

No. 21-418

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IN THE  
**Supreme Court of the United States**

JOSEPH A. KENNEDY,

*Petitioner,*

*v.*

BREMERTON SCHOOL DISTRICT,

*Respondent.*

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

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**BRIEF OF AMICI CURIAE THE FORUM ON  
THE MILITARY CHAPLAINCY AND FORMER  
MEMBERS OF THE MILITARY AND MILITARY  
CHAPLAINCIES IN SUPPORT OF RESPONDENT**

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## INTERESTS OF AMICI CURIAE<sup>1</sup>

Amici curiae are former members of the military with an interest in the free exercise of religion for all service members.

*Forum on the Military Chaplaincy* is an unincorporated association led by retired military chaplains whose membership also includes clergy, lay leaders, veterans, and concerned citizens committed to free and diverse religious expression. Since 2005 the Forum has sought to provide resources and advocacy for a military chaplaincy that is committed to and expressive of the sacred values of personal integrity, selfless compassion, respect for others, and excellence in leadership. The Forum supports the Chiefs of Chaplains in their constitutional duty to secure the free exercise of religion for all of America's service members, to provide an inclusive, socially and spiritually responsive program of training and education, and to extend a welcome and affirming presence to the troops and military families that they are called to serve.

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, amici curiae affirm that no counsel for a party authored this brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief and no person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission. Petitioner and Respondent filed blanket consents to the filing of amicus curiae briefs.

***Chaplain (Colonel) Stephen B. Boyd, USA (Retired)*** is a former Army Chaplain who served 32 years of active duty in the Army.

***Captain Thomas T. Carpenter, USMC (1970-1981)*** is a former Marine who served 15 years and is now Co-Chair of the Forum on the Military Chaplaincy.

***Chaplain (Major) Michael T. Curd, D.Min., USA (Retired)*** is a former Army Chaplain who served 20 years of active duty in the Army.

***Chaplain (Captain) Jon E. Cutler, USN (Retired)*** is a former Navy Chaplain who served 32 years in the Navy and is now Co-Chair of the Forum on the Military Chaplaincy.

***Chaplain (Colonel) Paul W. Dodd, D.Min, LPC, USA (Retired)*** is a former Army Chaplain who served 31 years in the Army.

***Chaplain (Captain) John F. Gundlach, USN (Retired)*** is a former Navy Chaplain who served 27 years in the Navy.

***Chaplain (Captain) Bruce E. Kahn, USN (Retired)***, is a former Navy Chaplain who served 28 years for retirement purposes on active duty and in the reserve.

***Chaplain (Captain) Philip D. King, D.Min, USN (Retired)*** is a former Navy Chaplain who served 29 years in the Navy, including seven as a pilot and 22 as a Chaplain.



**Chaplain (Major General) Howard D. Stendahl, USAF (Retired)** is a former Air Force Chaplain who served 30 years of active duty, including three as the 17<sup>th</sup> Chief of Chaplains for the Air Force.

### SUMMARY OF ARGUMENT

The Ninth Circuit's decision properly considered the First Amendment claims of a high school football coach who sought to lead public prayers on the school football field immediately after the end of football games. In its brief on the merits, Amicus Curiae Chaplain Alliance for Religious Liberty (the "Alliance") seeks to inject hypothetical questions about military chaplaincy programs into this appeal. The Alliance contends that the Ninth Circuit's decision could create "confusion" for military chaplains and potentially "lead to a chilling" of their ability to engage in "everyday religious speech." Alliance Br. 2, 18, 21. The Alliance makes a series of sweeping and speculative assertions about military chaplains and suggests that, beyond the Ninth Circuit's opinion, this Court's decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), poses a "threat" to military chaplains. Alliance Br. at 19.

The Forum on the Military Chaplaincy and additional Amici submit this brief to provide the Court with important context surrounding the military's religious programs and to explain why the Ninth Circuit's decision will not negatively impact military chaplains or their ability to work with service members.

Established by Congress, the military chaplaincies are subject to a comprehensive set of policies and regulations issued by the Department of Defense and the individual service branches. Those regulations define the objectives of the chaplaincy programs and establish the roles, responsibilities, and obligations of both commanders and chaplains who implement the military's religious programs. All of these policy documents, from the Secretary of Defense's Directive through multiple layers of implementing rules and procedures, recognize that chaplains operate in a pluralistic religious environment and mandate that they advance the free-exercise rights of service members to follow their own religious faiths.

Military religious programs are established by the commanders and religious services are provided by chaplains under the authority of their commanding officers. Chaplains are required to provide or facilitate religious and non-religious programs for all service members of all faiths. In accepting their commissions, military chaplains acknowledge that they must respect the rights of service members to have whatever faith they choose or no faith at all. Unlike civilian clergy, military chaplains must help meet the religious needs of service members who follow a different faith from their own. The Navy has rightly called this pluralistic requirement the "keystone of institutional ministry." See Department of the Navy, Navy War Publication ("NWP") 1-05, *Religious Ministry in the Fleet*, § 2.4.1 (2012) (<https://bit.ly/3LHaOP1>).

The Court, however, will not find any of this in the Alliance's brief. The Alliance does not discuss these long-standing military policies or the unique mandate of military chaplains to serve a religiously diverse population. Nor does it explain what may constitute "everyday religious speech" or how the asserted right to engage in such speech may impact the free-exercise rights of service members who follow a different faith or the military's interests in preventing religious coercion. Alliance Br. 21. Indeed, the military's specialized environment and strict chain of command increase the risks of improper religious endorsement and coercion, especially when attendance at command functions or other non-religious events is mandatory. And the Court cannot address the Alliance's hypothetical First Amendment issues about chaplains in broad strokes or in a vacuum.

A ruling affirming the Ninth Circuit's decision will not have any negative impact on chaplains' ability to support military service members in accordance with the applicable policies and regulations. To the contrary, the Ninth Circuit's decision reaffirms the principles of religious pluralism and avoiding religious coercion that animate the military chaplaincies. The Court should decline the Alliance's invitation to go beyond the questions presented.

## ARGUMENT

### **I. Chaplains Implement the Religious Programs of Commanding Officers to Support the Diverse Religious Needs of Service Members in a Pluralistic Environment**

“Chaplains have contributed to Soldier’s religious freedom, moral development, and spiritual well-being throughout the history of the Army.” Department of the Army, Army Regulation 165-1 (“AR”), Army Chaplain Corps Activities, § 1-5(b) (2015) (<https://bit.ly/3qMJAOD>). The military chaplaincy is “a product of the nation’s commitment to religious freedom.” *Id.* Because military chaplains represent their own religious organizations and serve as military staff officers, they must balance the First Amendment “protection of the free exercise of religion and protection from governmental establishment of religion.” Department of the Navy, Navy War Publication (“NWP”), 1-05 § 1.1.

Congress has enacted statutes that provide for chaplains and religious worship services within each branch of the military. *See, e.g.*, 10 U.S.C. § 7217 (2019) (“Duties: chaplains; assistance required of commanding officers”) (Army); *id.* § 8221 (2019) (“Chaplains: divine services”) (Navy and Marine Corps); *id.* § 9217 (2021) (“Duties: chaplains; assistance required of commanding officers”) (Air Force). Given the important roles of chaplains and the First Amendment interests at stake, the Department of Defense and the individual service branches have adopted a comprehensive series of

policies, instructions, and regulations that govern all aspects of the chaplaincy programs, including the appointment of chaplains, their roles and responsibilities, and their relationships with the chain of command.

For example, in Department of Defense Directive 1304.19, the Secretary of Defense declared that it is “DoD policy that the Chaplaincies of the Military Departments: . . .

Are established to advise and assist commanders in the discharge of their responsibilities to provide for the free exercise of religion in the context of military service as guaranteed by the Constitution, to assist commanders in managing Religious Affairs (DoD Directive 5100.73 (reference (e))), and to serve as the principal advisors to commanders for all issues regarding the impact of religion on military operations.

Department of Defense, Department of Defense Directive (“DoDD”) 1304.19, *Directive: Appointment of Chaplains for the Military Departments*, ¶ 4.1 (2007) (<https://bit.ly/36Zm1uQ>). The Under Secretary of Defense for Personnel and Readiness has issued more specific implementing regulations, as have the individual military branches. *See, e.g.*, Department of Defense, Department of Defense Instruction (“DoDI”) 1304.28, *The Appointment and Service of Chaplains* (2021) (<https://bit.ly/3JM6nBI>); Department of the Navy, Secretary of the Navy Instruction (“SECNAVINST”) 1730.7D, *Religious Ministry in the*

*Department of the Navy* (2008) (<https://bit.ly/3wNBNUv>); Department of the Navy, Chief of Naval Operations Instruction (“OPNAVINST”) 1730.1E, *Religious Ministry in the Navy* (2012) (<https://bit.ly/3LokMV5>); AR 165-1 (2015); NWP 1-05 (2012); Department of the Air Force, Air Force Instruction (“AFI”) 52-105, *Chaplain Corps Resourcing* (2020) (<https://bit.ly/3NpUP9D>). When the Navy issued its War Publication 1-05, the Navy’s Chief of Chaplains noted that the Publication “embodies how, with an emphasis on resilience and readiness, the Chaplain Corps supports the Chief of Naval Operation’s three tenets: Warfighting First, Operate Forward, and Be Ready.” NWP 1-05, § Cover Mem. from M.L. Tidd ¶ 1.

Under these and other Department of Defense policies, the military religious programs “are the commander’s program[s],” not the chaplains’ programs. AR 165-1, § 1-10. As the Chief of Naval Operations has directed, “[t]he commander shall establish a command religious program (CRP)” and “[r]eligious ministry is entrusted to Navy Chaplains and delivered under the authority of commanders and commanding officers.” OPNAVINST 1730.1E, ¶ 4(c), (e); *see also* AR 165-1, § 2-1(a) (“Commanders provide for the free-exercise of religion through assigned chaplains, religious affairs specialists, and other religious personnel.”). Accordingly, “[n]either command religious programs (CRPs) nor the responsibility for accommodating religious needs of personnel belong to chaplains or religious ministry team (RMT) personnel.” NWP 1-05, § 1.2. Instead,

“commanders are responsible for the accommodation of religion.” *Id.*<sup>2</sup>

### **A. Chaplains Serve as Religious Leaders and Staff Advisers**

Within this overarching regulatory structure, chaplains serve two primary roles: military religious leader and military religious staff adviser. AR 165-1, § 3-1(b). As religious leaders, chaplains provide or facilitate religious support “that accommodates the Soldier’s right to the free exercise of religion.” *Id.* § 2-3(b)(1). In this role, chaplains “are required to respect the right of those served to have whatever faith they choose or none at all” and to make “a professional commitment to serve in a pluralistic environment.” NWP 1-05, § 2.4.1; *see also Katcoff v. Marsh*, 755 F.2d 223, 227 (2d Cir. 1985) (explaining that the “primary function of the military chaplain is to engage in activities designed to meet the religious needs of a pluralistic military community”).

Pursuant to statute and Department of Defense policy, chaplains cannot be required “to perform any rite, ritual, or ceremony that is contrary to [their] conscience, moral principles, or religious beliefs.” Pub. L. 112-239, § 533(b) (codified at 10 U.S.C. prec. 1030 note); DoDI 1304.28, § 2.2(a). However, “[i]f a chaplain is unable to support a

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<sup>2</sup> Once chaplains have been endorsed by their sponsoring religious organization, the selection and promotion of chaplains are subject to generally-applicable military procedures and regulations, including officer selection boards. *In re England*, 375 F.3d 1169, 1172 (D.C. Cir. 2004) (“The Navy uses the same personnel system for all officers, including chaplains.”).

specific request because of his or her religious endorsing organization's teachings, the chaplain must offer referral to another chaplain or professional. Such referrals are accomplished respectfully, professionally, and in a reasonable period of time." DoDI 1304.28, § 3.1(g)(3).

As religious staff advisors, chaplains advise commanders on, among other things, "the discharge of the commander's responsibility to support the free exercise of religion" and "matters of morale, ethics, and overall wellbeing within the command." SECNAVINST 1730.10A, *Chaplain and Advisement Liaison*, ¶ 4(d)(2) (2018) (<https://bit.ly/3iS3eEO>); see also SECNAVINST 1730.7D, ¶ 5(e)(3)(d). Chaplains are "uniquely qualified and credentialed to authoritatively advise the commander and all leaders up and down the unit chain of command" on matters of religious accommodation. NWP 1-05, § 1.1. Indeed, "throughout the Army's history, chaplains have advised commanders on the impact of religion both within their own ranks and within the larger operational environment." AR 165-1, § 1-5(b).<sup>3</sup>

Consistent with Department of Defense Directive 1304.19 and "to meet the requirements of religious accommodation, morale and welfare, and to facilitate the understanding of the complexities of religion with regard to its personnel and mission," the

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<sup>3</sup> Air Force Instruction 52-105 similarly states that the "Department of the Air Force Chaplain Corps provides religious and spiritual care, advises leadership and ensures all Airmen and Guardians and their family members have opportunities to exercise their constitutional right to the free exercise of religion." AFI 52-105, § 1.1.



Navy divides these roles into four “core competencies” or “capabilities” for naval chaplains: provide, facilitate, care and advise. SECNAVINST 1730.7D, ¶ 5(e)(3).

**Provide:** Chaplains provide religious services for those of the same religious faith. Chaplains conduct divine services, administer sacraments and perform the rites or ceremonies in the form and manner of their own faith group. NWP 1-05, § 1.4. Congress has protected chaplains’ ability to conduct these religious services according to their own faith. *See* 10 U.S.C. § 8221(a) (2019) (“An officer in the Chaplain Corps may conduct public worship according to the manner and forms of the church of which he is a member.”). But “attendance at divine services shall be voluntary.” SECNAVINST 1730.7D, ¶ 4(c).

**Facilitate:** Chaplains facilitate the ministries for service members of other faiths. For example, chaplains may provide service members with religious scriptures or other materials of their faiths and assist in connecting service members with other chaplains or lay leader volunteers who can fulfill their faith-specific needs. NWP 1-05, §§ 2.4.1, 2.4.2.4. Especially in connection with deployments or other contingencies where access to religious support may be limited, a chaplain’s recruitment and training of lay leaders “is at the heart of facilitation.” *Id.* § 2.4.2.4. The chaplain’s facilitation of other religious faiths is essential in the military’s pluralistic environment. “In identifying facilitation as a capability, the Navy recognizes the diversity of religious backgrounds of naval personnel and the need for expertise in

handling regular support of [their] requirements.” *Id.* § 1.4.2; *see also* DoDI 1304.28, § 3.1(f) (Chaplains “[f]acilitate meeting the religious needs and requirements for those persons to whom they cannot directly minister.”).

**Care:** Chaplains care for the welfare and morale of all service members, regardless of their religious faith. They must deliver care that is “informed, guided, and shaped by the chaplains’ unique pastoral identity and insight” but also “sensitive to the religious, spiritual, moral, cultural, and personal differences of those served.” OPNAVINST 1730.1E, ¶ 6(c). Chaplains provide a range of non-religious services and programs, including counselling on mental health, marriage and relationships, suicide prevention and substance abuse. *See* NWP 1-05, § 2.6; *see also* CDR William A. Wildhack III, CHC, UNR, *Navy Chaplains at the Crossroads: Navigating the Intersection of Free Speech, Free Exercise, Establishment and Equal Protection*, 51 Naval L. Rev. 217, 240–41, 241 n.150 (2005). The Secretary of the Navy’s Instruction emphasizes that individual advice from chaplains should only be faith-based “when requested,” and not when the chaplain unilaterally desires to engage in religious speech. SECNAVINST 1730.10A, ¶ 4(b) (“Chaplains listen to individuals who come to them for help, regardless of religious affiliation, and offer advice to help individuals make sound decisions. Chaplain advice is rooted in ethics and morality, and when requested, can be faith-based.”); *see also* DoDI 1304.28, § 3.1(g) (“Such care and counseling are rooted in ethics and morality and may or may not be faith based at the person’s request.”).

**Advise:** Chaplains assist and advise officers in their chain of command regarding religious ministry requirements, ethics, morale and quality of life among service members, unit enhancement, culture and religious accommodations. See SECNAVINST 1730.10A, ¶ 4(d)(2); NWP 1-05, § 1.4. Commanders may also consult with chaplains about the appropriate form of religious elements to be included in command functions and other events. NWP 1-05, § 2.5.

**B. Chaplains Are Required to Respect Diverse Religious Faiths and the Military's Pluralistic Environment**

In their role as religious leaders, chaplains must serve the needs of all service members, regardless of their own religious affiliation. This requirement is repeated throughout Department of Defense policies and regulations, including the Directive issued by the Secretary of Defense, the Instructions issued by the Under Secretary of Defense for Personnel and Readiness, and the implementing regulations issued by the individual military branches.

The Secretary of Defense's Directive states that military chaplaincies:

Shall serve a religiously diverse population. Within the military, commanders are required to provide comprehensive religious support to all authorized individuals within their areas of responsibility. Religious Organizations that choose to participate

in the Chaplaincies recognize this command imperative and express willingness for their Religious Ministry Professionals (RMPs) to perform their professional duties as chaplains in cooperation with RMPs from other religious traditions.

DoDD 1304.19, ¶ 4.2. Accordingly, Department of Defense Instructions require that “to be considered for appointment,” a chaplain must be “willing to function in a pluralistic environment” and “to support directly and indirectly the free exercise of religion by all members of the Military Services.” DoDI 1304.28, § 3.2(b). Religious organizations that endorse chaplains for military service likewise “must recognize that the chaplaincies of the Military Departments serve a religiously diverse population and that military commanders must provide comprehensive religious support to all authorized individuals in their areas of responsibility . . . [and they] must express willingness for their [religious ministry professionals] to perform their professional duties as chaplains in coordination with chaplains from other religious traditions.” *Id.* § 4.1.

At the individual service branch level, the Army requires that chaplains provide “religious support for all Soldiers . . . from all religious traditions” within the “pluralistic religious setting of the military.” AR 165-1, § 1-6(b). Chaplains must “cooperate with each other, without compromising their religious tradition or ecclesiastical endorsement requirements, to ensure the most comprehensive religious support opportunities possible within the

unique military environment.” *Id.* And Army “chaplains will minister to the personnel of their unit and/or facilitate the free-exercise rights of all personnel, regardless of religious affiliation of either the chaplain or the unit member.” *Id.* § 3-2(b)(3).

Similarly, the Navy states that “in accepting their commissions, chaplains acknowledge the pluralistic environment in which they will serve” and that they “are required to respect the right of those served to have whatever faith they choose or none at all.” NWP 1-05, § 2.4.1; *see also id.* § 3.3.2.1 (“As a matter of DOD policy, it is understood that Navy chaplains, while never being required to compromise the standards of their RO, are required to function in a pluralistic environment.”). “The support and assistance given to Sailors who are not of the same faith background as the chaplain giving the support” is a “uniquely institutional aspect of naval ministry.” *Id.* § 1.4.2. Indeed, the “requirement to respect the religious rights of others is the keystone of institutional ministry.” *Id.* § 2.4.1.<sup>4</sup>

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<sup>4</sup> These requirements are also included in chaplain training materials. Navy chaplains are instructed that their duties involve “the support and assistance given to Sailors who are not of the same faith background as the Chaplain giving the support ... [a]s one of the CPR’s [Command Religious Program] primary functions is to meet diverse religious needs.” Department of the Navy, Commander Naval Surface Force, *Surface Forces Professional Naval Chaplaincy Training Manual*, at 11 (Feb. 7, 2017) (<https://bit.ly/3iT3LWI>). And the facilitation requirement specifically “presupposes the delivery of appropriate training by the Navy Chaplain Corps (CHC) to empower chaplains to effectively facilitate the faith requirements of those not of their specific faith group.” NWP 1-05, § 2.4.1. Army chaplains are similarly instructed that the mission of their training program

As the Navy’s Chief of Chaplains has explained, chaplains must “acknowledge [their] obligation to care for all in a way that respects the rights of individuals to determine their own religious and personal convictions.” M.G. Kibben, Chief of Chaplains, Dep’t of the Navy, Letter to Colleagues in the Ministry, at 1 (Mar. 15, 2017) (<https://bit.ly/3iO5sEU>). The Navy recognizes that “in doing so, the chaplain, on behalf of the [Department of the Navy], honors the First Amendment.” NWP 1-05, § 2.4.1.

The Secretary of Defense’s finding that chaplains serve a “religiously diverse population” cannot be disputed. DoDD 1304.19, ¶ 4.2. As the Congressional Research Service has found, “[r]eligious diversity in the military is broadly representative of the U.S. population.” Congressional Research Service, *Diversity, Inclusion, and Equal Opportunity in the Armed Services: Background and Issues for Congress*, at 46 (June 2019) (<https://bit.ly/3NptX9A>). The Department of Defense currently recognizes more than 200 religions in its faith and belief codes for service members, including Christianity, Judaism, Islam, Buddhism, Hinduism, Sikhism, and Atheism, among others. See Office of the Assistant Secretary of Defense, *Faith and Belief Codes for Reporting Personal Data of Service Members* (Mar. 27, 2017) (<https://bit.ly/3NptYua>). And some religious faiths include several different groups. There is significant diversity within the Christian

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is to create “professionals capable for serving a diverse force in any environment under any conditions.” Department of the Army, U.S. Army Chaplaincy Center and School, *Mission* (<https://bit.ly/3tOXS3l>) (last accessed Mar. 30, 2022).

faith, including Catholics, Protestants, Baptists, Methodists, Mormons, Christian Scientists, Eastern Orthodox, Pentecostals, and others. *Id.*

The chaplains themselves are also diverse. The Navy has 840 chaplains who are endorsed by more than 100 religious organizations. *See* United States Navy, “Navy Chaplain” (<https://bit.ly/36Dpakn>) (last visited Mar. 29, 2022). As a result, and taken together with institutional staffing limitations, chaplains will often serve large numbers of service members who follow diverse faiths. In 2020, the Navy Chief of Chaplains reported that “the Navy’s 840 chaplains care for more than 564,000 active component service members in the Navy, Coast Guard and Marine Corps. On average, every chaplain cares for more than 670 service members, not counting their family members and the civilians who are authorized to use their services.” *See* RADM Brent W. Scott, *Chaplain Corps Provides Irreplaceable Services*, U.S. Navy (Feb. 21, 2020) (<https://bit.ly/36DrCaz>).

Chaplains are thus required to recognize, from the time of their initial appointment, that they must support and respect the diverse religious faiths of all service members and that religious speech specific to their faith may not be appropriate or permitted in certain contexts within their professional responsibilities. For example, chaplains may not project their own religious faith into mandatory non-religious programs. As one example, in 2014 the *Army Times* reported that a chaplain had been issued a letter of concern after he distributed a two-sided piece of paper during a suicide prevention training

session with a list of Army resources on one side and Christian scripture and solutions on the other. At the non-religious training session, service members could not obtain Army resources about suicide prevention without also receiving Christian resources, regardless of their individual religious faith. Consistent with DoD policy and Army regulations, the commanding general issued a statement that chaplains may “not provide religious instruction during non-religious mandatory training classes.” Michelle Tan, *Chaplain under fire for comments during training*, Army Times (Dec. 10, 2014) (<https://bit.ly/3iJpgcL>).

Military commanders also have the authority to determine the appropriate role for chaplains at command functions, such as retirements, promotions, changes of command, or official memorial observances. These events are often mandatory for service members and thus could feature a chaplain speaking from a podium, with commanding officers, before a captive audience. In such situations, a chaplain’s religious speech could easily be interpreted as an endorsement of the chaplain’s faith and carry an implicit message of religious coercion.

Accordingly, Secretary of the Navy Instruction 1730.7D states that “commanders shall determine whether religious elements . . . shall be included in command functions.” SECNAVINST 1730.7D, ¶ 6(d). Applying that Instruction, Navy War Publication 1-05 specifies that commanders have “discretion to determine whether or not to have religious elements at an event.” NWP 1-05, § 2.5. Chaplains do not have the “right to participate” in these functions; instead they are “invited to do so.” *Id.* Further, “[i]f the



chaplain is not comfortable with what the commander has determined to be appropriate for inclusion in the ceremony (in consultation with the chaplain),” then “the chaplain is free to decline the invitation to provide a religious element.” *Id.* The chaplain, however, must “assist[] the commander in finding someone who can provide the religious element. The commander is free to make the determination that there will be no prayer from the podium.” *Id.*

**C. Chaplain Memoirs Demonstrate That They Respect Their Pluralistic Environment and the Free Exercise Rights of Service Members**

Numerous memoirs and testimonials by chaplains demonstrate how they have historically worked to support the religious needs of all service members, including those of different faiths, respecting the military’s pluralistic environment and not seeking to proselytize other service members. For example, Rabbi Bruce E. Kahn, a retired Navy chaplain, testified to Congress that the “chaplain adapts his or her exercise of religious freedom in order to affirm the religious freedom of the members of the command in which we are providing ministry.” See *Religious Accommodations in the Armed Forces: House of Rep. Armed Serv. Comm. Hearing* [H.A.S.C. No. 113-129], 113th Cong. (Nov. 19, 2014) (statement of Rabbi Kahn at 2) (<https://bit.ly/3LkwhwQ>). Over the course of his career, Rabbi Kahn “served the needs of Catholics and Protestants of every denomination, different groups of Latter-Day Saints, and numerous Christians of other affiliation, . . . the needs of different groups of Buddhists and Muslims and more,

as well as those with no affiliation, including agnostics and atheists.” *Id.* at 3. Among other anecdotes, Rabbi Kahn recalled counselling a Christian woman whose husband, a service member, had just died. He engaged with her about her Christian faith, not his own, to help her find strength. *See id.* at 4. Rabbi Kahn concluded that “[t]he religious freedom of the troops is not to be sacrificed to meet the demands of the chaplain. The chaplain adjusts to meet the faith requirements of the troops.” *Id.*

Retired Army Chaplain Mitchell Lewis has described the importance of religious pluralism in his preparation for prayer at a non-religious command event. He would

try to speak in the first person singular or in the imperative . . . . In a government ceremony, I cannot assume that everyone prays as I do. It would be inaccurate to put my words in their mouths. Since I can only speak for myself, I don’t ordinarily say ‘we ask’ or ‘we pray’ or other words that presume to speak for others.

*See* Mitchell Lewis, *How I Pray at Military Ceremonies* (Aug. 15, 2016) (<https://bit.ly/3IPmUmY>).

As Rabbi Arnold E. Resnicoff, a retired Navy chaplain, similarly explained, in a mandatory command function, chaplains recognize the balance between the “right” of the speaker and the “right” of the listener. *See* Arnold E. Resnicoff, *Prayers that Hurt: Public Prayer in Interfaith Settings* (July 1,

2009) (<https://bit.ly/36Ua7m7>). Consistent with Navy policies, when chaplains “accept the invitation or the assignment to participate in a public ceremony by offering a word of prayer, . . . [they] are making a contract of sorts.” *Id.* Chaplains are not required to give such a prayer, and may opt out of doing so, but after accepting the assignment they must respect the rights of others in the audience.

Reverend James B. Magness, a retired Navy chaplain and former Episcopal Bishop for the Armed Forces, testified to Congress that military chaplains have a responsibility to serve “military members who come from a diverse population.” *See Religious Accommodations in the Armed Forces: Hearing Before the House of Rep. Armed Serv. Comm. Hearing* [H.A.S.C. No. 113-76], 113th Cong. (Jan. 29, 2014) (statement of Reverend James B. Magness at 1) (<https://bit.ly/3uENEbb>). He explained that the current religious accommodation policies protect troops from “unwanted religious advances.” *See id.* at 2. He recalled an instance early in his career when he spoke at an official retirement ceremony for a Navy Captain. After he concluded his prayer with the words “through Jesus Christ our Lord,” he learned that “[he] had just excluded the honoree and all of his family by offering an inappropriate prayer. I realized then that my responsibility when offering public prayers in uniform is to care for all of those who are present, not just those from my own faith tradition.” *Id.*

Rabbi Harold Robinson, a retired Navy Rear Admiral, expressed the same sentiment of religious pluralism through the example of a Jewish chaplain

counselling a Christian Marine enduring physical therapy on his burned hand. *See* Harold L. Robinson, *Free Exercise Meets the Establishment Clause in Military Service*, Religious Freedom Institute (July 14, 2016) (<https://bit.ly/35oxcgu>). The chaplain encouraged the Marine with analogies to the suffering of Christ on the cross and helped the Marine recite the rosary during the therapy. Rabbi Robinson noted that the

[R]abbi has not abandoned his faith; he has found room in his heart to know and support the Marine in his, allowing him to find strength and solace there. And the rabbi has prepared for this moment. He is clear on the distinctions between his personal spiritual needs and his responsibility to help others to fulfill theirs.

*Id.* Rabbi Robinson appreciated that this type of religious speech and service would never be expected of civilian rabbis, but he believed it was required for Navy chaplains. *Id.*

## **II. Affirming The Ninth Circuit’s Decision Will Not Have Any Negative Impact on Military Chaplains**

The Ninth Circuit focused on whether Petitioner was acting in his capacity as a government employee when he engaged in demonstrative religious activity on the high school football field and whether the School District’s response was justified and permitted. Pet. App. 12–23. In answering these questions, the Ninth Circuit noted that Petitioner

“was clothed with the mantle of one who imparts knowledge and wisdom” and that “expression was Kennedy’s stock in trade.” Pet. App. 14. The Alliance argues that that description could also be applied generally to military chaplains, and from that tenuous link, speculates that affirming the Ninth Circuit’s decision has the potential to create “uncertainty” or “confusion” that “could lead to a chilling” of unspecified speech by chaplains in unknown contexts. Alliance Br. 18. The multiple layers of hypothetical inferences that are required to reach the Alliance’s tentative suggestions demonstrate that these issues are not ripe for the Court’s consideration and should play no role in this appeal.

**A. The Court Should Not Address the Alliance’s Hypothetical Issues**

As an initial matter, and as the Alliance concedes, this Court has consistently applied the First Amendment differently in the military context than in the public school context. *See, e.g., Parker v. Levy*, 417 U.S. 733, 758 (1974) (cited in Alliance Br. 3 n.2). The military is “a specialized society separate from civilian society,” and, while “military services are entitled to the protections of the First Amendment, the different character of the military community and of the military mission requires a different application of those protections.” *Brown v. Glines*, 444 U.S. 348, 354 (1980) (internal quotation marks omitted); *see also Goldman v. Weinberger*, 475 U.S. 503, 508 (1986) (substantial deference is appropriate because “military authorities have been charged by the Executive and Legislative Branches with carrying out our Nation’s military policy”); *Rostker v. Goldberg*,

453 U.S. 57, 66 (1981) (explaining that “particular deference” should be given to Congress and regulations made under Congress’s “authority to regulate the land and naval forces concerning what rights were available”). Any constitutional analysis of the rights of military chaplains to engage in religious speech must consider the unique context of the military, the history of the chaplaincy, and the historic focus on the free-exercise rights of the service members. *See Katcoff*, 755 F.2d at 232 (emphasizing that “neither the Establishment Clause nor statutes creating and maintaining the Army chaplaincy may be interpreted as if they existed in a sterile vacuum”). “Congress, acting under its authority to maintain and regulate the armed forces, may constitutionally place some restrictions on the speech that occurs under military command.” *Gen. Media Commc’ns Inc. v. Cohen*, 131 F.3d 273, 276 (2d Cir. 1997). Accordingly, the Court need not address the military chaplaincy to affirm the Ninth Circuit’s opinion.<sup>5</sup>

In any event, the Ninth Circuit’s decision will not negatively impact chaplains. The Ninth Circuit addressed context-specific questions about a high school football coach, the scope of his responsibilities

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<sup>5</sup> The military chaplaincy also involves substantially different First Amendment issues than public school cases. Historically, the chaplaincy has advanced the free-exercise requirements of service members who are compelled to travel to distant bases or deployments, without violating the Establishment Clause. *See, e.g., Katcoff*, 755 F.2d at 228. By contrast, public schools operate in a different environment, with children having access to their homes and local religious institutions, and cannot provide religious services to students under the Establishment Clause. *See School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

following the end of a football game, and the likelihood that the School District may be deemed to endorse his post-game religious expressions on the school field. The Ninth Circuit held that Petitioner “spoke as a public employee when he kneeled and prayed on the fifty-yard line immediately after games while in view of students and parents.” Pet. App. 17. The Ninth Circuit further detailed that he “insisted that his speech occur while players stood next to him, fans watched from the stands, and he stood at the center of the football field,” a location he had access to only “because of his employment” and “during a time when he was generally tasked with communicating with students.” Pet. App. 15. Those conclusions are supported by the factual findings of the district court.

The Alliance seeks to draw an analogy between Petitioner and military chaplains, but its analysis skips over the enabling regulations for the chaplaincy programs that balance the relevant First Amendment interests within the pluralistic military environment. The Alliance does not discuss the policies and regulations issued by the Department of Defense and individual service branches that seek to protect the free-exercise rights of all service members and avoid improper religious endorsement or coercion. The Alliance similarly ignores the overarching policies of religious accommodation and facilitation that are central to the military’s goals of meeting the diverse religious requirements of service members. Neither the chaplaincy, nor any potential impact of the Ninth Circuit’s decision, can be evaluated in a such a theoretical vacuum.

The Alliance suggests that chaplains should have an unlimited right to engage in undefined “everyday religious speech” on Army bases and naval vessels, but it never explains what that speech might encompass, in what contexts that speech may be made and to whom, or how it may comply with the military’s long-standing policies. Alliance Br. 21. The Court can only speculate as to what types of statements could constitute “everyday religious speech.” As explained above, the military’s policies comprehensively address the varied contexts in which chaplains may provide or facilitate religious and non-religious programs for service members. In compliance with directives from multiples levels within the Department of Defense, starting with the Secretary of Defense, the military chaplaincy has been dedicated to providing services for all service members and respecting the religious rights of others in the diverse military environment. The Court should not accept the Alliance’s invitation to engage in unsupported speculation about the military’s chaplaincy programs in the context of this high school-related appeal.

The Court should similarly reject the Alliance’s vague suggestion that the decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), poses a “threat” to the military chaplaincy because chaplains could become “subject to regulation.” Alliance Br. 19–20. Chaplains are military officers commissioned by the armed services and they have been subject to regulations for decades. The Alliance cannot ignore the entire body of existing military policies and doctrines. These regulations properly distinguish between chaplains’ varied roles in supporting the



religious needs of the pluralistic military forces, while protecting the right of chaplains to opt-out of participating in functions that may violate specific tenets of their own faiths. The Alliance also cannot show there are any risks of potential “confusion” or “uncertainty” in a vacuum, without addressing the established military policies that were in place before the Court decided *Garcetti* and have been repeatedly reaffirmed by Department of Defense leadership over the last 16 years. While the Alliance may wish that military commanders would reach a different balance or draw different lines in advancing the free-exercise rights of service members, this appeal is not an appropriate vehicle for the Court to evaluate the military chaplaincy writ large.

**B. The Ninth Circuit’s Decision Will Not Undermine the Military Chaplaincies**

The Ninth Circuit’s decision reflects a balancing of Free Exercise and Establishment Clause interests that also animates the Department of Defense policies governing military chaplaincies. Thus, for example, the Ninth Circuit recognized this Court’s holding that “a state interest in avoiding an Establishment Clause violation may be characterized as compelling, and therefore may justify content-based discrimination.” Pet. App. 57 (quoting *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112–14 (2001) (quoting *Widmar v. Vincent*, 454 U.S. 263, 271 (1981))). The Ninth Circuit further acknowledged that the Establishment Clause “mandates government neutrality between religion and religion, and religion and nonreligion.” Pet. App. 75 (quoting

*McCreary Cnty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 390 U.S. 941 (1968)).

So too for military chaplains. The comprehensive military rules carefully balance the First Amendment interests and protect the rights of all service members to follow their own faith or no faith at all. Like school district officials, chaplains must show their own form of religious “neutrality,” primarily embodied in the facilitation requirement, in order to serve the diverse and pluralistic military population. The Department of Defense instructs chaplains to “facilitate meeting the religious needs and requirements” of service members “to whom they cannot directly minister” because they have a different religious tradition. DoDI 1304.28, § 3.1(f). Chaplains must also do so “respectfully, professionally and in a reasonable amount of time.” *Id.* § 3.1(g)(3). The facilitation requirement “recognizes the diversity of religious backgrounds of [military] personnel” and the need for chaplains to “respect the religious rights of others.” NWP 1-05, §§ 1.4.2, 2.4.1.

These and other military policies preclude chaplains from proselytizing or, in the Alliance’s words, using their military positions to “spread their message” to service members who follow a different religious faith. Alliance Br. 4. Contrary to the Alliance’s suggestion, chaplains “[p]romote the spiritual well-being of Sailors and their families, in accordance with the First Amendment, by respecting and accommodating their diverse religious requirements.” NWP 1-05, § 3.2.2. Army Regulations

emphasize that chaplains must implement “the commander’s programs” for the benefit and support of other service members. AR 165-1, § 1-10. The military religious programs do not “belong” to chaplains, NWP 1-05, § 1.2, and they are not a vehicle for chaplains to “spread” their message. Alliance Br. at 4.

The Ninth Circuit also emphasized the risks of potential religious coercion in school environments, an issue of heightened concern within the military’s command structure. Pet. App. 17. Discussing Petitioner’s post-game prayers on the football field, the court of appeals noted that “over time, little by little, [Petitioner’s] players began to join him in this activity—at least one out of a fear that declining to do so would negatively impact his playing time.” Pet. App. 21. The military similarly recognizes that religious expressions by chaplains could carry messages of government endorsement or coercion of the chaplain’s specific religious faith. Thus, for example, because many military command functions require mandatory attendance, commanders have discretion to determine the degree of chaplain participation in non-religious events. SECNAVINST 1730.7D, ¶ 6(d).

The professional chaplaincy “is the means by which [the military] supports the free exercise of religion and avoids the establishment of a state religion, while at the same time ensuring that religious ministry is offered in a way which is respectful of good order and discipline.” NWP 1-05, § 3.3.1. Affirming the Ninth Circuit’s decision will

only advance, and not undermine, these principles of the military chaplaincies.

### CONCLUSION

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

Respectfully submitted,

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