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 THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether a public-school employee who says a brief, quiet prayer by himself while at school and visible to students is engaged in government speech that lacks any First Amendment protection.

2. Whether, assuming that such religious expression is private and protected by the Free Speech and Free Exercise clauses, the Establishment Clause nevertheless compels public schools to prohibit it.

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INTEREST OF AMICUS CURIAE[1]

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides legal representation without charge to individuals whose civil liberties are threatened or infringed and educates the public about constitutional and human rights issues.

One of the purposes of the Institute is to advance the preservation of the most basic freedoms our nation affords its citizens – in this case, the First Amendment right of public employees to engage in freedom of religion, speech, and expression. Attorneys affiliated with the Institute have filed *amicus curiae* briefs in this Court and federal courts of appeal on numerous occasions over the Institute's history, including on the issues raised in the Petition.

SUMMARY OF THE ARGUMENT

Once again, this Court is confronted with a case in which a lower court has eviscerated an individual's core First Amendment rights in a misguided attempt

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[1] Each party has filed a blanket consent for the filing of *amicus* briefs. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

to prevent a hypothetical Establishment Clause violation. But unlike in previous cases where the ***school's*** speech was at issue, this case comes before the Court on the matter of whether public school employees may engage in ***private*** prayer on school grounds outside of their official duties. While joining in Petitioner's arguments, *Amicus* writes separately to request that this Court not only hold definitively that such a right exists, but to clarify the scope of its prior ruling in *Garcetti v. Ceballos*, 547 U.S. 410 (2006). As the Ninth Circuit's majority and dissenting opinions make clear, there is confusion as to the extent of the Court's holding in that case, which has in turn resulted in individuals, including Petitioner, being denied their constitutional rights.

In addition, absent a formal holding from this Court that there is a robust First Amendment right to engage in the conduct in which Petitioner engaged and that *Garcetti* does not sweep as broadly as the Ninth Circuit would have it, citizens run the risk of self-censoring and school districts run the risk of terminating employees for engaging in constitutionally protected conduct in their (however well-meaning) desire to avoid the appearance of an Establishment Clause violation.

In sum, this case is the perfect vehicle for the Court to help shape the future for religious and other protected speech and conduct in our nation's public schools and provide much needed guidance to lower courts on the reach – and limits – of *Garcetti*.

ARGUMENT

A. The Ninth Circuit Erred By Holding Petitioner's Conduct Was Not Protected

Two overarching and immutable principles undergird this case: First, "religious beliefs and religious expression are too precious to be either proscribed or prescribed by the state." *Lee v. Weisman*, 505 U.S 577, 589 (1992). Second, neither students ***nor teachers*** "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 383 U.S. 503, 506 (1969).

Eschewing both principles, the District Court and then the Ninth Circuit failed Petitioner not once, but (at least) thrice: under each of the Establishment Clause, the Free Speech Clause, and the Free Exercise Clause of the First Amendment. As Judge O'Scannlain astutely noted in his dissent below, the Ninth Circuit's ruling "obliterate[d] such constitutional protections . . . by announcing a new rule that any speech by a public school teacher or coach, while on the clock and in earshot of others, is subject to plenary control by the government." *Kennedy v. Bremerton Sch. Dist.*, 4 F.4th 910, 930 (9th Cir. 2021) (O'Scannlain, J., dissenting). Accordingly, as the Ninth Circuit would have it, while "[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), this does not apply to our nation's public schoolteachers and coaches – at least not when the

constitutional freedom in question is a brief moment of private prayer.

As this Court has made clear, the litmus test for whether speech or conduct violates the Establishment Clause is whether an objective observer would perceive one's religious expression to be a "State endorsement of prayer in public schools." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000). In *Santa Fe*, the Court held that official prayer at school football games, even when student-led, places the imprimatur of official approval on religion. That, of course, is a far cry from here. Petitioner's prayer was not based on school policies, but his own conscience. No students were compelled to participate.

Although several students and members of the community chose to join Petitioner on the field after the October 16, 2015 game, *Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004, 1012-13 (9th Cir. 2021), that appears to have been more of a reaction to the school district seeking to suppress Petitioner's constitutional rights than simply joining him in prayer since such crowds were not present at previous games. Nor were crowds present at the following games on October 23 and 26, 2015, *id.* at 1013, which shows that Petitioner praying was not the cause of any disruption. The fact that Petitioner made the public aware of the school district's repressive responses to his prayers – as was his constitutional right – did not transform his private prayer on the football field into public speech, as the Ninth Circuit held, *id.* at 1023, because those were separate types of activities. The fact that no one continued to pray on

the field after the school district placed Petitioner on administrative leave following the October 26, 2015 game, *id.* at 1013, seems to indicate that the school district's actions had a chilling effect on students, which runs contrary to the role of "America's public schools [being] the nurseries of democracy." *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046 (2021).

Accordingly, Petitioner's conduct is fundamentally different from this Court's school prayer cases that involved school policies. Indeed, if the act of taking a knee on the fifty-yard line after a high school football game has ended and engaging in a brief moment of silent prayer constitutes unprotected conduct which violates the Establishment Clause, it is not hard to imagine what is left protected: only secular activities. Such discrimination, of course, would violate the First Amendment. Indeed, it is hard to believe that the school district – or any school district – would have taken disciplinary action against Petitioner had he engaged in a similar, but secular, act after the conclusion of each game.

Despite the private nature of Petitioner's conduct and the fact the school district did not endorse it implicitly or explicitly, the record makes clear that the avoidance of a potential Establishment Clause violation was the basis for the Ninth Circuit's holding. In so ruling, however, the Ninth Circuit relegated Petitioner's free speech and free exercise rights to an afterthought. *Amicus* recognizes that public employees, particularly schoolteachers, occupy a tenuous place between the public and the private in their ***official*** capacities and that the free speech rights of public employees is a complex legal issue –

especially post-*Garcetti* – requiring a balance between the right of the employee to be free from government censorship and the right of the government to ensure its employees act consistent with their duties. *See Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) ("The problem . . . is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."). However complicated that may be – and it is surely not ***that*** complicated – one must also remember that "schools do not endorse everything they fail to censor," *Bd. of Educ. of Westside Cmty. Sch. v. Mergens ex rel. Mergens*, 496 U.S. 226, 250 (1990) (plurality op.), and hypothetical fears of violating the Establishment Clause provide no basis to deprive public employees of their First Amendment rights. But that is precisely what happened here.

B. This Case Demonstrates The Need To Define – And Limit – *Garcetti*

Notwithstanding that the private nature of Petitioner's prayer should resolve this matter, *Amicus* believes that a large part of the problem in this case (and others) stems from this Court's decision in *Garcetti* – or more accurately how the Ninth Circuit and other lower courts have interpreted it. In *Garcetti*, the Court held that speech by a public official is only protected if it is engaged in as a private citizen, not if it is expressed as part of the official's public duties. Here, the Ninth Circuit held that "[a]pplying *Garcetti* to this fact pattern, the record leaves no doubt that Kennedy's prayers were speech in his

capacity as a public employee." *Kennedy*, 4 F.4th at 926. Contrary to the Ninth Circuit's ruling, there is significant doubt as to whether Petitioner's prayers were "speech in his capacity as a public employee" given Judge Ikuta, joined by five judges, wrote that "[u]nder the[] well-publicized circumstances" of the case, the school district's "concern that Kennedy's religious activities would be attributed to [it] is simply not plausible." *Id.* at 944 (Ikuta, J., dissenting). If the *en banc* panel reached such distinct conclusions as to the impact of *Garcetti* on the facts of this one case, it is safe to assume that courts across the country face similar confusion each day. This Court's guidance is thus badly needed.

Amicus submits that while *Garcetti* allows the government some leeway to restrict at-work speech of government employees "when employees make statements ***pursuant to their official duties***," 547 U.S. at 421 (emphasis added), the Ninth Circuit went far beyond this by holding that Petitioner's private conduct "made outside the duties of employment," *id.* at 424, was implicated. By so doing, the Ninth Circuit ignored that a government employee's speech may be private even when, as here, it occurs in a public setting. *Pickering*, 391 U.S. 563. More troublingly, the Ninth Circuit's overexpansive reading of *Garcetti* is consistent with that of other courts that have taken far too broad a reading of the decision – all with significant ramifications for our nation's citizen's constitutional rights. *See* Br. of the Liberty Justice Center in Supp. of Pet'r, *Kennedy v. Bremerton Sch. Dist.*, No. 21-418, at 7-10

Such cases not only threaten First Amendment freedoms directly, but also indirectly because any broad interpretation of the scope of *Garcetti* chills speech by forcing public employees to self-censor for fear of reprisals. Accordingly, the Court should take this opportunity to make clear what *Garcetti* permits – and just as importantly, what it does not. *See Kennedy*, 4 F.4th at 931 (O'Scannlain, J., dissenting) ("Our circuit now lies in clear conflict with *Garcetti* and decades of Supreme Court cases affirming the principle that the First Amendment *safeguards*—not banishes—private, voluntary religious activity by public employees."). Absent such clarification, there are significant practical implications for public employees, who will be severely limited in how, when, and where they practice their religion or other First Amendment rights. In essence, public employees will be faced with a choice: practice your religion and risk losing your job, or cease practicing your religion. This is no choice at all.

Put simply, there needs to be room for public employees to engage in the private practice of religion and other constitutionally protected behavior without risk of sanction under a broad reading of *Garcetti*. "Narrow tailoring is crucial where First Amendment activity is chilled—even if indirectly—because First Amendment freedoms need breathing space to survive." *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2384 (2021) (cleaned up). Therefore, the school district should be "required to find its most 'narrowly drawn' alternative." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 793-94 (1995) (Souter, J., concurring in part). Here, for example, the school district could have permitted (and may still

permit) Petitioner to engage in a moment of prayer while also informing any individuals who expressed concern that Petitioner's speech and conduct was his own. That would have been a small price for the school district to pay to avoid terminating an employee who simply wished for a moment of peaceful prayer after a football game. But the school district asking Petitioner to hide his faith and not "give thanks" or glory to God in the sight of others was not the most narrowly drawn alternative, and made him feel "dirty" and convicted because "he had broken his commitment to God."[2] *Kennedy*, 991 F.3d at 1010-12. This is the antithesis of the First Amendment.

CONCLUSION

For the foregoing reasons, and those described by Petitioner and his other *Amici*, the Court should

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[2] Indeed, as a "practicing Christian," *Kennedy*, 991 F.3d at 1010, Petitioner might feel compelled based on scripture not to hide his thanks or acknowledgement of God. *Matthew* 10:32-33 records Jesus as saying, "So everyone who acknowledges me before men, I also will acknowledge before my Father who is in heaven, but whoever denies me before men, I also will deny before my Father in heaven." *Romans* 1:21 states "For although they knew God, they did not honor him as god or give thanks to him, but they became futile in their thinking, and their foolish hearts were darkened." And *Acts* 12:23 states that after the people praised Herod, "[i]mmediately an angel of the Lord struck [Herod] down, because he did not give God the glory." (Bible quotations come from the English Standard Version.)

reverse the decision of the Ninth Circuit and take this opportunity to clarify – and limit – the reach of *Garcetti*.

Respectfully submitted,

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