No. 18-12

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

The decision below presents fundamental questions about whether teachers shed their free speech rights at the schoolhouse gates. Respondent denies that the Ninth Circuit adopted any categorical rule treating teacher speech as school speech, and suggests instead that the dispute in this case is factbound. As proof, respondent contends that the Ninth Circuit's decision does not preclude a teacher from engaging in private prayer outside of the earshot and eyeshot of students, and faults petitioner for not accepting an accommodation of praying in an empty press box. But a rule that protects teacher speech only when no student can hear it is both categorical and categorically inconsistent with *Tinker*. Moreover, while respondent now emphasizes that Coach Kennedy was wearing a school shirt and that his private prayer (or, perhaps more accurately, respondent's effort to suppress it) generated controversy, nothing in respondent's argument below or the Ninth Circuit's decision turns on such details. Instead, respondent asked the lower courts to hold that if a coach or teacher is "around the students, in the classroom or out, *every bit* of his expression is expression that the district has contracted for" and thus "*every bit* of it is subject to district control." Pet.App.72 (emphasis added). And the Ninth Circuit obliged. The Ninth Circuit's categorical rule treating virtually all teacher speech as government speech conflicts with *Tinker*, with a whole line of post-*Pickering* precedents, and with basic First Amendment values. The Court should grant review.

I. The Ninth Circuit's Categorical Denial Of First Amendment Protection To Teachers' "Demonstrative Communication" In The Vicinity Of Students Conflicts With *Tinker* And Other School Speech Cases.

According to the decision below, "teachers *necessarily* act as teachers," not private citizens, "when [1] at school or a school function, [2] in the general presence of students, [3] in a capacity one might reasonably view as official." Pet.App.21 (quoting *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 970 (9th Cir. 2011)). In other words, in the Ninth Circuit's view, *all* "demonstrative communication f[a]ll[s] within the compass of [a teacher's] professional obligations" because "'expression is a teacher's stock in trade.'" Pet.App.24-25, 20 (quoting *Johnson*, 658 F.3d at 967).

Respondent attempts to deny the categorical nature of that rule and portray the decision below as narrow and factbound. But respondent's efforts are stymied at the outset by the problem that this is not the first time the Ninth Circuit has embraced a broad rule effectively eliminating teachers' free speech rights. Rather, the decision below applied and reaffirmed existing Ninth Circuit precedent holding that public schools have essentially unchecked authority to control even the noncurricular speech of teachers. *See Johnson*, 658 F.3d at 967.

Indeed, respondent itself explains the decision below in categorical terms. By respondent's own telling, the Ninth Circuit held that Kennedy's brief post-game prayer was part of "his professional responsibility to communicate demonstratively to

students" because "being a role model and moral exemplar to students is what it means to be a high-school coach." BIO.13-14 (citing Pet.App.29, 2). If being a coach means "modeling good behavior" and being a "moral exemplar," it follows that *all* "demonstrative communication f[a]ll[s] within the compass of [a coach's] professional obligations" and every bit of such communication in the presence of students is beyond the protection of the First Amendment. Pet.App.24-25.[1] That is the "sweeping categorical rule" the Ninth Circuit adopted, and that is the "sweeping categorical rule" that is irreconcilable with this Court's precedents.

Respondent suggests that the third factor in the Ninth Circuit's three-part test makes its rule less than categorical. But the Ninth Circuit's own decision eliminates any such prospect by treating "modeling good behavior while acting in an official capacity in the presence of students" as part of a teacher's "official" job duties. Pet.App.24. Thus, as a practical matter, any "expression" from an on-duty teacher near students belongs the school and receives no First Amendment protection in the Ninth Circuit. Pet.App.24-25. Indeed, that is precisely the rule that respondent encouraged the Ninth Circuit to apply, insisting in its briefing below that because "Kennedy

[1] According to the Ninth Circuit, "[w]hile at the high school," a coach is "not just any ordinary citizen," but rather is "one of those especially respected persons chosen to teach." Pet.App.25. And when a person has been so "clothed with the mantle of one who imparts knowledge and wisdom," any on-duty "expression" that person makes around students will be reasonably perceived as part of his official duties. Pet.App.25. There is nothing "fact-intensive" about that inquiry.

was hired to express the District's ideas to students[,] … *every expression* he made in front of the students was an instance of the performance of his job duties." Bremerton.CA9.Br.25 (citing *Johnson*, 658 F.3d at 968) (emphasis added).

Respondent's suggested accommodation likewise underscores the categorical nature of the rule it successfully invoked. Respondent does not suggest that Kennedy's speech would have been his own if he had worn a different shirt or offered some disclaimer. Instead, respondent's proposed solution is for Kennedy to retreat to some private corner or wait until all students are out of eyeshot and earshot. But a rule that protects teachers' speech only when no student can hear it is both categorical and fundamentally inconsistent with *Tinker* and this Court's *Pickering* cases.

To be sure, the Ninth Circuit dropped a footnote stating that its decision should not "be construed to establish[] any bright-line rule." Pet.App.34 n.11. But there is no other way to construe it. The court certainly did not identify anything unique about Bremerton High or football coaches. Instead, the court announced a rule for *all* coaches, based on its preexisting rule for *all* teachers: "[E]xpression" is their "stock in trade," so when they express themselves at school and around students, the school owns every word and action. Pet.App.25 (quoting *Johnson*, 658 F.3d at 967). That is the rule, reaffirmed and expanded by the decision below, that now applies

to all 460,000 coaches and teachers in the Ninth Circuit.[2]

Respondent insists that the decision below does not "empower[] school districts to engage in 'wholesale viewpoint discrimination,'" claiming that "there is no credible evidence in the record that the District has engaged or seeks to engage in viewpoint discrimination." BIO.15 n.2. That is wrong as a matter of fact, *see infra*, but it also misses the point. Government speech is the one kind of speech as to which the government can permissibly discriminate on the basis of viewpoint. *See Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245-46 (2015). Thus, if "every bit" of a teacher's expression within earshot and eyeshot of students belongs to the government, then it follows as a matter of course that the government can dictate the viewpoint. The prospect of school boards dictating not just what will be taught in the classroom, but every viewpoint a teacher and coach may express within hearing range of students is chilling.

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[2] In attempting to paint this dispute as "factbound," respondent grossly mischaracterizes the actual facts by stating that Kennedy only "initially compl[ied]" with the District's directive to stop leading "the students on the Bremerton High School football teams in prayer," before "later resum[ing] kneeling in prayer … surrounded by students" and "the team." BIO.i, 18. In fact, as respondent previously admitted and the Ninth Circuit acknowledged, Pet.App.7, Kennedy did not kneel and pray until *after* his "players were … engaging in post-game traditions." E.R.90. The players in the photograph attached to respondent's brief were "from the *opposing* team," whose members "spontaneously joined [Kennedy] on the field" while he was praying. Pet.App.7 (emphasis added).

That is particularly true in the context of religious speech. Respondent's protests notwithstanding, it is hard to understand its singling out of Kennedy's religious expression for suppression (out of a mistaken concern with establishing religion, *see infra*) as anything other than viewpoint discrimination. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 832 (1995). Indeed, respondent has never denied that it sought to prohibit Kennedy's speech precisely because it was religious. And if one accepts respondent's premise that teachers and coaches are paid to be models of behavior and "moral exemplars," then nothing stops a school from telling them that the one viewpoint they cannot model is a religious one—a result that is profoundly troubling and profoundly at odds with multiple First Amendment protections.

Respondent maintains that even if Kennedy did have First Amendment rights, respondent still "had the authority to enforce" its ban on demonstrative religious activity because it needed "to protect against legal liability for violating students' and parents' Establishment Clause rights." BIO.22. But that position, like Judge Smith's concurring opinion, is based on the faulty premise that "every bit" of a teacher's speech is attributable to the government and "subject to district control." Pet.App.72; *see also* Pet.20-22. Indeed, that is why the decision below conflicts not only with *Tinker*, but with a host of Establishment Clause cases recognizing that not everything a teacher says or does, even in the classroom, is attributable to the government. *See* Pet.20-21. Those courts, unlike the Ninth Circuit, properly recognize the crucial difference between a teacher's official speech and her private speech and

thus honor 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." *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990). By attributing such plainly personal expression to the school, the Ninth Circuit's rule would allow—if not require—the school to fire a teacher who persists in wearing a hijab or yarmulke, or even bowing her head before a meal.

More to the point, respondent's argument that it could still silence Kennedy because its own interests outweigh his interest in his brief, post-game prayer is sorely misplaced. That balancing test is the precise inquiry that is obviated by the Ninth Circuit's mistaken view that Kennedy's speech belongs to the school district. Moreover, if the Ninth Circuit had applied such a balancing test, it is doubtful that respondent's claimed interests could withstand scrutiny. Respondent invokes its interests in minimizing crowd control burdens and negative publicity, which it blames on Kennedy's prayer. BIO.20-21. But Kennedy had kneeled on the field after games for years without incident—indeed, without respondent even noticing. *See* Pet.App.3-4. Any negative publicity and crowd control problems thus are far more likely attributable to respondent's censorship and ham-handed efforts to suppress a fleeting and private expression of religious belief.

In all events, the salient point is that there is a role for balancing government interests and private speech interests. Balancing those interests in favor of Kennedy would not open the door for all manner of

religious expressions, no matter how disruptive. But achieving a sensible balance in this arena depends on scrutinizing public and private interests, and not short-circuiting that inquiry by deeming all speech by teachers and coaches within earshot of students to be government speech.

II. The Ninth Circuit's Decision Conflicts With *Garcetti*, *Lane*, and Lower Court Decisions Faithfully Applying Them.

By eliminating the First Amendment rights of teachers and coaches when they are on-duty and near students, the Ninth Circuit has run afoul not only of *Tinker*, but also of more recent public employee precedents from this Court and other circuits. The Ninth Circuit made two fundamental errors, and respondent has no satisfactory response to either.

First, in direct contravention of this Court's precedent, the Ninth Circuit assigned "excessively broad job descriptions" to teachers and coaches, allowing schools to "restrict employees' rights" (*Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006)) by claiming that any expression—even the fleeting and personal "act of praying itself"—is "within the scope of [their] job responsibilities." Pet.App.33 n.9 (emphasis omitted). Respondent asserts that "the court of appeals here was well aware of, and heeded" this Court's admonition against broad job descriptions, noting that the court quoted *Garcetti*'s directive to conduct a "practical" inquiry. BIO.12. But acknowledging *Garcetti* is not the same as following it. By defining Kennedy's job to encompass service as a "role model," making any on-the-job conduct within eye- or earshot of students a firing offense, the Ninth

Circuit did precisely what *Garcetti* instructs lower courts not to do.

The Ninth Circuit's approach also conflicts with this Court's approach to public teacher speech in *Janus v. American Federation of State, County and Municipal Employees*, 138 S. Ct. 2448 (2018). There, the majority and dissent debated how *Garcetti* and *Pickering* would apply to "teachers protest[ing] merit pay in the school cafeteria." *Id.* at 2477 n.23. Notably, that teacher speech might occur at school and "in the presence of students" did not make it the school's speech and thus end the First Amendment inquiry at *Garcetti*'s first step. Instead, the Court concluded that a school's power to discipline such teachers would turn on "application of the standard *Pickering* test," and would require balancing factors such as "whether the protest occurred in the presence of students during the student lunch period." *Id.*; *see also id.* at 2496 (Kagan, J., dissenting) (noting that analysis would "turn on various 'factual detail[s]' relevant to the interest balancing that occurs at the *Pickering* test's *second* step" (quoting *id.* at 2477 n.23)). Thus, notwithstanding the disagreement between the majority and dissent, the entire terrain of the debate was flatly inconsistent with the Ninth Circuit's view that anything a teacher says within earshot of a student is government speech that obviates the need for *Pickering* balancing.

The Ninth Circuit's approach also conflicts with the holding of multiple courts of appeals that have rejected such overly broad job descriptions. *See* Pet.23-25. Respondent attempts to dismiss these decisions because they involve public employers other

than schools. *See* BIO.16-17. But these decisions employ reasoning that is fatal to respondent's theory, for they squarely reject the notion that public employees' "general obligations" can be invoked to stretch their official duties to encompass nearly all on-the-job speech. *See Chrzanowski v. Bianchi*, 725 F.3d 734, 739 (7th Cir. 2013). That reasoning cannot be reconciled with the Ninth Circuit's conversion of the general and undefined duty to model moral conduct into a rule that all of a teacher's "expressions" around students belongs to the school. Pet.App.25.[3]

Second, the Ninth Circuit went even further astray when it reintroduced the same "factual predicate" approach to employee speech doctrine that this Court recently rejected in *Lane*. *See* Pet.26-29. While *Garcetti* stated in dictum that a public employer may "[r]estrict[] speech that owes its existence to a public employee's professional responsibilities," *Garcetti*, 547 U.S. at 421, this Court subsequently made clear the limits of that language. In *Lane*, the Eleventh Circuit used *Garcetti* to craft what was

[3] Respondent claims (at 17) that the Ninth Circuit's decision accords with those of four other circuits, but each of those decisions involved speech that was admittedly curricular, not private. *See Evans-Marshall v. Bd. of Educ.*, 624 F.3d 332, 336 (6th Cir. 2010) (teacher alleged that school "had retaliated against her 'curricular and pedagogical choices'"); *Borden v. Sch. Dist. of Twp. of E. Brunswick*, 523 F.3d 153, 172 (3d Cir. 2008) (coach admitted that "his coaching methods are pedagogic"); *Mayer v. Monroe Cty. Cmty. Sch. Corp.*, 474 F.3d 477, 480 (7th Cir. 2007) (teacher had no right to "depart from the curriculum adopted by the school system"); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 406 (5th Cir. 1995) (employees had no right to "participat[e] in student prayers" during "curriculum-related activities").

effectively a but-for test, reasoning that "because Lane learned" about corruption "in the course of his employment," his trial testimony on that subject "owe[d] its existence to" his employment. *Lane v. Franks*, 134 S. Ct. 2369, 2376, 2379 (2014). This Court reversed, holding that the Eleventh Circuit "read *Garcetti* far too broadly." *Id.* at 2379.

Nevertheless, the Ninth Circuit invoked nearly identical reasoning below, holding that Kennedy's private prayer belongs to the District because it "'owes its existence' to his position" as a coach, on the theory the speech "could not physically have been engaged in by Kennedy if he were not a coach." Pet.App.27-28. That reasoning conflicts not only with *Lane*, but also with the Ninth Circuit's own assurance that Kennedy could "privately discuss politics or religion with his colleagues in the teacher's lounge." Pet.App.32. Surely "an ordinary citizen" has no greater right to access the teacher's lounge than he does the football field. Pet.App.27.

As Kennedy explained in his petition, multiple courts of appeals have rejected the notion that employee speech "owe[s] its existence to a public employee's professional responsibilities … simply because public employment provides a factual predicate for the expressive activity." *Chrzanowski*, 725 F.3d at 738; *see also* Pet.27-29. Yet respondent offers *no* defense whatsoever of the Ninth Circuit's factual-predicate rule, and never attempts the impossible task of reconciling that holding with *Lane* or the decisions of other courts of appeals. Respondent's silence is another sure sign that the Ninth Circuit has radically departed from this Court's

precedent and, in the process, created a 4-1 circuit split.

* * *

The stakes in this case are undeniable, as the First Amendment rights of over 460,000 public school teachers and coaches in the Ninth Circuit are at risk. Moreover, by treating everything a teacher says within earshot of students as government speech, the decision opens the way for massive viewpoint discrimination and the false perception that the Establishment Clause is violated any time a teacher or coach engages in religious expression. Finally, by treating teachers and coaches as "moral exemplars," but demanding that they refrain from any discernable religious expression, the decision below puts educators of faith, like Coach Kennedy, in an impossible position. This Court should grant certiorari and reaffirm that teachers and coaches, no less than students, do not "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).

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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