No. 21-418

In The
Supreme Court of the United States

JOSEPH A. KENNEDY,

Petitioner,

v.

BREMERTON SCHOOL DISTRICT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF CURRENT STATE LEGISLATORS AS AMICI CURIAE IN SUPPORT OF PETITIONER

RYAN KRIEGSHAUSER*
JOSHUA NEY
ALAN VESTER
KRIEGSHAUSER NEY LAW GROUP
15050 W. 138th St., Unit 4493
Olathe, KS 66063
Direct: (913) 303-0639
Fax: (785) 640-8446
ryan@knlawgroup.com
**Counsel of Record*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF AMICI CURIAE[1]

Amici Curiae are current members of state legislatures and are engaged in carrying out legislative functions in relation to the educational interests of their respective states.[2] They are active in passing and supporting laws, as well as providing legislative oversight, in relation to these interests. This includes acting to ensure that the laws of their state adequately protect the constitutional rights of students, teachers and staff. The outcome of this case will directly impact their legislative duties in this regard. In addition, Amici have taken oaths to support the Constitution of the United States, and the Constitutions of their respective states, and as such have an official interest in this Court's interpretation of the First Amendment, which affects these legislators in their drafting, considering, enacting and overseeing laws in their states.

SUMMARY OF ARGUMENT

This Court should grant certiorari, review, and correct the lower courts' ruling which is in apparent

[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court, counsel of record for all parties received notice at least 10 days prior to the due date of the Amici curiae's intention to file this brief. All parties have consented to the filing of this brief by filing blanket consents. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

[2] A complete list of state legislators participating as Amici appears in an appendix to this brief.

conflict with prior decisions of this Court safeguarding private, voluntary religious activity by public employees. The states, and the local school districts in those states, face tremendous challenges in navigating complex and sometimes contradictory court rulings in relation to the constitutional rights of public school employees. Clear standards that safeguard these employees' rights promote the kind of pluralism that undergirds our system of public education, and that fosters mutual respect among students, teachers and staff with differing beliefs. The decision below needlessly and harmfully creates confusion where clarity is needed, especially regarding the requirements of the Establishment Clause. It also undermines the constitutional values our public schools exist, in part, to promote.

The issues presented by this appeal, when understood in light of the actual facts, should not be controversial. The opinion below stands first for the novel and untenable notion that the Free Speech and Free Exercise clauses of the First Amendment are inapplicable to all on the clock speech and expression by public school employees. The opinion then goes even further, by suggesting that the Establishment Clause actually compels public schools to discipline such employees when they engage in private prayer. This result turns public school administrators away from their appropriate role of promoting pluralism, and instead makes them gatekeepers tasked with barring governmentally disapproved forms of private religious expression. If allowed to stand, this would breed

confusion and mistrust in our public schools, subverting the educational mission that Amici are pledged to support.

This Court should correct the ruling below by returning to the Court's traditional Free Speech and Free Exercise jurisprudence which is protective of private, voluntary religious activity by public employees. And by clarifying an often confusing Establishment Clause jurisprudence, to at least make plain that this Clause cannot create a compelling state interest in censoring private speech. These laudable and commonsense results can be achieved by simply applying: *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."); *Garcetti v. Ceballos*, 547 U.S. 410, 420-21 (2006) (all speech within a public employee's workplace is not automatically exposed to restrictions); *Lane v. Franks*, 573 U.S. 228, 240 (2014) ("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"); and *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001) (permitting private religious activity does not violate the Establishment Clause). Leaving the opinion below in place, in light of this Court's contrary precedent, would leave states, school districts, and school employees alike without clear guidance on an important issue weighing on the effective administration of public schools across the county. Only this Court can provide

that needed clarity, as such certiorari should be granted.

ARGUMENT

I. The Ninth Circuit Opinion Represents a Legal Sea Change, Putting Toleration and Pluralism at Risk.

Any government action that impedes the free speech and religious exercise of a citizen is a matter of grave concern. But as this Court has noted, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). While the law always has a teaching function, this is never more the case then when it is applied in the public-school context. This case is important and worthy of review because the opinion below directly threatens this Court's long held view that, "[i]n our system, state-operated schools may not be enclaves of totalitarianism." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

It is axiomatic in "our system," that, "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506. While it is true that this principle is not without limits, the line drawn by the Ninth Circuit in this regard would set public schools on

exactly the kind of "relentless and all-pervasive attempt to exclude religion from every aspect of public life" that this Court has warned against in the past. *See Lee v. Weisman*, 505 U.S. 577, 598-99 (1992). Rather than modeling principles of tolerance and pluralism, our schools would become enforcers of a rigid standard under which all speech, and especially religious speech, by public school teachers "while on the clock and in earshot of others, is subject to plenary control by the government." *Kennedy v. Bremerton School District*, 4 F.4th 910, 930 (9th Cir. 2021) (O'Scannlain, J., concurring).

This would be bad enough in some other context involving state employees. But it is doubly problematic for the malign message this would send to students educated in such an environment. The guiding principle would no longer be respect for religious difference, but rather an atmosphere of fear and suspicion in which even the most innocuous of religious expression by a teacher or coach must be stamped out. This is not only wrong as a matter of law, it is dangerous for what it instructs regarding the place of toleration and pluralism in our society.

II. The Ninth Circuit Opinion Leaves School Staff Wholly Unprotected by the First Amendment.

The *Garcetti* Court makes it crystal clear private, voluntary, religious activity by public employees is protected by the First Amendment. The Ninth Circuit instead determined that firing Coach Kennedy for

quietly kneeling to pray after a football game is *required* by the Establishment Clause. This result, under the facts of this case, simply cannot be squared with the longstanding view of this Court that a public employer may only limit the speech or expression of its employees where it falls within the scope of their official duties. *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). Nor can a public employer artificially expand an employee's duties, as a way of shrinking the scope of the employee's constitutionally protected speech or expression. *Garcetti*, 547 U.S. at 424.

Yet, this is exactly what the school district did in this case when it took the position that Coach Kennedy was always acting under his job duties any time before, during or after a game when he is in the presence of students or spectators. On this view, Coach Kennedy was acting in the scope of his official duties because he was in a place where he was authorized to be due to his employment, during a time when he was authorized to communicate with students. *Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004 (9th Cir. 2021). (*Kennedy III*). If this is true, there is virtually no space for private, voluntary, religious expression any time a teacher is on the clock. Indeed, teachers would be left wholly unprotected by the First Amendment any time they are involved in speech or expression, merely because the job of a teacher involves speaking and expressing.

III. The Ninth Circuit Opinion Creates a New Undefined Mandatory Enforcement Regime.

The tautology inherent in the logic of the Ninth Circuit's opinion runs contrary to the logic of *Garcetti*, which presumes that there is in fact such a thing as private, voluntary, religious speech and expression by public employees. This common-sense conclusion was further clarified by this Court when it noted that, "[t]he critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of those duties, not whether it merely concerns those duties." *Lane*, 573 U.S. at 240. This standard presumes a degree of good faith on the part of public employers. Pointing to broad and amorphous employment responsibilities as an after-the-fact justification for limiting private speech it doesn't like, simply cannot be what is meant by an ordinary job duty that places speech outside the purview of the First Amendment.

The Opinion below offers no workable limiting principle on the authority of a public employer to shrink the scope of the First Amendment, by arbitrarily expanding the manner in which it interprets generalized job responsibilities. The principle at work here is analogous to this Court's recent reminder that, "[w]e have never suggested that the government may discriminate against religion when acting in its managerial role." *Fulton v. Philadelphia*, 141 S. Ct. 1868, 1878 (2021). The fact government contractors, and employees, accept some limits on their freedoms, does not leave the state with plenary authority to single out all

employee religious speech and expression for particular disfavor.

Under the facts of this case, the private nature of the religious expression in view is easy to establish if the correct test is used. The proper inquiry is a practical one, focused on the simple question of whether the conduct in question involved one of the tasks he was paid by the school district to perform. *Garcetti*, 547 U.S. at 422. A brief, quiet, personal prayer in which no one else is asked to join, is not what he is paid to do. It is quintessential private speech, a type of expression that non-government employees commonly engage in. *Id.* at 423-24. Coach Kennedy did not lose his job because of a claim that his brief prayer interfered with his job duties. He lost his job solely because the district contended that failing to remove him from his coaching duties would have put them at risk of constitutional liability for his "religious conduct." *Kennedy III*, 991 F.3d at 1014.

The Ninth Circuit's affirmation of this contention leaves an important constitutional question in flux. At least within the bounds of the Ninth Circuit public school administrators are left to wonder just how assiduously they must now police every hint of religious expression by an employee that might be observed by a student or guest. This answer, under the reasoning of the opinion, would seem to be, aggressively and comprehensively.

IV. The Ninth Circuit's New Undefined Mandatory Enforcement Regime Swallows the Free Exercise Clause in Favor of the Establishment Clause.

This Court has been clear that government toleration of private religious activity does not violate the Establishment Clause. *Good News Club*, 533 U.S. at 119. The Ninth Circuit has taken the opposite view. Finding that *even if* Coach Kennedy's conduct is private, it still *must* be prohibited in order to prevent what it apparently views as the danger that a student or other observer might learn that some teachers and coaches pray. On this view, the Establishment Clause is now a club that government employers may use against the free exercise rights of their employees, even as private citizens.

It should have been clear that the school district's admission they fired Coach Kennedy specifically because of the religious nature of his conduct, did not strengthen their case under the Establishment Clause. Rather it should have been fatal to it under the Free Exercise Clause. First, by contending that the Establishment Clause was in play even if Coach Kennedy's conduct was private, the Court below apparently abrogated the need to prove state action in order to show a violation. Left unchecked, the ramifications of this novel and textually absurd reading are quite staggering. Moreover, this Court, "has never extended its Establishment Clause jurisprudence to foreclose private religious conduct during non-school hours merely because it takes place on school premises where

elementary school children may be present." *Id.* at Headnote 9; *see also id*. at 115. This applies equally well in the present case where the students most likely to observe the conduct are in high school.

From the perspective of Amici, the damage from the ruling below extends far beyond its impact on Coach Kennedy. It will also serve to create needless conflict and mistrust in our public schools, detracting from their educational mission. If public schools are deemed to endorse everything they do not forcefully suppress, they will be forced to become vapid enclaves cut off from the lives of the communities they exist to serve. Long before they fired him, the school district in this case had made it abundantly obvious that Coach Kennedy's brief prayers were not being offered as part of his duties as a coach. But that was not enough. Rather, the Court below apparently takes the view that public schools can only avoid the possibility of mistaken belief that they have endorsed private religious conduct if they fire employees engaged in private religious speech.

This result imposes the very Establishment Clause as "a modified heckler's veto" result that this Court has explicitly rejected in the past. *Id.* at 119. And it ignores the fact that schools can, and this case did, engage in far more limited action that would have the prophylactic effect necessary to disclaim an official approbation of Coach Kennedy's private speech. It is ironic, and dangerous, that a school district would forgo an opportunity to educate those who might observe that speech, and instead, opt for punitive measures

against the speaker. It is shocking that the Ninth Circuit apparently views that choice as not merely permissible – which it is not – but even mandatory.

CONCLUSION

If allowed to stand, this result would breed confusion and mistrust in our public schools, subverting the educational mission that Amici are pledged to support. Leaving the opinion below in place, in light of this Court's contrary precedent, would leave states, school districts, and school employees alike without clear guidance on an important issue weighing on the effective administration of public schools across the county. Only this Court can provide that needed clarity and, as such, certiorari should be granted.

Respectfully submitted,

RYAN KRIEGSHAUSER*
JOSHUA NEY
ALAN VESTER
KRIEGSHAUSER NEY LAW GROUP
15050 W. 138th St., Unit 4493
Olathe, KS 66063
Direct: (913) 303-0639
Fax: (785) 640-8446
ryan@knlawgroup.com
**Counsel of Record*

APPENDIX

Senator Bob Ballenger (AR)
Representative Sandy Salmon (IA)
Senator Renee Erickson (KS)
Senator Michael Fagg (KS)
Senator Beverly Gossage (KS)
Senator Richard Hilderbrand (KS)
Senator Ty Masterson (KS)
Senator Virgil Peck (KS)
Senator Mark Steffen (KS)
Senator Michael Thompson (KS)
Representative Emil Bergquist (KS)
Representative Doug Blex (KS)
Representative Jesse Burris (KS)
Representative Leo Delperdang (KS)
Representative Brett Fairchild (KS)
Representative Cheryl Helmer (KS)
Representative Steve Hubert (KS)
Representative Susan Humphries (KS)
Representative Stephen Owens (KS)
Representative Samantha Poetter (KS)
Representative Bill Rhiley (KS)
Representative Barbara Wasinger (KS)
Representative Kristy Williams (KS)
Representative Rick Edmonds (LA)
Representative Tammy Townley (OK)
Representative Doug Gilliam (SC)
Representative John McCravy (SC)
Representative Mike Burns (SC)
Representative Mark Smith (SC)
Representative Steven Long (SC)
Representative Garry Smith (SC)
Representative Melissa Oremus (SC)
Representative Sandy McGarry (SC)
Representative Stewart Jones (SC)

Representative Josiah Magnuson (SC)
Representative Shannon Erickson (SC)
Senator Paul Rose (TN)
Senator Page Walley (TN)
Senator Ed Jackson (TN)
Senator Mike Bell (TN)
Senator Steve Southerland (TN)
Senator Brian Kelsey (TN)
Senator Frank Niceley (TN)
Senator Bo Watson (TN)
Representative Debra Moody (TN)
Senator Charles Perry (TX)