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 AASA, THE SCHOOL SUPERINTENDENTS ASSOCIATION, *ET AL.* AS *AMICI CURIAE* SUPPORTING RESPONDENT


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## BRIEF FOR AASA, THE SCHOOL SUPERINTENDENTS ASSOCIATION, *ET AL.* AS *AMICI CURIAE* SUPPORTING RESPONDENT

## INTEREST OF THE *AMICI CURIAE*[1]

AASA, The School Superintendents Association (AASA), founded in 1865, is the professional organization for some 10,000 educational leaders in the United States and throughout the world. AASA members range from chief executive officers, superintendents, and senior level school administrators to cabinet members, professors, and aspiring school system leaders. Throughout its more than 150 years, AASA has advocated for the highest quality public education for all students, and provided programing to develop and support school system leaders. AASA members advance the goals of public education and champion children's causes in their districts and nationwide.

The National Association of Elementary School Principals (NAESP) is the leading advocate for elementary and middle-level principals in the United States and worldwide. NAESP believes principals are the primary catalyst for creating a lasting foundation for learning, driving school and student performance, and shaping the long-term impact of school improvement efforts.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties have submitted blanket letters of consent to the filing of *amicus* briefs.

The National Association of Secondary School Principals (NASSP) is the leading organization of and voice for middle level principals, high school principals, and other school leaders across the United States. NASSP seeks to transform education through school leadership, recognizing that the fulfillment of each student's potential relies on great leaders in every school committed to the success of each student.

The Washington Association of School Administrators (WASA) is an organization for professional administrators that is committed to leadership in providing equity and excellence in student learning. WASA's membership includes more than 1,900 members and is open to all educational administrators in central office, building management, and educational agency positions.

The issue in this case is one of enormous practical importance to *amici*, and to all educators who are responsible for maintaining a safe and effective system of public education. The rule embraced by petitioner inevitably will lead to disruption and coercion in public schools, while embroiling schools in lengthy and expensive litigation; the result predictably will harm students and undermine education. Because *amici* have extensive experience with, and a deep interest in, the resolution of such issues, they submit this brief to assist the Court with the resolution of this case.

## INTRODUCTION AND SUMMARY OF ARGUMENT

**A.** Imagine the example of a public high school teacher, Ms. Chichester, who teaches a senior chemistry lab that meets during eighth period. Ms. Chichester's school learned that, over a period of years, she recited audible Christian prayers in her classroom with her chemistry students. When the superintendent expressed concern about this practice, Ms. Chichester informed the school that her religious beliefs "compel [her] to 'give thanks through prayer' at the conclusion of each [lab] 'for what the [students] had accomplished' and 'for the opportunity to be part of their lives through [chemistry].'" Pet. Br. 4 (citations omitted). Because, "like many religious individuals, [Ms. Chichester] sought to make [her] personal religious acknowledgement in situ, immediately before or after an undertaking" (*id.* at 28), she insisted that she must recite the prayers while kneeling in the center of her classroom, and must do so when the lab is complete but the students remain in the room and have not yet removed their school-assigned protective goggles or cleaned their workstations. Virtually all the students in the class typically gathered around Ms. Chichester while she was praying and joined in her classroom prayers, although some (including those who are not Christian) informed their parents that they did so unwillingly, and only because they not want to stand out or run the risk that Ms. Chichester would dock their grades for failure to participate.

Ms. Chichester also invited other teachers and their classes to come to her classroom at the end of eighth period and join in her post-lab prayers, and

some did. Because Ms. Chichester had posted to Facebook about her practice of in-class praying, members of the public who were present in school at the end of eighth period also rushed to join the prayers. In the confusion and tumult, students who were leaving class or on their way to other classes were knocked to the floor of the school's hallway. Meanwhile, community members who were concerned that Ms. Chichester would be denied the ability to pray threatened violence, forcing the school to hire additional security personnel.

Faced with this disruption, the school offered Ms. Chichester ways to accommodate her religious faith that would be less problematic. It told her that she could pray silently; or could pray audibly in place after the students had left the classroom; or could pray in the faculty lounge or other spaces adjacent to her classroom, at any time consistent with her work responsibilities. And it invited her to propose other ways to accommodate her religious interests with the school's practical concerns. But she refused to engage with the school, insisting that she would continue her current course unchanged into the future.

**B.** It hardly seems possible that the First Amendment gives Ms. Chichester the right to behave in this way—that is, that the Constitution requires a public school to allow a teacher to audibly pray, in the classroom, while her responsibilities to her class have not yet terminated, surrounded by students who join the prayer, in a manner that some students and parents find coercive, and in a way that causes broader disruption to school operations and injury to students. But that *is* this case. When coach Joseph Kennedy prayed, he was (1) on duty as a school foot-

ball coach, whose players had not yet removed their uniforms or left the field; (2) positioned in the center of the field; (3) surrounded by his team, who joined in his audible prayers, sometimes joined by the other team and by members of the public who had rushed onto the field; (4) in circumstances that some Bremerton players found coercive; and (5) the cause of extraordinary disruption. Kennedy's assertion that he actually sought only to pray quietly and by himself is not supported by the record, and this case therefore does not present the question how the First Amendment affects such hypothetical unobtrusive in-school religious displays.

**C.** In-school religious activity like Kennedy's often threatens to disrupt education and generate conflict, as persons of widely divergent religious beliefs operate in the same small space. Examples of such activity are myriad. To protect students, ensure a productive learning environment, and avoid Establishment Clause liability, administrators therefore must be able to institute reasonable accommodations that safeguard employees' free exercise of religion, even as they limit student-facing religious activity.

**D.** Tested under the proper standard, Kennedy's claim must fail. Kennedy spoke as an on-duty public employee, meaning that his speech—whether religious, political, or of any other character—could be limited, restricted, or altogether prohibited by his employer. But even if his speech is thought to enjoy a measure of constitutional protection, the District's interest in imposing reasonable limits on that speech should prevail. Kennedy's conduct was disruptive and coercive; it likely put the District in violation of the Establishment Clause; and the District made

every effort to accommodate Kennedy's religious beliefs.

## ARGUMENT

### I. Kennedy's speech had coercive and disruptive effects.

Kennedy asks the Court to decide whether the Bremerton School District violated his First Amendment rights when he "los[t] his job" because "he knelt and said a quiet prayer by himself" after a football game. Pet. Br. i. But that question is not presented in the case: As both courts below found after a close review of the record, the conduct at issue is *not* "quiet prayer"; it is *not* Kennedy's attempt to "pray[] by himself"; and Kennedy did *not* "lose his job" for doing those things. Instead, for eight years Kennedy often prayed audibly with students while on duty as a football coach, in a manner that had a coercive effect on players and that ultimately caused significant harm and disruption to the school. Yet the District still went to extraordinary lengths to accommodate Kennedy's religious practices, specifically and repeatedly offering him an opportunity to pray either quietly or by himself—that is, *exactly* what he now says he wanted to do.

Because the Court cannot, on this record, decide the question presented by Kennedy, it should dismiss the petition as improvidently granted. And if the Court does resolve the case on the merits, it should do so with regard for Kennedy's actual behavior: that of an intransigent public-school employee whose conduct infringed the rights of students, detracted from his school's educational mission, and placed the District in an impossible bind.

### A. Kennedy recited audible and obtrusive prayers while he acted in his capacity as a school coach.

In early September 2015, the District's administrators learned that Kennedy, then an assistant coach for the school's varsity football team, had for several years been praying, before and after games, with students under his supervision. JA24-29, JA40-41. After games, his practice was to stand at midfield on the 50-yard line and pray aloud, surrounded by "a majority of [his] team," often kneeling with their heads bowed. JA40, JA126. Sometimes Kennedy would invite opposing teams and their coaches to gather around him as he gave religious speeches. JA77, JA229. The District's administration became concerned that Kennedy's prayers, on school property and surrounded by students Kennedy supervised, undermined safety at District events, threatened the religious-liberty rights of students and families, and "expos[ed] the District to significant risk of liability." JA41; see JA81, 95, 106.

After a game on Friday, September 11, Bremerton's athletic director observed Kennedy's post-game prayer and shook his head. JA269-271. That night, Kennedy posted on Facebook: "I think I just might have been fired for praying." JA271. Kennedy's Facebook post touched off a firestorm. An "explosion" of angry calls and emails poured into the school, denouncing the purported decision to fire Kennedy. JA256. Bremerton's principal, athletic director, and head football coach were flummoxed by these events. None of them had told Kennedy that he had been or would be fired. JA228, 230.

On September 17, the District's superintendent, Aaron Leavell, wrote Kennedy a first email of official guidance. Leavell told Kennedy that, while on duty, he was "free to engage in religious activity, including prayer, so long as it does not interfere with [his] job responsibilities." JA45. Leavell added that any such prayer should be "physically separate from any student activity, and students may not be allowed to join such activity." JA45. If Kennedy allowed students to join him in prayer, there was a risk of "alienation" among players who did not wish to pray. JA44. This "risk" was real; a parent subsequently told the District that their football-player son had felt "compelled to participate" in Kennedy's prayers. JA234.

Kennedy initially followed Leavell's instructions. The motivational speech he gave after Bremerton's September 18 game was secular. JA53, 364. Kennedy told a local newspaper that, as was perfectly acceptable under Leavell's guidance, he had returned to pray at midfield after students had left. JA53. Consequently, the coach cancelled a meeting that Leavell had proposed to hold with Kennedy about the latter's concerns, writing: "Not a big deal [to meet] anymore. * * * Proud of BHS!!!!! Go Knights!" JA58. No students visibly prayed with Kennedy at football games over the next month. JA356. From the District's perspective, the matter was resolved.

On Wednesday, October 14, however, Kennedy's posture appeared to shift. Newly hired attorneys wrote to the District, declaring that at the next game Kennedy would "continue his practice of saying a private, post-game prayer at the 50-yard line." JA62-

72. The letter demanded that the District rescind Leavell's September 17 guidance. JA62-72.

As the District knew from Kennedy's past behavior, however, the practice he sought to "continue" was not one of private prayer; indeed, Kennedy had stated that his intention was to continue to pray "audibly" with any student who joined him. JA63, JA70-71. The District therefore reasonably understood from Kennedy's demand that he "had specifically expressed his intention to pray with students on the field." JA354. "At no point" "did Mr. Kennedy or his representatives ever modify" that demand. JA354. In fact, Kennedy later stated that "I wasn't going to stop my prayer because there was kids around me." JA295. Against this background, as Judge Smith noted below, it was a "deceitful narrative" for Kennedy's counsel to represent that their client would be "continu[ing]" past practice by saying a "private" prayer, given that Kennedy had "added an increasingly public and audible element to his prayers over * * * seven years." Pet. App. 41.

The District wrote back to Kennedy, reiterating its desire to find a solution that allowed him to heed his religious conscience, while shielding students from pressure to engage in a prayer that might not correspond to their or their parents' faith. JA76-81. Despite the District's overtures, Kennedy publicly announced he would resume his post-game practices. JA74; see Pet. App. 138.

And he did. Following the final whistle at the October 16 game, Kennedy began to pray at midfield, out loud, "in the midst of" players. JA82, 297; Pet. App. 41. In addition, many adults—including a state representative—rushed out of the stands to join him

in prayer, knocking over members of the school band and cheer team. JA298, 354. Representatives of the news media added to the crowd.

Parents of students who had been knocked to the ground complained. JA181. Bremerton's head coach became concerned that his players, as well as cheerleaders and band members, would be unsafe at future games if Kennedy's behavior drew nonplayers onto Bremerton's field. JA347. The head coach and other staff also stated that they themselves felt "physically threatened" in the wake of the stampede to join Kennedy and in the generally tense atmosphere that had come to surround the school's football program. Pet. App. 3; see JA347. Concerns for student and staff safety forced the District to arrange with the Bremerton Police to keep adults off the field, and to issue several communications indicating that public access to the field would not be allowed. JA181.

(In addition to protecting its students, the district feared that allowing the public to join Christian prayer on the field would require granting similar access to school property for other religious groups. JA101, 180-81. Satanists had notified the District that they intended to conduct ceremonies on the field after games if Kennedy and members of the crowd were allowed to pray at midfield. JA100-101.)

For a third time, Superintendent Leavell wrote Kennedy, asking that he stop praying where he was observable by students and the public while on duty. JA90-95. Leavell again assured Kennedy that his beliefs "can and will be accommodated" and offered to reserve any of several areas, such as "a private location within the school building, athletic facility or

press box" where Kennedy could pray before and after games. JA93-94. Leavell also reiterated that he would be happy for Kennedy to propose other accommodations. JA93-94. And Leavell emphasized that the District "does not prohibit prayer or other religious exercise by employees while on the job," although it was concerned that "a court would almost certainly find" the coach's public, demonstrative prayers "to constitute District endorsement of religion in violation of the United States Constitution." JA91, 93.

In fact, the District believed that "any reasonable observer" would view Bremerton as sanctioning Kennedy's conduct—thus threatening Establishment Clause liability—if he were allowed to pray in the way that he demanded. JA93,106-107. That was so because:

- Kennedy was widely recognized to be on duty until "the last kid leaves" the game. JA92, 276.
- Bremerton students had crowded around Kennedy as he prayed and made his religiously themed motivational speeches. JA126.
- Kennedy's religious conduct happened at the expressive focal-point of the field on which Kennedy was allowed "solely by virtue of [his] employment by the District," and while he was wearing "BHS-logoed attire." JA92.

Kennedy did not respond to Leavell's proposed accommodations. JA306. Nor did he respond to the District's suggestion that he propose his own suitable

accommodations. Instead, the coach informed the media that he planned to continue his public prayers, in the way he always had (*i.e.* "audibly," surrounded by students and possibly community members, to whom his comments would at least partially be directed). See JA106.

After Kennedy prayed at midfield twice more, again joined on the field by unauthorized members of the public, Leavell wrote him a fourth letter about his conduct. JA102-103, 238. Unlike the first three, this communication was disciplinary: Leavell placed Kennedy on paid administrative leave for repeatedly defying District directives. JA103. Even so, however, Leavell declared yet again that "the District remains willing to discuss ways of accommodating your private religious exercise." JA103. Meanwhile, players' parents thanked the District for ending "awkward situations where [members of the team] did not feel comfortable declining to join with the other players in Mr. Kennedy's prayers." JA359.

As he had in prior weeks, however, Kennedy refused to engage with his employer. Instead, he spent his leave on a media circuit, seeming to maintain his demand that the District abandon any oversight of his on-duty religious practices. JA190, 354. Later, Kennedy ignored repeated attempts by the District to schedule an end-of-year evaluation. JA359. When his contract expired, Kennedy did not apply to coach the following season. JA178.

### B. The record demonstrates that the District acted reasonably.

1. Against this background, Kennedy paints a very different picture of his behavior. He insists over and over again, in intemperate terms—

"remarkabl[e]"! "[e]ven more remarkabl[e]"! (Pet. Br. 1)—that he sought to recite a "quiet prayer by himself" (*id.* at i), but was denied "all rights to individual expression on school grounds." *Id.* at 2.

But Kennedy cannot prove his case by yelling loudly and larding his argument with adjectives, and his picture of events is belied in key respects by the record and the findings of both courts below. Those courts determined that there was "no dispute" that Kennedy was on the job when he prayed. Pet. App. 15; see *id.* at 148-49. They also found that Kennedy refused to engage with the District's reasonable accommodations. See *id.* at 10, 139. Absent the most "obvious and exceptional showing of error"—which Kennedy has not even attempted to make—it is this Court's practice to accept as definitive such "concurrent findings of fact by two courts below." *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949); see *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 841 (1996).

And the findings below are confirmed by the record, which demonstrates that, in all material respects, Kennedy acted just like our hypothetical Ms. Chichester:

***Kennedy did not pray privately.*** Kennedy's prayers often were not private or silent; to the contrary, they were audible, demonstrative, and overtly religious. As the photos included in Bremerton's brief illustrate, the prayers came to include dozens of persons, including most members of Bremerton's team, players from other teams, and members of the public. See Resp. Br. 4, 8. This is a far cry from Kennedy offering "a quiet prayer by himself."

***Kennedy's religious display was coercive.*** Kennedy declares that he did not "coerce[]" students to join his prayers, by which he evidently means that he did not expressly instruct or request players to pray. Pet. Br. 5 (internal quotation marks omitted). But his prayer practice surely had a coercive impact on players. He engaged in religious speech on the field, immediately after games, at a time when he was acting in his role as coach; as the district court explained, "[a]ll of the evidence, including Kennedy's own testimony, confirms that his job responsibilities extended at least until the players were released after going to the locker room." Pet. App. 17 (internal quotation marks omitted). Kennedy himself acknowledged that he was on duty post-game "until the last kid leaves" and maybe even an "hour after that." JA276; see also JA287 (Kennedy agreeing that he had "responsibilities for the players" in those situations in which he "had been joined by [his] players and players from the other team and [he was] holding up the helmets.").

Even in the most benign circumstances, religious speech offered by such a figure, on school grounds, in the presence of the entire team, has a powerful impact on students; as the district judge noted when denying Kennedy's request for a preliminary injunction, coaches "can be monumental figures in a kid's life." Pet. App. 286. Kennedy agreed: "for some kids, the coach might even be the most important person they encounter in their overall life." JA323-325.

And here, the impact was not wholly benign. Unavoidably, a student in such circumstances will feel compelled to join in a coach's or other teacher's religious speech so as not to alienate a figure who has

authority over the student's academic or athletic lives, and so as not to stand apart from teammates or classmates. That danger was hardly hypothetical: players and their parents complained to the school (but, revealingly, not directly to Kennedy) that students felt pressured to participate in Kennedy's prayers. It is unlikely to be coincidental that numerous students prayed *with* Kennedy on repeated occasions, but that none felt moved to visibly pray after games when Kennedy did *not* pray in front of them. Pet. App. 157.

***Kennedy's prayers were disruptive.*** Kennedy's religious speech was profoundly disruptive of regular school operations. His practice of praying audibly, at midfield, immediately after games, with the invited participation of the opposing team, ultimately involved dozens of participants, as members of the public rushed onto the field and knocked students to the ground. The on-field assembly took on the character of an uncontrolled political rally; the tumult required the District to add additional security. Indeed, the disruption ultimately forced Bremerton's head football coach to leave his own position, "withdraw[ing] from the program and student-athletes [he] had been devoted to for eleven years," because of the "negative," "unsafe situation" caused by Kennedy's conduct. JA346-347.

The disruption also led Kennedy to abandon his school responsibilities. Although Kennedy had been told, and agreed, that he remained on duty after games, the District received indications that he neglected his job duties to instead attend to the media and public. The head coach, for example, found that "Mr. Kennedy failed to supervise student-athletes af-

ter games due to his interactions with media and community. * * * Prior to his public defiance of district directions, Mr. Kennedy had assisted in student supervision. However, most of the season he did not supervise student-athletes after games." JA114. Kennedy also missed practices for press conferences and media interviews. JA189.

***The District repeatedly sought to accommodate Kennedy's religious beliefs.*** Finally, Kennedy's suggestion that he was denied "all rights to individual expression on school grounds" (Pet. Br. 2) bears no resemblance to the District's actual approach. Bremerton went to extraordinary lengths to accommodate Kennedy's interest in praying on school property and in close proximity to the football field, informing him in at least four separate exchanges that his beliefs "can and will be accommodated"; allowing him to pray on the field after games when students had left; indicating that the school would reserve any of several areas, such as "a private location within the school building, athletic facility or press box" for him to pray before and after games; and inviting him to propose other accommodations that he would find suitable. JA93-94. But Kennedy first rejected and then simply ignored these offers, insisting on "continuing" to do just what he wanted, no matter the adverse effects on coerced students, the school's operations, and the educational environment.

2. That Kennedy's description of the case departs so far from the record strongly suggests his awareness that he cannot prevail if the Court takes account of what actually happened. In such circumstances, *amici* urge the Court to dismiss the petition

as improvidently granted: "'Examination of a case on the merits, on oral argument, may bring into proper focus a consideration which, though present in the record at the time of granting the writ, only later indicates that the grant was improvident.'" Stephen Shapiro, *et al.*, SUPREME COURT PRACTICE 5-51 (11th ed. 2019) (quoting *The Monrosa* v. *Carbon Black, Inc.*, 359 U.S. 180, 184 (1959)). See *id.* at 5-52 – 5-53 (citing cases). That is the circumstance in this case, where, on a review of the record, Kennedy has no plausible challenge to the decision below.

But if the Court instead resolves the case, the nature of Kennedy's demands and the District's proposed accommodations makes the answer easy: as explained by respondent and further addressed below, a public school employee whose religious interests have been substantially protected may not demand free license to disrupt and undermine his workplace.

## II. Religious conduct like Kennedy's undermines public schools' educational mission.

Kennedy pitches his case as one that involves a public employee whose religious rights have been suppressed for no good reason. In fact, Kennedy's circumstances illustrate a very different problem: the enormous practical difficulties faced by school districts whose employees insist on engaging in disruptive, coercive, and situationally inappropriate speech.

All agree—Bremerton certainly did—that school employees have important free-exercise rights, which sometimes permissibly may be exercised inside their classrooms. But school administrators also have a duty to ensure that schools are safe and productive learning environments. Administrators therefore

must have the leeway to impose reasonable limits on employee speech of all kinds, including religious and political speech, that threatens to disrupt learning or subject students to coercive pressure.

Kennedy asks the Court to deny administrators that essential flexibility. He would require school officials to determine that a teacher or coach is acting in a personal capacity—and therefore may engage in visible religious activity—even though that employee is (a) interacting with her students (b) on school grounds (c) during school events (d) in her school uniform (e) immediately adjacent to her official duties. Yet Kennedy offers no practical guide to how administrators should determine whether speech offered in such circumstances *is* personal in nature. As a consequence, his approach would have wide-ranging pernicious effects, as schools' fear of drawing the line in the wrong place—and thus finding themselves mired in costly, time-consuming litigation—would lead officials to err on the side of permitting divisive in-school speech, both religious and political. As Kennedy's own example demonstrates, that approach also would countenance disruptive employee speech that undermines schools' central educational mission and places coercive pressure on students.

### A. School officials have a duty to ensure that schools are safe and productive learning environments.

*Amici* have a particular understanding of the ways in which Kennedy's conduct undermines schools' educational mission: superintendents, principals, and other administrators are responsible for ensuring that schools are safe, orderly, and productive learning environments.

Superintendents are responsible for setting educational goals and ensuring that students meet those goals. Among other things, they oversee all employees of the school district who regularly interact with students. Superintendents and principals typically are responsible for hiring, evaluating, and, when necessary, firing employees.

Though pulled in multiple directions, superintendents and principals have one duty that guides all the others: ensuring maintenance of an environment where children are able to learn and develop into responsible adults. It therefore is paramount that schools be safe, healthy, and productive spaces, free of unnecessary disruptions. "Without first establishing discipline and maintaining order, teachers cannot begin to educate their students." *New Jersey* v. *T. L. O.*, 469 U.S. 325, 350 (1985) (Powell & O'Connor, J.J., concurring).

Maintaining environments conducive to students' development—whether in the chemistry lab, the theater, or the hockey rink—often requires school administrators to make difficult judgments. To do so, administrators rely on years of educational experience, an understanding of their students' needs, and knowledge of the relationships between students, teachers, and coaches.

### B. Superintendents and principals must be able to impose reasonable limits on employees' religious activity.

Against this background, *amici*'s experience teaches that employees' in-school religious activity often threatens to disrupt education and generate conflict, as persons of widely varying religious beliefs operate in the same small space. To protect students,

ensure a productive learning environment, and avoid Establishment Clause liability, administrators therefore must be able to institute reasonable accommodations that safeguard employees' free exercise of religion even as they limit student-facing religious activity.

1. To begin with, the practical problems—of coercion, disruption, hard feelings, and liability—that may be posed by public employees who seek to undertake demonstrative religious activity in schools cannot be overstated. Examples abound.

In one school alone, employees' unlawful religious activity included

> teacher-led after-school student religious meetings with Bible readings and prayer; teachers and other school officials extolling their faith to students during school-sponsored events and in class; teachers assigning religiously oriented school work and encouraging students to attend religious student clubs; a teacher preaching to students before school in the parking lot with the use of a bullhorn; and teachers inviting students to lead prayers before or during sporting events and other school activities.

*Allen* v. *Sch. Bd. for Santa Rosa Cnty., Fla.*, 782 F. Supp. 2d 1304, 1310 & n.6 (N.D. Fla. 2011) (listing conduct that led a Florida school to agree to a consent decree limiting religious activity).

In Colorado, principals and teachers at an elementary school used their school email accounts to solicit funds for a religious mission trip to Guatemala. *Am. Humanist Ass'n, Inc.* v. *Douglas Cnty. Sch.*

*Dist. RE-1*, 328 F. Supp. 3d 1203, 1207-1208, 1209 (D. Colo. 2018), remanded from 859 F.3d 1243 (10th Cir. 2017). They sent students home with flyers in their backpacks asking parents to donate and explaining that the school was partnering with a Christian organization. *Ibid.* A mother of two students successfully objected on Establishment Clause grounds. *Id.* at 1214-1215.

It is often difficult for school administrators to restrict—or even to know about—efforts by teachers to introduce religion into school spaces. For example, over the course of fifteen years, Ohio administrators sought to prevent an eighth-grade science teacher from exposing students to his religious beliefs, even as he tried to elude the schools' restrictions. *Freshwater* v. *Mt. Vernon City Sch. Dist. Bd. of Educ.*, 1 N.E.3d 335, 339 (Ohio 2013), cert. denied, 574 U.S. 816 (2014). First, administrators stopped the teacher from distributing to his students a pamphlet that, citing Genesis, advocated creationism. *Id.* at 340. Later, a parent complained that his son had brought home another handout—authored by a Christian organization advocating intelligent design—that the teacher apparently distributed and unsuccessfully tried to collect before the end of class. *Id.* at 341-342. As parents lodged other complaints, school administrators asked the teacher to remove the Ten Commandments from the classroom window and to move a Bible from his desk, advising him that he was free to take out and read the Bible as he pleased during his lunch hour when students weren't present. *Id.* at 343-344. In defiance of these requests, the teacher put up more public, student-facing religious displays,

arranging copies of the *Oxford Bible* and *Jesus of Nazareth* for view on a lab table. *Id.* at 344.[2]

2. Schools face the constant threat of litigation as they navigate employees' Free Exercise rights, students' rights under both the Establishment and Free Exercise Clauses, and the need to maintain a productive learning environment—all against the background of shifting and uncertain First Amendment doctrine. Schools face lawsuits when parents feel that the curriculum or instruction favors (or disfavors) certain religions[3]; when employees include prayer or religious material in employee meetings[4]; and, in an adjacent context, when students desire to

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[2] After a nearly two-year administrative hearing that produced 6,000 pages of transcript (1 N.E.3d at 350), followed by more than three years of litigation, the Ohio Supreme Court upheld the school's decision to terminate the teacher for insubordination. *Id.* at 355. The court held that the school's order to remove a personal Bible violated the teacher's free-exercise rights (*id.* at 344), but that no such rights were implicated by asking him to remove the student-facing material, which he displayed merely "to make a point once [the] controversy began." *Id.* at 355.

[3] See, *e.g.*, *Cal. Parents for the Equalization of Educ. Materials* v. *Torlakson*, 973 F.3d 1010, 1014 (9th Cir. 2020), cert. denied, 141 S. Ct. 2583 (2021); Kristen Taketa, *California to Remove Mayan Affirmation from Ethnic Studies after Lawsuit Argues It's a Prayer*, L.A. TIMES (Jan. 18, 2022), https://tinyurl.com/ecfkymyu.

[4] See, *e.g.*, *Warnock* v. *Archer*, 380 F.3d 1076, 1079-81 (8th Cir. 2004) (finding an Establishment Clause violation when the school superintendent led prayers at mandatory teacher trainings); *Faulkner* v. *Univ. of Cincinnati*, 173 F. Supp. 3d 575 (S.D. Ohio 2016) (upholding school's decision to prevent an employee from making overt Christian references during off-campus leadership trainings attended by school employees).

communicate religious messages during school events.[5]

Avoiding litigation and legal liability is not administrators' only, or even central, worry when faced with such employee conduct. Rather, employees' in-school religious activity is a particular concern because of its singular potential to disrupt students' learning, subject students to coercion, and provoke division among students, teachers, and parents. As the Court has explained: "Divisiveness * * * can attend any state decision respecting religions * * * [But] [t]he potential for divisiveness is of particular relevance * * * [when] it centers around an overt religious exercise in a secondary school environment where * * * subtle coercive pressures exist." *Lee* v. *Weisman*, 505 U.S. 577, 587-88 (1992)); see *Am. Legion* v. *Am. Humanist Ass'n*, 139 S. Ct. 2067, 2093 (2019) (Kavanaugh, J., concurring) (noting *Lee*'s reliance on the coercive effect of "govern-

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[5] Compare, *e.g.*, *A.M. ex rel. McKay* v. *Taconic Hills Cent. Sch. Dist.*, 510 F. App'x 3, 9 (2d Cir.) (upholding school officials' decision to remove religious language from a student's speech in order to avoid Establishment Clause liability), cert. denied, 571 U.S. 828 (2013), and *Nurre* v. *Whitehead*, 580 F.3d 1087, 1093-99 (9th Cir. 2009) (upholding a high school's decision to reject students' choice to play an instrumental version of "Ave Maria" at graduation), cert. denied, 130 S. Ct. 1927 (2010), with *Am. Humanist Ass'n.* v. *S.C. Dep't of Educ.*, 108 F. Supp. 3d 355, 359 (D.S.C. 2015) (upholding a school policy that allowed a student selected on neutral criteria to voluntarily say a prayer during graduation), vacated in part by *Am. Humanist Ass'n* v. *Greenville Cnty. Sch. Dist.*, 652 F. App'x 224 (4th Cir. 2016). and *Kountze Indep. Sch. Dist.* v. *Matthews ex rel. Matthews*, No. 09-13-00251-CV, 2017 WL 4319908 (Tex. App. Sept. 28, 2017) (upholding cheerleaders' ability to display biblical messages on run-through banners at football games).

ment-sponsored prayer in public schools"). Administrators have an obligation to prevent this sort of disruption and pressure "that materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Mahanoy Area Sch. Dist.* v. *B. L. ex rel. Levy*, 141 S. Ct. 2038, 2045 (2021) (citation omitted).

In particular, preventing coercion is imperative. As this case illustrates, implicit pressure to participate in public religious activity is unavoidable whenever that activity is led or encouraged by an authority figure in a school setting. And that is triply so in the sports context. Social pressure is acute on youth sports teams. See, *e.g.*, *Doe* v. *Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 161-163 (5th Cir. 1993) (twelve-year-old girl participated in coach-led prayers "she was uncomfortable with * * * and opposed to * * * out of a desire not to create dissension," and was heckled by a spectator when she eventually stood by herself while the team prayed). Moreover, as petitioner's *amici* themselves rightly note, coaches hold enormous moral authority over their players. See Bowden *amicus* Br. 2, 16-17. And coaches often wield significant *actual* authority over students whose future prospects—including college admissions and scholarships—requires staying, or starting, on the coach's team.

Yet coercion that results from individual employees' actions rather than a school policy is particularly likely to go unreported. For the same reason that students feel pressured to participate in religious acts against their will or in violation of their conscience, they may be reluctant to report such pressure to parents or administrators. But recent cases

indicate that the coercion felt by Bremerton football players (see pages 8, 12, *supra*) was not an outlier.

For example, in Arizona, three female varsity softball players at a public high school complained that, before each game, a group of players who shared the coach's denomination conducted a prayer in the outfield. *Ryan* v. *Mesa Unified Sch. Dist.*, 195 F. Supp. 3d 1080, 1083 (D. Ariz. 2016). Although the coach denied it, other players who did not share the coach's faith said that the coach encouraged the praying, going so far as to appoint "prayer leaders." *Ibid.* The plaintiff-players claimed that their decision not to participate in the prayer, and eventually to put an end to the prayer once they were leaders on the team, was one of the reasons the coach removed them from the team. *Id.* at 1089-92.

School officials must have the tools to address coach or teacher conduct that has such destructive effects. School administrators are particularly well-suited to engage in the "delicate and fact-sensitive" inquiry necessary to judge whether students might be at risk of coercion because of their coach's actions. *Cf. Lee* v. *Weisman*, 505 U.S. at 597.

### C. A rule permitting conduct like Kennedy's would be impossible to administer and would remake the nation's classrooms.

Experience therefore shows that conduct of the sort engaged in by Kennedy poses conflicting interests; it implicates the employee's religious rights, but also may—and, in this case, did—harm students and disrupt the educational environment. Faced with this conflict and obligated to protect student safety, it is imperative that school administrators be given the

leeway to make reasonable judgments about how best to accommodate these concerns—that is, to determine when a coach or teacher is speaking in their capacity as school employee and when particular types of conduct or speech are intolerably disruptive. But Kennedy takes the opposite tack: he proposes a novel, impossible-to-administer rule that allows administrators no breathing room.

To appreciate the rule that Kennedy asks this Court to adopt, it is important to recall what he actually *did*. He did not always pray silently or in private. Instead, he visibly and audibly recited prayers, on school grounds, surrounded by his team, in a manner that was coercive and disruptive. He refused the accommodations offered by the District, which would have permitted him to pray silently in place; or to pray audibly on the field after he no longer had supervisory responsibilities; or to pray in a private space elsewhere on school grounds.

Kennedy argues that he had an absolute right to engage in his preferred behavior because—even though he was on school grounds, only moments after the last whistle, in his school uniform, holding a team helmet, and interacting with his still-uniformed players—he was somehow acting in his personal capacity. It evidently is Kennedy's submission that this was so because, while praying, he was not calling plays, which is practically all that a school football coach does while on duty. See Pet. Br. 26-27.

But to say this test suffers from a fatal line-drawing problem understates its flaws significantly. There are any number of scenarios where, in Kennedy's view, it would be impossible to determine

(1) when, much less why, a school employee suddenly sheds her official capacity while interacting with students, or (2) what activity would be permissible in those moments:

- Imagine that the Arizona softball team, see page 25, *supra*, is traveling for an away game. The coach surely is entitled to pray privately in his hotel room. But could the coach claim that, notwithstanding his responsibility to oversee his students while on the road, in the evenings he takes off his coach's hat and can thus hold prayer sessions with his players in the hotel lobby? If non-participating students again complained of coercion and retaliation, could the school lawfully stop him?
- Consider the eighth-grade Ohio science teacher. See pages 21-22, *supra*. The school permitted him to read his Bible privately during his lunch hour. Under Kennedy's proposed rule, could a teacher also demand the right to read audibly from the Bible in the school cafeteria during lunch? Could he read responsively with students? Could students join a Muslim history teacher for daily prayer at midday in the history classroom?
- Recall the Colorado teachers who solicited funds for a Christian mission trip. See page 20-21, *supra*. Under the Kennedy rule, could these teachers conduct fundraising in class if they used personal email accounts and printed the flyers on their home printers? If students reported feeling pressured to participate—and thus to

promote a religion to which they did not subscribe—could the school stop the teachers' activity?

- And again consider Ms. Chichester, and her impact on students who object to being in a class with a teacher that prays. Would such students have to—indeed, would they have a First Amendment right to—switch classes? Would the school have to accommodate a requested change, so that Ms. Chichester's favored religious practices dictate student assignments? What if Ms. Chichester teaches the school's only AP Chemistry class, so there is no equivalent alternative teacher? Once reasonable accommodations like Bremerton's are rejected, there are no obvious answers to these questions.

These examples only begin to show the impossibility of translating Kennedy's defense into workable policy.

It may be that not all of these cases must, or should, come out the same way. But the proper treatment in any case, and the one that best reconciles the competing interests, must take account of the details of the employee's duties and assignments; the nature of the employee's specific interactions with students and other school personnel; and the likely effect of the employee's speech on students and the learning environment. Divining the appropriate result will call upon the expertise and experience of the on-the-spot administrators. And the complexity of these interactions—plainly visible in this case—means that the governing rules must allow for some

"'play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels." *Espinoza* v. *Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2254 (2020) (citation omitted). In particular, as Judge Newman wrote for the Second Circuit, a school district "must be accorded some breathing space to regulate in this difficult context." *Marchi* v. *Bd. of Coop. Educ. Servs. of Albany*, 173 F.3d 469, 476 (2d Cir. 1999). Kennedy would deny school districts that necessary room.

## III. Kennedy's First Amendment claims fail.

Viewed under the proper standard, Kennedy's claim must fail. He sought to pray while he was a school employee who was exercising his duties as a coach. The District offered him accommodations that were more than reasonable. And his conduct impeded both the performance of his duties and the regular operations of his school.

At the outset, as the District explains, Kennedy spoke as an on-duty public employee, with the consequence that his speech—whether religious, political, or of any other character—could be limited, restricted, or altogether prohibited by his employer. Resp. Br. 21-27; see *Garcetti* v. *Ceballos*, 547 U.S. 410, 421 (2006). Kennedy himself acknowledged that he was on duty until "the last kid leaves" the game and maybe even "an hour after that" (JA276), which means that he was involving students in prayer while he was supervising them and exercising his authority as coach. Both courts below therefore concluded that Kennedy was acting in his official capacity as a coach while involving the team in prayer. Such speech, "at the center of the field, under bright lights, in front of the bleachers, at a time when the

general public could not access the field," is "uniquely tied to the job" and "owes its existence to [Kennedy's] coaching position." Pet. App. 151-51 (quoting *Ceballos*, 547 U.S. at 421).

But even if that is not so and Kennedy's speech is thought to have had a measure of constitutional protection, the District's interest in imposing reasonable limits on that speech must prevail. It is settled that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering* v. *Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968). Although the Court developed this doctrine in cases involving public employees who seek to "speak as a citizen addressing matters of public concern" (*Garcetti*, 547 U.S. at 417), the same considerations govern employees who engage in religious rather than political speech. See *e.g., Borden* v. *Sch. Dist. of Twp. of E. Brunswick,* 523 F.3d 153, 159 (3d Cir. 2008); *Lee* v. *York City School Div.*, 484 F.3d 687, 694-97 (4th Cir. 2007); *Knight* v. *Connecticut Dep't of Pub. Health*, 275 F.3d 156, 163-65 (2d Cir. 2001).

In such circumstances, a government employer must be able to exercise "a significant degree of control over their employees' words and actions" so that it can provide "efficient provisions of services." *Garcetti*, 547 U.S. at 418. And in this case, the District's interest in imposing reasonable limits on Kennedy's speech and conduct is inarguable. As described above, his public prayers disrupted a school event, led to chaos on the football field, created a coercive environment for the team, and distracted him from

his post-game responsibilities; it "impeded the * * * proper performance of his daily duties" and generally "interfered with the regular operation of the school[]." *Pickering*, 391 U.S. at 572-733.

And Bremerton had good reason to fear that Kennedy's conduct would expose it to liability under the Establishment Clause, a concern for all school districts whose employees engage in public religious speech. As the Court has held, government-sponsored prayers in schools are unconstitutional. *Engel* v. *Vitale*, 370 U.S. 421 (1962); *Abington Twp. Sch. Dist.* v. *Schempp*, 374 U.S. 203 (1963). That prohibition extends to prayers at graduation ceremonies (*Lee* v. *Weisman*, 505 U.S. 577 (1992)), and football games. *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290 (2000). Lower courts, applying this doctrine, have consistently held that a school practice of allowing coaches to initiate prayers before or after games risks violating the Establishment Clause. See *Borden,* 523 F.3d at 160, 175-76; *Doe* v. *Duncanville Independent School District*, 70 F.3d 402, 404 (5th Cir. 1995).

To be sure, the Court's Establishment Clause doctrine is unsettled. See, *e.g.*, *Am. Legion* v. *Am. Humanist Ass'n*, 139 S. Ct. at 2080. But that uncertainty is reason to give districts *more* breathing room in devising reasonable accommodations that balance the mandates of the Establishment and Free Exercise Clauses. After all, "the interest of the State in avoiding an Establishment Clause violation may be a compelling one." *Lamb's Chapel* v. *Ctr. Moriches Union Free Sch. Dist.,* 508 U.S. 384, 394 (1993) (alteration and internal quotation marks omitted). Yet "[t]he decisions governmental agencies make in de-

termining when they are at risk of Establishment Clause violations are difficult, and, in dealing with their employees, they cannot be expected to resolve so precisely the inevitable tensions between the Establishment Clause and the Free Exercise Clause." *Marchi*, 173 F.3d at 476. Here, the District's proposed accommodations were reasonable; Kennedy's intransigence was not.

## CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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[6] The representation of *amici* by a Clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.