No. 21-418

In the
Supreme Court of the United States

JOSEPH A. KENNEDY,
Petitioner,

v.

BREMERTON SCHOOL DISTRICT,
Respondent.

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

BRIEF OF *AMICUS CURIAE* CALIFORNIA SCHOOL BOARDS ASSOCIATION, AND ITS EDUCATION LEGAL ALLIANCE, IN SUPPORT OF RESPONDENT

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, *Amicus Curiae*, the California School Boards Association ("CSBA") and its Education Legal Alliance ("ELA") submit this brief supporting Respondent Bremerton School District.[1]

CSBA is a California non-profit association duly formed and validly existing under the laws of the State of California. As a part of the CSBA, the ELA is composed of nearly 700 CSBA member entities dedicated to addressing legal issues of statewide concern to school districts and county offices of education. As part of its activities, the ELA files *amicus curiae* briefs in litigation which impacts California public educational agencies as a whole.

School districts in California and across the nation are entrusted with educating students from countless cultures and backgrounds, including innumerable religious traditions, from pre-school through high school. CSBA and the ELA have a strong interest in ensuring that the resolution of the issues presented in this case will provide California public schools with reasonable, workable standards for navigating their obligations and authority related to the Free Speech, Free Exercise, and Establishment Clauses of the First Amendment, as well as their obligation to reasonably

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[1] All parties have given blanket consent to the filing of this brief. No counsel for a party authored this brief in whole or in part. No person other than *amici curiae* made any monetary contribution intended to fund the preparation or submission of this brief.

accommodate employee religious beliefs and practices under Title VII of the Civil Rights Act of 1964.

INTRODUCTION AND SUMMARY OF ARGUMENT

Public employees, including public school teachers, regularly engage in quiet, personal prayer while they are in the workplace, and neither CSBA nor the ELA have an interest in limiting that activity or questioning this Court's precedent that balances personal and governmental interests when analyzing speech and exercise activity in the government workplace.

However, this case invokes this Court's precedent regarding the exercise of constitutional rights by public employees, precedent which dictates that context matters, as it should here. In the full context of the record in this case quiet, personal prayer by a public employee is not what this case is about — this case is not about a high school teacher bowing her head in prayer in the faculty cafeteria prior to eating, even if it might occur in view of student cafeteria workers or students passing by; this case is not about a teacher wearing a yarmulke in the classroom; this case does not ask whether public school teachers and coaches are prohibited from engaging in any religious activity or expression while they are on duty.

This case is about school districts ability to navigate the appropriate balance between honoring an individual's First Amendment right to private prayer and protecting students. This case is about Petitioner and former high school football coach Joseph Kennedy's ("Kennedy") decision and demand, conveyed through

counsel and publicized widely by both Kennedy and counsel, that he be permitted to return to his longstanding "practice" of engaging in "verbal" and "audible" prayer with students, to "help[] these kids be better people," in the middle of the school's football field in a crowded stadium immediately following the end of each game. And, it is about more than that — Kennedy's "defiant" and "unyielding stance" (in the words of Ninth Circuit dissenting Judge Ikuta) occurred in the midst of other relevant, significant contextual facts: when Kennedy returned to his previous practice, students authorized to be on the field were physically knocked over by reporters and other spectators who jumped a fence to get on the field to join or witness Kennedy's conduct; Kennedy invited the presence and involvement of a state legislator who supported Kennedy, spoke to the legislator of his plan on the sidelines during the game, and invited the legislator to join the after game prayer to speak to the students and others; a Satanist group demanded access to the field, contending the District was allowing the football field to be a forum for expressive activity by members of the public; the District was flooded with emails and media inquiries; several parents complained about Kennedy's practice, some commenting that their children had felt compelled to participate; parents of students knocked over after the game complained; coaches who did not express agreement with Kennedy were threatened, including the head coach, Kennedy's supervisor, who ended up (along with other coaches) declining to return the following season because of the "unsafe situation" he felt subjected to; a District employee, the parent of a District student, was the target of a social media

campaign advocating her termination from employment after she wrote about her experience of being bullied and harassed daily, in high school, for not joining in similar religious activities. This is the context in which the District had to decide what to do.

And throughout, the District's conduct was measured and respectful of the legitimacy of the competing interests here, and it attempted to reasonably navigate those interests. When the District learned that for several years Kennedy had led pre-game locker room prayers to a captive audience of players, and post-game overtly religious prayers in the midst of motivational speeches to his players — conduct which came to the attention of the District through an opposing coach characterizing the on-field practice as being "allowed" by the District — Kennedy was not removed from his position. Instead, the District tried to work with him to strike an appropriate balance between his faith-based desires and the District's interests as an employer, and as a required protector of student safety and student rights, seeking as it must, to avoid the appearance of endorsement, and endeavoring to avoid its athletic venues from becoming public forums immediately after each game ends. The District repeatedly encouraged Kennedy and his counsel to interact in good faith to discuss how Kennedy's desire to pray after games could be reasonably accommodated. These invitations continued even after Kennedy and his counsel announced that Kennedy would defy the District's direction and return to leading post-game, mid-field prayer. Every District invitation to engage in good faith dialogue was flatly ignored by Kennedy and his counsel.

As Ninth Circuit Judge Ikuta accurately stated in her dissent to the denial of rehearing en banc below, Kennedy's "defiant" and "unyielding stance" put the District in a "no-win situation." The District has employees who possess rights under Title VII and the Constitution, and the latter are neither shed at the schoolhouse gate nor equivalent in scope as they are outside that gate. Communication from Kennedy's counsel sent the clear message that litigation would be the likely result if Kennedy was not permitted to do exactly what he wanted, where he wanted, when he wanted, regardless of the circumstances or repercussions. The District also had the obligation (and the prerogative) to address concerns and complaints that students did or might feel compelled to participate; to address an incident that occurred where innocent students could have been injured; that non-participating or opposing employees were threatened and ridiculed publicly; that despite their best efforts they could not prevent people from charging onto the field after games; and that allowing Kennedy's demanded practice to continue, even if the District deemed his practice that of a private citizen rather than a District employee, would obligate it to provide on-field access to other groups demanding access for First Amendment activity.

This is an employment case, not a student free exercise case or a public forum access case as many of Kennedy's citations would suggest. The question is not whether private personal prayer should be allowed, but rather whether a school district should be liable for an employee who chooses to pray with students while on

duty at school events after having been given accommodations for private prayer.

This Court's longstanding precedent dictates that context matters in cases involving public employee First Amendment rights, just as it does in cases involving public school student First Amendment rights. It is contexts like the one in this case that cry out for this Court to reinforce and reaffirm the analysis it laid out in *Pickering v. Bd. of Ed. of Township High School Dist.*, 391 U.S. 563 (1968), one that for decades has provided the school officials and judges of this Nation with workable standards for determining, in specific factual contexts, whether and when public employees are speaking as private citizens on matters of public concern rather than as public employees, and when the employee speaks as a private citizen whether the interests of the public employer outweigh the rights of the employee.

CSBA and the ELA urge this Court to reaffirm the *Pickering* analysis in this case, to reject Kennedy's contention that public school employee religious activity is by definition private speech subject to strict scrutiny, and to confirm that applying *Pickering* leads to the conclusion that: 1) Kennedy acted as a public employee in his post-game speeches and prayers; and 2) even if his speech is deemed private the District's interests, especially in light of its relentless effort to initiate discussions to find common ground and accommodate Kennedy, outweighed Kennedy's right to engage in prayer at the exact time, place and manner he demanded.

ARGUMENT

I. *PICKERING* AND *GARCETTI* APPROPRIATELY BALANCE INDIVIDUAL INTERESTS AND GOVERNMENT INTERESTS, ESPECIALLY IN THE PUBLIC SCHOOL SETTING, AND THEY SHOULD BE APPLIED IN THIS CASE

Clearly, public employees do not surrender their First Amendment rights by reason of their public employment, *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006), but when they enter government service they "by necessity must accept certain limitations on [their] freedom." *Id.* at 418, citing *Waters v. Churchill,* 511 U.S. 661, 671 (1994) (plurality opinion), see also *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004) ("[A] governmental employer may impose certain restraints on the speech of its employees, restraints that would be unconstitutional if applied to the general public."). Since 1968, *Pickering* has addressed the balance between the retention of rights and the limitations of them in the context of public employment. Recently, in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S.Ct. 2448 (2018) this Court reaffirmed that the *Pickering* framework "was developed specifically for cases that involve 'one employee's speech and its impact on that employee's public responsibilities.'" 138 S.Ct. at 2472, quoting *United States v. Treasury Employees*, 513 U.S. 454, 467 (1995). In other words, the *Pickering* framework was developed for cases like this one.

Pickering and its progeny "identify two inquiries to guide interpretation of the constitutional protections accorded to public employee speech." *Garcetti,* 547 U.S.

at 418. First, the employee must establish that the conduct was undertaken not as an employee but as a citizen, on a matter of public concern. *Id.* at 418, citing *Pickering,* 391 U.S. at 568. If the former, "the employee has no First Amendment cause of action based on his or her employer's reaction to the speech." *Id.* at 418, citing *Connick v. Myers*, 461 U.S. 138, 147 (1983). If the latter, "the possibility of a First Amendment claim arises," and "[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." *Id.* at 418, citing *Pickering,* 391 U.S. at 568. "A government entity has broader discretion to restrict speech when it acts in its role as employer — the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations," *id.* at 418, but an employer need not wait until "disruption of the office and the destruction of working relationships is manifest before taking action." *Connick,* 461 U.S. at 152. The analysis "requires a fact-sensitive and deferential weighing of the government's legitimate interests." *Board of County Com'rs, Wabaunsee County v. Umbehr*, 518 U.S. 668, 677. Factors to be considered include the government's "presumably weighty" interests in workplace effectiveness and efficiency, in discipline by superiors and harmony among co-workers, in positive working relationships, in the unimpeded performance of the employee's duties, and in promoting the regular mission and operation of the enterprise. *Connick,* 461 U.S. at 150-154. Also relevant is whether the speech was aired in an inappropriate time, place, or manner. *Id.* at 152-153.

The time-tested *Pickering* analysis has been applied by this Court since 1968, has been reaffirmed in *Janus* as the appropriate framework for cases that involve an employee's speech and its impact, and is a workable standard that should be maintained. It has been successfully and faithfully applied by lower courts in the context of religious speech by public employees. See, e.g. *Berry v. Department of Social Services* (9th Cir. 2006) 447 F.3d 642 (applying *Pickering*, "we conclude that the Department has successfully navigated between the Scylla of not respecting its employee's right to the free exercise of his religion and the Charybdis of violating the Establishment Clause of the First Amendment by appearing to endorse religion); *Tucker v. State of Cal. Dept. of Ed.* (9th Cir. 1996) 97 F.3d 1204 (applying *Pickering*, concluding the state has a legitimate interest in avoiding the appearance of supporting religion and in furthering the efficiency of the workplace, but on the facts of the case the state interests were insufficient to support a ban on religious advocacy and on the posting of religious materials); *Knight v. Connecticut* (2nd Cir. 2001) 275 F.3d 156 (applying *Pickering*, and concluding that the state showed that permitting religious speech when working with clients was and would continue to be disruptive, the disruption outweighed the employees' free speech interests, and the employees' jobs required a great deal of public contact thus giving the state a significant interest in regulating speech related to that contact). School officials are not judges and are not typically constitutional scholars, but the *Pickering* test empowers and obligates them to do what District officials did in this case — respecting and balancing the rights of employees, including by seeking

accommodations in good faith, with its interests in promoting its educational mission, the safety and rights of its students, the efficiency of its public services and events, in avoiding the appearance of endorsement of a particular religious message, and in maintaining a closed forum for expressive activity.

Kennedy offers a single, passing citation to *Pickering* (Br. 26), does not cite *Connick*, and relies on *Garcetti* solely to argue that he was acting as a private citizen while on duty and with students in his presence and zone of supervisorial responsibility. *Amici* urge this Court to reject that approach, and to reaffirm its pronouncement in *Janus,* that *Pickering* and its progeny — and *both* prongs of *Pickering* and its progeny — govern this case and others like it.

II. APPLYING *PICKERING* AND *GARCETTI* IN THIS CASE, THE NINTH CIRCUIT DECISION SHOULD BE AFFIRMED

A. In this Case, Kennedy Spoke as an Employee, and Kennedy's Application of *Garcetti* is Overly Narrow and Unworkable Especially in a Public School Context

Garcetti teaches that "the proper inquiry" into whether a public employee speaks as an employee or a private citizen is "a practical one." 547 U.S. at 424. Courts should not rely mechanically on formal or written job descriptions, which "often bear little resemblance to the duties an employee actually is expected to perform." *Id.* at 424–25. "Many employees, in both the public and private sectors, are paid to write or speak for the purpose of furthering the interests of

their employers," and "in general when public employees are performing their job duties, their speech may be controlled by their employer." *Janus,* 138 S.Ct. at 2474. "Restricting 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.

Here, importantly, this proper, practical inquiry necessarily includes the fact that the speech at issue is praying *with students*. In his deposition, Kennedy confirmed this:

> Q. Is there anything in Exhibit 10 [his counsel's letter] that says you are going to stop praying with students?
> A. No, there is nothing that says that specifically.
> Q. So where it says in the last paragraph, "Coach Kennedy will continue his practice," do you understand that that is saying that you will continue your practice of praying with students if the students come around you?
> A. I wasn't going to stop my prayer because there was kids around me.
> Q. So is that a yes, sir?
> A. I — I'm sorry, one more time, could you just?
> MR. TIERNEY: Could you read that question back, please?
> (The record was read back by the reporter.)
> A. Yes.

Kennedy confirmed that between the receipt of direction from the District in September, 2015, and his counsel's announcement that he would return to his previous practice of praying with students about a month later, he prayed privately after several games without students and without resistance from the District. The record as a whole thus makes it clear that even Kennedy acknowledges a distinction between private personal prayer and that "praying with students" is what had happened before the District issued any directives to Kennedy, what Kennedy planned to continue, and what occurred after Kennedy (through counsel) informed the District that he was reinstating his previous practice. Thus, the relevant question here is whether an on-duty football coach praying with students at midfield immediately following a game, and inviting community members and elected officials to join in that prayer is speech as a government employee, or whether that speech can be considered purely private.

In the Equal Access Act, protecting public school student Free Exercise rights related to student clubs and access to public forums created by school districts, Congress addressed the issue of employee prayer with students by requiring that "employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity." 20 U.S. Code § 4071(c)(3). Indeed, this Court has repeatedly and correctly reinforced that public schools have a "custodial and tutelary responsibility for children" that cannot be artificially limited to delivering instruction and coaching during practice and while time remains on the game clock. *Vernonia Sch. Dist. 47J v. Acton*,

515 U.S. 646, 656 (1995); *Bd. of Educ. v. Earls*, 536 U.S. 822, 829–30 (2002). The Court has been properly sensitive to the impact of religious expression by public school teachers and coaches because of their position of authority and the influence they have on students, and because public school attendance is compulsory. *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987). This Court has also acknowledged, correctly, that students are more susceptible to peer pressure and coercion with regard to religion. *Lee v. Weisman*, 505 U.S. 577, 592 (1992). This is the standard that defines the boundaries within which public schools operate with respect to religious expression.

Against this backdrop, *amici* contend that in this case, on these facts, Kennedy was acting as a public school coach when praying with students. Kennedy announces he is not asserting that "*everything* teachers or coaches do or say within the public schools is beyond their employer's reach," Br. 25, emphasis in original, but he proceeds to imply that there is literally no control over public school employee speech unless the employee is engaging in the narrow, core duty of the job description — when the classroom teacher is instructing students in organic chemistry, or when the athletic coach is coaching players, calling plays, or giving halftime talks. Br. 26-27. Not only does this defy this Court's rulings in *Vernonia* and *Earls*, but if the job description of a teacher on a public school campus addressed only classroom instruction, or the job description of a coach addressed only communication during practice, games, pre- and post-game speeches, and halftime instruction, these descriptions would "bear little resemblance to the duties an employee

actually is expected to perform." *Garcetti*, 547 U.S. at 424-425. Kennedy himself admits as much.

B. In this Case, the Balance of Interests Tip in the District's Favor

1. The District's Actions Were Justified by the Legitimate Governmental Interests it Sought to Protect and Advance

Even if one adopts the position that Kennedy's on-field actions were that of a private citizen on a matter of public concern, *amici* contends that applying the extensive factual record in this case to the "practical inquiry" of the second prong of the *Pickering* analysis leads to the conclusion that the District's actions were reasonable and warranted. The District's thorough discussion of its "interest in the effective and efficient fulfillment of its responsibilities to the public," which warrants "full consideration" by this Court, need not be reiterated here. *Connick*, 461 U.S. at 150-151. *Amici* focus here, and urge the Court in this context to acknowledge and apply what it has already acknowledged and applied previously, on two additional and important considerations for public school officials and districts.

First, the "practical inquiry" into the District's interests and obligations, and into the actions the District took to address the actual circumstances it faced, should include what Kennedy and his counsel refused to do — to engage in the good faith, interactive process required of both employers *and* employees under Title VII of the Civil Rights Act of 1964. The Equal Employment Opportunity Commission (EEOC)

describes this legal and practical, mutual obligation in its Compliance Manual:

> Both the employer and the employee have roles to play in resolving an accommodation request. In addition to placing the employer on notice of the need for accommodation, the employee should cooperate with the employer's efforts to determine whether a reasonable accommodation can be granted. Once the employer becomes aware of the employee's religious conflict, the employer should obtain promptly whatever additional information is needed to determine whether a reasonable accommodation is available without posing an undue hardship on the operation of the employer's business. This typically involves the employer and employee mutually sharing information necessary to process the accommodation request. Employer employee cooperation and flexibility are key to the search for a reasonable accommodation. If the accommodation solution is not immediately apparent, the employer should discuss the request with the employee to determine what accommodations might be effective. If the employer requests additional information reasonably needed to evaluate the request, the employee should provide it.

EEOC Compliance Manual, Section 12-IV(A)(2) (Discussion of Request).[2] Although the Court has noted that EEOC guidelines are accorded less weight than

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[2] https://perma.cc/UE8Y-EATY

administrative regulations declared by Congress to have the force of law, *General Electric Co. v. Gilbert,* 429 U.S. 125, this Court has reinforced the EEOC guidance and the obligation to cooperate in good faith. *Ansonia Bd. of Educ. v. Philbrook,* 479 U.S. 60, 69 (1986) ("[B]ilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business."). Indeed, in *Ansonia* the Court confirmed that an employer meets its obligation to reasonably accommodate an employee's religious observance or practice under Title VII once it demonstrates that it has offered a reasonable accommodation to the employee, and that an employer does not have to demonstrate undue hardship related to other potential accommodations:

> Under the approach articulated by the Court of Appeals, however, the employee is given every incentive to hold out for the most beneficial accommodation, despite the fact that an employer offers a reasonable resolution of the conflict. This approach, we think, conflicts with both the language of the statute and the views that led to its enactment. We accordingly hold that an employer has met its obligation under [Title VII] when it demonstrates that it has offered a reasonable accommodation to the employee.

Id. at 69. *Amici* contend that the District offered more than one reasonable resolution, including a resolution that was implemented in mid-September, 2015, and under which Kennedy prayed after multiple games

until he demanded through counsel to return to his pre-September practice of praying with students and refused to discuss any other option. The record is clear that the District adhered to both established precedent and to EEOC guidance and accommodated Kennedy so he could engage in private, personal prayer. At minimum, *amici* urge this Court to reinforce that public employees seeking workplace accommodation of their religious beliefs and practices cannot simply demand a specific accommodation and refuse to discuss in good faith "the exigencies of the employer's business."

Second, *amici* urge the Court to resist the temptation, urged by Kennedy but unsupported by the record, to assume that the District's ultimate decisions were *because* Kennedy's activity was religious. The District in this case demonstrated, repeatedly, the *opposite* of hostility to Kennedy's religious beliefs and desire to pray after games, and it cannot be said that coaches checking cell phones or greeting family members in the stands, for example, were part of or contributed to the actual circumstances that are relevant to the second prong of the *Pickering* analysis. Given the facts in the record, after offering multiple accommodations, it was reasonable for the District to take action regarding Kennedy's "defiant" and "unyielding stance," and the record supports the conclusions that the same would have occurred had his insistence been that he be allowed to engage in other activity that similarly impacted workplace effectiveness and efficiency, discipline by superiors and harmony among co-workers, positive working relationships, the unimpeded performance of

employees' duties, and the promotion of the District's mission and operation.

2. A Rule That a Disclaimer by a Public School District Cures any Establishment Clause Concerns Would be Unworkable and Ineffective

Finally, *amici* support the District's opposition to Kennedy's assertion that a disclaimer by a school district would suffice to essentially negate the need to conduct the balancing test in the second prong of the *Pickering* framework, or at least the Establishment Clause element of it. Schools cannot escape their duty of care and responsibility to students by disavowing the words and actions of their employees. Allowing the activity to continue with a simple disclaimer in this case would likely have intensified the demands for access to the post-game forum and would have neither addressed nor negated the very real potential of students being impacted by the coach engaging in the conduct on school grounds at a school-sponsored event. Two additional reasons render unconvincing Kennedy's claim that a disclaimer would negate any Establishment Clause, operational, or governmental interest concerns present in the second prong of the *Pickering* analysis.

First, the cases cited and relied on related to disclaimers are factually and substantively distinct. This is not a case related to student speech, *Rosenberger v. Rector & Visitors*, 515 U.S. 819 (1995), *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), or access to an open forum on public school property that is open to other expressive

activity, *Good News Club v. Milford Cent. School*, 533 U.S. 98 (2001), *Widmar v. Vincent*, 454 U.S. 263 (1981), or access to other government property that has been opened to the public for speech. *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995). As Kennedy concedes, this "long line of this Court's cases" relates to "times and places where [the government entity] would permit the speaker to engage in other forms of activity or expression," not the case here, and they do not involve speech by teachers and coaches in the presence of students, their younger siblings, and others from the community. Br. 38-39. The Court has confirmed:

> Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary. The 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.

Edwards, 482 U.S. at 584 (citations omitted). There is a substantive difference between a governmental entity disclaiming speech by non-employees — by students, unaffiliated organizations in an open forum, etc. — and an entity disclaiming speech by an employee, *especially* when that employee is a teacher or coach in the midst

of impressionable students and (in this case) younger fans watching from the stands, who are all susceptible to peer pressure and see teachers and coaches (correctly so) as role models.

Second, and similarly, expanding the proposition that "schools do not endorse everything they fail to censor" to a rule or expectation that school districts can avoid controversy or litigation by simply disclaiming any connection to or endorsement of employee speech or religious exercise is offered by Kennedy devoid of context. It might be an easier argument in a case involving high school students only, but it raises the issue of how a disclaimer is distributed, how widely it is known, and its true effect. What, for example, would a disclaimer mean to elementary school students witnessing a teacher supervising recess taking a knee and praying when the bell rings to end recess and send students back to their classroom? And, in this case, can it really be said that a formal disclaimer would have satisfied those who perceived endorsement by the District, or that it would have satisfied the Satanic group and others demanding equal access to the field? A disclaimer from the District that Kennedy's activity was not endorsed by the District would not assuage the fears of students and their parents who felt compelled to participate. The superintendent of a school district or the president of its school board do not determine the starting lineup or select team captains, the coaches do, and it cannot be reasonably questioned that coaches, through their words and actions, have a tremendous influence on the young people they coach. Thankfully, and not surprisingly, the influence is typically positive, see, e.g. What Sport Means in

America: A Study of Sport's Role in Society, U.S. Anti-Doping Agency (2011),[3] but the direct influence cannot be discounted. Some students in this case felt pressured in relation to their role and status on the team, and undoubtedly students in other circumstances feel pressure to conform to a coach's view of what the coach believes will "help[] these kids be better people." Context matters, and when a teacher or coach speaks or acts on campus or at a school-sponsored activity it carries more weight and impact than when a superintendent or principal issues a disclaimer.

This Court has held that a school must retain the authority to refuse "to associate the school with any position other than neutrality on matters of political controversy," even in instances of *student* expression, *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988), and the record in this case does not support the proposition that a disclaimer would have ended the controversy or even altered the very real circumstances the District faced above and beyond the Establishment Clause issue.

CONCLUSION

For the foregoing reasons, this Court should reaffirm the *Pickering* framework in public employee speech cases, and affirm the decision of the Ninth Circuit Court of Appeals.

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[3] https://perma.cc/66HL-5A7N ("Among all audiences surveyed, coaches rank as the #1 positive influence on today's youth, according to the majority of respondents. This makes coaches, perhaps even more so than parents and teachers, the guardians of youth sport."),

Respectfully submitted,

Date: April 1, 2022

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