APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-35222

JOSEPH A. KENNEDY,

Plaintiff-Appellant,

v.

BREMERTON SCHOOL DISTRICT,

Defendant-Appellee.

Filed: March 18, 2021

Before: DOROTHY W. NELSON, MILAN D. SMITH, JR., and MORGAN CHRISTEN, *Circuit Judges*.

OPINION

M. SMITH, *Circuit Judge*:

This case requires us to decide whether Bremerton School District (BSD) would have violated the Establishment Clause by allowing Joseph Kennedy, a high school football coach, to engage in demonstrative religious conduct immediately after football games, while kneeling on the field's fifty-yard line, surrounded by many of his players, and occasionally members of the community. To answer this question, we must examine whether a reasonable

observer, aware of the history of Kennedy's religious activity, and his solicitation of community and national support for his actions, would perceive BSD's allowance of Kennedy's conduct as an endorsement of religion. Although there are numerous close cases chronicled in the Supreme Court's and our current Establishment Clause caselaw, this case is not one of them. When BSD's superintendent became aware of Kennedy's religious observances on the 50-yard line with players immediately following a game, he wrote Kennedy informing him what he must avoid doing in order to protect BSD from an Establishment Clause claim. In response, Kennedy determined he would "fight" his employer by seeking support for his position in local and national television and print media, in addition to seeking support on social media. In a letter from his counsel, he informed BSD that he would not comply with its instructions, and that he intended to continue engaging in the kind of mid-field religious exercises he had been told not to perform. Answering Kennedy's solicitation, scores of parents, a state representative, and students from both teams rushed to mid-field after a game to support Kennedy against BSD's efforts to avoid violating the Constitution. All of this was memorialized and broadcast by local and national TV stations and print media.

District personnel received hateful communications from some members of the public, and some BSD personnel felt physically threatened. When it evaluated BSD's actions concerning Kennedy, the district court held that seeking to avoid an Establishment Clause claim was the "sole reason" BSD limited Kennedy's public actions as it did. We hold that BSD's allowance of Kennedy's conduct would

violate the Establishment Clause; consequently, BSD's efforts to prevent the conduct did not violate Kennedy's constitutional rights, nor his rights under Title VII. We affirm the district court's grant of summary judgment to BSD on all claims.

FACTUAL AND PROCEDURAL BACKGROUND

We previously affirmed the district court's denial of Kennedy's request for a preliminary injunction. *Kennedy v. Bremerton Sch. Dist.* (*Kennedy I*), 869 F.3d 813 (9th Cir. 2017). Although our opinion in *Kennedy I* set forth the facts as they were known at the time, we nevertheless include the relevant facts here—both those in the record at the time of *Kennedy I*, and those added to the record since.

BSD employed Kennedy as a football coach at Bremerton High School (BHS) from 2008 to 2015. Kennedy was an assistant coach for the varsity football team and the head coach for the junior varsity football team. Kennedy's contract expired at the end of each football season. The contract provided that BSD "entrusted" Kennedy "to be a coach, mentor and role model for the student athletes." Kennedy further acknowledged that, as a football coach, he was "constantly being observed by others."

Kennedy is a practicing Christian. Kennedy's religious beliefs required him to "give thanks through prayer, at the end of each game, for what the players had accomplished and for the opportunity to be a part of their lives through football." Specifically, "[a]fter the game [was] over, and after the players and coaches from both teams [ ] met to shake hands at midfield," Kennedy felt called to kneel at the 50-yard line and offer a brief, quiet prayer of thanksgiving for player

safety, sportsmanship, and spirited competition." Kennedy's prayer usually lasted about thirty seconds. Kennedy's religious beliefs required that his prayer occur on the field where the game was played, immediately after the game concluded. This necessarily meant that spectators—students, parents, and community members—would observe Kennedy's religious conduct.

Kennedy began performing these prayers when he first started working at BHS. At the outset, he prayed alone. Several games into his first season, however, a group of BHS players asked Kennedy whether they could join him. "This is a free country," Kennedy replied, "You can do what you want." Hearing that response, the students joined him. Over time, the group grew to include the majority of the team. The BHS players sometimes invited the opposing team to join. BHS principal John Polm testified that he later became aware of a parent's complaint that his son "felt compelled to participate" in Kennedy's religious activity, even though he was an atheist, because "he felt he wouldn't get to play as much if he didn't participate."

Eventually, Kennedy's religious practice evolved. He began giving short motivational speeches at midfield after the games. Students, coaches, and other attendees from both teams were invited to participate. During the speeches, the participants kneeled around Kennedy. He then raised a helmet from each team and delivered a message containing religious content. Kennedy subsequently acknowledged that these motivational speeches likely constituted prayers.

BSD first learned that Kennedy was praying on the field in September 2015, when the opposing team's coach told BHS principal John Polm that Kennedy had asked his team to join him in prayer on the field. He also noted that "he thought it was pretty cool how [BSD] would allow" Kennedy's religious activity. After learning of the incident, Athletic Director Barton spoke with Kennedy and expressed disapproval when Kennedy conducted a prayer on the field. In response, Kennedy posted on Facebook, "I think I just might have been fired for praying." Shortly thereafter, BSD "was flooded with thousands of emails, letters, and phone calls from around the country" regarding the conflict over Kennedy's prayer, "many of which were hateful or threatening."

BSD's discovery prompted an inquiry into whether Kennedy was complying with the school board's policy on "Religious-Related Activities and Practices." Pursuant to that policy, "[a]s a matter of individual liberty, a student may of his/her own volition engage in private, non-disruptive prayer at any time not in conflict with learning activities." In addition, "[s]chool staff shall neither encourage nor discourage a student from engaging in non-disruptive oral or silent prayer or any other form of devotional activity."

The District's investigation revealed that coaching staff had received little training regarding the District's policy. Accordingly, BSD Superintendent Aaron Leavell sent Kennedy a letter on September 17, 2015, to clarify the District's prospective expectations.

Leavell advised Kennedy that he could continue to give inspirational talks but "[t]hey must remain

entirely secular in nature, so as to avoid alienation of any team member." He further advised that "[s]tudent religious activity must be entirely and genuinely student-initiated, and may not be suggested, encouraged (or discouraged), or supervised by any District staff." Leavell further counseled Kennedy that "[i]f students engage in religious activity, school staff may not take any action likely to be perceived by a reasonable observer, who is aware of the history and context of such activity at BHS, as endorsement of that activity." Lastly, Leavell stressed that Kennedy was

> free to engage in religious activity, including prayer, so long as it does not interfere with job responsibilities. Such activity must be physically separate from any student activity, and students may not be allowed to join such activity. In order to avoid the perception of endorsement discussed above, such activity should either be non-demonstrative (*i.e.*, not outwardly discernible as religious activity) if students are also engaged in religious conduct, or it should occur while students are not engaging in such conduct.

In response, Kennedy temporarily stopped praying on the field after football games. Instead, after the September 18th game, Kennedy gave a short motivational speech "that included no mention of religion or faith." According to Kennedy, he began to drive home that night but turned around to go back to the field because he "felt dirty," knowing that, by not praying at the conclusion of the game, he had broken his commitment to God. Back at the field, Kennedy

waited ten to fifteen minutes until "everyone else had left the stadium" so that he could have "a moment alone with God" to pray at the fifty-yard line.

BSD received no further reports of Kennedy praying on the field after games, and BSD officials believed that Kennedy was complying with its directive that allowed his religious activity, so long as he avoided "the perception of endorsement." According to Kennedy's averment in his deposition, however (and contrary to the allegations he raised in his EEOC complaint), he prayed directly after every game except the one on September 18.

Kennedy's increasingly direct challenge to BSD escalated when he wrote BSD through his lawyer on October 14, 2015. The letter announced that Kennedy would resume praying on the fifty-yard line immediately after the conclusion of the October 16, 2015 game. Kennedy testified in his deposition that he intended the October 14 letter to communicate to the district that he "wasn't going to stop [his] prayer because there was [sic] kids around [him]." In other words, Kennedy was planning to pray on the fifty-yard line immediately after the game, and he would allow students to join him in that religious activity if they wished to do so. The lawyer's letter also demanded that BSD rescind the directive in its September 17 letter that Kennedy cease his post-game prayers at the fifty-yard line immediately after the game.

Kennedy's intention to pray on the field following the October 16 game was widely publicized through Kennedy and his representatives' "numerous appearances and announcements [on] various forms of media." For example, the Seattle Times published an

article on October 14 (the same day as the lawyer's letter was sent to BSD), entitled "Bremerton football coach vows to pray after game despite district order. A Bremerton High School football coach said he will pray at the 50-yard line after Friday's homecoming game, disobeying the school district's orders and placing his job at risk." The Seattle Times has the twenty-third largest circulation of any newspaper in the country, with an average Sunday circulation of 364,454. *See Circulation numbers for the 25 largest newspapers*, Seattle Times (May 1, 2012), https://bit.ly/2OGgYX5.

In an attempt to secure the field from public access, BSD "made arrangements with the Bremerton Police Department for security, had signs made and posted, had 'robo calls' made to District parents, and otherwise put the word out to the public that there would be no access to the field." A Satanist religious group contacted BSD in advance of the game to notify them that "it intended to conduct ceremonies on the field after football games if others were allowed to."

On the day of the game, the District had not yet responded to Kennedy's letter. Kennedy nonetheless proceeded as he indicated he would. The Satanist group was present at the game, but "they did not enter the stands or go on to the field after learning that the field would be secured." But Kennedy had access to the field by virtue of his position as a public-school employee. Once the final whistle blew, Kennedy knelt on the fifty-yard line, bowed his head, closed his eyes, "and prayed a brief, silent prayer." According to Kennedy, while he was kneeling with his eyes closed, "coaches and players from the opposing team, as well as members of the general public and media,

spontaneously joined [him] on the field and knelt beside [him].” Kennedy’s claim that the large gathering around him of coaches, players, a state elected official, and other members of the public who had been made aware of Kennedy’s intentions because of the significant amount of publicity advertising what Kennedy was about to do, was “spontaneous” is self-evidently inaccurate. Moreover, Kennedy’s counsel acknowledged in his October 14, 2015 letter that Kennedy’s prayers were “verbal” and “audible,” flatly contradicting Kennedy’s own recounting. BSD stated that this demonstration of support for Kennedy involved “people jumping the fence” to access the field, and BSD received complaints from parents of students who had been knocked down in the stampede. Principal John Polm said that he “saw people fall[.]” Principal Polm testified that “when the public went out onto the field, we could not supervise effectively,” resulting in “an inability to keep kids safe.” A photo of this scene is in the record, and it depicts approximately twenty players in uniform kneeling around Kennedy with their eyes closed, a large group of what appear to be adults standing outside the ring of praying players, and several television cameras photographing the scene.

In the days after the game, similar pictures were “published in various media.” Kennedy also made numerous media appearances in connection with the October 16 game, to, in his words, “spread[] the word of what was going on in Bremerton.” For example, on October 18, 2015, CNN featured an article entitled “Despite orders, Washington HS coach prays on field after game.”

On October 23, 2015, BSD sent Kennedy a letter explaining that his conduct at the October 16 game violated BSD's policy. BSD reiterated that it "can and will" accommodate "religious exercise that would not be perceived as District endorsement, and which does not otherwise interfere with the performance of job duties." To that end, it suggested that "a private location within the school building, athletic facility or press box could be made available to [Kennedy] for brief religious exercise before and after games." Kennedy, of course, could also pray on the fifty-yard line after the stadium had emptied, as he did on September 18. Because the "[d]evelopment of accommodations is an interactive process," the District invited Kennedy to offer his own suggestions. Kennedy and his attorneys' only response in the record to BSD's invitation was informing the media that the only acceptable outcome would be for BSD to permit Kennedy to pray on the fifty-yard line immediately after games.

Kennedy engaged in the same behavior in violation of BSD's directive on October 23, 2015 and October 26, 2015. A photo taken after the October 23 game shows Kennedy kneeling alone on the field while players and other individuals mill about. A photo taken after the October 26 game shows at least six individuals, some of whom appear to be school-age children, kneeling around Kennedy.

Following the October 26 game, BSD placed Kennedy on paid administrative leave. When Kennedy was on leave, and during the time he temporarily ceased performing on-field prayers, BHS players did not initiate their own post-game prayer.

During this time, other BSD employees testified that they suffered repercussions due to the "attention given to Mr. Kennedy's issue and the way he chose to address the situation." For example, Nathan Gillam, BHS's head football coach, testified that during the controversy, "an adult who [he] had never seen before came up to [his] face and cursed [him] in a vile manner." Gillam further stated that he was concerned for his physical safety. He testified, "One of the assistant football coaches was also a police officer and, as we headed down to the field for one game, I obliquely asked him what he thought about whether we could be shot from the crowd." As a result of these concerns, Gillam "decided that [he] would resign" from the coaching position he had held for eleven years.

After the season wound down, BSD began its annual process of providing its coaches with performance reviews. Gillam recommended that Kennedy not be rehired because Kennedy "failed to follow district policy," "his actions demonstrated a lack of cooperation with administration," he "contributed to negative relations between parents, students, community members, coaches and the school district," and he "failed to supervise student-athletes after games due to his interactions with [the] media and [the] community." Kennedy did not apply for a 2016 coaching position.

Kennedy commenced this action in the Western District of Washington on August 9, 2016. He asserted that his rights were violated under the First Amendment and Title VII of the Civil Rights Act of 1964. Kennedy moved for a preliminary injunction on August 24, 2016. The district court denied the

preliminary injunction on September 19, 2016. Kennedy appealed the denial, and our panel affirmed. *Kennedy I*, 869 F.3d at 813. Kennedy petitioned for a writ of certiorari; the Supreme Court denied the petition. *Kennedy v. Bremerton Sch. Dist.* (*Kennedy II*), 139 S. Ct. 634 (2019) (mem.).

On remand, the parties cross-moved for summary judgment. The district court held that "the risk of constitutional liability associated with Kennedy's religious conduct was the 'sole reason' the District ultimately suspended him." The district court further held that BSD's actions were justified due to the risk of an Establishment Clause violation if BSD allowed Kennedy to continue with his religious conduct. Pursuant to this reasoning, the district court granted BSD's motion for summary judgment on all claims, and Kennedy appealed.

STANDARD OF REVIEW

We review the district court's grant of summary judgment *de novo*. *United States v. Phattey*, 943 F.3d 1277, 1280 (9th Cir. 2019). Our task is to "view the evidence in the light most favorable" to Kennedy, "and determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Id.* (cleaned up).

ANALYSIS

A.

We begin with Kennedy's free speech claim brought pursuant to 42 U.S.C. § 1983. In *Pickering*, the Supreme Court held that "[t]he problem" in a public-employee free speech case, "is to arrive at a balance between the interests of the teacher, as a

citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). "[S]ince *Pickering*," we wrote, the law on this topic "has evolved dramatically, if sometimes inconsistently. Unraveling *Pickering*'s tangled history reveals a sequential five-step series of questions." *Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009). Those questions are:

> (1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action; (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and (5) whether the state would have taken the adverse employment action even absent the protected speech.

Id. At issue here are factors (2) and (4). If Kennedy spoke as a public employee when he engaged in demonstrative religious activity at the fifty-yard line necessarily in view of the players and fans who stayed to the conclusion of the game, his speech is unprotected. *See id.* at 1071. Kennedy carries the burden of proof on factor (2). *Id.* Similarly, if BSD had adequate justification for treating Kennedy differently from other members of the public, Kennedy's claim fails. *Id.* at 1072. BSD carries the burden of proof on factor (4). *Id.*

1.

"[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). "The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." *Lane v. Franks*, 573 U.S. 228, 240 (2014). In answering that question,

> [t]he proper inquiry is a practical one. Formal 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.

Garcetti, 547 U.S. at 424-25.

In *Kennedy I*, we held that Kennedy spoke as a public employee, and thus his free speech claim failed at factor (2). 869 F.3d at 825. We explained that Kennedy "was one of those especially respected persons chosen to teach on the field, in the locker room, and at the stadium. He was clothed with the mantle of one who imparts knowledge and wisdom. Like others in this position, expression was Kennedy's stock in trade." *Id.* at 826 (quoting *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th

Cir. 1994) (internal citations and quotation marks omitted)). Thus, his expression on the field—a location that he only had access to because of his employment—during a time when he was generally tasked with communicating with students, was speech as a government employee. *Id.* at 828. We briefly address factor (2) to discuss subsequent developments. Our holding, however, has not changed.

First, our opinion in *Kennedy I* should not be read to suggest that, for instance, a teacher bowing her head in silent prayer before a meal in the school cafeteria would constitute speech as a government employee. *See Kennedy II*, 139 S. Ct. at 636 (Alito, J.). That type of expression is of a wholly different character than Kennedy's: Kennedy insisted that his speech occur while players stood next to him, fans watched from the stands, and he stood at the center of the football field. Moreover, Kennedy repeatedly acknowledged that—and behaved as if—he was a mentor, motivational speaker, and role model to students *specifically at the conclusion of a game*. That distinguishes this case from the hypothetical scenario of a teacher in the cafeteria.

We acknowledge the Supreme Court's warning not to create "excessively broad job descriptions" that "convert" expressions of a private citizen into speech as a government employee. *Id.* (quoting *Garcetti*, 547 U.S. at 424). But on the record before us, there is simply no dispute that Kennedy's position encompassed his post-game speeches to students on the field. Kennedy's employer specifically instructed him (1) that he should speak to players post-game and (2) what the speeches should be about: "You may

continue to provide motivational, inspirational talks to students before, during and after games and other team activity, focusing on appropriate themes such as unity, teamwork, responsibility, safety, endeavor and the like that have long characterized your very positive and beneficial talks with students." In commenting on Kennedy's secular post-game speech on September 18, Leavell wrote, "That talk was well received, and appreciated by the District and the community. I would certainly encourage continuation of that practice." The only conclusion based on this record is that Kennedy's post-game speech on the field was speech as a government employee.

Second, our prior opinion in this case was not meant to suggest that a teacher or coach "cannot engage in any outward manifestation of religious faith" while *off duty*. *Id.* at 637. In *Kennedy I*, we cited Kennedy's prayer in the bleachers, surrounded by news cameras, two days after BSD issued a public statement explaining Kennedy's suspension, in the context of "bolster[ing]" the already strong inference that he "inten[ded] to send a message to students and parents about appropriate behavior and what he values as a coach," in line with his job duties of demonstrative communication as a role model for players. 869 F.3d at 826. Kennedy's intent to send a message is important because this media event represented a continuation of his on-field demonstrative activities after the October 16, 23, and 26 games that were designed to attract publicity. Nevertheless, Kennedy's *pre-suspension* prescribed speaking responsibilities were the touchstone of our prior decision holding that Kennedy spoke as a

government employee—and they remain so in this one.

We also note the following from the opinion of the district court: "Although Kennedy originally claimed to be off duty after games, he has now abandoned that contention … All 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."

We therefore remain convinced that our conclusion in *Kennedy I*, that "Kennedy spoke as a public employee when he kneeled and prayed on the fifty-yard line immediately after games while in view of students and parents" is correct. 869 F.3d at 831.

2.

However, even if we were to assume, *arguendo*, that Kennedy spoke as a private citizen, BSD may still prevail if it can show that it had an adequate justification for treating Kennedy differently from other members of the general public. We hold that BSD's justification was adequate.

"[A] state interest in avoiding an Establishment Clause violation may be characterized as compelling, and therefore may justify content-based discrimination." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001) (internal quotation marks omitted); *see also Peloza*, 37 F.3d at 522 ("The school district's interest in avoiding an Establishment Clause violation trumps [a teacher's] right to free speech.").

The Establishment Clause provides that "Congress shall make no law respecting an

establishment of religion." U.S. Const. amend. I. The Fourteenth Amendment incorporated the Establishment Clause against the states and their public-school systems. *See Wallace v. Jaffree*, 472 U.S. 38, 49-50 (1985). The Clause "mandates government neutrality between religion and religion, and between religion and nonreligion." *McCreary Cnty., Ky. v. Am. Civil. Liberties Union of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). "The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987). In that setting, "[t]he State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure." *Id.* at 584. Accordingly, the Clause "proscribes public schools from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." *Lee v. Weisman*, 505 U.S. 577, 604-05 (1992) (Blackmun, J., concurring) (internal quotation marks and emphasis omitted).

The Supreme Court has made clear that an Establishment Clause analysis "not only can, but *must*, include an examination of the circumstances surrounding" the action alleged to have violated the Clause. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000) (emphasis added). Like the Court, "[w]e refuse to turn a blind eye to the context in which" Kennedy's conduct arose. *Id.* Guided by *Santa Fe*, we ask whether an objective observer, familiar with the history of Kennedy's on-field religious activity,

coupled with his pugilistic efforts to generate publicity in order to gain approval of those on-field religious activities, would view BSD's allowance of that activity as "stamped with [his or] her school's seal of approval." *Id.* at 308. Here, the answer is unquestionably yes.

At the outset, we address Kennedy's repeated contention that the practice he sought to engage in was a brief, personal, and private prayer. While his prayer may have been brief, the facts in the record utterly belie his contention that the prayer was personal and private. As noted, Kennedy engaged in a media blitz between October 14, 2015—when Kennedy's attorney informed BSD that he would be reinstituting his prior practice that included allowing students to join his prayer[1]—and October 16, 2015.[2]

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[1] Kennedy confirmed in his deposition that the October 14 letter included his intention not to stop students from joining his prayer:

> Q. So where it says in the last paragraph, "Coach Kennedy will continue his practice," do you understand that is saying that you will continue your practice of praying with students if the students come around you?
>
> A. I wasn't going to stop my prayer because there was kids around me.
>
> Q. So is that a yes, sir?
>
> …
>
> A. Yes.

[2] We note that Kennedy's media appearances continue to the present day. *See, e.g.*, Joe Kennedy, "Football Coach Joe Kennedy: A prayer sidelined me – here's why I'm still fighting to get back in the game," Fox News (January 26, 2021), https://fxn.ws/3cmoWyq; Fox & Friends, "Ex-high school football coach still fighting five years after he was fired by school for

Kennedy's deposition included the following exchange: "Q. So you appeared on the media because you wanted to spread the word about what you were doing? A. I was sharing the word, yes, sir." These media appearances took place prior to Kennedy's on-field prayer on October 16, 23, and 26. That on-field prayer cannot be construed as personal and private in the context of Kennedy's publicity leading up to it.

Context matters. As we know from *Santa Fe*, we must examine the surrounding circumstances to determine whether BSD rescinding the September 17 directive and allowing Kennedy free rein over his public demonstrations of religious exercise would have been perceived as a stamp of approval upon that exercise. Thus, at issue in this case is *not*, as Kennedy attempts to gloss it, a personal and private exercise of faith. At issue was—in every sense of the word—a demonstration, and, because Kennedy demanded that it take place immediately after the final whistle, it was a demonstration necessarily directed at students and the attending public.

The evolution of Kennedy's prayer practices with students is also essential to understanding how an

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praying on field," Fox News (January 26, 2021), https://fxn.ws/3la91pv; First Liberty, "Coach Joe Kennedy: How 20 Years in the Marine Corps Gave Him the Courage to Kneel," (May 3, 2019), https://bit.ly/3ak1e38 (interview with Kennedy in which Kennedy stated, "I couldn't believe that after 20 years of serving and protecting the Constitution they would tell me that my rights didn't matter because I was a public employee. And as a Marine, I knew I had to fight. I always told the young men whom I coached to stand up when adversity came their way. I had to be a leader to them and live up to what I said. So I wasn't going to back down[.]").

objective observer would view BSD continuing to allow Kennedy to pray on-field. An objective observer would know that, eight years earlier, Kennedy began praying alone on the fifty-yard line at the conclusion of each game. Over time, little by little, his players began to join him in this activity—at least one out of a fear that declining to do so would negatively impact his playing time. Kennedy did not stop players from joining him then, just as he made clear to BSD on October 14, 2015 that he would not stop them from joining him when he resumed his practice after the October 16 game. Indeed, as noted, the record unquestionably reflects that after October 14, 2015, Kennedy actively sought support from the community in a manner that encouraged individuals to rush the field to join him and resulted in a conspicuous prayer circle that included students. An objective observer would know, in advance of the October 16 game, BSD made clear that the field was not open to the public, specifically denying access to other religious groups. Yet, Kennedy used his access as a school employee to conduct his religious activity. Viewing this scene, an objective observer could reach *no other conclusion* than that BSD endorsed Kennedy's religious activity by not stopping the practice:

Post-game ritual on the field, October 16, 2015.

Kennedy points to his post-game prayer on October 23, 2015—when no one joined him—in an attempt to establish that all he wants is to pray alone. But this mischaracterizes the record. Instead, the record reflects that if BSD permitted Kennedy to resume his prior practice, students would join him. One instance, out of many, in which students did not join Kennedy's prayer cannot require us to pretend they never did and never will.[3] In sum, there is no doubt that an objective

[3] Throughout this litigation, Kennedy has urged us to turn a blind eye to the trajectory of his practice in favor of a segmented view of the evidence, picking parts that help his case and discarding those that do not. For example, during oral argument, Kennedy's counsel urged us to focus primarily on BSD's October 23 letter. This letter—when read in isolation—appears to assert that any demonstration of faith by any teacher in any context would be impermissible. But acceding to Kennedy's framing of the record would be rejecting the very inquiry that *Santa Fe* mandates. The October 23 letter was written after Kennedy rejected the restrictions announced in the September 17 letter and announced his intention to resume his unconstitutional behavior over his employer's clear prohibition. Such a myopic view of the events leading to litigation simply does not tell the

observer, familiar with the history of Kennedy's practice, would view his demonstrations as BSD's endorsement of a particular faith. For that reason, BSD had adequate justification for its treatment of Kennedy, and the district court correctly granted summary judgment to BSD on Kennedy's free speech claim.

B.

We next address Kennedy's free exercise claim. In *Church of Lukumi*, the Court wrote that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993). Pursuant to that analysis, a law that is *not* neutral and generally applicable "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id.* at 531-32.

The District concedes that its September 17 directive is not neutral and generally applicable. It purports to restrict Kennedy's religious conduct *because* the conduct is religious. *See id.* at 532 ("[T]he protections of the Free Exercise Clause pertain if the law at issue … regulates … conduct *because it is undertaken for religious reasons*." (emphasis added)). But the District contends that its directive satisfies strict scrutiny. We agree.

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whole story—like attempting to decipher the plot of "The Wizard of Oz" by viewing a still photograph of Dorothy waking in her bed at the end of the film.

1.

"[A] state interest in avoiding an Establishment Clause violation 'may be characterized as compelling,' and therefore may justify content-based discrimination," *Good News Club*, 533 U.S. at 113–14 (quoting *Widmar v. Vincent*, 454 U.S. 263, 271 (1981)), such as prohibiting religious conduct that could be imputed to the District. Based on the Establishment Clause analysis in the fourth *Eng* factor above, the District's September 17 directive was thus motivated by a compelling state interest.[4]

2.

In this context, a regulation fails the narrow tailoring prong of strict scrutiny if it is either overbroad or underinclusive given the government's compelling interest. *Church of Lukumi*, 508 U.S. at 546. For example, in *Church of Lukumi*, ordinances prohibiting animal slaughter were underinclusive for

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[4] We determined above that BSD's concern that it would violate the Establishment Clause by allowing Kennedy's conduct was well-founded—this activity indeed constituted a violation. But even without our holding as to the Establishment Clause, BSD had reason for concern. Public school districts were repeatedly sued in federal district courts across the country for alleged Establishment Clause violations in the ten years preceding BSD's September 17 letter to Kennedy. *See, e.g.*, *Sherman v. Twp. High School Dist. 214*, 624 F. Supp. 907 (N.D. Ill. 2007); *Doe v. Wilson Cnty. Sch. Sys.*, 524 F. Supp. 2d 964 (M.D. Tenn. 2007); *Am. Humanist Ass'n v. S.C. Dep't of Educ.*, 108 F. Supp. 3d 355 (D.S.C. 2015); *Ryan v. Mesa Unified Sch. Dist.*, 64 F. Supp. 3d 1356 (D. Ariz. 2014); *see also Borden v. Sch. Dist. of Twp. of E. Brunswick*, 523 F.3d 153, 178-79 (3d Cir. 2008) (holding that the Establishment Clause prohibited a football coach from bowing his head while players prayed because of his history of leading the team in prayer).

the stated interests of "protecting the public health and preventing cruelty to animals" because they failed "to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than [Plaintiff's religious] sacrifice does." *Id.* at 543.

Here, the September 17 directive and accompanying BSD policy prohibiting Kennedy's conduct were narrowly tailored to the compelling state interest of avoiding a violation of the Establishment Clause. Indeed, there was no other way to accomplish the state's compelling interest. The District tried repeatedly to work with Kennedy to develop an accommodation for him that would avoid violating the Establishment Clause; Kennedy declined to cooperate in that process and insisted that the only acceptable outcome would be praying immediately after the game on the fifty-yard line in view of students and spectators.

Because BSD had a compelling state interest to avoid violating the Establishment Clause, and it tried repeatedly to work with Kennedy to develop an accommodation for him that would avoid violating the Establishment Clause while nevertheless offering him options that were narrowly tailored to protect his rights, we affirm the decision of the district court to deny Kennedy's Free Exercise claim.

C.

In addition to his constitutional claims, Kennedy brought four claims pursuant to Title VII: failure to rehire, disparate treatment, failure to accommodate, and retaliation.

1.

Pursuant to Title VII, "an unlawful employment practice is established when the complaining party demonstrates that … religion … was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). "In order to establish a prima facie case" in Kennedy's circumstances, he must "show that [he] was a member of a protected group [ ], that [he] was adequately performing [his] job; and that [he] suffered an adverse employment action[.]" *Kortan v. Cal. Youth Auth.*, 217 F.3d 1104, 1113 (9th Cir. 2000).

Kennedy established that he was a member of a protected group and that he suffered an adverse employment action. However, he did not show that he was adequately performing his job. Instead, the record reflects that Kennedy refused to follow BSD policy and conducted numerous media appearances that led to spectators rushing the field after the October 16 game, disregarding his and BSD's responsibilities to ensure students' safety. We affirm the district court's grant of summary judgment to BSD on Kennedy's failure to rehire claim.

2.

To establish a prima facie case of disparate treatment under Title VII, a plaintiff must show "(1) he is a member of a protected class; (2) he was qualified for his position; (3) he experienced an adverse employment action; and (4) similarly situated individuals outside his protected class were treated more favorably." *Berry v. Dep't of Soc. Servs.*, 447 F.3d 642, 656 (9th Cir. 2006). Kennedy satisfies the first three prongs but stumbles on the fourth. "Other

employees are similarly situated to the plaintiff when they have similar jobs and display similar conduct." *Earl v. Nielsen Media Rsch., Inc.*, 658 F.3d 1108, 1114 (9th Cir. 2011) (internal quotation marks omitted).

Kennedy's conduct is clearly dissimilar to the other personal activities of assistant coaches he cites, such as checking a cell phone or greeting a spouse, because Kennedy's conduct violated the Establishment Clause, and obviously, checking a cell phone does not. Kennedy asserted that another assistant coach, David Boynton, could serve as a similarly-situated employee because Boynton once went on to the field following a game, took a picture of the scoreboard, and said a silent Buddhist chant to himself while standing. But Boynton's alleged practice of reciting silent Buddhist chants in his head while standing on the field does not make Boynton similarly situated to Kennedy, either—Leavell's declaration stated that he first "heard of an alleged Buddhist chant by Mr. Boynton [] in news reports of Mr. Kennedy's EEOC complaint in January 2016 … Other than Mr. Kennedy, [Leavell had] not received any reports of any other BSD employee who has allegedly engaged in readily observable demonstrative religious activity, while on-duty in the performance of his or her job, and in the presence of students." The fact that BSD was unaware of Boynton's alleged practice shows that Boynton and Kennedy were not similarly situated; BSD had no opportunity to impose differential treatment for conduct that was unobservable.

Because Kennedy cannot make out a prima facie case of disparate treatment, we affirm the district

court's grant of summary judgment to BSD on this claim.

3.

"To establish religious discrimination on the basis of a failure-to-accommodate theory," a plaintiff "must first set forth a prima facie case that (1) he had a bona fide religious belief, the practice of which conflicts with an employment duty; (2) he informed his employer of the belief and conflict; and (3) the employer discharged, threatened, or otherwise subjected him to an adverse employment action because of his inability to fulfill the job requirement." *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 606 (9th Cir. 2004). It is undisputed that Kennedy presented a prima facie case of failure-to-accommodate.

Once a plaintiff makes out a prima facie case, "the burden then shifts" to the employer "to show that it initiated good faith efforts to accommodate reasonably the employee's religious practices or that it could not reasonably accommodate the employee without undue hardship." *Id.* For the reasons already discussed, BSD did both. BSD officials repeatedly offered to work with Kennedy to find an accommodation that would insulate the District from an Establishment Clause violation; Kennedy did not respond or indicated that the only acceptable outcome in his view would be resuming his prior practice of praying on the fifty-yard line immediately following the game, in full view of students and spectators. Because allowing Kennedy to do so would constitute an Establishment Clause violation, the District could not reasonably accommodate Kennedy's practice without undue

hardship. Accordingly, we affirm the district court's grant of summary judgment to BSD on Kennedy's failure-to-accommodate claim.

4.

In a retaliation claim under Title VII, a "plaintiff has the burden of proving a prima facie case of discrimination based on opposition to an unlawful employment practice." *E.E.O.C. v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1012 (9th Cir. 1983). To prove a prima facie case of retaliation based on opposition, the plaintiff must show that "(1) he has engaged in statutorily protected expression; (2) he has suffered an adverse employment action; and (3) there is a causal link between the protected expression and the adverse action." *Id.* If he does so, "the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason' for the adverse employment action." *Id.* (quoting *Tex. Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).

Kennedy presented a prima facie case of retaliation. But Kennedy also refused to collaborate with BSD in designing a reasonable accommodation for his religious practice. Furthermore, as explained above, Kennedy made it clear that he would continue to pray on the fifty-yard line immediately following the game as long as BSD employed him—a practice that violated the Establishment Clause. This conduct is a legitimate nondiscriminatory reason for the adverse employment actions BSD took. We affirm the district court's grant of summary judgment to BSD on Kennedy's retaliation claim.

CONCLUSION

The record before us and binding Supreme Court precedent compel the conclusion that BSD would have violated the Establishment Clause by allowing Kennedy to pray at the conclusion of football games, in the center of the field, with students who felt pressured to join him. Kennedy's attempts to draw nationwide attention to his challenge to BSD compels the conclusion that he was not engaging in private prayer, but was instead engaging in public speech of an overtly religious nature while performing his job duties. BSD tried to reach an accommodation for Kennedy, but that was spurned by his insisting that he be allowed to pray immediately after the conclusion of each game, likely surrounded by students who felt pressured to join him.

Kennedy's Title VII claims also fail.

The judgment of the district court is AFFIRMED.

CHRISTEN, *Circuit Judge*, joined by D.W. NELSON, *Circuit Judge*, concurring:

I concur in the majority's decision affirming the district court's order granting summary judgment, and dismissing Coach Kennedy's Free Speech and Free Exercise claims. I write separately to underscore why, in my view, the outcome of this appeal is entirely driven by the circumstances from which Coach Kennedy's claims arose.

I.

We consider "a sequential five-step series of questions" when evaluating Free Speech claims brought by public employees. *Eng v. Cooley*, 552 F.3d

1062, 1070 (9th Cir. 2009). The second and fourth questions are at issue in this case: whether Kennedy spoke as a private citizen or as a public employee, and whether the Bremerton School District (BSD) had adequate justification for treating Kennedy differently from other members of the public. *Id.*

Garcetti v. Ceballos, 547 U.S. 410, 421 (2006), explains that a person speaks as a public employee when he makes statements pursuant to his official duties. *See Lane v. Franks*, 573 U.S. 228, 240 (2014) ("The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties."). *Garcetti* also cautioned that courts must not allow employers to describe job duties in infinitely elastic terms. 547 U.S at 424. *Garcetti*'s cautionary note is critically important: if employers were allowed to decide that any unpopular or unwelcome speech fell within their employees' job duties, they would be free to extinguish First Amendment rights—or at least free to require that employees choose between keeping their jobs and exercising their First Amendment right to speak. We conduct a practical inquiry to decide whether a task is within the scope of an employee's professional duties, *id.* at 424-25, so we begin from the premise that a coach's duties include teaching non-academic skills such as teamwork, sportsmanship, dedication, and personal discipline.

Here, the district court found Kennedy's job duties included mentoring students, setting a good example, and striving to "create good athletes and good human beings." BSD sent two letters to Kennedy after it learned he was engaged in religious speech with the

team. The first encouraged him to "continue to provide motivational, inspirational talks to students before, during and after games and other team activity," but cautioned that his talks "may not include religious expression, including prayer." Hopefully, all instructors at Bremerton High encourage their students' efforts, but it cannot be denied that the nature of motivational talks coaches deliver to their teams differs substantially from the words of encouragement one might expect from geometry or history teachers. Kennedy acknowledged that the inspirational speeches he gave to players at the conclusion of games likely constituted prayer, and his speeches to the team were unmistakably the kind of motivational communication that fell squarely within his job duties. Kennedy's demonstrative on-field prayers of thanks immediately following games must be viewed in the context of the motivational talks he routinely gave to the team. On the record presented, the district court correctly concluded there was no genuine dispute that Kennedy spoke as a public employee when he engaged in religious expression during the talks he gave to the team, and when he prayed at the fifty-yard line after the team's games.

Eng's fourth factor requires that we consider whether BSD had adequate justification for treating Kennedy differently from other members of the general public. 552 F.3d at 1070. The district court found the "sole reason" BSD suspended Kennedy was its desire to avoid violating the Establishment Clause. BSD's Establishment Clause defense requires that we ask whether an objective observer, familiar with the history and circumstances surrounding Kennedy's prayers, would perceive them as "state endorsement of

prayer in public schools," *i.e.*, whether an objective observer would view the prayers as "stamped with [the] school's seal of approval." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (citation and internal quotation marks omitted).

Kennedy's post-game prayers took place at midfield while spectators were still in the stands, but he insisted that he only intended to engage in "brief, quiet prayer of thanksgiving for player safety, sportsmanship, and spirited competition." The district court did not question Kennedy's intentions, but it recognized that if he had been allowed to continue praying at the fifty-yard line, any objective observer would have perceived that BSD endorsed Kennedy's speech. *Santa Fe*, 530 U.S. at 308. No other conclusion could have been drawn after Kennedy publicly announced he would defy BSD's directive that he stop praying at midfield, because spectators rushed to join him at a subsequent game and BSD was forced to engage security and close the field to the public. After the public was barred from the field, the perception that BSD endorsed Kennedy's speech was unavoidable because only his job as assistant coach allowed Kennedy access. As the district court explained, if "a director takes center stage after a performance, a reasonable onlooker would interpret their speech from that location as an extension of the school-sanctioned speech just before it." Kennedy's subjective intent to pray privately and personally did not guide BSD's response to Kennedy's actions; the question was how an objective observer would perceive Kennedy's speech.

Kennedy's talks evolved over time and the practice he eventually adopted, taking a knee at midfield and delivering what he referred to as private personal prayers alongside team members, was a thematic extension of the motivational speeches he delivered to Bremerton High's assembled football team. The majority does not imply that coaches cannot lead by example or serve as excellent role models if players see them engage in personal prayer. And it must be acknowledged that Kennedy coached high school players, who were surely less impressionable than elementary-aged students. Still, even high-schoolers are not immune from perceiving—or misperceiving—pressure to "go along," and the record shows that at least one parent confirmed a player felt "compelled to participate" in Kennedy's post-game prayers because "he felt he wouldn't get to play as much if he didn't." Kennedy agreed that coaches can have an outsized influence and "for some kids, the coach might even be the most important person they encounter in their overall life."

No case law requires that a high school teacher must be out of sight of students or jump into the nearest broom closet in order to engage in private prayer, but it cannot be denied that this football coach's prayer at the fifty-yard line, immediately after a game, under stadium lights and in front of players and spectators, objectively sent a public message. In contrast, even an on-duty teacher tasked with supervising students in a high school cafeteria would not risk sending a message that BSD endorses her faith, nor risk inadvertently coercing students to join her, if she took a moment to give thanks before eating her meal. And the Establishment Clause can surely

accommodate high school students observing a teacher giving thanks for an "all clear" announcement made in the wake of a safety scare like an earthquake tremor, or a "false alarm" announcement after a fire bell.

The opinion we entered affirming the district court's order denying Coach Kennedy's motion for a preliminary injunction made reference to prayer Kennedy engaged in while attending a game after he had been suspended. *Kennedy v. Bremerton Sch. Dist.*, 869 F.3d 813, 820, 826 (9th Cir. 2017). That off-duty speech played no role in BSD's decision to suspend Kennedy, nor did our prior opinion signal that BSD would be free to restrict Kennedy's off-duty speech. *See id.* Rather, the prayer Kennedy engaged in as a spectator after he was suspended was relevant because he was surrounded by members of the media he had courted. Although Kennedy argues he intended to engage in private prayer, his prayers were anything but private. Indeed, an objective observer would be aware that fans rushed to join Kennedy on the field and knocked over band members at the conclusion of the October 16 game.

Kennedy candidly testified that he gave numerous media interviews before he was suspended, and that he did so in an effort to "spread the word." In those interviews, Kennedy announced a firm stance that he would continue to pray and allow the team to join him, despite BSD's directives. In response, BSD was "flooded with thousands of emails, letters, and phone calls from around the country, many of which were hateful or threatening." Given the community's response to Kennedy's public statements, BSD would

have unquestionably sent a message of endorsement if it had allowed him to continue to pray at midfield. BSD's need to avoid an Establishment Clause violation provided adequate justification for prohibiting Kennedy's post-game prayers. Kennedy's Free Speech claim fails to satisfy *Eng*'s second and fourth factors. 552 F.3d at 1070.

II.

The sequence of events leading up to BSD's decision to place Kennedy on paid administrative leave painted BSD into a corner because an objective observer would have perceived the school's endorsement if Kennedy had been allowed to continue praying at midfield. BSD had a compelling interest in avoiding an Establishment Clause violation, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001), and the district court correctly ruled BSD's adverse employment action was narrowly tailored to advance that interest, *see Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 531-32 (1993).

BSD first learned of Kennedy's post-game prayers in September 2015, when an opposing team's coach told Bremerton High's principal that Kennedy had asked the visiting team to join in a post-game prayer on the field. BSD's first letter to Kennedy explained that his post-game prayers "would very likely be found to violate the First Amendment's Establishment Clause," and provided a number of "clear standards" to which Kennedy was required to adhere. Kennedy did not publicly pray at the following game, but on October 14 he informed BSD that he would resume his

practice of praying on the fifty-yard line immediately following the next game.

As explained, Kennedy's widely publicized intention to resume his post-game prayers resulted in an overwhelming response from the public, and BSD was reasonably concerned that it would be unable to "keep kids safe." BSD's concerns were realized when Kennedy resumed praying at the October 16 game and members of the public rushed the field. After that game, BSD enlisted help from the police department to provide security and also made public announcements and posted signs directing that public access to the field would no longer be allowed.

BSD's second letter reiterated that school staff may not "engage in action that is likely to be perceived as endorsing (or opposing) religion or religious activities." Nevertheless, Kennedy again prayed at the fifty-yard line following the next two games. Faced with mounting publicity and corresponding concern for student and public safety, BSD placed Kennedy on paid administrative leave.

At oral argument before our court, Kennedy's counsel repeatedly referred to a single sentence from BSD's second letter directing that "[w]hile on duty," Kennedy must refrain from engaging in "demonstrative religious activity, readily observable to (if not intended to be observed by) students and the attending public." Kennedy plucks this single sentence, and argues that it would prohibit a teacher from giving thanks at lunchtime or engaging in any other personal prayer while on duty. But this sentence cannot be read in isolation. BSD consistently sought to accommodate Kennedy's religious exercise without

running afoul of the Establishment Clause. BSD's correspondence to Kennedy "ma[d]e it clear that religious exercise that would not be perceived as District endorsement, and which does not otherwise interfere with the performance of job duties, can and will be accommodated." BSD offered Kennedy the use of a private location within the school building, athletic facility, or press box, and invited Kennedy to propose alternative accommodations.

By the time BSD's second letter directed Kennedy to refrain from engaging in religious activity observable to students and the attending public, Kennedy had announced his intention to resume praying midfield, BSD had received thousands of letters, many of which were hostile and threatening, and members of the public had knocked over some students while rushing to join him on the field after the October 16 game. Kennedy's public statements that he would continue to pray despite BSD's direction, and the public's response to his statements, provide important context for the single sentence he isolates from BSD's second letter.

BSD's attempts to accommodate Kennedy's prayer were efforts to more narrowly tailor its response, but Kennedy did not accept any of BSD's proposed accommodations, or even acknowledge them. Instead, he gave media interviews publicizing his intent to continue his post-game prayers and followed through by praying on the fifty-yard line at the two games that followed. Given Kennedy's announced plans to defy BSD's reasonable directives, BSD met its burden to show its response was the least-restrictive means consistent with avoiding an Establishment

Clause violation. *See Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020).

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-35222

JOSEPH A. KENNEDY,

Plaintiff-Appellant,

v.

BREMERTON SCHOOL DISTRICT,

Defendant-Appellee.

Filed: July 19, 2021

Before: DOROTHY W. NELSON, MILAN D. SMITH, JR., and MORGAN CHRISTEN,
Circuit Judges.

ORDER

A judge of this court sua sponte requested a vote on whether to rehear this case en banc. A vote was taken and the matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. *See* Fed. R. App. P. 35(f). Rehearing en banc is DENIED.

Judge Bress did not participate in the deliberations or vote in this case.

M. SMITH, *Circuit Judge*, concurring in the denial of rehearing en banc:

Unlike Odysseus, who was able to resist the seductive song of the Sirens by being tied to a mast and having his shipmates stop their ears with bees' wax, our colleague, Judge O'Scannlain, appears to have succumbed to the Siren song of a deceitful narrative of this case spun by counsel for Appellant, to the effect that Joseph Kennedy, a Bremerton High School (BHS) football coach, was disciplined for holding silent, private prayers. That narrative is false. Although I discuss the events in greater detail below, the reader should know the following basic truth *ab initio*: Kennedy was *never* disciplined by BHS for offering silent, private prayers. In fact, the record shows clearly that Kennedy initially offered silent, private prayers while on the job from the time he began working at BHS, but added an increasingly public and audible element to his prayers over the next *approximately seven years* before the Bremerton School District (BSD) leadership became aware that he had invited the players and a coach from another school to join him and his players in prayer at the fifty-yard line after the conclusion of a football game. He was disciplined only after BSD tried in vain to reach an accommodation with him after he (in a letter from his counsel) demanded the right to pray in the middle of the football field immediately after the conclusion of games while the players were on the field, and the crowd was still in the stands. He advertised in the area's largest newspaper, and local and national TV stations, that he intended to defy BSD's instructions not to publicly pray with his players while still on duty even though he said he might lose his job as a result.

As he said he would, Kennedy prayed out loud in the middle of the football field immediately after the conclusion of the first game after his lawyer's letter was sent, surrounded by players, members of the opposing team, parents, a local politician, and members of the news media with television cameras recording the event, all of whom had been advised of Kennedy's intended actions through the local news and social media.

In his statement, Judge O'Scannlain omits most of the key facts in this case, reorders the chronology of events, and ignores pertinent Establishment Clause law, much of which has been in place for more than half a century.

I.

When Joseph Kennedy was hired by BSD in 2008, his post-game prayers were initially silent and private. *Kennedy v. Bremerton Sch. Dist. (Kennedy III)*, 991 F.3d 1004, 1010 (9th Cir. 2021). Over the ensuing years, however, Kennedy made it his mission to intertwine religion with football. Eventually, he led the team in prayer in the locker room before each game, and some players began to join him for his post-game prayer, too, where his practice ultimately evolved to include full-blown religious speeches to, and prayers with, players from both teams after the game, conducted while the players were still on the field and while fans remained in the stands. *Id.*

When BSD's Athletic Director heard about Kennedy's practices, he told Kennedy that he should not be conducting prayers with his players. *Id.* Kennedy then wrote on his Facebook page that he

thought he might have been fired for praying. *Id.* at 1011. According to Principal John Polm's deposition, that post resulted in "thousands of people saying they were going to attend and storm the field with [Kennedy] after the game." In addition, Superintendent Aaron Leavell wrote in his declaration that "[o]nce the topic arose, the District was flooded with thousands of emails, letters, and phone calls from around the country, many of which were hateful or threatening." *Kennedy III*, 991 F.3d at 1011. Clearly, from that time forward, the public was watching to see whether BSD would permit Kennedy to continue his demonstrative religious practices while he was on the job. The public's interest was neither surprising nor unintended; during the course of these events, Kennedy gave numerous media interviews describing his practice of praying mid-field at the conclusion of BHS's games, and of his intention to defy BSD in so doing.

Having learned of Kennedy's on-duty religious practice, BSD concluded that it needed to make certain the coaching staff clearly understood the parameters of what was expected of them regarding religious activities while on the job. *Id.* BSD told the coaching staff that they could and should continue giving inspirational talks to their players but that "[t]hey must remain entirely secular in nature, so as to avoid alienation of any team member." *Id.* BSD also advised that "[s]tudent religious activity must be entirely and genuinely student-initiated, and may not be suggested, encouraged (or discouraged), or supervised by any District staff." *Id.* BSD further counseled that "[i]f students engage in religious activity, school staff may not take any action likely to

be perceived by a reasonable observer, who is aware of the history and context of such activity at BHS, as endorsement of that activity." *Id.* Last, BSD stressed that Kennedy personally was

> free to engage in religious activity, including prayer, so long as it does not interfere with job responsibilities. Such activity must be physically separate from any student activity, and students may not be allowed to join such activity. In order to avoid the perception of endorsement discussed above, such activity should either be non-demonstrative (*i.e.*, not outwardly discernible as religious activity) if students are also engaged in religious conduct, or it should occur while students are not engaging in such conduct.

Id.

Kennedy initially followed BSD's instructions, ceasing both his pre-game and post-game prayers, but he eventually commenced a very public campaign against BSD focused only on the post-game activity. Quoting from our opinion:

> Kennedy's increasingly direct challenge to BSD escalated when he wrote BSD through his lawyer on October 14, 2015. The letter announced that Kennedy would resume praying on the fifty-yard line immediately after the conclusion of the October 16, 2015 game. Kennedy testified in his deposition that he intended the October 14 letter to communicate to the district that he "wasn't going to stop [his] prayer because there was [sic] kids around [him]." In other words,

> Kennedy was planning to pray on the fifty-yard line immediately after the game, and he would allow students to join him in that religious activity if they wished to do so. The lawyer's letter also demanded that BSD rescind the directive in its September 17 letter that Kennedy cease his post-game prayers at the fifty-yard line immediately after the game.
>
> Kennedy's intention to pray on the field following the October 16 game was widely publicized through Kennedy and his representatives' "numerous appearances and announcements [on] various forms of media." For example, the Seattle Times published an article on October 14 (the same day as the lawyer's letter was sent to BSD), entitled "Bremerton football coach vows to pray after game despite district order. A Bremerton High School football coach said he will pray at the 50-yard line after Friday's homecoming game, disobeying the school district's orders and placing his job at risk."[1]
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> In an attempt to secure the field from public access, BSD "made arrangements with the Bremerton Police Department for security, had signs made and posted, had 'robo calls' made to District parents, and otherwise put

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[1] The Seattle Times has the twenty-third largest circulation of any newspaper in the country, with an average Sunday circulation of 364,454. *See Circulation numbers for the 25 largest newspapers*, Seattle Times (May 1, 2012), https://bit.ly/2OGgYX5.

the word out to the public that there would be no access to the field." A Satanist religious group contacted BSD in advance of the game to notify them that "it intended to conduct ceremonies on the field after football games if others were allowed to."

On the day of the game, the District had not yet responded to Kennedy's letter. Kennedy nonetheless proceeded as he indicated he would. The Satanist group was present at the game, but "they did not enter the stands or go on to the field after learning that the field would be secured." But Kennedy had access to the field by virtue of his position as a public-school employee. Once the final whistle blew, Kennedy knelt on the fifty-yard line, bowed his head, closed his eyes, "and prayed a brief, silent prayer." According to Kennedy, while he was kneeling with his eyes closed, "coaches and players from the opposing team, as well as members of the general public and media, spontaneously joined [him] on the field and knelt beside [him]." Kennedy's claim that the large gathering around him of coaches, players, a state elected official, and other members of the public who had been made aware of Kennedy's intentions because of the significant amount of publicity advertising what Kennedy was about to do, was "spontaneous" is self-evidently [false]. Moreover, Kennedy's counsel acknowledged in his October 14, 2015 letter that Kennedy's prayers were "verbal" and "audible," flatly

contradicting Kennedy's own recounting. BSD stated that this demonstration of support for Kennedy involved "people jumping the fence" to access the field, and BSD received complaints from parents of students who had been knocked down in the stampede. Principal John Polm said that he "saw people fall[.]" Principal Polm testified that "when the public went out onto the field, we could not supervise effectively," resulting in "an inability to keep kids safe." A photo of this scene is in the record, and it depicts approximately twenty players in uniform kneeling around Kennedy with their eyes closed, a large group of what appear to be adults standing outside the ring of praying players, and several television cameras photographing the scene.[2]

In the days after the game, similar pictures were "published in various media." Kennedy also made numerous media appearances in connection with the October 16 game, to, in

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Post-game ritual on the field, October 16, 2015.

his words, "spread[] the word of what was going on in Bremerton." For example, on October 18, 2015, CNN featured an article entitled "Despite orders, Washington HS coach prays on field after game."

On October 23, 2015, BSD sent Kennedy a letter explaining that his conduct at the October 16 game violated BSD's policy. BSD reiterated that it "can and will" accommodate "religious exercise that would not be perceived as District endorsement, and which does not otherwise interfere with the performance of job duties." To that end, it suggested that "a private location within the school building, athletic facility or press box could be made available to [Kennedy] for brief religious exercise before and after games." Kennedy, of course, could also pray on the fifty-yard line after the stadium had emptied, as he did on September 18. Because the "[d]evelopment of accommodations is an interactive process," the District invited Kennedy to offer his own suggestions. Kennedy and his attorneys' only response in the record to BSD's invitation was informing the media that the only acceptable outcome would be for BSD to permit Kennedy to pray on the fifty-yard line immediately after games.

Kennedy engaged in the same behavior in violation of BSD's directive on October 23, 2015 and October 26, 2015. A photo taken after the October 23 game shows Kennedy

kneeling alone on the field while players and other individuals mill about. A photo taken after the October 26 game shows at least six individuals, some of whom appear to be school-age children, kneeling around Kennedy.

…

During this time, other BSD employees testified that they suffered repercussions due to the "attention given to Mr. Kennedy's issue and the way he chose to address the situation." For example, Nathan Gillam, BHS's head football coach, testified that during the controversy, "an adult who [he] had never seen before came up to [his] face and cursed [him] in a vile manner." Gillam further stated that he was concerned for his physical safety. He testified, "One of the assistant football coaches was also a police officer and, as we headed down to the field for one game, I obliquely asked him what he thought about whether we could be shot from the crowd." As a result of these concerns, Gillam "decided that [he] would resign" from the coaching position he had held for eleven years.

After the season wound down, BSD began its annual process of providing its coaches with performance reviews. Gillam recommended that Kennedy not be rehired because Kennedy "failed to follow district policy," "his actions demonstrated a lack of cooperation with administration," he "contributed to

> negative relations between parents, students, community members, coaches and the school district," and he "failed to supervise student-athletes after games due to his interactions with [the] media and [the] community." Kennedy did not apply for a 2016 coaching position.

Kennedy III, 991 F.3d at 1012-14.

When Kennedy sought injunctive relief from the Supreme Court after we decided *Kennedy v. Bremerton School District (Kennedy I)*, 869 F.3d 813 (9th Cir. 2017), Justice Alito noted that "important unresolved factual questions would make it very difficult if not impossible at this stage to decide the free speech question that the petition asks us to review." *Kennedy v. Bremerton Sch. Dist. (Kennedy II)*, 139 S. Ct. 634, 635 (2019) (mem.) (Alito, J., concurring in denial of certiorari). Specifically, Justice Alito believed that the Court was unable to review our decision until the record was clear about "the basis for the school's action" against Kennedy. *Id.* But after the case was remanded to the district court and discovery was completed, *the district court ruled that "the risk of constitutional liability associated with Kennedy's religious conduct was the 'sole reason' the District ultimately suspended him." Kennedy III*, 991 F.3d at 1010 (emphasis added).

Judge O'Scannlain recounts only the facts that he claims are "constitutionally relevant." While our panel—like the Supreme Court—"refuse[s] to turn a blind eye to the context in which" an Establishment Clause violation would arise, *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 315 (2000), many

of the facts that Judge O'Scannlain selectively deems "constitutionally relevant" in his statement are unmoored from the record. For the reader's convenience, I here provide each material unmoored statement below, along with the accurate version, as reflected in the record.

The unmoored claim	What the record actually shows
"[S]tudents and coaches began to join Kennedy in prayer of their own accord." Statement at 46 (O'Scannlain, J., statement regarding denial of rehearing en banc).	There is no support for the suggestion that players could have avoided Kennedy's pre-game locker room prayers or post-game on-field prayers. At least one atheistic student athlete only participated in the post-game prayers because he feared he would get less playing time if he declined. No students prayed on the field without Kennedy when Kennedy paused his practice of doing so.
"Kennedy's prayer—no matter how personal, private, brief, or quiet—was *wholly unprotected* by the First Amendment." Statement at 52 (O'Scannlain, J., statement regarding	Kennedy's prayer was public, audible, and created a scene that included students being knocked down in the rush to jump over the fence to join Kennedy on the field.

denial of rehearing en banc).	
"Kennedy essentially asked his employer to *do nothing*—simply to tolerate the brief, quiet prayer of one man." Statement at 64 (O'Scannlain, J., statement regarding denial of rehearing en banc).	Kennedy engaged in private prayer for several years. But when BSD learned that he had begun leading students in pre-game locker room prayers and giving overtly religious speeches on the field post-game, it directed him to stop that practice. Kennedy demanded that his employer allow him to engage in a public religious demonstration surrounded by school-age children in front of a large crowd, in an area he could only access because he was a public employee.
The panel relied "simply on the existence of a District policy that coaches should 'exhibit sportsmanlike conduct at all times'" to determine Kennedy's job duties. Statement at 52 (O'Scannlain, J., statement regarding	The panel relied on numerous facts in the record, including BSD's direction that Kennedy engage in motivational speech to students of a secular nature at the end of each game. The panel also relied on Kennedy's own characterization of

denial of rehearing en banc).	his duties as a role model and mentor, and his agreement to "maintain positive media relations," "obey all the Rules of Conduct before players and public," and "serve[] as a personal example." Kennedy "plainly understood that demonstrative communication fell within the compass of his professional obligations." *Kennedy I*, 869 F.3d at 826.
"[O]n the panel's view, a school can restrict any speech for any reason so long as it instructs its employees to demonstrate good behavior in the presence of others." Statement at 54 (O'Scannlain, J., statement regarding denial of rehearing en banc).	A school can guide the content of demonstrative speech to students during times when the employee's job duties require that speech. *Kennedy III*, 991 F.3d at 1015.
The panel held "that prayer was one of Kennedy's job duties when his employer maintained a policy	The panel held that speech and demonstrative conduct after football games was one of Kennedy's job

banning it[.]" Statement at 58 (O'Scannlain, J., statement regarding denial of rehearing en banc).	duties, and therefore, his carrying out of those duties was speech as a public employee. *Kennedy I*, 869 F.3d at 826. This is quintessential regulable government employee speech.
"Only by ignoring everything the District said and did could an observer (mistakenly) think the school was endorsing Kennedy's [prayer]." Statement at 67 (O'Scannlain, J., statement regarding denial of rehearing en banc).	Given Kennedy's media campaign, if BSD had dropped its opposition to Kennedy's prayer instead of suspending him, an objective observer would believe that BSD now agreed that Kennedy was allowed to publicly pray surrounded by his players as a demonstration for the crowd. BSD's prior objection to the practice, followed by its accession, would magnify, not diminish, BSD's stamp of approval.
"[T]he panel neglects other, more narrowly tailored remedies." Statement at 68 (O'Scannlain, J.,	Kennedy rejected any compromise and demanded that he be allowed to pray on the field surrounded by his

statement regarding denial of rehearing en banc).	players and in front of all the game's attendees.
"[T]he district could have disclaimed Kennedy's prayer." Statement at 69 (O'Scannlain, J., statement regarding denial of rehearing en banc).	A disclaimer would have no effect on the proven coercive effect Kennedy's prayers had on his players. This coercive effect is documented in the record.

II.

With the *real* facts in mind, let us next consider the relevant law. Kennedy alleged BSD's actions violated his First Amendment Free Speech rights. We consider "a sequential five-step series of questions" when evaluating Free Speech claims brought by public employees. *Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009). *Eng*'s second and fourth questions are at issue in this case: whether Kennedy spoke as a private citizen or as a public employee, and whether BSD had adequate justification for treating Kennedy differently from other members of the public. BSD argued Kennedy's Free Speech claim failed because he spoke as a public employee and, even if he spoke as a private citizen, BSD had adequate justification for treating Kennedy as it did because BSD would have violated the Establishment Clause if it had permitted Kennedy to continue his religious practices on the field.

I begin my legal analysis where Judge O'Scannlain ended: with the Establishment Clause.

> By the time of the adoption of thef Constitution, our history shows that there was a widespread awareness among many Americans of the dangers of a union of Church and State. These people knew, some of them from bitter personal experience, that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer[.]

Engel v. Vitale, 370 U.S. 421, 429 (1962). For that reason, the Court in *Engel* held that a New York school district violated the Establishment Clause by having students recite a prescribed non-denominational prayer at the beginning of each school day. *Id.* at 436. Following *Engel*, Establishment Clause doctrine evolved to take special care when challenged religious endorsement occurred in schools. *See Lee v. Weisman*, 505 U.S. 577, 592 (1992) ("[T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."). In *Lee*, the Court held that it was unconstitutional for a Providence, Rhode Island high school to include a prayer by a clergyman in its graduation ceremony. *Id.* at 599. When discussing the graduation prayer, the Court was guided by "the lesson of history that was and is the inspiration for the Establishment Clause, the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce." *Id.* at 591-92. Religious expression that bears "the imprint of the State" results in "grave risk [to] that freedom of belief and conscience which are the

sole assurance that religious faith is real, not imposed." *Id.* at 590, 592. And in *Abington Township*, the Court ruled that optional morning readings from the Bible in public schools were unconstitutional, writing, "[W]e cannot accept that the concept of neutrality, which does not permit a State to require a religious exercise even with the consent of the majority of those affected, collides with the majority's right to free exercise of religion." *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 225-26 (1963). The Court continued, "While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs." *Id.* at 226. This brief review of the treatment of prayer in schools brings us to Kennedy's claim that he should have been allowed to use his access to the BSD's football field, its sports program, and the attention of BSD's spectators, to practice his beliefs.

If allowing Kennedy to continue his religious practice would have violated the Establishment Clause, BSD's restriction had "an adequate justification" for *Pickering*/*Eng* purposes, and its action was thus constitutional. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001) (holding that "a state interest in avoiding an Establishment Clause violation 'may be characterized as compelling,'" and justify restricting other First Amendment rights).

Judge O'Scannlain contends that the panel failed to identify the state action that constitutes an Establishment Clause violation. That is a curious

misreading of our opinion. We explained that Kennedy's media appearances and refusal to comply with BSD directives had created a public controversy, and, understanding how Kennedy's religious practice had evolved, we specifically identified "BSD's allowance of [Kennedy's religious] activity" as the state action that would have violated the Establishment Clause. *Kennedy III*, 991 F.3d at 1017; *see Santa Fe*, 530 U.S. at 305-06 (holding that a school's choice to permit student religious activity is enough to make student-led "pregame prayers bear the imprint of the State" (internal quotation marks omitted)). In writing that "private religious speech on public school property does not constitute state action and therefore does not run afoul of the Establishment Clause," Statement at 63 (O'Scannlain, J., statement regarding denial of rehearing en banc), Judge O'Scannlain puts the cart before the horse and ignores the controlling rule from *Santa Fe*. In reality, religious speech uttered by an individual on school property *can* violate the Establishment Clause if an objective observer would view the speech as stamped with the school's seal of approval. For example, in *Collins v. Chandler Unified School District*, we held that the school's practice of permitting students to say a prayer of their choosing at the beginning of student assemblies violated the Establishment Clause. 644 F.2d 759, 760-61 (9th Cir. 1981). The Student Council (not the school itself) selected the individual who would give the prayer and noted the event on the assembly agenda. *Id.* Like in *Kennedy*, the prayer in *Collins* was the independent choice of private individuals. Merely by allowing the prayer to take place, the school violated the Establishment Clause.

The same would be true here if BSD had allowed Kennedy's prayers to continue.[3]

Judge O'Scannlain's statement misses the crucial point that becomes clear when the events are viewed in the order in which they actually occurred. The panel was required to address the choice BSD confronted: impose some limits on Kennedy's First Amendment expression, or violate the Establishment Clause. It is only through this analysis that we could determine whether BSD's decision to limit Kennedy's religious expression was backed by a compelling interest.

As the Supreme Court made clear in *Santa Fe*, the context in which religious expression occurs is the touchstone for the Establishment Clause analysis. *Santa Fe*, 530 U.S. at 303-08. The Court instructed us to ask "whether an objective observer, acquainted with the text, [ ] history, and implementation of [the policy], would perceive it as a state endorsement of prayer in public schools." *Id.* at 308 (citation omitted). For this reason, we examined the context in which Kennedy's prayers occurred, including his publicity-seeking activities leading up to the games on October 16, 23, and 26 (after which he was suspended), the Coach's historical practice that resulted in players feeling pressure to pray with him, and his insistence that the prayer take place before the football players left the field or the fans left the stands. (As noted, BSD offered

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[3] Incidentally, in rejecting another prayer-in-schools Establishment Clause claim, Judge O'Scannlain attempted to distinguish *Collins*. *Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832, 836 (9th Cir. 1998). But his opinion was vacated upon en banc rehearing, and the en banc court decided the case on different grounds. 177 F.3d 789 (9th Cir. 1999).

Kennedy multiple accommodations, including one—which he accepted for a time—that allowed him to wait until students had left the field to say his mid-field prayer.) And like the Court in *Santa Fe*, we concluded that if BSD had allowed Kennedy to continue his activities rather than suspending him, an objective observer would have been left with no doubt that BSD endorsed the integration of prayer into the football games.

Still, Judge O'Scannlain maintains, our examination "drain[ed]" the Establishment Clause case law of "the factors animating [its] logic," which our colleague lists as "the school policy, the degree of control over employee speech, neutrality toward religion, or the possibility of coercion." In fact, these considerations featured prominently in *Kennedy III*: as stated previously, "the school policy" is set out in our opinion, and the question was whether BSD could allow Kennedy's religious expression directed at students. As for the degree of control over Kennedy's speech, BSD personnel specifically instructed Kennedy "(1) that he should speak to players post-game and (2) what the speeches should be about[.]" *Kennedy III*, 991 F.3d at 1016. With respect to neutrality toward religion, allowing Kennedy to pray in the manner he demanded would have forced BSD either to open the field to all religious practices or forgo neutrality. As we explained, "[a] Satanist religious group contacted BSD in advance of the [October 16] game to notify them that 'it intended to conduct ceremonies on the field after football games if others were allowed to.'" *Id.* at 1012. And as for the possibility of coercion, *Kennedy III* extensively discussed the uncontroverted direct and

circumstantial evidence in the record that some of the players felt coerced to pray with Coach Kennedy, and that he intended to continue that practice. *Id.* at 1018 ("Over time, little by little, his players began to join him in this activity—at least one out of a fear that declining to do so would negatively impact his playing time."); *id.* at 1012 ("Kennedy testified in his deposition that he intended the October 14 letter to communicate to the district that he 'wasn't going to stop [his] prayer because there was [sic] kids around [him].'"); *id.* at 1013 ("When Kennedy was on leave, and during the time he temporarily ceased performing on-field prayers, BHS players did not initiate their own post-game prayer."). We addressed every factor Judge O'Scannlain says we ignored, and each supported our disposition. Given Kennedy's own statement that he would pray with students if allowed to remain at his post, *id.* at 1012, the (very real) threat of an Establishment Clause violation justified his suspension.

Judge O'Scannlain's final assertion is that we overlooked BSD's option to provide a disclaimer that Kennedy's religious activity did not carry the school's endorsement. But this resolution would not dispel the pressure that players on the team felt to join in their coach's prayer circle out of fear that their playing time would suffer if they opted out. Disclaimers are insufficient in "coercive" contexts, *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 984-85 (9th Cir. 2003); our colleague's statement conveniently omits the uncontested evidence that Kennedy's conduct left some of his players feeling pressure to participate in mid-field prayers after the game. In addition, the record also shows that no players prayed

on the field when Kennedy was not there, which speaks to the coercive effect of Kennedy's religious practices.

I must not neglect to mention the dissent of a second colleague who believes our opinion should have been reheard en banc, Judge Ryan Nelson. Judge R. Nelson's dissent to the denial of rehearing en banc appears to be based on two claims: (1) *Santa Fe* should not be extended because it is "ahistorical"; and (2) we applied *Santa Fe*'s test incorrectly. Cabining Supreme Court precedent is a job for the Supreme Court—not a three-judge *or* en banc panel of our court—and I suspect Judge R. Nelson is fully aware of that fact. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("[T]he Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions."). Likewise, Judge Ikuta's suggestion that we should have taken this case en banc to develop a "framework for evaluating how a public employer can protect its employee's religious expression without becoming vulnerable to an Establishment Clause claim" would ostensibly conflict with the Supreme Court's decisions that already prescribe how courts should evaluate prayer in schools. We are not at liberty to make such a change.

As for the second of Judge R. Nelson's concerns, I strongly disagree. Initially, Judge R. Nelson prejudges the issue by claiming that the panel's reliance on *Santa Fe* was "inapt" because permitting Kennedy's prayer would not have been an endorsement of religion. Dissent at 75 (R. Nelson, J., dissenting from denial of en banc rehearing). However, the *Santa Fe*

test is *how we are required to determine* whether a particular state action unconstitutionally establishes religion. For that reason, the panel did not "extend" *Santa Fe*—we applied the relevant law to the facts in the record. Moreover, there are substantive problems with Judge R. Nelson's contention that players were not coerced into joining Kennedy's prayers. Most importantly, Judge R. Nelson gives short shrift to the clear line the Supreme Court has drawn between adults and children in discussing Establishment Clause coercion. In *Town of Greece*, the case upon which Judge R. Nelson relies for his coercion argument, the Court in fact distinguished "an unconstitutional imposition as to mature adults, who 'presumably' are 'not readily susceptible to religious indoctrination or peer pressure,'" from high school students at a school-sponsored event. *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 590 (2014) (citation omitted). Unlike in adult environments, taking into account "students' emulation of teachers as role models and the children's susceptibility to peer pressure," "[t]he Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987). Judge R. Nelson's coercion argument falls flat because it treats children as adults, in contravention of the Supreme Court's instruction that the two are different for purposes of determining the danger of coercion.

Additionally, Judge R. Nelson minimizes the experience of the student athlete who prayed with Kennedy in contravention of his own religious beliefs because he felt that declining to do so would decrease his playing time. Dissent at 80, (R. Nelson, J.,

dissenting from denial of rehearing en banc). This student's experience—which is undisputed in the record—perfectly illustrates the importance of the difference between teens and adults that the Court set forth in *Town of Greece*. Why is this student's right to be free from coercive pressure to violate his own religious beliefs inferior to Kennedy's right to practice his in such a public and demonstrative way? Judge R. Nelson's outright dismissal of this student's actual participation in a religious exercise that violated his beliefs is surprising. It implies that religious freedom is reserved for sectarian Christians, but not necessarily for those who are Jewish, Muslim, Buddhist, atheist, or who hold to other creeds. That approach, of course, flies in the face of current Supreme Court law.

Finally, Judge R. Nelson conflates the coercion inquiry with the *Santa Fe* inquiry, which perhaps contributes to his mistaken perspective on this issue. *See* Dissent at 80 n.5 (R. Nelson, J., dissenting from denial of rehearing en banc). Kennedy's publicity campaign was relevant not because it coerced the public to storm the field, but because it was essential to consider the *context* of Kennedy's religious activity in determining whether BSD's dropping its objection to Kennedy's behavior would cause an objective observer to view the activity as stamped with the school's seal of approval. In contrast, the coercive effect of Kennedy's religious activity is apparent from the record of events *before* BSD instructed Kennedy to stop leading students in prayer. By the same token, this evidence shows that it is also likely that players would feel pressured to join Kennedy's prayer *in the*

future if BSD gave Kennedy back his religious bully pulpit.

Several of our dissenting colleagues also suggest that the conflict between Kennedy and BSD made clear that BSD did not endorse Kennedy's religious activity. As stated above, the operative fact in this hypothetical would be BSD *dropping* its opposition to the activity—the very outcome Kennedy sought. Dropping opposition to the practice is different in kind from publicly opposing it. But more broadly, adopting a rule that rewards an employee's ability to garner public support and media coverage of a dispute with his employer would come with perverse incentives. Let us assume for a moment that an employer will act more forcefully to curb a more egregious potential Establishment Clause violation. Under a rule that uses the force of the employer's response to decide whether there ever was an Establishment Clause violation in the first place, the worst violations that receive the strongest responses would no longer be considered violations. That approach simply makes no sense, and conflicts sharply with current Supreme Court law.

III.

The actual facts of the case also leave no question that Kennedy did not carry his burden to show that he spoke as a private citizen, which is an independent basis to affirm the district court.[4] In reaching the

[4] Judge O'Scannlain appears to disapprove of the fact that our opinion included alternative holdings on prongs two and four of the *Eng* test. Statement at 59 (O'Scannlain, J., statement regarding denial of rehearing en banc). The practice of including alternative holdings or *arguendo* assumptions is quite common,

opposite conclusion, Judge O'Scannlain sets aside the context of Kennedy's audible prayers as well as Kennedy's acknowledgment that he was on duty while on the field with his players, and contends that our panel misapplied *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the central Supreme Court precedent for determining whether a government employee speaks as a private citizen or as a public official.

Judge O'Scannlain's contention that our opinion misapplied *Garcetti* is simply wrong on the current law. In *Garcetti*, the Court wrote that "[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." 547 U.S. at 418. One reason for this is that government employees "often occupy trusted positions in society," *id.* at 419, (such as a mentor to high school students, as Kennedy was). When a person in a trusted position "speak[s] out, they can express views that contravene governmental policies or impair the proper performance of governmental functions." *Id.* At bottom, "[u]nderlying [the Court's] cases has been the premise that while the First Amendment invests public employees with certain rights, it does not empower them to 'constitutionalize the employee grievance.'" *Id.* at 420 (quoting *Connick v. Thompson*, 461 U.S. 138, 154 (1983)). *Garcetti* considered several

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familiar to, and used by Judge O'Scannlain, and does not connote a court's lack of confidence in the first alternative holding. *See Ctr. for Biological Diversity v. Lohn*, 511 F.3d 960, 965 (9th Cir. 2007) (O'Scannlain, J.); *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1069 (9th Cir. 1998) (O'Scannlain, J.); *Huffman v. Cnty. of L.A.*, 147 F.3d 1054, 1060 (9th Cir. 1998) (O'Scannlain, J.); *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1307 (9th Cir. 1997) (O'Scannlain, J.).

factors: whether the employee speech was expressed internally or publicly, whether the speech concerned the subject matter of the employee's job, and—most importantly—whether the speech was "made pursuant to his duties" as a public employee. *Id.* at 420–22. In subsequent cases, our circuit alternately phrased this last inquiry as whether "the speech at issue owes its existence to" the speaker's government employment. *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 970 (9th Cir. 2011), *cert. denied*, 566 U.S. 906 (Mar. 26, 2012).[5]

An integral part of Kennedy's job was serving as a mentor and role model to students.[6] BSD recognized that one of the ways in which he carried out this duty was by giving post-game motivational speeches to his

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[5] Judge O'Scannlain's statement also relies heavily on the minority statement regarding denial of certiorari the last time this case was before the Supreme Court. It bears repeating that the relevant justices acknowledged they did not have the benefit of factual development in this case when the statement was made, and that four justices do not represent the opinion of the Court.

[6] It was also Kennedy's stated intent that his behavior set an example for children watching. Kennedy testified during his deposition that his behavior in the presence of students was "*always* setting some kind of an example to the kids … to do what is right." (Emphasis added.) In an interview published on May 3, 2019, Kennedy affirmed that he viewed his religious activity as setting an example, stating "[A]s a Marine, I knew I had to fight. I always told the young men whom I coached to stand up when adversity came their way. I had to be a leader to them and live up to what I said. So I wasn't going to back down[.]" *See Kennedy III*, 991 F.3d at 1017 n.2. Clearly, Kennedy himself viewed persisting in his public prayers as part of his service as a role model to students in fulfillment of his job duties.

players on the field after football games. Kennedy's employer requested that he engage in such expressions. In BSD's September 17 letter to Kennedy, Superintendent Aaron Leavell wrote, "You may continue to provide motivational inspirational talks to students before, during and after games and other team activity, focusing on appropriate themes … that have long characterized your very positive and beneficial talks with students." Leavell later wrote to Kennedy that he "values very highly" Kennedy's "positive contributions to the BHS football program and in particular," his "motivational and inspirational talks to players" after games. Leavell "encourage[d] continuation of" the practice of post-game secular motivational speeches to students.

Applying *Garcetti* to this fact pattern, the record leaves no doubt that Kennedy's prayers were speech in his capacity as a public employee. Kennedy insisted on expressing his religious speech publicly (indeed, he refused to wait until the audience had left the stadium so his prayers could be observed by all those on the field and in the stadium); the record shows he would not have had access to the field if he had not been working as a coach; he admitted he was on duty when he prayed on the field; and the prayers were uttered in violation of his employer's instructions as part of the post-game motivational speeches his employer had encouraged him to continue providing for the players. Given these facts, there can be no genuine dispute that this speech was within Kennedy's job description, and I reject the notion that our conclusion somehow improperly broadens Kennedy's duties in a way that contravenes *Garcetti*.

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In sum, based on the actual facts of the case, our conclusion in *Kennedy III* faithfully applies the relevant current law. I hope as this case proceeds that the truth of what actually happened will prevail, but whether it does or not, I personally find it more than a little ironic that Kennedy's "everybody watch me pray" staged public prayers (that spawned this multi-year litigation) so clearly flout the instructions found in the Sermon on the Mount on the appropriate way to pray.[7] I concur in our court's denial of rehearing this case en banc.

CHRISTEN, *Circuit Judge*, joined by D.W. NELSON, *Senior Circuit Judge*, concurring in the denial of rehearing en banc:

I do not typically publish my views concerning our court's decisions to grant or deny rehearing en banc, but I make an exception here because the salient facts that compelled our three-judge panel's decision to affirm the district court's summary judgment ruling may be obscured by the spirited statements dissenting from our court's denial of rehearing en banc. Our three-judge panel unanimously affirmed the district court's summary judgment ruling because Coach

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[7] 5 And when thou prayest, thou shalt not be as the hypocrites are: for they love to pray standing in the synagogues and in the corners of the streets, that they may be seen of men. Verily I say unto you, They have their reward.

6 But thou, when thou prayest, enter into thy closet, and when thou hast shut thy door, pray to thy Father which is in secret; and thy Father which seeth in secret shall reward thee openly. Matt 6:5-6 (King James).

Kennedy spoke as a public employee, because Bremerton School District (BSD) did not demonstrate a hint of hostility or bias toward religion or non-religion, and because BSD had a compelling interest in avoiding an Establishment Clause violation. *Kennedy v. Bremerton Sch. Dist.* (*Kennedy III*), 991 F.3d 1004, 1014-21 (9th Cir. 2021) (citing *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 113-14 (2001)). The outcome of this appeal was driven by the particular facts and circumstances of Coach Kennedy's post-game, on-field prayers, *see id.* at 1010-14, so it is critically important that we not stray from the facts that are supported by the record.

To begin, given the record presented to the district court, there is no genuine dispute that Coach Kennedy spoke as a public employee. Recognizing the Supreme Court's caution that job descriptions must not be read too broadly, *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006), the proper inquiry to determine whether a task is within the scope of a public employee's professional duties is a practical one, *id.* Here, the practical inquiry into the duties of a high school football coach must acknowledge that football coaches occupy a significant leadership role in their high school communities and wield undeniable—perhaps unparalleled—influence where their players are concerned.[8] *Kennedy III*, 991

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[8] *See* Brief of Amicus Curiae Former Professional Football Players Steve Largent and Chad Hennings at 1-2, *Kennedy v. Bremerton*, 869 F.3d 813 (9th Cir. 2017) (No. 16-35801), 2016 WL 6649979 at *1 (Pro Football Hall of Famer Steve Largent "credits his successes on and off the field in large part to the positive influence of the men who coached him in his own youth," and College Football Hall of Famer Chad Hennings "attributes much of his success to lessons imparted to him by the men who coached

F.3d at 1015-16, 1025. Contrary to our dissenting colleagues' suggestions, the parties did not consider this point to be controversial. Indeed, Coach Kennedy agreed that "for some kids, the coach might even be the most important person they encounter in their overall life," and that "the scope of what a coach has to do with some of the kids … is much more than what any teacher in a classroom has to do." *Id.* at 1025.

Second, regardless of Coach Kennedy's subjective intent, there was uncontroverted evidence that Coach Kennedy's prayerful speech had a coercive effect on his players. At least one student felt compelled to join Coach Kennedy's post-game prayers, contrary to the player's own beliefs, because he feared he would get less playing time if he did not participate. The record also shows that the players did not initiate their own post-game prayer when Coach Kennedy temporarily ceased his practice, nor after Coach Kennedy had been suspended. The conscientious district judge assigned to this case appropriately factored these practical considerations into his description of Coach Kennedy's job duties, and recognized that, in addition to teaching students how to play the game, *i.e.*, teaching players how to block and tackle, Coach Kennedy's job required him to motivate and mentor students, set a good example, and strive to "create good athletes and good human beings." *See id.* at 1010.

Third, our three-judge panel did not suggest that a coach or teacher necessarily speaks as a public employee every time he or she prays within eyeshot of

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him throughout his scholastic and professional athletic endeavors.").

students. Indeed, we illustrated that point by including a few examples where educators might engage in brief on-duty prayer that would be plainly private and pose no risk of violating the Establishment Clause. *Id.* at 1015-16, 1025. We explained that a teacher tasked with supervising a high school cafeteria would not risk an Establishment Clause violation if she took a moment to give thanks before eating her meal, and that the Establishment Clause "can surely accommodate high school students observing a teacher giving thanks for an 'all clear' announcement in the wake of a safety scare." *Id.* at 1015, 1025. We had no reason to explore or define the permissible limits of such speech in a school setting because Coach Kennedy's prayer so clearly crossed the line by purposefully sending a very public message. Coach Kennedy's prayers occurred on the fifty-yard line, immediately following the team's games, before the players left the field, under the stadium lights, and while spectators remained in the stands. *Kennedy III*, 991 F.3d at 1010, 1024. To be clear, Coach Kennedy insisted that he pray *immediately* after the games, not while the players were on their way back to the locker room. The players had not yet left the field and were sometimes still shaking the hands of the opposing players or singing the school fight song when Coach Kennedy knelt and audibly prayed. Although he initially agreed to one of BSD's suggested accommodations and prayed after the players and fans left the stadium, *see id.* at 1011-12, it is important to recognize that by the time the parties' dispute came to a head, Coach Kennedy had refused all BSD's accommodations and insisted that he be allowed to worship at his chosen time and place: at midfield, with

players and fans present. Our conclusion that Coach Kennedy spoke as a public employee when he prayed at midfield following the team's games rested on the facts in the record.

Respectfully, our colleagues' dissenting statements concerning the denial of rehearing en banc take sound bites from the record out of sequence and paint an inaccurate picture of the dilemma Coach Kennedy created. Though his prayers may have started as personal and private, they evolved into post-game motivational speeches to the majority of his players, and Kennedy admitted his speeches likely constituted prayers. *Id.* at 1011. After an opposing coach informed BSD that Coach Kennedy invited the opposing team to participate in post-game prayer, BSD directed Coach Kennedy not to pray with the students. But BSD encouraged Coach Kennedy to continue delivering secular post-game motivational messages. *Id.* at 1011. The district court correctly concluded that, at all times relevant to Coach Kennedy's claims, he spoke as a public employee when he prayed on the field immediately following games. Despite our dissenting colleague's protests, the record does not support the notion that he engaged in private personal prayer.

A few other points bear repeating: (1) BSD never sanctioned Coach Kennedy for engaging in private prayer; (2) as we describe at some length, Coach Kennedy's post-game prayers were anything but private, *id.* at 1011-14, 1025; (3) nowhere did our panel suggest that a school district will be subject to a viable Establishment Clause claim any time a school employee engages in private prayer; (4) Coach

Kennedy rejected several accommodations BSD offered that would have allowed him to pray privately, instead demanding that he be permitted to pray on the fifty-yard line immediately following games, while players, spectators, and media looked on, *id.* at 1013, 1022. To borrow an analogy from the district court, the venue Kennedy chose for his post-game prayers was akin to a drama teacher taking center stage to pray after a school play. An objective observer would interpret a teacher's speech, delivered from that location and directed to a school audience, as "an extension of the school-sanctioned speech just before it." There is no genuine question that Coach Kennedy's prayers sent a very public message.

Contrary to the statement of one of our colleagues, Coach Kennedy was not in the position of asking BSD to "do nothing" or "tolerate the brief, quiet prayer of one man." Coach Kennedy launched a national media campaign that magnified the public nature of his post-game prayers and painted BSD into a corner. As Judge Ikuta aptly described the situation:

> Joseph Kennedy's highly public demonstrations of his religious convictions put [BSD] in a no-win situation. BSD wanted to respect Kennedy's right "to engage in religious activity, including prayer," but it feared that allowing Kennedy to engage in such highly public activity on the field after football games would create a perception that BSD was endorsing religion, in violation of the Establishment Clause.

Following Kennedy's multiple media interviews, he was joined on the field by his own players, players

from opposing teams, members of the public—including a state representative—and the media. *Kennedy III*, 991 F.3d at 1010. Our three-judge panel described BSD's unsuccessful efforts to keep people off the football field and maintain a safe environment, *id.* at 1012, but those efforts were in vain. As spectators rushed to join Coach Kennedy in on-field prayer, band members were knocked over, and one of BSD's coaches questioned whether he could be shot from the crowd. Had BSD abandoned its opposition to Coach Kennedy's on-field prayers after his multiple interviews with local and national media, an objective observer would have perceived that BSD endorsed his speech. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000).

Our dissenting colleagues suggest that BSD could have issued a public disclaimer, but that was not a realistic option; a public disclaimer in the wake of Coach Kennedy's media campaign would have only called more attention to his very public worship. Moreover, "the 'First Amendment mandates governmental neutrality between religion and religion.'" *McCreary Cnty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). Thus, BSD could not simply distance itself from Kennedy's Christian prayer and allow Kennedy to continue; rather, BSD would have had to permit access by other religious faiths, including the Satanist group that had notified BSD it "intended to conduct ceremonies on the field after football games if others were allowed to." *Kennedy III*, 991 F.3d at 1012. The suggestion that BSD could have issued a public disclaimer is

untenable; BSD opened its forum for a football game, not for religious worship by all comers.

This case concerns prayer in a public school, not a town square. *See Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2092-93 (2019) (Kavanaugh, J., concurring) (identifying "religious expression in public schools" as a "categor[y] of Establishment Clause cases" distinct from "regulation of private religious speech in public forums"); *Lee v. Weisman*, 505 U.S. 577, 592 (1992) (recognizing "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools"). The touchstone of the Court's concern in this type of case is the risk of coercion. *See Lee*, 505 U.S. at 587; *Santa Fe*, 530 U.S. at 310-13. The district court found no genuine dispute that Coach Kennedy's prayers were public, not private, and that Coach Kennedy occupied a "powerful position in his players' lives." The record includes unrebutted evidence that at least one student felt compelled to participate in Coach Kennedy's post-game prayers, contrary to the student's own religious beliefs, because he feared he would not get as much playing time if he did not. As such, the uncontested facts support the district court's conclusion that Coach Kennedy's prayers had a coercive effect.

In the future, we may be presented with close cases in which our court will have an opportunity to address the important issues raised by a public school's response to an employee's private prayer. But this is not such a case. The actual record presented in the district court bears little resemblance to the hypothetical scenarios posited by Coach Kennedy, and

our decision faithfully applied existing Supreme Court precedent to the particular facts presented. Accordingly, I concur in our court's denial of rehearing en banc.

O'SCANNLAIN, *Circuit Judge*,[9] with whom Judges CALLAHAN, BEA, R. NELSON, COLLINS, and LEE join, with whom Judge BUMATAY joins as to Part III, and with whom Judge VANDYKE joins as to all parts except Part IIB, respecting the denial of rehearing en banc:

It is axiomatic that teachers do not "shed" their First Amendment[10] protections "at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).[11] Yet the opinion in this case obliterates such constitutional protections by announcing a new rule that *any* speech by a public

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[9] As a judge of this court in senior status, I no longer have the power to vote on calls for rehearing cases en banc or formally to join a dissent from failure to rehear en banc. *See* 28 U.S.C. § 46(c); Fed. R. App. P. 35(a). Following our court's general orders, however, I may participate in discussions of en banc proceedings. *See* Ninth Circuit General Order 5.5(a).

[10] U.S. Const. amend. I. References throughout this Statement will be made to the Free Speech Clause, *id.* cl. 3 ("Congress shall make no law … abridging the freedom of speech … "), the Free Exercise Clause, *id.* cl. 2 ("Congress shall make no law … prohibiting the free exercise []of [religion] … "), and the Establishment Clause, *id.* cl. 1 ("Congress shall make no law respecting an establishment of religion … ").

[11] Indeed, the Supreme Court reaffirmed this principle just a few days ago. *See Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. __, 2021 WL 2557069, at *4 (June 23, 2021) (citing *Tinker*, 393 U.S. at 506).

school teacher or coach, while on the clock and in earshot of others, is subject to plenary control by the government. Indeed, we are told that, from the moment public high school football coach Joseph Kennedy arrives at work until the very last of his players has gone home after a game, the Free Speech Clause simply doesn't apply to him.

Kennedy lost his coaching job because he refused to abandon his practice of kneeling on the field and uttering a prayer after each football game. In 2017, the three-judge panel decided that Kennedy's prayer was wholly unprotected by the Free Speech Clause. *Kennedy v. Bremerton Sch. Dist.*, 869 F.3d 813 (9th Cir. 2017) (*Kennedy I*). In an extraordinary filing, four Justices of the Supreme Court chastised the panel for its "highly tendentious" reading of *Garcetti v. Ceballos*, 547 U.S. 410 (2006). *Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 636 (2019) (statement of Alito, J.) (*Kennedy II*).

Rather than heed the extremely rare interlocutory guidance of four Justices, the panel has doubled down on its "troubling" view. *Id.* (statement of Alito, J.). The panel now declares not only that the school district was *permitted* to suspend Kennedy, but also that it was *constitutionally required* to do so. *Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004, 1016-19 (9th Cir. 2021) (*Kennedy III*). That is strange indeed, given that this is not an action brought by a student or parent who alleges the government coerced his or her participation in a state-sponsored prayer service. No matter, the opinion here weaponizes the Establishment Clause to defeat the Free Exercise

claim of one man who prayed "as a private citizen." *Id.* at 1016.

Our circuit now lies in clear conflict with *Garcetti* and decades of Supreme Court cases affirming the principle that the First Amendment *safeguards*—not banishes—private, voluntary religious activity by public employees. A decision at odds with Free Speech, Free Exercise, and Establishment Clause jurisprudence all at once, this case certainly warranted a rehearing en banc. It is unfortunate that our court has declined the opportunity to do so.

I.

A.

First, the facts—more specifically, the *constitutionally relevant* facts.[12] Joseph Kennedy was a football coach of Bremerton High School from 2008 to 2015. *Kennedy III*, 991 F.3d at 1010. A devout Christian, Kennedy sincerely believes that he is obliged to give thanks to God through prayer after each football game. *Id.* From the time he started coaching, Kennedy would "kneel at the 50-yard line and offer a brief, quiet prayer of thanksgiving for

[12] That is, as Kennedy's brief points out, the facts relevant to the dispute over the constitutional right Kennedy *actually asserted*—and the District *actually denied*—in this case: a "right to engage in brief, personal prayer *by himself* on the field at the conclusion of football games." *But see Kennedy III*, 991 F.3d at 1017-19 (panel dwelling at length on instances when students joined Kennedy in prayer, despite his never asserting a right to pray *with students*). *See also Kennedy II*, 139 S. Ct. at 636 (statement of Alito, J.) (criticizing panel for colorfully "recount[ing] all of [Kennedy's] prayer-related activities" over the course of several years, "[i]nstead of attempting to pinpoint" the facts actually relevant to his constitutional claim).

player safety, sportsmanship, and spirited competition." *Id.* His prayer "usually lasted about thirty seconds." *Id.*

Over the years, students and coaches began to join Kennedy in prayer of their own accord. *Id.* Sometimes Kennedy prayed quietly by himself; sometimes he combined his prayers with religious references in motivational speeches to his players. Kennedy "never coerced, required, or asked any student to pray."

In September 2015, Bremerton School District administrators learned of Kennedy's prayers. *Id.* at 1011. After an investigation, the District determined that Kennedy had violated District policy, which stated that "[s]chool staff shall [not] encourage" a student to pray. *Id.* The District directed Kennedy that his prayer must "be physically separate from any student activity" and later asked that he pray in "a private location." *Id.* at 1011-13. Moreover, if students chose to pray at the same time as Kennedy, the District ordered him not to pray in any way "outwardly discernible as religious activity"—i.e., he could not kneel or say his prayers aloud. *Id.* at 1011.

Through counsel, Kennedy expressed to the District that he was within his constitutional rights to continue saying a "short, private, personal, prayer at midfield." Kennedy proposed that he or another school official could provide a disclaimer to alleviate any concerns that his prayers would be somehow attributed to the school. Kennedy then continued to pray privately after games. 991 F.3d at 1012. After media attention to the controversy gained steam, a crowd of players, coaches, media, and members of the public gathered around Kennedy when he prayed after

the October 16, 2015, game. *Id.* at 1012-13. The District responded with a sweeping directive to Coach Kennedy that made no distinction for whether he prayed alone or with students, silently or out loud: "While on duty for the District as an assistant coach, you may not engage in demonstrative religious activity, readily observable to (if not intended to be observed by) students and the attending public." When Kennedy continued to pray at the conclusion of each of the next two games, the District suspended him. *Id.* at 1013. He was never rehired. *Id.* at 1014.

B.

Kennedy filed this suit under 42 U.S.C. § 1983, alleging violations of his First Amendment rights to Free Speech and Free Exercise, and under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2, 2000e-3, alleging employment discrimination on the basis of religion as well as various other violations of Title VII, including retaliation. Kennedy then moved for a preliminary injunction on Free Speech grounds, which the district court denied. The three-judge panel here affirmed the denial of a preliminary injunction. *Kennedy I*, 869 F.3d at 831. Kennedy petitioned for a writ of certiorari, which the Supreme Court denied in a one-line order. *Kennedy II*, 139 S. Ct. at 634. But four Justices,[13] in the very same order, took the extraordinary step of adding a three-page statement explaining that while an under-developed factual record would have rendered Supreme Court review premature, the denial of certiorari should *not* be taken

[13] *See Kennedy II*, 139 S. Ct. at 635-37 ("Statement of Justice ALITO, with whom Justice THOMAS, Justice GORSUCH, and Justice KAVANAUGH join, respecting the denial of certiorari.").

to "signify" that the Court "agree[d] with the decision (much less the opinion) below." *Id.* at 635 (statement of Alito, J.). Quite the contrary, the four Justices took the opportunity to criticize the panel opinion's "troubling" and "highly tendentious" misreading of *Garcetti*, the Court's leading case on the limits of the government's power to regulate the speech of public employees. *Id.* at 636-37 (statement of Alito, J.).

Upon subsequent remand of the case, the district court considered the remainder of Kennedy's claims. The district court found that "the risk of constitutional liability associated with Kennedy's religious conduct was the sole reason the District ultimately suspended him." *Kennedy v. Bremerton Sch. Dist.*, 443 F. Supp. 3d 1223, 1231 (W.D. Wash. 2020) (internal quotation marks omitted). Concluding that the Establishment Clause indeed required Kennedy's suspension, the district court granted summary judgment for the District on Kennedy's Free Speech, Free Exercise, and Title VII claims. *Id.* at 1245. On appeal, the same panel of our court agreed. *Kennedy III*, 991 F.3d at 1022-23. A judge *sua sponte* called for rehearing en banc, but the matter failed to receive a majority of the votes of the non-recused active judges in favor of en banc consideration. Accordingly, rehearing en banc was denied in the order to which this statement is added. *Ante*, __ F.3d __ (9th Cir. 2021).

II.

A.

While the panel's opinion, in my view, runs afoul of controlling Supreme Court precedents on the Free Speech, Free Exercise, *and* Establishment Clauses, it does so most egregiously with respect to the Free

Speech Clause. Let us therefore begin with the background principles animating the Court's jurisprudence on public employees' speech rights:

Though it is well established that "the government as employer … has far broader powers than does the government as sovereign," *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality op.), it is equally well established that "a citizen who works for the government is nonetheless a citizen," whose rights do not simply vanish in the workplace. *Garcetti*, 547 U.S. at 419. Thus, when public employees speak "as citizens about matters of public concern," they may be subjected "only [to] those speech restrictions that are necessary for their employers to operate efficiently and effectively." *Id*.

In other words, a public employer's special latitude to control its employees' speech extends only to speech "the employer itself has commissioned" or otherwise functionally "created." *Id.* at 422. But when public employees' expression falls *outside* their official job duties, we must "unequivocally reject[]" any suggestion that they "may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). Thus, our task in any public-employee speech case is to delineate whether the employee spoke "pursuant to [his or her] official duties" (in which case the First Amendment provides no protection) or, instead, in his or her capacity as a "private citizen" (in which we must subject the government to First Amendment scrutiny). *Garcetti*, 547 U.S. at 421-22.

Garcetti v. Ceballos provides the critical guideposts for this task. There, the Court analyzed what now serves as the paradigmatic example of "official" employee speech: a deputy prosecutor's internal memoranda to his supervisor, expressing his concerns with a pending case and recommending its dismissal. *Id.* at 414. The Court reasoned that because the memoranda in question arose directly from the very "tasks [Ceballos] was paid to perform"—namely, the core "practical" responsibility of a deputy prosecutor "to advise his supervisor about how best to proceed with … pending case[s]"—they could not be characterized as his private speech at all. *Id.* at 421-22, 424-25. Rather, they constituted speech that the *government* had "commissioned or created" (and therefore had power to control). *Id*. at 422.

The Court took pains, however, to admonish "that employers can [not] restrict employees' rights by creating excessively broad job descriptions." *Id.* at 424. Tellingly, the Court offered this admonition in direct response to Justice Souter's concern that "the government may well try to limit the English teacher's options," for example, "by the simple expedient of defining teachers' job responsibilities expansively, investing them with a general obligation to ensure sound administration of the school." *Id.* at 431 n.2 (Souter, J., dissenting). To guard against such concerns, the Court explained that the "proper inquiry" into a public employee's official job duties "is a practical one," and that "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.

B.

The opinion in *Kennedy III* has run far, far afield of the "practical" inquiry dictated by *Garcetti*. *Cf.* 547 U.S. 424. It arrives at the bizarre conclusion that Kennedy's prayer was speech pursuant to his official duties "as a government employee," *Kennedy III*, 991 F.3d at 1015—which, make no mistake, is to say that praying is somehow a football coach's responsibility in the same way that drafting memoranda on pending prosecutions is a deputy prosecutor's responsibility. Worse still, the panel's latest misapplication of *Garcetti* directly contravenes the guidance offered by four Supreme Court Justices *in this very case*. *Compare Kennedy II*, 139 S. Ct. at 636 (statement of Alito, J.) ("The Ninth Circuit's opinion [in *Kennedy I*] applies our decision in *Garcetti* … to public school teachers and coaches in a highly tendentious way."); *with Kennedy III*, 991 F.3d at 1015 ("Our holding [from *Kennedy I*] has not changed.").

According to the opinion, a coach is "clothed with the mantle of one who imparts knowledge and wisdom," so Kennedy's prayer "on the field—a location that he only had access to because of his employment—during a time when he was generally tasked with communicating with students, was speech as a government employee." *Kennedy III*, 991 F.3d at 1015 (quoting *Kennedy I*, 869 F.3d at 826). Thus, by the opinion's sweeping logic, Kennedy's prayer—no matter how personal, private, brief, or quiet—was *wholly unprotected* by the First Amendment.

1.

The fundamental flaw with the opinion's conclusion is that it relies on precisely the kind of "excessively broad job description[]" that *Garcetti* plainly precludes. 547 U.S. at 424. In adopting the reasoning of *Kennedy I*, which was more thorough but no less troubling, the *Kennedy III* panel repeats its original mistake. Relying simply on the existence of a District policy that coaches should "exhibit sportsmanlike conduct at all times," the panel leapt to this grandiosely broad characterization of Kennedy's job duties: "communicating the District's perspective on appropriate behavior" whenever "in the presence of students and spectators." *Kennedy I*, 869 F.3d at 825-27. This epitomizes the sort of reasoning *Garcetti* forbids. Moreover, the panel inferred its startling conclusion from an even more startlingly simplistic syllogism: Because Kennedy's job involved "demonstrative speech" and prayer can at times be "demonstrative speech," then (by the opinion's tortured logic) Kennedy's prayer necessarily "fulfill[ed] his professional responsibility to communicate demonstratively." *Id.* at 828. The opinion's flawed reasoning—at odds with Supreme Court precedent and common sense—lumps together obvious examples of football coaching, calling plays and the like, with any speech that can be overheard by someone else, no matter how personal or private it may be.

If *Garcetti* were as simplistic as the panel made it out to be, it could have been decided in just a few sentences. All the *Garcetti* Court would have needed to say—on the panel's misguided reading—was that

Ceballos was an attorney, that an attorney's job involves the written word, and that *any writing* by Ceballos accordingly would constitute speech pursuant to his official duties. Therefore, by the *Kennedy III* opinion's logic, the Supreme Court was only wasting ink when it delved into the content of Ceballos's memos, the precise duties of a calendar deputy in the district attorney's office, and the comparison to civilian analogues, because Ceballos could be disciplined with impunity *whenever he put pen to paper*.

2.

Garcetti and basic logical coherence are not the only victims of the opinion's Free Speech analysis. By assuming that teachers always act as teachers between the first and last bell of the school day (or that coaches always act as coaches from the time they arrive for work at the school's athletic office to the moment the stadium lights go out on the end of a game), the opinion also places itself in irreconcilable contradiction with the most basic, "unmistakable" axiom of the past century of school-speech jurisprudence: that, as noted above, teachers do not "shed their constitutional rights … at the schoolhouse gate." *Tinker*, 393 U.S. at 506; *see also, e.g.*, *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 688 (1986) (Brennan, J., concurring) (noting the Court's repeated "reaffirm[ance]" of this "unimpeachable proposition" of *Tinker*). For if, as the opinion declares, all "demonstrative communication" in the presence of students were unprotected, there would be little left of the First Amendment—let alone *Tinker*'s landmark holding—for public school employees. Likewise, the

Pickering balancing test would cease to provide refuge for large swaths of school speech, religious or not. That cannot be right. For as Kennedy rightly observes in his brief, "*Garcetti* applied *Pickering*; it did not overrule it."

3.

And yet, on the panel's view, a school can restrict any speech for any reason so long as it instructs its employees to demonstrate good behavior in the presence of others. *See Kennedy I*, 869 F.3d at 825-26. Despite the panel's tepid assurance that its opinion does not establish "any bright-line rule," *id.* at 830 n.11, four Justices share my doubt:

> According to the Ninth Circuit, public school teachers and coaches may be fired if they engage in any expression that the school does not like while they are on duty, and the Ninth Circuit appears to regard teachers and coaches as being on duty at all times from the moment they report for work to the moment they depart, provided that they are within the eyesight of students.

Kennedy II, 139 S. Ct. at 636 (statement of Alito, J.).

To illustrate, Justice Alito asked whether a teacher in the Ninth Circuit still has the right to pray before eating in the cafeteria where a student might notice. *Id. Kennedy I*'s answer appeared to be no. 869 F.3d at 829 ("Kennedy can pray in his office … "). To be sure, *Kennedy III* attempts to distinguish the hypothetical on the ground that a cafeteria prayer "is of a wholly different character" than one on the football field. 991 F.3d at 1015. But the panel fails to identify any principled distinction between the two

that would actually impact its analysis. Rather, its opinion simply describes the instant case: Kennedy prayed "while players stood next to him, fans watched from the stands, and he stood at the center of the football field. Moreover, Kennedy … was a mentor, motivational speaker, and role model to students specifically at the conclusion of a game." *Id.* at 1015 (emphasis omitted).

True enough, but none of these facts does anything to distinguish the cafeteria scenario (or innumerable others). If Kennedy prayed in the cafeteria, "a location that he only had access to because of his employment," at a time when he was on duty, "generally tasked with communicating with students," the panel's opinion would dictate that he spoke in his official capacity as a public employee in doing so. *Id.* at 1015. The opinion's *ipse dixit* exception for mealtime prayer defies its own logic and will surely not be taken seriously by litigants or courts attempting to apply this sweeping rule to many scenarios yet to come.[14]

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[14] Indeed, several other courts have acknowledged the far-reaching scope of *Kennedy I*'s rule, which *Kennedy III* now entrenches. *See, e.g.*, *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2265 (2020) (Thomas, J., concurring) (criticizing *Kennedy I* for failing to protect even off-duty religious speech); *Kennedy II*, 139 S. Ct. at 636-37 (statement of Alito, J.) ("[*Kennedy I*] regard[s] teachers and coaches as being on duty at all times … within the eyesight of students."); *Greisen v. Hanken*, 925 F.3d 1097, 1112 (9th Cir. 2019) (interpreting *Kennedy I* to apply whenever employees who teach and serve as role models act in an official capacity in the presence of others); *Barone v. City of Springfield*, 902 F.3d 1091, 1100-01 (9th Cir. 2018) (same); *Naini v. King Cty. Pub. Hosp. Dist. No. 2*, No. C19-0886-JCC, 2020 WL 290927, at *13-14 (W.D. Wash. Jan. 21, 2020) (same);

Suppose, for example, a teacher receives bad news about a family member while teaching and utters a brief, quiet prayer, or suppose a coach makes the sign of the cross upon seeing a player suffer an injury. Imagine a coach who kneels during the national anthem in protest or a teacher whose car parked on school property bears a bumper sticker for a presidential campaign. Even if the opinion's one-off exception for mealtime prayer were taken at face value, these citizens would now stand to be censored, disciplined, or even fired by their public employer for any or no reason at all.

Relegating such speech to an empty office, or perhaps to the teacher's lounge, is an insult to the First Amendment, which "extends to private *as well as public* expression." *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415 n.4 (1979) (emphasis added). More fundamentally, doing so corrodes the civic virtues that *underlie* the First Amendment: We ask "teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens … They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them." *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring).

Kountze Indep. Sch. Dist. v. Matthews ex rel. Matthews, No. 09-13-00251-CV, 2017 WL 4319908, at *4 (Tex. App. Sept. 28, 2017) (noting *Kennedy I*'s broad reliance on the coach's "responsibility to communicate demonstratively").

C.

Tellingly, and perhaps unsurprisingly, it would have required far less intellectual gymnastics for an en banc court to apply *Garcetti* properly than for the panel to misapply *Garcetti* as it did.

1.

To determine whether Kennedy prayed within the ambit of his official duties as a government employee, we must ask what tasks he was paid to perform. *Garcetti*, 547 U.S. at 422; *see also Dahlia v. Rodriguez*, 735 F.3d 1060, 1075 (9th Cir. 2013) (en banc) ("As part of a 'practical' inquiry, a trier of fact must consider what [the employee] was actually told to do."). Some of a football coach's speech—calling a play, addressing the players at halftime, or teaching how to block and how to tackle—undoubtedly accomplishes official tasks required of him. Yet a coach might speak instead for purely personal reasons, such as chatting about the weather with a spectator or calling his family to let them know the game is over. Both sets of examples take place on the job, on school property, and in earshot of students, but only the former can be fairly called speech the government paid to create.

Indeed, if we heed *Garcetti*'s instruction to inspect the functional *content* of an employee's speech, it is easy to see the distinction between private speech and official public speech in the context of football coaching. Private speech is "the kind of activity engaged in by citizens who do not work for the government," such as "writing a letter to a local newspaper" or "discussing politics with a co-worker." *Garcetti*, 547 U.S. at 423. This makes perfect sense. By contrast, where a public employee speaks in his or her

capacity as a public employee, "there is no relevant analogue to speech by citizens who are not government employees"—and accordingly, the government is more likely to be correct that the speech is really its to control. *Id.* at 424.

Writing a recommendation to the district attorney on how to handle a case has no civilian analogue, and thus, the speech in *Garcetti* was distinctly governmental in nature (and in turn, subject to governmental control). But if the attorney used the same medium in the same setting to communicate a message unrelated to work, say, an invitation to a birthday party, he would not speak as a public official. *See also Coomes v. Edmonds Sch. Dist. No. 15*, 816 F.3d 1255, 1264 (9th Cir. 2016) ("[E]ven if Coomes's duties … included speaking to parents regarding their children's participation in [a] program, she could have gone outside her duties in speaking to parents about other matters.").

So too here: Kennedy might use on-field speech to instruct the team's defense, or he might kneel on the field to pray quietly to God. The former is public because only coaches call plays. Such speech "owes its existence to a public employee's professional responsibilities." *Garcetti*, 547 U.S. at 421. But the latter is private because there is a clear civilian analogue: Millions of Americans give thanks to God, a practice that has nothing to do with coaching a sport.

2.

Perhaps the most obvious evidence that prayer fell outside of Kennedy's football-coaching duties was his employer's explicit and repeated opposition to such prayer—culminating in Kennedy's suspension. The

District demanded that coaching staff comply with a policy entitled "Religious-Related Activities and Practices," which the District interpreted to prohibit Kennedy's post-game prayer. *Kennedy III*, 991 F.3d at 1011-13. How can the panel hold that prayer was one of Kennedy's job duties when his employer maintained a policy banning it? Further heightening the contradiction, the District told Kennedy that his prayer "interfere[d] with the performance of job duties." *Id.* at 1013.[15] How can it be that Kennedy's prayer "interfere[d] with" his job duties if, as the District and panel maintain, it was simultaneously *pursuant to* such duties? *Cf. id.* Rather than straining to square this circle, a truly practical inquiry would have recognized that Kennedy's employer excluded prayer from his duties—both as a matter of general policy and as applied to him specifically.

In sum: A proper application of *Garcetti* and its progenitors dictates that Kennedy's prayer was his private speech, not that of the government. Consequently, his Free Speech rights are indeed implicated, and the government's stated justifications for its censorship must face constitutional scrutiny. *See Pickering*, 391 U.S. at 568.

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[15] To be clear, notwithstanding this statement from the District to Kennedy, it remains undisputed that "the risk of constitutional liability associated with Kennedy's religious conduct"—rather than any concern that Kennedy was being inattentive to his players—"was the '*sole reason*' the District ultimately suspended him." *Kennedy III*, 991 F.3d at 1014 (quoting *Kennedy*, 443 F. Supp. 3d at 1231) (emphasis added).

III.

The opinion's attempts to recast Kennedy's private speech as official government speech are strange enough. But it then wanders even further afield. Perhaps belying its own doubts, the panel does not rest on its (ostensibly dispositive) conclusion that Kennedy's prayer was official speech unprotected by the Free Speech Clause and therefore properly subject to discipline.

Instead, the panel proceeds to announce the alternative holding that, even if Kennedy's speech *were* private (and therefore triggered First Amendment scrutiny), the District would have a compelling interest in censoring it. *See Kennedy III*, 991 F.3d at 1016-19. That putatively "compelling interest" is the District's stated fear that, unless it fired Kennedy, it would be committing an Establishment Clause violation by creating the perception that it "endorsed" Kennedy's Christian religious beliefs. *See id*. Consequently, the opinion reaches the troubling conclusion that the Constitution not only permitted, but *required*, the District to punish Kennedy's private prayer. In so doing, the opinion defies the principle that "the state interest … in achieving … separation of church and State" is "*limited by the Free Exercise Clause*," *Widmar v. Vincent*, 454 U.S. 263, 276 (1981) (emphasis added)—and not the other way around. More fundamentally, the opinion subverts the entire thrust of the Establishment Clause, transforming a *shield* for individual religious liberty into a *sword* for governments to *defeat* individuals' claims to Free Exercise. The panel's holding, which thereby

misinterprets *both* of the First Amendment's religion clauses, simply cannot be squared with decades of Supreme Court precedent to the contrary.

Indeed, upon a more faithful examination of such precedents, they reveal a deep irony in the panel's Establishment Clause analysis: What the District puts forth (and the panel accepts) as a justification to *extinguish* Kennedy's Free Speech claim actually has quite the opposite effect. Namely, it imparts credence and urgency to his Free Exercise claim, which might otherwise have been dubious. *See Kennedy II*, 139 S. Ct. at 637 (statement of Alito, J.) (expressing doubt—prior to the District's subsequent concession, noted in the *Kennedy III* opinion, that District administrators' motivation for disciplining Kennedy was "not [religiously] neutral," 991 F.3d at 1020—as to whether Kennedy's Free Exercise claim might not pass muster under existing law).[16] Moreover, a faithful reading of

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[16] At the preliminary-injunction stage (*i.e.*, in the record that was before the Supreme Court Justices in *Kennedy II*), the District had advanced the dubious claim that its motivation for punishing Kennedy's prayer was that it "drew [him] away from [his] work." *Kennedy I*, 869 F.3d 819. Accordingly, the Justices could not at that stage rule out the possibility that the District's "reason" for suspending Kennedy was that "he was supposed to have been actively supervising the players after they had left the field but instead left them unsupervised while he prayed on his own." *Kennedy II*, 139 S. Ct. at 635. Were that the case, the District's punishment of Kennedy presumably would have constituted a "generally applicable, religion-neutral" action that merely had the "*effect* of burdening [Kennedy's] particular religious practice," which, under *Smith*, would "need not be justified by a compelling governmental interest." *Emp't Div., Dep't of Hum. Res. v. Smith*, 494 U.S. 872, 886 n.3 (1990). This appears to be the uncertainty to which Justice Alito was referring when he alluded to the possibility that Kennedy's Free Exercise

the Court's religion clauses jurisprudence makes clear that the District's (unfounded) fears of Establishment Clause liability could justify its incursions on *neither* Kennedy's Free Speech rights *nor* his Free Exercise rights.

A.

In crediting the District's Establishment Clause rationale, the panel backed itself into the corner of conceding that the District had targeted Kennedy's conduct "*because* the conduct is religious." *Kennedy III*, 991 F.3d at 1020 (emphasis in original). The unmistakable upshot of this concession is to trigger a Free Exercise problem and to increase the credibility of Kennedy's alternative claim. For the most basic lesson of the Supreme Court's Free Exercise jurisprudence teaches that when government actions "target the religious for 'special disabilities' based on their 'religious status,'" they trigger "the strictest scrutiny." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017) (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993)). That is, such targeted incursions on religious rights "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Lukumi Babalu Aye*, 508 U.S. at 531-32 (1993).

B.

Consequently, Kennedy's suspension must survive strict scrutiny, and the only way the District

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claim might—on the basis of the record then before the Court—be precluded by *Smith*. *Kennedy II*, 139 S. Ct. at 637 (statement of Alito, J.) (citing *Smith*, 494 U.S. 872).

wins is if its fears were valid—*i.e.*, if Kennedy could not privately pray on the field after football games without the District's violating the Establishment Clause and if suspending (then declining to re-hire) Kennedy were the *only way* the District could remedy such putative Establishment Clause problem. Even a cursory review of the Supreme Court's Establishment Clause jurisprudence should have assuaged the District's paranoia. But instead, the panel has chosen to exemplify the "brooding omnipresence" of the "modern understanding of the Establishment Clause … ever ready to be used to justify the government's infringement on religious freedom." *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2263 (2020) (Thomas, J., concurring) (quoting *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting)).

1.

a.

Most fundamentally, the opinion takes the rare—indeed, unprecedented—step of perceiving an Establishment Clause violation without first locating any state action to *constitute* such a violation. In so doing, the opinion contravenes the axiomatic principle that "an Establishment Clause violation must be moored in government action." *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring); *see also Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019) (explaining, in the Free Speech context, that "the First Amendment *constrains governmental actors* and *protects private actors*") (emphasis added). Indeed, the opinion contravenes the very text of the

Establishment Clause, which announces a constraint on the *State*, rather than non-state actors.

In case after case, the Supreme Court has determined that private religious speech on public school property does not constitute state action and therefore does not run afoul of the Establishment Clause. For example, a private organization can use classrooms for religious instruction after school, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112-19 (2001); a Christian student newspaper can receive university funding, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 837-46 (1995); a church can screen religious films on public school premises, *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394-95 (1993); students can form a religious club with a faculty monitor, *Bd. of Educ. of Westside Cmty. Schs. v. Mergens ex rel. Mergens*, 496 U.S. 226, 249-53 (1990) (plurality op.); and student groups can use university facilities for worship, *Widmar v. Vincent*, 454 U.S. 263, 270-75 (1981). In short, the Supreme Court "ha[s] never extended [its] Establishment Clause jurisprudence to foreclose private religious conduct during nonschool hours merely because it takes place on school premises where … children may be present." *Good News*, 533 U.S. at 115; *see also Capitol Square*, 515 U.S. at 764 (plurality op.) ("The test petitioners propose, which would attribute to a neutrally behaving government *private* religious expression, has no antecedent in our jurisprudence … ") (emphasis in original).

Underlying these holdings are decades of Supreme Court caselaw drawing a sharp distinction "between *government* speech endorsing religion, which

the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Mergens*, 496 U.S. 226 at 250 (plurality op.) (emphasis in original). The District, then, had no reason to worry about liability from Kennedy's private religious conduct, because—and this bears repeating—"an Establishment Clause violation must be moored in government action." *Capitol Square*, 515 U.S. at 779 (O'Connor, J., concurring).

Here, by contrast, Kennedy never asked the school to take any action endorsing or facilitating his religious practice. Quite the contrary, Kennedy essentially asked his employer to *do nothing*—simply to tolerate the brief, quiet prayer of one man (which is exactly what the District had done for years prior, without anyone ever raising an Establishment Clause claim against it).

b.

Consequently, this case bears no resemblance to the kinds of institutional entanglements with religion—often described as "coercive"—which may give rise to an Establishment Clause violation. *Cf. Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290, 305-06, 309 (2000) (school policy once titled "Prayer at Football Games" promoted prayer over the school P.A. system); *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (school both sponsored and directed a graduation prayer); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 205 (1963) (state law required daily Bible reading at school); *Engel v. Vitale*, 370 U.S. 421 (1962) (school required prayer to start each day).

Yet rather than abide the lessons of this line of complex Establishment Clause jurisprudence, the panel reduces it to one simplistic question: Would an objective observer have viewed Kennedy's prayer as "stamped" with the "school's seal of approval"? *Kennedy III*, 991 F.3d at 1017 (quoting *Santa Fe*, 530 U.S. at 308). If the answer is "yes," then, says the panel, the District *must* punish Kennedy for privately and independently engaging in such conduct. In other words, because someone *might* mistakenly attribute Kennedy's prayer to the District (notwithstanding its well-publicized opposition), the panel declares that the school not only was free, but indeed *obliged*, to discipline him in ways that would otherwise violate his Free Speech and Free Exercise rights.

Lacking a single Supreme Court case that supports its implicit assumption that a private individual can commit an Establishment Clause violation, the panel gestures desperately toward Establishment Clause cases merely *involving* school employees' endorsement of religion. But the panel's opinion drains such cases of the factors driving their logic—the school policy, the degree of control over employee speech, neutrality toward religion, or the possibility of coercion. *See, e.g.*, *Santa Fe*, 530 U.S. at 301-03, 306-12; *Weisman*, 505 U.S. at 593.

Critically, every case cited in the opinion's Establishment Clause analysis involved government speech, not private speech. *See McCreary County. v. Am. C.L. Union of Ky.*, 545 U.S. 844, 860 (2005) (courthouse displays of the Ten Commandments); *Santa Fe*, 530 U.S. at 315 (school policy "implemented with the purpose of endorsing school prayer");

Weisman, 505 U.S. 577, 587 (1992) ("state-sponsored and state-directed … formal religious observance"); *Edwards v. Aguillard*, 482 U.S. 578, 585-94 (1987) (statewide ban on teaching evolution without creationism); *Wallace v. Jaffree*, 472 U.S. 38, 59 (1985) (statewide school prayer statute). It strikes me as specious to conclude that such authorities should apply equally to Kennedy's speech merely because he worked for a public employer. Especially so where the Supreme Court and our court have expressly declined to find Establishment Clause violations in the context of private religious activity— authorities the opinion conveniently ignores. *Cf. Mergens*, 496 U.S. 226 at 250 (plurality op.) ("The proposition that schools do not endorse everything they fail to censor is not complicated."); *Hills v. Scottsdale Unified Sch. Dist. No. 48*, 329 F.3d 1044, 1055-56 (9th Cir. 2003) (same); *Tucker v. Calif. Dep't of Educ.*, 97 F.3d 1204, 1213 (9th Cir. 1996) ("[S]peech by a public employee, even a teacher, does not always represent, or even appear to represent, the views of the state.").

Likewise, the assumption that Kennedy spoke as a private citizen—which the opinion *expressly* adopts for the limited purpose of its in-the-alternative Establishment Clause analysis, *Kennedy III*, 991 F.3d at 1016, contrary to its earlier holding that Kennedy spoke "as a public employee," *id.* at 1015—forecloses the opinion's application of *Santa Fe Independent School District v. Doe*, the *only* Supreme Court case that bears even remote factual resemblance to ours. *Cf.* 530 U.S. at 310, 312 (holding, where student's prayer was "deliver[ed] … over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and

pursuant to a school policy that explicitly and implicitly encourage[d] public prayer," that school policy had coerced attendees into participation in prayer).

If the panel had engaged in a fair comparison between the facts of Kennedy's case and the facts of the Establishment Clause cases upon which it relies, it could have reached only one conclusion: The District made its disavowal of Kennedy's religious speech crystal clear to any reasonable observer. For one, the District, as mentioned above, had a pre-existing policy restricting any religious speech that might "encourage" a student to pray. *Kennedy III*, 991 F.3d at 1011. The superintendent then sent Kennedy two letters detailing the policy and ordering him to stop praying. *Id.* at 1011-13. Finally, the District published a letter addressed to parents and staff explaining its policy opposing prayer.

Given such facts, how could anyone be mistaken about the school's position—let alone "view [Kennedy's private prayer] as [the District's] endorsement of a particular faith"? *Id.* at 1019. The District vehemently opposed Kennedy's prayer, and the local community got the message loud and clear. *See id.* at 1012 ("[T]he Seattle Times published an article … entitled 'Bremerton football coach vows to pray after game *despite district order*.'" (emphasis added)). Only by ignoring everything the District said and did could an observer (mistakenly) think the school was endorsing Kennedy's. But the mere possibility of such a mistake does not turn private speech into endorsement, "at least where … the government has not fostered or encouraged the

mistake." *Capitol Square*, 515 U.S. at 766 (plurality op.); *see also Good News*, 533 U.S. at 119 ("We cannot operate … under the assumption that *any risk* … [of] perceive[d] endorsement should counsel in favor of excluding … religious activity. We decline to employ Establishment Clause jurisprudence using a modified heckler's veto … ") (emphasis added). A reasonable observer would have known of the District's actions prior to Kennedy's suspension, yet the opinion maintains that every ounce of discipline—including suspension—was required to comply with the Establishment Clause.

At bottom, because there can be no Establishment Clause violation without state action, the District's sole stated interest in avoiding Establishment Clause liability cannot justify suppressing the Free Exercise rights of its coach. And because strict scrutiny limits us to considering state interests that are "genuine, not hypothesized," *cf. United States v. Virginia*, 518 U.S. 515, 533 (1996) (imposing this requirement in the context of intermediate scrutiny, such that it applies *a fortiori* in the strict-scrutiny context), it necessarily follows that the District had *no* compelling interest in punishing Kennedy's prayer.

2.

The errors of the panel's Establishment Clause analysis do not stop with its stubborn refusal to recognize the distinction between state and private action. For even if an observer *could* mistake Kennedy's private speech for that of the school, it was *still* erroneous for the panel to assume that the District's sole constitutional option was to suspend Kennedy. In creating a false dichotomy between the

District's chosen course and "allowing Kennedy free rein," *Kennedy III*, 991 F.3d at 1018, the panel neglects other, more narrowly tailored remedies and hastily announces that "there was no other way" to handle the situation, *id.* at 1020. Instead, the panel should have considered the accommodation Kennedy's counsel proposed: a simple disclaimer, clarifying that Kennedy's prayer was his own private speech, not that of the District.

A school does not violate the Establishment Clause where it "can dispel any 'mistaken inference of endorsement' by making it clear to students that … private speech is not the speech of the school." *Prince v. Jacoby*, 303 F.3d 1074, 1094 (9th Cir. 2002) (quoting *Mergens*, 496 U.S. at 251); *see also Hills*, 329 F.3d at 1054-56. A disclaimer communicates that the school's permission "evinces neutrality toward, rather than endorsement of, religious speech." *Mergens*, 496 U.S. at 251. Our court has found a disclaimer to be inadequate only once—in the "coercive" context of a graduation speech. *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 983-85 (9th Cir. 2003).

If the school could have disclaimed Kennedy's prayer in a statement or at each game, then firing him was not necessary to comply with the Establishment Clause, and the violation of his Free Exercise rights was not narrowly tailored. As we have long recognized, the District could have more productively addressed its fear of confused observers while still protecting Kennedy's fundamental rights. Indeed, as our court has observed:

> The school's proper response is to educate the audience rather than squelch the speaker.

> Schools may explain that they do not endorse speech by permitting it. … Free speech, free exercise, and the ban on establishment are quite compatible when the government remains neutral and educates the public about the reasons.

Hills, 329 F.3d at 1055 (quoting *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1299-1300 (7th Cir. 1993)). By holding that any demonstrative prayer in public would necessarily (and unconstitutionally) be imputed to the District, the panel leaves no room for schools "to educate the audience." *Id.* (quoting *Hedges*, 9 F.3d at 1299). Rather, on the panel's view, the District had no choice but to issue a warning, a directive, and, ultimately, a suspension. At the very least because the District could have disclaimed Kennedy's prayer, the panel is mistaken. Under binding precedents of the Supreme Court, schools can and must do more to protect the First Amendment liberties of coaches and teachers.

IV.

The opinion has forced our circuit into clear conflict with the Supreme Court's instruction in *Garcetti*—despite the published guidance of four Justices in this very case. And the opinion compounds the error by commanding public schools throughout the nine states and two federal territories of the Ninth Circuit to search for and to eliminate private religious speech or else face liability under the Establishment Clause. The First Amendment does not demand that we "purge from the public sphere all that in any way partakes of the religious," *Van Orden v. Perry*, 545

U.S. 677, 699 (2005) (Breyer, J., concurring in the judgment), but unfortunately, the Ninth Circuit does.

For the foregoing reasons, it is most regrettable that our court has failed to rehear this case en banc.

O'SCANNLAIN and BEA, *Circuit Judges*, respecting the denial of rehearing en banc:

We agree with the views expressed by Judge Ikuta in her dissent from denial of rehearing en banc.

O'SCANNLAIN, *Circuit Judge*, respecting the denial of rehearing en banc:

I agree with the views expressed by Judge R. Nelson in his dissent from denial of rehearing en banc.

O'SCANNLAIN, *Circuit Judge*, respecting the denial of rehearing en banc:

I agree with the views expressed by Judge Collins in his dissent from denial of rehearing en banc.

BEA, *Senior Circuit Judge*, respecting the denial of rehearing en banc:

I agree with the views expressed by Judge Collins in his dissent from denial of rehearing en banc.

IKUTA, *Circuit Judge*, with whom CALLAHAN, R. NELSON, BADE, FORREST, and BUMATAY, *Circuit Judges*, join, dissenting from the denial of rehearing en banc:

I write separately to express a different perspective.

A.

Joseph Kennedy's highly public demonstrations of his religious convictions put Bremerton School District (BSD) in a no-win situation. BSD wanted to respect Kennedy's right "to engage in religious activity, including prayer," but it feared that allowing Kennedy to engage in such highly public activity on the field after football games would create a perception that BSD was endorsing religion, in violation of the Establishment Clause. *Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004, 1011 (9th Cir. 2021).

To avoid such a violation, BSD repeatedly told Kennedy to stop praying on the field after the football games. *Id.* at 1011-13. BSD sent Kennedy letters "explaining that his conduct … violated BSD's [religious activities] policy," *id.* at 1013, and advised him that his post-game talks "must remain entirely secular in nature," *id.* at 1011.

Kennedy was defiant. He told BSD, through his lawyer, that he intended to resume praying at the fifty-yard line at the next game notwithstanding BSD's orders. *Id.* at 1012. His unyielding stance was "widely publicized through Kennedy and his representatives' numerous appearances and announcements on various forms of media." *Id.* (cleaned up). The *Seattle Times* published an article with the headline "Bremerton football coach vows to pray after game despite district order," and explaining that "[a] Bremerton High School football coach said he will pray at the 50-yard line after Friday's homecoming game, disobeying the school district's orders and placing his job at risk." *Id.*

Under these well-publicized circumstances, no objective observer (assuming we apply the "objective observer" test) would think BSD was endorsing Kennedy's prayers. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (holding that in determining whether there is an Establishment Clause violation, "one of the relevant questions is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools" (cleaned up)). Rather, BSD took "pains to disassociate itself from the private speech involved in this case." *See Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 841 (1995); *Kennedy*, 991 F.3d at 1011, 1013. A "reasonable observer" who is "deemed aware of the history and context of the community and forum in which the religious speech takes place," *see Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001) (cleaned up), would know that Kennedy's prayer was not "stamped with [BSD's] seal of approval," *see Santa Fe*, 530 U.S. at 308. Clearly "there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed." *See Good News Club*, 533 U.S. at 113 (quoting *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993)). BSD's concern that Kennedy's religious activities would be attributed to BSD is simply not plausible. *See Rosenberger*, 515 U.S. at 841. Applying the objective observer test from *Santa Fe*, there is no Establishment Clause violation here.

Therefore, even assuming (as the panel majority does) that Kennedy spoke as a private citizen, BSD

could not successfully justify any content-based discrimination against Kennedy on the ground that it needed to do so to avoid an Establishment Clause violation.

B.

By holding that BSD could be subject to an Establishment Clause claim under the circumstances of this case, the majority missed an opportunity to address the tension between the Free Exercise Clause and Establishment Clause in the public employment context. The Supreme Court has recognized that public employers are caught between "countervailing constitutional concerns" of respecting the free exercise rights of their employees while at the same time avoiding giving offense to the public by appearing to endorse religious activity. *Good News Club*, 533 U.S. at 119. The majority's holding that BSD was reasonable to fear liability for an Establishment Clause violation is dangerous because it signals that public employers who merely fail to act with sufficient force to squelch an employee's publicly observable religious activity may be liable for such a claim. This raises the risk that public employers will feel compelled (or encouraged) to silence their employee's religious activities, even in moments of private prayer, so long as they can be seen by students. *Cf. Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 636 (2019) (Alito, J., statement respecting denial of certiorari).

We should address this issue directly. Just as the Supreme Court provided guidance to public employers for balancing their employees' free speech rights with the requirements of a particular job, *see Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006), we need a parallel

framework for evaluating how a public employer can protect its employee's religious expression without becoming vulnerable to an Establishment Clause claim. Because this case raises an opportunity to develop such a framework, I respectfully dissent from denial of rehearing this case en banc.

R. NELSON, *Circuit Judge*, joined by CALLAHAN, BUMATAY, and VANDYKE, *Circuit Judges*, and by IKUTA, *Circuit Judge*, as to Part I, dissenting from the denial of rehearing en banc:

The way to stop hostility to religion is to stop being hostile to religion. The panel held that merely allowing high school football coaches and players to pray on the field "unquestionably" violates the Establishment Clause. *Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004, 1017 (9th Cir. 2021). Not so fast.

First, the panel misapplied Supreme Court precedent since none of the School District's actions would have come close to an endorsement of religion or coercion. Instead, the panel went beyond precedent, assuming a hypothetical Establishment Clause violation where there was none. This extension is especially erroneous given that the panel's reliance on *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), is inapt as there would not have been an endorsement of religion by allowing Coach Kennedy to pray. Moreover, *Santa Fe* should not be extended as it stems from *Lemon v. Kurtzman*, 403 U.S. 602 (1971)—an ahistorical, atextual, and failed attempt to define Establishment Clause violations. *See Freedom From Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 910 F.3d 1297, 1305-06 (9th Cir.

2018) (R. Nelson, J., dissenting from denial of rehearing en banc). And given the Supreme Court has effectively killed *Lemon*, *see generally Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019), the panel should not have extended *Santa Fe*'s holding.

Second, the panel's analysis goes far afield from the original meaning of an established religion. *American Legion* demonstrated how critical historical practice and understanding is in the Establishment Clause context. The panel missed that cue. And because of that mistake, the panel allowed an ahistorical and expansive view of the Establishment Clause "to justify the [School District]'s infringement on [Coach Kennedy's] religious freedom." *See Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2263 (2020) (Thomas, J., concurring). Yet the Establishment Clause was originally intended "to secure religious liberty," not purge it from the public square. *See Santa Fe*, 530 U.S. at 313. And make no mistake, favoring secularism over religion is not neutrality. *Ante*, at 28-29 (M. Smith, J., concurring in denial of rehearing en banc).

Thus, the panel not only misapplied Supreme Court precedent; it also failed to analyze the Establishment Clause issue in light of *American Legion* and to realign our jurisprudence with the Establishment Clause's original meaning. Respectfully, I dissent.[17]

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[17] Judge O'Scannlain argues the Establishment Clause was not implicated for want of state action. *Ante*, at 62-63. That point has merit. For purposes of my analysis, however, I assume the School District's allowance of Coach Kennedy's mid-field prayers would

I.

The Constitution forbids Congress from making a "law respecting an establishment of religion." U.S. Const. amend. 1; *see also Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947) (incorporating Establishment Clause to the states). Under existing Supreme Court precedent, there was no Establishment Clause violation here. What is more, the panel extended that precedent to reach a conclusion far beyond the original meaning of the Establishment Clause.

A.

Under the Establishment Clause, that Congress cannot "formally establish[a] church is straightforward." *Am. Legion*, 139 S. Ct. at 2080. But "pinning down the meaning of 'a law respecting an establishment of religion' has proven to be a vexing problem." *Id.* In *Lemon*, the Supreme Court attempted to create a "grand unified theory" of Establishment Clause violations, focusing on a law's purpose, effects, and entanglement with religion. *Id.* at 2087; *see Lemon*, 403 U.S. at 612-13. That effort fell flat, and *Lemon* was slowly replaced by a kaleidoscope of other tests.[18] *Lemon*'s juice was finally wrung dry in 2019

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have been state action. Even then, there would have been no Establishment Clause violation.

[18] *See, e.g.*, *Hunt v. McNair*, 413 U.S. 734, 741 (1973); *Lee v. Weisman*, 505 U.S. 577 (1992); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Van Orden v. Perry*, 545 U.S. 677 (2005); *Town of Greece v. Galloway*, 572 U.S. 565 (2014); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

when a majority of the Justices yet again "personally dr[ove] pencils through the creature's heart."[19] *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment). But despite *Lemon*'s demise, we are left to sort through the continued application of its progeny.

Here, the panel primarily relied on *Santa Fe*, a test focused on what the "objective observer" would view as an endorsement of religion. *Kennedy*, 991 F.3d at 1017 (citing *Santa Fe*, 530 U.S. at 308). Given this

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[19] Writing for a plurality, Justice Alito criticized *Lemon* for its widespread shortcomings and noted its demise, *Am. Legion*, 139 S. Ct. at 2080-82, instead relying on "a more modest approach that focuses on the particular issue at hand and looks to history for guidance," *id.* at 2087. Concurring Justices reached similar conclusions. Justice Kavanaugh underscored that "this Court no longer applies the old test articulated in *Lemon v. Kurtzman*." *Id.* at 2092. Justice Thomas would "overrule the *Lemon* test in all contexts." *Id.* at 2097. Justice Gorsuch rejected the "misadventure" that was *Lemon*. *Id.* at 2101. And Justice Breyer analyzed the issue without relying on *Lemon*. *Id.* at 2090-91.

Since *American Legion*, the Supreme Court continues to ignore *Lemon*. *See Espinoza*, 140 S. Ct. at 2254. And other courts around the country have recognized *Lemon*'s demise and wisely left it dead. *See, e.g.*, *Woodring v. Jackson County*, 986 F.3d 979, 981 (7th Cir. 2021); *Perrier-Bilbo v. United States*, 954 F.3d 413, 425 (1st Cir. 2020); *Kondrat'yev v. City of Pensacola*, 949 F.3d 1319, 1321 (11th Cir. 2020); *Freedom From Religion Found., Inc. v. County of Lehigh*, 933 F.3d 275, 280-81 (3d Cir. 2019); *Williams v. Kingdom Hall of Jehovah's Witnesses*, No. 20190422, 2021 WL 2251819, at *4 (Utah June 3, 2021); *see also Brown v. Collier*, 929 F.3d 218, 246-48 (5th Cir. 2019) (rejecting *Lemon*'s application without recognizing its demise). Though not formally overruled, *see Georgia v. Pub. Res. Org., Inc.*, 140 S. Ct. 1498, 1520 n.6 (2020) (Thomas, J., dissenting), *Lemon* is effectively (and fortunately) dead.

test stems from *Lemon*'s atextual and ahistorical purpose and effects prongs, *see Lynch*, 465 U.S. 668, 688-90 (1984) (O'Connor, J., concurring), the endorsement test is equally suspect. *See infra* Part I.B. Even applying that test, however, the panel was wrong. In *Santa Fe*, a school's formal policy authorized religious prayer before all football games, excluded minority viewpoints, and controlled the invocation's content. 530 U.S. at 302-08. The school also provided access to its public address system and "clothed [the pregame prayer ceremony] in the traditional indicia of school sporting events." *Id.* at 307-08. Here, however, the School District's "degree of … involvement" in Coach Kennedy's private prayers or the players' voluntary participation is zero. *See id.* at 305. In fact, nothing in *Santa Fe* is remotely analogous to Coach Kennedy's case. Had the School District allowed him to pray, that would not have been an endorsement either, as I explain in the next section.

The Supreme Court has also directed us to look at whether a school's practices coerce students into religious practices or beliefs. *See generally Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Lee*, 505 U.S. 577. Coercion does not mean peer-pressure or offense when encountering a religious practice. *Town of Greece*, 572 U.S. at 589 (plurality op.) ("Offense, however, does not equate to coercion."); *id.* at 609 (Thomas, J., concurrence in part) (the Establishment Clause is not violated "whenever the reasonable observer feels subtle pressure" (internal quotation marks omitted)). As James Madison explained, the Establishment Clause was designed to stop Congress from "establish[ing] a religion, and enforc[ing] the legal observation of it by law, []or compel[ling] men to

worship God in any manner contrary to their conscience." Debates on the Amendments to the Constitution (Aug. 15, 1789), 1 Annals of Congress 758 (1834). Instead, coercion in the school context only occurs when a school sponsors religion or leverages mandatory attendance requirements. *See Good News Club*, 533 U.S. at 116; *see also Santa Fe*, 530 U.S. at 313 (voluntary prayer is allowed in public schools so long as the State does not "affirmatively sponsor[] the particular religious practice of prayer").

Nothing here suggests coercion. If anything, the School District vehemently opposed, not sponsored, Coach Kennedy's activities. *Ante*, at 66-67 (statement of O'Scannlain, J.); *ante*, at 72-73 (Ikuta, J., dissenting). The record also contains no evidence that participation in Coach Kennedy's mid-field prayers were mandatory. In fact, he made sure players knew that they did not need to join in. When players asked to participate, Coach Kennedy replied, "This is a free country[.] … You can do what you want." *Kennedy*, 911 F.3d at 1010. And because players, coaches, and others on a football field could join "as a result of their own genuine and independent private choice," there was no coercion and thus no establishment. *See Zelman*, 536 U.S. at 652. Those choices were "reasonably attributable to the individual" not the school.[20] *Id.* According to Coach Kennedy, while he

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[20] The panel noted that the "players did not initiate their own post-game prayer" once Coach Kennedy was placed on administrative leave. *Kennedy*, 991 F.3d at 1013; *see also ante*, at 29 (M. Smith, J., concurring in denial of rehearing en banc); *ante*, at 38 (Christen, J., concurring in denial of rehearing en banc). But that does not mean the players were previously coerced into joining Coach Kennedy when he did pray. If anything, it is more

"was kneeling with his eyes closed, coaches and players from the opposing team, as well as members of the general public and media, spontaneously[21] joined him on the field and knelt beside him." *Kennedy*, 991 F.3d at 1012-13 (alterations adopted) (internal quotation marks omitted).

One player expressed "fear" that not joining Coach Kennedy's mid-field prayer "would negatively impact his playing time." *Kennedy*, 991 F.3d at 1018. But a colorable coercion claim requires evidence of actual benefits or burdens discriminatorily allocated based on religious beliefs. *Town of Greece*, 572 U.S. at 589 (plurality op.). Though one player expressed fear of mistreatment, there was no hint of actual evidence that Coach Kennedy ever disfavored players based on their religious participation. And that is key, since by all accounts Coach Kennedy had engaged in religious

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reasonable to assume that the players avoided doing exactly what their coach had just been punished for. Fear of engaging in religious expression is not evidence of past coercion. To the contrary, it undermines any Establishment Clause violation by the School.

[21] The panel disagreed that the public response to Coach Kennedy's prayer was spontaneous. *Kennedy*, 991 F.3d at 1013. But Coach Kennedy's "publicity advertising" is beside the point for a coercion inquiry. *See id.* Whether the public felt inspired to join Coach Kennedy's efforts because of his publicity or joined in the moment, there is no evidence that Coach Kennedy's media appearances somehow coerced coaches, players, spectators, and others to join him. More fundamentally, the School District did the opposite of compelling participation—it attempted to dissuade the public from joining Coach Kennedy by fielding "robo calls" and restricting access to the field. *See id.* at 1012. Those who joined Coach Kennedy, whether spontaneously or not, did so voluntarily.

expression for years without one allegation of unequal treatment. Without more, this single statement from one player experiencing "subtle pressure" is hardly enough. *See Town of Greece*, 572 U.S. at 609 (Thomas, J., concurrence in part).[22] Courts must "distinguish between real threat" of an establishment "and mere shadow." *Am. Legion*, 139 S. Ct. at 2091 (Breyer, J., concurring) (citation omitted). Since neither the School District nor Coach Kennedy imposed consequences based on participation, there was no coercion. And the individual players' and coaches' choice to engage in religious expression would not have been an establishment.[23]

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[22] To be sure, the Supreme Court has recognized that elementary and secondary students can be more impressionable and thus more susceptible to coercion. *See Kennedy*, 991 F.3d at 1017 (quoting *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987)). Contrary to Judge M. Smith's assertion, I do not ignore this distinction. *Ante*, at 30-31 (M. Smith, J., concurring in denial of rehearing en banc). This case is not like those where a school requires students to say a non-denominational prayer, appoints a clergy to pray over a graduation ceremony, or offers optional morning Bible readings. *See id.* at 24-25. Because here the School District "[i]s not actually advancing religion, the impressionability of students" is not "relevant to the Establishment Clause issue." *Good News Club*, 533 U.S. at 116. And though teachers and coaches are role-models, the Supreme Court has yet to factor that consideration into its Establishment Clause analysis. *See id.*

[23] The panel thought that allowing Coach Kennedy to pray would have subjected the School District and spectators to a parade of horribles, including (alarmingly) letting anyone onto the field like the Satanists waiting in the stands. *See Kennedy*, 991 F.3d at 1012; *see also ante*, at 28-29 (M. Smith, J., concurring in denial of rehearing en banc); *ante*, at 42 (Christen, J., concurring in denial of rehearing en banc). This reasoning is

Despite there being neither endorsement nor coercion, the panel still thought allowing Coach Kennedy to pray would have "unquestionably" violated the Establishment Clause. *Kennedy*, 991 F.3d at 1017. That conclusion erroneously went beyond Supreme Court precedent and therefore should have been corrected.[24]

B.

The panel's analysis was wrong for a more fundamental reason: it leaps beyond the Establishment Clause's original meaning to the

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incorrect. Nothing would have required the School District to open the field to the public. Instead, it would have had to allow the religious exercise of those with access to the field without discriminating between beliefs or practices. *See Trump v. Hawaii*, 138 S. Ct. at 2417 ("[The] clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

If nearly all players had joined Coach Kennedy, that would not have been an establishment either. To be clear, these religious protections apply equally to all creeds. *See ante*, at 31 (M. Smith, concurring in denial of rehearing en banc). But when "nearly all" of those engaging in voluntary religious exercise "turn[] out to be" members of the same faith, allowing those homogenous exercises would "not reflect an aversion or bias … against minority faiths." *Town of Greece*, 572 U.S. at 585. So long as individuals, as here, retain a "genuine and independent private choice," the frequency of a religious belief or practice should not factor into an Establishment Clause analysis. *See Zelman*, 536 U.S. at 652.

[24] Were *Santa Fe* controlling, we clearly would need to apply Supreme Court precedent. *See ante*, at 29-30 (M. Smith, J., concurring in denial of rehearing en banc). But *Santa Fe* is not controlling, and we should not extend inapt precedent (as the panel did here), especially when the Supreme Court has recently taken a different tack in Establishment Clause cases. *See generally Am. Legion*, 139 S. Ct. 2067.

detriment of free exercise rights. Generally, we rely on the plain meaning of the Constitution because the Framers "employed words in their natural sense, and … intended what they have said." *Gibbons v. Ogden*, 22 U.S. (1 Wheat.) 1, 188 (1824). And "contemporary history, and contemporary interpretation" help us capture how the Constitution's text would have been understood by the ordinary voter at the time of its ratification. 3 Joseph Story, Commentaries on the Constitution of the United States § 405 (1833); *see also District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (cleaned up) ("the Constitution was written to be understood by the voters" at the time it was ratified). This inquiry is critical as "a practice consistent with our nation's traditions is just as permissible whether undertaken today" or 230 years ago. *Am. Legion*, 139 S. Ct. at 2102 (Gorsuch, J., concurring in the judgment); *cf. Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1896 (2021) (Alito, J., concurring in the judgment) (words in the Free Exercise Clause "had essentially the same meaning in 1791 as they do today"). Thus, the plain meaning of the Establishment Clause's text informed by historical practice should guide our interpretation of that Clause.

The Supreme Court has already interpretated the Establishment Clause under a historical test in many contexts. To name a few, the *Van Orden* plurality jettisoned *Lemon* to analyze a monument's nature and "our Nation's history." 545 U.S. at 686; *see also id.* at 699 (Breyer, J., concurring) (rejecting a single test, but recognizing the Court's reliance on historical practices in some contexts). In *Marsh v. Chambers*, 463 U.S. 783, 787-89 (1983), and *Town of Greece*, 572 U.S. at

575-76, the Court looked to historical practices and understandings to determine the constitutionality of legislative prayer. And recently in *American Legion*, the Court continued its trend with a majority of the Justices analyzing the "particular issue at hand" and relying on "history for guidance." 139 S. Ct. at 2067 (plurality op.); *see also id.* at 2096 (Thomas, J., concurring in the judgment); *id.* at 2102 (Gorsuch, J., concurring in the judgment). Even *Everson* relied on "the background and environment of the period in which [the Establishment Clause's] constitutional language was fashioned and adopted" in the school context. 330 U.S. at 8. This history-based test is not *a* way to approach Establishment Clause cases, *see Am. Legion*, 139 S. Ct. at 2092 (Kavanaugh, J., concurring)—it should be *the* way.

For judges, originalism provides a powerful check against injecting our own policy preferences into the Constitution; but sticking to the Establishment Clause's original public meaning is especially critical. The Bill of Rights generally sets a floor, allowing federal, state, and local governments to further protect those rights. Hence Congress and many states enacted legislation to keep protecting religious freedoms after the Supreme Court artificially limited the Free Exercise Clause. *See Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872 (1990); *Holt v. Hobbs*, 574 U.S. 352, 357 (2015); National Conference of State Legislatures, *State Religious Freedom Restoration Acts* (May 4, 2017), https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx. In contrast, the Establishment Clause is more of a ceiling. It was ratified to ensure the free exercise of religion without

government interference. *Santa Fe*, 530 U.S. at 313 ("Indeed, the common purpose of the Religion Clauses is to *secure* religious liberty." (emphasis added) (internal quotation marks and citation omitted)); *see also* James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), *reprinted in* The Founders' Constitution 82-84 (Philip B. Kurland & Ralph Lerner eds., 1986). But by expanding the Establishment Clause beyond its original scope, we frustrate its purpose and inhibit personal religious exercise in the public square.

The panel's analysis is a perfect example. Under the panel's ahistorical view of the Establishment Clause, the School District *had* to let Coach Kennedy go since simply allowing him to pray on the field would have "unquestionably" violated the Establishment Clause. *See Kennedy*, 991 F.3d at 1017. Or as Judge M. Smith reiterated, "[m]erely by allowing the prayer to take place," the School District would have "violated the Establishment Clause" *even if* the prayer "was the independent choice of private individuals." *Ante*, at 26 (M. Smith, J., concurring from denial of rehearing en banc). That conclusion could not be further from the original meaning of an established religion. Yet the panel expanded the Establishment Clause beyond its original scope, and even beyond our precedent, in a way that would allow the School District to violate the free exercise rights of an employee engaged in private prayer. *Kennedy,* 991 F.3d at 1019-21.

Historical practice shows that allowing religion in the public square was never understood to be an establishment. *See* 3 Story, *supra*, § 405. "There is an unbroken history of official acknowledgment by all

three branches of government of the role of religion in American life from at least 1789." *Lynch*, 465 U.S. at 674. George Washington as his "first official act" gave "fervent supplications to that Almighty Being who rules over the universe," for "[n]o people can be bound to acknowledge and adore the Invisible Hand, which conducts the affairs of men more than those of the United States." First Inaugural Address (Apr. 30, 1789), *reprinted in* 1 Inaugural Addresses of the Presidents of the United States 7 (2000). Only days after the Establishment Clause was ratified, Congress "enacted legislation providing for paid chaplains for the House and Senate." *Lynch*, 465 U.S. at 674. Thanksgiving began as a day of gratitude "to the Great Lord and Ruler of Nations," and eventually became a national holiday one century later. *Id.* at 677-78 & n.2 (citations omitted). Be it executive or legislative practices, the Pledge of Allegiance, or deific references on our coinage, these overtly religious practices are constitutional today not just because of tradition; they did not violate the Establishment Clause then and certainly do not now. *See Am. Legion*, 139 S. Ct. at 2102 (Gorsuch, J., concurring in the judgment).

In schools specifically, allowing religious exercise never caused heartburn. In our nation's early days, clergy oversaw education and often intermixed religious training. Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J. L. & Pub. Pol'y 657, 663 (1998); *see also* Alexis de Tocqueville, 1 Democracy in America 314 n.f (2d ed. 1900) ("Almost all education is entrusted to the clergy."). Massachusetts' constitution also affirmed that "the happiness of a people, and the good order and preservation of civil

government essentially depend upon piety, religion and morality" attained through "public worship of God and … public instructions." Mass. Const. of 1780 pt. I, art. III. Pennsylvania's constitution similarly considered "religious societies" as perfectly situated "for the advancement of religion or learning." Pa. Const. of 1776, §§ 44-45.

The First Congress allowed religion in schools as well. Those for and against a federal constitution agreed that the new Congress had no authority to establish a religion. *See* Amar, *supra*, at 36; The Federalist No. 45 (James Madison) ("The powers delegated by the proposed Constitution to the federal government are few and defined."); 3 Story, *supra*, § 1873 ("Thus, the whole power over the subject of religion is left exclusively to the state governments … "). Still, the First Congress had authority to reenact the Northwest Ordinance of 1787, which declared that "[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 52. Congress could not have passed that law if doing so would have impermissibly encroached into the religious sphere.

Tellingly, a recent analysis of founding-era corpora found no evidence that prayers or religious practices in schools were considered an establishment of religion at the time of the Establishment Clause's ratification. Stephanie H. Barclay et al., *Original Meaning and the Establishment Clause: A Corpus Linguistics Analysis*, 61 Ariz. L. Rev. 505, 555 (2019). The only potential Establishment Clause violation

occurred when parents and students could not choose between already religious schools. *Id.* at 555 n.311.

Decades later, the relationship between schools and religion began to shift. Newly minted public schools called for "strict religious neutrality" and the "entire exclusion of religious teaching." Viteritti, *supra*, at 666. But in reality, these policies aimed to weaken Catholic parochial schools and strengthen Protestant dominance in educational settings. *Id.* at 666-68. It worked. And sadly, this religious infighting laid the groundwork for the Supreme Court's separationist jurisprudence (like *Lemon*) and today's anti-religious demands in all public contexts. Eventually, it became culturally apropos to declare that "[t]he First Amendment has erected a wall between church and state" that "must be kept high and impregnable." *Everson*, 330 U.S. at 18. But that wall was not laid in 1791; it was laid brick by brick in the centuries that followed.[25]

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[25] *Everson* relies, in part, on a letter from Thomas Jefferson to the Danbury Baptist Association, explaining that the Religion Clauses were "intended to erect 'a wall of separation between Church and State.'" 330 U.S. at 16; *see also* Thomas Jefferson, Letter to the Danbury Baptist Association (Jan. 1, 1802), *reprinted in* The Founders' Constitution, *supra*, at 96. Separationists have relied on this statement for decades. But Jefferson was not present during the framing and ratification of the Bill of Rights and is thus "a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment." *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting); *see id.* ("It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history."). More importantly, Jefferson thought the Establishment Clause disallowed Congress from passing religiously focused legislation, but not the states

Applying the Establishment Clause's historical bounds to Coach Kennedy's case, the panel got it wrong. Merely allowing a coach or teacher to pray on the football field would not have been an establishment in 1791 and thus is not an establishment now. "The Religion Clauses of the First Amendment … [b]y no means … impose a prohibition on all religious activity in our public schools." *Santa Fe*, 530 U.S. at 313. Again, en banc review would have allowed our court to correct the panel's ahistorical analysis.

II.

One last thought. If we accept a historical approach to Establishment Clause cases (as *American Legion* requires), what do we do with the litany of other tests created over the years? It makes little sense to kill *Lemon* but keep its progeny. Thus, tests stemming from *Lemon*'s purpose, effects, or entanglement prongs are inherently suspect. That said, if a test accurately captures the Establishment Clause's historical bounds without narrowing or expanding those bounds, there is no need to jettison the test.

The panel's "objective observer" test far exceeds the original bounds of the Establishment Clause. *See Kennedy*, 991 F.3d at 1017 (quoting *Santa Fe*, 530 U.S.

(which retained the authority to enact such legislation). *Amar*, *supra*, at 34-35. This explains Jefferson's unwillingness to declare a day of Thanksgiving while president, but allowance of religious endorsements as Virginia's governor so long as dissenters retained their freedom of conscience. *Id.* Against this backdrop, it makes no sense to superimpose Jefferson's views of federal limits on state and local governments.

at 308). The test is already suspect since it stems from *Lemon*, *see Lynch*, 465 U.S. at 688-90 (O'Connor, J., concurring), and its overbroad sweep confirms that suspicion. First, "endorsement" is too opaque. As this case demonstrates, "endorsement" can sweep wide enough to forbid the School District from merely allowing personal prayer on a football field (a practice that historically was never an establishment).

Second, the test turns on the objective observer. But who is that? The panel did not have someone from 1791 in mind. No, the panel relied on whether a modern-day observer—infused with today's more recent separationist mentality—would view the School District's allowance of Coach Kennedy's prayer as an establishment. After all, only that modern mentality drove the School District to ask Coach Kennedy to pray in a "private location" off the field or non-visibly on the field. *See Kennedy*, 991 F.3d at 1013. Only that mentality allowed the district court to find the School District's actions were justified by the Establishment Clause. And only that mentality compelled the panel to praise the School District's "efforts to avoid violating the Constitution" yet disparage Coach Kennedy's efforts to personally exercise his beliefs in a public space and defend his free exercise rights.[26] *E.g.*, *Kennedy*, 991 F.3d at 1010.

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[26] The main opinion repeatedly criticized Coach Kennedy for publicly defending his rights and refusing to hide his religious beliefs— "pugilistic," to put it in a word. *Kennedy*, 991 F.3d at 1017. But would we ever pejoratively refer to members of various civil rights movements as "pugilistic" when they publicly, peacefully, and vocally tried to vindicate their rights? Absolutely not. *See, e.g.*, *Masterpiece Cakeshop Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1727 (2018) (gay individuals and

Put simply, relying on the modern-day observer allows governments and the courts to expand the Establishment Clause's prohibitions beyond its original bounds and inhibit free exercise. But the Establishment Clause as originally understood makes clear there is "no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). So just as *Lemon* has been deemed largely illegitimate, so is an equally illegitimate and ahistorical endorsement test based on the modern-day objective observer. *See Town of Greece*, 572 U.S. at 609-10 (Thomas, J., concurring in part).

III.

The Establishment Clause was designed to keep government out of personal religious exercise, not purge religion from the public square. Not only did the panel's analysis miss the mark, but it expanded a dangerous misunderstanding of the Establishment Clause that infringes, not protects, religious rights. There may be situations in which a school's sponsorship or mandatory attendance policies lead to actual coercion. But merely allowing religion to be

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couples "cannot be treated as social outcasts or as inferior in dignity or worth," and "[t]he exercise of their freedom on terms equal to others must be given great weight and respect by the courts"). The position "that religious beliefs cannot legitimately be carried into the public sphere … implying that … religious persons are less than fully welcome" is hostility toward religion, not neutrality. *Id.* at 1729.

independently expressed in a school setting was never and is not an establishment of religion.

Without a distorted view of the Establishment Clause to hide behind (whether analyzed under existing Supreme Court precedent specifically or a historical analysis generally), the School District violated Coach Kennedy's free exercise rights. Religion was the "sole reason" it acted against Coach Kennedy, triggering the strictest scrutiny. *Kennedy*, 991 F.3d at 1010; *Espinoza*, 140 S. Ct. at 2255. The School District also had no compelling interest other than an erroneous understanding of the Establishment Clause. In other words, at least Coach Kennedy's Free Exercise claim would have "unquestionably" succeeded.

We are left with yet another decision untethered from history and grounded in hostility toward religion of more recent vintage. But from this nation's beginning, when government "guarantee[d] the freedom to worship as one chooses," "ma[d]e room for [a] wide variety of beliefs and creeds," "show[ed] no partiality to any one group," and "let[] each flourish," it "follow[ed] the best of our traditions." *Zorach*, 343 U.S. at 313-14. With history as our guide, we can better follow the First Congress's "example of respect and tolerance for differing views, an honest endeavor to achieve inclusivity and nondiscrimination, and a recognition of the important role that religion plays in the lives of many Americans." *Am. Legion*, 139 S. Ct. at 2089. I dissent.

COLLINS, *Circuit Judge*, dissenting from the denial of rehearing en banc:

For the reasons set forth by Judge O'Scannlain, whose statement I join, I dissent from the denial of rehearing en banc in this case. I have little to add to the much that has already been said about this case, but I do think that it is worthwhile to underscore one irreducible aspect of the panel's opinion.

In concluding that Bremerton School District employed the least restrictive means of accomplishing its assertedly compelling interest in avoiding an Establishment Clause violation, the panel relied on the premise that "*allowing* Kennedy" to "pray[] on the fifty-yard line immediately following the game in full view of students and spectators" "*would* constitute an Establishment Clause violation." *Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004, 1022 (9th Cir. 2021) (emphasis added). Thus, according to the panel, allowing any publicly observable prayer behavior by the coach in those circumstances—even silent prayer while kneeling—would violate the Establishment Clause. *See id.* (describing "pray[ing] on the fifty-yard line immediately following the game" as "a practice that violated the Establishment Clause"). Whatever else might be said about what occurred at the various games at issue in this case, *that* holding is indefensible under current Supreme Court caselaw, as Judge O'Scannlain amply demonstrates.

Appendix C

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, AT TACOMA

No. 16-cv-05694

JOSEPH A. KENNEDY,

Plaintiff,

v.

BREMERTON SCHOOL DISTRICT,

Defendant.

Filed: March 6, 2020

JUDGMENT

☐ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☑ **Decision by Court**. This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

Judgment [63] is DENIED, and Defendant Bremerton School District's Motion for Summary Judgment [70] is GRANTED.

DATED: March 6, 2020.

William M. McCool
Clerk

[handwritten: signature]
Deputy Clerk

Appendix D

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, AT TACOMA

No. 16-cv-05694

JOSEPH A. KENNEDY,

Plaintiff,

v.

BREMERTON SCHOOL DISTRICT,

Defendant.

Filed: March 5, 2020

Before: LEIGHTON, Ronald B.,
District Judge.

OPINION

INTRODUCTION

THIS MATTER is before the Court on the parties' Cross-Motions for Summary Judgment. Dkt. ## 63, 70. Plaintiff Joseph Kennedy, a former football coach at Bremerton High School, was suspended in 2015 after he refused to change his practice of praying at the 50-yard line immediately after games. The ensuing dispute has highlighted a tension in the First Amendment between a public-school educator's right to free religious expression and their school's right to

restrict that expression when it violates the Establishment Clause. Although the Court is sympathetic to Kennedy's desire to follow his beliefs, the former right must give way to the latter in this case. The Court therefore GRANTS Defendant Bremerton School District's Motion for Summary Judgment and DENIES Kennedy's Motion.

BACKGROUND

1. Kennedy's Coaching Career and History of Religious Conduct with Players.

Kennedy was employed as a football coach at Bremerton High School (BHS) from 2008 until the 2015-16 season. Kennedy Dec., Dkt. # 71-4, at 1. As an assistant coach, Kennedy had to help the head coach with team supervision, assume direct supervisorial authority when designated by the head coach, and "[o]bey all Rules of Conduct before players and the public." Dkt. # 64-4 at 15. In addition to these practical responsibilities, Kennedy's position required him to act as a "mentor and role model for the student athletes, … exhibit sportsmanlike conduct at all times, … maintain positive media relations, … [and strive to] create good athletes and good human beings." Coaching Agreement, Dkt. # 64-2 at 11. In Kennedy's own estimation, a coach's role extends far beyond merely teaching a sport and often involves a large amount of influence over student athletes. Kennedy Dep., Dkt. # 64-24, at 106-108.

According to his colleagues and superiors, Kennedy was a successful and dedicated coach when he worked at BHS. Polm Dep., Dkt. # 71-5, at 42-43; Saulsberry Dep., Dkt. # 71-6, at 14; Boynton Dep., Dkt. # 71-7, at 12. Kennedy also was (and is) a

practicing Christian, and his sincerely-held beliefs required him to "give thanks through prayer, at the end of each game, for what the players had accomplished and for the opportunity to be a part of their lives through the game of football." Kennedy Dec., Dkt. # 71-4, at 2-3. This took the form of a roughly 30-second prayer that Kennedy delivered on one knee at the 50-yard line immediately after the players and coaches shook hands after the game. *Id*. at 3. According to Kennedy, these prayers were private communications with God that Kennedy committed to after watching a 2006 film called *Facing the Giants*. *Id*. at 2-3.

Kennedy recounts that when he began this practice in 2008 he would pray alone. *Id*. at 3. However, when players from the BHS team began to join him, he did not interfere. *Id*. Although the number of participating players varied from game to game, Kennedy recalls that a majority of the team eventually took part. *Id*. Eventually, Kennedy began delivering inspirational speeches with religious references after games. *Id*. at 4. He would also participate in pre- and post-game locker room prayers, although he testifies that these were not required by his religious beliefs. *Id*. Kennedy emphasizes that he "never coerced, required, or asked any student to pray with [him] at the conclusion of games." *Id*.

2. The District issues a Directive to Kennedy Limiting his Religious Conduct around Players on September 17, 2015.

Although Kennedy's religious activity with student athletes went on for years, the District did not find out about it until September 2015 when a coach

from an opposing team informed BHS Principal Polm that Kennedy had asked his team to join him in prayer on the field. Polm Dep., Dkt. # 71-5, at 55-56. Kennedy was first approached about his praying on September 11, when Athletic Director Barton spoke with Kennedy after a game and expressed disapproval when Kennedy conducted a prayer on the field. Kennedy Dep., Dkt. # 71-10, at 24-25. This prompted Kennedy to post on Facebook that he might get fired for praying. *Id*. at 25.

After an inquiry, the District sent Kennedy a letter on September 17, 2015, stating that his practices of giving religious inspirational talks at the 50-yard line (which "evolve[ed] organically" from his prayer at the 50-yard line) and leading prayer in the locker room likely violated District policy. September 17 Letter, Dkt. # 64-8, at 1. Specifically, the letter explained that the conduct likely ran afoul of Board Policy 2340, which seeks to avoid violations of the Establishment Clause by requiring that school staff neither encourage nor discourage students from engaging in religious activity. *Id*. at 1-2. Although noting that it "may not address every potential scenario," the letter closed with the following directive:

> Student religious activity must be entirely and genuinely student-initiated, and may not be suggested, encouraged (or discouraged), or supervised by any District staff. … You and all District staff are free to engage in religious activity, including prayer, so long as it does not interfere with job responsibilities. Such activity must be physically separate from any

> student activity, and students may not be allowed to join such activity. In order to avoid the perception of endorsement discussed above, such activity should either be non-demonstrative (i.e., not outwardly discernable as religious activity) if students are also engaged in religious conduct, or it should occur while students are not engaging in such conduct.

Id. at 3. Some students and parents expressed thanks for the District's directive that Kennedy cease praying after games, with some noting that their children had participated in the prayers to avoid being separated from the rest of the team or ensure playing time. Barton Dec., Dkt. # 65, at 2; Leavell Dec. at 7; Polm Dep., Dkt. # 64-25, at 73-74; *see also* Saulsberry Dep., Dkt. # 64-26, at 19-20.

After meeting with Kennedy to further explain the situation, Superintendent Leavell testified that Kennedy was "not happy" with the District's directive but agreed to abide by it. Leavell Dec., Dkt. # 67, at 4. At the September 18 game, Kennedy ceased praying in the locker room, omitted religious references in his inspirational speech, and prayed on the field only after the stadium had emptied. Kennedy Dec., Dkt. # 71-4, at 5. For the following five varsity and junior varsity games, Kennedy testified at his deposition that he either does not remember the manner in which he prayed or recalls that he prayed for 10-15 seconds while the team was performing the fight song, walking off the field, or heading to the bus. Kennedy Dep., Dkt. # 71-10, at 163-65. It is unclear whether he prayed at the 50-yard line. *Id.* Although Kennedy states that

there were school administrators at these games, Leavell, Polm, and Barton were unaware of Kennedy's prayer at the time and believed he had ceased praying immediately after games. Leavell Dec., Dkt. # 82, at 2; Polm Dec., Dkt. # 80, at 2; Barton Dec., Dkt. # 81, at 2. After Kennedy changed his practices in September, no students were witnessed praying on the field independently. Leavell Dec., Dkt. # 67, at 7.

3. Kennedy Opposes the District's Directive, makes Media Appearances, and Prays at the October 16 Homecoming Game.

On October 14, the District received a letter from Kennedy's lawyers requesting a religious accommodation on his behalf. October 14 Letter, Dkt. # 71-16. The letter emphasized that Kennedy's prayers were not obviously Christian and occurred "after his official duties as a coach have ceased." *Id*. at 2. In light of this, Kennedy's lawyers insisted that his prayers were private speech and that the District could not prohibit him from praying with students if they voluntarily joined. *Id*. at 6-7. The letter thus advised the District that Kennedy would resume praying at the 50-yard line after the October 16 homecoming game and requested that the District rescind its September 17 directive with respect to this practice. *Id*. at 6.

Meanwhile, Kennedy began making media appearances spreading the word that he intended to pray after the October 16 game. Kennedy Dep., Dkt. # 64-24, at 72-73. The Seattle Times published an article on October 14 announcing Kennedy's plans for the upcoming game, and a local news story aired before the game that explained the conflict with the

District and included a statement from Kennedy that he planned to "do what [he'd] always done" at the game. Seattle Times Article, Dkt. # 64-11; Local News Video, Dkt. 64-12. The District also began receiving a large amount of emails, letters, and phone calls regarding the conflict over Kennedy's prayer, many of which were hateful or threatening. Leavell Dec., Dkt. # 67, at 3. This may have been originally triggered by Kennedy's September 11 Facebook about getting fired for praying.

Given this public response, Superintendent Aaron Leavell anticipated that members of the community would likely try to join Kennedy on the field after the homecoming game and that the District was currently unprepared to prevent this. September 18 Email, Dkt. # 64-9; Leavell Dec., Dkt. # 67, at 4. This prediction proved accurate, as a large number of people came onto the field after October 16 game. Leavell Dec. at 6. In the rush to reach the field, some band members and cheerleaders were knocked down. *Id*. Kennedy himself followed his custom of praying at the 50-yard line after the players had shaken hands, except this time he was surrounded by cameras and joined by a group of players, coaches, and even a state representative (the BHS players were busy singing the school's fight song at the time). Kennedy Dep., Dkt. # 64-24, at 69-70; Photo of October 16 Game, Dkt. # 64-13.

4. The District Reiterates its Concerns and Kennedy Continues to Pray at the 50-Yard Line after Games.

After October 16, the District increased security at games and placed robocalls to parents informing them that there was no public access to the field.

Leavell Dec., Dkt. # 67, at 6. The District also sent another letter to Kennedy on October 23 informing him that his conduct at the homecoming game did not comply with the September 17 directive. October 23 Letter, Dkt. # 64-14, at 1. The letter emphasized that Kennedy's duties as an assistant coach did not cease immediately after games and continued until the players were out of the dressing rooms and released to their parents. *Id*. at 2. Indeed, the head coach of the BHS team had confirmed that Kennedy was among those assistant coaches "with specific responsibility for the supervision of players in the locker room following games." *Id*.; *see also* Polm Dep., Dkt. # 64-25, at 47; Kennedy Dep., Dkt. # 64-24, at 41-42 (testifying that he is performing "football coaching functions … until the last kid leaves [the stadium]"). The letter also stated that the "[d]evelopment of accommodations is an interactive process" and suggested the possibility of finding other options for Kennedy's prayer, such as a private location at the field. October 23 Letter at 2-3; *see also* Polm Dep., Dkt. # 64-25, at 46-49 (explaining that Kennedy was told he could pray on the field when his supervisory duties had ceased). However, Kennedy's current practices "drew him away from [his] work" and, to a reasonable observer, appeared as District endorsement of religion. October 23 Letter at 2.

Kennedy did not take the District up on its offer to keep discussing religious accommodations. Leavell Dec., Dkt. # 67, at 5. Instead, Kennedy continued his practice of praying at the 50-yard line in the next two games. At the October 23 game, Kennedy prayed alone in the middle of the field while the players headed to the stands. Video of October 23 Game, Dkt. # 71-20. At

the October 26 game, Kennedy initially knelt down by himself but was then joined by about a dozen other adults. Video of October 26 Game, Dkt. # 71-22. Once the players finished their fight song, they joined Kennedy at the middle of the field after he had finished his kneeling prayer. *Id*.

5. The District Places Kennedy on Administrative Leave and he Declines to Reapply for his Position as an Assistant Coach.

Citing Kennedy's decision to keep praying on the field at the games on October 16, 23, and 26, the District placed Kennedy on paid administrative leave on October 28, 2015 for violating the District's prior directives. October 28 Letter, Dkt. # 64-16. Although the October 23 letter had mentioned that Kennedy's prayer distracted him from his supervisorial duties, the risk of constitutional liability associated with Kennedy's religious conduct was the "sole reason" the District ultimately suspended him. Leavell Dep., Dkt. # 71-9, at 197; *see also* District Statement and Q&A regarding Kennedy, Dkt. # 71-2, at 1 (placing Kennedy on leave was "necessitated" by his refusal to cease his "overt, public religious displays."). Kennedy was no longer allowed to participate in games as a coach but could attend them as a member of the public, which he did on October 30 when he prayed in the bleachers with a group of people. *Id*.; Photo of Kennedy Praying in Bleachers, Dkt. # 64-17; Leavell Dec., Dkt. # 67, at 7. Although the October 28 letter renewed the District's invitation to discuss alternative accommodations, Kennedy did not respond. October 28 Letter; Kennedy Dep., Dkt. # 64-24, at 100.

Kennedy's evaluations for the 2015 season by Head Coach Gillam and Athletic Director Barton reflected the drama that had played out with the District. Gillam gave Kennedy low marks for putting his own interests over those of the team, although Kennedy received high marks for his relationship with players and other qualities. Gillam Evaluation, Dkt. # 64-19. Barton similarly praised Kennedy's coaching skills but criticized his lack of cooperation, noting that he "never came in after numerous requests and contacts." Barton Evaluation, Dkt. # 64-20. At the end of the 2015 season, Gillam resigned as head coach after eleven years in the position, and the six assistant coach contracts also expired. Gillam Dec., Dkt. # 66, at 3; Steedman Dec., Dkt. # 22, at 3. Kennedy was one of four current assistant coaches who did not reapply for their jobs. Steedman Dec. at 3.

6. Procedural History

Kennedy filed suit in this Court on August 9, 2016. Complaint, Dkt. # 1. Kennedy's first two claims under 42 U.S.C. § 1983 allege the District violated his First Amendment rights to free speech and free exercise by limiting his practice of praying at the 50-yard line and ultimately placing him on leave. *Id*. at 13-14. Kennedy's remaining five claims fall under Title VII of the Civil Rights Act of 1964 and allege failure to re-hire, protected characteristic as a motivating factor, disparate treatment, failure to accommodate, and retaliation. *Id*. at 14-16. Kennedy asks for declaratory relief and an injunction reinstating him as a BHS assistant coach with an acceptable religious accommodation for his practice of praying at the 50-yard line. *Id*. at 16.

Kennedy moved for a preliminary injunction based on his First Amendment claims on August 24, 2016. Dkt. # 15. The Court denied that motion at a hearing held on September 19. Dkt. # 25. Kennedy appealed, and the Ninth Circuit affirmed on the basis that Kennedy's prayers were delivered in his capacity as a public employee and were thus unprotected speech. *Kennedy v. Bremerton Sch. Dist.*, 869 F.3d 813 (9th Cir. 2017) (*Kennedy I*). The Supreme Court denied certiorari, but four of the justices issued a concurring opinion expressing skepticism at the prior holdings. *Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634 (2019) (*Kennedy II*). Now, both parties have moved for summary judgment on all seven of Kennedy's claims.

DISCUSSION

1. Summary Judgment Standard

Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether an issue of fact exists, the Court must view all evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *Anderson Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986); *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). A genuine issue of material fact exists where there is sufficient evidence for a reasonable factfinder to find for the nonmoving party. *Anderson*, 477 U.S. at 248.

On cross-motions, the defendant bears the burden of showing that there is no evidence which supports an

element essential of the plaintiff's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Conversely, the plaintiff "must prove each essential element by undisputed facts." *McNertney v. Marshall*, No. C-91-2605-DLJ, 1994 WL 118276, at *2 (N.D. Cal. Mar. 4, 1994) (citing *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir.1986)). Either party may defeat summary judgment by showing there is a genuine issue of material fact for trial. *Id.*; *Anderson*, 477 U.S. at 250. Although the parties may assert that there are no contested factual issues, this is ultimately the court's responsibility to determine. *Fair Hous. Council of Riverside Cty., Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001).

2. Section 1983 Free Speech Claim

To succeed in his claims under § 1983, Kennedy must prove that the District acted under color of state law to violate his constitutional rights under the First Amendment. *Stein v. Ryan*, 662 F.3d 1114, 1118 (9th Cir. 2011). In cases involving the free speech rights of government workers, First Amendment protections aim "both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions." *Garcetti v. Ceballos*, 547 U.S. 410, 420 (2006). This balancing test between employer control and individual freedom traces back to *Pickering v. Board of Ed. of Township High School Dist. 205*, 391 U.S. 563 (1968), but has evolved through subsequent cases. *See Ceballos*, 547 U.S. at 417-20 (collecting cases).

Today, the Ninth Circuit has boiled this precedent down to a First Amendment retaliation test that requires asking five sequential questions: "(1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action; (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and (5) whether the state would have taken the adverse employment action even absent the protected speech." *Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009).[1] A plaintiff's failure to satisfy a single one of these requirements is fatal to their claim. *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 961 (9th Cir. 2011).

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[1] The Ninth Circuit applies the analysis from *Pickering* "regardless of the reason an employee believes his or her speech is constitutionally protected," including if it is religious speech that also implicates the Free Exercise Clause. *Berry v. Dep't of Soc. Servs.*, 447 F.3d 642, 650 (9th Cir. 2006); *see also Knight v. Connecticut Dep't of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001) (reaching same conclusion). That said, Kennedy alleges a distinct claim based on the Free Exercise Clause challenging the District's directive barring Kennedy's practice of praying in view of students. Complaint, Dkt. # 1, at 14. While there is substantial overlap between these claims, unlike *Berry* and *Knight*, Kennedy does not allege a "hybrid" free speech/free exercise claim. *See Berry*, 447 F.3d at 649 n.5; *Knight*, 275 F.3d at 166. Kennedy's free exercise claim is sufficiently distinct from his free speech claim to warrant separate analysis under *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

a. Whether Kennedy Spoke as a Private Citizen or Public Employee

The District first contends that Kennedy's prayer at the 50-yard line was delivered in his capacity as a public employee, while Kennedy argues that it was private speech falling outside of his coaching role. "[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Ceballos*, 547 U.S. 410, 421. In *Ceballos*, the speech at issue—a critical disposition memo—indisputably fell within Ceballos's responsibilities as a prosecutor, giving the Court "no occasion to articulate a comprehensive framework for defining the scope of an employee's duties." *Id*. at 424. Nonetheless, the Court pointed out that the "proper inquiry is a practical one" and that "employers can[not] restrict employees' rights by creating excessively broad job descriptions." *Id*.; *see also Lane v. Franks*, 573 U.S. 228, 240 (2014) (The "critical question under *Ceballos* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties.").

The Ninth Circuit has interpreted *Ceballos* as presenting courts with a "mixed question of fact and law" regarding the nature of a public employee's speech. *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1129 (9th Cir. 2008). First, the trier or fact must determine the "scope and content of a plaintiff's job responsibilities;" then, "the court must "evaluate the ultimate constitutional significance of the facts as found." *Id*. (partly quoting *Bose Corp. v.*

Consumers Union of United States, Inc., 466 U.S. 485, 501 n.17 (1984)). If the employee's speech is "the product of performing the tasks the employee was paid to perform" or "owes its existence to [their] professional responsibilities," then they spoke in their capacity as a public employee and their speech is unprotected. *Eng*, 552 F.3d at 1071 (quoting *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1127 n.2 (9th Cir. 2008) and *Ceballos*, 547 U.S. at 421, respectively) (internal quotation omitted).

In *Johnson v. Poway Unified School District*, 658 F.3d 954 (9th Cir. 2011), the Ninth Circuit applied this framework to teachers and defined the scope of their duties with respect to student-directed speech. Johnson, a high school math teacher, had decorated his classroom using two banners with religious messages, such as "IN GOD WE TRUST." *Id.* at 958. The court concluded that Johnson's duties encompassed such communications because the school had a specific policy regulating the content of classroom banners and because "expression is a teacher's stock and trade, the commodity she sells to her employer in exchange for a salary." *Id.* at 967. The court thus held that, "*as a practical matter*, we think it beyond possibility for fairminded dispute that the 'scope and content of [Johnson's] job responsibilities' did not include speaking to his class in his classroom during class hours." *Id.* (quoting *Ceballos*, 547 U.S. at 424).

The court then assessed the constitutional significance of these facts and held that Johnson's speech owed its existence to his position, despite the fact that the banners' messages were outside the math

curriculum. *Id*. at 967-68. The court pointed out that "[a]n ordinary citizen could not have walked into Johnson's classroom and decorated the walls as he or she saw fit." *Id*. at 968. More broadly, "because of the position of trust and authority they hold and the impressionable young minds with which they interact, teachers *necessarily* act as teachers for purposes of a *Pickering* inquiry when at school or a school function, in the general presence of students, in a capacity one might reasonably view as official." *Id*.

It was *Johnson* that the Ninth Circuit primarily relied upon in upholding this Court's order denying a preliminary injunction. *Kennedy I*, 869 F.3d at 824-25. Just as Johnson was tasked with educating his students in the classroom, the appellate court determined that Kennedy's job was to serve as a role model and mentor on the field. *Id*. at 825. Consequently, "[w]hen acting in an official capacity in the presence of students and spectators, Kennedy was also responsible for communicating the District's perspective on appropriate behavior through the example set by his own conduct." *Id*. at 827. The court then held that Kennedy's prayer was a product of his coaching position because it took place "[1] at school or a school function, [2] in the general presence of students, [3] in a capacity one might reasonably view as official." *Id*. at 827 (quoting *Johnson*, 658 F.3d at 968). Further, the court noted that Kennedy's speech "owe[d] its existence" to the field-access provided by his coaching position and, as in *Johnson*, deemed the content of Kennedy's speech largely irrelevant. *Id*. at 827-28 (quoting *Ceballos*, 547 U.S. at 421-22).

Kennedy appealed again, and although the Supreme Court did not grant certiorari, four of the Justices criticized the Ninth Circuit's reasoning. *Kennedy II*, 139 S. Ct. at 635 (Alito, J., concurring). The Justices observed that the Ninth Circuit's application of *Ceballos* implies that teachers and coaches are "on duty" whenever students are nearby and can thus be fired for any expressive activity during the school day or at school events. *Id.* at 636. This could include a prayer before lunch or an innocuous comment that is overheard by students. *Id.* According to the four Justices, *Ceballos*'s holding does not reach so far. *Id.* at 636-37.

As this tension demonstrates, the question of what speech is public vs. private becomes especially difficult when an essential part of an employee's job *is* expression. On one hand, a coach or teacher's duties as an educator make it imperative that the school can control the types of information they impart to young minds. On the other hand, these broad duties could conceivably encompass all expression—no matter how personal—if there is a slight chance students could witness it. But while this case exists near the crossroads of these concerns, Kennedy's prominent, habitual prayer is not the kind of private speech that is beyond school control.

As the Ninth Circuit determined, Kennedy's duties as a coach "involved modeling good behavior while acting in an official capacity in the presence of students and spectators." *Kennedy I*, 869 F.3d at 826. The agreement Kennedy signed upon becoming a coach confirms this by requiring him to act as a "mentor and role model for the student athletes" and

"exhibit sportsmanlike conduct at all times." Coaching Agreement, Dkt. # 64-2 at 11. Kennedy himself testified that what he says or does while coaching serves as an influential example for his players to "do what is right". Kennedy Dep., Dkt. # 64-24, at 109-110. A practical description of a coach's job responsibilities must account for this far-reaching influence.

This does not necessarily mean that *all* of a coach's conduct nearby student athletes is within the scope of their job. After all, as the four concurring Justices pointed out, such an outcome could conceivably mean that a coach's speech is subject to control even off the clock. *Kennedy II*, 139 S. Ct. at 637 (Alito, J., concurring). There is a point at which an educator's speech is so obviously personal that it is delivered as a citizen. This may be the case when a coach greets family in the bleachers during a game or a teacher wears a cross around their neck. *See* District 30(b)(6) Dep., Dkt. # 71-9, at 125-26; *see also* Boynton Dep., Dkt. # 71-7, at 19-21 (testifying that BHS coaches would sometimes check their phones or greet friends and family in the stand after games).[2]

[2] Kennedy claims that the Ninth Circuit determined the scope of a coach's duties based on an incomplete record in *Kennedy I*. Kennedy Motion, Dkt. # 70, at 13. But the only additional evidence that Kennedy identifies is the deposition testimony of the District and Coach Boynton that a coach would not be disciplined for placing a brief call or greeting family while on duty. The fact that some specific speech would not lead to discipline does not necessarily mean it is delivered in a private capacity. But more importantly, this limited new evidence does not mean the record before the Ninth Circuit was fatally inadequate on this issue.

Although students may glimpse such expression from time to time, contextual cues will alert them that the conduct is private and not intended to influence them.

But just as it would excessively restrict public educators to encompass all speech within the scope of their duties, it would be equally harmful to exclude all speech that is not overtly educational. Speech around students bearing the mark of an educator's formal role, such as a classroom banner, is well within the scope of their responsibilities. *See Johnson*, 658 F.3d at 958. To hold otherwise would hinder schools' ability to protect students from all sorts of improper communications by teachers and coaches that happen to occur outside of a lesson. Consequently, while Kennedy's job description is broad, it nonetheless captures the reality that educators are entrusted with shaping students while on duty.

Given this practical assessment of Kennedy's duties as a coach, the Court must hold that his prayers at the 50-yard line were not constitutionally protected. "[T]eachers necessarily act as teachers for purposes of a *Pickering* inquiry when [1] at school or a school function, [2] in the general presence of students, [3] in a capacity one might reasonably view as official." *Kennedy I*, 869 F.3d at 827 (quoting *Johnson*, 658 F.3d at 968). It is the third requirement that Kennedy contests,[3] but his speech simply cannot be compared

[3] Although Kennedy originally claimed to be off duty after games, he has now abandoned that contention. *See* October 14 Letter, Dkt. # 71-16, at 2. All 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

to an impromptu phone call, greeting family in the bleachers, or even quickly bowing one's head before a meal. *See Kennedy II*, 139 S. Ct. at 636 (Alito, J., concurring). Like the front of a classroom or the center of a stage, the 50-yard line of a football field is an expressive focal point from which school-sanctioned communications regularly emanate. If a teacher lingers at the front of the classroom following a lesson, or a director takes center stage after a performance, a reasonable onlooker would interpret their speech from that location as an extension of the school-sanctioned speech just before it. The same is true for Kennedy's prayer from the 50-yard line.

Kennedy testified that, despite his prominent location on the field, his prayers were between him and God and not directed at players or audience members. Kennedy Dep. at 27. This may be true as far as Kennedy is concerned, but the *Ceballos*/*Eng* analysis is not so subjective. If it was, a teacher could validly claim that their sincerely-held beliefs compel them to announce their prayers after each lesson or proselytize in front of students. The teacher may not *intend* to direct their actions at the students, but the latter would nonetheless feel implicated. Kennedy's prayers 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 had a similar effect.

Kennedy's speech at the 50-yard line also "owes its existence" to his coaching position. *Ceballos*, 547 U.S. at 421. As the Ninth Circuit observed, this is

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room. Kennedy Dep., Dkt. # 64-24, at 41-42; October 23 Letter, Dkt. # 64-14, at 1; Polm Dep., Dkt. # 64-25, at 47.

literally the case because only BHS staff and players had access to the field immediately after football games. *Kennedy I*, 869 F.3d at 827. However, as the Court explained in *Ceballos*, presence in an exclusive location is insufficient on its own to expose an employee's speech to restriction. *See* 547 U.S. at 421 ("Many citizens do much of their talking inside their respective workplaces."). Here, however, Kennedy's speech was uniquely tied to his job. Kennedy's sincerely-held beliefs did not allow him to pray just anywhere about anything; he was required to pray on school-controlled property about a school-sponsored event. The place and manner of Kennedy's speech also gave it a unique effect that derived from his position. Just as the impact of Ceballos's memo depended on his authority and duties as a prosecutor, the impact of Kennedy's prayer came from his position as a coach. *See id*. at 414, 420.

And indeed, whether Kennedy intended it or not, his prayers did have an impact: players joined Kennedy at the 50-yard line for years despite evidence that some would not have done so if Kennedy were not a coach. Kennedy Dec., Dkt. # 71-4, at 2-3; Barton Dec., Dkt. # 65, at 2; Leavell Dec. at 7; Polm Dep., Dkt. # 64-25, at 73-74; *see also* Saulsberry Dep., Dkt. # 64-26, at 19-20. He may not have been teaching his players to block and tackle, but Kennedy's highly visible prayers were similarly influential on players' conduct. Because he was hired precisely to occupy this type of influential role for student athletes, Kennedy spoke in his capacity as a public employee and his § 1983 free speech claim fails as a result.

b. Whether the District's Actions were Adequately Justified

The fact that Kennedy spoke as an employee is enough to end the Court's analysis at part two of the *Eng* inquiry. *Johnson*, 658 F.3d at 961. However, the District's justification for disciplining Kennedy—avoiding an Establishment Clause violation—is so closely related to the public nature of Kennedy's speech and his remaining claims that it warrants discussion. "Establishment Clause concerns can justify speech restrictions 'in order to avoid the appearance of government sponsorship of religion.'" *Hills v. Scottsdale Unified Sch. Dist. No. 48*, 329 F.3d 1044, 1053 (9th Cir. 2003) (quoting *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 983-85 (9th Cir.2003)). Indeed, "a state interest in avoiding an Establishment Clause violation 'may be characterized as compelling.'" *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001) (quoting *Widmar v. Vincent*, 454 U.S. 263, 271 (1981)).

As the Supreme Court has recognized numerous times, "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *Lee v. Weisman*, 505 U.S. 577, 592 (1992) (collecting cases). *Santa Fe Independent School District v. Doe* is particularly instructive here. 530 U.S. 290 (2000). The policy in *Santa Fe*, which was adopted by a majority of the student body, allowed a student-led prayer to be delivered via the high school's announcement system before football games. *Id.* at 297-99. The Court held the policy unconstitutional because it amounted to

government endorsement of religion and coerced participation in religious activity.[4] *Id*. at 309, 312.

Under the endorsement test, the court must ask "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of [religion]." *Id*. at 308 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring in the judgment)). The prayer, which was delivered "over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer," created the perception of school sponsorship. *Id*. at 310. The coercion test asks simply whether students are somehow forced to "support or participate in religion or engage in a religious exercise." *Newdow v.*

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[4] Kennedy argues that *Santa Fe*'s holding was based solely on the coercive effects of the school's prayer announcement policy. Kennedy Opposition, Dkt. # 83, at 6. The Court disagrees. *Santa Fe* expressly held, "[T]he simple enactment of this policy, with the purpose and perception of school endorsement of student prayer, was a constitutional violation." 530 U.S. at 316. Indeed, in justifying its holding, *Santa Fe* quoted O'Connor's concurrence in *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) identifying the endorsement test. *Santa Fe*, 530 U.S. at 309-10. Other courts in this circuit have also applied both the endorsement and coercion tests in cases involving religious expression in schools. *See, e.g.*, *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1017 (9th Cir. 2010); *Kennedy I*, 869 F.3d at 834 (Smith, J., concurring). To the extent that Justice Kavanaugh's concurrence in *American Legion v. American Humanist Association*, 139 S. Ct. 2067, 2093 (2019) cabins the Establishment Clause analysis in school prayer cases to the coercion test, the Court declines to follow this non-binding dicta.

Rio Linda Union Sch. Dist., 597 F.3d 1007, 1038-39 (9th Cir. 2010) (citing *Lee*, 505 U.S. at 592). The *Santa Fe* Court determined that the policy was coercive because it used the "immense social pressure" associated with high school football games to "exact religious conformity" from those in attendance. *Id*. at 311-12 (quoting in part *Lee*, 505 U.S. at 596).

Other circuit courts have similarly recognized the potential for Establishment Clause violations when school employees become involved in religious expression. In *Doe v. Duncanville Independent School District*, for example, the Fifth Circuit held that school staff participating in student-led prayer at basketball games "improperly entangle[d] [the school] in religion and signal[ed] an unconstitutional endorsement of religion." 70 F.3d 402, 406 (5th Cir. 1995). And in *Borden v. School District of the Township of East Brunswick*, the Third Circuit held that a coach bowing his head and taking a knee to join his players in prayer before games violated the Establishment Clause. 523 F.3d 153, 179 (3d Cir. 2008). Although the court noted that the result might be different if the practice was viewed in isolation, the coach's years-long history of *leading* prayers with athletes would cause a reasonable observer to perceive school endorsement of religion. *Id*. at 177-78.

Here, Kennedy's practice of praying at the 50-yard line fails both the endorsement and coercion tests and violates the Establishment Clause.[5] While it may

[5] Some courts have employed the test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971) in cases involving religious conduct at schools. *See, e.g., Newdow*, 597 F.3d at 1076. Kennedy argues that the *Lemon* test is disfavored and does not apply in the school.

not convey school approval as universally as a public announcement system, speech from the center of the football field immediately after each game also conveys official sanction. This is even more true when Kennedy is joined by students or adults to create a group of worshippers in a place the school controls access to. Kennedy argues that he "intentionally avoided organizing prayer with others" after the District's September 17 letter, but the publicity surroundings his prayer and its prominent location made explicit invitations unnecessary. *See* Kennedy Dec., Dkt. # 71-4, at 3 (noting that his prayers on the field drew players to join over time); Photo of October 16 Game, Dkt. # 64-13 (showing Kennedy praying with players and members of the public). Indeed, at the very last game before Kennedy's suspension, a group of adults went to the center of the field to pray with him. Video of October 26 Game, Dkt. # 71-22. At no time did Kennedy, through words or actions, ensure that others would not amplify his religious message on the field.

And even if the District did not have an official policy condoning Kennedy's conduct, as in *Santa Fe*, a reasonable observer would conclude the school was aware that a "distinctively Christian prayer" was taking place and had chosen to allow it. *See Kennedy I*, 869 F.3d at 835 n.3 (observing that non-Christian religions employ different poses for worship). The risk of that perception is certainly higher here than in *Duncanville* and *Borden*, where school staff merely

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The Court need not address this because the endorsement and coercion tests are more readily applicable to the issues here and are sufficient to resolve them.

participated in prayer rather than initiating it themselves. *Duncanville*, 70 F.3d at 406; *Borden*, 523 F.3d at 176. And like those cases, Kennedy's role as a representative of the District makes disclaimers an inadequate remedy. *Duncanville*, 70 F.3d at 406; *Borden*, 523 F.3d at 177 n.20; *see also Kennedy I*, 869 F.3d at 836 (Smith, J., concurring).

Observers would also be aware that Kennedy's activities were religious in nature based on his history of engaging in religious activity with players. For eight years prior to 2015, Kennedy prayed with students in the locker room, prayed on the field, and delivered religious inspirational talks after games. Kennedy Dec., Ex. 71-4, at 3-4. Anyone familiar with this history would view Kennedy's prayer at the 50-yard line as continuing this tradition of injecting religious undertones into BHS football events.

But even more than the perception of school endorsement, the greatest threat posed by Kennedy's prayer is its potential to subtly coerce the behavior of students attending games voluntarily or by requirement. Players (sometimes via parents) reported feeling compelled to join Kennedy in prayer to stay connected with the team or ensure playing time, and there is no evidence of athletes praying in Kennedy's absence. Leavell Dec., Dkt. # 67, at 7; Barton Dep., Dkt. # 65, at 2; Polm Dep., Dkt. # 64-25, at 73-74; Saulsberry Dep., Dkt. # 64-26, at 19-20. Kennedy himself testified that, "[o]ver time, the number of players who gathered near [him] after the game grew to include the majority of the team." Kennedy Dec., Dkt. # 71-4, at 3. This slow accumulation of players joining Kennedy suggests

exactly the type of vulnerability to social pressure that makes the Establishment Clause vital in the high school context. As anyone who has passed through that fraught stage of life can confirm, there is no time when the urge to join majority trends is greater. But when it comes to religion, the Establishment Clause forbids government actors from using this pressure to promote conformity.

Kennedy argues that his prayers were not coercive because, after the District's September 17 directive, he "intentionally separated himself from students and waited until players were departing the field before engaging in prayer." Kennedy Motion, Dkt. # 70, at 18; *see also* Kennedy Dep., Dkt. # 64-24, at 62-66 (explaining that, after the September 17 letter, Kennedy and his lawyers planned for him to pray quickly at the 50-yard line while students were distracted by singing the fight song). However, even if the Court focuses only on Kennedy's final few games, the outcome is the same. Kennedy may have tried to deliver his prayers in late 2015 while players were distracted, but this does not mean the athletes were unaware of Kennedy's actions or could not have joined him. His brief prayers were still long enough for other adults to participate at the October 16 and 26 games, and Kennedy's original practice of praying alone on the field eventually drew in most of the team.

Indeed, Kennedy's post-September 17 prayers were not meaningfully different from his original practice before he started giving inspirational speeches. Kennedy's own statements have consistently represented his plan for the October 16, 23, and 26 games as a continuation of what he "started

out doing." Kennedy Dep. at 64; October 14 Letter, Dkt. # 71-16, at 6; Local News Video, Dkt. 64-12. Kennedy took no reliable steps to prevent students from joining him in prayer and has admitted that he would not have stopped them if they had. Kennedy Dep. at 65-66. The injunctive relief Kennedy requests, which would permit him to pray "at the 50-yard line at the conclusion of BHS football games" with no other limitations, reflects this. Complaint, Dkt. # 1, at 16. There is thus no assurance that, if Kennedy were allowed to resume his post-game prayers, students would not become involved again. This would be constitutionally unacceptable, as it would be impossible to tell which players joined out of genuine desire and which felt pressured.

Finally, Kennedy's own intentions also do not change the practical effects of his prayer. Kennedy occupied a powerful position in his players' lives, both as a role model and as one of the people controlling their chance to perform on the biggest stage American high schools have to offer: the football field. Kennedy Dep., Dkt. # 64-24, at 106 (acknowledging that coaches can be the most important figure in some student athletes' lives). As Judge Smith observed in his concurring opinion, there is "no reason to believe that the pressure emanating from [Kennedy's] position of authority would dissipate" simply because he may have intended it to. *Kennedy I*, 869 F.3d at 835. Rather, Kennedy's prayers sent a "message to members of the audience who are nonadherents that they are outsiders, not full members of the political community." *Id*. (quoting *Santa Fe*, 530 U.S. at 309). For many young athletes, the response to such a message is a desire to become an insider by joining

Kennedy at the 50-yard line. This coercive effect violates the Establishment Clause and justifies the District's decision to place Kennedy on leave.

3. Section 1983 Free Exercise Claim

In addition to his free speech claim, Kennedy also makes a § 1983 claim under the Free Exercise Clause. "[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, … and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993); *see also Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 883 (1990). "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Lukumi*, 508 U.S. at 533.

Kennedy contends that the District's September 17 directive, which derived from Board Policy 2340, was not neutral or generally applicable because it specifically targeted Kennedy's religious conduct. *See* September 17 Letter, Dkt. # 64-8. But even if this is the case, the District's decision to restrict Kennedy's post-game prayer activities was not unconstitutional under the standard from *Lukumi*. The District had a compelling interest in avoiding constitutional violations, *see Good News Club*, 533 U.S. at 112, and the Court has already concluded that allowing Kennedy to continue praying at the 50-yard line would have violated the Establishment Clause. The District's application of Board Policy 2340 to Kennedy was also narrowly tailored to protect his rights. The District gave Kennedy multiple options to continue

praying after games that would not have amounted to a violation. Kennedy, however, rejected these accommodations and did not respond to the District's requests for further input. In light of this, Kennedy's Free Exercise claim cannot succeed.

4. Title VII Claims

Finally, Kennedy asserts five claims under Title VII of the Civil Rights Act of 1964 related to his suspension: failure to re-hire (42 U.S.C. § 2000e-2(a)(1)), protected characteristic (§ 2000e-2(m)), disparate treatment (§ 2000e-2(a)), retaliation (§ 2000e-3(a)), and failure to accommodate (§§ 2000e-2(a) & 2000(j)). Kennedy Motion, Dkt. # 70, at 22-23. Congress passed Title VII to remove "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification," such as religion. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1993). However, in Kennedy's case, there is no evidence that the District's actions were motivated by anything other than a desire to avoid constitutional violations.

a. Failure to Re-Hire Motivated by Protected Characteristic

Kennedy asserts that the District failed to re-hire him on the basis of his religious beliefs, although his actual claim is that the District made it futile for him to re-apply for his job after they suspended him and issued critical evaluations. Complaint, Dkt. # 1, at 16. Title VII makes it unlawful for employers to "fail or refuse to hire or to discharge any individual … because of such individual's race, color,

religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

A 1991 amendment to the statute further provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." § 2000e-2(m).[6] Thus, even if the employer's action had other, nondiscriminatory motivations, they can still be liable if the employee's protected characteristic was also a motivation. *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 848 (9th Cir. 2002). It is also not necessary under Title VII that an employee actually suffer a rejection if a negative outcome is preordained. *Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757, 762 (9th Cir. 1980) ("When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application."). To establish a prima facie case under Title VII, a plaintiff need only present direct or indirect evidence creating an inference of discrimination. *Raad v.*

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[6] Kennedy alleges separate claims for failure to re-hire and protected characteristic as a motivating factor. Complaint, Dkt. # 1, at 15-16. But § 2000e-2(m) actually modified the definition of an "unlawful employment practice" as identified in § 2000e-2(a). *See Costa v. Desert Palace, Inc.*, 299 F.3d 838, 848 (9th Cir. 2002). In light of this, the Court will address Kennedy's failure to re-hire claim under this more plaintiff-friendly inspirational definition described in § 2000e-2(m) rather than addressing the claims separately.

Fairbanks N. Star Borough Sch. Dist., 323 F.3d 1185, 1196 (9th Cir. 2003).

Even under these forgiving standards, Kennedy's claim cannot pass scrutiny. There is no evidence that Kennedy's religion itself, rather than the unconstitutional time and manner he expressed it, motivated the District's actions. All the evidence shows that the District wanted to accommodate Kennedy's faith and encouraged constitutional religious expression. Indeed, the centerpiece of Kennedy's § 1983 claims is the assertion that he was placed on leave "solely [because of] concern that [his] conduct might violate the constitutional rights of students and other community members." Kennedy Motion, Dkt. # 70, at 9 (quoting Leavell Dep., Dkt. # 71-9, at 197). Kennedy's effort to equate the District's good faith efforts to obey the Establishment Clause with religiously-motivated discrimination cannot amount to a prima facie case of discrimination.

b. Disparate Treatment

Kennedy also asserts a disparate treatment claim based on the theory that the District targeted Kennedy for his demonstrative religious expression while failing to discipline other coaches who acted similarly. Complaint, Dkt. # 1, at 14. To succeed in a disparate impact claim, the plaintiff employee must first make a prima facie case by showing that: "(1) he is a member of a protected class; (2) he was qualified for his position; (3) he experienced an adverse employment action; and (4) similarly situated individuals outside his protected class were treated more favorably." *Berry v. Dep't of Soc. Servs.*, 447 F.3d 642, 656 (9th Cir. 2006). Then, the burden shifts to the

defendant employer to provide a "legitimate nondiscriminatory reason" for the action.[7] *Id*. If they succeed in this, the plaintiff again has the burden of demonstrating that the defendant's reason is actually pretextual. *Id*. (citing *McDonnell Douglas*, 411 U.S. at 804).

Here, Kennedy cannot carry his initial burden because he cannot show that anyone outside his class engaged in comparable conduct. Kennedy contends that other coaches on the team "similarly situated" to him were not disciplined for expressive activity like tying their shoes. But "[o]ther employees are similarly situated to the plaintiff when they have similar jobs

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[7] For Title VII theories other than disparate impact, § 2000e-2(m) establishes that an employer can still be liable even if they had an additional, non-discriminatory reason for their action if a protected characteristic was one of the motivating factors. *See Costa v. Desert Palace, Inc.*, 299 F.3d 838, 848 (9th Cir. 2002) ("[I]f the employee succeeds in proving only that a protected characteristic was one of several factors motivating the employment action, an employer cannot avoid liability altogether, but instead may assert an affirmative defense to bar certain types of relief by showing the absence of 'but for' causation."). However, § 2000e-2(k) contains its own definition of an "unlawful employment practice" for disparate impact claims: "An unlawful employment practice based on disparate impact is established under this subchapter *only* if … a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin *and* the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." (emphasis added). This supersedes the definition in § 2000e-2(m) (which only applies "[e]xcept as otherwise provided in this subchapter") and allows employers a complete defense if they can demonstrate a legitimate nondiscriminatory basis for the action.

and display *similar conduct*." *Earl v. Nielsen Media Research, Inc.*, 658 F.3d 1108, 1114 (9th Cir. 2011) (emphasis added). Tying one's shoes is in no way similar to demonstrative religious worship in the center of the field.

Kennedy argues that, under *Berry*, the Court should compare "Kennedy's brief, personal conduct [to the] brief, personal conduct of the other football coaches." Kennedy Opposition, Dkt. # 83, at 20. In *Berry*, the court compared the plaintiff's request to use a conference room for religious purposes to another group's request to use the room for secular purposes. 447 F.3d at 656. But unlike *Berry*, Kennedy's use of the center of the field to pray after each game is not the same as other coaches' spontaneous personal acts somewhere else on the field. The Court also rejects the notion that the District must treat religious expression the same as non-religious expression when there are no constitutional liabilities for the latter. *Berry* recognized this distinction as well. *Id*. at 656 ("[W]e perceive a difference between business-related social functions and religious meetings.").

The only evidence of a coach doing anything remotely comparable to praying on the 50-yard line is Kennedy's testimony that Coach Boynton engaged in silent Buddhist chants on the field after "many" BHS games. Kennedy Dec., Dkt. # 71-4, at 4; *see also* Kennedy Dep., Dkt. # 64-24, at 148. Boynton testified about one occurrence when he went onto the field after the last game of his first season, took a picture of the scoreboard, and said a silent chant to himself while standing. Boynton Dep., Dkt. # 64-23, at 54-57. The District was not aware of any religious conduct by

Boynton until Kennedy mentioned it in his EEOC complaint. Leavell Dec., Dkt. # 67, at 7. Kennedy himself admits that he would not have known that Boynton was engaging in Buddhist prayer at games because the only indication was that he sometimes closed his eyes briefly. Kennedy Dep. at 149-151. The fact that no one would have learned of Boynton's conduct if he had not said something himself confirms that it is not analogous to Kennedy's demonstrative prayer.

But even if it was, the District had a legitimate, non-discriminatory reason for placing Kennedy on leave: avoiding a constitutional violation. The undisputed evidence demonstrates that this was the District's rationale, and Kennedy presents no evidence that the District's actions were merely pretext to punish him for his religion. In fact, Kennedy argues that the District's rationale of avoiding liability was "consistent with [its] representations to both the public and the federal government." Kennedy Motion, Dkt. # 70, at 9. Kennedy's disparate treatment claim therefore fails.

c. Failure to Accommodate

Kennedy next claims that the District failed to accommodate his sincerely-held religious beliefs by putting restrictions on his post-game prayers. To succeed in a failure to accommodate claim, a plaintiff must show that: "(1) he had a bona fide religious belief, the practice of which conflicts with an employment duty; (2) he informed his employer of the belief and conflict; and (3) the employer discharged, threatened, or otherwise subjected him to an adverse employment action because of his inability to fulfill the job

requirement." *Berry*, 447 F.3d at 655 (quoting *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 606 (9th Cir. 2004)). The burden then shifts to the defendant employer, who must demonstrate that "it initiated good faith efforts to accommodate reasonably the employee's religious practices or that it could not reasonably accommodate the employee without undue hardship." *Id*. (quoting *Peterson*, 358 F.3d at 606).

Although Kennedy makes a prima facie showing that the District failed to accommodate him, the accommodation Kennedy demanded would have been an undue hardship for the District because it violated the Establishment Clause. As expressed in his October 14, 2015 letter, the accommodation Kennedy requested was unfettered freedom to "continue his practice of saying a private, post-game prayer at the 50-yard line," possibly with a disclaimer that his speech was private. October 14 Letter, Dkt. # 71-16, at 6. This would have violated the Establishment Clause, and Kennedy did not respond to the District's efforts to find a constitutional accommodation.

Kennedy now tries to argue that the District's September 17 letter was an acceptable accommodation allowing him to pray on the field away from students that the District deviated from later in its October 23 letter. Kennedy Motion, Dkt. # 70, at 23. This distinction, while convenient for Kennedy, is not supported by the record. First, the District's September 17 letter did not explicitly address Kennedy's 50-yard line prayers because they had by then "evolve[ed] organically" into inspirational talks with religious undertones. Dkt. # 64-8 at 1. Even so, the letter broadly stated, "Student religious activity

must be entirely and genuinely student-initiated, and may not be suggested, encouraged (or discouraged), or supervised by any District staff." *Id*. at 3. Kennedy himself interpreted this as a direction to "cease" his "private religious activity … [of] walk[ing] to the 50-yard line and pray[ing]." October 14 Letter, Dkt. # 71-16 at 1; *see also* Kennedy Dep., Dkt. # 64-24, at 38-39 (testifying that Leavell made the District's position about the prayer "very clear" and that Kennedy "agreed to stop the post-game prayers"). The District never offered to let Kennedy pray at the 50-yard line immediately after games.

Even if it had, any arrangement in which Kennedy prayed at the center of the field, immediately after games, in the presence of students would have run afoul of the Establishment Clause. Short of requiring Kennedy to pray out of students' sight, the only way to ensure Kennedy's prayers remained "separate from any student activity" was to forbid students from joining. September 17 Letter, Dkt. # 64-8 at 3. This, however, was also unacceptable to Kennedy because it would have infringed on the rights of students.[8] October 14 Letter, Dkt. # 71-16, at 5-6; *see also* Kennedy Dep., Dkt. # 64-24, at 65-66 ("I

[8] At his deposition, Kennedy admitted that he likely would have accepted an accommodation that allowed him to pray on the field during the window of time when students were on their way to the bus or on their way to the locker room. Kennedy Dep., Dkt. # 71-10, at 47-49. However, Kennedy never reached out to the District to discuss such an accommodation, *id.* at 47, and his October 14 letter made clear that he wished to resume his former practice of prayer. Dkt. # 71-16 at 6. The Court therefore need not decide whether such an arrangement would have complied with the Establishment Clause.

wasn't going to stop my prayer because there was kids around me."). There was thus no constitutional option for the District besides trying to find a way for Kennedy to pray privately after games. Because the District made several good-faith attempts to reach such an arrangement with Kennedy,[9] his Title VII claim fails.

d. Retaliation

Finally, Kennedy claims that the District retaliated against him for obtaining counsel and exercising his rights under the First Amendment. "To make out a prima facie case of retaliation, an employee must show that (1) he engaged in a protected activity; (2) his employer subjected him to an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action." *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000). "If a plaintiff has asserted a prima facie retaliation claim, the burden shifts to the defendant to articulate a legitimate nondiscriminatory reason for its decision." *Id*. The plaintiff then must prove that the defendant's reason is mere pretext. *Id*.

As with Kennedy's other Title VII claims, the fact that his prayers on the 50-yard line violated the

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[9] Kennedy claims that the District never offered to allow him to pray on the field after the students had left. But in his deposition, Principal Polm testified that he offered just such an accommodation to Kennedy. Polm Dep., Dkt. # 64-25, at 46-49. Kennedy himself returned to the field on September 18, waited for the stadium to empty, and prayed on the field. Kennedy Dec., Dkt. # 71-4, at 5. Regardless, this dispute is not material because Kennedy did not respond to the District's good faith efforts to reach an accommodation.

Establishment Clause is fatal. By unilaterally rejecting the District's September 17 directive, stoking media attention, and continuing his unconstitutional manner of prayer, Kennedy did not engage in "protected activity." The District's decision to place Kennedy on leave and issue evaluations critical of his non-cooperative choices was also justified by its desire to avoid liability under the Establishment Clause. Kennedy's retaliation claim therefore fails.

CONCLUSION

While public schools do not have unfettered discretion to restrict an employee's religious speech, they do have the ability to prevent a coach from praying at the center of the football field immediately after games. The Court GRANTS the District's Motion for Summary Judgment and DENIES Kennedy's Motion.

IT IS SO ORDERED.

Dated this 5th day of March, 2020.

[handwritten: signature]
Ronald B. Leighton
United States District Judge

Appendix E

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
WASHINGTON, AT TACOMA**

No. 16-cv-05694

JOSEPH A. KENNEDY,
Plaintiff,
v.
BREMERTON SCHOOL DISTRICT,
Defendant.

Summary Judgment Hearing

February 12, 2020

Before: LEIGHTON, Ronald B.,
District Judge.

THE CLERK: This is Kennedy versus Bremerton School District, Cause No. C16-5694-RBL.

Counsel, please make an appearance.

MR. ANDERSON: Good morning, Your Honor. Devin Anderson from Kirkland & Ellis, on behalf of plaintiff, joined by my colleague Bill Lane, also Jeff Helsdon, co-counsel, and Hiram Sasser, co-counsel.

THE COURT: Good morning.

MR. TIERNEY: Good morning, Your Honor. Michael Tierney appearing for the Bremerton School District, accompanied by Jeffrey Ganson, the general counsel for the District, and Superintendent Aaron Leavell.

THE COURT: Good morning, all.

This is the day scheduled for oral argument on competing motions for summary judgment. The defendant's motion was filled first, but on the same day. If you guys have agreed on an order, somebody has their Power Point on, so plaintiff wants to go first?

MR. ANDERSON: We'll have plaintiff go first, and we'll give the District their time.

THE COURT: We'll do this in the round, row the boat, you know, you have done that before, so just come back and forth until you say what you need to say.

You might focus on, at some point in your argument, Justice Alito's comments about drawing distinctions about the conduct that resulted in dismissal.

I didn't write an opinion, but I thought I made it very clear that I thought Mr. Kennedy was on duty with all of the ruffles and flourishes of coachdom, and he was responsible and still within his job responsibilities to take care of administrative issues that he had, and it would be very different if he went across the street to a park and prayed, read the Bible, students came with him, wanted to be with him and all that. It would have been a different situation. I thought that was all very clear to the Ninth Circuit and clear to the Supreme Court.

As trial judges, we are loathe to find facts, make findings in preliminary proceedings for injunctive relief and/or summary judgment. That is my concern a little bit on your arguments.

Mr. Anderson, you're up.

MR. ANDERSON: Thank you, Your Honor. Appreciate the opportunity to be heard today.

As Your Honor has seen, we prepared a document to go through. I have a hard copy, if Your Honor would prefer a hard copy; otherwise, we are happy to click through.

THE COURT: I would like a hard copy.

MR. ANDERSON: May I approach?

THE COURT: You bet.

MR. ANDERSON: I have a separate handout just of the timeline that we are going to be using. I think the timeline will help inform some of these questions. It is a printout of the slide.

Again, Your Honor, appreciate the opportunity to be heard this morning. Devin Anderson for Coach Kennedy.

I want to address and start where Your Honor left off with what Justice Alito said. I think he was—the Supreme Court obviously did not take the case. They thought there was still some factual development that needs to happen. What we have seen is discovery has shown—really, there are two central facts that I think have to be taken into account on which the issues in this case turn.

Fact No. 1 is: What was the conduct that is actually at issue here? Discovery has shown that the

conduct at issue, the practice that Coach Kennedy engaged in, sought to engage in, the practice for which he was ultimately placed on administrative leave, was to take a knee at the end of the football game to say a silent, personal prayer. It is not about prayer with students. It is a silent, personal prayer—and, in fact, that's how the District itself describes it—that lasted about 15 seconds. We will show a couple of stills.

We did submit the video. There is actually videos of the two games that immediately preceded his termination, which I think helps the Court get a sense for what the practice is at issue. It is a brief, 15-second prayer at the conclusion of the game as the players—they do their post-game handshake, they each go off, they do the fight songs, the coaches are milling about, that's when he was taking a knee. That's the activity at issue. That's the first key fact.

The second key fact—and I think this is where Justice Alito got a little bit—thought it wasn't asserted, was why the District took the action it did.

Discovery here has been—has clarified that. As we will see, the District suspended Coach Kennedy based solely—again, this word "solely," that is not my word, that is the District's word—solely on its view that allowing Coach Kennedy to do this conduct, the 15-second prayer, would violate the establishment clause.

Those are the two key facts: What did he do, and why did the District take the action.

On those two key facts, I think these constitutional issues turn, which is Issue No. 1, when Coach Kennedy took that knee and did his silent

prayer of thanksgiving, was he speaking as a public employee or private citizen?

Our argument is he spoke as a private citizen.

The second one is the establishment clause question. Does it violate the establishment clause for the District to allow Coach Kennedy to engage in this activity? We would submit the answer is no.

Long ago, the Supreme Court emphasized in the *Tinker* case that school employees do not shed the constitutional right to freedom of speech at the schoolhouse gate.

We respectfully submit that the District's position that anything a public employee does while technically on the clock and visible to others is unprotected speech, is directly contrary to *Tinker*'s direction here.

I think what I want to do is go through the timeline here, Your Honor. I appreciate the indulgence to walk through this because I think this will help crystalize the facts that I think are undisputed on which the Court can make the legal determinations it has to make.

The timeline is critical to understanding the two key facts, what he did and why the District took its action. For years prior to this 2015 football season, starting when Coach Kennedy became a coach in 2008 or 2009, he, compelled by his religious belief, engaged in this prayer of thanksgiving following football games. Over time, students noticed it and asked if they can join. He said, "It is a free country. You can do what you want."

From 2008 to about 2015, it was off and on, sometimes he would do it by himself, he testified, and sometimes other students would come with him. It wasn't a regular practice.

Anyway, the District apparently didn't know about this—that's what they have claimed—until the September 11th game, which is the—one of the first home games versus Klahowya.

THE COURT: Try Puyallup.

MR. ANDERSON: I am from Arizona.

THE COURT: I wanted to introduce you and welcome you to the Northwest.

MR. ANDERSON: I appreciate that. I really do.

That's when the District learned about this. Over the course of the week after this game, the District issues a letter on September 17th, where the District gave Coach Kennedy some very specific directives.

There are two key points. We are on slide 5. No. 1, the District recognized Coach Kennedy's action was voluntary. He wasn't requiring student participation. It gave a clear directive: You can't have students with you when you pray.

We have culled out from Exhibit 3 what the directive was. I think there are three or four components here that I want to highlight.

Directive No. 1 is: You and District staff are free to engage in religious activity, including prayer, so long as it does not interfere with your job duties.

The record shows in this case that a 15-second prayer, just as if he was to kneel down and tie his shoe,

doesn't distract him from his job duties. The District testified to that. That is beyond dispute.

The second direction: It has to be physically separate. One of the problems with the prior practice is students would come around him as he was praying. District said: Don't do that anymore. Coach Kennedy never did.

Third, students may not be allowed to join. Again, that was the third directive: No more prayer with students.

Fourth directive was: If it is demonstrative activity, you can't be doing it at the same time students are doing it. In other words, if the students are praying, you can't kind of pray also on your own. It needs to be separate.

That was the directive. That's the directive Coach Kennedy understood.

The next game was the September 18th home game. This is the day after the District provided the direction. At that game—this is the only game, Your Honor, in the 2015 season at which Coach Kennedy did not pray immediately after the game. He was still digesting the letter that he got from the District. He did not engage in a prayer right after the game.

What happened is, as he was driving home, as he was driving home, he felt, in his own words, dirty. He felt like he had committed the sin of ingratitude because he had not expressed his prayer of thanksgiving after the game. He actually turned around, he drove back, went to the stadium and prayed. The problem was his religious beliefs required

him to pray immediately after the game. That had—too much time had elapsed.

What happens is for the next five games after this one, he resumes the practice he had been doing years before of a silent, personal prayer. He waited until the students had separated and were starting to go do their fight song, post-game tradition, and he engaged in that activity. Nobody noticed.

The District submitted affidavits saying they actually didn't know he was engaged in this prayer activity, which we think actually proves our point, especially when we talk about what a reasonable observer would see from the establishment clause perspective. Nobody notices.

What happened then is on October 14th, Coach Kennedy sends a letter. He wants to be open with the District. He sends a letter from his attorneys to the District—we are at slide 9—reiterating saying, look, what I want to do, what I have been doing, is a private, personal prayer. That is what I want to do.

Then we come to the next game, the Centralia game. This was a home game on October 16, two days after Coach Kennedy sends the letter.

THE COURT: Centralia.

MR. ANDERSON: You keep correcting me, Your Honor. I deserve it.

THE COURT: Everybody needs to be humble. That is why you are here.

MR. ANDERSON: I appreciate that.

THE COURT: And me, too.

MR. ANDERSON: This is the picture Your Honor has seen before. This got a lot of air time at the PI hearing.

This is the Centralia game. What happened here is Coach knelt to say a prayer. Nobody from the Bremerton School District, but the opposing team from a different district spontaneously joined him because of the media coverage that ensued over this week. That's where this picture comes from. Two critical facts about this. Number one, this game has never been cited as the reason for the District's action. This game is not why the District took its action, as we'll see as we look at the exhibits in evidence.

In fact, if we go to the next slide, we have the contemporaneous emails from Dr. Leavell, the superintendent, immediately following this game to state officials. You see here Dr. Leavell says, "The coach moved on from leading prayer with kids—" everybody knew this was not about leading prayer with kids—"to taking a silent prayer at the 50-yard line." Bill Keim, from the Department of Education, responds, "Seems like it may be a moot issue. I assume the use of silent prayer changes the equation of it." Dr. Leavell says, "Yes, it does."

THE COURT: It moves out of evangelism to a thoughtful prayer of thanks.

MR. ANDERSON: Personal, right? A silent, personal prayer rather than sort of a team activity, which is different than the cases that the District brings in like the *Doe* case from the Fifth Circuit or the *Borden* case where you had coaches engaging with or leading student prayer.

If we go to the next slide, another contemporaneous email. "The issue is quickly changing as it shifted from leading prayer with student athletes to a coach's right to conduct a personal, private prayer on the 50-yard line." The reason for the 50-yard line is that's where he is after they finish the post-game shake. We have all seen those lines, the lines cross, people peel off, coaches are talking to each other. That's where Coach Kennedy is when he takes his knee.

Even the District recognizes, this is not about student prayer. This is not the situation anymore. It is a personal, silent prayer.

The next game, the District sends a second letter. We talked to Your Honor about the September 17th letter, "Don't pray with students. You can pray on your own, but you can't do it around students. You can't be demonstrative if the students are being demonstrative as well."

Now we get a second letter, the October 23rd letter, where the District again reiterated, "It looks like you are trying to do what we told you to do. In general, I believe you have attempted to comply with the guidelines." He is not praying with students.

Then they give him a new direction. This is a different directive than what was in the September 17th letter. "While on duty for the District as assistant coach, you may not engage in demonstrative religious activity, readily observable, if not intended to be observed, by students and the attending public. This is a different directive. You can't do demonstrative religious activity if people can see you.

Now Coach Kennedy has this different directive. Now he faces the next game, that day, October 23rd, against North Mason. This is an away game.

If we go to the next slide, we pulled out a still from a video clip we submitted into evidence. Your Honor, if I may approach the video screen. This one, unfortunately, is a little grainy. We put in a red arrow so you can see where Coach Kennedy is.

I think this captures what the post-game situation is like following a football game. You have players starting to head to the sidelines. You have coaches milling about. In the middle of all this, you see Coach Kennedy taking a knee. He could just as easily be checking the turf, he could be tying his shoe. He happens to be engaged in a personal prayer.

If we go to the next slide, again, the District recognized this is now becoming a closer call. Another contemporaneous email from Dr. Leavell saying, "His actions Friday," again, Friday being the North Mason game, "yet again moved closer to what we want, but are still unconstitutional."

That Monday—we have Friday is the varsity game versus North Mason. The next game is Monday, October 26th, is a home game versus North Mason. It is a junior varsity game where Coach Kennedy is the head coach of the junior varsity team. We have a still on that one, which is slide 21.

Again, you see the players are starting to separate. Coach Kennedy is taking a knee. This is a higher resolution. You can see him a bit better. You have other coaches milling about during this time period.

These two games, the two North Mason games are the basis for the District's action. How do we know this? The District sent a letter two days later. This is the official letter placing Coach Kennedy on administrative leave.

Let's go to slide 22. You will see there that the District cites those two games, October 23rd and October 26th, in their view, because Coach Kennedy was on duty. In other words, he is on the clock, right? He is still at work in the same way that somebody might be at work if they are still in the building while during working hours. He was still on duty. He kneeled and prayed while his players—players weren't with him. Players were engaged in other post-game traditions.

Those are the two games that are at issue. The two stills we saw are the two pieces of conduct at issue.

The District was also crystal clear why it took its action. If we go to the next slide. I asked Dr. Leavell, "Is it your testimony today that consistent with the representations made here to the government that the District's course of action in this matter has been driven solely by concern that Mr. Kennedy's conduct might violate the constitutional rights of students and others, right, by creating this establishment clause issue?" The answer was, "Yes." "Is it a true, accurate, complete description of all the bases?" "Yes."

That's the same thing the District told the public, as reflected in slide 24. It is the same representation the District made to the federal government in slide 25.

I think the confusion that Justice Alito had has been cleared up. This isn't a question of was he failing

to supervise during the 15 seconds. No. The District was very clear why it took its action, because we might get sued for the establishment clause. That's the District's position. That tees up the question for the Court. It is not a factual issue. The question is: Is that right? Was the District correct when it took that position?

That leads us to the free speech claims at issue, which is the *Eng* test. There is no dispute that we are in *Eng* land.

Eng has five factors, but I think—although the District has taken inconsistent positions in its two briefs, I think we are only fighting about two of these factors. No. 1 was on the matter of public concern. No dispute that religious speech is on that subject. That's what the Ninth Circuit Johnson case says.

Here we are at *Eng* Factor 2: In what capacity was Coach Kennedy speaking when he engaged in his demonstrative religious conduct at the conclusion of the games? That is a practical—the Ninth Circuit in its opinion in this very case said that's a practical, fact-intensive inquiry. It doesn't depend on root job descriptions. You have to look at what does this person do.

Under *Lane vs Franks*, the question is whether the speech at issue is ordinarily within the scope of the employee's job duties. So as a coach, I think if you look at it in that way, no, right? Praying—saying your own silent prayer is not within the scope of what a coach normally does.

What this Court looked at, and what the Ninth Circuit looked at at the early preliminary injunction phase is, well, look, a coach is a role model, right? The

coach is visible. The young men on the team are looking up to the coach. There is no dispute about that. That's precisely why Coach Kennedy wants to do what he does. He recognizes that, and frankly everybody who worked with him recognize—

THE COURT: It is subtly coercive. That's the Rubicon that we wrestle with is, is that coercive.

MR. ANDERSON: I think that comes in at *Eng* Factor 4, right? That coercion right is the establishment clause. I think the question right now is when he knelt to say a silent, personal prayer, in what capacity is he speaking?

The question under *Lane* is not was he officially on the clock or not. Otherwise, that would mean, contrary to *Tinker*, any time you show up for work as a public employee, you don't—your speech is unprotected. That's not the law.

I think that is what Justice Alito is highlighting. We can't read job duties so broad that any time a public employee is visible to somebody else, that that means they cannot—their speech is unprotected no matter what. That would prohibit bowing your head, folding your arms, saying a prayer for a meal if you happened to be in the school cafeteria and students see you.

And to come to the coercion point that Your Honor hit, I think what we know from the timeline—this is why I spent so much time on the timeline—there is no coercion involved here because there aren't students involved. Coach Kennedy never directed his prayers, as of September 17th, once he got the direction, to students anymore. This is about his own personal, private speech.

In fact, the District's own witnesses—if we go to slide 28, the District's own witnesses confirmed that coaches can engage in a variety of personal activity that lasts 15, 30 seconds following a game, and that doesn't pose any issue.

I asked Dr. Leavell if somebody tied their shoe, would that be an issue. Of course not. I asked Assistant Head Coach Boynton, what if somebody was talking to somebody in the stand—if we can go to the next slide. As an assistant head coach, sitting in your bird's eye view, if you saw an assistant coach was talking to parents, family, friends for 15 or 30 seconds, would you think they were somehow not doing what they were supposed to be doing? No. Everybody knows what the aftermath of a football game is. Kissing girlfriends, family members, giving high fives. This is not a captive audience situation. Right? This is not *Lee vs Weisman* or the *Santa Fe* case where you have a graduation ceremony, captive audience, you have a public announcement system through which you are communicating on behalf of the school. This is him, on his own, and as those pictures show, everybody is milling about, and a reasonable observer would look at him and say, is he tying his shoe, is he checking the turf and so forth.

The rule cannot be just because he's a coach, and because he's on the clock, his speech is unprotected. That's what Justice Alito—if we go to slide 30. That's what Justice Alito cautioned against. He thought the Ninth Circuit was straying into a view that public school teachers and coaches can be fired if they engage in any expression that the school does not like while they are on duty. We have to be careful to not say they

are on duty all the time; otherwise, we are contradicting what *Tinker* said 50 years ago.

As I was talking about, the speech was not directed at others. If we go to slide 31. It is the District's own description of the speech at issue. It is not directed to students. It is not directed at others. It is a silent, personal, private prayer. Those are the District's words, not mine.

The presence of others is irrelevant to Kennedy. Coach Kennedy testified—also, the whole personal thing, it also relates to the way people were using the word "public" and "prayer." It was, "Am I doing this as a school person like"—or, "Am I doing this as me? It is just between me and God. It is not the school doing it and the team doing it." That's his testimony. The legal determination ultimately is up to this Court. His testimony is the presence of people is not part of his sincere religious beliefs. His sincere religious belief is it is a silent prayer, he does it after the game, he does it on the field where the contest was fought.

That leads us to *Eng* Factor 4 where we are talking about the establishment clause. When we get to *Eng* Factor 4, the burden is on the School District. It bears a particularly heavy burden here because of the breadth of the rule it wants, which is if he is visible, if any public employee is visible to students or the public while on the clock, they cannot engage in demonstrative religious activity.

The establishment clause issue is the only justification on which the Court needs to rule, whether the District is right or wrong, and under the Ninth Circuit's *Hill* case, the District has to show there was an actual establishment clause violation.

The District says, well, the fear of a potential establishment clause lawsuit is sufficient. That's not the law. That's not what *Hill* says, that's not what *Good News Club* says. You need to have an actual establishment clause violation. That makes sense because you can always come up with some litigant who could stitch together some potential allegations and say, well, that person could come up with an establishment clause lawsuit. The District needs to be right. That creates the right balance between the constitutional rights of the employee and the constitutional obligations of the District.

The test at issue comes from the *Santa Fe* case—*Santa Fe* and *Lee vs Weisman* are the two Supreme Court cases that deal with prayer in the context of public schools. They look at coercion. Right? Supreme Court evaluates whether school prayer has the improper effect of coercing those present to participate in an act of religious worship.

Go to the next slide. This is the conduct at issue. Not students around him. Presence or absence of students is irrelevant to Coach Kennedy.

I think as a matter of law, when a coach kneels for a 15-second silent, personal, private prayer, as everybody else is milling about following the post-game, there is no coercive effect. There is no captive audience. Nobody—after receiving the direction from the District, no Bremerton School District students participated in any prayers with Coach Kennedy ever again. This is not the *Borden* case, it is not the *Doe* case.

I want to also make sure I touch on the free exercise claim that we have, which is separate from

the free speech claim. Let's go ahead and jump to slide 40.

Under the free exercise clause, and specifically under the Supreme Court's *Church of the Lukumi* case, you can't have a policy—we have *Employment Division vs Smith*, which says a neutral policy of general applicability is fine. What you can't have is a policy that specifically targets speech because it is religious.

We would submit that is exactly what happened here. The District's policy towards Coach Kennedy is he could not engage in demonstrative religious activity in front of students. That's precisely the type of religion-specific policy that *Church of Lukumi* said is not constitutional.

No question they suspended Coach Kennedy because his conduct was religious. Had he talked to an opposing coach about a recent presidential debate or election, some other type of expression, he would not have been suspended. It was specifically because of the religious content of his speech that he was targeted. As a result, we are in *Church of the Lukumi* land, and the District has to satisfy strict scrutiny.

Ultimately, that analysis will collapse into the establishment clause analysis because the District will say, well, look, the interest that we are trying to vindicate under strict scrutiny is avoiding the establishment clause violation. For all the reasons I have talked about, and I won't go over again, that is incorrect.

Finally, Your Honor, and I will make sure to give time to my opponent, we have Title VII claims. Those claims raise similar issues. We have the disparate

impact claim where Coach Kennedy has to show he belonged to a protected class; not in dispute. That he was qualified; not in dispute. Third, that he was subjected to an adverse employment action. Again, not in dispute. Four, similarly situated individuals were treated more favorably.

The evidence shows the District did not target coaches who engaged in non-religious forms of expression following football games, whether it is talking to somebody else about any topic. There was testimony that there was an assistant football coach who did a Buddhist chant once. Wasn't as demonstrative as kneeling down, but he did it. He was not subjected to adverse action.

The second Title VII claim is the failure to accommodate claim. The reasons here ultimately are going to collapse. The District never offered an accommodation that would satisfy Coach Kennedy's—or, eliminate the religious conflict between what Coach Kennedy was doing.

Third, there is a retaliation claim based on the District's action once Coach Kennedy asserted his constitutional rights in the October 14th letter.

With that, Your Honor, I will take a seat.

THE COURT: Thank you, Mr. Anderson.

Mr. Tierney, good to see you again.

MR. TIERNEY: Good to see you. I don't hear that often.

THE COURT: We're a kinder, gentler group.

MR. TIERNEY: What I would like to do, Your Honor, is pull back a little bit and emphasize an

overriding principle here, that we aren't deciding this case on the basis of overriding principles or broad rules or a one-size-fits-all test. If there is anything we learn from free speech and free exercise cases, it is that every case is decided on its particular facts.

I think that addresses Judge Alito's concerns. I think he was talking about the implications of some of the language in the Ninth Circuit opinion as to how it might be applied in other situations. Nowhere does he say that the Ninth Circuit failed to address this case on the specific facts of the speech.

THE COURT: I commented last time that on religious freedom cases, I prepare oral argument, write the decision, and burn all the stuff because you cannot keep the forms, the cookie cutters that you think might come in handy as you go. You have to start all over with the particular facts and circumstances.

MR. TIERNEY: I agree. I think that is what we need to do here. I'll be addressing, you know, what is the broad implication if this rule is applied in somebody's lunchroom or some other place. This is a case limited to the facts here.

I want to go out of order and move to the end of when we are talking about the speech in question, talking about the activities that took place, what do we end up with? What are the actual facts taking place at the end?

Now, I would like to turn the document camera on.

THE CLERK: It is on.

MR. TIERNEY: We saw a slide at the start of Mr. Kennedy's last prayer, the last game that he is

playing. That is just as he is starting to kneel down, and there are other people coming to join him. Counsel described it as other coaches milling around. In fact, there weren't other coaches milling around. There we go.

That was the first step in—that you saw before of Mr. Kennedy starting to kneel. This is what the prayer itself looked like as it was being performed.

Mr. Kennedy was joined by this other group of people. The facts of the last prayer that took place is a prayer circle at mid-field. It is interesting who these people are. This man in the trench coach with the "No. 2" on his back is a state representative.

THE COURT: Jesse Young.

MR. TIERNEY: Jesse young. Next to him with the "No. 3" is another state representative. We have two government officials praying at mid-field with the coach. There is two students there. We have heard discussion about Mr. Kennedy didn't want to pray with students. In fact, that was the heart of the letter that he wrote was that he be given permission to pray with students. That's the only position he ever communicated to the District. That is the position that his representatives made clear was the only position he was presenting. They turned down every opportunity to negotiate with the District or join in some form of looking for an accommodation. Mr. Kennedy admitted that in his deposition. We cited all that.

The position he took is entirely set forth in the letter of October, I think it was the 14th, October 14th letter.

This is what we are analyzing in the issues in this case. This is the instance of speech.

THE COURT: Is this in the declarations?

MR. TIERNEY: Yes.

THE COURT: I have seen so many—

MR. TIERNEY: It is attached in our exhibits, Your Honor. I have also cited the testimony of Mr. Kennedy where he is identifying these various people, some at least he said he didn't know. He agrees there appears to be two school-aged children there. This person No. 9 is taping or videoing the event.

This is—to back up a little bit, this is after a game. The context, the event that is happening, we are not talking about a casual, something at practice, something at some other situation. For these players, there is only about ten of these events a year. This is a big moment. There is a context that is attached to this demonstration that is taking place here. That carries meaning. It is a communication to the people around. That is not something that can be denied seriously, with a straight face.

This is a big moment for the kids. It is a big moment for the parents in the stands at games. The testimony from Mr. Barton was there is sometimes as many as a thousand people at a game, certainly hundreds. There is only a few of these events per year. There is band members, cheerleaders, everybody around.

If you look at that video of this, what takes place after this is, as his team comes back out onto the field, he addresses the team, the state legislators address

the team. That is part of the context of the communication that is taking place.

It is more than just a 15-second private, personal, unobservable prayer by Mr. Kennedy. It is a staged demonstration. However laudable, it is still a communication to everybody around about what the coach values, about what is taking place with the people that are going to address the team. It is a message to the players. It is a message to the people in the stands. This is what we analyzed in this case. This is certainly what the history was leading up to is this, that these—we have a picture I submitted in our materials of the prayer practice before of the students kneeling around Mr. Kennedy, him holding up two helmets, praying, delivering this prayer in a standing position in that situation. This all carries a context. It all carries communication to the people around.

I know that is at the end. I think it is important to point out where this goes.

The comments, the argument from the plaintiffs is that this is all about the establishment clause in the School District's mind, the School District's position. But that isn't what was said. What was said was the constitutional rights of students and others.

In a letter from Mr. Ganson early on in the matter, he pointed out that the Washington Constitution imposes stricter requirements than the Federal Constitution. There is the issue of the establishment clause under the Washington Constitution.

There is also concerns expressed, and I will pull out some of those materials and show you, about the forum rules, the forum access rules for the District,

and that this was not an open forum. This was not a platform for private speech.

The District's concern is that by allowing Mr. Kennedy to present his speech at this center stage, that it had to open a forum for anybody else to present their speech. There could be, in that instance, no distinctions drawn between the kind of speech that was allowed. The District can't discriminate on a content basis if it has an open, public forum. It can't say, well, Mr. Kennedy is allowed to pray, but we are not going to let somebody else conduct a religious ceremony.

THE COURT: We had a forum issue with the Department of Ecology. They allowed employees with particular interests to use their lobby and atrium in their building for promotion, charitable activities, and there were some labor meetings where their representative counsel was with them and there was an attempt by those who were trying to communicate with them about their right to opt out of union membership. That is perhaps at the Ninth Circuit now.

I felt like they didn't—there was a clear distinction, a purpose, and the antis would be outside in front of the place handing out their literature and the like.

It is a complex issue about what is a private forum, what is an open forum, and what is a melded forum situation.

MR. TIERNEY: Indeed. It is a thicket for a public agency to enter into, if it wants to try to limit a forum and/or somehow police a partly open forum.

We cite the *DiLoreto* case where the Ninth Circuit upheld a school district's decision to not want to enter that thicket and closing a forum completely just to avoid having to make those sorts of decisions. That involved posting advertisements on baseball field fences that included the Ten Commandments, and rather than have to deal with that, the school district said, fine, we won't have advertising on the fences, and that was an acceptable response.

In this case, we could easily imagine if somebody wants to say, well, the field afterward is an open, public forum, so I get to do whatever speech I want.

Would this case be decided differently if, instead of going out and saying a prayer, Mr. Kennedy held up somebody's campaign banner at the close, "vote for Clinton," "vote for Trump" at the end. Would there be any problem with the District saying, no, we don't want that?

I think that also goes to the question of whether this is directed at religion. The District didn't close the forum only for religious expression. It closed the forum for anybody's expression. It doesn't allow anybody else to go out there and conduct a social protest, burn a flag, support this cause or that cause.

Having pointed that out, I am going to—

THE COURT: It is important, at the end of the day, you have to pick your cabin, what this case is about and what it is not about.

Mr. Anderson says it is about the establishment clause.

MR. TIERNEY: It is about constitutional rights, and constitutional rights include the establishment

clause. They include the rights of others to have access to an open, public forum. There is really two kinds of rights there. I don't think—I don't agree that we necessarily have to choose between those. I think they were both concerns of the School District's.

It is expressed in the letters, when Mr. Kennedy was put on administrative leave and the District sent out a communication to the public, one of the things that was asked by the District in its Q and A—and it responded—"Is the District allowing other groups to use the football field for religious activities?" "During and after games until attendees leave, the field and stadium are exclusively in use by the District for District-sponsored events. The football field is not a public forum when it is used for a District-sponsored event." That was on the District's mind back then. Partly, it is an establishment clause issue. Factually, historically, that is also a piece of the District's mind.

Here is another internal communication by the District. Again, this—

THE COURT: I have seen this.

MR. TIERNEY: 64.21, the District is saying, this issue of equity is exactly the door we were worried about opening to all groups with Joe establishing his ritual of prayer after games. That is a piece of this case.

We have an establishment clause analysis to do, but we also have a public forum analysis to do.

Since I am on the public forum topic, there is no case that allows—no authority that allows a school district employee to determine the content of a school district event. That is in the hands of the district. The

district can say, this is the play we are going to put on. This is who is going to sing at the pep rally. This is how we are going to conduct our post-game ceremonies.

The District wanted, for safety reasons—and having been a lacrosse coach and seeing it happen, we might want to eliminate the handshake line. I saw a couple of handshake lines go bad in my time. It is up to the District to make those determinations. It is up to the District to decide who is going—what song the band is going to play at halftime. It is up to the District to decide whether it is going to present a prayer as part of its closing ceremonies. That is not something the District surrenders just by hiring somebody and giving them a position as an assistant coach. It doesn't say, okay, now you get to determine what we do on the football field as part of our closing ceremonies.

The District—this is part of what was involved in the discussions about: Are you on duty, off duty, is the event still going on. The District's direction to Mr. Kennedy was that yes, this is still an event going on. You are still part of the District. You are still subject to our directions. We don't want this to be part of the event.

There is no authority that allows Mr. Kennedy to say no, I am going to speak what I am going to speak at halftime—not halftime, but at the closing ceremony. I am going to hold up a campaign sign, say a prayer, or do whatever. Certainly, there is no authority that says, I am going to invite people out onto the field to pray in the middle of the field with me and address the team afterward. There is simply no authority for that.

That is what we are analyzing here in this case.

One thing that was left out. Sorry I was shuffling. I was cutting a couple things out of the binder. The timeline here leaves out the first letter from the District, which is October 16th. That is Document 71-15. I think looking at that document will tell us—this is the District's first response once it hears from Mr. Kennedy.

Just to back up. The District had its first exchange with Mr. Kennedy. It issued written directions. As I put in our briefing materials, the next thing it knows, it sees a news report that says Mr. Kennedy has returned to the field after the game and prayed an hour later. District thinks things are fine. Doesn't have anybody else monitoring him after that, and then gets this letter on October 14th that says—well, it says what it says.

Then the District responds to that, which isn't shown on the timeline. The response is addressing some of the points I am talking about. You are on—at the event on the field under the game lights solely by virtue of your employment. The field is not an open forum to which members of the public are invited.

I want to make sure I have the right date on this, Your Honor. This is the October 23rd letter. Sorry.

THE COURT: Let me see if I can pull it up.

MR. TIERNEY: No matter how much you rehearse this.

THE COURT: I don't have a letter of October 16th in the file. I had a verdict last night at 5:00. We have the day.

MR. TIERNEY: It is underneath an email. This is document 71-15. It starts with an email. This is what is attached underneath the email.

I am looking on this point in the middle here where it states, "After all, the District activity is not merely an athletic contest. The event encompasses all the pregame preparation and post-game activities attendant to which and are, as much as the game itself, reasons for District athletic programs." The District is pointing out to Mr. Kennedy the importance of the post-game ceremonies.

Then it goes on, on the next page, to distinguish that period of time from later when he is no longer on duty, he is free to engage in such activities as he chooses so long as they are otherwise consistent with the District policies regarding private use of District facilities.

In the first written response to Mr. Kennedy's letter, the District points out that he has to obey the District rules for access to District facilities for his speech. It is specifically—it goes on in the paragraph to acknowledge, we know, we saw the reports that you are going back to the field and praying after games. We have no problem with that practice. That is the paragraph, and it continues on.

In this case, from the beginning there was concerns about the impact on District policies of allowing—of opening the post-game ceremonies to—as a forum for private speech. For that reason, Mr. Kennedy doesn't gain anything in that argument by saying whether he is speaking as a public employee or private citizen. If he is speaking as a public employee, he doesn't have free speech rights under the *Pickering*

test. If he is not speaking as a public employee, he doesn't have access to the field and he is violating the District's rules on that basis.

I won't go through the others. In each of the letters after, it mentions to him the field is not an open, public forum. That is important on its own. It is also important as to how that colors the establishment clause issue.

The establishment clause issue turns on endorsement by the government. That is one of the tests. We cite three different tests in the coercion test and the *Lemon* test.

The endorsement test, the effect, the aura of endorsement grows even stronger in a situation where the District is allowing its property to be used only by one employee, and only for a religious expression, and only at the center stage of the post-game ceremonies in one of the big events of the year, and nobody else is allowed to use the field for any reason. That adds to the aura of endorsement.

When you add to it that it is a prior circle attended by two elected politicians who are allowed access as well, that adds to the issue of endorsement.

I won't pull it up, but the first picture from the Centralia game where Mr. Kennedy is in the field, the person right next to him again in the tan trench coat is Representative Jesse Young. Anybody with knowledge of the situation, anybody who had been following it, would see and would be aware of that history. That is one of the aspects for a test under the endorsement test is what is being communicated, if you have an awareness of the history of the situation, that Mr. Young has been out there praying with Mr.

Kennedy on the field and supporting him in his efforts through that. That, again, however laudable that might be, however proper the message might be for a person to receive, for a young athlete to receive, it is still an endorsement by the government of that message of religion in a situation where it should be neutral.

I think I have basically covered what I have to say. In the process, I wanted to point out, and I think I did, that there are other aspects to the facts, not that we are disputing the facts—

THE COURT: Are there any disputed facts?

MR. TIERNEY: I don't think there are any disputed facts. I think there is a question of whether everything is material, certainly. They are not contending that the District knew that Mr. Kennedy was doing some prayers while the District thought he wasn't praying anymore. The District quit monitoring him.

They are not disputing that he returned to the field or that that was published in the paper. I don't believe there is really any dispute about those things.

THE COURT: Of what significance is the fact that Mr. Kennedy did not reapply?

MR. TIERNEY: I understand the argument that he is saying that it would have been futile for me to reapply. It was clear that I wouldn't have gotten the job if I did.

I couldn't concede that for purposes of argument in saying that's fine, you can sue for them sending you that message or making it clear by the context that you wouldn't be rehired, but you can't sue them for

failing to rehire you if you didn't apply. I mean, you have to do something to trip the wire for that argument. The District didn't get an application from him, had four positions to fill and filled them with people who had applied. It didn't fail to rehire him.

It may seem like a small step, but it is the kind of thing that legal tests sometimes turn on where we have to do things to trigger a situation. I think that is the significance of it. I don't think it is a monumental point in the case because I believe the District's actions were justified in setting that requirement. I think that is the effect of it.

THE COURT: With regard to asserted remedies, is that an issue at this time?

MR. TIERNEY: I think it would be if we were at a remedy phase. Yeah, it would definitely. I don't think there is misconduct by the District to remedy there. It may be a technical point.

THE COURT: I am just trying to cover the waterfront of what—is this a two-step dance, one-step dance. It has already been one step. We are at two. All right.

Thank you, Mr. Tierney.

THE COURT: Mr. Anderson.

MR. ANDERSON: Thank you, Your Honor. Let me start where the Court left off on the question of reapplication. The law is clear under the *Dahlia vs Rodriguez* case, a placement on suspension is sufficient injury for 1983 purposes. There is still a live claim. We had testimony from the athletic director, from the head football coach that unless and until the directive was either rescinded by the District or Coach

Kennedy would agree to comply with the directive, he would not be rehired. To the extent we need to get to a remedy phase, and what that remedy—if it is rescission of the directive, or mandatory reinstatement, we can get to that at a separate phase.

I want to emphasize there is no significance to the legal issues of the case, of the fact he did not formally do a reapplication. There was no need to engage in a futile act of doing that.

I want to turn to the forum, this late-breaking forum argument from the District. I think it is somewhat remarkable that the District has moved away from the establishment clause, establishment clause, establishment clause and now is making all the argument about forum access.

THE COURT: If they can build a corral small enough that it weighs heavily on their side, it is a win-win. They say this promotes and endorses the establishment clause, and that was covered extensively in their brief, and if he is—if he is a private citizen, he is not entitled to go onto the 50-yard line and pray.

MR. ANDERSON: But it is a lose-lose for public employees under that. That violates *Tinker*. Under the District's argument, they are saying, we want to maintain the school as a non-public forum, is I think what their argument is. *Tinker* says under that rationale, then we are violating *Tinker* because public employees could never engage in any religious activity so long as they are in view of somebody. They can't have it both ways.

The exhibit—Mr. Tierney did not read this portion of this exhibit. If we put back up this October 16th letter, I drew an arrow to it.

There is a District policy regarding the private use of District facilities—which do not prohibit religious activities. The fact that—the—I think the confusion is the forum analysis actually doesn't come into play under *Pickering*. If you look at the *Johnson* case, *Johnson* was a case you might remember with the school teacher, math teacher who had the posters—

THE COURT: Right.

MR. ANDERSON:—in his room that highlighted God. One country under God, one nation under God, and highlighted those. The court there said no, no, we don't do a forum analysis. The plaintiff there had argued, well, semi public, different categories of forums. The Ninth Circuit said no, the forum analysis is not the right analysis for the *Pickering* claims by public employees. That makes sense, because otherwise the government employer could always say, it is a non-public forum, so you cannot engage in any private religious expression, even if it is—there is no impetus of coercion, no indicia of endorsement.

THE COURT: How do you say "Poway"?

MR. ANDERSON: I am not going to fall into that trap.

The forum analysis, number one, that's not the reason the District took the action. This is something that has come up as litigation has gone on, and frankly, is a sign the District has lost some confidence in the establishment clause issue.

I think—but more fundamentally, as I said, if you look at *Johnson vs Poway*, the Ninth Circuit said we don't do a forum analysis in the *Pickering* context. That makes sense because otherwise you start to run into *Tinker*.

I wanted to make sure I hit that forum point.

Also a reference to the Washington State Constitution, and that potentially being more broad. Again, all the cases that are cited—go back—the Court can go back and look at the letters. They are all federal establishment clause cases. That was the impetus of the District's position. Not until the litigation, have they started to reference more directly the Washington State Constitution.

Let's not forget, we are talking about Coach Kennedy's federal constitutional rights. Under the supremacy clause, the Washington State Constitution could not trump Coach Kennedy's federal constitutional rights in all events.

I don't think the—I don't think the District can run away from the foundational question here which is: Does the private, 15-second prayer, is that speech by a private employee—a private citizen, is he speaking as a private citizen at that moment? Again, *Tinker* and *Pickering* are clear that you can't just forbid, just because they happen to still be on the clock in the formal sense of "at work," that doesn't mean they are now stripped of their First Amendment rights.

For those reasons, Your Honor, we would ask that summary judgment be granted on the constitutional and Title VII claims.

THE COURT: Mr. Tierney, anything you want to add?

MR. TIERNEY: *Berry vs Department of Social Services* explains the circumstances under which forum analysis applies to a freedom of religion, free speech claim. It not employed there. It is not employed in the broad sense of just saying everything is a forum. When there is an issue of whether the government entity is imposing a non-public or limited public forum on a government space, it does apply. That is in the *Berry* case, Ninth Circuit case.

THE COURT: Anything, Mr. Anderson?

MR. ANDERSON: No, Your Honor. *Berry* is distinguishable. The Court can read that and figure it out.

THE COURT: Thank you very much for your scholarship, advocacy, and also for the litigants. You all are without guile. You are doing what you perceive to be the right thing to do for the right reasons. It is a first class lesson in civics, the Constitution, and we have to live it out now.

I am the low rung on the ladder. I am sure that the ladder will be climbed. I will get you my written decision within—well, very soon.

Have a great weekend. Thanks again. Court will be at recess.

* * *

s/Angela Nicolavo
ANGELA NICOLAVO
COURT REPORTER

Appendix F

SUPREME COURT OF THE UNITED STATES

No. 18-12

JOSEPH A. KENNEDY,

Petitioner,

v.

BREMERTON SCHOOL DISTRICT,

Respondent.

Filed: January 22, 2019

Before: ALITO, THOMAS, GORSUCH, AND KAVANAUGH,
Justices.

OPINION

The petition for a writ of certiorari is denied.

Statement of JUSTICE ALITO, with whom JUSTICE THOMAS, JUSTICE GORSUCH, and JUSTICE KAVANAUGH join, respecting the denial of certiorari.

I concur in the denial of the petition for a writ of certiorari because denial of certiorari does not signify that the Court necessarily agrees with the decision (much less the opinion) below. In this case, important unresolved factual questions would make it very

difficult if not impossible at this stage to decide the free speech question that the petition asks us to review.

I.

Petitioner Joseph Kennedy claims that he lost his job as football coach at a public high school because he engaged in conduct that was protected by the Free Speech Clause of the First Amendment. He sought a preliminary injunction awarding two forms of relief: (1) restoration to his job and (2) an order requiring the school to allow him to pray silently on the 50-yard line after each football game. The latter request appears to depend on petitioner's entitlement to the first—to renewed employment—since it seems that the school would not permit members of the general public to access the 50-yard line at the relevant time.

The key question, therefore, is whether petitioner showed that he was likely to prevail on his claim that the termination of his employment violated his free speech rights, and in order to answer that question it is necessary to ascertain what he was likely to be able to prove regarding the basis for the school's action. Unfortunately, the answer to this second question is far from clear.

On October 23, 2015, the superintendent wrote to petitioner to explain why the district found petitioner's conduct at the then-most recent football game to be unacceptable. And in that letter, the superintendent gave two quite different reasons: first, that petitioner, in praying on the field after the game, neglected his responsibility to supervise what his players were doing at that time and, second, that petitioner's conduct would lead a reasonable observer

to think that the district was endorsing religion because he had prayed while "on the field, under the game lights, in BHS-logoed attire, in front of an audience of event attendees." 869 F. 3d 813, 819 (CA9 2017). After two subsequent games, petitioner again kneeled on the field and prayed, and the superintendent then wrote to petitioner, informing him that he was being placed on leave and was forbidden to participate in any capacity in the school football program. The superintendent's letter reiterated the two reasons given in his letter of October 23. And the district elaborated on both reasons in an official public statement explaining the reasons for its actions.

When the case was before the District Court, the court should have made a specific finding as to what petitioner was likely to be able to show regarding the reason or reasons for his loss of employment. If the likely reason was simply petitioner's neglect of his duties—if, for example, he was supposed to have been actively supervising the players after they had left the field but instead left them unsupervised while he prayed on his own—his free speech claim would likely fail. Under those circumstances, it would not make any difference that he was praying as opposed to engaging in some other private activity at that time. On the other hand, his free speech claim would have far greater weight if petitioner was likely to be able to establish either that he was not really on duty at the time in question or that he was on duty only in the sense that his workday had not ended and that his prayer took place at a time when it would have been permissible for him to engage briefly in other private

conduct, say, calling home or making a reservation for dinner at a local restaurant.

Unfortunately, the District Court's brief, informal oral decision did not make any clear finding about what petitioner was likely to be able to prove. Instead, the judge's comments melded the two distinct justifications:

> "He was still in charge. He was still on the job. He was still responsible for the conduct of his students, his team. … And a reasonable observer, in my judgment, would have seen him as a coach, participating, in fact leading an orchestrated session of faith … " App. to Pet. for Cert. 89.

The decision of the Ninth Circuit was even more imprecise on this critical point. Instead of attempting to pinpoint what petitioner was likely to be able to prove regarding the reason or reasons for his loss of employment, the Ninth Circuit recounted all of petitioner's prayer-related activities over the course of several years, including conduct in which he engaged as a private citizen, such as praying in the stands as a fan after he was suspended from his duties.

If this case were before us as an appeal within our mandatory jurisdiction, our clear obligation would be to vacate the decision below with instructions that the case be remanded to the District Court for proper application of the test for a preliminary injunction, including a finding on the question of the reason or reasons for petitioner's loss of employment. But the question before us is different. It is whether we should grant discretionary review, and we generally do not grant such review to decide highly fact-specific

questions. Here, although petitioner's free speech claim may ultimately implicate important constitutional issues, we cannot reach those issues until the factual question of the likely reason for the school district's conduct is resolved. For that reason, review of petitioner's free speech claim is not warranted at this time.

II.

While I thus concur in the denial of the present petition, the Ninth Circuit's understanding of the free speech rights of public school teachers is troubling and may justify review in the future.

The Ninth Circuit's opinion applies our decision in *Garcetti* v. *Ceballos*, 547 U. S. 410 (2006), to public school teachers and coaches in a highly tendentious way. According to the Ninth Circuit, public school teachers and coaches may be fired if they engage in any expression that the school does not like while they are on duty, and the Ninth Circuit appears to regard teachers and coaches as being on duty at all times from the moment they report for work to the moment they depart, provided that they are within the eyesight of students. Under this interpretation of *Garcetti*, if teachers are visible to a student while eating lunch, they can be ordered not to engage in any "demonstrative" conduct of a religious nature, such as folding their hands or bowing their heads in prayer. And a school could also regulate what teachers do during a period when they are not teaching by preventing them from reading things that might be spotted by students or saying things that might be overheard.

This Court certainly has never read *Garcetti* to go that far. While *Garcetti* permits a public employer to regulate employee speech that is part of the employee's job duties, we warned that a public employer cannot convert private speech into public speech "by creating excessively broad job descriptions." *Id.*, at 424. If the Ninth Circuit continues to apply its interpretation of *Garcetti* in future cases involving public school teachers or coaches, review by this Court may be appropriate.

What is perhaps most troubling about the Ninth Circuit's opinion is language that can be understood to mean that a coach's duty to serve as a good role model requires the coach to refrain from any manifestation of religious faith—even when the coach is plainly not on duty. I hope that this is not the message that the Ninth Circuit meant to convey, but its opinion can certainly be read that way. After emphasizing that petitioner was hired to "communicate a positive message through the example set by his own conduct," the court criticized him for "his media appearances and prayer in the BHS bleachers (while wearing BHS apparel and surrounded by others)." 869 F. 3d, at 826. This conduct, in the opinion of the Ninth Circuit, "signal[ed] his intent to send a message to students and parents about appropriate behavior and what he values as a coach." *Ibid.* But when petitioner prayed in the bleachers, he had been suspended. He was attending a game like any other fan. The suggestion that even while off duty, a teacher or coach cannot engage in any outward manifestation of religious faith is remarkable.

III.

While the petition now before us is based solely on the Free Speech Clause of the First Amendment, petitioner still has live claims under the Free Exercise Clause of the First Amendment and Title VII of the Civil Rights Act of 1964. See Brief in Opposition 11, n. 1. Petitioner's decision to rely primarily on his free speech claims as opposed to these alternative claims may be due to certain decisions of this Court.

In *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U. S. 872 (1990), the Court drastically cut back on the protection provided by the Free Exercise Clause, and in *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977), the Court opined that Title VII's prohibition of discrimination on the basis of religion does not require an employer to make any accommodation that imposes more than a *de minimis* burden. In this case, however, we have not been asked to revisit those decisions.

Appendix G

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-35801

JOSEPH A. KENNEDY,

Plaintiff-Appellant,

v.

BREMERTON SCHOOL DISTRICT,

Defendant-Appellee.

Filed: August 23, 2017

Before: NELSON, J., SMITH, JR., J., and CHRISTEN, J., *Circuit Judges*.

OPINION

M. SMITH, *Circuit Judge*:

Bremerton High School (BHS) football coach Joseph A. Kennedy appeals from the district court's order denying his motion for a preliminary injunction that would require Bremerton School District (BSD or the District) to allow Kennedy to kneel and pray on the fifty-yard line in view of students and parents immediately after BHS football games. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. Bremerton School District

BSD is located in Kitsap County, Washington, across the Puget Sound from Seattle. The District is home to approximately 5,057 students, 332 teachers, and 400 non-teaching personnel. BSD is religiously diverse. Students and families practice, among other beliefs, Judaism, Islam, the Bahá'í faith, Buddhism, Hinduism, and Zoroastrianism.

BSD employed Kennedy as a football coach at Bremerton High School from 2008 to 2015. Kennedy served as an assistant coach for the varsity football team and also as the head coach for the junior varsity football team. Kennedy's contract expired at the end of each football season. It provided that BSD "entrusted" Kennedy "to be a coach, mentor and role model for the student athletes." Kennedy further agreed to "exhibit sportsmanlike conduct at all times," and acknowledged that, as a football coach, he was "constantly being observed by others."

Kennedy's formal job description required him to assist the head coach with "supervisory responsibilities," "[a]dhere to Bremerton School District policies and administrative regulations," "communicate effectively" with parents, "maintain positive media relations," and "[o]bey all the Rules of Conduct before players and the public as expected of a Head Coach," including the requirement to "use proper conduct before the public and players at all times." Consistent with his responsibility to serve as a role model, Kennedy's contract required that, "[a]bove all" else, Kennedy would endeavor not only "to create good athletes," but also "good human beings."

B. Kennedy's Religious Beliefs and Past Practices

Kennedy is a practicing Christian. Between 2008 and 2015, he led students and coaching staff in a locker-room prayer prior to most games. He also participated in prayers that took place in the locker room after the games had ended. Kennedy insists these activities predated his involvement with the program, and were engaged in as a matter of school tradition. His religious beliefs do not require him to *lead* any prayer before or after BHS football games.

Kennedy's religious beliefs *do* require him to give thanks through prayer at the end of each game for the players' accomplishments and the opportunity to be a part of their lives through football. Specifically, "[a]fter the game is over, and after the players and coaches from both teams have met to shake hands at midfield," Kennedy feels called to "take a knee at the 50-yard line and offer a brief, quiet prayer of thanksgiving for player safety, sportsmanship, and spirited competition." Kennedy's prayer usually lasts about thirty seconds. He wears a shirt or jacket bearing a BHS logo when he prays at midfield. Because his "prayer lifts up the players and recognizes their hard work and sportsmanship during the game," Kennedy's religious beliefs require him to pray on the actual field where the game was played.

Kennedy began performing these prayers when he first started working at BHS. At the outset, he prayed alone. Several games into his first season, however, a group of BHS players asked Kennedy whether they could join him. "This is a free country," Kennedy replied, "You can do what you want." Hearing that

response, the students elected to join him. Over time, the group grew to include the majority of the team. Sometimes the BHS players even invited the opposing team to join.

Eventually, Kennedy's religious practice evolved to something more than his original prayer. He began giving short motivational speeches at midfield after the games. Students, coaches, and other attendees from both teams were invited to participate. During the speeches, the participants kneeled around Kennedy, who raised a helmet from each team and delivered a message containing religious content. Kennedy subsequently acknowledged that these motivational speeches likely constituted prayers.

C. The September 17, 2015, Letter from BSD to Kennedy

The District first learned that Kennedy was leading locker-room prayers and praying on the field in September 2015, when an employee of another school district mentioned the post-game prayers to a BSD administrator.[1] The discovery prompted an inquiry into whether Kennedy was complying with the school board's policy on "Religious-Related Activities and Practices." Pursuant to that policy, "[a]s a matter of individual liberty, a student may of his/her own volition engage in private, non-disruptive prayer at any time not in conflict with learning activities." In addition, "[s]chool staff shall neither encourage nor discourage a student from engaging in non-disruptive

[1] The District had not received complaints up to that point. As the community became aware of Kennedy's practices, however, the District reports that individuals "expressed concern about Mr. Kennedy's actions."

oral or silent prayer or any other form of devotional activity."

Kennedy was candid and cooperative throughout the District's inquiry. The investigation revealed that coaching staff had received little training regarding the District's policy. Accordingly, BSD Superintendent Aaron Leavell sent Kennedy a letter on September 17, 2015, to clarify the District's prospective expectations.

Leavell explained that Kennedy's two practices were "problematic" under the Establishment Clause, but he acknowledged that they were well-intentioned and that Kennedy had "not actively encouraged, or required, [student] participation." Leavell advised Kennedy that he could continue to give inspirational talks, but "[t]hey must remain entirely secular in nature, so as to avoid alienation of any team member." He further advised that "[s]tudent religious activity must be entirely and genuinely student-initiated, and may not be suggested, encouraged (or discouraged), or supervised by any District staff." Leavell further counseled Kennedy that "[i]f students engage in religious activity, school staff may not take any action likely to be perceived by a reasonable observer, who is aware of the history and context of such activity at BHS, as endorsement of that activity." Lastly, Leavell stressed that Kennedy was

> free to engage in religious activity, including prayer, so long as it does not interfere with job responsibilities. Such activity must be physically separate from any student activity, and students may not be allowed to join such activity. In order to avoid the perception of endorsement discussed above, such activity

> should either be non-demonstrative (*i.e.*, not outwardly discernible as religious activity) if students are also engaged in religious conduct, or it should occur while students are not engaging in such conduct.

D. Kennedy Responds via an October 14th Letter

By this point, Kennedy's prayers had "generated substantial publicity." Comments on social media led the District to be concerned that BHS would not be able to secure its field after the September 18, 2015, game, assuming—as it suspected—that a crowd would come down from the stands to join Kennedy's on-field prayer. The District was "not able to prevent that from happening" based on the state of its preparations, and it decided that it would not "prevent access to the field at that point." On the day of the game, the school's concerns were not realized, however, because after receiving the District's letter, Kennedy temporarily stopped praying on the field while students were around. Instead, after the September 18th game, Kennedy gave a short motivational speech "that included no mention of religion or faith." Then, once "everyone else had left the stadium," he walked to the fifty-yard line, knelt, and prayed alone.

After complying in this manner for several weeks, Kennedy wrote the District through his lawyer on October 14, 2015. He requested a religious accommodation under the Civil Rights Act of 1964 that would allow him to "continue his practice of saying a private, post-game prayer at the 50-yard line" immediately following BHS football games. The letter opined that Kennedy's religious expression occurred

during "non-instructional hours" because, according to Kennedy, "his official coaching duties ceased" after the games had ended. The letter also acknowledged that Kennedy's prayers were "audibl[e]," but stressed that "he does not pray in the name of a specific religion," and "neither requests, encourages, nor discourages students from participating in" his prayer. Lastly, the letter announced that Kennedy would resume praying on the fifty-yard line at the October 16, 2015, game.

Kennedy's intention to pray on the field following the October 16th game "was widely publicized, including through [Kennedy's] own media appearances." On the day of the game, the District had not yet responded to Kennedy's letter, but Kennedy nonetheless proceeded as he had indicated. Once the final whistle blew, Kennedy shook hands with the opposing team and waited until most of the BHS players were singing the fight song to the audience in the stands. Then, he knelt on the fifty-yard line, bowed his head, closed his eyes, "and prayed a brief, silent prayer." According to Kennedy, while he was kneeling with his eyes closed, "coaches and players from the opposing team, as well as members of the general public and media, spontaneously joined [him] on the field and knelt beside [him]." In the days after the game, pictures were "published in various media" depicting Kennedy praying while surrounded by players and members of the public.

The District maintains that while Kennedy was walking to the fifty-yard line, "[t]here were people jumping the fence and others running among the cheerleaders, band[,] and players." Afterwards, "the District received complaints from parents of band

members who were knocked over in the rush of spectators on to the field." Sometime after the game, members of a Satanist religion contacted the District and said they "intended to conduct ceremonies on the field after football games if others were allowed to." Ultimately, the District made arrangements with the Bremerton Police Department to secure the field after games, then posted signs, made "robocalls" to District parents, and "otherwise put the word out to the public that there would be no [future] access to the field." Representatives of the Satanist religion showed up at the next game, "but they did not enter the stands or go on the field after learning that the field would be secured."[2]

E. The District's October 23rd and October 28th Letters

Leavell sent Kennedy a second letter on October 23, 2015. He thanked Kennedy for his "efforts to comply with the September 17 directives." Still, he explained that Kennedy's conduct at the game on October 16th was inconsistent with the District's requirements. Leavell emphasized "that the District does not prohibit prayer or other religious exercise by employees while on the job," but "such exercise must not interfere with the performance of job responsibilities, and must not lead to a perception of District endorsement of religion."

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[2] Kennedy contends that prior to this date, BHS had allowed parents and fans to walk onto the field after games to socialize and congratulate the players. He does not meaningfully contest that the field was not an open forum while in use by the District, however, and that the District retained the right to limit public access.

According to the District, Kennedy had not met those requirements because "paid assistant coaches in District athletic programs are responsible for supervision of students not only prior to and during the course of games, but also during the activities *following* games and until players are released to their parents or otherwise allowed to leave." (emphasis added). The District confirmed with Kennedy's head coach "that for over ten years, all assistant coaches have had assigned duties both before and after each game and have been expected to remain with the team until the last student has left the event." Thus, the District told Kennedy,

> [W]hen you engaged in religious exercise immediately following the game on October 16, you were still on duty for the District. You were at the event, and on the field, under the game lights, in BHS-logoed attire, in front of an audience of event attendees, solely by virtue of your employment by the District. The field is not an open forum to which members of the public are invited following completion of games; but even if it were, you continued to have job responsibilities, including the supervision of players. While [BSD] understand[s] that your religious exercise was fleeting, it nevertheless drew you away from your work. More importantly, any reasonable observer saw a District employee, on the field only by virtue of his employment with the District, still on duty, under the bright lights of the stadium,

> engaged in what was clearly, given your prior public conduct, overtly religious conduct.[3]

The District reiterated that it "can and will" accommodate "religious exercise that would not be perceived as District endorsement, and which does not otherwise interfere with the performance of job duties." To that end, it suggested that "a private location within the school building, athletic facility or press box could be made available to [Kennedy] for brief religious exercise before and after games." Kennedy, of course, could also resume his prior practice of praying on the fifty-yard line after the stadium had emptied. Because the "[d]evelopment of accommodations is an interactive process," the District invited Kennedy to offer his own suggestions. The District also reminded Kennedy that "[w]hile on duty for the District as an assistant coach, you may not engage in demonstrative religious activity, readily observable to (if not intended to be observed by) students and the attending public."

F. Kennedy Continues Praying on the Fifty-Yard Line

Kennedy's legal representatives responded to the District's letter by informing the media that the only acceptable outcome would be for the District to permit Kennedy to pray on the fifty-yard line immediately

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[3] Kennedy appears to have abandoned his argument that he was not "on duty" after the games. Instead, he contends that he never received a post-game assignment "that would prohibit [him] from engaging in religious expression lasting no more than 30 seconds."

after games.[4] Kennedy's conduct bore that out. He prayed on the fifty-yard line immediately after the game on October 23rd, and once again after the game on October 26th.

The District subsequently notified Kennedy in an October 28th letter that he had violated the District's directives and would be placed on paid administrative leave from his position as an assistant coach. The District also publicly-released a document entitled "Bremerton School District Statement and Q&A Regarding Assistant Football Coach Joe Kennedy," which detailed the history of the District's interactions with Kennedy and explained its views regarding the constitutionality of Kennedy's conduct.

While Kennedy was on leave, he was not allowed to participate in BHS football program activities. Kennedy could still attend the games in his capacity as a member of the public. At the October 30, 2015, game, which Kennedy attended as a member of the public, Kennedy prayed in the bleachers while wearing his BHS apparel, surrounded by others, and with news cameras recording his actions.

While Kennedy was on leave, and during the time that he temporarily ceased performing on-field prayers, BHS players did not pray on their own after BHS football games. Rather, during the 2015 season, the District observed players praying on the field only at the games where Kennedy elected to do so. The

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[4] Kennedy now contends that the District's accommodations were inadequate because "BSD did not explain how [his] religious expression would be accommodated at away games," where BSD does not have direct control over the facilities.

District's public statement thus opined "[i]t is very likely that over the years, players have joined in these activities because to do otherwise would mean potentially alienating themselves from their team, and possibly their coaches." The District also surmised that "students required to be present by virtue of their participation in football or cheerleading will necessarily suffer a degree of coercion to participate in religious activity when their coaches lead or endorse it." The District's statement acknowledged that there was "no evidence" that students were "*directly* coerced to pray with Kennedy." (emphasis added). The District also acknowledged that Kennedy "complied" with directives "not to *intentionally* involve students in his on-duty religious activities." (emphasis added).

G. Kennedy's Evaluation and Decision Not to Reapply for a Job

After the season ended, the District began its annual process of providing its coaches with performance reviews. This starts with written evaluations by the head coach and the school's athletic director. The assistant coach then typically meets with one of those two people to go over his performance evaluation. If the coach is unsatisfied with the head coach or athletic director's evaluation, he can involve the school principal or the District. Kennedy had previously participated in this review—and had received uniformly positive evaluations—but he did not participate in 2015. Kennedy's supervisors nonetheless submitted their assessments. The athletic director recommended that Kennedy not be rehired because Kennedy "failed to follow district policy" and "failed to supervise student-athletes after games due

to his interactions with [the] media and [the] community."

The head coach of the varsity football team left the job at the conclusion of the 2015 season. The one-year contracts also expired for all six of the assistant football coaches. The District therefore opened up to application all seven of the football coaching positions. Kennedy did not apply for a coaching position during the 2016 season.

H. Kennedy Files Suit

Kennedy commenced this action in the Western District of Washington on August 9, 2016. He asserts that his rights under the First Amendment and Title VII of the Civil Rights Act of 1964 were violated. Kennedy moved for a preliminary injunction on August 24, 2016, arguing that he would succeed on the merits of his claim that BSD retaliated against him for exercising his First Amendment right to free speech.[5] Kennedy sought an injunction ordering BSD to (1) cease discriminating against him in violation of the First Amendment, (2) reinstate him as a BHS football coach, and (3) allow him to kneel and pray on the fifty-yard line immediately after BHS football games.

The district court denied the requested preliminary injunction on September 19, 2016. Applying the five-step framework laid out in *Eng v.*

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[5] Kennedy brings his First Amendment retaliation claim pursuant to 42 U.S.C. § 1983. The First Amendment applies against the State pursuant to the Fourteenth Amendment. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 336 n.1 (1995) ("The term 'liberty' in the Fourteenth Amendment to the Constitution makes the First Amendment applicable to the States.").

Cooley, 552 F.3d 1062 (9th Cir. 2009), the court held that Kennedy was unlikely to prevail on the merits of his First Amendment retaliation claim because Kennedy spoke as a public employee and BSD's conduct was justified by its need to avoid violating the Establishment Clause. In reaching these conclusions, the court observed that "Kennedy was dressed in school colors," "chose a time and event [that] … is a big deal" for students, and "used that opportunity to convey his religious views" while "[h]e was still responsible for the conduct of his students." The court also found that Kennedy's prayer resulted in "subtle coercion" because "[i]f you are an athlete, you are impressionable, and you … want to please your coach to get more playing time, to shine." The court further concluded that a reasonable observer familiar with the relevant context "would have seen [Kennedy] as a coach, participating, in fact[,] leading an orchestrated session of faith." Given that Kennedy could not demonstrate a likelihood of success on the merits, the district court did not address the remaining preliminary injunction factors. Kennedy filed a timely notice of appeal on October 3, 2016.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

A plaintiff seeking a preliminary injunction must establish that (1) he is likely to succeed on the merits of his claim, (2) he is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in his favor, and (4) an injunction is in the public interest. *Sanders Cty. Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 744 (9th Cir. 2012).

"[W]e review the denial of a preliminary injunction for abuse of discretion." *Harris v. Bd. of Supervisors, L.A. Cty.*, 366 F.3d 754, 760 (9th Cir. 2004). "The district court necessarily abuses its discretion when it bases its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Id.* (internal quotation marks omitted). Where, as here, "the district court is alleged to have relied on an erroneous legal premise, we review the underlying issues of law *de novo*." *Id.*; *see also Sanders*, 698 F.3d at 744 ("[W]here a district court's denial of a preliminary injunction motion rests solely on a premise of law and the facts are either established or undisputed, our review is *de novo*." (internal quotation marks omitted)).

ANALYSIS

Kennedy contends that the district court erred by concluding that he was not likely to succeed on the merits of his claim that BSD placed him on paid administrative leave in retaliation for exercising his First Amendment right to free speech.

First Amendment retaliation claims are governed by the framework in *Eng*. *See* 552 F.3d at 1070-72. Kennedy must show that (1) he spoke on a matter of public concern, (2) he spoke as a private citizen rather than a public employee, and (3) the relevant speech was a substantial or motivating factor in the adverse employment action. *Coomes v. Edmonds Sch. Dist. No. 15*, 816 F.3d 1255, 1259 (9th Cir. 2016) (citing *Eng*, 552 F.3d at 1070-71). Upon that showing, the State must demonstrate that (4) it had an adequate justification for treating Kennedy differently from other members of the general public, or (5) it would

have taken the adverse employment action even absent the protected speech. *Id.* (citing *Eng*, 552 F.3d at 1070-72). "[A]ll the factors are necessary, in the sense that failure to meet any one of them is fatal to the plaintiff's case." *Dahlia v. Rodriguez*, 735 F.3d 1060, 1067 n.4 (9th Cir. 2013) (en banc). Accordingly, "a reviewing court is free to address a potentially dispositive factor first rather than addressing each factor sequentially." *Coomes*, 816 F.3d at 1260 (internal quotation marks omitted).

Here, the parties do not contest that Kennedy spoke on a matter of public concern (*Eng* factor one), that the relevant speech was a substantial or motivating factor in the District's decision to place Kennedy on leave (*Eng* factor three), and that the District would not have taken the adverse employment action in the absence of the relevant speech (*Eng* factor five). Thus, we need consider only whether Kennedy spoke as a private citizen or a public employee (*Eng* factor two), and whether BSD's conduct was adequately justified by its need to avoid an Establishment Clause violation (*Eng* factor four). We conclude that Kennedy spoke as a public employee, not as a private citizen, and therefore decline to reach whether BSD justifiably restricted Kennedy's speech to avoid violating the Establishment Clause. Kennedy accordingly cannot show a likelihood of success on the merits of his First Amendment retaliation claim, and is not entitled to the preliminary injunction he seeks.[6]

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[6] The parties have not briefed the remaining preliminary injunction factors, and we need not reach them in light of this conclusion.

I. Kennedy spoke as a public employee, and not as a private citizen, when he prayed on the fifty-yard line in view of students and parents immediately after BHS football games.

A. Governing Law

"[P]ublic employees do not surrender all their First Amendment rights by reason of their employment." *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006). Rather, they retain the right "in certain circumstances[] to speak as a citizen addressing matters of public concern." *Id.* Courts therefore must decide under the second *Eng* factor whether an official spoke as a citizen, and thus had First Amendment rights to exercise, or whether the official spoke in his capacity as a public employee, and therefore did not.

Pickering v. Board of Education of Township High School District 205, 391 U.S. 563 (1968), laid a foundation for this inquiry. The Court held that a school district violated a teacher's right to free speech when it fired the teacher for writing a letter to a local newspaper criticizing the school board's handling of a tax proposal. *Id.* at 564-65. The Court noted that the statements in the letter were not "directed towards any person with whom [the teacher] would normally be in contact in the course of his daily work." *Id.* at 569-70. Moreover, publication of the letter did not "imped[e] the teacher's proper performance of his daily duties in the classroom" or "interfere[] with the regular operation of the schools generally." *Id.* at 572-73. Because the school had no greater interest in limiting the teacher's speech than it did "in limiting a similar contribution by any member of the general

public," *id.* at 573, the teacher spoke as a private citizen, and the speech itself could not furnish a basis for the teacher's dismissal from public employment, *id.* at 574.

The Court refined this inquiry in *Garcetti v. Ceballos*, 547 U.S. 410 (2006). There it held "that when public employees make statements *pursuant to their official duties*, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 421 (emphasis added). Applying that reasoning, "the Court found that an internal memorandum prepared by a prosecutor in the course of his ordinary job responsibilities constituted unprotected employee speech." *Lane v. Franks*, 134 S. Ct. 2369, 2378 (2014) (citing *Garcetti*, 547 U.S. at 424). The prosecutor spoke as a public employee because he was "fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case." *Garcetti*, 547 U.S. at 421. In other words, "[the prosecutor's] expressions were made pursuant to his duties as a calendar deputy," *id.*, and "[r]estricting speech that owes its existence to a public employee's professional responsibilities," the Court said, "does not infringe any liberties the employee might have enjoyed as a private citizen," *id.* at 421-22.

Garcetti also emphasized "that various easy heuristics are insufficient for determining whether an employee spoke pursuant to his professional duties." *Dahlia*, 735 F.3d at 1069; *see also Garcetti*, 547 U.S. at 420-21, 424. For instance, it was "not dispositive" that the prosecutor "expressed his views inside his office,

rather than publicly," *Garcetti*, 547 U.S. at 420, or that the memorandum "concerned the subject matter of [the prosecutor's] employment," *id.* at 421. The Court rejected the suggestion that employers could restrict their employees' rights "by creating excessively broad job descriptions." *Id.* at 424. It ultimately instructed that

> The proper inquiry is a practical one. Formal 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.

Following *Garcetti*, we clarified that "the determination whether the speech in question was spoken as a public employee or a private citizen presents a mixed question of fact and law." *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1129 (9th Cir. 2008). "First, a factual determination must be made as to the scope and content of a plaintiff's job responsibilities." *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 966 (9th Cir. 2011) (internal quotation marks omitted). "Second, the ultimate constitutional significance of those facts must be determined as a matter of law." *Id.* (internal quotation marks omitted).

Helpfully, in 2011, we applied these instructions in a First Amendment retaliation case involving a

teacher employed by a public school. The teacher argued that he spoke as a private citizen when he decorated his classroom with two large banners that conveyed a religious message. *Johnson*, 658 F.3d at 965. We held that the teacher's religious speech was "unquestionably of inherent public concern," *id.* at 966, but that he nonetheless "spoke as an employee, not as a citizen," *id.* at 970.

At the first step, we observed that Johnson (the teacher) did "not hold a unique or exotic government position"—he "perform[ed] the ordinary duties of a math teacher." *Id.* at 967. In defining those duties, we found that "expression is a teacher's stock in trade, the commodity [he] sells to [his] employer in exchange for a salary." *Id.* (internal quotation marks and alteration omitted). So, it was "irrelevant … to the question of whether Johnson spoke as a citizen or as an employee" that "the banners were not part of Johnson's curriculum." *Id.* at 967 n.13. After all, "teachers do not cease acting as teachers each time the bell rings or the conversation moves beyond the narrow topic of curricular instruction." *Id.* at 967-68.

We further observed that Johnson hung the banners pursuant to a long-standing policy permitting teachers to decorate their classrooms subject to specific limitations. *Id.* at 967. Accordingly, we found that Johnson's speech occurred "while performing a function [] squarely within the scope of his position"; "[h]e was not running errands for the school in a car adorned with sectarian bumper stickers," for instance, "or praying with people sheltering in the school after an earthquake." *Id.* Adding it up, because Johnson was communicating with his students, "as a practical

matter," we found it was "beyond possibility for fairminded dispute that the scope and content of Johnson's job responsibilities did not include speaking to his class in his classroom during class hours." *Id.* (internal quotation marks, alteration, and emphasis omitted).

At step two, we assessed the constitutional significance of those facts by asking "whether Johnson's speech owe[d] its existence to his position, or whether he spoke just as any non-employee citizen could have." *Id.* For several reasons, we held "[t]he answer [was] clear": "Johnson did not act as an ordinary citizen when 'espousing God as opposed to no God' in his classroom." *Id.* To start, "[a]n ordinary citizen could not have walked into Johnson's classroom and decorated the walls as he or she saw fit, anymore than an ordinary citizen could demand that students remain in their seats and listen to whatever idiosyncratic perspective or sectarian viewpoints he or she wished to share." *Id.* at 968. "Unlike Pickering," moreover, "who wrote a letter to his local newspaper as any citizen might, … Johnson took advantage of his position to press his particular views upon the impressionable and captive minds before him." *Id.* (internal quotation marks and citation omitted). More generally, "because of the position of trust and authority [teachers] hold and the impressionable young minds with which they interact," we held that "teachers *necessarily* act as teachers for purposes of a *Pickering* inquiry when [1] at school or a school function, [2] in the general presence of students, [3] in a capacity one might reasonably view as official." *Id.* Applying that rule, Johnson fit the parameters. The religious speech "at issue" therefore "owe[d] its

existence to Johnson's position as a teacher." *Id.* at 970. And, because the speech fell within the ordinary scope of Johnson's professional responsibilities, the school "acted well within constitutional limits in ordering Johnson not to speak in a manner it did not desire."[7] *Id.*

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[7] Kennedy calls our attention to *Dahlia* and *Lane*. While we draw guidance from those decisions, they did not work an appreciable change to the legal inquiry required under the second *Eng* factor.

In *Lane*, the Supreme Court reiterated that "[t]he critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether [the subject matter of the speech] merely concerns those duties." 134 S. Ct. at 2379. It held that "[t]ruthful testimony under oath by a public employee *outside the scope of his ordinary job duties* is speech as a citizen for First Amendment purposes." *Id.* at 2378 (emphasis added).

In *Dahlia*, we reiterated that the second *Eng* factor requires a practical, fact-specific inquiry, and that courts may not rely solely on a generic job description. *See* 735 F.3d at 1070-71. We also articulated several "guideposts" for determining whether an individual acted within the scope of their professional duties. *Id.* at 1073-74. These included (1) "whether or not the employee confined his communications to his chain of command," (2) "the subject matter of the communication," and (3) whether a public employee's speech is "in direct contravention to his supervisor's orders." *Id.* at 1074-75. While we are mindful of these factors, they stem from the context *Dahlia* confronted—a police officer reporting abuse that occurred in his own police department. *See id.* at 1064-65. We find *Johnson* more informative for our purposes than either *Dahlia* or *Lane* because *Johnson* specifically addressed teacher speech in the public school context. *See Johnson*, 658 F.3d at 967-68; *see also Coomes*, 816 F.3d at 1259-61.

B. Application

Applying the foregoing principles, Kennedy spoke as a public employee, and not as a private citizen. Before undertaking our analysis, two critical points deserve attention. First, the relevant "speech at issue" involves kneeling and praying on the fifty-yard line *immediately* after games *while in view of students and parents*. *See Lane*, 134 S. Ct. at 2379. It is not, as Kennedy contends, praying on the fifty-yard line "silently and alone." We know this because Kennedy was offered (and, for a time, accepted) an accommodation permitting him to pray on the fifty-yard line after the stadium had emptied and students had been released to the custody of their parents. His refusal of that accommodation indicates that it is essential that his speech be delivered in the presence of students and spectators. Second, for the same reason, the "speech at issue" is *directed* at least in part to the students and surrounding spectators; it is not solely speech directed to God. Hence, the question under the second *Eng* factor is whether this demonstrative communication to students and spectators "is itself ordinarily within the scope of [Kennedy's] duties." *Id.*

1. Factual determination of Kennedy's job responsibilities.

Kennedy's job did not merely require him to supervise students in the locker room, at practice, and before and after games. Nor was it limited to treating injuries and instructing players about techniques related to football. Rather, in addition to these duties, BSD "entrusted" Kennedy "to be a coach, mentor and role model for the student athletes." Kennedy further

agreed to "exhibit sportsmanlike conduct at all times," and acknowledged that, as a football coach, he was "constantly being observed by others." The District also required Kennedy to "communicate effectively" with parents, "maintain positive media relations," and "[o]bey all the Rules of Conduct before players and the public as expected of a Head Coach," including the requirement to "use proper conduct before the public and players at all times." Consistent with his duty to serve as a role model to students, Kennedy's contract required that, "[a]bove all" else, Kennedy would endeavor not only "to create good athletes," but also "good human beings."

Kennedy's job, in other words, involved modeling good behavior while acting in an official capacity in the presence of students and spectators. Kennedy's amici agree. According to former professional football players Steve Largent and Chad Hennings, for instance, a football coach "serve[s] as a personal example." That is what the District hired Kennedy to do, when he was in the presence of students and parents: communicate a positive message through the example set by his own conduct. Any person who has attended a high school sporting event likely knows that this is true. To illustrate, when a referee makes a bad call, it is a coach's job to respond maturely. In doing so, he provides an example to players and spectators. Likewise, when a parent hassles a coach *after* a game seeking more playing time for her child, a calm reaction by the coach teaches the player about appropriate conduct. By acknowledging that he was "constantly being observed by others," Kennedy plainly understood that demonstrative communication fell within the compass of his

professional obligations. And tellingly, Kennedy's insistence that his demonstrative speech occur in view of students and parents suggests that Kennedy prayed pursuant to his responsibility to serve as a role model and moral exemplar. Were that not evident enough from Kennedy's rejection of BSD's accommodations, Kennedy's off-field conduct bolsters the inference. In particular, his media appearances and prayer in the BHS bleachers (while wearing BHS apparel and surrounded by others) signal his intent to send a message to students and parents about appropriate behavior and what he values as a coach.

Practically speaking, Kennedy's job as a football coach was also akin to being a teacher. *See Grossman v. S. Shore Pub. Sch. Dist.*, 507 F.3d 1097, 1100 (7th Cir. 2007) ("Staff that interact with students play a role similar to teachers."). "While at the high school" he was "not just any ordinary citizen." *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994). He was "one of those especially respected persons chosen to teach" on the field, in the locker room, and at the stadium. *Id.* He was "clothed with the mantle of one who imparts knowledge and wisdom." *Id.* Like others in this position, "expression" was Kennedy's "stock in trade." *Johnson*, 658 F.3d at 967. Kennedy's expressions also carried weight—as the district court said, "the coach is more important to the athlete than the principal." *See also* Br. of Americans United for Separation of Church and State et al. as Amici Curiae Supporting Appellee at 7-8 [hereinafter AUSCS Br.] (former BHS player states that Kennedy was a "parental figure" to the team).

As a high school football coach, it was also Kennedy's duty to use his words and expressions to "instill[] values in the team." *Borden v. Sch. Dist. of Tp. of E. Brunswick*, 523 F.3d 153, 173 n.15 (3rd Cir. 2008). As amici observe, "many mothers look to the coaches of their son's football team as the last best hope to show their son[s] what it means to become a man—a real man[.]" AUSCS Br. at 7 (quoting John Harbaugh, *Why Football Matters*, Balt. Ravens (Apr. 22, 2015), http://tinyurl.com/kn5fdhh). The record reflects that Kennedy pursued that task. For example, Kennedy gave motivational speeches to students and spectators after the games. Moreover, BHS players did not pray on their own in Kennedy's absence. Rather, the District observed players praying on the field only at the games where Kennedy personally elected to do so.

Finally, just as Johnson's job responsibilities included "speaking to his class in his classroom during class hours," Kennedy's included speaking demonstratively to spectators at the stadium after the game through his conduct. *Johnson*, 658 F.3d at 967. Kennedy's demonstrative speech thus occurred "while performing a function" that fit "squarely within the scope of his position." *Id.* After all, Kennedy spoke at a school event, on school property, wearing BHS-logoed attire, while on duty as a supervisor, and in the most prominent position on the field, where he knew it was inevitable that students, parents, fans, and occasionally the media, would observe his behavior.

In sum, Kennedy's job was multi-faceted, but among other things it entailed both teaching and serving as a role model and moral exemplar. When

acting in an official capacity in the presence of students and spectators, Kennedy was also responsible for communicating the District's perspective on appropriate behavior through the example set by his own conduct.

2. The constitutional significance of Kennedy's job duties.

Mindful of those facts, by kneeling and praying on the fifty-yard line immediately after games while in view of students and parents, Kennedy was sending a message about what he values as a coach, what the District considers appropriate behavior, and what students should believe, or how they ought to behave. Because such demonstrative communication fell well within the scope of Kennedy's professional obligations, the constitutional significance of Kennedy's job responsibilities is plain—he spoke as a public employee, not as a private citizen, and his speech was therefore unprotected.

Each of the guideposts we have established in this context suggests that Kennedy spoke as a public employee. First, "teachers *necessarily* act as teachers for purposes of a *Pickering* inquiry when [1] at school or a school function, [2] in the general presence of students, [3] in a capacity one might reasonably view as official." *Johnson*, 658 F.3d at 968. Kennedy's conduct easily meets all three of these conditions.

Next, as *Johnson* and *Coomes* instruct, if Kennedy's "speech 'owes its existence' to his position as a teacher, then [Kennedy] spoke as a public employee, not as a citizen, and our inquiry is at an end." *Id.* at 966 (quoting *Garcetti*, 547 U.S. at 421-22). Here, an ordinary citizen could not have prayed on the

fifty-yard line immediately after games, as Kennedy did, because Kennedy had special access to the field by virtue of his position as a coach. The record demonstrates as much. Representatives of a Satanist religion arrived at the stadium "to conduct ceremonies on the field after [a] [BHS] football game[.]" They were forced to abandon this effort after they learned that the field was not an open forum. Thus, the precise speech at issue—kneeling and praying on the fifty-yard line immediately after games while in view of students and parents—could not physically have been engaged in by Kennedy if he were not a coach. Kennedy's speech therefore occurred only because of his position with the District.[8]

Lastly, given that "expression," as in *Johnson*, was Kennedy's "stock in trade," the commodity he sold to his employer for a salary, *id.* at 967 (internal

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[8] Two additional points warrant comment. First, contrary to Kennedy's assertions, the forum is relevant because the on-field location is a required component of Kennedy's speech, and one that is central to the message he conveys. Indeed, Kennedy insists that his sincerely held religious beliefs do not permit him to pray anywhere other than on the field where the game was just played. The accommodations he refused signal further temporal and circumstantial requirements concerning his speech (i.e., that it must be delivered immediately after the game, while in view of spectators). These features confirm that the relevant conduct—Kennedy's demonstrative speech to students and spectators—owes its existence to Kennedy's position with the District. Second, Kennedy's demonstrative message to students only carries instructive force due to his position as a coach. Surely, if an ordinary citizen walked onto the field and prayed on the fifty-yard line, the speech would not communicate the same message because the citizen would not be clothed with Kennedy's authority. *See Johnson*, 658 F.3d at 968; *Evans-Marshall v. Bd. of Educ.*, 624 F.3d 332, 340 (6th Cir. 2010).

quotation mark and alteration omitted), it is similarly non-dispositive of "the question of whether [Kennedy] spoke as a citizen or as an employee" that the religious content of Kennedy's message was not part of his "curriculum," *id.* at 967 n.13. Coaches, like teachers, do not cease acting as coaches "each time the bell rings or the conversation moves beyond the narrow topic of curricular instruction." *Id.* at 967-68. In any event, Kennedy's prayer celebrates sportsmanship, so the content of Kennedy's speech arguably falls within Kennedy's curriculum. *See* ER 251 (job description requiring Kennedy to "exhibit sportsmanlike conduct at all times").

True, Kennedy spoke in contravention of his supervisor's orders, *see Dahlia*, 735 F.3d at 1075, but that lone consideration is not enough to transform employee speech into citizen speech. If it was, there would be no need for the *Garcetti* analysis because *every* First Amendment retaliation case in the employment context involves some degree of employer disagreement with the expressive conduct.

All told, by kneeling and praying on the fifty-yard line immediately after games, Kennedy was fulfilling his professional responsibility to communicate demonstratively to students and spectators. Yet, he "took advantage of his position to press his particular views upon the impressionable and captive minds before him." *Johnson*, 658 F.3d at 968 (internal quotation marks omitted). In addition, he "did not act as an ordinary citizen when 'espousing God as opposed to no God'" under the bright lights of the BHS football stadium. *Id.* at 967. Because his demonstrative speech fell within the scope of his typical job responsibilities,

he spoke as a public employee, and the District was permitted to order Kennedy not to speak in the manner that he did. *See id.* at 967-70; *Tucker v. State of Cal. Dep't of Educ.*, 97 F.3d 1204, 1213 (9th Cir. 1996) ("A teacher appears to speak for the state when he or she teaches; therefore, the department may permissibly restrict such religious advocacy."); *Peloza*, 37 F.3d at 522 (permitting District to restrict biology teacher's ability "to discuss his religious beliefs with students during school time on school grounds").

Other circuits agree. In *Borden*, the Third Circuit concluded that a coach spoke "pursuant to his official duties as a coach"—and thus as a public employee—when he bowed his head and took a knee with his team while they prayed in the locker room prior to football games. 523 F.3d at 171 n.13. The coach "concede[d] that the silent acts of bowing his head and taking a knee [were] tools that he use[d] to teach his players respect and good moral character." *Id.* at 172. He therefore was fulfilling his responsibilities as a teacher, as Kennedy is here.

In *Evans-Marshall v. Board of Education*, 624 F.3d 332 (6th Cir. 2010), the Sixth Circuit explained that "[w]hen a teacher teaches, the school system … *hires* that speech." *Id.* at 340 (internal quotation mark omitted). As a consequence, "it can surely regulate the content of what is or is not expressed," because a teacher is not "the employee *and* employer." *Id.* (internal quotation marks omitted). For example, "[w]hen Pickering sent a letter to the local newspaper criticizing the school board," the court noted, "he said something that any citizen has a right to say, and he did it on his own time and in his own

name, not on the school's time or in its name." *Id.* By contrast, when a teacher teaches—as Kennedy did through the example of his own conduct while acting in his capacity as an assistant coach—"[he] d[oes] something [he] was hired (and paid) to do, something [he] could not have done but for the Board's decision to hire [him] as a public school teacher." *Id.*

The Seventh Circuit employed the same reasoning in *Mayer v. Monroe County Community School Corporation*, 474 F.3d 477 (7th Cir. 2006). It found "that teachers hire out their own speech and must provide the service for which employers are willing to pay." *Id.* at 479. It thus held that a teacher spoke as an employee, not as a citizen, when she opined on the Iraq war at a "current-events session, conducted during class hours, [that] was part of her official duties." *Id.* Similarly, Kennedy spoke on the field, at a time when he was on call, and in a manner that was well within his job description. Like the teacher in *Mayer*, he therefore spoke as a public employee.

Finally, in *Doe v. Duncanville Independent School District*, 70 F.3d 402 (5th Cir. 1995), the Fifth Circuit barred school employees from participating in or supervising student-initiated prayers that took place after basketball practice. *Id.* at 406. It reasoned that "[t]he challenged prayers take place during school-controlled, curriculum-related activities that members of the basketball team are required to attend," and "[d]uring these activities[,] [District] coaches and other school employees are present as representatives of the school and their actions are representative of [District] policies." *Id.* Applying that

reasoning, if a coach speaks as an employee by standing in the vicinity of student prayer and supervising the students immediately after a basketball practice, there can be little question that Kennedy spoke as an employee when he likewise performed a task that the District hired and paid him to perform: demonstrative communication with students and spectators immediately after football games.

3. Kennedy's counterarguments are not convincing

Kennedy insists the district court invented "a bright-line temporal test that strips First Amendment protections from 'on the job' public employees." That is incorrect. The district court said "[t]here is no bright-line test … on this issue," and decided the second *Eng* factor by asking whether Kennedy spoke as a public employee or private citizen "under the totality of the circumstances." More importantly, the court did not articulate a temporal dichotomy that reserves First Amendment rights only for "off-duty" employees. To illustrate, Kennedy can pray in his office while he is on duty drawing up plays, pray non-demonstratively when on duty supervising students, or pray in "a private location within the school building, athletic facility, or press box" before and after games, as BHS offered. He can also write letters to a local newspaper while on duty as a coach, *see Pickering*, 391 U.S. at 572-74, or privately discuss politics or religion with his colleagues in the teacher's lounge, *see Rankin v. McPherson*, 483 U.S. 378, 388-92 (1987); *Tucker*, 97 F.3d at 1213. What he cannot do is claim the First Amendment's protections for private-citizen speech

when he kneels and prays on the fifty-yard line immediately after games in school logoed-attire in view of students and parents. *Cf. Berry v. Dep't of Soc. Servs.*, 447 F.3d 642, 651-52 (9th Cir. 2006) (upholding a restriction prohibiting a government employee from discussing religion with his clients in his government cubicle in the course of providing them assistance, while explaining that the employee could still read his Bible "whenever he does not have a client with him in his cubicle").

Next, Kennedy observes that "[t]he critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties." *Lane*, 134 S. Ct. at 2379. He argues that prayer—"the speech at issue"—did not "relate[] to" his job, and certainly did not constitute "coaching."[9] But again, where, as here, a teacher speaks at a school event in the presence of students in a capacity one might reasonably view as official, we have rejected the proposition that a teacher speaks as a citizen simply because the content of his speech veers beyond the topic of curricular instruction, and instead relates to religion. *Johnson*, 658 F.3d at 967-68; *see also Grossman*, 507 F.3d at 1100 ("The First Amendment is not a teacher license for uncontrolled expression at variance with established curricular content." (internal quotation marks omitted)); *Mayer*, 474 F.3d

[9] Kennedy elsewhere acknowledges that whether a public employee speaks "as a citizen" does not turn on the content of the speech. Kennedy may then be arguing that the *act* of praying itself is not related to his job. That argument fails because demonstratively speaking to students and spectators after games through the example set by his own conduct is within the scope of Kennedy's job responsibilities.

at 480 (concluding teacher spoke as employee even though she "had *not* been hired to buttonhole cosmetology students in the corridors and hand out tracts proclaiming that homosexuality is a mortal sin"). Kennedy also does not dispute that his demonstrative speech taught students about what he viewed as appropriate conduct. Nor can he dispute that many players responded as if prayer were part of the school-sponsored curriculum—they prayed on the field only when Kennedy elected to do so.

Finally, Kennedy insists it is irrelevant that he had access to the field only by virtue of his position because *Lane* establishes that the critical question is whether his speech was within the ordinary scope of his duties. For the reasons explained above, Kennedy's speech *was* within the ordinary scope of his duties. In any event, Kennedy overlooks *Coomes*, which affirmed that if a plaintiff's speech "owes its existence to [his] position as a teacher, then [he] spoke as a public employee, not as a citizen, and our inquiry is at an end."[10] 816 F.3d at 1260 (internal quotation marks and alterations omitted).

In sum, when Kennedy kneeled and prayed on the fifty-yard line immediately after games while in view of students and parents, he spoke as a public employee, not as a private citizen, and his speech therefore was constitutionally unprotected.[11]

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[10] We issued *Coomes* nearly two years after the Supreme Court issued *Lane*. Additionally, *Coomes* is more factually analogous than *Lane* because *Coomes* involved speech by a public-school official.

[11] We emphasize that our conclusion neither relies on, nor should be construed to establish, any bright-line rule. As our

CONCLUSION

On Friday nights, many cities and towns across America temporarily shut down while communities gather to watch high school football games. Students and families from all walks of life join "to root for a common cause" and admire the young people who step proudly onto the field. *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000). While we "recognize the important role that public worship plays in many communities, as well as the sincere desire to include public prayer as a part of [these] occasions," such activity can promote disunity along religious lines, and risks alienating valued community members from an environment that must be open and welcoming to all. *Id.* at 307. That is why the "preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission." *Lee v. Weisman*, 505 U.S. 577, 589 (1992).

As for the task at hand, we hold that Kennedy spoke as a public employee when he kneeled and prayed on the fifty-yard line immediately after games while in view of students and parents. Kennedy therefore cannot show a likelihood of success on the merits of his First Amendment retaliation claim. We

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analysis demonstrates, the second *Eng* factor requires a practical, fact-intensive inquiry into the nature and scope of a plaintiff's job responsibilities. It also requires a careful examination of the precise speech at issue. We also continue to recognize that "speech by a public employee, even a teacher, does not always represent, or even appear to represent, the views of the state." *Tucker*, 97 F.3d at 1213.

AFFIRM the district court's order denying Kennedy's motion for a preliminary injunction. Appellant shall bear costs on appeal. Fed. R. App. P. 39(a)(2).

M. Smith, *Circuit Judge*, specially concurring:

I write separately to share my view that BSD's actions were also justified to avoid violating the Establishment Clause. Kennedy's claim therefore fails on the additional ground that the District can satisfy the fourth *Eng* factor. *See Eng v. Cooley*, 552 F.3d 1062, 1071-72 (9th Cir. 2009) (asking whether the state has an adequate justification for restricting the employee's speech). I also write to share a few thoughts about the role of the Establishment Clause in protecting the rights of all Americans to worship (or not worship) as they see fit.

I. Governing Law

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. The Clause applies against the states, and therefore their public school systems, pursuant to the Fourteenth Amendment. *See Wallace v. Jaffree*, 472 U.S. 38, 49-50 (1985). The Clause "mandates governmental neutrality between religion and religion, and between religion and nonreligion." *McCreary Cty., Ky. v. Am. Civil. Liberties Union of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Ark.*, 393 U.S. 97, 104 (1968)) (internal quotation marks omitted). "The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987). In that setting, "[t]he State exerts

great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure." *Id.* at 584. Accordingly, the Clause "proscribes public schools from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." *Lee v. Weisman*, 505 U.S. 577, 604-05 (1992) (Blackmun, J., concurring) (internal quotation marks and emphasis omitted).

Under the fourth *Eng* factor, the District can escape potential liability if it can show that it had an adequate justification for treating Kennedy differently from other members of the general public. *Eng*, 552 F.3d at 1071-72. "[A] state interest in avoiding an Establishment Clause violation may be characterized as compelling, and therefore may justify content-based discrimination." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001) (internal quotation marks omitted); *see also Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994) ("The school district's interest in avoiding an Establishment Clause violation trumps [a teacher's] right to free speech.").[12]

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[12] The parties disagree as to whether the District must show an *actual* Establishment Clause violation, *see Good News*, 533 U.S. at 112-13, or merely a legitimate interest in avoiding an Establishment Clause violation, *see Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (noting the Court's suggestion in a prior case that "the interest of the State in avoiding an Establishment Clause violation may be a compelling one justifying an abridgement of free speech otherwise protected by the First Amendment." (internal quotation marks and alteration omitted)); *Berry v. Dep't of Soc.*

Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000), describes the framework for assessing whether BSD would be liable for an Establishment Clause violation if Kennedy were to resume kneeling and praying on the fifty-yard line immediately after games in the presence of students and spectators. *See id.* at 315 (asking whether the "continuation of" prayer at school event would violate the Establishment Clause).

In *Santa Fe*, the plaintiffs challenged a school district policy that permitted, but did not require, a student to deliver a prayer over the public address system before each varsity football game. *Id.* at 294. The "Prayer at Football Games" policy "authorized two student elections, the first to determine whether 'invocations' should be delivered, and the second to select the spokesperson to deliver them." *Id.* at 297 (internal quotation marks omitted). After the students had voted in favor of prayer and selected a speaker, the school district implemented two changes. It omitted the word "prayer" from the title and amended the policy to refer to "'messages' and 'statements' as well as 'invocations.'" *Id.* at 298 (internal quotation marks omitted).

To assess whether the amended policy violated the Establishment Clause, the Court asked whether an objective student observer who was familiar with

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Servs., 447 F.3d 642, 651 (9th Cir. 2006) (holding that the government's "need to avoid possible violations of the Establishment Clause" justified a restriction on employee speech). I do not reach this issue because a resumption of Kennedy's conduct would clearly result in an actual Establishment Clause violation.

the history and context of the school's conduct would perceive that "prayer is, in actuality, encouraged by the school." *Id.* at 308. Put differently, the relevant question was "whether an objective observer, acquainted with the text, legislative history, and implementation of the [policy], would perceive it as a state *endorsement* of prayer in public schools." *Id.* (emphasis added) (internal quotation marks omitted). Applying that rule, the Court held that "an objective Santa Fe High School student w[ould] unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval." *Id.*

The Court first considered the setting. The prayer would be "delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property." *Id.* at 307. The message would also be "broadcast over the school's public address system," which was "subject to the control of school officials." *Id.* The pregame ceremony would be "clothed in the traditional indicia of school sporting events, which generally include not just the team, but also cheerleaders and band members dressed in uniforms sporting the school name and mascot." *Id.* at 308. Further, the school's name would be emblazoned on the field and the crowd would be "waving signs displaying the school name." *Id.* The upshot, said the Court, was that an objective audience member would perceive the pregame prayer as a public expression "delivered with the approval of the school administration." *Id.*

The text and purpose of the policy reinforced that conclusion. The express purpose of the pregame message was to "solemnize the event." *Id.* at 306. Yet

tellingly, the only message type the text endorsed was an "invocation," and "in the past at Santa Fe High School, an 'invocation' ha[d] always entailed a focused religious message." *Id.* at 306-07 (internal quotation marks omitted). The Court also noted that the school regulated the content of the message. Among other things, the message had to "establish the appropriate environment for competition." *Id.* at 306 (internal quotation marks omitted). The school also required that the pregame message "promote good sportsmanship." *Id.*

The history and context of the policy bolstered the conclusion that an objective observer would perceive the school to be encouraging prayer. The school had a "long-established tradition of sanctioning student-led prayer at varsity football games," *id.* at 315, and the policy itself had evolved from the "office of 'Student Chaplain' to the candidly titled 'Prayer at Football Games' regulation," *id.* at 309. The Court noted that the prayers were possible only because the school board had *chosen* to give the students the opportunity to deliver pregame messages. *Id*. With that context, the Court said it was "reasonable to infer that the specific purpose of the policy was to preserve a popular state-sponsored religious practice." *Id.* (internal quotation marks omitted).

Lastly, the Court was "persuaded that the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship." *Id.* at 312. According to the Court, some nonadherents were likely *required* to attend the games, "such as cheerleaders, members of the band, and, of course, the team members themselves." *Id.* at

311. Even those who were not so required would "feel immense social pressure," the Court said, "to be involved in the extracurricular event that is American high school football." *Id.* (internal quotation marks omitted). So, by allowing the prayer to be delivered, the district was impermissibly forcing students to choose "between attending these games and avoiding [a potentially] personally offensive religious ritual[]." *Id.* at 312.

Mindful of the totality of these circumstances, the Court concluded that "the realities of the situation plainly reveal that [the district's] policy involves both perceived and actual endorsement of religion." *Id.* at 305. It therefore violated the Establishment Clause. *Id.* at 316.

II. Application

Here, an objective BHS student familiar with the history and context of Kennedy's conduct would perceive his practice of kneeling and praying on the fifty-yard line immediately after games in view of students and spectators as District endorsement of religion or encouragement of prayer. The District therefore justifiably restricted Kennedy's speech to avoid violating the Establishment Clause.

A. The setting, context, and history support the perception that Kennedy's conduct would be viewed as state endorsement of religion.

The setting supports this conclusion. If Kennedy's practice were to resume, an objective student would observe a public-school employee in BHS-logoed attire demonstratively praying in front of "a large audience assembled as part of a regularly scheduled, school-

sponsored function conducted on school property." *Id.* at 307. Based on previous experience, Kennedy's players would likely join him, meaning he would likely be surrounded by a majority of the team. The speech would also occur at the most prominent location on the field during a time when Kennedy is responsible for supervising players. Lastly, the scene would likely exhibit "the traditional indicia of school sporting events," including "cheerleaders and band members dressed in uniforms," an audience "waving signs displaying the school name," and the school's name or initials "written in large print across the field and on banners and flags." *Id.* at 308.

The context would bolster the perception that the District was endorsing religion. An objective observer would know that Kennedy had access to the field only by virtue of his position as a coach, that a Satanist group had been denied such access, and that Kennedy insists on demonstratively praying only while in view of students and spectators. True, in contrast to *Santa Fe*, the District would not be authorizing or regulating the content of Kennedy's prayers. *See* 530 U.S. at 306-07. Still, an objective observer would know that it is Kennedy's professional duty to communicate demonstratively to students and spectators after games, and that use of the field, like use of the public address system, is "subject to the control of school officials." *Id.* at 307.

The relevant history would add to the perception that the District encourages prayer. An objective observer would know that during the previous eight years, Kennedy led and participated in locker-room prayers, regularly prayed on the fifty-yard line, and

eventually led a larger spiritual exercise at midfield after each game. BSD states that it was not aware of this conduct until 2015, but if Kennedy were to resume his practice of praying at midfield, an objective student could reasonably infer that the District was ratifying the religious exercises that Kennedy had previously conducted. This inference would follow because the District would be acquiescing to Kennedy's conduct knowing full well that the players prayed only when Kennedy elected to do so, and that the previous practice started as an individual prayer but evolved into an orchestrated session of faith.[13]

Lastly, by permitting Kennedy's conduct, the District would be condoning the same coercion identified in *Santa Fe*. As was true in that case, various students would be required to attend the games, "such as cheerleaders, members of the band, and, of course, the team members themselves." *Id.* at 311. They would see an important District representative display "the distinctively Christian prayer form"[14] in the most prominent location on the

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[13] Again, perhaps bolstering this inference, an objective observer would likely see Kennedy surrounded by his players. An objective observer familiar with the relevant history would also know that the football team had engaged in pre- and post-game prayers "as a matter of school tradition," and that both activities apparently "predated" Kennedy's involvement with the football program. With that context, an objective observer might reasonably perceive that the District had changed its mind regarding the propriety of Kennedy's conduct. This is particularly so because BSD had previously stated in a letter to the Bremerton community that it could not permit Kennedy's conduct lest it be considered to be endorsing religion.

[14] Amici note that Kennedy employed "the distinctively Christian prayer form of kneeling with hands clasped and head

field, despite the community's religious diversity. This act would "send[] the ancillary message to members of the audience who are nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Id.* at 309-10 (internal quotation marks omitted). Kennedy might not "*intentionally* involve students in his on-duty religious activities," (emphasis added), but I have no reason to believe that the pressure emanating from his position of authority would dissipate. Accordingly, many students would feel pressure to join Kennedy's religious activity to avoid marking themselves as outsiders or alienating themselves from the team. The record suggests that this is precisely what occurred when Kennedy first started praying on the field in 2008. *See* Kennedy Decl. at 3 ("Over time, the number of players who gathered near me after the game grew to include the majority of the team."). Yet the Constitution forbids Kennedy from forcing students whose beliefs are not the same

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bowed—a pose with deep historical significance and symbolic meaning within Christianity." Br. of Americans United for Separation of Church and State et al. as Amici Curiae Supporting Appellee at 12. By contrast, Jews "do not typically kneel," and instead "stand for prayer and often sway." *Id.* at 13. For Muslims, "the typical prayer posture is prostration, though prayer also involves standing and bowing." *Id.* Prayer in the Bahá'í faith "involves kneeling, bowing, and prostration." *Id.* Hindus and Buddhists "pray in the seated, cross-legged lotus position." *Id.* Finally, it is worth noting that the Bremerton community includes individuals who identify as atheist or as agnostic. *Id.* at 14.

as his to compromise their personal beliefs or identify themselves as religious dissenters.

In sum, if Kennedy were to resume kneeling and praying on the fifty-yard line immediately after games while in view of students and spectators, an objective student observer would see an influential supervisor do something no ordinary citizen could do—perform a Christian religious act on secured school property while surrounded by players—simply because he is a coach. Irrespective of the District's views on that matter, a reasonable observer would conclude in light of the history and context surrounding Kennedy's conduct that the District, "in actuality," favors religion, and prefers Christianity in particular.[15] *Santa Fe*, 530 U.S. at 308.

B. Kennedy's counterarguments are not persuasive.

Kennedy contends that an objective observer would "conclude (at most) that he is engaged in a personal moment of silence" because students would

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[15] *Borden v. Sch. Dist. of Tp. of E. Brunswick*, 523 F.3d 153 (3rd Cir. 2008), supports this conclusion. There, the Third Circuit held that a football coach impermissibly endorsed religion by bowing his head and taking a knee while his players engaged in prayer. *Id.* at 174. Like Kennedy, the coach had a history of leading team prayers, yet stated that he wanted to bow and kneel only to show respect to his team. *Id.* at 177. The court concluded that the history gave rise "to a reasonable inference that [the coach's] requested conduct is meant to preserve a popular state-sponsored religious practice of praying with his team." *Id.* (internal quotation marks omitted). In light of Kennedy's history, an objective observer could draw the same inference here, notwithstanding Kennedy's statement that he seeks only to pray silently and alone.

not be directly coerced to pray, the District would not be regulating the content of his religious expression, and the prayer would not be the product of a school policy, in contrast to the prayer at issue in *Santa Fe*. These observations may be correct, but they have little significance when considered within the totality of the circumstances. Indeed, they are rebutted by the evidence of indirect coercion, and the fact that an objective observer familiar with the context would know it is Kennedy's professional duty to communicate demonstratively to students and spectators after games.

Next, Kennedy insists that kneeling and praying on the fifty-yard line would not be viewed as state endorsement of religion because a coach's expressive conduct around a playing field is quintessential personal speech. Kennedy notes that some athletes point to the heavens after a touchdown, or kneel when a player is being treated for an injury, yet fans do not generally view either of those actions as having been made on behalf of the team. Even if that is true, it says little about the speech at issue here, and it ignores entirely the relevant history and context surrounding Kennedy's speech. *See Santa Fe*, 530 U.S. at 315 (holding courts may not "turn a blind eye to the context in which [the conduct] arose").

Lastly, Kennedy contends that the remedy for any inference of endorsement "is to educate the audience rather than squelch the speaker." *Hills v. Scottsdale Unified Sch. Dist. No. 48*, 329 F.3d 1044, 1055 (9th Cir. 2003) (quoting *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1299-1300 (7th Cir. 1993)). However, we have held that a disclaimer is not

sufficient to alleviate Establishment Clause concerns in the graduation speech context, *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 984 (9th Cir. 2003), and it is similarly unlikely that a disclaimer would cure the perception of endorsement at issue here. Once again, an objective student observer would still see a respected District employee do something no ordinary citizen could do—perform a distinctively Christian religious act on a secured portion of school property while supervising students—simply because he is a BHS football coach. Moreover, because Kennedy's speech would occur in the course of his ordinary responsibilities and he would be speaking in his capacity as a public employee, his conduct would be attributed to the District, thus diluting the effect of any potential disclaimer. *See Borden*, 523 F.3d at 177 n.20 ("As an employee of the School District as both a coach and tenured teacher, Borden's actions can be imputed to the School District. For this reason, Borden's claim that the School District could remove any Establishment Clause violation by writing a disclaimer saying that Borden's speech does not represent the ideals of the School District is simply wrong."); *Doe v. Duncanville Ind. Sch. Dist.*, 70 F.3d 402, 406 (5th Cir. 1995) (stating that during school-sponsored sporting events coaches "are present as representatives of the school and their actions are representative of [school district] policies").[16]

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[16] I nonetheless emphasize that schools should not simply "throw up their hands because of the possible misconceptions about endorsement of religion." *Hills*, 329 F.3d at 1055. Instead, they should endeavor "to teach [students] about the first

In sum, the District can satisfy the fourth *Eng* factor. It justifiably restricted Kennedy's speech to avoid violating the Establishment Clause. An objective BHS student familiar with the relevant history and context would perceive Kennedy's conduct to reflect school endorsement of religion, encouragement of prayer, and a preference for one particular faith.[17]

III. Averting state establishment of religion ultimately safeguards religious liberty.

Some readers may find this conclusion disconcerting. The record reflects, after all, that Coach Kennedy cared deeply about his students, and that his conduct was well-intentioned and flowed from his sincerely-held religious beliefs. Given those factors, it is worth pausing to remember that the Establishment Clause is designed to *advance* and *protect* religious liberty, not to injure those who have religious faith. Indeed, history has taught us "that one of the greatest dangers to the freedom of the individual to worship in

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amendment, about the difference between private and public action, [and] about why we tolerate divergent views," as BSD's letter to the Bremerton community admirably sought to do here. *Id.* (first alteration in original) (quoting *Hedges*, 9 F.3d at 1299). "Free speech, free exercise, and the ban on establishment are quite compatible when the government remains neutral and educates the public about the reasons." *Id.* (quoting *Hedges*, 9 F.3d at 1300). However, in this instance, BSD would not be remaining neutral in the eyes of an objective observer if it were to permit Kennedy to resume his on-field prayers.

[17] The District also contends that Kennedy's conduct fails the so-called "coercion" test and the three-prong framework from *Lemon v. Kurtzman*, 403 U.S. 602 (1971). I do not address those arguments in light of the analysis outlined above.

his own way lay[s] in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services." *Engel v. Vitale*, 370 U.S. 421, 429 (1962).

It is a lamentable fact of human history that whenever a religious majority controls the government, it frequently uses the civil power to persecute religious minorities and non-believers.[18] The Founders who met in Philadelphia to negotiate the terms of the U.S. Constitution, and the men who later met in ratifying conventions in the several states, were well aware that many hundreds of thousands of people had lost their lives, been tortured, or had otherwise been deprived of their civil rights by governments in the control of some religious faith, during the then recent European wars of religion. These cataclysmic events led writers such as Thomas Hobbes (1588-1679) and John Locke (1632-1704), each of whom was familiar to the Founders, to argue that state coercion is an inappropriate and ineffective tool for enforcing religious conformity, since religious belief must be sincerely held to be truly efficacious.

In some ways, the United States is a nation whose very existence is due to religious conflict because most of the colonies were initially settled by persons who

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[18] Interested readers might find Will (and later Will and Ariel) Durant's epic series on the history of civilization, with separate volumes entitled The Age of Faith, The Renaissance, The Reformation, The Age of Reason Begins, The Age of Louis XIV, The Age of Voltaire, and Rousseau and Revolution, amongst others, an excellent source to learn more about this subject. *See* WILL DURANT & ARIEL DURANT, THE STORY OF CIVILIZATION (MJF Books 1993).

came here to escape religious persecution in Europe. When such colonists came, they generally settled amongst those who held similar religious beliefs, and the dominant religious group controlled the civil government, just as had been the case in Europe. Thus, Anglicans initially dominated in Virginia, Puritans in Massachusetts, Quakers in Pennsylvania, Baptists in Rhode Island, and Roman Catholics in Maryland. But when, for example, the Puritan leaders of the Massachusetts Bay Colony were challenged by religious dissenters, such as Roger Williams and Anne Hutchinson, the dissidents were banished from, and persecuted by, the Colony over disagreements concerning theology, as were Catholics and non-Puritans generally. Violence was frequently employed in many of the colonies to suppress religious dissenters.

Seeking to make America a more true refuge from religious persecution, some early leaders began to advocate for the disentanglement of religion and government. For example, in responding to a bill introduced by Patrick Henry calling for state support for "Teachers of the Christian Religion," future president James Madison penned an essay arguing that Virginia should not financially support Christian instruction. *See* James Madison, Memorial and Remonstrance Against Religious Assessments (June 20, 1785), in 5 THE FOUNDERS' CONSTITUTION 82 (P. Kurland & R. Lerner eds. 1986). Madison asked rhetorically: "Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?" *Id.* He also observed that

Henry's bill was "a departure from that generous policy, which, offering an Asylum to the persecuted and oppressed of every Nation and Religion, promised a lustre to our country." *Id.* at 83.

After Henry's bill was defeated, the Virginia legislature eventually took up Thomas Jefferson's plan for the separation of church and state. In 1786, the Virginia Bill for Establishing Religious Freedom was adopted. Among other things, that Bill provided:

> We the General Assembly of *Virginia* do enact, that no man shall be compelled to frequent or support any relig[i]ous Worship place or Ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief, but that all men shall be free to profess, and by argument to maintain their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.

Id. at 77. Jefferson wrote that the law was "meant to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and Mahometan, the Hindoo, and Infidel of every denomination." Thomas Jefferson, Autobiography (1821), in 5 THE FOUNDERS' CONSTITUTION, at 85.

Madison endeavored to make Jefferson's vision a part of the Constitution. For example, Article VI of the Constitution requires that all federal officials "shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public

Trust under the United States." U.S. Const. art. VI, cl. 3. Later, what became the First Amendment to the Constitution included the words: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof … ." *Id.* amend. I. The purpose of these clauses is to protect our freedom of worship unhindered by the government.

This very brief glimpse of one aspect of our history is intended to show that, having learned from the harmful effects of past religious conflicts, our nation's Founders included in our foundational law safeguards against religious oppression by a government (or arms of that government) under the control of a religious majority that would punish or severely limit our right to worship (or not worship) as we please. This is a priceless bulwark of our personal freedom, and I hope that interested readers will come to appreciate the Establishment Clause as a good friend and protector, and not as an enemy, of one of their most precious rights and liberties.

IV. Conclusion

Striking an appropriate balance between ensuring the right to free speech and avoiding the endorsement of a state religion has never been easy. Thankfully, we no longer resolve these conflicts with violence, but instead use courts of law, where parties make arguments in free and open hearings to address their differences. To that end, I commend the lawyers in these proceedings for the exceptional job they have done.

At the end of the day, I believe that a resumption of Kennedy's conduct would violate the Establishment Clause. I would therefore deny the preliminary

injunction on the additional ground that BSD can satisfy the fourth *Eng* factor.

Appendix H

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-35801

JOSEPH A. KENNEDY,

Plaintiff-Appellant,

v.

BREMERTON SCHOOL DISTRICT,

Defendant-Appellee.

Filed: January 25, 2018

Before: NELSON, J., SMITH, JR., J., and CHRISTEN, J., *Circuit Judges*.

ORDER

Judges M. Smith and Christen have voted to deny the petition for rehearing en banc, and Judge Nelson so recommends. A judge of the court called for a vote on the petition for rehearing en banc. A vote was taken, and a majority of the non-recused active judges of the court failed to vote for en banc rehearing. Fed. R. App. P. 35(f). The petition for rehearing en banc is DENIED.

Appendix I

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
WASHINGTON, TACOMA DIVISION**

No. CV16-5694RBL

JOSEPH A. KENNEDY,

Plaintiff,

v.

BREMERTON SCHOOL DISTRICT,

Defendant.

Preliminary Injunction Hearing

September 19, 2016

Before the Honorable Ronald B. Leighton
United States District Court Judge

THE CLERK: This is in the matter of Kennedy versus Bremerton School District, Cause No. C16-5694RBL. Counsel please make their appearances.

MS. RICKETTS: Good morning, your Honor. Rebekah Ricketts for the plaintiff, Joseph Kennedy. With me at counsel table is Ben Wilson.

MR. HELSDON: Good morning, your Honor. Jeff Helsdon for Joe Kennedy.

MR. BERRY: Good morning, your Honor. Michael Berry for Joe Kennedy.

MR. FERATE: Good morning, your Honor. A.J. Ferate here for Joe Kennedy.

THE COURT: Good morning.

MR. TIERNEY: Good morning, your Honor. Michael Tierney. I represent the Bremerton School District.

THE COURT: Good morning.

MR. TIERNEY: Accompanying me is Aaron Leavell. He is the superintendent of the school district. And Jeff Ganson is the general counsel for the school district. We have some others in the audience, but that's who is at the table with us.

THE COURT: Thank you. Good morning. I have reviewed everything that has been submitted by both sides. Because of the importance of this matter, I wanted to schedule oral argument for the plaintiff's motion for a preliminary injunction. Plaintiff can make their argument.

MS. RICKETTS: Good morning, your Honor. This case is about Coach Kennedy's First Amendment right to take a knee at midfield at the end of the BHS football games and say a silent prayer for 15 to 30 seconds.

The district has admitted it suspended Coach Kennedy from all participation in the BHS football program because he engaged in, quote, demonstrative religious conduct while he was still on duty as a coach.

The primary issue here is whether the district can strip Coach Kennedy of his First Amendment rights at

the schoolhouse gate. And that is exactly what *Tinker* forbids.

The district has already conceded that Coach Kennedy's religious conviction is fleeting, that any student participation was entirely voluntary, was never coerced, never even actively encouraged, and that Coach Kennedy fully complied with the district's directives not to intentionally involve students in his religious expression. All of these concessions are in the district's official correspondence, and are clear on the face of the record.

The district has also effectively conceded three of the four prongs of the preliminary injunction inquiry. That's not surprising, because the law is clear that deprivation of First Amendment rights constitutes irreparable harm, and the balance of equities and public interest prongs cut squarely in favor of the party whose rights are being chilled.

So what remains is the *Eng* test, and Coach Kennedy, we respectfully submit, amply satisfies that test.

As an initial matter, the district concedes, as it must, that Coach Kennedy's religious expression is a matter of public concern. So that takes care of Step 1.

At Step 2, the district has completely ignored controlling precedent from the Supreme Court and the Ninth Circuit. Under *Lane v. Franks*, the critical question in order to determine whether an individual speaks as a citizen or as an employee is whether that speech falls within the ordinary scope of his job responsibilities. That is the task that *Lane v. Franks* announces, and that is the task that the Ninth Circuit

specifically adopted in *Coomes*, following the *Lane* decision.

Under that task, your Honor, it is abundantly clear that Coach Kennedy's speech is outside the scope of his ordinary job responsibilities. The district has not decided whether he will speak or what he will say, and all of the responsibilities that the district points to, coaching football, caring for injuries, maintaining equipment, none of these have anything to do with Coach Kennedy's private personal prayer.

So the clear import of *Lane* is that Coach Kennedy speaks as a citizen, not as a public employee, and his speech is therefore fully protected.

THE COURT: You know, my parents were educators of a small district. They had responsibilities well beyond the classroom. My dad coached baseball, basketball, football. He wouldn't recognize the limitations that you're arguing, that Coach Kennedy is not a coach at that moment. Center of the field, lights on, school property.

How do you persuade people, who know the educational mission of all public schools, that Mr. Kennedy is off duty?

MS. RICKETTS: Your Honor, to be clear, our argument does not turn on whether Coach Kennedy is on duty or off duty. We think the controlling test under *Lane versus Franks* is whether the expression that is at issue is ordinarily within the scope of his job responsibilities. We do not, for these purposes, dispute—we don't think there is a factual dispute about the nature of his job responsibilities.

In fact, the district has effectively abandoned their prior argument that his alleged failure to supervise justified the adverse action here.

But the Ninth Circuit en banc in the *Dahlia* decision made clear that public employees may receive First Amendment protection for expressions made at work.

So the only thing the district can point to is this bright-line temporal test that they invent, that treats any expression by an on-duty public employee as speech, quote, as an employee for constitutional purposes.

THE COURT: Is there a difference between the speech if it is religious in nature? The trip wire is very taut for most speech that does not have a religious overtone, because we guard our liberties jealously for political discussion and the like. But there is a push me/pull you on religion. It is the uprights.

It is not Scylla, it is not Charybdis. I mean, we don't need a geography test for the Italian peninsula and Sicily, just the goalposts. You've got to thread the needle, so to speak, between establishment and free exercise.

And that, I think, makes the trip wire a little slack. How do you respond to that?

MS. RICKETTS: Respectfully, we would submit that for purposes of the prong two inquiry, under *Eng*, which looks at whether he is speaking as a citizen or as an employee, we do not think the religious content matters for purposes of that analysis.

Now, your Honor is certainly correct that when we get to prong four, which is where the district bears the

burden to show an adequate justification for its actions, then you're absolutely right that the Establishment Clause comes squarely into play, and in fact that is the only justification that the district has offered here for its adverse actions against Coach Kennedy.

It has abandoned the argument that it failed to supervise, and said solely that its adverse actions were required in order to violate the Establishment Clause.

So with your Honor's permission, I will skip to that step. The controlling test is *Sante Fe*, your Honor. And the question under *Sante Fe* is what the reasonable observer would understand given the facts and the context.

So what would the reasonable observer understand here? He would see Coach Kennedy take a knee at midfield for 15 to 30 seconds. At most, your Honor, the reasonable observer would draw the conclusion that he is engaged in a personal moment of silence.

Now, that is completely different—completely different facts from the district's other cases, which involve public employees who actively encourage, actively orchestrate student religious expression.

By the district's own admission—

THE COURT: Nobody orchestrated that gaggle of press and everyone around? I saw the pictures.

MS. RICKETTS: Your Honor, it is a great point, and I'm glad you raised the picture. The picture that is in the record of the coach surrounded by players was taken following the October 16th game. The district

puts forward this picture as evidence its Establishment Clause concerns are justified.

What the district does not tell you, following the October 16th game Coach Kennedy intentionally waited until the Bremerton students had finished their handshakes, were walking towards the stands, and were engaged in their post-game fight song. It was at that moment that he intentionally waited to drop to his knee, close his eyes, and engage in a personal prayer.

So the players that you see gathered around Coach Kennedy in that photo are not Bremerton players. They are Centralia players who gathered around him at a point in time where his eyes were closed, his head was bowed.

According to his sworn declaration, and the district does not dispute this, he had nothing to do with orchestrating that event.

In fact, the only reason, your Honor, that event occurred is because the district in prior weeks had taken very public actions to try to stamp out Coach Kennedy's religious expression.

So for the district to cite the controversy that it created as a justification for its adverse actions against Coach Kennedy, candidly, your Honor, we think that argument is perverse. That is not the relevant standard for purposes of the Establishment Clause analysis.

A quick word on *Borden*, your Honor, which is a case that the district cites very prominently. A couple of issues with that holding. Number one, the Third Circuit's analysis in that case actually turns on the

public concern inquiry, which is the one prong of the analysis that the district has fully conceded, as it must, because the Ninth Circuit has adopted a very expansive definition of public concern to incorporate any speech or expression that touches on religion.

The only Establishment Clause discussion that is actually in *Borden* is in dicta that the court admits it need not undertake.

But the most important point about *Borden*, your Honor, is that they are very different facts. The coach in that case had a history of actively encouraging students to participate in official prayer, and he continued to actively encourage that student religious expression, going so far as to email players asking them to participate, asking them to report back to him.

Coach Kennedy has made very clear that the nature of his religious conviction has nothing to do with engaging in prayer with students. The core of his religious conviction is to simply take a knee following the game and offer a prayer of thanks.

The district can point to no authority, your Honor, for the proposition that a 15- to 30-second silent prayer constitutes a state endorsement of religion. And that's because no federal court has endorsed, in our view, such an extreme and expansive understanding of the Establishment Clause.

The clear impact, we think, of the district's view would be to strip public employees of all First Amendment rights to engage in any visible religious conduct while they are on duty. The law simply does not support that conclusion.

THE COURT: How about if we hear from Mr. Tierney. You will have every opportunity—you will get multiple opportunities to take the floor and counter their argument. I get your basic argument. I want to hear Mr. Tierney and the district, and then you can come back. You will be up many times.

MS. RICKETTS: Thank you, your Honor.

MR. TIERNEY: Good morning, your Honor. So I don't have to try to say everything I want to say in ten minutes?

THE COURT: Right. There are no time limits here. Just in Seattle.

MR. TIERNEY: There's not a trapdoor that is going to open?

What I want to do is go back and start at what I think the logical prior steps are. But if you have some question, obviously you will direct me to it, and I will be happy to jump ahead.

THE COURT: You glean from my question, my big focus is on step two of the *Pickering* test. I am stuck on that. But I don't want to curtail your remarks.

MR. TIERNEY: I would still like to go back, because I think they illuminate what those questions will be later on.

The first question here is—This is a motion for preliminary injunction. We are arguing that it is a mandatory preliminary injunction. And the plaintiff's response has been, well, it is not really mandatory, we are just going back to the last peaceable status. And they say they want to go back to the status that was in existence for eight years. And that's out of their reply brief.

That status was clearly unconstitutional. I don't know that they really mean to say they want to go back to that status, but all we can do in a motion for preliminary injunction is examine what it is that the plaintiff is asking for and what sort of facts they have put before the court. And what they say they are asking for is, return to the status of eight years before.

Now, in that status of eight years before, the practice was Mr. Kennedy would lead prayers in the locker room prior to a game, and then after a game he would meet at the midfield, and players from his team, and possibly players from another team, and give basically a congratulation speech, with references to God. And he conceded in the district—and this is in the district's letter of September 17, that that constituted a prayer.

What they are asking to reinstate is the regime that consisted of Mr. Kennedy leading prayers in the locker room before the game, and leading verbal prayers with the team after the game.

So when we look at all of these steps in the test—all of the things that proceed farther down the line, we have to look at it in view of what they are actually asking for. I have my doubts that is really what they are asking for.

I want to illustrate what I think went on here—not that I think, that I know went on—with the timeline. Your Honor, it is Tab 3. For eight years there was a practice that clearly violated the Constitution. It came to the district's attention. And so, obviously, the district isn't aggressively trying to search out prayer and persecute Christians or anyone else. Had meetings with Mr. Kennedy, and he agreed to

abandon that practice, to not pray before games and to not pray after games. Now, that is the last peaceable status between the parties.

He made an agreement with the district. That agreement he honored for a month. And then his lawyers sent a letter saying he is going to pray at midfield, and you can't stop the students from joining him.

Now, I believe that is the regime they want to put in place. But that is not the last peaceable status. And there are several problems with it in the context of a motion for a preliminary injunction that I don't believe this court can get over the hurdles on.

I will start with, what was the agreement that Mr. Kennedy made? It is in a contract. And this is Tab 13. I am going to put it up here. Mr. Kennedy signed a contract with the district after the district told him stop praying before games and stop praying after games, and after he agreed that he would not do that. That contract is signed October 5th of 2015.

So the last peaceable status between the parties—

And I want to point out, this contract states under one of the bullet points, "Have read and understand all policies and procedures." So we have a pretty visible issue that has been discussed in the district. We have meetings between the superintendent and Mr. Kennedy. We have him agreeing to stop praying with the team before games and after games. And then we have him execute a written contract that says he has understood the policies.

THE COURT: The school district is not seeking to bar him from praying before or after the game, or during the game, or at any time, are you?

MR. TIERNEY: Do you mean outside his capacity as a coach?

THE COURT: He can say a prayer to himself?

MR. TIERNEY: Nobody would know if he was praying.

THE COURT: Joe Garagiola, he would make the sign of the cross in the dirt with his bat, and Yogi Berra would walk over and erase Garagiola's cross and say, "Let's let God watch this one." That was a humorous way to lighten the moment.

Anybody can pray at any moment. You can say a prayer right now silently. You are not contending that you want to bar him from doing that?

MR. TIERNEY: No. In fact, your Honor, the district was only concerned with demonstrative prayer around the students, that reflected on his role as a coach with the students.

THE COURT: So we are using that shorthand version for that construct—

MR. TIERNEY: Most of the prayers that people do—You know, you didn't see me praying at the table here beforehand. Most of the prayers people do, nobody can see and nobody can have any concern with.

But a coach's prayer, or a teacher's, when they are with the students in a role is a different animal. That is what we are addressing. That's what Mr. Kennedy agreed to stop doing.

The district offered other places for him to engage in a prayer if he wanted to. The district didn't oppose his prayer.

The only issue is basically what I call the time and place issue: When can you do that? When can that be acceptable? It was fine for a while until he insisted that he would be able to do it on the district's field, under the lights, when he wanted to do it, and the district couldn't say anything about it, and couldn't stop the students from joining him.

I believe that's the regime they want to put back in place. But that is a modification of the contract that would have been renewed if he had agreed to the same contract. He never applied. He never said, "Renew my contract," because he didn't want that contract anymore. He wanted a different contract.

He is asking the court to write a different contract for him that the parties had never agreed upon. That is a mandatory injunction. That requires the district to do something it had not done before. It is not putting back in place any sort of status quo.

The other problem with it, as long as we are talking about mandatory injunction, is that even if he were correct on his argument that, "Well, in that moment I'm not a public employee, I'm not a school district employee or coach, I am a private citizen," that doesn't advance him anywhere, because if he is a private citizen he is subject to the same rules that govern all the other private citizens sitting in the stand. They are not allowed to go on the field and use it as a forum for speech. They are not allowed to have a religious demonstration out there.

That is something that turned into an issue later on when we had this—and I submitted the photo, because I think it is kind of scary, we had the Satanist group show up and say, "We want to use the field, too."

He becomes a private citizen—If he wins his argument, he is a private citizen. But that doesn't allow him to take over the school's field at the 50-yard line and then engage in a prayer.

I think it makes no difference, really, as far as what this court can do under a mandatory injunction. You would be writing an order requiring the school district to reform his contract and writing an order requiring the school district to open a public forum on the school property after games. Because if Mr. Kennedy is allowed on the field to engage in free speech, everybody else is going to be allowed on the field to pray under free speech. And they have not established that ground for you.

And that's what I am talking about, what is before the court in this motion for preliminary injunction. They haven't even put it before you as to laying out exactly what you have to do. And having not accomplished that, they can't prevail on that. They haven't shown us anything that gives you grounds to say it is more likely than not that they will succeed in getting ultimately a decision in this case that requires the school district to open a public forum. It hasn't even been discussed, but that is the consequence of what they are asking for.

I mean, we are not going to do it, obviously. We are going to keep talking. But I think that ends the inquiry here in the injunction. Now, maybe we would talk more if we were at summary judgment. If the

mission at this hearing is to get the court to issue a mandatory injunction, they have failed in that mission.

I want to point out one other thing on a mandatory injunction. We talked about it changing the standard to producing a clear likelihood of success on the merits.

But the other effect of it—And it is in that very same case, the *Marlyn Nutraceuticals* case, is that it changes the irreparable harm standard. The irreparable harm standard says only extreme or very serious damage will result. Again, that is a heightened standard from a prohibitive injunction.

The next what I consider logical prior step is with respect to the elements for a Section 1983 action. And these are built on what we just talked about here, that in order to prevail on a Section 1983 action the plaintiffs have to show that there was a school district policy that inflicted the harm that he is complaining of. But the harm that he is complaining of is a contract and an agreement he made to stop praying before and after games.

All of the coaches' positions were open at the end of the season. They were all open for application. He didn't apply. Three other coaches didn't apply. The school district hired a new head coach. The head coach participated in the hiring of other assistants, and all the positions were filled. There was no application by Mr. Kennedy for a renewal of his contract.

So no school district employee, much less a policymaker, ever denied Mr. Kennedy a renewal of the October 5th contract, the contract that he had signed that said, "I won't pray before or after games."

That's what he would have been entitled to if he had actually applied for a job for 2016.

So in the absence of a policymaker—And that job for 2016 is at the core of what they are asking the court to do, "Exercise your injunctive powers on my 1983 claim." But if there is no policymaker, there is no Section 1983 claim, and we don't have a basis for federal jurisdiction to be exercised with respect to the 2016 coaching roster. I believe it goes to the court's jurisdiction. It certainly goes to the viability of any Section 1983 claim regarding the renewal of his contract.

He doesn't want the contract he had.

I think those should stop the inquiry at this point, especially when the standard is clear likelihood of success on the merits. I don't see any chance of showing policymaker involvement in not renewing a contract that he didn't ask to renew.

But is it ever going to get to clear likelihood of success on the merits? They basically refused to address that point, and simply say, "Well, it would have been futile."

And here's where I go back to what I started out with: Let's look at what we have in front of us for this motion. What we have in front of us is Mr. Kennedy's testimony that, "I was suspended, then they gave me a bad review, then they fired me." That's the testimony that is before the court. And it hasn't been changed.

"Suspending and then firing me from my job," that's what the allegation is. That's what the court has before it to deal with.

From the complaint it says, "In January 2016, Coach Kennedy's contract was not renewed." So they are alleging that something affirmative happened in January of 2016. That's what the basis for the preliminary injunction is. But that was established by the witness, by the party.

Now what we have is the lawyers attempting to backfill, provide their own testimony, change those facts. They say, "Well, it was futile. He was discouraged from applying because of what happened." That's testimony by a lawyer. That isn't what was submitted to the court as a basis for you to exercise your injunctive powers, any more than my testimony, if I were to say, "Well, that is not really what happened. He knew that they would renew the contract, but on the grounds of the one that they signed." I am testifying to that. That isn't the basis of a motion.

So what is the basis that this court has—what has been factually submitted to this court that says there was a policymaker that did something wrong with respect to renewing a contract for 2016? They have nothing.

They have an allegation by the plaintiff that, "They fired me," that something happened in January 2016. We've got the school district saying, "He never even applied. The positions were all open. We filled them with someone else." At best, that's a disputed fact. That is not a clear basis for exercise of your injunctive powers.

Now we are getting to what you wanted to get to. I think what I said before will illuminate this public-employee/private-citizen issue. The contract that

Mr. Kennedy signed, and I will try to cut to the chase a little more, if you read it all, he is going to be a coach, mentor, and a role model.

THE COURT: Right.

MR. TIERNEY: He is going to "exhibit sportsmanlike conduct at all times," not just the times of his choosing.

"Positive motivational strategies."

Underneath the bold, where it says, "Always approach officials with composure. I understand that I am constantly being observed by others." And that goes to the core of his role. And that is what is at the core of the court's Ninth Circuit ruling in *Johnson versus Poway Unified School District*.

What the court said there was a teacher doesn't stop being a teacher when he steps outside of the classroom, a coach doesn't stop being a coach when the whistle blows. He is always being observed. So when the coach is out there on the field, he is being observed as a coach.

What the *Johnson* court said—in this last one here, "Understand that the athletics program is an integral part of the total educational process."

What the court said in *Johnson* is—basically asking the question, what does a teacher sell to the school district? What the teacher sells to the school district is the teacher's expressions. And it cited cases from other circuits.

And there is nothing remarkable about that. That's what teaching is. That's what education is, you put young people together with older people. And having myself been a coach, been coached, and

watched my son being coached, I know that a coach in most situations—Not most. I don't want to be anti-education. But the *Johnson* case dealt with a calculus teacher. Now in the life of a teenage boy, who is the more towering figure, his football coach or his calculus teacher? It is going to be his football coach. They can be monumental figures in a kid's life.

What the district contracts for when it hires a coach is all of your expressions are relevant to what you are doing with our students: We are buying every bit of your behavior while you're around the students, because they are always watching you. You are very important, and everything you do is important to us.

So what the Johnson court says, basically, is everything that is expressed by a teacher is his job duties. There isn't some seam in there. There isn't some break when he is around the students.

If he goes in the teachers' lounge and he talks to other teachers, that is a different matter. If he is engaged in some totally different thing—As the court said about the teacher, if he is running errands or doing something else for the school district, that is a different matter. But if he is out and around the students, in the classroom or out, every bit of his expression is expression that the district has contracted for. So every bit of it is subject to district control.

THE COURT: I wrote and delivered a speech on civility, comportment, and the theme was "Everything I needed to know about civility I learned from baseball." That, it seems to me, is appropriate now. Coach Kennedy is a very, very good man, who teaches

powerful lessons to young men. But it is a two-edged sword, because he is a coach. He is "Coach."

I played baseball. I had two tryouts for the pros. I love baseball. I would walk through a wall for my coaches. In many ways it is outcome determinative. I love his sentiment enunciated at the center of the field. That is powerful stuff.

In a different era, it would have been acceptable and universally applauded—or almost universally. That is not the law that we have before us. That's my quandary.

MR. TIERNEY: And I couldn't agree more, your Honor. If you read the district's letters, that is the tenor of what the district is saying. We are almost basically begging, saying, "Look, do the wonderful stuff that you do, but let's work something out with the prayer." And they thought they had it worked out. And then he said, "No, you don't."

That puts the district in an extremely difficult position, that I would rather not have, of course. As you said, in the day and age we live in, if it is going to allow a demonstrative prayer at midfield, it is going to have to open a public forum to allow other people to speak what they want to speak.

THE COURT: I delivered the invocation at my graduation ceremony. Enough said. In my life and in my perception of tradition and faith, that was a good thing. But we are a diverse—a more diverse community, and the goalposts narrow. That's what we are wrestling with here.

MR. TIERNEY: And I agree, your Honor. I think it is worthy at this point—worthwhile to emphasize we

are not here on a motion for summary judgment. We are not here to decide the ultimate merits. We are here to decide whether you are going to issue that kind of order or what it will be going forward.

I feel like I have used up enough time.

THE COURT: You will have another shot. Ms. Ricketts, do you want to come back up and respond to what you have heard so far?

MS. RICKETTS: Yes, your Honor. A couple of points, your Honor. I will start at the end and back up and address the standard.

On the subject of whether his speech—whether Coach Kennedy's speech is as a citizen or as an employee, that is the step two inquiry that your Honor alluded to earlier. The district just told you that it is, quote, buying every bit of his behavior, and that every bit of it is subject to district control.

So the district is not backing off on its temporal bright-line rule. They are doubling down on a rule that says on-duty public employees cannot engage in any form of visible religious conduct. The problem with that, your Honor, is that it is squarely contradicted both by the Supreme Court and by Ninth Circuit precedent.

The Ninth Circuit in *Dahlia* made clear to caution courts not to determine whether you act pursuant to your official duties based on whether the views were expressed inside the office or not. So the question is not whether you're on duty or off duty, the inquiry is to look—

THE COURT: It is under the totality of the circumstances. If you're at a table in the cafeteria, and

you are invoking the Lord's blessing for the food, that's a different question than with all the accoutrements, all of the attention, all of the authority, by virtue of his coachhood, that's a different question from my perspective.

MS. RICKETTS: Respectfully, your Honor, we would disagree. The rule that the district has articulated and the rule that the district punished Coach Kennedy for violating was engagement in demonstrative religious conduct.

That equally prohibits the teacher who is sitting alone in the cafeteria and silently bows her head. It would prohibit any coach, any teacher from wearing a head scarf, from wearing a cross, from making the sign of the cross. Those are all visible religious expressions, your Honor.

And *Dahlia* and *Lane* squarely instruct the court to look not at whether you are on duty or off duty, but whether the speech is within or without the scope of the employment duties. The district, your Honor, has made no attempt to engage that test at all. They failed even to cite *Lane versus Franks*, which is the controlling test, in their response brief.

The district points to *Poway*—*Johnson versus Poway*. We think *Poway* is a great case for us. *Poway* illustrates how different the facts would have to be in order to find in favor of the district.

The teacher in that case engaged in religious expression in the classroom, hanging gigantic banners with religious expression. And the court—There were fact findings in that case that he had taken advantage of his position in order to press his religious views onto a captive audience of students.

Courts have consistently treated cases inside the classroom as wholly other, because in that context there is a captive audience of students who are forced to listen to whatever expression the teacher comes forward with. That is not this case, your Honor.

THE COURT: Were you an athlete?

MS. RICKETTS: Not a very good one, your Honor.

THE COURT: It is not a good or a bad. If you are an athlete, you are impressionable, and you are respectful, and you want to please your coach to get more playing time, to shine, to do whatever. That's a subtle coercion. It is called stigma. Stigma has a very laudatory role in society without rules, regulations, and all that, and dogma. The Golden Rule is about stigma, treat me the way you want to be treated.

There is coercion, albeit perhaps loving, kind, inspiring. It is coercion nonetheless, from my perspective.

MS. RICKETTS: Respectfully, your Honor, we disagree, and we think the cases disagree as well.

First of all, on the facts, the district has expressly stated that no students were ever coerced, were ever required, were even actively encouraged to participate in any religious conduct.

MR. TIERNEY: Your Honor, I would have to object. This is a Rule 106 objection. That is misquoting. And I would like to—

THE COURT: Put it on the record. Overruled.

MS. RICKETTS: I will have you look at the statements in context, as well, your Honor.

The more important point, I think, here, is that the Ninth Circuit has instructed what the remedy is in the event of any confusion. Because the courts are sensitive to exactly this concern that your Honor is raising, students are impressionable.

Even, let's say, in the context of a 15- to 30-second silent prayer, your Honor, we don't think there is any uncertainty about what a reasonable observer would understand in that situation.

But even if there was, the Ninth Circuit has said the district has two remedies: First of all, it can issue a disclaimer, making clear that the private speech is not the speech of the state. That's *Prince v. Jacoby*.

Second of all, your Honor, the Ninth Circuit has stated over and over that the role of the school is to educate the students, educate the community that the school does not endorse all speech that it fails to prohibit. That's the *Hills* case, which is cited in our brief, at Page 20.

The Ninth Circuit has made abundantly clear that the desirable approach here is not to suppress the speech, but instead for the school to simply make clear that private speech and government speech are separate.

A couple of points, your Honor, on the standard, if I may?

THE COURT: Yes.

MS. RICKETTS: First of all, your Honor, the district has misconstrued what is the last peaceable state of affairs. Of course Coach Kennedy is not seeking to pray with students. He is not seeking to engage in any sort of religious conduct with students.

He has made that abundantly clear, and the district itself has conceded that he complied with all directives not to intentionally involve students in his religious expression.

Instead, your Honor, the last peaceable state of affairs is one before the district announced its blanket ban on demonstrative religious conduct. That is essentially rewinding the clock to September 2015.

The injunction that Coach Kennedy seeks here is simply to preserve that state of affairs. The relevant metric for that state of affairs is what the district's policy was before it announced this, in our view, baldly unconstitutional rule.

The *Brewer* case, which is a Ninth Circuit 2014 opinion, makes clear that's how the analysis proceeds for purposes of determining whether something is a mandatory or prohibitory injunction.

Candidly, your Honor, ultimately the label does not matter, because courts order reinstatement even when that remedy is construed as mandatory. And that's because the remedy of reinstatement is not just an available remedy here, it is actually the preferred remedy in cases of First Amendment retaliatory discharge.

Courts have said that you are only to order monetary damages, which Coach Kennedy does not even seek, if there is some reason specific to the workplace why reinstatement would be inappropriate.

The district has obviously pointed to no such reason why reinstatement would be inappropriate here. So I would argue reinstatement is fully available

to the court, and in fact it is the preferred remedy in this case.

The notion that the characterization of the injunction as mandatory, which we disagree with, should be dispositive, we simply disagree.

Next, your Honor, the district points to and relies heavily upon Coach Kennedy's alleged failure to reapply for a position in the 2016 season.

It is interesting that the district thinks that it can escape liability on these grounds, for a couple of reasons: First of all, the district made clear when it suspended Coach Kennedy that he was prohibited from participating in any capacity in the BHS football program unless and until he agreed to the district's rules.

THE COURT: Ms. Ricketts, I am persuaded that the district acted under color of law. My question is, is there a violation of a constitutional right under the *Pickering* test? I am not looking at the mandatory and prohibitory injunction anymore. The standards, it makes no difference to me. The clearly—

MS. RICKETTS: We agree, your Honor.

THE COURT: 1983, it is all about whether there is a constitutional right. You drill down to the *Pickering* test. The second standard—And he is a teacher. He is a coach. Explain *Lane* to me, that it alters the analysis of religious speech. Not just free speech, but religiously-oriented free speech.

MS. RICKETTS: Your Honor, we would say that *Lane*, as affirmed by *Coomes*, as well as *Dahlia*, which is the Ninth Circuit en banc opinion, all of those cases stand for the proposition that there can be no bright-

line rule between when you are on duty and when you are off duty. That is not the relevant line in the sand.

Instead, what we have to do is say—the courts are instructed to undertake a fact-specific analysis to look at what are Coach Kennedy's responsibilities, and look at whether the speech is ordinarily a part of those job responsibilities.

THE COURT: Yeah. After the analysis of the facts, it is an issue of law. It is a question of law.

MS. RICKETTS: That's right. We would submit, your Honor, the prong two inquiry is actually relatively straightforward, simply because the district enunciates the wrong test.

What the district wants to do is take *Poway* and construe *Poway* as creating a bright-line temporal rule that applies to all public employees. First of all, I think that—

THE COURT: There is no bright-line test in my horizon on this issue. I've had three or four or five religious freedom cases. I seem to get all of them. They all stand on the facts presented before me. When I finish a case, I shred everything and start over, because there is no efficient way to try a case from a trial lawyer's perspective or from a judge's perspective.

Under these circumstances I evaluate what—I know a lot about coaching. I coached my sons. They are revered to men and women, boys and girls. That's one of the great advances in our culture, the equality of women and girls to compete, and learn the skills of competition. With all due respect, the coach is more important to the athlete than the principal.

MS. RICKETTS: In the life of students on a daily basis, we agree. Again, with no offense, Coach Kennedy, everyone, I think, agrees, has had a tremendous impact on the lives of these students. And he is currently, candidly, your Honor, in agony, not being able to participate in those relationships with those players that he built up over time. There are a number of seniors currently on the roster. He is not able to be on the sidelines coaching them through their final season. That itself, we would argue, is irreparable.

But, your Honor, we are sensitive to the fact that it would be attractive, it would be easier if the court in *Lane,* or *Garcetti,* or *Dahlia* had articulated a clear rule that said when you're on the clock, you speak only as a public employee; when you're off the clock, you don't. But that's not what the courts do.

Instead, we have to look at the employment responsibilities that the district has articulated. And respectfully, your Honor, they have nothing to do with the religious expressions he is engaged in.

THE COURT: But all the other cases, the free speech cases, are preferential in favor of free speech. Not so much on the religious. It has gotten much narrower because of the Establishment Clause. And that has become—Justice Sotomayor, if she had described the response in a religious speech case, I would follow it.

MS. RICKETTS: To the extent, your Honor—

Well, I will say that we wholeheartedly agree, that current Establishment Clause jurisprudence is not a model of clarity, by any means. However, it is clear, we think, that *Sante Fe* is the test. *Sante Fe* instructs

the court to look at what the reasonable observer would understand.

What the reasonable observer sees here is Coach Kennedy kneeling at midfield for a period of 10 to 15 seconds. Your Honor, even the district in its own answer says that it does not know whether Coach Kennedy was engaged in prayer in that length of time during that October 16th game. How can there be a violation of the Establishment Clause if the district does not itself know whether any religious expression was happening at all? It just doesn't make sense.

A couple of points, just quickly, your Honor, to touch on failure to reapply. As I mentioned earlier, the district made very clear that Coach Kennedy was to have no subsequent involvement in the football program until he agreed to the district's rule.

We now know from the papers that the district has filed in this court that the district adhered to that same view in its filings before the EEOC, and indeed it continues to adhere to that view today.

So to claim that any intervening action by Coach Kennedy would in any way have changed the result, we think, your Honor, is simply meritless. The law does not require futile action by a party.

But there is a second problem with the failure to reapply, your Honor. The Supreme Court in *Connick* made clear that the state cannot condition public employments on a basis that infringes freedom of expression. That is exactly what the district has done here. This whole notion that an intervening cause from Coach Kennedy's failure to comply, candidly, your Honor, we think that argument just doesn't work.

A couple of additional points that counsel raised. One related to the Satanists. We are by no means asking the district to endorse a rule that would require groups that clearly seek to disrupt or create a disturbance onto the field. The district has ample tools at its disposal to deal with those people. And those sorts of hypotheticals, we think, have no bearing here.

Finally, your Honor, the issue of *Monell*, which your Honor already alluded to, certainly is not a jurisdiction issue. We think there can be no plausible dispute that the district acted in its official capacity, official correspondence, official policymaker, official suspension.

THE COURT: Thank you, Ms. Ricketts. Mr. Tierney, do you want to say anything about *Lane*? If you want to say something about anything else, you have the votes, you don't need to speak.

MR. TIERNEY: I will just talk about *Lane*, your Honor. The problem with that discussion, your Honor, first of all, it mischaracterizes *Lane*, but most of all it mischaracterizes what the district is saying.

The district isn't saying that all public employees are subject to a temporal test that says if they are at work they are therefore speaking as public employees. We don't say anything of the sort. We don't come close to saying anything of the sort.

I would call it a straw man, except a straw man is even stronger than that. It is a ridiculous argument. It is a ridiculous argument for anybody to think that a party could make, that there is some rule that says all public employees while they are at work necessarily speak as public employees. That is not what the case law is about. We don't say that.

What we draw from *Johnson* is much more specific and much more varied. *Johnson* doesn't deal with all public employees. It only deals with the school context.

It takes pains—It is a long opinion. It refers to circuit court rulings from other districts, and draws on all of those principles, to describe what is it about the school environment that is unique, and what is it about the factual basis of what teachers do, and then it draws the conclusions from it.

And I will put the conclusions up here. This isn't a temporal test. It says, "Teachers necessarily"—this is the rule in this case, "A teacher necessarily acts as a teacher for purposes of a *Pickering* inquiry," one, "when at school or a school function"; two, "in the general presence of students"; three, "in a capacity one might reasonably view as official."

There are at least three components there. It's not a temporal test. It doesn't say from the minute they walk in the door until they go. It says, "If you are in school or at a school function." That is sort of a temporal test, but it is also a location test. And then, even more specific, "In the general presence of students." So it doesn't address anything that teachers do outside of the presence of students.

And then, finally, even more leeway for a teacher, "In a capacity one might reasonably view as official." There is a difference between the teacher at the basketball game who is keeping score, or he is standing in front of the crowd to keep people from running on the court, or something like that. That is a capacity you might reasonably view as official.

But if a teacher is sitting up in the stands watching a game, I think *Johnson* would say that teacher isn't necessarily acting in the capacity as a teacher. That is the test that we are applying.

There is no bright-line test here. There is a lot of room for nuance. There is a lot of different elements to it.

But if you take that, I think, under any generous reading even, for the plaintiff, each of these factors applies to his role when is he out in the middle of the field with the students—the players. They do the handshake line, which we never did when I was a player. But they do that now. They still have to watch the students then. Honestly, as a lacrosse coach, I will tell you, fights break out then sometimes, and we really had to watch it.

He's got his coaching gear on, he's got his students around him, clearly in an official capacity. That is a difference. It is not saying every single second, anything he says, we have this bright-line rule that wraps the whole package up. We are not saying that at all. What we are saying is that these factors apply squarely to the situation we are talking about.

I just have to briefly address that picture. I want to put this picture up, your Honor. When we are talking about the Establishment Clause issue—The top picture is the one we submitted with the motion. This bottom picture is—If you pull out the Ninth Circuit—the Third Circuit opinion, this is in there. This is what the Third Circuit said is a violation of the Establishment Clause.

Now, it didn't have the *Johnson versus Poway* test to apply. But if you read the reasoning of that case, it

applies. That case was cited by—I believe that case was cited by the—I might be thinking of *Doe versus Duncanville*, which was another coaching case, holding hands at midcourt. Those cases were cited by the *Johnson* court.

This bottom picture was found to be a violation of the Establishment Clause.

The top picture, they say, "Well, all he wants to do is kneel on his own at the 50-yard line." But in the same letter that says he is going to do that, it says, "Don't you dare do anything to stop the students from joining him."

The school can't, and doesn't want to, stop students from praying. If the students want to pray, they are entitled to pray.

So how does the school manage that situation, where a prayer circle with a coach in the middle of it is a violation of the Establishment Clause, but we can't stop the students from praying? We don't want to stop the students from praying. The only way they manage that is to say to the coach, "We are going to ask you to do your prayer somewhere else."

THE COURT: Thank you, Mr. Tierney.

MR. TIERNEY: You're welcome, your Honor.

THE COURT: Ms. Ricketts, any final thoughts?

MS. RICKETTS: Two points, very briefly, your Honor.

THE COURT: Thank you.

MS. RICKETTS: Your Honor, first, the step two inquiry, the district continues to run from *Lane*, continues to run from *Dahlia*. Both of those cases are

after *Johnson versus Poway*. Those are the controlling cases in this circuit.

But the district on one hand says, "We are not announcing a bright-line rule," on the other hand they are crafting such a rule with respect to public school employees.

Under the district's rule that's announced and that's applied against Coach Kennedy, visible religious conduct that may be observed by a student is prohibited. And respectfully, your Honor, that is just not what *Lane* and *Dahlia* permit. That is not the relevant analysis.

Here is what happened in *Poway:* The teacher in that case took advantage of his position to press his particular views upon the impressionable and captive minds before him. The court leaned heavily on the classroom context, the captive audience of students that were there. There is no classroom, there is no captive audience here.

Second, your Honor, briefly, as to *Borden*, the district wants to look at the eight-year history here and claim that is a factor in their favor. In fact, it is quite the opposite, your Honor. The district was wholly unaware of Coach Kennedy's religious expression for the first eight years of his tenure as a coach. That is how unobtrusive the religious expression is here.

What the district wants to do is claim the media attention resulting from the controversy it created, and say that creates an Establishment Clause violation.

Your Honor, that is simply not what is at issue. All that Coach Kennedy wants to do is take a knee at midfield for 15 to 30 seconds, for what is effectively a personal moment of silence. There is no federal court that should prohibit that religious expression. Thank you.

THE COURT: Thank you, Ms. Ricketts. First, I want to thank all participants for the written materials and the oral presentations that were made here today.

This is one of those cases that make you want to be a lawyer, to argue and deal with complex, sensitive issues in a public way. That's why I wanted to be a lawyer. I suspect that many of you feel the same way.

I am going to deny the motion for preliminary injunction. I am satisfied that under the 1983 elements for injunctive relief that the district did act under color of law, but they did not violate the constitutional right of free speech violation determined by *Pickering*.

The five elements or tests under *Pickering:* One, whether the plaintiff spoke on a matter of public concern: Yes. Two, whether the plaintiff spoke as a private citizen as opposed to a public employee: No. Three, whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action: Yes. Four, whether the state had an adequate justification for treating the employee differently from other members of the general public: Yes. Five, whether the state would have taken the adverse employment action even absent the protected speech: No. This is the reason that Coach Kennedy is no longer coaching for Bremerton.

He had a great opportunity, a great job, to influence young people. Most coaches would coach for free. Not the big coaching jobs at the university and all that, but the workaday coaches get a stipend, and it is not much. It is because they love the kids, they love the sport, they love the competition.

Coach Kennedy was dressed in school colors. He chose a time and event when the season is ten games, or nine games. It is one-tenth of the excitement for the students for that semester. It is a big deal. Under the lights. He used that opportunity to convey his religious views, as laudable as they were.

He was still in charge. He was still on the job. He was still responsible for the conduct of his students, his team. It is not a debatable point, from my perspective, that he was a private citizens as opposed to a public employee. He was on the job, as he would have wanted to be. And a reasonable observer, in my judgment, would have seen him as a coach, participating, in fact leading an orchestrated session of faith, of thanks, of fellowship. All those things are laudable. They just can't be happening on public property in this climate under the law.

For those reasons the preliminary injunction is denied, and I make no finding of mandatory versus prohibitory injunction. I am just focusing on Coach Kennedy's role as coach as determinative of this issue.

All right. Have a great week. Court will be at recess.

(Proceedings concluded.)

Appendix J

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
TACOMA DIVISION

No. CV16-5694RBL

JOSEPH A. KENNEDY,
Plaintiff,
v.
BREMERTON SCHOOL DISTRICT,
Defendant.

Relevant Docket Entry

Date Filed	#	Docket Text
		* * *
9/19/2016	25	MINUTE ENTRY for proceedings held before Judge Ronald B. Leighton - Dep Clerk: *Jean Boring*; Pla. Counsel: *Rebekah Ricketts*, *Jeffrey Heldson*, *Michael Berry*, *Anthony Ferate*; Def Counsel: *Michel Tierney*; CR: *Barry Fanning*; **Preliminary Injunction Hearing** held on 9/19/2016. Argument presented. For the reasons orally stated on the record, the 15 MOTION for Preliminary Injunction is DENIED. Hearing concluded. (JAB) (Entered: 09/19/2016.)
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Appendix K

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.