No. 16-35801

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOSEPH A. KENNEDY,

Plaintiff-Appellant,

v.

BREMERTON SCHOOL DISTRICT,

Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Washington
Case No. 3:16-CV-05694-RBL

BRIEF OF AMICI STATES OF ARIZONA, ARKANSAS, GEORGIA, LOUISIANA, MICHIGAN, MONTANA, NEVADA, OKLAHOMA, AND TEXAS IN SUPPORT OF PETITION FOR REHEARING *EN BANC*

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae, the States of Arizona, Arkansas, Georgia, Louisiana, Michigan, Montana, Nevada, Oklahoma, and Texas file this brief in support of Plaintiff-Appellant pursuant to Federal Rule of Appellate Procedure 29(a). Amici curiae are public employers and have interests both in protecting the constitutional rights of their employees and in regulating messages that are communicated by public employees within the scope of their employment. Amici curiae, as States, also have an interest in fostering the education of their citizens through environments that promote the recruitment of diverse and qualified teachers and that facilitate the instruction of students.

PROCEDURAL BACKGROUND

In *Eng v. Cooley*, the Ninth Circuit identified five questions to guide whether the First Amendment protects public employees from retaliation:

> (1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action; (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and (5)

> whether the state would have taken the adverse employment action even absent the protected speech.

552 F.3d 1062, 1070 (9th Cir. 2009). Purporting to apply *Eng*, the panel below held that the First Amendment did not protect Joseph Kennedy, a public school football coach, from being suspended for kneeling and offering a silent prayer after his team left the field.

In reaching this conclusion, the panel accepted that the religious speech at issue involved a matter of public concern (*Eng* factor one) and that the Bremerton School District took adverse employment action against Coach Kennedy because of this speech (*Eng* factors three and five). The panel also did not address whether the brief prayer at issue interfered with Coach Kennedy's job responsibilities or gave rise to an Establishment Clause violation, thereby providing the Bremerton School District an adequate justification for placing Coach Kennedy on leave (*Eng* factor four).

Instead, the sole basis of the decision was the panel's conclusion that, when Coach Kennedy prayed, he spoke as a public employee and not as a private citizen (*Eng* factor two). As such, the Bremerton School District had the absolute ability to regulate Coach Kennedy's speech.

The panel held that Coach Kennedy spoke as a public employee when he prayed because (1) Coach Kennedy's job—"akin to being a teacher"—"involved modeling good behavior while acting in an official capacity in the presence of students and spectators," and (2) by kneeling and praying mid-field in view of students and spectators, Coach Kennedy "was sending a message about what he values as a coach, what the District considers appropriate behavior, and what students should believe, or how they ought to behave." Op. at 25–28. The panel also thought it significant that "an ordinary citizen could not have prayed on the fifty-yard line immediately after games, as Kennedy did, because Kennedy had special access to the field by virtue of his position as a coach." *Id.* at 29.

ARGUMENT

The panel decision is built on a shaky syllogism. It reasons: Coach Kennedy's position as a public school football coach (like a teacher) requires him to communicate messages to students while on the job; Coach Kennedy's prayer was a communication to students while on the job because his prayer was in view of students after a football

game; therefore, his speech was made as a public employee, rather than as a private citizen.

But just because teachers are paid to communicate *some* messages to students, it does not mean that *all* messages that a teacher communicates are made in a public capacity. The issue here, under the second *Eng* factor, is not whether Coach Kennedy's prayer communicated something to students. The "critical question" for determining whether a public employee is speaking in that capacity is "whether the speech at issue is itself ordinarily within the scope of an employee's duties." *Lane v. Franks*, 134 S. Ct. 2369, 2379 (2014). It is indisputable that personal prayer was not within the scope of the job duties of Coach Kennedy (nor is it within the scope of any coach's employment). As such, Coach Kennedy's personal prayer was not done pursuant to any official duties. The panel therefore erred in holding that the speech at issue could be banned under the second *Eng* factor.

Whether the outward signs of religious observation at issue here are protected from retaliation under the First Amendment depends, not on a bright-line application of the second *Eng* factor, but instead on the careful balancing required under the fourth *Eng* factor. The panel's

decision to the contrary threatens three doctrinal errors: first, it collapses the second and fourth *Eng* factors; second, it expands the scope of official communications made by public employees, potentially subjecting public employers to greater liabilities; and third, it strips teachers of significant First Amendment rights.[1]

A. The Panel Decision Collapses the Second and Fourth *Eng* Factors.

The five questions identified in *Eng* for resolving First Amendment retaliation claims of public employees help courts "arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968).

Under the second *Eng* factor, this balance favors the public entity when an employee speaks as an employee because the public entity has a right to regulate what *it* communicates. *Garcetti v. Ceballos*, 547 U.S.

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[1] Because the panel decision did not rest on the Establishment Clause under the fourth *Eng* factor, this brief similarly focuses only on whether an employee's speech is attributable to his employer for purposes of retaliation under the Free Speech Clause.

410, 422 (2006) (ability to regulate speech made as a public employee "simply reflects the exercise of employer control over what the employer itself has commissioned or created"). But the rationale for this bright-line rule does not extend to communication conducted outside the scope of employment. At that point, the employer would be regulating what the *employee* communicates rather than what the *employer* communicates.

To get around the obvious fact that personal prayer, even if observable, is not speech as a public employee, the panel supplants the duty-based test repeatedly endorsed by the Supreme Court with a but-for test. The panel reasoned: "The precise speech at issue . . . could not physically have been engaged in by Kennedy if he were not a coach." Op. at 29. However, the legal ramifications of a but-for test would reshape the law governing every public employer and employee in the Ninth Circuit.

In particular, both the Supreme Court and this Court *en banc* have affirmed that the First Amendment can protect speech even when it would not have occurred but for the public employment. For example, in *Garcetti*, 547 U.S. at 420–22, the Supreme Court held that a deputy

district attorney's memorandum was made as a public employee because it "was written pursuant to [the attorney's] official duties," not simply because it was prepared inside his office or concerned the subject matter of the attorney's employment. *See also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) ("not every message" that takes place on government property is the government's own). Likewise, in *Dahlia v. Rodriguez*, 735 F.3d 1060, 1076–78 (9th Cir. 2013), this Court *en banc* held that the First Amendment protected a police officer against retaliation for reporting fellow-officer misconduct outside the chain of command. It was not relevant to the analysis that the officer would not have learned about the alleged misconduct but for his employment. Most recently, the Supreme Court in *Lane*, 134 S. Ct. at 2379, reaffirmed that speech is not made in a public capacity simply because it "relates to public employment or concerns information learned in the course of public employment," thereby vanquishing any notion that a but-for test might be appropriate. In fact, not a single circuit agrees with the panel's creation of a new but-for test. They faithfully apply the duty test reinforced in *Lane*. *See, e.g.*, *Dougherty v. Sch. Dist. of Philadelphia*, 772 F.3d 979, 989 (3d Cir. 2014) ("This Court

has never applied the 'owes its existence to' test . . . and 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, which is at odds with the delicate balancing and policy rationales underlying *Garcetti*."); *Boulton v. Swanson*, 795 F.3d 526, 534 (6th Cir. 2015) ("owes its existence" language from *Garcetti* "must be read narrowly as speech that an employee made in furtherance of the ordinary responsibilities of his employment"); *Carollo v. Boria*, 833 F.3d 1322, 1329 (11th Cir. 2016) (same). This Court should not tolerate the panel's departure from that consensus.

Recognizing a duty-based test for the second *Eng* factor does not, of course, mean that public employees can say or do anything they want while on the job as long as the speech falls outside the scope of job duties. It simply means that, if a public employer is going to compel an employee to forgo personal religious speech, it must justify the restriction by showing that it has "an adequate justification for treating the employee differently from any other member of the general public." *Garcetti*, 547 U.S. at 418. It cannot rely on an overbroad, bright-line rule about what is the ordinary scope of an employee's duties. *Dahlia*,

735 F.3d at 1069 n.7 ("*Garcetti* explicitly said that there is no bright line rule" for determining whether a plaintiff actually spoke pursuant to official duties). By holding that any personal but observable conduct is done on behalf of a school, even when the speech at issue is outside of a teacher's duties, the panel below transforms the test in *Eng* and the broader principles announced by the Supreme Court. The result is a test that gives impermissibly short shrift to a teacher's countervailing constitutional rights. *See also infra* Part C.

B. The Panel Decision Improperly Expands the Scope of Official Communications.

Properly applied, a First Amendment retaliation claim ends under *Eng* factor two when the speech at issue is spoken as a public employee. This makes sense because a public employer has the ability to regulate what it communicates. *See supra* Part A. It also makes sense because "[o]fficial communications have official consequences, creating a need for substantive consistency and clarity." *Garcetti*, 547 U.S. at 422. As such, public employers "have heightened interests in controlling speech made by an employee in his or her professional capacity." *Id.*

The panel below—through its expansive test concerning which messages are communicated in the speaker's capacity as a public

employee—also extends the scope of a public employer's official communications. For public employers, this expansion is worrisome. Because official communications have official consequences, including potentially binding a public employer or subjecting a public employer to liability, it is of vital importance that public employers are able to rely upon actual job duties to distinguish messages that are communicated in a public capacity from those that are the private speech of employees acting outside their duties. *See, e.g.*, *Roe v. Nevada*, 621 F. Supp. 2d 1039, 1051 (D. Nev. 2007) (school district could be held liable for verbal and physical abuse within the scope of a teacher's employment); *Duyser by Duyser v. Sch. Bd. of Broward County*, 573 So. 2d 130, 131 (Fla. Dist. Ct. App. 1991) (school board not liable when teacher performed satanic rituals on students because the conduct was "definitely not authorized or incidental to authorized conduct"); *McIntosh v. Becker*, 314 N.W.2d 728, 732 (Mich. Ct. App. 1981) (school could not be held liable for alleged racial and sexual slurs made by teacher outside the scope of employment). It is simply not feasible—let alone constitutional—for a public employer to regulate every observable message (both verbal and nonverbal) that its employees communicate or that would not occur but

for the public employment. With this limitation in mind, courts have, until now, cabined statements made in a public capacity to those within the scope of the employee's actual job duties. The *en banc* Court should restore that limitation.

C. The Panel Decision Strips Teachers of Significant First Amendment Rights.

Perhaps the most disturbing aspect of the panel's decision is what it means for teachers. Without "indulg[ing] in hyperbole," teachers have been recognized "as the priests of our democracy." *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring). While this noble calling often involves personal sacrifice, teachers have never been required to "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). The panel decision would exact this cost as a condition of employment. *Cf. Garcetti*, 547 U.S. at 413 ("It is well settled that a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression.") (quotes omitted).

Students constantly observe their teachers' actions. Op. at 5, 25–26. And virtually every action by a teacher communicates some type of

message, many of them religious: the Muslim teacher who wears a hijab or recites the du'a before meals, the Christian teacher who observes Ash Wednesday or wears a crucifix, the Hindu teacher who wears a bindi or observes dietary restrictions, the Jewish teacher who wears a yarmulke or is absent for Yom Kippur—all these, and many more, communicate something about the teacher's faith or lack thereof. Teachers may also communicate messages through the clothing or jewelry they wear, the pictures on their desk, their reaction to certain national events, or their participation, *vel non*, in the national anthem and Pledge of Allegiance. *See, e.g.*, *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (law requiring students and teachers to salute and pledge allegiance to the United State flag held unconstitutional under the First Amendment). But the fact that these messages are observable does not *ipso facto* mean that they are spoken as a public employee. It simply means that teachers are humans, not robots. To say that schools have the absolute ability to regulate all that is observable by students or that would not be observable but for a teacher's job is to say that schools have complete control over teacher speech.

This is not, nor has it ever been, the law. And for good reason. Teachers "cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them." *Wieman*, 344 U.S. at 196 (Frankfurter, J., concurring). An environment totally dependent on "authoritative selection" would (1) obstruct the recruitment of diverse and qualified educators, and (2) frustrate the "robust exchange of ideas" necessary for the cultivation of tomorrow's leaders. *See Keyishian v. Board of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 603 (1967) ("The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, (rather) than through any kind of authoritative selection.") (quotes omitted); *Tinker*, 393 U.S. at 511 ("In our system, state-operated schools may not be enclaves of totalitarianism."). Exposure to individuals whose demonstrative speech includes outward signs of religious observation is also essential to forming citizens who can interact with the wide variety of fellow Americans awaiting their arrival in the workplace and public square. *Grutter v. Bollinger*, 539 U.S. 306, 308 (2003) ("[T]he skills needed in today's increasingly global marketplace can only be developed through

exposure to widely diverse people, cultures, ideas, and viewpoints."). The panel's insistence on cleanroom-type sterilization of any observable expression of religiosity is a harm to teachers, students, and the educational mission that they should all share.

CONCLUSION

The panel below erred in holding that schools have the absolute ability to regulate all observable religious expressions of teachers. The Court should grant the Petition for Rehearing *en Banc* to correct this error.

Respectfully Submitted,

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October 2, 2017

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Circuit Rule 29-2(c)(2) because this brief contains 2,724 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century type.

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