No. 21-418

IN THE

Supreme Court of the United States

JOSEPH A. KENNEDY,

Petitioner,

v.

BREMERTON SCHOOL DISTRICT,

Respondent.

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

BRIEF OF *AMICI CURIAE* FORMER PROFESSIONAL FOOTBALL PLAYERS STEVE LARGENT AND CHAD HENNINGS IN SUPPORT OF PETITIONER

GORDON D. TODD*
CHRISTOPHER R. MILLS
CODY L. REAVES
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
gtodd@sidley.com

Counsel for Amici Curiae

* Counsel of Record

March 2, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

INTERESTS OF *AMICI CURIAE*[1]

Steve Largent represented the First District of Oklahoma in the United States House of Representatives from 1994 to 2002. Before his service in Congress, Mr. Largent played professional football for the Seattle Seahawks, and is a member of the Pro Football Hall of Fame.

As a citizen, a former member of Congress, and a former professional football player, Mr. Largent has a deep interest in ensuringappropriate protections for free expression by educators in our public schools, and in fostering open dialogue between players and coaches at all levels of play. Mr. Largent, whose father left his family when Mr. Largent was only six years old, credits his successes on and off the field in large part to the positive influence of the men who coached him in his youth. Mr. Largent, accordingly, is deeply concerned about judicial decisions limiting the scope of free speech and religious expression for individuals who serve as coaches and in similar mentoring roles.

Chad Hennings was a defensive tackle for the Dallas Cowboys from 1992 to 2000, during which period he and his team won three Super Bowls. Before joining the NFL, Mr. Hennings played football for the U.S. Air Force Academy, where he was a unanimous first-team All-American and a recipient of the Outland Trophy, awarded to the best college football interior lineman. Mr. Hennings was also subsequently inducted into the College Football Hall of Fame.

---

[1] All parties provided written consent to the filing of this brief by blanket consent. *See* Sup. Ct. R. 37.3(a). Per Rule 37.6, *amici* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

After graduating but before joining the Cowboys, Mr. Hennings served for several years as a pilot in the U.S. Air Force, flying 45 missions in the Persian Gulf and separating from active duty with the rank of captain. Mr. Hennings continued to serve in the Air Force Reserve while playing for the Cowboys.

Like Mr. Largent, Mr. Hennings attributes much of his success to the men who coached him throughout his scholastic and professional athletic careers, and who encouraged him both to play professional football and to serve his country. He shares Mr. Largent's concern about judicial decisions that impair a person's ability to speak freely and abide by his or her conscience and religious convictions, simply because he or she is employed by a public school as a coach.

INTRODUCTION AND SUMMARY OF ARGUMENT

The twin holdings in the decision below are as breathtaking as they are wrong. Neither has any basis in the First Amendment's text or this Court's precedents. Indeed, it is difficult to say which is more misguided: the view that the Free Speech Clause does not protect a public school teacher's or coach's right to say a brief, silent prayer on school grounds; or the view that the Establishment Clause *requires* a public school to prohibit its employees from offering such a prayer. It is important not just to *amici*, but to society generally, that the Court reverse the court below and correct its stifling views of what a coach may freely say and do and what public schools are required to do.

The Ninth Circuit's first holding—that Joseph Kennedy's brief, quiet prayers constitute government speech that lack First Amendment protection—cannot

be squared with the First Amendment. In fact, it effectively erases the line between public and private expression in the realm of public-school employment. In the court's view, virtually every action and statement by a high school football coach is tantamount to expression by the school itself. So long as the coach's presence on campus might be seen as having some connection to the school, the government has an unlimited right to regulate his speech and expressive conduct. That view of public-employee speech conflicts with almost a century of precedent and sharply departs from the Court's guidance in *Lane* v. *Franks*, 573 U.S. 228 (2014).

At a practical level, moreover, by forcing educators to shed their free speech rights at the schoolhouse door, the court's view of the law also undermines a coach's capacity to serve meaningfully as a mentor for students. This understanding of the First Amendment would chill educators from giving candid advice on virtually any non-scholastic topic—from college choices to personal struggles with relationships, harassment, or substance abuse—lest their statements run afoul of a school district's speech limitations, as Coach Kennedy's apparently did here. The court's analysis also misunderstands that coaches and other school employees who are regarded as role models earn that respect not on account of their state employment but because they are individuals whose personal choices inspire admiration.

The Ninth Circuit's second holding—that even if Coach Kennedy's prayers were private expression, the Establishment Clause required the school to prohibit them—is dangerously wrong. It flips the First Amendment on its head, permitting public schools to ban *private* religious expression on school grounds out of a

(supposed) fear that its failure to suppress such expression will be viewed as an endorsement of the expression. In other words, a school may cite the First Amendment as the reason why a teacher cannot bow her head and say a brief, quiet prayer before her lunch in the school cafeteria, and why a football coach cannot pray for the safety of players on both teams just before kickoff. This mistaken view of the First Amendment should be swiftly rejected.

In equating Coach Kennedy's private, quiet prayer with school-sponsored expression, the court ignored what anyone who has watched an athletic contest easily perceives—an athlete's or coach's personal expressive conduct around a playing field is quintessentially *personal* speech expressing the views and emotions of the *individual*, not of the team. Athletes at all levels of play can be found praying in end zones, pointing to the heavens, kneeling or standing during the national anthem, promoting particular charitable causes, and speaking about salient political and social issues. Coaches and athletes also often pray when a player is injured. No reasonable observer would mistake those actions as having been made on behalf of the government. Nor should any fair-minded observer conclude that Coach Kennedy's personal and quiet postgame prayer constituted school-endorsed speech.

Amici urge the Court to reverse the decision below and to reaffirm two bedrock principles: that coaches, teachers, and athletes do not shed their free-speech rights at the schoolhouse door, and that public schools may not deploy the Establishment Clause to expel private religious expression and religiously observant role models from school grounds.

ARGUMENT

I. THE APPELLATE COURT'S MISGUIDED VIEW OF THE FIRST AMENDMENT WILL IMPAIR COACHES' ABILITY TO SERVE AS ROLE MODELS AND MENTORS.

The Ninth Circuit held that all speech by school-district employees while on duty is—by definition—speech as a public employee under the second factor of the so-called *Eng* test. See *Eng* v. *Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009) (setting forth five-part test for government-employer restrictions of employee speech, the second of which concerns "whether the plaintiff spoke as a private citizen or public employee"). That holding conflicts with controlling law and with the practical realities of a coach's role in the lives of his or her players.

1. The First Amendment does not clock out when a coach or teacher clocks in. *Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."). In *Lane*, 573 U.S. 228, the Court clarified the rule regarding public employee speech, unanimously warning lower courts against an overly broad reading of *Garcetti* v. *Ceballos*, 547 U.S. 410 (2006). See also App-211 (Alito, J., respecting denial of certiorari) (calling the Ninth Circuit's reading of *Garcetti* "troubling" and "highly tendentious").

The Court explained that the "critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties." 573 U.S. at 240. Accordingly, speech "outside the scope of

[an employee's] ordinary job duties is speech as a citizen for First Amendment purposes." *Id.* at 238. Under this test, the Court has cautioned that a person's rights cannot be restricted through "excessively broad job descriptions." *Garcetti*, 547 U.S. at 424–25. "Formal job descriptions" or where the speech takes place do not control. *Id.* at 424. Rather, "[t]he proper inquiry is a practical one." *Id.*

Yet disregarding this controlling law, Bremerton School District advanced—and the district court and the Ninth Circuit adopted—a view that one of Coach Kennedy's job duties was to set a good example, which meant everything he did was fair game for regulation. See App-16. The Ninth Circuit's test focuses solely on the temporal aspect of the speech—*i.e.*, that a coach or teacher engages in "speech as a government employee" when in "a location that he only had access to because of his employment . . . during a time when he was generally tasked with communicating with students." App-15. Thus, in the lower court's view, because "expression" is an aspect of coaching, any statement made while a stadium's lights are on is necessarily part of a coach's official "duties" and thus is public-employee speech wholly unprotected by the First Amendment, regardless of whether the coach is actually coaching. See App-14–16. This simplistic, on-school-grounds reading of *Garcetti* disregards this Court's clear instruction that lower courts must conduct a "practical" inquiry. 547 U.S. at 424.

2. The Ninth Circuit also inappropriately reasoned that coaches should be subjected to even higher scrutiny—and therefore entitled to *less* First Amendment protection—because of the nature of their relationship with their athletes. See, *e.g.*, App-14 (explaining that

Kennedy "was one of those especially respected persons"); App-238 ("[T]he coach is more important to the athlete than the principal."); App-70 & n.8 ("[T]he practical inquiry into the duties of a high school football coach must acknowledge that football coaches occupy a significant leadership role . . . and wield undeniable—perhaps unparalleled—influence where their players are concerned.") (Christen, J., concurring in the denial of rehearing en banc). But this "importance" or "influence" inquiry has no basis in the First Amendment's text or in this Court's precedents. See *Lane*, 573 U.S. at 240 (explaining that the critical question is whether "the speech at issue is itself ordinarily within the scope of an employee's duties").

Reliance on factors such as a speaker's "influence" is particularly dubious and unworkable. Is a non-influential teacher or coach able to engage in different speech than an influential teacher or coach without crossing the line from private speech to government speech? Is the AP English teacher more influential than the baseball coach? (Influential to whom?) Do courts need to poll the high schoolers? Their parents? Cf. App-238 (providing a single citation to the opinion of one former Bremerton High School football player who said that Coach Kennedy was a "parental figure" to the team to support its view that "the coach is more important to the athlete than the principal"). No, no, and no. The protections afforded by the First Amendment do not depend on the outcome of a popularity contest.

Amici are particularly concerned with how the Ninth Circuit's opinion will impact students. Students benefit from having role models. Parents ought to be students' primary educators and role-models, but sadly

are not always. For instance, before becoming a household name, Mr. Largent came from what some would call a broken home, in Oklahoma City, Oklahoma. Mr. Largent's parents divorced when he was only six years old. His father moved away and largely fell out of Mr. Largent's life. Mr. Largent's mother eventually remarried, but to a chronic alcoholic. Home life was not a stable or protective environment. Still only a boy, Mr. Largent would often have to physically separate his mother from his step-father in an effort to protect her. In these types of circumstances, other adults—including teachers and coaches—can help fill the void.

The Ninth Circuit reasoned that coaches are role models simply because of their position or job responsibilities. That categorical view fundamentally misconstrues the reason why coaches are seen as role models.

Adults become positive role models not because of their job obligations but by transcending them. Mr. Hennings' his high school football coach, for example, was instrumental in helping him achieve his dreams of attending the Air Force Academy and serving our nation. This coach so believed in Mr. Hennings that, when it seemed that Mr. Hennings's performance at a small school in rural Iowa might be overlooked, the coach took it upon himself to drive more than 900 miles to Colorado Springs to personally deliver a 16-millimeter game tape to the recruiting coach at the Air Force Academy and to vouch for Mr. Hennings's character. Mr. Hennings received the last recruiting visit for that year and subsequently went on to receive his congressional nomination. Mr. Hennings' coach might humbly say he was simply doing his job. But everyone would recognize that he did much more, as a

thoughtful and caring person, not as a government representative.

Perversely, by reducing coaches to government employees with no autonomy, the court's reasoning would needlessly undermine coaches' ability to be effective as mentors and role models. Students may seek guidance from their coaches and teachers on any number of issues. A player may be struggling with her parents' divorce or a family member's death, grappling with incidents of harassment or abuse, questioning her personal, moral, or social identity, struggling with alcohol or substance abuse, or simply deliberating whether or where to attend college. When a player approaches her coach to seek personal advice, the player is not asking the government for help. She is seeking personal advice from someone she has come to look up to on account of their positive modeled behavior. And it is imperative for students that coaches thus approached be able to respond in a meaningful and authentic way. Requiring a coach to refer the student to some school-approved guidebook or sterilized training module would strip advice of the most important attribute—personal trust—and would transform the coach to simply another functionary.

The Ninth Circuit's opinion is also blind to the fact that no classroom curricula exist for the sorts of guidance that coaches (or any other similarly trusted educator) dispense. Coaches cannot serve as effective mentors if they fear that they will face professional repercussions simply for answering their players' questions on topics that the government as an entity has chosen to not address. Nor would a teenager who worked up the courage to seek an adult's help meaningfully be served by a coach who is forced to either parrot a government mantra or respond "I can't talk about that."

Indeed, that type of censorship—which itself would convey a message of government hostility toward the verboten beliefs—would be simply another example of a potential role model putting their own personal interests ahead of the student's. These students do not need another adult to let them down.

That, however, is just the sort of backwards result that the Ninth's Circuit misreading of *Lane* encourages. Coaches and teachers must suppress their personal religious, political, social, and economic views, and spurn players or students who inquire about them.

The lower court's decision takes a view of the First Amendment that is as unworkable as it is unsupported by the law. The Court should forcefully reject it.

II. NO REASONABLE OBSERVER COULD MISAPPREHEND THE INDIVIDUALIZED NATURE OF EXPRESSIONS ON A SPORTS FIELD.

The Ninth Circuit's holding that, even assuming that Coach Kennedy's prayers were private religious expression, the Establishment Clause nonetheless compels a school to prohibit them, rests on a fundamentally flawed understanding of the First Amendment. On this view, a public school cannot do *anything*—such as permit a private, pregame or postgame prayer on a football field or in a school gymnasium—that a member of the public might subjectively misperceive as government speech endorsing religion or religious beliefs. But this Court has time and again rejected the view that a government "endorses" religion by simply permitting religious expression alongside other forms of expression. See *Lamb's Chapel* v. *Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395

(1993) ("[T]he posited fears of an Establishment Clause violation are unfounded."); *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 118 (2001); *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845 (1995). And an outside observer's misperception of such speech does not change the rule.

1. "[S]chools do not endorse everything they fail to censor." *Bd. of Educ.* v. *Mergens ex rel. Mergens*, 496 U.S. 226, 250 (1990) (plurality op.). Indeed, given that "private religious expression receives *preferential* treatment under the Free Exercise Clause," it is "peculiar" to say that government "'promotes' or 'favors'" private religious expression by permitting it on school grounds. *Capitol Square Rev. & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 763–64, 767 (1995) (plurality op.). Yet the Ninth Circuit adopted just this peculiar reading of the Establishment Clause, giving public schools the green light to "silence or muffle" teachers' and coaches' religious expression by simply claiming that *not* doing so would "affix[] a government seal of approval" to "private speech." *Matal* v. *Tam*, 137 S. Ct. 1744, 1758 (2017). This test, "which would attribute to a neutrally behaving government *private* religious expression, has no antecedent in [this Court's] jurisprudence." *Capitol Square Rev.*, 515 U.S. at 764 (plurality op.).

In fact, just weeks ago during oral argument in *Shurtleff* v. *Boston* (No. 20-1800), several members of this Court once again decried this "mistaken understanding" of the Establishment Clause. Oral Arg. Tr. at 63:9–23 (Kavanaugh, J.); see *id.* at 70:9–71:6, 80:6–21 (Kagan, J.); *id.* at 77:9–18, 78:1–11, 79:5–10 (Gorsuch, J.). This erroneous understanding no doubt influenced the Ninth Circuit's view of whether Coach Kennedy's prayer constituted government or private

speech. See App-2 ("Although there are numerous close cases chronicled in the Supreme Court's and our current Establishment Clause caselaw, this case is not one of them."). This Court should make clear (yet again) that the Establishment Clause does not sanction—much less *require*—public schools to forbid teachers and coaches from engaging in private religious expression on school grounds.

2. The Ninth Circuit's view that this is not a "close case[]" gets it completely backward. No reasonable spectator would think that Coach Kennedy's private, quiet prayer was, in fact, censorable government speech. That is, coaches and players often engage in expressive conduct around the athletic field, which all observers understand as the expressive conduct of the *individual*, and not of that person's team or organization. See, *e.g.*, *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 305, 308 (2000) (holding that the relevant inquiry under the Establishment Clause is "whether an objective observer, acquainted with" the relevant context, "would perceive [the challenged conduct] as a state endorsement of prayer in public schools" (quoting *Wallace* v. *Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring in the judgment)).

Examples of expressive conduct during athletic events abound, running the gamut from religious to political and commercial speech. Wade Boggs, for instance, famously used to draw a *chai*, the Hebrew symbol for life, in the batter's box dirt before each at bat.[2]

---

[2] *See* Kevin Dupont, *Boggs of Red Sox Setting the Standard for Hitting*, N.Y. TIMES (Aug. 12, 1985), http://www.nytimes.com/1985/08/12/sports/boggs-of-red-sox-setting-the-standard-for-hitting.html.

Likewise, Ivan "Pudge" Rodriguez was known for making the sign of the cross before taking a pitch.[3] Heisman Trophy winner and former professional football and baseball player Tim Tebow prominently displayed Bible verses—such as, Philippians 4:13, John 3:16, and Hebrews 12:1-2—on the black strips he wore under his eyes for much of his college football career.[4] Tebow also became known for his expression upon scoring a touchdown, which was to kneel and pray silently in the end zone.[5]

And there is no shortage of athletes and coaches who can be found pointing to the heavens, kissing a crucifix, or otherwise ostensibly offering words of praise or gratitude to a deity for their on-field successes.[6] For example, Steph Curry, a two-time NBA MVP and three-time NBA Champion with the Golden State

---

[3] *See* Dave Caldwell, *Jesus Is the Coach for Many Latin Baseball Players*, DALLAS MORNING NEWS (Aug. 17, 1996), http://articles.sun-sentinel.com/1996-08-17/lifestyle/9608150372_1_latin-players-blesses-juan-gonzalez.

[4] *See* John Branch & Mary Pilon, *Tebow, a Careful Evangelical*, N.Y. TIMES (Mar. 27, 2012), http://www.nytimes.com/2012/03/28/sports/football/tebow-professes-his-evangelical-faith-carefully.html.

[5] *See* Greg Bishop, *In Tebow Debate, a Clash of Faith and Football*, N.Y. TIMES (Nov. 7, 2011), http://www.nytimes.com/2011/11/08/sports/football/in-tebow-debate-a-clash-of-faith-and-football.html.

[6] Athletes' tendency toward religiosity is so engrained that it has long been the subject of satire, with one of the most notable examples being the shrine built to the fictitious voodoo deity Jobu in the movies *Major League* and *Major League II*, which several members of the Cleveland Indians recreated during their World Series run in 2016. *See* Paul Hoynes, *Mike Napoli, Jason Kipnis Bring Jobu Back to Cleveland Indians' Clubhouse*, CLEVELAND.COM (June 21, 2016), http://www.cleveland.com/tribe/index.ssf/2016/06/post_451.html.

Warriors, often taps his chest and points to the sky after hitting a three-pointer, which he said "[b]asically means 'have a heart for God.'"[7] So too, innumerable postgame interviews begin with some offering of thanksgiving.

Athletes' expressions also tend toward the political. A few years ago, San Francisco 49ers' quarterback Colin Kaepernick attracted immense attention for his decision to kneel on the sidelines during the pre-game playing of the national anthem, to draw attention to what he saw as a nationwide epidemic of police brutality against people of color.[8] Since then, his protest has been replicated by athletes and coaches in virtually every sport and at every level of play around the country, including in high schools and middle schools.[9]

Of course, Mr. Kaepernick was not the first athlete to use the playing field to speak politically. Tommie Smith and John Carlos topped the international news when they raised their black-gloved fists during a medal ceremony at the 1968 Mexico City Olympics in

---

[7] Tim Kawakami, *Steph Curry, on His Many Quirks, in His Own Words: The Mouthpiece, the Fingernail-Chewing, the "Lock in!" Tweet, the Sprint to the Rim Before Tip-off and More*, MERCURY NEWS: TALKING POINTS (May 13, 2016), http://blogs.mercurynews.com/kawakami/2016/05/13/steph-curry-quirks/.

[8] *See* Christine Hauser, *Why Colin Kaepernick Didn't Stand for the National Anthem*, N.Y. TIMES (Aug. 27, 2016), http://www.nytimes.com/2016/08/28/sports/football/colin-kaepernick-national-anthem-49ers-stand.html.

[9] *See, e.g.*, Phil Anastasia, *Woodrow Wilson High Coaches and Players Take a Knee During Anthem*, PHILA. INQUIRER (Sept. 10, 2016), http://www.philly.com/philly/sports/high_school/new_jersey/20160911_Woodrow_Wilson_High_coaches_and_players_take_a_knee_during_anthem.html.

solidarity with the black power movement.[10] In 2014, LeBron James, Derrick Rose, the late Kobe Bryant, and other basketball players wore shirts emblazoned with the words "I Can't Breathe" during pre-game warm-ups, in reference to the death of Eric Garner, an unarmed black man who died after a police officer placed him in a chokehold.[11] These examples more easily come to mind because they involve widely-known individuals. But any attendee of sporting events knows that players and coaches of all ages make, and have long made, their own *personal* statements. And, when players or coaches engage in this type of expressive conduct, they speak for themselves and not for the teams or institutions they represent.

Football fans are also familiar with a far less celebratory sight: that of a player who has been injured during play.[12] In those anguished moments when a players lies stricken and coaches and teammates suffer the anguish of having nothing to do besides await medical personnel, many players and fans turn to the one thing they can do: pray. No reasonable observer watching teammates link arms, bow heads, or take a

---

[10] *See, e.g.*, Claire Barthelemy, *1968: Black Power Protest at the Olympics*, INT'L HERALD TRIB. (Oct. 23, 2013), http://iht-retrospective.blogs.nytimes.com/2013/10/23/1968-black-power-protest-at-the-olympics.

[11] *See* Marissa Payne, *President Obama Endorses LeBron James's 'I Can't Breathe' Shirt*, WASH. POST (Dec. 19, 2014), https://www.washingtonpost.com/news/early-lead/wp/2014/12/19/president-obama-endorses-lebron-jamess-i-cant-breathe-shirt.

[12] Like practically all football players, Mr. Largent suffered numerous injuries during his career. Some caused on-lookers quite a bit of concern. *See, e.g.*, NFL, *Football Feud: Steve Largent v. Mike Harden*, YOUTUBE (Oct. 25, 2015), https://www.youtube.com/watch?v=xSOPrwb-mQc.

knee as paramedics rush onto the field would think that the state was endorsing any religion. A reasonable observer instead would see what was plain to all—a person thoughtfully and earnestly pausing to pray for another's well-being.

Athletes also make statements to support their commercial and charitable interests. It is no secret that Steph Curry endorses Under Armour shoes, which he wears on the court,[13] in keeping with similar arrangements made by other athletes. Likewise, athletes often promote various charitable causes through their conduct on the field, either by wearing a distinctive piece of clothing,[14] or by tying their on-field performance to off-field donations, such as Malcolm Jenkins's widely-publicized pledge to donate a set amount of money to a youth sports safety organization for each interception his team recorded.[15]

---

[13] *See, e.g.*, Joe Nocera, *In Sneaker Wars, It's Also Curry (Under Armour) vs. James (Nike)*, N.Y. TIMES (June 17, 2016), http://www.nytimes.com/2016/06/18/sports/basketball/under-armour-shoes-nike-stephen-curry-lebron-james.html.

[14] *See, e.g.*, Ilan Mochari, *Beats, the NFL, and Guerrilla Marketing*, SLATE (Oct. 15, 2014), http://www.slate.com/blogs/moneybox/2014/10/15/guerrilla_marketing_colin_kaepernick_wears_beats_headphones_after_49ers.html (reporting on Colin Kaepernick's decision to wear pink Beats headphones to support breast cancer awareness month); Gillian Mohney, *NFL Star Fined for Wearing Green to Raise Awareness for Mental Illness*, ABC NEWS (Oct. 11, 2013), https://abcnews.go.com/blogs/health/2013/10/11/nfl-star-fined-for-wearing-green-to-raise-awareness-for-mental-illness (reporting that Chicago Bears wide receiver Brandon Marshall would wear green shoes during a game to support National Mental Health Awareness Week).

[15] *See* Malcolm Jenkins Found., *No PHLY Zone Challenge – Interceptions for Youth Sports Safety* (Oct. 1, 2015),

The expressions above and others found throughout the sporting world range from the serious to the farcical, but no one who has observed them is confused about who was doing the speaking. No one, for instance, mistakenly believes that Mr. Tebow's various teams ascribed to his particular Biblical interpretations, that Mr. Kaepernick espoused the entire 49ers team's views on race relations, or that the NBA or the Warriors cosign Mr. Curry's Christ-centered gesture. Nor would a reasonable observer conclude that Nike endorses everything done on the field by a member of the Washington State football program, or that Adidas endorses everything done on the field by a member of the University of Washington football program, even though each company's logo appears on practically every article of equipment used by those schools' athletes.

Here, Coach Kennedy's 50-yard-line prayer is in line with these other expressions. No reasonable observer should conclude that his quiet, prayerful postgame observation was school-endorsed speech, constituting a state establishment of religion. See *Capitol Square Rev.*, 515 U.S. at 763–64. Indeed, it is undisputed that Coach Kennedy never coerced or compelled any students to join him in his prayers—he explicitly told students, when they asked to join him, "[t]his is a free country." App-4. Cf. *Mergens*, 496 U.S. at 250 (plurality op.) ("We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.")

---

http://themalcolmjenkinsfoundation.org/index/php/no-phly-zone-challenge-interceptions-for-youth-sports-safety.

Bremerton School District's rule in this case nevertheless goes far beyond what would be needed to prevent coercion, and categorically prohibits any and all "demonstrative religious activity" by on-the-clock employees, App-37 (Christen, J., concurring), without any regard to whether the employee may be engaged in conduct that is outside the scope of their normal duties.

3. The Ninth Circuit, too, framed the issue in this case as whether "Kennedy spoke as a public employee when he engaged in demonstrative religious activity at the fifty-yard line." App-13. Thus, under the court's reasoning and the school district's rules, the school is free to forbid teachers and coaches from wearing yarmulkes, crosses, or religious head coverings on school grounds; reading a Bible or Quran alone during recess; or praying quickly and quietly before eating lunch or at football games.

The Ninth Circuit hand-wavingly dismissed these concerns by calling Kennedy's prayer "expression . . . of a wholly different character" than a teacher bowing her head to pray silently in the school cafeteria. App-15. That is so, the court says, because Kennedy "insisted that his speech occur while players stood next to him," "fans watched from the stands," and "he stood at the center of the football field." *Id.* But not one of those three features distinguishes Kennedy's speech from a teacher in the cafeteria.

First, as the court itself notes throughout its opinion, Kennedy did not "insist[ ]" that "players stood next to him" while he prayed. App-15. When "a group of BHS players asked Kennedy whether they could join him," he told them that "[t]his is a free country." App-4. And a photo of Kennedy's prayer just three days before being placed on administrative leave "shows Kennedy

kneeling alone on the field while players and other individuals mill about." App-10.

Despite this solo prayer just days before his effective termination, the court dismissed Kennedy's assertion that "all he wants is to pray alone" because "the record reflects that if BSD permitted Kennedy to resume his prior practice, students would join him." App-22. For one, even if some students might want to pray with Kennedy, that would in no way support the court's characterization that Kennedy "insisted that . . . players stood next to him." App-15. For another, the court's reasoning is at odds with its recognition that Kennedy told those who wanted to pray with him that this is a "free country." App-4.

Worse still, it is at odds with this Court's precedents—it uses others' *predicted response* to private, personal prayer to transform that private speech into government speech. But this Court's precedents do not allow the government to use the Establishment Clause as "a modified heckler's veto" to trump private activity protected by the First Amendment. See *Good News Club*, 533 U.S. at 119; *Capitol Square Rev.*, 515 U.S. at 779 (O'Connor, J., concurring in part and concurring in judgment) ("[B]ecause our concern is with the political community writ large, the endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from the discomfort of viewing symbols of a faith to which they do not subscribe.").

Second, the court fails to explain how "fans" watching "from the stands" is different from students watching a teacher's prayer from their cafeteria tables. Third, the court provides no explanation for why a *postgame* prayer on the 50-yard-line—hundreds of feet away from most observers—would cause "an objective

observer" to perceive that expression as "a state endorsement of prayer in public schools," but a midday prayer during school hours, inside the school cafeteria, and mere feet from dozens of students would not. See *Santa Fe*, 530 U.S. at 305, 308. Nor could it.

Moreover, the court turns a blind eye to the numerous ways the school district court have easily cleared up any purported confusion about whether it endorsed Coach Kennedy's private conduct, all of which would have been significantly less restrictive than simply banning Coach Kennedy from praying. See *Fulton* v. *City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021) ("[If] the government can achieve its interests in a manner that does not burden religion, it must do so.").

The Ninth Circuit's deeply flawed view of the First Amendment should be corrected.

CONCLUSION

For all the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

GORDON D. TODD*
CHRISTOPHER R. MILLS
CODY L. REAVES
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
gtodd@sidley.com

Counsel for Amici Curiae

* Counsel of Record

March 2, 2022