No. 21-418

In the Supreme Court of the United States

JOSEPH A. KENNEDY,

Petitioner,

v.

BREMERTON SCHOOL DISTRICT,

Respondent.

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

BRIEF OF TWENTY-FOUR STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amici Curiae are the States of Alaska, Arizona, Texas, Alabama, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Utah and West Virginia.[1] The States and their local governments employ multitudes of Americans as attorneys, civic planners, nurses, park rangers, police officers, and professors—to name just a few examples. These Americans do not abandon their religious liberty at the doors of their workplaces. Amici States are interested in protecting the rights of all public employees—in their States and elsewhere—from the sort of heavy-handed government control that pushes skilled employees out of public service and deters highly qualified applicants from entering it in the first place.

SUMMARY OF ARGUMENT

The Bremerton School District prohibited Coach Kennedy from "engag[ing] in demonstrative religious activity, readily observable to (if not intended to be observed by) students and the attending public." App. 37, 81. The District suspended Coach Kennedy for violating this directive when he offered a prayer by himself on a football field in view of students. App. 49–50, 81. The Ninth Circuit ruled that Coach Kennedy's private act of prayer could be interpreted as government speech and that the District was therefore justified in curtailing Coach Kennedy's religious expression.

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[1] Counsel of record for all parties received timely notice of Amici States' intent to file this brief. *See* Sup. Ct. R. 37.2(a).

The Court should grant review because of the serious First Amendment concerns this case raises. Indeed, four Justices of this Court have already recognized that the Ninth Circuit's holding is "troubling." *See* App. 211. And when the Ninth Circuit declined to rehear this case en banc, *eleven* judges objected.

By concluding that Coach Kennedy acted as a public employee rather than a private citizen when kneeling and praying on the football field, the Ninth Circuit impermissibly expanded his job description in a way that leaves teachers and other public employees in the Ninth Circuit questioning what counts as public as opposed to private speech. The Ninth Circuit's holding not only curtails the private religious expression of public employees, but it also contradicts well-settled precedent of this Court. The opinion countenances use of the Establishment Clause as a "*sword* for governments to *defeat*" Free Exercise Claims, instead of a "*shield* for individual religious liberty." App. 94 (O'Scannlain, J., respecting the denial of rehearing en banc).

If left unreviewed, the Ninth Circuit's decision threatens to curtail First Amendment liberties and in turn, deter individuals from seeking public employment. This will have grave effects on public employees and employers alike, especially within the realm of public education.

As Judge O'Scannlain recognized, the decision below is "at odds with Free Speech, Free Exercise, and Establishment Clause jurisprudence all at once[.]" App. 79. Such a case certainly warrants this Court's review.

ARGUMENT

I. The Ninth Circuit's Holding Goes Against Well-Settled Precedent And Threatens First Amendment Rights.

Four Justices of this Court have already said—in this very case—that the Ninth Circuit's "understanding of the free speech rights of public school teachers is troubling[.]" App. 211. Yet the Ninth Circuit, while acknowledging this Court's admonition, proceeded to adopt the same "troubling" analysis, concluding again that Kennedy acted as a public employee, not a private citizen, when he engaged in an individual act of prayer. *See* App. 15; App. 78 (O'Scannlain, J., respecting the denial of rehearing en banc) ("Rather than heed the extremely rare interlocutory guidance of four Justices, the panel has doubled down on its 'troubling' view."). The Ninth Circuit's analysis raises serious concerns for both individual expression and employer liability.

First, the Ninth Circuit interpreted *Garcetti v. Ceballos* in a way that impermissibly curtails public employees' right to express themselves as citizens. 547 U.S. 410 (2006). Although public employees "are not speaking as citizens for First Amendment purposes" when they "make statements pursuant to their official duties," *id.* at 421, this Court has warned that employers cannot define an employee's official duties so broadly as to unduly restrict employee expression, *id.* at 424; *see also Lane v. Franks*, 573 U.S. 228, 240 (2014) ("The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties.").

Despite *Garcetti's* warning against defining an employee's official duties too broadly, the Ninth Circuit reached the same "highly tendentious," *see* App. 211 (Alito, J., statement respecting the denial of certiorari), conclusion that garnered the attention of four of this Court's Justices: "Kennedy spoke as a public employee when he kneeled and prayed on the fifty-yard line immediately after games while in view of students and parents[.]" App. 17. The panel noted that Kennedy "was clothed with the mantle of one who imparts knowledge and wisdom[,]" and that "his expression on the field—a location that he only had access to because of his employment—during a time when he was generally tasked with communicating with students, was speech as a government employee." App. 14–15. Thus, under the Ninth Circuit's rationale, any time a teacher communicates something in view of students—regardless of whether that communication is directed toward students—a court may reason that he or she acts in an official capacity and deem the expression unprotected. *See, e.g.*, App. 92 (O'Scannlain, J., respecting the denial of rehearing en banc) ("Kennedy might use on-field speech to instruct the team's defense, or he might kneel on the field to pray quietly to God. The former is public because only coaches call plays …. But the latter is private because there is a clear civilian analogue: Millions of Americans" pray.). This is precisely the type of expanded-job-description analysis *Garcetti* cautioned against. *See* App. 86 (O'Scannlain, J., respecting the denial of rehearing en banc) ("[T]he panel leapt to this grandiosely broad characterization of Kennedy's job duties: 'communicating the District's perspective on

appropriate behavior' whenever 'in the presence of students and spectators.'").

Teachers 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 (1969). But the Ninth Circuit's application of *Garcetti* coerces public school teachers in nine states and two territories to do just that. The Court should grant certiorari to clarify the extent of these teachers' rights and ensure that they are afforded the protection guaranteed by the Constitution.

Second, by expanding the definition of employee speech, the Ninth Circuit panel also expands public employers' potential liability for that speech. Because official communications have official consequences, including potentially binding a public employer or subjecting a public employer to liability, it is of vital importance that public employers can look to an employee's actual job duties to distinguish messages communicated in a public capacity from the private speech of employees acting outside their duties. *See, e.g.*, *Roe v. Nevada*, 621 F. Supp. 2d 1039, 1051 (D. Nev. 2007) (school district could be held liable for verbal and physical abuse within the scope of a teacher's employment); *Duyser by Duyser v. Sch. Bd. of Broward Cnty.*, 573 So. 2d 130, 131 (Fla. Dist. Ct. App. 1991) (school board not liable when teacher performed satanic rituals on students because the conduct was "definitely not authorized or incidental to authorized conduct"); *McIntosh v. Becker*, 314 N.W.2d 728, 732 (Mich. Ct. App. 1981) (school could not be held liable for alleged racial and sexual slurs made by teacher outside the scope of employment); *Tall v. Bd. of Sch. Com'rs of Balt. City*, 706 A.2d 659, 668 (Md. Ct.

Spec. App. 1998) (school board could not be held liable for teacher who beat special education student because such acts were outside the scope of employment). It is simply not feasible—let alone constitutional—for a public employer to regulate every observable message (both verbal and nonverbal) that its employees communicate or that would not occur but for the public employment. With this limitation in mind, courts have, until now, cabined statements and conduct made in a public capacity to those within the scope of the employee's actual job duties. The Court should grant review to restore that limitation.

II. Allowing The District To Justify Its Discriminatory Actions Under The Establishment Clause Creates Problems For Public Employers And Employees Alike.

In addition to the problems already identified with the Ninth Circuit's free speech analysis, the court's opinion also turns the Establishment Clause on its head. The Ninth Circuit concluded that even if Kennedy's prayers are private, protected speech, the District's fears of Establishment Clause liability could justify discriminating against him based on the religious content of that speech. App. 17. That conclusion contravenes this Court's precedent. *See Widmar v. Vincent*, 454 U.S. 263, 276 (1981). A government employer like the District can avoid violating the Establishment Clause while continuing to respect its employees' rights to free speech and free exercise of religion. Respecting the proper balance not only ensures that individual constitutional rights are not infringed, but also protects government employers from the distasteful duty of policing their employees' every word and deed.

Because the District targeted Coach Kennedy's post-game prayers due to their religious nature, its actions must be "justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993). Preventing Establishment Clause liability may qualify as a compelling government interest, but "achieving greater separation of church and State than is already ensured under the Establishment Clause" never does. *Widmar*, 454 U.S. at 276; *see also Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112–13 (2001). By accepting the District's justification here, the Ninth Circuit has "subvert[ed] the entire thrust of the Establishment Clause, transforming a *shield* for individual religious liberty into a *sword* for governments to *defeat* individuals' claims to Free Exercise" and freedom of expression. App. 94 (O'Scannlain, J., respecting the denial of rehearing en banc).

Courts have repeatedly confirmed that the mere presence of protected, private religious speech on a school campus does not constitute an endorsement such that it brings the school within the ambit of an Establishment Clause violation. *See, e.g.*, *Good News Club*, 533 U.S. at 112–19 (permitting a private organization to use school facilities for religious instruction after school did not violate the Establishment Clause); *Widmar*, 454 U.S. at 270–75 (permitting a religious student group to use university facilities did not violate the Establishment Clause).

The Ninth Circuit's divergence from this well-established principle creates problems for both public employers and public employees. For public employees, an excessively broad interpretation of the

Establishment Clause inhibits individuals' First Amendment freedoms. And for public employers, the Ninth Circuit's opinion may impose an affirmative duty on employers to police the private actions of employees and take affirmative steps to prevent actions otherwise protected under the other First Amendment guarantees. The Court should grant review to forestall these far-reaching effects and to clarify that the Establishment Clause does not require the wholesale prohibition of private religious expression by public employees.

III. The Ninth Circuit's Curtailment Of First Amendment Liberties Is Detrimental To Public Education.

Attracting the most qualified candidates for public service—particularly in education—benefits society at large. But that recruitment effort will be undermined if potential public servants face unwarranted restrictions on their right to express their deeply held convictions. Although the government, as employer, may regulate religious exercise within reasonable bounds, public employees should not be required to divest themselves of their individuality and unique viewpoints when stepping into a public school or government office. This Court should grant certiorari to prevent schools and other government entities from being compelled to stifle protected expression.

A. Educators And Other Public Employees Perform Vital Functions In Our Society.

Educators "occupy a singularly critical and unique role in our society in that for a great portion of a child's life, they occupy a position of immense direct influence on a child, with the potential for both good and bad."

Knox Cnty. Educ. Ass'n v. Knox Cnty. Bd. of Educ., 158 F.3d 361, 375 (6th Cir. 1998); *see also* Alaska Stat. § 14.03.015 ("[T]he purpose of education is to help ensure that all students will succeed in their education and work, shape worthwhile and satisfying lives for themselves, exemplify the best values of society, and be effective in improving the character and quality of the world about them."). Because education plays such a pivotal role in the lives of young people, it is especially important that States recruit, train, and support high-quality educators. *See, e.g.*, Alaska Stat. § 14.25.001 ("The purpose of this chapter is to encourage qualified teachers to enter and remain in service ...."); Ariz. Rev. Stat. § 15-537 ("The governing board shall establish a teacher performance evaluation system that is designed to improve teacher performance and improve student achievement[.]"); Tex. Educ. Code § 4.001(b) ("Qualified and highly effective personnel will be recruited, developed, and retained."). In pursuit of those goals, for example, the Texas Legislature has directed state officials "to identify talented students and recruit those students … into the teaching profession" and "to develop recruiting programs designed to attract and retain capable teachers[.]" Tex. Educ. Code § 21.004(a), (d).

But even competitive salaries, excellent health insurance, and the satisfaction of public service will not induce qualified candidates to pursue public employment if accepting the position means compromising their dearest and most personal convictions. For most Americans—indeed, for most people across centuries and cultures—those convictions include religious commitments. *See Zorach v. Clauson*, 343 U.S. 306, 313 (1952) ("We are

a religious people whose institutions presuppose a Supreme Being."). If government employers (or courts) place unnecessary and overbroad restrictions on the ability of employees to express their religious convictions in the workplace, legitimate religious expression will be chilled. And that chilling effect will, in turn, deter highly qualified candidates who desire to work in an environment that allows them to preserve their personal integrity. The lack of these highly qualified candidates in government employ, particularly in public schools, will hurt society in general and students in particular.

B. Tolerating—And Encouraging—Individual Expression Furthers The Goals Of Education.

Government employees, including teachers, are people, not automatons. No one wants to abandon individuality at the school gate. Nor is it in the public's interest to require such uniformity.

Teachers "cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them." *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring). An environment totally dependent on "authoritative selection" would (1) obstruct the recruitment of diverse and qualified educators, and (2) frustrate the "robust exchange of ideas" necessary for the cultivation of tomorrow's leaders. *See Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) ("The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, (rather) than through any kind of authoritative selection.") (quotes omitted); *Tinker*,

393 U.S. at 511 ("In our system, state-operated schools may not be enclaves of totalitarianism."); Chris Chambers Goodman, *Retaining Diversity in the Classroom: Strategies for Maximizing the Benefits That Flow from A Diverse Student Body*, 35 Pepp. L. Rev. 663, 669 (2008) (noting that "[d]eveloping tolerance" is a "benefit of diversity in education" and recommending "[s]eeking empathy" "when we are talking about racial, ethnic, gender, economic and religious diversity"). "[T]he constitutional restrictions in the educational arena, which are created by the state with support from the courts, ultimately undermine the outcomes that society hopes the constraints will produce." Amanda Harmon Cooley, *Controlling Students and Teachers: The Increasing Constriction of Constitutional Rights in Public Education*, 66 Baylor L. Rev. 235, 240 (2014).

Exposure to individuals whose demonstrative speech includes outward signs of religious observation is an essential part of educating citizens who can interact with the wide variety of fellow Americans awaiting them in the workplace and public square. *Grutter v. Bollinger*, 539 U.S. 306, 308 (2003) ("[T]he skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."). "How well an enterprise works—how productive and successful it is in a highly competitive global economy—depends on whether it has the best people and people who are comfortable working across lines of race, class, religion, and background." Steven A. Ramirez, *Diversity and the Boardroom*, 6 Stan. J.L. Bus. & Fin. 85, 120 n.203 (2000).

The Ninth Circuit's opinion threatens this diversity by ensuring that the only people in government

employment—and the only people willing to become public school teachers—are those willing to accept a radical curtailment of their religious liberty by those wielding political or judicial power. *See* Cooley, *supra*, at 290 (noting that curtailing educators' constitutional rights "has broader implications for ... the nature of dissent and autonomy for groups that have less power than those bodies making rules to which they must conform"). As a result, public employees will be either those willing to hide their religious beliefs entirely or those who hold no religious beliefs at all. Qualified candidates who would otherwise become public servants will be diverted to the private sector, and the religious diversity of schools and government offices will diminish. *See McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring).

Religious expression and public service can and must coexist. By holding otherwise, the Ninth Circuit strips public servants of their First Amendment rights, to the detriment of educators, students, and the American public.

CONCLUSION

The Court should grant certiorari to protect critical First Amendment rights.

October 18, 2021

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