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 JO ANN MAGISTRO AND ALAN BRODMAN AS *AMICI CURIAE* SUPPORTING RESPONDENT

BRUCE P. MERENSTEIN
Counsel of Record
HEATHER JANIS GAW
DANIEL GROSS
SCHNADER HARRISON SEGAL & LEWIS LLP
1600 Market Street
Suite 3600
Philadelphia, PA 19103
(215) 751-2249
bmerenstein@schnader.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

INTEREST OF THE *AMICI CURIAE*

Amici curiae are a former superintendent of the East Brunswick School District in New Jersey and a longtime teacher at East Brunswick High School.[1] Almost twenty years ago, East Brunswick High School was the site of a constitutional dispute very much like the one before the Court. That dispute culminated in a unanimous Third Circuit opinion, holding that a football coach's participation in prayer with his team members, which followed almost a quarter century of similar prayer by the coach at team events, violated the Establishment Clause. *Borden v. Sch. Dist. of E. Brunswick*, 523 F.3d 153, 179 (3d Cir. 2008). As Judge McKee explained in a concurring opinion, the football team's "players were put in the untenable position of either compromising any opposing beliefs they may have had or going on record . . . as opposing their coach and perhaps a majority of their teammates." *Id.* at 182 (McKee, J., concurring). When the district—led by one of the *amici* here—enforced its policy prohibiting employees from participating in religious activities with students, the students whose complaints were presumed to have precipitated application of the policy were "taunted, bullied," and "harassed and threatened on a student internet 'blog.'" *Id.* at 184. The "venomous

---

[1] *Amici* affirm that no counsel for a party authored this brief in whole or in part and no person other than *amici* or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief. *Amici* affirm that all parties have filed blanket letters of consent to the filing of *amicus* briefs with the Clerk's Office.

comments" on the blog included racist, anti-Semitic, and violent content. *Id.* at 184 & n.31.

Amici were directly involved in the circumstances at the heart of the dispute in *Borden* and are intimately familiar with the community strife that followed enforcement of the policy governing the coach's prayer activities at team events. *Amici* share an interest in fostering an inclusive learning environment for public school students, and submit this brief because they are acutely aware of the religious strife and divisiveness that arise when a public school employee endorses and encourages participation in religious practices at public school events.

Based on their own experiences and this Court's Establishment Clause precedents, *amici* strongly believe that public school districts like Bremerton School District must have the authority to put reasonable limits on their employees' public religious expressions when they are acting in their official capacity—such as coaching a public school football team—so that students do not feel pressured into engaging in those religious practices. *Amici* also are committed to protecting students' constitutional rights, under not only the Establishment Clause, but the Free Speech and Free Exercise Clauses, as both the East Brunswick policy at issue in *Borden* and Bremerton's policy here do. *Borden*, 523 F.3d at 160; Pet. App. 5-7.

Dr. Jo Ann Magistro, Ed.D., is the former Superintendent of Schools for the East Brunswick School District and was a named defendant in the *Borden*

litigation. In her role as Superintendent, Dr. Magistro received complaints from a number of parents that their children, including football players and cheerleaders, were uncomfortable attending team events at which the East Brunswick football coach led attendees in prayer. The complaints led to application of a school district policy that prohibited the coach (or any school staff) from participating in prayers with students during school events, including the football team's pre-game meals and in the locker room before games.

Alan Brodman, a former attorney, is a retired Civics, World History, and Constitution teacher at East Brunswick High School. He joined the school district in 1992 and began teaching at East Brunswick High School in 1999. At the high school, he taught the Institute for Political and Legal Education class and supervised the Model U.N. Program. Mr. Brodman was first made aware of the East Brunswick football coach's prayers at team activities when Mr. Brodman was teaching at a local junior high school in the 1990s. At that time, a Jewish football player on the East Brunswick team approached Mr. Brodman to express his discomfort with the pre-game prayers. This student ultimately chose not to complain to the school district, as he feared being ostracized and losing the opportunity to play on the team. A number of years later, when he was teaching at the high school, several of Mr. Brodman's students from his Constitution class approached him and asked about the legality of the coach's prayers. Mr. Brodman discussed the issue with his students and advised them that while

student-initiated prayers were permitted in school, such prayers could not obstruct or disturb other students, and school faculty could not initiate those prayers.

SUMMARY OF ARGUMENT

Amici are well aware, through their personal experiences, of the ways in which coach-led prayer can coerce students into religious practices that some students might strongly object to or, at a minimum, wish to refrain from in a public setting. *Amici* also are well aware of how coach-led prayer can lead to school, team, and community strife and divisiveness, undermining the precise values that public schools are meant to foster, including camaraderie, respect, and equity.

The Bremerton School District, like the East Brunswick School District before it, adopted a reasonable, constitutional policy to address these concerns. That policy fully recognized and honored employees' rights to freely exercise religion, so long as that exercise did not coerce students into joining them or lead reasonable observers to believe that the school district endorsed that exercise of religion. The Bremerton policy, again like the East Brunswick policy, fully complied with this Court's precedents. More particularly, in allowing personal religious exercise during school events while taking steps to avoid government coercion or endorsement, the policy follows this Court's school-prayer precedents such as *Lee v. Weisman*, 505

U.S. 577 (1992), and *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000).

As respondent's brief explains at length, the record here is clear that, rather than comply with the school district's carefully constructed policy for accommodating both the religious expression and freedom of conscience protected by the First and Fourteenth Amendments, Joseph Kennedy insisted on leading high-profile prayers in the middle of a public school facility, expressly aimed (in the coach's own words) at "helping" the students on the football team. This Court should adhere to its well-established precedents that appropriately accommodate the rights and principles embodied in the Religion and Free Speech Clauses of the First Amendment. Those precedents lend no support to Kennedy's insistence on the right of a public school employee to lead students and other community members in prayers in the middle of a public school football field at the conclusion of a public school activity. Rather, they require no more than the reasonable accommodations Bremerton offered to Kennedy, which would have preserved his free exercise and free speech rights without causing the school district to violate the Establishment Clause and infringe the rights of the students it is charged with educating. Most significantly, the policy that Kennedy refused to follow ensures that the constitutional rights of *all* of the school district's employees and students are protected, thereby avoiding the coercion, strife, and divisiveness

that the Religion Clauses were intended to prevent, rather than foster.

ARGUMENT

I. Kennedy's Public Prayers on Public School Property and During Public School Events Were Coercive and Divisive.

Joseph Kennedy, then a Bremerton assistant football coach, began a practice of praying on the football field after watching a Christian sports film in 2008. Pet. App. 133-134; JA148. Over time, Kennedy's prayers became verbal, audible, and public; he led his students in pre- and post-game locker room prayers and delivered religiously inspired speeches after the games. Pet. App. 9, 134. These prayers took place while Kennedy was fulfilling his public school duties as coach, on school property, wearing school-logoed clothing, and supervising the football team. Pet. App. 139, 150-152, 239.

The prayers themselves took the place of post-game speeches to the players, which the school district had instructed Kennedy should be focused on "unity, teamwork, responsibility, safety, endeavor and the like." Pet. App. 15-16. Kennedy testified that, over time, he attracted more and more players to gather around him in prayer until it included the majority of the team. Pet. App. 157. The district court found this testimony to be evidence of the players' vulnerability to

social pressure and the coerciveness of the coach-led prayers. Pet. App. 157-158.

In 2015, after an opposing coach informed the school district that Kennedy had invited his team to join Bremerton's team in prayer, the school district informed Kennedy that these practices violated its policy to "neither encourage nor discourage students from engaging in religious activity." Pet. App. 134-135. The district made clear that it did not prohibit "student religious activity," and that Kennedy and other district employees were "free to engage in religious activity, including prayer," but that the district had to ensure that students did not feel pressured to engage in religious activities contrary to their beliefs. Pet. App. 135-136. Some students and parents thanked the school district for instructing Kennedy to cease his post-game prayers and they reported that the students had "participated in the prayers to avoid being separated from the rest of the team" or to prevent potential adverse action by Kennedy related to playing time. Pet. App. 136.

After a short interval during which he appeared to comply with the school district's instructions regarding on-field prayer, Kennedy began a media campaign in which he sought community support for his on-field prayers while his lawyers insisted that the district allow him to pray with students. Pet. App. 136-138. As a result, the school district received many hateful and threatening emails, letters, and phone calls about its decision to prevent coach-led prayer. Pet. App. 138. At one point, the head football coach was personally confronted by a Kennedy supporter and, concerned for his

physical safety, he eventually resigned from his 11-year position as head coach. Pet. App. 11.

Notably, for the brief period when Kennedy refrained from praying with students, and when Kennedy was placed on administrative leave, the players did not pray on their own. Pet. App. 224, 239; JA356. Rather, players prayed on the field only after games when Kennedy was there to lead them. Pet. App. 224, 239.

Once Kennedy began widely publicizing his conflict with the school district, a number of players made the school district aware that they had been uncomfortable with Kennedy's practice of leading prayers but felt that they had no choice but to join him. Pet. App. 136. For example, the high school principal was informed by a player's father that his son was an atheist, but participated in the coach's prayers because he was afraid that if he did not, his playing time would be reduced. JA233-234. An assistant football coach testified that a parent complained to the team and on Facebook because he did not want his son to have to participate in the prayers. JA186. Bremerton's superintendent "received, either directly or through other District employees, input from some local parents and students who were critical of Mr. Kennedy's actions, and whose children had participated in the team prayers only because they did not wish to separate themselves from the team." JA356. And the athletic director "was approached by several students and parents who expressed thanks for the District's actions" in addressing Kennedy's prayers, and described how Kennedy's prior

prayer practices "had put them or their children in awkward situations where they did not feel comfortable declining to join with the other players in Mr. Kennedy's prayers." JA359; *see also* Pet. App. 224-225 (quoting school district's statement regarding the coercive effect of the coach-led prayers).

II. The East Brunswick Experience With Coach-Led Prayer Starkly Demonstrates That Such Prayer, Including Kennedy's Prayer at Bremerton, Is Coercive and Divisive.

In East Brunswick, New Jersey, beginning in the mid-1980s, the head football coach at the high school organized, participated in, and eventually led the football team in prayer before games and at mandatory pre-game dinners.[2] His practice changed over the years, as parents complained to the administration. At first, a local minister said the prayers; later, a student read a prayer chosen by the minister; and eventually, the coach read the prayer himself. By the early 2000s, after meeting resistance from the administration (including *amicus* Dr. Magistro) on several occasions, the coach changed the practice in the locker room and at the pre-game meal to assigning students to lead the team in prayers. These students were not given a choice. At times, the prayers also included cheerleaders

[2] This description of the circumstances of the coach-led prayer in East Brunswick is taken primarily from the Third Circuit's decision, *Borden*, 523 F.3d at 159-63, as well as from *amici*'s personal recollections.

and other students or members of the community who attended the pre-game meal.

The chosen prayer leaders, as well as the many other team members and pre-game meal attendees, were placed in the untenable position of complying with this practice and joining the prayers or voicing complaints to school officials. Any complaints to school officials (or visible abstention from the prayer activities) would inevitably be made known to the coach and possibly other team members, likely leading to ostracization or retaliation. Both the players and their parents were therefore hesitant to object to the practice, either to the coach himself or to school officials.

Some students' parents ultimately did complain to the district administration. As Dr. Magistro recalls, while the identity of the objecting students was kept secret, the coach and many students publicly expressed their views as to the source of the complaints, primarily targeting religious minorities within the school community. The presumed sources were then subjected to racist, anti-Semitic, misogynistic, and violent slurs. Jewish cheerleaders were harassed and threatened. Fellow students sent anonymous anti-Semitic emails, wrote virulent chat room posts accusing these cheerleaders of lodging complaints, and made threats against the cheerleaders and any students who defended them. Judge McKee, in his concurring opinion in *Borden*, listed only a small sample of these derogatory on-line comments from the appellate record:

- "First they crucify Jesus, then they got Borden fired .... Jews gotta learn to stop ruining everything cool."
- "The jew is wrong. Borden is right. Let us pray."
- "d**n jews ... then you wonder why hitler did what he did back in the day."
- "MAYBE if [Borden] held a gun to the jjjjewwws head and was like b*tch get on ur knees and pray to jesus!! then that might be breaking the law...ehhh maybe not! ... just suck it up if u don't fu*king like whats going on in america then GO THE FU*K BACK TO YOUR COUNTRY AND STAY THERE AND PRAY ...."
- "Heil Hitla!!! sieg heill."

Borden, 523 F.3d at 184 (McKee, J., concurring) (alterations in original) (citations omitted).[3] Dr. Magistro

---

[3] Just a few additional comments from the voluminous collection in the appellate record, *Borden v. Sch. Dist. of E. Brunswick*, No. 06-3890, JA456-495 (3d Cir. Dec. 18, 2006), include:

- "[*Two names of students omitted*]...you guys thought u dint have friends to begin with...now ur really f**ked...I will make sure that i make the rest of the year a living hell for both of u."
- "alright enuff w/ the jews postin nuts...cuz i guarenteee they f**kin write there nuts in Works and f**kin spell check so they can sound smart..theyr probl..sittin in front of their comp. looking through a thesuras so they can sound really smart...blow me...I will never work for a jew..and no matter how much money u make...ull always be a f**kin jew."

recalls that the cheerleaders faced harassment and bullying from their fellow students in person as well, at pep rallies and football games, in the form of taunts, spitting, and items being thrown at them.

Amicus Alan Brodman also recalls speculation within the school community that certain cheerleaders had complained about the coach. Football team members became fixated on these girls "getting their coach fired" and the cheerleaders were targeted based on these suspicions. Mr. Brodman also recalls how the cheerleaders, particularly the Jewish ones, were harassed in person and received emails and other online messages with anti-Semitic content. These students suffered severe stress and feared escalating attacks, solely because some of their classmates suspected that they had expressed discomfort with being forced by the football coach to participate in group prayer.

These issues spilled over from the student body into the greater community, particularly after the football coach filed suit seeking to force the school district

---

- "what bothers me is the cheerleaders werent even supposed to be there..it was optional for them. why the f**k would u complain about something if your not even supposed to be there in the first place. if u have a problem with something when ur not even wanted there—well then get the fuuck out. d**n jews..then you wonder why hitler did what he did back in the day..maybe thats harsh but come on..stop being f**kiin tools."
- "why would i praise people that killed my savior. They turned on his ass when he was just tryin to save us all. Have fun chillin in hell with moses f*g**t."

Borden, JA457, 464, 471, 473 (all quotations verbatim).

to permit him to pray with his team members and other attendees of the pre-game meal. Mr. Brodman recalls that the community became divided into two groups, one supporting the coach and the other concerned that his actions violated students' rights, particularly the rights of minority-faith students. Mr. Brodman believes the split occurred largely along religious lines. Dr. Magistro also saw the split in the community between the Christian and Jewish population. She even contacted local churches and synagogues in an attempt to calm the town's population and reduce the strife and tension that the prayer dispute had wrought. Although the tension ebbed as time passed,[4] the conflict has re-surfaced each time the suit has been reported. And the students who were the targets of the harassment and "venomous comments," *Borden*, 523 F.3d at 184 n.31 (McKee, J., concurring), solely because they were suspected of objecting to the coach's prayer activities, express anxiety and trauma about the situation to this day.

III. Bremerton School District's Actions, Like East Brunswick's Two Decades Ago, Were Necessary to Avoid Violating the Establishment Clause's Prohibition on Coercing Students Into Engaging in Religious Activities.

One of the Establishment Clause's core purposes, frequently invoked by this Court, is avoiding

[4] It has been about thirteen years since the litigation concluded with this Court's denial of the coach's *certiorari* petition. *Borden v. Sch. Dist. of E. Brunswick*, 555 U.S. 1212 (2009).

"religiously based divisiveness." *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2085 (2019) (internal quotation omitted). A related purpose, particularly in the context of public school prayer, is ensuring that government actors do not coerce citizens, particularly minors, into engaging in religious practices inconsistent with their personal beliefs or consciences. *See*, *e.g.*, *Town of Greece v. Galloway*, 572 U.S. 565, 590 (2014) (opinion of Kennedy, J.) (noting that, in the school setting, the Court has held that a religious invocation may be coercive to objecting students "where school authorities maintained close supervision over the conduct of the students and the substance of the ceremony" (citing *Lee v. Weisman*, 505 U.S. 577, 592-94 (1992), and *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000))). In the circumstances here, just as in the very similar circumstances in East Brunswick two decades ago, these important goals justify the school district's reasonable policy prohibiting coercive coach-led prayer, thus ensuring that the district does not violate students' First Amendment rights.

A. The Establishment Clause Concern That Government Authorities Not Coerce Religious Conformance Is at Its Greatest in the Public School Context.

School districts have a compelling interest in avoiding violation of the Establishment Clause. *See*, *e.g.*, *Widmar v. Vincent*, 454 U.S. 263, 271 (1981). Although the Court's Establishment Clause jurisprudence outside the school setting has been heavily

contested and multi-faceted over the past few decades, the Court has consistently held that the Clause prohibits prayer in public schools where such prayer is officially mandated or endorsed by government employees. In doing so, the Court has emphasized the coercive effects of school prayer on children. *See*, *e.g.*, *Wallace v. Jaffree*, 472 U.S. 38, 72 (1985) (O'Connor, J., concurring in judgment); *cf.* Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 940 (1986) ("Recognition of the centrality of coercion—or, more precisely, its opposite, religious choice—to establishment clause analysis would lead to a proscription of all government action that has the purpose and effect of coercing or altering religious belief or action.").

"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." *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987). The Court has acknowledged that the State "exerts great authority and coercive power" over students in elementary and secondary schools because students emulate teachers as role models and are sensitive to peer pressure. *Id*. This same principle is applicable to school sports, which are an extension of a public school's educational mission, overseen by its employees, and can even count for school credit. In both *Borden* and this case, the football coaches led students in prayer while cloaked with the authority of a public

school, while on public school property, and during public school events. *See* Pet. App. 139, 150-152, 239; *Borden*, 523 F.3d at 159.

Because students are often impressionable and do not have control over whether they attend public school, the Court has for many decades been particularly vigilant in enforcing the Establishment Clause in the public school setting. *See*, *e.g.*, *Edwards*, 482 U.S. at 583-85; *see also Van Orden v. Perry*, 545 U.S. 677, 691 (2005) (plurality). The Court's concern for improper coercive activities in the public school setting is not limited to overt state pressure, but encompasses "subtle coercive pressure in the elementary and secondary public schools." *Lee*, 505 U.S. at 592; *see also id.* at 594 ("the government may no more use social pressure to enforce orthodoxy than it may use more direct means"); *Santa Fe*, 530 U.S. at 313-17.

Again, in both this case and *Borden*, those subtle coercive pressures plainly were present; in both cases, only after the school district began to address the issue did objecting students (or their parents) make their substantial concerns known to the administration. *See*, *e.g.*, Pet. App. 136; JA233-234, 356, 359. These students can hardly be faulted for buckling to this coercive pressure to join the prayers; when certain students in East Brunswick were simply *suspected* of objecting to the coach's prayers during team activities, they were vehemently attacked with scurrilous on-line screeds, many of them focusing on their religious affiliations and their minority religious status. *See*, *e.g.*, *Borden*, 523 F.3d at 184 & n.31 (McKee, J., concurring).

Protection of the rights of such religious minorities is a paramount goal of the Establishment Clause. For that reason, "[s]chool sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'" *Santa Fe*, 530 U.S. at 309-10 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)); *see also Wallace*, 472 U.S. at 81 (O'Connor, J., concurring in judgment) (distinguishing presidential proclamations from public school prayer, in that the former "are received in a noncoercive setting and are primarily directed at adults, who presumably are not readily susceptible to unwilling religious indoctrination," whereas, "when government-sponsored religious exercises are directed at impressionable children who are required to attend school, . . . government endorsement is much more likely to result in coerced religious beliefs").

"It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which establishes a state religion or religious faith, or tends to do so." *Lee*, 505 U.S. at 587 (internal quotation omitted). For the Bremerton School District when it enforced its policy prohibiting coach-led prayer at school events, just as for this Court in *Lee*, an overriding concern was that students objecting to public religious expression were

subject to, at a minimum, "subtle and indirect" pressure that "can be as real as any overt compulsion." *Id*. at 593. In both cases, without intervention, objectors faced a state-created or tolerated dilemma to either participate in religious activities during public school events or protest and suffer the consequences (or else abstain from the school activities).

This case, of course, is not the Court's first consideration of prayers in the context of a public school sporting event. *See Santa Fe*, 530 U.S. at 294-301. In the course of striking down a school district's policy permitting student-led prayer at football games in *Santa Fe*, the Court noted that the prayer was "delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property," *id.* at 307, a feature that Kennedy's prayers shared. The Court also rejected the school district's contention that, "because attendance at an extracurricular event, unlike a graduation ceremony, is voluntary," the prayers in *Santa Fe* were not coercive. *Id.* at 310. As the Court pointed out, and as is undoubtedly true in Bremerton as well, for some students, "such as cheerleaders, members of the band, and, of course, the team members themselves, . . . commitments mandate their attendance." *Id.* at 311; *see also id.* at 312 ("The constitutional command will not permit the District to exact religious conformity from a student as the price of joining her classmates at a varsity football game." (internal quotation omitted)).

Ultimately, the Court in *Santa Fe* explained how the Religion Clauses work together to ensure that *all*

members of a public school community may enjoy religious liberty: "nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday. But the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer." *Id.* at 313. This protection of liberty is precisely what the Bremerton School District sought to ensure in expressly informing Kennedy (and other members of the school district community) that voluntary, personal prayer by students or employees was permitted, but that prayer led by a prominent leader of the school community at "a regularly scheduled, school-sponsored function conducted on school property," *id.* at 307, crossed the line into impermissible territory.

In this case, as in *Borden* and *Santa Fe*, football players and other students faced "subtle and indirect" pressure "as real as any overt compulsion," *Lee*, 505 U.S. at 593, to join religious practices during a public school activity, on public school property, that had the imprimatur of a governmental employee with substantial influence and authority over those students. Such coercion renders that religious expression violative of the Establishment Clause. The Bremerton School District reasonably acted to ensure that it did not allow such a violation here.

B. Coach-Led Prayer During Public School Events, on Public School Property, Inevitably Leads to the Religious Strife and Divisiveness That the Establishment Clause Is Intended to Prevent.

The "basic purpose" of the Religion Clauses "is to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring). As Justice Goldberg explained, religious liberty and tolerance go hand in hand. The liberty promoted by both the Free Exercise and Establishment Clauses ensures that intolerance and religious divisiveness are minimized and, in particular, are not furthered by government action. *See*, *e.g.*, *id.* at 307 (emphasizing the "very divisive influences and inhibitions of freedom which both religion clauses of the First Amendment preclude"); *see also Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2085 (2019) (same) (citing *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring)).

As Justice Souter explained in *Mitchell v. Helms*, "government establishment of religion is inextricably linked with conflict," and even if such conflict is no longer considered "a practical criterion for applying the Establishment Clause case by case," it indelibly remains "a motivating concern behind the Establishment Clause." 530 U.S. 793, 872 & n.2 (2000) (Souter, J., dissenting). Indeed, in this precise context—prayer at public school football games—the Court has

emphasized that "divisiveness along religious lines in a public school setting" is "at odds with the Establishment Clause." *Santa Fe*, 530 U.S. at 311. Similarly, in *Lee*, the Court noted that while divisiveness "can attend any state decision respecting religions, and neither its existence nor its potential necessarily invalidates the State's attempts to accommodate religion in all cases," this animating principle of the Establishment Clause is of particular concern in the public school setting, where "subtle coercive pressures exist." 505 U.S. at 587-88.

Both this case and the *Borden* case highlight this concern that has been at the heart of the Establishment Clause since its adoption. Kennedy's actions, like those of the East Brunswick football coach, divided religious students from non-religious; Christian students from non-Christian; and those comfortable with public displays of religion from those who believed in private worship. And these divisions were hardly innocuous. Students who objected to the coach-led prayers during public school events, or even those simply suspected of objecting, were subjected to scurrilous attacks.

In East Brunswick, presumed objectors were attacked with "disgusting comments" rife with anti-Semitism, invocations of Nazism, and violent imagery. *Borden*, 523 F.3d at 184 (McKee, J., concurring). In addition to the "venomous" on-line comments, *id.* at 184 n.31, many of which identified their targets by name or description ("Jewish cheerleaders"), students suspected of objecting to the prayers were subjected to in-person verbal and physical harassment and bullying

by the coach's supporters. The East Brunswick community as well became deeply divided between the coach's supporters and those concerned about the rights of objecting students, particularly those not sharing the coach's religious beliefs. Similarly here, Kennedy's mid-field, post-game prayers led to deep divisions within the public school and broader communities. *See*, *e.g.*, Pet. App. 137-138; *see also* Pet. App. 2, 5, 11; JA351.

Religious strife and divisiveness are not the inevitable results of religious expression by public employees. But when that religious expression takes the form of public, sectarian prayer expressly intended to influence—even with only the best intentions—public school students of multiple religious faiths, beliefs, and practices, such strife and divisiveness are practically unavoidable, as the Religion Clauses' framers well knew. High-profile, audible prayer by a public employee on public school property at a public school event squarely implicates this core concern of the Establishment Clause. A policy prohibiting such prayer is not only reasonable, but necessary, to avoid religious strife and divisiveness and to protect the constitutional rights of all members of the public school community.

* * *

Coach-led prayer inevitably places students in an unavoidable bind that implicates the core values that the Religion Clauses were meant to protect. Students, especially those holding minority or unfavored

religious viewpoints, either must join these religious practices that violate their own beliefs (or, at a minimum, contravene their own views of public religious expression), or publicly distance themselves from their peers and authority figures, inviting ostracism, wrath, and even venomous attacks. While this coercion creates an untenable situation that is sufficient in itself to warrant school district intervention, the religious strife and divisiveness that inevitably follow provide all the more reason for reasonable actions such as Bremerton's, which leave ample space for personal, noncoercive religious expression in the public school setting. Public schools, and the sports teams that are an integral part of them, seek to develop qualities such as community, tolerance, and independence in their students. Bremerton School District's actions challenged by Joseph Kennedy do just that, and ensure the district's compliance with *all* provisions of the First Amendment.

CONCLUSION

For the foregoing reasons and those in the brief of respondent, the decision of the Ninth Circuit should be affirmed.

Respectfully submitted,

BRUCE P. MERENSTEIN
Counsel of Record
HEATHER JANIS GAW
DANIEL GROSS
SCHNADER HARRISON SEGAL
& LEWIS LLP
1600 Market Street
Suite 3600
Philadelphia, PA 19103
(215) 751-2249
bmerenstein@schnader.com

Counsel for Amici Curiae