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 FOR KIRK COUSINS, JOE DELAMIEL-LEURE, NICK FOLES, PHIL OLSEN, CHRISTIAN PONDER, DREW STANTON, HARRY SWAYNE, AND JACK YOUNGBLOOD AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Whether a public high school football coach's practice of offering a personal prayer at midfield after time expires is "government speech" for purposes of the Free Speech and Establishment Clauses of the First Amendment.

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INTERESTS OF *AMICI CURIAE*[*]

Amici curiae are current or former players in the National Football League who support robust protection for the First Amendment rights of both coaches and student athletes at public high schools and universities across the Nation. Each *amicus* attended and played football for at least one public high school or university before turning pro.

Each *amicus* also voluntarily exercised his constitutional right to pray before, during, and after games in which he competed on behalf of such schools—at times alone, at times with other players, and at times with coaches. Each *amicus* thus has firsthand experience with the environment in which this case arose. And each *amicus* can testify firsthand to the power of prayer—in generating gratitude for the opportunity to play, promoting high ideals of sportsmanship, protecting the safety of those who take the field, bridging personal, political, and racial divides among players, and ultimately in glorifying God.

For all these reasons, *amici* support protection for the free speech rights of public school coaches like Joe Kennedy. This Court should reverse the Ninth Circuit's decision, which flouts the rule that "[n]either students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

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[*] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part, and that no entity or person other than *amici curiae* and their counsel made any monetary contribution toward the brief's preparation or submission. Counsel for the parties have consented to the filing of this brief.

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INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents a vital First Amendment question: When is the speech of a public employee at a state-sponsored event fairly attributable to the state? The answer to this question is critical to a coherent theory of the Religion Clauses. An overly broad view of *government* speech would extend the prohibitions of the Establishment Clause to private speakers—thus eliminating private religious voices from public life. An overly broad view of *private* speech would nullify Establishment Clause restraints on the power of the government—thus permitting the state to organize or lead religious activity. That is why "[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," is "crucial." *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 302 (2000) (quoting *Bd. of Educ.* v. *Mergens*, 496 U.S. 226, 250 (1990)).

The Ninth Circuit's opinion in this case illustrates the danger of an undisciplined approach to drawing the line between government and private speech. Ignoring that "schools do not endorse everything they fail to censor" (*Mergens*, 496 U.S. at 250), the court below reasoned that Coach Kennedy's personal, on-field prayers were not his own, but the government's —and worse, that even if the prayers were his own, the risk of *mis*attribution to the state compelled their censorship. But Coach Kennedy's prayers were not a part of his official job responsibilities; and if he had engaged in comparable secular speech, no one would have thought of attributing it to *the state*.

Imagine, for example, if Coach Kennedy had "taken the knee" not to pray after the game, but to protest racial injustice beforehand—during the National Anthem—while others stood at attention saluting the flag, with hats off and their hands over their hearts. That practice, like Kennedy's prayers, is controversial—courageous to some and offensive to others. But if Joe Kennedy had taken a knee to protest racial injustice, the District almost certainly would not have argued that his speech was somehow *the state's*. Rather, there would have been no question that it was protected private speech. And as Justice Jackson put it for the Court in *West Virginia State Board of Education* v. *Barnette*, "a bended knee" can "convey political ideas" or "theological ones." 319 U.S. 624, 632 (1943). "[O]ne man's comfort and inspiration is another's jest and scorn," but the First Amendment protects both—whether seen as "good, bad or merely innocuous" by the state or the public. *Id.* at 633.

We file this brief to provide a general framework for discerning the line between government and private speech, and to urge the Court to confirm that the rules that govern whether secular speech is attributable to the state likewise govern whether religious speech is attributable to the state. The Free Speech and Free Exercise Clauses do not conflict with the Establishment Clause. Under a proper understanding of state action, there is no question that Coach Kennedy's prayers fall on the private side of the public-private line. Accordingly, those prayers are protected, not prohibited, by the First Amendment. The Ninth Circuit's judgment should be reversed.

STATEMENT

After serving nearly 20 years in the Marines, Joseph Kennedy spent eight years as an assistant football coach at Bremerton High School. From the start of his tenure, he knelt at midfield after every game, offering a brief, private prayer of gratitude to God.

Other coaches were likewise free to use this time for personal reasons, such as texting or calling others or entering the stands to greet spouses or friends—all before the players left the field. ECF 71-7 at 4-6; ECF 71-9 at 14-15. Another coach even, in his words, "took [his] own personal few moments" to do a Buddhist chant. ECF 64-23 at 3; E.R.114, 295, 374-375. *Amici* can attest that, in similar athletic contexts, coaches and players often make public statements about their personal beliefs on matters of politics or public issues, or take the knee during the National Anthem, on the field and in full view of the crowd.

Well after Coach Kennedy began this practice, several players asked if they could join him. He responded that it was a "free country" and they could "do what [they] want[ed]." Pet. App. 4. Over time, as more players joined him in prayer, Kennedy sometimes gave motivational remarks with faith-related themes. E.R.114.

Initially, no one complained. In fact, BHS only heard of Kennedy's post-game prayer because another school's coach praised the practice. E.R.134. But BHS then "expressed disapproval" (Pet. App. 5) and the District—while acknowledging that students participated voluntarily and that Kennedy had "not actively encouraged, or required, * * * participation"—concluded that his post-game expression violated school policy. E.R.299-301; Pet. App. 218.

The District acknowledged that Coach Kennedy's "religious expression was fleeting." E.R.99. But in its view, his brief prayer "drew [him] away from his work" and a "reasonable observer" would view it as a governmental "endorsement of religion." *Ibid.* Ultimately, the District directed him not to engage in any religious activity, even silent prayer, in the presence of a student. Pet. App. 6. That meant he could not offer a word of thanks before meals in the cafeteria.

Coach Kennedy sued, but the courts below ruled for the District. Reasoning that he "was clothed with the mantle of one who imparts knowledge and wisdom," and that "expression was [his] stock in trade," the Ninth Circuit held that he "spoke as a public employee when he kneeled and prayed on the fifty-yard line immediately after games while in view of students and parents." Pet. App. 14, 16-17. Indeed, the court concluded that even if Kennedy "spoke as a private citizen," the District did not abridge his freedom of speech because "an objective observer, familiar with the history of Kennedy's on-field religious activity" "could reach *no other conclusion* than that [the district] endorsed Kennedy's religious activity by not stopping the practice." *Id.* at 17-19, 21.

The Ninth Circuit did not explain why, in the case of a conflict between the Free Speech Clause and the Establishment Clause, the latter should prevail. It simply reaffirmed its prior holdings that "[a] school district's interest in avoiding an Establishment Clause violation trumps [a teacher's] right to free speech." *Id.* at 17 (citation omitted). Over the dissent of eleven judges in four separate opinions, the Ninth Circuit denied rehearing en banc. *Id.* at 77-129. In response, the panel opinion's author thought himself free to judge Coach Kennedy's prayer against

biblical standards, calling it "more than a little ironic that [his] 'everyone watch me pray'" prayers "so clearly flout[ed] the instructions found in the Sermon on the Mount on the appropriate way to pray." *Id*. at 69.

ARGUMENT

I. The distinction between state and private action plays a critical role in protecting free speech and is utterly indispensable to protecting religious liberty.

The line between governmental and private activity is foundational to our constitutional order. With limited exceptions, the Constitution is designed to limit the actions of the government, not private citizens.[1] The very language of the Fourteenth Amendment—"No State shall * * * deprive any person of life, liberty, or property, without due process of law"—by which the First Amendment is made applicable to the States, bespeaks its application to the government. And this Court has always maintained, ever since the issue first arose in the *Civil Rights Cases*, 109 U.S. 3 (1883), that "'the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States.'" *Blum* v. *Yaretsky*, 457 U.S. 991, 1002 (1982) (quoting *Shelley* v. *Kraemer*, 334 U.S. 1, 13 (1948)). The Fourteenth Amendment "erects no shield against merely private conduct." *Shelley*, 334 U.S. at 13.

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[1] The most notable exception is the Thirteenth Amendment, which provides that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. amend. XIII.

"To draw the line between governmental and private" is the work of "the state-action doctrine." *Manhattan Cmty. Access Corp.* v. *Halleck*, 139 S. Ct. 1921, 1926 (2019). As the Court has explained, "enforc[ing] [the] critical boundary between the government and the individual * * * protects a robust sphere of individual liberty," and "[e]xpanding the state-action doctrine beyond its traditional boundaries would expand governmental control while restricting individual liberty and private enterprise." *Id.* at 1934. Put another way, norms that *increase* freedom when applied to the state—which possesses coercive power over its citizens—*decrease* freedom when applied to private individuals and institutions that lack such power.

A. The line between public and private activity is fundamental even in cases involving secular speech, as "the Free Speech Clause prohibits only *governmental* abridgment of speech," not "*private* abridgment of speech." *Id.* at 1928. For example, while imposing an obligation of content neutrality on the state enhances the expressive liberty of private citizens (*Carey* v. *Brown*, 447 U.S. 455, 462-463 (1980)), imposing such an obligation on private parties would interfere with such liberty (*Hurley* v. *Irish-American Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557 (1995)). Subjected to the First Amendment, private parties "would lose the ability to exercise what they deem to be appropriate editorial discretion within that open forum" and "would face the unappetizing choice of allowing all comers or closing the platform altogether." *Halleck*, 139 S. Ct. at 1930-1931. Thus, "when a private entity provides a forum for speech, [it] is not ordinarily constrained by the First Amendment." *Id.* at 1930.

Likewise, "the fact that the government licenses, contracts with, or grants a monopoly to a private en-

tity does not convert the private entity into a state actor—unless the private entity is performing a traditional, exclusive public function." *Id.* at 1931. "The same principle applies if the government funds or subsidizes a private entity." *Id.* at 1932. In *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 840 (1982), for example, this Court dismissed a free speech claim against a private school that received 90-99% of its funding from the state, on the ground that it was not a state actor. And this Court has forcefully rejected the notion that "'being heavily regulated makes you a state actor,'" recognizing that it "is entirely circular and would significantly endanger individual liberty and private enterprise"—especially in "the speech context, because it could eviscerate certain private entities' rights to exercise editorial control over speech and speakers on their properties or platforms." *Halleck*, 139 S. Ct. at 1932; see also *Rust* v. *Sullivan*, 500 U.S. 173, 193-194 (1991) (free speech guarantees are inapplicable to private parties conveying governmental messages); *Eu* v. *San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 224-225 (1989) (applying political neutrality requirements to political parties would interfere with private advocacy).

B. The line between public and private action is even more critical when it comes to religion. If private citizens form a church or otherwise engage in religious exercise, their activities are *affirmatively protected* by the First Amendment's Free Speech and Free Exercise Clauses. But if the government forms a church or engages in religious exercise, its activities are not just *unprotected* by the Free Speech and Free Exercise Clauses; they are *affirmatively prohibited* by the Establishment Clause. See *Mitchell* v. *Helms*, 530 U.S. 793, 809 (2000) (plurality op.) (the Estab-

lishment Clause requires "distinguish[ing] between indoctrination that is attributable to the State and indoctrination that is not"). In other words, the line between private and governmental religious activity determines whether the activity is constitutionally protected or constitutionally prohibited. No wonder the line is "crucial." *Santa Fe*, 530 U.S. at 302.

II. Whether prayer is attributable to the state should be determined by applying the same legal standards that govern whether secular speech is attributable to the state.

Whether speech is religious as opposed to secular does not—or should not—alter how courts analyze whether that speech is fairly attributable to the state. While that determination has different *consequences* for religious speech than for secular speech, the determination itself turns on the neutral application of standards that apply without regard to the secular or religious subject matter of the speech. Thus, where secular speech is private under the governing neutral standards, religious speech of the same character is also private—and vice versa. Any other rule would put the courts in the business of discriminating based on content and viewpoint. And "private religious speech, far from being a first Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Capitol Sq. Rev. & Advis. Bd.* v. *Pinette*, 515 U.S. 753, 760 (1995).

So what are the governing standards? It may not be possible to catalog every possible context, but two common-sense rules control. Where the state invites private citizens to speak at school-sponsored events, whether that speech is attributable to the state depends on whether the criteria for selecting the speak-

ers are objective and neutral toward religion, and on whether the government exercises substantial control over the content of their speech. *Lee* v. *Weisman*, 505 U.S. 577, 586-590 (1992). And where the speakers are government employees, whether the speech is attributable to the government depends on whether the speech itself is part of their job duties—not simply on whether the speech takes place during working hours or on government property. *Garcetti* v. *Ceballos*, 547 U.S. 410, 420 (2006). Moreover, it is typically important—and revealing—to consider how the government treats employees' secular speech in similar circumstances.

A. Whether the speech of invited guests at school-sponsored events is private turns on whether they are chosen for secular and neutral reasons and retain primary control over the content of their speech.

Where private citizens offer religious speech in public school-sponsored settings or public fora, two main considerations govern whether their speech is attributable to the state: the neutrality (or lack thereof) of the criteria by which the outside speakers are given the opportunity to speak, and the extent to which the government controls the content of their speech. Depending on the circumstances, the speech might fall on either side of the public-private line.

1. In *Weisman*, for example, this Court held that a school district's practice of inviting clergy to deliver prayers at middle school graduation ceremonies violated the Establishment Clause. The Court stressed that the school "direct[ed] the performance of a formal religious exercise" by selecting a member of the clergy specifically to pray and curating his prayers'

content—to the point that they "bore the imprint of the State." *Id.* at 586, 590. To ensure that the prayer was "[a]ppropriate," the principal provided a visiting rabbi with "a pamphlet entitled 'Guidelines for Civic Occasions'" and "advised [that] the invocation and benediction should be nonsectarian." *Id.* at 581. Because the district selected the speaker specifically to deliver the prayers (non-neutral criteria) and "directed and controlled the content of the prayers," the prayers of its invited guest were "attributable to the State." *Id.* at 587-588.

The Court in *Weisman* took care, however, to reiterate that the "constitutional constraints" imposed by the First Amendment "applied to state action." *Id.* at 595. While the Constitution does not permit the public schools "to undertake th[e] task [of prayers] for itself," neither "does [it] allow the government to stifle praye[r]." *Id.* at 589. In short, the "Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Ibid.*

Similarly, the Court in *Santa Fe* invalidated a school policy that directed the student body to elect a single "chaplain" for the entire football season and actively encouraged the chaplain to give "invocations" at each football game. 530 U.S. at 309. Rather than choosing the speaker based on neutral criteria, the policy enlisted the student body to elect a speaker based on the expectation that the speaker would pray. *Id.* at 309-311.

By contrast, the Court in *Town of Greece* v. *Galloway* sustained the practice of opening town hall meetings with prayer because the town "neither reviewed the prayers in advance of the meetings nor provided

guidance as to their tone or content," but "instead left the guest clergy free to compose their own devotions," such that "any member of the public [was] welcome in turn to offer an invocation reflecting his or her own convictions." 572 U.S. 565, 571, 589 (2014). The prayers thus "reflect[ed] the values" of those praying "as private citizens," and was "an opportunity for them to show who and what they [were] without denying the right to dissent." *Id.* at 588.

2. On the other side of the public-private line, the Court's landmark decision in *Widmar* v. *Vincent*, 454 U.S. 263 (1981), confirms that it does not violate the Establishment Clause—and *does* violate the freedom of speech—for public universities to deny student groups equal access to school facilities "for purposes of religious worship or religious teaching." *Id*. at 265. Where the state allows access to public spaces based on neutral criteria—such as registration as a student group—the speech that results "does not [bear] any imprimatur of state approval" and the Establishment Clause is not implicated. *Id*. at 274. The state's use of neutral selection criteria shows that it is "no more commit[ted]" to religious groups' speech than to the speech of "'the Young Socialist Alliance,' or any other group eligible to use its facilities." *Ibid*. (citation omitted).

In so holding, the Court in *Widmar* forcefully rejected the idea that the university could "discriminate against religious speech on the basis of its content" or provide such speech with "less protection than other types of expression." *Id*. at 267. The state's asserted interest "in achieving greater separation of church and State than is already ensured under the Establishment Clause," the Court explained, "is limited by

the Free Exercise Clause and * * * the Free Speech Clause as well." *Id.* at 276.

The Court reaffirmed that principle in *Rosenberger* v. *Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995). There, a university refused to fund a student newspaper "solely on the basis of its religious viewpoint." *Id.* at 837. This Court condemned that refusal, again "reject[ing] the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers" on the same terms as nonreligious speakers. *Id.* at 839. The Establishment Clause applies where "the State is the speaker"—either because it "enlists private entities to convey its own message" or "determines the content" by substantially "regulat[ing] * * * what is or is not expressed." *Id.* at 833. But when speakers are chosen based on "evenhanded" and "neutral criteria" that do not "promote" or "encourage" a particular message (*id.* at 833, 839), the state *is not speaking* and the Free Speech Clause applies with full force to any religious speech offered by the speaker.

The same day, this Court rejected a claim that the state "violates the Establishment Clause when, pursuant to a religiously neutral state policy, it permits a private party to display an unattended religious symbol in a traditional public forum located next to its seat of government." *Pinette*, 515 U.S. at 757. As the Court held, "private expression" may not be curtailed to serve some purportedly "compelling interest in complying with the Establishment Clause" or "avoiding official endorsement of Christianity." *Id.* at 760, 761, 762. And the fact that "expression [is] made on government property" does not convert it to govern-

ment speech if the terms of access to a public arena are truly neutral. *Id.* at 763, 765-766 (plurality op.).

It is particularly important to stress that "fears of an Establishment Clause violation" do not allow the state to discriminate against private religious speech. *Lamb's Chapel* v. *Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 387, 393-395 (1993). In *Good News Club* v. *Milford Centr. Sch.*, 533 U.S. 98 (2001), for example, a private religious club wanted to use a school's facilities to host meetings after school, but the school denied the club the same access it provided to others. *Ibid.* This Court held that the school "unconstitutionally excluded a private speaker" based on its erroneous view that "its interest in not violating the Establishment Clause outweigh[ed] the Club's interest in gaining equal access to the school's facilities." *Id.* at 106, 112. The school's actions did not simply avoid an Establishment Clause violation; "it discriminated against the Club because of its religious viewpoint in violation of the Free Speech Clause." *Id.* at 120.

As these cases illustrate, whether speech is private (and thus beyond the Establishment Clause's strictures), or attributable to the state (and thus subject to the Establishment Clause's constraints), turns on (1) whether the criteria that made possible the speech given on state property or with state resources are neutral, and (2) whether the state controls the content of the speech. When the criteria are not neutral or the state controls the message, then "the State is the speaker." *Rosenberger*, 515 U.S. at 833. If the speech is secular, the state may "regulate the content of what is or is not expressed" to "ensure that its message is neither garbled nor distorted." *Ibid.*

3. The Department of Education, in consultation with the Department of Justice, has issued legal guidance on drawing the line between protected private religious speech and governmental speech controlled by the Establishment Clause. Under that guidance—which is legally binding on federally funded public schools—where the state allows expression based on "genuinely content-neutral criteria" and leaves speakers with "primary control over the content of their expression," any speech, including "prayer[,] is not attributable to the State and may not be restricted because of its religious content." U.S. Dep't of Educ., *Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools*, 85 Fed. Reg. 3257, 3265 (Jan. 21, 2020); see 68 Fed. Reg. 9645, 9647 (Feb. 24, 2003) (original version).[2]

Indeed, schools must remember that they "do not endorse everything they fail to censor." 85 Fed. Reg. at 3265-3266 (quoting *Mergens*, 496 U.S. at 250 (plurality op.)). And although the Establishment Clause bars the government from engaging in religious exercise, "neither the power nor the prestige" of the state may "be used to control, support or influence the kinds of prayer the American people can say." *Engel* v. *Vitale*, 370 U.S. 421, 429 (1962).

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[2] Under Section 8524(a) of the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the Every Student Succeeds Act and codified at 20 U.S.C. § 7904(a), this Guidance binds all public elementary and secondary schools that receive federal funding.

B. Whether the speech of public employees at state-sponsored events is attributable to the state turns on whether the speech itself is part of their job duties.

When the speaker is a government employee, determining whether her speech is the government's presents a somewhat different question. Nevertheless, because that inquiry does not shift depending on whether the employee's speech is secular or religious, the government's treatment of secular speech in similar circumstances is instructive.

1. It is beyond dispute that "citizens do not surrender their First Amendment rights by accepting public employment" (*Lane* v. *Franks*, 573 U.S. 228, 231 (2014)), and that government employees "receive First Amendment protection for expressions made at work" (*Garcetti*, 547 U.S. at 420). Government employees, no less than others, have the right "to speak as a citizen." *Id.* at 417.

Where this Court has approved restricting public employees' speech under the *Garcetti* framework, the restrictions have concerned "statements [made] pursuant to [the employee's] official duties." *Id.* at 421. In *Garcetti* itself, for example, an assistant prosecutor concluded that a search warrant affidavit "contained serious misrepresentations," and he recommended to his supervisors that the related criminal charges be dismissed. *Id.* at 420. His supervisors allegedly retaliated, transferring him to a less desirable job and denying him a promotion. *Id.* at 415. But the Court held that the prosecutor could be disciplined for his recommendation, calling it "controlling" that the particular speech at issue went to the core of his "official

duties": "advis[ing] his supervisor about how best to proceed with a pending case." *Id.* at 421.

In determining that the assistant prosecutor's recommendation was made in fulfilling his job duties and not in his capacity as a private citizen, the Court observed that it was not "the kind of activity engaged in by citizens who do not work for the government." *Id.* at 423. The Court had held protected government employee speech with citizen-speech analogues: a schoolteacher's "letter to a local newspaper" and "discussi[ons of] politics with a co-worker." *Id.* at 423-424 (citing *Pickering* v. *Bd. of Ed.*, 391 U.S. 563 (1968); *Rankin* v. *McPherson*, 483 U.S. 378 (1987)). "When a public employee speaks pursuant to employment responsibilities, however, there is no relevant analogue to speech by citizens who are not government employees." *Id.* at 424. Indeed, the prosecutor did "not dispute that [he] wrote his disposition memo pursuant to his employment duties." *Ibid.*

In announcing that Coach Kennedy "spoke as a public employee when he kneeled and prayed on the fifty-yard line immediately after games while in view of students and parents" (Pet. App. 16-17), the Ninth Circuit "read *Garcetti* far too broadly" (*Lane*, 573 U.S. at 239). By the Ninth Circuit's lights, it sufficed that Kennedy bore "the mantle of one who imparts knowledge and wisdom," and that "expression was [his] stock in trade." Pet. App. 14. But nothing in this Court's precedents supports the notion that the speech of public employees—even teachers—on public property during the workday is necessarily attributable to the state. Indeed, such a rule would sound the death knell for academic freedom.

Garcetti rejected the notion that "all speech within the office" or "concern[ing] the subject matter" of the job (which prayer is not) "is automatically exposed to restriction" as governmental speech. *Id.* at 421. *Lane* reaffirmed that this Court has never blessed restricting "speech that simply relates to public employment or concerns information learned in the course of public employment." 573 U.S. at 239. And in the Establishment Clause context, *Santa Fe* explained that "not every message" that is "authorized by a government policy and take[s] place on government property at government-sponsored school-related events * * * is the government's own." 530 U.S. at 302.

Thus, the inquiry does not turn on the employee's status as an "'especially respected person[]'" or the "time" or "location" of his speech. Pet. App. 14, 15 (citation omitted). Rather, "[t]he critical question * * * is whether the speech at issue is itself ordinarily within the scope of an employee's duties." *Lane*, 573 U.S. at 240. And this duty-centric inquiry must be "practical" not "[f]ormal[istic]"—employers cannot "restrict employees' rights by creating excessively broad job descriptions." *Garcetti*, 547 U.S. at 424.

Practical experience confirms that not everything public employees say during working hours is part of their job. Workplaces are venues for all kinds of discussions, and public employees engage in all sorts of speech not attributable to the state. Employees are often "'free to talk about whatever they want,' including 'the Cowboy[s'] game * * * [or] what they did over the weekend.'" *Texas State Teachers Ass'n* v. *Garland Indep. Sch. Dist.*, 777 F.2d 1046, 1054 (5th Cir. 1985), *aff'd*, 479 U.S. 801 (1986). Tons of speech, some of it controversial, takes place in schools during school

hours without becoming part of the curriculum or the speech of the state. The Ninth Circuit's extreme position would leave teachers unable to express opinions to their students, or in the hearing of their students —or in Coach Kennedy's case, even to pray silently at meals. If all teacher speech at school is "government speech," the government can censor it all.

2. Religious speech should not stand on such footing. Since the Clinton Administration, the Executive Branch has formally recognized that federal employees may engage in religious speech to the same extent that they may engage in non-religious speech. *Guidelines on Religious Exercise and Religious Expression in the Federal Workplace* (Aug. 14, 1997) ("Guidelines on Religious Exercise"). In issuing these Guidelines, President Clinton directed that agencies "permit employees to engage in personal religious expression (as they must permit other constitutionally valued expression) to the greatest extent possible, consistent with interests in workplace efficiency and requirements of law." President William J. Clinton, *Memorandum on Religious Exercise and Religious Expression in the Federal Workplace* 1247 (August 14, 1997). Moreover, the Guidelines "have the force of an Executive Order," and they reflect the consistent view of the Executive Branch for a quarter century. See Off. Att'y Gen., *Memorandum for All Executive Departments and Agencies: Federal Law Protections for Religious Liberty*, 11a (Oct. 6, 2017).

The Guidelines provide that "[e]mployees should be permitted to engage in religious expression" just as they "may engage in comparable nonreligious private expression, subject to reasonable and content-neutral standards and restrictions." Guidelines on Religious Exercise. And "[a]s a matter of law, agen-

cies shall not restrict personal religious expression by employees * * * except where the employee's interest in the expression is outweighed by the government's interest in the efficient provision of public services or where the expression intrudes upon the legitimate rights of other employees or creates the appearance, to a reasonable observer, of an official endorsement of religion." *Ibid*. Indeed, "even in workplaces open to the public," employees "may discuss religion * * * so long as the public would reasonably understand the religious expression to be that of the employees acting in their personal capacities." *Ibid*.

C. The misperception of endorsement of religion cannot convert state inaction into state action.

1. This Court has never held that the Establishment Clause is violated simply because observers might mistakenly attribute private religious activity by an employee to a governmental employer. And for good reason: just as the government does not endorse the Dallas Cowboys when a public employee praises the team during working hours, the fact that someone might think a coach or teacher is endorsing religion does not mean *the government* is doing so.

That rule applies with full force in public schools. "The proposition that schools do not endorse everything they fail to censor is not complicated." *Mergens*, 496 U.S. 226 at 250 (plurality op.). That is especially true where "the government has not fostered or encouraged any mistaken impression that the [speaker] speak[s] for the University." *Rosenberger*, 515 U.S. at 841 (quotation omitted). In *Rosenberger*, for example, where the university "t[ook] pains to disassociate itself from the private speech" at issue,

"[the] concern that Wide Awake's religious orientation would be attributed to the University [was] not a plausible fear, and there [was] no real likelihood that the speech in question [was] being either endorsed or coerced by the State." *Id*. at 841-842. Any other view would not only threaten "a denial of the right of free speech," but would "risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires." *Id*. at 845-846.

2. Critically, courts analyzing whether attribution is a "plausible fear" must evaluate the issue from the vantage point of a legally informed observer. See *Lamb's Chapel*, 508 U.S. at 395 (the Court's decisions determine whether "the posited fears of an Establishment Clause violation" are reasonable). Any other rule would allow public confusion about the law to create an Establishment Clause problem—even when this Court has affirmed that a specific practice is legitimate.

For example, an observer could not reasonably believe, given this Court's decision in *Good News Club*, that it is unconstitutional for a private group to be given equal access to classrooms for religious instruction after school. 533 U.S. at 112–119. Likewise, a reasonable observer considering whether a Christian student newspaper could receive equal access to university funding would not answer that question on a blank slate; it would look to *Rosenberger*. 515 U.S. at 837–846. The same is true of whether a church may be given equal access to public schools to screen religious films (*Lamb's Chapel*, 508 U.S. at 394–395), whether students may form a religious club with a faculty monitor (*Mergens*, 496 U.S. at 249–253 (plurality op.)), and whether student groups may use uni-

versity buildings for worship (*Widmar*, 454 U.S. at 270–275). It would eviscerate those decisions to suggest that the Establishment Clause might still be violated if a "reasonable observer" somehow thought the school was endorsing the practice in question.

That is why this Court in *Good News* "decline[d] to employ Establishment Clause jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed" based on misperceived religious endorsement. 533 U.S. at 119. As the Court recognized, granting objectors such a veto would upend "countervailing constitutional concerns related to rights of other individuals" to engage in free speech or free religious exercise. *Ibid.* *Good News* thus confirms that a constitutionally permissible practice does not become an Establishment Clause violation merely because some members of the public might be confused about its constitutionality.

Where the public schools are fairly concerned that observers will wrongly attribute to the government speech that is actually private, the proper remedy is not for them to silence private speakers, but rather to disclaim sponsorship of their messages. Because "[p]ublic belief that the government is partial does not permit the government to *become* partial," "[t]he school's proper response is to educate the audience rather than squelch the speaker." *Hedges* v. *Wauconda Community Sch. Dist.*, 9 F.3d 1295, 1299-1300 (7th Cir. 1993). "Schools may explain that they do not endorse speech by permitting it. If pupils do not comprehend so simple a lesson, then one wonders whether the * * * schools can teach anything at all." *Ibid.* And in all events, a school's respect for its employees' First Amendment rights cannot violate the

Establishment Clause just because observers *mistakenly* attribute private religious speech to the school.

III. Coach Kennedy's post-game prayers were private speech and thus cannot violate the Establishment Clause.

The Ninth Circuit erred in applying the foregoing principles of state action, free speech, and nonestablishment to Coach Kennedy's practice of praying after games where he had been coaching. First, it wrongly held that "Kennedy spoke as a public employee when he kneeled and prayed on the fifty-yard line immediately after games while in view of students and parents." Pet. App. 17 (citation omitted). Second, it wrongly reasoned that even if "[he] spoke as a private citizen," the District had "adequate justification" for censoring his prayer: an "objective observer" would have *perceived* giving Kennedy "free rein" as "a stamp of approval." *Id*. at 17, 18, 20. Indeed, the court declared that "[t]he school district's interest in avoiding an Establishment Clause violation trumps [a teacher's] right to free speech." *Id*. at 17 (citation omitted). But judged in light of neutral legal standards, Kennedy's prayers were not the state's, and "[t]here is no Establishment Clause violation in the [government] honoring its duties under the Free Speech Clause." *Rosenberger*, 515 U.S. at 846.

A. Kennedy's prayers were not attributable to Bremerton School District.

Coach Kennedy's prayers are not attributable to the state under any fair application of neutral legal standards. The facts here are far afield from cases where public schools direct employees to lead students in prayer (*Engel*, 370 U.S. at 422-424), invite a member of the clergy specifically to pray and "direct[]

and control[]" the substance of his prayer (*Weisman*, 505 U.S. at 587-588), or require the student body to elect a "chaplain" to pray (*Santa Fe*, 530 U.S. at 309).

To begin with, no one suggests that praying was part of Coach Kennedy's job duties—he is a football coach, not a chaplain. Nor were his prayers authorized or encouraged by any school policy. No evidence suggests that the District hired Kennedy, or allowed him to engage in the practice of post-game prayer, with the intent of promoting religion. Unlike Rabbi Gutterman in *Weisman*, he was not given privileged access to the podium because the state wanted the audience to hear a prayer. During the post-game period when Kennedy prays, others are free to socialize, mill about the field, enter the stands, or text friends or family—one fellow coach "took [his] own personal few moments" to perform a Buddhist chant. ECF 64-23 at 3. In fact, the court below acknowledged that, for the first six years of his practice, the District was not even *aware* of his midfield prayers; and when it did become aware of them, its immediate response was to tell him to stop. Pet. App. 4-5. In no rational universe could this sort of expression—unauthorized, long unknown, and eventually disapproved by the state—be viewed as "government speech."

No one disputes that "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions." *Garcetti*, 547 U.S. at 418. But the purpose of this control is to ensure "the efficient provision of public services" (*ibid.*), which is not reasonably threatened by actions like Kennedy's, and in any event is irrelevant to the District's stated rationale for firing him. Indeed, the implication of the Ninth Circuit's holding is that the state has the power to censor and control

the speech of coaches whenever it occurs on school property—which would damage free speech well beyond the religious context of this case.

Although speech can be unprotected if it disrupts the workplace (*Connick* v. *Myers*, 461 U.S. 138, 152 (1983)), the Free Speech Clause requires that any disruption be measured by neutral, secular criteria. If the state tolerates employees' secular private speech in a given context, then it must tolerate comparable religious speech. Here, nothing in the record suggests that the District would have clamped down on Coach Kennedy's post-game speech if, for example, he were making phone calls on the field or singing "We Are the Champions" after a big win. But he was not hired to do those things either. His speech during the post-game period simply was not part of his job duties—at least until the District, on realizing he used the time to pray, reimagined his job description.

Consider the practice that some of *amici*'s colleagues in the NFL for a time adopted—that of "taking a knee" during the National Anthem, to protest racism and related police violence. What the practice means, and how it is perceived, are matters of much debate. Some regard the practice as unpatriotic or disrespectful to the police; others see it as a courageous way to call attention to a social justice issue of grave urgency. Jeremy Adam Smith & Dacher Keltner, *The Psychology of Taking a Knee*, Sci. Am. (Sept. 29, 2017).[3] But if Coach Kennedy had taken a knee to protest racism during the National Anthem rather than taking a knee to pray after time expired, no one would suggest that his act was *governmental* speech.

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[3] https://blogs.scientificamerican.com/voices/the-psychology-of-taking-a-knee/.

Why? Because anyone remotely familiar with sporting events knows that symbolic expressions of personal opinion, though done on public property during working hours, are not "statements" made in performing one's "official duties"—the "controlling" test. *Garcetti*, 547 U.S. at 421. In other words, any reasonable observer would understand that Kennedy's speech in taking a knee was *his own*. As Dr. Dre said of his co-performer Eminem's taking a knee during the 2022 Super Bowl halftime show: "Em taking a knee that was Em doing that on his own"; "there was no problem with that." Lisa R. France, *Dr. Dre talks Eminem taking a knee at Super Bowl*, CNN (Feb. 17, 2022).[4]

Indeed, as *amici* can attest from their experience at all levels of sports—high school, college, and pro—audiences understand symbolic acts of speech on the field to reflect the views of the individual athletes and coaches who engage in them, whether they are Colin Kaepernick, Tim Tebow, Shaquille O'Neal, or Joe Kennedy. The analysis does not change because the speech is religious rather than political. *Barnette*, 319 U.S. at 632 (a "bended knee" can convey "theological" or "political ideas"). Nor does it matter that some might take offense, as "[i]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street* v. *New York*, 394 U.S. 576, 592 (1969); see also *Town of Greece*, 572 U.S. at 589 ("an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contra-

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[4] https://www.cnn.com/2022/02/16/entertainment/dre-eminem-super-bowl/index.html

ry religious views"). In short, it is far better, for both the freedom of speech and the neutrality of the government, for public schools and courts to recognize that players and employees are often speaking *as individuals*, not government mouthpieces.

Lacking any serious claim that the expressive acts of coaches and athletes on the field are governmental, the District juked. In a clumsy attempt to make everything Coach Kennedy said and did after the game part of his job, it instructed him to give "motivational, inspirational talks" instead of saying post-game prayers. Pet. App. 15-16. But this is a classic boot-strap. The state cannot single out particular speech for suppression on content-based grounds, and then conjure up a neutral justification for doing so by assigning the speaker a duty at the same time as the offensive speech. To state the obvious, prayers were not "ordinarily within the scope of" Coach Kennedy's duties. *Lane*, 573 U.S. at 240.

B. The Ninth Circuit's view that the dictates of the Establishment Clause and the Free Speech Clause conflict confirms that the court misunderstood the clauses' scope.

Citing *Good News Club* and its own decision in *Peloza* v. *Capistrano Unified School District*, 37 F.3d 517 (9th Cir. 1994), the court below suggested that certain conduct that is protected by the Free Speech Clause simultaneously violates the Establishment Clause—and that "[the state's] interest in avoiding an Establishment Clause violation trumps [a private citizen's] right to free speech." Pet. App. 17. This view rests on a conceptual error: If speech that is properly *attributable to the state* advances religion, the Establishment Clause compels the state to stop;

but if *private speech* advances religion, it is fully protected by the Free Speech Clause.

Rosenberger addressed precisely this point. There the Fourth Circuit had held that a public university's refusal to fund an otherwise-eligible student newspaper because of its religious perspective amounted to viewpoint discrimination, in violation of the students' freedom of speech, while at the same time holding that the Establishment Clause prohibited funding the newspaper. *Rosenberger*, 515 U.S. at 828. But this Court reversed, emphasizing the "crucial 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.'" *Id.* at 841 (quoting *Mergens*, 496 U.S. at 250).

The speech in *Rosenberger* was private—and thus not possibly a violation of the Establishment Clause—because "[t]he University [took] pains to disassociate itself from the private speech," it was "not a plausible fear" that the newspaper's "religious orientation would be attributed to the University," and there was "no real likelihood that the speech in question [was] being either endorsed or coerced by the State." *Id.* at 841-842. In other words, "denial[s] of the right of free speech" are never necessary to enforce the Establishment Clause; rather, such denials "risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires." *Id.* at 845-846. If a court concludes that the same speech is governmental for purposes of the Establishment Clause and private for purposes of the Speech Clause, one of the clauses is being misinterpreted.

To be sure, the Court in *Pinette* commented that "[t]here is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech." 515 U.S. at 761-762; see also *Good News*, 533 U.S. at 112 ("a state interest in avoiding an Establishment Clause violation" may "justify content-based discrimination"). Respectfully, however, that analysis misses the point: When these clauses are properly interpreted, there should never be a situation where the Establishment Clause requires one result and the Free Speech Clause requires another, forcing courts to choose between the clauses. To hold that Coach Kennedy's post-game prayers on the 50-yard line are private, but should be restricted by the Establishment Clause, is a conceptual impossibility. One clause does not take precedence over the other; they govern different situations. This Court should make that clear.[5]

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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[5] See also Douglas Laycock, *Religious Liberty as Liberty*, 7 J. Contemp. Legal Issues 313, 331 (1996); Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 Iowa L. Rev. 1, 83-86 (1998); *cf.* Laurence H. Tribe, American Constitutional Law § 14-8, at 1201 (2d ed. 1988) (in case of conflict, "the free exercise principle should be dominant [over] the anti-establishment principle").

Respectfully submitted.

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