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 TWENTY-SEVEN STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amici Curiae are the States of Alaska, Arizona, Florida, Texas, Alabama, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming (collectively, "States"). The States and their local governments employ Americans throughout the country as, for example, attorneys, civic planners, nurses, park rangers, police officers, and professors. These Americans do not abandon their religious liberty at the doors of their workplaces. The States are interested in protecting the rights of all public employees—in their States and elsewhere—from religious discrimination.

The States also have a unique interest in ensuring that federal courts strike the proper balance between allowing governments to regulate speech affecting a government interest and protecting the free speech rights of public employees. When federal courts apply the First Amendment in the government-employment context, thousands of state and local government employees are impacted. While the States have a strong interest in regulating employee speech created by the government and employee speech that negatively impacts the orderly administration of government, the States also have an interest in protecting the private speech rights of public employees and rejecting any legal standard that treats private speech as unprotected by the First Amendment. An uncertain standard is insufficient as it will likely lead public employees to refrain from valuable speech.

The Ninth Circuit failed to strike the proper balance here. Not only does the Ninth Circuit's decision erroneously convert large swaths of private speech into unprotected speech, it compels public employers to punish such private speech in the name of avoiding Establishment Clause liability and could expose public employers to Establishment Clause liability if they correctly choose not to punish private religious speech. This case, therefore, implicates the vital interests of the States in promoting the general welfare of their citizens and employees and protecting their constitutional rights.

SUMMARY OF ARGUMENT

The Bremerton School District prohibited Coach Kennedy from "engag[ing] in demonstrative religious activity, readily observable to (if not intended to be observed by) students and the attending public." Pet. App. 37, 81. The District then suspended Coach Kennedy for violating this directive when he offered a prayer by himself on a football field in view of students. Pet. App. 49–50, 81. The Ninth Circuit ruled that Coach Kennedy's private act of prayer could be interpreted as government speech and that the District was therefore justified in curtailing Coach Kennedy's religious expression based solely on fear of liability under the Establishment Clause. This was error.

The Ninth Circuit's conclusion is inconsistent with this Court's precedents regarding protected speech. This Court has recognized that a government employer must respect the First Amendment rights of government employees. Yet the Ninth Circuit relied on *Garcetti v. Ceballos*, 547 U.S. 410 (2006), to hold that Coach Kennedy's act of private prayer was

unprotected. That reliance was misplaced. *Garcetti* dealt with public-employee speech produced in connection with performing official job duties. The record here easily demonstrates that this case does not fall into the *Garcetti* exception. Coach Kennedy's individual act of prayer was not performed in connection with official job duties; in fact, his act of prayer was specifically excluded from his duties. Categorizing Coach Kennedy's prayer as public as opposed to private speech threatens the First Amendment rights of all public employees.

The Ninth Circuit's conclusion is also detrimental to public employers. Official communications have official consequences, and if allowed to stand, the Ninth Circuit's opinion could result in employers having to police every observable message by their employees. This is not a sound result.

In addition to its problematic speech analysis, the Ninth Circuit also erred by allowing the school district to justify its discriminatory actions under the Establishment Clause. The Establishment Clause precludes only government action, not the protected expression of private individuals. Furthermore, years of precedents confirm that a school district does not violate the Establishment Clause simply because of the presence of protected, private religious speech on a school campus. And the longtime tradition of religious and other individualized expression in athletics further supports the personal nature of Coach Kennedy's prayer. If the school district had any concern remaining, the proper path forward would have been for the school district to engage in its own speech and make clear that tolerance of religious views is not endorsement. Contrary to the Ninth Circuit's conclusion, a government employer can

respect employees' protected speech without violating the Establishment Clause.

The Ninth Circuit's overbroad reading of the First Amendment as to both the Establishment Clause and government speech is not only unconstitutional, but it is also detrimental to recruiting and retaining the most highly qualified candidates for public service. Individuals will not be willing to become public school teachers or other government employees if they must do so at the expense of sacrificing their constitutionally protected rights.

This Court must reverse the Ninth Circuit's decision, which threatens to curtail First Amendment liberties and, in turn, deter individuals from seeking public employment.

ARGUMENT

I. This Court's Precedents Do Not Hold That Private Speech By Public Employees Is Exempt From First Amendment Protection.

1. States and local governments operate only through those employed to do the "People's work." The employment relationship that States and local governments share with their employees is unique in several respects. Most importantly here, one party to that employment relationship—States and local governments—are state actors. Private employers, while required to abide by statutes and regulations, are not state actors required to extend constitutional rights to their employees. States and local governments, on the other hand, must do so.

The Court, therefore, has correctly recognized that a government employer must respect the First Amendment rights of a government employee. For

example, public employees are protected from adverse employment action for writing a letter to a local newspaper about matters of public importance or discussing politics with a co-worker. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 573 (1968); *Rankin v. McPherson*, 483 U.S. 378, 392 (1987). Likewise, public employers cannot prohibit public employees from accepting any compensation for making speeches or writing articles with no connection to the employee's official duties. *See United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 470 (1995). And as the Court famously explained in *Tinker v. Des Moines Independent Community School District*, "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." 393 U.S. 503, 506 (1969).

Outside the government-employment context, First Amendment rights are not absolute; the same can be said, with more force, *within* the government-employment context. The Court has recognized that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *See Pickering*, 391 U.S. at 568. Thus, the government-employer may regulate government-employee speech, even on matters of public importance, when the government's interest in doing so outweighs the employee's interest in speaking. *See id.* For example, a government employee may suffer adverse consequences for speech that is unrelated to employment and does not address a matter of public importance when the speech is "detrimental to the

mission and functions of the employer." *City of San Diego v. Roe*, 543 U.S. 77, 84 (2004) (per curiam).

A public employer also enjoys wide regulatory latitude when a public employee speaks as an employee upon matters that are not of public concern or otherwise protected under the Constitution. *See Connick v. Myers*, 461 U.S. 138, 147 (1983). In that situation, "absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Id.*

Relatedly, the Court has held that a public employee enjoys no First Amendment protection for speech "made pursuant to official responsibilities." *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006). This is because the First Amendment does not grant public employees with "a right to perform their jobs however they see fit" and "[r]efusing to recognize First Amendment claims based on government employees' work product does not prevent [public employees] from participating in public debate." *Id.* at 422.

2. This case centers around this last-mentioned exception to public-employee speech rights. Respondents argued—and the Ninth Circuit agreed—that the speech at issue is unprotected under *Garcetti*. In so doing, the Ninth Circuit stretched *Garcetti* beyond recognition.

Garcetti offers no support for the Ninth Circuit's notion that every form of speech an employee engages in while on the job—even a brief, private prayer—is categorically unprotected under the First Amendment. Rather, the "critical question under *Garcetti* is whether the speech at issue is itself

ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." *Lane v. Franks*, 573 U.S. 228, 240 (2014); *accord id.* at 247 (Thomas, J., concurring). That rule strikes a balance between allowing public employers to regulate government-created speech while also allowing public employees to speak as citizens.

In *Garcetti*, Ceballos, a calendar deputy with the Los Angeles District Attorney's office, drafted a memorandum to his superiors conveying concerns about how the office obtained a particular search warrant. The memo, however, did not stop Ceballos' superiors from moving forward with the prosecution, during which Ceballos testified in support of a defense motion challenging the warrant. The trial court denied that motion.

Following these events, Ceballos claimed that his employer retaliated against him for the memo in various ways, including denying him a promotion. Ceballos filed suit, claiming this alleged retaliation violated his First Amendment rights. This Court rejected Ceballos' First Amendment claim.

Importantly, unlike Coach Kennedy here, Ceballos conceded that his speech was performed pursuant to his official duties. *See Garcetti*, 547 U.S. at 424 (acknowledging that he "wrote his disposition memo pursuant to his employment duties"). The Court, thus, had "no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate." *Id.*

The Court made clear throughout its opinion, however, that Ceballos' concession doomed his First Amendment claim. The Court emphasized that "[t]he

memo concerned the subject matter of Ceballos' employment"; "his expressions were made pursuant to his duties as a calendar deputy"; "Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case"; and Ceballos' memo "owe[d] its existence to a public employee's professional responsibilities." *Id.* at 421.

Because the speech at issue in *Garcetti* was produced pursuant to official job duties, the Court had little problem rejecting First Amendment protection. As the Court put it, "the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities." *Id.* at 424. This is true even where an employee's "duties sometimes required him to speak or write." *Id.* at 422. The Court correctly concluded that refusing to protect "government employees' work product does not prevent them from participating in public debate," *id.*, and that a contrary rule would create separation of powers issues by "mandating judicial oversight of communications between and among government employees and their superiors in the course of official business," *id.* at 423.

While Justice Souter expressed concern that *Garcetti* would lead employers to "expand stated job descriptions to include more official duties and so exclude even some currently protectable speech from First Amendment purview," *id.* at 431 n.2 (Souter, J., dissenting), the majority rejected "the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions," *id.* at 424.

3. *Garcetti* therefore does not support the Ninth Circuit's holding that Coach Kennedy's private prayer

was unprotected speech. Instead, *Garcetti* removed First Amendment protection from public-employee speech when that speech constitutes work product or job performance. And it simply allows a government employer to judge an employee based on speech that the employer could be expected to evaluate for its quality in a performance review.

Here, Coach Kennedy did not engage in individual acts of prayer to fulfill his duties as a football coach, nor did his prayer amount to government work product. The Bremerton School District could not expect to evaluate the quality of Coach Kennedy's private prayer (as opposed to the quality of his play calling) in a performance review. Tellingly, "[t]he District demanded that coaching staff comply with a policy entitled 'Religious-Related Activities and Practices,' which the District interpreted to prohibit Kennedy's post-game prayer." Pet. App. 92–93 (O'Scannlain, J., statement respecting the denial of rehearing en banc). The Bremerton School District, therefore, "excluded prayer from his duties—both as a matter of general policy and as applied to him specifically." *Id.* at 93.

Yet the Ninth Circuit suggested that all of Coach Kennedy's "expression on the field . . . during a time when he was generally tasked with communicating with students" was pursuant to his job duties and thus unprotected by the First Amendment, Pet. App. 15, realizing Justice Souter's fears, *see Garcetti*, 547 U.S. at 431 n.2.

Like *Garcetti*, this case does not require the Court "to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate." 547 U.S. at 424. This case

presents the mirror image of *Garcetti*. There, Ceballos conceded that the speech was made pursuant to his official duties, and therefore the Court easily concluded that the speech at issue was unprotected. Here, the record demonstrates that Coach Kennedy's speech was not a part of his official duties and therefore should be protected.

4. The Ninth Circuit's contrary conclusion is not only detrimental to public employees' protections, but it also expands public employers' potential liability for employee speech. Because official communications have official consequences, including potentially binding a public employer or subjecting a public employer to liability, it is of vital importance that public employers can look to an employee's actual job duties to distinguish messages communicated in a public capacity from the private speech of employees acting outside those duties. *See, e.g.*, *Roe v. Nevada*, 621 F. Supp. 2d 1039, 1051–52 (D. Nev. 2007) (school district could be held liable for verbal and physical abuse within the scope of a teacher's employment); *Duyser v. Sch. Bd. of Broward Cnty.*, 573 So. 2d 130, 131 (Fla. Dist. Ct. App. 1991) (per curiam) (school board not liable when teacher performed satanic rituals on students because the conduct was "definitely not authorized or incidental to authorized conduct"); *McIntosh v. Becker*, 314 N.W.2d 728, 732 (Mich. Ct. App. 1981) (school could not be held liable for alleged racial and sexual slurs made by teacher outside the scope of employment); *Tall v. Bd. of Sch. Comm'rs of Balt. City*, 706 A.2d 659, 671 (Md. Ct. Spec. App. 1998) (school board could not be held liable for teacher who beat special education student because such acts were outside the scope of employment).

It is not practically feasible—let alone constitutional or desirable—for a public employer to regulate every observable message (both verbal and nonverbal) that its employees communicate or that would not occur merely but for (rather than pursuant to) public employment.

The Court should, therefore, limit unprotected speech under *Garcetti* to public-employee speech produced pursuant to an employee's job duties. *Garcetti* does not hold that a public employee's private speech—like Coach Kennedy's here—is unprotected by the First Amendment.

II. Allowing The School District To Justify Its Discriminatory Actions Under The Establishment Clause Creates Problems For Public Employers And Employees Alike.

The Ninth Circuit's analysis also turned the Establishment Clause on its head. No one appears to dispute that the District's restriction on Coach Kennedy's prayer was targeted at religion—the District admits that the issue it had with Kennedy was the religious content of his speech. The District attempted to justify such discrimination on the basis that discrimination was required to avoid Establishment Clause liability. This Court has repeatedly rejected such weaponization of the Establishment Clause. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 113 (2001) (noting that the Court has rejected similar defenses in Free Speech cases). Undeterred, the Ninth Circuit accepted the District's Establishment Clause defense. That conclusion was wrong—and concerning—for several reasons.

1. The panel "[took] the rare—indeed, unprecedented—step of perceiving an Establishment Clause violation without first locating any state action to constitute such a violation." Pet. App. 97 (O'Scannlain, J., statement respecting the denial of rehearing en banc). Under its plain terms and years of precedents, the Establishment Clause precludes only government action, not the protected expression of private individuals. *See Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring in part and concurring in the judgment) (On a fundamental level, "an Establishment Clause violation must be moored in government action."). This principle strikes at the core of the Establishment Clause and has been long-recognized in our nation's jurisprudence. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 838–39 (1995) ("If there is to be assurance that the Establishment Clause retains its force in guarding against those *governmental actions* it was intended to prohibit, we must in each case inquire first into the purpose and object of the *governmental action in question*[.]") (emphasis added).

As explained in section I, Coach Kennedy's speech was private speech, not government speech. Yet the Ninth Circuit affirmed the District's conduct of censoring that private speech, first mis-labeling the speech as government speech, and then holding that even if the speech was private, the District's justification of avoiding Establishment Clause liability was a "compelling state interest." Pet. App. 17, 25. To be sure, when actual government conduct or speech is involved, preventing Establishment Clause liability could qualify as a compelling government interest. *See Good News Club*, 533 U.S.

at 112–13. But "achieving greater separation of church and State than is already ensured under the Establishment Clause" never does. *Widmar v. Vincent*, 454 U.S. 263, 276 (1981); *see also Good News Club*, 533 U.S. at 112–13; *Hills v. Scottsdale Unified Sch. Dist. No. 48*, 329 F.3d 1044, 1053 (9th Cir. 2003) (per curiam). The Ninth Circuit "subvert[ed] the entire thrust of the Establishment Clause, transforming a *shield* for individual religious liberty into a *sword* for governments to *defeat* individuals' claims to Free Exercise." Pet. App. 94 (O'Scannlain, J., statement respecting the denial of rehearing en banc) (emphasis in original).

2. To trigger the Establishment Clause on public school property, state action is still required. Judge O'Scannlain pointed to the many cases where this Court "has determined that private religious speech on public school property does not constitute state action," bringing such actions outside the scope of an Establishment Clause violation. Pet. App. 98 (collecting cases). These cases repeatedly enforce the principle that the mere presence of protected, private religious speech on a school campus does not constitute an endorsement such that it would bring the school within the ambits of an Establishment Clause violation. *See, e.g.*, *Good News Club*, 533 U.S. at 112–19 (permitting a private organization to use school facilities for religious instruction after school did not violate the Establishment Clause); *Widmar*, 454 U.S. at 270–75 (permitting a student group to use university facilities did not violate the Establishment Clause).

This conclusion must follow because the Establishment Clause "is limited by the Free Exercise Clause and . . . the Free Speech Clause." *Widmar*, 454

U.S. at 276. Clearly there is a "critical difference 'between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.'" *Rosenberger*, 515 U.S. at 841 (quoting *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality op.)).

In *Mergens*, the Court rejected an argument that a public high school must exclude religious clubs because otherwise "the school would violate the Establishment Clause." 496 U.S. at 233. In so doing, the Court explained that preventing discrimination against religion does not raise Establishment Clause concerns because doing so "is undeniably secular." *Id.* at 249; *see also Widmar*, 454 U.S. at 271 ("[A]n open-forum policy, including nondiscrimination against religious speech, would have a secular purpose[.]"). The Court had faith that high school students "are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." *Mergens*, 496 U.S. at 250. And the Court rejected the notion that schools endorse everything they fail to censor. *See id.* Consequently, the Establishment Clause does not require government to censor private religious speech where such a censure would be unconstitutional if the private speech were nonreligious. *See Rosenburger*, 515 U.S. at 846 ("There is no Establishment Clause violation in the [government] honoring its duties under the Free Speech Clause.").

3. The correct path for a public school confronted with a situation like the District was here—rather than to engage in discrimination—is to engage in its own speech, explaining that tolerance of religious

views and practices does not constitute endorsement. As the Court put it in *Mergens*, "[t]o the extent a school makes clear that its recognition of respondents' proposed club is not an endorsement of the views of the club's participants, . . . students will reasonably understand that the school's official recognition of the club evinces neutrality toward, rather than endorsement of, religious speech." 496 U.S. at 251 (internal citation omitted); *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1300 (7th Cir. 1993) ("If pupils do not comprehend so simple a lesson, then one wonders whether the Wauconda schools can teach anything at all.").

There is no better way for a public school district to teach the value of toleration in a pluralistic society than to practice and preach neutrality when it comes to religion. "The school's proper response is to educate the audience rather than squelch the speaker. . . . Schools may explain that they do not endorse speech by permitting it." *Hedges*, 9 F.3d at 1299–1300. Neutrality is, after all, the very *least* that the Constitution demands and "educating the students in the meaning of the Constitution and the distinction between private speech and public endorsement . . . [is] what schools are for." *Id.* at 1299.

What government cannot do is exactly what the District did here—discriminate against private religious speech for fear that inaction would be misperceived as endorsement. As the Ninth Circuit correctly explained in *Hills*, "the desirable approach is not for schools to throw up their hands because of the possible misconceptions about endorsement of religion." 329 F.3d at 1055. "School districts seeking an easy way out try to suppress private speech" by declaring that "the best defense against

misunderstanding is censorship." *Hedges*, 9 F.3d at 1299. The Court should once again make clear that the "proper response is to educate the audience rather than squelch the speaker." *Id.*

4. The Ninth Circuit's divergence from these long-standing Establishment Clause principles creates problems for public employers and public employees. For public employees, the Establishment Clause may now be used to inhibit individuals' First Amendment freedoms. This could make government employment much less attractive. And for public employers, the Ninth Circuit's analysis could be read to create an affirmative duty to not only ensure that its actions remain religiously neutral, but also to police the private actions of its employees and take affirmative steps to prevent actions that would otherwise be protected under the First Amendment. Requiring public employers to affirmatively restrict private religious expression is not what the Establishment Clause requires.

Under a proper application of the First Amendment, a government employer can avoid violating the Establishment Clause while continuing to respect its employees' First Amendment rights. Respecting the proper balance ensures not only that individual constitutional rights are not infringed, but also protects government employers from the distasteful duty of policing their employees' every word and deed.

The Ninth Circuit's holding, concluding that Establishment Clause liability could result from government neutrality toward religion, and requiring government to affirmatively restrict private religious speech, also threatens state religious freedom legislation. In the wake of the Court's decisions in

Employment Division v. Smith, 494 U.S. 872 (1990), and *City of Boerne v. Flores*, 521 U.S. 507 (1997), many state legislatures passed religious freedom laws, requiring facially neutral government action that impedes upon religious freedoms to pass heightened judicial scrutiny.[1] This Court has never questioned the constitutionality of those laws under the Establishment Clause. Yet the Ninth Circuit's analysis, which could be read to impose an affirmative duty on government employers to stop employees from engaging in private displays of faith, would certainly not permit states, through religious freedom legislation, to grant such displays heightened protection. The Court should make clear that private displays of faith are just that—private—and that governmental concern that such displays may be misperceived as government displays of faith do not justify religious discrimination.

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[1] Twenty-three States have enacted religious freedom restoration acts. *See* Ala. Const. amend. 622; Ariz. Rev. Stat. §§ 41-1493 to 41-1493.04; Ark. Code Ann. §§ 16-123-401 to 16-123-407; Conn. Gen. Stat. § 52-571b; Fla. Stat. §§ 761.01 to 761.061; Idaho Code §§ 73.401 to 73.404; 775 Ill. Comp. Stat. 35/1-99; Ind. Code §§ 34-13-9-0.7 to 34-13-9-11; Kan. Stat. Ann. §§ 60-5301 to 60-5305; Ky. Rev. Stat. Ann. § 446.350; La. Rev. Stat. Ann. §§ 13:5231 to 13:5242; Miss. Code Ann. § 11-61-1; Mo. Rev. Stat. §§ 1.302 to 1.307; Mont. Code Ann. §§ 27-33-101 to 27-33-105; N.M. Stat. Ann. §§ 28-22-1 to 28-22-5; Okla. Stat. tit. 51, §§ 251 to 258; 71 Pa. Cons. Stat. §§ 2401 to 2407; R.I. Gen. Laws §§ 42-80.1-1 to 42.80.1-4; S.C. Code Ann. §§ 1-32-10 to 1-32-60; S.D. Codified Laws § 1-1A-4; Tenn. Code Ann. § 4-1-407; Tex. Civ. Prac. & Rem. Code Ann. §§ 110.001 to 110.012; Va. Code Ann. § 57-2.02.

III. The Tradition Of Individualized Expression In Athletics Confirms That Coach Kennedy's Prayer Is Protected By The First Amendment.

As this Court has explained, "the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious [speech takes place]." *Good News Club*, 533 U.S. at 119 (citing *Capitol Square,* 515 U.S. at 779–80 (O'Connor, J., concurring in part and concurring in the judgment)). Accordingly, Coach Kennedy's 50-yard-line prayer must be understood in relation to the rich tradition of religious and other individualized expression in athletics. Against that backdrop, a reasonable observer would see not *endorsement* of religion, but merely tolerance. Moreover, "[w]ith history as our guide, we can better follow the First Congress's 'example of respect and tolerance for differing views, an honest endeavor to achieve inclusivity and nondiscrimination, and a recognition of the important role that religion plays in the lives of many Americans.'" Pet. App. 128 (R. Nelson, J., dissenting from denial of rehearing en banc) (quoting *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2089 (2019) (plurality op.)).

For athletes and coaches alike, prayer offers humility and tranquility in a moment otherwise fraught with pride, anxiety, and adversity, even for the nonreligious. Prayer likewise offers solidarity when an injured athlete collapses to the field. For these and many other reasons, all manner of prayers and blessings are familiar to athletes as well as their fans. Recent, well-known examples include Heisman Trophy winner Tim Tebow, who displayed Bible verses on the black strips under his eyes during

college football games.[2] He would also kneel and pray silently in the end zone after a touchdown.[3] Lionel Messi forms the sign of the cross "as he strides onto the pitch."[4] Steph Curry points to the sky after a three-pointer.[5] And of course—among countless other examples—there is the familiar NFL post-game prayer, with players from both teams coming together for a variety of reasons, some "nonreligious," even "superstitious," and others "to give thanks to God."[6]

No one would seriously attribute these varied, individualized expressions to the player's or coach's league (or, as here, the state). The field has likewise become a frequent forum for nonreligious individual expression, reinforcing the point: Just as no one would think Colin Kaepernick's protests enjoy the endorsement of the league broadly viewed as his adversary in the matter, no one could plausibly think Coach Kennedy's prayer was endorsed by the School District with which he was publicly at odds. As Judge Ikuta explained, a "reasonable observer who is deemed aware of the history and context of the community and forum in which the religious speech

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[2] *See* John Branch & Mary Pilon, *Tebow, a Careful Evangelical*, N.Y. Times (Mar. 27, 2012), https://perma.cc/9NZH-8BKL.

[3] *See* Greg Bishop, *In Tebow Debate, a Clash of Faith and Football*, N.Y. Times (Nov. 7, 2011), https://perma.cc/GK7T-D6JA.

[4] Matthew Syed, *Religion and sport: Do prayers help players?*, BBC News (May 28, 2011), https://perma.cc/UFR9-7D2C.

[5] Tim Kawakami, *Steph Curry, on His Many Quirks, in His Own Words: The Mouthpiece, the Fingernail-Chewing, the "Lock in!" Tweet, the Sprint to the Rim Before Tip-off and More*, Mercury News: Talking Points (May 13, 2016), https://perma.cc/RRF9-RZJ5.

[6] Kelsey Dallas, *Taking a Knee: Professional Football and its Mysterious Postgame Prayer*, Deseret News (Aug. 27, 2014), https://perma.cc/8KND-PJFV.

takes place would know that Kennedy's prayer was not stamped with [the District's] seal of approval." Pet. App. 108 (Ikuta, J., dissenting from denial of rehearing en banc) (cleaned up). "Clearly there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed," and the District's "concern that Kennedy's religious activities would be attributed to [the District] is simply not plausible." *Id.* (cleaned up). If anything, the fact that the State is the employer here—and therefore under this Court's decisions is restricted in what religious speech it may endorse, *see Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302–03 (2000)—makes it less, not more, likely that such speech would be considered anything other than private.

IV. The Ninth Circuit's Curtailment Of First Amendment Liberties Is Detrimental To Public Service.

Attracting the most qualified candidates for public service—particularly in education—benefits society at large. But that recruitment effort will be undermined if public servants face unwarranted restrictions on their right to express their private, deeply held convictions outside of their official duties. The government, as an employer, may regulate private speech within reasonable bounds, but public employees who are not acting within the scope of their duties should not be required to divest themselves of their individuality and unique viewpoints just because they have stepped into a public school or government office.

For example, hindering the recruitment of qualified educators based on a reading of the First Amendment

that is overbroad as to both the Establishment Clause and government speech could have grave effects on public education systems. Educators "occupy a singularly critical and unique role in our society in that for a great portion of a child's life, they occupy a position of immense direct influence on a child, with the potential for both good and bad." *Knox Cnty. Educ. Ass'n v. Knox Cnty. Bd. of Educ.*, 158 F.3d 361, 375 (6th Cir. 1998); *see also* Alaska Stat. § 14.03.015 ("[T]he purpose of education is to help ensure that all students will succeed in their education and work, shape worthwhile and satisfying lives for themselves, exemplify the best values of society, and be effective in improving the character and quality of the world about them."). Because education plays such a pivotal role in the lives of young people, it is especially important that States recruit, train, and support high-quality educators. *See, e.g.*, Alaska Stat. § 14.25.001 ("The purpose of this chapter is to encourage qualified teachers to enter and remain in service[.]"); Ariz. Rev. Stat. § 15-537(A) ("The governing board shall establish a teacher performance evaluation system that is designed to improve teacher performance and improve student achievement[.]"); Tex. Educ. Code § 4.001(b) ("Qualified and highly effective personnel will be recruited, developed, and retained."). In pursuit of those goals, for example, the Texas Legislature has directed state officials "to identify talented students and recruit those students . . . into the teaching profession" and "to develop recruiting programs designed to attract and retain capable teachers[.]" Tex. Educ. Code § 21.004(a), (d).

But even competitive salaries, excellent health insurance, and the satisfaction of public service will not induce qualified candidates to pursue public

employment if accepting the position means accepting a complete curtailment of their constitutionally protected speech, especially as it relates to expressing personal convictions outside the scope of work performance. For most Americans—indeed, for most people across countries and cultures—those convictions include religious commitments. "We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). If government employers (or courts) place unnecessary and overbroad restrictions on the ability of employees to express their religious convictions in the workplace, legitimate religious expression will be chilled. And that chilling effect will, in turn, deter highly qualified candidates who desire to work in an environment that allows them to preserve their personal integrity. A lack of these highly qualified government personnel would hurt society.

Virtually every action by a public employee can communicate some type of message, many of them religious: the Muslim individual who wears a hijab or recites the du'a before meals; the Christian individual who observes Ash Wednesday or wears a crucifix; the Hindu individual who wears a bindi or observes dietary restrictions; the Jewish individual who wears a yarmulke or is absent on Yom Kippur—all these, and many more, communicate something about the employee's faith or lack thereof. Public employees may communicate messages through, for example, the clothing or jewelry they wear, the pictures on their desk, or their participation, *vel non*, in the national anthem and Pledge of Allegiance.

Exposure to individuals, including teachers, whose demonstrative speech includes outward signs of religious observation is an essential part of educating

citizens who can interact with the wide variety of fellow Americans in the workplace and public square. *Grutter v. Bollinger*, 539 U.S. 306, 308 (2003) ("[T]he skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."). "How well an enterprise works—how productive and successful it is in a highly competitive global economy—depends on whether it has the best people and people who are comfortable working across lines of race, class, religion, and background." Steven A. Ramirez, *Diversity and the Boardroom*, 6 Stan. J.L. Bus. & Fin. 85, 120 n.203 (2000).

The Ninth Circuit's opinion makes it a possibility that the only people in government employment—including within public schools—are the nonreligious or those willing to accept a radical curtailment of their personal religious liberty by those wielding political or judicial power. Qualified candidates who would otherwise become public servants will be diverted to the private sector, and the religious diversity of schools and government offices will diminish. *See McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring).

Private religious expression and public service can and must coexist. The Ninth Circuit's holding that they cannot, if allowed to stand, would be detrimental to educators, students, and the American public.

CONCLUSION

The Court should reverse the Ninth Circuit here.

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