality opinion) (quoting *New Jersey v. T.L. O.,* 469 U.S. 325, 351, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985)) (Blackmun, J., concurring in judgment)); 480 U.S., at 732, 107 S.Ct. 1492 (opinion of SCALIA, J.) (quoting same).

The *O'Connor* Court did disagree on the proper analytical framework for Fourth Amendment claims against government employers. A four-Justice plurality concluded that the correct analysis has two steps. First, because "some government offices may be so open to fellow employees or the public that no expectation of privacy is reasonable," *id.,* at 718, 107 S.Ct. 1492, a court must consider "[t]he operational realities of the workplace" in order to determine whether an employee's Fourth Amendment rights are implicated, *id.,* at 717, 107 S.Ct. 1492. On this view, "the question whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis." *Id.,* at 718, 107 S.Ct. 1492. Next, where an employee has a legitimate privacy expectation, an employer's intrusion on that expectation "for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances." *Id.,* at 725–726, 107 S.Ct. 1492.

Justice SCALIA, concurring in the judgment, outlined a different approach. His opinion would have dispensed with an inquiry into "operational realities" and would conclude "that the offices of government employees ... are covered by Fourth Amendment protections as a general matter." *Id.,* at 731, 107 S.Ct. 1492. But he would also have held "that government searches to retrieve work-related materials or to investigate violations of workplace rules—searches of the sort that are regarded as reasonable and normal in the private-employer context—do not violate the Fourth Amendment." *Id.,* at 732, 107 S.Ct. 1492.

Later, in the *Von Raab* decision, the Court explained that "operational realities" could diminish an employee's privacy expectations, and that this diminution could be taken into consideration when assessing the reasonableness of a workplace search. 489 U.S., at 671, 109 S.Ct. 1384. In the two decades since *O'Connor,* however, the threshold test for determining the scope of an employee's Fourth Amendment rights has not been clarified further. Here, though they disagree on whether Quon had a reasonable expectation of privacy, both petitioners and respondents start from the premise that the *O'Connor* plurality controls. See Brief for Petitioners 22–28; Brief for Respondents 25–32. It is not necessary to resolve whether that premise is correct. The case can be decided by determining that the search was reasonable even assuming Quon had a reasonable expectation of privacy. The two *O'Connor* approaches—the plurality's and Justice SCALIA's—therefore lead to the same result here.

III

A

Before turning to the reasonableness of the search, it is instructive to note the parties' disagreement over whether Quon had a reasonable expectation of privacy. The record does establish that OPD, at the outset, made it clear that

pager messages were not considered private. The City's Computer Policy stated that "[u]sers should have no expectation of privacy or confidentiality when using" City computers. App. to Pet. for Cert. 152. Chief Scharf's memo and Duke's statements made clear that this official policy extended to text messaging. The disagreement, at least as respondents see the case, is over whether Duke's later statements overrode the official policy. Respondents contend that because Duke told Quon that an audit would be unnecessary if Quon paid for the overage, Quon reasonably could expect that the contents of his messages would remain private.

At this point, were we to assume that inquiry into "operational realities" were called for, compare *O'Connor,* 480 U.S., at 717, 107 S.Ct. 1492 (plurality opinion), with *id.,* at 730–731, 107 S.Ct. 1492 (opinion of SCALIA, J.); see also *id.,* at 737–738, 107 S.Ct. 1492 (BLACKMUN, J., dissenting), it would be necessary to ask whether Duke's statements could be taken as announcing a change in OPD policy, and if so, whether he had, in fact or appearance, the authority to make such a change and to guarantee the privacy of text messaging. It would also be necessary to consider whether a review of messages sent on police pagers, particularly those sent while officers are on duty, might be justified for other reasons, including performance evaluations, litigation concerning the lawfulness of police actions, and perhaps compliance with state open records laws. See Brief for Petitioners 35–40 (citing Cal. Public Records Act, Cal. Govt.Code Ann. § 6250 *et seq.* (West 2008)). These matters would all bear on the legitimacy of an employee's privacy expectation.

The Court must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer. The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear. See, *e.g., Olmstead v. United States,* 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928), overruled by *Katz v. United States,* 389 U.S. 347, 353, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). In *Katz,* the Court relied on its own knowledge and experience to conclude that there is a reasonable expectation of privacy in a telephone booth. See *id.,* at 360–361, 88 S.Ct. 507 (Harlan, J., concurring). It is not so clear that courts at present are on so sure a ground. Prudence counsels caution before the facts in the instant case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations enjoyed by employees when using employer-provided communication devices.

Rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior. As one *amici* brief notes, many employers expect or at least tolerate personal use of such equipment by employees because it often increases worker efficiency. See Brief for Electronic Frontier Foundation et al. 16–20. Another *amicus* points out that the law is beginning to respond to these developments, as some States have recently passed statutes requiring employers to notify employees when monitoring their electronic communications. See Brief for New York Intellectual Property Law Association 22 (citing Del.Code Ann., Tit. 19, § 705 (2005); Conn. Gen.Stat. Ann. § 31–48d (West 2003)). At present, it is uncertain how workplace norms, and the law's treatment of them, will evolve.

Even if the Court were certain that the *O'Connor* plurality's approach were the right one, the Court would have difficulty predicting how employees' privacy expectations will be shaped by those changes or the degree to which society will be prepared to recognize those expectations as reasonable. See 480 U.S., at 715, 107 S.Ct. 1492. Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification. That might strengthen the case for an expectation of privacy. On the other hand, the ubiquity of those devices has made them generally affordable, so one could counter that employees who need cell phones or similar devices for personal matters can purchase and pay for their own. And employer policies concerning communications will of course shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated.

A broad holding concerning employees' privacy expectations vis–à-vis employer-provided technological equipment might have implications for future cases that cannot be predicted. It is preferable to dispose of this case on narrower

grounds. For present purposes we assume several propositions, *arguendo:* First, Quon had a reasonable expectation of privacy in the text messages sent on the pager provided to him by the City; second, petitioners' review of the transcript constituted a search within the meaning of the Fourth Amendment; and third, the principles applicable to a government employer's search of an employee's physical office apply with at least the same force when the employer intrudes on the employee's privacy in the electronic sphere.

B

Even if Quon had a reasonable expectation of privacy in his text messages, petitioners did not necessarily violate the Fourth Amendment by obtaining and reviewing the transcripts. Although as a general matter, warrantless searches "are *per se* unreasonable under the Fourth Amendment," there are "a few specifically established and well-delineated exceptions" to that general rule. *Katz, supra,* at 357, 88 S.Ct. 507. The Court has held that the " 'special needs' " of the workplace justify one such exception. *O'Connor,* 480 U.S., at 725, 107 S.Ct. 1492 (plurality opinion); *id.,* at 732, 107 S.Ct. 1492 (SCALIA, J., concurring in judgment); *Von Raab,* 489 U.S., at 666–667, 109 S.Ct. 1384.

Under the approach of the *O'Connor* plurality, when conducted for a "noninvestigatory, work-related purpos[e]" or for the "investigatio[n] of work-related misconduct," a government employer's warrantless search is reasonable if it is " 'justified at its inception' " and if " 'the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of' " the circumstances giving rise to the search. 480 U.S., at 725–726, 107 S.Ct. 1492. The search here satisfied the standard of the *O'Connor* plurality and was reasonable under that approach.

The search was justified at its inception because there were "reasonable grounds for suspecting that the search [was] necessary for a noninvestigatory work-related purpose." *Id.,* at 726, 107 S.Ct. 1492. As a jury found, Chief Scharf ordered the search in order to determine whether the character limit on the City's contract with Arch Wireless was sufficient to meet the City's needs. This was, as the Ninth Circuit noted, a "legitimate work-related rationale." 529 F.3d, at 908. The City and OPD had a legitimate interest in ensuring that employees were not being forced to pay out of their own pockets for work-related expenses, or on the other hand that the City was not paying for extensive personal communications.

As for the scope of the search, reviewing the transcripts was reasonable because it was an efficient and expedient way to determine whether Quon's overages were the result of work-related messaging or personal use. The review was also not " 'excessively intrusive.' " *O'Connor, supra,* at 726, 107 S.Ct. 1492 (plurality opinion). Although Quon had gone over his monthly allotment a number of times, OPD requested transcripts for only the months of August and September 2002. While it may have been reasonable as well for OPD to review transcripts of all the months in which Quon exceeded his allowance, it was certainly reasonable for OPD to review messages for just two months in order to obtain a large enough sample to decide whether the character limits were efficacious. And it is worth noting that during his internal affairs investigation, McMahon redacted all messages Quon sent while off duty, a measure which reduced the intrusiveness of any further review of the transcripts.

Furthermore, and again on the assumption that Quon had a reasonable expectation of privacy in the contents of his messages, the extent of an expectation is relevant to assessing whether the search was too intrusive. See *Von Raab, supra,* at 671, 109 S.Ct. 1384; cf. *Vernonia School Dist. 47J v. Acton,* 515 U.S. 646, 654–657, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995). Even if he could assume some level of privacy would inhere in his messages, it would not have been reasonable for Quon to conclude that his messages were in all circumstances immune from scrutiny. Quon was told that his messages were subject to auditing. As a law enforcement officer, he would or should have known that his actions were likely to come under legal scrutiny, and that this might entail an analysis of his on-the-job communications. Under the circumstances, a reasonable employee would be aware that sound management principles might require the audit of messages to determine whether the pager was being appropriately used. Given that the City issued the pagers to Quon and other SWAT Team members in order to help them more quickly respond

to crises—and given that Quon had received no assurances of privacy—Quon could have anticipated that it might be necessary for the City to audit pager messages to assess the SWAT Team's performance in particular emergency situations.

From OPD's perspective, the fact that Quon likely had only a limited privacy expectation, with boundaries that we need not here explore, lessened the risk that the review would intrude on highly private details of Quon's life. OPD's audit of messages on Quon's employer-provided pager was not nearly as intrusive as a search of his personal e-mail account or pager, or a wiretap on his home phone line, would have been. That the search did reveal intimate details of Quon's life does not make it unreasonable, for under the circumstances a reasonable employer would not expect that such a review would intrude on such matters. The search was permissible in its scope.

The Court of Appeals erred in finding the search unreasonable. It pointed to a "host of simple ways to verify the efficacy of the 25,000 character limit ... without intruding on [respondents'] Fourth Amendment rights." 529 F.3d, at 909. The panel suggested that Scharf "could have warned Quon that for the month of September he was forbidden from using his pager for personal communications, and that the contents of all of his messages would be reviewed to ensure the pager was used only for work-related purposes during that timeframe. Alternatively, if [OPD] wanted to review past usage, it could have asked Quon to count the characters himself, or asked him to redact personal messages and grant permission to [OPD] to review the redacted transcript." *Ibid.*

This approach was inconsistent with controlling precedents. This Court has "repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment." *Vernonia, supra,* at 663, 115 S.Ct. 2386; see also, *e.g., Board of Ed. of Independent School Dist. No. 92 of Pottawatomie Cty. v. Earls,* 536 U.S. 822, 837, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002); *Illinois v. Lafayette,* 462 U.S. 640, 647, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983). That rationale "could raise insuperable barriers to the exercise of virtually all search-and-seizure powers," *United States v. Martinez–Fuerte,* 428 U.S. 543, 557, n. 12, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976), because "judges engaged in *post hoc* evaluations of government conduct can almost always imagine some alternative means by which the objectives of the government might have been accomplished," *Skinner,* 489 U.S., at 629, n. 9, 109 S.Ct. 1402 (internal quotation marks and brackets omitted). The analytic errors of the Court of Appeals in this case illustrate the necessity of this principle. Even assuming there were ways that OPD could have performed the search that would have been less intrusive, it does not follow that the search as conducted was unreasonable.

Respondents argue that the search was *per se* unreasonable in light of the Court of Appeals' conclusion that Arch Wireless violated the SCA by giving the City the transcripts of Quon's text messages. The merits of the SCA claim are not before us. But even if the Court of Appeals was correct to conclude that the SCA forbade Arch Wireless from turning over the transcripts, it does not follow that petitioners' actions were unreasonable. Respondents point to no authority for the proposition that the existence of statutory protection renders a search *per se* unreasonable under the Fourth Amendment. And the precedents counsel otherwise. See *Virginia v. Moore,* 553 U.S. 164, 168, 128 S.Ct. 1598, 170 L.Ed.2d 559 (2008) (search incident to an arrest that was illegal under state law was reasonable); *California v. Greenwood,* 486 U.S. 35, 43, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988) (rejecting argument that if state law forbade police search of individual's garbage the search would violate the Fourth Amendment). Furthermore, respondents do not maintain that any OPD employee either violated the law himself or herself or knew or should have known that Arch Wireless, by turning over the transcript, would have violated the law. The otherwise reasonable search by OPD is not rendered unreasonable by the assumption that Arch Wireless violated the SCA by turning over the transcripts.

Because the search was motivated by a legitimate work-related purpose, and because it was not excessive in scope, the search was reasonable under the approach of the *O'Connor* plurality. 480 U.S., at 726, 107 S.Ct. 1492. For these same reasons—that the employer had a legitimate reason for the search, and that the search was not excessively

intrusive in light of that justification—the Court also concludes that the search would be "regarded as reasonable and normal in the private-employer context" and would satisfy the approach of Justice SCALIA's concurrence. *Id.,* at 732, 107 S.Ct. 1492. The search was reasonable, and the Court of Appeals erred by holding to the contrary. Petitioners did not violate Quon's Fourth Amendment rights.

C

Finally, the Court must consider whether the search violated the Fourth Amendment rights of Jerilyn Quon, Florio, and Trujillo, the respondents who sent text messages to Jeff Quon. Petitioners and respondents disagree whether a sender of a text message can have a reasonable expectation of privacy in a message he knowingly sends to someone's employer-provided pager. It is not necessary to resolve this question in order to dispose of the case, however. Respondents argue that because "the search was unreasonable as to Sergeant Quon, it was also unreasonable as to his correspondents." Brief for Respondents 60 (some capitalization omitted; boldface deleted). They make no corollary argument that the search, if reasonable as to Quon, could nonetheless be unreasonable as to Quon's correspondents. See *id.,* at 65–66. In light of this litigating position and the Court's conclusion that the search was reasonable as to Jeff Quon, it necessarily follows that these other respondents cannot prevail.

Because the search was reasonable, petitioners did not violate respondents' Fourth Amendment rights, and the court below erred by concluding otherwise. The judgment of the Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

No. 23-1989

88 S.Ct. 1731
Supreme Court of the United States

Marvin L. PICKERING, Appellant,
v.
BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT 205, WILL COUNTY, ILLINOIS.

No. 510.
|
Decided June 3, 1968.

Opinion

Mr. Justice MARSHALL delivered the opinion of the Court.

Appellant Marvin L. Pickering, a teacher in Township High School District 205, Will County, Illinois, was dismissed from his position by the appellee Board of Education for sending a letter to a local newspaper in connection with a recently proposed tax increase that was critical of the way in which the Board and the district superintendent of schools had handled past proposals to raise new revenue for the schools. Appellant's dismissal resulted from a determination by the Board, after a full hearing, that the publication of the letter was 'detrimental to the efficient operation and administration of the schools of the district' and hence, under the relevant Illinois statute, Ill.Rev.Stat., c. 122, s 10—22.4(1963), that 'interests of the schools require(d) (his dismissal).'

Appellant's claim that his writing of the letter was protected by the First and Fourteenth Amendments was rejected. Appellant then sought review of the Board's action in the Circuit Court of Will County, which affirmed his dismissal on the ground that the determination that appellant's letter was detrimental to the interests of the school system was supported by substantial evidence and that the interests of the schools overruled appellant's First Amendment rights. On appeal, the Supreme Court of Illinois, two Justices dissenting, affirmed the judgment of the Circuit Court. 36 Ill.2d 568, 225 N.E.2d 1 (1967). We noted probable jurisdiction of appellant's claim that the Illinois statute permitting his dismissal on the facts of this case was unconstitutional as applied under the First and Fourteenth Amendments.[1] 389 U.S. 925 88 S.Ct. 291, 19 L.Ed.2d 276 (1967). For the reasons detailed below we agree that appellant's rights to freedom of speech were violated and we reverse.

I.

In February of 1961 the appellee Board of Education asked the voters of the school district to approve a bond issue to raise $4,875,000 to erect two new schools. The proposal was defeated. Then, in December of 1961, the Board submitted another bond proposal to the voters which called for the raising of $5,500,000 to build two new schools. This second proposal passed and the schools were built with the money raised by the bond sales. In May of 1964 a proposed increase in the tax rate to be used for educational purposes was submitted to the voters by the Board and was defeated. Finally, on September 19, 1964, a second proposal to increase the tax rate was submitted by the Board and was likewise defeated. It was in connection with this last proposal of the School Board that appellant wrote the letter to the editor (which we reproduce in an Appendix to this opinion) that resulted in his dismissal.

Prior to the vote on the second tax increase proposal a variety of articles attributed to the District 205 Teachers' Organization appeared in the local paper. These articles urged passage of the tax increase and stated that failure to pass the increase would result in a decline in the quality of education afforded children in the district's schools. A letter from the superintendent of schools making the same point was published in the paper two days before the election and submitted to the voters in mimeographed form the following day. It was in response to the foregoing

material, together with the failure of the tax increase to pass, that appellant submitted the letter in question to the editor of the local paper.

The letter constituted, basically, an attack on the School Board's handling of the 1961 bond issue proposals and its subsequent allocation of financial resources between the schools' educational and athletic programs. It also charged the superintendent of schools with attempting to prevent teachers in the district from opposing or criticizing the proposed bond issue.

The Board dismissed Pickering for writing and publishing the letter. Pursuant to Illinois law, the Board was then required to hold a hearing on the dismissal. At the hearing the Board charged that numerous statements in the letter were false and that the publication of the statements unjustifiably impugned the 'motives, honesty, integrity, truthfulness, responsibility and competence' of both the Board and the school administration. The Board also charged that the false statements damaged the professional reputations of its members and of the school administrators, would be disruptive of faculty discipline, and would tend to foment 'controversy, conflict and dissension' among teachers, administrators, the Board of Education, and the residents of the district. Testimony was introduced from a variety of witnesses on the truth or falsity of the particular statements in the letter with which the Board took issue. The Board found the statements to be false as charged. No evidence was introduced at any point in the proceedings as to the effect of the publication of the letter on the community as a whole or on the administration of the school system in particular, and no specific findings along these lines were made.

The Illinois courts reviewed the proceedings solely to determine whether the Board's findings were supported by substantial evidence and whether, on the facts as found, the Board could reasonably conclude that appellant's publication of the letter was 'detrimental to the best interests of the schools.' Pickering's claim that his letter was protected by the First Amendment was rejected on the ground that his acceptance of a teaching position in the public schools obliged him to refrain from making statements about the operation of the schools 'which in the absence of such position he would have an undoubted right to engage in.' It is not altogether clear whether the Illinois Supreme Court held that the First Amemdment had no applicability to appellant's dismissal for writing the letter in question or whether it determined that the particular statements made in the letter were not entitled to First Amendment protection.

In any event, it clearly rejected Pickering's claim that, on the facts of this case, he could not constitutionally be dismissed from his teaching position.

II.

To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may 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, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court. E.g., Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216 (1952); Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247 (1960); Keyishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675 (1967). '(T)he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.' Keyishian v. Board of Regents, supra, 385 U.S. at 605—606, 87 S.Ct. at 685. At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between 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.

III.

The Board contends that 'the teacher by virtue of his public employment has a duty of loyalty to support his superiors in attaining the generally accepted goals of education and that, if he must speak out publicly, he should do so factually and accurately, commensurate with his education and experience.' Appellant, on the other hand, argues that the test applicable to defamatory statements directed against public officials by persons having no occupational relationship with them, namely, that statements to be legally actionable must be made 'with knowledge that (they were) false or with reckless disregard of whether (they were) false or not,' New York Times Co. v. Sullivan, 376 U.S. 254, 280, 84 S.Ct. 710, 726, 11 L.Ed.2d 686 (1964), should also be applied to public statements made by teachers. Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged. However, in the course of evaluating the conflicting claims of First Amendment protection and the need for orderly school administration in the context of this case, we shall indicate some of the general lines along which an analysis of the controlling interests should run.

An examination of the statements in appellant's letter objected to by the Board[2] reveals that they, like the letter as a whole, consist essentially of criticism of the Board's allocation of school funds between educational and athletic programs, and of both the Board's and the superintendent's methods of informing, or preventing the informing of, the district's taxpayers of the real reasons why additional tax revenues were being sought for the schools. The statements are in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here. Appellant's employment relationships with the Board and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning. Accordingly, to the extent that the Board's position here can be taken to suggest that even comments on matters of public concern that are substantially correct, such as statements (1)—(4) of appellant's letter, see Appendix, infra, may furnish grounds for dismissal if they are sufficiently critical in tone, we unequivocally reject it.[3]

We next consider the statements in appellant's letter which we agree to be false. The Board's original charges included allegations that the publication of the letter damaged the professional reputations of the Board and the superintendent and would foment controversy and conflict among the Board, teachers, administrators, and the residents of the district. However, no evidence to support these allegations was introduced at the hearing. So far as the record reveals, Pickering's letter was greeted by everyone but its main target, the Board, with massive apathy and total disbelief. The Board must, therefore, have decided, perhaps by analogy with the law of libel, that the statements were per se harmful to the operation of the schools.

However, the only way in which the Board could conclude, absent any evidence of the actual effect of the letter, that the statements contained therein were per se detrimental to the interest of the schools was to equate the Board members' own interests with that of the schools. Certainly an accusation that too much money is being spent on athletics by the administrators of the school system (which is precisely the import of that portion of appellant's letter containing the statements that we have found to be false, see Appendix, infra) cannot reasonably be regarded as per se detrimental to the district's schools. Such an accusation reflects rather a difference of opinion between Pickering and the Board as to the preferable manner of operating the school system, a difference of opinion that clearly concerns an issue of general public interest.

In addition, the fact that particular illustrations of the Board's claimed undesirable emphasis on athletic programs are false would not normally have any necessary impact on the actual operation of the schools, beyond its tendency to anger the Board. For example, Pickering's letter was written after the defeat at the polls of the second proposed tax

increase. It could, therefore, have had no effect on the ability of the school district to raise necessary revenue, since there was no showing that there was any proposal to increase taxes pending when the letter was written.

More importantly, the question whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administration, including the School Board, cannot, in a society that leaves such questions to popular vote, be taken as conclusive. On such a question free and open debate is vital to informed decision-making by the electorate. 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 operations 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.

In addition, the amounts expended on athletics which Pickering reported erroneously were matters of public record on which his position as a teacher in the district did not qualify him to speak with any greater authority than any other taxpayer. The Board could easily have rebutted appellant's errors by publishing the accurate figures itself, either via a letter to the same newspaper or otherwise. We are thus not presented with a situation in which a teacher has carelessly made false statements about matters so closely related to the day-to-day operations of the schools that any harmful impact on the public would be difficult to counter because of the teacher's presumed greater access to the real facts. Accordingly, we have no occasion to consider at this time whether under such circumstances a school board could reasonably require that a teacher make substantial efforts to verify the accuracy of his charges before publishing them.[4]

What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom[5] or to have interfered with the regular operation of the schools generally. In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.

IV.

The public interest in having free and unhindered debate on matters of public importance—the core value of the Free Speech Clause of the First Amendment—is so great that it has been held that a State cannot authorize the recovery of damages by a public official for defamatory statements directed at him except when such statements are shown to have been made either with knowledge of their falsity or with reckless disregard for their truth or falsity. New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710 (1964); St. Amant v. Thompson, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968). Compare Linn v. United Plant Guard Workers, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966). The same test has been applied to suits for invasion of privacy based on false statements where a 'matter of public interest' is involved. Time, Inc. v. Hill, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967). It is therefore perfectly clear that, were appellant a member of the general public, the State's power to afford the appellee Board of Education or its members any legal right to sue him for writing the letter at issue here would be limited by the requirement that the letter be judged by the standard laid down in New York Times.

This Court has also indicated, in more general terms, that statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors. Garrison v. State of Louisiana, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964); Wood v. Georgia, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962). In Garrison, the New York Times test was specifically applied to a case involving a criminal defamation conviction stemming from statements made by a district attorney about the judges before whom he regularly appeared.

While criminal sanctions and damage awards have a somewhat different impact on the exercise of the right to freedom of speech from dismissal from employment, it is apparent that the threat of dismissal from public employment is nonetheless a potent means of inhibiting speech. We have already noted our disinclination to make an across-the-board equation of dismissal from public employment for remarks critical of superiors with awarding damages in a libel suit by a public official for similar criticism. However, in a case such as the present one, in which the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher, we conclude that it is necessary to regard the teacher as the member of the general public he seeks to be.

In sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him,[6] a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment. Since no such showing has been made in this case regarding appellant's letter, see Appendix, infra, his dismissal for writing it cannot be upheld and the judgment of the Illinois Supreme Court must, accordingly, be reversed and the case remanded for further proceedings not inconsistent with this opinion. It is so ordered.

Judgment reversed and case remanded with directions.

Footnotes

1 Appellant also challenged that statutory standard on which the Board based his dismissal as vague and overbroad. See Keyishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960). Because of our disposition of this case we do not reach appellant's challenge to the statute on its face.

2 We have set out in the Appendix our detailed analysis of the specific statements in appellant's letter which the Board found to be false, together with our reasons for concluding that several of the statements were, contrary to the findings of the Board, substantially correct.

3 It is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal. Likewise, positions in public employment in which the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them can also be imagined. We intimate no views as to how we would resolve any specific instances of such situations, but merely note that significantly different considerations would be involved in such cases.

4 There is likewise no occasion furnished by this case for consideration of the extent to which teachers can be required by narrowly drawn grievance procedures to submit complaints about the operation of the schools to their superiors for action thereon prior to bringing the complaints before the public.

5 We also note that this case does not present a situation in which a teacher's public statements are so without foundation as to call into question his fitness to perform his duties in the classroom. In such a case, of course, the statements would merely be evidence of the teacher's general competence, or lack thereof, and not an independent basis for dismissal.

6 Because we conclude that appellant's statements were not knowingly or recklessly false, we have no occasion to pass upon the additional question whether a statement that was knowingly or recklessly false would, if it were neither shown nor could reasonably be presumed to have had any harmful effects, still be protected by the First Amendment. See also n. 5, supra.

103 S.Ct. 1684
Supreme Court of the United States

Harry CONNICK, Individually and in His Capacity as District Attorney, etc., Petitioner,
v.
Sheila MYERS.

No. 81–1251.
Decided April 20, 1983.

Opinion

Justice WHITE delivered the opinion of the Court.

In *Pickering v. Board of Education,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), we stated that a public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment. We also recognized that the State's interests as an employer in regulating the speech of its employees "differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Id.,* at 568, 88 S.Ct., at 1734. The problem, we thought, was arriving "at a balance between 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." *Ibid.* We return to this problem today and consider whether the First and Fourteenth Amendments prevent the discharge of a state employee for circulating a questionnaire concerning internal office affairs.

I

The respondent, Sheila Myers, was employed as an Assistant District Attorney in New Orleans for five and a half years. She served at the pleasure of petitioner Harry Connick, the District Attorney for Orleans Parish. During this period Myers competently performed her responsibilities of trying criminal cases.

In the early part of October, 1980, Myers was informed that she would be transferred to prosecute cases in a different section of the criminal court. Myers was strongly opposed to the proposed transfer[1] and expressed her view to several of her supervisors, including Connick. Despite her objections, on October 6 Myers was notified that she was being transferred. Myers again spoke with Dennis Waldron, one of the first assistant district attorneys, expressing her reluctance to accept the transfer. A number of other office matters were discussed and Myers later testified that, in response to Waldron's suggestion that her concerns were not shared by others in the office, she informed him that she would do some research on the matter.

That night Myers prepared a questionnaire soliciting the views of her fellow staff members concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns.[2] Early the following morning, Myers typed and copied the questionnaire. She also met with Connick who urged her to accept the transfer. She said she would "consider" it. Connick then left the office. Myers then distributed the questionnaire to 15 assistant district attorneys. Shortly after noon, Dennis Waldron learned that Myers was distributing the survey. He immediately phoned Connick and informed him that Myers was creating a "mini-insurrection" within the office. Connick returned to the office and told Myers that she was being terminated because of her refusal to accept the transfer. She was also told that her distribution of the questionnaire was considered an act of insubordination. Connick particularly objected to the question which inquired whether employees "had confidence in and would rely on the word" of various superiors in

the office, and to a question concerning pressure to work in political campaigns which he felt would be damaging if discovered by the press.

Myers filed suit under 42 U.S.C. § 1983, contending that her employment was wrongfully terminated because she had exercised her constitutionally-protected right of free speech. The District Court agreed, ordered Myers reinstated, and awarded backpay, damages, and attorney's fees. 507 F.Supp. 752 (E.D.La.1981).[3] The District Court found that although Connick informed Myers that she was being fired because of her refusal to accept a transfer, the facts showed that the questionnaire was the real reason for her termination. The court then proceeded to hold that Myers' questionnaire involved matters of public concern and that the state had not "clearly demonstrated" that the survey "substantially interfered" with the operations of the District Attorney's office.

Connick appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed on the basis of the District Court's opinion. 654 F.2d 719 (1981). Connick then sought review in this Court by way of certiorari, which we granted. 455 U.S. 999, 102 S.Ct. 1629, 71 L.Ed.2d 865 (1982).

II

For at least 15 years, it has been settled that a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression. *Keyishian v. Board of Regents,* 385 U.S. 589, 605–606, 87 S.Ct. 675, 684–685, 17 L.Ed.2d 629 (1967); *Pickering v. Board of Education,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); *Perry v. Sindermann,* 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972); *Branti v. Finkel,* 445 U.S. 507, 515–516, 100 S.Ct. 1287, 1293, 63 L.Ed.2d 574 (1980). Our task, as we defined it in *Pickering,* is to seek "a balance between 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." 391 U.S., at 568, 88 S.Ct., at 1734. The District Court, and thus the Court of Appeals as well, misapplied our decision in *Pickering* and consequently, in our view, erred in striking the balance for respondent.

A

The District Court got off on the wrong foot in this case by initially finding that, "[t]aken as a whole, the issues presented in the questionnaire relate to the effective functioning of the District Attorney's Office and are matters of public importance and concern." 507 F.Supp., at 758. Connick contends at the outset that no balancing of interests is required in this case because Myers' questionnaire concerned only internal office matters and that such speech is not upon a matter of "public concern," as the term was used in *Pickering.* Although we do not agree that Myers' communication in this case was wholly without First Amendment protection, there is much force to Connick's submission. The repeated emphasis in *Pickering* on the right of a public employee "as a citizen, in commenting upon matters of public concern," was not accidental. This language, reiterated in all of *Pickering's* progeny,[4] reflects both the historical evolvement of the rights of public employees, and the common sense realization that government offices could not function if every employment decision became a constitutional matter.[5]

For most of this century, the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights. The classic formulation of this position was Justice Holmes', who, when sitting on the Supreme Judicial Court of Massachusetts, observed: "A policeman may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. Mayor of New Bedford,* 155 Mass. 216, 220, 29 N.E. 517, 517 (1892). For many years, Holmes' epigram expressed this Court's law. *Adler v. Board of Education,* 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517 (1952); *Garner v. Board of Public Works,* 341 U.S. 716, 71 S.Ct. 909, 95 L.Ed. 1317 (1951); *United Public Workers v. Mitchell,* 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947); *United States v. Wurzbach,* 280 U.S. 396, 50 S.Ct. 167, 74 L.Ed. 508 (1930); *Ex parte Curtis,* 106 U.S. 371, 1 S.Ct. 381, 27 L.Ed. 232 (1882).

The Court cast new light on the matter in a series of cases arising from the widespread efforts in the 1950s and early 1960s to require public employees, particularly teachers, to swear oaths of loyalty to the state and reveal the groups with which they associated. In *Wieman v. Updegraff,* 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216 (1952), the Court held that a State could not require its employees to establish their loyalty by extracting an oath denying past affiliation with Communists. In *Cafeteria Workers v. McElroy,* 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961), the Court recognized that the government could not deny employment because of previous membership in a particular party. See also *Shelton v. Tucker,* 364 U.S. 479, 490, 81 S.Ct. 247, 253, 5 L.Ed.2d 231 (1960); *Torcaso v. Watkins,* 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961); *Cramp v. Board of Public Instruction,* 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed.2d 285 (1961). By the time *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), was decided, it was already "too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Id.,* at 404, 83 S.Ct., at 1794. It was therefore no surprise when in *Keyishian v. Board of Regents,* 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967), the Court invalidated New York statutes barring employment on the basis of membership in "subversive" organizations, observing that the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, had been uniformly rejected. *Id.,* at 605–606, 87 S.Ct., at 684–685.

In all of these cases, the precedents in which *Pickering* is rooted, the invalidated statutes and actions sought to suppress the rights of public employees to participate in public affairs. The issue was whether government employees could be prevented or "chilled" by the fear of discharge from joining political parties and other associations that certain public officials might find "subversive." The explanation for the Constitution's special concern with threats to the right of citizens to participate in political affairs is no mystery. The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States,* 354 U.S. 476, 484, 77 S.Ct. 1304, 1308, 1 L.Ed.2d 1498; *New York Times Co. v. Sullivan,* 376 U.S. 254, 269, 84 S.Ct. 710, 720, 11 L.Ed.2d 686 (1964). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana,* 379 U.S. 64, 74–75, 85 S.Ct. 209, 215–216, 13 L.Ed.2d 125 (1964). Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the "highest rung of the heirarchy of First Amendment values," and is entitled to special protection. *NAACP v. Claiborne Hardware Co.,* ── U.S. ——, ——, 102 S.Ct. 3409, 3426, 73 L.Ed.2d 1215 (1982); *Carey v. Brown,* 447 U.S. 455, 467, 100 S.Ct. 2286, 2293, 65 L.Ed.2d 263 (1980).

Pickering v. Board of Education, supra, followed from this understanding of the First Amendment. In *Pickering,* the Court held impermissible under the First Amendment the dismissal of a high school teacher for openly criticizing the Board of Education on its allocation of school funds between athletics and education and its methods of informing taxpayers about the need for additional revenue. Pickering's subject was "a matter of legitimate public concern" upon which "free and open debate is vital to informed decision-making by the electorate." 391 U.S., at 571–572, 88 S.Ct., at 1736.

Our cases following *Pickering* also involved safeguarding speech on matters of public concern. The controversy in *Perry v. Sindermann,* 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972), arose from the failure to rehire a teacher in the state college system who had testified before committees of the Texas legislature and had become involved in public disagreement over whether the college should be elevated to four-year status—a change opposed by the Regents. In *Mt. Healthy City Board of Ed. v. Doyle,* 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), a public school teacher was not rehired because, allegedly, he had relayed to a radio station the substance of a memorandum relating to teacher dress and appearance that the school principal had circulated to various teachers. The memorandum was apparently prompted by the view of some in the administration that there was a relationship between teacher appearance and public support for bond issues, and indeed, the radio station promptly announced the adoption of the dress code as a news item. Most recently, in *Givhan v. Western Line Consolidated School District,* 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979), we held that First Amendment protection applies when

a public employee arranges to communicate privately with his employer rather than to express his views publicly. Although the subject-matter of Mrs. Givhan's statements were not the issue before the Court, it is clear that her statements concerning the school district's allegedly racially discriminatory policies involved a matter of public concern.

Pickering, its antecedents and progeny, lead us to conclude that if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge.[6] When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable. *Board of Regents v. Roth,* 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Perry v. Sindermann,* 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); *Bishop v. Wood,* 426 U.S. 341, 349–350, 96 S.Ct. 2074, 2079–2080, 48 L.Ed.2d 684 (1976).

We do not suggest, however, that Myers' speech, even if not touching upon a matter of public concern, is totally beyond the protection of the First Amendment. "The First Amendment does not protect speech and assembly only to the extent it can be characterized as political. 'Great secular causes, with smaller ones, are guarded.' " *United Mine Workers v. Illinois State Bar Association,* 389 U.S. 217, 223, 88 S.Ct. 353, 356, 19 L.Ed.2d 426 (1967), *quoting Thomas v. Collins,* 323 U.S. 516, 531, 65 S.Ct. 315, 323, 89 L.Ed. 430 (1945). We in no sense suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the State can prohibit and punish such expression by all persons in its jurisdiction. See *Chaplinsky v. New Hampshire,* 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942); *Roth v. United States,* 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957); *New York v. Ferber,* 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). For example, an employee's false criticism of his employer on grounds not of public concern may be cause for his discharge but would be entitled to the same protection in a libel action accorded an identical statement made by a man on the street. We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. *Cf. Bishop v. Wood,* 426 U.S. 341, 349–350, 96 S.Ct. 2074, 2079–2080, 48 L.Ed.2d 684 (1976). Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the state.

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.[7] In this case, with but one exception, the questions posed by Myers to her coworkers do not fall under the rubric of matters of "public concern." We view the questions pertaining to the confidence and trust that Myers' coworkers possess in various supervisors, the level of office morale, and the need for a grievance committee as mere extensions of Myers' dispute over her transfer to another section of the criminal court. Unlike the dissent, *post,* at 1698, we do not believe these questions are of public import in evaluating the performance of the District Attorney as an elected official. Myers did not seek to inform the public that the District Attorney's office was not discharging its governmental responsibilities in the investigation and prosecution of criminal cases. Nor did Myers seek to bring to light actual or potential wrongdoing or breach of public trust on the part of Connick and others. Indeed, the questionnaire, if released to the public, would convey no information at all other than the fact that a single employee is upset with the status quo. While discipline and morale in the workplace are related to an agency's efficient performance of its duties, the focus of Myers' questions is not to evaluate the performance of the office but rather to gather ammunition for another round of controversy with her

superiors. These questions reflect one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a cause celèbre.[8]

To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case. While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.

One question in Myers' questionnaire, however, does touch upon a matter of public concern. Question 11 inquires if assistant district attorneys "ever feel pressured to work in political campaigns on behalf of office supported candidates." We have recently noted that official pressure upon employees to work for political candidates not of the worker's own choice constitutes a coercion of belief in violation of fundamental constitutional rights. *Branti v. Finkel,* 445 U.S. 507, 515–516, 100 S.Ct. 1287, 1293, 63 L.Ed.2d 574 (1980); *Elrod v. Burns,* 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). In addition, there is a demonstrated interest in this country that government service should depend upon meritorious performance rather than political service. *CSC v. Letter Carriers,* 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973); *United Public Workers v. Mitchell,* 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947). Given this history, we believe it apparent that the issue of whether assistant district attorneys are pressured to work in political campaigns is a matter of interest to the community upon which it is essential that public employees be able to speak out freely without fear of retaliatory dismissal.

B

Because one of the questions in Myers' survey touched upon a matter of public concern, and contributed to her discharge we must determine whether Connick was justified in discharging Myers. Here the District Court again erred in imposing an unduly onerous burden on the state to justify Myers' discharge. The District Court viewed the issue of whether Myers' speech was upon a matter of "public concern" as a threshold inquiry, after which it became the government's burden to "clearly demonstrate" that the speech involved "substantially interfered" with official responsibilities. Yet *Pickering* unmistakably states, and respondent agrees[9], that the state's burden in justifying a particular discharge varies depending upon the nature of the employee's expression. Although such particularized balancing is difficult, the courts must reach the most appropriate possible balance of the competing interests.[10]

C

The *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public. One hundred years ago, the Court noted the government's legitimate purpose in "promot[ing] efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service." *Ex parte Curtis,* 106 U.S. 371, 373, 1 S.Ct. 381, 384, 27 L.Ed. 232 (1882). As Justice POWELL explained in his separate opinion in *Arnett v. Kennedy,* 416 U.S. 134, 168, 94 S.Ct. 1633, 1651, 40 L.Ed.2d 15 (1974):

> "To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency."

We agree with the District Court that there is no demonstration here that the questionnaire impeded Myers' ability to perform her responsibilities. The District Court was also correct to recognize that "it is important to the efficient and successful operation of the District Attorney's office for Assistants to maintain close working relationships with

their superiors." 507 F.Supp., at 759. Connick's judgment, and apparently also that of his first assistant Dennis Waldron, who characterized Myers' actions as causing a "mini-insurrection", was that Myers' questionnaire was an act of insubordination which interfered with working relationships.[11] When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate. Furthermore, we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.[12] We caution that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern.

The District Court rejected Connick's position because "unlike a statement of fact which might be deemed critical of one's superiors, [Myers'] questionnaire was not a statement of fact, but the presentation and solicitation of ideas and opinions," which are entitled to greater constitutional protection because "under the First Amendment there is no such thing as a false idea." 507 F.Supp., at 759. This approach, while perhaps relevant in weighing the value of Myers' speech, bears no logical relationship to the issue of whether the questionnaire undermined office relationships. Questions, no less than forcefully stated opinions and facts, carry messages and it requires no unusual insight to conclude that the purpose, if not the likely result, of the questionnaire is to seek to precipitate a vote of no confidence in Connick and his supervisors. Thus, Question 10, which asked whether or not the Assistants had confidence in and relied on the word of five named supervisors, is a statement that carries the clear potential for undermining office relations.

Also relevant is the manner, time, and place in which the questionnaire was distributed. As noted in *Givhan v. Western Line Consolidated School Dist., supra* at 415, n. 4, 99 S.Ct., at 696, n. 4, "Private expression ... may in some situations bring additional factors to the *Pickering* calculus. When a government employee personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time, and place in which it is delivered." Here the questionnaire was prepared, and distributed at the office; the manner of distribution required not only Myers to leave her work but for others to do the same in order that the questionnaire be completed.[13] Although some latitude in when official work is performed is to be allowed when professional employees are involved, and Myers did not violate announced office policy[14], the fact that Myers, unlike Pickering, exercised her rights to speech at the office supports Connick's fears that the functioning of his office was endangered.

Finally, the context in which the dispute arose is also significant. This is not a case where an employee, out of purely academic interest, circulated a questionnaire so as to obtain useful research. Myers acknowledges that it is no coincidence that the questionnaire followed upon the heels of the transfer notice. When employee speech concerning office policy arises from an employment dispute concerning the very application of that policy to the speaker, additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office. Although we accept the District Court's factual finding that Myers' reluctance to accede to the transfer order was not a sufficient cause in itself for her dismissal, and thus does not constitute a sufficient defense under *Mt. Healthy City Board of Ed. v. Doyle,* 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), this does not render irrelevant the fact that the questionnaire emerged after a persistent dispute between Myers and Connick and his deputies over office transfer policy.

III

Myers' questionnaire touched upon matters of public concern in only a most limited sense; her survey, in our view, is most accurately characterized as an employee grievance concerning internal office policy. The limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships. Myers' discharge therefore did not offend the First Amendment. We reiterate, however, the caveat we expressed in *Pickering, supra,* at 569, 88

S.Ct., at 1735: "Because of the enormous variety of fact situations in which critical statements by ... public employees may be thought by their superiors ... to furnish grounds for dismissal, we do not deem it either appropriate or feasible to lay down a general standard against which all such statements may be judged."

Our holding today is grounded in our long-standing recognition that the First Amendment's primary aim is the full protection of speech upon issues of public concern, as well as the practical realities involved in the administration of a government office. Although today the balance is struck for the government, this is no defeat for the First Amendment. For it would indeed be a Pyrrhic victory for the great principles of free expression if the Amendment's safeguarding of a public employee's right, as a citizen, to participate in discussions concerning public affairs were confused with the attempt to constitutionalize the employee grievance that we see presented here. The judgment of the Court of Appeals is

Reversed.

Footnotes

1 Myers' opposition was at least partially attributable to her concern that a conflict of interest would have been created by the transfer because of her participation in a counseling program for convicted defendants released on probation in the section of the criminal court to which she was to be assigned.

2 The questionnaire is reproduced as Appendix A.

3 Petitioner has also objected to the assessment of damages as being in violation of the Eleventh Amendment and to the award of attorney's fees. Because of our disposition of the case, we do not reach these questions.

4 See *Perry v. Sindermann,* 408 U.S. 593, 598, 92 S.Ct. 2694, 2698, 33 L.Ed.2d 570 (1972); *Mt. Healthy City School Dist. Board of Ed. v. Doyle,* 429 U.S. 274, 284, 97 S.Ct. 568, 574, 50 L.Ed.2d 471 (1977); *Givhan v. Western Line Consolidated School District,* 439 U.S. 410, 414, 99 S.Ct. 693, 695, 58 L.Ed.2d 619 (1979).

5 The question of whether expression is of a kind that is of legitimate concern to the public is also the standard in determining whether a common-law action for invasion of privacy is present. See Restatement (Second) of Torts, § 652D. See also *Cox Broadcasting Co. v. Cohn,* 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975) (action for invasion of privacy cannot be maintained when the subject-matter of the publicity is matter of public record); *Time, Inc. v. Hill,* 385 U.S. 374, 387–388, 87 S.Ct. 534, 541–542, 17 L.Ed.2d 456 (1967).

6 See, *Clark v. Holmes,* 474 F.2d 928 (CA7 1972) cert. denied, 411 U.S. 972, 93 S.Ct. 2148, 36 L.Ed.2d 695 (1973); *Schmidt v. Fremont County School Dist.,* 558 F.2d 982, 984 (CA10 1977).

7 The inquiry into the protected status of speech is one of law, not fact. See n. 10, *infra.*

8 This is not a case like *Givhan, supra,* where an employee speaks out as a citizen on a matter of general concern, not tied to a personal employment dispute, but arranges to do so privately. Mrs. Givhan's right to protest racial discrimination—a matter inherently of public concern—is not forfeited by her choice of a private forum. 439 U.S., at 415–416, 99 S.Ct., at 696–697. Here, however, a questionnaire not otherwise of public concern does not attain that status because its subject matter could, in different circumstances, have been the topic of a communication to the public that might be of general interest. The dissent's analysis of whether discussions of office morale and discipline could be matters of public concern is beside the point—it does not answer whether *this* questionnaire is such speech.

9 See Brief for Respondent 9 ("These factors, including the degree of the 'importance' of plaintiff's speech, were proper considerations to be weighed in the *Pickering* balance."); Tr. of Oral Arg. 30 (Counsel for Respondent) ("I certainly would not disagree that the content of the questionnaire, whether it affects a matter of great public concern or only a very narrow internal matter, is a relevant circumstance to be weighed in the *Pickering* analysis.")

10 "The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they are made to see whether or not they ... are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." *Pennekamp v. Florida,* 328 U.S. 331, 335, 66 S.Ct. 1029, 1031, 90 L.Ed. 1295 (1946) (footnote omitted).

Because of this obligation, we cannot "avoid making an independent constitutional judgment on the facts of the case." *Jacobellis v. Ohio,* 378 U.S. 184, 190, 84 S.Ct. 1676, 1679, 12 L.Ed.2d 793 (1964) (Opinion of BRENNAN, J.). See *Edwards v. South Carolina,* 372 U.S. 229, 235, 83 S.Ct. 680, 683, 9 L.Ed.2d 697 (1963); *New York Times v. Sullivan,* 376 U.S. 254, 285, 84 S.Ct. 710, 728, 11 L.Ed.2d 686 (1964); *NAACP v. Claiborne Hardware Co.,* —— U.S. ——, ——, n. 50, 102 S.Ct. 3409, 3427, n. 50, 73 L.Ed.2d 1215 (1982).

11 Waldron testified that from what he had learned of the events on October 7, Myers "was trying to stir up other people not to accept the changes [transfers] that had been made on the memorandum and that were to be implemented." App. 167. In his view, the questionnaire was a "final act of defiance" and that, as a result of Myers' action, "there were going to be some severe problems about the changes." *Ibid.* Connick testified that he reached a similar conclusion after conducting his own investigation. "After I satisfied myself that not only wasn't she accepting the transfer but that she was affirmatively opposing it and disrupting the routine of the office by this questionnaire, I called her in ... [and dismissed her]." App. 130.

12 Cf. *Perry Ed. Assn. v. Perry Local Ed. Assn.,* ——U.S. ——, ——, 103 S.Ct. 948, 957, 74 L.Ed.2d 794 (1983) (proof of future disruption not necessary to justify denial of access to non-public forum on grounds that the proposed use may disrupt the property's intended function.); *Greer v. Spock,* 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976) (same).

13 The record indicates that some, though not all, of the questionnaires were distributed during lunch. Employee speech which transpires entirely on the employee's own time, and in non-work areas of the office, bring different factors into the *Pickering* calculus, and might lead to a different conclusion. Cf. *NLRB v. Magnavox Co.,* 415 U.S. 322, 94 S.Ct. 1099, 39 L.Ed.2d 358 (1974).

14 The violation of such a rule would strengthen Connick's position. See *Mt. Healthy City Board of Ed. v. Doyle,* 429 U.S., at 284, 97 S.Ct., at 574.

No. 23-1989

126 S.Ct. 1951
Supreme Court of the United States

Gil GARCETTI et al., Petitioners,
v.
Richard CEBALLOS.

No. 04–473.
|
Decided May 30, 2006.

Opinion

Justice KENNEDY delivered the opinion of the Court.

It is well settled that "a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick v. Myers,* 461 U.S. 138, 142, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). The question presented by the instant case is whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties.

I

Respondent Richard Ceballos has been employed since 1989 as a deputy district attorney for the Los Angeles County District Attorney's Office. During the period relevant to this case, Ceballos was a calendar deputy in the office's Pomona branch, and in this capacity he exercised certain supervisory responsibilities over other lawyers. In February 2000, a defense attorney contacted Ceballos about a pending criminal case. The defense attorney said there were inaccuracies in an affidavit used to obtain a critical search warrant. The attorney informed Ceballos that he had filed a motion to traverse, or challenge, the warrant, but he also wanted Ceballos to review the case. According to Ceballos, it was not unusual for defense attorneys to ask calendar deputies to investigate aspects of pending cases.

After examining the affidavit and visiting the location it described, Ceballos determined the affidavit contained serious misrepresentations. The affidavit called a long driveway what Ceballos thought should have been referred to as a separate roadway. Ceballos also questioned the affidavit's statement that tire tracks led from a stripped-down truck to the premises covered by the warrant. His doubts arose from his conclusion that the roadway's composition in some places made it difficult or impossible to leave visible tire tracks.

Ceballos spoke on the telephone to the warrant affiant, a deputy sheriff from the Los Angeles County Sheriff's Department, but he did not receive a satisfactory explanation for the perceived inaccuracies. He relayed his findings to his supervisors, petitioners Carol Najera and Frank Sundstedt, and followed up by preparing a disposition memorandum. The memo explained Ceballos' concerns and recommended dismissal of the case. On March 2, 2000, Ceballos submitted the memo to Sundstedt for his review. A few days later, Ceballos presented Sundstedt with another memo, this one describing a second telephone conversation between Ceballos and the warrant affiant.

Based on Ceballos' statements, a meeting was held to discuss the affidavit. Attendees included Ceballos, Sundstedt, and Najera, as well as the warrant affiant and other employees from the sheriff's department. The meeting allegedly became heated, with one lieutenant sharply criticizing Ceballos for his handling of the case.

Despite Ceballos' concerns, Sundstedt decided to proceed with the prosecution, pending disposition of the defense motion to traverse. The trial court held a hearing on the motion. Ceballos was called by the defense and recounted his observations about the affidavit, but the trial court rejected the challenge to the warrant.

Ceballos claims that in the aftermath of these events he was subjected to a series of retaliatory employment actions. The actions included reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion. Ceballos initiated an employment grievance, but the grievance was denied based on a finding that he had not suffered any retaliation. Unsatisfied, Ceballos sued in the United States District Court for the Central District of California, asserting, as relevant here, a claim under Rev. Stat. § 1979, 42 U.S.C. § 1983. He alleged petitioners violated the First and Fourteenth Amendments by retaliating against him based on his memo of March 2.

Petitioners responded that no retaliatory actions were taken against Ceballos and that all the actions of which he complained were explained by legitimate reasons such as staffing needs. They further contended that, in any event, Ceballos' memo was not protected speech under the First Amendment. Petitioners moved for summary judgment, and the District Court granted their motion. Noting that Ceballos wrote his memo pursuant to his employment duties, the court concluded he was not entitled to First Amendment protection for the memo's contents. It held in the alternative that even if Ceballos' speech was constitutionally protected, petitioners had qualified immunity because the rights Ceballos asserted were not clearly established.

The Court of Appeals for the Ninth Circuit reversed, holding that "Ceballos's allegations of wrongdoing in the memorandum constitute protected speech under the First Amendment." 361 F.3d 1168, 1173 (C.A.9 2004). In reaching its conclusion the court looked to the First Amendment analysis set forth in *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), and *Connick, supra,* 103 S.Ct. 1684. *Connick* instructs courts to begin by considering whether the expressions in question were made by the speaker "as a citizen upon matters of public concern." See *id.,* at 146–147, 103 S.Ct. 1684. The Court of Appeals determined that Ceballos' memo, which recited what he thought to be governmental misconduct, was "inherently a matter of public concern." 361 F.3d, at 1174. The court did not, however, consider whether the speech was made in Ceballos' capacity as a citizen. Rather, it relied on Circuit precedent rejecting the idea that "a public employee's speech is deprived of First Amendment protection whenever those views are expressed, to government workers or others, pursuant to an employment responsibility." *Id.,* at 1174–1175 (citing cases including *Roth v. Veteran's Admin. of Govt. of United States,* 856 F.2d 1401 (C.A.9 1988)).

Having concluded that Ceballos' memo satisfied the public-concern requirement, the Court of Appeals proceeded to balance Ceballos' interest in his speech against his supervisors' interest in responding to it. See *Pickering, supra,* at 568, 88 S.Ct. 1731. The court struck the balance in Ceballos' favor, noting that petitioners "failed even to suggest disruption or inefficiency in the workings of the District Attorney's Office" as a result of the memo. See 361 F.3d, at 1180. The court further concluded that Ceballos' First Amendment rights were clearly established and that petitioners' actions were not objectively reasonable. See *id.,* at 1181–1182.

Judge O'Scannlain specially concurred. Agreeing that the panel's decision was compelled by Circuit precedent, he nevertheless concluded Circuit law should be revisited and overruled. See *id.,* at 1185. Judge O'Scannlain emphasized the distinction "between speech offered by a public employee acting *as an employee* carrying out his or her ordinary job duties and that spoken by an employee acting *as a citizen* expressing his or her personal views on disputed matters of public import." *Id.,* at 1187. In his view, "when public employees speak in the course of carrying out their routine, required employment obligations, they have no *personal* interest in the content of that speech that gives rise to a First Amendment right." *Id.,* at 1189.

We granted certiorari, 543 U.S. 1186, 125 S.Ct. 1395, 161 L.Ed.2d 188 (2005), and we now reverse.

II

As the Court's decisions have noted, for many years "the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights." *Connick,* 461 U.S., at 143, 103 S.Ct. 1684. That dogma has been qualified in important respects. See *id.,* at 144–145, 103 S.Ct. 1684. The Court has made clear that public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern. See, *e.g., Pickering, supra,* at 568, 88 S.Ct. 1731; *Connick, supra,* at 147, 103 S.Ct. 1684; *Rankin v. McPherson,* 483 U.S. 378, 384, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987); *United States v. Treasury Employees,* 513 U.S. 454, 466, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995).

Pickering provides a useful starting point in explaining the Court's doctrine. There the relevant speech was a teacher's letter to a local newspaper addressing issues including the funding policies of his school board. 391 U.S., at 566, 88 S.Ct. 1731. "The problem in any case," the Court stated, "is to arrive at a balance between 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." *Id.,* at 568, 88 S.Ct. 1731. The Court found the teacher's speech "neither [was] shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally." *Id.,* at 572–573, 88 S.Ct. 1731 (footnote omitted). Thus, the Court concluded that "the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public." *Id.,* at 573, 88 S.Ct. 1731.

Pickering and the cases decided in its wake identify two inquiries to guide interpretation of the constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. See *id.,* at 568, 88 S.Ct. 1731. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. See *Connick, supra,* at 147, 103 S.Ct. 1684. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. See *Pickering,* 391 U.S., at 568, 88 S.Ct. 1731. This consideration reflects the importance of the relationship between the speaker's expressions and employment. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations.

To be sure, conducting these inquiries sometimes has proved difficult. This is the necessary product of "the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors ... to furnish grounds for dismissal." *Id.,* at 569., 88 S.Ct. 1731 The Court's overarching objectives, though, are evident.

When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom. See, *e.g., Waters v. Churchill,* 511 U.S. 661, 671, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994) (plurality opinion) ("[T]he government as employer indeed has far broader powers than does the government as sovereign"). 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. Cf. *Connick, supra,* at 143, 103 S.Ct. 1684 ("[G]overnment offices could not function if every employment decision became a constitutional matter"). Public employees, moreover, often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions.

At the same time, the Court has recognized that a citizen who works for the government is nonetheless a citizen. The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens. See *Perry v. Sindermann,* 408 U.S. 593, 597, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively. See, *e.g., Connick, supra,* at 147, 103 S.Ct. 1684 ("Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government").

The Court's employee-speech jurisprudence protects, of course, the constitutional rights of public employees. Yet the First Amendment interests at stake extend beyond the individual speaker. The Court has acknowledged the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion. *Pickering* again provides an instructive example. The Court characterized its holding as rejecting the attempt of school administrators to "limi[t] teachers' opportunities to contribute to public debate." 391 U.S., at 573, 88 S.Ct. 1731. It also noted that teachers are "the members of a community most likely to have informed and definite opinions" about school expenditures. *Id.,* at 572, 88 S.Ct. 1731. The Court's approach acknowledged the necessity for informed, vibrant dialogue in a democratic society. It suggested, in addition, that widespread costs may arise when dialogue is repressed. The Court's more recent cases have expressed similar concerns. See, *e.g., San Diego v. Roe,* 543 U.S. 77, 82, 125 S.Ct. 521, 160 L.Ed.2d 410 (2004) *(per curiam)* ("Were [public employees] not able to speak on [the operation of their employers], the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it" (citation omitted)); cf. *Treasury Employees,* 513 U.S., at 470, 115 S.Ct. 1003 ("The large-scale disincentive to Government employees' expression also imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said").

The Court's decisions, then, have sought both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions. See, *e.g., Rankin,* 483 U.S., at 384, 107 S.Ct. 2891 (recognizing "the dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the First Amendment"). Underlying our cases has been the premise that while the First Amendment invests public employees with certain rights, it does not empower them to "constitutionalize the employee grievance." *Connick,* 461 U.S., at 154, 103 S.Ct. 1684.

III

With these principles in mind we turn to the instant case. Respondent Ceballos believed the affidavit used to obtain a search warrant contained serious misrepresentations. He conveyed his opinion and recommendation in a memo to his supervisor. That Ceballos expressed his views inside his office, rather than publicly, is not dispositive. Employees in some cases may receive First Amendment protection for expressions made at work. See, *e.g., Givhan v. Western Line Consol. School Dist.,* 439 U.S. 410, 414, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979). Many citizens do much of their talking inside their respective workplaces, and it would not serve the goal of treating public employees like "any member of the general public," *Pickering,* 391 U.S., at 573, 88 S.Ct. 1731, to hold that all speech within the office is automatically exposed to restriction.

The memo concerned the subject matter of Ceballos' employment, but this, too, is nondispositive. The First Amendment protects some expressions related to the speaker's job. See, *e.g., ibid.; Givhan, supra,* at 414, 99 S.Ct. 693. As the Court noted in *Pickering:* "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." 391 U.S., at 572, 88 S.Ct. 1731. The same is true of many other categories of public employees.

The controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy. See Brief for Respondent 4 ("Ceballos does not dispute that he prepared the memorandum 'pursuant to his duties as a prosecutor' "). That consideration—the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case—distinguishes Ceballos' case from those in which the First Amendment provides protection against discipline. We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.

Ceballos wrote his disposition memo because that is part of what he, as a calendar deputy, was employed to do. It is immaterial whether he experienced some personal gratification from writing the memo; his First Amendment rights do not depend on his job satisfaction. The significant point is that the memo was written pursuant to Ceballos' official duties. Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created. Cf. *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 833, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) ("[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes"). Contrast, for example, the expressions made by the speaker in *Pickering,* whose letter to the newspaper had no official significance and bore similarities to letters submitted by numerous citizens every day.

Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings. In the same way he did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case. When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance.

This result is consistent with our precedents' attention to the potential societal value of employee speech. See *supra,* at 1958 – 1959. Refusing to recognize First Amendment claims based on government employees' work product does not prevent them from participating in public debate. The employees retain the prospect of constitutional protection for their contributions to the civic discourse. This prospect of protection, however, does not invest them with a right to perform their jobs however they see fit.

Our holding likewise is supported by the emphasis of our precedents on affording government employers sufficient discretion to manage their operations. Employers have heightened interests in controlling speech made by an employee in his or her professional capacity. Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission. Ceballos' memo is illustrative. It demanded the attention of his supervisors and led to a heated meeting with employees from the sheriff's department. If Ceballos' superiors thought his memo was inflammatory or misguided, they had the authority to take proper corrective action.

Ceballos' proposed contrary rule, adopted by the Court of Appeals, would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business. This displacement of managerial discretion by judicial supervision finds no support in our precedents. When an employee speaks as a citizen addressing a matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences. When, however, the employee is simply performing his or her job duties, there is no warrant

for a similar degree of scrutiny. To hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers.

The Court of Appeals based its holding in part on what it perceived as a doctrinal anomaly. The court suggested it would be inconsistent to compel public employers to tolerate certain employee speech made publicly but not speech made pursuant to an employee's assigned duties. See 361 F.3d, at 1176. This objection misconceives the theoretical underpinnings of our decisions. Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government. The same goes for writing a letter to a local newspaper, see *Pickering, supra,* 88 S.Ct. 1731, or discussing politics with a co-worker, see *Rankin,* 483 U.S. 378, 107 S.Ct. 2891. When a public employee speaks pursuant to employment responsibilities, however, there is no relevant analogue to speech by citizens who are not government employees.

The Court of Appeals' concern also is unfounded as a practical matter. The perceived anomaly, it should be noted, is limited in scope: It relates only to the expressions an employee makes pursuant to his or her official responsibilities, not to statements or complaints (such as those at issue in cases like *Pickering* and *Connick*) that are made outside the duties of employment. If, moreover, a government employer is troubled by the perceived anomaly, it has the means at hand to avoid it. A public employer that wishes to encourage its employees to voice concerns privately retains the option of instituting internal policies and procedures that are receptive to employee criticism. Giving employees an internal forum for their speech will discourage them from concluding that the safest avenue of expression is to state their views in public.

Proper application of our precedents thus leads to the conclusion that the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities. Because Ceballos' memo falls into this category, his allegation of unconstitutional retaliation must fail.

Two final points warrant mentioning. First, as indicated above, the parties in this case do not dispute that Ceballos wrote his disposition memo pursuant to his employment duties. We thus have no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate. We reject, however, the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions. See *post,* at 1965, n. 2 (SOUTER, J., dissenting). The proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the 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.

Second, Justice SOUTER suggests today's decision may have important ramifications for academic freedom, at least as a constitutional value. See *post,* at 1969 – 1970. 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.

IV

Exposing governmental inefficiency and misconduct is a matter of considerable significance. As the Court noted in *Connick,* public employers should, "as a matter of good judgment," be "receptive to constructive criticism offered by their employees." 461 U.S., at 149, 103 S.Ct. 1684. The dictates of sound judgment are reinforced by the powerful network of legislative enactments—such as whistle-blower protection laws and labor codes—available to those who seek to expose wrongdoing. See, *e.g.,* 5 U.S.C. § 2302(b)(8); Cal. Govt.Code Ann. § 8547.8 (West 2005);

Cal. Lab.Code Ann. § 1102.5 (West Supp.2006). Cases involving government attorneys implicate additional safeguards in the form of, for example, rules of conduct and constitutional obligations apart from the First Amendment. See, *e.g.,* Cal. Rule Prof. Conduct 5–110 (2005) ("A member in government service shall not institute or cause to be instituted criminal charges when the member knows or should know that the charges are not supported by probable cause"); *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). These imperatives, as well as obligations arising from any other applicable constitutional provisions and mandates of the criminal and civil laws, protect employees and provide checks on supervisors who would order unlawful or otherwise inappropriate actions.

We reject, however, the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties. Our precedents do not support the existence of a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job.

The judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

No. 23-1989

127 S.Ct. 2618
Supreme Court of the United States

Deborah MORSE et al., Petitioners,
v.
Joseph FREDERICK.

No. 06–278.
|
Decided June 25, 2007.

ROBERTS, C.J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined. THOMAS, J., filed a concurring opinion, *post*, p. 2629. ALITO, J., filed a concurring opinion, in which KENNEDY, J., joined, *post*, p. 2636. BREYER, J., filed an opinion concurring in the judgment in part and dissenting in part, *post*, p. 2638. STEVENS, J., filed a dissenting opinion, in which SOUTER and GINSBURG, JJ., joined, *post*, p. 2643.

Opinion

Chief Justice ROBERTS delivered the opinion of the Court.

At a school-sanctioned and school-supervised event, a high school principal saw some of her students unfurl a large banner conveying a message she reasonably regarded as promoting illegal drug use. Consistent with established school policy prohibiting such messages at school events, the principal directed the students to take down the banner. One student—among those who had brought the banner to the event—refused to do so. The principal confiscated the banner and later suspended the student. The Ninth Circuit held that the principal's actions violated the First Amendment, and that the student could sue the principal for damages.

Our cases make clear that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Independent Community School Dist.,* 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). At the same time, we have held that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," *Bethel School Dist. No. 403 v. Fraser,* 478 U.S. 675, 682, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986), and that the rights of students "must be 'applied in light of the special characteristics of the school environment,' " *Hazelwood School Dist. v. Kuhlmeier,* 484 U.S. 260, 266, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988) (quoting *Tinker, supra,* at 506, 89 S.Ct. 733). Consistent with these principles, we hold that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use. We conclude that the school officials in this case did not violate the First Amendment by confiscating the pro-drug banner and suspending the student responsible for it.

I

On January 24, 2002, the Olympic Torch Relay passed through Juneau, Alaska, on its way to the winter games in Salt Lake City, Utah. The torchbearers were to proceed along a street in front of Juneau–Douglas High School (JDHS) while school was in session. Petitioner Deborah Morse, the school principal, decided to permit staff and students to participate in the Torch Relay as an approved social event or class trip. App. 22–23. Students were allowed to leave class to observe the relay from either side of the street. Teachers and administrative officials monitored the students' actions.

Respondent Joseph Frederick, a JDHS senior, was late to school that day. When he arrived, he joined his friends (all but one of whom were JDHS students) across the street from the school to watch the event. Not all the students

waited patiently. Some became rambunctious, throwing plastic cola bottles and snowballs and scuffling with their classmates. As the torchbearers and camera crews passed by, Frederick and his friends unfurled a 14–foot banner bearing the phrase: "BONG HiTS 4 JESUS." App. to Pet. for Cert. 70a. The large banner was easily readable by the students on the other side of the street.

Principal Morse immediately crossed the street and demanded that the banner be taken down. Everyone but Frederick complied. Morse confiscated the banner and told Frederick to report to her office, where she suspended him for 10 days. Morse later explained that she told Frederick to take the banner down because she thought it encouraged illegal drug use, in violation of established school policy. Juneau School Board Policy No. 5520 states: "The Board specifically prohibits any assembly or public expression that ... advocates the use of substances that are illegal to minors ...." *Id.,* at 53a. In addition, Juneau School Board Policy No. 5850 subjects "[p]upils who participate in approved social events and class trips" to the same student conduct rules that apply during the regular school program. *Id.,* at 58a.

Frederick administratively appealed his suspension, but the Juneau School District Superintendent upheld it, limiting it to time served (eight days). In a memorandum setting forth his reasons, the superintendent determined that Frederick had displayed his banner "in the midst of his fellow students, during school hours, at a school-sanctioned activity." *Id.,* at 63a. He further explained that Frederick "was not disciplined because the principal of the school 'disagreed' with his message, but because his speech appeared to advocate the use of illegal drugs." *Id.,* at 61a.

The superintendent continued:

> "The common-sense understanding of the phrase 'bong hits' is that it is a reference to a means of smoking marijuana. Given [Frederick's] inability or unwillingness to express any other credible meaning for the phrase, I can only agree with the principal and countless others who saw the banner as advocating the use of illegal drugs. [Frederick's] speech was not political. He was not advocating the legalization of marijuana or promoting a religious belief. He was displaying a fairly silly message promoting illegal drug usage in the midst of a school activity, for the benefit of television cameras covering the Torch Relay. [Frederick's] speech was potentially disruptive to the event and clearly disruptive of and inconsistent with the school's educational mission to educate students about the dangers of illegal drugs and to discourage their use." *Id.,* at 61a–62a.

Relying on our decision in *Fraser, supra,* the superintendent concluded that the principal's actions were permissible because Frederick's banner was "speech or action that intrudes upon the work of the schools." App. to Pet. for Cert. 62a (internal quotation marks omitted). The Juneau School District Board of Education upheld the suspension.

Frederick then filed suit under 42 U.S.C. § 1983, alleging that the school board and Morse had violated his First Amendment rights. He sought declaratory and injunctive relief, unspecified compensatory damages, punitive damages, and attorney's fees. The District Court granted summary judgment for the school board and Morse, ruling that they were entitled to qualified immunity and that they had not infringed Frederick's First Amendment rights. The court found that Morse reasonably interpreted the banner as promoting illegal drug use—a message that "directly contravened the Board's policies relating to drug abuse prevention." App. to Pet. for Cert. 36a–38a. Under the circumstances, the court held that "Morse had the authority, if not the obligation, to stop such messages at a school-sanctioned activity." *Id.,* at 37a.

The Ninth Circuit reversed. Deciding that Frederick acted during a "school-authorized activit[y]," and "proceed[ing] on the basis that the banner expressed a positive sentiment about marijuana use," the court nonetheless found a violation of Frederick's First Amendment rights because the school punished Frederick without demonstrating that his speech gave rise to a "risk of substantial disruption." 439 F.3d 1114, 1118, 1121–1123 (2006). The court further concluded that Frederick's right to display his banner was so "clearly established" that a reasonable principal in

Morse's position would have understood that her actions were unconstitutional, and that Morse was therefore not entitled to qualified immunity. *Id.,* at 1123–1125.

We granted certiorari on two questions: whether Frederick had a First Amendment right to wield his banner, and, if so, whether that right was so clearly established that the principal may be held liable for damages. 549 U.S. 1075, 127 S.Ct. 722, 166 L.Ed.2d 559 (2006). We resolve the first question against Frederick, and therefore have no occasion to reach the second.[1]

II

At the outset, we reject Frederick's argument that this is not a school speech case—as has every other authority to address the question. See App. 22–23 (Principal Morse); App. to Pet. for Cert. 63a (superintendent); *id.,* at 69a (school board); *id.,* at 34a–35a (District Court); 439 F.3d, at 1117 (Ninth Circuit). The event occurred during normal school hours. It was sanctioned by Principal Morse "as an approved social event or class trip," App. 22–23, and the school district's rules expressly provide that pupils in "approved social events and class trips are subject to district rules for student conduct," App. to Pet. for Cert. 58a. Teachers and administrators were interspersed among the students and charged with supervising them. The high school band and cheerleaders performed. Frederick, standing among other JDHS students across the street from the school, directed his banner toward the school, making it plainly visible to most students. Under these circumstances, we agree with the superintendent that Frederick cannot "stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school." *Id.,* at 63a. There is some uncertainty at the outer boundaries as to when courts should apply school speech precedents, see *Porter v. Ascension Parish School Bd.,* 393 F.3d 608, 615, n. 22 (C.A.5 2004), but not on these facts.

III

The message on Frederick's banner is cryptic. It is no doubt offensive to some, perhaps amusing to others. To still others, it probably means nothing at all. Frederick himself claimed "that the words were just nonsense meant to attract television cameras." 439 F.3d, at 1117–1118. But Principal Morse thought the banner would be interpreted by those viewing it as promoting illegal drug use, and that interpretation is plainly a reasonable one.

As Morse later explained in a declaration, when she saw the sign, she thought that "the reference to a 'bong hit' would be widely understood by high school students and others as referring to smoking marijuana." App. 24. She further believed that "display of the banner would be construed by students, District personnel, parents and others witnessing the display of the banner, as advocating or promoting illegal drug use"—in violation of school policy. *Id.,* at 25; see *ibid.* ("I told Frederick and the other members of his group to put the banner down because I felt that it violated the [school] policy against displaying ... material that advertises or promotes use of illegal drugs").

We agree with Morse. At least two interpretations of the words on the banner demonstrate that the sign advocated the use of illegal drugs. First, the phrase could be interpreted as an imperative: "[Take] bong hits ..."—a message equivalent, as Morse explained in her declaration, to "smoke marijuana" or "use an illegal drug." Alternatively, the phrase could be viewed as celebrating drug use—"bong hits [are a good thing]," or "[we take] bong hits"—and we discern no meaningful distinction between celebrating illegal drug use in the midst of fellow students and outright advocacy or promotion. See *Guiles v. Marineau,* 461 F.3d 320, 328 (C.A.2 2006) (discussing the present case and describing the sign as "a clearly pro-drug banner").

The pro-drug interpretation of the banner gains further plausibility given the paucity of alternative meanings the banner might bear. The best Frederick can come up with is that the banner is "meaningless and funny." 439 F.3d, at 1116. The dissent similarly refers to the sign's message as "curious," *post,* at 2643 (opinion of STEVENS, J.), "ambiguous," *ibid.,* "nonsense," *post,* at 2644, "ridiculous," *post,* at 2646, "obscure," *post,* at 2646, "silly," *post,* at 2649, "quixotic," *ibid.,* and "stupid," *ibid.* Gibberish is surely a possible interpretation of the words on the banner, but it is not the only one, and dismissing the banner as meaningless ignores its undeniable reference to illegal drugs.

The dissent mentions Frederick's "credible and uncontradicted explanation for the message—he just wanted to get on television." *Post,* at 2649. But that is a description of Frederick's *motive* for displaying the banner; it is not an interpretation of what the banner says. The *way* Frederick was going to fulfill his ambition of appearing on television was by unfurling a pro-drug banner at a school event, in the presence of teachers and fellow students.

Elsewhere in its opinion, the dissent emphasizes the importance of political speech and the need to foster "national debate about a serious issue," *post,* at 2651, as if to suggest that the banner is political speech. But not even Frederick argues that the banner conveys any sort of political or religious message. Contrary to the dissent's suggestion, see *post,*at 2650 – 2651, this is plainly not a case about political debate over the criminalization of drug use or possession.

IV

The question thus becomes whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use. We hold that she may.

In *Tinker,* this Court made clear that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students." 393 U.S., at 506, 89 S.Ct. 733. *Tinker* involved a group of high school students who decided to wear black armbands to protest the Vietnam War. School officials learned of the plan and then adopted a policy prohibiting students from wearing armbands. When several students nonetheless wore armbands to school, they were suspended. *Id.,* at 504, 89 S.Ct. 733. The students sued, claiming that their First Amendment rights had been violated, and this Court agreed.

Tinker held that student expression may not be suppressed unless school officials reasonably conclude that it will "materially and substantially disrupt the work and discipline of the school." *Id.,* at 513, 89 S.Ct. 733. The essential facts of *Tinker* are quite stark, implicating concerns at the heart of the First Amendment. The students sought to engage in political speech, using the armbands to express their "disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them." *Id.,* at 514, 89 S.Ct. 733. Political speech, of course, is "at the core of what the First Amendment is designed to protect." *Virginia v. Black,* 538 U.S. 343, 365, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003) (plurality opinion). The only interest the Court discerned underlying the school's actions was the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," or "an urgent wish to avoid the controversy which might result from the expression." *Tinker,* 393 U.S., at 509, 510, 89 S.Ct. 733. That interest was not enough to justify banning "a silent, passive expression of opinion, unaccompanied by any disorder or disturbance." *Id.,* at 508, 89 S.Ct. 733.

This Court's next student speech case was *Fraser,* 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549. Matthew Fraser was suspended for delivering a speech before a high school assembly in which he employed what this Court called "an elaborate, graphic, and explicit sexual metaphor." *Id.,* at 678, 106 S.Ct. 3159. Analyzing the case under *Tinker,* the District Court and Court of Appeals found no disruption, and therefore no basis for disciplining Fraser. 478 U.S., at 679–680, 106 S.Ct. 3159. This Court reversed, holding that the "School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech." *Id.,* at 685, 106 S.Ct. 3159.

The mode of analysis employed in *Fraser* is not entirely clear. The Court was plainly attuned to the content of Fraser's speech, citing the "marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of [Fraser's] speech." *Id.,* at 680, 106 S.Ct. 3159. But the Court also reasoned that school boards have the authority to determine "what manner of speech in the classroom or in school assembly is inappropriate." *Id.,* at 683, 106 S.Ct. 3159. Cf. *id.,* at 689, 106 S.Ct. 3159 (Brennan, J., concurring in judgment) ("In the present case, school officials sought only to ensure that a high school assembly proceed in an orderly manner. There is no

suggestion that school officials attempted to regulate [Fraser's] speech because they disagreed with the views he sought to express").

We need not resolve this debate to decide this case. For present purposes, it is enough to distill from *Fraser* two basic principles. First, *Fraser's* holding demonstrates that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *Id.,* at 682, 106 S.Ct. 3159. Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected. See *Cohen v. California,* 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971); *Fraser, supra,* at 682–683, 106 S.Ct. 3159. In school, however, Fraser's First Amendment rights were circumscribed "in light of the special characteristics of the school environment." *Tinker, supra,* at 506, 89 S.Ct. 733. Second, *Fraser* established that the mode of analysis set forth in *Tinker* is not absolute. Whatever approach *Fraser* employed, it certainly did not conduct the "substantial disruption" analysis prescribed by *Tinker, supra,* at 514, 89 S.Ct. 733. See *Kuhlmeier,* 484 U.S., at 271, n. 4, 108 S.Ct. 562 (disagreeing with the proposition that there is "no difference between the First Amendment analysis applied in *Tinker* and that applied in *Fraser,*" and noting that the holding in *Fraser* was not based on any showing of substantial disruption).

Our most recent student speech case, *Kuhlmeier,* concerned "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." 484 U.S., at 271, 108 S.Ct. 562. Staff members of a high school newspaper sued their school when it chose not to publish two of their articles. The Court of Appeals analyzed the case under *Tinker,* ruling in favor of the students because it found no evidence of material disruption to classwork or school discipline. *Kuhlmeier v. Hazelwood School Dist.*, 795 F.2d 1368, 1375 (C.A.8 1986). This Court reversed, holding that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Kuhlmeier,* 484 U.S., at 273, 108 S.Ct. 562.

Kuhlmeier does not control this case because no one would reasonably believe that Frederick's banner bore the school's imprimatur. The case is nevertheless instructive because it confirms both principles cited above. *Kuhlmeier* acknowledged that schools may regulate some speech "even though the government could not censor similar speech outside the school." *Id.,* at 266, 108 S.Ct. 562. And, like *Fraser,* it confirms that the rule of *Tinker* is not the only basis for restricting student speech.[2]

Drawing on the principles applied in our student speech cases, we have held in the Fourth Amendment context that "while children assuredly do not 'shed their constitutional rights ... at the schoolhouse gate,' ... the nature of those rights is what is appropriate for children in school." *Vernonia School Dist. 47J v. Acton,* 515 U.S. 646, 655–656, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995) (quoting *Tinker, supra*, at 506, 89 S.Ct. 733). In particular, "the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject." *New Jersey v. T.L. O.,* 469 U.S. 325, 340, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985). See *Vernonia, supra,* at 656, 115 S.Ct. 2386 ("Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere ..."); *Board of Ed. of Independent School Dist. No. 92 of Pottawatomie Cty. v. Earls,* 536 U.S. 822, 829–830, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002) (" 'special needs' inhere in the public school context"; "[w]hile schoolchildren do not shed their constitutional rights when they enter the schoolhouse, Fourth Amendment rights ... are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children") (quoting *Vernonia,* 515 U.S., at 656, 115 S.Ct. 2386; citation and some internal quotation marks omitted)).

Even more to the point, these cases also recognize that deterring drug use by schoolchildren is an "important—indeed, perhaps compelling" interest. *Id.,* at 661, 115 S.Ct. 2386. Drug abuse can cause severe and permanent damage to the health and well-being of young people:

> "School years are the time when the physical, psychological, and addictive effects of drugs are most severe. Maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound; children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor. And of course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted." *Id.,* at 661–662[, 115 S.Ct. 2386] (citations and internal quotation marks omitted).

Just five years ago, we wrote: "The drug abuse problem among our Nation's youth has hardly abated since *Vernonia* was decided in 1995. In fact, evidence suggests that it has only grown worse." *Earls, supra,* at 834, and n. 5, 122 S.Ct. 2559.

The problem remains serious today. See generally 1 National Institute on Drug Abuse, National Institutes of Health, Monitoring the Future: National Survey Results on Drug Use, 1975–2005, Secondary School Students (2006). About half of American 12th graders have used an illicit drug, as have more than a third of 10th graders and about one-fifth of 8th graders. *Id.,* at 99. Nearly one in four 12th graders has used an illicit drug in the past month. *Id.,* at 101. Some 25% of high schoolers say that they have been offered, sold, or given an illegal drug on school property within the past year. Dept. of Health and Human Services, Centers for Disease Control and Prevention, Youth Risk Behavior Surveillance—United States, 2005, 55 Morbidity and Mortality Weekly Report, Surveillance Summaries, No. SS–5, p. 19 (June 9, 2006).

Congress has declared that part of a school's job is educating students about the dangers of illegal drug use. It has provided billions of dollars to support state and local drug-prevention programs, Brief for United States as *Amicus Curiae* 1, and required that schools receiving federal funds under the Safe and Drug–Free Schools and Communities Act of 1994 certify that their drug-prevention programs "convey a clear and consistent message that ... the illegal use of drugs [is] wrong and harmful," 20 U.S.C. § 7114(d)(6) (2000 ed., Supp. IV).

Thousands of school boards throughout the country—including JDHS—have adopted policies aimed at effectuating this message. See Pet. for Cert. 17–21. Those school boards know that peer pressure is perhaps "the single most important factor leading schoolchildren to take drugs," and that students are more likely to use drugs when the norms in school appear to tolerate such behavior. *Earls, supra,* at 840, 122 S.Ct. 2559 (BREYER, J., concurring). Student speech celebrating illegal drug use at a school event, in the presence of school administrators and teachers, thus poses a particular challenge for school officials working to protect those entrusted to their care from the dangers of drug abuse.

The "special characteristics of the school environment," *Tinker,* 393 U.S., at 506, 89 S.Ct. 733, and the governmental interest in stopping student drug abuse—reflected in the policies of Congress and myriad school boards, including JDHS—allow schools to restrict student expression that they reasonably regard as promoting illegal drug use. *Tinker* warned that schools may not prohibit student speech because of "undifferentiated fear or apprehension of disturbance" or "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.,* at 508, 509, 89 S.Ct. 733. The danger here is far more serious and palpable. The particular concern to prevent student drug abuse at issue here, embodied in established school policy, App. 92–95; App. to Pet. for Cert. 53a, extends well beyond an abstract desire to avoid controversy.

Petitioners urge us to adopt the broader rule that Frederick's speech is proscribable because it is plainly "offensive" as that term is used in *Fraser*. See Reply Brief for Petitioners 14–15. We think this stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of "offensive." After all, much political and religious speech might be perceived as offensive to some. The concern here is not that Frederick's speech was offensive, but that it was reasonably viewed as promoting illegal drug use.

Although accusing this decision of doing "serious violence to the First Amendment" by authorizing "viewpoint discrimination," *post,* at 2644, 2645, the dissent concludes that "it might well be appropriate to tolerate some targeted viewpoint discrimination in this unique setting," *post,* at 2646. Nor do we understand the dissent to take the position that schools are required to tolerate student advocacy of illegal drug use at school events, even if that advocacy falls short of inviting "imminent" lawless action. See *post,* at 2646 ("[I]t is possible that our rigid imminence requirement ought to be relaxed at schools"). And even the dissent recognizes that the issues here are close enough that the principal should not be held liable in damages, but should instead enjoy qualified immunity for her actions. See *post,* at 2643. Stripped of rhetorical flourishes, then, the debate between the dissent and this opinion is less about constitutional first principles than about whether Frederick's banner constitutes promotion of illegal drug use. We have explained our view that it does. The dissent's contrary view on that relatively narrow question hardly justifies sounding the First Amendment bugle.

School principals have a difficult job, and a vitally important one. When Frederick suddenly and unexpectedly unfurled his banner, Morse had to decide to act—or not act—on the spot. It was reasonable for her to conclude that the banner promoted illegal drug use—in violation of established school policy—and that failing to act would send a powerful message to the students in her charge, including Frederick, about how serious the school was about the dangers of illegal drug use. The First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers.

The judgment of the United States Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice STEVENS, with whom Justice SOUTER and Justice GINSBURG join, dissenting.

A significant fact barely mentioned by the Court sheds a revelatory light on the motives of both the students and the principal of Juneau–Douglas High School (JDHS). On January 24, 2002, the Olympic Torch Relay gave those Alaska residents a rare chance to appear on national television. As Joseph Frederick repeatedly explained, he did not address the curious message—"BONG HiTS 4 JESUS"—to his fellow students. He just wanted to get the camera crews' attention. Moreover, concern about a nationwide evaluation of the conduct of the JDHS student body would have justified the principal's decision to remove an attention-grabbing 14–foot banner, even if it had merely proclaimed "Glaciers Melt!"

I agree with the Court that the principal should not be held liable for pulling down Frederick's banner. See *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). I would hold, however, that the school's interest in protecting its students from exposure to speech "reasonably regarded as promoting illegal drug use," *ante,* at 2622, cannot justify disciplining Frederick for his attempt to make an ambiguous statement to a television audience simply because it contained an oblique reference to drugs. The First Amendment demands more, indeed, much more.

The Court holds otherwise only after laboring to establish two uncontroversial propositions: first, that the constitutional rights of students in school settings are not coextensive with the rights of adults, see *ante,* at 2625 – 2628; and second, that deterring drug use by schoolchildren is a valid and terribly important interest, see *ante,* at 2627 – 2629. As to the first, I take the Court's point that the message on Frederick's banner is not *necessarily* protected speech, even though it unquestionably would have been had the banner been unfurled elsewhere. As to the second, I am willing to assume that the Court is correct that the pressing need to deter drug use supports JDHS' rule prohibiting willful conduct that expressly "advocates the use of substances that are illegal to minors." App. to Pet.

for Cert. 53a. But it is a gross non sequitur to draw from these two unremarkable propositions the remarkable conclusion that the school may suppress student speech that was never meant to persuade anyone to do anything.

In my judgment, the First Amendment protects student speech if the message itself neither violates a permissible rule nor expressly advocates conduct that is illegal and harmful to students. This nonsense banner does neither, and the Court does serious violence to the First Amendment in upholding—indeed, lauding—a school's decision to punish Frederick for expressing a view with which it disagreed.

I

In December 1965, we were engaged in a controversial war, a war that "divided this country as few other issues ever have." *Tinker v. Des Moines Independent Community School Dist.,* 393 U.S. 503, 524, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) (Black, J., dissenting). Having learned that some students planned to wear black armbands as a symbol of opposition to the country's involvement in Vietnam, officials of the Des Moines public school district adopted a policy calling for the suspension of any student who refused to remove the armband. As we explained when we considered the propriety of that policy, "[t]he school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners." *Id.,* at 508, 89 S.Ct. 733. The district justified its censorship on the ground that it feared that the expression of a controversial and unpopular opinion would generate disturbances. Because the school officials had insufficient reason to believe that those disturbances would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," we found the justification for the rule to lack any foundation and therefore held that the censorship violated the First Amendment. *Id.,* at 509, 89 S.Ct. 733 (internal quotation marks omitted).

Justice Harlan dissented, but not because he thought the school district could censor a message with which it disagreed. Rather, he would have upheld the district's rule only because the students never cast doubt on the district's antidisruption justification by proving that the rule was motivated "by other than legitimate school concerns—for example, a desire to prohibit the expression of an unpopular point of view, while permitting expression of the dominant opinion." *Id.,* at 526, 89 S.Ct. 733.

Two cardinal First Amendment principles animate both the Court's opinion in *Tinker* and Justice Harlan's dissent. First, censorship based on the content of speech, particularly censorship that depends on the viewpoint of the speaker, is subject to the most rigorous burden of justification:

> "Discrimination against speech because of its message is presumed to be unconstitutional .... When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 828–829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (citation omitted).

Second, punishing someone for advocating illegal conduct is constitutional only when the advocacy is likely to provoke the harm that the government seeks to avoid. See *Brandenburg v. Ohio,* 395 U.S. 444, 449, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) *(per curiam)* (distinguishing "mere advocacy" of illegal conduct from "incitement to imminent lawless action").

However necessary it may be to modify those principles in the school setting, *Tinker* affirmed their continuing vitality. 393 U.S., at 509, 89 S.Ct. 733 ("In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would materially and substantially

interfere with the requirements of appropriate discipline in the operation of the school, the prohibition cannot be sustained" (internal quotation marks omitted)). As other federal courts have long recognized, under *Tinker,*

> "regulation of student speech is generally permissible only when the speech would substantially disrupt or interfere with the work of the school or the rights of other students. ... *Tinker* requires a specific and significant fear of disruption, *not just some remote apprehension of disturbance*." *Saxe v. State College Area School Dist.,* 240 F.3d 200, 211 (C.A.3 2001) (Alito, J.) (emphasis added).

Yet today the Court fashions a test that trivializes the two cardinal principles upon which *Tinker* rests. See *ante,* at 2629 ("[S]chools [may] restrict student expression that they reasonably regard as promoting illegal drug use"). The Court's test invites stark viewpoint discrimination. In this case, for example, the principal has unabashedly acknowledged that she disciplined Frederick because she disagreed with the pro-drug viewpoint she ascribed to the message on the banner, see App. 25—a viewpoint, incidentally, that Frederick has disavowed, see *id.,* at 28. Unlike our recent decision in *Tennessee Secondary School Athletic Assn. v. Brentwood Academy, ante*, at 296, 127 S.Ct. 2489, 2493, 168 L.Ed.2d 166, 2007 WL 1773196 (plurality opinion), see also *ante,* at 2637 –2638 (ALITO, J., concurring), the Court's holding in this case strikes at "the heart of the First Amendment" because it upholds a punishment meted out on the basis of a listener's disagreement with her understanding (or, more likely, misunderstanding) of the speaker's viewpoint. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson,* 491 U.S. 397, 414, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989).

It is also perfectly clear that "promoting illegal drug use," *ante,* at 2629, comes nowhere close to proscribable "incitement to imminent lawless action." *Brandenburg,* 395 U.S., at 449, 89 S.Ct. 1827. Encouraging drug use might well increase the likelihood that a listener will try an illegal drug, but that hardly justifies censorship:

> "Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. ... Advocacy of law-breaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on." *Whitney v. California,* 274 U.S. 357, 376, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring) (footnote omitted).

No one seriously maintains that drug advocacy (much less Frederick's ridiculous sign) comes within the vanishingly small category of speech that can be prohibited because of its feared consequences. Such advocacy, to borrow from Justice Holmes, "ha[s] no chance of starting a present conflagration." *Gitlow v. New York,* 268 U.S. 652, 673, 45 S.Ct. 625, 69 L.Ed. 1138 (1925) (dissenting opinion).

II

The Court rejects outright these twin foundations of *Tinker* because, in its view, the unusual importance of protecting children from the scourge of drugs supports a ban on all speech in the school environment that promotes drug use. Whether or not such a rule is sensible as a matter of policy, carving out pro-drug speech for uniquely harsh treatment finds no support in our case law and is inimical to the values protected by the First Amendment.[1] See *infra,* at 2650 – 2651.

I will nevertheless assume for the sake of argument that the school's concededly powerful interest in protecting its students adequately supports its restriction on "any assembly or public expression that ... advocates the use of substances that are illegal to minors ...." App. to Pet. for Cert. 53a. Given that the relationship between schools and students "is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults," *Vernonia School Dist. 47J v. Acton,* 515 U.S. 646, 655, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995), it might well be appropriate to tolerate some targeted viewpoint discrimination in this unique setting. And while

conventional speech may be restricted only when likely to "incit[e] ... imminent lawless action," *Brandenburg,* 395 U.S., at 449, 89 S.Ct. 1827, it is possible that our rigid imminence requirement ought to be relaxed at schools. See *Bethel School Dist. No. 403 v. Fraser,* 478 U.S. 675, 682, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986) ("[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings").

But it is one thing to restrict speech that *advocates* drug use. It is another thing entirely to prohibit an obscure message with a drug theme that a third party subjectively—and not very reasonably—thinks is tantamount to express advocacy. Cf. *Masses Pub. Co. v. Patten,* 244 F. 535, 540, 541 (S.D.N.Y.1917) (Hand, J.) (distinguishing sharply between "agitation, legitimate as such," and "the direct advocacy" of unlawful conduct). Even the school recognizes the paramount need to hold the line between, on the one hand, nondisruptive speech that merely expresses a viewpoint that is unpopular or contrary to the school's preferred message, and on the other hand, advocacy of an illegal or unsafe course of conduct. The district's prohibition of drug advocacy is a gloss on a more general rule that is otherwise quite tolerant of nondisruptive student speech:

> "Students will not be disturbed in the exercise of their constitutionally guaranteed rights to assemble peaceably and to express ideas and opinions, privately or publicly, provided that their activities do not infringe on the rights of others and do not interfere with the operation of the educational program.
>
> "The Board will not permit the conduct on school premises of any willful activity ... that interferes with the orderly operation of the educational program or offends the rights of others. The Board specifically prohibits any assembly or public expression that ... advocates the use of substances that are illegal to minors ...." App. to Pet. for Cert. 53a; see also *ante,* at 2623 (opinion of the Court) (quoting rule in part).

There is absolutely no evidence that Frederick's banner's reference to drug paraphernalia "willful[ly]" infringed on anyone's rights or interfered with any of the school's educational programs.[2] On its face, then, the rule gave Frederick wide berth "to express [his] ideas and opinions" so long as they did not amount to "advoca[cy]" of drug use. App. to Pet. for Cert. 53a. If the school's rule is, by hypothesis, a valid one, it is valid only insofar as it scrupulously preserves adequate space for constitutionally protected speech. When First Amendment rights are at stake, a rule that "sweep[s] in a great variety of conduct under a general and indefinite characterization" may not leave "too wide a discretion in its application." *Cantwell v. Connecticut,* 310 U.S. 296, 308, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). Therefore, just as we insisted in *Tinker* that the school establish some likely connection between the armbands and their feared consequences, so too JDHS must show that Frederick's supposed advocacy stands a meaningful chance of making otherwise-abstemious students try marijuana.

But instead of demanding that the school make such a showing, the Court punts. Figuring out just *how* it punts is tricky; "[t]he mode of analysis [it] employ[s] ... is not entirely clear," see *ante,* at 2626. On occasion, the Court suggests it is deferring to the principal's "reasonable" judgment that Frederick's sign qualified as drug advocacy.[3] At other times, the Court seems to say that *it* thinks the banner's message constitutes express advocacy.[4] Either way, its approach is indefensible.

To the extent the Court defers to the principal's ostensibly reasonable judgment, it abdicates its constitutional responsibility. The beliefs of third parties, reasonable or otherwise, have never dictated which messages amount to proscribable advocacy. Indeed, it would be a strange constitutional doctrine that would allow the prohibition of only the narrowest category of speech advocating unlawful conduct, see *Brandenburg,* 395 U.S., at 447–448, 89 S.Ct. 1827, yet would permit a listener's perceptions to determine which speech deserved constitutional protection.[5]

Such a peculiar doctrine is alien to our case law. In *Abrams v. United States,* 250 U.S. 616, 40 S.Ct. 17, 63 L.Ed. 1173 (1919), this Court affirmed the conviction of a group of Russian "rebels, revolutionists, [and] anarchists," *id*.,

at 617–618, 40 S.Ct. 17 (internal quotation marks omitted), on the ground that the leaflets they distributed were thought to "incite, provoke and encourage resistance to the United States," *id.,* at 617, 40 S.Ct. 17 (internal quotation marks omitted). Yet Justice Holmes' dissent—which has emphatically carried the day—never inquired into the reasonableness of the United States' judgment that the leaflets would likely undermine the war effort. The dissent instead ridiculed that judgment: "[N]obody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so." *Id.,* at 628, 40 S.Ct. 17. In *Thomas v. Collins,* 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430 (1945) (opinion for the Court by Rutledge, J.), we overturned the conviction of a union organizer who violated a restraining order prohibiting him from exhorting workers. In so doing, we held that the distinction between advocacy and incitement could not depend on how one of those workers might have understood the organizer's speech. That would "pu[t] the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning." *Id*., at 535, 65 S.Ct. 315. In *Cox v. Louisiana,* 379 U.S. 536, 543, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965), we vacated a civil rights leader's conviction for disturbing the peace, even though a Baton Rouge sheriff had "deem[ed]" the leader's "appeal to ... students to sit in at the lunch counters to be 'inflammatory.' " We never asked if the sheriff's in-person, on-the-spot judgment was "reasonable." Even in *Fraser,* we made no inquiry into whether the school administrators reasonably thought the student's speech was obscene or profane; we rather satisfied ourselves that "[t]he pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers and students—indeed to any mature person." 478 U.S., at 683, 106 S.Ct. 3159. Cf. *Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485, 499, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) ("[I]n cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression" (internal quotation marks omitted)).[6]

To the extent the Court independently finds that "BONG HiTS 4 JESUS" *objectively* amounts to the advocacy of illegal drug use—in other words, that it can *most* reasonably be interpreted as such—that conclusion practically refutes itself. This is a nonsense message, not advocacy. The Court's feeble effort to divine its hidden meaning is strong evidence of that. *Ante,* at 2625 (positing that the banner might mean, alternatively, " '[Take] bong hits,' " " 'bong hits [are a good thing],' " or " '[we take] bong hits' "). Frederick's credible and uncontradicted explanation for the message—he just wanted to get on television—is also relevant because a speaker who does not intend to persuade his audience can hardly be said to be advocating anything.[7] But most importantly, it takes real imagination to read a "cryptic" message (the Court's characterization, not mine, see *ante,* at 2624 – 2625) with a slanting drug reference as an incitement to drug use. Admittedly, some high school students (including those who use drugs) are dumb. Most students, however, do not shed their brains at the schoolhouse gate, and most students know dumb advocacy when they see it. The notion that the message on this banner would actually persuade either the average student or even the dumbest one to change his or her behavior is most implausible. That the Court believes such a silly message can be proscribed as advocacy underscores the novelty of its position, and suggests that the principle it articulates has no stopping point.

Even if advocacy could somehow be wedged into Frederick's obtuse reference to marijuana, that advocacy was at best subtle and ambiguous. There is abundant precedent, including another opinion The Chief Justice announces today, for the proposition that when the "First Amendment is implicated, the tie goes to the speaker," *Federal Election Comm'n v. Wisconsin Right to Life, Inc., post*, at 474, 127 S.Ct. 2652, 168 L.Ed.2d 329, 2007 WL 1804336, 17 (principal opinion), and that "when it comes to defining what speech qualifies as the functional equivalent of express advocacy ... we give the benefit of the doubt to speech, not censorship," *post,* at 2674. If this were a close case, the tie would have to go to Frederick's speech, not to the principal's strained reading of his quixotic message.

Among other things, the Court's ham-handed, categorical approach is deaf to the constitutional imperative to permit unfettered debate, even among high school students, about the wisdom of the war on drugs or of legalizing marijuana for medicinal use.[8] See *Tinker,* 393 U.S., at 511, 89 S.Ct. 733 ("[Students] may not be confined to the expression of those sentiments that are officially approved"). If Frederick's stupid reference to marijuana can in the Court's view justify censorship, then high school students everywhere could be forgiven for zipping their mouths about drugs at school lest some "reasonable" observer censor and then punish them for promoting drugs. See also *ante,* at 2639 (BREYER, J., concurring in judgment in part and dissenting in part).

Consider, too, that the school district's rule draws no distinction between alcohol and marijuana, but applies evenhandedly to all "substances that are illegal to minors." App. to Pet. for Cert. 53a; see also App. 83 (expressly defining " 'drugs' " to include "all alcoholic beverages"). Given the tragic consequences of teenage alcohol consumption—drinking causes far more fatal accidents than the misuse of marijuana—the school district's interest in deterring teenage alcohol use is at least comparable to its interest in preventing marijuana use. Under the Court's reasoning, must the First Amendment give way whenever a school seeks to punish a student for any speech mentioning beer, or indeed anything else that might be deemed risky to teenagers? While I find it hard to believe the Court would support punishing Frederick for flying a "WINE SiPS 4 JESUS" banner—which could quite reasonably be construed either as a protected religious message or as a pro-alcohol message—the breathtaking sweep of its opinion suggests it would.

III

Although this case began with a silly, nonsensical banner, it ends with the Court inventing out of whole cloth a special First Amendment rule permitting the censorship of any student speech that mentions drugs, at least so long as someone could perceive that speech to contain a latent pro-drug message. Our First Amendment jurisprudence has identified some categories of expression that are less deserving of protection than others—fighting words, obscenity, and commercial speech, to name a few. Rather than reviewing our opinions discussing such categories, I mention two personal recollections that have no doubt influenced my conclusion that it would be profoundly unwise to create special rules for speech about drug and alcohol use.

The Vietnam War is remembered today as an unpopular war. During its early stages, however, "the dominant opinion" that Justice Harlan mentioned in his *Tinker* dissent regarded opposition to the war as unpatriotic, if not treason. 393 U.S., at 526, 89 S.Ct. 733. That dominant opinion strongly supported the prosecution of several of those who demonstrated in Grant Park during the 1968 Democratic Convention in Chicago, see *United States v. Dellinger,* 472 F.2d 340 (C.A.7 1972), and the vilification of vocal opponents of the war like Julian Bond, cf. *Bond v. Floyd,* 385 U.S. 116, 87 S.Ct. 339, 17 L.Ed.2d 235 (1966). In 1965, when the Des Moines students wore their armbands, the school district's fear that they might "start an argument or cause a disturbance" was well founded. *Tinker,* 393 U.S., at 508, 89 S.Ct. 733. Given that context, there is special force to the Court's insistence that "our Constitution says we must take th[at] risk; and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society." *Id.,* at 508–509, 89 S.Ct. 733 (citation omitted). As we now know, the then-dominant opinion about the Vietnam War was not etched in stone.

Reaching back still further, the current dominant opinion supporting the war on drugs in general, and our antimarijuana laws in particular, is reminiscent of the opinion that supported the nationwide ban on alcohol consumption when I was a student. While alcoholic beverages are now regarded as ordinary articles of commerce, their use was then condemned with the same moral fervor that now supports the war on drugs. The ensuing change in public opinion occurred much more slowly than the relatively rapid shift in Americans' views on the Vietnam War, and progressed on a state-by-state basis over a period of many years. But just as prohibition in the 1920's and early 1930's was secretly questioned by thousands of otherwise law-abiding patrons of bootleggers and speakeasies,

today the actions of literally millions of otherwise law-abiding users of marijuana,[9] and of the majority of voters in each of the several States that tolerate medicinal uses of the product,[10] lead me to wonder whether the fear of disapproval by those in the majority is silencing opponents of the war on drugs. Surely our national experience with alcohol should make us wary of dampening speech suggesting—however inarticulately—that it would be better to tax and regulate marijuana than to persevere in a futile effort to ban its use entirely.

Even in high school, a rule that permits only one point of view to be expressed is less likely to produce correct answers than the open discussion of countervailing views. *Whitney,* 274 U.S., at 377, 47 S.Ct. 641 (Brandeis, J., concurring); *Abrams,* 250 U.S., at 630, 40 S.Ct. 17 (Holmes, J., dissenting); *Tinker,* 393 U.S., at 512, 89 S.Ct. 733. In the national debate about a serious issue, it is the expression of the minority's viewpoint that most demands the protection of the First Amendment. Whatever the better policy may be, a full and frank discussion of the costs and benefits of the attempt to prohibit the use of marijuana is far wiser than suppression of speech because it is unpopular.

I respectfully dissent.

Footnotes

1 Justice BREYER would rest decision on qualified immunity without reaching the underlying First Amendment question. The problem with this approach is the rather significant one that it is inadequate to decide the case before us. Qualified immunity shields public officials from money damages only. See *Wood v. Strickland,* 420 U.S. 308, 314, n. 6, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975). In this case, Frederick asked not just for damages, but also for declaratory and injunctive relief. App. 13. Justice BREYER's proposed decision on qualified immunity grounds would dispose of the damages claims, but Frederick's other claims would remain unaddressed. To get around that problem, Justice BREYER hypothesizes that Frederick's suspension—the target of his request for injunctive relief—"may well be justified on non-speech-related grounds." See *post,* at 2643 (opinion concurring in judgment in part and dissenting in part). That hypothesis was never considered by the courts below, never raised by any of the parties, and is belied by the record, which nowhere suggests that the suspension would have been justified solely on non-speech-related grounds.

2 The dissent's effort to find inconsistency between our approach here and the opinion in *Federal Election Comm'n v. Wisconsin Right to Life, Inc.,* 551 U.S. 449, 127 S.Ct. 2652, 2007 WL 1804336 (2007), see *post,* at 2649, overlooks what was made clear in *Tinker, Fraser,* and *Kuhlmeier*: Student First Amendment rights are "applied in light of the special characteristics of the school environment." *Tinker,* 393 U.S., at 506, 89 S.Ct. 733. See *Fraser,* 478 U.S., at 682, 106 S.Ct. 3159; *Kuhlmeier,* 484 U.S., at 266, 108 S.Ct. 562. And, as discussed above, *supra,* at 2625, there is no serious argument that Frederick's banner is political speech of the sort at issue in *Wisconsin Right to Life*.

1 I also seriously question whether such a ban could really be enforced. Consider the difficulty of monitoring student conversations between classes or in the cafeteria.

2 It is also relevant that the display did not take place "on school premises," as the rule contemplates. App. to Pet. for Cert. 53a. While a separate district rule does make the policy applicable to "social events and class trips," *id.,* at 58a, Frederick might well have thought that the Olympic Torch Relay was neither a "social event" (for example, prom) nor a "class trip."

3 See *ante,* at 2622 (stating that the principal "reasonably regarded" Frederick's banner as "promoting illegal drug use"); *ante,* at 2624 (explaining that "Principal Morse thought the banner would be interpreted by those viewing it as promoting illegal drug use, and that interpretation is plainly a reasonable one"); *ante,* at 2625 (asking whether "a principal may ... restrict student speech ... when that speech is reasonably viewed as promoting illegal drug use"); *ante,* at 2629 (holding that "schools [may] restrict student expression that they reasonably regard as promoting illegal drug use"); see also *ante,* at 2636 (ALITO, J., concurring) ("[A] public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use").

4 See *ante,* at 2625 ("We agree with Morse. At least two interpretations of the words on the banner demonstrate that the sign advocated the use of illegal drugs"); *ante,* at 2629 (observing that "[w]e have explained our view" that "Frederick's banner constitutes promotion of illegal drug use").

5 The reasonableness of the view that Frederick's message was unprotected speech is relevant to ascertaining whether qualified immunity should shield the principal from liability, not to whether her actions violated Frederick's constitutional rights. Cf. *Saucier v. Katz,* 533 U.S. 194, 202, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001) ("The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted").

6 This same reasoning applies when the interpreter is not just a listener, but a legislature. We have repeatedly held that "[d]eference to a legislative finding" that certain types of speech are inherently harmful "cannot limit judicial inquiry when First Amendment rights are at stake," reasoning that "the judicial function commands analysis of whether the specific conduct charged falls within the reach of the statute and if so whether the legislation is consonant with the Constitution." *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 843, 844, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978); see also *Whitney v. California,* 274 U.S. 357, 378–379, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring) ("[A legislative declaration] does not preclude enquiry into the question whether, at the time and under the circumstances, the conditions existed which are essential to validity under the Federal Constitution .... Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature"). When legislatures are entitled to no deference as to whether particular speech amounts to a "clear and present danger," *id.,* at 379, 47 S.Ct. 641, it is hard to understand why the Court would so blithely defer to the judgment of a single school principal.

7 In affirming Frederick's suspension, the district superintendent acknowledged that Frederick displayed his message "for the benefit of television cameras covering the Torch Relay." App. to Pet. for Cert. 62a.

8 The Court's opinion ignores the fact that the legalization of marijuana is an issue of considerable public concern in Alaska. The State Supreme Court held in 1975 that Alaska's Constitution protects the right of adults to possess less than four ounces of marijuana for personal use. *Ravin v. State,* 537 P.2d 494. In 1990, the voters of Alaska attempted to undo that decision by voting for a ballot initiative recriminalizing marijuana possession. Initiative Proposal No. 2, §§ 1–2 (effective Mar. 3, 1991), 11 Alaska Stat., p. 872 (2006). At the time Frederick unfurled his banner, the constitutionality of that referendum had yet to be tested. It was subsequently struck down as unconstitutional. See *Noy v. State,* 83 P.3d 538 (App.2003). In the meantime, Alaska voters had approved a ballot measure decriminalizing the use of marijuana for medicinal purposes, 1998 Ballot Measure No. 8 (approved Nov. 3, 1998), 11 Alaska Stat., p. 883 (codified at Alaska Stat. §§ 11.71.190, 17.37.010–17.37.080), and had rejected a much broader measure that would have decriminalized marijuana possession and granted amnesty to anyone convicted of marijuana-related crimes, see 2000 Ballot Measure No. 5 (failed Nov. 7, 2000), 11 Alaska Stat., p. 886.

9 See *Gonzales v. Raich,* 545 U.S. 1, 21, n. 31, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005) (citing a Government estimate "that in 2000 American users spent $10.5 *billion* on the purchase of marijuana").

10 *Id.,* at 5, 125 S.Ct. 2195 (noting that "at least nine States ... authorize the use of marijuana for medicinal purposes").

746 F.3d 402
United States Court of Appeals,
Ninth Circuit.

David K. DEMERS, Plaintiff–Appellant,
v.
Erica AUSTIN; Erich Lear; Warwick M. Bayly; Frances McSweeney, Defendants–Appellees.

No. 11–35558.
|
Filed Jan. 29, 2014.

Before: WILLIAM A. FLETCHER and RAYMOND C. FISHER, Circuit Judges, and GORDON J. QUIST, Senior District Judge.

OPINION

W. FLETCHER, Circuit Judge:

David Demers is a tenured associate professor at Washington State University. He brought suit alleging that university administrators retaliated against him in violation of the First Amendment for distributing a short pamphlet and drafts from an in-progress book. The district court granted summary judgment for the defendants, finding that the pamphlet and draft were distributed pursuant to Demers's employment duties under *Garcetti v. Ceballos,* 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006). Alternatively, the court held that the pamphlet was not protected under the First Amendment because its content did not address a matter of public concern.

We hold that *Garcetti* does not apply to "speech related to scholarship or teaching." *Id.* at 425, 126 S.Ct. 1951. Rather, such speech is governed by *Pickering v. Board of Education,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). In Demers's case, we conclude that the short pamphlet was related to scholarship or teaching, and that it addressed a matter of public concern under *Pickering.* We remand for further proceedings. We conclude, further, that there is insufficient evidence in the record to show that the in-progress book triggered retaliation against Demers. Finally, we conclude that defendants are entitled to qualified immunity, given the uncertain state of the law in the wake of *Garcetti.*

I. Background

David Demers is a member of the faculty in the Edward R. Murrow College of Communication ("Murrow School" or "Murrow College") at Washington State University ("WSU"). He joined the faculty in 1996. He was granted tenure as an associate professor in 1999. Demers also owns and operates Marquette Books, an independent publishing company.

Demers brought suit alleging First Amendment violations by WSU Interim Director of the Murrow School Erica Austin, Vice Provost for Faculty Affairs Frances McSweeney, Dean of the College of Liberal Arts Erich Lear, and Interim WSU Provost and Executive Vice President Warwick Bayly. Demers contends that defendants retaliated against him, in violation of his First Amendment rights, for distributing a pamphlet called "The 7– Step Plan" ("the Plan") and for distributing a draft introduction and draft chapters of an in-progress book titled "*The Ivory Tower of Babel* " ("*Ivory Tower* "). Demers contends that defendants retaliated by giving him negative annual performance reviews that contained falsehoods, by conducting two internal audits, and by entering a formal notice of discipline.

Demers contends in his brief that over a three-year period he "went from being a popular teacher and scholar with high evaluations to a target for termination" due to the actions of defendants.

The Plan is a two-page pamphlet Demers wrote in late 2006 and distributed in early 2007. Demers distributed the Plan while he was serving on the Murrow School's "Structure Committee," which was actively debating some of the issues addressed by the Plan. At that time, the Murrow School was part of the College of Liberal Arts at WSU, but the faculty had voted unanimously in favor of becoming a free-standing College. (It became a College in July 2008.) The Murrow School had two faculties. One faculty was Mass Communications, which had a professional and practical orientation. The other was Communications Studies, which had a more traditional academic orientation. Faculty members held appointments in either Mass Communications or Communications Studies. The Structure Committee was considering whether to recommend, as part of the restructuring of the Murrow School, that the two faculties of the School be separated. There was serious disagreement at the Murrow School on that question.

Demers is a member of the Mass Communications faculty. Demers's Plan proposed separating the two faculties. It proposed strengthening the Mass Communications faculty by appointing a director with a strong professional background and giving more prominent roles to faculty members with professional backgrounds. For four years, early in his career, Demers had himself been a professional reporter.

On January 16, 2007, Demers sent the Plan to the Provost of WSU. In his cover letter, he stated that the purpose of the Plan is to show how WSU "can turn the Edward R. Murrow School of Communication into a revenue-generating center for the university and, at the same time, improve the quality of the program itself." Demers's letter also stated, "To initiate a fund-raising campaign to achieve this goal, my company and I would like to donate $50,000 in unrestricted funds to the university." Demers signed the letter "Dr. David Demers, Publisher/ Marquette Books LLC." A footnote appended to the signature line specified, "Demers also is associate professor of communications at Washington State University. Marquette Books LLC is a book/journal publishing company that he operates in his spare time. It has no ties with nor does it use any of the resources at Washington State University." The cover of the Plan states that it was "prepared by Marquette Books LLC." The Provost did not respond to Demers's letter and Plan. On March 29, 2007, Demers sent the Plan to the President of WSU. The cover letter was identical to the letter he had sent to the Provost, except that he increased the offered donation to $100,000.

In his declaration, Demers states that he sent the Plan "to members of the print and broadcast media in Washington state, to administrators at WSU, to some of my colleagues, to the Murrow Professional Advisory Board, and others." Demers also posted the Plan on the Marquette Books website. In his deposition, Demers stated that he could not remember the names of the individuals to whom he had sent the Plan. Demers did not submit the Plan to the Structure Committee or to Interim Director Austin. In her deposition, Austin stated that alumni and members of the professional community contacted faculty members to ask about the Plan.

During the period relevant to his suit, Demers had completed drafts of parts of what would eventually become "*Ivory Tower*." The book was not published until after the actions about which Demers complains took place. In his self-prepared 2006 "Faculty Annual Report," submitted in early 2007, Demers described the in-progress book as "partly autobiographical and partly empirical. It will involve national probability surveys of social scientists, governmental officials and journalists." Demers attached a copy of the draft introduction and the first chapter to his November 2007 application for a sabbatical. In his application, he described the planned book as follows:

> [T]he book examines the role and function of social science research in society.... Today most social scientists believe very strongly that the research they conduct is important for solving social problems, or at least has some impact on public policy. However, empirical research in political science and public policy shows just the opposite. Social scientific research generally has little impact on public policy decisions and almost never has a direct impact on solving social problems. Instead, social movements play a much more important role....

Demers also wrote in the application, "The book contains information that is critical of the academy, including some events at Washington State University." In his self-prepared 2008 Annual Activity Report, Demers reported that he had completed 250 of a planned 380 pages of the book.

Demers did not put any of the drafts of the book in the record. Interim Director Austin recalled in her deposition that she had seen parts of the book in connection with Demers's application for sabbatical. Vice Provost McSweeney stated in her deposition that she read some draft chapters that had been posted online, in particular chapters written about her and about "anything that [she] was directly involved in."

Demers contends that defendants retaliated against him for circulating the Plan and drafts of *Ivory Tower.* He claims that Austin and others knowingly used incorrect information to lower his performance review scores for 2006, 2007, and 2008. He contends that some defendants falsely stated that he had improperly canceled classes and that he had not gone through the proper university approval process before starting Marquette Books. He contends that specific acts of retaliation included spying on his classes, preventing him from serving on certain committees, preventing him from teaching basic Communications courses, instigating two internal audits, sending him an official disciplinary warning, and excluding him from heading the journalism sequence at the Murrow School. Demers claims that these acts affected his compensation and his reputation as an academic. Demers argues on appeal that the Plan is protected, despite *Garcetti,* because it was not written and distributed as part of his employment. He contends further that the Plan and *Ivory Tower* are protected because *Garcetti* does not apply to academic speech.

Defendants respond that changes in Demers's evaluations and the investigations by the university were warranted, and were not retaliation for the Plan or *Ivory Tower.* Defendants contend that Demers reoriented his priorities away from academia after receiving tenure, that Demers's attendance at faculty committee meetings was sporadic, and that Demers gave online quizzes instead of appearing in person to teach his Friday classes despite repeated requests to comply with university policies that required him to appear in person. Defendants contend that the legitimate reasons for Demers's critical annual reviews include his post-tenure failure to publish scholarship in refereed journals, his failure to perform his appropriate share of university service, and his failure to report properly his activities at Marquette Books. Defendants contend, further, that Demers's lower marks under Interim Director Austin were partly attributable to an overall adjustment of the annual review scale for the faculty as a whole.

Defendants contend that the Plan was written and circulated pursuant to Demers's official duties and so is not protected under *Garcetti,* and that, in any event, the Plan does not address a matter of public concern. They contend that because Demers failed to place any of the drafts of *Ivory Tower* in the record, there is insufficient evidence upon which to sustain Demers's retaliation claim based on those drafts. Finally, defendants contend that they are entitled to qualified immunity from any damages based on the uncertain status of teaching and academic writing after *Garcetti.*

The district court granted summary judgment to defendants. It held that the Plan and *Ivory Tower* were written and distributed in the performance of Demers's official duties as a faculty member of WSU, and were therefore not protected under the First Amendment. The district court held, alternatively, with respect to the Plan, that it did not address a matter of public concern. Demers timely appealed.

II. Standard of Review

[OMITTED]

III. Discussion

Demers makes two arguments. First, he argues that writing and distributing the Plan were not done pursuant to his official duties, and thus do not come within the Court's holding in *Garcetti.* Second, he argues that even if he wrote and distributed the Plan (as well as *Ivory Tower*) pursuant to his official duties, *Garcetti*'s holding does not extend to speech and academic writing by a publicly employed teacher. We disagree with his first argument but agree with his second.

A. Speech Pursuant to Official Duties

The district court found that Demers wrote and distributed the Plan and *Ivory Tower* pursuant to his duties as a professor at WSU. We agree with the district court. "[A]fter *Garcetti, ...* the question of the scope and content of a plaintiff's job responsibilities is a question of fact." *Dahlia v. Rodriguez,* 735 F.3d 1060, 1072 (9th Cir.2013) (en banc) (citation and internal quotation marks omitted).

While he was preparing the Plan, Demers sent an email to his fellow faculty members at the Murrow School, soliciting ideas and comments. He wrote:

> As you know, I'm preparing a proposal for splitting the School back into two separate units, a Communications Studies department and a professional/mass communication school.

In his self-prepared 2007 Annual Activity Report, Demers listed under the heading "Murrow School of Communication Service Activities":

> Developed a 7–Step Plan for reorganizing the Murrow School to improve the quality of the professional programs and attract more development funds. The plan recommends that the communications studies program be separated from the four professional programs (print journalism, broadcasting, public relations, and advertising), the School hire more professionals and give them more authority, seek accreditation for the professional programs, and develop stronger partnerships with the business community.

Demers prepared and sent the Plan to the Provost and President while he was serving as a member of the Murrow School "Structure Committee," which was deciding, among other things, whether to recommend separating the Mass Communications and Communications Studies faculties.

Demers points out that the cover of the Plan indicates that it was prepared by Marquette Books, that he did not sign his cover letters to the Provost and the President as a professor, and that he included a footnote in the letter stating that he was not acting as a professor. He contends that this, along with his private donation offer, shows that he was not acting pursuant to his duties as a professor when he wrote and distributed the Plan. However, it is impossible, as a realworld practical matter, to separate Demers's position as a member of the Mass Communications faculty, and as a member of the Structure Committee, from his preparation and distribution of his Plan. Further, we note that when it was to his advantage to do so, Demers characterized his development of the Plan as part of his official duties in his 2007 Annual Activities Report. Demers may not have been acting as a team player in sending his Plan directly to the top administrators at WSU, rather than working with and through his fellow committee members. But we conclude that in preparing the Plan, in sending the Plan to the Provost and President, in posting the Plan on the Internet, and in distributing the Plan to news media, to selected faculty members and to alumni, Demers was acting sufficiently in his capacity as a professor at WSU that he was acting "pursuant to [his] official duties" within the meaning of *Garcetti.* 547 U.S. at 421, 126 S.Ct. 1951. We thus turn to the question whether *Garcetti* applies to academic speech.

B. Academic Speech Under the First Amendment

Until the Supreme Court's 2006 decision in *Garcetti,* public employees' First Amendment claims were governed by the public concern analysis and balancing test set out in *Pickering v. Board of Education,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), and *Connick v. Myers,* 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). *Garcetti,*

however, changed the law. The plaintiff in *Garcetti* was a deputy district attorney who had written a memorandum concluding that a police affidavit supporting a search warrant application contained serious misrepresentations. *Garcetti,* 547 U.S. at 413–14, 126 S.Ct. 1951. The plaintiff contended that his employer retaliated against him in violation of the First Amendment for having written and then defended the memorandum. *Id.* at 415, 126 S.Ct. 1951. The Court held in *Garcetti* that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 421, 126 S.Ct. 1951.

However, *Garcetti* left open the possibility of an exception. In response to a concern expressed by Justice Souter in dissent, the Court reserved the question whether its holding applied to "speech related to scholarship or teaching." *Id.* at 425, 126 S.Ct. 1951. Justice Souter had expressed concern about the potential breadth of the Court's rationale, writing, "I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to ... official duties.' " *Id.* at 438, 126 S.Ct. 1951 (Souter, J., dissenting) (alteration in original).

Demers presents the kind of case that worried Justice Souter. Under *Garcetti,* statements made by public employees "pursuant to their official duties" are not protected by the First Amendment. 547 U.S. at 421, 126 S.Ct. 1951. But teaching and academic writing are at the core of the official duties of teachers and professors. Such teaching and writing are "a special concern of the First Amendment." *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.,* 385 U.S. 589, 603, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967). We conclude that if applied to teaching and academic writing, *Garcetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court. One of our sister circuits agrees. *See Adams v. Trs. of the Univ. of N.C.–Wilmington,* 640 F.3d 550, 562 (4th Cir.2011) ("We are ... persuaded that *Garcetti* would not apply in the academic context of a public university as represented by the facts of this case.").

The Supreme Court has repeatedly stressed the importance of protecting academic freedom under the First Amendment. It wrote in *Keyishian:*

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."

Id. at 603, 87 S.Ct. 675 (quoting *Shelton v. Tucker,* 364 U.S. 479, 487, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960)). It had previously written to the same effect in *Sweezy v. New Hampshire*:

> The essentiality of freedom in the community of American universities is almost self-evident.... To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.... Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

354 U.S. 234, 250, 77 S.Ct. 1203, 1 L.Ed.2d 1311 (1957). More recently, the Court wrote in *Grutter v. Bollinger*, "We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." 539 U.S. 306, 329, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003); *see also Rust v. Sullivan,* 500 U.S. 173, 200, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991) ("[T]he university is ... so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment.").

We conclude that *Garcetti* does not—indeed, consistent with the First Amendment, cannot—apply to teaching and academic writing that are performed "pursuant to the official duties" of a teacher and professor. We hold that academic employee speech not covered by *Garcetti* is protected under the First Amendment, using the analysis established in *Pickering.* The *Pickering* test has two parts. First, the employee must show that his or her speech addressed "matters of public concern." *Pickering,* 391 U.S. at 568, 88 S.Ct. 1731; *see Connick,* 461 U.S. at 146, 103 S.Ct. 1684. Second, the employee's interest "in commenting upon matters of public concern" must outweigh "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering,* 391 U.S. at 568, 88 S.Ct. 1731; *see Cockrel v. Shelby Cnty. Sch. Dist.,* 270 F.3d 1036, 1048 (6th Cir.2001); *Leary v. Daeschner,* 228 F.3d 729, 737 (6th Cir.2000).

In *Pickering,* a public high school teacher wrote a letter to a local newspaper complaining about budgetary decisions made by the school district. *Pickering,* 391 U.S. at 564, 88 S.Ct. 1731. The Court wrote that teachers have a First Amendment right "to comment on matters of public interest in connection with the operation of the public schools in which they work," but that, at the same time, the rights of public school teachers are not independent of the interest of their employing school district. *Id.* at 568, 88 S.Ct. 1731. The task of a court is "to arrive at a balance between the interests of the teacher, as a citizen, ... and the interest of the State, as an employer." *Id.* The Court held in *Pickering* that "the question whether a school system requires additional funds is a matter of legitimate public concern," *id.* at 571, 88 S.Ct. 1731, and that the school district did not have a sufficient interest in preventing the teacher from speaking out on this question to deprive him of his First Amendment rights. *Id.* at 572–74, 88 S.Ct. 1731.

In *Connick v. Myers,* the Court returned to the question whether an employee's speech addressed a matter of public concern. The employee in *Connick* was an assistant district attorney who objected to being transferred to prosecute cases in a different section of the criminal court. 461 U.S. at 140, 103 S.Ct. 1684. She circulated a questionnaire within the district attorney's office raising questions about "office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns." *Id.* at 141, 103 S.Ct. 1684. The Court held that all but one of the topics in the questionnaire were not matters of public concern. With the exception of the question about pressure to work on political campaigns, the "questions reflect[ed] one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a cause célèbre." *Id.* at 148, 103 S.Ct. 1684. The Court held that the question about political campaigns, however, addressed "a matter of interest to the community upon which it is essential that public employees be able to speak out freely without fear of retaliatory dismissal." *Id.* at 149, 103 S.Ct. 1684.

The Court in *Connick* refined the *Pickering* analysis in two ways. First, perhaps recognizing the artificiality of characterizing an employee's speech about matters relating to his employment as merely speech "as a citizen," the Court did not insist on characterizing the *Connick* plaintiff's protected question about political campaigns as speech "as a citizen." While her question may in some sense have been speech as a citizen, it was much more directly and obviously speech as an employee. Not only did the employee circulate her questionnaire exclusively within her workplace. In addition, the clear implication from the record is that she was herself subject to pressure to work on campaigns, and that her fellow employees, to whom she sent the questionnaire, were subject to that same pressure. Second, the Court emphasized the subtlety of the balancing process, writing that "the State's burden in justifying a particular [discipline] varies depending upon the nature of the employee's expression. Although such particularized balancing is difficult, the courts must reach the most appropriate possible balance of the competing interests." *Id.* at 150, 103 S.Ct. 1684.

The *Pickering* balancing process in cases involving academic speech is likely to be particularly subtle and "difficult." *Id.* The nature and strength of the public interest in academic speech will often be difficult to assess. For example, a long-running debate in university English departments concerns the literary "canon" that should have pride of place in the department's curriculum. This debate may seem trivial to some. But those who conclude that the composition of the canon is a relatively trivial matter do not take into account the importance to our culture not

only of the study of literature, but also of the choice of the literature to be studied. Analogous examples could readily be drawn from philosophy, history, biology, physics, or other disciplines. Recognizing our limitations as judges, we should hesitate before concluding that academic disagreements about what may appear to be esoteric topics are mere squabbles over jobs, turf, or ego.

The nature and strength of the interest of an employing academic institution will also be difficult to assess. Possible variations are almost infinite. For example, the nature of classroom discipline, and the part played by the teacher or professor in maintaining discipline, will be different depending on whether the school in question is a public high school or a university, or on whether the school in question does or does not have a history of discipline problems. Further, the degree of freedom an instructor should have in choosing what and how to teach will vary depending on whether the instructor is a high school teacher or a university professor. Still further, the evaluation of a professor's writing for purposes of tenure or promotion involves a judgment by the employing university about the quality of what he or she has written. Ordinarily, such a content-based judgment is anathema to the First Amendment. But in the academic world, such a judgment is both necessary and appropriate. Here too, recognizing our limitations, we should hesitate before concluding that we know better than the institution itself the nature and strength of its legitimate interests.

With the foregoing in mind, we turn to what Demers wrote.

C. *Ivory Tower*

We put to one side Demers's *Ivory Tower*. For reasons best known to himself, Demers did not put the draft introduction or any of the draft chapters of *Ivory Tower* into the record. The only information we have about those drafts are the brief descriptions Demers provided when he applied for sabbatical and when he described his academic activities for purposes of his annual reviews, and the acknowledgments by Austin and McSweeney that they saw or read parts of those drafts. There is only one sentence in Demers's descriptions of his drafts that could conceivably have prompted any adverse reaction from defendants. In his application for sabbatical, Demers wrote, "The book contains information that is critical of the academy, including some events at Washington State University." However, Demers described no specific "events" at WSU. This is pretty thin gruel. Even assuming for the moment that defendants retaliated against Demers, he has provided insufficient information about the drafts of *Ivory Tower* to support a claim that any such retaliation resulted from those drafts. We therefore conclude that Demers has failed to establish a First Amendment violation with respect to *Ivory Tower*.

D. The Plan

1. "Speech Related to Scholarship or Teaching" Under *Garcetti*

We conclude that The 7–Step Plan prepared by Demers in connection with his official duties as a faculty member of the Murrow School was "related to scholarship or teaching" within the meaning of *Garcetti*. *See* 547 U.S. at 425, 126 S.Ct. 1951. The basic thrust of the Plan may be understood from its first paragraphs:

> The relationship between mass communication programs (e.g., journalism, broadcasting, public relations, advertising) and the academy in general has always been a rocky one. The first print journalism programs emerged in the early 1900s, mostly at Midwestern universities and colleges, and were staffed largely with teachers who had professional backgrounds (former journalists and editors). As the years passed, increasing pressure was placed on journalism and other related programs (broadcasting, public relations, advertising) to "scholarize" their faculty—that is, to hire faculty who had earned Ph.D. degrees in the social sciences and conduct research. At the same time, the programs began hiring fewer teachers with professional experience.

> As the number of Ph.D.s increased, so did the tension within these departments. Some historians have referred to this as the era of the "green eyeshades" versus the "chisquares." Not unexpectedly, at larger research-oriented universities, the Ph.D.s won the battle and today most of the faculty teaching in mass communication programs at research-oriented universities have the Ph.D.
>
> Needless to say, this turn of events alienated many professionals and mediarelated businesses. Students were required to take more theory and conceptual courses and fewer skills-based courses, such as writing and reporting. Professionals complained more and more that the writing skills of university graduates were declining. The close relationship universities once had with the professional community was disappearing.

The Plan proposed seven steps that would increase the influence of professionals and reduce the influence of Ph.D.s within the Murrow School. Those steps were:

> 1. Separate the mass communication program from the communication studies program at WSU—i.e., create two separate units....
>
> 2. Hire a director of the Edward R. Murrow School of Communication who has a strong professional background....
>
> 3. Create an Edward R. Murrow Center for Media Research that conducts joint research projects with the professional community....
>
> 4. Give professionals an active (rather than the current passive) role in the development of the curriculum in the School....
>
> 5. Give professional faculty a more active role in the development of the undergraduate curriculum for mass communication students....
>
> 6. Seek national accreditation for the "new" mass communication program....
>
> 7. Hire more professional faculty with substantial work experience....

In Demers's view, the teaching of mass communications had lost a critical connection to the real world of professional communicators. His Plan, if implemented, would restore that connection and would, in his view, greatly improve the education of mass communications students at the Murrow School. It may in some cases be difficult to distinguish between what qualifies as speech "related to scholarship or teaching" within the meaning of *Garcetti.* But this is not such a case. The 7–Step Plan was not a proposal to allocate one additional teaching credit for teaching a large class instead of a seminar, to adopt a dress code that would require male teachers to wear neckties, or to provide a wider range of choices in the student cafeteria. Instead, it was a proposal to implement a change at the Murrow School that, if implemented, would have substantially altered the nature of what was taught at the school, as well as the composition of the faculty that would teach it.

2. Matter of Public Concern Under *Pickering*

The first step in determining whether the Plan is protected under the First Amendment is to determine whether it addressed a matter of public concern. Whether speech is a matter of public concern under *Pickering* is a matter of law that we review de novo. *Berry v. Dep't of Soc. Servs.,* 447 F.3d 642, 648 (9th Cir.2006). The plaintiff bears the burden of showing that his or her speech addresses an issue of public concern. *Eng v. Cooley,* 552 F.3d 1062, 1071 (9th Cir.2009).

"Speech involves a matter of public concern when it can fairly be considered to relate to 'any matter of political, social, or other concern to the community.' " *Johnson v. Multnomah Cnty.,* 48 F.3d 420, 422 (9th Cir.1995) (quoting *Connick,* 461 U.S. at 146, 103 S.Ct. 1684). The "essential question is whether the speech addressed matters of public as opposed to personal interest." *Desrochers v. City of San Bernardino,* 572 F.3d 703, 709 (9th Cir.2009) (internal quotation marks and citation omitted). Public interest is "defined broadly." *Ulrich v. City & Cnty. of S.F.,* 308 F.3d 968, 978 (9th Cir.2002). We have adopted a "liberal construction of what an issue of public concern is under the First Amendment." *Roe v. City & Cnty. of S.F.,* 109 F.3d 578, 586 (9th Cir.1997) (internal quotation marks omitted). We consider "the content, form, and context of a given statement, as revealed by the whole record." *Connick,* 461 U.S. at 147–48, 103 S.Ct. 1684. Of these, content is the most important factor. *Desrochers,* 572 F.3d at 710.

We begin by noting two obvious points. First, not all speech by a teacher or professor addresses a matter of public concern. Teachers and professors, like other public employees, speak and write on purely private matters. If a publicly employed professor speaks or writes about what is "properly viewed as essentially a private grievance," *Roe,* 109 F.3d at 585, the First Amendment does not protect him or her from any adverse reaction. Second, protected academic writing is not confined to scholarship. Much academic writing is, of course, scholarship. But academics, in the course of their academic duties, also write memoranda, reports, and other documents addressed to such things as a budget, curriculum, departmental structure, and faculty hiring. Depending on its scope and character, such writing may well address matters of public concern under *Pickering.* Indeed, in *Pickering* itself the teacher's protected letter to the newspaper addressed operational and budgetary concerns of the school district. The Court in *Pickering* noted that the letter addressed "the preferable manner of operating the school system," which "clearly concerns an issue of general public interest." 391 U.S. at 571, 88 S.Ct. 1731. Further, the Court wrote that "the question whether a school system requires additional funds is a matter of legitimate public concern." *Id.*

Demers described his Plan on its cover as a "7–Step Plan for Making the Edward R. Murrow School of Communication Financially Independent." The first page of the Plan gave an abbreviated history of "mass communications programs ... and the academy in general," and placed the communications program at WSU in the broader context of similar programs at other universities. The second page recommended seven steps for improving the communications program at WSU. Demers's Plan did not focus on a personnel issue or internal dispute of no interest to anyone outside a narrow "bureaucratic niche." *Tucker v. Cal. Dep't of Educ.,* 97 F.3d 1204, 1210 (9th Cir.1996) (citation omitted); *see Desrochers,* 572 F.3d at 713. Nor did the Plan address the role of particular individuals in the Murrow School, or voice personal complaints. Rather, the Plan made broad proposals to change the direction and focus of the School. *See Schrier v. Univ. of Colo.,* 427 F.3d 1253, 1263 (10th Cir.2005) (holding that a professor's critiques of a plan to move the medical school "addressing the use of public funds and regarding the objectives, purposes and mission of the University of Colorado and its medical school fall well within the rubric of 'matters of public concern' "). The importance of the proposed steps in Demers's Plan is suggested by the fact that the Murrow School had appointed a "Structure Committee," of which Demers was a member, to address some of the very issues addressed in Demers's Plan.

The manner in which the Plan was distributed reinforces the conclusion that it addressed matters of public concern. If an employee expresses a grievance to a limited audience, such circulation can suggest a lack of public concern. *See Desrochers,* 572 F.3d at 713–14. But limited circulation is not, in itself, determinative, as may be seen in *Connick* where the questionnaire was distributed only within the employee's office. *See* 461 U.S. at 141, 103 S.Ct. 1684. Here, Demers sent the Plan to the President and Provost of WSU, to members of the Murrow School's Professional Advisory Board, to other faculty members, to alumni, to friends, and to newspapers. He posted the Plan on his website, making it available to the public.

There may be some instances in which speech about academic organization and governance does not address matters of public concern. *See, e.g., Brooks v. Univ. of Wis. Bd. of Regents,* 406 F.3d 476, 480 (7th Cir.2005) (objections by professors against the closing of their laboratories and study programs represented "a classic personnel

struggle—infighting for control of a department—which is not a matter of public concern"); *Clinger v. N.M. Highlands Univ., Bd. of Regents,* 215 F.3d 1162, 1166 (10th Cir.2000) (no matter of public concern where professor publicly disagreed with the Board of Trustees "on the internal process they followed in selecting a president and reorganizing the University"). But this is not such a case. Demers's Plan contained serious suggestions about the future course of an important department of WSU, at a time when the Murrow School itself was debating some of those very suggestions. We therefore conclude that the Plan addressed a matter of public concern within the meaning of *Pickering.*

E. Remaining Issues on the Merits

Based on its holding that Demers's Plan did not address a matter of public concern, the district court granted summary judgment to defendants. As to the three questions it would have had to reach had it held otherwise, the district court wrote that there were questions of material fact. Those questions were whether defendants had a sufficient interest in controlling or sanctioning Demers's circulation of the Plan to deprive it of First Amendment protection; whether, if the Plan was protected speech under the First Amendment, its circulation was a substantial or motivating factor in any adverse employment action defendants might have taken; and whether defendants would have taken such employment action absent the protected speech. *See Anthoine v. N. Cent. Cntys. Consortium,* 605 F.3d 740, 748 (9th Cir.2010). The district court may address those questions, as appropriate, on remand.

[OMITTED]

Conclusion

We hold that there is an exception to *Garcetti* for teaching and academic writing. We affirm the district court's determination that Demers prepared and circulated his Plan pursuant to official duties, but we reverse its determination that the Plan does not address matters of public concern. **[OMITTED]** We remand for further proceedings consistent with this opinion.

The parties shall bear their own costs.

AFFIRMED in part, REVERSED in part, and REMANDED.