No. 21-418

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**

## *AMICUS* CURIAE BRIEF OF COACH TOMMY BOWDEN IN SUPPORT OF PETITIONER


DANIEL M. SAMSON
SAMSON APPELLATE LAW
201 South Biscayne
Boulevard, Suite 2700
Miami, FL 33131
(305) 341-3055

ADAM M. FOSLID
*Counsel of Record*
STUMPHAUZER FOSLID
SLOMAN ROSS & KOLYA, PLLC
Two South Biscayne
Boulevard, Suite 1600
Miami, FL 33131
(305) 614-1400
afoslid@sfslaw.com

*Counsel for Coach Tommy Bowden*



October 18, 2021

308179

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

## TABLE OF CONTENTS

*Table of Contents*

## TABLE OF CITED AUTHORITIES

*Page*

**Cases**

*Cited Authorities*

*Page*



**Other Authorities**



**Rules**

## INTEREST OF AMICUS CURIAE

Tommy Bowden is a former college football coach and a member of what is widely considered to be college football's most famous family.[1] He is the son of legendary college football coach Bobby Bowden and the brother of former college football coaches Terry and Jeff Bowden (together with Tommy Bowden and Bobby Bowden, the "Bowdens"). During coaching careers collectively spanning well over a century, the Bowdens coached thousands of student-athletes at several public colleges and universities.

The Bowdens are devout Christians. Above all else, the Bowdens credit their coaching success to their dedication to and freedom to express their faith. Thus, in 2018, when Bobby Bowden learned that the Bremerton School District (the "District") had forced Petitioner, Coach Joseph Kennedy, to choose between freely exercising his faith and coaching football, the legendary coach felt led to share, as *amicus curiae*, his thoughts on the intersection of three subjects that formed the cornerstones of his life: faith, football, and freedom. And for these same reasons, Tommy Bowden felt led to follow, once again, in his now late father's footsteps and offer his views on this case.

---

1. Pursuant to Rule 37(2)(a), undersigned counsel represents that the parties were given proper notice of Tommy Bowden's intent to file an amicus curiae brief and have consented to this filing. Pursuant to Rule 37(6), undersigned counsel represents further that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Further, no person other than the *amicus curiae*, or his counsel made a monetary contribution to its preparation or submission.

Indeed, the Bowdens have, for many decades, spoken and written that observant coaches who live their faith can only be effective coaches when they are free to make their faith and spiritual identity known and available to their student-athletes. The Bowdens have made it a point throughout their respective coaching careers to share their spiritual identity with their student-athletes and embrace their roles not only as coaches, teachers, and role models, but also as mentors, counselors, and pseudo-father figures. In fact, many former student-athletes under the Bowdens' collective charge have credited their post-college-football success to the important life lessons the Bowdens imparted through, among other things, references to their faith.

In the Bowdens' view, the Circuit Court's opinion jeopardizes an observant coach's ability to impart these life lessons. It also effectively strips a coach of his or her spiritual identity while in the presence of his or her student-athletes by categorically eliminating at the public schoolhouse gate the coach's First Amendment rights to engage in any form of religious expression. Simply put, the Bowdens believe that no coach should have to set down their faith when they pick up a whistle.

## SUMMARY OF ARGUMENT

This Court should grant certiorari in order to, at a minimum, re-establish that "[n]either students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506

(1969).[2] To be sure, the Ninth Circuit's decision "runs counter to at least two decades of First Amendment jurisprudence and turns the Religion Clauses on their head, using imagined Establishment Clause concerns to inflict real Free Exercise damage." Petition for Writ of Certiorari at 18.

As Justice Alito wrote in concurring with the denial of Certiorari in *Kennedy I*, the Ninth Circuit would seem to allow public schools to prohibit teachers from engaging in "any 'demonstrative' conduct of a religious nature," even practices as commonplace as, for example, "folding their hands or bowing their heads in prayer" before lunch. *Kennedy v. Bremerton Sch. Dist.*, 139 S.Ct. 634, 635 (2019) (Statement of Justice Alito respecting the denial of certiorari). Justice Alito wrote further that, "[w]hat is perhaps most troubling about the Ninth Circuit's opinion is language that can be understood to mean that a coach's duty to serve as a good role model requires the coach to refrain from any manifestation of religious faith, even when the coach is plainly off duty." *Id.*

While the Ninth Circuit paid lip service to that admonition, it ultimately approved a school policy that requires Coach Kennedy to express any religious activity in private, out of sight of students or members of the

2. As set forth *infra*, this case also presents a particularly apt factual circumstance for the Court to set (or eliminate) the contours between conduct that discriminates on the basis of religious status and conduct that discriminates on the basis of religious use, as discussed in the concurrences to *Trinity Lutheran Church of Columbia, Inc. v. Comer*, -- U.S. --, 137 S.Ct. 2012 (2017). *See Comer*, -- U.S. --, 137 S.Ct. 2012, 2025 (2017) (Thomas, J., concurring in part); *id.* at 2025–26 (Gorsuch, J., concurring, in part).

public. In essence, Coach Kennedy was terminated because the District determined that a 15–30 second, silent, post-game prayer by an assistant football coach in view of student-athletes constituted state endorsement of religion. Needless to say, this policy—that any religious expression by a coach while in view of students amounts to an Establishment Clause violation—infringes on observant coaches' free exercise and use of their religion.

Moreover, the District's policy and the Circuit Court's decision fundamentally transform the student-athlete/coach relationship. Coaches, like Kennedy and the Bowdens, seek to be active in their student-athletes' lives, to be the person they can count on for guidance when they cannot go to, or do not have, a parent at home. It is in the fulfillment of these unique, personal roles that a coach's faith and spiritual identity cannot be set aside. But the District's policy and Circuit Court's holding does just that; it strips coaches of their faith and spiritual identity while in the presence of their student-athletes and jeopardizes their ability to be an effective mentor, counselor, or pseudo-parental figure and otherwise impart important life lessons to the student-athlete.

Against the backdrop of the unique student-athlete/coach relationship, no reasonable observer, aware of the history of Coach Kennedy's motivational speeches and personal religious convictions, and context of post-football-game rituals, could possibly confuse Coach Kennedy's silent, religious expression, as state sponsored endorsement of his religion. In fact, a reasonable observer, especially under these circumstances, would more likely determine that the prohibition of a 15–30 second silent, non-sectarian prayer, shows hostility toward Coach Kennedy's religion, rather than neutrality.

For these reasons, this Court should grant certiorari and review and reverse the Circuit Court's bright-line rule that coaches do not possess any First Amendment rights while on the job and in view of students. In so doing, the Court need not draw or re-draw any sort of line between free exercise and establishment of religion; it need only reaffirm the well-established law that coaches most certainly do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506; *see also Bd. of Educ. of Westside Cmty. Sch. v. Mergens ex rel. Mergens*, 496 U.S. 226, 250-51 (1990) (restating that the "proposition that schools do not endorse everything they fail to censor is not complicated"). Indeed, allowing coaches the freedom to express themselves while fulfilling the role of a mentor, counselor, and pseudo-parental figure, does not violate the Establishment Clause, it "follows the best of our traditions." *Zorach v. Clausen*, 343 U.S. 306, 314 (1952).

## ARGUMENT

### I. THE CIRCUIT COURT'S OPINION CATEGORICALLY DENIES RELIGIOUSLY OBSERVANT TEACHERS AND COACHES OF THEIR FIRST AMENDMENT RIGHTS.

#### A. The District's Treatment of Coach Kennedy Was Facially Violative of His First Amendment Rights to Freely Exercise His Religion.

"The development of the law with regard to the Religion Clauses in the decisions of the Supreme Court of the United States illustrates the conflict inherent in the First Amendment, which requires governments to walk a sometimes fine line between laws 'establishing' or

'endorsing' religion, and laws averse or hostile to religion." *Nichol v. ARIN Intermediate Unit 28,* 268 F. Supp. 2d 536, 548 (W.D. Pa. 2003). "A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion, favoring neither one religion over others nor religious adherents collectively over nonadherents." *Bd. of Ed. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 695 (1994) (internal quotations and citation omitted).

"The neutrality principle, synthesized from the Free Speech, Free Exercise and Establishment Clauses of the First Amendment, respects the 'crucial distinction between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.'" *Nichol,* 268 F. Supp. 2d at 549 (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 841 (1995)). In other words, the government can no more demonstrate hostility toward religion than it can sponsor religion: neutrality is the key. *Mergens*, 496 U.S. at 248. It is this government neutrality toward religion that "is the hallmark of the Religion Clauses." *ACLU of N.J. v. Black Horse Pike Reg'l Bd. of Ed.*, 84 F.3d 1471, 1488 (3d Cir. 1996).

The Circuit Court's opinion, however, stomps on this principle of neutrality and entirely erases the fine line between endorsement of and hostility toward religion, in favor of a categorical prohibition on all demonstrative religious expression, no matter how personal or fleeting, by a coach when at work and in front of others. This categorical rule violates the First Amendment rights of observant coaches, like Coach Kennedy, and cannot

be reconciled with this Court's precedent or with the decisions from other courts faithfully applying it.

In effect, such a rule would force observant coaches to choose between abiding by public school policy or the basic tenets of their faith; and, stretched to its inevitable conclusion, it would allow the District to, among other things, prevent an observant Muslim from wearing a hijab, an observant Jew from wearing a yarmulke, or an observant Christian from wearing a cross. This Court has made clear, however, that the Establishment Clause cannot be stretched so far to "license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." *Mergens*, 496 U.S. at 248 (quoting *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in judgment)).

But the District's policy does just that. Broadly speaking, it prevents any school employee from even acknowledging that they are religiously observant, it prohibits any practice of that religion on school grounds in the presence of others, and it explicitly promotes secularism. And more specifically, the policy effectively prevents Coach Kennedy from freely exercising his religion.

By all accounts, Coach Kennedy is "a practicing Christian" whose "sincerely held religious beliefs require [him] to engage in brief, private religious expression at the conclusion of [] football games." E.R. 112.[3] He

3. "E.R." refers to the excerpts of the record Coach Kennedy filed with the Ninth Circuit in appeal No. 20-35222.

"made a commitment to God" to "give thanks through prayer, at the end of each game, for what the players had accomplished and for the opportunity to be part of their lives through the game of football." *Id.* at 112-13. Coach Kennedy's commitment to his sincerely held religious beliefs is so strong, that although he tried to comply with the District's, and now the Circuit Court's, no outward displays of religion in front of students policy, it made him feel dirty. *Id.* at 115. That is because his sincerely held religious beliefs made him feel he had broken a sacred commitment to God. *Id.*

Notwithstanding these undisputed facts, the District determined and the Circuit Court held that Coach Kennedy's silent, post-game, 15–30 second prayer is entitled to no First Amendment protection at all simply because it was in view of and joined voluntarily by some student-athletes. In this regard, the District focuses its entire policy on religious expression through the lens of promoting secularism. For example, the District permits musical, artistic and dramatic presentations that have a religious theme, but such must be presented in a secular way. Indeed, in a letter to Coach Kennedy, the District characterized Coach Kennedy's motivational, inspirational talks to students as very positive and beneficial, but explicitly directed that those talks "remain entirely secular in nature." *Id.* at 109.

This directive is entirely inappropriate as it expresses a "value judgment that secular motivations" for giving an inspirational talk are more important than "religious motivations." *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999); *accord Nichol,* 268 F. Supp. 2d at 548 (preventing school

employees from wearing religious jewelry is openly "averse to religion" because it only punishes "symbolic speech by its employees having religious content or viewpoint, while permitting its employees to wear jewelry containing secular messages"). For these reasons, the District's policy toward religion generally, and as applied to Coach Kennedy specifically, "is not neutral in effect, and does not pretend to be." *See Nichol*, 268 F. Supp. 2d at 552.

> The effect of [the District's] policy is to prohibit [Coach Kennedy] and other employees of [the District] from publicly displaying and expressing (or exercising) their religious beliefs and affiliations while working. At the same time, employees may publicly display and express other secular messages through jewelry, dress, insignia and emblems while working. There can be no doubt, on the record before the Court, that the effect of the [District's] policy is to prohibit an employee's symbolic religious expression and discipline those who do not comply, while exempting employees' symbolic speech which expresses a non religious message from similar treatment.

*See id.* Just as an employee's "act of wearing her cross on a necklace outside of her clothing is symbolic speech on a matter of public concern (religion)," so too is Coach Kennedy's act of taking a knee and making a silent prayer. *See id.*

### B. In Holding That Any Religious Expression by a Coach or Teacher While on the Job and in View of Students Constitutes State Endorsement of Religion, the Circuit Court Opinion Has Stripped Religiously Observant Employees of the Use of Their Religion.

On the surface, the Circuit Court casts its opinion as a narrow one, but that is most definitely not the case. By holding that religious expression of a public-school employee while on school grounds and in view of others falls within that employee's official employment duties, the Circuit Court has effectively banned observant employees from making any outward expression of personal religious faith. As set forth *supra*, a short moment of silent prayer, crossing oneself before eating a meal in a cafeteria, wearing a religiously expressive piece of jewelry or article of clothing, or even pointing towards the sky in thanks are now potentially problematic.

Indeed, the Circuit Court went to great lengths to justify this overly-expansive holding, postulating that Coach Kennedy could give his prayer while in hiding in an empty office, or at the stadium after it has been cleared of all students, parents, or other observers. But rather than hew to this Court's precedent requiring neutrality, and acknowledging that personal freedoms do not end at the schoolhouse door, the Circuit Court established a bright-line rule that any personal religious expression in view of students is forbidden. This type of categorical rule has, however, been rejected time and time again, by this and other courts across the country. *E.g., Warnock v. Archer*, 380 F.3d 1076, 1082 (8th Cir. 2004) (the mere fact that framed psalm is on wall of a teacher's government

office does not render it unconstitutional); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 841 (1995); *Mergens*, 496 U.S. at 250; *McDaniel*, 435 U.S. at 641 (Brennan, J., concurring in judgment).

And, while the District does not appear to suggest that it is entitled to a categorical rule discriminating on the basis of religious "status" (*i.e.*, that a person is a Christian or holds Christian beliefs), the District does, in effect, argue that it can propagate a categorical rule to prevent observant Christians from revealing, even in the most diminutive of ways, any outward expression or "use" of their religion while on the job. In essence, the District's policy is that Christians may work for the District, so long as no one can ever tell, on school grounds, that the employee is, in fact, a religiously observant Christian. And now, the Circuit Court has enshrined that artificial "status" versus "use" distinction into law.

Such a distinction, however, is completely untenable. As Justice Gorsuch observed:

> Does a religious man say grace before dinner? Or does a man begin his meal in a religious manner? Is it a religious group that built the playground? Or did a group build the playground so it might be used to advance a religious mission? The distinction blurs in much the same way the line between acts and omissions can blur when stared at too long, leaving us to ask (for example) whether the man who drowns by awaiting the incoming tide does so by act (coming upon the sea) or omission (allowing the sea to come upon him).

*Comer*, -- U.S. --, 137 S.Ct. at 2025–26 (Gorsuch, J., concurring, in part).

These same untenable distinctions are present here: is Coach Kennedy a religious man who silently prays for the well-being of his players, or is Coach Kennedy praying for his students' well-being to "advance a religious mission"? "Often enough the same facts can be described in both ways." *Id.* at 2026. Indeed, the First Amendment's Free Exercise Clause "guarantees the free exercise of religion, not just the right to inward belief (or status)." *Id.* There is simply no material distinction between a governmental entity prohibiting employment to a Christian and government prohibiting employment to people "who do [Christian] things[.]" *Id.*

Thus, this case presents the Court with an opportunity to address this flawed distinction between religious "status" and religious "use" head on and confirm that "the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious. Such absolutism is not only inconsistent with our national traditions, but would tend to promote the kind of social conflict the Establishment Clause seeks to avoid." *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring in judgment).

## II. THE CIRCUIT COURT'S OPINION EFFECTIVELY ELIMINATES THE ABILITY OF A RELIGIOUSLY OBSERVANT COACH TO SERVE AS A MENTOR, COUNSELOR, AND PSEUDO-PARENTAL FIGURE TO HIS OR HER PLAYERS.

"The role and purpose of the American public school system were well described by two historians, who stated: '[P]ublic education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.'" *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (quoting C. Beard & M. Beard, New Basic History of the United States 228 (1968)). "In *Ambach v. Norwick*, 441 U.S. 68, 76–77, 99 S.Ct. 1589, 1594, 60 L.Ed.2d 49 (1979), [this Court] echoed the essence of this statement of the objectives of public education as the 'inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system.'" *Id.*

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, (rather) than through any kind of authoritative selection." *Tinker*, 393 U.S. at 513 (internal citations and quotations omitted).

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 a pseudo-parental figure. The best coaches, not just religiously observant ones like the Bowdens and Coach Kennedy, feel and are, in fact, obligated by their faith or simply their professional sensibilities to serve as mentors, counselors, and parental-figures to their players.

Coach Kennedy explained this special, personal connection with and unique responsibility to his players in the following way:

> I have never coached [] simply for the money. No amount of money can compensate me for losing the ability to mentor and have a positive impact on the lives of my players.

E.R. 117.

Bobby Bowden elaborated on this special relationship and unique responsibility, stating:

> I tried to make every one of my players feel like they were wanted and loved. . . . They just need someone to give them direction. That's why I always believed my job was to make them better athletes, better students, and better people. It was my hope that when they left me they were going to become better fathers, husbands, and men.

Bobby Bowden, Called to Coach: Reflections in Life, Faith, and Football 149 (Howard Books eds., 2010).

Tommy Bowden has echoed his father's sentiments:

> Football isn't the only thing a coach teaches. He teaches life. He makes men. It may sound insincere to say, but that doesn't mean it's not true.
>
> …
>
> I felt as though part of my assignment in being a head coach was to train my players in becoming spiritually responsible, which I thought would develop not only their life skills but also their playing skills. It was part of my winning strategy. I expected it to pay off not only in their future but on the scoreboard in the fall.

Tommy Bowden, Winning Character: A Proven Game Plan for Success 130 (B&H Publishing Group, 20120).

Just as the Bowdens did, Coach Kennedy believes his role goes beyond the "coach" and "role model" contemplated by his job description. He, like Coach Bowden, seeks to be active in his student-athletes' lives, to be the person they can count on to help with their problems on and off the field, and to be the person they rely on for guidance when they cannot go to, or do not have, a parent at home. It is in the fulfillment of these unique, personal roles, that a coach's faith and spiritual identity cannot be set aside.

The importance of the coach's unique role in guiding the life of a student-athlete, although not directly addressed by this Court's precedent, finds support in several of this Court's opinions addressing the focus of public education. As the Court has written, "[t]he process of educating our

youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers—and indeed the older students—demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models." *Fraser,* 478 U.S. at 683.

The *Tinker* Court held that this principle is not only applicable to the classroom, but also to "the playing field." 393 U.S. at 512. And, although the context in *Tinker* was a student's freedom of expression, the same freedoms apply to a student-athlete learning important life lessons from his or her coach. Coaches are in a unique position to impart these important life lessons to student-athletes in their charge, and thus in a unique position to provide and, indeed, encourage "a robust exchange of ideas." *Id.*

Here, where it is undisputed that Coach Kennedy did not mandate (or actively encourage) participation in his silent prayer, and where it is undisputed that Coach Kennedy's prayer was full of non-sectarian concepts, like competition, comradery, community, and citizenship, it is particularly apt to consider the message Coach Kennedy's actions actually conveyed to the student-athletes he coached. At bottom, the main point conveyed to the student-athlete was not religious, but an important life lesson that one must have the character to stand up for who you are and what you believe. By taking a knee, Coach Kennedy took a stand.

That is, without question, a message Coach Kennedy was entitled to convey and one his student-athletes were

entitled to receive. To hold otherwise would strip a coach of his or her rights to freedom of speech, expression, and exercise, and unnecessarily restrict the ability of a religiously observant coach to serve as an effective mentor, counselor, or pseudo-parental figure to his or her players.

## III. NO REASONABLE OBSERVER COULD HAVE INTERPRETED COACH KENNEDY'S SILENT PRAYER AS STATE/DISTRICT ENDORSEMENT OF RELIGION.

This Court has long held that "the reasonable observer in the endorsement inquiry must be deemed aware of the history and context underlying" challenged conduct. *Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002). Indeed, "[t]he proposition that schools do not endorse everything they fail to censor is not complicated." *Mergens*, 496 U.S. at 250. And yet, the Circuit Court's opinion holds just the opposite: that schools endorse everything said or done by their employees while in the presence of students, regardless of context.

But a reasonable observer, aware of the history and context underlying Coach Kennedy's silent 15–30 second post-game midfield prayer, would know that Coach Kennedy's message is non-sectarian, mostly addressed to competition, comradery, community, and citizenship, and explicitly not endorsed by the District as religious expression. In the context of student religious speech, this Court has noted that "[w]e think that secondary school students are mature enough to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." *Mergens*, 496 U.S. at 250.

It is hard to fathom why this same reasoning would not be equally applicable to an assistant football coach's private, 15–30 second, silent, non-sectarian prayer. Indeed, numerous courts have found limited personal religious expressions by school employees not to offend the Establishment Clause because no reasonable observer could determine that such were state-sponsored actions. *E.g.*, *Warnock*, 380 F.3d at 1082 (framed psalm on the wall of a teacher's office "is clearly personal and does not convey the impression that the government is endorsing it"); *Draper v. Logan Cnty. Pub. Library*, 403 F. Supp. 2d 608, 621 (W.D. Ky. 2005) ("permitting public library employee to have "unobtrusive displays of religious adherence . . . could not be interpreted by a reasonable observer as governmental endorsement of religion"); *Nichol,* 268 F. Supp. 2d at 554 ("Given the inconspicuous nature of plaintiff's expression of her religious beliefs by wearing a small cross on a necklace, and the fact that other jewelry with secular messages or no messages is permitted to be worn at school, it is extremely unlikely that even elementary students would perceive Penns Manor or ARIN to be *endorsing* her otherwise unvoiced Christian viewpoint, and defendants certainly presented no evidence to support such a perception. Merely employing an individual, such as plaintiff, who unobtrusively displays her religious adherence is not tantamount to government endorsement of that religion, absent any evidence of endorsement or coercion"); *Freshwater v. Mt. Vernon City Sch. Dist. Bd. of Ed.*, 1 N.E. 3d 335, 354 (Ohio 2013) ("The district does not convey a message that it endorses or promotes Christianity by simply allowing Freshwater to keep a personal Bible on his desk").

This conclusion is all the more apparent in this context because there are many post-game rituals, practices, and activities involved in high school football games. For example, coaches and players will ordinarily shake hands with the opposing coaches and players, greet their families, and interact with their respective school communities. Although these are typically non-religious activities, the point is that the post-game high school football field is, as the District itself recognizes, a public space filled with activity, but none of which would a reasonable observer find the school to have endorsed.[4]

Any objective observer familiar with the full history and context of Coach Kennedy's activities would view Coach Kennedy's actions as one aspect of the broader post-game rituals and not as the District's endorsement of Christianity. *Cf. Lynch v. Donnelly*, 465 U.S. 668, 692–93 (1984) (O'Connor, J., concurring) (observer would not find city's holiday religious display to be promoting religion given the context of a public holiday with "very strong secular components and traditions"). In fact, the District's policies on religious expression have the opposite of their stated intended effect. A reasonable observer, familiar with the history and context of Coach Kennedy's activities, and the District's corresponding positions, would likely conclude that the District is hostile toward religion.

---

4. The example of coaches greeting their families brings numerous parallel issues to mind. Does a coach kissing his spouse amount to State endorsement of marriage or of that coach's sexuality? Of course not. No reasonable observer could possibly come to such a conclusion, just as no reasonable observer could determine that the State endorses Christianity simply by permitting an assistant football coach's silent, post-game prayer.

But that need not be so. The District "itself has control over any impressions it gives its students" and could send a clear message that it respects but does not endorse Coach Kennedy's silent prayer. Instead, the District and the Circuit Court have removed all First Amendment protections from high school coaches based on the faulty premise that a reasonable observer with knowledge of Coach Kennedy's post-game activities would presume the District was endorsing both his motivational and religious messages. That is simply not the case, and the Court should accept review in order to clarify and amplify the fundamental principle that schools do not endorse everything they fail to censor. *Mergens*, 496 U.S. at 248.

## CONCLUSION

For all the foregoing reasons, this Court should grant Certiorari and review the Circuit Court's decision.

Respectfully submitted,

Daniel M. Samson
Samson Appellate Law
201 South Biscayne
Boulevard, Suite 2700
Miami, FL 33131
(305) 341-3055

Adam M. Foslid
*Counsel of Record*
Stumphauzer Foslid
Sloman Ross & Kolya, PLLC
Two South Biscayne
Boulevard, Suite 1600
Miami, FL 33131
(305) 614-1400
afoslid@sfslaw.com

*Counsel for Coach Tommy Bowden*

October 18, 2021