No. _____

In the
Supreme Court of the United States

JOSEPH A. KENNEDY,

Petitioner,

v.

BREMERTON SCHOOL DISTRICT,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

KELLY J. SHACKELFORD
HIRAM SASSER
MICHAEL BERRY
FIRST LIBERTY INSTITUTE
2001 W. Plano Parkway
Suite 1600
Plano, TX 75075

JEFFREY PAUL HELSDON
THE HELSDON LAW FIRM, PLLC
1201 Pacific Avenue
Suite 600
Tacoma, WA 98402

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
EDMUND G. LACOUR JR.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Anthony J. Ferate
FERATE PLLC
4308 Echohollow Trail
Edmond, OK 73025

Counsel for Petitioner

June 25, 2018

QUESTION PRESENTED

This Court observed almost 50 years ago that "[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." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (emphasis added). But in the decision below, the Ninth Circuit not only argued that teachers shed their First Amendment rights at the schoolhouse gate, but made it circuit law. In particular, the court held that any "demonstrative communication" by a public school teacher or coach that occurs "at school or a school function" and "in the general presence of students" is entitled to no First Amendment protection at all. Applying that sweeping categorical rule, the court held that a public high school football coach could be fired for engaging in the most personal of expressive gestures, kneeling at midfield to say a brief, quiet prayer by himself after games, because he undertook this "demonstrative religious activity" in the vicinity of students.

The question presented is:

Whether public school teachers and coaches retain any First Amendment rights when at work and "in the general presence of" students.

PARTIES TO THE PROCEEDING

Petitioner is Joseph Kennedy. He was plaintiff in the District Court and plaintiff-appellant in the Court of Appeals.

Respondent is Bremerton School District. The District was defendant in the District Court and defendant-appellee in the Court of Appeals.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Petitioner Joseph Kennedy lost his job as a football coach at a public high school because he knelt and said a quiet prayer by himself at midfield after the game. According to the decision below, Coach Kennedy's discharge neither violates, nor even implicates, his First Amendment rights. Remarkably, the Ninth Circuit reached that conclusion by reasoning that *all* "demonstrative communication" by teachers and coaches on school grounds or at school functions, no matter how obviously personal and unattributable to the school, is outside the scope of the First Amendment so long as it occurs "in the general presence of students." App.21. That rule cannot be reconciled with this Court's precedent or the decisions of other courts.

This Court made clear almost 50 years ago that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Indeed, even back in 1969, that "ha[d] been the unmistakable holding of this Court for almost 50 years." *Id.* Likewise, while this Court has acknowledged that some restrictions on a public employee's free speech rights come with the job, it has underscored that "citizens do not surrender their First Amendment rights by accepting public employment." *Lane v. Franks*, 134 S. Ct. 2369, 2374 (2014). Indeed, the Court has rejected out of hand the argument that everything a public employee says and does is chargeable to the government. The government

neither owns nor may censor everything an employee says or does on the job.

Applying those settled principles, courts have long recognized and protected the First Amendment rights of teachers—including the right to engage in "demonstrative religious expression"—even if students may hear or view their expression. To be sure, the unique nature of the school setting may require a sensitive analysis of the nature of the expression and the particular context in which it occurs. But the Ninth Circuit's rule obviates the need for that sensitive analysis, simply deeming *everything* a teacher says or does in view of students as unprotected. No other court has embraced that sweeping proposition, and with good reason.

By the Ninth Circuit's dangerous logic, expressing any political opinion or engaging in any religious expression, whether donning a hijab or yarmulke or making the sign of the cross before lunch in the school cafeteria, could be made a fireable offense. This is a case in point: Coach Kennedy was suspended for saying a quiet prayer *by himself* simply because he did so within eyesight of students. And the Ninth Circuit's categorical rule, which governs hundreds of thousands of public school teachers and coaches, has ramifications far beyond the context of religious expression. After all, if any and all "demonstrative communication" in the view of students belongs to the school, not the speaker, then there is nothing to stop the school from engaging in outright viewpoint discrimination against teachers and coaches. Our nation's educators deserve better, and the First Amendment demands more.

This is an excellent vehicle to resolve the question presented. The facts are undisputed, and the Ninth Circuit made crystal clear that it was applying a categorical rule that teachers and coaches do not possess any First Amendment rights at all while they are on the job "in the general presence of students." Because that rule is so sweeping and so categorical, moreover, the Court need not determine precisely where the line between protected and unprotected speech, or the line between free exercise and establishment of religion, should be drawn in the public school setting to resolve this case. Instead, the Court need only determine whether it does indeed remain the law that "teachers [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 869 F.3d 813 and reproduced at App.1-53. The Ninth Circuit's order denying rehearing en banc is reported at 880 F.3d 1097 and reproduced at App.92-93. The district court issued its ruling from the bench following a preliminary injunction hearing. The transcript of that hearing is reproduced at App.54-89, and the minute entry on the district court's docket reflecting the court's ruling is reproduced at App.90-91.

JURISDICTION

The Ninth Circuit issued its opinion on August 23, 2017. App.1. Petitioner filed a timely petition for rehearing en banc, which the court denied on January 25, 2018. App.92. On April 10, 2018, Justice Kennedy

extended the time to file a petition for writ of certiorari until May 25, 2018. On May 15, 2018, Justice Kennedy further extended the time to file a petition for writ of certiorari until June 24, 2018. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments are reproduced at App.94.

STATEMENT OF THE CASE

A. Factual Background

1. Joseph Kennedy is a Christian. Until not long ago, he was also a football coach. From 2008 until 2015, Kennedy served as an assistant coach for Bremerton High School's (BHS) varsity football team and head coach for the school's junior varsity squad. App.2. Kennedy's religious beliefs require him to give thanks through prayer at the end of each game for what the players accomplished and for the opportunity to be part of their lives through football. App.3. Specifically, after the final whistle, and after both teams' players and coaches have met at midfield to shake hands, Kennedy feels called to pause, take a knee, and offer a silent or quiet prayer of thanksgiving for player safety, sportsmanship, and spirited competition. App.3. The prayer lasts about 15 to 30 seconds. App.3.

Kennedy engaged in such religious expression at the conclusion of BHS football games since he began working at BHS. App.3. Initially, Kennedy prayed quietly and alone. App.3. After several games, some BHS players asked what he was doing and whether

they could join him. App.3-4. Kennedy responded that he was giving thanks and said, "This is a free country. You can do what you want." App.4. Over time, the number of players who gathered near Kennedy after the game grew to include most of the team, although the number of players who participated varied from game to game. E.R.145.[1] Sometimes no players gathered, and Kennedy prayed alone. *Id.* Sometimes BHS players invited players from the opposing team to join. *Id.*

Over time, Kennedy also began giving short motivational speeches to players who would gather after the game. E.R.146. Though Kennedy's post-game speeches often included religious content and a short prayer, they were always nonsectarian and non-proselytizing. *Id.*

Before Kennedy joined BHS, the football team had sometimes engaged in pre- and post-game locker room prayers as a matter of school tradition. E.R.146, E.R.158. After he joined BHS, Kennedy sometimes participated in these prayers. E.R.146.

2. No one ever complained to the Bremerton School District about Coach Kennedy's conduct. The District learned of the group prayers in fall 2015, when an employee from another high school mentioned the post-game prayers to a BHS administrator. App.4; E.R.183-84. On September 17, 2015, District Superintendent Aaron Leavell sent Kennedy a letter announcing that the District was investigating whether "District staff have

[1] "E.R." refers to the excerpts of the record Kennedy filed with the Ninth Circuit.

appropriately complied" with the school board's policy on "Religious-Related Activities and Practices." E.R.158; App.4. The policy provides that, "[a]s a matter of individual liberty, a student may of his/her own volition engage in private, non-disruptive prayer at any time not in conflict with learning activities." App.4-5. While the policy states that "[s]chool staff shall neither encourage nor discourage a student from engaging in non-disruptive oral or silent prayer or any other form of devotional activity," App.5, the policy does not specifically address or prohibit demonstrative religious expression by on-duty school staff.

In its letter, the District identified "two problematic practices": Kennedy's midfield prayers with students and pregame locker room prayers. E.R.158. The District recognized that any student participation in Kennedy's post-game religious expression was "voluntary," and that Kennedy "ha[d] not actively encouraged, or required, participation" by the students. E.R.158; App.5. Even so, the District concluded that these practices violated its policy. The District also set forth certain guidelines for Kennedy's religious expression. Kennedy was "free to engage in religious activity, including prayer, so long as it does not interfere with job responsibilities," the activity is "physically separate from any student activity, and students [are] not … allowed to join such activity." App.5-6. Further, "to avoid the perception of endorsement" of religion, "such activity should either be non-demonstrative (*i.e.*, not outwardly discernible as religious activity) if students are also engaged in religious conduct, or it should occur while students are not engaging in such conduct." App.6.

After receiving the District's letter, Kennedy immediately ceased participating in any pre-game or other group prayers. E.R.146. Kennedy also temporarily refrained from engaging in any private religious expression immediately after BHS football games. App.6. After the game on September 18, 2015, Kennedy gave a short motivational speech to the players, omitting any mention of religion or faith, and he did not pray with players or by himself. App.6. But on his drive home, Kennedy felt "dirty" for having broken his commitment to God. E.R.147. He turned his car around and went back to the field, where he waited until everyone else had left the stadium. *Id.* Kennedy then walked to the 50-yard line, where he knelt to pray alone. *Id.*; App.6.

3. On October 14, 2015, Kennedy sent a letter to Superintendent Leavell and the District school board informing them of his sincerely held religious belief that he is compelled to pray following each football game. E.R.168-73; App.6-7. He also formally requested a religious accommodation under Title VII of the Civil Rights Act of 1964 that would affirm his right to engage in a brief, quiet, solitary prayer at midfield at the conclusion of BHS games. App.6-7.

After the football game on October 16, 2015, Kennedy walked to midfield for the customary handshake with the opposing team. App.7. As instructed by the District's September 17 letter, Kennedy waited until the students were "physically separate" from him and engaged in other conduct, namely, walking toward the stands to sing the post-game fight song. App.7; E.R.73. He then knelt at the

50-yard line, closed his eyes, and prayed a brief, quiet prayer. App.7.

While Kennedy was kneeling with his eyes closed, coaches and players from the opposing team, as well as members of the public and media, spontaneously joined him on the field and knelt beside him. App.7. Kennedy did not ask anyone to join him on the field, and he did not know that anyone was going to do so.

On October 23, 2015, just hours before the next scheduled football game, Superintendent Leavell sent Kennedy a letter that "emphasize[d] [his] appreciation for [Kennedy's] efforts to comply with the September 17 directives," and acknowledged that Kennedy's religious expression on October 16 was "fleeting." App.8-9. Nonetheless, the District denied Kennedy's request for a religious accommodation and asserted that his kneeling on the field was prohibited by the Establishment Clause because it was "overtly religious conduct." App.10.

While the District's September 17 letter had stated that employees could engage in religious expression so long as it did not interfere with their jobs and was "physically separate from any student activity," such that students would not be "engaging in such conduct," E.R.73, the District's October 23 letter set forth a sweeping new ban. The District prohibited Kennedy from engaging in *any* "demonstrative religious activity" that is "readily observable to (if not intended to be observed by) students and the attending public." App.10. Thus, the District's new policy prohibits any employee, when on-duty and within view of a student or the public, from engaging in any "demonstrative religious activity."

After the BHS football game ended that night, Kennedy knelt alone at the 50-yard line and bowed his head for a brief, quiet prayer. E.R.148. Likewise, when the junior varsity team's game ended on October 26 and the players began "engaging in post-game traditions," Kennedy knelt alone to offer a brief prayer of thanks. E.R.90.

Two days later, the District placed Kennedy on paid administrative leave and prohibited him from "participat[ing], in any capacity, in BHS football program activities." E.R.179; App.11. The District's stated reason for these adverse employment actions was that Kennedy had "engag[ed] in overt, public and demonstrative religious conduct while still on duty as an assistant coach." E.R.179. Specifically, the District stated that it was suspending Kennedy for "kneel[ing] on the field and pray[ing] immediately following the … game"—even though his prayer occurred when BHS players were engaged in "post-game traditions" like singing the school fight song. *Id.*; E.R.183.

In a public document entitled "Bremerton School District Q&A Regarding Assistant Football Coach Joe Kennedy," the District stated that Kennedy "will not participate, in any capacity, in BHS football program activities" until he "affirms his intention to comply with the District's directives." E.R.181. The District conceded that Kennedy "has complied with [its] directives not to intentionally involve students in his on-duty religious activities," but stated that "he has continued a practice of engaging in a public religious display immediately following games, while he is still on duty." E.R.182.

In November 2015, the District further retaliated against Kennedy by giving him a poor performance evaluation for the first time in his BHS coaching career. E.R.265-66; App.12. The evaluation recommended that Kennedy not be rehired because he allegedly "failed to follow district policy" regarding religious expression and "failed to supervise student-athletes after games." App.12-13. Kennedy did not return for the following season. E.R.149.

B. District Court Proceedings

Kennedy filed suit in the Western District of Washington on August 9, 2016, alleging violations of his rights under the Free Speech and Free Exercise Clauses of the First Amendment and Title VII of the Civil Rights Act of 1964. On August 24, 2016, Kennedy moved for a preliminary injunction that would order the District to cease discriminating against him in violation of the First Amendment, reinstate him as a BHS football coach, and allow him to take a knee at midfield at the conclusion of BHS football games to "say a silent prayer that lasts 15-30 seconds." E.R.140; App.13.

Kennedy argued that he was likely to succeed on the merits of his First Amendment claims because the District's blanket ban on "demonstrative religious activity" by on-duty school employees is unconstitutional. Drawing on this Court's public employee speech doctrine, Kennedy contended that his brief religious expression was not made pursuant to his ordinary duties as a coach; rather, it was made as a private citizen for First Amendment purposes. And he argued that the District lacked an adequate

justification for punishing him based on his protected expression.

In response, the District did not dispute the sincerity of Kennedy's religious beliefs, and it did not dispute that his prayer constitutes speech on a matter of public importance. Instead, it argued that when a coach or teacher is on the job, *nothing* he says or does in the presence of students is entitled to First Amendment protection. According to the District, what it "contracts for when it hires a coach is all of your expressions …[.] We are buying every bit of your behavior while you're around the students because they are always watching you." App.72. Thus, for any coach or teacher "out and around the students, in the classroom or out, every bit of his expression is expression that the district has contracted for. So every bit of it is subject to district control." App.72. The District also argued that it was required by the Establishment Clause to prohibit Kennedy's brief post-game prayers because reasonable observers would think the District was endorsing his religious beliefs. App.85-86.

The district court heard oral argument on the motion for preliminary injunction, and at the conclusion of the hearing, the court orally denied the motion. App.88-89; App.91. The court agreed that Kennedy spoke on a matter of "public concern" and that the District would not have taken the adverse employment actions against Kennedy absent his speech. App.88. But the court held that Kennedy's speech was not protected by the First Amendment because he spoke as "a public employee," not as a private citizen, when he knelt at midfield to offer a

brief, quiet prayer. App.88. The court declared that "[i]t is not a debatable point" that Kennedy spoke as a public employee because he "was still in charge" and "still on the job" at the time of his religious expression. App.89.

The district court also held that the District had an adequate justification for its adverse employment actions because "a reasonable observer, in my judgment, would have seen him as a coach" when he knelt to pray. App.89. The court opined that "those things … can't be happening on public property in this climate under the law." App.89. The court concluded by reiterating that it was "just focusing on Coach Kennedy's role as coach as determinative of this issue." App.89.[2]

C. Ninth Circuit Decision

The Ninth Circuit affirmed, holding that Kennedy's religious expression fell outside the scope of the First Amendment because he "spoke as a public employee, and not as a private citizen." App.17.

The court began by defining Kennedy's "ordinary job responsibilities" as a coach. App.18 (quoting *Lane*, 134 S. Ct. at 2378). Though the court recognized that "employers c[annot] restrict their employees' rights 'by creating excessively broad job descriptions,'" App.19 (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006)), it held that Kennedy's job as a coach "did not merely require him to supervise students in the locker room, at practice, and before and after games. Nor

[2] The district court based its decision solely on the likelihood of success on the merits and did not address the other factors of the preliminary injunction analysis. App.89.

was it limited to treating injuries and instructing players about techniques related to football." App.23. In the Ninth Circuit's view, Kennedy's job duties included being a "mentor and role model for the student athletes." App.23. In support of that view, the court noted that Kennedy's coaching agreement required him "to 'use proper conduct before the public and players at all times.'" App.24. In sum, "Kennedy's job … involved modeling good behavior while acting in an official capacity in the presence of students and spectators." App.24. Thus, *any* "demonstrative communication fell within the compass of his professional obligations." App.24-25.

The Ninth Circuit defined Kennedy's job by comparing it to that of a teacher. For both, "expression" is their "stock in trade." App.25. Thus, in the Ninth Circuit, *any* expression by an on-duty coach or teacher that is observable by students falls outside the scope of the First Amendment.

With Kennedy's job duties so defined, the Ninth Circuit concluded that his prayer was unprotected because it constituted "demonstrative communication" in the vicinity of students and parents, and "[b]ecause such demonstrative communication fell well within the scope of Kennedy's professional obligations." App.27. The court held that Kennedy's expression belonged to the District "because Kennedy had special access to the field by virtue of his position as a coach." App.27-28. In other words, because the speech "could not physically have been engaged in by Kennedy if he were not a coach," it belonged to the District. App.28.

Having concluded that Kennedy's speech was not entitled to any protection, the majority did not address whether the District had good reason to ban his speech. But in his concurrence, Judge Smith opined that the District's "actions were also justified to avoid violating the Establishment Clause." App.37. Though Kennedy had obeyed District "directives not to intentionally involve students in his on-duty religious activities," E.R.93, and though he had not kneeled until BHS players had left midfield to "engag[e] in post-game traditions," E.R.90, Judge Smith concluded that if the District allowed Kennedy to pray, his "players would likely join him, meaning he would likely be surrounded by a majority of the team." App.42. Judge Smith then drew on the majority's reasoning to conclude that "[a]n objective observer" of this hypothetical scene "would know that Kennedy had access to the field only by virtue of his position as a coach," and "that it is Kennedy's professional duty to communicate demonstratively to students and spectators after games." App.43. Thus, in Judge Smith's view, if the District did not ban Kennedy's prayer, an objective observer would reasonably believe that the District was favoring religion. App.46.

REASONS FOR GRANTING THE PETITION

This case raises the fundamental question whether *Tinker* still applies to teachers. While *Tinker* is well known for reaffirming the First Amendment rights of students, this Court actually stated that it was beyond argument that "either students *or teachers* shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506 (emphasis added). The second half of

that disjunctive statement is no longer true in the Ninth Circuit, as this case dramatically illustrates. Indeed, according to the Ninth Circuit, the schoolhouse gate is precisely what demarcates a free-speech-free zone for teachers. Once teachers cross the threshold of the school grounds, the school owns all their speech, and any "demonstrative communication" within earshot or eyesight of students is effectively unprotected by the First Amendment. App.20. Applying that rule, the court concluded that the undisputed facts that Kennedy was suspended and ultimately lost his job for engaging in what the District itself characterized as "fleeting" religious expression does not even implicate the First Amendment.

That sweeping categorical rule cannot be reconciled with this Court's precedent or with decisions from other circuits faithfully applying it. *Tinker* makes clear that schoolhouses are not First-Amendment-free zones for either students or teachers. And in articulating broader principles concerning the free speech rights of public employees, "[t]he Court has made clear that public employees do not surrender all their First Amendment rights by reason of their employment." *Garcetti*, 547 U.S. at 417. To be sure, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 421. But it is a necessary corollary that not every statement on or relating to the job is "pursuant to … official duties." *Id.* And employers cannot convert private speech into public speech "by creating excessively broad job

descriptions," *id.* at 424, or declaring all speech with a but-for connection to the job unprotected, *Lane*, 134 S. Ct. at 2379.

Applying those principles, courts have long recognized that there is no schoolhouse exception to the First Amendment. It could hardly be otherwise, as it "has been the unmistakable holding of this Court for" nearly a century that both teachers and students alike retain First Amendment rights at school. *Tinker*, 393 U.S. at 506. Of course, there are certainly difficult cases about how to harmonize free speech and free exercise rights with "the comprehensive authority of … school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Id.* at 507. But this case is not one of them. Indeed, only by employing a sweeping categorical rule could a court arrive at the startling proposition that a coach may be fired for the offense of saying a quiet, personal prayer within eyesight of students.

The Ninth Circuit's conception that the government effectively owns any "demonstrative communication" by teachers on school grounds is also fundamentally incompatible with rights to religious exercise. If any "demonstrative communication" by teachers, no matter how obviously personal, is in fact attributable to the school, then any religious exercise by teachers, whether it takes the form of crossing oneself before a meal or a short silent prayer after a game, raises Establishment Clause concerns. Courts outside the Ninth Circuit have repeatedly reached the opposite conclusion and held that public school teachers do not forfeit the right to engage in religious

expression in the workplace. To be sure, courts have recognized that there is a difference between proselytizing in the classroom and keeping a Bible on one's desk or wearing a visible cross or Star of David. But as with free speech analysis, the reconciliation of Establishment Clause concerns and Free Exercise Clause rights turns on the nature and context of the expression, not the simple fact that it emanated from a teacher on school grounds "in the general presence of students." App.21. Yet the Ninth Circuit's rule renders all of that critical context irrelevant, lumping everything from classroom instruction to a quiet prayer over lunch in the cafeteria into the official speech of the school, subject to government control and Establishment Clause concern.

In short, the decision below makes *Tinker* inapplicable to hundreds of thousands of teachers and coaches in the Ninth Circuit. This Court should grant review and restore their free speech and free exercise rights.

I. The Ninth Circuit's Categorical Denial Of First Amendment Protection To Teachers' "Demonstrative Communication" Cannot Be Reconciled With Decisions From This Court Or Other Circuits.

A. The Decision Below Conflicts with *Tinker* and a Long Line of School Speech Cases Before and After It.

Long before this Court recognized "that citizens do not surrender their First Amendment rights by accepting public employment," *Lane*, 134 S. Ct. at 2374, it held that "[n]either students [n]or teachers shed their constitutional rights to freedom of speech

or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506. Indeed, that "has been the unmistakable holding of this Court for" nearly a century. *Id*. As the Court has emphasized, "a citizen who works for the government is nonetheless a citizen," *Garcetti*, 547 U.S. at 419, and that is every bit as true of a citizen who accepts employment with a public school. After all, in the school context, as in any other, "it would not serve the goal of treating public employees like 'any member of the general public,' to hold that all speech within the office is automatically exposed to restriction." *Garcetti*, 547 U.S. at 420-21 (quoting *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cty.*, 391 U.S. 563, 573 (1968)).

To be sure, this Court has also recognized that "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions." *Garcetti*, 547 U.S. at 418. Recognizing that teachers have well-established free speech rights does not mean that schools are wholly without authority to control or discipline the speech of teachers. This Court's cases have instead striven to strike a delicate "balance between the interests of the teacher, as a citizen," and "the interest of the State, as an employer." *Pickering*, 391 U.S. at 568. The English teacher, for example, undoubtedly has no constitutional right to teach theology or trigonometry instead of Shakespeare. Likewise, when a coach is instructing his players in proper tackling, pleading with a referee for fair application of the rules, or dealing with a parent who thinks his child should get more playing time, the school's overriding interest in his speech cannot be gainsaid. But when it comes to "noncurricular speech, the teacher assuredly enjoys

some First Amendment protection." *Boring v. Buncombe Cty. Bd. of Educ.*, 136 F.3d 364, 373 (4th Cir. 1998) (Luttig, J., concurring). And when it comes to distinctly personal expressions of faith, even when visible to students, the teacher's First Amendment rights are well established outside the Ninth Circuit.

The decision below is impossible to reconcile with those precedents. According to the Ninth Circuit, all "demonstrative communication"—in other words, everything a teacher says or does with expressive content—"in the general presence of students" is school speech, not private speech, and thus entitled to no First Amendment protection whatever. App.24-25. That is not an exaggeration. The decision below concluded that a school district could remove a football coach from his job for the offense of kneeling to pray "a brief, silent prayer" following a football game. App.7. According to the Ninth Circuit, when Kennedy engaged in this plainly personal expression of his faith, he "spoke as a public employee, and not as a private citizen," and so his expression could be made a firing offense. App.7, 17.

That is extraordinary. If all expression by coaches and teachers in the presence of students—no matter how obviously personal—belongs to the school, then "the determination of who may speak and who may not is left to the unbridled discretion of a government official." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763 (1988). Put simply, the Ninth Circuit's categorical approach enables public schools to engage in wholesale viewpoint discrimination. Since all "demonstrative communication" of teachers and coaches is school speech, the government can

control all of it, right down to the viewpoint. That untenable result is precisely why this Court "ha[s] often and uniformly held that" policies like the one sanctioned here "are unconstitutional." *Id.* at 763-64 (citing *Cox v. Louisiana*, 379 U.S. 536, 557 (1965); *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958)); *see also Minn. Voters Alliance v. Mansky*, No. 16-1435, slip op. at 17-18 (U.S. June 14, 2018) (cautioning against "more covert forms of discrimination that may result when arbitrary discretion is vested in some governmental authority"). Indeed, the central thrust of this Court's public employee speech cases is "to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech." *Rankin v. McPherson*, 483 U.S. 378, 383-84 (1987). Yet the Ninth Circuit's rule empowers schools to do exactly the latter.

That the Ninth Circuit has (repeatedly) deployed that rule to stamp out religious expression makes the need for this Court's intervention even more critical. Courts elsewhere have repeatedly recognized that public school teachers retain the right to engage in some religious expression on school grounds. More than a century ago, the Pennsylvania Supreme Court rejected the notion "that it is sectarian teaching for a devout woman to appear in a school room in a dress peculiar to a religious organization of a Christian church." *Hysong v. Sch. Dist. of Gallitzin Borough*, 30 A. 482, 484 (Pa. 1894). And more than a century later, the Ohio Supreme Court had no trouble concluding that allowing a teacher to keep his Bible on his desk—"demonstrative" as that act may be—"posed no threat

to the Establishment Clause." *Freshwater v. Mt. Vernon City Sch. Dist. Bd. of Educ.*, 1 N.E.3d 335, 353 (Ohio 2013). Likewise, the Eighth Circuit held that a school administrator's decision to hang a "framed psalm on the wall of [his] office" was "clearly personal and d[id] not convey the impression that the government is endorsing it." *Warnock v. Archer*, 380 F.3d 1076, 1082 (8th Cir. 2004). And the Western District of Pennsylvania concluded that "there is no danger that permitting an … employee to wear a cross while working at school will encroach upon the Establishment Clause." *Nichol v. ARIN Intermediate Unit 28*, 268 F. Supp. 2d 536, 560 (W.D. Pa. 2003).

As these cases demonstrate, religious expression by teachers has long been compatible with both the Free Speech Clause and the Establishment Clause. Yet as Judge Smith recognized in his concurring opinion, the Ninth Circuit's rule renders it compatible with neither. By viewing all speech by teachers and coaches as school speech, the Ninth Circuit converts any religious expression by teachers and coaches into the government's own religious expression, and thus obliterates the "crucial 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." *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990). Indeed, by its terms, the Ninth Circuit's rule admits of no distinction between a teacher leading students in prayer during curricular instruction and a teacher saying a quiet prayer over her own lunch in the school cafeteria. All of it is "demonstrative communication," and so all of it may be made a firing offense.

That result cannot be reconciled with *any* of the relevant clauses of the First Amendment. Schools are no more entitled "to purge from the public sphere all that in any way partakes of the religious," *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring in the judgment), than they are to force "teachers [to] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506. And they are no more entitled to fire teachers for wearing a yarmulke or crossing themselves before a meal than for wearing an American flag pin or a black armband. To the contrary, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

B. The Decision Below Conflicts With *Garcetti*, *Lane*, and Lower Court Decisions Faithfully Applying Them.

1. The decision below is all the more problematic because it reflects precisely the kind of "overly broad" reading of *Garcetti* that this Court has twice rejected, first in *Garcetti* itself, and then more recently again in *Lane*. As *Garcetti* explained, this Court employs a two-step approach for determining whether a public employee's speech is protected by the First Amendment. "The first requires determining whether the employee spoke as a citizen on a matter of public concern." *Garcetti*, 547 U.S. at 418. If the answer is yes, then the second entails determining whether restricting the speech is "necessary" for the "employer[] to operate efficiently and effectively." *Id.* at 419. Accordingly, "[t]he critical question under

Garcetti is whether the speech at issue is itself ordinarily within the scope of an employee's duties." *Lane*, 134 S. Ct. at 2379.

While this Court has had "no occasion to articulate a comprehensive framework for defining the scope of an employee's duties," *Garcetti*, 547 U.S. at 424, it has made two things crystal clear. First, "employers" may not "restrict employees' rights by creating excessively broad job descriptions." *Id.* After all, if employers could get around the First Amendment by simply declaring all employee speech part of the employee's job duties, then the protections *Garcetti* recognized would become a dead letter. Second, speech does not fall on the unprotected side of the line simply because it relates to, or is made possible only because of, the employee's job duties. While the *Garcetti* Court found the speech at issue there (an internal memorandum prepared as part of the employee's job duties) unprotected in part because it "owe[d] its existence" to the employee's job duties, 547 U.S. at 421, the Court has subsequently clarified that an employee does not speak as an employee merely because his job was a but-for cause of his speech or the speech "relates to public employment." *Lane*, 134 S. Ct. at 2379.

Applying those principles, lower courts have been appropriately skeptical of attempts to expand the scope of an employee's duties at the expense of the employee's constitutional rights. For example, in *Chrzanowski v. Bianchi*, the Seventh Circuit considered the claim of an assistant state's attorney who had been fired after testifying at trial about misconduct by his supervisor. 725 F.3d 734, 736-37

(2013). The district court held that his testimony was unprotected employee speech because "it was 'part of [his] job to serve the people of McHenry County in the proper administration of justice.'" *Id.* at 739. But the Seventh Circuit "rejected the argument that job descriptions such as … 'a general obligation to ensure sound administration' of public institutions … could place otherwise protected speech outside the ambit of the First Amendment." *Id.* at 739-40. Prosecutors are hired "to prosecute crimes," *id.* at 740, and Chrzanowski's employer could not use an "excessively broad job description" to avoid First Amendment scrutiny of its actions, *id.* at 739 (quoting *Garcetti*, 547 U.S. at 422).

The Fourth Circuit reached a similar conclusion in *Hunter v. Town of Mocksville*, 789 F.3d 389 (4th Cir. 2015). There, three police officers alleged that their First Amendment rights were violated when they were fired for reporting their superiors' criminal misconduct to the governor. *Id.* at 395. The defendants argued that this was unprotected employee speech "because all sworn police officers have a duty to enforce criminal laws, and Plaintiffs, police officers, suspected criminal conduct." *Id.* at 399. In support of that argument, they emphasized that the "Police Manual broadly obligated Plaintiffs to, among other things … 'enforce all Federal, State, and City laws and ordinances coming within departmental jurisdiction.'" *Id.* The Fourth Circuit rejected that approach, concluding that "a general duty to enforce criminal laws in the community does not morph calling the Governor's Office because the chief of police himself is engaging in misconduct into part of an officer's daily duties." *Id.*

Courts have not hesitated to apply the same skepticism when schools try to define the job duties of their employees in excessively broad terms. The Tenth Circuit, for example, confronted a case involving a charter school that retaliated against several teachers for meeting off campus to discuss matters related to the operation of the school. *See Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1199-1201 (2007). The school argued that the teachers' speech fell within their official job duties because the school encouraged them "to present their views to improve the Academy … in the form of complaints and grievances to the Board." *Id.* at 1204. The Tenth Circuit rejected that argument, holding that it could not "deem such a generalized grievance policy to be an official duty without eviscerating *Garcetti* and the general constitutional principle that 'public employees do not surrender all their First Amendment rights by reason of their employment.'" *Id.* (quoting *Garcetti*, 547 U.S. at 417).

The decision below is a product of exactly the flawed reasoning that these and other courts have rejected. According to the Ninth Circuit, *any* "demonstrative communication f[a]ll[s] within the compass of [a teacher's] professional obligations" because "'expression is a teacher's stock in trade.'" App.24-25, 20 (quoting *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 967 (9th Cir. 2011)). Thus, in its view, "teachers *necessarily* act as teachers," not private citizens, for purposes of *Garcetti* "when [1] at school or a school function, [2] in the general presence of students, [3] in a capacity one might reasonably view as official," App.21 (quoting *Johnson*, 658 F.3d at 970), because "modeling good behavior while acting in

an official capacity in the presence of students and spectators" is part of their job. App.24. That reasoning is impossible to reconcile with the Fourth, Seventh, and Tenth Circuit's adherence to this Court's admonition that employers may not "restrict employees' rights by creating excessively broad job descriptions." *Garcetti*, 547 U.S. at 424.

2. In fact, the decision below repeats the same basic error that this Court corrected just a few Terms ago in *Lane*. There, the Eleventh Circuit overread *Garcetti* as creating something akin to a but-for test, reasoning that Lane's testimony about corruption he witnessed on the job "owed its existence to" his employment "because Lane learned of the subject matter of his testimony in the course of his employment." *Lane*, 134 S. Ct. at 2379. In other words, because he would not have been in a position to testify on the matter if he had not been an employee, Lane spoke as an employee, not a citizen. This Court rejected that reasoning, concluding that "the Eleventh Circuit read *Garcetti*" and its "owed its existence to" language "far too broadly." *Id.*

Under *Lane*, then, (just as under *Garcetti*), it is not enough that Kennedy's prayer "could not physically have been engaged in by Kennedy if he were not a coach." App.28. After all, Lane's speech could not have occurred but for his job. The same is true of the protected political commentary in *Rankin*, which "took place in an area to which there was ordinarily no public access." *Rankin*, 483 U.S. at 389. And *Pickering* recognized that speech made possible by a citizen's position as a teacher could actually heighten, rather than diminish, the need for First Amendment

protection. *Pickering*, 391 U.S. at 572 (holding it "essential that [teachers] be able to speak out freely" on "how funds allotted to the operation of the schools should be spent"). In short, if a but-for connection between the speech and the job were enough, *Lane*, *Rankin*, and perhaps even *Pickering* itself would have come out differently.

So, too, would the many lower court cases that have resisted efforts—both before and after *Lane*—to limit employee rights through an overly broad reading of *Garcetti*'s "owed its existence to" language. In *Boulton v. Swanson*, for example, a police officer who was also a leader in his union claimed that he was retaliated against because he gave testimony that contradicted his superior officer during contract arbitration proceedings. 795 F.3d 526, 529 (6th Cir. 2015). The district court declared his speech unprotected, reasoning that it "'owe[d] its existence'" to his job because "Boulton could not have participated in the union or the arbitration if he were not an employee of the Sheriff's Office." *Id.* at 533. But the Sixth Circuit rejected that approach, recognizing that "the phrase 'owes its existence to a public employee's professional responsibilities' must be read narrowly as speech that an employee made in furtherance of the ordinary responsibilities of his employment." *Id.* at 534.

The Seventh and Eleventh Circuits likewise have rejected efforts to contract public employees' First Amendment rights by expanding *Garcetti*'s "owes its existence to" language. *See, e.g.*, *Chrzanowski*, 725 F.3d at 738 (speech does not "owe[] its existence to a public employee's" job "simply because public

employment provides a factual predicate for the expressive activity"); *Carollo v. Boria*, 833 F.3d 1322, 1329 (11th Cir. 2016) ("owes its existence to ... must be read narrowly to encompass speech that an employee made in accordance with or in furtherance of the ordinary responsibilities of her employment"). And the Third Circuit has "*never* applied the 'owes its existence to' test ... for good reason: this nearly all-inclusive standard would eviscerate citizen speech by public employees simply because they learned the information in the course of their employment …." *Flora v. Cty. of Luzerne*, 776 F.3d 169, 177-78 (3d Cir. 2015) (emphasis added). As it recognized, carving out all speech that could be said to "owe its existence" to the job cannot be squared with *Garcetti*'s admonishment that "the First Amendment necessarily 'protects some expressions related to the speaker's job.'" *Id.* at 178 (quoting *Garcetti*, 547 U.S. at 421).

Yet the Ninth Circuit not only refused to reconsider, but expressly reaffirmed, its pre-*Lane* circuit precedent holding that teachers have no First Amendment rights "in the general presence of students" because all speech in their capacity as teachers "owe[s] its existence to [their] position as a teacher." App.21-22 (quoting *Johnson*, 658 F.3d at 970). While Kennedy explained to the panel below that *Johnson* cannot be reconciled with *Lane*'s subsequent admonition against reading *Garcetti*'s "owed its existence to" language "too broadly," *Lane*, 134 S. Ct. at 2378-39, the court dismissed *Lane* as concerning only whether "'testimony under oath by a public employee *outside the scope of his ordinary job duties* is speech as a citizen for First Amendment

purposes.'" App.22 n.7 (quoting *Lane*, 134 S. Ct. at 2378). In its view, because Kennedy "could not physically have been" on the field after games "if he were not a coach," his "speech … occurred only because of his position," and thus belonged to the District. App.28. That reasoning cannot be reconciled with *Garcetti*, *Lane*, or lower court cases faithfully applying them.

* * *

In sum, in the Ninth Circuit—and (at least for now) the Ninth Circuit alone—public school teachers and coaches can no longer invoke the protections of the First Amendment for *any* speech or expression while on duty in the view of a student. Instead, they can be fired for any expression—religious or otherwise—with which the school disagrees, because all "demonstrative communication f[a]lls within the compass of [their] professional obligations." App.24. By blessing such an "excessively broad job description[]," *Garcetti*, 547 U.S. at 424, the Ninth Circuit has stripped hundreds of thousands of teachers and coaches of First Amendment rights that they would enjoy in other circuits, forcing them to "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506. The Court should grant certiorari and confirm that schools are not immune from the rule that "public employers may not condition employment on the relinquishment of constitutional rights." *Lane*, 134 S. Ct. at 2377.

II. This An Ideal Vehicle For Addressing This Exceptionally Important Issue.

This case is an ideal vehicle for resolving the question presented and reviewing the Ninth Circuit's entrenched free-speech-obliterating rule for public school teachers and coaches. That question was unquestionably dispositive, as the parties agree "that Kennedy spoke on a matter of public concern …, that the relevant speech was a substantial or motivating factor in the District's decision to place Kennedy on leave …, and that the District would not have taken the adverse employment action in the absence of the relevant speech." App.16. The Ninth Circuit's decision thus turned solely on "whether Kennedy spoke as a private citizen or a public employee" when he briefly knelt on the field to pray after games. App.16. And because the court resolved that issue by deploying a sweeping categorical rule for teachers and coaches, this case cleanly tees up a legal issue that is often fairly fact-bound. If all of a teacher's or coach's "demonstrative communication" near students is public employee speech, App.24, then the factual disputes narrow dramatically to (i) whether there was on-the-job expression and (ii) whether students were within ear- or eyeshot. Neither of those facts is disputed here.

Moreover, because the decision below presses *Garcetti* to the breaking point, there is no need to "articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate." *Garcetti*, 547 U.S. at 424. Put simply, this should have been an easy case. Unlike some of Kennedy's earlier expressive conduct,

the "demonstrative communication" that led to his dismissal was discrete and distinctly personal. Kennedy knelt briefly on the field after a game to say a quiet prayer, then walked away. Nothing about the day-to-day duties of coaching suggests that this expression was part of Kennedy's job, rather than his own private speech. And wherever the line between citizen and employee speech should be drawn, it cannot be that *all* of Kennedy's "demonstrative communication fell within the compass of his professional obligations." App.24. Thus, to resolve this case, the Court need not devise a framework for resolving every difficult employee speech case that might arise. It need simply reaffirm that "teachers [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506.

Reaffirming that core principle is critical to millions of public servants across the country. In the school setting in particular, "[t]he doctrinal framework governing the First Amendment rights of teachers is in dire need of clarification and reform." Mary-Rose Papandrea, *Social Media, Public School Teachers, and the First Amendment*, 90 N.C. L. Rev. 1597, 1641 (2012). It is bad enough that the Ninth Circuit's ruling jeopardizes the First Amendment rights of the 460,000 teachers who work within the court's jurisdiction.[3] If that ruling is allowed to stand,

[3] As of 2015-2016, states within the jurisdiction of the Ninth Circuit had 19,283 public schools and 466,796 public school teachers. *See* Mark Glander, Nat'l Ctr. for Educ. Statistics, *Selected Statistics From the Public Elementary and Secondary*

millions of other teachers will have to fear that "every stray remark [they] make[] in class, on a school bulletin board, or to a student in between classes is government speech that the school is entitled to control without limit." Papandrea, 90 N.C. L. Rev. at 1632. Just as troubling, they may be forced to choose between public school employment and abiding by basic tenets of their faith, and schools may be forced to accept "a brooding and pervasive devotion to the secular." *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in the judgment).

Rather than allow the Ninth Circuit's decision to further muddle multiple strands of First Amendment jurisprudence, this Court should grant certiorari and confirm that a public school does not own every on-the-job expression its teachers or coaches may make around students. After all, not only does the right to free speech not stop at the schoolhouse gate, but "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton*, 364 U.S. at 487.

Education Universe: School Year 2015-16 7 (Dec. 2017), https://bit.ly/2yLmZd1.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

KELLY J. SHACKELFORD
HIRAM SASSER
MICHAEL BERRY
FIRST LIBERTY INSTITUTE
2001 W. Plano Parkway
Suite 1600
Plano, TX 75075

JEFFREY PAUL HELSDON
THE HELSDON LAW FIRM, PLLC
1201 Pacific Avenue
Suite 600
Tacoma, WA 98402

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
EDMUND G. LACOUR JR.
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

ANTHONY J. FERATE
FERATE PLLC
4308 ECHOHOLLOW TRAIL
EDMOND, OK 73025

Counsel for Petitioner

June 25, 2018