No. 21-418

IN THE

Supreme Court of the United States

JOSEPH A. KENNEDY,

Petitioner,

v.

BREMERTON SCHOOL DISTRICT,

Respondent.

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

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are United States Senators and Members of the House of Representatives who share a strong interest in upholding Congress's long tradition of protecting religious liberty. *Amici* believe that the decision below threatens to impermissibly turn the Establishment Clause into a ban on individual religious expression not only in public schools, but in the public sector more broadly, and to deprive teachers, coaches, and other government employees (who include both *amici* and millions of the *amici*'s constituents) of their fundamental rights.

Amici are:

United States Senators

James Lankford (Oklahoma)

Mitch McConnell (Kentucky)

Marsha Blackburn (Tennessee)

Roy Blunt (Missouri)

John Boozman (Arkansas)

Mike Braun (Indiana)

Tom Cotton (Arkansas)

Kevin Cramer (North Dakota)

Ted Cruz (Texas)

Steve Daines (Montana)

Chuck Grassley (Iowa)

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici* and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have filed blanket consents to the filing of *amicus* briefs at the merits stage.

Bill Hagerty (Tennessee)
Josh Hawley (Missouri)
John Hoeven (North Dakota)
Cindy Hyde-Smith (Mississippi)
James M. Inhofe (Oklahoma)
Michael S. Lee (Utah)
Marco Rubio (Florida)
Ben Sasse (Nebraska)
Tim Scott (South Carolina)
John Thune (South Dakota)
Thom Tillis (North Carolina)
Roger F. Wicker (Mississippi)
Todd Young (Indiana)

Members of the House of Representatives

Vicky Hartzler (Missouri)
Robert B. Aderholt (Alabama)
Brian Babin, D.D.S. (Texas)
Dan Bishop (North Carolina)
Ted Budd (North Carolina)
Andrew Clyde (Georgia)
Rodney Davis (Illinois)
Byron Donalds (Florida)
Jeff Duncan (South Carolina)
Scott Fitzgerald (Wisconsin)
Louie Gohmert (Texas)
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Bill Huizenga (Michigan)
Ronny Jackson (Texas)
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Doug LaMalfa (California)
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INTRODUCTION AND SUMMARY OF ARGUMENT

After the game was over, a public high school football coach prayed a brief private prayer on the field. The Ninth Circuit's decision to prohibit this timeless act of religious expression distorts the First Amendment and wrongly empowers the government to force public employees to choose between the practice of their faith and their job.

The adverse impact of the Ninth Circuit's decision cannot be overstated. It deprives half a million public school teachers and coaches who work within its jurisdiction of their Free Speech and Free Exercise rights. And it threatens the rights of millions of other federal, state, and local government employees nationwide. Public servants should not have to—indeed, the law has never before required them to—surrender their constitutional right to privately practice their faith just because they collect a paycheck from the government.

As bizarre and troubling as this holding is, the Ninth Circuit's reasoning is far worse. It took two steps to give schools complete authority to censor the private religious expression of their employees. First, the court defined an educator's job to include any time "when he was generally tasked with communicating with students," thus allowing schools to censor as government speech anything an educator does while visible to students on school premises. *See Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004, 1015 (9th Cir. 2021). And second, the Ninth Circuit held that religious speech of public school educators may be (indeed, *must* be) censored under the Establishment

Clause—even if that speech is private speech—to avoid the perception of government endorsement of religion.

The implications of this reasoning are astounding. "According to the Ninth Circuit, public school teachers and coaches may be fired if they engage in any expression that the school does not like while they are on duty, [which is] . . . at all times from the moment they report for work to the moment they depart, provided that they are within the eyesight of students." *See Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 636 (2019) (Alito, J., statement respecting the denial of certiorari).

Neither text, nor history, supports the Ninth Circuit's decision to strip public school teachers of their right to freely practice their faith in public view. The Establishment Clause was enacted to protect the religious practices of individuals from the preferences of majority rule—not to suppress them. And the founders never intended to eliminate religion from the public sphere. Indeed, their actions prove this: the very men who ratified the Establishment Clause "voted to appoint and to pay a Chaplain" to open congressional legislative sessions with prayer. *Marsh v. Chambers*, 463 U.S. 783, 790 (1983). The Ninth Circuit's approach here runs counter to this history and needlessly pits the Free Speech and Free Exercise Clauses against the Establishment Clause when, in fact, all three clauses serve the same goal—to protect private religious expression from government control.

The Ninth Circuit's reasoning weaponizes the Establishment Clause, concluding that it *requires* a school to root out any religious expression by its

employees—even to fire teachers, coaches, and staff who will not leave their faith at home. If left uncorrected, this ruling threatens religious liberty not just in Ninth Circuit schools, but nationwide and for all public employees. Challengers to public expressions of religiosity will be emboldened to expand this new precedent. Schools and other public employers that are afraid of costly and time-consuming litigation will play it safe by banning public practices of faith. And teachers and public employees afraid of termination will err on the side of caution by self-censoring their religious expression. In short, if left unchecked, the Ninth Circuit's decision will give those hostile to religion the tools they need to drive it out of public life. This Court should reverse the Ninth Circuit's decision before yet another private expression of faith is banished from the public square.

ARGUMENT

I. The Ninth Circuit's Decision Wrongly Interprets the First Amendment as Suppressing Rather Than Protecting Religious Freedom.

The First Amendment prohibits Congress from "mak[ing] [any] law respecting an establishment of religion, or prohibiting the free exercise thereof." "[T]he common purpose of the[se] Religion Clauses 'is to *secure* religious liberty.'" *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000) (emphasis added). The Clauses are not—and never were—aimed at prohibiting the private religious expression of individuals merely because they happen to work in the public sector.

Nevertheless, the Ninth Circuit's decision in this case interpreted the Clauses to require just this sort of prohibition. It held that the Establishment Clause compelled a coach to cease his private religious activity—saying a prayer after football games—simply because he worked for a public school. In so doing, the Ninth Circuit's decision "subverts the entire thrust" of the Establishment Clause, "transforming" it from "a shield for individual religious liberty into a sword for governments to defeat individuals' claims to Free Exercise." *See Kennedy v. Bremerton Sch. Dist.*, 4 F.4th 910, 938 (9th Cir. 2021) (O'Scannlain, J., respecting the denial of rehearing en banc).

The result the Ninth Circuit reached cannot be the right one. The First Amendment is aimed at protecting religious liberty and cannot rightly be interpreted to bar private individuals from practicing their faith. The court's result stems from a misunderstanding of the Establishment Clause. The Ninth Circuit's decision starts from the premise that the Establishment Clause excludes religion from the public sphere. And because of this, it assumes that the Establishment Clause forbids public employees from openly practicing their faith merely because they happen to work for the government.

This is wrong. Both history and precedent belie the Ninth Circuit's reading. The reality is that the Establishment Clause does not and never has required religion "to be strictly excluded from the public forum." *McCreary Cnty. v. Am. Civ. Liberties Union of Ky.*, 545 U.S. 844, 886 (2005) (Scalia, J., dissenting); *see also Lynch v. Donnelly*, 465 U.S. 668, 678 (1984) ("In our modern, complex society, whose

traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court."). Indeed, this Court has repeatedly upheld public expressions of religion against Establishment Clause challenge. *See, e.g.*, *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019) (display of a cross to honor soldiers on public land); *Town of Greece v. Galloway*, 572 U.S. 565 (2014) (public prayer before town board meetings); *Van Orden v. Perry*, 545 U.S. 677, 683 (2005) (display of Ten Commandments on public land); *Marsh*, 463 U.S. 783 (public prayer before state legislative sessions). There is simply no justification for the backwards reading of the Establishment Clause that the Ninth Circuit adopted in this case.

II. The Ninth Circuit's Decision Contradicts a Long Historical Tradition Permitting the Public Religious Expression of Private Individuals.

The United States has a rich historical tradition of allowing private individuals to publicly practice their faith, even when they work for the government. This tradition includes the right to pray in public.

Dating back to the founding, all three branches of government have readily embraced the public prayers of private individuals. George Washington began his first inaugural address with "fervent supplications" to God and ended the address in prayer for God's "divine blessing." George Washington, First Inaugural Address (Apr. 30, 1789), *reprinted in* The American Presidency Project (John Woolley & Gerhard Peters

eds.), https://www.presidency.ucsb.edu/node/200393 (last visited Feb. 24, 2022). The First Continental Congress established the tradition of opening legislative sessions with a prayer in 1774—a practice that Congress has followed without interruption to this day. *See Marsh*, 463 U.S. at 787. And this Court, following a tradition that began under Chief Justice John Marshall, opens its sessions by praying: "God save the United States and this Honorable Court." *Engel v. Vitale*, 370 U.S. 421, 448 (1962) (Stewart, J., dissenting). In short, this country has an "unambiguous and unbroken history of more than 200 years" of public prayer. *Marsh*, 463 U.S. at 792.

The practices of this nation's early public leaders make it clear that religion was never meant to be excluded from public life. That tradition continues to this day. Even now, the government recognizes the right of public employees to practice their faith while on the job. Both Houses of Congress continue to open each legislative day with a prayer. The President speaks at a National Prayer Breakfast each February. And the federal government allows its employees to keep religious texts on their desks, discuss their religious beliefs with coworkers, wear religious clothing and jewelry, and invite others to attend worship services. *See* Federal Law Protections for Religious Liberty, 82 Fed. Reg. 49,668, 49,670 (Oct. 26, 2017). Indeed, Congress has repeatedly emphasized the right of Americans to be faithful at work by, for instance, enacting laws that protect employees from suffering adverse employment action because of their religion, including any "religious observance and practice." *See* 42 U.S.C. §§ 2000e(j), 2000e-2(a), (j)).

Nothing in the text or history of the First Amendment suggests that a different rule should apply to the private religious expressions of public school employees. This nation has a tradition of private religious exercise in schools that is just as robust as our tradition of legislative prayer. For most of American history, "allowing religious exercise" in schools "never caused heartburn." *See Kennedy*, 4 F.4th at 951 (R. Nelson, J., dissenting from the denial of rehearing en banc). In fact, in "our nation's early days, clergy oversaw education and often intermixed religious training." *Id.* And both state constitutions and federal statutes recognized the role of schools in fostering religious virtue. *See id.* In short, history shows that "[t]he Religion Clauses of the First Amendment . . . [b]y no means . . . impose a prohibition on all religious activity in our public schools." *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 313.

History matters when interpreting the Establishment Clause, as shown by the many times this Court has looked to history in interpreting it. *Am. Legion*, 139 S. Ct. at 2087 (plurality op.) (noting that the Court must rely on "history for guidance" in analyzing the Establishment Clause); *see also Kennedy*, 4 F.4th at 950 (R. Nelson, J., dissenting from the denial of rehearing en banc) (compiling cases in which the Court has referred to historical practice when interpreting the Establishment Clause). Our nation has a long, unbroken tradition of permitting private religious expression in public spaces—including in public schools. The Ninth Circuit's decision contradicts this history, and must be reversed.

III. The Reasoning in the Ninth Circuit's Decision Threatens Public Employees' Right to Express Their Beliefs.

The Ninth Circuit's novel interpretation of the First Amendment in this case is not only wrong—it is dangerous. By labeling a public school employee's speech at work as government speech—no matter how obviously personal or private it was—the Ninth Circuit's ruling deprives public school employees of two important constitutional protections: the right to freedom of speech and the right to freedom of religious exercise. And by interpreting the Establishment Clause to require public schools to seek out and quash a teacher's private religious practices, the Ninth Circuit's decision imposes a special disability on religious expression that the First Amendment is meant to protect. In short, if allowed to stand, the Ninth Circuit's reasoning would require teachers to leave their faith at home, turning public schools into the "enclaves of totalitarianism" that this Court warned about nearly sixty years ago. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

A. The Ninth Circuit's Rule Threatens All Manner of Religious Expression In Schools.

"[P]ublic employees"—including public educators—"do not surrender all their First Amendment rights by reason of their employment." *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006). It has long been this Court's "unmistakable holding" that teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S.

at 506; *cf. Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 115 (2001) (noting that the Court has "never extended [its] Establishment Clause jurisprudence to foreclose private religious conduct during nonschool hours merely because it takes place on school premises where elementary school children may be present").

Ignoring this "unmistakable holding," the Ninth Circuit's decision makes two key moves that strip public school employees of their right to private religious expression.

First, contrary to this Court's instruction in *Garcetti*, the Ninth Circuit assigned an unreasonably broad and vague job description to Kennedy because of his role as an educator, thus allowing the school to police as government speech anything he said in view of students. *See Garcetti*, 547 U.S. at 424 (holding that the government may not "creat[e] excessively broad job descriptions" to suppress employee speech as government speech). Specifically, the Ninth Circuit held that Kennedy's job description covered all "demonstrative communication." *Kennedy*, 991 F.3d at 1016; *see also Kennedy v. Bremerton Sch. Dist.*, 869 F.3d 813, 825–27 (9th Cir. 2017) (expanding Kennedy's job description). Thus, the Ninth Circuit held that Kennedy's prayer was not protected because it occurred where it would be seen by others: after a school football game "at the fifty-yard line necessarily in view of the players and fans who stayed to the conclusion of the game." *Kennedy*, 991 F.3d at 1015.

Second, the Ninth Circuit took an unreasonably broad view of what observers would think was government speech (even if it was not *actually*

government speech), thus allowing schools to police private religious expression under the guise of preventing "endorsement" of religion. Thus, the Ninth Circuit concluded that even if Kennedy spoke as a private citizen during his postgame prayer, his demonstrative religious conduct threatened the Establishment Clause, requiring the school district to prohibit it. *Id.* at 1016–19.

If allowed to stand, the Ninth Circuit's reasoning will effectively eliminate all avenues for public school educators to engage in private religious expression on school grounds. According to the Ninth Circuit, a public school employee's religious expression must be silenced if simple criteria are met: the employee is "one of those especially respected persons chosen to teach" and then the employee engages in religious activity where students can see it. *Id.* at 1015. A host of troubling examples fall within these parameters:

- A Catholic teacher cannot make the sign of the cross and visibly bow her head in prayer as she prepares to eat her lunch in a cafeteria shared with her students;
- A Muslim teacher may not pull out a prayer mat and say his midday prayers in his classroom if he leaves it open to allow students to seek tutoring during lunch;
- A Jewish librarian may not put on his yarmulke and silently study a religious text in the library during his break;
- A guidance counselor cannot silently read a daily religious devotional near the school flag pole before the first bell; and

- A Catholic soccer coach cannot say the rosary quietly to herself while traveling home from a game on the bus with her team.

Recognizing the impracticality and absurdity of the rule it has created, the Ninth Circuit promises to limit its reach, noting that the decision "should not be read to suggest that, for instance, a teacher bowing her head in silent prayer before a meal in the school cafeteria would constitute speech as a government employee." *Id.* It claims that the teacher's prayer before a meal differs from Kennedy's prayer on the field because Kennedy's prayer drew the attention of students, players, and fans. *See id.*

This distinction is illusory. Like the teacher silently praying in the cafeteria before a meal, Kennedy's midfield prayer began as a private, solitary moment of religious devotion. *Id.* at 1018. But "[o]ver time, little by little," students began to join him. *Id.* Eventually, the school district became aware of these postgame prayers and tried to get Kennedy to stop them. *Id.* at 1011. But this simply drew more attention to the practice and encouraged an even broader group of students, parents, and community members to participate. *Id.* at 1011–12. There is no reason that this same pattern could not repeat with any educator engaging in any private religious practice—including the teacher bowing her head in silent prayer before a meal in the school cafeteria. Thus, despite its protests, the Ninth Circuit's decision has no real limiting principle.

Even worse, the Ninth Circuit's reasoning places in the hands of the government the power to convert protected private religious exercise into unprotected

government conduct, making the First Amendment's protection against government censorship of religion a mirage. According to the Ninth Circuit, Kennedy's private prayer became a public "demonstration" of religion that violated the Establishment Clause because he refused to acquiesce in the school district's order to cease praying. *See id.* at 1017–19. The Ninth Circuit's decision thus gives the government complete power to end its employees' private religious expressions either by demanding that an employee voluntarily stop practicing his faith or, if he does not, by forcing him to stop under the guise of avoiding an Establishment Clause violation. And, perhaps most disturbing of all, the Ninth Circuit asserted that this was not a close case, making clear that its holding will be extended to block even more private religious expression in the future. *See, e.g.*, *id.* at 1009 ("Although there are numerous close cases chronicled in the Supreme Court's and our current Establishment Clause caselaw, this case is not one of them.").

In short, the Ninth Circuit's decision rests on a reading of the First Amendment that has never before been adopted and that disables the Amendment's power to protect private religious expression from government control. The First Amendment does not strip public employees of their right to practice their faith in public view. This Court should reverse the Ninth Circuit's decision holding that it does.

B. The Ninth Circuit's Holding Requires Schools to Discriminate Against Religious Expression.

The Ninth Circuit's decision in this case not only deprives public school employees of their right to privately practice their faith, it *requires* public schools to ferret out and quash the religious expression of their employees under the guise of avoiding Establishment Clause violations. *See Kennedy*, 991 F.3d at 1016–20. This reading transforms the First Amendment from private shield into governmental sword and imposes special disabilities on religious speech, even though that speech is doubly protected under both the Free Speech and Free Exercise Clauses of the First Amendment. *See Ill. Republican Party v. Pritzker*, 973 F.3d 760, 764 (7th Cir. 2020) ("[A] comparison between ordinary speech (including political speech, which all agree lies at the core of the First Amendment) and the speech aspect of religious activity reveals something more than an 'apples to apples' matching. What we see instead is 'speech' being compared to 'speech plus,' where the 'plus' is the protection that the First Amendment guarantees to religious exercise.").

The Ninth Circuit's reading is clearly wrong. The Establishment Clause was never meant to authorize aggressive governmental policing of private religious expression. Like the Free Exercise Clause, it was meant to protect individual religious liberty. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 313. For this reason, this Court has not interpreted the Establishment Clause as a "constitutional requirement which makes it necessary for government to be hostile to religion and to throw its

weight against efforts to widen the effective scope of religious influence." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). To the contrary, it has specifically warned against using the Establishment Clause to justify religious censorship as this "risk[s] … undermin[ing] the very neutrality the Establishment Clause requires." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845–46 (1995).

A pair of hypotheticals makes the absurdity of the Ninth's Circuit's ruling here obvious. Suppose two teachers kneel on the field in public view before a football game. One is protesting police brutality. The other is silently praying. A school would not be permitted—much less *required*—to bar the first teacher's expressive activity. *See Tinker*, 393 U.S. at 514 (holding school could not bar the expressive act of wearing armbands to protest the Vietnam war). But the school would be obligated to take any steps necessary to stop the second teacher's expression (up to, and including, firing him) precisely "*because* [his] conduct is religious." *Kennedy*, 991 F.3d at 1020.

When all is said and done, the Ninth Circuit now mandates what this Court has long forbidden: viewpoint-based discrimination on the basis of religion. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017). It makes public school officials the gatekeepers of private religious expression, giving them the authority to tell their teachers and coaches when, where, how—indeed, even *if*—they may engage in religious exercise on the job. That outcome cannot be squared with this Court's repeated caution against imposing "special disabilities" on religion. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533

(1993) (internal quotation marks omitted). Nor can it be squared with the text of the First Amendment, which *protects* private religious expression. Accordingly, the Ninth Circuit's decision must be reversed.

CONCLUSION

For these reasons, and those advanced by the Petitioner, the Court should reverse the Ninth Circuit's decision below.

MARCH 2, 2022

Respectfully submitted,

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