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 *AMICI CURIAE* WASHINGTON STATE CHARTER SCHOOLS ASSOCIATION AND CALIFORNIA CHARTER SCHOOLS ASSOCIATION IN SUPPORT OF RESPONDENT

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## INTEREST OF *AMICI CURIAE*[1]

The Washington State Charter Schools Association ("WSCSA") and California Charter Schools Association ("CCSA") are statewide, non-profit membership and advocacy organizations. Their missions are to meet the needs of students, parents, educators, and communities for great public school options by supporting and advocating for high quality non-profit charter public schools and by sharing their successes with other public schools in their states.

WSCSA and CCSA advocate on behalf of charter schools that prepare their students for success in college, career, community, and life – especially those schools that provide our most systemically underserved and vulnerable students with the high-quality public education they deserve. Charter public schools are committed to innovative educational solutions that can serve students from all backgrounds. But that is only possible in efficient and effective school environments that respect all students and families.

Charter schools are part of the fabric of the Washington and California public school systems. Sixteen public charter schools, serving approximately 4,500 students, are currently operating in Washington. Nearly 700,000 children – approximately 11.5% of all

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* affirms that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* or their counsel contributed money intended to fund preparing or submitting this brief. Counsel for both parties have consented to the filing of this brief.

public school students in the state – attend the more than 1,300 charter schools operating in California.

WSCSA and CCSA submit this brief as *amici curiae* in support of respondent. They have an interest in this matter that aligns with that of traditional public schools such as those in the Bremerton School District ("BSD") but is independently important. A ruling for petitioner would have serious and negative day-to-day consequences for all public schools. But those consequences would be particularly problematic for charter public schools and their students.

## SUMMARY OF THE ARGUMENT

The constitutional issues raised by this case have long been settled and reflect a careful balancing of weighty interests. Employers can regulate employees' actions and speech made "pursuant to their official duties[.]" *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). It could hardly be otherwise for any business or school to function. But this discretion is limited, as it should be; employers cannot create "excessively broad job descriptions" in order to squelch employee speech. *Ibid.* at 424.

Evincing even greater solicitude for individual rights, state restrictions on truly private religious expression outside the employer-employee context "must be narrowly tailored to advance . . . a compelling governmental interest[.]" *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

But, again, the right to free expression is not absolute. Compliance with the Establishment Clause, a concern at its apex in the public school setting, *see*, *e.g.*, *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987), provides a valid basis for state regulation, *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761-62 (1995).

The Ninth Circuit Court of Appeals even-handedly applied these principles in ruling for the respondent, BSD. By his own admission, petitioner prayed while fulfilling his official duties. JA276. While he contends his prayers were private and quiet, the facts belie this at every turn. Petitioner inviting opposing teams to join him in prayer on the 50-yard line immediately following games (JA41, 229, 266-68), members of the public "stampeding" the field to join as well (Pet.App. 9), his players feeling coerced to join (Pet.App. 4, 157; JA359) – if this is private and quiet, then what is public and loud? The lower court thus had no choice but to hold that petitioner's prayers were government speech subject to regulation by BSD. Pet.App. 16-17. Accepting for the sake of argument that petitioner's prayers were private does not change the outcome. The Ninth Circuit correctly held, in the alternative, that the school's interest in preventing an Establishment Clause violation constituted a compelling interest that they appropriately pursued by seeking to work with the petitioner to identify an acceptable accommodation. Pet.App. 23-25.

While petitioner attacks these principles, *amici* not only rely upon them but also know that they are

essential to the educational mission of charter public schools.

They are the lines on the field that show what actions are in bounds and what actions are out of bounds. *See infra* Section I.B. If petitioner were successful in erasing these lines, *see ibid.*, schools could no longer balance and seek to accommodate the interests of their student bodies, teachers, coaches, and parents. Instead, schools would become subject to individual vetoes no matter how well-founded their efforts to protect their students from religious coercion, *see infra* Section II.A., to keep their classrooms aimed at educational success, *see infra* Section II.B., their grounds serving their intended purposes, and their students safe on those grounds, *see infra* Section II.C.

Though this imperils the mission of all public schools, these concerns are all the more pronounced for charter public schools. *See infra* Sections I.B.-II.B. Serving systemically underserved students and experimentation with different educational programs are very much at the heart of the charter school movement. *See infra* Sections I.A., II.A.-II.B. These programs include schools working with families in their homes and students engaging in experiential learning in their communities, both of which require thoughtful oversight. *See infra* Section II.B. Greater freedom to operate free from the constraints of the traditional public school bureaucracy means greater liberty to try these new ways of reaching and serving students. *See infra* Section II.B. But that does not mean charters wish to give up oversight of their programs, or the ability to

welcome students of all backgrounds, beliefs, and identities. A ruling for petitioner would imperil charters' ability to effectively supervise their staffs and deliver on their promise of unique educational opportunities to parents and students. *See infra* Section II.

Educating children is hard work. So too is honoring and respecting all of the weighty interests touched upon by public education. Mistakes can and do happen. But the current, pragmatic First Amendment jurisprudence empowers schools to strike the right balance of safeguarding core individual liberties while also ensuring schools can realize their reason for being. The Ninth Circuit's faithful application of that case law to the facts of this case means this Court must affirm.

## ARGUMENT

### I. THE PRACTICAL FIRST AMENDMENT JURISPRUDENCE RELIED UPON BY THE LOWER COURT IN DECIDING THIS CASE APPROPRIATELY RECOGNIZES THE WEIGHTY INTERESTS THAT CHARTER PUBLIC SCHOOL COMMUNITIES BALANCE.

#### A. Charter schools are public schools subject to state and federal constitutional obligations.

At the foundation of *amici*'s interest in this case is a simple fact: charter schools are public schools. Cal. Educ. Code § 47605(c) (2021) ("[C]harter schools

are and should become an integral part of the California educational system[.]"); Wash. Rev. Code § 28A.710.020(1) (2022) ("A charter school . . . [i]s a public school[.]"); *see also Wilson v. State Bd. of Educ.*, 75 Cal.App.4th 1125, 1139 (Cal. Ct. App. 1999) ("[C]harter schools *are* public schools because . . . charter schools are part of the public school system[.]") (emphasis in original); *El Centro de la Raza v. State*, 428 P.3d 1143, 1146 (Wash. 2018) (Wiggins, J., dissenting) ("Charter schools, of course, are public schools.").[2] This is not merely a legal reality. It reflects charter schools' purpose and practice of serving all students and bringing new ideas into the broader public school system. *See*, *e.g.*, Cal. Educ. Code § 47601(b) (2021) (noting legislative intent in creating charter schools to "[i]ncrease learning opportunities for all pupils" and "[e]ncourage use of different and innovative teaching methods"); Wash. Rev. Code § 28A.710.020(1)(a) (2022) (requiring charter schools be "[o]pen to all children free of charge"); Wash. Rev. Code § 28A.710.040(3) (2022) (granting charter schools flexibility "to innovate in . . . educational programs to improve student outcomes and academic achievement").

With public status and support comes associated responsibilities, which charter schools accept and,

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[2] Because this is a brief on behalf of *amici* WSCSA and CCSA, it focuses on the Washington and California charter school legal regimes and day-to-day experiences. That being said, the proposition that charter schools are public schools is a generally unremarkable proposition. *See*, *e.g.*, N.C. Gen. Stat. § 115C-218.15(a) (2021) ("A charter school . . . shall be a public school within the local school administrative unit in which it is located.").

indeed, view as essential to realizing their mission. For instance, Washington and California charter schools are subject to many of the same transparency laws applicable to other local public agencies, including those related to open meetings and public records. Cal. Educ. Code § 47604.1 (2021); Wash. Rev. Code § 28A.710.040(i) (2022). Charters in Washington and California also must abide by state restrictions on religious control or influence over public education. Cal. Const. art. IX, § 8 ("No public money shall ever be appropriated for the support of any sectarian or denominational school[.]"); Wash. Const. art. IX, § 4 ("All schools maintained or supported wholly or in part by public funds shall forever be free from sectarian control or influence."); *see also* Wash. Rev. Code §§ 28A.710.010(1), .030(1)(f), .040(4) (2022) (noting, respectively, charter schools cannot be managed by or accept donations from sectarian or religious organizations or otherwise engage in any sectarian practices of operations); *Wilson*, 75 Cal.App.4th at 1143 ("Charter petitioners must affirm that their schools will be nonsectarian in its programs and operations."). And, of course, as public schools, charter schools must abide by the federal constitution. *See Wallace v. Jaffree*, 472 U.S. 38, 49-50 (1985).

### B. Current First Amendment jurisprudence carefully and practically balances the interests of students, families, and employees in public school communities.

First Amendment school jurisprudence is built around a pragmatic appreciation of the challenges schools face as educators and employers and as classroom, facility, and grounds managers. The Ninth Circuit rightly turned back petitioner's appeal based on an even-handed application of this jurisprudence. Reversing this ruling would not only erase well-established lines from the field but also, and even more importantly, imperil the ability of charters to respect the interests of all students and families in their school communities and perhaps even continue to operate at all.

The basis upon which the Ninth Circuit decided this case is familiar and, hence, foundational to the operation of charter schools. As the starting point for its employee speech analysis, the court below noted that "when public employees make statements pursuant to their official duties, the employers are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti*, 547 U.S. at 421. "The critical question . . . is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." *Lane v. Franks*, 573 U.S. 228, 240 (2014). While employers may not create "excessively broad job descriptions" to convert employees' private speech into government

speech, *Garcetti*, 547 U.S. at 424, an employee may not demand his or her employer ignore the practical reality or consequences of his or her speech, *ibid.* at 424-25.

The Ninth Circuit's free exercise and establishment analyses likewise reflect a careful and familiar balancing of interests. On the one hand, restrictions on private religious conduct occurring outside of the employer-employee context "must be narrowly tailored to advance . . . a compelling governmental interest," the highest standard of constitutional scrutiny. *Lukumi*, 508 U.S. at 531. On the other hand, "[a] state interest in avoiding an Establishment Clause violation may be characterized as compelling, and therefore may justify content-based discrimination." *Good News Club v. Milford Central Sch.*, 533 U.S. 98, 112 (2001) (cleaned up); *see also Lee v. Weisman*, 505 U.S. 577, 587 (1992) ("The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause."). The key in assessing whether there has been an Establishment Clause violation is whether the reasonable observer would believe the religious activity in question has been "stamped" with the government's "seal of approval." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000).

Context is pivotal in this analysis. As a general matter, "an Establishment Clause analysis 'not only can, but *must*, include an examination of the circumstances surrounding' the action alleged to have violated the Clause." Pet.App. 18 (quoting *Santa Fe*, 530

U.S. at 315 (emphasis added)). One context meriting "particular[ ] vigilan[ce]" is "elementary and secondary schools." *Edwards*, 482 U.S. at 583-84. This is with good reason as, in that setting, "[t]he State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure." *Ibid.* at 584.

That the application of these well-established principles turned back petitioner's arguments evinces no hostility to private speech or religious exercise; governing case law appropriately balances the weighty interests of all stakeholders who are in and who interact with schools. Two recent examples from *amici*'s communities bear this out. In *Riley's American Heritage Farms v. Elsasser*, 2022 WL 804108, *2-4 (9th Cir. Mar. 17, 2022), a school district cancelled a contract for student field trips to a nearby farm on account of what it considered offensive political commentary from one of the farm's principal shareholders. Correctly ruling that this violated free speech rights, the Ninth Circuit noted "we give less weight to the government's concerns about the disruptive aspect of speech outside the workplace context[,]" and that there was no actual disruption to school operations caused by the speech. *Ibid.* at *11. The court further noted that the shareholder "was not speaking for, or on behalf of the School District." *Ibid.* at *13. Similarly, a charter school declined to contract with an art business on account of religious messages on the business's website in *Our Peculiar Family v. Inspire Charter School*, 2020 WL 3440562, at

*1 (C.D. Cal. June 23, 2020). The trial court rightly held that this violated the right to free exercise in a way that "vague citation of religious establishment concerns" could not justify. *Ibid.* at *3. In sum, the principles applied in the current controversy serve to protect expression when it is truly private and does not raise real concerns of governmental religious endorsement or coercion.[3]

While petitioner chides schools for ostensibly failing "to get the message" sent by this case law (Br. 37), it is, in fact, petitioner who launches a full-on assault on it. Often the attack is explicit. *Compare* Br. 24 ("The government cannot discriminate *against* private religious speech, even in the name of avoiding Establishment Clause concerns.") (emphasis in original) *with Pinette*, 515 U.S. at 761-62 ("There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech."). On other occasions the attack turns on sleight of hand. *See* Br. 38 (citing *Bd. of Educ. of Westside Cmty. Sch. v. Mergens ex rel. Mergens*, 496 U.S. 226, 250-51 (1990) (plurality op.) for the proposition "that schools do not endorse everything

[3] These principles are reinforced by Washington and California statutory law. *See*, *e.g.*, Cal. Educ. Code § 220 (2021) (prohibiting discrimination against any person on the basis of religion in any public school program); Cal. Educ. Code § 48907 (2021) (guaranteeing students' free speech rights, requiring schools to have a free speech policy, and protecting school employees who act to protect pupils' free speech rights); Wash. Rev. Code § 28A.642.010 (2022) (prohibiting discrimination on the basis of religion in Washington public schools).

they fail to censor" without noting this was about student, not school employee, speech). Most fundamentally, petitioner seeks to evade the applicable constitutional scrutiny by re-imagining his public, student interactive prayers at the 50-yard line as "quiet" and "personal." Br. 44; *but see* Pet.App. 41 (Smith, J.) ("Kennedy was *never* disciplined by BHS [Bremerton High School] for offering silent, private prayers.") (emphasis in original). Though differing in their degree of directness, the goal of each attack is the same: to erase the lines on which public schools have relied.

What replaces them is unclear. Where petitioner argues that the current rules forbid truly quiet and personal religious displays with only the most modest implications on official duties, such as a teacher prayer over her lunch (Br. 32) (they do not) (Pet.App. 37-38), the real danger is in what flows from *his* arguments. "[I]f a history teacher stopped the lesson thirty seconds before the bell rang every day, dropped to one knee or stood at the front of the class, and delivered a prayer, with students joining and other teachers invited to join also, . . . would [that] be personal, private speech"? BIO.25. Undoubtedly so based on petitioner's arguments, making plain, at the very least, the sea change in law and practice he demands.

That the contours of schools' responsibilities would become unclear if petitioner were to prevail is no mere academic concern. As the current controversy demonstrates, a disagreement as to schools' obligations can result in years-long litigation. Accepting petitioner's arguments, and its vast unsettling

of well-established jurisprudence, would mean even more such litigation as the line between what schools and their staffs control blurs. This poses serious challenges for all public schools, but particularly for charter public schools. Charters, unlike traditional public schools, face closure if they do not live up to their legal obligations. *See*, *e.g.*, Cal. Educ. Code § 47607(f)(4) (2021) ("A charter may be revoked . . . if the chartering authority finds . . . that the charter school . . . [v]iolated any law."); Wash. Rev. Code § 28A.710.200(1)(d) (2022) ("An authorizer may revoke a charter . . . if the authorizer determines that the charter school . . . [s]ubstantially violated any material provision of law[.]"). It cannot be that schools have to walk a tightrope that moves beneath them, and, if their good-faith efforts at balancing their constitutional obligations to students and their duties to employees are even slightly off, then they face a mountain of liability or even closure.

Charter schools in particular need clear, manageable lines on the field. Petitioner's re-conceptualizing of these lines will result in confusion that imperils the very existence of the schools that *amici* represent. More than that, charters require and the First Amendment demands rules that balance and respect the interests of all stakeholders, including those of schools' diverse student bodies. Though public schools do not always strike the balance perfectly, the status quo works to vindicate the weighty interests at stake. As discussed below, ruling for petitioner would constitute

a hammer blow against schools' ability to successfully operate and educate students.

## II. RULING FOR THE PETITIONER WOULD THREATEN CHARTER SCHOOLS' ABILITY TO EDUCATE THEIR STUDENTS AS WELL AS EFFECTIVELY MANAGE THEIR EMPLOYEES, CLASSROOMS, FACILITIES, AND GROUNDS.

Lost in petitioner's creative re-casting of the facts of this case is what, at bottom, schools actually do: employ teachers, coaches, and staff and manage myriad classrooms, facilities, and grounds to create an environment conducive to student learning. Though more prosaic than conjuring hypothetical disputes that do not actually exist, running a school is a serious and challenging enterprise. Schools serve students from every background and they need discretion to manage their day-to-day operations, realities plain from the actual facts of this case and especially true for charter public schools.

### A. Charter schools must be able to establish welcoming, non-coercive environments for all students.

Almost entirely absent from petitioner's arguments are those whom schools serve first and foremost: their students. Public schools, including charter public schools, educate students from every walk of life and faith imaginable. The best schools and educators do not

shelter their students from the challenges of life. But, at the same time, they take pains to meet students where they are and not impose additional burdens upon them in the classroom or playing on the field. Petitioner's conduct and arguments in this case transgress the Establishment Clause and, as a corollary, the notion that public education is for and should include everyone.

"Divisiveness, of course, 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." *Lee*, 505 U.S. at 588-89. "The potential for divisiveness is of particular relevance[,]" however, in public schools. *Ibid.* at 589. Indeed, this Court "has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Edwards*, 482 U.S. at 583-84. This makes sense for two interconnected reasons. First, "[t]he State exerts great authority and coercive power through mandatory attendance requirements[.]" *Ibid.* at 584. Second, "because of students' emulation of teachers as role models and the children's susceptibility to peer pressure." *Ibid.* This susceptibility raises "heightened concerns with protecting [student] freedom of conscience from subtle coercive pressure[.]" *Lee*, 505 U.S. at 592.

The current controversy bears out these concerns. It is beyond dispute that the current controversy unfortunately, but predictably, devolved into animosity. This included petitioner's supporters cursing BHS's head football coach, Nathan Gillam, "in a vile manner."

JA346. The situation grew so fraught that Coach Gillam, a police officer when not coaching, asked one of his assistants, also a police officer, "whether we could be shot from the crowd." JA347. This pressure-cooker environment "drove a wedge in [the] coaching staff[,]" which Coach Gillam attributed to petitioner repeatedly "put[ting] himself before the team." JA250. As a result of these concerns and challenges, Coach Gillam resigned from the position he had held for eleven years. Pet.App. 11.

Students, of course, also were impacted by this divisiveness. When the petitioner's supporters stampeded the field to support his prayer practice, school cheerleaders and band members were knocked over. Pet.App. 9, 138. Students felt the effects in more "subtle" ways as well. *Lee*, 505 U.S. at 592. For instance, a parent complained to the school administration "that his son 'felt compelled to participate' in Kennedy's religious activity, even though he was an atheist, because 'he felt he wouldn't get to play as much if he didn't participate.'" Pet.App. 4. Other parents indicated that their children "participated in the team prayers only because they did not wish to separate themselves from the team." JA356. Several students and parents thanked the school for stepping in because students "did not feel comfortable declining to join with the other players in [petitioner's] prayers." JA359.

This is unsurprising given students' susceptibility to outside pressure. *Edwards*, 482 U.S. at 584. That the pressure to conform here came from a role model controlling the student's playing time places all students, especially those with heterodox religious views,

"in an untenable position." *Lee*, 505 U.S. at 590; *see also Examining Islamophobia in California Schools*, Council on American-Islamic Relations-California, 2021, at 6, https://static.ca.cair.com/reports/islamophobia/downloads/cair-ca-bullying-report-2021.pdf (noting "55.73% of all respondents reported feeling unsafe, unwelcome, or uncomfortable at school because of their Muslim identity"). As petitioner acknowledged, "coaches can have an outsized influence and 'for some kids, the coach might even be the most important person they encounter in their overall life.'" Pet.App. 34. Tellingly, when Kennedy was on leave, and during the time he temporarily ceased performing on-field prayers, BHS players did not initiate their own post-game prayer. JA181.

The concerns over pressure on students to conform regarding matters of conscience are higher still in charter public schools. Charter schools particularly aim to serve systemically underserved and vulnerable students. *See*, *e.g.*, Cal. Educ. Code § 47605(i) (2021) ("In reviewing petitions for the establishment of charter schools with the school district, the governing board of the school district shall give preference to petitions that demonstrate the capacity to provide comprehensive learning experiences to pupils identified . . . as academically low achieving[.]"); Wash. Rev. Code § 28A.710.130(2)(o) (2022) (requiring inclusion of "targeted plans for recruiting at-risk students" in application for charter school seeking authorization to operate).

The numbers bear that out. Where 49% of students in traditional public schools in Washington state are students of color, that percentage is 62% in Washington's charter schools. *Charter School Report 2020-2021*, Washington State Board of Education, 2021, at 17, https://www.sbe.wa.gov/sites/default/files/public/documents/CharterSchools/2021%20Charter%20School%20Report_SBE_Final.pdf. And more than two-thirds of California public charter students are students of color. *Charters at 30: Reimagining Public Education*, CCSA, 2022, at 7, https://chartersat30.org (follow "Get Report" hyperlink) [hereinafter "Charters at 30"]. Unsurprisingly then, charters educate students of every imaginable faith tradition as well as nonbelievers. *See* Pew Research Center, *2014 Religious Landscape Study: Adults in California*, https://www.pewforum.org/religious-landscape-study/state/california/ (noting Californians identify as follows: 32% Protestant, 28% Catholic, 1% Mormon, 1% Orthodox Christian, 1% Jehovah's Witness, 2% Jewish, 1% Muslim, 2% Buddhist, 2% Hindu, 27% "unaffiliated," 18% "nothing in particular"); Pew Research Center, *2014 Religious Landscape Study: Adults in Washington*, https://www.pewforum.org/religious-landscape-study/state/washington/ (noting Washingtonians identify as follows: 40% Protestant, 17% Catholic, 3% Mormon, 2% Jehovah's Witness, 1% Jewish, 1% Buddhist, 1% Hindu, 32% "unaffiliated," 22% "nothing in particular").

Schools educate students. Successfully serving diverse student bodies, and specifically systemically underserved students, requires fully integrating and

supporting them in the school community. Public schools, including charter public schools, thus must have the ability to ensure their administrators, teachers, coaches, and staff put their diverse student bodies first. Coercing or otherwise excluding students because of who they are or what they believe, intentionally or not, is incompatible not only with the law but also the educational mission of public schools.

### B. Charter schools must be able to direct their on-duty employees.

To maintain control of their operations and functions, public school employers in Washington and California must have some "managerial discretion" over their employees. *Garcetti*, 547 U.S. at 423. This means, first and foremost, the ability to ensure employees fulfill their duties. It also means public school employers can regulate their employees' speech made pursuant to these duties, an especially important form of discretion for public schools and, in particular, public charters.

At the most basic, general level, employers "need a significant degree of control over their employees' . . . actions; without it, there would be little chance for the efficient provision of public services." *Ibid.* at 418. For example, as Justice Alito observed, petitioner's arguments should fail if "he was supposed to have been actively supervising the players after they had left the field but instead left them unsupervised while he prayed on his own[.]" Pet.App. 209 (Alito, J., respecting denial of certiorari); *see also* Pet.App. 11 (noting Coach

Gillam "recommended that Kennedy not be rehired because . . . he 'failed to supervise student-athletes after games due to his interactions with [the] media and [the] community' " and that "Kennedy did not apply for a 2016 coaching position").

In the context of employee instructional speech at public schools, managerial discretion means the ability to "regulate the content of what is or is not expressed" such that the educational institution may "convey its own message" to students. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995); *see also Edwards v. Cal. Univ. of Penn.*, 156 F.3d 488 (3d Cir. 1998) ("The Supreme Court has explained that '[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently on autonomous decisionmaking by the academy itself.' ") (quoting *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 226 n.12 (1985)). As Judge Easterbrook has noted, a public "school system does not 'regulate' teacher's speech as much as it *hires* that speech." *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 479 (7th Cir. 2007) (emphasis in original).

This case amply demonstrates the challenges public schools face as employers generally and specifically when it comes to employee speech. Ensuring the long-tenured geometry teacher down the hall from the principal's office is effectively guiding all of her students through the essential curricular points is straightforward compared to supervising contractual employees who are often working far afield. Indeed, BSD did not

learn of petitioner's prayer practice, which he acknowledges he led while on-duty (JA276), for *seven years* and then only when an opposing coach told BHS's principal that his team had been invited to join in the prayers.[4] Pet.App. 5, 41 (Smith, J.).

BSD acknowledged the challenges in running a huge enterprise like a public school likely contributed to the current controversy. Specifically, the school noted that year-to-year contractual employees on its football coaching staff received limited training pertaining to the school's policy that employees should neither encourage nor discourage student prayer. Pet.App. 5. When this dispute arose, BSD responded thoughtfully, setting about to "find a positive solution that meets the needs of [its] staff member(s), and . . . protect[s] all students['] rights." JA88. But petitioner rebuffed these efforts (Pet.App. 7-10), insisting instead on continuing his practice of praying with students (JA295).

Charter public schools share the school-as-employer concerns raised by this case as well as facing their own unique challenges in this space. Charters, of course, also require managerial discretion. Like BSD, they exercise that authority with an eye toward balancing all interests whenever possible. Consistent with their emphasis on educational innovation, charters also offer services rare in traditional public

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[4] Tellingly, this opposing coach, the quintessential objective observer, *see Santa Fe*, 530 U.S. at 308, attributed petitioner's prayers to the school district. JA229.

schools. For instance, many charter schools have employees meet with all students and their parent(s) or guardian(s) in their homes to discuss and assist with matters of school performance. *See*, *e.g.*, *Charters at 30*, at 18. These visits "establish a home-school connection and ensure appropriate supports and interventions are provided[,]" *ibid.*; they are also potentially unduly intrusive or even coercive if not thoughtfully managed. In addition, charter students participate in any number of experiential learning activities that take place off-campus. *See*, *e.g.*, Peter Alexander, *How Much Do You Know About Olympia Oysters?*, GREAT PENINSULA CONSERVANCY (Oct. 6, 2021), https://greatpeninsula.org/how-much-do-you-know-about-olympia-oysters/ (chronicling students from Catalyst Public School "collect[ing] data on habitat conditions" in Washington's Klingel-Bryan-Beard Wildlife Refuge and Belfair State Park); *see also* Cal. Educ. Code § 47605.1(f) (authorizing "in the field" instruction in partnership with, among others, "[f]ederally affiliated Youth Build programs" and "California Conservation Corps or local conversation corps certified by the California Conservative Corps"). Charter schools must be able to guide, supervise, and, yes, correct, their employees and those with whom they contract to ensure these potentially delicate off-campus activities are constructive.

There is always room for innovation in and beyond the classroom; this is *the* North Star for public charter schools. *See*, *e.g.*, Cal. Educ. Code § 47601(c) (2021); Wash. Rev. Code § 28A.710.040(3) (2022). Pursuing a creative educational approach, however, does not mean

discarding the foundation upon which every school builds. Schools and their employees must pull in the same direction to help students realize the best possible outcomes. Petitioner stands these realities on their head, arguing essentially that elementary and secondary schools are about serving the adults they employ. One can appreciate that schools cannot fulfill their mission without teachers and staff and owe them boundless respect, while also appreciating that they do not get to unilaterally dictate how students are treated and schools operate.

### C. Charter schools must be able to control their classrooms, facilities, and grounds.

Finally, public schools also have an interest in the physical spaces in which they operate. As with their employees, if schools lose effective control over when and how their classrooms, facilities, and grounds are used, then it would be much more difficult for them to carry out their educational mission. The current controversy again illustrates these perils well.

Petitioner's argument is based on the (dubious) proposition that his prayer practice constituted private speech. *Cf. Am. Legion v. Am. Humanist Ass'n*, 139 S.Ct. 2067, 2092 (2019) (Kavanaugh, J., concurring) (identifying "religious expression in public schools" as a category of Establishment Clause case distinct from "regulation of private religious speech in public forums"). This allows him to suggest that, at most, BSD needed only to disclaim his prayers. Br. 9; *cf.* Pet.App.

55 (Smith, J.) ("A disclaimer would have no effect on the proven coercive effect Kennedy's prayers had on his players."); Pet.App. 61 (Smith, J.) ("[State] [d]isclaimers [of religious activity] are insufficient in 'coercive' context[s].") (quoting *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 984-85 (9th Cir. 2003)).

Even accepting this facile suggestion as a panacea for establishment concerns, however, does nothing to address the whole new First Amendment issue this approach would raise. "[A] public disclaimer in the wake of Coach Kennedy's media campaign would have only called more attention to his very public worship." Pet.App. 75 (Christen, J.). Thus, to realize the First Amendment's mandate of "neutrality between religion and religion, and between religion and nonreligion[,]" *McCreary Cnty. v. Am. Civil Liberties of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)), BSD "would have had to permit access [to its football field] by other religious faiths[.]" Pet.App. 75 (Christen, J.).

In so doing, BSD would necessarily acquiesce to petitioner's prayers making its field into at least a limited public forum.[5] Public schools are (rightly) limited in their regulation of expression when operating such forums. A school, for example, "must not discriminate against speech on the basis of viewpoint" within a limited public forum. *Good News Club*, 533 U.S. at 106. In

[5] Petitioner himself directly opened the forum by allowing an elected official onto the field to pray with him and his team. JA314-15.

short, accommodating petitioner's "private" prayers on the 50-yard line would also mean needing to accommodate all religious and irreligious speech and expression on its field. *See McCreary*, 545 U.S. at 860. During the course of this controversy, the school superintendent informed the school board that this was "exactly the door we worried about opening[.]" JA101.

The consequences of opening this door are no mere hypotheticals. In fact, "[a] Satanist religious group contacted BSD in advance of [a] game to notify them that 'it intended to conduct ceremonies on the field after football games if others were allowed to.'" Pet.App. 8. BSD was only able to keep them off the field (Pet.App. 8 ("The Satanist group was present at the game, but 'they did not enter the stands or go on to the field after learning that the field would be secured.'")), because it continued to treat the field as a nonpublic forum, *see Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 48 (1983) ("Because the school mail system is not a public forum, the School District had no constitutional obligation per se to let any organization use the school mail boxes.") (cleaned up); *see also Pinette*, 515 U.S. at 761 ("It is undeniable, of course, that speech which is constitutionally protected against state suppression is not thereby accorded a guaranteed forum on all property owned by the State.").

But BSD's broader efforts to secure the field on this occasion were unsuccessful. Despite making "arrangements with the Bremerton Police Department for security," posting signs as well as making robocalls to BSD parents, "and otherwise put[ting] the word out to

the public that there would be no access to the field[,]" it was overrun. Pet.App. 8-9. Members of the public as well as the media stormed the field to join petitioner's prayer, including "'people jumping the fence' to access the field." Pet.App. 9. In the course of this "stampede[,]" (Pet.App. 9), members of the BSD cheerleading squad and marching band were knocked to the ground (Pet.App. 9, 138). Simply put, BSD was unable "to keep kids safe."[6] JA222-23.

To rule for the petitioner would require this Court to hold that BSD allowed petitioner to open a forum, one that it could not close. Granting this authority to an employee, in the face of strenuous school efforts to the contrary, again stands both the case law and common sense on its head. The consequences of doing so are apparent from this case and, if endorsed by this Court, difficult, if not impossible, to cabin. Taken to their logical end, petitioner's arguments would imperil charter public schools' ability to regulate their grounds, facilities, and classrooms and, hence, their ability to educate and keep their students safe.



[6] This case thus implicates yet another compelling interest for public schools – safeguarding "the physical and psychological well-being of minors." *Sable Cmmc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

## CONCLUSION

For the above reasons, this Court should affirm.

Respectfully submitted,

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