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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Misdescribing or ignoring the facts in the record, the petition raises the purely hypothetical question whether a public-school employee ever has any right to pray alone, quietly and privately, if students might happen to see him. The actual questions presented are:

1. Did petitioner, who has conceded that he was on duty, deliver his midfield prayers to students in his capacity as a high-school coach?

2. Was respondent constitutionally required to capitulate to petitioner's demand to resume his years-long practice of praying with students on the 50-yard line at football games, or was it entitled to accommodate his religious exercise in alternative ways that respected the beliefs of students and their families?

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BRIEF FOR THE RESPONDENT IN OPPOSITION

INTRODUCTION

According to petitioner, this case presents two questions concerning whether a school district may prevent its employees from ever offering a "solitary," "silent or quiet prayer" while at work. Pet. 4, 7. Petitioner calls the court of appeals' decision on those questions a "remarkable," "stunning," "staggering," "radical," "indefensible," "egregiously" and "exceptionally wrong" "triple threat" and "outlier" that "obliterated" and "botch[ed] three separate lines of First Amendment jurisprudence in one fell swoop." Pet. 1, 17-19, 23, 27, 33. But no amount of purple prose can change that petitioner's conduct was never as the petition describes it; the School District never imposed the restrictions that the petition asserts; and the court of appeals never addressed the grand questions of legal doctrine that the petition insists—much less did it repudiate all existing First Amendment jurisprudence. The questions posed in the petition are perhaps interesting ones, but in this case they are merely hypothetical.

Here is what actually happened: For more than seven years, Joseph Kennedy—a public-school football coach—delivered prayers to players on the 50-yard line while on duty at the end of games. ER107, 113-114, 356-357; SER498.[1] He was often surrounded by students, and he invited opposing coaches to join. ER107, 133-134, 357. When the District learned what was going on, it recognized that the practice could be

[1] ER refers to the excerpts of record (ECF 14) and SER refers to the supplemental excerpts of record (ECF 27) filed in the court of appeals.

coercive. ER107-109. Indeed, the District later heard from players' parents that their children felt "compelled to participate." ER379-380; see also SER517.

The District offered Kennedy time and space to pray before and after games, in the press box or elsewhere that Kennedy would not be surrounded by the team. ER99-100. It tried repeatedly to accommodate his desire to "exercise his fundamental religious freedoms" (ER253; see ER100) as a means of "honoring [his] rights" (ER109). And it invited him to suggest other accommodations that might satisfy him. ER99-100, 367.

Kennedy's only response was a demand from his lawyers that he be allowed to "continue his practice of saying a private, post-game prayer on the 50-yard line." ER263. But the prayer practice he wanted to continue hadn't been private at all: For years, he had been delivering prayers to the team. ER107, 204. Kennedy then made a series of media appearances announcing his intention to resume his past practice. SER482, 484-488, 516. And he held more postgame prayers on the 50-yard line, with students and community members rushing the field to join him, knocking over members of the marching band. ER364-365, 368-370; SER481, 516.

The District thus faced a stark choice: Either let its employee dictate how school events would be run—even if that threatened the safety and religious freedom of the students—or take the steps necessary to curb the practice. The question whether a school employee has the right to a "brief, quiet prayer by himself while at school" (Pet. i) is entirely beside the point. This case is about a school district's authority to protect students when its employee does not work with it to find a reasonable accommodation.

To borrow a word or two from the petition, it would be truly "staggering" and "radical" for this Court to grant review on hypothetical questions that bear no relation to the facts or to the court of appeals' decision, which correctly applied settled law to those facts.

STATEMENT

1. Kennedy was an assistant coach for the varsity football team and head coach of the junior-varsity team at Bremerton High School. ER111. He held a one-year term position subject to renewal on reapplication at the end of each school year. SER531-532.

For more than seven years, Kennedy delivered prayers to students. ER107, 113-114, 356-357; SER498. To begin with, he prayed on the 50-yard line at the end of games and participated in pregame and postgame locker-room prayers. ER113-114, 380. Next, he began allowing students on the team to join his on-field prayers. ER113. Then, he began standing, holding up the helmets from both teams, and delivering "motivational" "prayers" to the players (ER114, 209, 293, 361; SER498), with kneeling Bremerton players surrounding him (ER299). Sometimes, players from the opposing team joined also. ER107, 113, 356-357.

SER498 (arrow added).

The District learned of Kennedy's prayer practice in September 2015, when a coach from another school told Bremerton's principal that Kennedy "had asked him and his team to join [Kennedy] and [the Bremerton] team * * * after their game to pray last season." ER133-134. At the September 11 game, Bremerton's athletic director, now understanding that Kennedy's postgame speeches to the players were prayers, shook his head in disapproval when he saw Kennedy deliver one. ER201-203. That evening, Kennedy posted on Facebook: "I think I just might have been fired for praying." ER203. His posting led to an "explosion in calls and emails" to the District. ER236.

The District therefore investigated whether Kennedy's conduct violated its policies. ER299. In that inquiry, Kennedy confirmed that, "among others, coaching staff from other teams were invited to join in his post-game prayer." ER253. The District also ultimately learned from a player's father that his son felt "compelled to participate" because he feared that he

otherwise "wouldn't get to play as much." ER379. And other players' parents reported that their children had "participated in the team prayers only because they did not wish to separate themselves from the team." SER517.

On September 17, Superintendent Aaron Leavell wrote to inform Kennedy that he was "free to engage in religious activity, including prayer, so long as it does not interfere with [his] job responsibilities." ER107-109. Leavell instructed that Kennedy's prayers while on duty should be "physically separate from any student activity, and students may not be allowed to join such activity." ER109. Leavell clarified that Kennedy's prayers "should *either* be non-demonstrative (*i.e.*, not outwardly discernible as religious activity) if students are also engaged in religious conduct, *or* [they] should occur while students are not engaging in such conduct." ER109 (emphasis added). In other words, Kennedy could pray, including where students could see him, but he should not deliver prayers to or pray with students at school activities, because that could cause "alienation" of "team member[s]" who did not wish to participate. ER109. Acknowledging that these instructions might not cover every scenario, Leavell encouraged Kennedy to raise any questions with his superiors or with Leavell himself. ER109.

Kennedy initially complied: On September 18, his postgame speech to the team was nonreligious. SER426. He returned to the field to pray after the crowd departed, which was acceptable to the District. SER426-427. To the District's knowledge, Kennedy refrained, for approximately a month, from holding

prayers at the games. SER430, 432-433.[2] No players visibly prayed on the field when Kennedy was not initiating the prayers. SER517.

2. On October 14, Kennedy's attorneys sent the District a letter declaring that, beginning "on October 16," Kennedy would "continue his practice of saying a private, post-game prayer at the 50-yard line," and they demanded that the District "rescind the directive" in its September 17 letter. ER263; see generally ER258-263. Counsel described Kennedy's prayers as "verbal" and "audibl[e]" (ER259) and asserted that students had the right to join (ER262-263). (After remand, Kennedy testified: "I wasn't going to stop my prayer because there was kids around me." ER363-364.) Counsel's letter also asserted that Kennedy had never invited anyone to join in his prayers, that Kennedy did not close them with the word "amen," and that Kennedy was praying "after his official duties as a coach have ceased." ER259.

Kennedy then made media appearances in which he announced his plan to hold midfield postgame prayers on October 16. SER462, 482, 484-488, 516.

The day of the game, the District responded to Kennedy's counsel. ER253-256. It first reiterated the District's intention to work "in good faith with Mr. Kennedy" to find a solution acceptable to everyone. ER253. But the District also explained that Kennedy's attorneys "materially misunderst[ood] key facts in this case." ER253.

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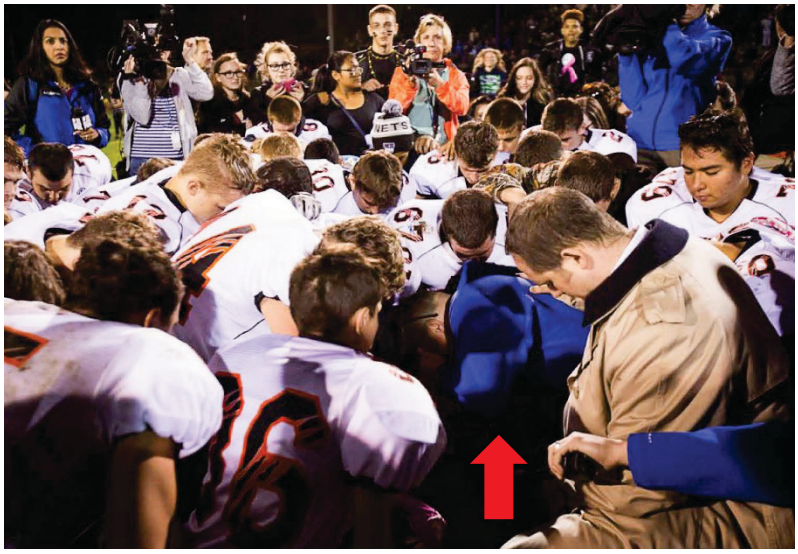
[2] In his January 2016 EEOC complaint, Kennedy described his actions this way. ER294. In his 2019 deposition he instead said that he prayed midfield at every game except on September 18. ER217-219.

With respect to counsel's assertions that Kennedy had not concluded the prayers with "amen" or invited others to join, the District explained that "the opposite was true": Kennedy had invited, "among others," opposing coaches "to join his post-game prayer" (ER253; see ER133-134); and a video from the September 14 game showed Kennedy closing the prayer with "amen" (ER253). The District also explained that Kennedy's prayers occurred not "on his own time" but instead while he "remain[ed] on duty." ER254 (emphasis omitted). The District noted that its "expectation" to remain on duty "until the players have * * * depart[ed] the District-sponsored activity" was "clearly understood by all coaches," and that school functions "encompassed all of the pre-game preparation and post-game activities." ER254. (After remand, Kennedy conceded that he was on duty during the prayers. ER359.)

As he had announced, Kennedy resumed having prayers at the October 16 game, surrounded by players bowing their heads and by a crush of spectators who ran onto the field to join him—including students, a state legislator, and members of the press. ER364-365; SER481, 516.



SER481 (arrow added).

Spectators "jumped over the fence" to reach the field and people tripped over cables and fell. ER378. School band members were knocked over. SER516. In the commotion, the District was unable to "keep kids safe." ER378. The District later "received complaints from parents of students who had been knocked down in the stampede." Pet. App. 9.

Meanwhile, "District personnel received hateful communications from some members of the public, and some [District] personnel felt physically threatened." Pet. App. 2; see SER513. Bremerton's head varsity football coach, Nathan Gillam, became concerned about his own safety and that of the players, cheerleaders, and band members. SER521-522. Among other incidents at games, "an adult [Gillam] had never seen before came up to [Gillam's] face and cursed [him] in a vile manner." SER521-522. The environment was so heated that Gillam, speaking to an off-duty police officer while walking onto the field for a

game, expressed fear that he "could be shot from the crowd." SER522.

Additionally, after the October 16 game, a Satanist group notified the District that it intended to conduct religious ceremonies on the field after games if others were allowed to do so (SER516); and other groups requested access to the field also (SER427).

The District therefore took several measures to protect students' safety, maintain control over its facilities and activities, and prevent the football field from becoming a forum for use by outside groups: It placed robocalls to inform District parents that there was no public access to the field; it posted signs saying the same thing; and it arranged for the Bremerton Police to provide security and keep spectators from rushing the field. SER516.

3. On October 23, Superintendent Leavell wrote to Kennedy again. ER98-100. He reiterated unequivocally that Kennedy's religious exercise "can and will be accommodated" as long as it did not interfere with Kennedy's performance of his job duties and would not be perceived as the District's endorsement of religion. ER99. The letter instructed Kennedy to stop his public prayer practice, which was observable to students and everyone else while Kennedy was "still on duty" at the games. ER99. Leavell explained that, given the context, "any reasonable observer" would view Kennedy as acting in his official role as a District employee. ER99. Leavell offered Kennedy a variety of accommodations, including "a private location within the school building, athletic facility or press box" to pray before and after games; and he invited Kennedy to contact him directly to discuss other potential accommodations. ER100. Additionally, Bremerton's principal told Kennedy that he could return to the field to

pray after the students were gone (ER378), as Kennedy had done in September (SER426-427).

Kennedy did not respond to the District's October 16 or October 23 letters. ER367; SER515. Instead, his lawyers alerted the media that the only acceptable outcome would be for the District to permit him to continue his past prayer practice (ER321), echoing counsel's October 14 demand letter.

On October 23, Kennedy prayed midfield at the end of a varsity away game. ER381, 404. He did so again at the junior-varsity home game on October 26, joined by a group that included two state legislators, two school-aged children, and other community members. ER368-370; SER479. The opposing team's coach, presumably concerned about coach-led prayer, instructed his players not to join. ER381.

On October 28, the District wrote to Kennedy a fourth time. ER277. Noting Kennedy's continued violations of the District's directives, Superintendent Leavell placed him on paid administrative leave. ER277. Leavell reiterated, however, that "the District remains willing to discuss ways of accommodating your private religious exercise"; and he again encouraged Kennedy to "contact me if you wish to discuss the options I have previously identified, or any other options you may have in mind." ER277.

Kennedy testified on remand that he "didn't doubt" the superintendent's "sincerity" and understood him to be "working very hard" to develop a suitable accommodation. ER367. Yet Kennedy never responded and never suggested any acceptable accommodations. Nor did he deviate from the October 14 demand that the District rescind in its entirety its

September 17 guidance and allow Kennedy to "continue his practice" of "audibly" praying with students on the field after games. ER259, 263; SER515. Superintendent Leavell understood that "Kennedy had specifically expressed his intention to pray with students on the field." SER515. "At no point" "did Mr. Kennedy or his representatives ever modify" this demand (SER515)—that is, he never asked to pray silently and alone.

While on administrative leave, Kennedy attended games as a spectator and knelt to pray in the stands, joined by others. SER475. The District did nothing to stop him. For the remainder of the season, the District enforced its policy against having spectators on the field after games. SER516. No players had postgame prayers on the field once Kennedy was no longer initiating them. SER517. Players and their parents thanked the District for putting an end to "awkward situations where they did not feel comfortable declining to join with the other players in Mr. Kennedy's prayers." SER526.

When Kennedy's contract expired at the end of the season, he did not reapply to coach the following year. SER532.[3] Head coach Gillam also did not reapply, be-

[3] Though the petition (at i) contends that "the school district ultimately agreed * * * that Kennedy lost his job solely because of his religious expression," not only did Kennedy *not* lose his job—rather than take the District up on its ongoing offer to accommodate him, he did not reapply for the next year—but the District's position has always been that it acted to maintain order and ensure students' safety at school events, to keep from having its field and games become a public forum, *and* to respect students' and their families' religious beliefs and comply with the law. See, *e.g.*, SER467, 516-517; Pet. App. 75-76.

cause of the "negative," "unsafe situation" that Kennedy's actions had created. SER522. Gillam "consider[ed] it a great personal loss" to have to "withdraw from the program and student-athletes he had been devoted to for eleven years." SER522.

4. In January 2016, Kennedy filed an EEOC complaint, which described his practice as evolving from silent prayers to "audible" ones joined by a "majority of the team." ER293.

Kennedy commenced this action in the Western District of Washington just before the start of the next football season and moved for a preliminary injunction. ER416-417. Denying that motion, the district court found it particularly salient that Kennedy had used his influence as a coach to convey religious views while "in charge" and "on the job." Pet. App. 303.

Kennedy appealed, and the court of appeals affirmed. Pet. App. 214-266. It concluded under *Garcetti* v. *Ceballos*, 547 U.S. 410 (2006), that Kennedy had delivered his prayers as a public employee and that the District could therefore regulate his speech. Pet. App. 228-247.

Kennedy petitioned for a writ of certiorari, which this Court denied. Pet. App. 207. Justice Alito issued a statement respecting the denial. Pet. App. 207-213. He noted that the Court generally does not grant discretionary review "to decide highly fact-specific questions." Pet. App. 210-211. He also criticized the district court for not making a "specific finding" on why Kennedy was placed on administrative leave (Pet. App. 209-210), questioned the scope of what the court of appeals considered to be "on duty" (Pet. App. 211), and expressed concern about whether the panel opinion could "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 not on duty" (Pet. App. 212).

5. The proceedings on remand answered those concerns.

As to whether Kennedy was on duty while praying, he himself testified that his "football coaching functions" continued "until the last kid leaves." ER359. Superintendent Leavell agreed that Kennedy "remained on duty and responsible for the supervision of the football players until they were dismissed from the locker room after the game." SER516. And the District had always maintained that Kennedy's speeches to the team were part of his job. See ER109, 254.

On summary judgment, the district court made the "specific finding" (Pet. App. 209) that the School District justifiably placed Kennedy on leave based on "the risk of constitutional liability associated with [his] religious conduct" (Pet. App. 140, 153-160).

The court of appeals unanimously affirmed. Pet. App. 1-39. The court, per Judge Milan Smith Jr., reiterated that there was now "no dispute" that Kennedy was on the job when he held the prayers. Pet. App. 15. The court also affirmed that Kennedy was speaking as a school official, not as a private citizen, when he delivered his "post-game speeches to students on the field"—i.e., his motivational prayers. Pet. App. 15; see SER498. So Kennedy's free-speech claim failed. Pet. App. 15.

Addressing Justice Alito's concern that the panel the first time around might have overread *Garcetti* to apply "even when the coach is plainly not on duty" (Pet. App. 212), the court explained that it had looked at Kennedy's off-duty conduct solely to "bolster[] the

already strong inference" that Kennedy intended "to send a message to students and parents about appropriate behavior and what he values as a coach, in line with his job duties of demonstrative communication as a role model for players." Pet. App. 16 (internal quotation marks omitted). In other words, Kennedy's off-duty conduct illuminated how he himself understood his on-duty conduct—and what he meant for students to understand about it. The court underscored that Kennedy's on-the-job actions at the games—not any off-field activities—were the "touchstone" of its analysis that "Kennedy spoke as a government employee." Pet. App. 16-17.

The court also ruled in the alternative that even if Kennedy's prayers had been private speech, the District had ample justification to regulate them on the particular facts here. Pet. App. 17-23. It concluded that Kennedy's free-exercise claim merited strict scrutiny, but that the District had a compelling interest in not violating the Establishment Clause and that its actions were narrowly tailored because Kennedy refused the District's repeated attempts to accommodate his prayers. Pet. App. 23-25.

Judge Christen, joined by Judge Dorothy Nelson, filed a concurrence (Pet. App. 30-39) that further detailed the specific facts supporting the court's conclusions. She explained that Kennedy's counsel's argument that the District's policy "would prohibit a teacher from giving thanks at lunchtime or engaging in any other personal prayer while on duty" was not supported by the record. Pet. App. 37. She also explained that the District "consistently sought to accommodate Kennedy's religious exercise without running afoul of the Establishment Clause." Pet. App. 37-38.

6. The court denied rehearing en banc. Pet. App. 40-129. Four dissents from (or statements opposing) denial and two statements in support were filed.

In opposition, Judge O'Scannlain stated his view that Kennedy's prayers were private. Pet. App. 77-106. Judge Ikuta, though recognizing that "Kennedy's highly public demonstrations of his religious convictions put Bremerton * * * in a no-win situation" (Pet. App. 107), expressed the view that circuit law should be clarified (Pet. App. 106-110). Judge Ryan Nelson argued that the panel misapplied precedent and strayed from the First Amendment's original meaning. Pet. App. 110-128. And Judge Collins criticized the panel's Establishment Clause reasoning. Pet. App. 129.

Judge Christen filed a statement explaining that on the "particular facts and circumstances" in the record, "there [was] no genuine dispute that Coach Kennedy spoke as a public employee." Pet. App. 70. She also detailed the "uncontroverted evidence that Coach Kennedy's prayerful speech had a coercive effect on his players." Pet. App. 71. And she explained that the "suggestion that [the District] could have issued a public disclaimer" that the prayers were private, while "allow[ing] Kennedy to continue," was "untenable" because the District "would have had to permit access" to other groups, opening the field as a public forum. Pet. App. 75-76. Because Kennedy's "hypothetical scenarios" of quiet, solitary prayer bore "little resemblance" to "[t]he actual record," she explained, this was not a "close case[]." Pet. App. 76.

Judge Milan Smith, author of the panel opinion, further clarified:

> Kennedy was *never* disciplined * * * for offering silent, private prayers. In fact, the record shows clearly that Kennedy * * * added an increasingly public and audible element to his prayers over the next *approximately seven years* before the Bremerton School District (BSD) leadership became aware that he had invited the players and a coach from another school to join him and his players in prayer at the fifty-yard line after the conclusion of a football game. He was disciplined only after BSD tried in vain to reach an accommodation with him after he (in a letter from his counsel) demanded the right to pray in the middle of the football field immediately after the conclusion of games while the players were on the field, and the crowd was still in the stands. * * * Kennedy prayed out loud in the middle of the football field immediately after the conclusion of the first game after his lawyer's letter was sent, surrounded by players, members of the opposing team, parents, a local politician, and members of the news media with television cameras recording the event, all of whom had been advised of Kennedy's intended actions through the local news and social media.

Pet. App. 41-42.

Judge Smith warned of "the Siren song of a deceitful narrative of this case spun by counsel for Appellant, to the effect that Joseph Kennedy * * * was disciplined for holding silent, private prayers." Pet. App. 41.

REASONS FOR DENYING THE PETITION

On this record, the court's rulings were commonplace, fact-bound applications of settled precedents that are not in tension with decisions of this Court or any other. And they were correct. By contrast, Kennedy's preferred result would require this Court to overturn decades of settled law under both the Free Speech and Establishment Clauses.

This Court has "well-known criteria for granting review, and they are not met here." *Taylor* v. *Riojas*, 141 S. Ct. 52, 55 (2020) (Alito, J., concurring in the judgment). Whatever this Court's interest may be in the questions posed by the petition, they are entirely hypothetical.

I. This case is an exceedingly poor vehicle for further review.

A. The case does not present the questions that the petition poses.

The petition insists that this case is about Kennedy's "brief, quiet prayer by himself." Pet. i. Except for "prayer," every word of that description is wrong.

The petition says that Kennedy's prayer lasted "approximately 15 to 30 seconds." Pet. 4. But focusing on the length of each individual prayer elides that the prayers were a regular "practice" that spanned more than seven years, expanded over time, included prayers both before and after games, and undoubtedly coerced years of Bremerton student-athletes. ER107, 113-114, 356-57, 379; SER498. A football game consists of many separate plays, each of which lasts only seconds. But a single play doesn't tell the whole story of a game, just as 'a brief prayer' doesn't tell the whole story of Kennedy's prayer practice.

Though taking a half-step back from the dogged insistence below that the prayers were silent—after the court of appeals took Kennedy's counsel to task because his own demand letter to the District specifically described his prayers as "audible" (Pet. App. 9; see ER259)—the petition now labels them as "silent or quiet" (Pet. 4). But the motivational speeches—which Kennedy himself testified were prayers (ER 209)—"utterly belie his contention" (Pet. App. 19-20). That Kennedy also sometimes prayed quietly is irrelevant. He regularly delivered postgame prayers to crowds of players and others. ER114; see ER 368-370.

The petition also insists that Kennedy prayed "by himself." Pet i. Again, the record tells a different story: Bremerton players often surrounded Kennedy as he prayed (ER299; SER498); and coaches and players from opposing teams—and by the end, community members—joined too (ER107, 113, 356-357, 368-370; SER498). Indeed, opposing coaches did so at Kennedy's invitation. ER133-134, 357. That was true both when Kennedy stood to deliver his postgame motivational prayers (ER203-204, 209, 212) and when he knelt for prayers (see ER481). And he demanded that students must be allowed to join. ER263.

Add to all of that the evidence that Kennedy was repeatedly offered accommodations (see ER97-100, 107-109, 277) that would have allowed him to have the "brief, quiet prayer by himself" that he insists he was denied (Pet. i), as well as the District's repeated invitations to propose other accommodations that would satisfy him while still respecting students' and their families' religious beliefs (ER99-100, 109, 277). Plus Kennedy's testimony that he did not doubt the superintendent's "sincerity" in "working very hard" to accommodate him. ER367.

Though the petition categorizes Kennedy's prayer practice as a short, solitary, silent or quiet moment of personal devotion, that is not what Kennedy actually did, not what he demanded to "continue" doing (ER263), and not what the students and the entire school community experienced. And given the "uncontroverted evidence that Coach Kennedy's prayerful speech had a coercive effect on his players" (Pet. App. 70-71), the petition's characterizations are not what the district court and court of appeals were asked to consider. Petitioner urges this Court "to turn a blind eye to the trajectory of his practice in favor of a segmented view of the evidence * * *. But acceding to Kennedy's framing of the record * * * simply does not tell the whole story." Pet. App. 22 n.3. Because the petition relies on reimagined facts, it does not and cannot raise substantial legal issues worthy of this Court's attention.

B. To grant Kennedy relief, the Court would have to overturn decades of law under multiple First Amendment clauses.

The court of appeals' dual holdings—that the District could regulate Kennedy's conduct because he acted as a public-school employee (Pet. App. 14-17) and that it was entitled to do so under the Religion Clauses (Pet. App. 17-23)—combine with the fact-bound nature of the court's analysis to make this case an exceptionally poor candidate for further review.

The petition asks this Court to make grand pronouncements that would rewrite settled doctrine under both the Free Speech and Establishment Clauses. See Part II, *infra*. But when this Court considers "an important issue of constitutional law," it takes pains not to "decide the question if it has not been cleanly presented." *Rogers* v. *United States*, 522 U.S. 252, 259

(1998) (O'Connor, J., concurring). Here, the court of appeals made plain that its government-speech and Establishment Clause holdings independently justified ruling for the District. See Pet. App. 17. So neither holding is "squarely presented" on its own. *Rogers*, 522 U.S. at 259 (O'Connor, J., concurring).[4]

The only way that this Court could avoid sweeping pronouncements of constitutional law would be to accept Kennedy's tale about what occurred, and then to review a mishmash of purported errors. But this Court is "not a court of error correction." *Martin* v. *Blessing*, 571 U.S. 1040, 1045 (2013) (statement of Alito, J., respecting denial of certiorari). In all events, if the legal issues here are as serious and far-reaching as the petition asserts—which is doubtful, given that they do not genuinely arise here, and the petition identifies no other cases involving them either—future cases presenting each question legitimately and cleanly will arise. Those would be the occasions to take them up.

* * *

Granting petitioner relief would be a tall order if the facts were as he says. On this record, it would be extraordinary.

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[4] Yet another line of free-speech jurisprudence is also implicated and would need to be substantially revised: The court of appeals acknowledged the District's interest in preventing the football field from being converted into a public forum for outside groups that demanded access equal to Kennedy's. See Pet. App. 8. To rule for Kennedy, this Court would have to hold both that the District inadvertently opened a forum (or allowed Kennedy to do so), and that it could not close that forum.

II. The rulings here do not conflict with decisions of this Court or any other.

Because this case is not about anyone's "brief, quiet prayer by himself" (Pet. i) but instead is about a public-school coach's demand to continue his years-long practice of audibly praying with and to students on the 50-yard line at football games, the court of appeals' holdings were straightforward and correct: Kennedy engaged in government speech at the focal center of a government event that the School District had authority to direct; and even if Kennedy's practice had somehow not qualified as government speech, the District still had authority and justification to regulate its employee's conduct because of Establishment Clause concerns.

To conjure a split, the petition misstates the court of appeals' reasoning, misapplies this Court's precedents, and raises wholly irrelevant law from other jurisdictions. The application of the pertinent law to this record was consistent with this Court's precedents and the decisions of sister circuits.

A. The decision does not conflict with this Court's precedents.

The petition criticizes as "radical" and "boundless" (Pet. 23) the court of appeals' interpretation of this Court's government-speech and Establishment Clause precedents. It is, however, the petition that misunderstands those precedents.

1. Government Speech

This Court has long recognized the need to "balance" the free-speech rights of public-school teachers

as citizens and the State's unique "interests as an employer in regulating the speech of its employees." *Pickering* v. *Board of Educ.*, 391 U.S. 563, 568 (1968).

a. "The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties." *Lane* v. *Franks*, 573 U.S. 228, 240 (2014). When it is, "the Constitution does not insulate" the speech "from employer discipline." *Garcetti*, 547 U.S. at 421.

The "speech at issue" (*Lane*, 573 U.S. at 240) is the specific speech in which the public employee engages, not a general category of speech. See *Garcetti*, 547 U.S. at 414-415, 422. And the "scope of an employee's duties" (*Lane*, 573 U.S. at 240) is not narrowly limited to the "subject matter" of the speaker's employment, but instead includes any speech made "pursuant to [one's] duties as a" public employee (*Garcetti*, 547 U.S. at 421).

These legal rules reflect a practical consideration: Government must have some "managerial discretion" over its employees if it is to maintain control of its operations and functions. *Garcetti*, 547 U.S. at 423. In the public schools, that means an educational institution must be able to "regulate the content of what is or is not expressed" so that it may "convey its own message" to students. *Rosenberger* v. *Rector & Visitors*, 515 U.S. 819, 833 (1995).

b. The court of appeals straightforwardly applied those rules to determine whether Kennedy's prayer practice was that of a "private citizen or public employee." Pet. App. 13 (internal citation omitted). The court noted Kennedy's concession that he was on duty for the prayers and "until the last kid leaves" (ER359), and his specific testimony "that his job responsibilities

extended" to postgame activities (Pet. App. 17). It also considered that Kennedy was "clothed with the mantle of one who imparts knowledge and wisdom," and that he "repeatedly acknowledged that—and behaved as if—he was a mentor, motivational speaker, and role model to students *specifically at the conclusion of a game*." Pet. App. 14-15 (emphasis in original). It determined that Kennedy's "position encompassed his post-game speeches to students on the field." Pet. App. 15. And in light of all of that, it evaluated Kennedy's demand that his speech must "occur while players stood next to him, fans watched from the stands, and he stood at the center of the football field." Pet. App. 15; see ER258-263.[5]

Petitioner's attempts to recast the facts notwithstanding, the court correctly recognized the context in which the School District had to determine whether it could restrict Kennedy's on-field religious speeches to students. That settled the matter under *Lane*, *Garcetti*, and *Pickering*.

c. The petition insists, however, that because the "'speech at issue'" was not "'ordinarily within the scope of [Kennedy's] duties,'" it must be categorized as private. Pet. 19 (quoting *Lane*, 573 U.S. at 240). In other words, because Kennedy's job description did not list praying as a job duty, his prayers were by definition private speech—whenever, wherever, however, and to whomever he delivered them. To arrive at

[5] In this fact-specific application of the law, the court drew a careful, principled distinction—not a "strained" one (Pet. 23)—between Kennedy's speeches to the team and, for example, the act of a teacher who bows her head in silent prayer before lunch in the school cafeteria. Pet. App. 15.

that conclusion, it is the petition, not the court of appeals, that forsakes any pretense of fidelity to this Court's decisions.

First of all, the court of appeals determined, in accordance with *Lane* and *Garcetti*, that the speech at issue was not just "prayer" but the specific "practice" that "Kennedy insisted" that he be allowed to "continue"—namely, delivering motivational-speech prayers while surrounded by players midfield at football games. Pet. App. 15, 19 n.1.

And the suggestion that a football coach's job-related speech is limited to calling plays (Pet. 20) is frankly silly. Cf. *Garcetti*, 547 U.S. at 421. Every coach understands that motivational speeches to the team and serving as a mentor and role model on the field "during post-game activities" (ER254) are part of the job. Kennedy certainly did. See, *e.g.*, ER373 (agreeing that his behavior is an "example to the kids" "at a game or at practice"). Petitioner's own *amici* underscore the point. See Br. *Amicus* Coach Tommy Bowden 14-15 (detailing "special relationship" between players and coaches); Br. *Amici* Former Football Players Largent & Hennings 8-9 (explaining how influential coaches are in lives of student-athletes).

Petitioner's argument is tantamount to saying that a geometry teacher could be disciplined if she got the Pythagorean Theorem wrong but not if she converted her classes into partisan political rallies, because her only job was to teach math. And what of other public employees? The court clerk who sang showtunes to litigants and the police officer who lectured arrestees on the evils of the federal income tax would be engaging in constitutionally protected private speech that their employers would be powerless to curtail. For on petitioner's theory, the further that

a public employee's on-the-job speech or expressive conduct strays from official duties, the less the employer can do about it—regardless of its effect on the government's ability to perform its public functions.

More than that, on petitioner's view, if a history teacher stopped the lesson thirty seconds before the bell rang every day, dropped to one knee or stood at the front of the class, and delivered a prayer, with students joining and other teachers invited to join also, that would be personal, private speech. But no one present would think of it that way—especially not the Jewish and Muslim students who had to go along or else mark themselves as outsiders and religious dissenters. So too here: The football field and locker room are a coach's classroom, and practices and games are his classes.

2. Establishment Clause

The court's ruling in the alternative—that the School District could justify its regulation of Kennedy's speech because of Establishment Clause concerns—also faithfully applied this Court's precedents to the facts.

a. This "Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools," because the state coerces students to attend and conform, and "because of the students' emulation of teachers as role models." *Edwards* v. *Aguillard*, 482 U.S. 578, 583-584 (1987). Hence, courts must examine all the circumstances to determine whether (intentionally or not) school officials are pressuring students to participate in religious exercises that may be contrary to their religious beliefs. *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 315 (2000).

b. Again, the ruling was a prosaic application of the settled legal test. The court did not, as the petition contends (at 24-25), simply assume that Kennedy's conduct would be attributed to the District. Instead, the court took seriously this Court's admonition not to "'turn a blind eye to the context in which' Kennedy's conduct arose." Pet. App. 18 (quoting *Santa Fe*, 530 U.S. at 315); see also Pet. App. 22 n.3. And it recounted the pertinent facts—including that:

- Kennedy had a long-standing, expanding prayer practice at games that included delivering midfield motivational prayers to players on both teams. Pet. App. 4.
- Kennedy's demand letter "acknowledged" that his prayers were "'verbal' and 'audible,' flatly contradicting Kennedy's own recounting." Pet. App. 9.
- Kennedy specifically demanded to "continue his practice" of praying with students. Pet. App. 19 n.1.
- Kennedy invited an opposing team's coach to have his team join in the prayers; and that coach told Bremerton's principal that he "'thought it was pretty cool how [the District] would allow' Kennedy's religious activity." Pet. App. 5 (showing how even adult school officials viewed the prayers).
- A photo in the record depicted "approximately twenty players in uniform kneeling around Kennedy with their eyes closed, a large group of * * * adults standing outside the ring of praying players, and several television cameras photographing the scene." Pet. App. 9.

- Kennedy "actively sought support from the community in a manner that encouraged individuals to rush the field to join him and resulted in a conspicuous prayer circle that included students" (Pet. App. 21), causing a "stampede" onto the field (Pet. App. 9). Despite its efforts to keep the field closed to the public, the District was unable to "'supervise effectively,' resulting in 'an inability to keep kids safe.'" Pet. App. 9 (quoting principal's testimony).
- A parent reported "that his son 'felt compelled to participate' in Kennedy's religious activity." Pet. App. 4 (quoting principal's testimony).

Only after considering all these facts and circumstances, as it "must" (*Santa Fe*, 530 U.S. at 315), did the court conclude that "allowing Kennedy free rein over his public demonstrations of religious exercise would have been perceived as a stamp of approval upon that exercise" (Pet. App. 20). So the court determined that even if somehow the prayers hadn't been government speech, Kennedy's conduct raised constitutional concerns for the students' religious freedom, warranting the District's actions. Pet. App. 20-23.

c. The petition's chief assertion of a conflict with this Court's jurisprudence (at 17-18) is that by crediting those concerns the court of appeals ignored the proposition of a plurality (though the petition does not identify it as such) in *Board of Education* v. *Mergens* that "schools do not endorse everything they fail to censor." 496 U.S. 226, 250 (1990) (plurality opinion). But what the plurality actually recognized is that "secondary school students are * * * likely to under-

stand that a school does not endorse or support *student* speech that it merely permits on a nondiscriminatory basis." *Ibid.* (emphasis added). The Court based that conclusion on the Senate Judiciary Committee's finding that "students below the college level are capable of distinguishing between State-initiated, school sponsored, or teacher-led religious speech," which may raise Establishment Clause concerns, "and student-initiated, student-led religious speech," which generally does not. *Id.* at 250-251 (quoting S. Rep. No. 357, 98th Cong., 2d Sess. 35 (1984)).

Rosenberger, 515 U.S. 819, was likewise about student speech in a public forum. And *Good News Club* v. *Milford Central School*, 533 U.S. 98, 103 (2001), and *Lamb's Chapel* v. *Center Moriches Union Free School District*, 508 U.S. 384, 387-388 (1993), were about the rights of outside groups to use school facilities after hours—which *Good News* specifically contrasted with the "curriculum taught by state teachers" (533 U.S. at 117).

How those cases establish that students would understand this "[coach]-led religious speech" to the players (*Mergens*, 496 U.S. at 250 (plurality opinion) (citation omitted)) to be private and personal, we cannot fathom.

d. This Court's jurisprudence that addresses school officials' conduct required the court of appeals to consider, as it did, that "students' emulation of teachers as role models" at school activities can be (and actually was) coercive for the students. *Edwards*, 482 U.S. at 584. In other words, school officials are school *officials*, with enormous authority and influence over students. And while public schools generally do not stumble into endorsing the speech of students (*Mergens* and *Rosenberger*) or outsiders (*Good News*

and *Lamb's Chapel*), that says nothing about either their duty or their discretion when it comes to their employees' religious speeches to and religious exercises with students at school activities.

e. Had the District instead tried to disclaim as personal, private, and solitary Kennedy's prayers to the team on the 50-yard line, the history, context, and conduct of his prayer practice would have made that a fiction—and cold comfort to the students who felt pressured to participate. See ER379; SER517, 526. The sham would also have been transparent to all in the school community who saw Kennedy deliver the prayers to the Bremerton players and their opponents.[6]

This Court has never held that "it's not us, it's them" disavowals absolve public school districts of all responsibility for their employees' actions with students. Much less has the Court held that schools are constitutionally prohibited from acknowledging responsibility and taking reasonable measures to protect students' rights, as the District did here. The *Mergens* plurality's statement that schools do not endorse everything they fail to censor (496 U.S. at 250) does not mean that they are *never* responsible for the on-the-job conduct of their faculty—much less that they can *never* regulate that conduct when they determine

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[6] Even if the District could have absolved itself of responsibility, moreover, the question was whether it must be penalized for having chosen a different path. The line between constitutional duties to students and obligations to employees cannot be so finely drawn that attempts to respect both inevitably trigger liability one way or the other. There must be reasonable discretion to manage employees to protect students' religious freedom—and their safety. ER 109, 378; see, *e.g.*, *Marchi* v. *Board of Coop. Educ. Servs.*, 173 F.3d 469, 476 (2d Cir. 1999) (Newman, J.).

it to be contrary to the school's pedagogical aims or the students' rights. Public school districts simply could not function if that were so.[7]

Finally, the petition chastises the court of appeals five times (Pet. 2, 3, 14, 25, 32) for its single reference to Kennedy's "pugilistic efforts to generate publicity in order to gain approval of those on-field religious activities" (Pet. App. 19), accusing the court of punishing Kennedy for "defense of [his] liberty" (Pet. 25). What the court in fact concluded was not, as the petition puts it, that Kennedy's publicity campaign "justif[ied] greater government suppression" of speech (Pet. 25), but that what Kennedy said to the media illuminated what he did on the field, and insisted on continuing to do, which "utterly belie[d] his contention that the prayer was personal and private" (Pet. App. 19). The court determined—as any reasonable person in the school community would—that Kennedy did not act, or speak, like someone who sought only to be left alone for private, solitary, silent prayer. Pet. App. 18-20; cf. *Santa Fe*, 530 U.S. at 315.[8] The conflict is only imagined.

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[7] As for the contention that because the controversy became public, no one would view Kennedy's speech or actions as approved by the District (Pet. 24), if that were the rule, public employees could ignore their job requirements and evade their employer's policies just by announcing loudly and proudly that they intended to disobey. Whatever the line may be between official conduct and private activity, it cannot be *that*.

[8] Petitioner also castigates Judge Smith (Pet. 2, 17, 25-26) for mentioning Jesus' Sermon on the Mount (see Pet. App. 69). But that reference, in Judge Smiths' en banc statement (not the court's opinion), was merely his "personal[]" view about how far Kennedy's conduct was from his litigating position that he sought only to be left alone for silent devotions. Pet. App. 69.

B. There is no circuit split.

The petition also asserts conflicts with a handful of cases bearing no resemblance to this one, while conveniently failing to mention the legion of pertinent cases that have come out as this case did.

1. Government Speech

As explained above, the court based its determination that Kennedy spoke as a public employee on extensive review of his activities as coach. Both the approach and the conclusion align with decades of circuit-court decisions about instructors' speech in public secondary schools[9] and colleges.[10] For as Judge

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[9] See, *e.g.*, *Rayborn* v. *Bossier Par. Sch. Bd.*, 881 F.3d 409, 418 (5th Cir. 2018); *Johnson* v. *Poway Unified Sch. Dist.*, 658 F.3d 954, 969-970 (9th Cir. 2011); *Evans-Marshall* v. *Board of Educ.*, 624 F.3d 332, 340 (6th Cir. 2010); *Borden* v. *School Dist.*, 523 F.3d 153, 172 (3d Cir. 2008); *Grossman* v. *South Shore Pub. Sch. Dist.*, 507 F.3d 1097, 1100 (7th Cir. 2007); *Lee* v. *York Cnty. Sch. Div.*, 484 F.3d 687, 700 (4th Cir. 2007); *Mayer* v. *Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 479-480 (7th Cir. 2007); *Downs* v. *Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1016 (9th Cir. 2000); *Lacks* v. *Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718, 719, 724 (8th Cir. 1998); *Boring* v. *Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364, 368-371 (4th Cir. 1998) (en banc); *Silano* v. *Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 722-724 (2d Cir. 1994); *Miles* v. *Denver Pub. Schs.*, 944 F.2d 773, 778-779 (10th Cir. 1991); *Bishop* v. *Aronov*, 926 F.2d 1066, 1075-1076 (11th Cir. 1991); *Bradley* v. *Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176 (3d Cir. 1990); *Kirkland* v. *Northside Indep. Sch. Dist.*, 890 F.2d 794, 795, 802 (5th Cir. 1989); *Palmer* v. *Board of Educ.*, 603 F.2d 1271, 1274 (7th Cir. 1979); *Cary* v. *Board of Educ.*, 598 F.2d 535, 543-544 (10th Cir. 1979); *Ahern* v. *Board of Educ.*, 456 F.2d 399, 403-404 (8th Cir. 1972).

[10] See*, e.g.*, *Bradley* v. *West Chester Univ.*, 880 F.3d 643, 652-653 (3d Cir.), cert. denied, 139 S. Ct. 167 (2018); *Brown* v. *Armenti*, 247 F.3d 69, 75 (3d. Cir. 2001); *Edwards* v. *California Univ. of Pa.*, 156 F.3d 488, 491-492 (3d Cir. 1998) (Alito, J.); *Dambrot* v.

Easterbrook explained, a public "school system does not 'regulate' teachers' speech as much as it *hires* that speech." *Mayer* v. *Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 479 (7th Cir. 2007). And as then-Judge Alito stated, a school has the "ability to say what it wishes when it is the speaker." *Edwards* v. *California Univ. of Pa.*, 156 F.3d 488, 491 (3d Cir. 1998).

Yet the petition mentions none of that—not even the Third Circuit's decision in *Borden* v. *School District*, which explicitly held that a high-school football coach's prayers with his team were "pedagogic," with the coach "acting as a proxy for the School District," so the district could regulate his speech. 523 F.3d 153, 172 (3d Cir. 2008).

Instead, the petition fabricates a circuit split by pointing to cases rejecting overly broad job descriptions as sweeping too much into the category of government speech. See Pet. 28-29 (citing *Hunter* v. *Town of Mocksville*, 789 F.3d 389, 399 (4th Cir. 2015); *Chrzanowski* v. *Bianchi*, 725 F.3d 734, 739-740 (7th Cir. 2013); *Brammer-Hoelter* v. *Twin Peaks Charter Acad.*, 492 F.3d 1192, 1204 (10th Cir. 2007)). But those decisions have no bearing, because here "there [was] simply no dispute that Kennedy's position encompassed his post-game speeches to students on the field" (Pet. App. 15). And the court's conclusions about the scope of Kennedy's job were based not on a job description, excessively broad or otherwise, but on Kennedy's coaching practices over more than seven years, his demand to continue those practices, and his explicit concession that he was on the job for the prayers. See Pet. App. 15-17, 150 n.3.

Central Mich. Univ., 55 F.3d 1177, 1190 (6th Cir. 1995); *Lovelace* v. *Southeastern Mass. Univ.*, 793 F.2d 419, 426 (1st Cir. 1986).

The court's detailed, fact-bound analysis also accords with other circuits' decisions by demanding more than the bare fact that speech "'ow[es] its existence' to [an employee's] public position" (Pet. 29 (citing *Boulton* v. *Swanson*, 795 F.3d 526, 532-534 (6th Cir. 2015))). Though the court certainly noted that Kennedy was on the field as a coach (Pet. App. 14-15), that was only the beginning of the court's analysis, not the end. The court concluded that Kennedy's coaching practice was to command the attention of the players in his charge and deliver motivational prayers to them as a closing ritual at games—which is something that only a coach would or could do, at a place and in a way that only a coach could do it, because motivational speeches to the team at games are part of the coach's job. Pet. App. 14-15. Like other circuits, the court considered the entire record to determine whether Kennedy's speech was "made in accordance with or in furtherance of the ordinary responsibilities of [his] employment"—and rightly concluded that it was. *Carollo* v. *Boria*, 833 F.3d 1322, 1329 (11th Cir. 2016); accord *Boulton*, 795 F.3d at 532-534; *Flora* v. *County of Luzerne*, 776 F.3d 169, 177-180 (3d Cir. 2015); *Chrzanowski*, 725 F.3d at 739-740.

2. Establishment Clause

Finally, the petition asserts a split with other courts' Establishment Clause jurisprudence. But tellingly, it does not mention that every case in the courts of appeals (or this Court) that involved prayer at public-school sporting events led or sponsored by public-school officials came out as this case did: in favor of the school districts' authority, and duty, to regulate the conduct to ensure that students are not pressured to participate in religious exercises contrary to their beliefs. See *Santa Fe*, 530 U.S. at 301; *Borden,* 523

F.3d at 174; *Doe* v. *Duncanville Indep. Sch. Dist.,* 70 F.3d 402, 406 & n.4 (5th Cir. 1995); *Jager* v. *Douglas Cnty. Sch. Dist.,* 862 F.2d 824, 831 (11th Cir. 1989).

Having determined that Kennedy's on-field-prayer practice resulted in actual coercion of students (see Pet. App. 4, 21; ER379; SER517, 526), the court applied those same legal principles and arrived at the same conclusion.

Because the pertinent cases are of no help to him, petitioner points principally to ones involving nondemonstrative conduct. See, *e.g.*, *Warnock* v. *Archer*, 380 F.3d 1076, 1082 (8th Cir. 2004) ("personal" framed psalm in school administrator's office held not to violate First Amendment). Petitioner's invocation of *Freshwater* v. *Mount Vernon City School District Board of Education*, 1 N.E.3d 335 (Ohio 2013), showcases the chasm here: The court held that a teacher's "personal Bible" on his desk did not violate the Establishment Clause. *Id.* at 352. Though the petition (at 27) describes the Bible as "demonstrative," that term appears nowhere in the opinion. Rather, the court took pains to emphasize just how "inconspicuous" it was. *Id.* at 353-354.[11]

Petitioner's cases only underscore the key principle identified and applied here: "Context matters" (Pet. App. 20). With the context firmly laid (see pp. 26-27, *supra*), the court determined that Kennedy's

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[11] The petition also points to *Hysong* v. *School District*, 30 A. 482, 484 (Pa. 1894)—a single, 127-year-old state-court case that arguably involved demonstrative conduct in distinguishing religious garb from impermissible religious instruction. Even if that made for a genuine conflict, which it doesn't, an issue as pressing as the petition asserts surely would have arisen sometime in the past century.

words, actions, and demands were not those of someone who wished merely to engage in personal, private prayer but instead were "a demonstration" "in every sense of the word" (Pet. App. 20). They were thus far afield from the cases that petitioner cites—and from his litigating position that his prayers were solitary, private, and silent. The court's determinations are not at odds with those decisions or any others.

CONCLUSION

As Justice Alito noted the first time around, this Court does not grant review "to decide highly fact-specific questions." Pet. App. 210-211. That is surely even more true when the questions that a petition poses are not remotely grounded in the record or implicated by the lower courts' correct applications of settled law. The petition should be denied.

Respectfully submitted.

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