No. 21-418

In the Supreme Court of the United States

JOSEPH A. KENNEDY,

Petitioner

v.

BREMERTON SCHOOL DISTRICT,

Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* FAMILY POLICY ALLIANCE AND STATE FAMILY POLICY COUNCILS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae Family Policy Alliance and state family policy councils[2] advocate for educators, parents, and students in public schools. *Amici* write to give their perspective on the treatment of religious speech and other forms of controversial speech in school. Parents and children understand that not all faculty speech is attributable to schools. Context often demonstrates that such speech belongs to the individual teacher. Nevertheless, the religious speech of faculty members is silenced while other controversial speech is permitted. Rather than singling out religious speech to be silenced, more faculty speech must be protected so that neutrality can be maintained in our schools.

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[1] No counsel for a party authored this brief in whole or in part, and no party, party's counsel, or any person other than *amici curiae* or their counsel contributed money intended to fund preparation or submission of this brief. Counsel for all parties have consented in writing to the filing of this brief.

[2] Alaska Family Action, Center for Arizona Policy, California Family Council, Family Institute of Connecticut, Delaware Family Policy Council, Florida Family Policy Council, Hawaii Family Forum, Idaho Family Policy Center, Indiana Family Institute, The Family Leader (Iowa), Kansas Family Voice, The Family Foundation (Kentucky), Louisiana Family Forum, Christian Civic League of Maine, Michigan Family Forum, Minnesota Family Council, Nebraska Family Alliance, Family Policy Alliance of New Jersey, Family Policy Alliance of New Mexico, New Yorker's Family Research Foundation, North Carolina Family Policy Council, North Dakota Family Alliance, Pennsylvania Family Institute, Palmetto Family (South Carolina), Family Heritage Alliance (South Dakota), Texas Values, Family Policy Institute of Washington, Wisconsin Family Action, and Family Policy Alliance of Wyoming.

SUMMARY OF THE ARGUMENT

Bremerton School District justifies its suppression of Joseph Kennedy's religiously motivated speech on the basis that it had a compelling interest in avoiding an Establishment Clause violation. Because the lower courts agreed, it is critical that this Court provides guidance as to the application of the Establishment Clause and its reasonable observer standard.

One principle of modern Establishment Clause jurisprudence in the context of schools is that no student should be coerced by the power of prevailing, officially approved religious beliefs.[3] But in the time since the development of this jurisprudence, a new area of religious-like beliefs has grown in popularity: beliefs held with the zeal and fervor traditionally associated with religion, but without the historical connection to organized faith. These beliefs are now vigorously advocated within our schools, although doing so raises the same philosophical concerns that underlie Establishment Clause jurisprudence.

School officials are often quick to point out that such advocacy in the classroom is really the faculty member's own speech and not that of the school. Conversely, many schools like Bremerton immediately treat a faculty member's religious devotion as attributable to the school.

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[3] *See*, *e.g.*, *Engel v. Vitale*, 370 U.S. 421, 431 (1962) ("When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.").

As a result, traditional religious beliefs are uniquely targeted for censure, while a host of comparable, religious-like beliefs receive a free pass or even endorsement. Rather than creating "neutrality between religion and religion, and between religion and nonreligion,"[4] a reasonable observer would comprehend that traditional religion alone is being treated as poisonous and inappropriate in society. The solution to this problem, quite simply, is to give additional room for individual expression that, like Kennedy's, is not attributable to a school.

ARGUMENT

The Establishment Clause should not be used to single out and prohibit Kennedy's brief post-game prayer—one that others chose to join without solicitation—especially when teachers do in fact advocate and pressure students during school time on other subjects with a religious-like zeal.

I. The Logic Behind 20th Century Establishment Clause Jurisprudence Applies Differently in the Present Environment.

The Establishment Clause arose in the context of a new nation—a nation with strong regional religious beliefs, so strong that many of the states had their own established churches. Thus, in order to adopt a new federal constitution that unified the states and its people, it was critical that the federal government not take sides or repeat the mistakes of the

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[4] *McCreary Cty. v. ACLU*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas,* 393 U.S. 97, 104 (1968)).

constituent states. The Establishment Clause provided for full inclusion in the midst of the religious differences of the time.

Modern Establishment Clause jurisprudence dating from the mid-20th century also aims at full inclusion despite religious pluralism, but the scope of the modern doctrine differs in that it forbids practices long permitted in the early republic. Its scope is broader, not only because the Fourteenth Amendment incorporated the Establishment Clause to the states, but also because the growth of government made the overlap between church and state inevitable.[5]

Establishment Clause jurisprudence in schools has been characterized by efforts to create neutrality as to religion precisely in those contexts where previously the government had promoted religion. The rationale was that schools ought not pressure students when it came to their core beliefs. Teaching and promoting certain religious beliefs was offensive even to religious parents who contended that particular religious values, which not only differ between religions but also among denominations, were best taught in the home.

In the mid-20th century, our core belief systems—those that define our understanding of ourselves, our moral duties, and the deeper meaning of our existence—were synonymous with our religious beliefs. Americans have long experienced religious

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[5] *The Establishment Clause, Secondary Religious Effects, and Humanistic Education*, 91 YALE LAW J. 1196, 1198 (1982).

diversity, so that differences in these core belief systems have always been points of disagreement and sometimes deep controversy. By attempting to establish neutrality as to these areas of disagreement, our courts sought to create a respectful environment conducive to learning.

The context has changed dramatically. Today, many look to other belief systems to give life meaning and to inform the moral duties of society. Adherents care deeply about these beliefs, which often permeate persons' lives in such a way that they become intertwined with their core conception of self. These are not understood to be theistic religious beliefs, and yet they are embraced with a zeal that equals or far surpasses that of many adherents to traditional religions. Just like religions, these worldviews are heavily proselytized, and those who do not convert to the new orthodoxies can expect to encounter ongoing pressure, criticism, and marginalization.

In contrast to Kennedy's brief display of religious conduct following a game, many teachers have been directly advocating their belief systems within the classroom itself. This includes the use of books, flags, t-shirts, lesson plans, and more. Sometimes, this proselytizing has been carried out with a religious-like zeal that is worrisome even to those who might generally agree with that particular worldview.

If firing Coach Kennedy was intended to prevent impressionable school children from being pressured to adhere to controversial beliefs—beliefs which parents may disagree with, and which are better taught in the home—then the school's effort is both

underinclusive and overinclusive. It is underinclusive in that other belief systems are not included, and overinclusive in that it targets speech that is neither coercive nor attributable to the school.

Amici are not asking this Court to read new meaning into the Establishment Clause so as to apply its prohibitions to other belief systems (although the comparison here is instructive). Instead, this Court should reiterate a more rational and historic understanding of the clause, one that is friendlier to individual liberties as a whole. Indeed, teachers ought not "shed" their First Amendment rights "at the schoolhouse gate," *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969), because "a citizen who works for the government is nonetheless a citizen," *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006).

It is, of course, appropriate for schools to limit coercive speech, such as controversial flags and stickers placed by teachers in their classroom. Some schools limit such displays in order to foster impartiality and neutrality—whether directed to a teacher who puts a cross sticker on the door or to a teacher who flies a flag on the wall advocating another belief system. Stickers or flags that symbolize one particular belief system (whether popular or religious) certainly do carry with them a potential for government endorsement. Coach Kennedy's speech does not. His brief prayer following a game, by comparison, is both innocuous and de minimus.

Not only does Kennedy's speech steer clear of coercion, it is also not attributable to the school. Although classroom instruction is on the end of the

continuum that constitutes government speech, Coach Kennedy's brief prayer after a game is the opposite—private speech unconnected to the school. Parents and students alike know that individual faculty members are diverse in their beliefs, and even when they may disagree with a particular teacher, they do not automatically assume that his or her speech is endorsed by the school, particularly outside of instructional time. "The proposition that schools do not endorse everything they fail to censor is not complicated." *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990).

Besides, nobody could have assumed that the district endorsed Coach Kennedy's speech after it went to great lengths to distance itself from it. Conversely, when the mere hint of religious practice brings the consequences imposed on Kennedy, it is easy to surmise not only that the school is not neutral, but that it highly disfavors belief systems merely because they are viewed as "religious."

II. Government Neutrality Toward Religion Requires More Tolerance for the Religiously Motivated Individual Speech at Issue Here.

A core purpose of Establishment Clause jurisprudence has been neutrality towards religion. But when courts demand that religious voices be silenced, and when every display of personal religious conviction is treated like asbestos in a public school, a hazard which must be contained and removed, the result is not neutrality, but hostility. A reasonable, objective observer would recognize that among the myriad competing belief systems permitted in school,

traditional religion is now uniquely singled out and branded as unacceptable. Moreover, the critical treatment of religion is such that most students would perceive that speech on any number of controversial subjects is welcome in school, so long as it is not in any way favorable towards traditional religion. Ultimately, this communicates the sentiment that religion is like poison, and it should not be permitted in any civilized environment, particularly a school.

This outcome is avoided when we allow school employees to speak, and when it is clear that the school itself is not itself taking sides. There was no question that Kennedy's speech was not that of the school, a fact which the district made doubly clear when it issued a statement to that effect.

It is always better to favor protecting First Amendment speech and religious freedom than to invoke the Establishment Clause in a way that cannot serve its goal of neutrality. Singling out religious voices results only in systematically shaming religion and the religious.

Nor is this shaming merely implicit. As the Ninth Circuit stated earlier in this case, Kennedy's duties included "communicating the District's perspective on appropriate behavior" whenever "in the presence of students and spectators." *Kennedy v. Bremerton Sch. Dist.*, 869 F.3d 813, 825-27 (9th Cir. 2017). Likewise, the Ninth Circuit pointed out that Kennedy was to be a "role model." *Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004, 1015 (9th Cir. 2021).

There is no doubt what either the district or the

Ninth Circuit understood to be "appropriate behavior" or a "good role model." Clearly, in their estimation, this did not include the act of thanking God following the conclusion of a dangerous game. Not only was the district's discipline of Kennedy religiously targeted, but both the court and the school have exerted their authority to influence the way individuals think about religious exercise. If we truly want the government to remain neutral, we must allow individual speech and religious exercise to flourish.

CONCLUSION

The Court should not permit the Establishment Clause to be applied in such a way as to justify the discipline of a coach's brief prayer following a football game. To do so does not achieve neutrality but hostility.

Respectfully submitted,

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