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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

Four Justices concluded at the preliminary-injunction stage of this case that the Ninth Circuit's free-speech ruling was "troubling" and might "justify review" if the court "continue[d]" to embrace it. Pet.App.211 (Alito, J.). In the decision below, the Ninth Circuit did just that—and more. Indeed, the court managed to couple its misguided free-speech holding with even more alarming constructions of the Religion Clauses, culminating in the remarkable conclusion that schools are *constitutionally compelled* to suppress all private religious expression by on-duty teachers and coaches. The upshot is that Ninth Circuit law is now even further removed from the precedent of this Court and the decisions of other circuits, while the private religious expression of half-a-million teachers and coaches (especially those unwilling to take the loss of their First Amendment rights meekly) stands on the brink of extinction. As 11 Ninth Circuit judges and numerous amici have attested, the decision below cries out for review.

The district's effort to resist that conclusion is a study in misdirection. The bulk of its opposition rests on the repeated premise that Coach Kennedy claims a constitutional right not to make a quiet post-game prayer but to deliver religious-infused "motivational speeches" to students. But whatever other conduct may have pre-dated this litigation without drawing a contemporaneous objection, this lawsuit has always concerned only whether a public-school employee has a constitutional right to engage in brief, quiet prayer *by himself*. Indeed, the district itself conceded as much years ago in its communications with

Kennedy—a concession that is conspicuously absent from its submission to this Court.

The district's felt need to obfuscate the facts is understandable; it has little to offer on the law. The district barely disputes that the Ninth Circuit's decision converts virtually all public-employee speech into government speech lacking First Amendment protection. The district does not even acknowledge the Ninth Circuit's remarkable holding that even *private* religious speech by teachers and coaches violates the Establishment Clause, presumably because it recognizes that it is indefensible. The district denies the clear circuit conflict only by insisting that public employees are confined to "nondemonstrative" expressions of faith. And the district's complaints that additional players and even spectators sought to join Kennedy in his prayers *after* the district told him to stand down underscores that the only viable government response to private religious speech is neutrality and accommodation, not hostility and suppression. The Ninth Circuit lost sight of that fundamental principle in the decision below; this Court's intervention to reaffirm it is imperative.

I. The Decision Below Is Egregiously Wrong.

The Ninth Circuit's decision is "at odds with Free Speech, Free Exercise, and Establishment Clause jurisprudence all at once"—a trifecta that "certainly warrant[s]" this Court's review. Pet.App.79 (O'Scannlain, J.). The district's attempts to deny this First Amendment triple threat fail at every turn.

1. The Ninth Circuit started out on the same wrong foot below as it did at the preliminary-injunction stage, reaffirming its holding that

Kennedy's religious expression was government speech and hence devoid of any First Amendment protection. The district wholeheartedly embraces that holding, insisting that because Kennedy "was 'clothed with the mantle of one who imparts knowledge,'" "was on duty … 'until the last kid leaves,'" and "had access" to the football field "only … because of his employment," his private expression of faith actually belonged to the district. BIO.22-23, 33; Pet.App.15. That is precisely the sort of "excessively broad job description[]" that this Court's precedent precludes. *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006). It would eliminate any avenue for teachers and coaches to engage in private religious expression on school grounds, a result four members of this Court have already found "troubling." Pet.App.211 (Alito, J.).

As this Court's decisions teach, the "critical question" in separating private and government speech is whether the "speech at issue is itself ordinarily within the scope of an employee's duties," *Lane v. Franks*, 573 U.S. 228, 240 (2014)—not simply whether it occurred while the employee was on premises or "on duty." The Ninth Circuit's conflation of those distinct inquiries produces the untenable consequence of banishing religious speech from places of public employ entirely. Indeed, while the district is eager to distinguish a teacher who "bows her head in silent prayer before lunch in the school cafeteria," it tellingly never explains what "principled distinction" would differentiate that pre-meal prayer from Kennedy's post-game prayer, such that only the latter constitutes government speech. BIO.23 n.5.

Instead, the district tries to make this case about far more than a quiet, post-game prayer. By the district's telling, "this case is not about anyone's 'brief, quiet prayer by himself'"; it is about Kennedy's purported "demand" to "pray[] with and to students" in "post-game speeches." BIO.21, 23-24. In fact, Kennedy never made any such "demand" in this suit. Rather, as the district itself conceded long ago, the sole "issue" in dispute here is "personal, private prayer … on the 50 yard line." E.R.267.

To be sure, Kennedy had sometimes *in the past*—without any contemporaneous objection—given post-game motivational talks that included religious content. E.R.114. But once the district expressed concern with his religious expression, the only practice Kennedy ever again undertook or asked to undertake was saying a brief, quiet, post-game prayer by himself at midfield. Pet.App.10-11; E.R.6. He neither claimed nor sought a right to "deliver" prayers "to students," BIO.i—*as the district itself contemporaneously acknowledged*, *see, e.g.*, E.R.185; E.R.267 (email from superintendent acknowledging that the issue "has shifted from leading prayer with student athletes to" whether Kennedy could "conduct a personal, private prayer … on the 50 yard line"). Whatever happened previously, this lawsuit has always been about Kennedy's ability to conduct such "a personal, private prayer."[1]

[1] The district's claim that Kennedy "alerted the media that the only acceptable outcome would be for the District to permit him to continue his past prayer practice," BIO.10, is both irrelevant and highly misleading. What matters is the relief Kennedy sought in court, but what he told the media was unacceptable was

Nor did Kennedy lose his right to pray because others chose to join him on the field and engage in their own personal expressions of faith *after* the district suppressed Kennedy's religious exercise. That was of course *their* constitutional right, not any form of government speech. *See, e.g.*, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). That showing of solidarity was also an entirely predictable consequence of the district's suppression of Kennedy's private religious speech. Intolerance of private religious speech is neither popular nor constitutional. The sensible and lawful course for the government is neutrality, not hostility to private religious expression.[2]

All of that readily distinguishes the district's breathless parade of horribles. Of course the government may discipline "a geometry teacher" who "converted her classes into partisan political rallies" or

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the district's insistence that his religious expression be hidden behind closed doors, rather than take place on-field. And the district's accusation that Kennedy failed to "respond to the District's October 16 or October 23 letters" offering him the "accommodation" of praying in private, BIO.10, is simply wrong. While the parties' settlement communications are (unsurprisingly) not all in the record, the district is well aware that it was *the district* that declined Kennedy's counsel's repeated offers to meet after he received the October letters.

[2] The district mistakenly suggests that deeming Kennedy's speech private would require converting school football fields into public fora. BIO.20 n.4. That just underscores the district's miserly view of the First Amendment rights of teachers and coaches. *Tinker* held that neither students nor teachers shed their First Amendment rights at the schoolhouse gates, but no one (save possibly the district) thinks *Tinker* converted every schoolhouse into a public forum.

a "court clerk who sang showtunes to litigants." BIO.24. Those are obvious examples of non-germane speech occurring "within the scope of an employee's duties." *Lane*, 573 U.S. at 240. A public employer need no more tolerate such speech than it need tolerate a football coach who used timeouts to talk trigonometry or the infield-fly rule rather than gridiron strategy. Here, by contrast, Kennedy's prayer did not occur within the scope of his duties; he sought to pray only after games concluded, after the customary handshake with the opposing team, and after students were separately engaged in other post-game activities like singing the fight song. E.R.107-09. The district cannot convert that private religious expression into its own speech by pretending that Kennedy claimed a right to do something else entirely.

2. The Ninth Circuit's new alternative holding that the district was free to prohibit Kennedy's prayer even if it *was* private expression is even less defensible. Indeed, even the district conspicuously declines to defend the court's startling holding that "allowance of Kennedy's conduct would violate the Establishment Clause," Pet.App.2-3—in other words, that the Constitution *compels* suppression of private religious expression by public school teachers and coaches. But the district fares no better in defending the junior-varsity variant that it could suppress Kennedy's private speech "because of Establishment Clause *concerns*." BIO.25 (emphasis added). Once it is accepted that Kennedy's religious speech is his own, and not the government's, there are no remaining Establishment Clause concerns, let alone violations.

To the contrary, this Court has squarely and repeatedly rejected the proposition that the possibility that observers would mistake private religious speech for government endorsement justifies the suppression of private religious exercise. *See, e.g., Rosenberger v. Rector & Visitors*, 515 U.S. 819 (1995); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. of Westside Cmty. Sch. v. Mergens ex rel. Mergens*, 496 U.S. 226, 250 (1990) (plurality op.). Everywhere except the Ninth Circuit, it has long been settled that government efforts to convert schools into religion-free-zones with respect even to private religious speech are not a benign form of Establishment Clause over-compliance, but a free-speech violation that reflects the kind of hostility to religion affirmatively prohibited by the Religion Clauses.

The district can defend the Ninth Circuit's holding only by disregarding its premise that schools can suppress even *private* religious speech under the guise of Establishment Clause compliance. For example, the district claims that the Ninth Circuit simply engaged in a "prosaic application of the settled legal test" under *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), and *Edwards v. Aguillard*, 482 U.S. 578 (1987). But *Santa Fe* and *Edwards* involved what the Court deemed to be *government* speech. Pet.App.100-01 (O'Scannlain, J.). The Ninth Circuit's misguided and unprecedented Establishment Clause analysis, by contrast, was explicitly premised on the notion that Kennedy's religious expression was *private*. Pet.App.17-25.

The relevant cases thus are not *Santa Fe* or *Edwards*, but rather the long line of cases reiterating the "critical 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.'" *Rosenberger*, 515 U.S. at 841 (quoting *Mergens*, 496 U.S. at 250 (plurality op.)). The district suggests that those cases are limited to private religious speech by students. But just as *Tinker* affirmed the First Amendment rights of "students *and teachers*," the critical distinction between government speech endorsing religion and private religious speech extends beyond students. *See, e.g.*, *Good News Club*, 533 U.S. at 117-19. If the rule were otherwise, schools could suppress all religious expression by teachers and coaches for fear that their private religious exercise would be mistaken by students as the government's own religious speech. This Court's precedents have rejected the idea that such fears could justify the suppression of religious speech for at least three decades. The Ninth Circuit's contrary view is not just "troubling," but in urgent need of correction.

If the district remains concerned that students will mistake Kennedy's private religious speech for its own, it certainly has far less restrictive options than speech suppression. The district could have provided additional disclaimers, though it is hard to see how more would be necessary in light of the district's "well-publicized" efforts to distance itself from Kennedy's religious expression. Pet.App.108 (Ikuta, J.). The district insists that disclaiming Kennedy's "prayers to the team" as "personal" and "private" would have amounted to a "fiction." BIO.29. But the only "fiction"

here is that this lawsuit is about "prayers to the team," rather than a personal and private on-field prayer. There is simply no justification for the district's decision to suppress that private religious expression, rather than follow the path of neutrality and tolerance the Constitution commands.[3]

II. The Decision Below Conflicts With Decisions From Other Courts.

For more than a century, most lower courts have recognized that public schools may tolerate teachers' private but observable religious expression without running afoul of the Establishment Clause. *See* Pet.27-28. The district tries to distinguish these cases as involving only what it labels "inconspicuous" and "nondemonstrative conduct." BIO.34. But the "critical difference" for constitutional purposes is not between wearing a cross inside or outside a blouse, but "'between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and

[3] The district protests that anything short of shuttering Kennedy's prayer behind closed doors would have been "cold comfort to the students" (actually, "one" student, Pet.App.21) "who felt pressured to participate." BIO.29. But there is no evidence that Kennedy himself ever applied any such pressure, E.R.114, or that anyone felt coerced by the personal and private prayers at issue in this lawsuit, as opposed to any earlier motivational speeches, *see, e.g.*, E.R.299 (letter from Leavell acknowledging that Kennedy "ha[d] not actively encouraged, or required, participation" in any religious activities). At any rate, a wide range of private speech, religious and otherwise, may create perceived pressures to dissent or concur, but this Court has never allowed that kind of "modified heckler's veto" to carry the day. *Good News Club*, 533 U.S. at 119.

Free Exercise Clauses protect.'" *Rosenberger*, 515 U.S. at 841. A First Amendment doctrine that protected only nondemonstrative conduct would be a strange animal indeed.

The district's effort to dismiss the government-speech conflict fares no better. *See* Pet.28-31. The district admits that multiple other courts applying *Garcetti* have "reject[ed] overly broad job descriptions as sweeping too much into the category of government speech." BIO.32. It claims that those cases "have no bearing" here because Kennedy's job duties included "post-game speeches to students on the field." BIO.32. But this lawsuit is about Kennedy's own personal prayers that occurred wholly separate from post-game strategy sessions and speeches. *See supra* p.4. To the extent the district means to suggest that *everything* Kennedy ever did "on duty" was government speech, that is precisely the kind of overbroad job description other courts have rejected.

Finally, the district chides Kennedy for failing to "mention" various other purportedly "pertinent" government-speech decisions (most pre-dating *Garcetti*), including then-Judge Alito's opinion in *Edwards v. California University of Pennsylvania*, 156 F.3d 488 (3d Cir. 1998), which explained that a "school has the 'ability to say what it wishes when it is the speaker.'" BIO.31-32 & nn.9-10. Kennedy has no quarrel with the principle that the government may control government speech. But that principle is precisely why it is critical to draw a sensible line between private and government speech, and not simply default to the propositions that everything a teacher or coach says is government speech and that

the government endorses everything it fails to censor. By embracing the latter propositions, the decision below conflicts with decades of precedents from this Court and other circuits.

III. This Case Is An Excellent Vehicle To Resolve These Exceptionally Important Questions.

The questions presented here are undeniably important, as four members of this Court have already recognized. *See* Pet.App.211 (Alito, J.). And the case has taken on even greater importance now that the Ninth Circuit has added Free Exercise and Establishment Clause errors to the mix. *See* Pet.App.77-129. As a result, 11 judges and a small army of amici have implored this Court to grant review to restore the First Amendment rights of half-a-million public-school teachers and coaches in "nine states and two federal territories." Pet.App.105 (O'Scannlain, J.).

The district concedes (with considerable understatement) that the questions presented "are perhaps interesting," BIO.1, but insists that various "vehicle" problems would prevent this Court from answering them, BIO.17. But the principal problem identified is a figment of the district's imagination, as the sole "issue" in this case is indeed "a coach's right to conduct a personal, private prayer … on the 50 yard line." E.R.267. The district argues that, because the Ninth Circuit issued both "government-speech and Establishment Clause holdings" in the alternative, "neither holding is 'squarely presented,'" BIO.20. But there is no two-wrongs-make-a-right exception to certiorari. To the contrary, when a panel tries to insulate a holding that four Justices have already

found troubling by adding an alternative holding that is, if anything, more obviously inconsistent with this Court's precedents, the case for plenary review is only strengthened.

Finally, the district complains that by publicizing the denial of his First Amendment rights, Kennedy put the district in an impossible position. Judge Smith suggested that the way out of this seeming dilemma was for Kennedy to take a lesson from the Sermon on the Mount. The district wisely does not try to defend that suggestion. Not only does that suggestion have no proper place in the pages of the Federal Reporter, raising the only real Establishment Clause violation in this case, but the Constitution and this Court's cases provide the obvious path forward. The proper response by the government to the private religious expression of its citizens is neutrality and accommodation, not hostility and suppression. The former path "follows the best of our traditions." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). When the government chooses the latter path, citizens should complain. The decision below lost sight of that fundamental lesson. This Court's review is imperative.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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