No. 21-418

In the
Supreme Court of the United States

JOSEPH A. KENNEDY,
Petitioner,

v.

BREMERTON SCHOOL DISTRICT,
Respondent.

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

BRIEF *AMICI CURIAE* OF THE ETHICS AND RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, BILLY GRAHAM EVANGELISTIC ASSOCIATION, NATIONAL ASSOCIATION OF EVANGELICALS, CONCERNED WOMEN FOR AMERICA, CONGRESSIONAL PRAYER CAUCUS FOUNDATION, SAMARITAN'S PURSE, ANGLICAN CHURCH IN NORTH AMERICA, LUTHERAN CHURCH—MISSOURI SYNOD, THE FAMILY FOUNDATION, ILLINOIS FAMILY INSTITUTE, THE NATIONAL LEGAL FOUNDATION, PACIFIC JUSTICE INSTITUTE, THE INTERNATIONAL CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS, AND VETERANS IN DEFENSE OF LIBERTY,

in Support of Petitioner

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INTERESTS OF THE *AMICI CURIAE*[1]

The **Ethics and Religious Liberty Commission** (ERLC) is the moral concerns and public policy entity of the Southern Baptist Convention (SBC), the nation's largest Protestant denomination, with over 46,000 churches and 15.2 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as religious liberty, marriage and family, the sanctity of human life, and ethics. Religious freedom is an indispensable, bedrock value for Southern Baptists. The Constitution's guarantee of freedom from governmental interference in matters of faith is a crucial protection upon which SBC members and adherents of other faith traditions depend as they follow the dictates of their conscience in the practice of their faith.

The **Billy Graham Evangelistic Association** (BGEA) was founded by Billy Graham in 1950, and continuing the lifelong work of Billy Graham, exists to support and extend the evangelistic calling and ministry of Franklin Graham by proclaiming the Gospel of the Lord Jesus Christ to all we can by every effective means available to us and by equipping the church and others to do the same. BGEA ministers to people around the world through a variety of activities including Decision America Tour prayer rallies, evangelistic festivals and celebrations, television and internet evangelism, the Billy Graham Rapid Response

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[1] The parties were provided notice and have consented to the filing of this brief in writing. No counsel for any party authored this brief in whole or in part. No person or entity other than *amicus* made a monetary contribution intended to fund the preparation or submission of this brief.

Team, the Billy Graham Training Center at the Cove, and the Billy Graham Library. Through its various ministries and in partnership with others, BGEA intends to represent Jesus Christ in the public square; to cultivate prayer, and to proclaim the Gospel. Thus, it is concerned whenever government acts to restrict and inhibit the free expression of the Christian faith those activities represent.

The **National Association of Evangelicals** (NAE) is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 40 member denominations, as well as numerous evangelical associations, missions, social-service providers, colleges, seminaries, religious publishers, and independent churches. NAE serves as the collective voice of evangelical churches, as well as other church-related and independent religious ministries.

Concerned Women for America (CWA) is the largest public policy organization for women in the United States, with approximately half a million supporters from all 50 States. Through its grassroots organization, CWA encourages policies that strengthen women and families and advocates for the traditional virtues that are central to America's cultural health and welfare, including religious liberties. CWA actively promotes legislation, education, and policymaking consistent with its philosophy. Its members are people whose voices are often overlooked—everyday, middle-class American women whose views are not represented by the powerful elite.

The **Congressional Prayer Caucus Foundation** (CPCF) is an organization established to protect religious freedoms (including those related to America's Judeo-Christian heritage) and to promote prayer (including as it has traditionally been exercised in Congress and other public places). It is independent of, but traces its roots to, the Congressional Prayer Caucus that currently has over 100 representatives and senators associated with it. CPCF has a deep interest in the right of people of faith to speak, freely exercise their religion, and assemble as they see fit, without government censorship or coercion. CPCF reaches across all denominational, socioeconomic, political, racial, and cultural dividing lines. It has an associated national network of citizens, legislators, pastors, business owners, and opinion leaders hailing from forty-one states.

Samaritan's Purse is a nondenominational evangelical Christian organization formed in 1970 to provide spiritual and physical aid to hurting people around the world. The organization seeks to follow the command of Jesus to "go and do likewise" in response to the story of the Samaritan who helped a hurting stranger. Samaritan's Purse operates in over 100 countries providing emergency relief, community development, vocational programs and resources for children, all in the name of Jesus Christ. Samaritan's Purse's concern arises when government hostility prevents persons of faith from practicing core aspects of faith such as prayer, discipleship, evangelism, acts of charity for those in need, or other day-to-day activities of those practicing their sincerely held religious beliefs.

The **Anglican Church in North America** (ACNA) unites some 100,000 Anglicans in nearly 1,000 congregations across the United States and Canada into a single Church. It is a Province in the Fellowship of Confessing Anglicans, initiated at the request of the Global Anglican Future Conference (GAFCon) and formally recognized by the GAFCon Primates—leaders of Anglican Churches representing 70 percent of active Anglicans globally. The ACNA is determined with God's help to maintain the doctrine, discipline, and worship of Christ as the Anglican Way has received them and to defend the God-given inalienable human right to free exercise of religion.

The **Lutheran Church—Missouri Synod** (Synod) is an international Lutheran denomination headquartered in St. Louis, Missouri. It has more than 6,000 member congregations, 22,000 ordained and commissioned ministers, and nearly 2 million baptized members throughout the United States. Additionally, the Synod has numerous Synodwide related entities, two seminaries, six universities, the largest Protestant parochial school system in America, and hundreds of recognized service organizations operating all manner of charitable nonprofit corporations throughout the country. The Synod has a keen interest in religious liberty and the preservation of all First Amendment protections and fully supports safeguarding the free exercise of religion for all.

The Family Foundation (TFF) is a Virginia nonpartisan, non-profit organization committed to promoting strong family values and defending the sanctity of human life in Virginia through its citizen advocacy and education. TFF serves as the largest profamily advocacy organization in Virginia, and its

interest in this case is derived directly from its members throughout Virginia who seek to advance a culture in which children are valued, religious liberty thrives, and marriage and families flourish.

The **Illinois Family Institute** (IFI) is a nonprofit educational and lobbying organization based in Tinley Park, Illinois, that exists to advance life, faith, family, and religious freedom in public policy and culture from a Christian worldview. A core value of IFI is to uphold religious freedom and conscience rights for all individuals and organizations.

The **National Legal Foundation** (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties and the restoration of the moral and religious foundation on which America was built. The NLF and its donors and supporters, including those in Washington, seek to ensure that First Amendment freedoms are protected in all places.

The **Pacific Justice Institute** (PJI) is a nonprofit legal organization established under Section 501(c)(3) of the Internal Revenue Code. Since its founding in 1997, PJI has advised and represented in court and administrative proceedings thousands of individuals, businesses, and religious institutions, particularly in the realm of First Amendment. As such, PJI has a strong interest in the development of the law in this area.

The **International Conference of Evangelical Chaplain Endorsers** (ICECE) has as its main function to endorse chaplains to the military and other organizations requiring chaplains that do not have a denominational structure to do so, avoiding the

entanglement with religion that the government would otherwise have if it determined chaplain endorsements. ICECE safeguards religious liberty for all.

Veterans in Defense of Liberty is a national advocacy group of veterans dedicated to restoring and sustaining the original moral and constitutional principles of our Republic. Members continue to serve with the same passion and dedication to our country as we did in combat; we continue to honor our sacred oath to support and defend the Constitution of the United States; and we act with a heightened sense of continued duty to ensure that the sacrifices of our brethren who did not come home were not made in vain. We did not "solemnly swear," 10 U.S.C. § 502—a life-long pledge which still ends with, "So help me God"—merely to defend a piece of paper enshrined in our collective history; we also pledged to defend the society and culture it has established and guided for over two centuries. Religious liberty, like national security, is a veterans' issues.

SUMMARY OF ARGUMENT

A simple thought experiment demonstrates the bias against religion shown by the Ninth Circuit in this case. Consider whether a reasonable observer would understand a coach to be expressing his own or the school's speech in the following two situations: (1) the coach during the playing of the national anthem is the only one to take a knee; and (2) the coach after the game kneels with his head bowed at the 50-yard-line and extends his right arm with a clenched fist. It is obvious that all reasonable observers would see both of these as purely personal expressions, and,

hopefully, a public school would encourage and support a coach's right to make these individual, *political* statements. Coach Kennedy's conduct here of kneeling and bowing his head at the 50-yard line after a game is of the same ilk—except that his speech and conduct were *religious*, rather than political. The school's punishment of the coach because his speech and conduct were *religious* cannot be countenanced.

The Establishment Clause cannot excuse this discrimination. The Ninth Circuit asserts that the district's violation of the coach's free speech and free exercise rights is excusable because the violation generated publicity and many, including students, protested the district's action by joining the coach on the field. According to the Ninth Circuit, the Establishment Clause required the school to stop the coach's practice and punish him for continuing to exercise his rights because, to do otherwise, it would have "endorsed" his religious exercise. *See Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004, 1016-19 (9th Cir. 2021) ("*Kennedy III*").

This bootstrap to excuse a Free Exercise Clause violation doesn't work. Instead, it dramatizes a wrongheaded view of the Establishment Clause that this Court should take the opportunity to correct. Coach Kennedy's initial genuflection at the 50-yard line was private, not official, action, and others joining the coach voluntarily and without school encouragement did not convert it into official action. Nor can a subjective, unsubstantiated concern by a student about repercussions from failure to join the group properly override the coach's freedom of religion. The Free Exercise and Establishment Clauses are not properly

interpreted to conflict with each other in situations like this.

ARGUMENT

The Ninth Circuit's decision sets a precedent that strikes at teachers' fundamental freedoms of speech, religion, and assembly. It should not be allowed to stand.

I. The Petition Should Be Granted to Resolve That Teachers, Like Students, Do Not Shed All Their Constitutional Rights at the Schoolhouse Door

This case began because the school objected to the coach kneeling with head bowed at the 50-yard line after a game. In contradistinction to the speech at issue in *Garcetti v. Ceballos,* 547 U.S. 410, 421-22 (2006), this activity was not something the school requested, and it was unrelated to any of the coach's official duties. Despite this Court's frequent admonitions that a government employee does not shed all his First Amendment rights just because he is "on the government clock," *see, e.g., Lane v. Franks*, 573 U.S. 228, 236-37 (2014); *Garcetti,* 547 U.S. at 417-19; *Tinker v. Des Moines Ind. Cmty. Sch. Dist.,* 393 U.S. 503, 506 (1969), the Ninth Cicuit held essentially the opposite. *See Kennedy III*, 991 F.3d at 1014-16.

The decision below is based on a view that a person may put his religion on and off at will, making religion a purely private enterprise that an individual can wholly internalize and that he should hide during government employment. *See id.* at 1016 (criticizing Coach Kennedy for making his grievance known

publicly). That is not an accurate view: Jews wear yarmulkes, Muslim women wear a hijab, and the New Testament enjoins Christians to do "*all* in the name of the Lord Jesus, giving thanks to God the Father through him." Col. 3:17, NIV (emphasis added). The circuit's restrictive view is also antithetical to the First Amendment's protection of the free exercise of religion, of speech, and of assembly. *See Kennedy v. Bremerton Sch. Dist.*, 4 F.4th 910, 930 (9th Cir. 2021) ("*Kennedy IV*") (O'Scannlain, J., statement on denial of *en banc* rehearing).

For a teacher, actions exhibiting the free exercise of religion may include wearing an armband protesting the death penalty for theological reasons, wearing a necklace with a crucifix, having a Bible at one's desk, silently reading the Qur'an while proctoring a test, having a bumper sticker on one's car on school grounds depicting church affiliation, bowing one's head to say grace in the cafeteria, hanging a favorite Scripture verse on one's office wall, attending a student-led religious club, and explaining personal views on religious subject matter when asked. *See Kennedy v. Bremerton Sch. Dist.,* 139 S. Ct. 634, 636-37 ("*Kennedy II*") (Alito, J., statement re denial of pet. for cert.). Despite its claims to the contrary, *see Kennedy III*, 991 F.3d 1015-16, the Ninth Circuit's reasoning makes unconstitutional all these common behaviors when done by teachers, some of which have been protected by Congress and specifically held to be constitutional by this Court. *See Kennedy IV*, 4 F.4th at 940 (O'Scannlain, J.). For example, in *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), this Court upheld provisions of the Equal Access Act, 20 U.S.C. §§ 4071-74, that require religious clubs to have the same privileges as other

student clubs in secondary schools, along with teacher supervision of them. And some of the types of teacher expressions of religious belief listed above are specifically approved in a Joint Statement adopted by President Clinton and reaffirmed as having the force of an executive order by the Trump administration. *See* 10/6/17 DOJ Mem. for All Exec. Agencies, published at https://www.gpo.gov/fdsys/pkg/WCPD-1997-08-18/pdf/WCPD-1997-08-18-Pg1246.pdf, at 6-7, 10a-11a (listing similar examples). In fact, Coach Kennedy's activities here are even more attenuated from work duties than many of these just-mentioned examples, in that he acted after a game, without directing his speech or conduct toward anyone, without anyone in compulsory attendance, and on a field open to public view.

The Ninth Circuit reasons that, because the coach *could have* required students to attend a post-game motivational talk, his private, silent prayer was government speech. *Kennedy III*, 991 F.3d at 1015-16. If that were the test, it would effectively sweep away all speech rights of teachers when they are "on duty," as they presumably can always require obedience from students during school activities. But that is contrary to this Court's rulings that, even during normal school hours and in the classroom, teachers retain their free speech rights to a significant degree. *See, e.g.*, *Tinker*, 393 U.S. at 506 (secondary school setting); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (university setting).

II. A Teacher's Speech and Free Exercise Rights Cannot Be Abridged Because Students and Others Voluntarily Exercise Their Rights Alongside Him

The Ninth Circuit tried to change the result in such a scenario by pointing out that, after it became known that the school was trying to shut down the coach's silent, private prayer, several players from both teams, and then some members of the public as well, joined him on the field after the game. *Kennedy III*, 911 F.3d at 1017-18. This does not alter the character of the coach's private exercise of religion. Moreover, the Ninth Circuit ignored the force of the Assembly and Speech Clauses in these circumstances.

That others began to join the coach did not somehow make this a school event. To the contrary, all who joined did so voluntarily. *Id.* at 1110. It is hard to fathom how this made it a school-sponsored event, rather than a private assembly of like-minded individuals. It was the very fact that the school was attempting to prohibit the coach's private action that attracted others, who joined the coach to show their solidarity with him and their opposition to the school trying to shut down his free exercise of religion. They were excercising their own freedoms of religion, speech, assembly, and protest.

The Ninth Circuit, though, ignored those constitutional rights and turned to another First Amendment provision. It found a prohibited "establishment" of religion in this situation, but its holding is directly contrary to this Court's ruling in *Zorach v. Clauson*, 343 U.S. 306 (1952). In *Zorach*, this Court rebuffed an Establishment Clause attack of a public school releasing

students for voluntary, off-campus religious instruction. This Court held that the school did not violate the Establishment Clause by merely publicizing the opportunity and supervising the release of the students; only evidence of teachers using active persuasion or force with students to take the offered religion classes would suffice. *Id.* at 311. This situation is much further removed from any such active persuasion or force. Those who joined the coach did so completely voluntarily and, to put it mildly, without any active encouragement of the school itself.

The Ninth Circuit has sanctioned a thinly veiled punishment of the coach by the school because, in his private capacity, he let others know that the school was violating his individual rights. The Constitution does not permit that. *See Lane*, 572 U.S. at 242; *Pickering v. Bd. of Educ. of Twnshp. High Sch. Dist.,* 391 U.S. 563 (1968); *see also Kennedy IV*, 139 S. Ct. at 636-37 (Alito, J., statement re denial of pet. for cert.).

III. Free Exercise and Assembly Rights Cannot Be Curtailed by Someone Having an Unsubstantiated Fear of Repercussions for Nonparticipation

The Ninth Circuit also relied on testimony by one student member of the team who feared that, if he did not join others praying with the coach, he might lose playing time. *Kennedy III*, 911 F.3d at 1011, 1018. Relying on such unsubstantiated fears is the functional equivalent of allowing a heckler's veto to stop free speech. *See Gregory v. Chicago*, 394 U.S. 496, 516 (1969); *Cox v. La.*, 379 U.S. 536, 538-40 (1965). The government may terminate neither speech, nor religious practice, nor assembly just because others find

it threatening or objectionable. *See Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (Alito, J.) (speech); *see also Town of Greece v. Galloway*, 572 U.S. 565, 609 (2014) (Thomas, J., concurring) (religion); *Tex. v. Johnson*, 491 U.S. 397 (1989) (speech); *Cox*, 379 U.S. at 538-40 (speech, assembly, and protest); *Hague v. CIO*, 307 U.S. 496, 516 (1939) (speech and assembly); *DeJonge v. Ore.*, 299 U.S. 353, 364-65 (1937) (assembly). As this Court stated in *Tinker*, "fear or apprehension" of others "is not enough to overcome the right to freedom of expression." 393 U.S. at 508. The fact that the expression is religious does not alter that calculus one whit; it only reinforces it. *See Kennedy IV*, 4 F.4th at 954 (R. Nelson, J., dissenting from denial of *en banc* rehearing).

IV. The Ninth Circuit Improperly Pitted the Establishment Clause Against the Free Exercise Clause

The Ninth Circuit also erred when it ruled that the school's Free Exercise violation can be excused by concerns about an Establishment Clause infraction. *Kennedy III*, 911 F.3d at 1016-21. This fails both factually and legally.

The idea that a reasonable observer would think the school was sponsoring the coach's prayer is absurd in these circumstances. The school made it very clear on numerous occasions that it opposed Mr. Kennedy's private prayers after football games, which was reenforced by Mr. Kennedy in press conferences. There could be no mistake that Mr. Kennedy's prayers were not school-sponsored. What this Court stated in *Mergens* has full applicability here: "We think that secondary school students are mature enough and are

likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." 496 U.S. at 250. The same is true for teacher speech, whether religious in nature or otherwise, and whether done standing or on one knee. It turns the Constitution on its head to suggest that teachers may practice spoken or symbolic speech only as long as it does not involve prayer or other religious observance; "the free *exercise*" of religion is protected by the text of the First Amendment itself. *See Kennedy IV*, 4 F.4th at 941-42 (O'Scannlain, J.); *id.* at 944-45 (Ikuta, J., dissenting from denial of *en banc* rehearing).

Obviously, a public school teacher wears two hats—that of a private citizen and that of a government worker. No one is confused by that. Thus, action taken by a teacher, even on school grounds and during school hours, that is personal in nature has the protection of the Free Exercise, Speech, and Assembly Clauses and does not implicate the Establishment Clause.

Initially, the coach waited until the game was well over and acted alone. His speech was private. Presumably, if he had not knelt and closed his eyes, but had mouthed whatever message he wished while standing and with his eyes open, no one would have complained. The problem, then, was that he made it too obvious that he was exercising his religion. But he was no more obvious in that respect than a Muslim teacher wearing an hijab. *See EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015).

At a more basic level, the Ninth Circuit erred by holding that the Establishment Clause can excuse the

Free Exercise Clause violation. In circumstances such as these, the clauses are not in tension; they both forbid government action, and they both are designed to secure religious liberty, "not purge it from the public square." *Kennedy IV*, 4 F.4th at 946 (R. Nelson, J.); *see* Carl H. Esbeck, *The Establishment Clause: Its Original Public Meaning and What We Can Learn from the Plain Text*, 22 Federalist Soc'y Rev. 26, 37-38 (2021) (explaining how the Religion Clauses work in harmony).

The panel's error in pitting the Religion Clauses against each other is dramatically illustrated here. The school district generated a supposedly "compelling interest," based on the Establishment Clause, to infringe Coach Kennedy's free exercise rights by its own infringement becoming public and others protesting that infringement. But the only "endorsement" that a reasonable observer could have understood if the school had allowed the coach to continue his practice was that, as a general proposition, the school endorsed the *free exercise* of religion, not that it endorsed the *particular* religion the coach exercised. The two are distinct concepts, improperly merged by the Ninth Circuit panel. The Establishment Clause's "guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Rosenberger v. Rectors and Visitors of Univ. of Va.,* 515 U.S. 819, 839 (1995).

The school did not forbid or in any way punish others from kneeling or otherwise privately practicing any other religious observance; nor did it ask all to join the coach's prayer. And if it were concerned about

anyone getting the wrong idea about whether it "endorsed" or sponsored the coach's practice, it could have made an announcement over the public address system to the contrary to dispel any potential misimpressions. *See Kennedy IV*, 4 F.4th at 942-43 (O'Scannlain, J.). What it could *not* do was stop a legitimate, private exercise of religion by claiming someone might think the school sponsored it. That vestige of strict-separationist thinking has long ago been rightfully shelved. *See, e.g., Zelman v. Simmons-Harris,* 576 U.S. 639 (2002); *Agostini v. Felton,* 521 U.S. 203 (1997), *overruling Aguilar v. Felton,* 473 U.S. 402 (1985). As Judge Ikuta observed in dissenting from the denial of *en banc* rehearing, the panel's ruling "raises the risk that public employers will feel compelled (or encouraged) to silence their employee's religious activities, even in moments of private prayer, as long as they can be seen by students." 4 F.4th at 945 (Ikuta, J.).

The school should have supported the exercise of the constitutional freedoms to speak, pray, and assemble. It cannot convert stopping such practices into a legal virtue. *See Good News Club v. Milford Cent. Sch.,* 533 U.S 98, 120-21 (2001) (Scalia, J., concurring); *Kennedy IV*, 4 F.4th at 949-54 (R. Nelson, J.). The Establishment Clause certainly does not proscribe the unassisted, private exercise of religion on government property.

The Establishment Clause does not require schools to be policed as religion-free zones, *see Tinker,* 393 U.S at 506, and a reasonable person understands that teachers can act in private capacities. *See Mergens,* 496 U.S. at 250. When teachers do so, even on school grounds and even during school hours, their freedoms are not to be curtailed, and they are not to be

punished. *See Lane,* 573 U.S. at 236-37; *Garcetti*, 547 U.S. at 417-19; *Tinker,* 393 U.S. at 506.

CONCLUSION

This Court should grant the petition and reverse the decision of the Ninth Circuit, on multiple grounds.

Respectfully submitted
this 18th day of October 2021,

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