No. 18-12

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 THE THOMAS MORE SOCIETY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The Thomas More Society ("TMS") is a nonprofit organization devoted to the defense and advocacy of First Amendment rights, including freedom of speech and religious freedom. Incorporated as a 501(c)(3) not-for-profit corporation in Illinois and based in Chicago, TMS accomplishes its organizational mission through litigation, education, and related activities.

SUMMARY OF THE ARGUMENT

TMS urges this Court to accept this case for review to rectify a startling departure by the Ninth Circuit from the established precedent of this Court affirming the rights of public employees to speak on matters of public concern. *See, e.g.*, *Lane v. Franks*, 134 S.Ct. 2369 (2014); *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Pickering v. Bd. of Educ. of Twp. High Sch. Dist.*

[1] A blanket letter of consent from Petitioner has been lodged with the Clerk. Respondent has also consented to the filing of an *amicus* brief on behalf of Petitioner by the Thomas More Society. Pursuant to S. Ct. Rule 37.2, *amicus* Thomas More Society states that all parties' counsel received timely notice of the intent to file this brief. Pursuant to S. Ct. Rule 37.6, *amicus* further states that no counsel for a party wrote 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. No person or entity, other than the *amicus curiae* or its counsel, has made a monetary contribution to this brief's preparation or submission.

205, Will Cty., 391 U.S. 563 (1968). In this case, the Ninth Circuit affirmed the termination of Petitioner, Joseph Kennedy ("Kennedy" or "Petitioner"), a coach at a public high school, for engaging in 15-30 second silent or quiet prayers by himself because the prayers took place within view of students after high school football games. (Pet. App. 3, 34-35). The Ninth Circuit concluded that when Kennedy kneeled after games in view of students and parents he spoke as a public employee, not as a private citizen, and, accordingly, that his speech was not constitutionally protected. (Pet. App. 16, 34). This Court's decisions, however, have long made clear, "A State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006).

In reaching its decision, the Ninth Circuit disregarded the precedent of this Court in decisions such as *Pickering*, *Garcetti*, and *Lane*, by dispensing with any practical analysis of Kennedy's job responsibilities in determining whether he spoke as a private citizen or a public employee. The Ninth Circuit so broadly defined Kennedy's job as a public employee, premised on general aspirational descriptions of teachers and coaches as role models and moral exemplars (*see* Pet. App. 24-25), as to encompass all conduct by teachers and coaches within potential view of students and, onsequently, unprotected by the First Amendment. This case is an ideal vehicle for the Court to reaffirm that delineating public employee claims to First Amendment protection requires a careful analysis of a

public employee's actual day-to-day job responsibilities. By contrast, the broad strokes imprecise analysis adopted by the Ninth Circuit allows public employers to extinguish the First Amendment rights of their employees by simply adopting job descriptions that include generalities that encompass everything an employee does during business hours. For example, job descriptions requiring employees to be "good" or "loyal" employees, "to set a good example for other employees" and "to comport themselves in a manner consistent with the expectations and goals of the State because they are 'constantly being observed by others' as representatives of the State" would easily reach all speech by any public employee. Granting review in this case will allow the Court to reaffirm and further refine the law governing the First Amendment protection afforded to the speech of public employees by insisting that lower courts focus on substance and actual factual analysis, not sweeping generalizations, when conducting the inquiry that will circumscribe the First Amendment rights of public employees to speak.

ARGUMENT

This Court Should Accept This Case To Reaffirm That Public Employers May Not Use Expansive General Characterizations Of Public Employee Job Responsibilities As A Basis For Abrogating Their First Amendment Rights.

This Court has long and consistently affirmed that public employees, including public school teachers, may not constitutionally "be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest. . . ." *Pickering*, 391 U.S. at 568. That is because "a citizen who works for the government is nonetheless a citizen" and "[t]he First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." *Garcetti*, 547 U.S. at 419.

This Court has recognized that a public employee retains his right to comment as a citizen on matters of public interest but that the interests of a public employee in commenting on such matters must be balanced against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. The first step in determining whether a public employee's speech is protected by the First Amendment is a determination of whether the employee spoke as a private citizen on a matter of public concern. *See, e.g.*, *Garcetti*, 547 U.S. at 418. In this case, it is conceded that Kennedy's prayers constituted speech

related to a matter of public interest. (*See, e.g.*, Pet., pp. 11, 30, 56). The Ninth Circuit, however, concluded that Kennedy spoke as a private citizen, rather than a public employee, and so his speech was unprotected by the First Amendment. (Pet. App. 16, 34). In doing so, however, the Ninth Circuit ignored the controlling precedent of this Court.

The decisions of this Court in *Pickering*, *Garcetti* and *Lane* demonstrate that the determination of whether a public employee is speaking as a private citizen is based on analysis of an employee's specific day-to-day job responsibilities, rather than generalities, such as a "duty of loyalty to support his superiors in attaining generally accepted goals." *See Pickering*, 391 U.S. 568-69. In *Pickering*, this Court addressed a public school teacher's claim that his First Amendment rights were violated when he was fired for a letter written to the local newspaper that criticized the school board's use of public funds and asserted that the superintendent sought to silence teachers who wished to oppose tax increases for the school system. The Court rejected the claim that "acceptance of a teaching position in the public schools obliged [Pickering] to refrain from making statements about the operation of the schools 'which in the absence of such position he would have an undoubted right to engage in.' " *Pickering*, 391 U.S. at 567-68. The Court found that the statements critical of his employer were "neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the

classroom or to have interfered with the regular operation of the school generally." *Id.* at 572-73.

In *Garcetti*, the Court determined whether a deputy district attorney was speaking as a public employee or a private citizen when he wrote a memorandum questioning the propriety of a search warrant and recommending the dismissal of criminal charges. In conducting that analysis, the Court specifically considered the deputy district attorney's job responsibilities to "exercise[ ]certain supervisory responsibilities over other lawyers," to investigate aspects of pending cases (*Garcetti*, 547 U.S. at 413-14) and "to advise his supervisor about how best to proceed with a pending case." *Id.* at 421. Indeed, in *Garcetti*, it was undisputed that the disposition memorandum at issue was created "pursuant to his duties as a calendar deputy." *Id.* Based on its determination that the deputy district attorney "did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings," the Court found that in the context of the memorandum at issue his speech was not protected by the First Amendment. The Court concluded, "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Id.* at 421-22.

Importantly, in *Garcetti*, the Court rejected the idea that public employers may curtail the First Amendment rights of their employees by adopting

expansive job descriptions defining their responsibilities to include anything touching upon their employment. Responding to the dissent's concern that "employers can restrict employees' rights by creating excessively broad job descriptions" (*id.* at 424), the majority emphasized:

> The proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes.

Id. at 424-25.

Similarly, in *Lane*, the Court began its analysis with a recitation of Lane's specific job responsibilities as "overseeing . . . day-to-day operations, hiring and firing employees, and making decisions with respect to the program's finances." *Lane*, 134 S.Ct. at 2375. The Court determined that the speech at issue – Lane's testimony relating to his termination of an employee, who was also a State representative, because she rarely, if ever, came to work – constituted speech as a citizen for First Amendment purposes even though it was information he learned during his employment. *Id.* at 2378. In distinguishing *Garcetti*, the Court emphasized, "The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." *Id.* at 2379. The Court held, "Sworn testimony

in judicial proceedings is a quintessential example of speech as a citizen for a simple reason: Anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth." *Id.* [Citations omitted.]

This Court's decisions in in *Pickering*, *Garcetti* and *Lane* establish that a determination of whether a public employee is speaking as an employee or a citizen is a practical determination that must be made with reference to an employee's specific job responsibilities. In this case, however, the Ninth Circuit ignored the question of whether Kennedy's 15-30 second prayers fell within the scope of Kennedy's actual day-to-day responsibilities such as supervising his players, coaching football, caring for injuries and maintaining equipment. (*See* Pet. App. 2-3, 24-25, 57). The Ninth Circuit similarly ignored whether the speech fell within even his more broadly stated responsibilities such as demonstrating "sportsmanlike conduct," "approach[ing] officials with composure," "obey[ing] Rules of Conduct," "communicat[ing] effectively with parents" or "maintain[ing] positive media relations." (App. 2-3, 24-25). Instead, the Ninth Circuit concluded that since Kennedy could be "constantly observed by others" (presumably like most public employees working with other employees and, sometimes, members of the public), and was "entrusted" "to be a coach, mentor and role model," all of his even potentially observable behavior related to his role as "a role model and moral exemplar" and was undertaken as a public employee and not as a private citizen. (*See* Pet. App. 23-27). This

is, however, precisely the kind of impractical, all-encompassing assessment that the Court expressly rejected in *Garcetti*. As the precedent of this Court establishes, a public employer may not so broadly define an employee's job responsibilities so as to foreclose any opportunity to speak as a citizen on matters of public concern. The contrary rule adopted by the Ninth Circuit impermissibly requires public employees to relinquish any First Amendment right to speak on any matter of public interest which in any way touches upon their employment.

CONCLUSION

For the foregoing reasons, and those set forth in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

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