NO. 16-35801

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOSEPH A. KENNEDY,

Plaintiff-Appellant,

v.

BREMERTON SCHOOL DISTRICT,

Defendant-Appellee.

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

BRIEF OF AMICUS CURIAE JEWS FOR RELIGIOUS LIBERTY IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae, Jews For Religious Liberty, has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

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INTEREST OF AMICUS CURIAE

Jews for Religious Liberty (JFRL) is an unincorporated cross-denominational association of lawyers, rabbis, and communal professionals who practice Judaism and are committed to defending religious liberty. JFRL's members have written extensively on the role of religion in public life. As followers of a minority religion, JFRL members have a strong interest in ensuring that the First Amendment rights of adherents of minority religions are protected. The panel opinion jeopardizes this interest by eliminating the First Amendment rights of public school teachers and coaches to engage in religious expression of the sort required by Orthodox Judaism and many other minority religions.[1]

SUMMARY OF ARGUMENT

Under the panel's flawed decision, virtually all on-the-job religious expression by public school teachers is categorically beyond the protection of the Free Speech Clause—even when such expression is entirely consistent with the Establishment Clause. Indeed, the panel's reasoning could be equally applied to justify governmental bans on public school teachers wearing Yarmulkes or engaging

[1] Pursuant to Circuit Rule 29-2(a), counsel for amicus Jews For Religious Liberty certifies that all parties have consented to the filing of this brief. No party or party's counsel authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief. No person, other than amicus or their counsel contributed money intended to fund preparation or submission of this brief.

in other unobtrusive individual religious expression. As a result, the consequences of this ruling will fall disproportionately on Jews and other religious minorities whose faith requires them to engage in routine expressive religious conduct.

Because the panel opinion in this case poses a serious threat to the free speech rights of religious minorities and threatens to exclude many religious minorities from employment as public school teachers, the Court should grant the petition for en banc rehearing.

ARGUMENT

I. The Panel Opinion Incorrectly Decided a Question of Exceptional Importance By Narrowing the Free Speech Rights of Religiously Observant Teachers and Coaches.

The linchpin of the panel opinion is that speech falling within a government employee's official duties is categorically unprotected by the First Amendment, and since Coach Kennedy's job "entailed both teaching and serving as a role model and moral exemplar," Opinion at 28 (Aug. 23, 2017), Doc. 64-1 ("Op."), his speech was unprotected when he briefly and silently prayed in public view while allegedly on the job. As the petition for en banc rehearing ably demonstrates, the Supreme Court rejected this methodology in *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006), making clear that neither public employers nor courts may "restrict employees' rights by creating excessively broad job descriptions." Rather than the rigid approach adopted by the panel in this case, "the proper inquiry is a practical one" that requires a court

to consider "the duties [the] employee actually is expected to perform." *Id.* at 424–25. An employee who speaks "outside the scope of his ordinary job duties" does so with the benefit of rights under the Free Speech Clause. *Lane v. Franks*, 134 S. Ct. 2369, 2378–79 (2014). Under a proper application of these precedents, Kennedy's brief and individual expression of religious faith was protected by the Free Speech Clause.

To be sure, the best teachers and coaches act as role models and mentors for young people, imparting life lessons that are not limited to the curriculum that they are tasked with teaching. But such educators are more than mere mouthpieces for the state, and they deserve praise precisely because they do something more than perform the ordinary duties of a public school teacher or coach. The "goal" of *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563 (1968) and its progeny is "treating public employees like 'any other member of the general public' " for First Amendment purposes, *Garcetti*, 547 U.S. at 420–21, and this goal is not well served by a rule that places all teacher speech in view of students categorically beyond the protections of the Free Speech Clause.

Troublingly, some parts of the panel opinion seem to suggest that Coach Kennedy was entitled to a less favorable application of *Garcetti* due to the religious nature of his expression. The panel opinion cites Kennedy's religious reasons for refusing an accommodation that would have permitted him to pray outside the

presence of students and spectators as proof that he was acting to instruct students in his official capacity as a coach. Op. 24–25. Elsewhere, the opinion goes so far as to emphasize the *content* of Kennedy's silent prayers, reasoning that a prayer that "celebrates sportsmanship . . . arguably falls within Kennedy's curriculum." Op. 30. Although the panel opinion reaches all speech, these passages leave room for doubt whether the panel would have decided differently had Kennedy engaged in similar non-religious expression. And while the religious nature of Kennedy's speech would obviously be important to analysis of his actions under the Establishment Clause—an issue that the majority did not reach—the panel went seriously astray to the extent it imposed "special disabilities" on Coach Kennedy's First Amendment right to engage in expressive conduct due to the religious character of that conduct. *See Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017). While some may find Kennedy's public expression of religious faith offensive, that does not make his conduct any less entitled to First Amendment protection. *Cf. Elmbrook School Dist. v. Doe*, 134 S. Ct. 2283, 2286 (2014) (Scalia, J., dissenting from denial of certiorari) ("[I]t is decidedly not the job of the Constitution" "to prevent hurt feelings at school events.").

II. The Panel's Opinion Uniquely and Unjustifiably Burdens the Speech of Orthodox Jews and Other Religious Minorities.

If allowed to stand, the panel's decision will empower the government to adopt rules that would make employment in public schools difficult, if not impossible, for observant Orthodox Jews and many other religious minorities.

Many Orthodox Jewish men would not accept a job that prohibited them from covering their heads, as they would find it religiously problematic to make a prayer before eating, or, to a lesser degree, to walk around without a Yarmulke or other head covering. Rabbi Adin Steinsaltz, *Kippot, Hats and Head Coverings: A Traditionalist View*, MY JEWISH LEARNING, https://goo.gl/Kt5f1q; Baruch S. Davidson, *Why Do We Wear a Kippah?*, CHABAD.ORG, https://goo.gl/mpqc3e; *Code of Jewish Law*, Orach Chaim 2:6, 91:3–5. Many Orthodox Jewish men also feel religiously compelled to wear tzitzit—a fringed four-cornered garment—with the fringes visible outside their other clothing. *What is the Tzitzit and Tallit?*, CHABAD.ORG, https://goo.gl/ZeFc64; *Code of Jewish Law*, Orach Chaim 8:11, 24:1; *Mishnah Berurah* 8:25, 8:26. Most married Orthodox Jewish women feel obliged by their faith to cover their hair while in public. Steinsaltz, *supra*; Talmud, *Berakhot* 24a; Talmud, *Ketubot* 72a; Maimonides, *Mishneh Torah*; *Hilchot Issurei Biah* 21:17; *Code of Jewish Law*, Even HaEzer 21:2, 115:4. And virtually all Orthodox Jews agree that it is obligatory to say a brief blessing both before and after eating or drinking. Rabbi Michael Strassfeld, *Food Blessings*, MY JEWISH LEARNING,

https://goo.gl/FeU2UR; Talmud, *Berakhot* 35a; *Code of Jewish Law*, Orach Chaim 184–86, 202–05, 207–08; *Deuteronomy* 8:10. Preventing Orthodox Jews from engaging in those behaviors, and many more that characterize the life of an Orthodox Jew, would make it extremely difficult if not impossible for him or her to serve as a public-school teacher or coach.

Orthodox Jews are not alone in adhering to a minority faith that requires them to engage in certain publicly visible expressive conduct. Many Muslim women wear headscarves while in public, *see Khatib v. County of Orange*, 639 F.3d 898, 901 (9th Cir. 2011), and it is common for Sikhs not to cut their hair and to wear turbans. *See Sherwood v. Brown*, 619 F.2d 47, 48 (9th Cir. 1980). Hindu women commonly wear the bindi, a symbol on the forehead with religious significance. *See Gairola v. Virginia Dep't of Gen. Servs.*, 753 F.2d 1281, 1284 (4th Cir. 1985).

Such outward expressions of individual faith have virtually no potential to interfere with a public-school teacher's performance of his or her duties. Yet under the panel's analysis, that is of no moment; any expressive conduct in the presence of students is undertaken "pursuant to" a teacher's job duties and therefore is not protected by the Free Speech Clause.

Worry that state and local governments might exploit this limitation on the Free Speech Clause to adopt policies that make it difficult or impossible for religious minorities to teach in public schools is not hypothetical. During a period of anti-

Catholic intolerance in the early twentieth century, a number of states enacted statutes prohibiting public school teachers from wearing religious garb in a bid to stop priests and nuns from teaching children. *See United States v. Board of Educ. for Sch. Dist. of Phila.*, 911 F.2d 882, 893–94 (3d Cir. 1990); *Cooper v. Eugene Sch. Dist. No. 4J*, 723 P.2d 298 (Or. 1986). Pennsylvania's religious garb ban—although disapproved of by federal courts—remains on the books today, *see* 24 PA. STAT. § 11-1112(a); *Nichol v. ARIN Intermediate Unit 28*, 268 F. Supp. 2d 536, 555 (W.D. Pa. 2003) (concluding that Pennsylvania garb ban "unlikely" to "withstand . . . heightened scrutiny" and enjoining school policy implementing the ban for school employees). Nebraska and Oregon only recently repealed their similar laws. *See* LB 62, 105th Leg. (NEB. 2017) (repealing NEB. STAT. § 79-898); Laws 105, 112th Cong. § 3 (OR. 2010) (repealing OR. STAT. § 342.650). The panel opinion leaves the door open to the enactment of additional such laws in the future.

Jews for Religious Liberty submits that even when such laws are not adopted out of religious animus, they unfairly deter religious minorities from taking positions of public employment for which they are otherwise qualified. But perhaps even more problematic is what such policies mean for public education. "[R]espect for religious pluralism" is a value "commanded by the Constitution," *County of Allegheny v. ACLU*, 492 U.S. 573, 610 (1989), and communicating such civic values is one of the essential functions of public education, *see Bethel Sch. Dist. No. 403 v. Fraser*, 478

U.S. 675, 683 (1986). The very fact of a school faculty's religious diversity communicates an important message about religious pluralism to students: that people of all creeds have an important role to play in public discourse and should not be ignored merely because of how they dress or pray. That is a lesson that Orthodox Jews and other religious minorities are uniquely qualified to teach, and the Court should grant en banc rehearing to protect the constitutional rights of religious minorities and allow them to continue imparting that important message.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for en banc rehearing.

October 2, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of FED. R. APP. P. 29(b)(4) and Circuit Rule 29-2(c)(2) because it contains 1,824 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

Dated: October 2, 2017

s/ Brian W. Barnes
Brian W. Barnes

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the forgoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 2, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: October 2, 2017

s/ Brian W. Barnes
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