No. 21-418

In The
Supreme Court of the United States

JOSEPH KENNEDY,

Petitioner,

v.

BREMERTON SCHOOL DISTRICT,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE FREEDOM FROM RELIGION FOUNDATION, CENTER FOR INQUIRY, AMERICAN HUMANIST ASSOCIATION, AND SECULAR COALITION FOR AMERICA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici are national nonprofit organizations dedicated to promoting freedom of conscience. *Amici* work to protect the First Amendment and its core principles, which prohibit public school employees from imposing their religion on students.

The Freedom From Religion Foundation is the largest national association of freethinkers, representing atheists, agnostics, and others who form their opinions about religion based on reason, rather than faith, tradition, or authority. Founded nationally in 1978 as a 501(c)(3) nonprofit, FFRF has more than 36,000 members, including members in every state and the District of Columbia. It has more than 1,600 active members in Washington State. Its purposes are to educate about nontheism and to preserve the cherished constitutional principle of separation between religion and government. FFRF provides direct support for citizens encountering religious entanglements between religion and government, with half of its caseload involving Establishment Clause violations in public schools. FFRF tirelessly works to protect students from school-sponsored religious activity.

The Center For Inquiry is a nonprofit educational organization dedicated to promoting and defending

[1] All parties consented to the filing of this amicus brief. No party's counsel in this case authored this brief in whole or in part. No party or party's counsel contributed any money intended to fund preparing or submitting this brief. No person, other than amicus, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

science, reason, humanist values, and freedom of inquiry. Through education, research, publishing, social services, and other activities, including litigation, CFI encourages evidence-based inquiry into science, pseudoscience, medicine, health, religion, and ethics. CFI advocates for public policy rooted in science, evidence, and objective trust, and works to protect the freedom of inquiry that is vital to a free society. CFI believes that the separation of church and state is vital to the maintenance of a free society that allows for a reasoned exchange of ideas about public policy.

The American Humanist Association is a national nonprofit membership organization based in Washington, D.C. Founded in 1941, the AHA is the nation's oldest and largest humanist organization. The AHA has tens of thousands of members and over 242 local chapters and affiliates across the country. Humanism is a progressive lifestance that affirms—without theism or other supernatural beliefs—our responsibility to lead meaningful and ethical lives that add to the greater good of humanity. The mission of the AHA's legal center is to protect one of the most fundamental principles of our democracy: the separation of church and state. To that end, the AHA has litigated dozens of First Amendment cases nationwide, including in this Court.

The Secular Coalition for America is a group of diverse organizations large and small representing atheists, agnostics, humanists, and other nonreligious Americans. As such, the Secular Coalition for America is a dedicated 20-year-old lobbying organization whose

mission is to advocate for the equal rights of nonreligious Americans and defend the separation of religion and government in Congress, in the executive branch, and in the courts. SCA is also dedicated to amplifying the diverse and growing voice of the nontheistic community in the United States.

SUMMARY OF ARGUMENT

Changed circumstances render this case moot, divesting this Court of Article III jurisdiction and mandating that the Court dismiss the case.

Petitioner Joseph Kennedy moved approximately 2,800 miles from the Bremerton, Washington area to Pensacola, Florida. Suggestion of Mootness, 1–2, 6. He sold his home in Washington and purchased a home in Florida in 2020. *Id.* at 1–2. Kennedy and his wife are no longer employed in Washington. *Id.* The assistant football coach position at Bremerton High School is a year-round commitment that pays just $5,304. *Id.* at 2–3. These changed circumstances are problematic for Kennedy because a Florida resident cannot sue a Washington school district over its policies.

Under the Court's precedents, the case is moot. This is reinforced by the principle that a plaintiff who removes himself from the threat of allegedly unconstitutional policies has mooted his claims for prospective relief. *See Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 72 (1997); *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 283 (2001). Because a plaintiff

must maintain a "personal interest" in the matter at "all stages of litigation," *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 796 (2021), there is no mechanism to "un-moot" a moot case. Kennedy's case is moot and the Court likely would not have issued a *writ of certiorari* had the Court been aware of Kennedy's changed circumstances.

Amici express serious concern that the Court may disregard Article III jurisdictional requirements in challenges involving Free Exercise litigants. Atheists seeking to enforce the Establishment Clause have not been treated similarly. The Court's cases involving religion demonstrate the need for the Court to act evenhandedly in its approach to jurisdiction.

If the Court is inclined to review the merits of this case, it must take into account the harm caused to students who are nonreligious or who are religious minorities when coaches instigate prayer. The unique features of the coach-student relationship coerce students to participate in coach-led prayers. This type of religious activity has harmed students in numerous respects, including by marginalizing nonreligious students and making them susceptible to attacks from other students and members of the community.

ARGUMENT

I. This case is moot.

A. The Court is required to determine whether this case has become moot.

Bremerton School District has indicated that the Court lacks Article III jurisdiction to decide this case in its Suggestion of Mootness. Having been briefed on the facts, the Court must analyze whether the case has become moot. The Constitution requires that "federal courts may adjudicate only actual, ongoing cases or controversies." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990), *citing Deakins v. Monaghan*, 484 U.S. 193, 199 (1988); *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). The principle that federal courts may not issue advisory opinions is "the oldest and most consistent thread in the federal law of justiciability." *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (citation omitted).

The Court cannot simply waive its responsibility to comply with the case or controversy requirements of Article III. As a threshold issue, this Court has an obligation to review and address it prior to any adjudication on the merits.

B. This case is moot because Kennedy cannot establish that he will benefit from judicial relief.

The only ongoing motivation for this litigation is the prospect of a "win" before the Supreme Court by Kennedy. If "intervening circumstances" deprive

Kennedy of a stake in this case "at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Genesis Healthcare Corp.*, 569 U.S. at 72, *citing Lewis*, 494 U.S. at 477–478.

Kennedy has the burden to demonstrate that his changed circumstances do not render his appeal non-justiciable. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). "At all stages of litigation, a plaintiff must maintain a personal interest in the dispute." *Uzuegbunam*, 141 S. Ct. at 796. Kennedy must establish that he maintains a "personal stake." *U.S. v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 (2018). This requirement is fundamental to ensuring that the federal judiciary "confines itself to its constitutionally limited role of adjudicating actual and concrete disputes." *Id., quoting Genesis HealthCare Corp.*, 569 U.S. at 71.

Bremerton School District's Suggestion of Mootness is fatal to Kennedy's appeal. In 2020, Kennedy moved 2,800 miles from the Bremerton, Washington area to Pensacola, Florida.[2] He sold his home in Washington. He purchased a home in Florida and established residency there. He and his wife are no longer employed in Washington. There can hardly be a realistic prospect that the assistant football coach position

[2] When Kennedy sold his home and moved to Florida, at a minimum, his counsel should have informed opposing counsel and the Ninth Circuit Court of Appeals. "It is the duty of counsel to bring to the federal tribunal's attention, '*without delay,*' facts that may raise a question of mootness." *Arizonans for Off. Eng.*, 520 U.S. at 68 n.23, *citing Board of License Comm'rs of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985) (per curiam).

at Bremerton High School is the type of position that one picks up and moves across the country to accept. It is a year-round commitment that pays just $5,304. On these key facts alone, Kennedy cannot maintain an action for prospective relief against a school district in Washington.

1) A Florida resident cannot sue a Washington school district over its policies.

An action seeking prospective relief related to an unconstitutional policy may become moot if the plaintiff moves from the geographical jurisdiction of the government entity that created the policy. *Loertscher v. Anderson*, 893 F.3d 386, 393 (7th Cir. 2018). As discussed in *Loertscher*, this Court's decision in *Camreta v. Greene*, 563 U.S. 692 (2011) is instructive. When a student bringing a Fourth Amendment challenge had moved to Florida from Oregon and was about to graduate from school, "she face[d] not the slightest possibility of being seized in a school in the Ninth Circuit's jurisdiction as part of a child abuse investigation." *Camreta*, 563 U.S. at 710–711. Similarly, in *Loertscher*, the plaintiff moved out of Wisconsin and had no plans to return. 893 F.3d at 388.

Other courts have had to decline to rule on important cases when the person seeking judicial relief had moved out of state. In *Cooley v. Granholm*, 291 F.3d 880 (6th Cir. 2002), a case involving Michigan law, one physician had moved from Michigan to California with the intention of returning "if he c[ould] find a suitable

job." *Id.* at 882. The Sixth Circuit held that he lacked "an immediate concrete interest in the outcome of the case" and thus "the case ha[d] completely lost 'its character as a present live controversy of the kind that must exist if [the Court is] to avoid advisory opinions on abstract propositions of law." *Id.* at 882–883, *quoting Hall v. Beals*, 396 U.S. 45, 48 (1969). In *Lucero v. Trosch*, the Eleventh Circuit discovered that a doctor had sold his health clinic and no longer lived in Alabama. 121 F.3d 591, 595 (11th Cir. 1997). The court determined that any claims for injunctive relief related to the clinic by the doctor or his family became moot. *Id.* at 596.

2) A case is moot when the plaintiff removes themself from the threat of allegedly unconstitutional policies.

Decisions related to the geographical location of the litigants are similar to decisions where the plaintiff has voluntarily removed themself from the threat of allegedly illegal policies. This Court determined that an employee's challenge to a state law affecting the performance of her job was mooted by changed circumstances, her resignation to pursue work in the private sector. *Arizonans for Off. Eng.*, 520 U.S. at 72. Likewise, a case was moot when an adult business that was challenging a local ordinance had ceased its efforts to renew its license after it petitioned for *certiorari*. *City News & Novelty, Inc.*, 531 U.S. at 283. The business had argued that the case was not moot, as its license denial was disqualifying for any future licenses, not just for

its closed location. Reply Brief of City News & Novelty, Inc. at 1–2, 2000 WL 1740741. Hence, the possibility of a future benefit did not save such cases from mootness.

In the school context, prospective relief claims are often nonjusticiable when students, by happenstance, have left the school. *Bd. of Sch. Comm'rs of City of Indianapolis v. Jacobs*, 420 U.S. 128 (1975) (per curiam). When students graduate, "it seems clear that a case or controversy no longer exists between the named plaintiffs and the [board] with respect to the validity of the rules at issue." *Id.* at 129. The Court has also determined that a high school student's challenge to graduation prayer was moot after the student had graduated. *Joint Sch. Dist. No. 241 v. Harris*, 515 U.S. 1154 (1995).

These decisions have a common theme: When the plaintiff has removed himself from the threat of an allegedly unconstitutional policy, he cannot continue to challenge said policy.

3) There is no mechanism for Kennedy to "un-moot" this case.

It is of little consequence that Kennedy claims his residency in Florida is "temporary" and that he would fly 2,800 miles back to Bremerton to take a year-round assistant coach position that pays $5,304. Kennedy cannot carry the burden of establishing that he still has a "personal stake." *Sanchez-Gomez*, 138 S. Ct. at 1537.

First, such self-serving statements are implausible on their face. Kennedy has the burden to demonstrate that the Court has jurisdiction. Regardless of the statements in his affidavit, the prospect that a person in his situation can obtain prospective relief is impractical in the extreme. People who work as assistant coaches in high school athletic programs for less than 8 percent of the median household income do not move across the country to take such a position.[3] Certainly, those persons do not sell their homes, buy new homes, and give up their new jobs or schooling to do so. A modicum of legal judgment applied to the circumstances here leads inevitably to the conclusion that the controversy is one that has passed.

Second, even if Kennedy asserts a plausible assurance that he would return, the effect is not to "un-moot" the case. This case became moot when he left the Bremerton area and established residency in Florida. "At all stages of litigation, a plaintiff must maintain a personal interest in the dispute." *Uzuegbunam*, 141 S. Ct. at 796. There is no mechanism to "un-moot" a moot case. If Kennedy were to return to Bremerton, he could pursue an action against the Bremerton School District at such time, which would be subject to appropriate fact-finding before a tribunal. But he is not permitted today to litigate what an assistant coach may do on the athletic fields in Bremerton, Washington, as

[3] Median household income in the U.S. in 2020 was $67,521. US Census Bureau, Income and Poverty in the United States: 2020. U.S. Census Report No. P60-273. (Sept. 14, 2021).

a resident of Florida. His "some day" intention of returning is insufficient. *Lujan*, 504 U.S. at 564.

II. The Court must apply jurisdictional doctrines uniformly, otherwise it manipulates its jurisdiction in order to benefit preferred litigants.

Amici work to protect the rights of nonreligious Americans, including through litigation concerning the Establishment Clause of the First Amendment. This Court has dismissed Establishment Clause claims as nonjusticiable in cases where reasonable minds could differ. *See Elk Grove Unified Sch. Dist. v. Newdow*, U.S. 1, 17–18 (2004), *abrogated by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). In this case, it is apparent that Kennedy's claims for prospective relief are nonjusticiable.

The Court cannot pick and choose when to ignore Article III. If the Court's jurisdiction is circumscribed by Article III's case or controversy requirement, then the Court must decline to hear the matter. If the Court asserts it has jurisdiction to decide such cases, it must apply its jurisdiction uniformly to all litigants, and not only to cases involving preferred litigants. A review of the Court's cases involving religion highlights the need for the Court to adopt an evenhanded approach to jurisdiction.

Concerns over manipulation of jurisdictional requirements by the Supreme Court have been noted by multiple observers of the Court. *See* Wright and Miller,

13A Fed. Prac. & Proc. Juris. § 3531.1 (3d ed.) (Recognizing that justiciability determinations have sometimes led to "disingenuous manipulation."). As one scholar put it, "Many observers believe the manipulation of justiciability doctrine to be rampant."[4] Another scholar has analyzed the mechanisms by which courts manipulate outcomes by utilizing procedural, substantive, and justiciability principles.[5]

Atheist and Muslim plaintiffs who bring Establishment Clause claims ought not to face higher procedural and jurisdictional hurdles when seeking judicial relief.[6] The Court has often found that it had no authority to decide cases involving the first ten words of the First Amendment.

In *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, the Court, in part, found that plaintiffs who resided in Maryland could not challenge a transfer of property in Pennsylvania to vindicate their claim that the transfer

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[4] Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 Va. L. Rev. 633, 655 (2006).

[5] Michael Coenen, *Right-Remedy Equilibration and the Asymmetric Entrenchment of Legal Entitlements*, 61 B.C. L. Rev. 129, 134–135 (2020).

[6] Beyond justiciability issues, Muslim litigants have faced substantial scrutiny of their religious liberty claims before the Supreme Court. *See Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *Dunn v. Ray*, 139 S. Ct. 661 (2019) (Vacating stay of execution of Muslim death row inmate who sought the comfort of an imam at his last moments of life).

violated the Establishment Clause. 454 U.S. 464, 471, 486–487 (1982).

In *Elk Grove Unified Sch. Dist. v. Newdow*, the Court concluded that a father lacked prudential standing to challenge the Pledge of Allegiance on behalf of his daughter when he did not have legal custody of the child at the time the Court of Appeals issued its decision. 542 U.S. at 17–18.

In *Hein v. Freedom From Religion Found., Inc.*, the Court held that taxpayers lacked standing to challenge federal expenditures under the Establishment Clause without express authorization for the expenditures from Congress. 551 U.S. 587, 608 (2007).

Likewise, in *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125 (2011), the Court ruled that taxpayers challenging a tax credit for religious education, as opposed to an expenditure, lacked Article III standing.

In the school context, Establishment Clause plaintiffs have had their appeals dismissed as moot after they were no longer subject to school policies. In *Joint Sch. Dist. No. 241*, 515 U.S. 1154 (1995), the Court granted a petition for *certiorari*, and then vacated and remanded the case with directions to dismiss as moot. The student-plaintiff who challenged prayer practices at her school had graduated. Circuit courts of appeals have similarly dismissed prospective relief claims by Establishment Clause plaintiffs. *See Mellen v. Bunting*, 327 F.3d 355, 365 (4th Cir. 2003) (Vacating injunctive and declaratory relief awarded to former cadets at state military college); *Doe v. Madison Sch. Dist. No.*

321, 177 F.3d 789, 791 (9th Cir. 1999) (Holding in part that Establishment Clause claim concerning school graduation prayers was moot after the student graduated); *Bauchman for Bauchman v. W. High Sch.*, 132 F.3d 542, 548 (10th Cir. 1997) (Finding that Establishment Clause claim by former Jewish student was moot after graduation).

Christians who have brought Free Exercise challenges have not faced significant procedural and jurisdictional hurdles. The Court has not only heard such cases when jurisdiction was in doubt, it has done so regularly. In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the Court determined, in a footnote, that the case had not become moot despite the Missouri Governor providing the relief sought by the church. 137 S. Ct. 2012, 2019 n.1 (2017). The new Missouri Governor had directed the Department of Natural Resources to allow religious organizations to receive grants from the state. *Id.*

In a per curiam decision, the Court ordered injunctive relief in *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020). Dissenting justices noted the fact that the religious organizations seeking an injunction were no longer subject to restrictions implicating the Free Exercise Clause. *Id.* at 75 (Roberts, C.J., dissenting) ("None of the houses of worship identified in the applications is now subject to any fixed numerical restrictions."); (Breyer, J., dissenting) ("[N]one of the applicants are now subject to the fixed-capacity restrictions that they challenge in their applications.").

This term, the Court will decide *Carson v. Makin*, which asks whether either the First or Fourteenth Amendments require Maine to include religious schools in a program designed to provide a free public education to students who live in school systems which do not operate secondary public schools. *Carson v. Makin*, 141 S. Ct. 2883 (2021). In its brief, Maine has argued that parents who appealed lack standing because they failed to present evidence that their desired Christian schools are even willing to participate in the program. *Carson v. Makin*, Brief of Respondent, 2021 WL 4993533 at 53 (Oct. 22, 2021) (No. 20-1088). In fact, it is unlikely that the schools will participate, or at least it is doubtful that they would seek to do so. *Id.* at 53–54. At this time, the Court has yet to address the standing issue or issue an opinion deciding the case.

In *303 Creative LLC v. Elenis*, No. 21-476, a business sought the Court's review of whether a public accommodation law violates both the Free Exercise and Free Speech Clause of the First Amendment. In response, Colorado civil rights officials and the Colorado Attorney General argued that the claims are not justiciable. *303 Creative LLC v. Elenis*, Brief in Opposition, 2021 WL 5893335 (Dec. 8, 2021) (No. 21-476). The response asked, "Whether a commercial provider has standing, and its claim is ripe, when it has not entered the market, has no customers, has not created a product, and has not shown a credible threat of enforcement under the challenged law?" *Id.* Despite the justiciability issues, the Court granted *certiorari* on

the Free Speech question. *303 Creative LLC v. Elenis*, 142 S. Ct. 1106 (2022).

The Court has erected substantial barriers to plaintiffs who assert Establishment Clause claims. The court ought to apply the same scrutiny to claims asserted by Christian litigants who espouse Free Exercise claims. If Establishment Clause claims become moot when students challenge prayer policies and then leave their school, Kennedy's challenge to policies impacting prayer is moot when he leaves the state. The Court must act as an impartial arbiter when it comes to justiciability determinations. Because these decisions foreclose access to courts, they must not be manipulated to provide the availability of judicial relief to only preferred litigants.

III. Students who are nonreligious or who are religious minorities are harmed when coaches instigate prayer or other religious practices for their students.

Coaches who create a team prayer practice inevitably hurt nonreligious students and students who are religious minorities. Recent incidents involving prayer by coaches have led to students' unwanted participation in prayer, students feeling isolated, students fearing that they could not inform their parents about team religious practices, students fearing retaliation, and students ultimately leaving the team. The experiences of these students highlight the damage that is caused when adults utilize public schools to impose

their religion on other people's children. School-sponsored prayers have long marginalized nonreligious students and made them susceptible to attacks from other students and members of the community.

A. The features of the coach-student relationship coerce students to participate in coach-led prayers.

School athletic teams foster an atmosphere of both communal activity among players and also allegiance to the coach. These features, combined with the social pressures exerted when an authority figure engages in religious practices, coerce non-Christian students to participate in Christian prayers.

Religious exercises in secondary schools involve "subtle coercive pressures." *Lee v. Weisman*, 505 U.S. 577, 588 (1992). This Court has observed, "[T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *Id.* at 592*, citing School Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 307 (1963) (Goldberg, J., concurring); *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987); *Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens*, 496 U.S. 226, 261–262 (1990) (Kennedy, J., concurring). The Court acknowledged, "[P]rayer exercises in public schools carry a particular risk of indirect coercion." *Id.* at 592. The Court correctly surmised:

> What to most believers may seem nothing more than a reasonable request that the

> nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.

Id.

The coercive pressures on an athletic team are even stronger than the typical school event. As members of athletic teams, students are expected to be "team players" and to do as instructed by their coach. Teams foster expectations that each member will do the same pre-game and post-game activities. Sometimes those activities involve pre-game pep talks, post-game handshake lines, and post-game talks. Even without explicit instruction to do so, members of sports teams understand that they are supposed to engage in certain pre-game and post-game activities with their teammates and coaches.

The influence of coaches and teammates is significant. Coaches control important aspects of a players' life, such as their practice regimen, their position on a team, and their playing time. Coaches routinely discipline students. Coaches also have influence over aspects of the health of players, especially in contact sports.[7] Coaching performance is positively impacted when players believe they are compatible with their coach (including their goals, personality, and beliefs)

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[7] *See* Erin B. Edwards, *College Athletics, Coercion, and the Establishment Clause: The Case of Clemson Football*, 106 Va. L. Rev. 1533, 1556–1559 (2020).

and negatively impacted when players believe they are incompatible with the coach.[8] In practice, and by design, coaches have a significant influence over the behavior of student athletes. Students want to please the most significant authority figure in their athletic career.

The dynamics of player and coach require that coaches not have improper coercive influence over the religious liberty of players. It must be for students to decide what, if any, religious practices to engage in and how to do so. Once coaches adopt on-field prayer, it is inevitable that their players and the team will participate in the prayers.

When a coach instigates a prayer practice, a student who does not wish to participate is given a troubling dilemma. In violation of his conscience, that student can participate and go against his personal beliefs. Or the student can make himself conspicuous and isolate from the team by standing aside and abstaining from the prayer. That "choice" makes his objection to the prayer obvious. It puts the student in the crosshairs of fellow students on the basis of his religion. It also drives a wedge between the objecting student and

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[8] Laura Kenow and Jean M. Williams, *Coach-Athlete compatibility and athlete's perception of coaching behaviors*, Journal of Sport Behaviors 22.2 (June 1999); *See also* Jean M. Williams, Gerald J. Jerome, Laura J. Kenow, Tracie Rogers, Tessa A. Sartain & Greg Darland, *Factor Structure of the Coaching Behavior Questionnaire and Its Relationship to Athlete Variables*, 17 Sport Psych. 16, 16 (2003), https://digitalcommons.linfield.edu/hhpafac_pubs/3/.

the coach. Coaches make innumerable discretionary decisions and dole out benefits to preferred players (such as making the team, playing time, position status, plays called, and captain status). Students understand that they should stay in a coach's good graces if they want to be given the best opportunities.

Nonreligious students and students who are religious minorities have no good option when it comes to team prayers. If they participate in the prayer, they act contrary to their conscience. Or, they make themselves transgressors and subject themselves to a magnifying glass by their nonparticipation. They then suffer the consequences of offending their coaches and receiving peer pressure from other student athletes. Inevitably, the practices of the coach become team practices and those carry heavy consequences for some students. That is especially the case when the coach intentionally involved players in his religious practice for seven years.

Coach Kennedy's religious activity on the 50-yard line was a team activity. He intended to continue to pray with students on the field, as was his prior practice. JA295, JA354. Kennedy's post-game prayers were anything but private. They were intended to be *team* prayers. This is problematic for students who would otherwise choose not to participate. Here, that was demonstrated to be the case as some children "participated in the team prayers only because they did not wish to separate themselves from the team." JA356. Because of the pressure associated with school-sponsored religious practices, students are coerced into team religious exercises.

B. Recent examples demonstrate the harm of coach-imposed prayers.

Several recent examples demonstrate the impact on students when coaches improperly influence the religious practices of their students. Several *Amici* are routinely contacted by students and their parents when the students have been subject to Christian prayer by teachers and coaches.

- In Michigan, a girl on the seventh grade basketball team was told to pray by her coach before middle school basketball games.[9] The coach would have the girls gather in a circle, make them hold hands, and then say a prayer. When the coach was finished with the prayer, he would ask if any of the girls had a prayer that they wanted to say. The girl, who was nonreligious, was afraid to tell her father because she feared that she would no longer be able to continue to play basketball.

- In Ohio, football coaches told players to go to the middle of the field to "take a knee" and participate in a post-game prayer.[10] The head coach would regularly lead the team in the Lord's Prayer before every game either in the

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[9] Press Release, *FFRF secures state/church victory in Mich. school*, Freedom From Religion Foundation (Feb. 11, 2021), https://ffrf.org/news/news-releases/item/38473-ffrf-secures-state-church-victory-in-mich-school.

[10] Catherine Ross, *Kirtland Football Parent Files First Amendment Complaint After Post-Game Prayer*, News 5 Cleveland (Mar. 3, 2022), https://www.news5cleveland.com/news/local-news/kirtland-football-parent-files-first-amendment-complaint-after-post-game-prayer.

locker room or the end zone. A nonreligious player on the team felt uncomfortable with the team prayer. The player's family wished to remain anonymous after *Amici* sent a complaint to the school for fear of pushback by others at the school.

- In Virginia, the coach of a boys' soccer team led students in pre-game prayers.[11] Players locked arms on the field in a circle with their coaches during the prayers. A boy on the team said he didn't want to step out of the prayer circle, which would make him feel isolated.

- In Alabama, a high school volleyball coach required the girls on her team to gather in a prayer circle before and after every game and practice.[12] Due in part to the prayers, the student ultimately left the team. The same school also broadcast prayers by a pastor over the public address system before and after football games.

Even at the collegiate level, students feel immense pressure to participate in team religious activities at the behest of their coaches. In 2015, an atheist football player on a nationally ranked football team reported that the head coach requested that he, the atheist

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[11] Press Release, *FFRF persuasively tutors Va. school district*, Freedom From Religion Foundation, (June 30, 2021), https://ffrf.org/news/news-releases/item/39538-ffrf-persuasively-tutors-va-school-district.

[12] Paul Gattis, *Freedom From Religion targets Madison City Schools*, Advance Local (Aug. 21, 2015), https://www.al.com/news/huntsville/2015/08/freedom_from_religion_targets.html.

player, lead a team prayer.[13] The player felt he had no choice but to comply and in fact led a prayer in the locker room, in violation of his conscience. *Id.*

In 2005, three Muslim football players sued the coach of the New Mexico State team after allegations that he had mistreated them on the basis of their beliefs.[14] The coach had players recite the Lord's Prayer after each practice and before each game. The players said that the prayers made them feel like outcasts and caused them to pray separately from the team.

Amici have heard these types of complaints about coach prayers for decades. When coaches instigate team religious activity, students who do not share the coach's personal religious beliefs suffer.

C. Other school-sponsored religious activities harm students.

Aside from school athletics, students who are nonreligious or religious minorities suffer when school staff implement religious practices for students. With few exceptions, these students must either avoid religious practices or be treated as unwanted "outsiders" by students who participate in the favored religious practice. Some *Amici* are well acquainted with the harms imposed on nonparticipating students due to

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[13] *Pray to Play*, Freedom From Religion Foundation at 3 (2015), https://ffrf.org/images/PraytoPlayReport.pdf.

[14] *Muslim players sue saying beliefs led to dismissal*, ESPN (Aug. 28, 2006), https://www.espn.com/college-football/news/story?id=2564489.

receiving complaints from students, and also litigating cases on behalf of these students and their families.

On Feb. 2, 2022, a West Virginia school hosted a religious assembly and revival during the school day in the school auditorium.[15] The religious assembly was not an option for some students—including a non-religious student and a Jewish student—because some classrooms were mandated to attend. *Id.* at 5–6. An evangelist led students in prayer and told the students that they would face eternal torment if they did not give their lives over to Jesus that day. *Id.* at 4.

In another West Virginia case, an elementary school student was forced to leave the classroom and sit alone during "Bible in the Schools" class. *Deal v. Mercer Cty. Bd. of Educ.*, 911 F.3d 183, 186–187 (4th Cir. 2018). She was bullied by fellow students and was told that she and her parents were going to hell. *Id.* She ultimately was forced to attend school in a neighboring school system to avoid school-sponsored religious activities. *Id.*

In Mississippi, a student was coerced to attend a mandatory religious assembly during the school day put on by a local church.[16] She had said that the

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[15] *Mays v. Cabell Cnty. Bd. of Educ.*, No. 3:22-cv-00085, ECF No. 1 (S.D.W.Va. Feb. 17, 2022)

[16] *M.B. ex rel. Bedi v. Rankin Cty. Sch. Dist.*, No. 3:13-CV241-CWR-FKB, ECF No. 63 (S.D. Miss. Nov. 22, 2013).

assembly made her uncomfortable and that she and other students were led in communal prayer.[17]

In Rhode Island, a high school student was reviled in her community for challenging her high school's prayer banner. Jessica Ahlquist faced "bullying and threats at school, on her way home from school and online." *Ahlquist v. City of Cranston ex rel. Strom*, 840 F.Supp. 507, 516 (D.R.I. 2012). She was "subject to frequent taunting and threats at school, as well as a virtual online hate campaign via Facebook." *Id.* Jessica's state representative called her an "evil little thing" on the radio and florists refused to deliver flowers ordered for Jessica.[18] Jessica eventually needed a police escort to attend public meetings and class. *Id.*

These cases show the real world impact on students who do not wish to participate in school-sponsored religious practices. The students are isolated or compelled to engage in religious practices with which they disagree. Should students publicly disagree with the practices, they are routinely vilified by adults and other students.

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[17] *M.B. ex rel. Bedi v. Rankin Cty. Sch. Dist.*, No. 3:13-CV241-CWR-FKB, ECF No. 1 (S.D. Miss. Apr. 24, 2013).

[18] Benjamin P. Edwards, *When Fear Rules in Law's Place: Pseudonymous Litigation As A Response to Systematic Intimidation*, 20 Va. J. Soc. Pol'y & L. 437, 458–460 (2013).

D. Nonreligious students and religious minorities have long been harmed by school-sponsored religious activity.

Since the 1940s, students who have publicly objected to religion in their schools have faced severe retribution. Those are not just the consequences of forced participation in prayer or isolation due to non-participation, but also because of acts of violence and verbal attacks lobbed against them by members of the community. This history is doomed to repeat itself if religious minorities and nonreligious students are forced to publicly oppose religious practices undertaken by their schools. Nearly every major lawsuit relating to religion in schools has involved community members attacking students and their families.[19]

This trend began in 1945 when Vashti McCollum sued because her local public schools hosted religious classes during the school day in school classrooms. *See Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948). Ms. McCollum was fired from her job, her house was vandalized, she received more than one thousand letters of hate, and her sons were assaulted. Edwards at 456–457; Alley at 84–89.

The families who objected to prayer and Bible readings in *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203 (1963), were verbally and physically attacked. The Schempp children were bullied and one received a letter of "disrecommendation" from his school

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[19] *See* Edwards at 455–466; Robert S. Alley, Without a Prayer: Religious Expression in Public Schools (1996).

principal that was sent to the university that had admitted the student.[20] The home of Madalyn Murray O'Hair was firebombed and one of her children was beaten on the way home from school. Alley at 98.

In 1981, Joann Bell and Lucille McCord filed suit to block prayer sessions and the distribution of Gideon Bibles in their children's schools. *See Bell v. Little Axe Indep. Sch. Dist. No. 70*, 766 F.2d 1391 (10th Cir. 1985). The plaintiffs' children, who regularly attended Christian churches, were branded "devil worshipers." Edwards at 457 n.124; Alley at 106. "An upside-down cross was hung on thirteen-year-old Robert McCord's locker" and the Bells received threatening phone calls. Alley at 106. "More than once a caller said he . . . was going to break in the house, tie up the children, rape their mother in front of them, and then 'bring her to Jesus.'" *Id.* at 107–108. The threats were not empty: the Bells' home was burned down. *Id.*

In 1994, Lisa Herdahl challenged prayer practices in her children's schools. *See Herdahl v. Pontotoc Cty. Sch. Dist.*, 887 F.Supp. 902 (N.D. Miss. 1995). As a result, her children were called "atheists and devil worshipers" by their classmates.[21] Other parents

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[20] Linda K. Wertheimer, *50 Years After* Abington v. Schempp*, a Dissenter Looks Back on School Prayer*, The Atlantic (Jun. 17, 2013), https://www.theatlantic.com/national/archive/2013/06/50-years-after-i-abington-v-schempp-i-a-dissenter-looks-back-on-school-prayer/276921/.

[21] Stephanie Saul, *A Lonely Battle in the Bible Belt; A Mother Fights to Halt Prayers at Mississippi School*, Newsday, Mar. 13, 1995, at A8.

threatened to beat their own children if they were caught talking to, or playing with, the Herdahl children. Alley at 177. Herdahl gave up her job "because of threats against her children." Alley at 182. She received death threats and threats that her home would be firebombed. *Id.* at 186.

The trend of attacking objectors to school prayer practices continued into the 2000s. The plaintiff's son in *Chandler v. Siegelman*, 230 F.3d 1313 (11th Cir. 2000) (challenging prayer at school-related events), was "harassed at school almost daily."[22] And even though she was not a plaintiff but merely a vocal opponent of the school-prayer policy challenged in *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), Debbie Mason received threatening phone calls and was followed home by people trying to intimidate her.[23] Her family was unable to find work in their own town. *Id.*

Tyler Deveny, the eighteen-year-old plaintiff in *Deveney*[24] *v. Board of Education*, 231 F.Supp. 2d 483 (S.D.W.Va. 2002), endured a beating after successfully challenging the invocation planned for his high-school

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[22] Jonathan Ringel, *Alabama Claims U.S. Court Order Denies Students' Right to Pray*, Fulton County Daily Rep., Dec. 4, 1998, at 1.

[23] Kenny Byrd, *Baptist Family Opposed to Football Prayer Feels Pressure*, Baptist Standard (June 12, 2000), http://web.archive.org/web/20151028003130/http://assets.baptiststandard.com/archived/2000/6_12/pages/pressure.html.

[24] Mr. Deveny's last name was erroneously spelled "Deveney" in the case caption.

graduation ceremony.[25] A group of eight teens, evidently displeased with the outcome, attacked Deveny in a public place, with one saying, "Oh, you hate God," before striking Deveny in the face. *Id*.

The Dobrich family—plaintiffs in *Dobrich v. Walls*, 380 F.Supp. 366 (D. Del. 2005)—suffered so much harassment, anti-Semitic taunts, and threats that they were forced to move, after challenging school prayer and other religious practices.[26]

A mob mentality takes over when a student's family disagrees with group religious practices in public schools. The people who have historically taken the brunt of these attacks are nonreligious families, Jewish families, and Christians from a non-dominant sect in the community.[27]

There can be little doubt that if a coach, like Kennedy, establishes a repeated practice of prayer after games, students will be coerced into participating or will face substantial harm for noncompliance with the team's practices. This history of harm to students who are forced into conflict with school-sponsored religious practices, and the overall dynamics of the

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[25] *See* Charles Shumaker, *Student Beaten for Prayer Suit, He Says*, Charleston Gazette & Daily Mail, June 19, 2002, at 6D.

[26] David Bario, *A Lesson in Tolerance*, Am. Lawyer, July 2008, at 122.

[27] Attorneys working for *Amici* themselves have been subject to death threats and threats of violence in connection to representing families in cases involving opposition to school religious practices.

coach-student relationship, require the Court to protect the religious liberty of students.

In short, it is improper and a gross violation of freedom of conscience to coerce or even encourage student athletes to pray in order to play. Our public schools exist to educate, not to indoctrinate.

CONCLUSION

Because this case is moot, the Court should dismiss the appeal for lack of jurisdiction. Alternatively, the Court should affirm the ruling of the Court of Appeals.

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