APPENDIX

TABLE OF APPENDICES

Appendix A

Opinion, United States Court of Appeals for the Ninth Circuit, *Kennedy v. Bremerton School District*, No. 16-35801 (Aug. 23, 2017) App-1

Appendix B

Preliminary Injunction Hearing Transcript, United States District Court for the Western District of Washington, *Kennedy v. Bremerton School District*, No. 3:16-cv-5694-RBL (Sept. 19, 2016) App-54

Appendix C

Relevant Docket Entry, United States District Court for the Western District of Washington, *Kennedy v. Bremerton School District*, No. 3:16-cv-5694-RBL (Sept. 19, 2016) App-90

Appendix D

Order, United States Court of Appeals for the Ninth Circuit Denying Petition for Rehearing En Banc, *Kennedy v. Bremerton School District*, No. 16-35801 (Jan. 25, 2018) App-92

Appendix E

Constitutional Provisions Involved App-94

U.S. Const. amend. I App-94

U.S. Const. amend. XIV, § 1 .... App-94

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-35801

JOSEPH A. KENNEDY,
Plaintiff-Appellant,
v.
BREMERTON SCHOOL DISTRICT,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Washington

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Argued and Submitted: June 12, 2017
Filed: August 23, 2017

Before: Dorothy W. Nelson, Milan D. Smith, Jr., and Morgan Christen, Circuit Judges.

OPINION

M. SMITH, Circuit Judge:

Bremerton High School (BHS) football coach Joseph A. Kennedy appeals from the district court's order denying his motion for a preliminary injunction that would require Bremerton School District (BSD or the District) to allow Kennedy to kneel and pray on

the fifty-yard line in view of students and parents immediately after BHS football games. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. Bremerton School District

BSD is located in Kitsap County, Washington, across the Puget Sound from Seattle. The District is home to approximately 5,057 students, 332 teachers, and 400 non-teaching personnel. BSD is religiously diverse. Students and families practice, among other beliefs, Judaism, Islam, the Bahá'í faith, Buddhism, Hinduism, and Zoroastrianism.

BSD employed Kennedy as a football coach at Bremerton High School from 2008 to 2015. Kennedy served as an assistant coach for the varsity football team and also as the head coach for the junior varsity football team. Kennedy's contract expired at the end of each football season. It provided that BSD "entrusted" Kennedy "to be a coach, mentor and role model for the student athletes." Kennedy further agreed to "exhibit sportsmanlike conduct at all times," and acknowledged that, as a football coach, he was "constantly being observed by others."

Kennedy's formal job description required him to assist the head coach with "supervisory responsibilities," "[a]dhere to Bremerton School District policies and administrative regulations," "communicate effectively" with parents, "maintain positive media relations," and "[o]bey all the Rules of Conduct before players and the public as expected of a Head Coach," including the requirement to "use proper conduct before the public and players at all times." Consistent with his responsibility to serve as a role model, Kennedy's contract required that, "[a]bove

all" else, Kennedy would endeavor not only "to create good athletes," but also "good human beings."

B. Kennedy's Religious Beliefs and Past Practices

Kennedy is a practicing Christian. Between 2008 and 2015, he led students and coaching staff in a locker-room prayer prior to most games. He also participated in prayers that took place in the locker room after the games had ended. Kennedy insists these activities predated his involvement with the program, and were engaged in as a matter of school tradition. His religious beliefs do not require him to *lead* any prayer before or after BHS football games.

Kennedy's religious beliefs *do* require him to give thanks through prayer at the end of each game for the players' accomplishments and the opportunity to be a part of their lives through football. Specifically, "[a]fter the game is over, and after the players and coaches from both teams have met to shake hands at midfield," Kennedy feels called to "take a knee at the 50-yard line and offer a brief, quiet prayer of thanksgiving for player safety, sportsmanship, and spirited competition." Kennedy's prayer usually lasts about thirty seconds. He wears a shirt or jacket bearing a BHS logo when he prays at midfield. Because his "prayer lifts up the players and recognizes their hard work and sportsmanship during the game," Kennedy's religious beliefs require him to pray on the actual field where the game was played.

Kennedy began performing these prayers when he first started working at BHS. At the outset, he prayed alone. Several games into his first season, however, a group of BHS players asked Kennedy whether they

could join him. "This is a free country," Kennedy replied, "You can do what you want." Hearing that response, the students elected to join him. Over time, the group grew to include the majority of the team. Sometimes the BHS players even invited the opposing team to join.

Eventually, Kennedy's religious practice evolved to something more than his original prayer. He began giving short motivational speeches at midfield after the games. Students, coaches, and other attendees from both teams were invited to participate. During the speeches, the participants kneeled around Kennedy, who raised a helmet from each team and delivered a message containing religious content. Kennedy subsequently acknowledged that these motivational speeches likely constituted prayers.

C. The September 17, 2015, Letter from BSD to Kennedy

The District first learned that Kennedy was leading locker-room prayers and praying on the field in September 2015, when an employee of another school district mentioned the post-game prayers to a BSD administrator.[1] The discovery prompted an inquiry into whether Kennedy was complying with the school board's policy on "Religious-Related Activities and Practices." Pursuant to that policy, "[a]s a matter of individual liberty, a student may of his/her own volition engage in private, non-disruptive prayer at

[1] The District had not received complaints up to that point. As the community became aware of Kennedy's practices, however, the District reports that individuals "expressed concern about Mr. Kennedy's actions."

any time not in conflict with learning activities." In addition, "[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."

Kennedy was candid and cooperative throughout the District's inquiry. The investigation revealed that coaching staff had received little training regarding the District's policy. Accordingly, BSD Superintendent Aaron Leavell sent Kennedy a letter on September 17, 2015, to clarify the District's prospective expectations.

Leavell explained that Kennedy's two practices were "problematic" under the Establishment Clause, but he acknowledged that they were well-intentioned and that Kennedy had "not actively encouraged, or required, [student] participation." Leavell advised Kennedy that he could continue to give inspirational talks, but "[t]hey must remain entirely secular in nature, so as to avoid alienation of any team member." He further advised that "[s]tudent religious activity must be entirely and genuinely student-initiated, and may not be suggested, encouraged (or discouraged), or supervised by any District staff." Leavell further counseled Kennedy that "[i]f students engage in religious activity, school staff may not take any action likely to be perceived by a reasonable observer, who is aware of the history and context of such activity at BHS, as endorsement of that activity." Lastly, Leavell stressed that Kennedy was

> free to engage in religious activity, including prayer, so long as it does not interfere with job responsibilities. Such activity must be physically separate from any student activity,

> and students may not be allowed to join such activity. In order to avoid the perception of endorsement discussed above, 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.

D. Kennedy Responds via an October 14th Letter

By this point, Kennedy's prayers had "generated substantial publicity." Comments on social media led the District to be concerned that BHS would not be able to secure its field after the September 18, 2015, game, assuming—as it suspected—that a crowd would come down from the stands to join Kennedy's on-field prayer. The District was "not able to prevent that from happening" based on the state of its preparations, and it decided that it would not "prevent access to the field at that point." On the day of the game, the school's concerns were not realized, however, because after receiving the District's letter, Kennedy temporarily stopped praying on the field while students were around. Instead, after the September 18th game, Kennedy gave a short motivational speech "that included no mention of religion or faith." Then, once "everyone else had left the stadium," he walked to the fifty-yard line, knelt, and prayed alone.

After complying in this manner for several weeks, Kennedy wrote the District through his lawyer on October 14, 2015. He requested a religious accommodation under the Civil Rights Act of 1964 that would allow him to "continue his practice of

saying a private, post-game prayer at the 50-yard line" immediately following BHS football games. The letter opined that Kennedy's religious expression occurred during "non-instructional hours" because, according to Kennedy, "his official coaching duties ceased" after the games had ended. The letter also acknowledged that Kennedy's prayers were "audibl[e]," but stressed that "he does not pray in the name of a specific religion," and "neither requests, encourages, nor discourages students from participating in" his prayer. Lastly, the letter announced that Kennedy would resume praying on the fifty-yard line at the October 16, 2015, game.

Kennedy's intention to pray on the field following the October 16th game "was widely publicized, including through [Kennedy's] own media appearances." On the day of the game, the District had not yet responded to Kennedy's letter, but Kennedy nonetheless proceeded as he had indicated. Once the final whistle blew, Kennedy shook hands with the opposing team and waited until most of the BHS players were singing the fight song to the audience in the stands. Then, he knelt on the fifty-yard line, bowed his head, closed his eyes, "and prayed a brief, silent prayer." According to Kennedy, while he was kneeling with his eyes closed, "coaches and players from the opposing team, as well as members of the general public and media, spontaneously joined [him] on the field and knelt beside [him]." In the days after the game, pictures were "published in various media" depicting Kennedy praying while surrounded by players and members of the public.

The District maintains that while Kennedy was walking to the fifty-yard line, "[t]here were people

jumping the fence and others running among the cheerleaders, band[,] and players." Afterwards, "the District received complaints from parents of band members who were knocked over in the rush of spectators on to the field." Sometime after the game, members of a Satanist religion contacted the District and said they "intended to conduct ceremonies on the field after football games if others were allowed to." Ultimately, the District made arrangements with the Bremerton Police Department to secure the field after games, then posted signs, made "robocalls" to District parents, and "otherwise put the word out to the public that there would be no [future] access to the field." Representatives of the Satanist religion showed up at the next game, "but they did not enter the stands or go on the field after learning that the field would be secured."[2]

E. The District's October 23rd and October 28th Letters

Leavell sent Kennedy a second letter on October 23, 2015. He thanked Kennedy for his "efforts to comply with the September 17 directives." Still, he explained that Kennedy's conduct at the game on October 16th was inconsistent with the District's requirements. Leavell emphasized "that the District does not prohibit prayer or other religious exercise by employees while on the job," but "such exercise must

[2] Kennedy contends that prior to this date, BHS had allowed parents and fans to walk onto the field after games to socialize and congratulate the players. He does not meaningfully contest that the field was not an open forum while in use by the District, however, and that the District retained the right to limit public access.

not interfere with the performance of job responsibilities, and must not lead to a perception of District endorsement of religion."

According to the District, Kennedy had not met those requirements because "paid assistant coaches in District athletic programs are responsible for supervision of students not only prior to and during the course of games, but also during the activities *following* games and until players are released to their parents or otherwise allowed to leave." (emphasis added). The District confirmed with Kennedy's head coach "that for over ten years, all assistant coaches have had assigned duties both before and after each game and have been expected to remain with the team until the last student has left the event." Thus, the District told Kennedy,

> [W]hen you engaged in religious exercise immediately following the game on October 16, you were still on duty for the District. You were at the event, and on the field, under the game lights, in BHS-logoed attire, in front of an audience of event attendees, solely by virtue of your employment by the District. The field is not an open forum to which members of the public are invited following completion of games; but even if it were, you continued to have job responsibilities, including the supervision of players. While [BSD] understand[s] that your religious exercise was fleeting, it nevertheless drew you away from your work. More importantly, any reasonable observer saw a District employee, on the field only by virtue of his

> employment with the District, still on duty, under the bright lights of the stadium, engaged in what was clearly, given your prior public conduct, overtly religious conduct.[3]

The District reiterated that it "can and will" accommodate "religious exercise that would not be perceived as District endorsement, and which does not otherwise interfere with the performance of job duties." To that end, it suggested that "a private location within the school building, athletic facility or press box could be made available to [Kennedy] for brief religious exercise before and after games." Kennedy, of course, could also resume his prior practice of praying on the fifty-yard line after the stadium had emptied. Because the "[d]evelopment of accommodations is an interactive process," the District invited Kennedy to offer his own suggestions. The District also reminded Kennedy that "[w]hile on duty for the District as an assistant coach, you may not engage in demonstrative religious activity, readily observable to (if not intended to be observed by) students and the attending public."

F. Kennedy Continues Praying on the Fifty-Yard Line

Kennedy's legal representatives responded to the District's letter by informing the media that the only acceptable outcome would be for the District to permit Kennedy to pray on the fifty-yard line immediately

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[3] Kennedy appears to have abandoned his argument that he was not "on duty" after the games. Instead, he contends that he never received a post-game assignment "that would prohibit [him] from engaging in religious expression lasting no more than 30 seconds."

after games.[4] Kennedy's conduct bore that out. He prayed on the fifty-yard line immediately after the game on October 23rd, and once again after the game on October 26th.

The District subsequently notified Kennedy in an October 28th letter that he had violated the District's directives and would be placed on paid administrative leave from his position as an assistant coach. The District also publicly-released a document entitled "Bremerton School District Statement and Q&A Regarding Assistant Football Coach Joe Kennedy," which detailed the history of the District's interactions with Kennedy and explained its views regarding the constitutionality of Kennedy's conduct.

While Kennedy was on leave, he was not allowed to participate in BHS football program activities. Kennedy could still attend the games in his capacity as a member of the public. At the October 30, 2015, game, which Kennedy attended as a member of the public, Kennedy prayed in the bleachers while wearing his BHS apparel, surrounded by others, and with news cameras recording his actions.

While Kennedy was on leave, and during the time that he temporarily ceased performing on-field prayers, BHS players did not pray on their own after BHS football games. Rather, during the 2015 season, the District observed players praying on the field only at the games where Kennedy elected to do so. The

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[4] Kennedy now contends that the District's accommodations were inadequate because "BSD did not explain how [his] religious expression would be accommodated at away games," where BSD does not have direct control over the facilities.

District's public statement thus opined "[i]t is very likely that over the years, players have joined in these activities because to do otherwise would mean potentially alienating themselves from their team, and possibly their coaches." The District also surmised that "students required to be present by virtue of their participation in football or cheerleading will necessarily suffer a degree of coercion to participate in religious activity when their coaches lead or endorse it." The District's statement acknowledged that there was "no evidence" that students were "*directly* coerced to pray with Kennedy." (emphasis added). The District also acknowledged that Kennedy "complied" with directives "not to *intentionally* involve students in his on-duty religious activities." (emphasis added).

G. Kennedy's Evaluation and Decision Not to Reapply for a Job

After the season ended, the District began its annual process of providing its coaches with performance reviews. This starts with written evaluations by the head coach and the school's athletic director. The assistant coach then typically meets with one of those two people to go over his performance evaluation. If the coach is unsatisfied with the head coach or athletic director's evaluation, he can involve the school principal or the District. Kennedy had previously participated in this review—and had received uniformly positive evaluations—but he did not participate in 2015. Kennedy's supervisors nonetheless submitted their assessments. The athletic director recommended that Kennedy not be rehired because Kennedy "failed to follow district policy" and "failed to supervise student-athletes after games due

to his interactions with [the] media and [the] community."

The head coach of the varsity football team left the job at the conclusion of the 2015 season. The one-year contracts also expired for all six of the assistant football coaches. The District therefore opened up to application all seven of the football coaching positions. Kennedy did not apply for a coaching position during the 2016 season.

H. Kennedy Files Suit

Kennedy commenced this action in the Western District of Washington on August 9, 2016. He asserts that his rights under the First Amendment and Title VII of the Civil Rights Act of 1964 were violated. Kennedy moved for a preliminary injunction on August 24, 2016, arguing that he would succeed on the merits of his claim that BSD retaliated against him for exercising his First Amendment right to free speech.[5] Kennedy sought an injunction ordering BSD to (1) cease discriminating against him in violation of the First Amendment, (2) reinstate him as a BHS football coach, and (3) allow him to kneel and pray on the fifty-yard line immediately after BHS football games.

The district court denied the requested preliminary injunction on September 19, 2016. Applying the five-step framework laid out in *Eng v.*

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[5] Kennedy brings his First Amendment retaliation claim pursuant to 42 U.S.C. § 1983. The First Amendment applies against the State pursuant to the Fourteenth Amendment. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 336 n.1 (1995) ("The term 'liberty' in the Fourteenth Amendment to the Constitution makes the First Amendment applicable to the States.").

Cooley, 552 F.3d 1062 (9th Cir. 2009), the court held that Kennedy was unlikely to prevail on the merits of his First Amendment retaliation claim because Kennedy spoke as a public employee and BSD's conduct was justified by its need to avoid violating the Establishment Clause. In reaching these conclusions, the court observed that "Kennedy was dressed in school colors," "chose a time and event [that] . . . is a big deal" for students, and "used that opportunity to convey his religious views" while "[h]e was still responsible for the conduct of his students." The court also found that Kennedy's prayer resulted in "subtle coercion" because "[i]f you are an athlete, you are impressionable, and you . . . want to please your coach to get more playing time, to shine." The court further concluded that a reasonable observer familiar with the relevant context "would have seen [Kennedy] as a coach, participating, in fact[,] leading an orchestrated session of faith." Given that Kennedy could not demonstrate a likelihood of success on the merits, the district court did not address the remaining preliminary injunction factors. Kennedy filed a timely notice of appeal on October 3, 2016.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

A plaintiff seeking a preliminary injunction must establish that (1) he is likely to succeed on the merits of his claim, (2) he is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in his favor, and (4) an injunction is in the public interest. *Sanders Cty. Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 744 (9th Cir. 2012).

"[W]e review the denial of a preliminary injunction for abuse of discretion." *Harris v. Bd. of Supervisors, L.A. Cty.*, 366 F.3d 754, 760 (9th Cir. 2004). "The district court necessarily abuses its discretion when it bases its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Id.* (internal quotation marks omitted). Where, as here, "the district court is alleged to have relied on an erroneous legal premise, we review the underlying issues of law *de novo*." *Id.*; *see also Sanders*, 698 F.3d at 744 ("[W]here a district court's denial of a preliminary injunction motion rests solely on a premise of law and the facts are either established or undisputed, our review is *de novo*." (internal quotation marks omitted)).

ANALYSIS

Kennedy contends that the district court erred by concluding that he was not likely to succeed on the merits of his claim that BSD placed him on paid administrative leave in retaliation for exercising his First Amendment right to free speech.

First Amendment retaliation claims are governed by the framework in *Eng*. *See* 552 F.3d at 1070-72. Kennedy must show that (1) he spoke on a matter of public concern, (2) he spoke as a private citizen rather than a public employee, and (3) the relevant speech was a substantial or motivating factor in the adverse employment action. *Coomes v. Edmonds Sch. Dist. No. 15*, 816 F.3d 1255, 1259 (9th Cir. 2016) (citing *Eng*, 552 F.3d at 1070-71). Upon that showing, the State must demonstrate that (4) it had an adequate justification for treating Kennedy differently from other members of the general public, or (5) it would

have taken the adverse employment action even absent the protected speech. *Id.* (citing *Eng*, 552 F.3d at 1070-72). "[A]ll the factors are necessary, in the sense that failure to meet any one of them is fatal to the plaintiff's case." *Dahlia v. Rodriguez*, 735 F.3d 1060, 1067 n.4 (9th Cir. 2013) (en banc). Accordingly, "a reviewing court is free to address a potentially dispositive factor first rather than addressing each factor sequentially." *Coomes*, 816 F.3d at 1260 (internal quotation marks omitted).

Here, the parties do not contest that Kennedy spoke on a matter of public concern (*Eng* factor one), that the relevant speech was a substantial or motivating factor in the District's decision to place Kennedy on leave (*Eng* factor three), and that the District would not have taken the adverse employment action in the absence of the relevant speech (*Eng* factor five). Thus, we need consider only whether Kennedy spoke as a private citizen or a public employee (*Eng* factor two), and whether BSD's conduct was adequately justified by its need to avoid an Establishment Clause violation (*Eng* factor four). We conclude that Kennedy spoke as a public employee, not as a private citizen, and therefore decline to reach whether BSD justifiably restricted Kennedy's speech to avoid violating the Establishment Clause. Kennedy accordingly cannot show a likelihood of success on the merits of his First Amendment retaliation claim, and is not entitled to the preliminary injunction he seeks.[6]

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[6] The parties have not briefed the remaining preliminary injunction factors, and we need not reach them in light of this conclusion.

I. Kennedy spoke as a public employee, and not as a private citizen, when he prayed on the fifty-yard line in view of students and parents immediately after BHS football games.

A. Governing Law

"[P]ublic employees do not surrender all their First Amendment rights by reason of their employment." *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006). Rather, they retain the right "in certain circumstances[] to speak as a citizen addressing matters of public concern." *Id.* Courts therefore must decide under the second *Eng* factor whether an official spoke as a citizen, and thus had First Amendment rights to exercise, or whether the official spoke in his capacity as a public employee, and therefore did not.

Pickering v. Board of Education of Township High School District 205, 391 U.S. 563 (1968), laid a foundation for this inquiry. The Court held that a school district violated a teacher's right to free speech when it fired the teacher for writing a letter to a local newspaper criticizing the school board's handling of a tax proposal. *Id.* at 564-65. The Court noted that the statements in the letter were not "directed towards any person with whom [the teacher] would normally be in contact in the course of his daily work." *Id.* at 569-70. Moreover, publication of the letter did not "imped[e] the teacher's proper performance of his daily duties in the classroom" or "interfere[] with the regular operation of the schools generally." *Id.* at 572-73. Because the school had no greater interest in limiting the teacher's speech than it did "in limiting a similar contribution by any member of the general public," *id.* at 573, the teacher spoke as a private

citizen, and the speech itself could not furnish a basis for the teacher's dismissal from public employment, *id.* at 574.

The Court refined this inquiry in *Garcetti v. Ceballos*, 547 U.S. 410 (2006). There it 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." *Id.* at 421 (emphasis added). Applying that reasoning, "the Court found that an internal memorandum prepared by a prosecutor in the course of his ordinary job responsibilities constituted unprotected employee speech." *Lane v. Franks*, 134 S. Ct. 2369, 2378 (2014) (citing *Garcetti*, 547 U.S. at 424). The prosecutor spoke as a public employee because he was "fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case." *Garcetti*, 547 U.S. at 421. In other words, "[the prosecutor's] expressions were made pursuant to his duties as a calendar deputy," *id.*, and "[r]estricting speech that owes its existence to a public employee's professional responsibilities," the Court said, "does not infringe any liberties the employee might have enjoyed as a private citizen," *id.* at 421-22.

Garcetti also emphasized "that various easy heuristics are insufficient for determining whether an employee spoke pursuant to his professional duties." *Dahlia*, 735 F.3d at 1069; *see also Garcetti*, 547 U.S. at 420-21, 424. For instance, it was "not dispositive" that the prosecutor "expressed his views inside his office, rather than publicly," *Garcetti*, 547 U.S. at 420, or that

the memorandum "concerned the subject matter of [the prosecutor's] employment," *id.* at 421. The Court rejected the suggestion that employers could restrict their employees' rights "by creating excessively broad job descriptions." *Id.* at 424. It ultimately instructed that

> The proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes.

Id. at 424-25.

Following *Garcetti*, we clarified that "the determination whether the speech in question was spoken as a public employee or a private citizen presents a mixed question of fact and law." *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1129 (9th Cir. 2008). "First, a factual determination must be made as to the scope and content of a plaintiff's job responsibilities." *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 966 (9th Cir. 2011) (internal quotation marks omitted). "Second, the ultimate constitutional significance of those facts must be determined as a matter of law." *Id.* (internal quotation marks omitted).

Helpfully, in 2011, we applied these instructions in a First Amendment retaliation case involving a teacher employed by a public school. The teacher

argued that he spoke as a private citizen when he decorated his classroom with two large banners that conveyed a religious message. *Johnson*, 658 F.3d at 965. We held that the teacher's religious speech was "unquestionably of inherent public concern," *id.* at 966, but that he nonetheless "spoke as an employee, not as a citizen," *id.* at 970.

At the first step, we observed that Johnson (the teacher) did "not hold a unique or exotic government position"—he "perform[ed] the ordinary duties of a math teacher." *Id.* at 967. In defining those duties, we found that "expression is a teacher's stock in trade, the commodity [he] sells to [his] employer in exchange for a salary." *Id.* (internal quotation marks and alteration omitted). So, it was "irrelevant . . . to the question of whether Johnson spoke as a citizen or as an employee" that "the banners were not part of Johnson's curriculum." *Id.* at 967 n.13. After all, "teachers do not cease acting as teachers each time the bell rings or the conversation moves beyond the narrow topic of curricular instruction." *Id.* at 967-68.

We further observed that Johnson hung the banners pursuant to a long-standing policy permitting teachers to decorate their classrooms subject to specific limitations. *Id.* at 967. Accordingly, we found that Johnson's speech occurred "while performing a function [] squarely within the scope of his position"; "[h]e was not running errands for the school in a car adorned with sectarian bumper stickers," for instance, "or praying with people sheltering in the school after an earthquake." *Id.* Adding it up, because Johnson was communicating with his students, "as a practical matter," we found it was "beyond possibility for

fairminded dispute that the scope and content of Johnson's job responsibilities did not include speaking to his class in his classroom during class hours." *Id.* (internal quotation marks, alteration, and emphasis omitted).

At step two, we assessed the constitutional significance of those facts by asking "whether Johnson's speech owe[d] its existence to his position, or whether he spoke just as any non-employee citizen could have." *Id.* For several reasons, we held "[t]he answer [was] clear": "Johnson did not act as an ordinary citizen when 'espousing God as opposed to no God' in his classroom." *Id.* To start, "[a]n ordinary citizen could not have walked into Johnson's classroom and decorated the walls as he or she saw fit, anymore than an ordinary citizen could demand that students remain in their seats and listen to whatever idiosyncratic perspective or sectarian viewpoints he or she wished to share." *Id.* at 968. "Unlike Pickering," moreover, "who wrote a letter to his local newspaper as any citizen might, . . . Johnson took advantage of his position to press his particular views upon the impressionable and captive minds before him." *Id.* (internal quotation marks and citation omitted). More generally, "because of the position of trust and authority [teachers] hold and the impressionable young minds with which they interact," we held that "teachers *necessarily* act as teachers for purposes of a *Pickering* inquiry 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." *Id.* Applying that rule, Johnson fit the parameters. The religious speech "at issue" therefore "owe[d] its existence to Johnson's position as a teacher." *Id.* at

970. And, because the speech fell within the ordinary scope of Johnson's professional responsibilities, the school "acted well within constitutional limits in ordering Johnson not to speak in a manner it did not desire."[7] *Id.*

B. Application

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[7] Kennedy calls our attention to *Dahlia* and *Lane*. While we draw guidance from those decisions, they did not work an appreciable change to the legal inquiry required under the second *Eng* factor.

In *Lane*, the Supreme Court reiterated that "[t]he critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether [the subject matter of the speech] merely concerns those duties." 134 S. Ct. at 2379. It held that "[t]ruthful testimony under oath by a public employee *outside the scope of his ordinary job duties* is speech as a citizen for First Amendment purposes." *Id.* at 2378 (emphasis added).

In *Dahlia*, we reiterated that the second *Eng* factor requires a practical, fact-specific inquiry, and that courts may not rely solely on a generic job description. *See* 735 F.3d at 1070-71. We also articulated several "guideposts" for determining whether an individual acted within the scope of their professional duties. *Id.* at 1073-74. These included (1) "whether or not the employee confined his communications to his chain of command," (2) "the subject matter of the communication," and (3) whether a public employee's speech is "in direct contravention to his supervisor's orders." *Id.* at 1074-75. While we are mindful of these factors, they stem from the context *Dahlia* confronted—a police officer reporting abuse that occurred in his own police department. *See id.* at 1064-65. We find *Johnson* more informative for our purposes than either *Dahlia* or *Lane* because *Johnson* specifically addressed teacher speech in the public school context. *See Johnson*, 658 F.3d at 967-68; *see also Coomes*, 816 F.3d at 1259-61.

Applying the foregoing principles, Kennedy spoke as a public employee, and not as a private citizen. Before undertaking our analysis, two critical points deserve attention. First, the relevant "speech at issue" involves kneeling and praying on the fifty-yard line *immediately* after games *while in view of students and parents*. *See Lane*, 134 S. Ct. at 2379. It is not, as Kennedy contends, praying on the fifty-yard line "silently and alone." We know this because Kennedy was offered (and, for a time, accepted) an accommodation permitting him to pray on the fifty-yard line after the stadium had emptied and students had been released to the custody of their parents. His refusal of that accommodation indicates that it is essential that his speech be delivered in the presence of students and spectators. Second, for the same reason, the "speech at issue" is *directed* at least in part to the students and surrounding spectators; it is not solely speech directed to God. Hence, the question under the second *Eng* factor is whether this demonstrative communication to students and spectators "is itself ordinarily within the scope of [Kennedy's] duties." *Id.*

1. Factual determination of Kennedy's job responsibilities.

Kennedy's job did not merely require him to supervise students in the locker room, at practice, and before and after games. Nor was it limited to treating injuries and instructing players about techniques related to football. Rather, in addition to these duties, BSD "entrusted" Kennedy "to be a coach, mentor and role model for the student athletes." Kennedy further agreed to "exhibit sportsmanlike conduct at all times,"

and acknowledged that, as a football coach, he was "constantly being observed by others." The District also required Kennedy to "communicate effectively" with parents, "maintain positive media relations," and "[o]bey all the Rules of Conduct before players and the public as expected of a Head Coach," including the requirement to "use proper conduct before the public and players at all times." Consistent with his duty to serve as a role model to students, Kennedy's contract required that, "[a]bove all" else, Kennedy would endeavor not only "to create good athletes," but also "good human beings."

Kennedy's job, in other words, involved modeling good behavior while acting in an official capacity in the presence of students and spectators. Kennedy's amici agree. According to former professional football players Steve Largent and Chad Hennings, for instance, a football coach "serve[s] as a personal example." That is what the District hired Kennedy to do, when he was in the presence of students and parents: communicate a positive message through the example set by his own conduct. Any person who has attended a high school sporting event likely knows that this is true. To illustrate, when a referee makes a bad call, it is a coach's job to respond maturely. In doing so, he provides an example to players and spectators. Likewise, when a parent hassles a coach *after* a game seeking more playing time for her child, a calm reaction by the coach teaches the player about appropriate conduct. By acknowledging that he was "constantly being observed by others," Kennedy plainly understood that demonstrative communication fell within the compass of his professional obligations. And tellingly, Kennedy's

insistence that his demonstrative speech occur in view of students and parents suggests that Kennedy prayed pursuant to his responsibility to serve as a role model and moral exemplar. Were that not evident enough from Kennedy's rejection of BSD's accommodations, Kennedy's off-field conduct bolsters the inference. In particular, his media appearances and prayer in the BHS bleachers (while wearing BHS apparel and surrounded by others) signal his intent to send a message to students and parents about appropriate behavior and what he values as a coach.

Practically speaking, Kennedy's job as a football coach was also akin to being a teacher. *See Grossman v. S. Shore Pub. Sch. Dist.*, 507 F.3d 1097, 1100 (7th Cir. 2007) ("Staff that interact with students play a role similar to teachers."). "While at the high school" he was "not just any ordinary citizen." *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994). He was "one of those especially respected persons chosen to teach" on the field, in the locker room, and at the stadium. *Id.* He was "clothed with the mantle of one who imparts knowledge and wisdom." *Id.* Like others in this position, "expression" was Kennedy's "stock in trade." *Johnson*, 658 F.3d at 967. Kennedy's expressions also carried weight—as the district court said, "the coach is more important to the athlete than the principal." *See also* Br. of Americans United for Separation of Church and State et al. as Amici Curiae Supporting Appellee at 7-8 [hereinafter AUSCS Br.] (former BHS player states that Kennedy was a "parental figure" to the team).

As a high school football coach, it was also Kennedy's duty to use his words and expressions to

"instill[] values in the team." *Borden v. Sch. Dist. of Tp. of E. Brunswick*, 523 F.3d 153, 173 n.15 (3rd Cir. 2008). As amici observe, "many mothers look to the coaches of their son's football team as the last best hope to show their son[s] what it means to become a man—a real man[.]" AUSCS Br. at 7 (quoting John Harbaugh, *Why Football Matters*, Balt. Ravens (Apr. 22, 2015), http://tinyurl.com/kn5fdhh). The record reflects that Kennedy pursued that task. For example, Kennedy gave motivational speeches to students and spectators after the games. Moreover, BHS players did not pray on their own in Kennedy's absence. Rather, the District observed players praying on the field only at the games where Kennedy personally elected to do so.

Finally, just as Johnson's job responsibilities included "speaking to his class in his classroom during class hours," Kennedy's included speaking demonstratively to spectators at the stadium after the game through his conduct. *Johnson*, 658 F.3d at 967. Kennedy's demonstrative speech thus occurred "while performing a function" that fit "squarely within the scope of his position." *Id.* After all, Kennedy spoke at a school event, on school property, wearing BHS-logoed attire, while on duty as a supervisor, and in the most prominent position on the field, where he knew it was inevitable that students, parents, fans, and occasionally the media, would observe his behavior.

In sum, Kennedy's job was multi-faceted, but among other things it entailed both teaching and serving as a role model and moral exemplar. When acting in an official capacity in the presence of students and spectators, Kennedy was also

responsible for communicating the District's perspective on appropriate behavior through the example set by his own conduct.

2. The constitutional significance of Kennedy's job duties.

Mindful of those facts, by kneeling and praying on the fifty-yard line immediately after games while in view of students and parents, 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. Because such demonstrative communication fell well within the scope of Kennedy's professional obligations, the constitutional significance of Kennedy's job responsibilities is plain—he spoke as a public employee, not as a private citizen, and his speech was therefore unprotected.

Each of the guideposts we have established in this context suggests that Kennedy spoke as a public employee. First, "teachers *necessarily* act as teachers for purposes of a *Pickering* inquiry 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." *Johnson*, 658 F.3d at 968. Kennedy's conduct easily meets all three of these conditions.

Next, as *Johnson* and *Coomes* instruct, if Kennedy's "speech 'owes its existence' to his position as a teacher, then [Kennedy] spoke as a public employee, not as a citizen, and our inquiry is at an end." *Id.* at 966 (quoting *Garcetti*, 547 U.S. at 421-22). Here, 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. The record demonstrates as much. Representatives of a Satanist religion arrived at the stadium "to conduct ceremonies on the field after [a] [BHS] football game[.]" They were forced to abandon this effort after they learned that the field was not an open forum. Thus, the precise speech at issue—kneeling and praying on the fifty-yard line immediately after games while in view of students and parents—could not physically have been engaged in by Kennedy if he were not a coach. Kennedy's speech therefore occurred only because of his position with the District.[8]

Lastly, given that "expression," as in *Johnson*, was Kennedy's "stock in trade," the commodity he sold to his employer for a salary, *id.* at 967 (internal quotation mark and alteration omitted), it is similarly non-dispositive of "the question of whether [Kennedy]

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[8] Two additional points warrant comment. First, contrary to Kennedy's assertions, the forum is relevant because the on-field location is a required component of Kennedy's speech, and one that is central to the message he conveys. Indeed, Kennedy insists that his sincerely held religious beliefs do not permit him to pray anywhere other than on the field where the game was just played. The accommodations he refused signal further temporal and circumstantial requirements concerning his speech (i.e., that it must be delivered immediately after the game, while in view of spectators). These features confirm that the relevant conduct—Kennedy's demonstrative speech to students and spectators—owes its existence to Kennedy's position with the District. Second, Kennedy's demonstrative message to students only carries instructive force due to his position as a coach. Surely, if an ordinary citizen walked onto the field and prayed on the fifty-yard line, the speech would not communicate the same message because the citizen would not be clothed with Kennedy's authority. *See Johnson*, 658 F.3d at 968; *Evans-Marshall v. Bd. of Educ.*, 624 F.3d 332, 340 (6th Cir. 2010).

spoke as a citizen or as an employee" that the religious content of Kennedy's message was not part of his "curriculum," *id.* at 967 n.13. Coaches, like teachers, do not cease acting as coaches "each time the bell rings or the conversation moves beyond the narrow topic of curricular instruction." *Id.* at 967-68. In any event, Kennedy's prayer celebrates sportsmanship, so the content of Kennedy's speech arguably falls within Kennedy's curriculum. *See* ER 251 (job description requiring Kennedy to "exhibit sportsmanlike conduct at all times").

True, Kennedy spoke in contravention of his supervisor's orders, *see Dahlia*, 735 F.3d at 1075, but that lone consideration is not enough to transform employee speech into citizen speech. If it was, there would be no need for the *Garcetti* analysis because *every* First Amendment retaliation case in the employment context involves some degree of employer disagreement with the expressive conduct.

All told, by kneeling and praying on the fifty-yard line immediately after games, Kennedy was fulfilling his professional responsibility to communicate demonstratively to students and spectators. Yet, he "took advantage of his position to press his particular views upon the impressionable and captive minds before him." *Johnson*, 658 F.3d at 968 (internal quotation marks omitted). In addition, he "did not act as an ordinary citizen when 'espousing God as opposed to no God'" under the bright lights of the BHS football stadium. *Id.* at 967. Because his demonstrative speech fell within the scope of his typical job responsibilities, he spoke as a public employee, and the District was permitted to order Kennedy not to speak in the

manner that he did. *See id.* at 967-70; *Tucker v. State of Cal. Dep't of Educ.*, 97 F.3d 1204, 1213 (9th Cir. 1996) ("A teacher appears to speak for the state when he or she teaches; therefore, the department may permissibly restrict such religious advocacy."); *Peloza*, 37 F.3d at 522 (permitting District to restrict biology teacher's ability "to discuss his religious beliefs with students during school time on school grounds").

Other circuits agree. In *Borden*, the Third Circuit concluded that a coach spoke "pursuant to his official duties as a coach"—and thus as a public employee—when he bowed his head and took a knee with his team while they prayed in the locker room prior to football games. 523 F.3d at 171 n.13. The coach "concede[d] that the silent acts of bowing his head and taking a knee [were] tools that he use[d] to teach his players respect and good moral character." *Id.* at 172. He therefore was fulfilling his responsibilities as a teacher, as Kennedy is here.

In *Evans-Marshall v. Board of Education*, 624 F.3d 332 (6th Cir. 2010), the Sixth Circuit explained that "[w]hen a teacher teaches, the school system . . . *hires* that speech." *Id.* at 340 (internal quotation mark omitted). As a consequence, "it can surely regulate the content of what is or is not expressed," because a teacher is not "the employee *and* employer." *Id.* (internal quotation marks omitted). For example, "[w]hen Pickering sent a letter to the local newspaper criticizing the school board," the court noted, "he said something that any citizen has a right to say, and he did it on his own time and in his own name, not on the school's time or in its name." *Id.* By contrast, when a teacher teaches—as Kennedy did

through the example of his own conduct while acting in his capacity as an assistant coach—"[he] d[oes] something [he] was hired (and paid) to do, something [he] could not have done but for the Board's decision to hire [him] as a public school teacher." *Id.*

The Seventh Circuit employed the same reasoning in *Mayer v. Monroe County Community School Corporation*, 474 F.3d 477 (7th Cir. 2006). It found "that teachers hire out their own speech and must provide the service for which employers are willing to pay." *Id.* at 479. It thus held that a teacher spoke as an employee, not as a citizen, when she opined on the Iraq war at a "current-events session, conducted during class hours, [that] was part of her official duties." *Id.* Similarly, Kennedy spoke on the field, at a time when he was on call, and in a manner that was well within his job description. Like the teacher in *Mayer*, he therefore spoke as a public employee.

Finally, in *Doe v. Duncanville Independent School District*, 70 F.3d 402 (5th Cir. 1995), the Fifth Circuit barred school employees from participating in or supervising student-initiated prayers that took place after basketball practice. *Id.* at 406. It reasoned that "[t]he challenged prayers take place during school-controlled, curriculum-related activities that members of the basketball team are required to attend," and "[d]uring these activities[,] [District] coaches and other school employees are present as representatives of the school and their actions are representative of [District] policies." *Id.* Applying that reasoning, if a coach speaks as an employee by standing in the vicinity of student prayer and

supervising the students immediately after a basketball practice, there can be little question that Kennedy spoke as an employee when he likewise performed a task that the District hired and paid him to perform: demonstrative communication with students and spectators immediately after football games.

3. Kennedy's counterarguments are not convincing.

Kennedy insists the district court invented "a bright-line temporal test that strips First Amendment protections from 'on the job' public employees." That is incorrect. The district court said "[t]here is no bright-line test . . . on this issue," and decided the second *Eng* factor by asking whether Kennedy spoke as a public employee or private citizen "under the totality of the circumstances." More importantly, the court did not articulate a temporal dichotomy that reserves First Amendment rights only for "off-duty" employees. To illustrate, Kennedy can pray in his office while he is on duty drawing up plays, pray non-demonstratively when on duty supervising students, or pray in "a private location within the school building, athletic facility, or press box" before and after games, as BHS offered. He can also write letters to a local newspaper while on duty as a coach, *see Pickering*, 391 U.S. at 572-74, or privately discuss politics or religion with his colleagues in the teacher's lounge, *see Rankin v. McPherson*, 483 U.S. 378, 388-92 (1987); *Tucker*, 97 F.3d at 1213. What he cannot do is claim the First Amendment's protections for private-citizen speech when he kneels and prays on the fifty-yard line immediately after games in school logoed-attire in

view of students and parents. *Cf. Berry v. Dep't of Soc. Servs.*, 447 F.3d 642, 651-52 (9th Cir. 2006) (upholding a restriction prohibiting a government employee from discussing religion with his clients in his government cubicle in the course of providing them assistance, while explaining that the employee could still read his Bible "whenever he does not have a client with him in his cubicle").

Next, Kennedy observes that "[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. He argues that prayer—"the speech at issue"—did not "relate[] to" his job, and certainly did not constitute "coaching."[9] But again, where, as here, a teacher speaks at a school event in the presence of students in a capacity one might reasonably view as official, we have rejected the proposition that a teacher speaks as a citizen simply because the content of his speech veers beyond the topic of curricular instruction, and instead relates to religion. *Johnson*, 658 F.3d at 967-68; *see also Grossman*, 507 F.3d at 1100 ("The First Amendment is not a teacher license for uncontrolled expression at variance with established curricular content." (internal quotation marks omitted)); *Mayer*, 474 F.3d at 480 (concluding teacher spoke as employee even though she "had *not* been hired to buttonhole

[9] Kennedy elsewhere acknowledges that whether a public employee speaks "as a citizen" does not turn on the content of the speech. Kennedy may then be arguing that the *act* of praying itself is not related to his job. That argument fails because demonstratively speaking to students and spectators after games through the example set by his own conduct is within the scope of Kennedy's job responsibilities.

cosmetology students in the corridors and hand out tracts proclaiming that homosexuality is a mortal sin"). Kennedy also does not dispute that his demonstrative speech taught students about what he viewed as appropriate conduct. Nor can he dispute that many players responded as if prayer were part of the school-sponsored curriculum—they prayed on the field only when Kennedy elected to do so.

Finally, Kennedy insists it is irrelevant that he had access to the field only by virtue of his position because *Lane* establishes that the critical question is whether his speech was within the ordinary scope of his duties. For the reasons explained above, Kennedy's speech *was* within the ordinary scope of his duties. In any event, Kennedy overlooks *Coomes*, which affirmed that if a plaintiff's speech "owes its existence to [his] position as a teacher, then [he] spoke as a public employee, not as a citizen, and our inquiry is at an end."[10] 816 F.3d at 1260 (internal quotation marks and alterations omitted).

In sum, when Kennedy kneeled and prayed on the fifty-yard line immediately after games while in view of students and parents, he spoke as a public employee, not as a private citizen, and his speech therefore was constitutionally unprotected.[11]

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[10] We issued *Coomes* nearly two years after the Supreme Court issued *Lane*. Additionally, *Coomes* is more factually analogous than *Lane* because *Coomes* involved speech by a public-school official.

[11] We emphasize that our conclusion neither relies on, nor should be construed to establish, any bright-line rule. As our analysis demonstrates, the second *Eng* factor requires a practical, fact-intensive inquiry into the nature and scope of a

CONCLUSION

On Friday nights, many cities and towns across America temporarily shut down while communities gather to watch high school football games. Students and families from all walks of life join "to root for a common cause" and admire the young people who step proudly onto the field. *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000). While we "recognize the important role that public worship plays in many communities, as well as the sincere desire to include public prayer as a part of [these] occasions," such activity can promote disunity along religious lines, and risks alienating valued community members from an environment that must be open and welcoming to all. *Id.* at 307. That is why the "preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission." *Lee v. Weisman*, 505 U.S. 577, 589 (1992).

As for the task at hand, we hold that Kennedy spoke as a public employee when he kneeled and prayed on the fifty-yard line immediately after games while in view of students and parents. Kennedy therefore cannot show a likelihood of success on the merits of his First Amendment retaliation claim. We AFFIRM the district court's order denying Kennedy's

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plaintiff's job responsibilities. It also requires a careful examination of the precise speech at issue. We also continue to recognize that "speech by a public employee, even a teacher, does not always represent, or even appear to represent, the views of the state." *Tucker*, 97 F.3d at 1213.

motion for a preliminary injunction. Appellant shall bear costs on appeal. Fed. R. App. P. 39(a)(2).

M. Smith, Circuit Judge, specially concurring:

I write separately to share my view that BSD's actions were also justified to avoid violating the Establishment Clause. Kennedy's claim therefore fails on the additional ground that the District can satisfy the fourth *Eng* factor. *See Eng v. Cooley*, 552 F.3d 1062, 1071-72 (9th Cir. 2009) (asking whether the state has an adequate justification for restricting the employee's speech). I also write to share a few thoughts about the role of the Establishment Clause in protecting the rights of all Americans to worship (or not worship) as they see fit.

I. Governing Law

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. The Clause applies against the states, and therefore their public school systems, pursuant to the Fourteenth Amendment. *See Wallace v. Jaffree*, 472 U.S. 38, 49-50 (1985). The Clause "mandates governmental neutrality between religion and religion, and between religion and nonreligion." *McCreary Cty., Ky. v. Am. Civil. Liberties Union of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Ark.*, 393 U.S. 97, 104 (1968)) (internal quotation marks omitted). "The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987). In that setting, "[t]he State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure." *Id.* at

584. Accordingly, the Clause "proscribes public schools from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." *Lee v. Weisman*, 505 U.S. 577, 604-05 (1992) (Blackmun, J., concurring) (internal quotation marks and emphasis omitted).

Under the fourth *Eng* factor, the District can escape potential liability if it can show that it had an adequate justification for treating Kennedy differently from other members of the general public. *Eng*, 552 F.3d at 1071-72. "[A] state interest in avoiding an Establishment Clause violation may be characterized as compelling, and therefore may justify content-based discrimination." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001) (internal quotation marks omitted); *see also Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994) ("The school district's interest in avoiding an Establishment Clause violation trumps [a teacher's] right to free speech.").[1]

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[1] The parties disagree as to whether the District must show an *actual* Establishment Clause violation, *see Good News*, 533 U.S. at 112-13, or merely a legitimate interest in avoiding an Establishment Clause violation, *see Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (noting the Court's suggestion in a prior case that "the interest of the State in avoiding an Establishment Clause violation may be a compelling one justifying an abridgement of free speech otherwise protected by the First Amendment." (internal quotation marks and alteration omitted)); *Berry v. Dep't of Soc. Servs.*, 447 F.3d 642, 651 (9th Cir. 2006) (holding that the government's "need to avoid possible violations of the Establishment Clause" justified a restriction on employee speech). I do not reach this issue because a resumption of

Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000), describes the framework for assessing whether BSD would be liable for an Establishment Clause violation if Kennedy were to resume kneeling and praying on the fifty-yard line immediately after games in the presence of students and spectators. *See id.* at 315 (asking whether the "continuation of" prayer at school event would violate the Establishment Clause).

In *Santa Fe*, the plaintiffs challenged a school district policy that permitted, but did not require, a student to deliver a prayer over the public address system before each varsity football game. *Id.* at 294. The "Prayer at Football Games" policy "authorized two student elections, the first to determine whether 'invocations' should be delivered, and the second to select the spokesperson to deliver them." *Id.* at 297 (internal quotation marks omitted). After the students had voted in favor of prayer and selected a speaker, the school district implemented two changes. It omitted the word "prayer" from the title and amended the policy to refer to "'messages' and 'statements' as well as 'invocations.'" *Id.* at 298 (internal quotation marks omitted).

To assess whether the amended policy violated the Establishment Clause, the Court asked whether an objective student observer who was familiar with the history and context of the school's conduct would perceive that "prayer is, in actuality, encouraged by the school." *Id.* at 308. Put differently, the relevant

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Kennedy's conduct would clearly result in an actual Establishment Clause violation.

question was "whether an objective observer, acquainted with the text, legislative history, and implementation of the [policy], would perceive it as a state *endorsement* of prayer in public schools." *Id.* (emphasis added) (internal quotation marks omitted). Applying that rule, the Court held that "an objective Santa Fe High School student w[ould] unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval." *Id.*

The Court first considered the setting. The prayer would be "delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property." *Id.* at 307. The message would also be "broadcast over the school's public address system," which was "subject to the control of school officials." *Id.* The pregame ceremony would be "clothed in the traditional indicia of school sporting events, which generally include not just the team, but also cheerleaders and band members dressed in uniforms sporting the school name and mascot." *Id.* at 308. Further, the school's name would be emblazoned on the field and the crowd would be "waving signs displaying the school name." *Id.* The upshot, said the Court, was that an objective audience member would perceive the pregame prayer as a public expression "delivered with the approval of the school administration." *Id.*

The text and purpose of the policy reinforced that conclusion. The express purpose of the pregame message was to "solemnize the event." *Id.* at 306. Yet tellingly, the only message type the text endorsed was an "invocation," and "in the past at Santa Fe High School, an 'invocation' ha[d] always entailed a focused

religious message." *Id.* at 306-07 (internal quotation marks omitted). The Court also noted that the school regulated the content of the message. Among other things, the message had to "establish the appropriate environment for competition." *Id.* at 306 (internal quotation marks omitted). The school also required that the pregame message "promote good sportsmanship." *Id.*

The history and context of the policy bolstered the conclusion that an objective observer would perceive the school to be encouraging prayer. The school had a "long-established tradition of sanctioning student-led prayer at varsity football games," *id.* at 315, and the policy itself had evolved from the "office of 'Student Chaplain' to the candidly titled 'Prayer at Football Games' regulation," *id.* at 309. The Court noted that the prayers were possible only because the school board had *chosen* to give the students the opportunity to deliver pregame messages. *Id.* With that context, the Court said it was "reasonable to infer that the specific purpose of the policy was to preserve a popular state-sponsored religious practice." *Id.* (internal quotation marks omitted).

Lastly, the Court was "persuaded that the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship." *Id.* at 312. According to the Court, some nonadherents were likely *required* to attend the games, "such as cheerleaders, members of the band, and, of course, the team members themselves." *Id.* at 311. Even those who were not so required would "feel immense social pressure," the Court said, "to be involved in the extracurricular event that is American

high school football." *Id.* (internal quotation marks omitted). So, by allowing the prayer to be delivered, the district was impermissibly forcing students to choose "between attending these games and avoiding [a potentially] personally offensive religious ritual[]." *Id.* at 312.

Mindful of the totality of these circumstances, the Court concluded that "the realities of the situation plainly reveal that [the district's] policy involves both perceived and actual endorsement of religion." *Id.* at 305. It therefore violated the Establishment Clause. *Id.* at 316.

II. Application

Here, an objective BHS student familiar with the history and context of Kennedy's conduct would perceive his practice of kneeling and praying on the fifty-yard line immediately after games in view of students and spectators as District endorsement of religion or encouragement of prayer. The District therefore justifiably restricted Kennedy's speech to avoid violating the Establishment Clause.

A. The setting, context, and history support the perception that Kennedy's conduct would be viewed as state endorsement of religion.

The setting supports this conclusion. If Kennedy's practice were to resume, an objective student would observe a public-school employee in BHS-logoed attire demonstratively praying in front of "a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property." *Id.* at 307. Based on previous experience, Kennedy's players would likely join him, meaning he would likely be surrounded by a majority of the team. The speech

would also occur at the most prominent location on the field during a time when Kennedy is responsible for supervising players. Lastly, the scene would likely exhibit “the traditional indicia of school sporting events,” including “cheerleaders and band members dressed in uniforms,” an audience “waving signs displaying the school name,” and the school’s name or initials “written in large print across the field and on banners and flags.” *Id.* at 308.

The context would bolster the perception that the District was endorsing religion. An objective observer would know that Kennedy had access to the field only by virtue of his position as a coach, that a Satanist group had been denied such access, and that Kennedy insists on demonstratively praying only while in view of students and spectators. True, in contrast to *Santa Fe*, the District would not be authorizing or regulating the content of Kennedy’s prayers. *See* 530 U.S. at 306-07. Still, an objective observer would know that it is Kennedy’s professional duty to communicate demonstratively to students and spectators after games, and that use of the field, like use of the public address system, is “subject to the control of school officials.” *Id.* at 307.

The relevant history would add to the perception that the District encourages prayer. An objective observer would know that during the previous eight years, Kennedy led and participated in locker-room prayers, regularly prayed on the fifty-yard line, and eventually led a larger spiritual exercise at midfield after each game. BSD states that it was not aware of this conduct until 2015, but if Kennedy were to resume his practice of praying at midfield, an objective

student could reasonably infer that the District was ratifying the religious exercises that Kennedy had previously conducted. This inference would follow because the District would be acquiescing to Kennedy's conduct knowing full well that the players prayed only when Kennedy elected to do so, and that the previous practice started as an individual prayer but evolved into an orchestrated session of faith.[2]

Lastly, by permitting Kennedy's conduct, the District would be condoning the same coercion identified in *Santa Fe*. As was true in that case, various students would be required to attend the games, "such as cheerleaders, members of the band, and, of course, the team members themselves." *Id.* at 311. They would see an important District representative display "the distinctively Christian prayer form"[3] in the most prominent location on the

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[2] Again, perhaps bolstering this inference, an objective observer would likely see Kennedy surrounded by his players. An objective observer familiar with the relevant history would also know that the football team had engaged in pre- and post-game prayers "as a matter of school tradition," and that both activities apparently "predated" Kennedy's involvement with the football program. With that context, an objective observer might reasonably perceive that the District had changed its mind regarding the propriety of Kennedy's conduct. This is particularly so because BSD had previously stated in a letter to the Bremerton community that it could not permit Kennedy's conduct lest it be considered to be endorsing religion.

[3] Amici note that Kennedy employed "the distinctively Christian prayer form of kneeling with hands clasped and head bowed—a pose with deep historical significance and symbolic meaning within Christianity." Br. of Americans United for Separation of Church and State et al. as Amici Curiae Supporting Appellee at 12. By contrast, Jews "do not typically kneel," and instead "stand for prayer and often sway." *Id.* at 13. For Muslims,

field, despite the community's religious diversity. This act would "send[] the ancillary message to members of the audience who are nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Id.* at 309-10 (internal quotation marks omitted). Kennedy might not "*intentionally* involve students in his on-duty religious activities," (emphasis added), but I have no reason to believe that the pressure emanating from his position of authority would dissipate. Accordingly, many students would feel pressure to join Kennedy's religious activity to avoid marking themselves as outsiders or alienating themselves from the team. The record suggests that this is precisely what occurred when Kennedy first started praying on the field in 2008. *See* Kennedy Decl. at 3 ("Over time, the number of players who gathered near me after the game grew to include the majority of the team."). Yet the Constitution forbids Kennedy from forcing students whose beliefs are not the same as his to compromise their personal beliefs or identify themselves as religious dissenters.

In sum, if Kennedy were to resume kneeling and praying on the fifty-yard line immediately after games while in view of students and spectators, an objective student observer would see an influential supervisor

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"the typical prayer posture is prostration, though prayer also involves standing and bowing." *Id.* Prayer in the Bahá'í faith "involves kneeling, bowing, and prostration." *Id.* Hindus and Buddhists "pray in the seated, cross-legged lotus position." *Id.* Finally, it is worth noting that the Bremerton community includes individuals who identify as atheist or as agnostic. *Id.* at 14.

do something no ordinary citizen could do—perform a Christian religious act on secured school property while surrounded by players—simply because he is a coach. Irrespective of the District's views on that matter, a reasonable observer would conclude in light of the history and context surrounding Kennedy's conduct that the District, "in actuality," favors religion, and prefers Christianity in particular.[4] *Santa Fe*, 530 U.S. at 308.

B. Kennedy's counterarguments are not persuasive.

Kennedy contends that an objective observer would "conclude (at most) that he is engaged in a personal moment of silence" because students would not be directly coerced to pray, the District would not be regulating the content of his religious expression, and the prayer would not be the product of a school policy, in contrast to the prayer at issue in *Santa Fe*. These observations may be correct, but they have little significance when considered within the totality of the

[4] *Borden v. Sch. Dist. of Tp. of E. Brunswick*, 523 F.3d 153 (3rd Cir. 2008), supports this conclusion. There, the Third Circuit held that a football coach impermissibly endorsed religion by bowing his head and taking a knee while his players engaged in prayer. *Id.* at 174. Like Kennedy, the coach had a history of leading team prayers, yet stated that he wanted to bow and kneel only to show respect to his team. *Id.* at 177. The court concluded that the history gave rise "to a reasonable inference that [the coach's] requested conduct is meant to preserve a popular state-sponsored religious practice of praying with his team." *Id.* (internal quotation marks omitted). In light of Kennedy's history, an objective observer could draw the same inference here, notwithstanding Kennedy's statement that he seeks only to pray silently and alone.

circumstances. Indeed, they are rebutted by the evidence of indirect coercion, and the fact that an objective observer familiar with the context would know it is Kennedy's professional duty to communicate demonstratively to students and spectators after games.

Next, Kennedy insists that kneeling and praying on the fifty-yard line would not be viewed as state endorsement of religion because a coach's expressive conduct around a playing field is quintessential personal speech. Kennedy notes that some athletes point to the heavens after a touchdown, or kneel when a player is being treated for an injury, yet fans do not generally view either of those actions as having been made on behalf of the team. Even if that is true, it says little about the speech at issue here, and it ignores entirely the relevant history and context surrounding Kennedy's speech. *See Santa Fe*, 530 U.S. at 315 (holding courts may not "turn a blind eye to the context in which [the conduct] arose").

Lastly, Kennedy contends that the remedy for any inference of endorsement "is to educate the audience rather than squelch the speaker." *Hills v. Scottsdale Unified Sch. Dist. No. 48*, 329 F.3d 1044, 1055 (9th Cir. 2003) (quoting *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1299-1300 (7th Cir. 1993)). However, we have held that a disclaimer is not sufficient to alleviate Establishment Clause concerns in the graduation speech context, *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 984 (9th Cir. 2003), and it is similarly unlikely that a disclaimer would cure the perception of endorsement at issue here. Once again, an objective student

observer would still see a respected District employee do something no ordinary citizen could do—perform a distinctively Christian religious act on a secured portion of school property while supervising students—simply because he is a BHS football coach. Moreover, because Kennedy's speech would occur in the course of his ordinary responsibilities and he would be speaking in his capacity as a public employee, his conduct would be attributed to the District, thus diluting the effect of any potential disclaimer. *See Borden*, 523 F.3d at 177 n.20 ("As an employee of the School District as both a coach and tenured teacher, Borden's actions can be imputed to the School District. For this reason, Borden's claim that the School District could remove any Establishment Clause violation by writing a disclaimer saying that Borden's speech does not represent the ideals of the School District is simply wrong."); *Doe v. Duncanville Ind. Sch. Dist.*, 70 F.3d 402, 406 (5th Cir. 1995) (stating that during school-sponsored sporting events coaches "are present as representatives of the school and their actions are representative of [school district] policies").[5]

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[5] I nonetheless emphasize that schools should not simply "throw up their hands because of the possible misconceptions about endorsement of religion." *Hills*, 329 F.3d at 1055. Instead, they should endeavor "to teach [students] about the first amendment, about the difference between private and public action, [and] about why we tolerate divergent views," as BSD's letter to the Bremerton community admirably sought to do here. *Id.* (first alteration in original) (quoting *Hedges*, 9 F.3d at 1299). "Free speech, free exercise, and the ban on establishment are quite compatible when the government remains neutral and educates the public about the reasons." *Id.* (quoting *Hedges*, 9 F.3d at 1300). However, in this instance, BSD would not be

In sum, the District can satisfy the fourth *Eng* factor. It justifiably restricted Kennedy's speech to avoid violating the Establishment Clause. An objective BHS student familiar with the relevant history and context would perceive Kennedy's conduct to reflect school endorsement of religion, encouragement of prayer, and a preference for one particular faith.[6]

III. Averting state establishment of religion ultimately safeguards religious liberty.

Some readers may find this conclusion disconcerting. The record reflects, after all, that Coach Kennedy cared deeply about his students, and that his conduct was well-intentioned and flowed from his sincerely-held religious beliefs. Given those factors, it is worth pausing to remember that the Establishment Clause is designed to *advance* and *protect* religious liberty, not to injure those who have religious faith. Indeed, history has taught us "that one of the greatest dangers to the freedom of the individual to worship in his own way lay[s] in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services." *Engel v. Vitale*, 370 U.S. 421, 429 (1962).

It is a lamentable fact of human history that whenever a religious majority controls the government, it frequently uses the civil power to

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remaining neutral in the eyes of an objective observer if it were to permit Kennedy to resume his on-field prayers.

[6] The District also contends that Kennedy's conduct fails the so-called "coercion" test and the three-prong framework from *Lemon v. Kurtzman*, 403 U.S. 602 (1971). I do not address those arguments in light of the analysis outlined above.

persecute religious minorities and non-believers.[7] The Founders who met in Philadelphia to negotiate the terms of the U.S. Constitution, and the men who later met in ratifying conventions in the several states, were well aware that many hundreds of thousands of people had lost their lives, been tortured, or had otherwise been deprived of their civil rights by governments in the control of some religious faith, during the then recent European wars of religion. These cataclysmic events led writers such as Thomas Hobbes (1588-1679) and John Locke (1632-1704), each of whom was familiar to the Founders, to argue that state coercion is an inappropriate and ineffective tool for enforcing religious conformity, since religious belief must be sincerely held to be truly efficacious.

In some ways, the United States is a nation whose very existence is due to religious conflict because most of the colonies were initially settled by persons who came here to escape religious persecution in Europe. When such colonists came, they generally settled amongst those who held similar religious beliefs, and the dominant religious group controlled the civil government, just as had been the case in Europe. Thus, Anglicans initially dominated in Virginia, Puritans in Massachusetts, Quakers in Pennsylvania, Baptists in Rhode Island, and Roman Catholics in

[7] Interested readers might find Will (and later Will and Ariel) Durant's epic series on the history of civilization, with separate volumes entitled The Age of Faith, The Renaissance, The Reformation, The Age of Reason Begins, The Age of Louis XIV, The Age of Voltaire, and Rousseau and Revolution, amongst others, an excellent source to learn more about this subject. *See* WILL DURANT & ARIEL DURANT, THE STORY OF CIVILIZATION (MJF Books 1993).

Maryland. But when, for example, the Puritan leaders of the Massachusetts Bay Colony were challenged by religious dissenters, such as Roger Williams and Anne Hutchinson, the dissidents were banished from, and persecuted by, the Colony over disagreements concerning theology, as were Catholics and non-Puritans generally. Violence was frequently employed in many of the colonies to suppress religious dissenters.

Seeking to make America a more true refuge from religious persecution, some early leaders began to advocate for the disentanglement of religion and government. For example, in responding to a bill introduced by Patrick Henry calling for state support for "Teachers of the Christian Religion," future president James Madison penned an essay arguing that Virginia should not financially support Christian instruction. *See* James Madison, Memorial and Remonstrance Against Religious Assessments (June 20, 1785), in 5 THE FOUNDERS' CONSTITUTION 82 (P. Kurland & R. Lerner eds. 1986). Madison asked rhetorically: "Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?" *Id.* He also observed that Henry's bill was "a departure from that generous policy, which, offering an Asylum to the persecuted and oppressed of every Nation and Religion, promised a lustre to our country." *Id.* at 83.

After Henry's bill was defeated, the Virginia legislature eventually took up Thomas Jefferson's plan for the separation of church and state. In 1786,

the Virginia Bill for Establishing Religious Freedom was adopted. Among other things, that Bill provided:

> We the General Assembly of *Virginia* do enact, that no man shall be compelled to frequent or support any relig[i]ous Worship place or Ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief, but that all men shall be free to profess, and by argument to maintain their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.

Id. at 77. Jefferson wrote that the law was "meant to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and Mahometan, the Hindoo, and Infidel of every denomination." Thomas Jefferson, Autobiography (1821), in 5 THE FOUNDERS' CONSTITUTION, at 85.

Madison endeavored to make Jefferson's vision a part of the Constitution. For example, Article VI of the Constitution requires that all federal officials "shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." U.S. Const. art. VI, cl. 3. Later, what became the First Amendment to the Constitution included the words: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." *Id.* amend. I. The purpose of these clauses is to protect our freedom of worship unhindered by the government.

This very brief glimpse of one aspect of our history is intended to show that, having learned from the harmful effects of past religious conflicts, our nation's Founders included in our foundational law safeguards against religious oppression by a government (or arms of that government) under the control of a religious majority that would punish or severely limit our right to worship (or not worship) as we please. This is a priceless bulwark of our personal freedom, and I hope that interested readers will come to appreciate the Establishment Clause as a good friend and protector, and not as an enemy, of one of their most precious rights and liberties.

IV. Conclusion

Striking an appropriate balance between ensuring the right to free speech and avoiding the endorsement of a state religion has never been easy. Thankfully, we no longer resolve these conflicts with violence, but instead use courts of law, where parties make arguments in free and open hearings to address their differences. To that end, I commend the lawyers in these proceedings for the exceptional job they have done.

At the end of the day, I believe that a resumption of Kennedy's conduct would violate the Establishment Clause. I would therefore deny the preliminary injunction on the additional ground that BSD can satisfy the fourth *Eng* factor.

Appendix B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
TACOMA DIVISION

No. CV16-5694RBL

JOSEPH A. KENNEDY,
Plaintiff,
v.
BREMERTON SCHOOL DISTRICT,
Defendant.

Preliminary Injunction Hearing

September 19, 2016

Before the Honorable Ronald B. Leighton
United States District Court Judge

THE CLERK: This is in the matter of Kennedy versus Bremerton School District, Cause No. C16-5694RBL. Counsel please make their appearances.

MS. RICKETTS: Good morning, your Honor. Rebekah Ricketts for the plaintiff, Joseph Kennedy. With me at counsel table is Ben Wilson.

MR. HELSDON: Good morning, your Honor. Jeff Helsdon for Joe Kennedy.

MR. BERRY: Good morning, your Honor. Michael Berry for Joe Kennedy.

MR. FERATE: Good morning, your Honor. A.J. Ferate here for Joe Kennedy.

THE COURT: Good morning.

MR. TIERNEY: Good morning, your Honor. Michael Tierney. I represent the Bremerton School District.

THE COURT: Good morning.

MR. TIERNEY: Accompanying me is Aaron Leavell. He is the superintendent of the school district. And Jeff Ganson is the general counsel for the school district. We have some others in the audience, but that's who is at the table with us.

THE COURT: Thank you. Good morning. I have reviewed everything that has been submitted by both sides. Because of the importance of this matter, I wanted to schedule oral argument for the plaintiff's motion for a preliminary injunction. Plaintiff can make their argument.

MS. RICKETTS: Good morning, your Honor. This case is about Coach Kennedy's First Amendment right to take a knee at midfield at the end of the BHS football games and say a silent prayer for 15 to 30 seconds.

The district has admitted it suspended Coach Kennedy from all participation in the BHS football program because he engaged in, quote, demonstrative religious conduct while he was still on duty as a coach.

The primary issue here is whether the district can strip Coach Kennedy of his First Amendment rights at

the schoolhouse gate. And that is exactly what *Tinker* forbids.

The district has already conceded that Coach Kennedy's religious conviction is fleeting, that any student participation was entirely voluntary, was never coerced, never even actively encouraged, and that Coach Kennedy fully complied with the district's directives not to intentionally involve students in his religious expression. All of these concessions are in the district's official correspondence, and are clear on the face of the record.

The district has also effectively conceded three of the four prongs of the preliminary injunction inquiry. That's not surprising, because the law is clear that deprivation of First Amendment rights constitutes irreparable harm, and the balance of equities and public interest prongs cut squarely in favor of the party whose rights are being chilled.

So what remains is the *Eng* test, and Coach Kennedy, we respectfully submit, amply satisfies that test.

As an initial matter, the district concedes, as it must, that Coach Kennedy's religious expression is a matter of public concern. So that takes care of Step 1.

At Step 2, the district has completely ignored controlling precedent from the Supreme Court and the Ninth Circuit. Under *Lane v. Franks*, the critical question in order to determine whether an individual speaks as a citizen or as an employee is whether that speech falls within the ordinary scope of his job responsibilities. That is the task that *Lane v. Franks* announces, and that is the task that the Ninth Circuit

specifically adopted in *Coomes*, following the *Lane* decision.

Under that task, your Honor, it is abundantly clear that Coach Kennedy's speech is outside the scope of his ordinary job responsibilities. The district has not decided whether he will speak or what he will say, and all of the responsibilities that the district points to, coaching football, caring for injuries, maintaining equipment, none of these have anything to do with Coach Kennedy's private personal prayer.

So the clear import of *Lane* is that Coach Kennedy speaks as a citizen, not as a public employee, and his speech is therefore fully protected.

THE COURT: You know, my parents were educators of a small district. They had responsibilities well beyond the classroom. My dad coached baseball, basketball, football. He wouldn't recognize the limitations that you're arguing, that Coach Kennedy is not a coach at that moment. Center of the field, lights on, school property.

How do you persuade people, who know the educational mission of all public schools, that Mr. Kennedy is off duty?

MS. RICKETTS: Your Honor, to be clear, our argument does not turn on whether Coach Kennedy is on duty or off duty. We think the controlling test under *Lane versus Franks* is whether the expression that is at issue is ordinarily within the scope of his job responsibilities. We do not, for these purposes, dispute—we don't think there is a factual dispute about the nature of his job responsibilities.

In fact, the district has effectively abandoned their prior argument that his alleged failure to supervise justified the adverse action here.

But the Ninth Circuit en banc in the *Dahlia* decision made clear that public employees may receive First Amendment protection for expressions made at work.

So the only thing the district can point to is this bright-line temporal test that they invent, that treats any expression by an on-duty public employee as speech, quote, as an employee for constitutional purposes.

THE COURT: Is there a difference between the speech if it is religious in nature? The trip wire is very taut for most speech that does not have a religious overtone, because we guard our liberties jealously for political discussion and the like. But there is a push me/pull you on religion. It is the uprights.

It is not Scylla, it is not Charybdis. I mean, we don't need a geography test for the Italian peninsula and Sicily, just the goalposts. You've got to thread the needle, so to speak, between establishment and free exercise.

And that, I think, makes the trip wire a little slack. How do you respond to that?

MS. RICKETTS: Respectfully, we would submit that for purposes of the prong two inquiry, under *Eng*, which looks at whether he is speaking as a citizen or as an employee, we do not think the religious content matters for purposes of that analysis.

Now, your Honor is certainly correct that when we get to prong four, which is where the district bears the

burden to show an adequate justification for its actions, then you're absolutely right that the Establishment Clause comes squarely into play, and in fact that is the only justification that the district has offered here for its adverse actions against Coach Kennedy.

It has abandoned the argument that it failed to supervise, and said solely that its adverse actions were required in order to violate the Establishment Clause.

So with your Honor's permission, I will skip to that step. The controlling test is *Sante Fe*, your Honor. And the question under *Sante Fe* is what the reasonable observer would understand given the facts and the context.

So what would the reasonable observer understand here? He would see Coach Kennedy take a knee at midfield for 15 to 30 seconds. At most, your Honor, the reasonable observer would draw the conclusion that he is engaged in a personal moment of silence.

Now, that is completely different—completely different facts from the district's other cases, which involve public employees who actively encourage, actively orchestrate student religious expression.

By the district's own admission—

THE COURT: Nobody orchestrated that gaggle of press and everyone around? I saw the pictures.

MS. RICKETTS: Your Honor, it is a great point, and I'm glad you raised the picture. The picture that is in the record of the coach surrounded by players was taken following the October 16th game. The district

puts forward this picture as evidence its Establishment Clause concerns are justified.

What the district does not tell you, following the October 16th game Coach Kennedy intentionally waited until the Bremerton students had finished their handshakes, were walking towards the stands, and were engaged in their post-game fight song. It was at that moment that he intentionally waited to drop to his knee, close his eyes, and engage in a personal prayer.

So the players that you see gathered around Coach Kennedy in that photo are not Bremerton players. They are Centralia players who gathered around him at a point in time where his eyes were closed, his head was bowed.

According to his sworn declaration, and the district does not dispute this, he had nothing to do with orchestrating that event.

In fact, the only reason, your Honor, that event occurred is because the district in prior weeks had taken very public actions to try to stamp out Coach Kennedy's religious expression.

So for the district to cite the controversy that it created as a justification for its adverse actions against Coach Kennedy, candidly, your Honor, we think that argument is perverse. That is not the relevant standard for purposes of the Establishment Clause analysis.

A quick word on *Borden*, your Honor, which is a case that the district cites very prominently. A couple of issues with that holding. Number one, the Third Circuit's analysis in that case actually turns on the

public concern inquiry, which is the one prong of the analysis that the district has fully conceded, as it must, because the Ninth Circuit has adopted a very expansive definition of public concern to incorporate any speech or expression that touches on religion.

The only Establishment Clause discussion that is actually in *Borden* is in dicta that the court admits it need not undertake.

But the most important point about *Borden*, your Honor, is that they are very different facts. The coach in that case had a history of actively encouraging students to participate in official prayer, and he continued to actively encourage that student religious expression, going so far as to email players asking them to participate, asking them to report back to him.

Coach Kennedy has made very clear that the nature of his religious conviction has nothing to do with engaging in prayer with students. The core of his religious conviction is to simply take a knee following the game and offer a prayer of thanks.

The district can point to no authority, your Honor, for the proposition that a 15- to 30-second silent prayer constitutes a state endorsement of religion. And that's because no federal court has endorsed, in our view, such an extreme and expansive understanding of the Establishment Clause.

The clear impact, we think, of the district's view would be to strip public employees of all First Amendment rights to engage in any visible religious conduct while they are on duty. The law simply does not support that conclusion.

THE COURT: How about if we hear from Mr. Tierney. You will have every opportunity—you will get multiple opportunities to take the floor and counter their argument. I get your basic argument. I want to hear Mr. Tierney and the district, and then you can come back. You will be up many times.

MS. RICKETTS: Thank you, your Honor.

MR. TIERNEY: Good morning, your Honor. So I don't have to try to say everything I want to say in ten minutes?

THE COURT: Right. There are no time limits here. Just in Seattle.

MR. TIERNEY: There's not a trapdoor that is going to open?

What I want to do is go back and start at what I think the logical prior steps are. But if you have some question, obviously you will direct me to it, and I will be happy to jump ahead.

THE COURT: You glean from my question, my big focus is on step two of the *Pickering* test. I am stuck on that. But I don't want to curtail your remarks.

MR. TIERNEY: I would still like to go back, because I think they illuminate what those questions will be later on.

The first question here is—This is a motion for preliminary injunction. We are arguing that it is a mandatory preliminary injunction. And the plaintiff's response has been, well, it is not really mandatory, we are just going back to the last peaceable status. And they say they want to go back to the status that was in existence for eight years. And that's out of their reply brief.

That status was clearly unconstitutional. I don't know that they really mean to say they want to go back to that status, but all we can do in a motion for preliminary injunction is examine what it is that the plaintiff is asking for and what sort of facts they have put before the court. And what they say they are asking for is, return to the status of eight years before.

Now, in that status of eight years before, the practice was Mr. Kennedy would lead prayers in the locker room prior to a game, and then after a game he would meet at the midfield, and players from his team, and possibly players from another team, and give basically a congratulation speech, with references to God. And he conceded in the district—and this is in the district's letter of September 17, that that constituted a prayer.

What they are asking to reinstate is the regime that consisted of Mr. Kennedy leading prayers in the locker room before the game, and leading verbal prayers with the team after the game.

So when we look at all of these steps in the test—all of the things that proceed farther down the line, we have to look at it in view of what they are actually asking for. I have my doubts that is really what they are asking for.

I want to illustrate what I think went on here—not that I think, that I know went on—with the timeline. Your Honor, it is Tab 3. For eight years there was a practice that clearly violated the Constitution. It came to the district's attention. And so, obviously, the district isn't aggressively trying to search out prayer and persecute Christians or anyone else. Had meetings with Mr. Kennedy, and he agreed to

abandon that practice, to not pray before games and to not pray after games. Now, that is the last peaceable status between the parties.

He made an agreement with the district. That agreement he honored for a month. And then his lawyers sent a letter saying he is going to pray at midfield, and you can't stop the students from joining him.

Now, I believe that is the regime they want to put in place. But that is not the last peaceable status. And there are several problems with it in the context of a motion for a preliminary injunction that I don't believe this court can get over the hurdles on.

I will start with, what was the agreement that Mr. Kennedy made? It is in a contract. And this is Tab 13. I am going to put it up here. Mr. Kennedy signed a contract with the district after the district told him stop praying before games and stop praying after games, and after he agreed that he would not do that. That contract is signed October 5th of 2015.

So the last peaceable status between the parties—

And I want to point out, this contract states under one of the bullet points, "Have read and understand all policies and procedures." So we have a pretty visible issue that has been discussed in the district. We have meetings between the superintendent and Mr. Kennedy. We have him agreeing to stop praying with the team before games and after games. And then we have him execute a written contract that says he has understood the policies.

THE COURT: The school district is not seeking to bar him from praying before or after the game, or during the game, or at any time, are you?

MR. TIERNEY: Do you mean outside his capacity as a coach?

THE COURT: He can say a prayer to himself?

MR. TIERNEY: Nobody would know if he was praying.

THE COURT: Joe Garagiola, he would make the sign of the cross in the dirt with his bat, and Yogi Berra would walk over and erase Garagiola's cross and say, "Let's let God watch this one." That was a humorous way to lighten the moment.

Anybody can pray at any moment. You can say a prayer right now silently. You are not contending that you want to bar him from doing that?

MR. TIERNEY: No. In fact, your Honor, the district was only concerned with demonstrative prayer around the students, that reflected on his role as a coach with the students.

THE COURT: So we are using that shorthand version for that construct—

MR. TIERNEY: Most of the prayers that people do—You know, you didn't see me praying at the table here beforehand. Most of the prayers people do, nobody can see and nobody can have any concern with.

But a coach's prayer, or a teacher's, when they are with the students in a role is a different animal. That is what we are addressing. That's what Mr. Kennedy agreed to stop doing.

The district offered other places for him to engage in a prayer if he wanted to. The district didn't oppose his prayer.

The only issue is basically what I call the time and place issue: When can you do that? When can that be acceptable? It was fine for a while until he insisted that he would be able to do it on the district's field, under the lights, when he wanted to do it, and the district couldn't say anything about it, and couldn't stop the students from joining him.

I believe that's the regime they want to put back in place. But that is a modification of the contract that would have been renewed if he had agreed to the same contract. He never applied. He never said, "Renew my contract," because he didn't want that contract anymore. He wanted a different contract.

He is asking the court to write a different contract for him that the parties had never agreed upon. That is a mandatory injunction. That requires the district to do something it had not done before. It is not putting back in place any sort of status quo.

The other problem with it, as long as we are talking about mandatory injunction, is that even if he were correct on his argument that, "Well, in that moment I'm not a public employee, I'm not a school district employee or coach, I am a private citizen," that doesn't advance him anywhere, because if he is a private citizen he is subject to the same rules that govern all the other private citizens sitting in the stand. They are not allowed to go on the field and use it as a forum for speech. They are not allowed to have a religious demonstration out there.

That is something that turned into an issue later on when we had this—and I submitted the photo, because I think it is kind of scary, we had the Satanist group show up and say, “We want to use the field, too.”

He becomes a private citizen—If he wins his argument, he is a private citizen. But that doesn’t allow him to take over the school’s field at the 50-yard line and then engage in a prayer.

I think it makes no difference, really, as far as what this court can do under a mandatory injunction. You would be writing an order requiring the school district to reform his contract and writing an order requiring the school district to open a public forum on the school property after games. Because if Mr. Kennedy is allowed on the field to engage in free speech, everybody else is going to be allowed on the field to pray under free speech. And they have not established that ground for you.

And that’s what I am talking about, what is before the court in this motion for preliminary injunction. They haven’t even put it before you as to laying out exactly what you have to do. And having not accomplished that, they can’t prevail on that. They haven’t shown us anything that gives you grounds to say it is more likely than not that they will succeed in getting ultimately a decision in this case that requires the school district to open a public forum. It hasn’t even been discussed, but that is the consequence of what they are asking for.

I mean, we are not going to do it, obviously. We are going to keep talking. But I think that ends the inquiry here in the injunction. Now, maybe we would talk more if we were at summary judgment. If the

mission at this hearing is to get the court to issue a mandatory injunction, they have failed in that mission.

I want to point out one other thing on a mandatory injunction. We talked about it changing the standard to producing a clear likelihood of success on the merits.

But the other effect of it—And it is in that very same case, the *Marlyn Nutraceuticals* case, is that it changes the irreparable harm standard. The irreparable harm standard says only extreme or very serious damage will result. Again, that is a heightened standard from a prohibitive injunction.

The next what I consider logical prior step is with respect to the elements for a Section 1983 action. And these are built on what we just talked about here, that in order to prevail on a Section 1983 action the plaintiffs have to show that there was a school district policy that inflicted the harm that he is complaining of. But the harm that he is complaining of is a contract and an agreement he made to stop praying before and after games.

All of the coaches' positions were open at the end of the season. They were all open for application. He didn't apply. Three other coaches didn't apply. The school district hired a new head coach. The head coach participated in the hiring of other assistants, and all the positions were filled. There was no application by Mr. Kennedy for a renewal of his contract.

So no school district employee, much less a policymaker, ever denied Mr. Kennedy a renewal of the October 5th contract, the contract that he had signed that said, "I won't pray before or after games."

That's what he would have been entitled to if he had actually applied for a job for 2016.

So in the absence of a policymaker—And that job for 2016 is at the core of what they are asking the court to do, "Exercise your injunctive powers on my 1983 claim." But if there is no policymaker, there is no Section 1983 claim, and we don't have a basis for federal jurisdiction to be exercised with respect to the 2016 coaching roster. I believe it goes to the court's jurisdiction. It certainly goes to the viability of any Section 1983 claim regarding the renewal of his contract.

He doesn't want the contract he had.

I think those should stop the inquiry at this point, especially when the standard is clear likelihood of success on the merits. I don't see any chance of showing policymaker involvement in not renewing a contract that he didn't ask to renew.

But is it ever going to get to clear likelihood of success on the merits? They basically refused to address that point, and simply say, "Well, it would have been futile."

And here's where I go back to what I started out with: Let's look at what we have in front of us for this motion. What we have in front of us is Mr. Kennedy's testimony that, "I was suspended, then they gave me a bad review, then they fired me." That's the testimony that is before the court. And it hasn't been changed.

"Suspending and then firing me from my job," that's what the allegation is. That's what the court has before it to deal with.

From the complaint it says, "In January 2016, Coach Kennedy's contract was not renewed." So they are alleging that something affirmative happened in January of 2016. That's what the basis for the preliminary injunction is. But that was established by the witness, by the party.

Now what we have is the lawyers attempting to backfill, provide their own testimony, change those facts. They say, "Well, it was futile. He was discouraged from applying because of what happened." That's testimony by a lawyer. That isn't what was submitted to the court as a basis for you to exercise your injunctive powers, any more than my testimony, if I were to say, "Well, that is not really what happened. He knew that they would renew the contract, but on the grounds of the one that they signed." I am testifying to that. That isn't the basis of a motion.

So what is the basis that this court has—what has been factually submitted to this court that says there was a policymaker that did something wrong with respect to renewing a contract for 2016? They have nothing.

They have an allegation by the plaintiff that, "They fired me," that something happened in January 2016. We've got the school district saying, "He never even applied. The positions were all open. We filled them with someone else." At best, that's a disputed fact. That is not a clear basis for exercise of your injunctive powers.

Now we are getting to what you wanted to get to. I think what I said before will illuminate this public-employee/private-citizen issue. The contract that

Mr. Kennedy signed, and I will try to cut to the chase a little more, if you read it all, he is going to be a coach, mentor, and a role model.

THE COURT: Right.

MR. TIERNEY: He is going to "exhibit sportsmanlike conduct at all times," not just the times of his choosing.

"Positive motivational strategies."

Underneath the bold, where it says, "Always approach officials with composure. I understand that I am constantly being observed by others." And that goes to the core of his role. And that is what is at the core of the court's Ninth Circuit ruling in *Johnson versus Poway Unified School District*.

What the court said there was a teacher doesn't stop being a teacher when he steps outside of the classroom, a coach doesn't stop being a coach when the whistle blows. He is always being observed. So when the coach is out there on the field, he is being observed as a coach.

What the *Johnson* court said—in this last one here, "Understand that the athletics program is an integral part of the total educational process."

What the court said in *Johnson* is—basically asking the question, what does a teacher sell to the school district? What the teacher sells to the school district is the teacher's expressions. And it cited cases from other circuits.

And there is nothing remarkable about that. That's what teaching is. That's what education is, you put young people together with older people. And having myself been a coach, been coached, and

watched my son being coached, I know that a coach in most situations—Not most. I don't want to be anti-education. But the *Johnson* case dealt with a calculus teacher. Now in the life of a teenage boy, who is the more towering figure, his football coach or his calculus teacher? It is going to be his football coach. They can be monumental figures in a kid's life.

What the district contracts for when it hires a coach is all of your expressions are relevant to what you are doing with our students: We are buying every bit of your behavior while you're around the students, because they are always watching you. You are very important, and everything you do is important to us.

So what the Johnson court says, basically, is everything that is expressed by a teacher is his job duties. There isn't some seam in there. There isn't some break when he is around the students.

If he goes in the teachers' lounge and he talks to other teachers, that is a different matter. If he is engaged in some totally different thing—As the court said about the teacher, if he is running errands or doing something else for the school district, that is a different matter. But if he is 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.

THE COURT: I wrote and delivered a speech on civility, comportment, and the theme was "Everything I needed to know about civility I learned from baseball." That, it seems to me, is appropriate now. Coach Kennedy is a very, very good man, who teaches

powerful lessons to young men. But it is a two-edged sword, because he is a coach. He is "Coach."

I played baseball. I had two tryouts for the pros. I love baseball. I would walk through a wall for my coaches. In many ways it is outcome determinative. I love his sentiment enunciated at the center of the field. That is powerful stuff.

In a different era, it would have been acceptable and universally applauded—or almost universally. That is not the law that we have before us. That's my quandary.

MR. TIERNEY: And I couldn't agree more, your Honor. If you read the district's letters, that is the tenor of what the district is saying. We are almost basically begging, saying, "Look, do the wonderful stuff that you do, but let's work something out with the prayer." And they thought they had it worked out. And then he said, "No, you don't."

That puts the district in an extremely difficult position, that I would rather not have, of course. As you said, in the day and age we live in, if it is going to allow a demonstrative prayer at midfield, it is going to have to open a public forum to allow other people to speak what they want to speak.

THE COURT: I delivered the invocation at my graduation ceremony. Enough said. In my life and in my perception of tradition and faith, that was a good thing. But we are a diverse—a more diverse community, and the goalposts narrow. That's what we are wrestling with here.

MR. TIERNEY: And I agree, your Honor. I think it is worthy at this point—worthwhile to emphasize we

are not here on a motion for summary judgment. We are not here to decide the ultimate merits. We are here to decide whether you are going to issue that kind of order or what it will be going forward.

I feel like I have used up enough time.

THE COURT: You will have another shot. Ms. Ricketts, do you want to come back up and respond to what you have heard so far?

MS. RICKETTS: Yes, your Honor. A couple of points, your Honor. I will start at the end and back up and address the standard.

On the subject of whether his speech—whether Coach Kennedy's speech is as a citizen or as an employee, that is the step two inquiry that your Honor alluded to earlier. The district just told you that it is, quote, buying every bit of his behavior, and that every bit of it is subject to district control.

So the district is not backing off on its temporal bright-line rule. They are doubling down on a rule that says on-duty public employees cannot engage in any form of visible religious conduct. The problem with that, your Honor, is that it is squarely contradicted both by the Supreme Court and by Ninth Circuit precedent.

The Ninth Circuit in *Dahlia* made clear to caution courts not to determine whether you act pursuant to your official duties based on whether the views were expressed inside the office or not. So the question is not whether you're on duty or off duty, the inquiry is to look—

THE COURT: It is under the totality of the circumstances. If you're at a table in the cafeteria, and

you are invoking the Lord's blessing for the food, that's a different question than with all the accoutrements, all of the attention, all of the authority, by virtue of his coachhood, that's a different question from my perspective.

MS. RICKETTS: Respectfully, your Honor, we would disagree. The rule that the district has articulated and the rule that the district punished Coach Kennedy for violating was engagement in demonstrative religious conduct.

That equally prohibits the teacher who is sitting alone in the cafeteria and silently bows her head. It would prohibit any coach, any teacher from wearing a head scarf, from wearing a cross, from making the sign of the cross. Those are all visible religious expressions, your Honor.

And *Dahlia* and *Lane* squarely instruct the court to look not at whether you are on duty or off duty, but whether the speech is within or without the scope of the employment duties. The district, your Honor, has made no attempt to engage that test at all. They failed even to cite *Lane versus Franks*, which is the controlling test, in their response brief.

The district points to *Poway—Johnson versus Poway*. We think *Poway* is a great case for us. *Poway* illustrates how different the facts would have to be in order to find in favor of the district.

The teacher in that case engaged in religious expression in the classroom, hanging gigantic banners with religious expression. And the court—There were fact findings in that case that he had taken advantage of his position in order to press his religious views onto a captive audience of students.

Courts have consistently treated cases inside the classroom as wholly other, because in that context there is a captive audience of students who are forced to listen to whatever expression the teacher comes forward with. That is not this case, your Honor.

THE COURT: Were you an athlete?

MS. RICKETTS: Not a very good one, your Honor.

THE COURT: It is not a good or a bad. If you are an athlete, you are impressionable, and you are respectful, and you want to please your coach to get more playing time, to shine, to do whatever. That's a subtle coercion. It is called stigma. Stigma has a very laudatory role in society without rules, regulations, and all that, and dogma. The Golden Rule is about stigma, treat me the way you want to be treated.

There is coercion, albeit perhaps loving, kind, inspiring. It is coercion nonetheless, from my perspective.

MS. RICKETTS: Respectfully, your Honor, we disagree, and we think the cases disagree as well.

First of all, on the facts, the district has expressly stated that no students were ever coerced, were ever required, were even actively encouraged to participate in any religious conduct.

MR. TIERNEY: Your Honor, I would have to object. This is a Rule 106 objection. That is misquoting. And I would like to—

THE COURT: Put it on the record. Overruled.

MS. RICKETTS: I will have you look at the statements in context, as well, your Honor.

The more important point, I think, here, is that the Ninth Circuit has instructed what the remedy is in the event of any confusion. Because the courts are sensitive to exactly this concern that your Honor is raising, students are impressionable.

Even, let's say, in the context of a 15- to 30-second silent prayer, your Honor, we don't think there is any uncertainty about what a reasonable observer would understand in that situation.

But even if there was, the Ninth Circuit has said the district has two remedies: First of all, it can issue a disclaimer, making clear that the private speech is not the speech of the state. That's *Prince v. Jacoby*.

Second of all, your Honor, the Ninth Circuit has stated over and over that the role of the school is to educate the students, educate the community that the school does not endorse all speech that it fails to prohibit. That's the *Hills* case, which is cited in our brief, at Page 20.

The Ninth Circuit has made abundantly clear that the desirable approach here is not to suppress the speech, but instead for the school to simply make clear that private speech and government speech are separate.

A couple of points, your Honor, on the standard, if I may?

THE COURT: Yes.

MS. RICKETTS: First of all, your Honor, the district has misconstrued what is the last peaceable state of affairs. Of course Coach Kennedy is not seeking to pray with students. He is not seeking to engage in any sort of religious conduct with students.

He has made that abundantly clear, and the district itself has conceded that he complied with all directives not to intentionally involve students in his religious expression.

Instead, your Honor, the last peaceable state of affairs is one before the district announced its blanket ban on demonstrative religious conduct. That is essentially rewinding the clock to September 2015.

The injunction that Coach Kennedy seeks here is simply to preserve that state of affairs. The relevant metric for that state of affairs is what the district's policy was before it announced this, in our view, baldly unconstitutional rule.

The *Brewer* case, which is a Ninth Circuit 2014 opinion, makes clear that's how the analysis proceeds for purposes of determining whether something is a mandatory or prohibitory injunction.

Candidly, your Honor, ultimately the label does not matter, because courts order reinstatement even when that remedy is construed as mandatory. And that's because the remedy of reinstatement is not just an available remedy here, it is actually the preferred remedy in cases of First Amendment retaliatory discharge.

Courts have said that you are only to order monetary damages, which Coach Kennedy does not even seek, if there is some reason specific to the workplace why reinstatement would be inappropriate.

The district has obviously pointed to no such reason why reinstatement would be inappropriate here. So I would argue reinstatement is fully available

to the court, and in fact it is the preferred remedy in this case.

The notion that the characterization of the injunction as mandatory, which we disagree with, should be dispositive, we simply disagree.

Next, your Honor, the district points to and relies heavily upon Coach Kennedy's alleged failure to reapply for a position in the 2016 season.

It is interesting that the district thinks that it can escape liability on these grounds, for a couple of reasons: First of all, the district made clear when it suspended Coach Kennedy that he was prohibited from participating in any capacity in the BHS football program unless and until he agreed to the district's rules.

THE COURT: Ms. Ricketts, I am persuaded that the district acted under color of law. My question is, is there a violation of a constitutional right under the *Pickering* test? I am not looking at the mandatory and prohibitory injunction anymore. The standards, it makes no difference to me. The clearly—

MS. RICKETTS: We agree, your Honor.

THE COURT: 1983, it is all about whether there is a constitutional right. You drill down to the *Pickering* test. The second standard—And he is a teacher. He is a coach. Explain *Lane* to me, that it alters the analysis of religious speech. Not just free speech, but religiously-oriented free speech.

MS. RICKETTS: Your Honor, we would say that *Lane*, as affirmed by *Coomes*, as well as *Dahlia*, which is the Ninth Circuit en banc opinion, all of those cases stand for the proposition that there can be no bright-

line rule between when you are on duty and when you are off duty. That is not the relevant line in the sand.

Instead, what we have to do is say—the courts are instructed to undertake a fact-specific analysis to look at what are Coach Kennedy's responsibilities, and look at whether the speech is ordinarily a part of those job responsibilities.

THE COURT: Yeah. After the analysis of the facts, it is an issue of law. It is a question of law.

MS. RICKETTS: That's right. We would submit, your Honor, the prong two inquiry is actually relatively straightforward, simply because the district enunciates the wrong test.

What the district wants to do is take *Poway* and construe *Poway* as creating a bright-line temporal rule that applies to all public employees. First of all, I think that—

THE COURT: There is no bright-line test in my horizon on this issue. I've had three or four or five religious freedom cases. I seem to get all of them. They all stand on the facts presented before me. When I finish a case, I shred everything and start over, because there is no efficient way to try a case from a trial lawyer's perspective or from a judge's perspective.

Under these circumstances I evaluate what—I know a lot about coaching. I coached my sons. They are revered to men and women, boys and girls. That's one of the great advances in our culture, the equality of women and girls to compete, and learn the skills of competition. With all due respect, the coach is more important to the athlete than the principal.

MS. RICKETTS: In the life of students on a daily basis, we agree. Again, with no offense, Coach Kennedy, everyone, I think, agrees, has had a tremendous impact on the lives of these students. And he is currently, candidly, your Honor, in agony, not being able to participate in those relationships with those players that he built up over time. There are a number of seniors currently on the roster. He is not able to be on the sidelines coaching them through their final season. That itself, we would argue, is irreparable.

But, your Honor, we are sensitive to the fact that it would be attractive, it would be easier if the court in *Lane,* or *Garcetti,* or *Dahlia* had articulated a clear rule that said when you're on the clock, you speak only as a public employee; when you're off the clock, you don't. But that's not what the courts do.

Instead, we have to look at the employment responsibilities that the district has articulated. And respectfully, your Honor, they have nothing to do with the religious expressions he is engaged in.

THE COURT: But all the other cases, the free speech cases, are preferential in favor of free speech. Not so much on the religious. It has gotten much narrower because of the Establishment Clause. And that has become—Justice Sotomayor, if she had described the response in a religious speech case, I would follow it.

MS. RICKETTS: To the extent, your Honor—

Well, I will say that we wholeheartedly agree, that current Establishment Clause jurisprudence is not a model of clarity, by any means. However, it is clear, we think, that *Sante Fe* is the test. *Sante Fe* instructs

the court to look at what the reasonable observer would understand.

What the reasonable observer sees here is Coach Kennedy kneeling at midfield for a period of 10 to 15 seconds. Your Honor, even the district in its own answer says that it does not know whether Coach Kennedy was engaged in prayer in that length of time during that October 16th game. How can there be a violation of the Establishment Clause if the district does not itself know whether any religious expression was happening at all? It just doesn't make sense.

A couple of points, just quickly, your Honor, to touch on failure to reapply. As I mentioned earlier, the district made very clear that Coach Kennedy was to have no subsequent involvement in the football program until he agreed to the district's rule.

We now know from the papers that the district has filed in this court that the district adhered to that same view in its filings before the EEOC, and indeed it continues to adhere to that view today.

So to claim that any intervening action by Coach Kennedy would in any way have changed the result, we think, your Honor, is simply meritless. The law does not require futile action by a party.

But there is a second problem with the failure to reapply, your Honor. The Supreme Court in *Connick* made clear that the state cannot condition public employments on a basis that infringes freedom of expression. That is exactly what the district has done here. This whole notion that an intervening cause from Coach Kennedy's failure to comply, candidly, your Honor, we think that argument just doesn't work.

A couple of additional points that counsel raised. One related to the Satanists. We are by no means asking the district to endorse a rule that would require groups that clearly seek to disrupt or create a disturbance onto the field. The district has ample tools at its disposal to deal with those people. And those sorts of hypotheticals, we think, have no bearing here.

Finally, your Honor, the issue of *Monell*, which your Honor already alluded to, certainly is not a jurisdiction issue. We think there can be no plausible dispute that the district acted in its official capacity, official correspondence, official policymaker, official suspension.

THE COURT: Thank you, Ms. Ricketts. Mr. Tierney, do you want to say anything about *Lane*? If you want to say something about anything else, you have the votes, you don't need to speak.

MR. TIERNEY: I will just talk about *Lane*, your Honor. The problem with that discussion, your Honor, first of all, it mischaracterizes *Lane*, but most of all it mischaracterizes what the district is saying.

The district isn't saying that all public employees are subject to a temporal test that says if they are at work they are therefore speaking as public employees. We don't say anything of the sort. We don't come close to saying anything of the sort.

I would call it a straw man, except a straw man is even stronger than that. It is a ridiculous argument. It is a ridiculous argument for anybody to think that a party could make, that there is some rule that says all public employees while they are at work necessarily speak as public employees. That is not what the case law is about. We don't say that.

What we draw from *Johnson* is much more specific and much more varied. *Johnson* doesn't deal with all public employees. It only deals with the school context.

It takes pains—It is a long opinion. It refers to circuit court rulings from other districts, and draws on all of those principles, to describe what is it about the school environment that is unique, and what is it about the factual basis of what teachers do, and then it draws the conclusions from it.

And I will put the conclusions up here. This isn't a temporal test. It says, "Teachers necessarily"—this is the rule in this case, "A teacher necessarily acts as a teacher for purposes of a *Pickering* inquiry," one, "when at school or a school function"; two, "in the general presence of students"; three, "in a capacity one might reasonably view as official."

There are at least three components there. It's not a temporal test. It doesn't say from the minute they walk in the door until they go. It says, "If you are in school or at a school function." That is sort of a temporal test, but it is also a location test. And then, even more specific, "In the general presence of students." So it doesn't address anything that teachers do outside of the presence of students.

And then, finally, even more leeway for a teacher, "In a capacity one might reasonably view as official." There is a difference between the teacher at the basketball game who is keeping score, or he is standing in front of the crowd to keep people from running on the court, or something like that. That is a capacity you might reasonably view as official.

But if a teacher is sitting up in the stands watching a game, I think *Johnson* would say that teacher isn't necessarily acting in the capacity as a teacher. That is the test that we are applying.

There is no bright-line test here. There is a lot of room for nuance. There is a lot of different elements to it.

But if you take that, I think, under any generous reading even, for the plaintiff, each of these factors applies to his role when is he out in the middle of the field with the students—the players. They do the handshake line, which we never did when I was a player. But they do that now. They still have to watch the students then. Honestly, as a lacrosse coach, I will tell you, fights break out then sometimes, and we really had to watch it.

He's got his coaching gear on, he's got his students around him, clearly in an official capacity. That is a difference. It is not saying every single second, anything he says, we have this bright-line rule that wraps the whole package up. We are not saying that at all. What we are saying is that these factors apply squarely to the situation we are talking about.

I just have to briefly address that picture. I want to put this picture up, your Honor. When we are talking about the Establishment Clause issue—The top picture is the one we submitted with the motion. This bottom picture is—If you pull out the Ninth Circuit—the Third Circuit opinion, this is in there. This is what the Third Circuit said is a violation of the Establishment Clause.

Now, it didn't have the *Johnson versus Poway* test to apply. But if you read the reasoning of that case, it

applies. That case was cited by—I believe that case was cited by the—I might be thinking of *Doe versus Duncanville*, which was another coaching case, holding hands at midcourt. Those cases were cited by the *Johnson* court.

This bottom picture was found to be a violation of the Establishment Clause.

The top picture, they say, "Well, all he wants to do is kneel on his own at the 50-yard line." But in the same letter that says he is going to do that, it says, "Don't you dare do anything to stop the students from joining him."

The school can't, and doesn't want to, stop students from praying. If the students want to pray, they are entitled to pray.

So how does the school manage that situation, where a prayer circle with a coach in the middle of it is a violation of the Establishment Clause, but we can't stop the students from praying? We don't want to stop the students from praying. The only way they manage that is to say to the coach, "We are going to ask you to do your prayer somewhere else."

THE COURT: Thank you, Mr. Tierney.

MR. TIERNEY: You're welcome, your Honor.

THE COURT: Ms. Ricketts, any final thoughts?

MS. RICKETTS: Two points, very briefly, your Honor.

THE COURT: Thank you.

MS. RICKETTS: Your Honor, first, the step two inquiry, the district continues to run from *Lane*, continues to run from *Dahlia*. Both of those cases are

after *Johnson versus Poway*. Those are the controlling cases in this circuit.

But the district on one hand says, “We are not announcing a bright-line rule,” on the other hand they are crafting such a rule with respect to public school employees.

Under the district’s rule that’s announced and that’s applied against Coach Kennedy, visible religious conduct that may be observed by a student is prohibited. And respectfully, your Honor, that is just not what *Lane* and *Dahlia* permit. That is not the relevant analysis.

Here is what happened in *Poway:* The teacher in that case took advantage of his position to press his particular views upon the impressionable and captive minds before him. The court leaned heavily on the classroom context, the captive audience of students that were there. There is no classroom, there is no captive audience here.

Second, your Honor, briefly, as to *Borden*, the district wants to look at the eight-year history here and claim that is a factor in their favor. In fact, it is quite the opposite, your Honor. The district was wholly unaware of Coach Kennedy’s religious expression for the first eight years of his tenure as a coach. That is how unobtrusive the religious expression is here.

What the district wants to do is claim the media attention resulting from the controversy it created, and say that creates an Establishment Clause violation.

Your Honor, that is simply not what is at issue. All that Coach Kennedy wants to do is take a knee at midfield for 15 to 30 seconds, for what is effectively a personal moment of silence. There is no federal court that should prohibit that religious expression. Thank you.

THE COURT: Thank you, Ms. Ricketts. First, I want to thank all participants for the written materials and the oral presentations that were made here today.

This is one of those cases that make you want to be a lawyer, to argue and deal with complex, sensitive issues in a public way. That's why I wanted to be a lawyer. I suspect that many of you feel the same way.

I am going to deny the motion for preliminary injunction. I am satisfied that under the 1983 elements for injunctive relief that the district did act under color of law, but they did not violate the constitutional right of free speech violation determined by *Pickering*.

The five elements or tests under *Pickering:* One, whether the plaintiff spoke on a matter of public concern: Yes. Two, whether the plaintiff spoke as a private citizen as opposed to a public employee: No. Three, whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action: Yes. Four, whether the state had an adequate justification for treating the employee differently from other members of the general public: Yes. Five, whether the state would have taken the adverse employment action even absent the protected speech: No. This is the reason that Coach Kennedy is no longer coaching for Bremerton.

He had a great opportunity, a great job, to influence young people. Most coaches would coach for free. Not the big coaching jobs at the university and all that, but the workaday coaches get a stipend, and it is not much. It is because they love the kids, they love the sport, they love the competition.

Coach Kennedy was dressed in school colors. He chose a time and event when the season is ten games, or nine games. It is one-tenth of the excitement for the students for that semester. It is a big deal. Under the lights. He used that opportunity to convey his religious views, as laudable as they were.

He was still in charge. He was still on the job. He was still responsible for the conduct of his students, his team. It is not a debatable point, from my perspective, that he was a private citizens as opposed to a public employee. He was on the job, as he would have wanted to be. And a reasonable observer, in my judgment, would have seen him as a coach, participating, in fact leading an orchestrated session of faith, of thanks, of fellowship. All those things are laudable. They just can't be happening on public property in this climate under the law.

For those reasons the preliminary injunction is denied, and I make no finding of mandatory versus prohibitory injunction. I am just focusing on Coach Kennedy's role as coach as determinative of this issue.

All right. Have a great week. Court will be at recess.

(Proceedings concluded.)

Appendix C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
TACOMA DIVISION

No. CV16-5694RBL

JOSEPH A. KENNEDY,
Plaintiff,
v.
BREMERTON SCHOOL DISTRICT,
Defendant.

RELEVANT DOCKET ENTRY

Date Filed	#	Docket Text
* * *		
09/19/2016	25	MINUTE ENTRY for proceedings held before Judge Ronald B. Leighton- Dep Clerk: *Jean Boring*; Pla Counsel: *Rebekah Ricketts, Jeffrey Helsdon, Michael Berry, Anthony Ferate*; Def Counsel: *Michael Tierney*; CR: *Barry Fanning*; **Preliminary Injunction Hearing** held on 9/19/2016. Argument presented. For the reasons orally stated on the record, the 15 MOTION for Preliminary Injunction is DENIED. Hearing concluded. (JAB) (Entered: 09/19/2016.
* * *		

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-35801

JOSEPH A. KENNEDY,

Plaintiff-Appellant,

v.

BREMERTON SCHOOL DISTRICT,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Washington

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Filed: January 25, 2018

Before: Dorothy W. Nelson, Milan D. Smith, Jr., and Morgan Christen, Circuit Judges.

ORDER

Judges M. Smith and Christen have voted to deny the petition for rehearing en banc, and Judge Nelson so recommends. A judge of the court called for a vote on the petition for rehearing en banc. A vote was taken, and a majority of the non-recused active judges of the court failed to vote for en banc rehearing. Fed.

R. App. P. 35(f). The petition for rehearing en banc is DENIED.

Appendix E

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.