No. 10-1305

In the Supreme Court of the United States

SHELLEY EVANS-MARSHALL,
Petitioner,

v.

BOARD OF EDUCATION OF THE TIPP CITY EXEMPTED VILLAGE SCHOOL DISTRICT, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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May 25, 2011

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QUESTION PRESENTED BY PETITIONER

Should *Garcetti v. Ceballos*, 547 U.S. 410 (2006) be extended to hold that all in-class speech by teachers in the public schools is categorically unprotected by the First Amendment?

COUNTER-STATEMENT OF QUESTION PRESENTED

The Petitioner's Question Presented overstates the Sixth Circuit's holding, which applies only to in-class curricular speech of public teachers in primary and secondary schools made "pursuant to" the teacher's official duties.

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OPINIONS BELOW

The Respondents agree that the relevant opinions below have been identified by the Petitioner, and are included in the Petitioner's Appendix at pages 1a through 105a. Additionally, the Respondent submits the state court's decision overruling the Petitioner's grievance. *Evans-Marshall v. Bd. of Educ.*, 2003 Ohio 4977, Miami App. No. 03CA2 (2nd Dist. 2003); appeal denied by *Evans-Marshall v. Bd. of Educ.*, 101 Ohio St. 3d 1423 (Ohio 2004). The Ohio Supreme Court declined to review the case without opinion.

JURISDICTION

The Respondents do not dispute the Petitioner's jurisdictional statement.

CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to the First Amendment and 42 U.S.C. 1983, Ohio Revised Code Sections 3313.60 and 3319.11 are pivotal to analyzing Petitioner's claim. The relevant provisions from each are set forth below in turn:

> **§3313.60. Required curriculum; requirements for promotion to ninth grade and for graduation from high school**
>
> ...
>
> (A) The board of education of each city and exempted village school district, the governing board of each educational service center, and the board of each cooperative education school district established pursuant to section

3311.521 [3311.52.1] of the Revised Code shall prescribe a curriculum for all schools under their control. Except as provided in division (E) of this section, in any such curriculum there shall be included the study of the following subjects:

(1) The language arts, including reading, writing, spelling, oral and written English, and literature;

(2) Geography, the history of the United States and of Ohio, and national, state, and local government in the United States, including a balanced presentation of the relevant contributions to society of men and women of African, Mexican, Puerto Rican, and American Indian descent as well as other ethnic and racial groups in Ohio and the United States;

(3) Mathematics;

(4) Natural science, including instruction in the conservation of natural resources;

(5) Health education, which shall include instruction in:

(a) The nutritive value of foods, including natural and organically produced foods, the relation of nutrition to health, and the use and effects of food additives;

(b) The harmful effects of and legal restrictions against the use of drugs of abuse, alcoholic beverages, and tobacco;

(c) Venereal disease education, except that upon written request of the student's parent or guardian, a student shall be excused from taking instruction in venereal disease education;

(d) In grades kindergarten through six, instruction in personal safety and assault prevention, except that upon written request of the student's parent or guardian, a student shall be excused from taking instruction in personal safety and assault prevention;

(e) In grades seven through twelve, age-appropriate instruction in dating violence prevention education, which shall include instruction in recognizing dating violence warning signs and characteristics of healthy relationships.

In order to assist school districts in developing a dating violence prevention education curriculum, the department of education shall provide on its web site links to free curricula addressing dating violence prevention.

If the parent or legal guardian of a student less than eighteen years of age submits to the principal of the student's school a written request to examine the dating violence prevention instruction materials used at that

school, the principal, within a reasonable period of time after the request is made, shall allow the parent or guardian to examine those materials at that school.

(6) Physical education;

(7) The fine arts, including music;

(8) First aid, including a training program in cardiopulmonary resuscitation, safety, and fire prevention, except that upon written request of the student's parent or guardian, a student shall be excused from taking instruction in cardiopulmonary resuscitation.

(B) Except as provided in division (E) of this section, every school or school district shall include in the requirements for promotion from the eighth grade to the ninth grade one year's course of study of American history. A board may waive this requirement for academically accelerated students who, in accordance with procedures adopted by the board, are able to demonstrate mastery of essential concepts and skills of the eighth grade American history course of study.

(C) Except as provided in division (E) of this section, every high school shall include in the requirements for graduation from any curriculum one unit of American history and government, including a study of the constitutions of the United States and of Ohio.

(D) Except as provided in division (E) of this section, basic instruction in geography, United States history, the government of the United States, the government of the state of Ohio, local government in Ohio, the Declaration of Independence, the United States Constitution, and the Constitution of the state of Ohio shall be required before pupils may participate in courses involving the study of social problems, economics, foreign affairs, United Nations, world government, socialism and communism.

(E) For each cooperative education school district established pursuant to section 3311.521 [3311.52.1] of the Revised Code and each city, exempted village, and local school district that has territory within such a cooperative district, the curriculum adopted pursuant to divisions (A) to (D) of this section shall only include the study of the subjects that apply to the grades operated by each such school district. The curriculums for such schools, when combined, shall provide to each student of these districts all of the subjects required under divisions (A) to (D) of this section.

(F) The board of education of any cooperative education school district established pursuant to divisions (A) to (C) of section 3311.52 of the Revised Code shall prescribe a curriculum for the subject areas and grade levels offered in any school under its control.

(G) Upon the request of any parent or legal guardian of a student, the board of education of

any school district shall permit the parent or guardian to promptly examine, with respect to the parent's or guardian's own child:

(1) Any survey or questionnaire, prior to its administration to the child;

(2) Any textbook, workbook, software, video, or other instructional materials being used by the district in connection with the instruction of the child;

(3) Any completed and graded test taken or survey or questionnaire filled out by the child;

(4) Copies of the statewide academic standards and each model curriculum developed pursuant to section 3301.079 [3301.07.9] of the Revised Code, which copies shall be available at all times during school hours in each district school building.

§3319.11. Eligibility for continuing service status; limited contract; notice of intent not to re-employ

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B) Teachers eligible for continuing service status in any city, exempted village, local, or joint vocational school district or educational service center shall be those teachers qualified as described in division (D) of section 3319.08 of the Revised Code, who within the last five years have taught for at least three years in the district or center, and those teachers who, having attained continuing contract status elsewhere, have served two years in the district

or center, but the board, upon the recommendation of the superintendent, may at the time of employment or at any time within such two-year period, declare any of the latter teachers eligible.

...

(2) If the superintendent recommends that a teacher eligible for continuing service status not be reemployed, the board may declare its intention not to reemploy the teacher by giving the teacher written notice on or before the thirtieth day of April of its intention not to reemploy the teacher. If evaluation procedures have not been complied with pursuant to division (A) of section 3319.111 [3319.11.1] of the Revised Code or the board does not give the teacher written notice on or before the thirtieth day of April of its intention not to reemploy the teacher, the teacher is deemed reemployed under an extended limited contract for a term not to exceed one year at the same salary plus any increment provided by the salary schedule. The teacher is presumed to have accepted employment under the extended limited contract for a term not to exceed one year unless such teacher notifies the board in writing to the contrary on or before the first day of June, and an extended limited contract for a term not to exceed one year shall be executed accordingly. Upon any subsequent reemployment of a teacher only a continuing contract may be entered into.

(3) Any teacher receiving written notice of the intention of a board not to reemploy such teacher pursuant to this division is entitled to

the hearing provisions of division (G) of this section.

STATEMENT OF THE CASE

The report of my death was an exaggeration.

--Mark Twain, 1897

The Petitioner heralds the death of the "marketplace of ideas" in classrooms across the country in her Petition for Writ of Certiorari to this Court, following the Sixth Circuit's decision in *Evans-Marshall v. Bd. of Educ. of the Tipp City Exempted Vill. School Dist.*, 624 F.3d 332 (6th Cir. 2010). The Petitioner bemoans the Sixth Circuit's "kill[ing] of the democratic spirit that has been the lifeblood of our best schools for many generations." The Petitioner's sounding of the death knell for our nations fifty states' public schools is just as Mark Twain so aptly put it back in 1897: an exaggeration.

Mark Twain is also quoted as saying "truth is mighty and will prevail," and followed that up with the warning "there is nothing the matter with this, except that it ain't so."[1] The Petitioner has proceeded under this premise, starting in 2001 when she took exception to parents in the Tipp City community objecting to some of the assignments that she handed down to their children in her English class at Tippecanoe High School. The Petitioner overlooks the fact that a good deal of the parents' criticism was actually aimed at the school board, because one of the books the parents

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[1] Mark Twain, 1898.

found objectionable, *Siddhartha*, had been previously purchased by the school board several years before the Petitioner utilized it in her English class. Unwilling to accept the constructive criticisms of the students' parents, memorialized by a petition signed by 500 parents, the Petitioner embarked on a crusade against her critics, which included the parents, the students, the school board and its administration. When parents of a high school student requested an alternative assignment for their child, Petitioner responded by punitively assigning books meant "for a four-to-eight year old child." The Petitioner showed little respect for the school board, the principal, and the superintendent, firing back at Principal Wray that she "didn't know she had to get approval from Daddy" for her curriculum. Despite facts such as these, the Petitioner labels herself a "team player," and self-reports no communication issues within Tippecanoe High School.

Eventually, the school board voted not to renew the Petitioner's teaching contract. The Petitioner unsuccessfully pursued a grievance against the board. *Evans-Marshall v. Bd. of Educ.*, 2003 Ohio 4977, Miami App. No. 03CA2 (2nd Dist. 2003); appeal denied by *Evans-Marshall v. Bd. of Educ.*, 101 Ohio St. 3d 1423 (Ohio 2004). This action then followed, in which the Petitioner claimed the Respondents retaliated against her exercise of her First Amendment right to select whatever curriculum she wanted to present to high school students at Tippecanoe High School. The District Court granted summary judgment to the Respondents, finding that the Petitioner's claim failed to satisfy the requirements of *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). The Sixth Circuit affirmed, finding that *Garcetti v. Ceballos*, 547 U.S.

410 (2006) applied to primary and secondary public school teachers in this context, and as such, the Petitioner had no First Amendment protection for her choice of in-class curriculum.

The facts of this case, as accurately recounted by the Sixth Circuit and district court, coupled with the applicable legal principles, reveal that the Petitioner's theories predicting the death of our public schools are nothing more than exaggerations. The Sixth Circuit's holding in this case is directly tied to Ohio's controlling statutory code. The Sixth Circuit correctly held that state statute lawfully empowers boards of education - not individual teachers, not department chairs, not principals, and not even superintendents - to prescribe curriculum for Ohio's primary and secondary public schools. The Sixth Circuit acknowledged that, in turn, the democratic system is strengthened under Ohio's laws by permitting parents to have a say in their children's public education. The Sixth Circuit's application of *Garcetti* in these circumstances is just as sound as *Garcetti* itself. To again quote Mark Twain, "How empty is theory in the presence of fact!"[2] Such sentiments aptly describe the Petitioner's exaggerations, and this Court should decline to grant a writ of certiorari.

A. The Petitioner's Employment and Job Duties

The Petitioner was hired to fill a position in the English or Language Arts Department, where she was assigned to teach 9th & 10th grade English, and

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[2] Mark Twain wrote this in *A Connecticut Yankee in King Arthur's Court.*

Creative Writing to 11th and 12th graders.[3] As part of her duties as an English teacher, the Appellant was required to create and submit lesson plans that complied with the curricular objectives set forth in each department's curricular guide.[4] In addition to the textbook for each course, she was given discretion to choose from a stock of supplemental materials she would use to support the curriculum objectives.[5] Those supplemental materials had been evaluated and chosen by curriculum review committees, after which, the Tipp City Board purchased a sufficient number of books for an entire class of students.[6]

B. Ohio's Statutory Scheme Regarding Public Education

Largely absent from the Petition is any meaningful discussion regarding the relevant and controlling Ohio statutes. The Petitioner cannot acknowledge controlling state statutes and still credibly argue that she, as an Ohio public high school English teacher, is the final decision maker on curriculum once she steps into her classroom.

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[3] See Petitioner's Appendix, at 2a.

[4] R. 31 at page 190, and R. 33, at page 56. These are the deposition transcripts of the Petitioner and Respondent Charles Wray, and are part of the District Court record.

[5] R. 31 at page 13, and R. 33, at page 51.

[6] R. 32, at pages 123-124. This is the deposition transcript of Respondent John Zigler, which is part of the District Court record.

In Ohio, each board of education has a statutory responsibility to prescribe a curriculum for schools under its control. O.R.C. §§3313.47 and 3313.20(A) specifically give boards of education authority to make policies that are necessary for the government of its schools and students. O.R.C. §3313.60 specifically commits the duty of selecting and purchasing textbooks to local boards of education. O.R.C. §3329.08. Local boards of education are also responsible for extending or not extending a teacher's limited contract. O.R.C. §3319.11. A board of education comprised of elected officials is singularly accountable to the public. O.R.C. §3313.02.

These state statutory mandates were not lost on the Sixth Circuit in this case. This statutory structure was explained by the Sixth Circuit as follows:

> Start with Ohio law. Under it, "[t]he board of education of each city . . . shall prescribe a curriculum." O.R.C. § 3313.60(A). State law gives elected officials--the school board--not teachers, not the chair of a department, not the principal, not even the superintendent, responsibility over the curriculum. ***This is an accountability measure, pure and simple, one that ensures the citizens of a community have a say over a matter of considerable importance to many of them--their children's education--by giving them control over membership on the board.***

Evans-Marshall, 624 F.3d at 341 (Petitioner's Appendix, at 15a)(emphasis added).

The Petitioner speaks of "democratic spirit" in public schools, but her arguments seek to strip public schools of all democratic process. The Ohio General Assembly, an elected legislative body, first enacted Chapter 3313 of the Ohio Revised Code in the 1950's to give each community's citizenry a voice as to the education of its children in public schools. No one elected the Petitioner and her curricular choices. To elevate the Petitioner over the school board turns Ohio's statutory structure on its head and disenfranchises the parents who elect board members and who attend board meetings to exchange ideas with the board.

C. Democracy in Action: The Parents Speak Out

The Petitioner used *Siddhartha*, a novel by Hermann Hesse, as part of the curriculum for her English class. *Siddhartha* was a book that had been purchased by the school board, and was available for the Petitioner to use with her English class.[7] *Siddhartha* contains explicit language and sexual themes, which caused concerns for some parents in the community.[8] At least one parent tried to address the concerns with the Petitioner directly, asking for an alternative assignment for their child.[9] The Petitioner admittedly sought to rebuke such a request, and gave the child, as an alternative assignment to *Siddhartha*,

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[7] Petitioner's Appendix, at 3a.

[8] *Id.*

[9] *Id.*

books that were "for a four-to-eight year old."[10] The Petitioner's message to parents was clear, and was not unnoticed by the Sixth Circuit.

In addition to *Siddhartha*, the Petitioner also used Ray Bradbury's *Fahrenheit 451* with her 9th grade class, and used the book as a springboard into an assignment which required the students to choose books from the American Library Association's list of "100 Most Frequently Challenged Books" for an in-class debate.[11] Two groups chose the book *Heather Has Two Mommies*, which prompted a complaint from at least one parent.[12]

In October of 2001, approximately twenty-five parents attended the school board meeting to voice complaints about the curricular choices in the schools.[13] The complaints included *Siddhartha* and the book-censorship assignment. One parent admonished the school board for its choice to purchase a book like *Siddhartha*, saying "you should be embarrassed."[14] The parent also complained of the Petitioner's response to the request for an alternative

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[10] *Id.*

[11] *Id.* at 2a. This was identified as the "book-censorship assignment" by the Sixth Circuit.

[12] *Id.* While *Heather Has Two Mommies* was ranked as one of the most challenged books of the 1990's, it fell off the American Library Association's Office for Intellectual Freedom's list of the top 100 of most challenged books for the decade ending in 2009.

[13] *Id.*

[14] *Id.* at 3a.

assignment instead of *Siddhartha*, understandably stating that the Petitioner seemed to be punishing the child.[15] Not only did the Petitioner's choice appear punitive, in doing so the Petitioner chose to deny her student a free public education simply because someone voiced an opinion contrary to Petitioner's in a public meeting conducted to allow for the free exchange of ideas.

The complaining parents in Tipp City grew in number, and approximately 100 parents attended the November 2001 school board meeting, which was covered by the local media.[16] A group of parents presented the school board with a 500-signature petition calling for "decency and excellence" in the classroom.[17]

The school board, and Respondent Superintendent John Zigler in particular, defended the Petitioner's use of *Siddhartha* in response to the objecting parents at the board meeting.[18] As the Sixth Circuit recounted, the school board and some parents defended the Petitioner's teaching methods as follows:

> The meeting was not one-sided. A member of the board--a parent himself--warned that the school district's policies about potentially objectionable material "have to be well thought

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[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

> out because what you might find offensive, I might not." Another board member reminded the group that, as elected officials, the board "must walk the middle of the road to some extent," even if the community might "err . . . on the conservative side." And a parent who made a formal statement said that he "[did not] condone" the behavior of some of the more vocal parents and trusted that school officials "want what's best for our kids."

Petitioner's Appendix, at 3a (record citations omitted).

These facts demonstrate the importance of Ohio's statutory scheme, which makes the school board ultimately responsible for what goes on in the classrooms in primary and secondary public schools in Ohio. The Petitioner did not respond appropriately to parents' concerns, and if the buck stopped there, as the Petitioner would have it, the parents would have no voice as to how their children were being educated in the public school system. As Judge Sutton wrote, this is a "recipe for disenfranchising the 9,000 or so members of the Tipp City community."[19]

D. The Response by the School Board and the Petitioner

In response to the parents' concerns, Superintendent Zigler told the parents that there did not appear to be a problem with Board policy because it was essentially the same policy used by other school

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[19] Petitioner's Appendix, at 13a.

districts in the area.[20] He explained that none of the district administrators he spoke to had been able to come up with a full-proof solution to the issue then being debated in Tipp City. Rather, he felt the problem was with the procedures used in implementing board policy.[21]

Zigler further explained that the district would establish a procedure for reviewing certain library books; particularly those purchased in bulk, to ensure that those less mature students were no longer presented with obscene or offensive materials.[22] With respect to classroom materials, the policy would remain the same. If the parent did not want his or her child to read the book, their option was to request an alternate assignment for their child.[23] Because the books would be staying, the administration would revise the procedure for requesting an alternate assignment, by creating and providing a list of potential, supplemental materials for parents to review.[24] This would ensure that the Board's policy of allowing parents to ask for alternate assignments would not be thwarted by the fact that the students

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[20] R. 37-1, Affidavit of John Zigler, at ¶9.

[21] *Id.*

[22] *Id.* at ¶11.

[23] *Id.* at ¶ 13

[24] *Id.* at ¶ 12.

already had their hands on the book before the parent could request the alternate.[25]

The Petitioner, on the other hand, disregarded the parents' constitutional rights to have input in the education of their children, and claimed the parents were interfering with her ability to teach.[26] The Petitioner stopped communicating with department chairs.[27] The Petitioner's creative writing class then took center stage, when Principal Wray discovered that the Petitioner had a folder with writing samples collected from students from other schools where she taught available to Tipp students that contained objectionable materials. Those materials included a short story that included a first-hand account of a rape, and another short story that involved a young boy who murdered a priest and desecrated a church.[28] When Principal Wray confronted the Petitioner with these materials, the Petitioner insubordinately responded by stating she did not know she needed "to get approval from Daddy."[29]

The Petitioner later had another argument with Principal Wray regarding final exams. The Petitioner arrogantly asked Principal Wray to give her a "model

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[25] *Id.*

[26] R. 31, at page 21.

[27] R. 33, at page 131.

[28] Petitioner's Appendix, at 3a-4a.

[29] R. 31-3, Bates Tipp City 000246.

exam" so she could "give him back exactly what he wanted."[30]

Given the Petitioner's chosen behavior, it is hardly surprising that she was not viewed as a "team player," and was given a negative evaluation by Principal Wray. In March of 2002, the school board voted unanimously not to renew the Petitioner's teaching contract.[31]

E. Putting it All Together: The Sixth Circuit's Decision and *Garcetti*

The Sixth Circuit found that the *Garcetti* decision applied to primary and secondary public school teachers, and as such, upheld the dismissal of the Petitioner's First Amendment retaliation claim against the Respondents. The Petitioner characterizes this as an "extension" of *Garcetti*. In reality, the Sixth Circuit simply applied *Garcetti* to this case.

1. The Reasoning Behind *Garcetti*

In 2006, this Court announced its decision in *Garcetti*, which upheld the dismissal of a prosecutor who claimed he was retaliated against by the prosecutor's office for exercising his First Amendment right in the course and scope of his employment as a prosecutor. The Court recognized the realities that come with government employment, reasoning as follows:

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[30] Petitioner's Appendix, at 4a.

[31] *Id.*

> 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, 75 L. Ed. 2d 708 ***("[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.

Garcetti, 547 U.S. at 418-419 (emphasis added).

The Court noted that the First Amendment does invest public employees with certain rights, but further noted that it has long been held that the First Amendment does not empower public employees to "constitutionalize the employee grievance." *Id.* at 420 (citing *Connick v. Myers*, 461 U.S. 138, 154 (1983)).

The *Garcetti* Court then held 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." *Garcetti*, supra at 421. The sound reasoning of this holding was further explained as follows:

> 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.

Id. at 422-423.

As the Sixth Circuit recognized, this reasoning is equally applicable to teachers employed in primary and secondary public schools. Public school teachers are government employees, hired to do a job. While primary and secondary school teachers undoubtedly perform an invaluable service in educating our children, police officers, firefighters, and prosecutors also provide invaluable services to our communities. Local governments are required to provide those services to its citizenry as well.

The school board, by statute, is responsible to prescribe the curriculum in primary and secondary public schools in Ohio. If the school board has no say over the curriculum selected by teachers, how can the

school board act on its statutory mandate? How could the school board ever discipline teachers under such an approach? Should Petitioner be constitutionally protected from discipline when she punitively assigns a high school student an alternative curriculum reading assignment "for a four-to-eight year old"? *Garcetti* eliminates such unworkable propositions. Teachers are not without recourse if discipline is taken against them that they feel is unjust or unwarranted. Teachers are free to file grievances for such actions, just as the Petitioner did in this case. Her case was fully reviewed by Ohio's courts and her termination was ruled lawful. *Evans-Marshall v. Bd. of Educ.*, 2003 Ohio 4977, Miami App. No. 03CA2 (2nd Dist. 2003); appeal denied by *Evans-Marshall v. Bd. of Educ.*, 101 Ohio St. 3d 1423 (Ohio 2004).

2. The Unanswered Question in *Garcetti*

Justice Souter, dissenting in *Garcetti*, stated "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. The *Garcetti* majority specifically addressed this concern as follows:

> Second, Justice Souter suggests today's decision may have important ramifications for academic freedom, at least as a constitutional value. There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason

> do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.

Id. at 425.

As such, the unanswered question from *Garcetti* is whether the "pursuant to official duties" holding applies to public colleges and universities. A simple reading of the Sixth Circuit's decision in this case reveals that question was not answered by the Sixth Circuit, and more importantly, this case does not present the Court with an opportunity to revisit this unanswered question.

3. The Sixth Circuit's Application of *Garcetti*

The Sixth Circuit's reasoning mirrors that of this Court in *Garcetti*. Judge Sutton wrote the following for the panel:

> In the light cast by *Garcetti*, ***it is clear that the First Amendment does not generally "insulate" Evans-Marshall "from employer discipline,"*** *Garcetti*, 547 U.S. at 421, even discipline prompted by her curricular and pedagogical choices and even if it otherwise appears (at least on summary judgment) that the school administrators treated her shabbily. ***When a teacher teaches, "the school system does not 'regulate' [that] speech as much as it hires that speech.*** Expression is a teacher's stock in trade, the commodity she sells to her employer in exchange for a salary." *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477,

> 479 (7th Cir. 2007). ***And if it is the school board that hires that speech, it can surely "regulate the content of what is or is not expressed,"*** *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995), what is expressed in other words on its behalf. ***Only the school board has ultimate responsibility for what goes on in the classroom, legitimately giving it a say over what teachers may (or may not) teach in the classroom.***

Petitioner's Appendix, at 10a-11a (emphasis added).

The appellate panel questioned how a contrary approach would work, and that key question is not answered by Petitioner because Petitioner is admittedly unable to answer it for this Court. The following discussion by the Sixth Circuit illustrates the need for the *Garcetti* rule in this arena:

> If one teacher, Evans-Marshall, has a First Amendment right "to select books and methods of instruction for use in the classroom," so presumably do other teachers. Evans-Marshall may wish to teach Siddhartha in the first unit of the school year in a certain way, but the chair of the English department may wish to use the limited time in a school year to teach *A Tale of Two Cities* at that stage of the year. Maybe the head of the upper school has something else in mind. When educators disagree over what should be assigned, as is surely bound to happen if each of them has a First Amendment right to influence the curriculum, whose free-speech rights win? Why indeed doesn't the

> principal, Wray, have a right to defend the discharge on the ground that he was merely exercising his First Amendment rights in rejecting Evans-Marshall's curricular choices and methods of teaching?

Petitioner's Appendix, at 16a.

These legitimate and realistic questions posed by the panel are not answered by the Petitioner at any point. Instead, the Petitioner asks this Court to do what the Sixth Circuit and District Court would not do, which is to elevate her preferences over those of other teachers, the department chair, the principal, the superintendent, the school board, and the parents.

The only reasonable answer to these questions is to apply *Garcetti* to primary and secondary public school teachers, and leave it up to the individual communities, through their school boards, to make curricular choices. This point is driven home by the following reasoning of the Sixth Circuit:

> Because "one man's vulgarity is another's lyric," *Cohen v. California*, 403 U.S. 15, 25, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971), or, as one school board member put the point at the November 2001 meeting, "what you might find offensive, I might not," parents long have demanded that school boards control the curriculum and the ways of teaching it to their impressionable children. Permitting federal courts to distinguish classroom vulgarities from lyrics or to pick sides on how to teach *Siddhartha* not only is a recipe for disenfranchising the 9,000 or so members of the Tipp City community but

> also tests judicial competence. "If even the most happily married parents cannot agree on what and how their own children should be taught, as [we] suspect is not infrequently the case, what leads anyone to think the federal judiciary can answer these questions?"

Petitioner's Appendix, at 17a-18a.

Under Ohio's statutory structure, the courts need not answer such questions. Indeed, the Sixth Circuit did not kill "democratic spirit," as the Petitioner accuses, but instead, the Sixth Circuit is permitting Tipp City to continue to engage in the process of democracy.

4. The Unanswered Question Stays Unanswered In This Case

The Sixth Circuit acknowledged Justice Souter's dissent in *Garcetti*, and expressly noted that the Petitioner is not a teacher at a public college or university, and thus, falls outside of the group that Justice Souter wished to protect.[32] As such, the Petitioner's contention that this case answers *Garcetti*'s unanswered question is incorrect. Respondents submit that open question should remain until a case involving a public college or university professor reaches this Court. When the many exaggerations are brushed aside, and the issues are squarely examined, what Petitioner is actually asking the Court to do is revisit *Garcetti* itself because the

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[32] Petitioner's Appendix, at 21a.

facts of this case do not fall under *Garcetti's* unanswered question.

REASONS FOR DENYING THE PETITION

I. THE CIRCUITS ARE NOT SPLIT ON THIS ISSUE.

The Petitioner claims a "deep split" exists among the circuits regarding the First Amendment rights of public school teachers, concluding that the First, Second, Fifth, Eighth, Tenth and Eleventh Circuits have found some in-class speech is protected by the First Amendment, while the Third, Fourth, Sixth, and Seventh Circuits have reached the opposite conclusion. The Sixth Circuit and Respondents do not agree with this argument. Upon examination, this is just another of the Petitioner's exaggerations.

The Petitioner's "deep split" claim is predicated upon the examination of ***pre-Garcetti*** case law. Of all the decisions cited by Petitioner to report a "deep split," ***only two decisions—the Seventh Circuit in 2007 and the Sixth Circuit in this case—are post-Garcetti decisions.*** Not surprisingly, the two post-*Garcetti* decisions both apply *Garcetti* in the context of primary and secondary public school teachers. To quote another literary classic, the Petitioner's argument regarding a circuit conflict is simply much ado about nothing.

The conflict described in the Petition was resolved by this Court with *Garcetti*. *Garcetti* did not leave unanswered its application to primary and secondary public schools.

The Sixth Circuit, in its opinion, was mindful to consider the lay of the land post-*Garcetti* and included a careful discussion on this very issue. Judge Sutton, for the panel, wrote that the Seventh Circuit has applied *Garcetti* in the same manner that the Sixth Circuit did in this case. Petitioner's Appendix, at pages 18a-19a (citing *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477 (7th Cir. 2007)).

The appellate panel then noted that the Second, Third, and Fourth Circuits have declined to resolve the applicability of *Garcetti* to in-class curricular speech because the claims in those cases were resolved by pre-*Garcetti* precedent. *Id.* (citing *Panse v. Eastwood*, 303 F. App'x 933, 935 (2d Cir. 2008)(" we need not resolve the issue of whether Garcetti or some other standard applies here because Panse does not raise this issue on appeal and his claim would fail regardless of the standard"); *Borden v. Sch. Dist. of Twp. of E. Brunswick*, 523 F.3d 153, 171 n.13 (3d Cir. 2008)("Based on our prior decisions, as well as the decisions of other courts of appeals, Borden's actions do not constitute speech on a matter of public concern regardless of the application of the Supreme Court's most recent case in the line of cases on the free speech rights of public employees"); and *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 694 n.11 (4th Cir. 2007)(following Fourth Circuit precedent in *Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364 (4th Cir. 1998), holding that curricular speech is not a matter of public concern, and thus, does not invoke First Amendment protections).

The appellate panel also noted that the Tenth Circuit has applied *Garcetti* to a public school teacher's speech about curriculum, even when made outside the

classroom. *Id.* (citing *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1204 (10th Cir. 2007)).

As such, much like the Petitioner's arguments regarding the death of public schools, the Petitioner's claim that there is a "deep conflict" among the Circuits is greatly exaggerated, to say the least. The Petitioner fails to acknowledge *Garcetti* and its significance to the proclaimed "split" as described by the Petitioner. The true question would be whether Circuits are split after *Garcetti* was handed down with regard to its application to primary and secondary public schools. The answer to that pivotal question is no, just as the Sixth Circuit concluded. Since this Court's decision in *Garcetti*, no Circuit Court has held that *Garcetti* does not apply to in-class curricular speech of primary and secondary public school teachers.

II. THE UNANSWERED QUESTION IN *GARCETTI* WAS NOT ANSWERED BY THE SIXTH CIRCUIT, AND THERE IS NO LEGITIMATE REASON FOR THE COURT TO REVISIT *GARCETTI*.

The Sixth Circuit expressly stated that the unanswered question in *Garcetti* involving public colleges and universities is not being answered here. Accordingly, the hyperbole contained in the Petitioner's second argument in favor of granting the Writ is not directed to an "extension" of *Garcetti* itself, but instead, is actually arguing that an exception to *Garcetti* should be carved out for primary and secondary public school teachers.

Such a contention is without merit here. With the ink now dry on *Garcetti*, some cases involving public

colleges and universities are now making their way up the Circuits, as described below. The unanswered question of *Garcetti* will be addressed in such cases, and should the Court wish to speak on that point, one of those cases will eventually find its way here.

There is no reason for the Court to revisit *Garcetti* to create an exception for public and secondary school curriculum. This Court has long recognized that school boards do have the right to regulate classroom speech. Ohio's statutory scheme fosters the democratic process, placing no one person, like Petitioner, in charge of molding Tipp City's youth. There is nothing in the Sixth Circuit's decision here that runs afoul of this Court's guidance in *Garcetti* or its other precedent.

A. The unanswered question in *Garcetti* is irrelevant to this case and, other Circuits are addressing it.

The Petitioner asserts the following argument in support of the request for a Writ:

> In leaving open whether *Garcetti* applied to teachers, this court essentially asked the lower courts to determine whether the constitutional interests outlined above required a different rule for those engaged in "scholarship or classroom instruction."[33]

While the Petitioner ignores the express language of *Garcetti* in that the open question involves teachers in the public college or university setting, the

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[33] Petition, at page 27.

Petitioner also ignores the fact that the lower courts are actually doing what the Petitioner believes they should do. While this case does not involve the public college or university setting, other Circuits are grappling with this issue in various contexts.

In the recent unreported decision, *Adams v. Trs. of the Univ. of N. Carolina-Wilmington*, 111 Fair Empl. Prac. Cas. (BNA) 1665, 2011 U.S. App. LEXIS 7036 (4th Cir. 2011), the Fourth Circuit held that *Garcetti* did not apply to a university professor's scholarship and teaching, although the Fourth Circuit acknowledged that there may be some circumstances where *Garcetti* would apply in a university setting. *Id.* It is unknown to the Respondents at this time as to whether a writ is being sought by the defendants/appellees in *Adams*.[34]

The Seventh Circuit found such a circumstance where *Garcetti* did apply in a university setting, and reached a different decision than the Fourth Circuit. In *Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2009), the Seventh Circuit found that a professor's complaint to the university chair regarding the payment of undergraduates, which included critical comments about the dean, to have no protection under the First Amendment.

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[34] The Petitioner's current attorneys also authored an amicus curiae brief on behalf of Petitioner Evans-Marshall in the Sixth Circuit when a rehearing and en banc rehearing was requested by the Petitioner. The amicus that the Petitioner's counsel wrote for in the Sixth Circuit was The Coalition to Defend Affirmative Action, Integration, and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN).

Ultimately, the *Adams* and *Renken* cases do not involve primary or secondary public school curricular, and as such, those cases have no bearing here. They are noteworthy, however, because they demonstrate that lower courts are addressing *Garcetti*'s true unanswered question, and they are doing it in the context contemplated by this Court.

B. The Petitioner ignores pre-*Garcetti* guidance from this Court.

This Court has long recognized that the "determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683 (1986). In *Hazelwood*, the Court distinguished between the First Amendment protection announced in *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969), and curricular speech, reasoning as follows:

> The question whether the First Amendment requires a school to tolerate particular student speech -- the question that we addressed in *Tinker* -- is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, ***and other expressive activities that students, parents,***

> ***and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.***

Hazelwood, 484 U.S. at 270-271 (emphasis added).

Thus, the Petitioner's suggestion that the Sixth Circuit violates the principles of *Tinker* fails to recognize the fact that this Court has distinguished between the personal expression of a student, which was at issue in *Tinker*, and school-promoted curricular speech. Further, the *Hazelwood* Court stated that school facilities, when not opened for the "indiscriminate use by the general public," are not "public forums," and "school officials may impose reasonable restrictions on the speech of students, ***teachers***, and other members of the school community." *Hazelwood*, 484 U.S. at 267 (emphasis added).

Along that same vein, this Court, in a plurality decision, acknowledged that the school board has the authority to remove books that are vulgar. *Bd. of Educ. v. Pico*, 457 U.S. 853, 871-872 (1982) (plurality opinion); *id.*, at 879-881 (Blackmun, J., concurring in part and in judgment); *id.*, at 918-920 (Rehnquist, J., dissenting). In a university setting, this Court recognized that "[w]hen the University determines the content of the education it provides, it is the

University speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995)(citing *Widmar v. Vincent*, 454 U.S. 263, 276 (1981)).

The Petitioner fails to acknowledge this precedent in her discussion of cases such as *Brown v. Board of Education*, 347 U.S. 483 (1954) and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). While this Court has recognized the importance of teachers in our country, and rightfully so, this Court has also been mindful of the authority and role of the school boards in our communities.

C. The Petitioner is not a sovereign unto herself.

The Petitioner has argued throughout this case, starting with her complaint, that primary and secondary public school teachers have a right to "select books and methods of instruction for use in the classroom without interference from public officials."[35] This stalwart refusal to acknowledge Ohio's clear statutory scheme continues in the Petition.

The Sixth Circuit rightly rejected such a notion, and set forth the following sound reasoning in doing so:

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[35] Petitioner's Appendix, at page 15a, citing the Petitioner's complaint, R. 1, at ¶32.

> It is true that teachers, like students, do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969). ***But that does not transform them into the employee and employer when it comes to deciding what, when and how English is taught to fifteen-year-old students.*** Consider the difference between the speech of Evans-Marshall and Marvin Pickering, teachers both. When Pickering sent a letter to the local newspaper criticizing the school board, he said something that any citizen has a right to say, and he did it on his own time and in his own name, not on the school's time or in its name. Yet when Evans-Marshall taught 9th grade English, ***she did something she was hired (and paid) to do, something she could not have done but for the Board's decision to hire her as a public school teacher.*** As with any other individual in the community, ***she had no more free-speech right to dictate the school's curriculum than she had to obtain a platform--a teaching position--in the first instance for communicating her preferred list of books and teaching methods.*** "[N]o relevant analogue" exists between her in-class curricular speech and speech by private citizens.

Petitioner's Appendix, at pages 14a-15a (emphasis added).

The appellate panel notes that the First Amendment does not prohibit Ohio from creating

elected school boards and placing responsibility for the curriculum of each school district in the hands of the board. Further, while teachers are required to speak, write, and otherwise express themselves in the classroom, the Sixth Circuit points out that this does not make teachers "sovereigns unto themselves."[36]

The facts of this case demonstrate how Ohio's statutory structure effectively worked. A substantial number of parents in the Tipp City community had concerns about the curriculum at Tippecanoe High School. Some of the parents tried to address their concerns with the Petitioner directly by requesting an alternate assignment, which was met with an inappropriate response by the Petitioner. The parents then took their complaints to the school board at board meetings, which allowed the school board the opportunity to address the parents' concerns, and also defend curricular choices regarding books like *Siddhartha*, which had been purchased by the school board. The parents had a voice in the process, and the school board was ultimately responsible for the curricular choices. This exchange of ideas led to the creation of a new procedure to enhance communication with students' parents about supplemental reading material.

What is implied by the Petitioner, but never actually said in her briefing, is that in the Petitioner's view, the parents should simply butt out and not interfere with their children's education, because Petitioner knows what is best for their children. This ignores the long-recognized right of parents and

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[36] Petitioner's Appendix, at pages 15a-16a.

guardians to direct the upbringing and education of their children. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-535 (1925); *Prince v. Massachusetts*, 321 U.S. 158 (1944).

In addition to the parents' constitutional rights regarding their children, the State of Ohio requires parents to send their children to school. See generally, Chapter 3321 of the Ohio Revised Code. In fact, if parents fail to do so, they are subject to criminal penalties. See O.R.C. §§3321.38 and 3321.99.

Despite these facts, and the sound and measured reasoning of the Sixth Circuit, the Petitioner would have this Court remove the parents and the school board from the equation, and let the Petitioner alone decide the curriculum for the Tipp City community, one class at a time. The relief sought by Petitioner is not founded in state or federal law and, therefore, must be rejected.

D. The sky is not falling, as the Petitioner suggests.

The Petitioner argues that the Sixth Circuit's decision will plunge the nation into an era of "new Monkey Trials" if this Court does not intervene. Petition, at page 30 (citing *Scopes v. State*, 154 Tenn. 105 (1927). Such hyperbole deserves little, if any, consideration. The same types of outlandish scenarios can be set forth in opposition to those set forth in the Petition. For example, what if the Petitioner decided to require her 9th grade students to read *Mein Kampf*? What if the Petitioner decided that she did not like the textbook for the 9th grade English class purchased by the school board, and instead, elected to assign those

students only books that included graphic sexual descriptions, or graphic violence? Should the students' parents have no say in such a curricular choice? In the Petitioner's ideal world, there does not appear to be any limitations whatsoever on what she can present to public high school students.

Most of the Petitioner's arguments focus on her concept of academic freedom. She fails to acknowledge this Court's reasoning that "[U]niversities occupy a special niche in our constitutional tradition" and the constitutional rules applicable in higher education do not necessarily apply in primary and secondary schools, where students generally do not choose whether or where they will attend school. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 724-25 (2007). The appellate panel further acknowledged the roots of "academic freedom" as being "conceived and implemented in the university" out of concern for "teachers who are also researchers or scholars--work not generally expected of elementary and secondary school teachers." Petitioner's Appendix, at 21a (citing J. Peter Byrne, Academic Freedom: A "Special Concern of the First Amendment", 99 Yale L.J. 251, 288 n.137 (1989)).

The Petitioner's "Chicken Little" arguments that the sky is falling are indeed nothing more than hyperbole and exaggeration. This case is not about the death of "democratic spirit." This case is not about legislation in Arizona. This case is not about whether Darwinism can be taught in schools. This case is not about "academic freedom" as it is recognized in legal precedent. This case does not alter the landscape of academic freedom in the public college or university setting.

The Sixth Circuit's decision merely gives effect to Ohio law that mandates school boards are responsible for curricular choices. The Petitioner has never challenged Ohio's statutory scheme setting forth that mandate at any stage in the proceedings before Ohio's state courts or our nation's federal courts. As such, this case does not present this Court with a chance to save our nation's schools and children, as the Petitioner desires. This is a case that follows longstanding precedent from this Court, and the sound reasoning of a 2006 decision from this Court that prevents every employment decision from becoming a constitutional controversy.

CONCLUSION

When you strip away the Petitioner's exaggerations, hyperbole, and alarmist arguments, the Court is left with only the facts. The Sixth Circuit's decision in this case does not change the landscape of "academic freedom," nor does it kill democracy in public schools. The Sixth Circuit simply followed this Court's precedent set forth in the *Garcetti* decision in the context of in-class curricular speech in primary and secondary public schools. Public school teachers are not sovereigns unto themselves in the context of primary and secondary schools, and in Ohio, the elected school board is responsible for classroom curriculum. Indeed, the Petitioner's warnings of the death of our public schools are nothing more than an exaggeration.

For the reasons stated, the Respondents respectfully request that the Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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