

No. 21-418

In the Supreme Court of the United States

JOSEPH A. KENNEDY, PETITIONER,

v.

BREMERTON SCHOOL DISTRICT

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

**BRIEF OF *AMICUS CURIAE* CHAPLAIN ALLIANCE
FOR RELIGIOUS LIBERTY**

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STATEMENT OF INTEREST¹

The Chaplain Alliance for Religious Liberty is a private, non-profit association that advocates for and protects the religious liberty of military chaplains and those they serve. Most of Chaplain Alliance’s members and leadership are official representatives of their various faith groups who certify chaplains for service in the United States Armed Forces. Through this certification relationship, the Chaplain Alliance speaks on behalf of almost fifty percent of chaplains currently serving in the military.

The Ninth Circuit’s sweeping rule concerning unprotected government speech risks chilling the speech of *any* public employee who serves as a role model and mentor to others. Employees who could be affected by such a reading include military chaplains, who act as “coaches” for members of our armed forces every day. Indeed, as government employees who routinely engage in religious speech, military chaplains have a unique perspective to offer this Court. Chaplain Alliance therefore urges the Court to take up this case—and, in doing so, provide some much-needed guidance on how this Court’s government-speech jurisprudence applies to football coaches and other public employees who occupy leadership positions.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Ninth Circuit held in this case that petitioner was speaking as a government employee while he was praying on his team’s field because petitioner was in “a location

¹ Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Rule 37.2(a), counsel for both parties received timely notice and both parties have filed blanket consents to the filing of *amicus* briefs.

that he only had access to because of his employment,” and football coaches like petitioner are “clothed with the mantle of one who imparts knowledge and wisdom.” Pet. App. 14-15. In so doing, the Ninth Circuit effectively concluded that “teachers and coaches” lack First Amendment rights “from the moment they report for work to the moment they depart, provided that they are within the eyesight of [their] students”—a “highly tendentious” understanding of this Court’s government-speech case law that four members of the Court have explicitly rejected. Pet. App. 211 (Alito, J., respecting the denial of certiorari).

Many public employees besides football coaches are likewise “clothed with the mantle of one who imparts knowledge and wisdom.” Pet. App. 14. That list includes, for example, teachers, guidance counselors, social workers, and local government leaders. The list undoubtedly also includes military chaplains.² While “locat[ed]” in places that they “ha[ve] access to because of [their] employment”—such as Army bases and naval ships—military chaplains lead worship services, facilitate mental health workshops, and serve as personal counsellors for servicemembers. The tradition of having chaplains serve alongside American troops pre-dates the Founding, and it has long been “the opinion of top [American] generals” that in the absence of military chaplains, “the motivation, morale and willingness of soldiers to face combat would suffer * * * and our national defense would be weakened accordingly.” *Katcoff v. Marsh*, 755 F.2d 223, 228 (2d Cir. 1985).

The Ninth Circuit’s understanding of this Court’s government-speech case law could leave myriad public employees—including military chaplains—in a deeply uncertain state as to which of their speech is protected

² “In fact, the word chaplain is derived from *cappa*, the Latin word for cloak.” The Army Historical Foundation, *U.S. Army Chaplain Corps* (2021), available at <https://bit.ly/3oGWIEJ>.

and which is subject to government regulation.³ Military chaplains routinely serve in close proximity to servicemembers for extended periods of time, “mentoring, cheering, and reassuring” them. Hans Zeiger, *Why Does the U.S. Military Have Chaplains?*, Pepperdine Policy Review, Spring 2009, 15. To do their jobs effectively, chaplains—like all public employees—need strong First Amendment protections. The alternative could lead to a chilling of military chaplains’ speech—and, accordingly, a weakening of “the motivation, morale and willingness of [our] soldiers to face combat” and the other rigors of life in the military. *Katcoff*, 755 F.2d at 228. Because of the importance of this issue, the Court should grant the petition.

ARGUMENT

I. The Military Chaplaincy Plays a Critical Role in Our National Defense by Fostering Servicemembers’ Morale

“As long as armies have existed, military chaplains have served alongside soldiers, providing for their spiritual needs, working to improve morale, and aiding the wounded.” *U.S. Army Chaplain Corps*, *supra* n.2. The tradition dates back to Biblical times, with Moses exhorting the ancient Israelites to have a priest address the army before going out to war. *Deuteronomy* 20:2-3; see also *Joshua* 6:13 (noting that priests accompanied the ancient Israelites into battle).

The American tradition of military chaplaincy predates the Founding. “When the Continental Army was formed” in 1775, the “chaplains attached to the militia of the 13 colonies became part of our country’s first national army.” *Katcoff*, 755 F.2d at 225. The following year,

³ Although the First Amendment applies differently in the military context than in the civilian context, see, e.g., *Parker v. Levy*, 417 U.S. 733, 758 (1974), this Court has emphasized that even “in the military context” the First Amendment is not “entirely nugatory,” *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986).

General George Washington directed the “Colonels or commanding officers of each [Army] regiment” to “procure Chaplains accordingly,” noting that “[t]he blessing and protection of Heaven are at all times necessary but especially so in times of public distress and danger.” General George Washington, *General Orders, 9 July 1776*, National Archives, available at <https://bit.ly/3BmJwsr>. On March 3, 1791, the First Congress formally “authorized the appointment of a commissioned Army chaplain.” *Katcoff*, 755 F.2d at 225.⁴ Today, the American military has approximately 5,500 chaplains,⁵ representing nearly 200 religious denominations.⁶

In addition, over the course of history approximately 419 American military chaplains have fallen in the line of duty. Michael M. Phillips, *A Chaplain and an Atheist Go to War*, Wall St. J. (Sep. 4, 2010), available at <https://on.wsj.com/3iQOG8P>. That list includes four Army chaplains who, on February 3, 1943, willingly gave their lives to help their fellow servicemembers escape the *Dorchester*, a U.S. Army transport that had been torpedoed. John Brinsfield, *Chaplain Corps History: The Four Chaplains*, U.S. Army (Jan. 28, 2014), available

⁴ “That the First Congress provided for the appointment of chaplains” soon after “approving language for the First Amendment” in 1789 “demonstrates that the Framers considered” military chaplains to be “a benign acknowledgment of religion’s role in society.” *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 576 (2014); see also *id.* at 577 (explaining that the Establishment Clause does not forbid “a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change”).

⁵ See Press Release, Chaplain Alliance for Religious Liberty (Mar. 23, 2018), available at <https://bit.ly/3mGfhGE>.

⁶ See *Endorsing Organizations/Agents*, Office of the Under Secretary for Personnel and Readiness, available at <https://bit.ly/3oSUUJ9>.

at <https://bit.ly/3oRYPWi>.⁷ The list also includes Reverend George S. Rentz, a Presbyterian minister who, while serving as a United States Navy chaplain during World War II, circulated among his men while the enemy was firing upon his ship. *Commander George S. Rentz – Chaplain, USS Houston*, Naval History and Heritage Command (Jan. 7, 2021), available at <https://bit.ly/3DnDoR3>. As one of his officers later noted, “[w]hen the Sailors saw this man of God walking fearlessly among them, they no longer felt alone.” *Id.*

American generals have long recognized the critical importance of bolstering the fighting spirit of servicemembers. As General George S. Patton has famously noted, “[w]ars may be fought with weapons, but they are won by men. It is the *spirit* of the men who follow and of the man who leads that gains the victory.” Quoted in President Ronald W. Reagan, *Address at Commencement Exercises at the United States Military Academy* (May 27, 1981), available at <https://bit.ly/2Yrv6bU> (emphasis added). General George C. Marshall has similarly insisted that “[t]he soldier’s heart, the soldier’s spirit, the soldier’s soul, are everything. Unless the soldier’s soul sustains him he cannot be relied on.” General George C. Marshall, *Speech at Trinity College* (June 15, 1941), available at <https://bit.ly/3mC67uy>. By bolstering soldiers’ morale, determination and resolve, therefore, military chaplains play a crucial role in strengthening our national defense. See *Katcoff*, 755 F.2d at 228.

II. Military Chaplains Have Broad Job Responsibilities as Both Commissioned Officers and Spiritual Advisors for Servicemembers

Military chaplains “represent a unique, hybrid form of government employee.” Steven K. Green, *Reconciling*

⁷ The four chaplains were awarded a posthumous Special Medal for Heroism—an award that “was never given before and will never be given again.” Brinsfield, *supra*.

the Irreconcilable: Military Chaplains and the First Amendment, 110 W. Va. L. Rev. 167, 183 (2007). On the one hand, a military chaplain is a commissioned officer. *In re England*, 375 F.3d 1169, 1171 (D.C. Cir. 2004). He “is subject to the same discipline and training as that given to other officers and soldiers,” and “[w]hen ordered with troops into any area, including a combat zone under fire, he must obey.” *Katcoff*, 755 F.2d at 226. Thus, a military chaplain “is answerable to his commander in war and peace. As a defender of the U.S. Constitution, he is a partisan for a particular City of Man.” *Zeiger*, *supra*, at 13.

On the other hand, a military chaplain “is [also] the designated spokesman for the City of God in the nation’s Armed Forces.” *Ibid.* To that end, a military chaplain must “engage in activities designed to meet the religious needs” of servicemembers, such as by “conduct[ing] religious services,” “furnish[ing] religious education to soldiers and their families,” and “counsel[ing] soldiers.” *Katcoff*, 755 F.2d at 226, 228; see also United States Army Regulation 165-1, Army Chaplain Corps Activities § 2-3(b) (noting that members of the Army Chaplain Corps have “dual role[s]” as both a “professional military religious staff advisor” to the commander and staff and as a “professional military religious leader” to soldiers).

Due to the hybrid nature of military chaplains’ duties, the range of their professional activities can be extraordinarily broad. One Navy chaplain, for example, summarizing his “personal experiences as a chaplain or those of others known to him over more than twenty years of reserve and active duty,” notes that Navy chaplains, among other things,

engage in counseling sessions one-on-one with Sailors, Marines, other service members, and family members; attend and participate in staff meetings with other officers; visit workspaces and dining facilities; travel to far-flung lands; lead workshops on

healthy relationships, planning for deployment, and return and reunion issues; offer invocations and benedictions at assemblies ranging in size from a handful to hundreds of attendees; spend weeks or months at sea, interacting daily with the rest of the crew; accompany forces encountering hostile fire; broadcast an evening prayer over a ship's public address system just before "Taps" at the end of each day; [and] visit patients in sickbays or hospitals.

CDR William A. Wildhack III, CHC, USNR, *Navy Chaplains at the Crossroads: Navigating the Intersection of Free Speech, Free Exercise, Establishment, and Equal Protection*, 51 Naval L. Rev. 217, 240-241 & n.150 (2005). While engaging in all of these activities, of course, a military chaplain must carefully balance his roles as both a commissioned officer and "a professional representative of [his] particular religious denomination." *England*, 375 F.3d at 1171 (quotation marks and brackets omitted).

III. The Ninth Circuit's Decision Leaves First Amendment Protections for Government Employees—Such as Military Chaplains—in a Deeply Uncertain State

As noted above, numerous government employees—including military chaplains as well as teachers, guidance counselors, social workers, and local government leaders—are "clothed with the mantle of one who imparts knowledge and wisdom." Pet. App. 14. Thus, a lower court could read the Ninth Circuit's decision as deeming all "demonstrative communication" by such employees to be government speech, so long as the employee is near an individual who regards the employee as a role model. See, e.g., Pet. App. 16; see also, e.g., Pet. App. 90 (O'Scannlain, J., statement concerning the denial of rehearing en banc) (arguing that, under the Ninth Circuit's decision, "a teacher whose car parked on school property bears a bumper sticker for a presidential campaign" could "stand to be censored, disciplined, or even fired by [her] public

employer for any or no reason at all”). In the context of military chaplains specifically, it takes little imagination to realize why such a holding could potentially hinder a chaplain’s ability to provide counselling services, lead workshops, or impart religious guidance, among the myriad other activities described above.

Notably, some lower courts have recognized that the rule that this Court announced in *Garcetti v. Ceballos*, 547 U.S. 410 (2006)—namely, that “government employees generally have no First Amendment protection with respect to speech made ‘pursuant to their official duties’”—can “pose[] a particular threat to [some] uniquely situated public employees.” *Turner v. U.S. Agency for Glob. Media*, 502 F. Supp. 3d 333, 374 (D.D.C. 2020) (quoting *Garcetti*, 547 U.S. at 421). Cases involving people in such professions, including professors at public universities, see *Demers v. Austin*, 746 F.3d 402, 412 (9th Cir. 2014); *Adams v. Trustees of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 562 (4th Cir. 2011), and government-employed journalists, see *Turner*, 502 F. Supp. 3d at 375, highlight the dangers of broad applications of *Garcetti* in cases that implicate countervailing constitutional interests. These courts have recognized the importance of being sensitive to “additional constitutional interests that are not fully accounted for by * * * employee-speech jurisprudence,” and counsel in favor of a more nuanced and balanced First Amendment analysis. *Id.* (quoting *Garcetti*, 547 U.S. at 425). Military chaplains highlight the importance of recognizing that speech by public employees, even speech undertaken during working hours by people who occupy positions of leadership and mentorship, should not too readily be deemed “government speech” subject to regulation.

The Ninth Circuit’s sweeping approach in this case could leave government employees such as military chaplains dangerously uncertain as to when they are engaging in protected activity and when they are not.

That state of affairs is intolerable from a First Amendment perspective: this Court has repeatedly emphasized that “rigorous adherence to [precision and guidance] is necessary to ensure that ambiguity does not chill protected speech.” *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253-254 (2012); see also *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2384 (2021) (“First Amendment freedoms need breathing space to survive.” (quoting *Nat’l Ass’n for Advancement of Colored People v. Button*, 371 U.S. 415, 433 (1963))). Thus, for the sake of the innumerable public employees who serve as mentors to others—including military chaplains, who continue to play a critical role in bolstering our national defense—the Court should take up this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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