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

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BRIEF OF ADVANCING AMERICAN FREEDOM, YOUNG AMERICA'S FOUNDATION, AND 42 ADDITIONAL ORGANIZATIONS AND INDIVIDUALS AS AMICI CURIAE SUPPORTING PETITIONER

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STATEMENT OF INTEREST OF AMICI CURIAE

Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends policies that elevate traditional American values, including freedom of speech and religious worship. AAF believes that a person's freedom of speech and religious worship are among the most fundamental of individual rights and must be secured against government encroachment.[1]

Young America's Foundation is a nonprofit organization dedicated to advancing the ideas of individual freedom, traditional values, a strong national defense, and free enterprise. Young America's Foundation engages with students, parents, and teachers on campuses across the country and is a strong advocate for protecting First Amendment freedoms.

Forty-two additional organizations and individuals, listed in the Appendix, also join this brief. These *amici curiae* are individuals and organizations concerned about how the Ninth Circuit's decision will affect the First Amendment rights of teachers and other public employees and are committed to securing

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No person other than *amici curiae* made any monetary contribution intended to fund the preparation or submission of this brief.

fundamental constitutional rights against government infringement.

SUMMARY OF THE ARGUMENT

No right is more fundamental under our Constitution than the ability of every citizen to give personal thanks to God for the blessings of His provision. And there is no exception to the First Amendment that allows the rights of public servants to practice their faith to be relegated to a lesser constitutional status. Many public officials enter public service as an answer to faith's call, and the Constitution does not permit the government to deny such men and women the opportunity to humbly and devotedly give thanks to their Creator.

Yet when high school football coach Joseph Kennedy engaged in 30 seconds of personal prayer at the conclusion of a football game, the school district that employed him first suspended him and then placed him on administrative leave. The Ninth Circuit upheld the school district's discriminatory adverse employment actions as necessary to avoid a governmental establishment of religion. That is wrong. This Court should reverse the Ninth Circuit, and hold that public officials have a constitutionally protected right under the First Amendment to offer personal prayers of thanks. A rule that would require public officials to forego personal prayer while performing the public duties to which God has called them would drum the faithful out of public life.

The Ninth Circuit's decision is founded on two errors of law that would make it difficult if not impossible for public officials of faith to reconcile the requirements of their religion with the performance of public service. First, when a public official engages in silent prayer on bended knee following the completion of one of his most important job responsibilities, that prayer is universally understood by all reasonable observers to be an act of personal thanks and devotion. It is absurd to label an act of obvious personal gratitude and humility as governmental speech that is prohibited by the Constitution. It is commonplace in our Republic for public officials to pray aloud in front of public audiences, which has since the time of the Founding been understood to be a permissible and healthy expression of the personal faith of the speaker, and not an impermissible endorsement of religion by the government. The Ninth Circuit's rule transforming personal, brief, and silent prayers of thanks by public officials after completing important tasks into impermissible government speech simply because it is observable by members of the public would threaten to excise personal prayer from public life.

Second, the Ninth Circuit fundamentally misapplied the Establishment Clause in holding that Bremerton School District ("BSD") was required to prohibit Coach Kennedy's prayer in order to avoid an Establishment Clause violation. Personal speech cannot violate the Establishment Clause. Silent prayers of thanks, briefly and personally offered, do not violate the Establishment Clause simply because

the public can see them. BSD never should have prohibited Coach Kennedy's personal prayer in the first place. Yet the Ninth Circuit's decision would prevent school districts like BSD from lifting such wrongful bans once instituted, on the absurd grounds that such rightful corrections somehow impermissibly endorse religion. And to the extent that the Ninth Circuit purported to ground its holding in the specific unusual circumstances of publicity that came to be focused on Coach Kennedy's personal prayer, it gets the relevant Establishment Clause analysis precisely backwards. The publicity was caused by BSD's inappropriate ban, not by Coach Kennedy, who had previously prayed for years without media attention. BSD further made it absolutely clear to all observers through its own publicity that Coach Kennedy's prayers were purely personal acts of devotion that the government did not remotely endorse.

The Ninth Circuit's erroneous holdings would render it exceedingly difficult for public officials to prayerfully practice their faith during working hours. Most public officials are not constitutional scholars. Even if the Ninth Circuit's decision were interpreted to permit accommodated prayer by public officials in some narrow sets of circumstances, the court's cramped interpretation of the First Amendment would inevitably chill the speech or expression of individuals concerned about the severe consequences of even perceived missteps. This Court should reverse the Ninth Circuit's decision, restoring the clear and venerable rule that brief prayers of personal thanks are not government speech, do not violate the

Establishment Clause, and are a healthy part of the Free Exercise of Religion that is the lifeblood of our Republic.

ARGUMENT

I. The First Amendment Protects the Rights of Public Employees to Engage in Personal Religious Expression in the Workplace

The "State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick v. Myers*, 461 U.S. 138, 142 (1983); *see Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006) ("The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens."). This Court has previously held that "a citizen who works for the government is nonetheless a citizen," *id.*, and does "not surrender their First Amendment rights by accepting public employment," *Lane v. Franks*, 573 U.S. 228, 231 (2014).

Kennedy coached football at a public high school in Washington State from 2008 to 2015. As a devout Christian, his sincerely held religious beliefs compelled him to "give thanks through prayer, at the end of each [football] game, for what the players had accomplished and for the opportunity to be a part of their lives through football." *Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004, 1010 (9th Cir. 2021). Kennedy exercised his First Amendment rights by

kneeling at the 50-yard line and offering a silent and brief prayer lasting approximately 30 seconds. *Id.* Ultimately, the BSD placed Kennedy on administrative leave and later suspended him for violating a district policy that prohibited him from "engag[ing] in demonstrative religious activity, readily observable to (if not intended to be observed by) students and the attending public" while "on duty." *Kennedy v. Bremerton Sch. Dist.*, 869 F.3d 813, 819 (9th Cir. 2017).

The Ninth Circuit affirmed BSD's curtailment of Kennedy's right to engage in religious expression because – in its view – he spoke as a public employee when he prayed and, even if he prayed as a private citizen, the school district would have violated the Establishment Clause if it permitted Kennedy to continue to pray. *Kennedy*, 991 F.3d at 1014-19.

A. The Ninth Circuit's Conclusion That Public Employees Engage in Government Speech When Silently Praying in Public View Is Unconstitutionally Overbroad

This Court has previously held that "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." *Garcetti*, 547 U.S. at 421. Thus, "the critical question . . . 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*, 573 U.S. at 240.

The Ninth Circuit held that Kennedy's silent prayer on the football field constituted speech as a public employee because he

> was one of those especially respected persons chosen to teach on the field, in the locker room, and at the stadium. He was clothed with the mantle of one who imparts knowledge and wisdom. Like others in this position, expression was Kennedy's stock in trade. Thus, his expression on the field—a location that he only had access to because of his employment—during a time when he was generally tasked with communicating with students, was speech as a government employee.

Kennedy, 991 F.3d at 1015 (internal quotations and citations omitted).

The analysis the Ninth Circuit employed to reach its conclusion is problematic; it not only is overly broad, but also incorrect. Under the Circuit's reasoning, any public employee loses her First Amendment speech protections when (1) on duty and (2) in an area that is restricted to the general public, yet visible to it. *See Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 636 (2019) (Alito, J., statement concurring in denial of certiorari). ("According to the Ninth Circuit, public school teachers and coaches may be fired if they engage in any expression that the

school does not like while they are on duty, [which is] . . . at all times from the moment they report for work to the moment they depart, provided that they are within the eyesight of students.").

Nearly all public employees would lose their right to engage in brief, silent prayer and other religious expression under the Ninth Circuit's test. Instead of analyzing whether the "expressions were made *pursuant to* [] official duties," *Garcetti*, 547 U.S. at 421 (emphasis added), the court created an "excessively broad," *id.* at 424, view of public speech that threatens to drum the devoutly faithful out of public service. Under the Ninth Circuit's logic, any visible practice of personal faith that occurs on duty and in the workplace is subject to government control. Public employees cannot escape or avoid this all-encompassing conception of government speech. No matter how personal or private, if speech or expression occurs in the presence of other individuals at the workplace during duty hours, in the conception of the Ninth Circuit, it is completely unprotected under the First Amendment. *See Kennedy v. Bremerton Sch. Dist.*, 4 F.4th 910 (9th Cir. Jul. 19, 2021) (O'Scannlain, J., statement regarding denial of rehearing en banc) ("For if, as the [Ninth Circuit's majority] opinion declares, all demonstrative communication in the presence of students were unprotected, there would be little left of the First Amendment . . . for public school employees.") (internal quotations omitted).

The Ninth's Circuit's sweepingly overbroad standard for categorizing government speech is not

limited — or limitable — to the context of public schools. A Ninth Circuit panel has already applied the Circuit's logic from the *Kennedy* decision outside the school context. *See Barone v. City of Springfield*, 902 F.3d 1091, 1098 – 1101 (9th Cir. 2018) (citing Kennedy to support the conclusion that a community service officer spoke as a public employee when she spoke and answered questions at an event titled: "Come Meet Thelma Barone from the Springfield Police Department."). And a district court within the Ninth Circuit has similarly applied *Kennedy* to the employee of a public hospital. *Naini v. King Cnty. Pub. Hosp. Dist. No. 2*, Case No. C19-0886-JCC, at * 24 – 26 (W.D. Wash. Jan. 19, 2020) (stating that the "principles" set forth in *Kennedy* "compel" the court to conclude that a neurosurgeon at a public hospital spoke to his patients as a public employee and pursuant to his official duties).

The Ninth Circuit's test would permit — perhaps even require — outright prohibition by the government of a significant portion of religious expression that is protected under the First Amendment. Each of the following scenarios describes religious expression that is commonly understood as protected by the First Amendment.[2]

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[2] Several court opinions envision as permissible religious conduct that the Ninth Circuit's opinion would seemingly eliminate or chill. *See Kennedy*, 139 S. Ct. at 636 (Alito, J., statement respecting denial of certiorari) (finding "the Ninth Circuit's understanding of the free speech rights of public school teachers . . . troubling" and implying that its decision could prohibit

Yet each situation could easily run afoul of the Ninth Circuit's broad and unconstitutional test for determining whether an individual is speaking as a government employee, because the religious expression occurs during the individual's normal duty hours and at a location visible to others that the individual could only access due to her employment.

- During normal school hours a teacher proctors an examination in her classroom. Upon receiving and reading a text message that contains unfortunate news, she folds her hands and bows her head to say a brief silent prayer.

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teachers from "bowing their heads in prayer" when "visible to a student while eating lunch" or "saying things" about their faith during a free period because their conversation may be "overheard" by students); *Van Orden v. Perry*, 545 U.S. 677, 690 (2005) ("Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."); *Id.* at 699 (Breyer, J. concurring in the judgment) (noting the Establishment Clause's tolerance of "certain references to, and invocations of, the Deity in the public words of public officials . . ."); *Kennedy v. Bremerton Sch. Dist.*, 4 F.4th 910 (9th Cir. Jul. 19, 2021) (O'Scannlain, J., statement regarding denial of rehearing en banc) ("Suppose, for example, a teacher receives bad news about a family member while teaching and utters a brief, quiet prayer, or suppose a coach makes the sign of the cross upon seeing a player suffer an injury. . . . [T]hese citizens would now stand to be censored, disciplined, or even fired by their public employer for any or no reason at all."); *Warnock v. Archer*, 380 F.3d 1076, 1082 (8th Cir. 2004) (finding that a framed psalm on the school superintendent's wall was a "personal religious effect[]" and "constitutionally protected under the free speech and free exercise clauses . . .").

- Before lunch in the school cafeteria a teacher bows her head or folds her hands in a silent prayer of thanks while students are nearby.

- A civilian employee at the Pentagon keeps the Qur'an visibly on her desk so that she can read it during her personal time.

- A doctor in a state hospital wears a visible Crucifix during patient rounds. Hospital policy permits employees to wear visible jewelry around the neck.

- A teacher who practices the Jewish faith wears a yarmulke through the duration of each workday.

- A football coach makes the sign of the cross after he observes one of his players having difficulty getting up after taking a hit on the field.

- On September 11, 2001, the Senate Majority Leader, Senate Minority Leader, House Minority Whip, House Minority Leader, and Speaker of the House of Representatives lead a prayer on the steps of the U.S. Capitol. Andrew Glass, *When bipartisan lawmakers broke into song, Sept. 11, 2001* (Sept. 11, 2017), *available at* https://www.politico.com/story/2017/09/11/when-bipartisan-lawmakers-broke-into-song-sept-11-2001-242489.

- In remarks at a prayer service for police officers, the Mayor of New York City gave "honor to God" and acknowledged that "without Him," the "day would not be possible. Mayor Bill de Blasio, *Transcript: Mayor de Blasio Delivers Remarks at Prayer Service for New York City Police Officers* (Aug. 24, 2020), *available at* https://www1.nyc.gov/office-of-the-mayor/news/604-20/transcript-mayor-de-blasio-delivers-remarks-prayer-service-new-york-city-police-officers.

- The Speaker of the House of Representatives issued a press release stating that "Members of Congress join Americans in prayer for the lives lost or devastated by this vicious [corona]virus." Press Release, *Pelosi Statement on 500,000 American Coronavirus Deaths* (Feb. 22, 2021), *available at* https://www.speaker.gov/newsroom/22221-0.

- During remarks at the White House by President Biden regarding a recent attack that resulted in the loss of several American lives, he publicly observed a moment of silence "for all those in uniform and out of uniform, military and civilian, of giving the last full measure of devotion." Following the moment of silence, the President stated: "May God bless you all and may God protect the troops and all those standing watch for America." *See* Rob Picheta, Meg Wagner, Melissa Mahtani, Melissa Macaya, Veronica Rocha and Fernando Alfonso

III, *Biden holds moment of silence for Americans who gave "the last full measure of devotion"* (Aug. 26, 2021), *available at* https://www.cnn.com/world/live-news/afghanistan-news-taliban-refugees-08-26-21-intl/h_416bef881df2e121f127dd41e3554e87.

1. To the extent that the Ninth Circuit's opinion does not entirely prohibit public employees from praying while on duty, it will chill the exercise of their First Amendment rights.

This Court has long suggested that government action cannot chill – that is, cannot directly or indirectly deter or impede – constitutionally protected rights. *See e.g., Gibson v. Florida Legislative Comm.*, 372 U.S. 539, 555-57 (1963) (noting that the protections placed on "groups engaged in the constitutionally protected free trade in ideas and beliefs" are "more essential" where the "chilling effect on the free exercise of constitutionally enshrined rights of free speech, expression, and association is consequently the more immediate and substantial"); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 871-72 (1997) (stating that the vagueness of a regulation "is a matter of special concern" when it "raises special First Amendment concerns because of its obvious chilling effect on free speech."); *Walker v. City of Birmingham*, 388 U.S. 307, 345 (1967) (Brennan, J., dissenting) (stating that the Court's "overriding duty

[is] to insulate all individuals from the chilling effect upon exercise of First Amendment freedoms . . . ") (internal quotations omitted).

Most public employees are not constitutional scholars. Even if the Ninth Circuit's decision could be understood to be tied to the school context or the specific facts and circumstances that are referenced in the opinion, public employees cannot reasonably be expected to carefully parse confusing and overbroad court opinions in an effort to ascertain whether specific instances of contemplated personal religious practice would qualify as constitutionally protected or not. Any public employee who dared to undertake such a task would face the dauting threat of severe consequences, such as potential termination from employment, if their understanding ultimately proved wrong. Thus, even if the Ninth Circuit's opinion could be understood not to wholly eliminate the ability of public employees to observably pray while on duty and in a location where they might be seen by others, the decision will nonetheless severely chill public employees from engaging in constitutionally protected acts of personal religious practice. The Court should not allow such a chill to remain for the millions of public employees who work in the Ninth Circuit.

2. The ability of public officials to practice their faith through non-proselytizing prayer is historically pervasive, constitutionally protected, and important to the functioning of our Republic.

For many individuals with sincerely held religious beliefs, their faith is lived out in every aspect of their life. Faith is pervasive; it is a central component of daily decisions and interactions. It is a critical component of their personality and cannot be left at home or checked at the front door to the workplace.

Thus, personal faith, for many people, is often an essential component of answering the call for and participating in public service. President Abraham Lincoln echoed this sentiment, emphasizing the importance of faith and God in public service: "I would be the most foolish person on this footstool earth if I believed for one moment that I could perform the duties assigned to me without the help of one who is wiser than all." Lee Edwards, *Presidential Prayers: Turning to God in Times of Need* (Apr. 6, 2020), *available at* https://www.heritage.org/religious-liberty/commentary/presidential-prayers-turning-god-times-need (quoting Abraham Lincoln).

The non-proselytizing expression of personal faith through prayers offered by public officials has been part of our nation's rich lifeblood from the Founding of the Republic to present.

The day following the proposal of the First Amendment, Congress requested that the nation's First President, George Washington, "proclaim a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favours of Almighty God." *Lee v. Weisman*, 505 U.S. 577, 635 (1992) (Scalia, J. dissenting) (internal quotations omitted). On October 3, 1789, President Washington proclaimed November 26, 1789 "a day of public thanksgiving and prayer to be observed by acknowledging with grateful hearts the many signal favors of Almighty God" and reminded the citizenry of "the duty of all Nations to acknowledge the providence of Almighty God, to obey his will, to be grateful for his benefits, and humbly to implore his protection and favor." George Washington, *Thanksgiving Proclamation of 1789* (Oct. 3, 1789), *available at* https://www.mountvernon.org/education/primary-sources-2/article/thanksgiving-proclamation-of-1789/. The rich tradition of issuing Thanksgiving Proclamations containing religious themes, and giving thanks to God, has been continued by almost every President. *See Weisman*, 505 at 635 (Scalia, J. dissenting).

In addition to the Thanksgiving Proclamation tradition, the first Thursday of May is recognized under federal law as a National Day of Prayer. 36 U.S.C. § 119 ("The President shall issue each year a proclamation designating the first Thursday in May as a National Day of Prayer on which the people of the United States may turn to God in prayer and meditation at churches, in groups, and as

individuals."). Most recently, President Joseph Biden's National Day of Prayer Proclamation emphasized that "[t]hroughout our history, Americans of many religions and belief systems have turned to prayer for strength, hope, and guidance" and asked the country to "remember and celebrate the role that the healing balm of prayer can play in our lives and in the life of our Nation." Joseph Biden, A Proclamation on National Day of Prayer (May 5, 2020), *available at* https://www.whitehouse.gov/briefing-room/presidential-actions/2021/05/05/a-proclamation-on-national-day-of-prayer/.

Our nation's Presidents have also turned to prayer during times of national or international crisis. After approximately four bloody years, the Civil War was coming to an end. Against this backdrop, President Lincoln delivered his second inaugural address, which had a ubiquitous religious tone and several allusions and direct quotes from the Bible. Abraham Lincoln, *Second Inaugural Address* (Mar. 4, 1865), *available at* https://www.nps.gov/linc/learn/historyculture/lincoln-second-inaugural.htm. The address also included a "fervent[]" prayer to God for him to end the war, but also acknowledged that if "God wills that [the war] [] continue . . . it must be said the judgments of the Lord are true and righteous altogether." *Id.* (internal quotations omitted).

President Franklin Roosevelt similarly turned to prayer during another critical moment in our nation's history. On D-Day, June 6, 1944, Roosevelt closed his radio address publicly announcing the ongoing

military operation with a prayer that "Almighty God" give the soldiers "Thy blessings" and "Embrace" those that have fallen and "receive them . . . into Thy kingdom." William Bennett, *Prayers of American Presidents* (May 5, 2021), *available at* https://www.faithgateway.com/prayers-of-american-presidents/#.YWS1EGLMKUl.

In the aftermath of the deadly attacks on September 11, 2001, President George W. Bush similarly offered a public prayer, asking "Almighty God to watch over our nation . . . comfort and console those who now walk in sorrow . . . [and] thank Him for each life we now must mourn, and the promise of a life to come." *Id.*

These examples illustrate an extensive national tradition of public officials openly offering prayers in public settings. Coach Kennedy's brief and silent prayers, offered on bended knee at the conclusion of football games, are unquestionably a more modest expression of one man's personal faith and devoted thankfulness. Yet the Ninth Circuit's decision would quash and chill this venerable and constitutionally protected conduct, by errantly deeming personal acts of faithful devotion government speech that the Establishment Clause prohibits.

B. The Ninth Circuit's Ruling Misapplies the Establishment Clause

The Ninth Circuit concluded that even if Kennedy's brief and silent prayer occurred in his personal

capacity, his punishment was nevertheless justifiable as a necessary means for BSD to avoid a perceived Establishment Clause violation. This Court has repeatedly stated that a governmental policy that tolerates and accommodates private religious speech in public schools does not constitute an Establishment Clause violation. *See e.g., Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112-19 (2001). To the contrary, the "Free Speech and Free Exercise Clauses" actually mandate that the government must protect "private speech endorsing religion." *Westside Cmty. Bd. of Ed. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality op.). The fact that Kennedy's brief and silent prayer of thanks was observable by the public cannot on its own transform his personal speech into an Establishment Clause violation.

The court based its erroneous conclusion on the media publicity regarding Kennedy's prayer. The problem with that analysis, however, is that if Kennedy's prayer is correctly understood to have occurred in his personal capacity, no state action existed that could conceivably have constituted an Establishment Clause violation. *Capitol Square Rev. Advisory Bd. v. Pinette*, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring) ("[A]n Establishment Clause violation must be moored in government action.").

Further, anyone familiar with the publicity in the case and the actions of BSD would have known that the school district did not favor or endorse Kennedy's personal prayer. For instance, an article published in

the Seattle Times was entitled "Bremerton football coach ***vows to pray after game despite district order***." *Kennedy*, 991 F.3d at 1012 (emphasis added). The article stated that "[a] Bremerton High School football coach said he will pray at the 50-yard line after Friday's homecoming game, ***disobeying the school district's orders*** and placing his job at risk." *Id.* (emphasis added); *see also id.* at 1013 ("[O]n October 18, 2015, CNN featured an article entitled ***Despite orders, Washington HS coach prays on field after game***.") (internal quotations omitted) (emphasis added). It was, therefore, indisputably clear to the public that Kennedy's prayers were personal acts of devotion, not government sanctioned conduct. *See Kennedy v. Bremerton Sch. Dist.*, 4 F.4th 910 (9th Cir. Jul. 19, 2021) (Ikuta, J., dissenting from the denial of rehearing en hanc) ("Under these well-publicized circumstances, no objective observer . . . would think BSD was endorsing Kennedy's prayers."). Further, the record was also clear that Kennedy never asked BSD to endorse or facilitate his prayer. *See Kennedy v. Bremerton Sch. Dist.*, 4 F.4th 910 (9th Cir. Jul. 19, 2021) (O'Scannlain, J., statement regarding denial of rehearing en banc) ("Kennedy never asked the school to take any action endorsing or facilitating his religious practice. Quite the contrary, Kennedy essentially asked his employer to do nothing—simply to tolerate the brief, quiet prayer of one man (which is exactly what the District had done for years prior, without anyone ever raising an Establishment Clause claim against it") (emphasis omitted). An Establishment Clause violation cannot occur without the critical elements of either government action or

endorsement. Declining to censor protected speech does not constitute impermissible government endorsement. *See Westside Cmty. Bd. of Ed.*, 496 U.S. at 250 ("[S]chools do not endorse everything they fail to censor.").

Moreover, it was not Kennedy who caused the extreme publicity. All Kennedy ever sought to do – and for several years accomplished without publicity or acknowledgment – was to offer prayers of thanks after football games. The media attention and publicity commenced only when BSD violated Kennedy's constitutional rights and banned him from continuing his brief and silent prayers.

II. The Ninth Circuit's Decision is Inconsistent with Federal Guidance on Public Employee Speech and Accommodation of Religious Practice

The Ninth Circuit's ruling is particularly egregious because it would offer teachers and government employees significantly less protection in the personal practice of their faith than their counterparts in the private sector enjoy. Guidance from the U.S. Equal Employment Opportunity Commission explicitly mandates that in most circumstances covered private employers must accommodate an employee's sincerely held religious beliefs. *See* U.S. Equal Employment Opportunity Commission, *What You Should Know: Workplace Religious Accommodation* (Mar. 6, 2014), *available at* https://www.eeoc.gov/laws/guidance/what-you-should-

know-workplace-religious-accommodation. Accommodations that are mandatory in the private sector that would effectively be deemed impermissible for teachers and public employees in the Ninth Circuit include: permitting a Muslim woman to wear a hijab or a Jewish man to wear a yarmulke or providing a Muslim employee with a break in her schedule to permit observable daily prayer. *See id*.

The Ninth Circuit's decision also contradicts the Guidelines on Religious Exercise and Religious Expression in the Federal Workplace, issued by President Clinton, *see* Guidelines on Religious Exercise and Religious Expression in the Federal Workplace (Aug. 14, 1997) *available at* https://clintonwhitehouse4.archives.gov/WH/New/html/19970819-3275.html, (Clinton Guidelines) that have been applied by "the federal government . . . over the last twenty years," The Attorney General, *Memorandum for all Executive Departments and Agencies from the Attorney General, Federal Law Protections for Religious Liberty* (Oct. 6, 2017), available at https://www.justice.gov/opa/press-release/file/1001891/download. The Clinton Guidelines "principally address employees' religious exercise and religious expression when the employees are acting in their personal capacity within the Federal workplace and the public does not have regular exposure to the workplace." Clinton Guidelines. These guidelines explicitly permit religious speech in several scenarios where it would be impermissibly chilled or eliminated under the Ninth Circuit's approach. For example, the guidelines

permit federal employees to "keep a Bible or Koran on" an employee's "private desk" to be "read [] during breaks," "wear religious medallions over their clothes or so that they are otherwise visible" to others, *id*. at § l(A), and "wear religious garb, such as . . . yarmulke, or a head scarf or hijab," *id*. at § l(C).

Finally, guidance from the U.S. Department of Education also contradicts the Ninth Circuit's broad holding. *See* U.S. Department of Education, *Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools* (Jan. 16, 2020), *available at* https://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html. The "purpose of . . . [the] guidance is to provide information on the current state of the law concerning religious expression in public schools." *Id*. The guidance specifically authorizes teachers to engage in "religious activities such as prayer even during their workday" during times when it is permissible to "engage in other private conduct such as making a personal telephone call." *Id*. at II(C). It goes without saying that Kennedy could not and would not have been suspended by BSD for taking a telephone call after the football game while he was standing at the 50-yard line. Similarly, the Education Department guidance states that teachers can permissibly meet with teachers to pray or study the Bible before school or during lunch so long as "other conversation or nonreligious activities" is also permissible during this time. *Id*.

CONCLUSION

As discussed above, the Ninth Circuit's holding will impermissibly and unconstitutionally curtail or chill the private religious speech of public officials. The Court should, therefore, reverse the Ninth Circuit's decision to protect the ability of teachers and other government employees to express their protected First Amendment right to engage in private religious expression without fear of government retribution or Establishment Clause violation.

Respectfully submitted,

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APPENDIX

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