No. 18-12

In the Supreme Court of the United States

JOSEPH A. KENNEDY,

Petitioner,

v.

BREMERTON SCHOOL DISTRICT,

Respondent.

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

For years, petitioner led the students on the Bremerton High School football teams in prayer and delivered religious speeches to them. When the School District's Superintendent found out, he directed petitioner to stop, both to respect the religious freedom of all students and their families and to avoid liability for violating their constitutional rights.

Although initially complying, petitioner later resumed kneeling in prayer on the 50-yard-line immediately after games, in school attire, surrounded by students; and he refused the District's offers to accommodate his religious exercise by allowing him to pray either at midfield after the students left or anywhere else at school without students and spectators. Petitioner was thus placed on administrative leave for the rest of the season, and he did not reapply for the term position as a coach the next year.

Instead, he sued, alleging that his midfield prayer surrounded by students and spectators was private, and claiming First Amendment and Title VII violations. The courts below determined on these specific facts that petitioner's practice was not private speech but official action as a public-school coach whose job was to model proper behavior for his students.

The petition elides the facts and the fact-specific analyses of the courts below, instead posing the inapposite (and easily answered) question whether public-school teachers and coaches have any First Amendment rights at all. Of course they do.

The question actually presented is:

Whether, in the factual setting of this case, petitioner offered his midfield prayer in his capacity as a public-school coach.

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CONSTITUTION

BRIEF FOR THE RESPONDENT IN OPPOSITION

This case concerns whether a public school district has legal authority to direct the conduct of one of its football coaches when that coach is performing his official duties and supervising students at an official school event, on campus, and when the school district reasonably believes that the coach's conduct violates the constitutional rights of students and their families.

The district court and the court of appeals reviewed all the facts and circumstances of petitioner's actions in light of his job responsibilities as a public-school coach and his long history of holding team prayer. And both the district court and the court of appeals, in a unanimous opinion, concluded that respondent Bremerton School District had lawful authority to direct petitioner in the performance of his job duties, and that petitioner did not have private free-speech rights to disobey those instructions.

Identifying neither a departure from this Court's prior decisions nor any circuit split, the petition instead mischaracterizes the court of appeals' fact-bound (and clearly correct) decision as instead "deploying a sweeping categorical rule" (Pet. 30) to strip public-school teachers and coaches of all First Amendment rights. Petitioner thus asks this Court to review a legal question that the case does not present.

STATEMENT

1. Petitioner is a former football coach at Bremerton High School in Bremerton, Washington. Pet. App. 2. He was hired to a one-year term position as an assistant coach in 2008 and reapplied and was rehired for each of the next seven years. *Ibid.* Throughout his

tenure as a coach, petitioner maintained a practice of leading the students on the football team in prayer before games (*id.* at 3); and he later developed postgame rituals of delivering religious speeches and praying aloud on the field with the Bremerton team and often also with the students on the opposing team (*id.* at 3-4).

The School District first learned of petitioner's team-prayer practice during the 2015 football season. Pet. App. 4. The District therefore opened an investigation, which determined that petitioner's practice violated the District's Policy on Religious-Related Activities and Practices. *Id.* at 4-5. Accordingly, on September 17, 2015, the Superintendent informed petitioner in writing that although teachers and coaches were of course free to pray, they could not do so demonstratively with students. *Id.* at 5-6.

The Superintendent's letter explained the School District's concern that, as a legal matter, "school staff may not indirectly encourage students to engage in religious activity (or discourage them from doing so), or even engage in action that is likely to be perceived as endorsing (or opposing) religion or religious activity." C.A. E.R. 279. The Superintendent enumerated several applications of this requirement and also noted that the listed "parameters may not address every potential scenario." *Id.* at 280. Finally, the Superintendent "encourage[d] [petitioner] to raise any questions [he] may have [had] about these parameters, or scenarios not clearly addressed by them, with [his] supervisors, and also invite[d] [petitioner] to address such questions directly to" the Superintendent. *Ibid.*

At the football game the following day, petitioner altered his long-standing practice: Rather than hold-

ing team prayer before and after the game, he delivered a nonreligious motivational postgame speech to the team; and after the students in his charge went home, he himself prayed on the football field at the fifty-yard line. Pet. App. 6. Petitioner continued this new practice for a few weeks. *Ibid.*

On October 14, however, petitioner's counsel sent a letter to the School District, requesting that petitioner be allowed to "continue" to offer a "private" prayer immediately after the games. Pet. App. 6-7 (quoting letter). Petitioner then publicized through the media his plan to resume the prayers at the football game on October 16; and at that game, petitioner did in fact hold a prayer at midfield immediately after the game, where he was surrounded by players, coaches, other students, and members of the media. *Id.* at 7; see also p. 1a, *infra* (photo). As spectators and media stormed the field to join petitioner, some students in the marching band were knocked to the ground. Pet. App. 7-8. And a Satanist group subsequently contacted the School District, stating that it planned to conduct religious ceremonies on the football field just as petitioner had. *Id.* at 8.

Although under School District rules the public was not permitted onto the field during or after football games (see C.A. E.R. 184), the District was as a practical matter incapable of stopping students and others from taking the field as they had on October 16 (Pet. App. 7). The District thus needed to (and did) arrange for police assistance in preventing similar incidents from occurring at future games. *Id.* at 8.

On October 23, the Superintendent responded to petitioner's counsel, thanking petitioner for his "efforts to comply with the September 17 directives" but explaining that petitioner's conduct at the October 16

game once again violated District policy. Pet. App. 8. The Superintendent "emphasized 'that the District does not prohibit prayer or other religious exercise by employees while on the job,' but 'such exercise must not interfere with the performance of job responsibilities, and must not lead to a perception of District endorsement of religion.'" *Id.* at 8-9 (quoting letter). The Superintendent also explained that "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." *Id.* at 9 (quoting letter).

The Superintendent continued:

> [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 [the School District] 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.

Pet. App. 9-10; C.A. E.R. 290.

The Superintendent then underscored that the School District "can and will" accommodate employees' "religious exercise that would not be perceived as District endorsement, and which does not otherwise interfere with the performance of job duties." Pet. App. 10 (quoting letter). The Superintendent offered petitioner "a private location within the school building, athletic facility or press box * * * for brief religious exercise before and after games," and also solicited from petitioner additional ideas for accommodating his prayer. *Ibid.* And petitioner retained the option of waiting for the students to depart and then praying on the field, as he had after the Superintendent's September 17 letter. *Ibid.*

Petitioner did not respond to the District. Instead, his counsel informed the media that "the only acceptable outcome would be for the District to permit petitioner to pray on the fifty-yard line immediately after games." Pet. App. 10-11. And that is what petitioner did on both October 23 and October 26, kneeling in prayer on the fifty-yard line while on duty as a coach, in his coach's attire, in full view of students and members of the public. *Id.* at 11.

On October 28, the Superintendent notified petitioner that he would be placed on paid administrative leave for violating the Superintendent's explicit directions and the School District's Policy on Religious-Related Activities and Practices. Pet. App. 11. The Superintendent stated that the School District continued to be open to working with and accommodating petitioner (C.A. E.R. 182, 293), while also explaining that

petitioner's "conduct poses a genuine risk that the District will be liable for violating the federal and state constitutional rights of students or others" and that "[f]or this reason" it was necessary to place petitioner on leave (*id.* at 181).

Petitioner remained on paid leave for the rest of the football season, at which time his standard one-year contract of employment expired by its own terms. Pet. App. 13. Petitioner did not apply to be rehired as a coach for the 2016 season. *Ibid.*

2. In August 2016, Petitioner filed suit against the School District, claiming violations of the Free Speech and Free Exercise Clauses of the First Amendment and Title VII of the Civil Rights Act of 1964. C.A. E.R. 46. He moved for a preliminary injunction on his First Amendment claims only, and limited his arguments to the Free Speech Clause. *Id.* at 140.

The U.S. District Court for the Western District of Washington denied the motion. The district court found that, for the prayer practice at issue, petitioner "was dressed in school colors," "[u]nder the lights," "still in charge," "still on the job," and "still responsible for the conduct of his students, his team." Pet. App. 89. "And a reasonable observer," the court continued, "would have seen [petitioner] as a coach, participating, in fact leading an orchestrated session of faith." *Ibid.* Thus, the court rejected petitioner's proffered analogy to prayer by a teacher who is "at a table in the cafeteria, and * * * [is] invoking the Lord's blessing for the food," because petitioner's prayer practice came "with all the accoutrements, all of the attention, all of the authority, by virtue of his coachhood." *Id.* at 74-75.

The district court concluded that there was no Free Speech Clause violation because petitioner's prayer practice entailed speaking as a public employee, not as a private citizen, and also because the School District had authority to regulate petitioner's conduct to ensure that the District did not violate the Establishment Clause. Pet. App. 88. The court explained that it had "no bright-line test in [its] horizon on this issue" (*id.* at 80) but instead considered all the facts and circumstances of petitioner's conduct and the terms and conditions of his employment, noting that public-school educators have "responsibilities well beyond the classroom" (*id.* at 57).

3. Petitioner appealed solely on Free Speech grounds. And the court of appeals unanimously affirmed, on the basis that petitioner "spoke as a public employee, not as a private citizen." Pet. App. 16. The court declined to decide whether the School District also "justifiably restricted [petitioner]'s speech to avoid violating the Establishment Clause." *Ibid.*

The court of appeals first noted that what petitioner was asking to do "involves kneeling and praying on the fifty-yard line *immediately* after games *while in view of students and parents*"—"not, as [petitioner] contends, praying on the fifty-yard line 'silently and alone.'" Pet. App. 23. Noting that petitioner had refused "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," the court recognized that "it is essential [to petitioner] that his speech be delivered in the presence of students and spectators." *Ibid.* Hence, the court concluded that petitioner's speech was "*directed* at least in part to the students and surrounding spectators." *Ibid.*

Additionally, the court explained that the School District "'entrusted' [petitioner] 'to be a coach, mentor and role model for the student athletes'" (Pet. App. 23) and that petitioner's "contract required that, '[a]bove all' else, [petitioner] would endeavor not only 'to create good athletes,' but also 'good human beings'" (*id.* at 24 (first alteration in original)). The court thus determined that petitioner's job "entailed both teaching and serving as a role model and moral exemplar," which "included speaking demonstratively to spectators at the stadium after the game through his conduct." *Id.* at 26.

Accordingly, the court concluded that, "by kneeling and praying on the fifty-yard line immediately after games while in view of students and parents, [petitioner] 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." Pet. App. 27. The court further concluded that petitioner's "insistence that his demonstrative speech occur in view of students and parents suggests that [petitioner] prayed pursuant to his responsibility to serve as a role model and moral exemplar." *Id.* at 25. Thus, the court ruled, petitioner's "demonstrative communication fell well within the scope of [petitioner's] professional obligations, * * * and his speech was therefore unprotected." *Id.* at 27.

Judge Smith, who authored the court's opinion, also filed a special concurrence concluding that petitioner's conduct as a school official constituted "school endorsement of religion, encouragement of prayer, and a preference for one particular faith" (Pet. App. 49), and therefore that "a resumption of [petitioner's]

conduct would clearly result in an actual Establishment Clause violation" (*id.* at 38-39 n.1), thus warranting the District's actions here.

REASONS FOR DENYING THE PETITION

The petition poses the question "[w]hether public school teachers and coaches retain any First Amendment rights when at work and 'in the general presence of' students." Pet. i. That question was not considered or decided by the courts below, and the case does not present it.

Rather, both the district court and the court of appeals recognized that public-school employees *do* retain Free Speech rights during the workday, albeit within a well-established framework that accounts for a school district's legitimate interests as employer. Under that framework, the courts below each properly conducted fact-intensive inquiries in accordance with this Court's long-standing jurisprudence concerning public-employee speech. Their rulings neither vary from that settled law nor implicate any circuit split. And Judge Smith's special concurrence offers an independent and persuasive reason why the decision was correct. The petition should be denied.

A. The Question Presented In The Petition Is Inapposite And Does Not Determine The Outcome Of This Case.

Petitioner contends that the court of appeals "was applying a categorical rule that teachers and coaches do not possess any First Amendment rights at all while they are on the job 'in the general presence of students.'" Pet. 3. That is incorrect. The court repeatedly recognized that teachers speak as public employees only under certain circumstances: "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.'" Pet. App. 21 (alterations in original) (quoting *Johnson* v. *Poway Unified Sch. Dist.*, 658 F.3d 954, 968 (9th Cir. 2011), cert. denied, 566 U.S. 906 (2012)); accord *id.* at 27.

Applying these conjunctive requirements, the court "neither relie[d] on, nor should be construed to establish, any bright-line rule." Pet. App. 34 n.11. Rather, the court engaged in "a practical, fact-intensive inquiry into the nature and scope of [petitioner's] job responsibilities" and "a careful examination of the precise speech at issue." *Ibid.* To get to his statement of the question here, petitioner ignores the court of appeals' explication of the third requirement (namely, that the teacher be acting "in a capacity one might reasonably view as official" (*id.* at 21)), the court's analysis under that requirement, and all the facts that go to that inquiry.

But as petitioner acknowledges, the facts and legal analysis matter. See Pet. 2 ("[T]he unique nature of the school setting may require a sensitive analysis of the nature of the expression and the particular context in which it occurs."). The court of appeals determined that petitioner cannot "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" (Pet. App. 32-33)—not as an abstract principle that teachers and coaches lack any First Amendment rights, but because, among other pertinent considerations, petitioner "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" (*id.* at 26). Indeed, petitioner has been clear that he seeks to present his prayer *only* under conditions that maximize the communicative impact on all those participating in or attending football games. *Id.* at 10-11; see also *id.* at 24-25 (noting petitioner's "insistence that his demonstrative speech occur in view of students and parents").

Hence, answering the question posed by petitioner would not resolve (or even assist in resolving) this case. Neither the School District nor the courts below have ever disputed that "public school teachers and coaches retain any [*i.e.*, 'some'] First Amendment rights when at work and 'in the general presence of' students" (Pet. i). And the School District tried repeatedly to accommodate petitioner's exercise of those rights within the school. Pet. App. 10; see, *e.g.*, C.A. E.R. 291 (offering accommodations); C.A. E.R. 293 (same).

Acknowledging that public-school coaches have First Amendment rights does not, however, answer whether petitioner's specific on-the-job conduct here was First Amendment-protected private speech. Yet *that* is the only question that this case genuinely presents.[1]

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[1] Additionally, even a categorical holding by this Court, on this appeal from denial of a preliminary injunction, that coaches have *no* free-speech rights would not end the matter. Though petitioner limited his appeal, and his arguments in the district court, to his Free Speech claim, his Complaint also alleges a Free Exercise claim and five separate counts of Title VII violations. Petitioner has never presented arguments, and no court has ever ruled, on those claims, which remain to be litigated in the first instance on remand.

B. The Decision Below Faithfully Applies This Court's Binding Precedents And Creates No Circuit Split.

1. The decision faithfully applies this Court's jurisprudence.

The principal arguments of the petition are that the decision below misapplies this Court's decisions in *Garcetti* v. *Ceballos*, 547 U.S. 410 (2006), and *Lane* v. *Franks*, 134 S. Ct. 2369 (2014), and that the decision contravenes *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969). Both arguments are meritless.

1. Recognizing that "[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom" (547 U.S. at 418), this Court held in *Garcetti* 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). Cf. *Janus* v. *AFSCME, Council 31*, 138 S. Ct. 2448, 2473 (2018) ("[I]f the speech in question is part of an employee's official duties, the employer may insist that the employee deliver any lawful message.").

To be sure, *Garcetti* also explained that governmental entities "can[not] restrict employees' rights by creating excessively broad job descriptions." 547 U.S. at 424. But the court of appeals here was well aware of, and heeded, that admonition. See Pet. App. 19 (quoting *Garcetti*'s directive to conduct "practical" inquiry into "the duties an employee actually is expected to perform"). Hence, far from "rely[ing] solely on a ge-

neric job description," the court engaged in a "practical, fact-specific inquiry" into the actual terms, conditions, and requirements of petitioner's employment, taking account of what it actually means to be a public-school football coach at Bremerton High. *Id.* at 22 n.7.

Likewise, it is true that *Lane*, 134 S. Ct. at 2379, rejected an unduly broad interpretation of the statement in *Garcetti* that "speech that owes its existence to a public employee's professional responsibilities" is not constitutionally protected (*Garcetti*, 547 U.S. at 421), thus supporting reading that statement "narrowly to encompass speech that an employee made in accordance with or in furtherance of the ordinary responsibilities of her employment" (*Carollo* v. *Boria*, 833 F.3d 1322, 1329 (11th Cir. 2016) (quoting *Alves* v. *Board of Regents of the Univ. Sys.*, 804 F.3d 1149, 1162 (11th Cir. 2015)); accord *Boulton* v. *Swanson*, 795 F.3d 526, 534 (6th Cir. 2015)).

But again, that is just what the court of appeals did here. The court determined that when petitioner supervised students at the conclusion of the games, he was not just on the clock but performing the central responsibilities of his job as a coach, which duties "included speaking demonstratively to spectators at the stadium after the game through his conduct." Pet. App. 26. Thus, the court determined, "by kneeling and praying on the fifty-yard line immediately after games, [petitioner] was fulfilling his professional responsibility to communicate demonstratively to students and spectators" (*id.* at 29) both because being a role model and moral exemplar to students is what it means to be a high-school coach, and because petitioner's contract specifically provided that he was "to

be a coach, mentor, and role model for the student athletes" (*id.* at 2).

2. Petitioner also urges that the decision here contravenes the principle set forth in *Tinker* that students and teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." See Pet. i (quoting *Tinker*, 393 U.S. at 506*); id.* at 1 (same); *id.* at 3 (same); *id.* at 14 (same); *id.* at 16 (same); *id.* at 17-18 (same); *id.* at 22 (same); *id.* at 29 (same); *id.* at 31 (same).

But *Tinker* did not hold that the free-speech rights of public-school teachers and coaches in the performance of their official teaching duties are coextensive with the teachers' speech rights as private citizens—especially not when, as here, a school district's regulation of employee speech or conduct is undertaken in service of the district's "fundamental obligation to protect the rights of all of its students" (C.A. E.R. 184; see also, *e.g.*, *id.* at 278-280).

Tinker followed from this Court's holding the previous term in *Pickering v. Board of Education*, 391 U.S. 563 (1968), that teachers enjoy First Amendment protections on the job not absolutely, but when speaking as citizens on matters of public concern. *Id.* at 568. In *Connick* v. *Myers*, 461 U.S. 138 (1983), this Court further underscored that the free-speech rights of public employees do not extend to speech "upon matters only of personal interest." *Id.* at 147. And as already noted, *Garcetti* confirmed 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." 547 U.S. at 421.

These restrictions do "not infringe any liberties the employee might have enjoyed as a private citizen" but "simply reflect[ ] the exercise of employer control over what the employer itself has commissioned." *Garcetti*, 547 U.S. at 421-422.

In keeping with these principles, the court of appeals did not apply any "sweeping categorical rule" (contra Pet. i; *id.* at 15; *id.* at 16; *id.* at 30) but instead conducted a "practical, fact-intensive inquiry into the nature and scope of [petitioner's] job responsibilities" and "a careful examination of the precise speech at issue" (Pet. App. 34 n.11). And it concluded that, in this case and on these facts, petitioner's speech was unprotected. *Id.* at 34. In short, the court of appeals did not disregard this Court's precedents; it applied them faithfully. Petitioner may disfavor the application, but that does not mean that the court applied the wrong test.[2]

2. There is no circuit split.

Petitioner also suggests that the court below is out of step with sister circuits (see, *e.g.*, Pet. 16-17), yet he does not identify any genuine split of authority. For there is none.

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[2] Because there was no "categorical approach" (Pet. 19), petitioner's contention that the decision below empowers school districts to engage in "wholesale viewpoint discrimination" (*ibid.*) is likewise inapt. The decision says nothing about viewpoint discrimination; and there is no credible evidence in the record that the District has engaged or seeks to engage in viewpoint discrimination.

There is similarly not a whiff of evidence that the School District allowed Buddhist but not Christian prayer (contra Bowden Amicus Br. 8); the District has unequivocally denied it (see C.A. E.R. 296-297); and petitioner has abandoned that canard.

The Eighth Circuit in *Warnock* v. *Archer*, 380 F.3d 1076 (8th Cir. 2004), concluded that a "framed psalm on the wall of [a teacher's] office" did not violate the Establishment Clause because the item was "clearly personal and d[id] not convey the impression that the government [wa]s endorsing it" (*id.* at 1082). Here, the court of appeals declined to decide any Establishment Clause issue; only Judge Smith's concurrence took up the question. See Pet. App. 16; *id.* at 37 (Smith, J., specially concurring). And the court recognized that petitioner "can pray in his office" (*id.* at 32), just as the *Warnock* court concluded that the teacher there could post the psalm in *his* office.

In *Brammer-Hoelter* v. *Twin Peaks Charter Academy*, 492 F.3d 1192 (10th Cir. 2007), the Tenth Circuit considered the free-speech rights of charter-school teachers when meeting with each other, privately, off campus and off duty, without students present, to discuss their concerns about the school (see *id.* at 1199). And even under those circumstances, the Tenth Circuit concluded that "[n]early all of the matters" that the teachers "claim they discussed *were* made pursuant to their duties as teachers"—meaning that the discussions were *not* First Amendment-protected private speech. *Id.* at 1204 (emphasis added).

Most of the other court-of-appeals decisions to which petitioner points (at 23-24, 27-28) have nothing whatever to do with public schools—the distinct setting with which petitioner is concerned (see generally Pet. *passim*). *Boulton*, 795 F.3d at 526, and *Hunter* v. *Town of Mocksville*, 789 F.3d 389 (4th Cir. 2015), involved police officers. *Chrzanowski* v. *Bianchi*, 725 F.3d 734 (7th Cir. 2013), an assistant state's attorney. *Carollo*, 833 F.3d at 1322, a city manager. And *Flora*

v. *City of Luzerne*, 776 F.3d 169 (3d Cir. 2015), a public defender.

And as for appellate decisions that *do* touch on the free-speech rights of public-school teachers when on the job and at school, the decision here follows, relies on, and is in full accord with them. See Pet. App. 30-32 (relying on *Evans-Marshall* v. *Board of Educ.*, 624 F.3d 332 (6th Cir. 2010); *Borden* v. *School Dist.*, 523 F.3d 153 (3d Cir. 2008); *Mayer* v. *Monroe Cty. Cmty. Sch. Corp.*, 474 F.3d 477 (7th Cir. 2006); *Doe* v. *Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995)).

C. The Decision Below Was Correct.

1. Petitioner spoke and acted as a school official, not as a private citizen.

As already explained, this Court has consistently held that when public employees are performing their official duties, their speech does not receive the same First Amendment protections as does the speech of private citizens. See *Garcetti*, 547 U.S. at 421. That is because "[g]overnment employers"—and most especially public school districts—"need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Id.* at 418. It simply would not be possible to run the public schools if each teacher and coach were a law unto him- or herself. School districts, not individual teachers, must have the authority to decide what instruction is provided, how it is provided, and how students are supervised to ensure their safety and to respect their and their families' rights.

Under his job description, petitioner remained responsible for the students on the team until they left

the stadium and were returned to their parents' custody. Pet. App. 9, 26; see also C.A. E.R. 87 ("all assistant coaches * * * have been expected to remain with the team until the last student has left the event; * * * [petitioner] ha[s] been among the assistant coaches with specific responsibility for the supervision of players in the locker room following games"). Petitioner contends that the School District had no authority to place any restrictions on what he describes as "saying a quiet prayer *by himself*" when he was "within eyesight of students" (Pet. 2; accord *id.* at 16), or to discipline him for failing to follow District policy. But petitioner's conduct occurred as part of the team's and the coaches' regular postgame rituals, such as shaking hands with the opposing team, while petitioner was at the center of the field, dressed as a Bremerton coach, and surrounded by the team and other students. On those facts, a teacher or coach who is in full view of and surrounded by students whom he is actively supervising as part of his job is not "by himself." Compare *id.* at 2 ("Coach Kennedy was suspended for saying a quiet prayer *by himself* simply because he did so within eyesight of students" (emphasis in original)), with p. 1a, *infra* (photo). To say otherwise misapprehends what it means to be a coach.

More concretely, petitioner's job description specified, and the court of appeals determined, that petitioner's job as a coach was to be a mentor and role model to the students. Pet. App. 23-26; see also C.A. E.R. 251.[3] A central duty—perhaps *the* central duty—

[3] The state amici's concern that the decision here improperly "extends the scope of a public employer's official communications" (Arizona Amicus Br. 7-8) is thus misplaced. The court of appeals did not expansively attribute to the School District

of a coach is to teach, through his actions, what the School District deems to be important for the students to learn—to show them what matters and to demonstrate to them how they ought to behave. Pet. App. 24; see also Bowden Amicus Br. 14 ("Even more so than the student/teacher relationship, the student-athlete/coach relationship is highly personal, with the coach serving not only as a coach, teacher, and role model, but also as a mentor, a counselor, and with regard to football players in particular, a pseudo-father figure.").

Petitioner well understood all of that. Although describing his prayers as personal and private, he rejected a series of offered religious accommodations, insisting that the only acceptable venue for his prayer was the most public place and time—the center of the field, during the team's and coaches' traditional postgame ritual, in full view of and surrounded by the students in his charge.

We have no doubt that petitioner is a caring coach who was acting in what he believed to be the students' best interest by demonstrating to them what is important to him—his faith and religious practice. Cf. Bowden Amicus Br. 16 (Petitioner "used his religious observance to show his players that faith is personal."). But that is not the lesson that the School District wanted to impart, viewing those matters as appropriately reserved instead to the students themselves, their families, and their houses of worship. And curricular choices about what students will be

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speech that the District wanted no part of. Rather, the court *allowed* the School District to regulate speech that was paid for by the District, was explicitly part of petitioner's job description, and was undertaken in the performance of petitioner's job as a school official and employee.

taught belong not to individual school employees but to the School District, subject, of course, to state law and any federal and state constitutional restrictions on the public schools. Cf., *e.g.*, *Minnesota State Bd. for Cmty. Colls.* v. *Knight*, 465 U.S. 271, 287-288 (1984); *Edwards* v. *California Univ. of Pa.*, 156 F.3d 488, 491-492 (3d Cir. 1998) (Alito, J.).

The state amici argue, as petitioner argued below, that the School District's prohibition of petitioner's conduct is evidence that petitioner's speech cannot be attributed to the District. See Arizona Amicus Br. 2. It simply cannot be, however, that a public employee's violation of his employer's express directive renders the employee's conduct private, constitutionally protected, and thus immune from the policies and directives of the governmental employer. No school district, or any other governmental entity, could operate under a regime that allows each individual employee to decide what speech will be presented to the public at official events.

Additionally, petitioner's actions, though well-intentioned, nonetheless had detrimental effects on the School District's operations and on students. Most obviously, the crowd's rush onto the field to join petitioner's prayer, in apparent response to petitioner's media campaign (see Pet. App. 7-8), put District students at risk (see, *e.g.*, *id.* at 8 (noting complaints by parents of marching-band members that their children were knocked down by crowd rushing onto field to surround petitioner)), and placed additional burdens on the School District to secure the football field and maintain crowd control (see, *e.g.*, Pet. App. 6-8 (describing additional efforts required)).

More generally, petitioner's failure to adhere to District policy "contributed to negative relations between parents, students, community members, coaches and the school district." C.A. E.R. 109. And his use of the postgame ceremonies as a platform for speech of his choice would have exposed the District to demands from other employees, and also from non-employees, to use the same platform for their own purposes—such as waving political campaign banners or engaging in social protests. Indeed, in response to petitioner's October 2015 prayers, a Satanist group actually did inform the District that it planned to conduct its own religious ceremonies on the field after games. See Pet. App. 8.

Thus, even if petitioner had been speaking as a private citizen on a matter of public concern, the School District's "need for orderly school administration" (*Pickering*, 391 U.S. at 569) would outweigh petitioner's interests (cf. Pet. App. 15-16).

Orderly administration of the schools to ensure student safety is always a paramount governmental interest—even when, unlike here, the free-speech rights of teachers as private citizens are genuinely implicated. Cf. *Pickering*, 391 U.S. at 569. Petitioner's conduct, though certainly not intended to endanger students, was incompatible with the maintenance of good order, discipline, and basic student safety. The School District therefore had the right—indeed, the responsibility—to act.

2. The School District was constitutionally entitled to protect itself against legal liability and to respect students' rights.

Judge Smith, author of the court of appeals' unanimous opinion, also wrote a special concurrence, concluding that the School District had the authority to enforce its policy regarding on-the-job conduct to protect against legal liability for violating students' and parents' Establishment Clause rights.

This Court has made clear that there is "play in the joints" between the Establishment and Free Exercise Clauses that affords flexibility for government to remain neutral on matters of religion. *Walz* v. *Tax Comm'n*, 397 U.S. 664, 669 (1970); accord *Locke* v. *Davey*, 540 U.S. 712, 718 (2004). The need for this flexibility "is particularly acute in the public-school context" (Texas Coaches' Amicus Br. 18), where school districts "with even the best intentions are often unable to avoid costly litigation" (*id.* at 19). And avoiding Establishment Clause violations is a compelling governmental interest that justifies reasonable restrictions on speech (see *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 112 (2001)).

High-school coaches have a unique position of authority and influence over their players. See Pet. App. 89 (petitioner "had a great opportunity, a great job, to influence young people"); Bowden Amicus Br. 4 ("Coaches * * * are active in their student-athletes' lives; student-athletes can count on these coaches for guidance when they can't go to, or don't have, a parent at home."). That is especially true for football coaches, because football plays so central a role in high-school life (see *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 311-312 (2000)).

Judge Smith thus reasoned that while petitioner "might not '*intentionally* involve students in his on-duty religious activities,' * * * [there was] no reason to believe that the pressure emanating from his position of authority would dissipate." Pet. App. 45 (Smith, J., concurring) (quoting C.A. E.R. 93). "Accordingly, many students"—including the players and others required to attend games—"would feel pressure to join [petitioner's] religious activity to avoid marking themselves as outsiders or alienating themselves from the team." *Id.* at 44-45 (Smith, J., concurring); see also *Santa Fe*, 530 U.S. at 312; *Lee* v. *Weisman*, 505 U.S. 577, 593 (1992) (identifying "subtle and indirect" coercion on students to participate in school-sponsored prayer at school events). And indeed, the record evidence is that the Bremerton students never prayed on the field *except when petitioner did*. See Pet. App. 26. Judge Smith therefore expressed the view that "the [School] District would be [unconstitutionally] condoning the same coercion identified in *Santa Fe*." *Id.* at 44 (Smith, J., concurring).

Indeed, Judge Smith concluded on the facts here that petitioner, "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,'" violated the Constitution. Pet. App. 42 (Smith, J., concurring) (quoting *Santa Fe*, 530 U.S. at 307); see also *id.* at 88-89 (reasoning that Establishment Clause provided "an adequate justification" for controlling petitioner's speech under *Pickering*). That conclusion was bolstered by petitioner's long history of holding team prayer (see, *e.g.*, *id.* at 43 (Smith, J., concurring) ("[D]uring the previous eight years, [petitioner] 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.")), of which the students and school community are deemed aware (see *Santa Fe*, 530 U.S. at 309).

This determination by a federal judge that allowing petitioner's conduct to continue would have violated students' constitutional rights confirms that the School District had good reason to be concerned about the risk of liability and to act accordingly (see C.A. E.R. 176-177). Whether or not the School District was absolutely required to take action, it surely had the authority to do so. Cf., *e.g.*, *Locke*, 540 U.S. at 725.

* * *

"There can be no doubt that the First Amendment protects the right to pray." *Sause* v. *Bauer*, 138 S. Ct. 2561, 2562 (2018) (per curiam). Neither the School District nor the courts below have ever suggested otherwise. Yet "there are clearly circumstances in which [government] may lawfully prevent someone from praying at a particular time and place." *Ibid.* On the particular facts here, this was one such instance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

APPENDIX A

C.A. E.R. 245.