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 RESPONDENT

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QUESTIONS PRESENTED

Petitioner Joseph Kennedy continues to pose questions about personal, private prayer that are, as the court of appeals detailed, "utterly belie[d]" by the record (Pet. App. 19).

The actual questions presented are:

1. Did Kennedy speak as a public-school coach when he made a spectacle of delivering midfield prayers at the immediate conclusion of games and insisted that students must be allowed to join?

2. Should the Court jettison the settled test for government-employee speech and instead require strict scrutiny whenever the speech is religious, or should it reaffirm that maintaining control over government events and respecting students' beliefs justify regulation—especially when the employee ignores sincere efforts to accommodate his religious exercise?

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BRIEF FOR RESPONDENT

INTRODUCTION

Kennedy tells a breathless tale of authoritarian government forbidding private religious expression, insisting that unless the Court applies his preferred legal test, religious practice will be quashed across the country. But his argument relies on creative remodeling of both the facts and the law. Hypothetical constructs are no basis for adopting sweeping new constitutional rules. And when what actually occurred is considered under this Court's settled precedents, the commonsense result is that the Bremerton School District was well within its legitimate authority when it regulated its employee's very public speech.

After the District learned that Kennedy regularly prayed to and with the football team, it did not fire him. Instead, it instructed him on what constitutes appropriate speech for a public-school employee, and it made clear (as it did up to the end) that his religious practice would be accommodated. That appeared to resolve the matter: For a month, Kennedy prayed privately while the team was otherwise occupied, and the District let him be—a fact that he neglects to mention.

But because no good deed goes unlitigated, Kennedy's counsel sent a letter to the District castigating its guidance and accommodation efforts as unconstitutional and demanding that Kennedy be permitted to continue his previous prayer practice. Kennedy then announced to the press that he would indeed be continuing his prayers as before. He spurned all accommodation attempts, and his counsel worked overtime to turn the community against the District, while insisting that Kennedy be allowed to continue his midfield prayer with students.

The public responded. District administrators received threats and hate mail. Strangers confronted and screamed obscenities at the head coach, who feared for his safety. Kennedy supporters and members of the press rushed the field, knocking over students. And at Kennedy's final game, he invited a state legislator to join his prayer and address the team. Even then, the District still tried to work with Kennedy to find a suitable solution.

Ignoring these facts, Kennedy frames his prayers as personal and private. But his contemporaneous words tell the real story: He repeatedly demanded to "continue" his prayer practice, declaring that he was "helping these kids be better people." JA69-74. And his counsel explained to the district court: "The young men on the team are looking up to the coach. * * * That's precisely why Coach Kennedy wants to do what he does." JA368.

Public-school coaches can and do help students "be better people." But spiritual guidance should come from students' families and houses of worship, not the government. Under this Court's long-standing jurisprudence, the District's interests in protecting students from religious coercion and in preventing employees from commandeering government events outweigh Kennedy's interest in praying with the students on the 50-yard line.

Kennedy disregards that settled law, insisting that when a government employer responds to its employee's public religious speech at work—even when that speech causes difficult and dangerous situations—the employer is acting because of religion, so strict scrutiny should apply.

The Court should reject that novel proposition. Kennedy's proffered rule would introduce untold confusion for all government employers, who would have to decide in real time, as circumstances evolve on the ground, the precise moment when an employee's speech suddenly ceases to be government speech and becomes absolutely protected private speech. That approach cannot be squared with the law, the practical realities of government employment, or common sense.

STATEMENT

1. For eight years, Kennedy was an assistant coach for the varsity football team and head coach of the junior-varsity team at Bremerton High School. JA167. Throughout that time, Kennedy delivered prayers to students. JA40, 98, 168-170, 266-268. At first, he prayed alone on the 50-yard line at the end of games, and he also led and participated in pregame and postgame locker-room prayers. JA41, 168-170, 235-236, 262. Within just a few games, students began joining his on-field prayers, with his permission. JA169. Before long, Kennedy took to standing, holding up helmets from both teams, and delivering what he termed "motivational" "prayers," which intertwined gratitude to God with praise for student performance. JA98, 170, 261, 283-284, 286-287. Bremerton players knelt around him. JA40. Sometimes, coaches and players from opposing teams joined also. JA40, 77, 126, 265-268.

JA98 (arrow added).

The District didn't learn of Kennedy's prayer practice until 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." JA229. The other coach "thought it was pretty cool" that the District "would allow [Kennedy] to go ahead and invite other teams' coaches and players to pray after a game." JA229.

Before the September 11 game, Bremerton's athletic director instructed the coaching staff to end the prayer practice. JA269-270. When Kennedy delivered a prayer after the game anyway, he saw another coach shake his head in disapproval. JA269-271. That evening, Kennedy posted on Facebook, "I think I just might have been fired for praying." JA271. His posting led to an "explosion in calls and emails" to the District. JA256.

The District then investigated whether Kennedy's conduct violated Board Policy 2340, which specifies that employees should "neither encourage nor discourage a student from" prayer, "convey a religious or devotional message," or engage in "religious rites" or "religious indoctrination" at school-sponsored activities. JA24-28; see JA40. In the inquiry, Kennedy acknowledged that his midfield speeches "constitute[d] prayer." JA40.

2. On September 17, Superintendent Aaron Leavell, himself a former coach (JA349), 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." JA40-45. Dr. Leavell instructed 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." JA45 (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, "so as to avoid alienation of any team member." JA44. Leavell encouraged Kennedy to raise any questions with his superiors or with Leavell himself. JA45.

Kennedy initially complied: On September 18, his postgame speech to the team was nonreligious. JA53, 364. He returned to the field to pray after the players and crowd departed, which was acceptable to the District. JA53, 364. For the next month, Kennedy testified, he took a knee and prayed after games while the students were otherwise occupied. JA339-342. Those prayers did not attract attention; and the District neither said nor did anything to stop them. JA340-342,

360, 366. In other words, Kennedy had what he now says he wanted—private prayers at games—without interference or incident. No players visibly prayed on the field at those games. JA356.

3. Yet on October 14, Kennedy's attorneys sent a letter demanding that the District "rescind the [September 17] directive," declaring that beginning "on October 16," Kennedy would "continue his practice" of praying at the 50-yard line immediately after games. JA71-72; see generally JA62-72. Though labeling Kennedy's prayers "private," counsel described them as "verbal" and "audibl[e]" (JA63-64) and asserted that students had the right to join (JA70-71). That was consistent with an October 1 e-mail from Kennedy to Leavell, explaining that the practice Kennedy wanted to continue involved students coming "onto the field to join me" in prayer (JA59). Kennedy confirmed in his deposition that his October 14 demand meant that he would "continue" his "practice of praying with students." JA295.

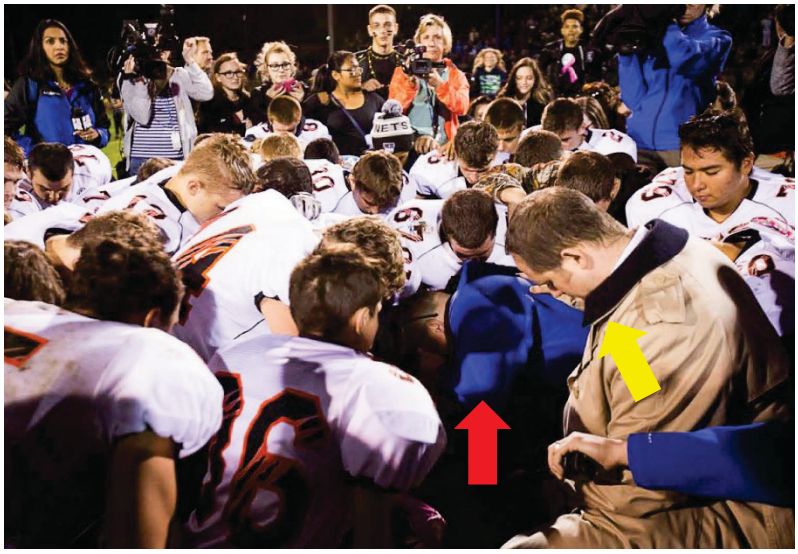
Through media appearances (JA189), Kennedy announced his plan to hold midfield postgame prayers at the October 16 homecoming game (JA73-75, 354; see also JA188-190), explaining that he was "helping these kids be better people" (JA73-74).

The District responded to Kennedy's counsel on October 16 (JA76-81), reiterating that it would work "in good faith with Mr. Kennedy" to find a solution acceptable to everyone (JA76). It then explained that Kennedy's attorneys "materially misunderst[ood] key facts" about Kennedy's practice. JA76. Contrary to his lawyers' assertions (JA64), Kennedy had invited opposing coaches, "among others," "to join his post-game prayer" (JA77; see JA229), and he had closed prayers with "amen" (JA77).

The District further explained that the prayers occurred while Kennedy "*remain[ed] on duty*"—not "on his own time." JA78. In his deposition, Kennedy agreed. JA275-276.

The District assured Kennedy not only that it did "not purport to control [his] private conduct, including exercise of his religious rights" while "not on duty," but also that he was "free to engage in religious activity, including prayer, even while on duty, so long as doing so [did] not interfere with performance of his job duties" or "constitute District endorsement of religion." JA80.

4. As announced, Kennedy resumed his practice of public midfield prayer at the homecoming game, surrounded by players bowing their heads and by a crush of spectators who ran onto the field to join him—including students, reporters, and a state legislator. JA82, 297-301, 354-355. About "a dozen times" beforehand, and also on the sidelines during the game, Kennedy had spoken with the legislator, state Representative Jesse Young; Kennedy informed Young that he would pray at the end of the game; and Young pledged that "he would be there to support [Kennedy]." JA297-299. Young also declared his support to the media. JA52.



JA82 (red arrow, Kennedy; yellow arrow, Young, with hand on Kennedy's back).

To join the prayers, spectators jumped the fence, ran through the crowd of cheerleaders and band members, and knocked students down. JA181. In the commotion, the District was unable to "keep kids safe." JA222-223. It "received complaints from parents of band members who were knocked over." JA181.

In the days following, other groups demanded the same access to the field as Kennedy had. JA364. One was a Satanist group that said it would conduct religious ceremonies on the field if others were allowed to do so. JA100-101; see JA86, 355; Chris Tucker, *Satanists' Presence Riles Up Crowd at Bremerton Football Game*, Kitsap Daily News (Oct. 30, 2015), https://perma.cc/9VGJ-WYLX.

Kennedy's media appearances also sparked other responses: "District personnel received hateful communications from some members of the public, and some [District] personnel felt physically threatened."

Pet. App. 2; see JA351. Bremerton's head varsity football coach, Nathan Gillam, received "hostile and even threatening" communications and feared for his own safety and that of the players, cheerleaders, and band members. JA346-347. For the first time in Gillam's eleven years as Bremerton's head coach, belligerent onlookers confronted him at games. JA346-347. In one instance, "an adult [Gillam] had never seen before came up to [his] face and cursed [him] in a vile manner." JA346. The environment was so heated that Gillam worried that he "could be shot from the crowd." JA347.

The District, meanwhile, worried about students' safety (JA222-223) and about having to allow others to use the field if it tried to pass off Kennedy's midfield prayer as private speech (JA100-101). The superintendent informed the school board:

> We do not allow folks access to the field post-games * * *. However, we have not been able to stop the hundreds of folks who have rushed the field in the two home games where folks came out to support [Kennedy]. This issue of equity[] is exactly the door we were worried about opening to all groups with [Kennedy] establishing his ritual of prayer after games.

JA101; see also JA223-227 ("tempers flar[ed] after games," requiring supervision of students); JA253-254 (up to 1,000 people attended home games). So the District placed robocalls to inform parents that there was no public access to the field, posted signs and made announcements at games saying the same thing, and had the Bremerton Police secure the field. JA100-101, 354-355. But the District recognized that these measures might be inadequate if Kennedy continued conducting midfield prayer with students. JA101.

After the homecoming game, the State Superintendent of Public Instruction e-mailed Bremerton Superintendent Leavell, observing that "[w]hen a school official decides to lead a prayer, he or she puts students in an awkward position. That's not fair to students who don't share the official's faith." JA88-89. Leavell responded, expressing his "hope" that the District could "find a positive solution that meets the needs of our staff member(s), and * * * protect(s) all students['] rights." JA88. Leavell also hinted at Kennedy's counsel's efforts to reframe "leading prayer with student athletes" as "a coach['s] right to conduct a personal, private prayer.....on the 50 yard line." JA88.

5. On October 23, Superintendent Leavell wrote to Kennedy again (JA90-95), instructing him to stop his public prayer practice while "on duty" at games, because "any reasonable observer [who] saw a District employee, on the field only by virtue of his employment with the District, still on duty, under the bright lights of the stadium, engaged in what was clearly, given [Kennedy's] prior public conduct, overtly religious conduct," would recognize that Kennedy acted in his official role. JA93. Leavell also reminded Kennedy that the "field is not an open forum to which members of the public are invited following the completion of games." JA92. He reiterated that Kennedy's religious exercise "can and will be accommodated" and offered several options to pray before and after games, including "a private location within the school building, athletic facility or press box"; he also invited Kennedy to contact him to discuss other accommodations. JA93-94.

Additionally, Bremerton's principal told Kennedy that he could return to the field to pray after the

students left (JA223), as Kennedy had done on September 18 (JA53, 364).

Kennedy and his counsel did not respond to any of that. JA306, 354. Instead, in press conferences they repeated their October 14 demand: The only acceptable outcome would be for Kennedy to continue his past prayer practice with students. JA74-75.

On October 23, Kennedy prayed at the end of a varsity away game, where no one joined. JA173, 236-237. Kennedy then invited Representative Young, another state legislator, and a third person onto the football field at the October 26 junior-varsity home game; they brought others along; and Kennedy prayed midfield with them. JA97, 238-239, 310-318. As Kennedy then talked to Young and the others, Bremerton players gathered around them. Kennedy addressed the team and had Young do so also. ER274; JA238-239. Presumably worried about the content of those speeches, the opposing team's coach instructed his players not to join the huddle. JA239-240.

On October 28, the District wrote to Kennedy a fourth time. JA102-103. Noting Kennedy's continued violations of District directives, Superintendent Leavell placed him on paid administrative leave. JA103. Leavell repeated that "the District remains willing to discuss ways of accommodating your private religious exercise," and he again encouraged Kennedy to contact him to propose additional accommodations. JA103. The District also issued a public Q&A explaining that it had placed Kennedy on paid leave because of (i) the concern "that over the years, players [had] joined in [Kennedy's] activities because to do otherwise would mean potentially alienating themselves from the team, and possibly their coach"; (ii) the attendant potential liability, which put at risk "scarce

funds needed for the District's basic educational mandate"; and (iii) the need to prevent the football field from becoming "a public forum when it [was] in use for a District-sponsored athletic event." JA107-110.

Kennedy testified that he "didn't doubt" the superintendent's "sincerity" and understood the superintendent to be "working very hard" to "find[] some way to develop an accommodation * * * that would allow [Kennedy] to continue having a prayer after the game." JA306. Kennedy also testified that it might have been "acceptable" to him to pray after games while the students headed to the locker room or team bus (JA280-282), yet neither he nor his counsel ever informed the District of that; they never accepted any offered accommodations; and they never responded to the District's repeated invitations to propose other accommodations that might satisfy Kennedy (JA307).

Instead, they stood on their October 14 demand and press statements that the District must rescind its September 17 guidance and allow Kennedy to "continue his practice" of praying "audibly" with students on the 50-yard line. JA63, 71, 353. The District understood that Kennedy "had specifically expressed his intention to pray with students on the field." JA354. "At no point * * * did Mr. Kennedy or his representatives ever modify" this demand (JA354) or ask to say a "quiet prayer by himself" (Br. i). Rather, Kennedy testified that the October demand to "continue his practice" (JA71) meant his "practice of praying with students" (JA295). See JA40, 98, 169-170, 283-284, 286-287. While on administrative leave, Kennedy attended games as a spectator and knelt to pray in the stands, joined by others. SER475. The District neither said nor did anything in response. For the remainder of the season, the District enforced its policy against

having spectators on the field after games. JA110-111, 181.

The players did not have postgame prayers when Kennedy was no longer initiating and leading them. JA181.

6. As the 2015 season unfolded, parents voiced complaints about Kennedy's prayer practice. One player's father was "very upset" because his son felt "compelled to participate" for fear that he "wouldn't get to play as much." JA234. Other parents reported that their children "participated in the team prayers only because they did not wish to separate themselves from the team." JA356; see JA186. Complaints were raised on social media also. JA186. After the school asked Kennedy to stop his practice, "several students and parents" "expressed thanks for the District's actions" to correct the "awkward situations where they did not feel comfortable declining to join with the other players in Mr. Kennedy's prayers." JA359.

7. In January, Kennedy filed an EEOC complaint, which described his practice as evolving from silent prayers to "audible" ones joined by a "majority of the team." JA126. That complaint incorrectly reported that Kennedy did not pray after games from mid-September to mid-October. JA126-127. (Kennedy testified to the opposite in his deposition. JA340-342.) The complaint also identified an on-field Buddhist prayer by another coach, wrongly describing it as "overt, public, and demonstrative religious conduct while on duty," and arguing that the District had favored the Buddhist prayer over Kennedy's Christian prayer. JA128-130. In fact, as Kennedy testified, the Buddhist prayer was nondemonstrative: The coach simply "st[ood] with his eyes closed." JA336. Just as the District did not regulate Kennedy's personal, private prayers (JA340-

342, 360, 366), it did not regulate the other coach's (JA141).

When his contract expired in the spring, Kennedy did not reapply to coach the following year. JA177-178. Head coach Gillam also did not reapply, because of the "negative," "unsafe situation" that Kennedy's actions had created. JA345-347. Gillam "consider[ed] it a great personal loss" to "withdraw from the program and student-athletes he had been devoted to for eleven years." JA347. Gillam explained that while praying was Kennedy's "choice," the "time and manner in which he did it" "cast [the football] program in a poor light in the community," drew attention away from the players, "put himself before the team," and "drove a wedge in [the] coaching staff." JA248, 250. Two other coaches likewise did not reapply. JA178.

8. Kennedy filed suit and moved for a preliminary injunction. JA10. The district court denied that motion, and the court of appeals affirmed (Pet. App. 214-266), concluding under *Garcetti* v. *Ceballos*, 547 U.S. 410 (2006), that Kennedy had spoken as a public employee, so the District could regulate his speech (Pet. App. 228-247).

Kennedy sought certiorari, which was denied. Pet. App. 207. Justice Alito issued a statement respecting the denial. Pet. App. 207-213. He 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 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).

9. In the merits litigation, Kennedy testified that his "football coaching functions" continued "until the last kid leaves" (JA276) and that coaching included more than football: Serving as a "mentor and role model for student athletes" is "exactly" what coaches "are supposed to do" (JA323, see JA56-57, 186). "[F]or some kids," he acknowledged, "the coach might even be the most important person they encounter in their overall life" (JA323), with far more influence than classroom teachers (JA324). 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" and was "responsible for safety, health, group relationships, morality, sportsmanship, character development, and more." JA350, 355. And the District maintained that Kennedy's postgame speeches to the team were part of his job. See JA42-44, 78.

On summary judgment, the district court determined 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., concluded that there was now "no dispute" that Kennedy was on the job when he prayed, and affirmed that Kennedy spoke as a school official when he delivered his "post-game speeches to students on the field"—*i.e.*, his motivational prayers. Pet. App. 15; see JA98.

Addressing Justice Alito's concern that in the preliminary-injunction proceedings the panel might have overread *Garcetti* to apply "even when the coach is plainly not on duty" (Pet. App. 212), the court explained that it had earlier looked at Kennedy's off-

duty conduct solely to "bolster[] the already strong inference that he 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); see JA56 (coaching agreement). 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 ruled in the alternative that the District had ample justification to regulate even personal speech on the particular facts here. Pet. App. 17-23. It concluded that even under strict scrutiny the District had compelling interests in not violating the Establishment Clause and in avoiding lawsuits by parents. Pet. App. 23-24 & n.4. The court also concluded that narrow tailoring was satisfied because Kennedy repeatedly refused accommodations for private, personal prayer. Pet. App. 25.

Judge Christen, joined by Judge Dorothy Nelson, concurred (Pet. App. 30-39), explaining that the record did not support Kennedy's assertion that District policy "would prohibit a teacher from giving thanks at lunchtime or engaging in any other personal prayer while on duty" (Pet. App. 37).

10. 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 Ikuta recognized that "Kennedy's highly public demonstrations of his religious convictions put Bremerton * * * in a no-win situation" (Pet. App. 107), and wished for circuit law to be

clarified (Pet. App. 106-110). Judge O'Scannlain opined that Kennedy's prayers were private. Pet. App. 77-106. Judge Ryan Nelson argued that the panel misapplied precedent and strayed from the First Amendment's original meaning. Pet. App. 110-128. 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," including the "uncontroverted evidence that Coach Kennedy's prayerful speech had a coercive effect on his players," "there [was] no genuine dispute that Coach Kennedy spoke as a public employee." Pet. App. 70-71. 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 Jr., author of the panel opinion, 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. He explained:

> That narrative is false. * * * Kennedy was *never* disciplined * * * for offering silent, private prayers. In fact, the record shows clearly that Kennedy * * * was disciplined only after [the School District] tried in vain to reach an accommodation with him * * * 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 expressed the "hope [that] as this case proceeds * * * the truth of what actually happened will prevail." Pet. App. 69.

SUMMARY OF ARGUMENT

For more than fifty years, courts have sensibly balanced government employers' interests in regulating employee speech with government employees' interest in speaking.

Under this Court's time-tested approach, when government employees speak as employees, the First Amendment does not shield them from employer regulation. *Garcetti*, 547 U.S. at 418. When they speak as citizens, their speech may be regulated if the government's interests as employer in regulating the speech outweigh the employee's interest in speaking. *Pickering* v. *Board of Educ.*, 391 U.S. 563, 568 (1968). This standard is a practical one that considers the on-the-ground realities and myriad challenges that government employers face.

Under any application of these rules, the District was free to regulate Kennedy's public religious speech on the 50-yard line.

For more than seven years, Kennedy prayed to and with students midfield at the conclusion of football games. The multi-year history of his self-described "practice" of praying with students and his demands to "continue" made plain that his religious speech was delivered in his capacity as coach. His minor adjustments in October 2015 notwithstanding, to the District and the students it was impossible to view

his actions any other way. That should end the matter under *Garcetti*.

But regardless of whether Kennedy's very public speech was official, the District could regulate it. His prayer practice wrested control from the District over the District's own events, interfered with students' religious freedom, and subjected the District to substantial litigation risks. Under *Pickering*, those interests outweighed Kennedy's desire to pray with students at the 50-yard line.

Kennedy wholly ignores *Pickering*'s interest-balancing test, asserting that strict scrutiny should instead apply because his speech was religious. Without admitting as much, Kennedy would unwind decades of this Court's jurisprudence, cast aside employers' interests, and introduce untold confusion for government offices and courts alike. By removing the careful and considered balancing of *Pickering*, Kennedy's approach would force public employers to divine the precise moment when speech goes from wholly unprotected to shielded by the most demanding judicial scrutiny. That would subject public employers to an ever-present risk of litigation and liability for not acing a test that many constitutional-law scholars would fail.

In all events, given the District's repeated—but ignored—offers to accommodate personal, private prayer, which Kennedy now says is all he wanted, the District's actions satisfied any conceivable legal standard. The District could have fired Kennedy for praying with and to students for seven years. But it chose instead to try—again, and again, and again—to provide him with time and space for personal prayer. Kennedy and his counsel responded by insisting in the media that he be allowed to pray publicly with

students, creating a firestorm at the games. Where, as here, an employee rebuffs the very accommodations that in later litigation he claims he was denied, those offers satisfy any level of scrutiny.

ARGUMENT

Government employers, "like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Garcetti*, 547 U.S. at 418. Hence, while "public employers may not condition employment on the relinquishment of constitutional rights," the government has "countervailing interest[s] in controlling the operation of its workplaces." *Lane* v. *Franks*, 573 U.S. 228, 236 (2014). So "the government as employer indeed has far broader powers than does the government as sovereign," including the power to "restrict its employees' speech." *Waters* v. *Churchill*, 511 U.S. 661, 671-672 (1994) (plurality opinion); see, *e.g.*, *Engquist* v. *Oregon Dep't of Agric.*, 553 U.S. 591, 598 (2008). This rule reflects not only the "managerial discretion" that all employers have (*Garcetti*, 547 U.S. at 423), but also the "common sense realization that government offices could not function if every employment decision became a constitutional matter" (*Connick* v. *Myers*, 461 U.S. 138, 143 (1983)).

This Court has established a two-step test to "guide interpretation of the constitutional protections accorded to public employee speech" (*Garcetti*, 547 U.S. at 418) that balances the interests of employees with those of the government and the public it serves (*Pickering*, 391 U.S. at 568). First, if a public employee speaks as an employee, there can be "no First Amendment cause of action based on his or her employer's reaction to the speech." *Garcetti*, 547 U.S. at 418.

Second, if a government employee speaks as a citizen on matters of public concern, "[t]he question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Ibid.* At this second step, courts must balance the "government's interest in the effective and efficient fulfillment of its responsibilities to the public" (*Connick*, 461 U.S. at 150), the rights of the employee, and the rights and interests of the public (*id.* at 142). The test thus prevents unreasonable speech restrictions while ensuring that "government employers" can adequately "perform their important public functions" (*Garcetti*, 547 U.S. at 419-420).

The District could regulate Kennedy's speech at either step: He conducted his postgame midfield prayers with students as a government employee. And in all events, the District had ample justification to act as it did, because of the effects that Kennedy's demonstrative speech had on the District's operations, and on the students. On the actual facts here, there is no basis to rewrite precedent wholesale.

I. Kennedy spoke as a government employee.

1. "[W]hen the State is the speaker," it may "regulate the content of what is or is not expressed," to "convey its own message." *Rosenberger* v. *Rector & Visitors*, 515 U.S. 819, 833 (1995). Hence, "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Garcetti*, 547 U.S. at 421-422.

Accordingly, if "the speech at issue is itself ordinarily within the scope of an employee's duties" (*Lane*, 573 U.S. at 240) or "pursuant to employment responsibilities" (*Garcetti*, 547 U.S. at 424), "the Constitution does not insulate [it] from employer discipline" (*id.* at 421).

2. When determining the speech at issue, what matters is the speech that actually occurred, because that is what the government faces when deciding to regulate. See *Connick*, 461 U.S. at 147-148. Generic descriptions—especially ones contrived for litigation—have no bearing. Cf. *id.* at 150 n.10.

Kennedy's own words make clear that the "speech at issue" (*Lane*, 573 U.S. at 240) was not "private, personal prayer" (Br. 9) "by himself" (Br. i). Rather, it was "audibl[e]" prayer with students on the 50-yard line at the conclusion of football games. JA63-64. Kennedy contemporaneously described his practice as "prayer after a game is completed and the team leaves the field, then comes back onto the field to join me." JA59. And he specifically testified that what he wished to "continue" was his "practice of praying with students." JA295; see JA70-72, 286-287.

What is more, Kennedy testified that after the District's September 17 guidance, he prayed privately at eight of the next nine games (and prayed at the other one after everyone had left). JA339-342; see JA37-38. If the speech at issue had actually been personal, solitary, private prayer, as Kennedy now insists, no demand letter—and no litigation—would have been necessary, because the District never

expressed disapproval of his prayers at those games. JA342.[1]

3. "The proper inquiry" to determine whether the speech at issue was "pursuant to [Kennedy's] employment responsibilities" is "a practical one." *Garcetti*, 547 U.S. at 424. While "[t]he listing of a given task in an employee's written job description" may be helpful, it "is neither necessary nor sufficient" to define what is or isn't government speech. *Id.* at 425. Instead, the inquiry turns on whether the actual speech that Kennedy delivered and wished to "continue" (JA69) fell broadly "within the scope of [his] professional duties." *Garcetti*, 547 U.S. at 424-425.

It did. Kennedy spoke at the center of the field just after the handshake line, at the time of his traditional postgame talks. See JA90; ER274 (video from October 26 game). As every high-school athlete knows, taking a knee around your coach at the end of the game is both team ritual and instruction. It is when coaches address heightened emotions, celebrate accomplishments, teach sportsmanship and "proper behavior," (JA327), manage group dynamics (JA350), and correct mistakes. And for years, Kennedy admits, he blended these critical functions with prayer. JA40.

Kennedy and everyone else understood that what he did at that crucial moment was an essential part of his job as coach. Not only was he on duty (JA276), but

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[1] Kennedy alters and then relies heavily (Br. 10-11, 27-28, 31) on an e-mail from Leavell to the State Superintendent of Public Instruction saying that Kennedy was now presenting the issue as whether he had a "right to conduct a personal, private prayer…..on the 50 yard line." JA88. The superintendent's quote, with the five dots that Kennedy omits, highlighted the difference between what Kennedy was doing and how his lawyers described it.

as the District explained, a football game "is not merely an athletic contest"; it instead "encompasses all of the pre-game preparation and post-game activities * * *[,] which are, as much as the game itself, reasons for school district athletic programs" (JA78). Kennedy testified that he was "a mentor and role model" (JA323) and that because his behavior at games was "always setting some kind of example to the kids" (JA327), he was not "free to behave in a way that's not conducive for" them (JA326).

Kennedy's job description accorded with his understanding: It specified that, as "coach," he was hired and "entrusted" to be a "mentor and role model for the student athletes"; that he was, in his official capacity, "constantly being observed by others"; and that his job included providing "positive motivational strategies," such as postgame speeches. JA56.

Consistent with those job duties, Kennedy announced to the press just before the October 16 game that his midfield prayers were "helping these kids be better people." JA73-74.

It beggars belief that the students would have experienced Kennedy at that moment immediately after the games as anything other than the coach. After all, for seven years he had imbued his midfield speeches with prayer. Students recognized his practice as a team activity, not a personal, private one; they knew to take a knee around him, sometimes with the opposing team, and play their part. JA76-77; see, *e.g.*, JA271 (at September 11 game, student handed Kennedy his helmet to use for prayer). And when Kennedy demanded publicly to continue his prayer practice (JA73-75), he insisted that the prayers take place with students on the 50-yard line, at the center of attention and traditional place for postgame speeches.

Kennedy would ignore this context and have the Court ask only whether his prayers at the October 16, 23, and 26 games were the "form[] of speech" that the District had "commissioned" (Br. 27-28). But context matters. See *Garcetti*, 547 U.S. at 424-25. And the context that the District faced was straightforward: As soon as it found out about Kennedy's years-long practice of praying with and to students, it told him to stop. After that, he prayed privately at games for a month, which the District allowed. JA339-342. He then told the District and the public that he was going to "continue [his] practice of praying with students" midfield (JA295), which helped them "be better people" (JA73-74). And at his final game, Kennedy invited others to join him midfield, prayed with them, and then had one of those individuals—Representative Young—address the team in the postgame huddle. JA314-315; ER274. To the superintendent, as to any reasonable observer, Kennedy was seeking to pray in his capacity as coach, regardless of any *post hoc* relabeling of that speech as personal and private.

4. Nor can there be any doubt that public-school teachers and coaches as a class have broad professional responsibilities. After all, "school authorities act[] in *loco parentis*." *Vernonia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646, 655 (1995) (quoting *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 684 (1986)). Classroom teachers teach more than algebra and Shakespeare, and coaches teach more than trick plays and two-minute drills: They have "personal responsibility for the student's welfare as well as for his education" (*New Jersey* v. *T.L.O.*, 469 U.S. 325, 350 (1985) (Powell, J., concurring)).

Acknowledging this unique role does not mean that "government owns and can censor literally

everything that coaches and teachers say" (Br. 35). If an instructor's speech on the job with students cannot reasonably be perceived to carry an instructional message, it isn't government speech. But speech that is demonstrative and instructional is part of the job.

Absent extraordinary circumstances, therefore, students would not reasonably view a "teacher wearing a yarmulke in the classroom" (Br. 32) or "crossing herself before a meal in the lunchroom" (Br. 26-27) as official conduct. But changes in circumstance can alter whether speech is personal or official. Consider a teacher who silently reads her Bible at her desk before the first bell. That would be private conduct, and fully in accordance with Board Policy 2340. See JA24. But if the teacher stood in the doorway as students entered the classroom and read aloud from the Bible, the change in context would turn an otherwise-private act into government speech—and any teacher, coach, student, or parent would readily recognize it as such. Again, the circumstances of Kennedy's practice—taking a knee midfield, with students, immediately after games, at the moment when he (and coaches everywhere) would traditionally deliver instructional postgame messages—make clear that he spoke as the coach.

As for the possibility that some coaches might check their phones or speak to family members after a game (Br. 29)—undeniably private speech—that makes no difference under *Garcetti*. What matters is the speech at issue, not how other speech might be treated. *Lane*, 573 U.S. at 240. On Kennedy's view, if one teacher chaperoning a field trip texts her family while another stands in the aisle of the school bus and delivers a lecture, both are engaging in private speech, and because the school doesn't forbid the

texts, it can't regulate the lecture. But nothing in this Court's jurisprudence allows an employee to categorize her speech as private by simply pointing to *other* speech in *other* contexts by *other* employees.

* * *

Garcetti is clear, administrable, and dispositive here. The District, the students, and Kennedy himself all understood that when he prayed aloud, at the 50-yard line, with the team, at the end of the games, he did so as the coach. Because that is so, he has "no First Amendment cause of action." *Garcetti*, 547 U.S. at 418. That should end the matter.

II. Regardless of whether Kennedy's speech was government speech, on these facts the District could regulate it.

"The time-tested *Pickering* balance * * * provides the governing framework for analysis of all manner of restrictions on speech by the government as employer." *United States* v. *National Treasury Emps. Union*, 513 U.S. 454, 480 (1995) (O'Connor, J., concurring in part). When a public employee speaks as a citizen on matters of public concern rather than as a government official, *Pickering* requires determining whether the employer's interests in regulating the speech outweigh the employee's. See *Garcetti*, 547 U.S. at 419. "The *Pickering* balance" is a practical inquiry that "requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Connick*, 461 U.S. at 150. Here, that balance tilts decisively in the District's favor.

As an initial matter, restrictions that apply to members of the general public just as to government

employees do not implicate First Amendment concerns. See *Garcetti*, 547 U.S. at 418. The District's policy barring noninstructional demonstrative speech on the 50-yard line applied equally to everyone, including the Satanists who wished to use the field for demonstrative religious ceremonies and the other groups that demanded access for their activities. JA100-101, 364. What Kennedy requests is special treatment, not equal treatment.

But even if the District treated Kennedy "differently from any other member of the general public," it had "adequate justification." *Garcetti*, 547 U.S. at 418. For regardless of his intent, Kennedy's "religious speech" (Br. 37) interfered dramatically with the District's control over its own events, and with students' religious-freedom rights.

Kennedy ignores the operative test entirely, positing instead that strict scrutiny should apply. Br. 36. That's not the law. But even if the Court were to discard decades of settled jurisprudence and adopt a test that prefers religious speech over all other speech, the District should still prevail. For under any standard, the District's actions were justified.

A. The District had adequate justification to restrict even citizen speech.

1. The District expressed and acted on multiple valid reasons for limiting Kennedy's midfield speech.

When a government employer treats employee speech on matters of public concern differently than speech by the general public, courts must determine whether the employer's interests outweigh the employee's. See *Garcetti*, 547 U.S. at 419. "In performing the balance," the speech "will not be considered in a

vacuum; the manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose." *Rankin* v. *McPherson*, 483 U.S. 378, 388 (1987); see *Connick*, 461 U.S. at 150 n.10.

Given the "manner, time, and place" of Kennedy's speech, the District's actions were justified by myriad interests: The District was entitled to prevent disruption of and maintain control over school events (*Connick*, 461 U.S. at 151-153), to safeguard students' rights (cf. *Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969)), and to avoid constitutional violations (*Widmar* v. *Vincent*, 454 U.S. 263, 271 (1981)), all of which Kennedy's prayer practice threatened. So even if the District treated Kennedy differently than the general public, it had "adequate justification" (*Garcetti*, 547 U.S. at 418), because his prayer practice interfered with the "efficiency of the public services [the District] performs" (*Pickering*, 391 U.S. at 568).[2]

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[2] According to Kennedy, the District conceded that it acted solely to avoid liability resulting from his religious conduct. Br. 36. The District did not (and had no reason to) concede that point. On the contrary, the District offered substantial evidence of its contemporaneous concerns for students' safety, well-being, and religious liberty, and for keeping control over District events and messages. JA44, 101, 181. References to its constitutional concerns must be read in context. As a public-school superintendent tasked with overseeing the education of 5,000 students, Leavell was driven by his duty to safeguard their best interests, not by religious animus: "I never had any negative motivations toward Mr. Kennedy because of his religion. * * * In opposing Mr. Kennedy's position, I was motivated only by the need to comply with the District's constitutional obligations." JA349-350. To the extent that Kennedy means that the only reason the District put him on leave arose out of his midfield prayer practice and the

a. Safety and order at District events. The District had authority to control its own messages, maintain order at school activities, manage the working relationships of its staff, and ensure student safety.

Government must be free to determine how it engages with the public. That is especially true for public schools, which may regulate "expressive activities that * * * might reasonably [be perceived] to bear the imprimatur of the school." *Hazelwood Sch. Dist.* v. *Kuhlmeier*, 484 U.S. 260, 271 (1988). "These activities," after all, "may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." *Ibid.* When Kennedy turned the District's events into a public referendum on his preferred religious speech, the District had every right to step in.

After the District learned that Kennedy was praying to its team, it told him to stop. JA229, 270. He doesn't dispute that the District was right to do so. Br. 41-42. When he ignored the athletic director's and superintendent's instructions (JA271), posted his displeasure on Facebook (JA361), and then demanded to "continue" his practice (JA71-72), the District did not fire or discipline him. Instead, it tried to accommodate him. JA45, 93-94, 103. Yet neither he nor his counsel

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hectic and dangerous conditions that it produced, the District agrees. (The District did not put him on leave because he was habitually tardy, for example.) But if Kennedy means to imply that the District would *not* have responded if an employee created a similarly fraught situation with nonreligious speech, nothing in the record supports that counterintuitive and frankly absurd supposition.

engaged. JA307. Rather, counsel called a press conference and published a letter informing the District and the community that Kennedy would accept nothing less than full capitulation and would be praying at the October 16 game. JA62-72, 73-75. In other words, they insisted that Kennedy—not the District—could control school events, and turned an employment dispute into a public spectacle.

Predictably, the District was inundated with phone calls and mail from the community and across the country. JA351. The events at the October 16 game underscore the intensity of the situation: After Kennedy announced to the press that he was going to hold his postgame midfield prayer and talked with Representative Young a dozen times, Young, a "rush of spectators," and the media "jump[ed] over the fence" to join him, knocking down members of the marching band. JA181, 347; see JA82, 298-299. The public controversy attracted individuals "from outside of the local community," including someone who "cursed [Head Coach Gillam] in a vile manner." JA346. With emotions running so high, Gillam worried that he might "be shot from the crowd." JA347. Strangers sent hate mail to school staff (JA346, 351), and community members campaigned to fire a District employee for speaking in favor of students' religious liberty (Tim Peacock, *School Employee Speaks Out After HS Football Coach Prays with Students*, Peacock Panache (Sept. 22, 2015), https://perma.cc/67R9-8AVJ).

Given all of that, the District realized that the situation had become out of control and unsafe. JA222; see also JA347. It was reasonable, therefore, for the District to conclude that Kennedy's unwavering demand and ongoing practices would continue causing

"substantial disruption" and "material interference with school activities" that justified the District's exercise of authority over its own events (*Tinker*, 393 U.S. at 514).

By that time, too, Kennedy's actions were dividing the coaching staff and creating discord that ultimately led to the departure of several coaches, including Head Coach Gillam. JA178, 249-250, 347-348. As this Court has recognized, government workers must "maintain close working relationships with their superiors" to serve the public efficiently and effectively. *Connick*, 461 U.S. at 151. The District was entitled to seek to prevent conflicts between coaches and avoid the staff exodus resulting from Kennedy's actions.

The District also had, and contemporaneously expressed, serious concerns that Kennedy's conduct, if permitted as private speech, would require allowing others to use the field at games for their own demonstrative speech. When the superintendent reported to the school board the demand from the Satanists for "the same access to the field to pray" as Kennedy had, he explained that this "issue of equity" was "exactly the door [they] were worried about opening." JA100-101; see JA99. The District thus had urgent need to prevent its employee from transforming school facilities and events into something else entirely.

Ignoring the powder keg that the District faced, Kennedy tries to compare his midfield prayer to "looking at [one's] phone," "greet[ing] a spouse in the stands," or "calling home or making a reservation for dinner at a local restaurant." Br. 29 (second alteration in original) (citations omitted). But those activities would not have disrupted District programs, invited demands to use the field as a public forum, or otherwise interfered with the District's "effective and

efficient fulfillment of its responsibilities to the public" (*Connick*, 461 U.S. at 150). If they had, the District could—and surely would—have stopped them.

Further disregarding the record, Kennedy tries to limit this Court's analysis to the two or three games before he was put on leave. But under *Pickering*, "the context in which the dispute arose is also significant." *Connick*, 461 U.S. at 153. A rule that determines the constitutional rights and duties of public employers and employees across the country should not ignore the practical realities that governments face—and that the District faced here.

Specifically, for weeks Kennedy and his counsel spurned the District's efforts to find suitable accommodations. They broadcast that Kennedy disagreed with the District's policy and wouldn't be following it. And on October 26, despite the District's attempts to keep the field from becoming a venue for public debate over prayer with students, Kennedy allowed Representative Young onto the field, prayed with him and others, and then had Young address the team. JA97, 314-315; ER274. *That*, not isolated "private" prayers, is what the District was responding to.

When, as here, employee speech about a government policy "arises from an employment dispute concerning the very application of that policy," the government's view that the speech "threaten[s] the authority of the employer to run" its programs has "additional weight." *Connick*, 461 U.S. at 153.

To the extent that Kennedy does address the environment that his actions sparked, he speaks broadly of the virtue of fighting for one's rights. But again, context matters. Under Kennedy's view, an op-ed on the District's allocation of resources must be treated

the same way as marching the media and the public to a school activity and leading a rally to demand better funding for extracurriculars. That can't be.

b. Religious liberty. If that weren't enough, the District also protected the religious-liberty interests of the players, and the community.

First, families and their houses of worship get to decide who will teach them whether, when, and how to pray. "State interference in that sphere would obviously violate the free exercise of religion." *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). Indeed, "educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities" so important that even foundational civil-rights laws must sometimes give way to avoid governmental intrusion. *Id.* at 2064.

Public schools have a constitutional duty, therefore, not to encroach, or let their staff encroach, on families' rights to "freely choose [their] own course" when it comes to "religious training, teaching, and observance." *School Dist.* v. *Schempp*, 374 U.S. 203, 222 (1963). Parents should not have to fear that the messages their children receive in Sunday school will be undermined by competing religious messages Monday morning in English class—or Friday night on the football field. See *Wisconsin* v. *Yoder*, 406 U.S. 205, 213-214 (1972).

Kennedy transformed the team's customary postgame motivational speech and associated rituals into instruction and encouragement to credit and thank God for what the students accomplished on the field. JA170-171. And in modeling at midfield, in front of the students and the entire school community, what he viewed as proper religious exercise, he "guide[d]

[the players], by word and deed, toward the goal of living their lives in accordance with [his] faith" (*Morrissey-Berru*, 140 S. Ct. at 2066), impermissibly influencing decisions about their spiritual development (cf. *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534-535 (1925)). That alone gave the District strong reason to act.

Second, Kennedy's practice of incorporating core religious activity into the postgame rituals also burdened students' religious exercise by putting them to the choice between curtailing their participation in a formative high-school activity and joining a religious practice inconsistent with their beliefs. Cf. *Fulton* v. *City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021). That is an impermissible burden to place on anyone (see *ibid.*), and all the more so on students. To say that the District was forbidden to step in is not just legally unsupported, but cruel to the students, and disrespectful to their parents. The District should not be penalized for proactively protecting the religious freedom of the young people it is charged to serve, who are more "readily susceptible to religious indoctrination or peer pressure" than are mature adults. *Town of Greece* v. *Galloway*, 572 U.S. 565, 590 (2014) (plurality opinion) (quoting *Marsh* v. *Chambers*, 463 U.S. 783, 792 (1983)).

Here, the coach—the most visible authority figure on the field—held prayers at the focal point of the postgame ceremonies, as hundreds of people in the stands watched. For students who did not want to participate in Kennedy's practice, the decision to stay true to their own beliefs required them stand up, turn their backs on the team, literally and figuratively, and walk away, in full view of coaches, teammates, classmates, teachers, and the entire school community.

Expressing dissent about Kennedy's spectacle became more difficult yet after their coach, his lawyers, and Representative Young made media appearances to plump for midfield prayer. JA52, 73-74, 189-190, 354; see also Peter O'Cain, *Kennedy to Resume Prayers with Football Team*, Kitsap Daily News (Oct. 14, 2015), https://perma.cc/C5ML-33RC. The pressure reached its zenith at homecoming—an especially important occasion for high-schoolers that Kennedy described as "their night" (JA343)—when a crowd, including elected officials, rushed the field *en masse* to join the prayers. JA297-298, 354-355.

Though Kennedy doggedly insists that "[t]here is zero record evidence that any student felt compelled to join" him in prayer (Br. 44), his amici acknowledge that the opposite is true (see, *e.g.*, Br. Amicus Thomas More Soc'y 13, 15 n.7 (detailing—even while downplaying significance of—record evidence of pressure on players)). When Kennedy does begrudgingly acknowledge that a student "felt compelled to join [him]" against the student's beliefs for fear of being denied playing time, he asserts that the student's concerns were limited to "team prayers in the locker room" (Br. 44-45 (citing JA233-234 (Polm testimony), 356 (Leavell Declaration))). Yet neither Polm's testimony, nor Leavell's Declaration, nor anything else in the record supports that restrictor. Rather, the record evidence about concerns from "parents and students" (plural) about their "children" (plural) who "had participated in the team prayers only because they" (plural) "did not wish to separate themselves" (plural) "from the team" was about Kennedy's involving students in prayers at the 50-yard line in all the ways that he did that. JA356.

As the District recognized (JA110), moreover, those who complained likely represented just a fraction of the students who prayed with Kennedy contrary to their own beliefs. Cf. JA181 (no one visibly prayed when Kennedy didn't). After all, the pressure to conform is also pressure to remain silent: Objecting would identify students as religious dissenters, exposing them to potential retaliation, punishment, ostracism, and worse.

Thus, in *Santa Fe Independent School District* v. *Doe*, the district court had to curb serious "intimidation [and] harassment" aimed at the pseudonymous plaintiffs who objected to prayers at football games. 530 U.S. 290, 294 & n.1 (2000). If the vitriol and threats directed at Bremerton staff and administrators are any indication, students who spoke up here would reasonably fear the same.

It is therefore no surprise that parents and students came forward to thank the District *after* it investigated and acted—rather than complaining beforehand. JA359. Kennedy, after all, wielded enormous authority and influence over the students, which at the very least placed impermissible "indirect coercion" "on the[ir] free exercise of religion" (*Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2022 (2017) (quoting *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988))).

Third, the District had strong interests in ensuring that it was not viewed as endorsing Kennedy's prayer practices and being perceived, accordingly, as engaging in religious favoritism.

Though Kennedy insists that no one would view his audible, repeated midfield prayers with students,

elected officials, and community members as school-sponsored speech because "government does not endorse what it fails to censor" (Br. 38-39), the practical reality was quite different. The District learned of the prayers when the coach from another school commented on how Bremerton "allow[ed]" its coach to have team prayers. JA229. If a mature adult, himself a public-school official and coach, understood Kennedy's actions to be authorized and approved by the District, how could students *not* come to that same conclusion? As in *Santa Fe*, the prayer was "part of a regularly scheduled, school-sponsored function conducted on school property." 530 U.S. at 307. The post-game rituals (and the coach himself) were "clothed in the traditional indicia of school sporting events" and included "not just the team, but also" community members, press, elected officials, and opposing teams. *Id.* at 308. Any player or observer would reasonably view Kennedy's prayer as endorsed and approved by the District.

Kennedy concedes that the District was right to regulate his years-long practice of using "religious content" in "post-game speeches to players." Br. 41. But he asks the Court to ignore that history and focus instead on his final few games, because he supposedly "readily acceded to" the District's instructions to cease his prior practice. Br. 41-42. That would require ignoring Kennedy's own statements demanding to *continue* his practice of praying with players *and* his long course of conduct. But see *Connick*, 461 U.S. at 153-154.

But even the actions in his last three games show why reasonable observers would associate his religious speech with the District. At the homecoming game on October 16, Kennedy prayed midfield with

students, community members, and a state legislator. And while Kennedy prayed alone at the October 23 away game, he then involved others at the October 26 home game: In violation of District policy barring public access to the field, he gave Representative Young, plus a second elected official and others, permission to join and pray with him midfield; students—still on the field, as they were required to be—looked on; and Kennedy then had Young address the team. ER274; JA314-315. To say that the prayers could not be attributed to the District just bucks common sense.

As for Kennedy's invocation of *Mergens* (Br. 38), the plurality's reasoning was premised on congressional findings that high-school students are mature enough to understand that *student* speech in a public forum is presumptively private while *teacher* speech is not. *Board of Educ.* v. *Mergens*, 496 U.S. 226, 250-251 (1990) (plurality opinion). A school district may be responsible for its instructors' words and deeds on the job even when it doesn't expressly embrace them.

Besides, Kennedy essentially demands that the District *should* have embraced his religious speech. It is, after all, the District's opposition to that speech that Kennedy challenges: When another coach merely shook his head about the prayer, Kennedy posted to Facebook that he thought he might be fired for praying, triggering threats against District personnel. JA271, 361-362. In so charged an environment, what more (or less) could the School District do? And what message would capitulating have sent about the District's relationship to Kennedy's speech?

c. Obligations to students and the public. The District was justifiably concerned that Kennedy's "conduct might violate the constitutional rights of students and other community members, thereby

subjecting the District to significant potential liability" in suits by parents (JA138) and endangering "scarce funds needed for the District's basic educational mandate" (JA107). After all, in every case on prayer involving public-school officials or school support at school sporting events, the courts have held that the prayers were constitutional violations. See *Santa Fe*, 530 U.S. at 316; *Borden* v. *School Dist.*, 523 F.3d 153, 175 (3d Cir. 2008); *Doe* v. *Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 166 (5th Cir. 1993); *Jager* v. *Douglas Cnty. Sch. Dist.*, 862 F.2d 824, 830-831 (11th Cir. 1989).

Kennedy frames the issue as a conflict solely between his First Amendment interests and the District's "phantom Establishment Clause" interests. Br. 47. He is doubly wrong. As just explained, the District's Establishment Clause interests were real. The District and its employees are forbidden, by *both* the Establishment *and* Free Exercise Clauses, to coerce or pressure students into prayer; and the District also must not endorse religious speech. It is responsible for protecting the religious-liberty rights of District students and families—rights that Kennedy fails even to mention. And the District has substantial interests in directing its events, managing its staff, and controlling use of its facilities.

What is more, "dangers of burdensome litigation" warrant "substantial deference, as mandated by *Pickering*, *Connick*, and *Waters*, to the government's reasonable view of its legitimate interests." *Board of Cnty. Comm'rs* v. *Umbehr*, 518 U.S. 668, 678 (1996). The line between a District's constitutional obligations to students and its duties to employees cannot be so finely drawn that attempts to respect both inevitably trigger liability one way or the other. *Marchi* v.

Board of Coop. Educ. Servs., 173 F.3d 469, 476 (2d Cir. 1999) (Newman, J.). Whether or not the District was *required* to regulate Kennedy's speech, it surely had ample justification and legitimate authority to do so under *Pickering*.

2. Kennedy's interests in praying on the 50-yard line with students do not outweigh the District's interests.

Kennedy undeniably has substantial interests in personal, private prayer. Religion plays a vital role in the lives of millions of Americans. Government does not and cannot ask them to abandon their faith to undertake public employment. The District has never suggested otherwise. When it learned that Kennedy's postgame speeches included explicitly religious content, and that Kennedy had led students in prayer for years, it did not discipline or fire him. Instead, it invited him, again and again, to engage in the "interactive process" of finding accommodations (JA93) that respected his right to personal, private prayer.[3]

But Kennedy's interest in having prayer on the 50-yard line, at the end of games, in front of the team and entire community, is altogether less weighty. Important as the right to express religious beliefs is, it is not absolute for public employees at all times and places and in any manner they might wish. And the fact that "religious speech" (Br. 37) is both religious

[3] Finding no religious animus by the District, Kennedy points to Judge Milan Smith's reference to the Sermon on the Mount in his statement on denial of rehearing en banc. That "personal[]" observation (Pet. App. 69) is not part of the decision under review. And the District agrees that it is impermissible for judges to instruct others in how to pray—just as it is for public-school coaches to do so.

and speech does not logically warrant a new or different legal test. Cf. Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Doctrine*, 57 U. Chi. L. Rev. 1109, 1121-1122 (1990). In all events, Kennedy testified that he preferred to pray by himself with "nobody around" (JA284-285), as he did after the September 18 game (JA53, 364-365)—which the District expressly permitted.

3. A disclaimer would not solve the problems that Kennedy's midfield religious speech created.

Ignoring the need to balance his interests with the District's and the public's, Kennedy insists (at 34) that all the District's concerns could have been obviated by a disclaimer. But Kennedy does not explain why that would not *always* be the case when government regulates employee speech. Cf. *Weaver* v. *United States Info. Agency*, 87 F.3d 1429, 1442-1443 (D.C. Cir. 1996); *id.* at 1453 (Wald, J., dissenting). And disclaimers would not have solved the District's legal or practical problems.

To begin with, Kennedy's one-size-fits-all approach would not change the District's interest in avoiding lawsuits and liability to parents, which government cannot escape by simply saying "it's not us, it's him." See, *e.g.*, *Santa Fe*, 530 U.S. at 302-303.

As a practical matter, a disclaimer without regulation of Kennedy's conduct might well have exacerbated the circus on the field: It would have signaled that the District permits anyone to use the field to speak on whatever they wish, no matter how much the District disagrees with the message. Competing factions would see Kennedy use the field as a stage and

seek to make that stage their own. Indeed, some made that demand here. JA100-101, 181.

Nor would disclaimers have protected students against the pressure of a coach seeking support for his religious speech. As Kennedy testified, the coach is often not just the "most important person that [students] encounter at school," but "the most important person they encounter in their overall life." JA323. As the district-court judge, himself a former amateur athlete and coach's son (Pet. App. 271), put it, a coach's "sentiment enunciated at the center of the field * * * is powerful stuff," and most players would "walk through a wall for [their] coaches" (Pet. App. 287).

That is true not just because students respect their coaches, but also because they would reasonably fear, as players did here, that there will be consequences if they don't participate in what the coach makes clear is of paramount importance to him. For tens of thousands of high-school students each year, playing time and a coach's recommendation are the gateway to college scholarships—and all the opportunities that higher education offers. See *Scholarships*, NCAA, https://perma.cc/C8ZW-S2UL. Accordingly, disclaimers from the superintendent or school board would have meant little. The public official who mattered to students was not sitting in District headquarters; he was kneeling at midfield.[4]

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[4] The Ninth Circuit held that the District's Establishment Clause concerns alone would have been sufficient to justify regulating Kennedy's speech. Pet. App. 17. The District agrees, but as just explained, the record shows reasons beyond the Establishment Clause that also fully justified the District's actions. If the Court disagrees with the Ninth Circuit's mode of analysis,

B. *Pickering* appropriately weighs the competing interests when a government employee engages in religious speech at work.

This Court has already decided that when a public employee speaks as a citizen on matters of public concern, courts must balance the employee's First Amendment rights with the government's interests and the rights and interests of the public, regardless of what level of scrutiny would apply if the speaker did not work for the government. See *Garcetti*, 547 U.S. at 418. That is true even for viewpoint-based restrictions that would otherwise receive the most searching judicial scrutiny. See *Lane*, 573 U.S. at 238-242; *Garcetti*, 547 U.S. at 420-423; *Connick*, 461 U.S. at 150-154; *Pickering*, 391 U.S. at 568-575.

Kennedy agrees that his religious speech was a matter of public concern. See, *e.g.*, Pet. App. 183. And he acknowledges that *Garcetti* applies to religious speech (Br. 28), just as it does to political speech. Yet rather than attempting to show that he would prevail under *Pickering* balancing if his speech is not government speech, he looks to cases that did not involve public employees. Though Kennedy may prefer a different legal standard, he offers no justification to depart from *Pickering*.

Nor can we think of one. *Pickering* is a long-settled, flexible, commonsense test that considers the rights of employees and the interests of government employers and the public.

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the answer would not be to ignore the law altogether, as Kennedy does, but to remand for full consideration of the interests under *Pickering*.

Consider one of Kennedy's own hypotheticals. Br. 30. Under *Pickering*, a government employer could not prohibit a teacher from crossing herself or offering a prayer of thanks before eating her lunch. That is because government employers do not have an interest in stopping genuinely personal, private expressions of faith—which is likely why Kennedy does not point to a single case in which some authoritarian government employer has tried. But a school district *would* have significant interests in regulating a teacher's speech if, for instance, she had a long-standing practice of leading students in prayer in the cafeteria and then told the school that she would continue praying with students, all while whipping the school community into a frenzy. And that would be so even if the teacher's lawyers labeled her practice "personal" and "private" contrary to how it unfolded and everyone experienced it.

Kennedy's novel standard would mean that schools would have to divine the exact point at which the teacher's prayer to the students transforms from freely regulable public speech under *Garcetti*, to become "personal" speech that subjects the school to strict scrutiny. But how would a school administrator determine that—especially if the employee refuses to discuss accommodations, slightly modifies the practice each week, and maintains a demand to pray with students, as Kennedy did? Kennedy doesn't provide an answer. And no wonder: It would be an impossible situation for a busy school administrator making on-the-ground decisions in real time. *Pickering* does not have severe yet ill-defined lines and surprise liability. Kennedy's proffered replacement does, creating many more problems than it solves.

Moreover, Kennedy's test would extend not just to religious speech; it would necessarily require government employers to navigate a constitutional maze for all speech. The First Amendment mandates "neutral[ity] toward religion." *Masterpiece Cakeshop, Ltd.* v. *Colorado Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1732 (2018). While religious speech must not be disfavored, neither may it receive uniquely preferred status.[5] At the very least, speech on "sensitive political topics," which "occupies the highest rung of the hierarchy of First Amendment values," must receive the same "special protection." *Janus* v. *American Fed'n of State, Cnty., & Mun. Emps.*, 138 S. Ct. 2448, 2476 (2018) (quoting *Snyder* v. *Phelps*, 562 U.S. 443, 452 (2011)); accord *Citizens United* v. *FEC*, 558 U.S. 310, 340 (2010); *Buckley* v. *Valeo*, 424 U.S. 1, 14-15 (1976) (per curiam); *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966). Thus, for the Court to adopt Kennedy's approach, it would have to conclude also that the *Pickering* framework no longer applies to political speech. But see, *e.g.*, *O'Hare Truck Serv., Inc.* v. *City of Northlake*, 518 U.S. 712, 719-720 (1996).

If Kennedy means for religious speech to receive uniquely preferred status, despite decades of precedent prohibiting that result, it wouldn't make the

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[5] See*, e.g.*, *Calvary Chapel Dayton Valley* v. *Sisolak*, 140 S. Ct. 2603, 2613 (2020) (Kavanaugh, J., dissenting from denial of application for injunctive relief) ("[T]he Court's precedents do *not* require that religious [speech] be treated *more favorably* than all secular [speech]."); *Capitol Square Rev. & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 766 (1995) (plurality opinion) ("[G]iving sectarian religious speech preferential [treatment] * * * would violate the Establishment Clause (as well as the Free Speech Clause, since it would involve content discrimination)."); *Heffron* v. *International Soc'y for Krishna Consciousness*, 452 U.S. 640, 652-653 (1981).

standard any more administrable. Our nation's rich religious pluralism means that virtually any speech might be sincerely religiously motivated for some. To many, sharing policy views is itself a religious imperative.[6] And virtually anything might be *described* as religiously motivated. That would put government employers in the untenable position of routinely having to ascertain the sincerity of religious claims, or else having to allow any speech or expressive activity on the job for which an employee asserts a religious motivation.

Kennedy's desired new rule would render *Pickering* a dead letter and "subject[] public employers to intolerable legal uncertainty" (*Waters*, 511 U.S. at 692 (Scalia, J., concurring in judgment)). Kennedy cannot justify that radical change in the law.

C. On any legal standard, the District's actions were lawful.

1. *If the Court were to jettison* Pickering*, at most intermediate scrutiny should apply.*

If the Court were to accept Kennedy's bid to defenestrate *Pickering* for cases involving religious speech, any novel standard must at the very least take into account interests on the School District's side of the ledger, including the safety, well-being, and religious freedom of students. Though *Pickering*

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[6] See, *e.g.*, *Global Impact Ministries* v. *Mecklenburg County*, No. 20-cv-232, 2022 WL 610183, at *7 (W.D.N.C. Mar. 1, 2022) (pro-life activities were plaintiffs' "form of religious ministry"); *In re Westboro Baptist Church*, 189 P.3d 535, 540 (Kan. Ct. App. 2008) (religious beliefs required condemnation of United States and "homosexuality"); *Hawai'i* v. *Fergerstrom*, 101 P.3d 652, 655 (Haw. Ct. App. 2004) (religious beliefs required political protest against federal control over Hawai'i).

appropriately addresses all of that, intermediate scrutiny provides at least a pale second-best.

Intermediate scrutiny may apply when governmental action, "while not facially invidious, nonetheless give[s] rise to recurring constitutional difficulties." *Plyler* v. *Doe*, 457 U.S. 202, 217 (1982). That description might be thought to fit public-employer restrictions on religious speech that, like the District's here, are driven not by animus but by the array of concerns that employees' religious speech may raise in the government workplace. That is all the more true in the public schools, where the need to protect students and maintain control over school activities gives employers additional justification to restrict employee speech. By contrast, strict scrutiny would make sense if laws or policies "target the religious for 'special disabilities' based on their 'religious status.'" *Trinity Lutheran*, 137 S. Ct. at 2019 (quoting *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 533, 542 (1993)).

Kennedy's speech was restricted not because of who he is, but because of what effects his speech had. There was nothing "invidious" about the District's actions to protect its interests and those of its students. If *Pickering* were to be abandoned, intermediate scrutiny would be the better fit for evaluating restrictions on employees' religious speech.

2. The District's actions satisfy any level of scrutiny.

But really, it comes down to this: The District's actions satisfy any standard that might be offered up. On intermediate scrutiny, restrictions on speech must advance "significant governmental interest[s]" and not "burden substantially more speech than is

necessary to further" those interests. *Packingham* v. *North Carolina*, 137 S. Ct. 1730, 1736 (2017) (quoting *McCullen* v. *Coakley*, 573 U.S. 464, 486, 490 (2014)). On strict scrutiny, government must demonstrate "that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Citizens United*, 558 U.S. at 340 (citation omitted). Either way, the District's actions were justified.

A school district's interest in protecting students' constitutional rights is undeniably compelling. See, *e.g.*, *Widmar*, 454 U.S. at 271. So too is government's interest in "complying with its constitutional obligations" more generally, including avoiding liability for constitutional violations. *Ibid.* "[A] government need not wait for the flood before building the levee." *Ramirez* v. *Collier*, No. 21-5592, 2022 WL 867311, at *18 n.2 (Mar. 24, 2022) (Kavanaugh, J., concurring). And a school district need not wait for suits by parents before protecting students' fundamental rights.

School districts, moreover, inarguably have a "compelling interest" in protecting student safety—*i.e.*, the "physical and psychological well-being of minors." *Sable Commc'ns of Cal., Inc.* v. *FCC*, 492 U.S. 115, 126 (1989); see also *Denver Area Educ. Telecomms. Consortium* v. *FCC*, 518 U.S. 727, 755 (1996). And all governmental entities have a compelling interest in maintaining control of their facilities and official programs, including to avoid accidentally creating public forums. Cf. Reply Br. at 1, 15-16, *Shurtleff* v. *City of Boston*, No. 20-1800 (Jan. 7, 2022) (arguing that public forums can be created by practice). These compelling interests satisfy any conceivable legal test.

And they were all at issue here. As already explained, Kennedy's prayer practice turned an official District event into an unsafe and chaotic

environment, violated the Religion Clauses, and opened the District to liability.

The District's actions in response went no further than necessary—that is to say, they were narrowly tailored—satisfying even strict scrutiny. As the district court and court of appeals determined (Pet. App. 25, 163), the District bent over backwards to accommodate actual personal prayer, offering Kennedy less restrictive alternatives time and again (see JA76, 93-94, 103).

Kennedy derisively describes one proposed accommodation (Br. 12), as though it were all the District ever offered. Yet not only did that accommodation align with Kennedy's testimony that he would "prefer[]" praying by himself, "with nobody around" (JA284-285), but as already explained, the District proposed multiple accommodations and also invited Kennedy, over and over, to name additional ones that he would find acceptable (JA40-45, 76-81, 90-95, 102-103). And while Kennedy ultimately testified that several accommodations different from what he now demands might have satisfied him, such as praying while the players returned to the locker room (JA280), that, too, would have been covered by what the District offered (JA76, 94, 103). Yet Kennedy did not avail himself of any of it. The narrow-tailoring requirement surely cannot be violated when a government defendant actually provides accommodations that would fully satisfy the claimant's stated religious needs but the claimant ignores them.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted.

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