No. 21-418

In The
Supreme Court of the United States

JOSEPH A. KENNEDY,

Petitioner,

v.

BREMERTON SCHOOL DISTRICT,

Respondent.

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

BRIEF FOR ROBERT D. KAMENSHINE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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April 1, 2022

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INTEREST OF THE *AMICUS CURIAE*[1]

Robert D. Kamenshine has a long-standing interest in freedom of speech issues that arise in the conduct of public education. *See* Robert D. Kamenshine, *The First Amendment's Political Establishment Clause*, 67 Cal. Rev. 1104, 1132-1138 (1979); Robert D. Kamenshine, *Reflections on Coerced Expression*, 34 Land and Water L. Rev. 101 (1999), as well as in issues that concern the free exercise of religion. *See* Robert D. Kamenshine, *Scrapping Strict Review in Free Exercise Cases*, 4 Const. Comm. 147 (1987).

He was on the Vanderbilt Law School faculty for over twenty years – 1967-88 (Full Professor 1973-88; Associate Professor 1970-73; Assistant Professor 1967-70). In 1987-88, while on leave from Vanderbilt, he was Professor-in-Residence at the United States Department of Justice, Civil Division, Appellate Staff, where he thereafter continued as an attorney, until he retired from the Department in 2017.

While at Vanderbilt, Mr. Kamenshine taught Constitutional and First Amendment Law. In 1980-81, he was a Visiting Professor at Duke Law School. In 1984-85, he was Lee Distinguished Visiting Professor, College of William and Mary, Marshall-Wythe School of Law, Bill of Rights Institute. In 1997-98, while on leave from the Department of Justice, he was

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[1] Rule 37 statement: The parties have filed blanket consents to the filing of *amicus* briefs. No counsel for any party authored any part of this brief, and no person or entity other than *amicus* funded its preparation or submission.

Distinguished Visiting Professor, E. George Rudolph Chair, University of Wyoming College of Law. During the 2006 spring semester, while also on leave, he was Senior Faculty Fellow at Marshall-Wythe. And from 2010-2013, he was an adjunct professor in the University of Baltimore Law School's LOTUS (Law of the United States) program, in which he taught Constitutional law to foreign-trained lawyers.

Ten amicus briefs were filed in support of the petition for a writ of certiorari. None was filed in opposition. Thirty-eight amicus briefs were filed in support of Kennedy on the merits. Far fewer have been filed in support of the School District. This amicus brief will assist the Court to better understand the strong constitutional underpinning of the District's case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Kennedy's admirable devotion to his football team, its high school, and, most importantly his religion, is indisputable. Nor may his sincerity be seriously questioned. He believes that he is religiously compelled to engage in a public quiet, but demonstrative prayer on the 50-yard line immediately at the close of each game. Thus, from his vantagepoint the other plentiful opportunities afforded him to similarly pray on the school premises are of no consequence.

In that light, the only question that this case presents is whether Kennedy's religious choice to

routinely engage in public demonstrative quiet prayer at the specific school football events, on-field location and time of his choosing is constitutionally immunized against the School District's regulation. The answer must be *no*. He has no First Amendment right, whether as a matter of his freedom of speech or free exercise of religion, to insist on inclusion of a controversial religious element in those events.

That is because the football game setting in which Kennedy seeks to perform his prayer is a discrete school public event, just like a graduation, or a school play. Thus, it stands to reason that the District's administrators would be attentive to exactly what messages – uniforms to be worn, songs to be played, cheers to be conducted – the event would convey. The administrators could validly shape the event as they deemed appropriate.

The administrators never decided to include some sort of closing prayer in their event. Yet Kennedy, whether or not intentionally, would effectively make his demonstrative quiet prayer a coda to each and every game. There was nothing casual or spontaneous about that prayer. Nothing by way of time and/or space separated it from all the other football events of the day. Rather, all persons at the game could count on viewing the prayer as much as any anything else that they would have expected to witness.

Many, perhaps even most spectators might well have approved of that prayer as part of the event. But many others might not. In those circumstances –

regardless of any other in-school demonstrative religious observances by employees, for example at lunch in the school cafeteria – the School District acted reasonably to exclude Kennedy's demonstrative prayer from the football game activities.

Finally, the demonstrative prayer's regular inclusion in the football events, unlike in other non-event school settings, would have placed the District's imprimatur upon a sectarian prayer. That imprimatur would violate the Constitution's Establishment Clause.

ARGUMENT

I.

THE SCHOOL DISTRICT WAS CONSTITUTIONALLY ENTITLED TO EXCLUDE KENNEDY'S DEMONSTRATIVE QUIET PRAYER AS AN APPARENT ROUTINE ELEMENT OF ITS FOOTBALL EVENT

A. The School District Was Entitled To Control All Communicative Facets Of Its Football Event

Athletic contests, parades, fairs, and other large scale public events can provide attractive platforms for persons who seek to publicly display their messages. But event organizers are not always in accord with such messages, or at least may conclude that the message in question might disrupt the event or introduce

an unwanted element of controversy. *See Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston [GLIB]*, 515 U.S. 557 (1995). There, the Court held that the First Amendment protected the right of private organizers of a St. Patrick's Day parade to exclude participation by a gay group, and thereby omit "a message the organizers d[id] not wish to convey."[2] *Id*. at 559.

Government bodies are equally entitled to shape the expressive content of their programs and events. *Pleasant Grove City* v. *Summum*, 555 U.S. 460 (2009). In *Pleasant Grove*, a city chose to display in one of its parks a number of privately donated symbols. Among those was a Ten Commandments monument. Yet the city declined to accept for similar display a religious organization's monument containing a comparable "Seven Aphorisms of Summum."

Rejecting the organization's freedom of speech claim, the *Pleasant Grove* Court (opinion by Justice Alito) reasoned that unlike "speeches and other transitory expressive acts" (555 U.S. at 464), "the

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[2] At a 1968 Olympics awards ceremony, two black athletes caused controversy when, to protest racial discrimination, they gave a black power clenched-fist salute during the playing of the national anthem. *See* Wikipedia *1968 Black Power salute*, https://en.wikipedia.org/wiki/1968_Olympics_Black_Power_salute. And, more recently, to protest racial injustice, football star Colin Kaepernick "took a knee" during the playing of the national anthem at an exhibition game. *See* The New York Times*, Kneeling, Fiercely Debated in the N.F.L.*, *Resonates in Protests*, https://www.nytimes.com/2020/06/05/sports/football/george-floyd-kaepernick-kneeling-nfl-protests.html.

placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause." *Id*. The Court noted that "because property owners typically do not permit the construction of such monuments on their land, persons who observe donated monuments routinely – and reasonably – interpret them as conveying some message on the property owner's behalf."[3] *Id*. at 471.

Similarly in the public school environment, no student's nor teacher's right to freedom of speech or free exercise of religion limits a *school district's* ability to shape its own expression. It is irrelevant that "'[n]either students [n]or teachers shed their constitutional rights to freedom of speech or expression at the school house gate,'" Pet. Br. 25 (quoting *Tinker* v. *Des Moines Indep. Cnty. Sch. Dist*., 393 U.S. 503, 506 (1969)).[4]

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[3] The Court did not decide whether the proposed inclusion of the "Seven Aphorisms of Summum," as well as the pre-existing display of the Ten Commandments, would violate the Establishment Clause. Subsequently, the Court sustained the display on 22-acre state house grounds of a Ten Commandments monolith, one of 17 monuments, and 21 historical markers). *Van Orden* v. *Perry*, 545 U.S. 677 (2005). *See American Humanist Ass'n* v. *Prince George's Cty., Md.*, 139 S. Ct. 2067 (2019) (sustaining display of cross memorializing war dead). Here, there would be only one permanent and purely religious element (as long as Kennedy continued to coach) – his demonstrative quiet prayer.

[4] Even assuming a student's or teacher's freedom of speech to be implicated, the proposition that the student or teacher enjoys First Amendment protection within the school merely begins the constitutional analysis. *See Mahanoy Area School Dist.* v. *B.L.*, 141 S. Ct. 2038, 2044 (2021) ("But we have also made clear that courts must apply the First Amendment 'in light of the

See also Pet. Br. 30.[5] Thus, this Court has clarified that "[t]he question of whether the First Amendment requires a school to tolerate particular student speech – the question that we addressed in *Tinker* – is different from the question of whether the First Amendment requires a school affirmatively to promote particular student speech." *Hazelwood School District* v. *Kuhlmeier*, 484 U.S. 260 (1988).

In *Hazelwood*, the Court, upheld a high school principal's deletion of two student-written stories from the school paper. The Court explained that the case did not "address[ ] educators' ability to silence a student's personal expression that happens to occur on school premises." 484 U.S. at 271. Instead, the issue concerned "educators' authority over school-sponsored publications, theatrical productions, and other *expressive activities* that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Id*. (emphasis added). *See also Bethel School Dist.* v. *Fraser*, 478 U.S. 675 (1986) (school district could discipline a student for giving a lewd speech at a school assembly).

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special characteristics of the school environment." (quoting *Hazelwood School District* v. *Kuhlmeier*, 484 U.S. 260, 266 (1988)).

[5] And, of course, those rights include religiously-oriented participation in any limited public forum that a school may create. *See Good News Club* v. *Milford Central School*, 533 U.S. 98 (2001).

B. Kennedy's Demonstrative Quiet Prayer Effectively Would Be A Permanent Coda To Each Scheduled Football Game Event, And Thus The School District, In Exercise Of Its Editorial Judgment, Could Excise It

The School District could validly edit Bremerton's football events as it deemed appropriate. High school football game events are much like school assemblies or graduations. There is nothing casual or spontaneous about them. The games are held under an established schedule at a school's stadium. The school's team is outfitted in official school uniforms and is coached by school employees. Beyond providing a rewarding experience for the team's members, the games are public spectator events. Added to the contest of the competing teams, there are typically performing cheer leaders and school bands. The games not only entertain, but help build school spirit and community support for the school's endeavors. Thus, it stands to reason that the District's administrators would be attentive to exactly what messages – uniforms to be worn, songs to be played, cheers to be conducted – the event would convey.

The School District was entitled to edit Kennedy's demonstrative prayer out of its event. Kennedy describes his activity as a "quiet prayer." Pet. Br. 10. Yet a truly silent prayer, one with no physical manifestation, would raise no constitutional issue. The issue this case presents exists because the prayer involved public conduct that constitutes a form of symbolic expression. *See Texas* v. *Johnson*, 491 U.S. 397 (1989)

(flag burning); *Barnes* v. *Glen Theatre*, 501 U.S. 560 (1991) (nude dancing performances). Kennedy engaged in his demonstrative quiet prayer at a scheduled highly structured school event – game day. Virtually all witnessing that conduct would understand that Kennedy was praying[6]. Thus it was Kennedy's " 'readily observable' " " 'demonstrative religious activity' " (Pet. Br. 11) that the District ended.

Kennedy correctly points out that he "would have been free to engage in other forms of speech on the field, such as " 'calling home or making a reservation for dinner at a local restaurant.' " Pet. Br. 29 (quoting Alito, J., Pet. App. 209-10). He similarly references "kneel[ing] at the 50-yard line * * * to propose to his significant other 'while players stood next to him' and 'fans watched from the stands' " (Pet. Br. 33), and broadly describes "simply speaking or engaging in some activity with an expressive component while in the workplace." *Id*. at 26. But, much like the permanent monuments at issue in *Pleasant Grove*, Kennedy's demonstrative quiet prayer would not be an isolated happenstance, like a one-time speech or distributed flyer. Rather, it was to be a de facto permanent fixture at Bremerton's football games – one that all could anticipate, and greet with approval, disapproval, or perhaps indifference.[7]

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[6] Kennedy nowhere suggests that his actions would be otherwise understood.

[7] Kennedy describes how "he declined the offer to relegate his personal prayers to an outpost where no one could witness his religious exercise or possibly follow suit." Pet. Br. 28. The School

Thus, it was an appropriate matter for the School District to address. The District was almost certainly aware that the inclusion of a religious element in school events could raise serious Establishment concerns. *See Santa Fe Independent School District* v. *Doe*, 530 U.S. 290 (2000) (invalidating school-authorized student-led invocations at school football games). *Lee* v. *Weisman*, 505 U.S. 577 (1992) (invalidating graduation prayer by school-invited rabbi).

Agreed, the District could have simply attempted to disassociate itself from what appeared to be a planned element of the football event. *See* Pet. Br. 34 ("When it comes to concerns about who is actually doing the speaking, the obviously less restrictive alternative is 'an adequate disclaimer.'" (quoting *Capitol Square Rev. & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 782 (1995) (O'Connor, J., concurring in part)). But it was under no obligation to take that route – no more than was the city in *Pleasant Grove* to accept the donation of the Summum religious group's monument and simply attach a disclaimer to explain that city did not endorse the monument's message. *See also Miami Herald Pub.*

District's October 23 letter actually "prohibited any 'demonstrative religious activity, readily observable to (if not intended to be observed by) students *and the attending public*.'" Pet. Br. 11 (emphasis added). The letter's reference to "'the attending public'" makes clear that it was not an all-encompassing prohibition of demonstrative prayer on school premises. Rather, it applied to a specific context – the football game event. Indeed, there was no suggestion that "'a coach's duty to serve as a good role model requires the coach to refrain from *any* manifestation of religious faith,'" Pet. Br. 31 (emphasis added) (quoting Alito, J., Pet. App. 212).

Co. v. *Tornillo*, 418 U.S. 241 (1974) (newspaper may not be compelled to publish undesired speech). Thus, contrary to Kennedy's assertion, the District's exercise of such editorial judgment involves no "forbidden religious and viewpoint discrimination." Pet. Br. 29.

Kennedy's on-field public conduct immediately following a football game's conclusion was well within the scope of his official duties, and consequently a matter of legitimate concern to the School District. Indeed, Kennedy cites no decision of this Court, or for that matter, of any other any other, that comes even close to holding that an employee in his circumstances was engaging in protected speech outside the scope of employment. It is difficult to imagine such a claim even being seriously made if, for example, instead of engaging in a devout demonstrative prayer of thanksgiving, Kennedy were instead routinely burning an American flag, displaying a Russian Federation Flag, or even directing an obscene gesture toward the parents and other spectators. Yet the hypothesized cases would equally involve the coach's symbolic expression, and almost certainly be of serious concern to the School District.

In short, this case has nothing to do with any " 'excessively broad job description' that distorts the government-speech analysis and abridges freedom of speech." Pet. Br. 29-30, quoting *Garcetti* v. *Ceballos*, 547 U.S. 410, 424 (2006). There, the Court observed that it had "no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate." *Id*. It then "reject[ed] Justice Souter's dissenting

"suggestion" of a risk that, under the Court's opinion, employers would be able to "restrict employees' rights by creating excessively broad job descriptions." *Id*.

The Court explained that "[t]he proper inquiry is a practical one." 547 U.S. at 424. Thus, the Court stressed, "[f]ormal *job descriptions* often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's *written job description* is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes." *Id*. at 424-25 (emphasis added). *See Lane* v. *Franks*, 573 U.S. 228, 238 (2014) ("Truthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes."). Here, there is no such *pro forma* "written job description." *Garcetti*, 547 U.S. at 425.

Kennedy deems the unique time and place of his demonstrative prayer to be constitutionally irrelevant. Essentially, in his view, once the football game clock runs out, not only is the game over, but also the event. Effectively, in his mind, an invisible curtain descends that somehow separates his immediate post-game on-field conduct from the total game event. That is an artificial and unrealistic line. Thus, for example Kennedy himself describes how at the close of the game, there was "a *customary* midfield handshake with the opposing team" (Pet. Br. 10 (emphasis added)), and that "students * * * walk[ed] toward the stands to sing the post-game fight song" * * * . *Id*. *See also* Pet. Br. 12

("[P]layers engaged in other post-game traditions."). For purposes of constitutional analysis, the event ends when the stadium has emptied.

To further clarify the close-of-game scenario, imagine a Bremerton High School student play where at the final close of the curtain, the play's faculty-director would step out from behind the curtain to engage in a quiet demonstrative prayer like Kennedy's. Would Kennedy seriously argue that the school authorities could not control what occurred at the very end of the play. Certainly, if it were a Broadway production, there would be no doubt that the play's producer could instruct the director to take his prayer elsewhere.

Or consider a classroom setting. Kennedy agrees that school authorities may determine the subject matter for classroom instruction, *i.e.*, a teacher must teach geometry in a geometry class. *See* Pet. Br. 26. But what if a teacher decided that at the end of each geometry lesson, he would conclude with a demonstrative thanksgiving prayer.

Here, Kennedy's symbolic expression, kneeling, was religious and familiar, engendering much public support. Another time with another coach, the expression, religious or political, could be far less familiar and far more controversial. Regardless, the governing principle is the same. The School District may direct its personnel to shape the contours of its own event.

But were the Court to uphold the elimination of Kennedy's demonstrative quiet prayer, he paints an unfounded dire picture for in-school freedom of

religious expression. He projects that sustaining the School District's decision here would mean that "protections for religious expression" would "*disappear* when someone crosses the threshold of a public school or accepts public employment." Pet. Br. 25 (emphasis added). *See also id*. at 35 ("It is difficult to imagine a more *profound threat* to our first freedoms * * * than that the government owns and can censor literally everything that coaches and teachers say.") (emphasis added); *id.* at 30 ("[R]eligious beliefs * * * do not become the government's just because they are on the clock or on the premises.").

Indeed, Kennedy sweepingly claims that if the District prevails, it could equally bar his and others' religious observance at any other time and place within the school. *See* Pet. Br. 30 (teachers would "only have First Amendment rights when they steer clear of the schoolhouse gates"). He describes how a "teacher who had specific supervisory duties in the lunchroom * * * [has a] right to begin her own lunch in that same lunchroom with a brief private blessing" (*id*. at 32), and similarly that a teacher could "wear[ ] a yarmulke in the classroom" or while "eating lunch with students in the cafeteria." *Id*.

Certainly students and teachers who are present would witness those religious activities. But, given their likely diversity, no one would reasonably suppose that the school was somehow implicated in such expressions. The same is true for other common and clearly individualized religious expression, for example wearing a Cross or Star of David.

In sum, none of Kennedy's hypothesized horribles involves a football coach's incorporation of a religious practice into a public high school's football event. Rather, he set himself on a collision course with the School District solely because he insisted on conducting his quiet demonstrative prayer at a *single place and time of his choosing*, not because of any broad threat to his at-school religious expression, or that of others. The District infringed no First Amendment right by the exercise of control over its own event.

II.

RETENTION OF KENNEDY'S DEMONSTRATIVE QUIET PRAYER IN THE SCHOOL'S FOOTBALL GAME EVENT WOULD HAVE VIOLATED THE ESTABLISHMENT CLAUSE

Kennedy correctly states that "the Establishment Clause does not compel public schools to purge from public view all religious exercise of coaches and teachers." Pet. Br. 35. And he correctly sets out, as "bedrock constitutional law," the proposition that "the government does not endorse private speech that occurs on the schoolhouse grounds just because it does not suppress it * * * ." *Id*. at 35-36.

But he incorrectly assumes that those propositions address the circumstances in his case – effectively incorporating his demonstrative quiet prayer as a permanent element of his school's football game events. The Establishment Clause bars only that insinuation of a religious component into an official school

function. *See Santa Fe Independent School District* v. *Doe*, 530 U.S. 290 (2000); *Lee* v. *Weisman*, 505 U.S. 577 (1992). It leaves untouched the wide swath of non-event-related manifestations of religious involvement or sentiment by both school personnel and students.

Consider again the situation in *Hazelwood* and imagine that, like Kennedy, one of the school paper editors had sincere and compelling religious convictions. Most certainly, the Establishment Clause would not require the school to bar that editor from wearing a faith symbol (for example, a Cross, Star of David, or yarmulka), or from reciting a blessing before eating lunch in the school cafeteria. But what if those admirable religious convictions also demanded that the editor add a *regular* religious feature to the paper. In each edition, the editor would write a short piece expressing thanks to God for the position on the school paper, and for the paper's success. Under *Hazelwood*, the school, as publisher of the paper, could validly eliminate that feature.

But if the school instead chose to allow its continuance, that would violate the Establishment Clause. The very reasoning that caused the Court in *Hazelwood* to reject the student writers' freedom of speech claim compels that conclusion. As in *Hazelwood*, the "students, parents, and members of the public might reasonably perceive [the religious editorials in the school paper] '*to bear the imprimatur of the school*.'" 484 U.S. at 271 (emphasis added). *See Allegheny County* v. *American Civil Liberties Union*, 492 U.S. 573

(1989) (adopting "no endorsement" of religion analysis to determine violation of Establishment Clause).

Similarly, Kennedy's post-game demonstrative quiet prayer, as a regular religious observance at each game event, would reasonably be believed to bear a similar school "imprimatur." *Hazelwood*, 484 U.S. at 271. Neither the District's efforts to halt the prayers, nor the intensive press coverage of the controversy may erase the Establishment Clause violation.

Kennedy contends that there has been sufficient efforts by the District, along with the accompanying publicity, to detach the District from an ostensible establishment of religion. Pet. Br. 40. He ignores the critical point that his case is really more about the future than the past. Kennedy is oblivious to the fact that if he prevails here, he expects to carry on his demonstrative quiet prayer coda to each game long after the Court's decision, and after the cited public controversy is forgotten. *See* Response To Respondent's Suggestion of Mootness 1 (Kennedy "remains ready, willing and able to return to his job just as soon as his constitutional rights are vindicated."). That is the circumstance under which the Court must address the Establishment Clause violation, one in which the District's forbidden "imprimatur" would indefinitely remain.

Even assuming that "there is nothing unconstitutional in a State's favoring religion *generally*" (*Van Orden* v. *Perry*, 545 U.S. 677, 692 (2005) (Justice Scalia, concurring) (emphasis added)), that proposition would

not apply to a public school's incorporation of a *sectarian* demonstrative quiet prayer in its football events. At the minimum, government may no more endorse a particular faith than suppress it. *See Larson* v. *Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

Here, the District's "imprimatur" would continue to be placed on a sectarian prayer, Kennedy, "a devout Christian (Pet. Br. 4.), kneels to pray (*id*. at 10, 20). Persons of other faiths adopt different postures for prayer. By contrast, for example, Muslims "perform * * * salah." (Pet. Br. 32), an element of which involves prostration, in which the forehead, nose, palms of both hands, knees and toes point forward and all touch the floor. *See* Ayman Agahani, *How to Perform Salah* (July 23, 2020), https://muslihands.org.uk/latest/2020/07/how-to-perform-salah; CJ News, *How Jewish Pray On Knees And Elbows*, https://www.chicagojewishnews.com/how-jewish-pray-on-knees-and-elbows/ (describing varying modes of prayer among different religions).

Undeniably, the removal of Kennedy's prayer from the boundaries of the school's football event collides with his admirable, strong and sincere religious conviction. Unfortunately for him, that conviction confers no constitutional right to inject his demonstrative quiet prayer into the school's football event, and thereby to enmesh the school in an Establishment Clause violation.

Most critically, however, Kennedy retains broad free speech and free exercise rights that he and *all* school personnel and students "do not shed * * * at the school house gate." *Tinker*, 393 U.S. at 506.

CONCLUSION

For the foregoing reasons, this Court should affirm.

Respectfully submitted,

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April 1, 2022