No. 21-418

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

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are United States Senators and Members of the House of Representatives who share a strong interest in upholding Congress's long tradition of protecting religious liberty. *Amici* believe that the decision below threatens to impermissibly turn the Establishment Clause into a ban on individual religiosity in public schools and to deprive teachers and coaches (who are among the *amici*'s constituents) of their fundamental rights.

Amici are:

United States Senators

James Lankford of Oklahoma

Roy Blunt of Missouri

John Boozman of Arkansas

Kevin Cramer of North Dakota

Ted Cruz of Texas

Steve Daines of Montana

James M. Inhofe of Oklahoma

Mike Lee of Utah

Marco Rubio of Florida

Tim Scott of South Carolina

John Thune of South Dakota

Roger F. Wicker of Mississippi

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have filed blanket consents to the filing of *amicus* briefs at the merits stage. The parties were given timely notice under Rule 37(2)(a).

Members of the House of Representatives

Vicky Hartzler of Missouri
Robert B. Aderholt of Alabama
Brian Babin of Texas
Dan Bishop of North Carolina
Ted Budd of North Carolina
Bob Good of Virginia
Lance Gooden of Texas
Richard Hudson of North Carolina
Ronny Jackson of Texas
John Joyce, M.D., of Pennsylvania
Debbie Lesko of Arizona
Barry Loudermilk of Georgia
Alex X. Mooney of West Virginia
Randy K. Weber of Texas

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent Bremerton School District fired Petitioner Joseph A. Kennedy from his job as a high school football coach for kneeling alone in silent prayer at midfield after a game.

This Court's review is urgently needed to correct the Ninth Circuit's clearly erroneous interpretation of the Establishment Clause that upheld Respondent's firing of Kennedy and obliterates the Free Exercise rights of public school teachers and coaches. The immediate and cascading effects of this case can scarcely be overstated—if the Ninth Circuit's holding is left to stand, certain school districts will be emboldened (and others will feel compelled) to curtail the Free Exercise and Speech rights of half a million public school teachers and coaches who work in Ninth Circuit jurisdictions, while seriously threatening those rights for the three million teachers and coaches in other circuits nationwide.[2]

According to the Ninth Circuit, teachers' and coaches' speech degrades into unprotected government speech the moment they step through the schoolhouse gate and engage in "expression . . . during a time when [they are] generally tasked with communicating with students"—meaning any time during school hours or functions. *See Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004, 1015 (9th Cir. 2021). Perhaps realizing that position is indefensible, the Ninth Circuit doubles down by concluding that even if Kennedy's speech is

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[2] Cristobal de Brey et al., *Digest of Education Statistics 2019*, U.S. Dep't of Educ. Nat'l Ctr. for Educ. Stat. at Inst. of Educ. Scis., at 6 (55th ed. 2021).

private and protected, the Establishment Clause still requires the School District to shut it down and punish him to avoid the perception that it "endorsed" Kennedy's religious beliefs. *See id.* at 1016–19.

Under this expansive legal theory, any private religious expression by a teacher or coach violates the Establishment Clause and requires the school's immediate and decisive action to stop it—all because there's a chance that someone might think that the School District endorses the otherwise private religious expression.[3] But that theory, of course, contradicts both the Establishment Clause's purpose and this Court's precedent.

The Establishment Clause was enacted to protect the religious practice and expression of individuals and minorities from the preferences of majority rule, whether that majority be theist or atheist. The drafters never intended to eradicate religiosity in public life—whether in the form of prayer or any other expression. But the Ninth Circuit's approach falsely pits the Free Exercise and Establishment Clauses against each other in a zero-sum game. Neither the history of the Establishment Clause nor this Court's prior interpretations of the Clause requires this

[3] Establishment Clause issues should not be evaluated from the perspective of an "unreasonable [or] mistake-prone observer," *Green v. Haskell Cnty. Bd. of Comm'rs*, 574 F.3d 1235, 1243 (10th Cir. 2009) (Gorsuch, J., dissenting from the denial of rehearing en banc), who is "reasonably biased, impaired, and distracted" so as to mistake private religious conduct as state-endorsed action, *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1110 (10th Cir. 2010) (Gorsuch, J., dissenting from the denial of rehearing en banc). But that is precisely what the Ninth Circuit has done here and is an independent reason to reverse the holding below.

tension. A proper understanding of the Establishment Clause, this Court's treatment of it, and our nation's centuries of public prayer exposes the fallacy of the court's holding below.

The importance of correcting this error is pressing. This case is about far more than a coach kneeling on a football field to pray. The Ninth Circuit's ruling imperils the most basic forms of individual religious expression by each of the public school teachers and coaches within its jurisdiction. The effect is alarming. Take, for example, a teacher who observes Ash Wednesday, or a principal who visibly bows her head in silent prayer in a busy cafeteria before eating. The Ninth Circuit's ruling requires schools to tamp down all such expressions—or terminate all teachers, coaches, and staff who will not check their religion at the door—under the auspice of the Establishment Clause. And if left uncorrected, this ruling threatens a paralyzing effect not just in the Ninth Circuit and not just in the school context, but nationwide and for all public employees. Challengers to any and all public religiosity will be empowered and emboldened to seek to stretch this new precedent even further. Schools and other public employers—unable to sacrifice the time or resources to engage in litigation—will likely err on what they believe is the side of caution by banning all religious expression. This is not just a slippery slope; it is a cliff.

Simply put, merely because one becomes a public school teacher or coach ought not require the surrender of religious liberty protected by the First Amendment. The Court should grant certiorari and restore public employees' First Amendment rights.

ARGUMENT

I. The First Amendment Provides Dual Guarantees of Religious Liberty: The Establishment Clause and the Free Exercise Clause.

The Establishment Clause is not an "anti-religion" clause in perpetual tension with the "pro-religion" Free Exercise Clause. Far from it, the Religion Clauses, each in its own way, work to protect religious freedom of individuals and groups. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000) ("Indeed, the common purpose of the Religion Clauses 'is to secure religious liberty.'"). Yet the Ninth Circuit has now affirmatively weaponized the Establishment Clause to banish private, voluntary religious activity by public employees. *See Kennedy v. Bremerton Sch. Dist.*, 4 F.4th 910, 938 (9th Cir. 2021) (O'Scannlain, J., respecting the denial of rehearing en banc) ("[T]he opinion subverts the entire thrust of the Establishment Clause, transforming a shield for individual religious liberty into a sword for governments to defeat individuals' claims to Free Exercise.").

The Ninth Circuit misapplies the Establishment Clause by either (i) deigning one man's personal religious expression to be government action, or (ii) finding a violation of the Establishment Clause without the requisite government action. *See Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring in part and concurring in the judgment) ("[A]n Establishment Clause violation must be moored in government action."); *see also Manhattan Cmty. Access Corp. v.*

Halleck, 139 S. Ct. 1921, 1926 (2019) (explaining, in the Free Speech context, that "the First Amendment constrains governmental actors and protects private actors").

Both Establishment Clause theories fail. Indeed, by concluding that teachers' and coaches' speech degrades into unprotected government speech whenever they are on the job, the Ninth Circuit collapses the "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." *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 302 (quoting *Bd. of Educ. of Westside Cmty. Schs. v. Mergens ex rel. Mergens*, 496 U.S. 226, 250 (1990)). But this Court's Religion Clause jurisprudence contains no such occupation- or location-based binary of Free Exercise Clause and Establishment Clause rights.[4] *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 115 (2001) (noting that the Supreme Court "ha[s] never extended [its] Establishment Clause jurisprudence to foreclose private religious conduct during nonschool hours merely because it takes place on school premises where . . . children may be present").

The reality is that the Establishment Clause does not and has never required religion "to be strictly excluded from the public forum." *McCreary Cnty. v. Am. Civ. Liberties Union of Ky.*, 545 U.S. 844, 886

[4] As the Eleventh Circuit noted, it is not the public location that makes some speech attributable to the government, but rather it is the entanglement with or endorsement by the government that turns an employee's words into government speech that can be controlled and silenced by the government. *See Chandler v. Siegelman*, 230 F.3d 1313, 1316 (11th Cir. 2000).

(2005) (Scalia, J., dissenting). To the contrary, religion is enshrined with our history and in our government. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 212 (1963). It is only by whitewashing that rich and colorful history that the Ninth Circuit's decision could even begin to approximate faint coherence.

History matters. A great deal in fact—as shown by the many times this Court has already looked to history in interpreting the Establishment Clause. *See Kennedy*, 4 F.4th at 950 (Nelson, J., dissenting from the denial of rehearing en banc) (compiling cases in which the Court has interpreted the Establishment Clause using history). The Court looked to historical practice to uphold the constitutionality of legislative prayer in *Marsh v. Chambers*, 463 U.S. 783, 787–89 (1983), and *Town of Greece v. Galloway*, 572 U.S. 565, 575–76 (2014). In *American Legion*, the Court noted that in analyzing the "particular [Establishment Clause] issue at hand" it must rely on "history for guidance." *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2087 (2019) (plurality op.). Here, our history shows a long, unbroken tradition of sanctioning individual religious expression in public spaces.

George Washington began his first inaugural address with what he described as "fervent supplications" to God, spoke of God's "[i]nvisible [h]and" conducting "the affairs of men," and ended in prayer for God's "divine blessing." George Washington, First Inaugural Address (Apr. 30, 1789), *reprinted in* The American Presidency Project (John Woolley & Gerhard Peters eds.), https://www.presidency.ucsb.edu/documents/inaugural-address-16 (last visited Oct. 18, 2021).

The First Congress initiated the practice of opening legislative sessions with a prayer. *See Marsh*, 463 U.S. at 787.

And the Supreme Court under Chief Justice John Marshall opened its sessions by praying "God save the United States and this Honorable Court." *Engel v. Vitale*, 370 U.S. 421, 446 (1962) (Stewart, J., dissenting).

These actions were not just indicative of the time, but have continued today, making clear that religion was never meant to be excluded from public life.

Indeed, the Founders' understanding of the Establishment Clause was rooted in the oppression that they and their ancestors had personally experienced and ultimately escaped. That history included centuries of religious strife wherein religious sects codified and enforced their understanding of orthodoxy, often violently, depending on the ebb and flow of political power.

The British Parliament's Act of Uniformity, for example, instituted the Anglican Book of Common Prayer as the only lawful form of worship, with punishments of up to life imprisonment for leading unorthodox services. Act of Uniformity, 1549, 2 & 3 Edw. 6, ch. 1 (Eng.). Similarly, the Corporation Act of 1661 restricted public office to members of the Church of England, 13 Car. 2, stat. 2, ch. 1 (Eng.), and the Test Act of 1673 required all public servants take an oath of allegiance to the Church and denounce key tenets of Roman Catholicism. 25 Car. 2, ch. 2 (Eng.).

Such intolerance was sadly the norm in the aftermath of the Protestant Reformation, leading to dramatic episodes of unthinkable violence, like the St.

Bartholomew's Day Massacre in France, and wars of religion, such as the Thirty Years' War, that spread carnage and misery across continental Europe. Not surprisingly, religious minorities like the French Huguenots—the perennial losers of such religious conflict—sought refuge in the New World. Indeed, a "large proportion of the early settlers of [the United States] came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches." *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 8 (1947).[5]

It was against such widespread and state-sponsored violations of individual conscience that the Free Exercise Clause and Establishment Clause were enacted. The Founders would never have imagined that the Establishment Clause could be used as an imprimatur to validate coercion, intolerance, or bigotry on account of one's religion, as the Ninth Circuit attempts to do here.

This proper understanding of the Establishment Clause and its application to the public educational context is further confirmed by the extensive history of religion in schools specifically, as aptly set forth in Judge Nelson's dissent to the Ninth Circuit's denial of en banc review. *See Kennedy*, 4 F.4th at 951–52 (Nelson, J., dissenting from the denial of rehearing en banc). Simply put, "[t]he Religion Clauses of the First Amendment . . . [b]y no means . . . impose a prohibition

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[5] *See also Mayflower Compact* (1620), *reprinted in* The Avalon Project, *Mayflower Compact: Agreement Between the Settlers at New Plymouth: 1620*, Yale Law School (2008), https://avalon.law.yale.edu/17th_century/mayflower.asp (confirming the religious motivations of the first colonists).

on all religious activity in our public schools." *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 313.

* * *

In sum, the Ninth Circuit's transformation of the Establishment Clause into a weapon against individual religious practice—specifically here to eradicate the Free Exercise rights of public school employees—cannot be squared with any historical interpretation of the Religion Clauses.

II. The Ninth Circuit's Rule Threatens the Right of Public Employees to Express their Religious Beliefs.

The Ninth Circuit sets forth an expansive, double-barreled approach to the Establishment Clause. First, anything teachers or coaches say or do while on school property or during school functions is government speech. Thus, teachers' and coaches' religious speech issues from the government and necessarily violates the Establishment Clause. Second—even if that theory is wrong (and it certainly is)—any private religious speech by teachers or coaches while on the job poses such a grave risk of being taken as school-endorsed speech that it violates the Establishment Clause.

The outcome is that if teachers or coaches express their private religious beliefs in a school organized setting, the Establishment Clause is triggered and the state *must* police it. That's what happened to Kennedy, whose half-minute post-game prayers were apparently thirty seconds too long.

The Ninth Circuit's novel interpretation of the religion clauses achieves the rare trifecta of conflicting with this Court's Free Exercise, Free Speech, and

Establishment Clause jurisprudence. And although this ruling is an outlier, it is also now binding precedent in the Ninth Circuit that, if undisturbed, threatens to metastasize, transforming public schools across the country into the "enclaves of totalitarianism" that this Court warned about nearly sixty years ago. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

A. The Ninth Circuit's Rule Threatens All Manner of Religious Expression In Schools.

"[P]ublic employees do not surrender all their First Amendment rights by reason of their employment." *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006). Nothing in that precedent carves out public educators. Instead, it is long been this Court's "unmistakable holding" that teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506; *Good News Club*, 533 U.S. at 115 (noting that the Court has "never extended [its] Establishment Clause jurisprudence to foreclose private religious conduct during nonschool hours merely because it takes place on school premises where elementary school children may be present"). The Ninth Circuit holding bucks that precedent. And alarmingly, it does so in a manner that treats this particular case as so far beyond the limits of the Establishment Clause that presumably a wide swath of even more unobtrusive expressions of faith would be likewise off limits. *See Kennedy*, 991 F.3d at 1009 ("Although there are numerous close cases chronicled in the Supreme Court's and our current Establishment Clause caselaw, this case is not one of them.").

The likely implications of the Ninth Circuit's ruling are far-reaching and troubling:

- A teacher cannot visibly bow her head in silent prayer as she prepares to eat her lunch in a cafeteria full of students;
- A Jewish teacher may not answer his students' curiosity about the High Holy Days and the reasons for his own observance;
- A high school soccer coach cannot observe Ash Wednesday before leading her team during practice; and
- A math teacher cannot silently read the Quran as he proctors a pop quiz.

The list goes on. Crucifixes, yarmulkes, turbans, religious tattoos, items on the teacher's desk, and classroom decorations all threaten to confuse or upset students and render public school teachers constitutional outlaws, if the Ninth Circuit is to be believed. The teacher who receives bad news and utters a brief, silent prayer within sight of students offends the Establishment Clause. So does a coach who makes the sign of the cross after witnessing a devastating physical injury—especially if on the court or field and in sight of students. The absurdity is self-evident. Yet the Ninth Circuit has imagined a world in which students and spectators believe that obviously personal religious conduct is actually school-endorsed. Therefore it repurposes the Establishment Clause to bar all such expression by teachers and coaches. Ironically, these very practices have long been viewed not only as permissible, but constitutionally protected *by the Establishment Clause*. *See, e.g.*, *Good News Club*, 533 U.S. at 115.

Indeed, little distinguishes the above examples from Kennedy. Consider the pattern: demonstrative religious activity takes place in the view or general presence of students, and the employee's visibility or status of authority is due only to his public employment. The Ninth Circuit assures us that its holding does not extend far enough to condemn the teacher who prays before eating. But how can this be true? Aside from the court's say-so, there is no meaningful distinction, and this assurance will hardly present more than minor speed bump for any future litigant challenging such conduct.

The very things that the Ninth Circuit pointed to in Kennedy's case are mirrored in the cafeteria example. The teacher, like Kennedy, is tasked with serving as a role model to her students. The teacher, like Kennedy, demonstratively expresses her religion in front of her students. And the teacher, like Kennedy, only has access to the cafeteria because of her employment. According to the Ninth Circuit's rationale, in these circumstances, students would necessarily understand that the school endorsed the teacher's prayer. That is obviously absurd. But should a student witness the prayer and report it to his parents, they may now sue the school for allowing the constitutional offense of prayer before a meal. This distinction is also fraught with potential nuances that a litigant would surely claim shifts the analysis. What if the teacher sits in the center of the room instead of on the edge? What if other students see the teacher praying and choose to join her in doing so? The only truly safe way for a teacher to engage in such conduct under this precedent would be to retreat to the privacy of an empty room to hide her religiosity.

The Ninth Circuit, then, has crafted an extraordinary rule that pits constitutional right against constitutional right. This is obvious in the court's methods. The Ninth Circuit repeatedly faulted Kennedy both for the way he exercised his religious beliefs, *see Kennedy*, 991 F.3d at 1018 ("Kennedy demanded that [his prayer] take place immediately after the final whistle."), and the way he defended them, *see id*. at 1017 (scolding Coach Kennedy for "engag[ing] in a media blitz" and for "his pugilistic efforts to generate publicity"). In doing so, the Ninth Circuit drained both the Free Speech and the Free Exercise Clauses of their meaning by retaliating against Kennedy for seeking to vindicate his Free Exercise rights by zealously exercising his Free Speech rights.

This sends an unmistakable message to teachers and coaches: if you exercise one right, then you lose another. But this Court has never treated the First Amendment's constituents as combatants rather than companions. "Indeed, the common purpose of the Religion Clauses 'is to secure religious liberty,'" not banish it to the broom closet. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 313 (citing *Engel*, 370 U.S. at 430); *Schempp*, 374 U.S. at 223.

Ultimately the Ninth Circuit's approach does not merely mandate that schools prohibit religious expression. It goes one step further, requiring schools to affirmatively ban religious expression because of its content. Assuming Kennedy's speech was private, the Ninth Circuit has told schools that they must regulate religious speech and religious speech only. Indeed, that is the unmistakable implication from the Court's holding, which forcibly imparted to public schools a

"compelling interest" in stamping out demonstrative religious expression.

Under the guise of avoiding an Establishment Clause violation, schools—and, likely more troubling, would-be watchdog litigants *against* schools—are now empowered to specifically target religious expression. Suppose, for instance, that Kennedy knelt to protest police brutality before a game rather than to kneel and pray after games. The Ninth Circuit's reading of the Establishment Clause does not implicate such a free speech protest even though the symbolic taking of the knee may be an identical gesture to prayer. Yet the Ninth Circuit's interpretation not only makes it acceptable for the school to punish the prayer, but in fact directs the school to do so. This cannot be squared with this Court's repeated caution against imposing "special disabilities" on religion based on its "religious status." *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). Indeed, other courts have reasonably come to the opposite conclusion: that is, speech receives *more protection*, not less, if it implicates Religion Clause interests. *See Ill. Republican Party v. Pritzker*, 973 F.3d 760, 764 (7th Cir. 2020) ("[A] comparison between ordinary speech (including political speech, which all agree lies at the core of the First Amendment) and the speech aspect of religious activity reveals something more than an 'apples to apples' matching. What we see instead is 'speech' being compared to 'speech plus,' where the 'plus' is the protection that the First Amendment guarantees to religious exercise.").

The Ninth Circuit now mandates what this Court has long forbidden: viewpoint-based discrimination on

the basis of religion. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017).

B. The Ninth Circuit's Holding Requires Schools to Dictate When, Where, and How Teachers Exercise Their Religion.

The Ninth Circuit's ruling aims the Establishment Clause directly at private expressions of religiosity. Indeed, there is no ambiguity here: If a teacher or coach's religious expression will take place near students while the teacher or coach is on duty (although the prayer here occurred after the game), the school cannot allow it. The Ninth Circuit thus demands greater public regulation of private religious expression—the very thing the Establishment Clause exists to prevent.

As Judge O'Scannlain points out, the Ninth Circuit's holding inevitably leads to "the troubling conclusion that the Constitution not only permitted, but *required*, the District to punish Kennedy's private prayer." *See Kennedy*, 4 F.4th at 938 (O'Scannlain, J., respecting the denial of rehearing en banc) Thus, the holding leaves schools with no option but to aggressively police the religious activity of their teachers and coaches—lest they be sued. *See* Sarah M. Isgur, Note, *"Play in the Joints": The Struggle to Define Permissive Accommodation Under the First Amendment*, 31 Harv. J.L. & Pub. Pol'y 371, 371 (2008) ("Public schools in particular have been caught in the crossfire between the mandate of the Free Exercise Clause and the prohibition of the Establishment Clause.").

The court's ruling, in other words, "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 [an Establishment Clause] claim." *Kennedy*, 4 F.4th at 945 (Ikuta, J., dissenting from the denial of rehearing en banc). This creates an obvious incentive for schools "to silence their employee's religious activities, even in moments of private prayer, so long as they can be seen by students." *Id.*

But of the several purposes of the Establishment Clause that this Court has pointed out, scrubbing brief, personal religious expression by public school teachers is not one of them. In fact, schools' interest in separating church and state is "limited by the Free Exercise Clause"—not the other way around. *Widmar v. Vincent*, 454 U.S. 263, 276 (1981) And the Establishment Clause was never meant to authorize aggressive policing of religious expression. To the contrary, "governmental intervention in religious matters can itself endanger religious freedom." *Van Orden v. Perry*, 545 U.S. 677, 683 (2005).

Put differently, the Establishment Clause, properly understood, is a shield protecting religious minorities and cultivating religious diversity. *See Lynch v. Donnelly*, 465 U.S. 668, 678 (1984) ("In our modern, complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court."). But while prophets of old longed for the day when swords would be beaten into plowshares, *see Isaiah* 2:4, the Ninth Circuit strikes a more bellicose tone, transforming a tool to cultivate religious diversity into a sword to

strike down any religious expression of which it disapproves.

The practical results that will flow from the Ninth Circuit's decision are clear. This Court has noted repeatedly that schools have a compelling interest in preventing Establishment Clause violations. And if even brief, personal expressions of religious belief by teachers or coaches who are on duty can trigger the Establishment Clause, then schools will have no choice but to monitor their religious employees and implement overbroad measures as a prophylaxis against violating the Establishment Clause. To the extent that religious demonstrations in school are acceptable, they can happen only on the state's terms. But as this Court has warned, "[f]reedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots." *Tinker*, 393 U.S. at 513.

The Ninth Circuit's holding needlessly sets teachers' and coaches' interest in free exercise against schools' interest in obeying the Establishment Clause, as if those interests are mutually exclusive. Then it constructs a false legal framework in which the latter will always and emphatically swallow the former—against this Court's explicit instruction. *See Lynch*, 465 U.S. at 672. Where the Free Exercise and Establishment Clauses are designed to coexist, the Ninth Circuit treats them as enemies by inviting schools to control their teachers' and coaches' fleeting religious expression. This empowers schools to tell their teachers and coaches when, where, and how they may follow the dictates of their conscience, rendering

to Caesar what has belonged to God under centuries of American constitutional tradition.

In short, the Ninth Circuit's decision rests on a reading of the First Amendment that the Ninth Circuit invented. There is no basis in the First Amendment's text or history for it, nor does the court's decision comport with this Court's longtime understanding of the relationship between the Free Exercise and Free Speech Clauses. The Constitution does not require public schools to sterilize religious expression. If anything, "[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution." *Lee v. Weisman*, 505 U.S. 577, 598 (1992). The Ninth Circuit's decision attempts to advance precisely that.

CONCLUSION

For these reasons, and those advanced by the Petitioner, the Court should grant the petition for a writ of certiorari.

OCTOBER 18, 2021

Respectfully submitted,

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