No. 16-35801

In the United States Court of Appeals for the Ninth Circuit

JOSEPH A. KENNEDY,

Plaintiff–Appellant,

v.

BREMERTON SCHOOL DISTRICT

Defendant–Appellee.

On Appeal from the United States District Court for the Western District of Washington, Tacoma Division, Case No. 3:16-CV-05694-RBL

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SUMMARY OF THE ARGUMENT

The panel opinion establishes a sweeping, unconstitutional rule: Public school teachers and coaches have *no* First Amendment rights whenever they are "in view of students." That holding is contrary to the decisions of this Court and the Supreme Court, and threatens to undo a half-century of precedent confirming that public employees—including public school "teachers" and coaches—"are not relegated to a watered-down version of constitutional rights." *Dahlia v. Rodriguez*, 735 F.3d 1060, 1071 (9th Cir. 2013) (en banc).

Appellant Joseph A. Kennedy ("Coach Kennedy"), a popular and well-respected football coach at Bremerton High School ("BHS"), was suspended from his coaching job because he knelt to pray silently at the end of BHS football games. "Once the final whistle blew, Kennedy shook hands with the opposing team and waited until most of the BHS players were singing the fight song to the audience in the stands. Then, he knelt on the fifty-yard line, bowed his head, closed his eyes, 'and prayed a brief, silent prayer.'" *Kennedy v. Bremerton Sch. Dist.*, No. 16-35801, 2017 WL 3613343, at *4 (9th Cir. Aug. 23, 2017).

The panel holds that Coach Kennedy's "brief, silent prayer" was constitutionally unprotected because it was "in view of students and parents immediately after BHS football games." *Id.* at *4; *see id.* at *14 (same). But under that rule, *all* speech or religious exercise by a teacher or coach is unprotected

whenever it *may* be observed by students or the public. Indeed, the Bremerton School District ("BSD") policy that the panel upheld expressly prohibits all "*demonstrative religious activity*" that is "readily observable to (if not intended to be observed by) students and the attending public." *Id.* at *5 (emphasis added).

The panel opinion strips First Amendment protection from an extraordinary range of ordinary speech and religious exercise. Under the panel's decision, a teacher could be fired for bowing to pray silently over lunch in the cafeteria, for donning a yarmulke or hijab, for making the sign of the cross, or for wearing a "Love Conquers Hate" lapel pin—and there would be no constitutional recourse. That turns *Tinker* on its head, forcing teachers to "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).[1]

The panel opinion contravenes controlling Supreme Court and Ninth Circuit precedent in at least two distinct ways:

[1] Citing *Tinker*, courts have held that teachers have First Amendment rights in the workplace. *See, e.g.*, *Russo v. Cent. Sch. Dist. No. 1*, 469 F.2d 623, 631 (2d Cir. 1972) (firing teacher for refusing to recite pledge of allegiance was unconstitutional under *Tinker*); *James v. Bd. of Ed. of Cent. Dist. No. 1 of Towns of Addison et al.*, 461 F.2d 566, 573 (2d Cir. 1972) (firing teacher for wearing anti-war armband was unconstitutional under *Tinker*); *Nichol v. ARIN Intermediate Unit 28*, 268 F. Supp. 2d 536, 554 (W.D. Pa. 2003) (firing teacher for wearing cross necklace was unconstitutional under *Tinker*).

First, the panel adopts a "court-created job description" for *all* public school teachers and coaches—contrary to this Court's express prohibition on "broad court-created job description[s] applicable to every member of a profession." *Dahlia*, 735 F.3d at 1070.

Second, the panel creates a "but for" constitutional test for public employee speech, holding that all expression that owes its "physical[]" existence to the employee's job is unprotected. 2017 WL 3613343, at *11 (citing *Garcetti v. Ceballos*, 547 U.S. 410 (2006)). That repeats the error the Supreme Court rejected in *Lane v. Franks*, 134 S. Ct. 2369, 2379 (2013), when it rebuked the lower court for "read[ing] *Garcetti* far too broadly."

The panel opinion works a profound shift in First Amendment jurisprudence, holding that a school has absolute power to ban all "demonstrative religious activity" or expression that may be observed by students or the public. That decision contravenes controlling precedent and tramples on the principle that schools may not "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 872 (1982) (internal quotation marks omitted).

The Court should grant rehearing en banc.

STATEMENT OF THE CASE

A. Factual Background

Coach Kennedy was employed as a football coach at Bremerton High School from 2008 until he was suspended in fall 2015. 2017 WL 3613343, at *2.

Coach Kennedy is a practicing Christian. His religious convictions require him to give thanks through prayer at the end of each game. *Id.* Specifically, "[a]fter the game is over, and after the players and coaches from both teams have met to shake hands at midfield," Coach Kennedy feels called to "take a knee at the 50-yard line and offer a brief, quiet prayer of thanksgiving." *Id.* His prayer lasts no more than 30 seconds. *See id.* Because Coach Kennedy's prayer "lifts up the players and recognizes their hard work and sportsmanship during the game," his religious beliefs require him to pray on the field following the game. *Id.*

On three occasions in fall 2015—October 16, 23, and 26—Coach Kennedy knelt to pray silently after a BHS football game. *Id.* After each game, Coach Kennedy intentionally "waited" to pray until the BHS players were engaged in other post-game activities (*i.e.*, "singing the fight song to the audience"). *Id.* "Then, he knelt on the fifty-yard line, bowed his head, closed his eyes, 'and prayed a brief, silent prayer.'" *Id.*; *see also id.* at *5; ER 179.[2]

[2] Following the October 16 game, players and coaches from the opposing team, along with members of the public, spontaneously joined Coach Kennedy on the field and surrounded him *after* he began praying silently by himself. 2017 WL

Defendant BSD publicly acknowledged that Coach Kennedy's prayers were "fleeting," and that he "complied" with BSD's "directives not to intentionally involve students in his on-duty religious activities." *Id.* at *4–*5. Although Coach Kennedy had prayed with students on earlier occasions, BSD conceded that he never "actively encouraged, or required, student [participation]," *id.* at *3, and that he ceased involving students when asked to do so in September 2015, before the prayers for which he was suspended. *Id*. at *3, *5.

Notwithstanding Coach Kennedy's full "compli[ance]" with BSD's directives not to involve students in his prayers, the District suspended him. *Id.* at *5. As the District explained, Coach Kennedy's silent prayer violated BSD's prior directives prohibiting *all* "demonstrative religious activity" that is "readily observable to (if not intended to be observed by) students and the attending public." 2017 WL 3613343, at *5; *see* ER 179.

In November 2015, BSD retaliated against Coach Kennedy by giving him a poor performance evaluation—with a "do not rehire" recommendation—for the first time in his coaching career. He did not return for the following season.

3613343, at *4. This show of community support for Coach Kennedy was not the basis for the adverse employment action taken against him, and is not at issue here. *See id*. at *5.

B. Procedural History

Coach Kennedy filed suit, alleging violations of his rights under the First Amendment and Title VII of the Civil Rights Act of 1964. He moved for a preliminary injunction, requesting that BSD cease discriminating against him, reinstate him as a coach, and allow him to take a knee after football games and "say a silent prayer that lasts 15–30 seconds." ER 140.

The district court denied the motion. Applying the "five step" framework laid out in *Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009),[3] the district court held—at step two of the *Eng* analysis—that Coach Kennedy spoke only "as a public employee," not as a private citizen, when he knelt to pray.[4]

This appeal followed.

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[3] To apply *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), this Court uses a "sequential five-step" analysis:

> (1) whether the plaintiff spoke on a matter of public concern;
> (2) whether the plaintiff spoke as a private citizen or public employee;
> (3) whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action;
> (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and
> (5) whether the state would have taken the adverse employment action even absent the protected speech.

Eng, 552 F.3d at 1070.

[4] The district court also held that BSD had an adequate justification for its actions (*Eng* step four). The panel does not reach that question.

ARGUMENT

It is well established that public school employees do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506; *see also Morse v. Frederick*, 551 U.S. 393, 403 (2007) (same). Thus, the government "may not abuse its position as employer to stifle 'the First Amendment rights' [of] its employees." *Eng*, 552 F.3d at 1070 (quoting *Pickering*, 391 U.S. at 568).

Yet the panel holds that teachers and coaches have no First Amendment rights whenever they are "in view of students"—and thus Coach Kennedy spoke only "as a public employee," not as a private citizen, when he knelt in silent prayer. That holding eviscerates First Amendment protection for public employees and contravenes the controlling precedent of this Court and the Supreme Court.

I. The Panel Opinion Eviscerates First Amendment Protection For Teachers and Coaches

The panel holds that Coach Kennedy's "brief, silent prayer" at midfield was unprotected by the First Amendment because it was "in view of students and parents immediately after BHS football games." 2017 WL 3613343, at *1, *4. Although the panel acknowledged that Coach Kennedy intentionally "waited" to pray until the players were "singing the fight song to the audience in the stands," *id.* at *4, it relied

on the fact that he was still "in view of students and parents," calling this a "critical point[]" in the analysis. *Id.* at *10; *see also id.* at *11, *13, *14 (same).[5]

The panel decision marks a dramatic curtailment of the First Amendment rights of public employees in general and public school teachers and coaches in particular. Under the panel opinion, *all* speech or religious exercise by a teacher or coach is constitutionally unprotected whenever it *may* be observed by students or the public. Indeed, the underlying BSD policy prohibits all "demonstrative religious activity" that is "readily observable to (*if not intended to be observed by*) students and the attending public." *Id.* at *5 (emphasis added). Thus, "demonstrative religious activity" is prohibited whenever a student may observe it—even when that observation is *purely incidental* to the expression at issue.

The panel opinion therefore strips First Amendment protection from an extraordinary range of religious (and non-religious) expression. Under the panel's decision, the teacher who bows her head in silent prayer over her lunch in the

[5] The panel erroneously contends that Coach Kennedy "refus[ed]" an "accommodation permitting him to pray on the fifty-yard line after the stadium had emptied." 2017 WL 3613343, at *10. In fact, BSD offered no such accommodation—Coach Kennedy returned to the field of his own initiative because he "knew that he had broken [his] commitment to God" when he failed to pray immediately after the game. ER 147. Like the teacher who bows her head to pray over her lunch, Coach Kennedy kneels in prayer after the game because that is the time and place at which he feels called to give thanks. The panel's claim that his *silent prayer* "is not solely speech directed to God" is baseless and presumptuous. 2017 WL 3613343, at *10.

cafeteria has no First Amendment rights. After all, the act of bowing the head and closing the eyes is clearly "demonstrative." And under the panel opinion, if that everyday religious observance occurs "in view of students," *see id.* at *14, it is equally unprotected. The same is true for the teacher who makes the sign of the cross, or dons a yarmulke or hijab, or wears a "Love Conquers Hate" lapel pin while "in view of students." Each of these garden-variety acts of religious exercise or personal expression is indisputably "demonstrative"—and under the panel's rationale, each is unprotected.

To confirm the expansive scope of the panel's rule, one need look only to the panel's own explanation of the surviving avenues for expressive activity. The panel insisted that it was *not* establishing "a temporal dichotomy that reserves First Amendment rights only for 'off-duty employees," explaining as follows:

> To illustrate, Kennedy can pray in his office while he is on duty drawing up plays, pray non-demonstratively when on duty supervising students, or pray in "a private location within the school building, athletic facility, or press box" before and after games, as BHS offered.

Id. at *13. In other words, Coach Kennedy can kneel to pray in hiding—but not on a football field, or in a cafeteria, or anywhere else that might be "in view of students."

II. Under Controlling Supreme Court and Ninth Circuit Precedent, Coach Kennedy Spoke "As a Citizen" When He Knelt to Say a "Brief, Silent Prayer"

Breaking from the precedent of this Court and the Supreme Court, the panel decides that *all* expression by a teacher or coach that is "in view of" students—even an act of *silent* prayer—belongs to the state. That is not the law.

A. Speech "Outside the Scope" of an Employee's "Ordinary Job Responsibilities" Is Protected Citizen Speech

"[P]ublic employees do not renounce their citizenship when they accept employment." *Lane*, 134 S. Ct. at 2377. The First Amendment therefore "protects a public employee's right" to speak "as a citizen" on matters of public concern. *Coomes v. Edmonds Sch. Dist. No. 15*, 816 F.3d 1255, 1259 (9th Cir. 2016).

In *Lane*, the Supreme Court held that the "critical question" to determine whether a public employee's speech is protected citizen speech "is whether the *speech at issue* is itself ordinarily within the scope of an employee's duties." 134 S. Ct. at 2379 (emphasis added). This Court has expressly adopted *Lane*'s "critical question" test in analyzing public employee speech, most recently in an opinion filed one day prior to the panel's decision. *See Moonin v. Tice*, 868 F.3d 853, 2017 WL 3598083, at *5 (9th Cir. 2017).

In *Dahlia*, the en banc Court cautioned that "various easy heuristics are insufficient" to determine whether a public employee spoke "as a citizen" or "as an employee." 735 F.3d at 1069. For example, the mere fact that an employee

"expressed his views inside the office, rather than publicly," is "not dispositive." *Id.* at 1069 (quoting *Garcetti*, 547 U.S. at 420).

Rather than applying any "bright line rule," courts are to evaluate public employee speech by conducting a "practical" inquiry into "the scope of an employee's professional duties." *Id.* at 1069 n.7, 1071. Speech that is "outside the scope of [an employee's] ordinary job duties is speech as a citizen for First Amendment purposes." *Lane*, 134 S. Ct. at 2378.

B. The Panel Opinion Contravenes *Dahlia* By Relying On a "Broad Court-Created Job Description" For All Teachers And Coaches

In *Dahlia*, this Court expressly held that a court may *not* "rely[] on a broad court-created job description applicable to every member of a profession" to determine the scope of First Amendment protection for a public employee's speech. 735 F.3d at 1070. Rejecting prior decisions that relied on a "generic job description" for police officers, *Dahlia* held that "[t]he Supreme Court has made it clear that 'policemen, *like teachers* and lawyers . . . are not relegated to a watered-down version of constitutional rights." 735 F.3d at 1071 (emphasis added).

The panel opinion ignores that holding—and instead enshrines a "broad court-created job description" for all teachers and coaches. According to the panel, *all* expressive conduct is part of the job duties of a teacher or coach, because "persons chosen to teach" are "clothed with the mantle of one who imparts knowledge and wisdom," and thus are always acting as a "a role model and moral exemplar" when

"in the presence of students." 2017 WL 3613343, at *10. The panel concludes that "expression" is a teacher's "stock in trade"—and thus all teachers' speech rights are forfeit. *Id.* That holding clearly contravenes *Dahlia*'s prohibition on using "broad court-created job descriptions" to restrict the First Amendment rights of a class of public employee.[6]

The panel buries this controlling case law in a single footnote, *id.* at *9 n.7, and instead relies on *Johnson v. Poway*, 658 F.3d 954 (9th Cir. 2011), a case that preceded both *Lane* and *Dahlia*. But even *Johnson* did not announce a sweeping rule that all teacher speech in the vicinity of students is constitutionally unprotected. Instead, it analyzed the speech at issue—displaying religious banners of "overwhelm[ing]" size in the classroom, under the auspices of an official District policy—and concluded that speech was made in Johnson's "official" capacity as a teacher. *Id.* at 967–68.[7]

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[6] The panel also refers to a series of platitudes from the "Coach and Volunteer Coach Agreement," which states that Coach Kennedy is a "role model for the student athletes," who is "constantly being observed by others," and who should "exhibit sportsmanlike conduct at all times." 2017 WL 3613343, at *10 (citing ER 251). But both the Supreme Court and this Court have made clear that "'employers [cannot] restrict employees' rights by creating excessively broad job descriptions.'" *Dahlia*, 735 F.3d at 1070 (quoting *Garcetti*, 547 U.S. at 424).

[7] The panel quotes *Johnson* in support of its holding that *all* "teachers necessarily act as teachers when [1] at school or a school function, [2] in the general presence of students, [3] in a capacity one might reasonably view as official." 2017 WL 3613343, at *9, *11. But *Johnson* did not announce any such test—and if it had, it would have been overruled by *Dahlia*'s explicit prohibition on "broad court-

By misreading *Johnson* as a blanket ban on teacher speech at school, the panel creates a direct conflict with subsequent precedent. If *Johnson* in fact held that teachers lose their free speech rights when in the presence of students at school *merely because they are teachers*, that would flout *Tinker* and violate *Dahlia*'s prohibition on "broad court-created job description[s] applicable to every member of a profession." 735 F.3d at 1070. It would also run afoul of *Lane* by stripping First Amendment protection from a *group of speakers*, rather than from *particular speech* made in the course of a speaker's ordinary job duties. 134 S. Ct. at 2379.[8]

In sum, *Dahlia* forecloses the panel's decision to wield a "broad court-created job description" to eviscerate First Amendment protection for all teachers and coaches. That conflict with controlling precedent merits en banc rehearing.

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created job description[s]." In *Johnson*, the quoted sentence explained the uncontroversial proposition that teachers speaking *directly* to students *while in the classroom* are acting as teachers, even if they are not teaching a specific lesson plan. 658 F.3d at 967–68.

[8] In a parting footnote, the panel purports to disclaim "any bright-line rule," and pays lip service to the "fact-intensive" nature of the *Eng* inquiry. 2017 WL 3613343, at *14 n.11. But the balance of the opinion belies that characterization. As explained above, the panel in fact holds that all teachers and coaches have no First Amendment rights whenever they are "in view of students."

C. The Panel Opinion Contravenes *Lane* By Holding That All Expression That "Could Not Physically Have Been Engaged In" By A Private Citizen Is Unprotected

The panel further holds that Coach Kennedy's speech was unprotected because "the precise speech at issue—kneeling and praying on the fifty-yard line immediately after games while in view of students and parents—*could not physically have been engaged in* by Kennedy if he were not a coach." 2017 WL 3613343, at *11 (emphasis added). That holding contradicts voluminous precedent—and marks a dramatic rollback of First Amendment protection for *all* public employees.

In *Lane*, the Supreme Court expressly rejected the assertion that the First Amendment does not protect speech that could only be made by a public employee. The lower court in *Lane* held that the sworn testimony of a public employee was ineligible for First Amendment protection "because *Lane* learned of the subject matter of his testimony in the course of his employment." *Id.* at 2379. Because Lane's speech could not have been made by a private citizen, the lower court—"rel[ying] extensively on *Garcetti*"—held that his speech "owe[d] its existence" to Lane's public employment, and was therefore unprotected. *Id.* at 2376.

The Supreme Court unanimously reversed, rebuking the lower court for "read[ing] *Garcetti* far too broadly." *Id.* at 2379. The Court held that "the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—

speech." *Id.* In other words, the fact that public employment is a "but for" cause of the speech does *not* render that speech unprotected by the First Amendment.

The panel opinion repeats the very error *Lane* rejected when it holds that Coach Kennedy's speech "owes its existence" to his employment because "the precise speech at issue . . . could not physically have been engaged in by Kennedy if he were not a coach." 2017 WL 3613343, at *11. The panel concludes that "Kennedy's speech . . . occurred only because of his position with the District," and is therefore unprotected. *Id.*[9]

The panel's "but for" public employment test is wildly overbroad. In fact, the panel's rule would *reverse* the holdings of nearly every landmark public employee speech case decided by this Court or the Supreme Court. For example: Edward Lane "could not physically have been engaged in" offering sworn testimony regarding his oversight of a public college program "if he were not a [public college administrator]." *See Lane*, 134 S. Ct. at 2376. Similarly, Detective Angelo Dahlia could not have disclosed investigative misconduct to Internal Affairs at his police station "if he were not a [police detective]." *See Dahlia*, 735 F.3d at 1077. And

[9] The panel also erroneously holds that "the forum is relevant"—despite the fact the fact that *Johnson*, on which the panel otherwise heavily relies, held that "forum-based analysis *does not apply*" where "the government acts as both sovereign and employer." 658 F.3d at 961 (emphasis added). Indeed, *Johnson reversed* the lower court for conducting a forum analysis rather than applying *Eng*.

Margaret Ward, an Alaska Governor's Office employee, could not have complained about sexual harassment in her office "if [s]he were not a [Governor's Office employee]." *Alaska v. EEOC*, 564 F.3d 1062, 1069–70 (9th Cir. 2009) (en banc).[10]

The absurdity of the panel's rule is made clear by its application to the alternative avenues for expression offered elsewhere in the opinion. The panel insists that its holding does not "reserve[] First Amendment rights only for 'off-duty' employees"—because Coach Kennedy retains the option to "pray in his office," or "pray in 'a private location within the school building, athletic facility, or press box,'" or "discuss politics or religion with his colleagues in the teacher's lounge." 2017 WL 3613343, at *13. But none of those locations—a private office, private locations within school facilities, or the teacher's lounge—are open to "ordinary citizen[s]." *Id.* Accordingly, that speech—no less than Coach Kennedy's "brief, silent prayer" on the field—"could not physically have been engaged in . . . if he

[10] Contrary to the panel's assertion, *Coomes* did not adopt any "but for" public employment test analogous to the panel's rule. The school administrator speech at issue in *Coomes* was clearly only "physically" possible because the administrator was a public employee. 816 F.3d at 1262. But rather than rely on the fact that public employment was a "but for" cause of the speech, *Coomes* engaged in the requisite fact-specific inquiry to determine whether the administrator's speech was made pursuant to her official duties. *Id*. at 1261–64; *see also id*. at 1260 (explaining importance of *Lane*).

were not a coach." *Id.* Under the panel's own rationale, these alternative means of expression are themselves unprotected by the First Amendment.[11]

The panel's "but for" public employment test conflicts with *Lane* and strips First Amendment protection from nearly all public employee speech. This Court's en banc review is warranted.

CONCLUSION

For these reasons, the Court should vacate the panel opinion and grant rehearing en banc.

[11] The panel also overrules this Court's holding in *Demers v. Austin*, which held "that *Garcetti* does not—and 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." *Demers v. Austin*, 746 F.3d 402, 412 (9th Cir. 2014) (emphasis added). Although *Demers* involved a university professor, it explicitly included "high school teacher[s]" within its holding, explaining that "a public high school teacher" is constitutionally protected when "choosing what and how to teach." *Id*. at 413. By holding that all teacher speech that "physically" owes its existence to a teacher's employment is unprotected, the panel abrogates *Demers* without even mentioning it.

Dated: September 20, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Circuit Rules 35-4 and 40-1 because this brief contains 4,189 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that, on September 20, 2017, a true and correct copy of the foregoing brief was served via the Court's CM/ECF system on all counsel of record.

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