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 FOR AMICI CURIAE ELISABETH P. DEVOS AND DEFENSE OF FREEDOM INSTITUTE FOR POLICY STUDIES IN SUPPORT OF PETITIONER

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## INTERESTS OF AMICI CURIAE[1]

Elisabeth P. DeVos served as the eleventh United States Secretary of Education. She is a leading advocate for education reform in America, and a staunch defender of rights guaranteed by the First Amendment to both students and school employees. Secretary DeVos has long been a public advocate for and defender of religious liberty, particularly in the educational context. On January 21, 2020, for example, she published "Updated Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools," school prayer guidance required by Congress that had been left dormant and stale by prior administrations since 2003. She is a pioneer in efforts to ensure the protection of students' and teachers' religious freedom across the country.

The Defense of Freedom Institute for Policy Studies, Inc. ("DFI") is a nonprofit, nonpartisan 501(c)(3) institute dedicated to defending freedom and opportunity for every American family, student, entrepreneur, and worker, as well as to protecting their constitutional and civil rights at school and in the workplace. DFI promotes policies that foster open, diverse, and intellectually engaging public schools fully compliant with the First Amendment to the U.S. Constitution. DFI places a particular focus on defending persons who suffer infringements of their First Amendment rights to protected speech and religious exercise in public schools.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person, other than amici curiae or their counsel, made any monetary contribution to the preparation or submission of this brief.

As preeminent authorities on the intersection of religion and public education, Secretary DeVos and DFI have a significant interest in and experience with the issues presented by this matter.

## SUMMARY OF ARGUMENT

If, as the Ninth Circuit held, Coach Kennedy cannot silently pray at the school where he was employed, what is left of the First Amendment for teachers and coaches?

The Ninth Circuit's decision below suffers from numerous defects, both factual and legal, that warrant reversal. The Ninth Circuit reached its conclusion only by revising the facts found by the District Court and then misconstruing the law as previously interpreted by this Court.

As an initial matter, the Ninth Circuit relied on facts that simply are not at issue in the instant case. This case *only* concerns Joseph Kennedy's personal prayers after September 17, 2015, which were not audible and did not entail any overt effort to involve his players. Indeed, even the photo included in the Ninth Circuit's opinion is misleading without the correct context. It does not depict Kennedy's own players (for whom he had job responsibilities), but rather players from the opposing team over whom he exercised no authority. The Ninth Circuit also erred in considering the media and political attention surrounding this case. The District Court's factual finding was that the school suspended Coach Kennedy *solely* because of its Establishment Clause concerns, not because of any actions taken by Kennedy to publicize or discuss the limitations on his First Amendment rights. Simply, the questions in this case concern—and *only* concern—Kennedy's

"brief, quiet prayer by himself while at school and visible to students."

The Ninth Circuit's opinion also suffers from defects in its legal analysis. First, its interpretation of this Court's Free Speech precedent is simply wrong. Ignoring the warnings of four Justices that its interpretation of what constitutes government speech was "troubling," *Kennedy* v. *Bremerton Sch. Dist.*, 139 S. Ct. 634, 636 (2019) (mem.) (statement of Alito, J.) ("*Kennedy II*"), the Ninth Circuit held that silent prayer is somehow an official duty of a football coach, *Kennedy* v. *Bremerton Sch. Dist.*, 991 F.3d 1004, 1016 (9th Cir. 2021) ("*Kennedy III*"). This is despite the fact that the Bremerton School District ("BSD") made clear that post-game prayer by Kennedy violates its policies. *Id.* at 1011-1013. The Ninth Circuit's holding is not only in conflict with *Garcetti* v. *Ceballos*, 547 U.S. 410 (2006), but it eviscerates the Free Speech rights of coaches and teachers, who do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

Finally, the Ninth Circuit should have ruled in favor of Kennedy's Free Exercise and Free Speech claims. The court below concluded that BSD was justified in prohibiting Kennedy's religious speech because "a state interest in avoiding an Establishment Clause violation may be characterized as compelling." *Kennedy III*, 991 F.3d at 1016, 1020 (citations omitted). However, the Establishment Clause analysis ignored this Court's recent guidance. The Ninth Circuit should not have entirely relied on the *Lemon*-era endorsement test to analyze these facts and should have instead considered Kennedy's prayers using an analysis focused on whether Kennedy's actions were coercive and how they

fit into American tradition and historical practice. Had the court below considered those factors, it would have concluded that Kennedy's religious speech did not come anywhere near an Establishment Clause violation, and would thus not have permitted BSD's infringement of his First Amendment rights.

## ARGUMENT

### I. THE NINTH CIRCUIT RELIED ON IRRELEVANT FACTS

The Ninth Circuit wrongly considered facts that are *not* at issue here. First, this case is not about a football coach praying with his players in the locker room before or after the game. "Kennedy ceased praying in the locker room" after the school asked him to do so in its September 17, 2015 letter. *Kennedy* v. *Bremerton Sch. Dist.*, 443 F. Supp. 3d 1223, 1229 (W.D. Wash. 2020).

Nor is this case about a coach delivering sermons or speeches replete with religious references after a game. Again, although Coach Kennedy did say prayers with his players before September 17, the record is devoid of any instance in which Coach Kennedy audibly prayed in the presence of Bremerton High School students after the school asked him to stop. Instead, the District Court found that, in each of the three instances in which Coach Kennedy prayed on the field after September 17, 2015, his own players were "busy singing the school's fight song" (October 16 game), "headed to the stands" (October 23 game), or "joined Kennedy at the middle of the field *after* he had finished his kneeling prayer" and after "the players finished their fight song" (October 26 game). *Kennedy*, 443 F. Supp. 3d at 1230-1231. Although the Ninth Circuit included a photo of Coach Kennedy kneeling and surrounded by football

players on October 16 in its opinion, *Kennedy* v. *Bremerton Sch. Dist.*, 991 F.3d 1004, 1019 (9th Cir. 2021) *("Kennedy III")*, it neglected to mention that the players in the photo were all wearing white jerseys—they were members of the *opposing* team who voluntarily joined the prayer (and whom Coach Kennedy could not possibly have coerced into participating). *Cf. Borden* v. *School Dist. of Twp. of E. Brunswick*, 523 F.3d 153 (3d Cir. 2008) (finding Establishment Clause violation where coach prayed with his own players). Nor indeed, would this be remotely in his job responsibilities as he is not hired to coach or otherwise mentor players from other schools.

Second, the relevant conduct to this case should be considered irrespective of media or political attention. The Ninth Circuit's opinion is replete with references to Coach Kennedy's "pugilistic efforts to generate publicity in order to gain approval of [his] on-field religious activities." *Kennedy III*, 991 F.3d at 1017. It contrasted Coach Kennedy's professed desire to engage in "personal and private prayer" with his "media blitz" and concluded that "on-field prayer cannot be construed as personal and private in the context of Kennedy's publicity leading up to it." *Id.* at 1017-1018. Setting aside the question of how much publicity an employee should attempt to generate when he believes that he has been the victim of unlawful employment discrimination, the District Court did not find that the school suspended Coach Kennedy and failed to rehire him for another season because he generated bad press for the school or even because outsiders carelessly put students at risk as they tried to exploit the situation for their own political motives.

Rather, the District Court found that "the risk of *constitutional* liability associated with Kennedy's *reli-*

*gious conduct* was the *sole reason* the [School] District ultimately suspended him." *Kennedy*, 443 F. Supp. at 1231 (quotation omitted) (emphasis added); *see also Kennedy III*, 991 F.3d at 1010 ("When it evaluated BSD's actions concerning Kennedy, the district court held that *seeking to avoid an Establishment Clause claim was the sole reason BSD limited Kennedy's public actions as it did.* We hold that BSD's allowance of Kennedy's conduct would violate the Establishment Clause; consequently, BSD's efforts to prevent the conduct did not violate Kennedy's constitutional rights, nor his rights under Title VII." (quotation omitted) (emphasis added)). In other words, the District Court's factual finding was that the school suspended Coach Kennedy *solely because it was worried about being sued for a prohibited establishment of religion.*

As Coach Kennedy framed it in his petition for certiorari, the primary facts this case presents are related to Kennedy's post-September 17 "brief, quiet prayer by himself while at school and visible to students."

## II. THE NINTH CIRCUIT'S OVERBOARD VIEW OF A GOVERNMENT EMPLOYEE'S OFFICIAL DUTIES WARPED ITS ANALYSIS OF KENNEDY'S FIRST AMENDMENT RIGHTS

The Ninth Circuit misinterpreted this Court's Free Speech precedent by holding that Kennedy's brief, silent prayer was government speech that lacked First Amendment protection. *See Kennedy III*, 991 F.3d at 1016 (We therefore remain convinced that … 'Kennedy spoke as a public employee when he kneeled and prayed on the fifty-yard line immediately after games while in view of students and parents[.]'"). The Ninth Circuit came to this conclusion despite being warned by four Justices that its view of Kennedy's Free Speech claim was "troubling." *Kennedy* v. *Bremerton School*

*District*, 139 S. Ct. 634, 636 (2019) (mem.) (statement of Alito, J.) ("*Kennedy II*"). If the Court does not correct the Ninth Circuit's overbroad interpretation of *Garcetti* v. *Ceballos*, 547 U.S. 410 (2006), it will have significant detrimental effects on the speech of coaches and teachers, as well as citizens writ large.

### A. Kennedy's Speech Is Not Government Speech Under Supreme Court Precedent

Teachers and coaches do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker* v. *Des Moines Indep. Sch. Cmty. Dist.*, 393 U.S. 503, 506 (1969). Thus, while "the government as employer ... has far broader powers than does the government as sovereign," *Waters* v. *Churchill*, 511 U.S. 661, 671 (1994) (plurality op.), "a citizen who works for the government is nonetheless a citizen" and their speech is protected by the First Amendment, *Garcetti*, 547 U.S. at 419; *see also Lane* v. *Franks*, 573 U.S. 228, 236 (2014) ("public employees do not renounce their citizenship when they accept employment, and this Court has cautioned time and again that public employers may not condition employment on the relinquishment of constitutional rights").

To determine when and what speech a government employer may restrict, the Court in *Garcetti* established a two-step test:

> The first [step] requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The

> question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. This consideration reflects the importance of the relationship between the speaker's expressions and employment.

*Garcetti*, 547 U.S. at 418 (citations omitted).

"The critical question" for the first step of the *Garcetti* inquiry "is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." *Lane*, 573 U.S. at 240; *see also id.* at 237 (In "the first step … *Garcetti* distinguished between employee speech and citizen speech."). The Court stressed this distinction because "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti*, 547 U.S. at 421. So if the content of the speech is within the scope of an employee's duties, it is government speech. *Lane*, 573 U.S. at 240. If the content lies outside of the employee's official duties, then the employee is speaking as a citizen and his or her statements are matters of public concern. *Id.*

One way to determine whether the speech is that of a citizen on a matter of public concern, or of a government employee made pursuant to their official duties, is to examine if the content has a private analogue. If the speech "is the kind of activity engaged in by citizens who do not work for the government," such as "writing a letter to a local newspaper or discussing politics with a co-worker," then it is likely private speech and pro-

tected. *Garcetti*, 547 U.S. at 423 (internal citation omitted). But where the speech lacks a "relevant analogue to speech by citizens who are not government employees," it is likely government speech. *Id.* at 424.

As to step two of the inquiry, any "restrictions [the government] imposes must be directed at speech that has some potential to affect the entity's operations." *Garcetti*, 547 U.S. at 418. Further, "a stronger showing [of government interests] may be necessary if the employee's speech more substantially involve[s] matters of public concern." *Lane*, 573 U.S. at 242 (quoting *Connick* v. *Myers*, 461 U.S. 138, 152 (1983)).

In *Garcetti*, the Court held that because the speech at issue—a disposition memorandum written by a deputy district attorney—was made pursuant to the respondent's official duties, he was not acting as a private citizen and the speech could be regulated. *Garcetti*, 547 U.S. at 420-423. That the respondent wrote the memo in his office during working hours did not automatically make it government speech, since "[m]any citizens do much of their talking inside their respective workplaces, and it would not serve the goal of treating public employees like 'any member of the general public,' to hold that all speech within the office is automatically exposed to restriction." *Id.* at 420-421 (internal citation omitted). Nor did it matter that the speech concerned the subject matter of his employment. *Id.* at 421. Rather, "[t]he controlling factor … is that his expressions were made pursuant to his duties as a calendar deputy," *e.g.*, these "official duties" were spelled out and understood. *Id.*

Contrast the holding in *Garcetti* with that in *Lane*. In *Lane*, the speech at issue—courtroom testimony—was found to be that of a private citizen speaking out on

a matter of public concern for two reasons. 573 U.S. at 238-242. First, testifying under oath was not within the normal scope of the petitioner's educational job duties; "[t]he critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." *Id.* at 240. Second, the petitioner's sworn testimony was determined to be a subject of general interest and value to the public. *Id.* at 241. With the private nature of the speech established, the Court determined that there was no adequate justification for treating petitioner any differently than any other member of the public. *Id.* at 242-243.

### B. The Ninth Circuit Ignored This Court's Guidance

Applying *Garcetti* and *Lane*, it is readily apparent that the speech at issue—silent, post-game prayer—is that of a citizen on a matter of public concern, not of an employee pursuant to his official duties. Applying the *Garcetti* framework to Kennedy's speech, for the first step, "[t]he critical question … is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." *Lane*, 573 U.S. at 240. Clearly a brief, solitary prayer is not within the scope of a football coach's duties. While "calling a play, addressing the players at halftime, or teaching how to block and how to tackle" are speech-based official tasks of a football coach, offering a prayer by oneself is not. *Kennedy*, 4 F.4th at 936 (O'Scannlain, J.). And even if solitary, quiet prayer "concerns" those duties—such as praying for the health of players or giving thanks for the sportsmanship shown in the game—unless the prayer is an official du-

ty of the coach, it is not government speech. *Lane*, 573 U.S. at 240.

Analogizing Kennedy's prayer to the speech at issue in *Garcetti*, unlike the disposition memo where "there [wa]s no relevant analogue to speech by citizens who are not government employees," 547 U.S. at 424, here "[m]illions of Americans" who are not government employees regularly "give thanks to God, a practice that has nothing to do with coaching a sport." *Kennedy*, 4 F.4th at 937 (O'Scannlain, J.). Indeed, the fact that a prayer is religious in nature should have signaled that the speech was not made pursuant to any official duties. And perhaps even more dispositive is the fact that the District demanded that the coaching staff comply with its "Religious-Related Activities and Practices" policy, which it interpreted to ban any post-game prayer. *Kennedy III*, 991 F.3d at 1011-1013. Saying that prayer is both contrary to policy and an official duty is a logical contradiction.

As to the second step under *Garcetti*, there is no valid justification for treating Kennedy differently from any other member of the general public and prohibiting his speech. *Garcetti*, 547 U.S. at 418. As discussed *infra*,[2] the Ninth Circuit should have found that there was no Establishment Clause violation if the District had permitted Kennedy's prayer.

Even though the application of *Garcetti* to Kennedy's prayer is straightforward, the Ninth Circuit tortured it in holding that Kennedy spoke as a public employee. Specifically, the Ninth Circuit held that "Kennedy 'was one of those especially respected persons

[2] The Ninth Circuit's second step analysis is solely based on its flawed Establishment Clause reading, which is discussed below.

chosen to teach on the field, in the locker room, and at the stadium. He was clothed with the mantle of one who imparts knowledge and wisdom. Like others in this position, expression was Kennedy's stock in trade.'" *Kennedy III*, 991 F.3d at 1015. Therefore, Kennedy's post-game prayer, on the football field that he had access to because of his employment, was government speech which could be regulated. *Id.* In other words, "by the opinion's sweeping logic, Kennedy's prayer—no matter how personal, private, brief, or quiet—was wholly unprotected by the First Amendment." *Kennedy*, 4 F.4th at 934 (O'Scannlain, J.).

The Ninth Circuit's twisted analysis is incorrect for multiple reasons. First, the only behavior at issue is Kennedy's "right to engage in brief, personal prayer by himself on the field at the conclusion of football games." *Kennedy*, 4 F.4th at 931, n.4 (O'Scannlain, J.); *see also* App. 180. Kennedy's post-game speech was not at issue, so the scope of the Ninth Circuit's analysis was wrong. Second, it did not matter that Kennedy's speech came in "a location that he only had access to because of his employment." *Kennedy III*, 991 F.3d 1015. Even though the respondent in *Garcetti* "expressed his views inside his office, rather than publicly," this was "not dispositive." 547 U.S. at 420. Third, and most critically, to reach its conclusion the Ninth Circuit was forced to create an "excessively broad job description[]" for a football coach, and one that would apply with equal force to teachers, whose expression is also their "stock in trade." *Id.* at 424.

Specifically, the Ninth Circuit said that Kennedy's job description stated that he must "exhibit sportsmanlike conduct at all times," "'communicate effectively' with parents," "maintain positive media relations," "[o]bey all the Rules of Conduct before players and the

public as expected of a Head Coach," and create "good human beings." *Kennedy* v. *Bremerton Sch. Dist.*, 869 F.3d 813, 825-827 (9th Cir. 2017) ("*Kennedy I*"). From that job description, the Ninth Circuit extrapolated out that Kennedy must "communicat[e] the District's perspective on appropriate behavior" whenever "in the presence of students and spectators." *Id.* Then extrapolating this overly broad, unwritten, and unacknowledged duty out further, the Ninth Circuit reasoned that since the duty to communicate the District's perspective involves "demonstrative speech," the District could regulate *any* demonstrative speech. *Id.* at 828. Since prayer is "demonstrative speech," the Ninth Circuit concluded that it is government speech and can be regulated. *Id.* at 828; *see also Kountze Indep. Sch. Dist.* v. *Matthews ex rel. Matthews*, 2017 WL 4319908, at *4 (Tex. App. Sept. 28, 2017) ("Despite the fact that the game was over, that he was not exercising authority over any student-athlete, and that he had no specific, assigned task at the time of his prayer, the Ninth Circuit held that the coach's speech was part of his 'job responsibilities.'").

But if any "demonstrative speech" made while a coach is on or around a playing field, or made by a teacher anywhere in a school building, is government speech that can be regulated, what is left of the First Amendment for teachers and coaches? Despite the Ninth Circuit's conclusory statement to the contrary, a teacher's silent prayer in the cafeteria could be regulated under this logic. *See Kennedy*, 4 F.4th at 935 (O'Scannlain, J.) ("none of these facts does anything to distinguish the cafeteria scenario (or innumerable others)). This is the exact logic that four Justices warned of when this case previously came before the Court. As Justice Alito stated:

> Under this interpretation of *Garcetti*, if teachers are visible to a student while eating lunch, they can be ordered not to engage in any "demonstrative" conduct of a religious nature, such as folding their hands or bowing their heads in prayer. And a school could also regulate what teachers do during a period when they are not teaching by preventing them from reading things that might be spotted by students or saying things that might be overheard. This Court certainly has never read *Garcetti* to go that far. While *Garcetti* permits a public employer to regulate employee speech that is part of the employee's job duties, we warned that a public employer cannot convert private speech into public speech "by creating excessively broad job descriptions."

*Kennedy II*, 139 S. Ct. at 636-637 (Alito, J.).

If any demonstrative speech by a coach or teacher may be regulated, then teachers and coaches will be forced to "shed their constitutional rights to freedom of speech or expression at the school-house gate." *Tinker*, 393 U.S. at 506. Not only will *Tinker* effectively be overruled by the Ninth Circuit's holding, "[l]ikewise, the *Pickering* balancing test would cease to provide refuge for large swaths of school speech, religious or not. That cannot be right. For as Kennedy rightly observes in his brief, '*Garcetti* applied *Pickering*; it did not overrule it.'" *Kennedy*, 4 F.4th at 935 (O'Scannlain, J.). The Court cannot permit this to happen.

## III. THE NINTH CIRCUIT'S ESTABLISHMENT CLAUSE ANALYSIS WAS FLAWED

The Ninth Circuit concluded that BSD was justified in engaging in "'content-based discrimination'" against Kennedy's religious speech because a "'state interest in avoiding an Establishment Clause violation may be characterized as compelling.'" *Kennedy III*, 991 F.3d at 1016, 1020 (quoting *Good News Club* v. *Milford Cent. Sch.*, 533, U.S. 98, 112 (2001)). The decision thus rested on a determination that BSD rightly determined that Kennedy's quiet, post-game prayers violate the Establishment Clause. However, the Ninth Circuit's analysis should not have entirely relied on the endorsement test and should have instead considered Kennedy's prayers using an analysis primarily focused on coercion and historical practice.

### A. The Ninth Circuit Should Not Have Relied Entirely On *Santa Fe*'s Endorsement Test

The Ninth Circuit ignored this Court's recent guidance by exclusively analyzing the establishment issues in this case using the endorsement test. *See Kennedy III*, 991 F.3d at 1017-1019 ("In sum, there is no doubt that an objective observer, familiar with the history of Kennedy's practice, would view his demonstrations as BSD's endorsement of a particular faith."). The opinion relied most heavily on *Santa Fe Independent School District* v. *Doe*, 530 U.S. 290, 308 (2000) (finding that the endorsement test looks to "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools." (quotation omitted)).

In explaining its use of the endorsement test, the Ninth Circuit noted that this "'Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools,'" where "'[t]he State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure.'" *Kennedy III*, 991 F.3d at 1017-1019 (quoting *Edwards* v. *Aguillard*, 482 U.S. 578, 583-584 (1987)); *see also id.* (citing *Wallace* v. *Jaffree*, 472 U.S. 38, 49-50 (1985)). However, the court below offered practically no additional discussion of its decision to use the endorsement test,[3] nor did it discuss recent guidance from this Court suggesting that other factors should be considered instead.

Two problematic threads pervade the precedents relied on by the Ninth Circuit: *First*, none evaluated an employee's individual, discrete exercise of religion, and *second*, each relied on *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). *See Wallace*, 472 U.S. at 55-61 (applying *Lemon* to an Alabama statute's legislative history and concluding "that the State intended to characterize prayer as a favored practice"); *Edwards*, 482 U.S. at

[3] Indeed, the Ninth Circuit opinion offers no discussion of its decision to rely entirely on the endorsement test as articulated by *Santa Fe*. Instead, its analysis states broad anti-establishment principles, which, while relatively uncontroversial, are also not explanatory of its decision to rely entirely on the endorsement test nor particularly insightful for the facts that were before it. *See Kennedy III*, 991 F.3d at 1017 ("The [Establishment] Clause 'mandates government neutrality between religion and religion, and between religion and nonreligion.' … [T]he Clause 'proscribes public schools from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.'" (citations omitted)).

585-594 (applying *Lemon* to hold that a state statute regulating schools' science curriculum violated the Establishment Clause); *Lee* v. *Weisman*, 505 U.S. 577, 587 (1992) (holding under *Lemon* that permitting a member of the clergy to offer an invocation and a benediction at a school graduation ceremony amounts to "government involvement with religious activity [that] is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school"); *Santa Fe*, 530 U.S. at 314-317 (applying *Lemon* to invalidate school policy allowing students to lead pre-game prayer over the public announcement system).

To the extent *Lemon* has any remaining precedential value, it is exceedingly limited, as a majority of this Court has recently reiterated. *See American Legion* v. *American Humanist Ass'n*, 139 S. Ct. 2067, 2080, 2087 (2019) (plurality opinion) (collecting Establishment Clause cases where *Lemon* was not followed or ignored, and noting that in recent cases, "we have taken a more modest approach that focuses on the particular issue at hand and looks to history for guidance.")); *id.* at 2102 (Thomas, J., concurring) (describing the *Lemon* test as "long-discredited" and suggesting that it should be overruled in "all contexts"); *id.* at 2093 (Kavanaugh, J., concurring) ("[T]he *Lemon* test is not good law and does not apply to Establishment Clause cases in any of the five categories [including prayer in schools]"); *id.* at 2101 (Gorsuch, J., concurring in the judgment) ("*Lemon* was a misadventure.").

Indeed, even were it good precedent, *Lemon* cannot explain many types of Establishment Clause cases, including "the prayers that open legislative meetings, certain references to, and invocations of, the Deity in the public words of public officials; the public references to God on coins, decrees, and buildings; or the at-

tention paid to the religious objectives of certain holidays, including Thanksgiving." *Id.* at 2080-2081, (citing *Van Orden* v. *Perry*, 545 U.S. 677, 699-700 (2005) (Breyer, J., concurring) (citation omitted)). And "the *Lemon* test presents particularly daunting problems in cases … that involve the use, for ceremonial, celebratory, or commemorative purposes, of words … with religious associations." *Id.* at 2081-2082.

Yet despite these statements about *Lemon*'s shortcomings, the Ninth Circuit decided—with little discussion—to rely entirely on the endorsement test, which originated from *Lemon*'s purpose and effects prongs. *See, e.g.*, *County of Allegheny* v. *ACLU*, 492 U.S. 573, 592 (1989), *abrogated by Town of Greece* v. *Galloway*, 572 U.S. 565 (2014); *Lynch* v. *Donnelly*, 465 U.S. 668, 689-690 (1984) (O'Connor, J., concurring) (stating that the endorsement test operates as a "clarifi[cation of] the *Lemon* test as an analytical device.").

Just as the *Lemon* test should not be extended, neither should the endorsement test. *See American Legion*, 139 S. Ct. at 2080-2081 (plurality opinion) (four Justices rejecting the usefulness of the *Lemon* test, specifically noting that its second prong asks whether a reasonable observer would conclude that the activity was an endorsement of religion—i.e., the endorsement test); *id.* at 2101 (Gorsuch, J., concurring) (expressing disapproval of the endorsement prong specifically, and of lower courts' uses of it in light of *Lemon*). Indeed, the endorsement test has not even been used by this Court since 2005, *see McCreary Cnty.* v. *ACLU of Ky.*, 545 U.S. 844 (2005).

The Ninth Circuit, however, analyzed this case's establishment issues primarily using endorsement criteria, asking:

> [W]hether an objective observer, familiar with the history of Kennedy's on-field religious activity, coupled with his pugilistic efforts to generate publicity in order to gain approval of those on-field religious activities, would view [the school district's] allowance of that activity as "stamped with [his or] her school's seal of approval."

*Kennedy III*, 991 F.3d at 1017 (quoting *Santa Fe*, 530 U.S. at 308).

The endorsement test was also poorly applied to these facts. BSD's "degree of … involvement," *Santa Fe*, 530 U.S. at 305, in Kennedy's private prayers was nonexistent, except to the extent it requested that he *stop* his religious exercise. *Cf. id.* at 302-308 (finding unconstitutional a school policy authorizing religious prayer before all games and providing access to the public address system to effectuate that policy). Declining to censor protected speech does not constitute impermissible government endorsement. *See Board of Educ. of Westside Cmty. Schs.* v. *Mergens ex rel. Mergens*, 496 U.S. 226, 250 (1990) (plurality op.) ("[S]chools do not endorse everything they fail to censor."). Indeed, Kennedy was coaching high school football, and "secondary school students are mature enough … to understand that a school does not endorse or support … speech that it merely permits on a nondiscriminatory basis." *Id.* This can only be truer where, as here, the relevant government entity explicitly disclaimed the protected speech of its employee.

Thus, even if the endorsement test were the best way to analyze these facts, it does not follow that a government entity's non-action—much less its disclaimer—of an individual's personal religious exercise

and speech would be viewed as an endorsement of the same.

### B. The Establishment Clause Analysis Should Instead Focus On Coercion And Historical Practice

BSD's Establishment Clause concerns instead should be analyzed by addressing: (i) whether Kennedy's quiet, individual prayer "coerced" students into religious practices or beliefs; and (ii) how the type of prayer at issue fits within the nation's history and tradition. *See American Legion*, 139 S. Ct. at 2093 (Kavanaugh, J., concurring).

The coercion test strikes a balance in Establishment Clause analysis that other formulations do not. It forbids the government from compelling its citizenry to adopt one sect over another, or religion over non-religion, without overly encroaching on citizens' individual exercises of free speech and religion. Recognizing the benefits, this Court has considered coercion as a key factor in Establishment Clause cases, including in relatively recent cases related to schools. *See generally Good News Club*, 533 U.S. 98; *Weisman*, 505 U.S. 577; *see also American Legion*, 139 S. Ct. at 2093 (Kavanaugh, J., concurring) ("[T]he Court has proscribed government-sponsored prayer in public schools … not because of *Lemon*, but because [it] posed a risk of coercion of students.").

To be coercive, a practice must allocate benefits or burdens on the basis of religious beliefs or participation. *See Town of Greece*, 572 U.S. at 589 (plurality op.). Coercion does not mean subjectively taking offense when encountering a religious practice. *Id.* ("Offense, however, does not equate to coercion."). Courts must

"'distinguish between real threat'" of an establishment "'and mere shadow.'" *American Legion*, 139 S. Ct. at 2091 (Breyer, J., concurring). As discussed earlier, there is heightened sensitivity to the inherent coercive risks involved in the education of younger children. However, younger children are distinguishable from adolescents and from young adults. *See Mergens*, 496 U.S. at 250 (plurality op.) (noting the differences in impressionability between age groups). In the school context, coercion analysis may also consider the extent of supervision and the pressures on students to participate in the prayer or religious activity. *Weisman*, 505 U.S. at 593.

Considering these factors, the instant facts counsel toward finding that Kennedy's quiet, individual prayers were not coercive. First and foremost, BSD did not support, but opposed Kennedy's prayer. If the relevant government entity is opposed to the prayer, it is hard to imagine that the same entity would be coercing its students to participate in it. Second, Kennedy did "'not actively encourage[] or require[] [student] participation.'" Pet.App.218 (third brackets in original); *Kennedy III*, 991 F.3d at 1010. Third, there is no evidence in the record that Kennedy treated any players better or worse based on their participation or lack thereof in his personal post-game prayers, nor did any of Kennedy's players testify that they feared retaliatory treatment. While the district court noted that some parents expressed "that their children had participated in the prayers to avoid being separated from the rest of the team or ensure playing time," *Kennedy*, 443 F. Supp. 3d at 1229, the children did not themselves so testify. Nor is there any evidence to substantiate that unfounded fear, if it existed. Without any evidence of coercion, there is nothing to animate BSD's Establishment

Clause concerns, and thus no compelling interest in prohibiting Kennedy's prayers.

Finally, this Court should again take into consideration the place of public prayer in American history and tradition in making its Establishment Clause determination. This is a time-honored way of analyzing the propriety of government action. For example, in *Van Orden*, the plurality analyzed a monument's nature in the context of American history in determining its constitutionality. 545 U.S. at 686; *see also id.* at 699, (Breyer, J., concurring) (recognizing the Court's reliance on history in some contexts). Likewise, *Marsh* v. *Chambers*, 463 U.S. 783, 787-789 (1983), and *Town of Greece*, 572 U.S. at 575-576, relied on historical practices and understandings to determine the constitutionality of legislative prayer. And most recently, this Court's decision in *American Legion* featured a majority of Justices analyzing the Establishment Clause issue in light of its historical backdrop. 139 S. Ct. 2067 (plurality op.); *see also id.* at 2096 (Thomas, J., concurring in the judgment); *id.* at 2102 (Gorsuch, J., concurring in the judgment). Thus, in addition to considering coercion, the Establishment Clause analysis should account for whether the type of prayer in this case has a foundation in America's "history or tradition." *Id.* at 2093 (Kavanaugh, J., concurring).

Other briefs in this case have well covered the history of public prayer, and of prayer in connection with football games. *See, e.g.*, Alabama Center Br. 7-15. The inevitable conclusion is that the practice has a rich history in our nation, both from the broad perspective of public prayer, and in the specific context of the game at issue in this case. This Court should correct the Ninth Circuit's misapplication of the Establishment Clause to this case given the lack of coercion in Kennedy's pray-

ers, and the robust historical context for and practice of such activities.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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