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

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

REPLY BRIEF

When Coach Kennedy knelt after football games to say a brief, quiet prayer, he engaged in his own private religious speech, not government speech. His personal religious exercise was doubly protected under the Free Speech Clause *and* the Free Exercise Clause. Yet the district prohibited that expression solely because it was religious, out of fear that tolerating it would violate the Establishment Clause. The Ninth Circuit endorsed that suppression on the grounds that Kennedy's speech on school grounds while on duty was government speech and that allowing it would violate the Establishment Clause even if it were private speech.

The district largely abandons the Ninth Circuit's reasoning. It spends just six pages defending the court's government-speech holding, and it does so largely by recharacterizing the record and trying to make this case about since-abandoned coach-led practices, rather than individual prayers with students free to join or not because this "is a free country." JA169. The district spends even less time defending the Ninth Circuit's view that allowing *private* religious speech by teachers and coaches raises Establishment Clause problems that justify its suppression, preferring instead to invite this Court to balance away textual protections for free speech and free exercise under *Pickering v. Board of Education*, 391 U.S. 563 (1968). But *Pickering* and its balancing test have never been applied when the government suppresses private religious speech *because* it is religious, out of Establishment Clause concerns. In that context, this Court has repeatedly instructed that

Establishment Clause fears are fundamentally misplaced because the government does not endorse everything it fails to censor.

While the district can be forgiven for not defending the bulk of the Ninth Circuit's reasoning, there is no excuse for ignoring this Court's precedents and their clear teaching. Declining to cite cases like *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), and *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), does not make them any less relevant. Those cases provide a clear answer—far clearer than any balancing test—in cases like this. When it comes to private religious speech, whether by students, teachers, or coaches, the government does not endorse what it merely allows on school grounds. Everyone in Bremerton knew that Coach Kennedy was kneeling and praying personally, not on behalf of the government. But to the extent spectators misperceive endorsement because the person praying is a coach or sports the team logo, the answer here, as in other First Amendment contexts, is more speech, not suppression. The distinction between private speech the government allows and public speech it endorses is critical to our constitutional protections and simple enough for students to understand. It should be simple enough for spectators and school administrators to comprehend as well. The specter of phantom Establishment Clause liability is no excuse for denying this Court's promise that teachers and coaches, no less than students, do not "shed their constitutional rights … at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

ARGUMENT

I. The Free Speech And Free Exercise Clauses Doubly Protect Kennedy's Religious Exercise.

Coach Kennedy's brief, personal prayers after Bremerton High School (BHS) football games were private expression that enjoyed double protection under the Free Speech and Free Exercise Clauses, not government speech. Speech by a government employee is government speech only when it is made "pursuant to [the employee's] official duties." *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). Kennedy was not suspended for injecting prayer into practices, mid-game huddles, or post-game debriefings (or for allowing a state legislator onto the field). He was suspended for kneeling to say a prayer after games had concluded, when both students and coaches were free to engage in other private expression. That personal religious exercise, undertaken at home and away games alike, and at both varsity and junior-varsity games, was not part of his official duties as a BHS football coach. *See* Pet'r.Br.23-35.

The district spends just six pages on the government-speech issue, and it dedicates most of its effort to trying to rewrite the record, rather than defending the Ninth Circuit's sweeping reasoning that would claim virtually all teacher and coach speech as the district's. By the district's telling, "the speech at issue" here is not Kennedy's brief, personal prayers after games, but a "multi-year history … of praying with students" that Kennedy purportedly "demand[ed] to 'continue.'" Resp.Br.18, 22. But while Kennedy certainly engaged in some government speech over the years, the relevant speech here is the

expression that subjected him to discipline. *Garcetti*, 547 U.S. at 421; *see also Lane v. Franks*, 573 U.S. 228, 238 (2014). And the district ultimately concedes that "it did not discipline" Kennedy for his "postgame speeches" that "included explicitly religious content" or "le[ading] students in prayer." Resp.Br.41. Nor could it have, for he abandoned those practices once asked, as the district repeatedly acknowledged contemporaneously. *See, e.g.*, JA105-06 ("Mr. Kennedy has complied with … directives" that "prohibited [him] from repeating his prior practices of leading players in a pre-game prayer in the locker room or leading players in a post-game prayer immediately following games[.]"); JA88 (issue "shifted from leading prayer with student athletes, to a coaches [sic] right to conduct a personal, private prayer.....on the 50 yard line" (ellipsis in original)).[1]

Instead, as the district explained in its October 28 disciplinary letter, it suspended Kennedy because he "kneeled on the field and prayed immediately following the varsity football game" on October 23, and "kneeled on the field and prayed immediately following" the October 26 junior-varsity game "while [his] players were still engaging in post-game traditions." JA102-03. It was Kennedy's "conduct on both occasions," not any of his discontinued pre-September-17 practices involving leading players in

[1] The district implies that Kennedy's opening brief omitted something critical from this last source, an e-mail from the district superintendent to a state official, but the only thing "ellipsised" out of the JA cite was an ellipsis. *See* JA88. Exactly how substituting a bracket for five dots obscured "the difference between what Kennedy was doing and how his lawyers described it," Resp.Br.23 n.1, remains a mystery.

prayer, that the district concluded "necessitate[d]" his suspension. JA103. The district tries to conflate the two, insisting (*ad nauseam*) that Kennedy "demand[ed] … to continue his past prayer practice with students." Resp.Br.11. But all Kennedy wanted to "continue" and all that he was disciplined for was his own brief religious exercise, with students free to join or not because, as he told them: "This is a free country." JA169.

That is clear from the district's disciplinary letter, JA102-03, which says not a word about "delivering" prayers to students, "inviting" students to pray with him, or even praying "with students." That is because none of those things happened on either of the occasions that prompted his suspension. In fact, "no one joined" Kennedy when he knelt to pray after the October 23 away game, Pet.App.22, JA96, and only a handful of people—none of them players—joined him on October 26, JA314-15; JA354-56. While players "from the *opposing* team" and some members of the public joined Kennedy when he knelt to pray on October 16, Pet.App.8-9 (emphasis added), the suspension letter concerned later games, and the district's letter addressing the October 16 game raises no concern about who joined Kennedy on the field. JA90-95.[2] Instead, as the suspension letter makes clear, the district's real-time concern was neither abandoned past practices nor who joined Kennedy, but

[2] While the district claims that Kennedy "invited others" to "pray[] with" him after the October 26 game, Resp.Br.25, that claim is refuted by the very portion of the record it cites, *see* JA314 ("Q. And did you invite them to come onto the field and pray with you? A. No, I did not.").

that Kennedy "engag[ed] in overt, public and demonstrative religious conduct while still on duty as an assistant coach." JA102. Despite the district's effort to conjure up factual disputes at every turn, the suspension letter (like the record more generally) speaks for itself.

The district seizes on the word "continue" in Kennedy's October 14 letter to the district as suggesting a "demand" to return to since-abandoned practices. Once again, the letter speaks for itself. All Kennedy sought was to "continue his post-game personal prayer" practice, "whereby at the conclusion of each football game, he walks to the 50-yard line and prays." JA62, 64. To be sure, Kennedy also asked the district to rescind its unconstitutional directive that he "flee from students if they voluntarily choose to come to a place where he is privately praying." JA70. But that is both consistent with the students' own constitutional rights and orders of magnitude different from demanding to revive his "past" practice of "deliver[ing] prayers to students" as part of post-game motivational talks. Resp.Br.3.

The district's felt need to make this case about anything other than the conduct for which it actually suspended Kennedy is understandable. Unless *Tinker* and its promise that teachers do not shed their constitutional rights on school grounds are to be jettisoned, then a private, personal prayer is about the last thing that can be commandeered as government speech. Kennedy plainly was not performing any "official duty" when he knelt after games to say a quiet prayer once students were leaving the field to engage in other activities. The district emphasizes that "post-

game activities" are part of a coach's duties. Resp.Br.23-24. But Kennedy was not fired for neglect of his actual post-game duties, and he sought to kneel to pray at a time when the district concedes that he was free to greet his wife or call to make a dinner reservation even though he remained on school grounds and was still in some sense "on duty." JA205. Just as a teacher in the lunchroom may engage in a private conversation or a private prayer while still "on duty" enough to stop a food fight, a coach who has discharged his immediate post-game responsibilities is free to call home or take a knee despite being "on duty" and responsible for maintaining on-field decorum and respect for the opposing team.

The district follows the Ninth Circuit's lead in arguing that Kennedy "was hired and 'entrusted' to be a 'mentor and role model for the student athletes'" and "was, in his official capacity, 'constantly being observed by others.'" Resp.Br.23-24. But that is precisely the overbroad reasoning that four Justices criticized as inconsistent with both this Court's precedents and any meaningful First Amendment rights of teachers and coaches. Pet.App.211 (Alito, J.). This Court has already "reject[ed] … the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions." *Garcetti*, 547 U.S. at 424. While schools certainly have ample latitude to ensure that teachers and coaches serve as good role models by, for example, refraining from profanity or derogatory comments, the notion that the only good role model is one who "refrain[s] from any manifestation of religious faith" is antithetical to our constitutional values and textual guarantees. Pet.App.212 (Alito, J.).

Indeed, even the district appears to agree (at least absent unidentified "extraordinary circumstances") that it cannot prohibit teachers from engaging in *any* overtly religious expression while "on duty" that may be "observed by" students. *See* Resp.Br.24. The district instead tries to distinguish Kennedy's actions from what it views as permissible religious exercise by labeling them "instructional." Resp.Br.26. But that is just another effort to fight the record. Kennedy's discontinued motivational speeches could fairly be labeled "instructional," but his taking a knee at mid-field was no more "instructional" than a teacher crossing herself in the lunchroom or a student athlete crossing herself before a free throw or performing a brief sujud after a goal. It may instruct others that the teacher or student has religious beliefs (and may even embolden a student to express her own beliefs). But in a Nation founded on principles of religious liberty and toleration, that is no basis for the government to claim that private religious speech as its own or to suppress it.

The district only confuses matters by suggesting that Kennedy was praying as a coach or school official. A teacher who crosses herself is still a teacher, yet she is simultaneously an individual who did not shed her First Amendment rights at the schoolhouse gates, but rather remains free to engage in private expression, both religious and non-religious, that is not "pursuant to [her] official duties." *Garcetti*, 547 U.S. at 421. The district's approach would give teachers and coaches less protection than other public employees when *Garcetti* itself suggested that, if anything, academic-freedom principles might give teachers more. *Id.* at 425.

Ultimately, the district's argument is less that Kennedy's speech actually *was* "pursuant to [his] official duties," *id.* at 421, and more that some may have *mistaken* it for the district's speech, because of his position or on-field location. But that claim proves too much, as some may feel that teachers and coaches always represent the school or that the government owns all the speech of anyone who draws a government salary. Those misperceptions are incompatible with this Court's precedents, and the district is not entitled to suppress speech based on misperceptions. Instead, the government's remedy is more speech, explaining that coaches and teachers, no less than students, remain free to speak and pray as individuals on both sides of the schoolhouse gates.

II. The Establishment Clause Does Not Compel Public Schools To Purge From Public View All Religious Exercise Of Coaches And Teachers.

The Ninth Circuit's alternative holding—that the school could suppress Kennedy's *private* religious speech to avoid running afoul of the Establishment Clause—is even less defensible, and the district barely even tries to defend it. Instead, the district dedicates the bulk of its brief to arguing that government efforts to suppress the private religious speech of government employees are subject to *Pickering* and its balancing test. The district goes so far as to criticize Kennedy for failing to address *Pickering* balancing. But the same criticism could be leveled at the district court and Ninth Circuit. In reality, neither court addressed the *Pickering* balancing test for a compelling reason: *Pickering* has no application when the government

restricts employee speech "solely because of its religious character"; rather such government actions "trigger[] the most exacting scrutiny" twice over. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012, 2021 (2017); *see also, e.g.*, *Good News Club*, 533 U.S. at 107-12. The district cannot come close to satisfying that demanding scrutiny because it failed to heed this Court's repeated teachings that the government does not endorse private speech it fails to censor and that allowing such private speech does not create any serious Establishment Clause problem that would justify its suppression.

1. It is no accident that none of this Court's cases applying *Pickering* involved avowed government efforts to prohibit employee speech *because* it was religious. When the government prohibits employee speech precisely because it is religious and thus might give rise to perceived Establishment Clause violations (or Establishment Clause litigation), *Pickering* and its balancing test have no role to play. Instead, the numerous cases that Kennedy cited, and that the district studiously avoids discussing, provide the central lesson and reaffirm the "critical difference 'between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.'" *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 841 (1995) (quoting *Bd. of Educ. of Westside Cmty. Sch. v. Mergens ex rel. Mergens*, 496 U.S. 226, 250 (1990) (plurality op.)).

The district suggests that its real reasons for suppressing Kennedy's prayer went beyond Establishment Clause worries, to concerns about

safety or maintaining a non-public forum. But the district is once again fighting the record. As much as the district may now wish it were otherwise, it did not prohibit Kennedy's religious expression in a neutral effort "to prevent disruption and maintain control over school events." Resp.Br.29. As both courts below concluded, the district prohibited his expression "sole[ly]" because it was religious. Pet.App.2, 32, 140. Once again, the record is clear. The district court found that the district *admitted* (at least twice) that "the risk of constitutional liability associated with Kennedy's religious conduct"—*viz.*, "avoiding an Establishment Clause violation"—"was the 'sole reason' the District ultimately suspended him." Pet.App.140 (citing JA220-21 & JA138). The Ninth Circuit likewise observed that the district "concede[d]" that it "purport[ed] to restrict Kennedy's religious conduct *because* the conduct is religious." Pet.App.23; *see also* Pet.App.2 ("seeking to avoid an Establishment Clause claim was the 'sole reason' [the district] limited Kennedy's public actions as it did").[3]

The district tries to add "context" to those concessions, Resp.Br.29 n.2, but fact findings are fact findings, and the district's earlier words speak for themselves. The district expressly informed the EEOC that its actions were "driven solely" by "Establishment Clause Concerns," JA138, and Leavell confirmed as much in his deposition, JA220-21. The district's disciplinary letter, JA102-03, says nothing about disruption, safety concerns, or any policy

[3] Those sole-reason findings defeat the district's suggestion that the Court remand "for full consideration of" its post-hoc rationalizations. Resp.Br.43-44 n.4.

neutrally prohibiting "noninstructional demonstrative speech on the 50-yard-line" after games. Resp.Br.28. It instead explains that Kennedy was suspended because he "violated" the district's "directives by engaging in overt, public and demonstrative *religious* conduct while still on duty as an assistant coach." JA102 (emphasis added).

The problems with the district's newfound safety concerns do not end there. First, any safety problems were generated by the district's suppression of Kennedy's religious exercise, not by the prayers themselves. After all, another aspect of the record that is incontestable is that Kennedy engaged in varying religious expressions for nearly seven years without incident before the matter was brought to the district's attention by a favorable comment from an opposing coach. Safety problems arose only after the district acted to suppress Kennedy's private prayers, which prompted members of the public to rally in solidarity with Kennedy.

Second, even after its overreaction created difficulties, the district proved adept at maintaining order. While the district makes much of the events following the October 16 game, when several spectators rushed onto the field to join Kennedy, it neglects to mention that it was able to prevent a repeat of those events by widely circulating the message that the public could not access the field. *See, e.g.*, Pet.App.138. Presumably owing in part to those less restrictive measures, only a handful of people joined Kennedy on October 26. JA314-15; JA354-56. And "no one joined" Kennedy when he knelt to pray at the October 23 *away* game, Pet.App.22, which

underscores that the district's overreaction (which was not replicated by the rival/host) was the root of the problem. Moreover, even the district's October 23 letter to Kennedy addressing the October 16 game says nothing about disruption or safety concerns. JA90-95. Instead, the district expressed only the concern that "a court would almost certainly find your conduct on October 16 … to constitute District endorsement of religion." JA93.

The courts below therefore managed to get at least one thing right: *Pickering* is of no help to the district here, as the district's actions had nothing to do with "promoting the efficiency of the public services it performs through its employees," *Pickering*, 391 U.S. at 568, and everything to do with trying to avoid what the district perceived to be an Establishment Clause violation. And when the government targets private religious speech *because* it is religious, *Pickering* may not be deployed to balance away free speech, let alone free *exercise*, rights.

Finally, it bears emphasis that even if *Pickering*'s balancing test applied, it would hardly serve the district's purported interest in giving clear direction to school districts facing difficult questions. Balancing tests by their nature are designed to provide discretion to judges, not clear rules for those subjected to them. *See* Antonin Scalia, *The Rule of Law As A Law of Rules*, 56 U. Chi. L. Rev. 1175, 1186 (1989) ("when balancing is the mode of analysis, not much general guidance may be drawn from the opinion"). If the district is looking for clear guidance, it can find it in this Court's repeated admonitions that there is a "critical difference" between government speech and

private speech, and the government need not fear Establishment Clause liability for private speech "it fail[s] to censor." *Mergens*, 496 U.S. at 250; *see also Widmar v. Vincent*, 454 U.S. 263, 270-75 (1981)*; Lamb's Chapel*, 508 U.S. at 394-96*; Rosenberger*, 515 U.S. at 838-46; *Good News Club*, 533 U.S. at 113-19.[4]

2. The district essentially ignores that wall of precedent. In fact, it does not even acknowledge *Good News Club* and *Lamb's Chapel*, and it invokes *Rosenberger* only once, for the undisputed proposition that the government may control its own speech, Resp.Br.21. But ignoring this Court's cases neither makes them go away nor changes the fact that they are irreconcilable with the district's actions and the Ninth Circuit's decision approving them.

The district cannot bring itself to defend the Ninth Circuit's alternative holding that permitting Kennedy's prayer would have *violated* the Establishment Clause. The most it claims is that permitting it would have raised serious endorsement concerns or the prospect of litigation asserting Establishment Clause violations. But that plainly does not suffice. This Court has expressly reserved the question whether avoiding an *actual* "Establishment Clause violation would justify viewpoint

[4] The district cannot escape strict scrutiny by claiming that its actions were "driven not by animus" toward religion. Resp.Br.48. While the government's motivations may come into play in *applying* strict scrutiny, they cannot justify evading that scrutiny altogether. Moreover, the very statements the district cites to show an absence of animus demonstrate only the absence of any religion-neutral motivation. *See* Resp.Br.29.n.2 ("I was motivated only by the need to comply with the District's constitutional obligations") (quoting JA349-50)).

discrimination." *Good News Club*, 533 U.S. at 113. At the same time, it has repeatedly held that *unfounded* Establishment Clause concerns are not a permissible (let alone compelling) reason for restricting religious expression. *See, e.g.*, *id.*; *Rosenberger*, 515 U.S. at 845; *Lamb's Chapel*, 508 U.S. at 395. And if the mere threat of facing meritless Establishment Clause litigation justified suppressing private religious speech, then all of this Court's cases—from *Widmar* to *Good News Club* and everything in between—would have come out the other way.

The district eschews this Court's cases in favor of its own conception of "the religious-liberty interests of the players, and the community." Resp.Br.34. But this Court has never accepted the remarkable proposition that the Constitution compels public schools to ensure that students (let alone adult spectators) have zero exposure to religion or overtly religious people outside the confines of their "families … and houses of worship." Resp.Br.34; *see* 27 States Amicus.Br.16. Exposure to a variety of private religious speech is a necessary corollary to our national commitment to religious toleration and religious liberty. And this Court's cases—the same cases the district ignores—repeatedly make clear that schools do not impermissibly endorse such private religious speech simply by allowing students to hear it.

That proposition is not confined, as the district would have it, to "*student* speech in a public forum." Resp.Br.39. To the contrary, the principle that "[*n*]*either* students [*n*]*or* teachers shed their constitutional rights to freedom of speech or

expression at the schoolhouse gate," *Tinker*, 393 U.S. at 506 (emphases added), necessarily presumes that students are capable of understanding that teachers have First Amendment rights too. Vague concerns about preserving religious liberty by keeping schools a religion-free zone and ensuring an absence of discernibly religious role models are no match for those First Amendment rights.

Moreover, a reasonable observer is one familiar with both the relevant facts and this Court's precedents. Accordingly, as Judge Ikuta underscored, Pet.App.108, there is zero threat of endorsement here, especially in light of Coach Kennedy's well-publicized "pugilistic" efforts to preserve his individual right to engage in private prayers. But even assuming there were some legitimate fear of a mistaken perception of endorsement, the district could have readily dispelled it through the manifestly less restrictive means of clarifying that it was *not* endorsing Kennedy's speech, but rather was merely respecting his right to engage in private religious exercise. After all, the district was not shy about communicating its (incorrect) claim that it had to *prohibit* Kennedy's prayer to comply with the Establishment Clause. *See* JA104-11. The district does not explain why students and parents could be trusted with that mistaken message, but could not have grasped a correct statement explaining that the Constitution and this Court's cases actually require it to *permit* his private religious exercise. Indeed, "[i]f pupils do not comprehend so simple a lesson, then one wonders whether the … schools can teach anything at all." *Hedges v. Wauconda Comm. Sch. Dist.*, 9 F.3d 1295, 1300 (7th Cir. 1993).

The district complains that a disclaimer "would have signaled that the District permits anyone to use the field to speak on whatever they wish, no matter how much the District disagrees with the message." Resp.Br.42; *accord* Resp.Br.32. That reflects a fundamental misunderstanding of this Court's precedents. Allowing a teacher to cross herself before a meal or a coach to take a knee in prayer does not necessitate opening up either the school lunchroom or the football field as a public forum. The reason teachers and coaches have First Amendment rights on the schoolhouse side of the gates is not because *Tinker* converts schools into public forums open to the local Satanists during lunchtime or gametime. Teachers and coaches have First Amendment rights even on school premises that they can access only because of their public employment because the government does not own everything they say while "on duty." Thus, to whatever extent the district suppressed Kennedy's private religious expression out of a perceived need to restrict access to the playing field or other school facilities, that concern was misplaced. Clarifying that schools face no prospect of losing the ability to control access to school grounds by allowing teachers and coaches an outlet for private religious expression will do far more to provide clarity to school districts than subjecting their actions to a balancing test.

3. In apparent recognition that this Court's precedents render its endorsement concerns illusory, the district attempts to shift gears and claim that its speech suppression "protected students against the pressure" to join Kennedy in prayer. Resp.Br.43. There are multiple problems with this anti-coercion rationale, starting with the fact that it is not what the

district told Kennedy or anyone else contemporaneously. When the district disciplined Kennedy, it did not invoke any concerns that he had coerced anyone or even rest on generic Establishment Clause concerns. Instead, it specified that its concern was with endorsement. Once again, the record speaks for itself. Kennedy was disciplined for violating "the directives set forth in [Leavell's] October 23 letter." JA103. That letter, in turn, emphasized that school staff may not "*engage in action that is likely to be perceived as endorsing (or opposing) religion*." JA91. It did not identify any concern that Kennedy's "fleeting" religious exercise coerced anyone. The concern it identified was that it occurred "on the field, under the game lights, in BHS-logoed attire, in front of an audience of event attendees," JA92—circumstances that the district believed "would almost certainly" lead a court to find "District endorsement of religion." JA93.

The explanation for the exclusive focus on endorsement and the lack of any contemporarily expressed coercion concerns is straightforward. There is zero evidence that Kennedy ever even *asked* any player to join him in prayer, let alone threatened to withhold playing time should someone choose not to do so. To the contrary, the district itself publicly acknowledged that "[t]here is indeed no evidence that students have been directly coerced to pray with Kennedy." JA105; *see also, e.g.*, JA170 (Kennedy "never coerced, required, or asked any student to pray"). For the Bremerton players, it was, in fact, "a free country."

What the district is complaining about, then, is not actual coercion, but at most "the compulsion of ideas," which the First Amendment protects. *Good News Club*, 533 U.S. at 121 (Scalia, J., concurring). The Establishment Clause requires much more than "discomfort-as-coercion." *See* U.S. Conf. of Catholic Bishops Amicus.Br.8-12. Any self-induced pressure students may feel to emulate those whom they admire—whether teachers, coaches, fellow students, or anyone else—is "one of the attendant consequences of a freedom of association that is constitutionally protected." *Good News Club*, 533 U.S. at 121 (Scalia J., concurring); *see* Kirk Cousins Amicus.Br.23. Such concerns are hardly limited to religious expression; they are inherent in permitting *any* private expression by teachers, coaches, or students. A teacher or coach who expresses his allegiance to a favorite team by wearing a team jersey risks the possibility that students will follow suit in an effort to curry favor. A teacher who punishes students for not falling into line—either by failing to cross themselves or by sporting a non-confirming jersey—engages in serious misconduct worthy of swift discipline. But a prophylactic rule against any private expression by teachers and coaches for fear that one of them might cross that line is antithetical to our constitutional traditions. When it comes to concerns with actual coercion, and not the mere compulsion of ideas, punishing any true coercion that actually materializes is the obvious less restrictive alternative to suppressing private speech. *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002) ("The Government may not suppress lawful speech as the means to suppress unlawful speech.").

Moreover, the district's post-hoc efforts to generate concerns of peer pressure from Kennedy's private prayers are wildly overstated. The district invokes vague testimony that, after Kennedy had been suspended, some parents told Leavell (or unidentified "other District employees") that their sons had "participated in the team prayers only because they did not wish to separate themselves from the team." JA356. But those concerns presumably arose from Kennedy's abandoned practices of using prayer in pre- and post-game team talks, where a player would have to separate from the team to avoid the talk. There is no evidence that the whole team, or even the bulk of it, participated in Kennedy's private prayer after the October games for which he was actually disciplined. The players who joined Kennedy on October 16 were "from the opposing team," Pet.App.8, and thus could not have "reasonably fear[ed]" that he would decrease their "playing time" or destroy their "opportunities" for "higher education" "if they [did not] participate," Resp.Br.43. As for the other two games, "no one joined him" on October 23, Pet.App.22, and only a few members of the public joined him on October 26, JA314-15.

For the same reason, the district's vivid image of players being forced to "stand up, turn their backs on the team, literally and figuratively, and walk away," Resp.Br.35, blinks reality. Because Kennedy waited until players had left the area and were singing the fight song before he knelt to pray, players actually would have had to turn their backs *on the team* to return to the 50-yard-line and kneel alongside him—which no BHS player appears to have done.

Finally, the district suggests that the failure of students to engage in any personal religious observances after Kennedy was fired suggests that that coercion must explain their past participation. In reality, the likelier explanation for that absence of First Amendment activity is the profound chilling effect produced by Coach Kennedy's removal. Having seen their coach lose his job because of his religious expression, students could hardly be blamed for limiting their religious expression to their homes and "houses of worship," as the district evidently prefers. Resp.Br.34.

4. Unable to explain why the manifestly less restrictive means of appropriately educating students and spectators about the critical difference between government speech endorsing religion and private religious exercise, the district tries to shift the burden, faulting Kennedy for declining various "accommodations." *See* Resp.Br.50. But much as the district tries to portray Kennedy as the obstinate one, it was the district that took the hard line that it would consider only "accommodations" that forced Kennedy to shutter his faith behind closed doors. *See, e.g.*, JA94 ("It is common for schools to provide an employee whose faith requires a particular form of exercise with a private location to engage in such exercise during the work day, not observable to students or the public … Please let me know if you would like to discuss such accommodations."). The district's "accommodations" thus ignored that, just like a teacher seeking to give thanks in the school cafeteria or a player seeking to celebrate a goal on the field, Kennedy wanted to express himself in situ, rather than be relegated to "an area that a benevolent

government has provided as a safe haven for crackpots," *Tinker*, 393 U.S. at 513; *see* Am. Legion Amicus.Br.28-29.[5]

Endeavoring to appear more obliging, the district notes that it "never expressed disapproval of [Kennedy's] prayers" following games in late September and early October, Resp.Br.22-23, even though Kennedy testified that they all took place on the field, JA340-42. But the reason for the absence of disapproval (and for the carefully phrased double negative) is ignorance, not benevolence. Both the principal and the superintendent submitted declarations attesting that they were "not aware of Mr. Kennedy praying on those occasions" and learned of it only several years later in this litigation. JA360, JA363. Moreover, the reason those on-field prayers escaped the notice (and opprobrium) of BHS officials appears to be that many of those prayers occurred at *away* games. That fact speaks volumes. When school officials at other schools simply allowed Kennedy to engage in a fleeting religious acknowledgement on the field, there was no media circus, no storming the field,

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[5] That said, Kennedy did endeavor to engage in his personal prayers at times when most players were engaged in post-game activities elsewhere, as his religious beliefs do not require others to join him in prayer. JA294. Moreover, while the district chides Kennedy for purportedly "ignor[ing]" its outreach, Resp.Br.50, it does not deny that "it was *the district* that declined Kennedy's counsel's repeated offers to meet after he received the October letters," Pet'r.Cert.Reply.5 n.1. The district now suggests that it might have let Kennedy "pray[] while the players returned to the locker room," Resp.Br.50, but what matters is what it offered at the time, which was only praying in "a private location … not observable to students or the public," JA94.

and no demand for equal time by outsiders. The stark difference between home and away games underscores that the source of difficulties here was not Kennedy's brief, personal prayer, but the district's overreaction.

The district bemoans that schools face competing demands and lack clear guidance in avoiding the shoals of the Religion Clauses. But as the away-game non-events demonstrate, there is a clear path for avoiding controversy and liability: toleration of private religious speech, even when it comes from teachers and coaches. Moreover, the clear guidance schools need will not come from superimposing a balancing test, but rather is already provided by this Court's existing precedents. Those cases reaffirm, again and again, that schools do not endorse everything they fail to censor and need not fear Establishment Clause liability for permitting private religious speech on school grounds. Those cases also make clear that permitting private religious speech by students, teachers, or coaches does not convert the cafeteria or playing fields into public fora. Teachers and coaches have greater access to school grounds than the general public because they are teachers and coaches, but they do not leave their First Amendment rights at the schoolhouse gate. When schools recognize that and refrain from suppressing their private expression just because it is religious, they do not run afoul of the Establishment Clause, but rather "follow[] the best of our traditions." *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952).

CONCLUSION

The Court should reverse.

Respectfully submitted,

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