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 *AMICUS CURIAE* CALIFORNIA SCHOOL BOARDS ASSOCIATION, AND ITS EDUCATION LEGAL ALLIANCE, IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

IDENTITY AND INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 7

I. Pickering and Garcetti Appropriately Balance Individual Interests and Government Interests, Especially in the Public School Setting, and They Should be Applied in this Case 7

II. Applying Pickering and Garcetti in this Case, the Ninth Circuit Decision Should be Affirmed 10

A. In this Case, Kennedy Spoke as an Employee, and Kennedy's Application of Garcetti is Overly Narrow and Unworkable Especially in a Public School Context 10

B. In this Case, the Balance of Interests Tip in the District's Favor 14

1. The District's Actions Were Justified by the Legitimate Governmental Interests it Sought to Protect and Advance 14

2. A Rule That a Disclaimer by a Public School District Cures any Establishment Clause Concerns Would be Unworkable and Ineffective 18

CONCLUSION 21

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Ansonia Bd. of Educ. v. Philbrook ,
479 U.S. 60 (1986). 16

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536 U.S. 822 (2002). 13

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447 F.3d 642 (9th Cir. 2006). 9

Board of County Com'rs, Wabaunsee County v.
Umbehr , 518 U.S. 668 (1996) 8

Capitol Square Review and Advisory Bd. v. Pinette ,
515 U.S. 753 (1995). 19

City of San Diego v. Roe ,
543 U.S. 77 (2004). 7

Connick v. Myers ,
461 U.S. 138 (1983). 8, 10, 14

Edwards v. Aguillard ,
482 U.S. 578 (1987). 13, 19

Garcetti v. Ceballos ,
547 U.S. 410 (2006). 7, 8, 10, 11, 14

General Electric Co. v. Gilbert ,
429 U.S. 125 (1976). 16

Good News Club v. Milford Cent. School ,
533 U.S. 98 (2001). 19

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484 U.S. 260 (1988). 21

Janus v. American Federation of State, County, and Municipal Employees, Council 31 , 138 S.Ct. 2448 (2018) 7, 10, 11

Knight v. Connecticut , 275 F.3d 156 (2nd Cir. 2001) 9

Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist. , 508 U.S. 384 (1993) 18

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CODE

20 U.S. Code § 4071(c)(3) 12

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, Amicus Curiae, the California School Boards Association ("CSBA") and its Education Legal Alliance ("ELA") submit this brief supporting Respondent Bremerton School District. [1]

CSBA is a California non-profit association duly formed and validly existing under the laws of the State of California. As a part of the CSBA, the ELA is composed of nearly 700 CSBA member entities dedicated to addressing legal issues of statewide concern to school districts and county offices of education. As part of its activities, the ELA files amicus curiae briefs in litigation which impacts California public educational agencies as a whole.

School districts in California and across the nation are entrusted with educating students from countless cultures and backgrounds, including innumerable religious traditions, from pre-school through high school. CSBA and the ELA have a strong interest in ensuring that the resolution of the issues presented in this case will provide California public schools with reasonable, workable standards for navigating their obligations and authority related to the Free Speech, Free Exercise, and Establishment Clauses of the First Amendment, as well as their obligation to reasonably

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[1] All parties have given blanket consent 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.

accommodate employee religious beliefs and practices under Title VII of the Civil Rights Act of 1964.

INTRODUCTION AND SUMMARY OF ARGUMENT

Public employees, including public school teachers, regularly engage in quiet, personal prayer while they are in the workplace, and neither CSBA nor the ELA have an interest in limiting that activity or questioning this Court's precedent that balances personal and governmental interests when analyzing speech and exercise activity in the government workplace.

However, this case invokes this Court's precedent regarding the exercise of constitutional rights by public employees, precedent which dictates that context matters, as it should here. In the full context of the record in this case quiet, personal prayer by a public employee is not what this case is about — this case is not about a high school teacher bowing her head in prayer in the faculty cafeteria prior to eating, even if it might occur in view of student cafeteria workers or students passing by; this case is not about a teacher wearing a yarmulke in the classroom; this case does not ask whether public school teachers and coaches are prohibited from engaging in any religious activity or expression while they are on duty.

This case is about school districts ability to navigate the appropriate balance between honoring an individual's First Amendment right to private prayer and protecting students. This case is about Petitioner and former high school football coach Joseph Kennedy's ("Kennedy") decision and demand, conveyed through

counsel and publicized widely by both Kennedy and counsel, that he be permitted to return to his longstanding “practice” of engaging in “verbal” and “audible” prayer with students, to “help[] these kids be better people,” in the middle of the school’s football field in a crowded stadium immediately following the end of each game. And, it is about more than that — Kennedy’s “defiant” and “unyielding stance” (in the words of Ninth Circuit dissenting Judge Ikuta) occurred in the midst of other relevant, significant contextual facts: when Kennedy returned to his previous practice, students authorized to be on the field were physically knocked over by reporters and other spectators who jumped a fence to get on the field to join or witness Kennedy’s conduct; Kennedy invited the presence and involvement of a state legislator who supported Kennedy, spoke to the legislator of his plan on the sidelines during the game, and invited the legislator to join the after game prayer to speak to the students and others; a Satanist group demanded access to the field, contending the District was allowing the football field to be a forum for expressive activity by members of the public; the District was flooded with emails and media inquiries; several parents complained about Kennedy’s practice, some commenting that their children had felt compelled to participate; parents of students knocked over after the game complained; coaches who did not express agreement with Kennedy were threatened, including the head coach, Kennedy’s supervisor, who ended up (along with other coaches) declining to return the following season because of the “unsafe situation” he felt subjected to; a District employee, the parent of a District student, was the target of a social media

campaign advocating her termination from employment after she wrote about her experience of being bullied and harassed daily, in high school, for not joining in similar religious activities. This is the context in which the District had to decide what to do.

And throughout, the District's conduct was measured and respectful of the legitimacy of the competing interests here, and it attempted to reasonably navigate those interests. When the District learned that for several years Kennedy had led pre-game locker room prayers to a captive audience of players, and post-game overtly religious prayers in the midst of motivational speeches to his players — conduct which came to the attention of the District through an opposing coach characterizing the on-field practice as being "allowed" by the District — Kennedy was not removed from his position. Instead, the District tried to work with him to strike an appropriate balance between his faith-based desires and the District's interests as an employer, and as a required protector of student safety and student rights, seeking as it must, to avoid the appearance of endorsement, and endeavoring to avoid its athletic venues from becoming public forums immediately after each game ends. The District repeatedly encouraged Kennedy and his counsel to interact in good faith to discuss how Kennedy's desire to pray after games could be reasonably accommodated. These invitations continued even after Kennedy and his counsel announced that Kennedy would defy the District's direction and return to leading post-game, mid-field prayer. Every District invitation to engage in good faith dialogue was flatly ignored by Kennedy and his counsel.

As Ninth Circuit Judge Ikuta accurately stated in her dissent to the denial of rehearing en banc below, Kennedy's "defiant" and "unyielding stance" put the District in a "no-win situation." The District has employees who possess rights under Title VII and the Constitution, and the latter are neither shed at the schoolhouse gate nor equivalent in scope as they are outside that gate. Communication from Kennedy's counsel sent the clear message that litigation would be the likely result if Kennedy was not permitted to do exactly what he wanted, where he wanted, when he wanted, regardless of the circumstances or repercussions. The District also had the obligation (and the prerogative) to address concerns and complaints that students did or might feel compelled to participate; to address an incident that occurred where innocent students could have been injured; that non-participating or opposing employees were threatened and ridiculed publicly; that despite their best efforts they could not prevent people from charging onto the field after games; and that allowing Kennedy's demanded practice to continue, even if the District deemed his practice that of a private citizen rather than a District employee, would obligate it to provide on-field access to other groups demanding access for First Amendment activity.

This is an employment case, not a student free exercise case or a public forum access case as many of Kennedy's citations would suggest. The question is not whether private personal prayer should be allowed, but rather whether a school district should be liable for an employee who chooses to pray with students while on