No. 18-12

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 FOR THE STATES OF ARIZONA, ARKANSAS, GEORGIA, LOUISIANA, MICHIGAN, MONTANA NEBRASKA, NEVADA, OKLAHOMA, SOUTH CAROLINA, TEXAS, WEST VIRGINIA, AND WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amici curiae, the States of Arizona, Arkansas, Georgia, Louisiana, Michigan, Montana, Nebraska, Nevada, Oklahoma, South Carolina, Texas, West Virginia, and Wisconsin file this brief in support of Petitioner Joseph A. Kennedy ("Coach Kennedy").[1] Amici curiae are public employers and have interests both in protecting the constitutional rights of their employees and in regulating messages that are communicated by public employees within the scope of their employment. Amici curiae, as States, also have an interest in fostering the education of their citizens through environments that promote the recruitment of diverse and qualified teachers and that facilitate the instruction of students.

SUMMARY OF ARGUMENT

The Bremerton School District has a policy that prohibits "demonstrative religious activity" that is "readily observable to (if not intended to be observed by) students and the attending public." App. 10. The Bremerton School District suspended Coach Kennedy because he violated this policy when he offered a prayer by himself on a football field in view of students. App. 11, 55.

The Ninth Circuit decision below endorses not only the Bremerton School District's policy of excluding any observable religious expression, it also regards students "as closed-circuit recipients of only that which

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

the State chooses to communicate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969). The Ninth Circuit does this through a shaky syllogism. It reasons: educators (like Coach Kennedy) communicate messages to students while on the job; Coach Kennedy's private prayer while on the job communicated a message to students because they could see him pray; therefore, his speech—*i.e.*, his prayer—was made as a public employee, rather than as a private citizen.

This argument rests on a faulty premise. The fact that teachers are paid to communicate some messages to students does not mean that all messages that a teacher communicates are made in a public capacity. To hold, as the Ninth Circuit did, that the "professional responsibility" of educators is "to communicate demonstratively to students" simply substitutes an "excessively broad job description" for careful legal analysis. *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006) ("We reject, however, the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions.").

Instead, the "critical question" for determining whether a public employee is speaking in a public or private capacity is whether the particular "speech at issue is itself ordinarily within the scope of an employee's duties." *Lane v. Franks*, 134 S. Ct. 2369, 2379 (2014). Prayer is not an ordinary part of coaching football, and no reasonable observer would believe that the Bremerton School District, which specifically prohibits "demonstrative religious activity," was speaking through Coach Kennedy's private religious observance. In short, Coach Kennedy's prayer in view

of students was not done pursuant to any official duties and was not speech as a public employee. The Ninth Circuit erred in holding that state-operated schools can absolutely control any demonstrative activity of teachers in view of students. *See Tinker*, 393 U.S. at 511 ("In our system, state-operated schools may not be enclaves of totalitarianism."). This holding guts the First Amendment's protection that teachers cannot, as a condition of employment, be required to "shed their constitutional rights to freedom of speech [and] expression at the schoolhouse gate." *Id.* at 506.

Of course, private speech is not wholly immune from regulation by school districts. Whether Coach Kennedy's outward expression of religious observation is protected from retaliation under the First Amendment depends on whether the school "had an adequate justification for treating the employee differently from any other member of the general public." *Garcetti*, 547 U.S. 410.

The Ninth Circuit decision to the contrary is doctrinally wrong for at least three reasons. First, it collapses the two-step inquiry from *Garcetti* into a single, bright-line rule about whether the teacher's speech was "in view of students." Second, it expands the scope of official communications made by public employees, potentially subjecting public employers to greater liabilities. Third, it strips teachers of significant First Amendment rights. The Court should grant review to correct these errors and affirm that the First Amendment still applies to teachers.

ARGUMENT

I. The Ninth Circuit Collapses the Two-Step *Garcetti* Test into a Single Bright-Line Rule for Teachers.

In *Garcetti*, this Court laid out a two-step inquiry to determine whether a public employee's speech is entitled to First Amendment protection. First, courts ask "whether the employee spoke as a citizen on a matter of public concern." 547 U.S. at 418. If the employee speaks on a matter of public concern as a private citizen rather than as a public employee, the second question is "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Id.* These two questions help courts "arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968).

Under the first *Garcetti* inquiry, the balance favors the public entity when an employee speaks as an employee because the public entity has a right to regulate what it communicates. *Garcetti*, 547 U.S. at 422 (ability to regulate speech made as a public employee "simply reflects the exercise of employer control over what the employer itself has commissioned or created"). But the rationale for this rule does not extend to communication conducted outside the scope of employment. At that point, the employer would be

regulating what the employee communicates rather than what the employer communicates.

To get around the obvious fact that personal prayer, even if observable, was not within the scope of Coach Kennedy's job duties, the Ninth Circuit replaced the job-duty test adopted by this Court with a but-for test. *Compare Lane*, 134 S. Ct. at 2373 ("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.") *with* App. 28. ("The precise speech at issue . . . could not physically have been engaged in by Kennedy if he were not a coach.").

The Ninth Circuit's but-for test is in conflict with decisions of this Court and circuit courts across the country, which have uniformly affirmed that the First Amendment protects speech even when it would not have occurred but for the public employment. For example, in *Garcetti*, 547 U.S. at 420–22, this Court held that a deputy district attorney's memorandum was made as a public employee because it "was written pursuant to [the attorney's] official duties," not simply because it was prepared inside his office or concerned the subject matter of the attorney's employment. *See also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) ("not every message" that takes place on government property is the government's own). Most recently, this Court in *Lane*, 134 S. Ct. at 2379, reaffirmed that speech is not made in a public capacity simply because it "relates to public employment or concerns information learned in the course of public employment," thereby vanquishing any notion that a but-for test might be appropriate.

In fact, not a single circuit agrees with the Ninth Circuit's creation of a new but-for test. They faithfully apply the job-duty test reinforced in *Lane*. *See, e.g., Dougherty v. Sch. Dist. of Philadelphia*, 772 F.3d 979, 989 (3d Cir. 2014) ("This Court has never applied the 'owes its existence to' test . . . and for good reason: this nearly all-inclusive standard would eviscerate citizen speech by public employees simply because they learned the information in the course of their employment, which is at odds with the delicate balancing and policy rationales underlying *Garcetti*."); *Boulton v. Swanson*, 795 F.3d 526, 534 (6th Cir. 2015) ("owes its existence" language from *Garcetti* "must be read narrowly as speech that an employee made in furtherance of the ordinary responsibilities of his employment"); *Carollo v. Boria*, 833 F.3d 1322, 1329 (11th Cir. 2016) (same). The Ninth Circuit departed from this precedent, concluding instead that if a teacher's "speech owes its existence to his position as a teacher, then he spoke as a public employee, not as a citizen, and our inquiry is at an end." App. 27, 34 (quotes and alterations omitted).

Following this Court's job-duty test for the first *Garcetti* inquiry does not, of course, mean that public employees can say or do anything they want while on the job as long as the speech falls outside the scope of job duties. It simply means that if a public employer is going to compel an employee to forgo personal speech on matters of public concern (including matters of religion), then it must justify the restriction under the second *Garcetti* inquiry by showing that it has "an adequate justification for treating the employee differently from any other member of the general public." 547 U.S. at 418. It cannot rely on an

overbroad, bright-line rule that anytime a teacher communicates anything in view of students it is done in an official capacity and subject to absolute school regulation.

By holding that any observable conduct of a teacher is done on behalf of a school, the Ninth Circuit transforms the rule under the first *Garcetti* prong in a way that undermines the rationale for the rule: public employers can absolutely regulate what they communicate, but they cannot absolutely regulate what their employees communicate. By detaching the rule from its purpose, the Ninth Circuit's resulting test gives impermissibly short shrift to a teacher's countervailing constitutional rights. *See also infra* Part III.

II. The Ninth Circuit Improperly Expanded the Scope of Official Communications.

Properly applied, a First Amendment retaliation claim ends under the first *Garcetti* inquiry when the speech at issue is spoken as a public employee. This makes sense because a public employer has the ability to regulate what it communicates. *See supra* Part I. It also makes sense because "[o]fficial communications have official consequences, creating a need for substantive consistency and clarity." *Garcetti*, 547 U.S. at 422. As such, public employers "have heightened interests in controlling speech made by an employee in his or her professional capacity." *Id.*

The panel below—through its expansive test concerning which messages are communicated in the speaker's capacity as a public employee—also extends the scope of a public employer's official

communications. For public employers like Amici, this expansion is worrisome. 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 are able to rely upon actual job duties to distinguish messages that are communicated in a public capacity from those that are 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 County*, 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. Board of School Com'rs of Baltimore 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.

III. The Ninth Circuit Strips Teachers of Significant First Amendment Rights.

Perhaps the most disturbing aspect of the Ninth Circuit's decision is what it means for teachers. Without "indulg[ing] in hyperbole," teachers have been recognized "as the priests of our democracy." *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring). While this noble calling often involves personal sacrifice, this sacrifice has never required teachers to "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506. The Ninth Circuit's decision would exact this cost as a condition of employment. *Cf. Garcetti*, 547 U.S. at 413 ("It is well settled that a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression.") (quotes omitted).

Students constantly observe their teachers' actions. App. 2, 24–25. And virtually every action by a teacher communicates some type of message, many of them religious: the Muslim teacher who wears a hijab or recites the du'a before meals, the Christian teacher who observes Ash Wednesday or wears a crucifix, the Hindu teacher who wears a bindi or observes dietary restrictions, the Jewish teacher who wears a yarmulke or is absent for Yom Kippur—all these, and many more, communicate something about the teacher's faith or lack thereof. Teachers may also communicate messages through, for example, the clothing or jewelry they wear, the pictures on their desk, or their participation, *vel non*, in the national anthem and Pledge of Allegiance. *See, e.g.*, *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (law

requiring students and teachers to salute and pledge allegiance to the United States flag held unconstitutional under the First Amendment). But the fact that these messages are observable does not mean that they are spoken as a public employee. It simply means that teachers are humans, complete with religious convictions. To say that schools have the absolute ability to regulate all that is observable by students or that would not be observable but for a teacher's job is just another way of saying that schools have complete control over teacher speech.

This is not, nor has it ever been, the law. And for good reason. Teachers "cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them." *Wieman*, 344 U.S. at 196 (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."). Exposure to individuals whose demonstrative speech includes outward signs of religious observation is also essential to forming citizens who can interact with the wide variety of fellow Americans awaiting their arrival 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."). The Ninth Circuit's endorsement of cleanroom-type sterilization of any observable religious expression harms the educational mission that teachers, students, and public schools all share.

CONCLUSION

The Ninth Circuit erred in holding that public schools have the absolute ability to regulate all observable religious expressions of teachers. The Court should grant the Petition for Certiorari.

Respectfully submitted.

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