No. 21-418

In the Supreme Court of the United States

JOSEPH A. KENNEDY,
Petitioner,

v.

BREMERTON SCHOOL DISTRICT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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

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

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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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 reverse the Ninth Circuit Court of Appeals and rule in favor of Petitioner Kennedy to correct the Ninth Circuit's ruling which directly contradicts this Court's prior decisions safeguarding private, voluntary religious activity by public

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[1] 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.

employees. The states, and the local school districts within those states, face tremendous challenges in navigating complex and sometimes contradictory court rulings in relation to the constitutional rights of public-school employees. Holding in favor of Petitioner Kennedy's right to engage in private religious conduct on school grounds would establish clear standards safeguarding these public employees' rights, and promoting the kind of pluralism that undergirds our system of public education. Further, a decision upholding public employees' right to practice their own faiths would foster mutual respect among students, teachers and staff with differing beliefs. The appellate decision below needlessly and harmfully creates confusion where clarity is needed—especially muddying this Court's Establishment Clause jurisprudence. Permitting the ruling below to stand would likewise undermine the core 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 result of the Ninth Circuit's opinion would forward the novel and untenable position 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. Yet, the Ninth Circuit's opinion then goes even further—suggesting 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

disproved forms of private religious expression. If allowed to stand, this would breed confusion and mistrust in our public school, subverting the educational mission that *Amici* are pledged to support.

Moreover, this Court must reverse the Ninth Circuit in order to safeguard its own Free Speech and Free Exercise Clause Jurisprudence. Prior to the Ninth Circuit's ruling, private, voluntary religious activity by public employees was shielded by Free Speech and Free Exercise caselaw. However, the Ninth Circuit's recent decision disrupts these already-settled constitutional waters. While the employment status of Coach Kennedy matters, allowing the Ninth Circuit's decision to stand essentially denudes public employees of their Right to Free Exercise, creating a new exceptionally broad interpretation of the Establishment Clause with a mandatory enforcement regime at the expense of diversity and pluralism. Regardless of the facts in this particular case, a plausible reading of the Ninth Circuit's new interpretation is that it mandates the termination of a public employee who participates in even the most *de minimis* practice of religious activity on public property. This result represents a sea-change in First Amendment jurisprudence and should be resisted.

Further, a holding in favor of Petitioner Kennedy could grant this Court an opportunity to clarify its somewhat murky Establishment Clause jurisprudence. This Court should, at least, make plain that the Establishment Clause does not create a compelling state interest in censoring private speech.

These laudable and common-sense results can be achieved by simply applying existing precedent. *See*, *e.g.*, *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."); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 11 9 (2001) (permitting private religious activity does not violate the Establishment Clause). Leaving the Ninth Circuit's opinion in place would leave states, school districts, and school employees without clear guidance on an important issue weighing on the effective administration of public schools across the county. What is more, this judicially-created confusion would stand contrary to this Court's precedent. Only this Court can calm the waters now troubled by the Ninth Circuit. Accordingly, this Court should reverse the Ninth Circuit and rule in favor of Petitioner Kennedy.

ARGUMENT

I. The Ninth Circuit's Opinion Places Toleration and Pluralism at Risk.

The Framers of the Constitution held out clearly and succinctly the inherent value of the individuals' Freedom of Speech. *See*, *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244, 122 S. Ct. 1389, 1398, 152 L. Ed. 2d 403 (2002) ("The First Amendment commands, 'Congress shall make no law . . . abridging the freedom of speech.'"). Accordingly, government action that impedes citizens' free speech or free exercise of religion is a constitutionally serious matter. Moreover, this Court has explained these vital freedoms do not stop just because someone stands on public ground. *See, Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469, 129 S. Ct. 1125, 1132, 172 L. Ed. 2d 853 (2009)("[T]he government does not have a free hand to regulate private speech on government property. This Court long ago recognized that members of the public retain strong free speech rights when they venture into public streets and parks, which 'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.' . . . [T]his Court has recognized that members of the public have free speech rights on other types of government property.").

Indeed, this Court has expressly recognized that "[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). Petitioner Kennedy's case is vitally important because

the Ninth Circuit's opinion directly threatens this Court's long held view that, "[i]n our system, state-operated schools may not be enclaves of totalitarianism." *Tinker*, 393 U.S. at 511. It is axiomatic 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 limitless, the line drawn by the Ninth Circuit 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 specifically warned against. *See*, *Lee v. Weisman*, 505 U.S. 577, 598-99 (1992). Permitting the Ninth Circuit's ruling to stand as precedent would flip this system on its head, turning schools into enforcers of rigid standards—completely divested of expressive speech of a religious character—rather than modeling principles of tolerance and pluralism. Effectively, this Ninth Circuit's standard would subject on-the-clock public school teachers to near "plenary control by the government." *Kennedy v. Bremerton School District*, 4 F.4th 910, 930 (9th Cir. 2021) (O'Scannlain, J., concurring).

This result would be bad enough for government employees generally. But, this result is doubly problematic for the malign message it sends 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 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 Strips School Employees of First Amendment Protections.

The *Garcetti* Court clearly held that private, voluntary, religious activity by public employees is protected by the First Amendment. *Garcetti*, 547 U.S. at 419 ("The 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".). Contrary to *Garcetti*, the Ninth Circuit held that firing Petitioner Kennedy for quietly kneeling to pray after a football game is *required* by the Establishment Clause. This result cannot be countenanced within this Court's longstanding view 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, the school district did exactly that when it determined Petitioner Kennedy was always acting under his job duties before, during, or after games when he was in the presence of students or spectators. According to the Ninth Circuit, Petitioner 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. (Kennedy III)*, 991 F.3d 1004, 1005 (9th Cir. 2021). If the Ninth Circuit's interpretation is correct, public school teachers have virtually no capacity for private, voluntary, religious expression when 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's Opinion Creates a New Undefined Mandatory Enforcement Regime.

The Ninth Circuit's opinion directly contradicts the *Garcetti* Court's logic, which reaffirmed the existence of private, voluntary, religious speech and expression by public employees. *Garcetti*, 547 U.S. at 419. This common-sense conclusion was clarified and bolstered when this Court held "[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. *See*, *id.* Permitting the school district to point to broad and amorphous employment responsibilities as a post-hoc rationalization for limiting private speech it does not like, simply runs counter to what this Court meant by an ordinary job duty that places speech outside the purview of the First Amendment.

The Ninth Circuit Opinion provides no workable limiting principle on a public employer's authority to shrink the scope of First Amendment protected conduct by arbitrarily expanding the manner in which it interprets generalized job responsibilities. Recently, this Court emphasized 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. *See generally*, *Summum*, 555 U.S. at 460.

The private nature of Petitioner Kennedy's religious expression 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 was paid to do. This was quintessential private speech, and a type of expression that non-government employees commonly engage in. *Id.* at 423-24. The school district did not fire Petitioner Kennedy because his brief and private prayer interfered with his job duties. Quite the contrary, Petitioner Kennedy lost his job solely because the school district contended that failing to remove him from his coaching duties put the school district at risk of constitutional liability for Petitioner Kennedy's "religious conduct." *Kennedy III*, 991 F.3d at 1014.

The Ninth Circuit's affirmation of this perverse constitutional interpretation leaves important questions unanswered. At least within the bounds of the Ninth Circuit, public school administrators are currently left to wonder just how assiduously they must police every hint of religious expression by a school employee which might be observed by a student or guest. Affirming the Ninth Circuit and ruling against Petitioner Kennedy would not only throw decades of First Amendment jurisprudence into turmoil, but would also suggest to school administrators nationwide that the answer to this ambiguity is "aggressively and comprehensively." Such a result is clearly not intended by the First Amendment, as previously interpreted by this Court.

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 ("We are not convinced that there is any significance in this case to the possibility that elementary school children may witness the Good News Club's activities on school premises, and therefore we can find no reason to depart from . . . [our past holdings]. Accordingly, we conclude that permitting the Club to meet on the school's premises would not have violated the Establishment Clause."). The Ninth Circuit has taken the opposite view, holding that *even if* Petitioner Kennedy's conduct was private, it still

must be prohibited to prevent what the Ninth Circuit apparently viewed as the danger that a student or other observer might learn that some teachers and coaches pray. This constitutional paradigm would transform the Establishment Clause into a blunt club that government employers could wield against their own employees to discourage the free exercise of religion—even as private citizens.

That the school district admitted it fired Petitioner Kennedy specifically because of the religious nature of his conduct should not have strengthened the school district's case under the Establishment Clause. Rather, this intentional targeting of religious conduct should have been the fatal blow to the school district's cause.

First, by contending the Establishment Clause was implicated even if Coach Kennedy's conduct was private, the Ninth Circuit abrogated any need to prove state action to show a violation. The ramifications of this novel and textually absurd reading are quite staggering. This Court must reaffirm its Establishment Clause jurisprudence and reject the Ninth Circuit's constitutional framework by reversing the Ninth Circuit and holding in favor of Petitioner Kennedy. Second, 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 holding applies equally to Petitioner Kennedy's case where the students most likely to observe the conduct are in high school.

The *Amici* contend the damage inflicted by the Ninth Circuit's ruling extends far beyond its impact on Petitioner Kennedy. Beyond the present case, the Ninth Circuit's holding will 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 made it abundantly obvious that Petitioner Kennedy's brief prayers were not being offered as part of his duties as a coach. But that was not enough. Rather, the Ninth Circuit held 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.

Should this court rule against Petitioner Kennedy, it would transfigure the Establishment Clause into "a modified heckler's veto"—a result this Court has explicitly rejected in the past. *Id.* at 119. Schools can engage in far more limited action that would have the prophylactic effect necessary to disclaim an official approbation of Petitioner 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. Instead opting for punitive measures against the speaker. It is shocking that the Ninth Circuit apparently viewed that choice as not merely constitutionally permissible—but even constitutionally mandated.

CONCLUSION

Were the Ninth Circuit's ruling be allowed to stand, it would breed confusion and mistrust in our public schools and subvert the educational mission the *Amici* are pledged to support. In light of this Court's past precedent, leaving the Ninth Circuit's opinion in place would leave states, school districts, and school employees alike without clear guidance on important constitutional issues weighing on the effective administration of public schools across the country. Only this Court can provide that needed clarity, and as such, this Court should reverse the Ninth Circuit and find in favor of Petitioner Kennedy.

Respectfully submitted,

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

Counsel for Amici Curiae

APPENDIX

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COMPLETE LIST OF *AMICI CURIAE*

Senator Bob Ballenger (AR)
Senator Amy Sinclair (IA)
Senator Dennis Guth (IA)
Representative Sandy Salmon (IA)
Senator Ty Masterson (KS – Senate President)
Senator Kellie Warren (KS)
Senator Beverly Gossage (KS)
Senator Renee Erickson (KS)
Senator Mark Steffen (KS)
Senator Michael Thompson (KS)
Senator Gene Sullentrop (KS)
Senator Virgil Peck (KS)
Representative Jesse Burris (KS)
Representative Randy Garber (KS)
Representative Emil Bergquist (KS)
Representative Kristey Williams (KS)
Representative Steve Hubert (KS)
Representative Susan Humphries (KS)
Representative Stephen Owens (KS)
Representative Bill Rhiley (KS)
Representative Barbara Wasinger (KS)
Representative Paul Waggoner (KS)
Representative Brian Bergkamp (KS)
Representative Michael Murphy (KS)
Representative William Clifford (KS)
Representative Cheryl Helmer (KS)
Representative Kyle Hoffman (KS)
Representative Samantha Poetter Parshall (KS)
Representative Doug Blex (KS)
Representative Cyndi Howerton (KS)
Representative Les Mason (KS)
Representative Clarke Sanders (KS)

Representative Will Carpenter (KS)
Representative Beryl A. Amedee (LA)
Senator Bob Onder (MO)
Senator Eric Burlison (MO)
Representative Brad Hudson (MO)
Representative Kim Koppelman
(ND – Speaker of the House)
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)
Senator Paul Rose (TN)
Senator Page Walley (TN)
Senator Steve Southerland (TN)
Senator Brian Kelsey (TN)
Senator Janice Bowling (TN)
Representative Debra Moody (TN)
Senator Charles Perry (TX)
Representative Cody Harris (TX)
Representative Matt Schaefer (TX)
Representative Briscoe Cain (TX)
Representative James White (TX)
Senator Amy Grady (WV)
Delegate Jonathan Pinson (WV)