

No. 21-418

In the Supreme Court of the United States

JOSEPH A. KENNEDY, PETITIONER,

v.

BREMERTON SCHOOL DISTRICT

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

**BRIEF OF *AMICUS CURIAE* CHAPLAIN ALLIANCE
FOR RELIGIOUS LIBERTY IN SUPPORT OF
PETITIONER**

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STATEMENT OF INTEREST¹

The Chaplain Alliance for Religious Liberty is a private, non-profit association that advocates for the religious liberty of military chaplains and those they serve. The Chaplain Alliance’s members certify chaplains for service in the United States Armed Forces. Through this certification relationship, the Chaplain Alliance speaks on behalf of almost 50% of chaplains currently serving in the military.

The Ninth Circuit’s sweeping rule concerning unprotected government speech risks chilling the speech of *any* public employee who serves as a role model and mentor to others. This may include military chaplains, who act as teachers and coaches for members of our armed forces every day. Indeed, as government employees who routinely engage in religious speech, military chaplains have a unique perspective to offer this Court. The military chaplaincy is the paradigmatic example of a long-held principle of this Court: Government institutions “do not endorse everything they fail to censor.” *Bd. of Educ. of Westside Cmty. Sch. v. Mergens By & Through Mergens*, 496 U.S. 226, 250 (1990) (*Mergens*). Because the Ninth Circuit’s decision could create confusion as to when military chaplains are engaging in protected expressive activity—and also furthers the incorrect notion that a government institution inherently “endorses” all religious speech it declines to suppress—Chaplain Alliance urges this Court to reverse.

¹ No counsel for a party authored this brief in whole or in part, and no person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission. Both parties have filed blanket consents to the filing of *amicus* briefs.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Ninth Circuit’s decision rests on two erroneous holdings. The first is that petitioner—a high-school football coach—was speaking as a government employee while praying on his team’s field. Pet. App. 14–17. The second is that respondent—the local school district—could discipline petitioner for saying his prayer. Pet. App. 22–23. These holdings, if left to stand, will create unnecessary confusion regarding the applicability of First Amendment free-speech doctrine to those who serve the public as government employees.

To support the first holding, the Ninth Circuit reasoned that petitioner was in “a location that he only had access to because of his employment,” and was “clothed with the mantle of one who imparts knowledge and wisdom.” Pet. App. 14–15. In so doing, as Justice Alito concluded, the Ninth Circuit effectively held that “teachers and coaches” lack First Amendment rights “from the moment they report for work to the moment they depart, provided that they are within the eyesight of students.” Pet. App. 211 (Alito, J., respecting the denial of certiorari).

If permitted to stand, that reasoning could create confusion with respect to the many other public employees who are likewise “clothed with the mantle of one who imparts knowledge and wisdom” and may engage in religious expression in the workplace. Pet. App. 14. The list includes, for example, teachers, guidance counselors, social workers, and local government leaders.

It also includes military chaplains, who are often literally as well as figuratively clothed with the mantle of knowledge and wisdom. “In fact, the word chaplain is derived from *cappa*, the Latin word for cloak.” The Army Historical Foundation, *U.S. Army Chaplain Corps* (2021), <https://bit.ly/3oGWIEJ>. While “locat[ed]” in

places that they “ha[ve] access to because of [their] employment”—such as Army bases and naval vessels—military chaplains lead worship services, facilitate mental health workshops, and serve as personal counsellors for servicemembers.

America’s tradition of chaplains serving alongside troops pre-dates the Founding, and it has long been the opinion of top American generals that in the absence of military chaplains, “the motivation, morale and willingness of soldiers to face combat would suffer * * * and our national defense would be weakened accordingly.” *Katcoff v. Marsh*, 755 F.2d 223, 228 (2d Cir. 1985).

Our Nation’s military history is also replete with examples of soldiers who have assumed leadership positions—whether by virtue of rank or of circumstance—using religious expression to inspire, comfort, and console their colleagues in times of great stress and danger.

The Ninth Circuit’s interpretation of this Court’s government-speech case law would leave military chaplains—as well as non-ordained soldiers and myriad other public employees—uncertain as to which of their speech is protected and which might subject them to potentially severe discipline.²

To support the second holding—that respondent could discipline petitioner for praying—the Ninth Circuit reasoned that “an objective observer” would conclude that respondent “endorsed” petitioner’s “religious

² Although the First Amendment applies differently in the military context than in the civilian context, see, e.g., *Parker v. Levy*, 417 U.S. 733, 758 (1974), this Court has emphasized that even “in the military context” the First Amendment is not “entirely nugatory,” *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986).

activity” by failing to “stop[]” his “practice.” Pet. App. 21. But “endorsing” a government employee’s right to freely exercise *his* religion is not the same as “endorsing” the employee’s religious expression, his particular religion, or even endorsing religion generally. Cf., *e.g.*, Pet. App. 102 (O’Scannlain, J., statement concerning the denial of rehearing en banc) (“Only by ignoring everything the District said and did could an observer (mistakenly) think the school was endorsing Kennedy’s [prayer].”).

As this Court has made clear for over three decades, a government institution “do[es] not endorse everything [it] fail[s] to censor.” *Mergens*, 496 U.S. at 250. Indeed, providing all faiths with resources to spread their message under the same aegis does not “confer any imprimatur of state approval on religious sects or practices,” but rather conveys a message of “*neutrality* rather than *endorsement*.” *Id.* at 248 (emphasis added) (quoting *Widmar v. Vincent*, 454 U.S. 263, 274 (1981)). The military chaplaincy is an excellent example of this principle: It “leav[es] the practice of religion solely to the individual soldier, who is free to worship or not as he chooses without fear of any discipline or stigma.” *Katcoff*, 755 F.2d at 231–232.

Because the Ninth Circuit’s decision would create unnecessary confusion regarding the application of the First Amendment to government employees, the Chaplain Alliance urges this Court to reverse.

ARGUMENT

I. Since The Founding, The Nation’s Military Has Benefitted From Free Religious Expression Among The Chaplaincy And Soldiers

Military chaplains play a crucial role in strengthening America’s national defense by bolstering soldiers’ morale, determination, and resolve. See *Katcoff*, 755 F.2d at 228. As General George C. Marshall

once said, “[t]he soldier’s heart, the soldier’s spirit, the soldier’s soul, are everything. Unless the soldier’s soul sustains him he cannot be relied on.” General George C. Marshall, Speech at Trinity College (June 15, 1941), <https://bit.ly/3mC67uy>.

In every American conflict—from the Battle of Lexington to Operation Inherent Resolve—chaplains have served the irreplaceable role of spiritual advisors, intercessors, and motivators. Their ethical and spiritual guidance provide a “guardrail” in battlefield conditions where “a sense of right and wrong can disappear in the fog of adrenaline and anger.” Anne C. Loveland, *Change and Conflict in the U.S. Army Chaplain Corps Since 1945* 132 (2014). Generation after generation of young military men and women have relied on these chaplains for support and guidance. And, simply put, there can be no chaplaincy without free religious expression.

Likewise, in each of this Nation’s armed conflicts, military members at every level—from the most senior commanders to ordinary foot soldiers—have used religious expression to guide, inspire, and comfort their colleagues in times of extraordinary stress.

A. The Chaplaincy Has A Storied History In The American Military

“As long as armies have existed, military chaplains have served alongside soldiers, providing for their spiritual needs, working to improve morale, and aiding the wounded.” The Army Historical Foundation, *U.S. Army Chaplain Corps*, The National Museum of the United States Army (2021), <https://bit.ly/3oGWIEJ>. The tradition dates back to Biblical times, with Moses exhorting the ancient Israelites to have a priest address the army before going forth to war. *Deuteronomy* 20:2–3; see also *Joshua* 6:13 (noting that priests accompanied the ancient Israelites into battle).

Chaplains have served the American military since its inception. “When the Continental Army was formed” in 1775, the “chaplains attached to the militia of the 13 colonies became part of our country’s first national army.” *Katcoff*, 755 F.2d at 225. The following year, General George Washington directed the “Colonels or commanding officers of each [Army] regiment” to “procure Chaplains accordingly,” noting that “[t]he blessing and protection of Heaven are at all times necessary but especially so in times of public distress and danger.” General George Washington, *General Orders, 9 July 1776*, National Archives: Founders Online, <https://bit.ly/3BmJwsr>. Among its final acts before adjourning on March 3, 1791, the First Congress formally “authorized the appointment of a commissioned Army chaplain.” *Katcoff*, 755 F.2d at 225.³

During its entire history, chaplains have remained a linchpin of the American military. From the battlefield of Lexington to the deserts of Afghanistan, chaplains have served as the “conscience” of the military in all corners of the world. Loveland 103. More than 400 chaplains have given their lives in the line of duty. Michael M. Phillips, *A Chaplain and an Atheist Go to War*, Wall St. J. (Sept. 4, 2010), <https://on.wsj.com/3iQOG8P>. And some have received the military’s highest honors, including the Distinguished Service Cross, the Silver Star, and the Medal of Honor. See, e.g., Eric Jorgensen, *U.S. Army*

³ “That the First Congress provided for the appointment of chaplains” soon after “approving language for the First Amendment” in 1789 “demonstrates that the Framers considered” military chaplains to be “a benign acknowledgment of religion’s role in society.” *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 576 (2014); see also *id.* at 577 (explaining that the Establishment Clause does not forbid “a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change”).

Chaplain Corps Medal of Honor Recipients, U.S. Army (Mar. 24, 2021), <https://bit.ly/3t7hAWt>.

One early example is Reverend Father William Corby, whose statue still stands today upon the hallowed ground of Gettysburg, Pennsylvania. *Fr. Corby's Statue*, University of Notre Dame: 175 Moments, <https://bit.ly/356PBON>. Father Corby served as chaplain to the Irish Brigade of the Union Army in the Civil War. John P. Deeben, National Archives, *Faith on the Firing Line – Army Chaplains in the Civil War*, Prologue Magazine, Spring 2016, <https://bit.ly/35wUGiY>. In the late afternoon of July 2, 1863, Father Corby climbed atop a large boulder on the battlefield as Confederate troops swiftly advanced. *Ibid.* His fellow Union soldiers knelt around him, and Father Corby began an impromptu rite of general absolution. *Ibid.* With the comfort of Father Corby's blessing, the Irish Brigade bravely plunged into battle, halting the Confederate advance, and helping to ultimately defeat General Lee's army and turn the tide of the Civil War. *Ibid.*

Decades later, chaplains would serve the same vital role in World War II. On February 3, 1943, for example, when a German submarine torpedoed an American Army transport ship, four chaplains—one Methodist pastor, one Jewish rabbi, one Roman Catholic priest, and one Dutch Reformed minister—sprang into action. John Brinsfield, *The Four Chaplains*, U.S. Army (Jan. 28, 2014), <https://bit.ly/3oRYPWi>. The “Four Chaplains,” as they would become known, calmed the frightened soldiers, guided them safely to lifeboats, and gave the life jackets off their backs. *Ibid.* Soldiers would later recall the moment they realized that the chaplains “never intended to leave the ship.” *Ibid.* “As the ship went down, survivors in nearby rafts could see the four chaplains—arms linked and braced against the slanting deck. Their voices could also be heard offering prayers and singing hymns.” *Ibid.*

At the end of the war, after most American troops had returned home, Chaplain Henry Gerecke traveled to Nuremberg, where he showcased yet another facet of chaplaincy's unique and irreplaceable role in the military. Daria Labinsky, *The Chaplain at Nuremberg*, National Archives: The Text Message (May 20, 2014), <https://bit.ly/3t8YpM3>. Reverend Gerecke was asked to serve as a spiritual advisor to both the members of the International Military Tribunal and to the Nazi officials standing trial. *Ibid.* Reverend Gerecke made a profound impact on all parties, but particularly on the Nazi defendants. Henry F. Gerecke as told to Merle Sinclair, *I Walked to the Gallows With the Nazi Chiefs*, *The Saturday Evening Post*, Sept. 1, 1951, at 17–19, 57–58. The prisoners with whom he prayed—many of whom had committed some of the most heinous war crimes known to mankind—would eventually write to Reverend Gerecke's wife in handwritten German, pleading for the chaplain to remain in Nuremberg until the end of the trial: “[W]e cannot miss your husband now * * *. It is impossible for any other to break through the walls that have been built up around us.” *Id.* at 57.

In the Korean War, the actions of one chaplain—Emil Kapaun—would ultimately earn him the military's highest distinction: the Medal of Honor. Anne Leland, U.S. Congressional Research Service, RL30011, *Medal of Honor Recipients: 1979-2014* 33–34 (2014). Father Kapaun famously introduced himself to his fellow soldiers by silently grabbing a shovel and digging latrines alongside them. Roy Wenzl and Travis Heying, *Father Emil Kapaun laid to rest in Wichita as thousands pay their respects*, *Wichita Eagle (Kan.)*, Sept. 29, 2021, 2021 WLNR 32067298. Father Kapaun later carried more than thirty wounded soldiers across a river to safety, saved an American sergeant from execution, and negotiated the safe surrender of injured Americans. David Vergun, *Medal of Honor Awarded to Army Chaplain*, U.S. Army (July 26, 2013), <https://bit.ly/3JXmLZC>. And when he and his fellow

soldiers were forced to a prison camp, Father Kapaun became known as the “Great Thief,” as he regularly stole food for his fellow POWs and even led an Easter sunrise service in defiance of his captors. *Ibid.*

In Vietnam, “an extremely different war” with “no frontlines,” chaplains again proved instrumental in maintaining the morale and resolve of the soldiers. Department of the Army, Pam. 165-1, *A Brief History of the United States Army Chaplain Corps* 24 (1974). As one correspondent noted of the chaplain in the unit he was traveling with, the “sermons are brief and often mention the value of suffering as a means to understand what Christ Himself endured.” *Ibid.* Another Vietnam-era chaplain was Charles Liteky, who carried over twenty wounded soldiers to safety when his unit came under fire. Jacqueline E. Whitt, *Bringing God to Men: American Military Chaplains and the Vietnam War* 10 (2014). And in addition to evacuating his fellow soldiers, for which he received the Medal of Honor, he also prayed with them, administering last rites “while bullets flew fewer than fifteen feet away.” *Ibid.*

In the wake of Vietnam, the American military relied on the chaplaincy for a new problem: a “decline of discipline and morale” that included problems with “[d]esertion, drugs, and racial violence.” Loveland 85. For the first time, the military began staffing chaplains as faculty at military academies to teach “moral leadership and moral responsibility.” *Id.* at 105. By the 1980s, chaplain instructors, including two female chaplains, were teaching at West Point and twenty other service schools. *Id.* at 106. As of 1996, 80% of ethics courses taught in Army service school leadership departments were taught by chaplains. *Ibid.* The incorporation of these religious leaders into the early stages of military training “infuse[d] leadership training with ethical and moral principles,” solidifying the chaplain as the “primary ethical player in the army.” *Id.* at 106–107.

“In peace and in battle, in garrison and in combat, [chaplains] have played an incalculably important role in maintaining the religious faith and the military morale of our defenders,” President Eisenhower once said. Department of the Army, Pam. 165-1 at iii. “The consecration, the diligence, the courage and the resourcefulness of its chaplains is part of the Army’s proudest traditions.” *Ibid.*

B. The Chaplaincy Is Critical To Today’s Military, And Free Religious Expression Is Critical To The Chaplaincy

Today, the United States military “maintain[s] chaplaincies to accommodate religious needs, to provide religious and pastoral care, and to advise commanders on the complexities of religion with regard to its personnel and mission, as appropriate.” Chairman of the Joint Chiefs of Staff, Joint Publication 1-05, *Religious Affairs in Joint Operations* vii, I-1 (2013). “As military members, chaplains are uniquely positioned to assist Service members, their families, and other authorized personnel with the challenges of military service as advocates of religious, moral, and spiritual well being and resiliency.” *Ibid.* The American military currently has approximately 5,500 chaplains,⁴ representing nearly 200 religious denominations.⁵

The vital importance of military chaplains reflects the unique burdens that the government places on today’s military servicemembers—particularly young ones. Members of the military perform their duties

⁴ See Press Release, Chaplain Alliance for Religious Liberty (Mar. 23, 2018), <https://bit.ly/3mGfhGE>.

⁵ See *Endorsing Organizations/Agents*, Office of the Under Secretary for Personnel and Readiness, <https://bit.ly/3oSUUJ9>.

under harrowing conditions: losing contact with their families for months on end; relinquishing control over their living conditions and geographic locale; risking their own lives; and witnessing and sometimes causing death. Joshua T. Morris, *The Army Chaplain as Counselor*, 37 *Reflective Prac.: Formation and Supervision in Ministry* 107, 107–108 (2017).

Spiritual support is essential for these young men and women—the vast majority of whom are religious. Indeed, approximately 75% of active duty forces identify themselves as religious. Kristy N. Kamarck, Cong. Research Serv., R44321, *Diversity, Inclusion, and Equal Opportunity in the Armed Services* 47 (2019). And most students at America’s military academies are also religious. 2017 United States Military Academy, Bd. of Visitors, *Annual Report*, at 36–39 (around 90% of West Point students identified with a religion).

The goal is “not only to offer a religious and moral environment that would sustain these young people during their period of service, but also to ensure that they returned to civilian life as good as or better people than they were when they entered the military.” Loveland 4. The return of service members to civilian life has “a profound effect upon our social fabric,” and “support for their religious and moral well-being is an inescapable obligation that faces the whole nation.” President’s Committee on Religion and Welfare in the Armed Forces, *Community Responsibility to Our Peacetime Servicemen and Women*, Mar. 24, 1949, at 3.

Today’s chaplain provides “pastoral care, counseling, and coaching” in a “relational” manner. Chairman of the Joint Chiefs of Staff, Joint Publication 1-05, at II-1. The chaplain’s care is “enhanced by their proximity and immediate presence, distinguished by confidential communication and imbued with professional wisdom and genuine respect for human beings.” *Id.* at II-3. This counseling is “most effective when based on strong relationships developed in the context of shared life in

the same unit.” *Ibid.* Examples of the care provided by chaplains includes “work-space visitation, coaching on military life, pre-and post-deployment training for Service members and their families, crisis prevention and response, family life programs, memorial observances, and combat casualty care.” *Ibid.*; see also Department of Defense Instruction 1304.28, *The Appointment and Service of Chaplains* (effective May 12, 2021), <https://bit.ly/35h7AlK>.

Chaplains and the free expression of religion play a significant role in helping military members deal with stress, anxiety, and relationship issues. Chaplains are often the first point of contact for service members who are hesitant to utilize mental health services. Tiffany E. Ho, et al., Office of People Analytics, OPA-2018-048, *Mental Health and Help-Seeking in the U.S. Military: Survey and Focus Group Findings* 49 (2018). According to the Military Family Life Project, in 2012, many military members and their spouses sought counseling for stress, mental health, and relationship issues. Defense Manpower Data Cntr., DMDC Report No. 2013-036, *2012 Military Family Life Project, Tabulations and Responses* 136–139 (2013). Nearly 20% of military members’ spouses sought this critical counseling from a military chaplain or civilian religious leader. *Id.* at 160.

The trusted relationship between chaplains and active duty service members is even more critical when it comes to suicide prevention. Slightly more than 14% of active duty service members experience thoughts of suicide. Ho, et al. 12–14. Of those, about 15% have made a suicide attempt. *Id.* at 15–17. Military chaplains, among other support groups, play a critical role by being in primary contact with service members at risk for mental health issues. *Id.* at 4. Around 22% of active military members seeking help discussed suicidal thoughts and attempts with a chaplain or other spiritual counselor. *Id.* at 25. And more than 30% of active-duty members who contemplated suicide but did not actively

seek help nonetheless considered speaking with a chaplain or other spiritual counselor. *Id.* at 26.

For centuries, chaplains have freely expressed religious ideas to men and women in the armed forces. There is no doubt that our military and our country are better for it.

C. Free Religious Expression Is Also Vital To Non-Chaplain Servicemembers

Chaplains are not the only members of the military who others look to for the mantle of wisdom and knowledge, nor do they hold a monopoly on religious expression within the military. To the contrary, soldiers who find themselves occupying leadership positions—whether by rank or by circumstance—have often used religious expression to guide, inspire, and comfort their colleagues. In particular, innumerable stories about courage, rescue, and survival—some prominent and some obscure in our Nation’s military history—feature prayer and religious expression as the crucial elements.

At the outset of the D-Day landings in Normandy during World War II, President Franklin D. Roosevelt in a radio address urged all Americans to “join with [him] in prayer,” then asked “Almighty God” to aid our soldiers in “a struggle to preserve our Republic, our religion, and our civilization, and to set free a suffering humanity.” United States Department of State, Pub. 2144, *“In this Poignant Hour . . .”: Prayer by the President*, Department of State Bulletin, Vol. X, 525 (June 10, 1944). He prayed with those listening—who doubtless included many soldiers, sailors, and Marines—that God “[l]ead them straight and true; give strength to their arms; stoutness to their hearts; [and] steadfastness in their faith.” *Ibid.*

Later that year, during the Battle of the Bulge, General George Patton deployed religious expression toward a more practical and immediate end, famously

inviting his troops to pray that God “restrain these immoderate rains with which we have had to contend [and] [g]rant us fair weather for Battle.” Harold A. Winters, *Battling the Elements: Weather and Terrain in the Conduct of War 45* (1998).

Lower-ranking soldiers also routinely employed religious expression to guide, inspire, and comfort their colleagues. See Kevin L. Walters, *Beyond the Battle: Religion and American Troops in World War II*, 21 Theses and Dissertations 28–33 (2013), <https://bit.ly/3slZCAk>. Because of its scale, World War II provides a wealth of examples. A well-known one—depicted in the 1974 book *A Bridge Too Far* and the subsequent 1977 film—involves Julian Cook, a Major in the Army’s 82nd Airborne Division. Cornelius Ryan, *A Bridge Too Far* 586–594 (2010). Major Cook and his lightly armed men were ordered to cross the swift-flowing Waal River at Nijmegen, in a daring daylight raid on a Nazi-defended bridge. *Ibid.* Inadequately supplied, Cook and others in his command were left to cross in small canvas boats, using their rifle butts as paddles; as the smokescreen laid for the crossing quickly dissipated, the boats were exposed to withering fire. *Ibid.* Major Cook guided his men through this unimaginable stress by loudly reciting the first lines of the Hail Mary, keeping the men focused and paddling in proper time—and the boats therefore headed in the right direction—until they landed on the far bank. *Id.* at 592 & 611 n.1.

Another example of religious valor in the Second World War involves an unarmed medic named Desmond Doss. Though initially unpopular among his regiment because he was a conscientious objector who refused to fight on principle, Doss ran through enemy fire along a cliff in Okinawa to rescue dozens of wounded soldiers, as famously depicted in the 2016 film *Hacksaw Ridge*. Richard B. Frank, *Hacksaw Ridge; The Conscientious Objector; The Unlikeliest Hero: the Story of Desmond T.*

Doss, Conscientious Objector Who Won His Nation's Highest Military Honor, 104 *J. Am. Hist.* 301 (2017). When he reached soldiers stranded atop the plateau, known as Hacksaw Ridge, he carried them back one at a time, tied them to a rope wrapped around a tree stump, and lowered them down the cliff to safety. Booton Herndon, *Redemption at Hacksaw Ridge* 125–126 (2016). After each rescue, he prayed that God would “just help him get one more,” and then turned around and went back for another soldier, continuing until he had lowered every wounded man to safety. *Id.* at 126, 213. By the end of the battle, he had rescued seventy-five men. *Id.* at 126.

Other well-known examples involve Eddie Rickenbacker and Louis Zamperini, who were separately stranded for weeks on life rafts in the Pacific Ocean. While stranded, each of them—and the men with them—took solace in praying, singing hymns, and reading the Bible. Walters 29–30. One previously unreligious soldier, Lieutenant James Whitaker, credits this with saving his life over twenty days at sea: “It was my newly found faith in God that sustained me * * * . Had it not been for the fortitude built up in hours of prayer, I think we all would have abandoned hope.” *Id.* at 30.

Less-prominent soldiers routinely risked their lives to freely express their religion. Corporal Roger Houtz, for example, walked a mile to participate in communion with several other men in a French orchard, watching for snipers along the way. *Id.* at 67. Another service, held in a partially destroyed building in Europe, continued amid the noise of artillery explosions until the chaplain yelled “dismissed!” after a nearby shell rained dust and debris on the service. *Id.* at 66–67.

And countless soldiers, not all of them chaplains, led worship services as a “common form of preparation before battle as men sought reassurance and perhaps even a level of control over their future.” *Id.* at 59. Pre-flight prayers, usually led by pilots or other non-

chaplains, were common before air missions. *Id.* at 73–74. Corporal William Kiessel described the atmosphere in the days before the invasion of Normandy as “fellows * * * trying to catch up on years of neglected religion in a few days.” *Id.* at 74–75.

Without the freedom to express their religion, these members of the military—from the Commander-in-Chief to generals, officers, and ordinary soldiers—would lack one of their most important resources for our troops’ survival and success.

II. The Ninth Circuit’s Decision Should Be Reversed

A. The Decision Below Could Create Confusion As To When Military Chaplains Are Engaging In Protected Speech

As noted above, religious freedom is a core element of all aspects of military life. Attempting to silence religious speech by government employees—or even to drive those who engage in such speech from government service—is profoundly misguided. Government employees do not surrender their First Amendment rights upon entry into government service, and our Nation is infinitely better off because of that.

Military chaplains in particular are “clothed with the mantle of one who imparts knowledge and wisdom.” Pet. App. 14. Thus, the ruling below could create confusion and have a chilling effect on the speech of chaplains. See, *e.g.*, Pet. App. 15–16; see also, *e.g.*, Pet. App. 90 (O’Scannlain, J., statement concerning the denial of rehearing en banc) (arguing that, under the Ninth Circuit’s decision, “a teacher whose car parked on school property bears a bumper sticker for a presidential campaign” could “stand to be censored, disciplined, or even fired by [her] public employer for any or no reason at all”).

Simply put, military chaplains “represent a unique, hybrid form of government employee.” Steven K. Green,

Reconciling the Irreconcilable: Military Chaplains and the First Amendment, 110 W. Va. L. Rev. 167, 183 (2007). On the one hand, a military chaplain is a commissioned officer. *In re England*, 375 F.3d 1169, 1171 (D.C. Cir. 2004). He “is subject to the same discipline and training as that given to other officers and soldiers,” and “[w]hen ordered with troops into any area, including a combat zone under fire, he must obey.” *Katcoff*, 755 F.2d at 226. Thus, a military chaplain “is answerable to his commander in war and peace. As a defender of the U.S. Constitution, he is a partisan for a particular City of Man.” Hans Zeiger, *Why Does the U.S. Military Have Chaplains?*, Pepperdine Policy Review, Spring 2009, at 13.

On the other hand, a military chaplain “is [also] the designated spokesman for the City of God in the nation’s Armed Forces.” *Ibid.* To that end, a military chaplain must “engage in activities designed to meet the religious needs” of servicemembers, such as by “conduct[ing] religious services,” “furnish[ing] religious education to soldiers and their families,” and “counsel[ing] soldiers.” *Katcoff*, 755 F.2d at 226, 228; see also United States Army Regulation 165-1, Army Chaplain Corps Activities § 2-3(b) (noting that members of the Army Chaplain Corps have “dual role[s]” as both a “professional military religious staff advisor” to the commander and staff and as a “professional military religious leader” to soldiers).

Due to the hybrid nature of military chaplains’ duties, the range of their professional activities can be extraordinarily broad. One Navy chaplain, for example, summarizing his “personal experiences as a chaplain or those of others known to him over more than twenty years of reserve and active duty,” notes that Navy chaplains, among other things,

engage in counseling sessions one-on-one with Sailors, Marines, other service members, and family members; attend and participate in staff meetings with other officers; visit workspaces

and dining facilities; travel to far-flung lands; lead workshops on healthy relationships, planning for deployment, and return and reunion issues; offer invocations and benedictions at assemblies ranging in size from a handful to hundreds of attendees; spend weeks or months at sea, interacting daily with the rest of the crew; accompany forces encountering hostile fire; broadcast an evening prayer over a ship's public address system just before "Taps" at the end of each day; [and] visit patients in sickbays or hospitals.

CDR William A. Wildhack III, CHC, USNR, *Navy Chaplains at the Crossroads: Navigating the Intersection of Free Speech, Free Exercise, Establishment, and Equal Protection*, 51 Naval L. Rev. 217, 240-241 & n.150 (2005).

The Ninth Circuit's decision could render the constitutional status of these kinds of interactions—all of which constitute religious "demonstrative communication"—deeply uncertain. Like football coaches, military chaplains' "stock in trade" lies in "expression." Pet. App. 14. Military chaplains routinely serve in close proximity to servicemembers for extended periods of time, "mentoring, cheering, and reassuring" them. Zeiger 15. While engaging in this conduct, a chaplain cannot be required to continually pause and seek legal counsel as to whether her conduct is protected. Such a state of affairs could lead to a chilling of military chaplains' speech—and, consequentially, a weakening of "the motivation, morale and willingness of [our] soldiers to face combat" and the other rigors of life in the military. *Katcoff*, 755 F.2d at 228.

The confusion created by the Ninth Circuit's decision could also potentially infringe the First Amendment rights of *servicemembers*. As the Second Circuit recognized in *Katcoff*, the Free Exercise Clause "obligates Congress, upon creating an Army, to make

religion available to soldiers who have been moved by the Army to areas of the world where religion of their own denominations is not available to them.” *Katcoff*, 755 F.2d at 234. Congress, that is, “recognized as early as 1850 that its failure to provide a chaplaincy would deprive soldiers of their Free Exercise rights.” *Id.* at 234–235. By creating additional uncertainty in First Amendment doctrine that could lead to a chilling of chaplains’ speech, therefore, the Ninth Circuit’s decision could also possibly affect the religious rights of soldiers under the Free Exercise Clause. See, e.g., *id.* at 228 (“Unless there were chaplains ready to move simultaneously with the troops and to tend to their spiritual needs as they face possible death, * * * soldiers would be left in the lurch, religiously speaking.”). And that is to say nothing about the religious expression of non-chaplain military leaders.

Notably, some lower courts have recognized that the rule that this Court announced in *Garcetti v. Ceballos*, 547 U.S. 410 (2006)—namely, that “government employees generally have no First Amendment protection with respect to speech made ‘pursuant to their official duties’”—can “pose[] a particular threat to [some] uniquely situated public employees.” *Turner v. U.S. Agency for Glob. Media*, 502 F. Supp. 3d 333, 374 (D.D.C. 2020) (quoting *Garcetti*, 547 U.S. at 421).⁶ Cases involving people in such professions, including professors at public universities, see *Demers v. Austin*, 746 F.3d 402, 412 (9th Cir. 2014); *Adams v. Trustees of the Univ.*

⁶ Indeed, one district court incorrectly determined in 2015 that military chaplains’ “religious speech” constituted government speech under *Garcetti*—and that, as a result, ostensibly, chaplains have no First Amendment rights while speaking on religious matters. See *Heap v. Carter*, 112 F. Supp. 3d 402, 424 (E.D. Va. 2015) (“[C]haplains speak on religious matters only as part of their official military duties. It is impossible to separate a chaplain’s official duties from speech on religion * * *.”).

of *N.C.-Wilmington*, 640 F.3d 550, 562 (4th Cir. 2011), and government-employed journalists, see *Turner*, 502 F. Supp. 3d at 375, highlight the dangers of broad applications of *Garcetti* in cases that implicate countervailing constitutional interests. These courts have recognized the importance of being sensitive to “additional constitutional interests that are not fully accounted for by * * * employee-speech jurisprudence,” and counsel in favor of a more nuanced and balanced First Amendment analysis. *Ibid.* (quoting *Garcetti*, 547 U.S. at 425).

Military chaplains highlight the importance of recognizing that speech by public employees, even speech undertaken during working hours by people who occupy positions of leadership and mentorship, should not too readily be deemed “government speech” subject to regulation.

B. The Decision Below Could Create Confusion About Whether—And, If So, Under What Circumstances—The Government “Endorses” Religious Speech That It Fails To Censor

The Ninth Circuit concluded that the Bremerton School District would have “endorsed” petitioner’s religious speech if it had simply tolerated the speech and allowed it to occur unhindered. Pet. App. 21. But as this Court has long made clear, “an open-forum policy” that “include[s] nondiscrimination against religious speech” “ha[s] a secular purpose, and would in fact *avoid* entanglement with religion.” *Mergens*, 496 U.S. at 248 (quoting *Widmar*, 454 U.S. at 271). A program that allows numerous religious denominations to preach their doctrines within the confines of a single government institution, in other words, does not pose a First Amendment problem; in fact, it reflects a policy of religious “neutrality” rather than “endorsement.” *Mergens*, 496 U.S. at 248; see also *Warnock v. Archer*, 380 F.3d 1076, 1082 (8th Cir. 2004) (“When [religious] speech and acts can reasonably be attributed to the

government itself, of course, the restrictions of the establishment clause apply. But * * * the mere fact that [religious speech] occurs in a government setting does not render it unconstitutional.”).

The military chaplaincy serves an excellent example of this longstanding principle—namely, that a government institution “do[es] not endorse everything [it] fail[s] to censor,” *Mergens*, 496 U.S. at 250. It is well-established that although “military chaplains may be employed by the military to perform religious duties,” not “every word they utter bears the imprimatur of official military authority.” *Rigdon v. Perry*, 962 F. Supp. 150, 159 (D.D.C. 1997). Nor could that possibly be the case. As noted above, the military chaplaincy today represents nearly 200 religious denominations. It would be absurd to claim that the government somehow “endorsed” every one of these denominations’ (potentially inconsistent or even mutually exclusive) religious beliefs. To the contrary, “[w]hen meeting in * * * worshipful settings, the military not only allows but *expects* chaplains to preach and expound according to the dictates of the faith represented, not to that of the government.” Green, 110 W. Va. L. Rev. at 185 (emphasis added). Indeed, a rule that deems chaplains’ religious speech to be “government speech”—and, therefore, subject to government oversight and regulation—would lead to *greater* government entanglement in private matters of religion. Such a rule would allow the government to police the everyday religious speech of chaplains, in an effort to ensure that chaplains’ speech conforms to government policy. That cannot be the law: “[t]he First Amendment” specifically “protects the right of religious institutions ‘to decide for themselves, *free from [government] interference*, matters of * * * faith and doctrine.’” *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020) (emphasis added) (quoting *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952)).

As this Court has noted in a different context, “[t]he government must be neutral when it comes to competition between sects,” and “[i]t may not make a religious observance compulsory.” *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). But there is “no 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.” *Ibid.* By failing to recognize the distinction between “endorsing” the free exercise of religion and “endorsing” religion itself, the Ninth Circuit’s holding reflects the sort of “hostil[ity] to religion” that this Court criticized in *Zorach*, and accordingly should be reversed.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

Respectfully submitted.

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