No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Joseph Kennedy lost his job as a football coach at a public high school because he knelt and said a quiet prayer by himself at midfield after the game ended. After considering an interlocutory petition in which Kennedy sought review of the lower courts' refusal to grant him a preliminary injunction, four members of this Court observed that "the Ninth Circuit's understanding of the free speech rights of public school teachers is troubling and may justify review in the future," but concluded that this Court should stay its hand until the lower courts definitively determined the reason for Kennedy's termination. The statement also noted that Kennedy had a then-unaddressed claim under the Free Exercise Clause.

On remand, the lower courts found—and the school district ultimately agreed—that Kennedy lost his job solely because of his religious expression. Yet the Ninth Circuit nevertheless ruled against him again. The court not only doubled down on its "troubling" free-speech reasoning, which transforms virtually all speech by public-school employees into government speech lacking any First Amendment protection, but reached the remarkable conclusion that, even if Kennedy's prayer was *private* expression protected by the Free Speech and Free Exercise Clauses (which it undoubtedly was), the Establishment Clause nevertheless *required* its suppression. The court denied *en banc* review over the objection of 11 judges.

The questions presented are:

1. Whether a public-school employee who says a brief, quiet prayer by himself while at school and

visible to students is engaged in government speech that lacks any First Amendment protection.

2. Whether, assuming that such religious expression is private and protected by the Free Speech and Free Exercise Clauses, the Establishment Clause nevertheless compels public schools to prohibit it.

PARTIES TO THE PROCEEDING

Petitioner Joseph Kennedy was the sole plaintiff and appellate below. Respondent Bremerton School District was the sole defendant and appellee below.

STATEMENT OF RELATED PROCEEDINGS

This case is directly related to the following proceedings in the U.S. Court of Appeals for the Ninth Circuit and this Court:

Kennedy v. Bremerton School District, No. 16-35801 (9th Cir.) (Aug. 23, 2017)

Kennedy v. Bremerton School District, No. 16-35801 (9th Cir.) (Jan. 25, 2018) (denying rehearing)

Kennedy v. Bremerton School District, No. 18-12 (Jan. 22, 2019) (denying petition for certiorari)

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PETITION FOR WRIT OF CERTIORARI

The decision below reached the remarkable conclusion that the Constitution prohibits what it protects twice over. Petitioner Joseph Kennedy is a former football coach at a public high school who lost his job after kneeling at the 50-yard line after a high school football game to say a brief, quiet prayer of gratitude. Three Terms ago, at the preliminary-injunction stage of this case, four Justices expressed serious doubts about the Ninth Circuit's conclusion that, in offering his personal prayer, Coach Kennedy engaged in government (not private) speech that is wholly unprotected by the Free Speech Clause. Although the Justices considered the Ninth Circuit's free-speech reasoning "troubling" and "highly tendentious" and indicated that it "may justify review in the future," they thought that the lower courts should first definitively determine whether Kennedy lost his job because of his religious expression or for some other reason. App.211. They also made a point of noting that Kennedy had a free-exercise claim that the lower courts had not yet addressed.

Those cautionary words appear to have had the exact opposite of their intended effect: The Ninth Circuit not only doubled down on its "troubling" government-speech holding, but reached the stunning conclusion that the school district had a constitutional *duty* to prohibit Kennedy's prayer—even if he offered it as a private citizen—because failure to do so purportedly would have violated the Establishment Clause. Adding insult to constitutional injury, the Ninth Circuit created the ultimate chilling effect by making clear that, in its view, Kennedy had no one to

blame but himself for the loss of his First Amendment rights because he purportedly sought to vindicate them in too "pugilistic" a fashion.

As 11 members of the Ninth Circuit detailed in multiple objections to the denial of *en banc* review—prompting the author of the panel opinion to criticize Kennedy for "flout[ing] the instructions found in the Sermon on the Mount on the appropriate way to pray," App.69—the decision below is impossible to reconcile with bedrock First Amendment principles. It converts practically everything public-school teachers do or say during school hours or after-hours functions into government speech that the school may prohibit, thereby ensuring that teachers in the Ninth Circuit really do shed their constitutional rights to freedom of speech and expression at the schoolhouse gate. It converts the Establishment Clause from a protection against state-imposed religion into a cover for suppressing private religious speech. And it eviscerates free-exercise rights in the process, leaving virtually no room in the Nation's public schools for those who are not content to confine their religious beliefs to the privacy of their homes.

None of that is remotely compatible with any sensible balance between private religious expression and the public schools, with this Court's precedent, or with the free-speech and free-exercise principles upon which our Nation is built. This Court has observed (repeatedly) that the "proposition that schools do not endorse everything they fail to censor is not complicated." *Bd. of Educ. of Westside Cmty. Sch. v. Mergens ex rel. Mergens*, 496 U.S. 226, 250-51 (1990). When a school allows a teacher or coach space for

private religious expression, it does not run afoul of the Establishment Clause but rather "follows the best of our traditions." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

The Ninth Circuit's failure to abide by that critical and uncomplicated teaching plainly merits this Court's review. Indeed, when a decision is "at odds with Free Speech, Free Exercise, and Establishment Clause jurisprudence all at once," App.79 (O'Scannlain, J.), there can be no doubt that this Court's intervention is appropriate. But the stakes here are higher still. The decision below has far-reaching effects for the hundreds of thousands of teachers in the Ninth Circuit who have been forewarned that if they fight for their constitutional rights, their "pugilism" will be held against them. It is hard to imagine a more direct chilling effect on religious expression. The Court should review and reverse the decision below and vindicate the "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Mergens*, 496 U.S. at 250.

OPINIONS BELOW

The Ninth Circuit's decisions are reported at 991 F.3d 1004 and 869 F.3d 813 and reproduced at App.1-39 and App.214-266. The Ninth Circuit's orders denying rehearing *en banc* are reported at 4 F.4th 910 and 880 F.3d 109 and reproduced at App.40-129 and App.267. The district court's summary-judgment decision is reported at 443 F.Supp.3d 1223 and reproduced at App.130-170; a transcript of the district

court's preliminary-injunction hearing and bench ruling is reproduced at App.268-304.

JURISDICTION

The Ninth Circuit issued its opinion on March 18, 2021. App.1. After a Ninth Circuit judge *sua sponte* requested a vote to rehear the case *en banc*, that court denied rehearing *en banc* on July 19, 2021. App.40. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First and Fourteenth Amendments to the U.S. Constitution are reproduced at App.305.

STATEMENT OF THE CASE

A. Factual Background

1. Joseph Kennedy is a devout Christian. From 2008 to 2015, he also served as an assistant coach for Bremerton High School's (BHS) varsity football team and head coach for the school's junior varsity squad. App.3. Kennedy's religious beliefs compelled him to give thanks through prayer at the conclusion of each game for what the players accomplished and for the opportunity to be part of their lives through football. *Id.*; E.R.113-115.[1] Specifically, after the final whistle, and after both teams' players and coaches met at midfield to shake hands, Kennedy felt called to pause, kneel, and offer a silent or quiet prayer of thanksgiving for player safety, sportsmanship, and spirited competition. App.3-4. His "brief" prayer typically lasted approximately 15 to 30 seconds. App.4.

[1] "E.R." refers to the excerpts of the record Kennedy filed with the Ninth Circuit in appeal No. 20-35222.

Kennedy engaged in this religious expression at the conclusion of BHS football games since he first began working at BHS. *Id.* Initially, Kennedy prayed quietly and alone. *Id.* After several games, some BHS players asked him what he was doing and whether they could join him. *Id.* After describing his prayer, Kennedy told them "[t]his is a free country" and "[y]ou can do what you want." *Id.* Some players elected to gather near Kennedy after games, and the number of players ultimately grew to include most of the team, although the participants often varied. E.R.113. Sometimes no players gathered, and Kennedy prayed alone. *Id.* Sometimes BHS players invited players from the opposing team to join. *Id.*

Over time, Kennedy also began giving short motivational speeches to players who gathered after the game. *Id.* While Kennedy's post-game speeches often included religious content and a short prayer, he "never coerced, required, or asked any student to pray" or "told any student that it was important that they participate in any religious activity." E.R.114.

Separately, the team sometimes engaged in pre- and post-game locker room prayers, a tradition that predated Kennedy's time at BHS. E.R.114; E.R.299. After joining BHS, Kennedy sometimes participated in these prayers too. E.R.114.

2. For seven years, no one at BHS complained to the Bremerton School District about any of that. The district learned of Kennedy's post-game prayers in the fall of 2015, when an employee from another high school mentioned them to BHS's principal. App.5. Another BHS administrator then "expressed disapproval" to Kennedy, prompting him to post on

Facebook: "I think I just might have been fired for praying." *Id.* In response, the district "was flooded with thousands of emails, letters, and phone calls from around the country." *Id.*

On September 17, 2015, the superintendent, Aaron Leavell, sent Kennedy a letter informing him of the district's investigation into whether "District staff have appropriately complied" with the school board's policy on "Religious-Related Activities and Practices." App.5; E.R.299. The policy provides that, "[a]s a matter of individual liberty, a student may of his/her own volition engage in private, non-disruptive prayer at any time not in conflict with learning activities." App.5. While the policy states that "[s]chool staff shall neither encourage nor discourage a student from engaging in non-disruptive oral or silent prayer or any other form of devotional activity," *id.*, it does not speak to religious expression by on-duty school staff.

The September 17 letter identified what the district deemed two "problematic" practices: Kennedy's midfield, post-game prayers with students and pre-game locker room prayers. App.218. The district recognized that students participated voluntarily in Kennedy's post-game religious expression and that Kennedy had "not actively encouraged, or required, [ ] participation." *Id.* Nonetheless, it concluded that these practices violated its policy. The district also set forth new guidelines for Kennedy's religious expression. Kennedy could "engage in religious activity, including prayer, so long as it does not interfere with job responsibilities," the activity is "physically separate from any student activity, and students [are] not … allowed to join such

activity." App.6. Further, "to avoid the perception of endorsement" of religion, "such activity should either be non-demonstrative (*i.e.*, not outwardly discernible as religious activity) if students are also engaged in religious conduct, or it should occur while students are not engaging in such conduct." *Id.*

After receiving the letter, Kennedy ceased participating in any pre-game or other group prayers. *Id.* Kennedy also felt obligated, at the end of the team's next game, to abandon his usual practice of post-game prayer. *Id.* Thus, after the game on September 18, 2015, Kennedy gave a short motivational speech to the players—which made no mention of religion—but did not pray with players or by himself. *Id.* On his drive home, however, Kennedy felt upset that he had succumbed to pressure to break his commitment to God. *Id.* Kennedy therefore turned his car around and returned to the field, where he waited until everyone else had left the stadium. App.6-7. Kennedy then walked to the 50-yard line and knelt to pray alone. *Id.*

3. Soon thereafter, Kennedy retained counsel to advise him of the constitutional landscape, and on October 14, 2015, he sent a letter to Leavell and the school board informing them of his sincerely held religious belief that he is compelled to pray following each football game. App.7. He also formally requested a religious accommodation under Title VII to engage in a brief, quiet, solitary prayer at midfield at the conclusion of BHS games. App.10-11; E.R.6. And he began publicly "sharing the word" about the district's efforts to compel him to surrender his First Amendment rights. App.20.

After the next game, Kennedy walked to midfield for the customary handshake with the opposing team. App.220. As instructed by the September 17 letter, he waited until the students began engaging in other conduct "physically separate" from him—namely, walking toward the stands to sing the post-game fight song. E.R.109. He then knelt at the 50-yard line, closed his eyes, and prayed a brief, quiet prayer. App.220. While he was kneeling with his eyes closed, coaches and players from the opposing team, along with members of the public, decided to join him on the field and to kneel beside him. *Id*. Kennedy did not ask anyone to join him, and he did not know that anyone would do so. Various media documented the gathering, as "media attention" regarding the district's efforts to stop Kennedy's prayer had by then "gained steam." App.80.

Just hours before the next week's football game, Leavell sent Kennedy a letter that "emphasize[d] [his] appreciation for [Kennedy's] efforts to comply with the September 17 directives." E.R.98. Days earlier, Leavell had described Kennedy's religious expression at the previous game as "fleeting," and recognized that the issue was "a coach's right to conduct a personal, private prayer … on the 50 yard line," not prayer with students. App.180; E.R.267. The district nonetheless denied Kennedy's request for a religious accommodation, claiming that his religious expression "drew [him] away from [his] work" and—"[m]ore importantly"—that "any reasonable observer saw a District employee, on the field only by virtue of his employment with the District, still on duty, under the bright lights of the stadium, engaged in what was

clearly, given your prior public conduct, overtly religious conduct." App.222-23.

While the September 17 letter stated that employees could engage in religious expression so long as it does not interfere with their jobs and is "physically separate from any student activity," App.218, the October 23 letter set forth a sweeping new ban: The district prohibited Kennedy from engaging in *any* "demonstrative religious activity" that is "readily observable to (if not intended to be observed by) students and the attending public." App.223. Thus, the district's new policy prohibits any employee, when on-duty and within view of a student or the public, from engaging in any "demonstrative religious activity," either silently or audibly. *Id*. The district offered to "accommodate" Kennedy's religious exercise by permitting him to pray in secret in a "private location within the school building, athletic facility[,] or press box." *Id*.

After the BHS football game ended that night, Kennedy knelt alone at the 50-yard line and bowed his head for a brief, quiet prayer. App.224. Leavell later informed him that although this brief, solitary prayer "moved closer to what we want," it was "still unconstitutional." E.R.44. Unwilling to break his commitment to God yet again, however, Kennedy knelt alone to offer a brief prayer of thanks when the next game ended and the players began "engag[ing] in other post-game traditions." App.182.

Two days later, the district placed Kennedy on paid administrative leave and prohibited him from "participating in any capacity in the BHS football program." App.293. Echoing its October 23 letter, the

district maintained that Kennedy had impermissibly "engag[ed] in overt, public and demonstrative religious conduct while still on duty as an assistant coach." E.R.318. And the district explained that it was suspending Kennedy because of his practice of "kneel[ing] on the field and pray[ing] immediately following the … game." *Id.*; E.R.322.

In a public document entitled "Bremerton School District Statement and Q&A Regarding Assistant Football Coach Joe Kennedy," the district stated that Kennedy "will not participate, in any capacity, in BHS football program activities" until he "affirms his intention to comply with the District's directives." E.R.320. The district conceded that Kennedy "has complied with [its] directives not to intentionally involve students in his on-duty religious activities," but stated that "he has continued a practice of engaging in a public religious display immediately following games, while he is still on duty." E.R.321.

In November 2015, for the first time in Kennedy's BHS coaching career, the district gave him a poor performance evaluation. App.225-26. The evaluation advised against rehiring Kennedy because he allegedly "failed to follow district policy" regarding religious expression and "failed to supervise student-athletes after games." App.225. Kennedy did not return for the following season. App.226.

B. Kennedy's Preliminary Injunction Request and First Petition for Certiorari

1. Kennedy filed suit against the district, alleging that it violated his rights under the Free Speech and Free Exercise Clauses (and Title VII). Relying primarily on free-speech principles, Kennedy moved

for a preliminary injunction, arguing that he had engaged in religious expression as a private citizen, not pursuant to his duties as a coach. The district court denied the motion. App.304. As relevant here, the court determined that Kennedy's religious expression lacked First Amendment protection because he offered his prayer "as a public employee": "He was still in charge. He was still on the job. He was still responsible for the conduct of his students … And a reasonable observer, in my judgment, would have seen him as a coach, participating, in fact leading an orchestrated session of faith." App.303.

2. The Ninth Circuit affirmed. In an opinion that recounted Kennedy's various prayer-related activities over the course of several years—including off-field and off-duty activities such as "media appearances and prayer in the BHS bleachers" after his suspension—the court agreed with the district court that Kennedy's religious expression lacked First Amendment protection. App.238. Invoking *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the court opined that "when Kennedy kneeled and prayed on the fifty-yard line immediately after games while in view of students and parents, he spoke as a public employee, not as a private citizen, and his speech therefore was constitutionally unprotected." App.247. In the Ninth Circuit's view, because "Kennedy's job … involved modeling good behavior while acting in an official capacity in the presence of students and spectators," *any* "demonstrative communication fell within the compass of his professional obligations." App.237-38.

3. Kennedy filed a petition for certiorari, which this Court denied. Justice Alito, joined by Justices Thomas, Gorsuch, and Kavanaugh, issued a statement concurring in the denial but explaining that it "does not signify that the Court necessarily agrees with the decision (much less the opinion) below." App.207. To the contrary, Justice Alito observed that "the Ninth Circuit's understanding of the free speech rights of public school teachers is troubling and may justify review in the future." App.211. As he explained, the "highly tendentious way" in which the court applied *Garcetti* would seem to let schools forbid teachers from engaging in "any 'demonstrative' conduct of a religious nature," even things as innocuous as "folding their hands or bowing their heads in prayer" before lunch. *Id*. Justice Alito further observed that "[w]hat is perhaps most troubling about the Ninth Circuit's opinion is language that can be understood to mean that a coach's duty to serve as a good role model requires the coach to refrain from any manifestation of religious faith—even when the coach is plainly not on duty." App.212.

Justice Alito explained that he nevertheless concurred in the denial of certiorari because "although [Kennedy's] free speech claim may ultimately implicate important constitutional issues, we cannot reach those issues until the factual question of the likely reason for the school district's conduct is resolved." App.211. But he cautioned that, "[i]f the Ninth Circuit continues to apply its interpretation of *Garcetti* in future cases involving public school teachers or coaches, review by this Court may be appropriate." App.212. Justice Alito also observed

that Kennedy "still has live claims under the Free Exercise Clause of the First Amendment," which the preliminary-injunction proceedings did not address. App.213.

C. Remand Proceedings

1. On remand, the district court found that, although the district previously made the dubious claim that "Kennedy's prayer distracted him from his supervisorial duties," "the risk of constitutional liability associated with Kennedy's religious conduct was the 'sole reason' the District ultimately suspended him." App.140. Nevertheless, the court granted summary judgment to the district across the board.

As to the free-speech claim, relying on the Ninth Circuit's first decision, the court held that "prominent, habitual prayer is not the kind of private speech that is beyond school control." App.148. Although the court considered "[t]he fact that Kennedy spoke as an employee is enough to end the … analysis," it went on to conclude that the district's interest in "avoiding an Establishment Clause violation" independently sufficed to justify prohibiting Kennedy's prayer. App.153. As to the free-exercise claim, although the court acknowledged that the district did not act in a "neutral or generally applicable" manner when "it specifically targeted Kennedy's religious conduct," it concluded that the district had a compelling interest in prohibiting Kennedy's prayer to avoid an Establishment Clause violation. App.160.

2. The Ninth Circuit affirmed. On the free-exercise claim, notwithstanding the doubts expressed by four Justices, the court explained that "[o]ur holding … has not changed": Kennedy "was clothed

with the mantle of one who imparts knowledge and wisdom," and 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. Although the court "acknowledge[d] the Supreme Court's warning not to create 'excessively broad job descriptions,'" it concluded that "there is simply no dispute that Kennedy's position encompassed his post-game speeches to students on the field." App.15. And the court tried to distinguish Kennedy's religious expression from "a teacher bowing her head in silent prayer before a meal in the school cafeteria" on the grounds that players and fans could see Kennedy in the middle of the field and that he served as a "mentor, motivational speaker, and role model to students *specifically at the conclusion of a game*." *Id*. (emphasis in original). The court also noted that while it did "not mean[] to suggest that a teacher or coach 'cannot engage in any outward manifestation of religious faith' while *off duty*," it still considered Kennedy's off-field expression "important" because it demonstrated his "intent to send a message." App.16 (emphasis in original).

The court next concluded that, even if it construed Kennedy's personal prayer as private speech, its bottom-line judgment would not change because the district had "adequate justification" for taking action against Kennedy under the Establishment Clause. App.17. In the court's view, "an objective observer, familiar with the history of Kennedy's on-field religious activity, coupled with his pugilistic efforts to generate publicity in order to gain approval of those

on-field religious activities, would view [the district's] allowance of that activity as 'stamped with [the] school's seal of approval.'" App.19 (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)). The court took particular issue with Kennedy's decision to share his story with the public, labeling it a "media blitz" and "not[ing]," with evident disproval, "that Kennedy's media appearances continue to the present day." App.19 & n.2.

Turning to the free-exercise claim, the Ninth Circuit acknowledged that the district "conceded[]" that Kennedy was not suspended pursuant to a "neutral and generally applicable" policy since it "purport[ed] to restrict Kennedy's religious conduct *because* the conduct is religious." App.23. Again, however, the court concluded that avoiding the purported Establishment Clause violation justified religious discrimination and trumped Kennedy's rights under the Free Exercise Clause. *Id*.

3. A Ninth Circuit judge *sua sponte* called for a vote on whether to rehear the case *en banc*. The court ultimately denied rehearing *en banc*, over the dissent of nine active judges and disagreement of two senior judges.

Judge O'Scannlain, joined by seven of his colleagues, explained that "[o]ur circuit now lies in clear conflict with *Garcetti* and decades of Supreme Court cases affirming the principle that the First Amendment *safeguards*—not banishes—private, voluntary religious activity by public employees." App.79. He further observed that the opinion "weaponizes the Establishment Clause to defeat the Free Exercise claim of one man who prayed 'as a

private citizen.'" App.78-79. In his view, a "decision at odds with Free Speech, Free Exercise, and Establishment Clause jurisprudence all at once … certainly warrant[s]" further review. App.79.

Judge Ikuta, joined by five judges, wrote to emphasize that, "[u]nder the[] well-publicized circumstances" of this case, the district's "concern that Kennedy's religious activities would be attributed to [it] is simply not plausible." App.108. She warned that the panel's holding that the district "was reasonable to fear liability for an Establishment Clause violation is dangerous because it signals that public employers who merely fail to act with sufficient force to squelch an employee's publicly observable religious activity may be liable for such a claim." App.109.

Judge Ryan Nelson, joined by five judges, wrote to explain that the panel's opinion is "especially erroneous" because it relied on precedent stemming from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and "failed to … realign" with this Court's more recent decisions. App.110-11.

Judge Collins, joined by two judges, wrote to emphasize that the notion that "allowing any publicly observable prayer behavior by the coach in those circumstances—even silent prayer while kneeling—would violate the Establishment Clause" is "indefensible." App.129.

Judge Milan Smith, the author of the panel opinion, wrote separately to defend it. He began by accusing Judge O'Scannlain of having "succumbed to the Siren song of a deceitful narrative of this case spun by counsel for Appellant." App.41. And he closed by

noting that he "personally find[s] it more than a little ironic that Kennedy's 'everybody watch me pray' staged public prayers … so clearly flout the instructions found in the Sermon on the Mount on the appropriate way to pray." App.69. The panel's two other members, Judges Christen and Dorothy Nelson, issued opinions explaining why they thought "Kennedy's prayer so clearly crossed the line." App.72.

REASONS FOR GRANTING THE PETITION

The decision below got an exceptionally important issue exceptionally wrong, and managed to break sharply with the clear teaching of this Court and the decisions of its sister circuits in the process. Indeed, the court managed to botch three separate lines of First Amendment jurisprudence in one fell swoop, eviscerating the free-speech and free-exercise rights of public-school teachers and coaches to avoid a Potemkin Establishment Clause concern. Three Terms ago, four Justices indicated that just *one* of those constitutional missteps might suffice to justify plenary review on a full record. The case for certiorari at this juncture is overwhelming: The record is now complete; the decision below is now final; and the Ninth Circuit has now doubled down on its highly troubling free-speech conclusion, and added free-exercise and establishment conclusions that are indefensible. The resulting decision is a triple threat to individual liberty and First Amendment values.

This Court has expressly "reject[ed]" the "suggestion that employers can restrict employees' rights by creating excessively broad job descriptions." *Garcetti*, 547 U.S. at 424. Yet the Ninth Circuit allowed the district to do exactly that. This Court has

made emphatically clear that there is no Establishment Clause concern with allowing private religious speech because "schools do not endorse everything they fail to censor." *Mergens*, 496 U.S. at 250-51. Yet the Ninth Circuit concluded exactly the opposite. And this Court has repeatedly held that using manufactured Establishment Clause concerns to ban religious expression is "unconstitutional viewpoint discrimination." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 109 (2001). Yet the Ninth Circuit sanctioned exactly that. The court's failure to abide by any *one* of those holdings suffices to justify review; its failure to abide by *any* of them makes it imperative.

The stakes could hardly get higher. The decision below runs counter to at least two decades of First Amendment jurisprudence and turns the Religion Clauses on their head, using imagined Establishment Clause concerns to inflict real Free Exercise Clause damage. And the breadth of the opinion's impact is staggering. The religious expression of hundreds of thousands of teachers in the Ninth Circuit is now on the verge of extinction, and the chilling effects elsewhere around the country are palpable, as the Ninth Circuit essentially held petitioner's efforts to publicize the denial of his constitutional rights against him. The decision cannot stand, and the path forward is clear: This Court should grant certiorari and reiterate that "[n]either students [n]or teachers 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); that "citizens do not surrender their First Amendment rights by accepting public employment,"

Lane v. Franks, 573 U.S. 228, 231 (2014); and that accommodating private religious speech does not run afoul of the Establishment Clause, but rather "follows the best of our traditions," *Zorach*, 343 U.S. at 314.

I. The Decision Below Is Egregiously Wrong And Squarely Conflicts With This Court's Precedents.

1. Under both the Free Speech Clause and the Free Exercise Clause, this should have been a straightforward case. *Tinker* affirmed that teachers, no less than students, retain their First Amendment rights when passing through the schoolhouse gates. In the school context as in any other, "it would not serve the goal of treating public employees like 'any member of the general public,' to hold that all speech within the office is automatically exposed to restriction." *Garcetti*, 547 U.S. at 420-21 (citation omitted). The "critical question" in determining whether a public employee spoke as a citizen is whether the "speech at issue is itself ordinarily within the scope of an employee's duties." *Lane*, 573 U.S. at 240. If it is, then the employer may regulate it; otherwise, "the First Amendment provides protection against discipline." *Garcetti*, 547 U.S. at 421.

Coach Kennedy's brief, personal acts of religious expression plainly were not undertaken as part of his job responsibilities as an assistant football coach. To be sure, Kennedy's coaching duties encompassed a variety of expressive activities, such as "calling a play, addressing the players at halftime, or teaching how to block and how to tackle." App.91 (O'Scannlain, J.). *That* sort of speech undoubtedly "owes its existence to a public employee's professional responsibilities,"

Garcetti, 547 U.S. at 421, and a coach that repeatedly implored the team to run off tackle without positive effect could be disciplined. But the same cannot be said of Kennedy's prayer, which involved taking a few moments for brief, personal expression at a time when all manner of other brief, personal activities were permissible. Those acts of personal devotion were manifestly not part of Kennedy's duties as a coach, any more than if Kennedy had taken those same roughly 30 seconds to "call[] home or mak[e] a reservation for dinner at a local restaurant." App.210 (Alito, J.). Indeed, the line between private speech and on-the-job activities should be particularly clear in this context: "Millions of Americans give thanks to God, a practice that has nothing to do with coaching a sport." App.92 (O'Scannlain, J.).

The religious nature of Kennedy's expression not only should have made it easy to identify as private speech, but makes its suppression doubly problematic, for when the government singles out speech "because it is undertaken for religious reasons," "the protections of the Free Exercise Clause pertain" too. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). By its own admission, that is exactly what the district does here: It "restrict[ed] Kennedy's religious conduct *because* the conduct is religious." App.23. The "strictest scrutiny" thus should have applied twice over—and as this Court recently reiterated, "[t]hat 'stringent standard' … 'really means what it says.'" *Espinoza v. Mont. Dep't of Revenue*, 140 S.Ct. 2246, 2260 (2020).

The district does not have any interest—let alone an "interest[] of the highest order," *id.*—in eradicating

"demonstrably religious conduct" from the school setting, and any concerns it may have had about potential confusion over whether it was affirmatively endorsing Kennedy's prayer could easily have been addressed by the far less restrictive means of simply reiterating the uncomplicated message that the school does not endorse private speech it declines to censor. Instead, the district offered Kennedy only the purported "accommodation[]" of praying in a "private location," effectively banishing religious expression from public view. App.38. That is an affront to the Religion Clauses, and not even close to the least restrictive means of advancing any legitimate government interest. Thus, under a straightforward application of this Court's precedent, the district's actions plainly violated both the Free Speech Clause and the Free Exercise Clause.

2. Rather than heed the strong cautions that four members of this Court sounded two years ago, the Ninth Circuit managed to *strengthen* the case for certiorari the second time around. It began by doubling down on the same "highly tendentious" reading of *Garcetti* that four Justices found so "troubling." App.211 (Alito, J.). According to the Ninth Circuit, any time teachers or coaches are anywhere they have "access to because of [their] employment"—*i.e.*, whenever they step through the schoolhouse gate—and engage in "expression … during a time when [they are] generally tasked with communicating with students"—*i.e.*, any time during school hours or functions—that speech is government speech subject to government control. App.15. That is so, in the court's view, because "expression" is the "stock in

trade" of educators and coaches, who are "clothed with the mantle of one who imparts knowledge and wisdom." App.14.

That sweeping conception of government speech is impossible to reconcile with this Court's precedent. What matters under the government speech test this Court has articulated is whether "expressions were made pursuant to his official duties." *Garcetti*, 547 U.S. at 411. The notion that "praying is somehow a football coach's responsibility in the same way that drafting memoranda on pending prosecutions is a deputy prosecutor's responsibility," App.85 (O'Scannlain, J.), defies common sense. Moreover, this Court has explicitly "reject[ed]" the "suggestion that employers can restrict employees' rights by creating excessively broad job descriptions." *Garcetti*, 547 U.S. at 424. Yet that is precisely what the Ninth Circuit did for the district by declaring that Kennedy's "job duties" (like every coach's or teacher's) included "demonstrative communication as a role model for players," App.16, and thus that all of his "demonstrative communication" in view of students belongs to the school. If all expression by coaches and teachers in the presence of students—no matter how obviously personal—belongs to the school simply because coaches and teachers are mentors, then there is nothing left of the First Amendment rights of teachers and coaches at school.

The Ninth Circuit insisted that its opinion "should not be read to suggest that, for instance, a teacher bowing her head in silent prayer before a meal in the school cafeteria would constitute speech as a government employee." App.15. But that disclaimer

is belied by the court's strained effort to distinguish that obviously protected expression from this case. In the Ninth Circuit's view, Kennedy's prayer was "wholly different" because it "occur[ed] while players stood next to him, fans watched from the stands, and he stood at the center of the football field," and he considered himself "a mentor, motivational speaker, and role model to students *specifically at the conclusion of a game*." *Id.* (emphasis in original). But a teacher could be equally said to be a role model specifically at the beginning of a meal. In reality, the two brief, religious observances are indistinguishable and equally protected.

3. The Ninth Circuit strayed even farther afield with its remarkable conclusion that the district could prohibit Kennedy's prayer even if it was *private* speech (which it undoubtedly was). Indeed, the court's boundless Establishment Clause reasoning is even more obviously wrong and more troubling than its radical reading of *Garcetti*.

This Court has made clear time and again that the government does not run afoul of the Establishment Clause by tolerating private religious expression or activity. *See, e.g.*, *Good News Club*, 533 U.S. 98; *Rosenberger v. Rector & Visitors*, 515 U.S. 819 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). And banishing religious expression from fora where other expression is permitted not only raises grave concerns under the Free Exercise Clause, but is "unconstitutional viewpoint discrimination." *Good News Club*, 533 U.S. at 109. The Establishment Clause "does not license government to treat religion and those who teach or

practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring). Yet that is exactly what the Ninth Circuit accomplished by sanctioning the district's decision to "restrict Kennedy's religious conduct *because* the conduct is religious." App.23.

The Ninth Circuit seemed to think that result was compelled by this Court's decision in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). But *Santa Fe* did not involve private prayer in view of students; it involved a school policy permitting school-edited and -approved prayers to be broadcast over the school's public address system before games, as part of the school's official pregame ceremonies. *Id.* at 296-99. That could not be farther from the facts of this case, where everyone knew that the district wanted nothing to do with Kennedy's prayer. It "is simply not plausible" that anyone acquainted with the "well-publicized circumstances" surrounding Kennedy's prayer would attribute it to the district. App.108 (Ikuta, J.). Indeed, "[o]nly by ignoring everything the District said and did could an observer (mistakenly) think the school was endorsing Kennedy's" prayer. App.102 (O'Scannlain, J.).

The Ninth Circuit nonetheless claimed that "an objective observer could reach *no other conclusion* than that BSD endorsed Kennedy's religious activity by not stopping the practice." App.21 (emphasis in original). But equating a failure to censor with endorsement is a fatal error under this Court's cases. This Court has emphasized that the "proposition that

schools do not endorse everything they fail to censor is not complicated," *Mergens*, 496 U.S. at 250-51, and has held that even young students can be expected—indeed, encouraged—to appreciate the difference between private speech the school tolerates and government speech the school endorses. *See, e.g.*, *id.*; *Good News Club*, 533 U.S. at 117-19. That the Ninth Circuit lost sight of those uncomplicated lessons is unfathomable and plainly justifies this Court's intervention.

The Ninth Circuit made matters worse by suggesting that *Kennedy* made matters worse and forfeited whatever minimal free-speech and free-exercise rights he possessed by sharing his story with the public—or, to use the court's pejorative description, through his "pugilistic efforts to generate publicity." App.19. But pugilism in defense of liberty is no vice, and suggesting that efforts to vindicate rights to religious speech and exercise justify greater government suppression creates an unprecedented chilling effect. When a football coach is fired because of his religious activity, which the record now confirms, he is entitled to take to the airwaves. Whatever is true of the kingdom of heaven, the First Amendment is not reserved for the meek.

It was bad enough for the district to penalize Kennedy for his religious expression. For the Ninth Circuit to suggest that Kennedy's public protests gave the district no choice but to stick by its discipline lest its capitulation be perceived as endorsement turns the First Amendment on its head. And the extraordinary notion that an Article III judge would chide a litigant about "the instructions found in the Sermon on the

Mount on the appropriate way to pray," App.69 (M. Smith, J.), is the closest thing in this case to an *actual* Establishment Clause violation.

This case was "troubling" enough the first time around when the Ninth Circuit embraced a "highly tendentious" reading of *Garcetti* that treats "teachers and coaches as being on duty at all times from the moment they report for work to the moment they depart, provided that they are within the eyesight of students." App.211 (Alito, J.). But the Ninth Circuit's remarkable conclusion that schools are constitutionally obligated to *prohibit* teachers and coaches from engaging in "demonstrative religious conduct" in view of students, even assuming it is properly classified as private speech, makes this Court's intervention imperative. Left standing, the decision below will have the inevitable effect of "purg[ing] from the public [schools] all that in any way partakes of the religious," *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring), including any employees who do not ascribe to the view that their faith should be practiced only behind closed doors.

II. The Decision Below Conflicts With Decisions From Other Courts.

As Judge O'Scannlain recognized, the Ninth Circuit "now lies in clear conflict with *Garcetti* and decades of Supreme Court cases" interpreting the First Amendment. App.79. Not surprisingly, the Ninth Circuit lies in clear conflict with numerous other circuit courts that have faithfully adhered to this Court's precedent and bedrock First Amendment principles.

1. As to the specific question whether schools can tolerate private religious speech by teachers and coaches without creating an Establishment Clause problem, the decision below is a complete outlier. Decisions new and old and far and wide reject the notion that "public employers who merely fail to act with sufficient force to squelch an employee's publicly observable religious activity may be liable for [an Establishment Clause] claim." App.109 (Ikuta, J., dissenting). Although the Ninth Circuit concluded that "there was no other way to accomplish the state's compelling interest" in avoiding an Establishment Clause violation than by removing Kennedy's private prayer from public view, App.25, other courts have consistently concluded that a teacher's private religious expression is perfectly compatible with the Establishment Clause.

For instance, more than a century ago, the Pennsylvania Supreme Court rejected the notion "that it is sectarian teaching for a devout woman to appear in a school room in a dress peculiar to a religious organization of a Christian church." *Hysong v. Sch. Dist. of Gallitzin Borough*, 30 A. 482, 484 (Pa. 1894). More than a century later, the Ohio Supreme Court had no trouble concluding that allowing a teacher to keep his Bible on his desk—"demonstrative" as it is—"posed no threat to the Establishment Clause." *Freshwater v. Mt. Vernon City Sch. Dist. Bd. of Educ.*, 1 N.E.3d 335, 353 (Ohio 2013). And the Eighth Circuit has held that a school administrator's "clearly personal" decision to hang a "framed psalm on the wall of [his] office" "d[id] not convey the impression that the government is endorsing it." *Warnock v. Archer*, 380 F.3d 1076, 1082 (8th Cir. 2004); *see also Wigg v. Sioux*

Falls Sch. Dist., 382 F.3d 807 (8th Cir. 2004). Other courts have reached similar conclusions too. *See, e.g.*, *Nichol v. ARIN Intermediate Unit 28*, 268 F.Supp.2d 536, 560 (W.D. Pa. 2003) ("[T]here is no danger that permitting an … employee to wear a cross while working at school will encroach upon the Establishment Clause.").

2. The decision below is equally out-of-step with other circuits when it comes to the proper application of *Garcetti*. As noted, the Ninth Circuit first determined that a coach is "clothed with the mantle of one who imparts knowledge and wisdom," so Kennedy's prayer "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.15. In two important respects, that reasoning conflicts with numerous other decisions applying *Garcetti*.

First, multiple circuits have rejected the proposition that public employers may expand the scope of an employee's duties at the expense of her constitutional rights. In *Chrzanowski v. Bianchi*, 725 F.3d 734 (7th Cir. 2013), the Seventh Circuit considered the claim of an assistant state's attorney who lost his job after testifying at trial about his supervisor's misconduct. *See id.* at 736-37. The district court determined that his testimony qualified as unprotected employee speech because "it was 'part of [his] job to serve the people of [the] County in the proper administration of justice.'" *Id.* at 739. But the Seventh Circuit "rejected the argument that job descriptions such as … 'a general obligation to ensure

sound administration' of public institutions … could place otherwise protected speech outside the ambit of the First Amendment." *Id*. at 739-40.

The Fourth Circuit reached a similar conclusion in *Hunter v. Town of Mocksville*, 789 F.3d 389 (4th Cir. 2015), holding that a police officer's "general duty to enforce criminal laws in the community" did not mean that he engaged in unprotected employee speech when he reported a superior's criminal misconduct to a higher official. *See id*. at 395, 399. And the Tenth Circuit applied this same skepticism in the school context in *Brammer-Hoelter v. Twin Peaks Charter Academy*, 492 F.3d 1192 (10th Cir. 2007). There, the court held that off-campus teacher speech related to the school's operation did not lose First Amendment protection merely because the school encouraged teachers "to present their views to improve the Academy … in the form of complaints and grievances to the Board"—and that the contrary conclusion would "eviscerat[e] *Garcetti*." *Id*. at 1199-1201, 1204.

Second, multiple circuits have rejected the notion that *Garcetti* empowers public employers to characterize an employee's speech as "owing its existence" to a public position—thus transforming it into government speech—just because there is a but-for connection between the speech and the job. Consider the Sixth Circuit. In *Boulton v. Swanson*, 795 F.3d 526 (6th Cir. 2015), a police officer/union leader claimed that the county retaliated against him because he provided testimony that contradicted his superior officer during contract arbitration proceedings. The district court declared his speech unprotected, reasoning that it "'owe[d] its existence'"

to his job because he "could not have participated in the union or the arbitration if he were not an employee of the Sheriff's Office." *Id.* at 532-33. But the Sixth Circuit disagreed, recognizing that "the phrase 'owes its existence to a public employee's professional responsibilities' must be read narrowly as speech that an employee made in furtherance of the ordinary responsibilities of his employment." *Id.* at 534.

The Seventh and Eleventh Circuits have embraced the same view. *See, e.g.*, *Chrzanowski*, 725 F.3d at 738 (speech does not "owe[] its existence to a public employee's" job "simply because public employment provides a factual predicate for the expressive activity"); *Carollo v. Boria*, 833 F.3d 1322, 1329 (11th Cir. 2016) ("owes its existence to … must be read narrowly to encompass speech that an employee made in accordance with or in furtherance of the ordinary responsibilities of her employment"). And the Third Circuit has "*never* applied the 'owes its existence to' test … 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 contrary to *Garcetti*'s admonishment that "the First Amendment necessarily 'protects some expressions related to the speaker's job.'" *Flora v. Cnty. of Luzerne*, 776 F.3d 169, 177-78 (3d Cir. 2015) (emphasis added).

The Ninth Circuit's decision is "far, far afield" from these cases. App.85 (O'Scannlain, J.). Indeed, the panel relied on precisely the kind of excessively broad job descriptions (*e.g.*, "impart[ing] knowledge and wisdom," *id.*) and but-for logic (*e.g.*, "the field [is]

a location that [Kennedy] only had access to because of his employment," App.15) that other courts have resoundingly rejected. Accordingly, the threshold question in this case—whether Kennedy's religious expression belongs to Kennedy or the government—plainly would have come out the other way in several other courts.

* * *

As all of this underscores, the decision below is at war with every relevant precedent on every relevant issue. And if the extraordinary circumstances of this case prove anything, nothing short of plenary review by this Court will resolve this constitutional conflict.

III. This Case Is Exceptionally Important.

The questions presented are undeniably important. Indeed, four Justices have already recognized that the free-speech claim in this case, standing alone, is "troubling" and may merit plenary review if fact-finding proved that the district singled out Kennedy's religious speech because of its religiosity and "the Ninth Circuit continues to apply its interpretation of *Garcetti*." App.212. Not only have both of those eventualities now come to pass, but the Ninth Circuit has now embraced equally (if not more) problematic interpretations of both Religion Clauses. This case has gone way beyond "troubling"; it now poses a clear triple threat to First Amendment values.

That is particularly true given the far-reaching effects of the Ninth Circuit's decision, which governs "throughout … nine states and two federal territories," App.105 (O'Scannlain, J.), where public schools employ approximately half a million teachers

and coaches.[2] In those jurisdictions, a public school now has unbridled discretion to "restrict any speech" it dislikes "so long as it instructs its employees to demonstrate good behavior in the presence of others," as all of that speech now belongs to the government, not the speaker. App.88 (O'Scannlain, J.). The threat of viewpoint discrimination is palpable since "viewpoint discrimination is permissible[] where the government itself is speaking." *Matal v. Tam*, 137 S.Ct. 1744, 1768 (2017) (Kennedy, J., concurring). More troubling still, the decision below essentially requires schools to be intolerant of any religious speech in their employee ranks because, under its logic, a public school that refuses to "search for and … eliminate … religious speech" will "face liability under the Establishment Clause." App.105 (O'Scannlain, J.). And perhaps most troubling of all, by suggesting that Coach Kennedy contributed to the problem through his "pugilistic" efforts to draw attention to his plight and essentially left the district with no choice but to suppress his religious speech, the decision below promises to chill religious speech and punish efforts to vindicate the First Amendment. That state of affairs simply cannot persist.

Even before the Ninth Circuit went so badly astray, moreover, the "doctrinal framework governing the First Amendment rights of teachers [stood] in dire need of clarification and reform." Mary-Rose Papandrea, *Soc. Media, Pub. Sch. Teachers, and the*

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[2] The jurisdictions within the Ninth Circuit have nearly 20,000 public schools and nearly 500,000 teachers. *See* Nat'l Ctr. for Educ. Statistics, School Year 2018-19 Table 2, *available at* https://bit.ly/2UeDklJ (last visited Sept. 14, 2021).

First Amend., 90 N.C. L. Rev. 1597, 1641 (2012). If the decision below is left standing, millions of other teachers and coaches will now have to fear that "every stray remark [they] make[] in class, on a school bulletin board, or to a student in between classes is government speech that the school is entitled to control without limit." *Id.* at 1632. And like their counterparts in the Ninth Circuit, they may have to fear that their efforts to vindicate their rights will be held against them, and hence may have to choose between public-school employment and abiding by basic tenets of their faith. Schools, in turn, will be left with little choice but to accept "a brooding and pervasive devotion to the secular." *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring).

Rather than allow the Ninth Circuit's decision to muddle three strands of First Amendment jurisprudence at once, this Court should grant certiorari and confirm that a public school does not own every on-the-job expression that its teachers or coaches may make around students, and that the First Amendment does not demand that schools "purge from the public sphere all that in any way partakes of the religious." App.105 (O'Scannlain, J.) (quoting *Van Orden*, 545 U.S. at 699 (Breyer, J. concurring)). After all, the distinction between government religious speech that the Establishment Clause forbids, and private religious speech that the Free Speech and Free Exercise Clause protects, is essential to the vitality of all three guarantees. That line is not complicated, but it has been obliterated in the Ninth Circuit. This Court's intervention is imperative.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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