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 JEWISH COALITION FOR RELIGIOUS LIBERTY; THE ISLAM AND RELIGIOUS FREEDOM ACTION TEAM OF THE RELIGIOUS FREEDOM INSTITUTE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether a public-school employee who says a brief, quiet prayer by himself while at school and visible to students is engaged in government speech that lacks any First Amendment protection.

2. Whether, assuming that such religious expression is private and protected by the Free Speech and Free Exercise Clauses, the Establishment Clause nevertheless compels public schools to prohibit it.

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INTEREST OF *AMICI CURIAE*[1]

The Jewish Coalition for Religious Liberty is a nonprofit organization—a group of lawyers, rabbis, and professionals who practice Judaism and defend religious liberty. The Coalition's members have written on the role of religion in public life. Representing members of the legal profession, and adherents of a minority religion, Amicus has a unique interest in ensuring the flourishing of diverse religious viewpoints and practices. The Coalition advocates for people of faith who practice their faith in religious services, schools, and the public square.

The Islam and Religious Freedom Action Team ("IRF") of the Religious Freedom Institute amplifies Muslim voices on religious freedom, seeks a deeper understanding of the support for religious freedom inside the teachings of Islam, and protects the religious freedom of Muslims. To this end, the IRF engages in research, education, and advocacy on core issues including freedom from coercion in religion and equal citizenship for people of diverse faiths. The IRF explores and supports religious freedom by translating resources by Muslims about religious freedom, fostering inclusion of Muslims in religious freedom work both where Muslims are a majority and where they are a minority, and by partnering with the Institute's other teams in advocacy.

Amici are interested in preserving the ability of religious individuals to participate in all aspects of

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[1] Rule 37 Statement: All parties have filed letters granting blanket consent to the filing of *amicus* briefs. No counsel for a party authored any part of this brief, the preparation and submission of which was funded by *amici* alone.

public life, without having to choose between their sincerely held religious beliefs and their chosen profession. The decision below blessed a heckler's veto on the public exercise of religion, at least when such an exercise occurs within a public school. *Amici* aim to highlight the ways in which this disfavored treatment of religion is an affront to the Nation's traditions and poses a particular danger to the members of minority faiths.

INTRODUCTION AND SUMMARY OF ARGUMENT

Adherents to Orthodox Judaism and other minority faiths such as Islam engage in public practices that may pique the curiosity or even ire of non-adherents. Uncommon practices are more likely to stand out or arouse curiosity, and therefore to be perceived as "visible to students." The Ninth Circuit Circuit's decision below would allow or perhaps even require public schools to ban such private religious conduct simply because of its heightened visibility. This Court should reverse the decision below and reaffirm that public-school teachers are permitted to engage in private non-coercive religious conduct even if it happens to be visible to students.

The Ninth Circuit's decision is out of step with this Court's precedent, as well as this Nation's history as a welcoming environment for members of minority faiths. The decision below extends this Court's precedent far beyond what this Court has ever required and distorts it in troubling fashion. Instead of closely scrutinizing the facts to see whether the Coach Kennedy's prayer was offered in an environment where attendance was compulsory by rule or societal expectation,

see Lee v. Weisman, 505 U.S. 577 (1992), or whether the religious message and messenger were vetted by the school, *see Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290 (2000), the Ninth Circuit took a near-categorical approach that a prayer by a public school official on school's property necessarily violates the Establishment Clause if such prayer is visible to students. The Ninth Circuit's approach is wrong and, if allowed to stand, would have a disproportionally harmful effect on the practitioners of minority faiths, such as adherents of Orthodox Judaism and Islam.

There are many instances in which an Orthodox Jewish teacher or coach would be religiously required to engage in brief quiet prayer that is visible and/or audible to his students. For example, Jewish law requires the recitation of blessings before and after eating and drinking. A Jewish coach sitting on the bench or standing on the sidelines at a football game would be required to follow such a requirement whenever he takes a drink of water or eats any food. The prayer after drinking may only take fifteen or twenty seconds, but the words must be actually recited and not merely kept in one's mind. Students are likely to notice their coach's seemingly "odd" behavior. Many Jewish people recite a prayer for safety while traveling between cities. A public-school coach traveling on a bus with his team would have to quietly recite this brief prayer while sitting near his players. There are numerous other situations where Observant Jews may make a contemporaneous blessing, including upon seeing a rainbow or lightning, or upon hearing thunder.

Simply put, for many Orthodox Jews, brief quiet prayer is a fact of every-day life, and may often have

to be uttered in front of other people. If this Court were to determine that the Establishment Clause compels public schools to prohibit employees from engaging in such conduct, it could effectively bar Orthodox Jews from teaching in public schools. A Jewish Coach uttering a quiet prayer upon seeing a rainbow does not coerce anyone into following Judaism, and no reasonable observer would believe that the State had established Judaism by allowing him to engage in this brief personal behavior. The Ninth Circuit's extension of *Lee* and *Santa Fe* significantly beyond what those cases require stretches the logic of those cases well past the breaking point. This Court should not endorse this erroneous approach and accordingly should reverse the judgment below.

ARGUMENT

I. The Ninth Circuit Misapplied this Court's Establishment Clause Doctrine

This Court has recognized that there are situations in which public-school teachers, or their representatives, may not engage in religious conduct at a public-school. *See Santa Fe*, 530 U.S. 290; *Lee*, 505 U.S. 577. But even under those precedents, the Bremerton School District, and ultimately the courts below, went too far in limiting Coach Kennedy's ability to offer a voluntary, but public prayer.

The touchstone of *Lee* and *Santa Fe* is coercion. Even leaving aside the problems with that approach identified by Justice Scalia in his dissent in *Lee*, the Court has never held that students would or could be coerced simply by seeing a figure of authority offer a prayer. Instead, Court has limited the coercion rationale to situations that created a particular risk of

coercion. Thus, in *Lee*, the Court concluded that the students had no true choice to either object to the prayer being offered or to forego attending the graduation exercises in the first place because declining to attend graduation would result in "forfeiture of those intangible benefits which have motivated the student through youth and all her high school years." *Lee*, 505 at 595. But the same is not true for prayers being offered *after* a football game. At that point, the school event has concluded. The football players could choose to hit the showers or to mill around the field, or, if they wanted, to attentively observe Coach Kennedy or to join in his prayer, or even to hoot and holler while he prayed. Indeed, "[a] photo taken after the October 23 game shows Kennedy kneeling alone on the field while players and other individuals mill about." *Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004, 1013 (9th Cir. 2021).

Such lack of felt compulsion should come as no surprise. Unlike during a graduation ceremony, where solemnity is both expected and enforced (on pain of having one's diploma delayed or withheld) there are no such expectations on a school football field following a game. In fact, as both courts below found, even when asked by students whether they could join him in prayer, Coach Kennedy declined to give an affirmative answer and instead stated: "This is a free country. You can do what you want." *Id.* at 1010. Thus, the coercion rationale, such as it is, is simply inapplicable to the situation where a school staff member offers a quiet (though audible) prayer in public view. If Coach Kennedy's prayer can be viewed as "coercive" then so can a teacher wearing any religious attire (from a crucifix, to a yarmulke, to a hijab), or any other display of faith, such as marking one's

forehead with an ash cross on Ash Wednesday.[2] In other words, the Ninth Circuit's rule would transform this country's tradition of religious tolerance and accommodation to a tradition of *laïcité* — a practice that may be acceptable in parts of Europe, but that is wholly foreign to our country and violative of our laws, traditions, and historical practices.

Nor is this case like *Santa Fe*. In *Santa Fe*, this Court reemphasized that "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." 530 U.S. at 302 (quoting *Board of Ed. of Westside Community Schools (Dist.66) v. Mergens*, 496 U.S. 226, 250 (1990) (opinion of O'Connor, J.)) (emphasis in original). The Court, however, concluded that when the school selects a particular student, permits that student to deliver a message over the school-operated loudspeaker system, enforces "particular regulations that confine the content and topic of the student's message," has a policy that "by its terms, invites and encourages religious messages," and "fail[s] to divorce itself from the religious content in the invocations," the speech is government

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[2] In fact, some Courts have come to exactly that conclusion. *See, e.g.*, *Cooper v. Eugene Sch. Dist. No. 4J*, 723 P.2d 298 (Or. 1986) (holding that wearing a religious outfit required by the Sikh religion is incompatible with the role of a public school teacher), *abrogated on other grounds by Brian v. Oregon Government Ethics Commission*, 874 P.2d 1294 (Or. 1994); *United States v. Bd. of Educ. for Sch. Dist. of Philadelphia*, 911 F.2d 882, 898-901 (3d Cir. 1990) (Ackerman, J., concurring) (concluding that permitting a teacher to wear a hijab would violate the Establishment Clause).

speech and as such, subject to the strictures of the Establishment Clause. *Id.* at 302-08. All of the factors that the Court identifies as weighing against the constitutionality of prayer in *Santa Fe* are absent here. What is more, the record indicates that the Bremerton School District did everything possible to disassociate itself from Coach Kennedy's prayers, and that such disassociation was widely known in the community.

To recapitulate, unlike in *Sante Fe*, the school did not select Coach Kennedy to give an invocation. The school did not provide Coach Kennedy with any equipment such as a loudspeaker, a microphone, a screen projector, or the like. The school did not feature Coach Kennedy's prayers in any of its promotion materials. Nor did the school edit the "content and topic" of Kennedy's message. Considering the totality of the school's connection to Kennedy's speech—including its obvious disapproval—no reasonable observer would believe that it had controlled or directed his message.

The Establishment Clause does not require the government to stamp out religious expression in public schools, and the Free Exercise Clause does not permit it do so. *See Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995). To require the school to actively suppress Coach Kennedy's religious speech to ensure that no one would confuse that speech for school's own speech, "would be merely bizarre were religious speech simply *as* protected by the Constitution as other forms of private speech; but it is outright perverse when one considers that private religious expression receives *preferential* treatment under the Free Exercise Clause." *Capitol Square*, 515 U.S. at 766 (emphasis in original) (opinion of Scalia,

J., joined by Rehnquist, C.J., Kennedy, and Thomas, JJ.)

For these reasons, permitting Coach Kennedy's religious speech and practices would not run afoul of the Establishment Clause's strictures as construed by *Lee* and *Santa Fe*. The Bremerton School District therefore has no interest, compelling or otherwise, to restrict such practices.

II. The Ninth Circuit's Approach Would Cause Disproportionate Harm to the Adherents of Minority Faiths.

The rule adopted by the Ninth Circuit would, if allowed to stand, disproportionately harm the adherents of minority faiths — perhaps to the point of driving them out of jobs in public education altogether. The caveats in the Court of Appeals' opinion are simply insufficient.

For example, adherents of Orthodox Judaism have an exacting set of rules that they must follow in everyday life which cover everything from their dress to the prayer said upon exiting the bathroom. Orthodox Judaism demands that certain activities be accompanied by a blessing, and that the blessing be spoken rather than merely thought internally. Thus, an Orthodox Jewish coach may be *religiously obligated* to say a prayer upon seeing a rainbow over a game, or upon taking a drink of water during the game. A prayer said over the rainbow must be said *immediately* and not at some later point in time. Similarly, prayers over the drink of water must be said before and after the drink is taken. Thus, an "accommodation" suggested by the Bremerton School District of

having Coach Kennedy pray after everyone has gone home, or to retire to a separate location to pray there would simply not be sufficient to allow an Orthodox Jew in Coach Kennedy's position to meet his religious obligations.

Similarly, consider an observant Jewish or Muslim school staff member who serves as a chaperone on a field trip. Both Judaism and Islam require the offering of prayers during certain times of day. Certain prayers can only be offered during a specific time of day (*e.g.*, before noon, after sunset, etc.). In the wintertime, the timeframe for saying certain prayers (which must be said in the afternoon, but before sundown) may be quite short. Thus, an observant Jewish or Muslim staff member may be religiously obligated to pray while riding on the bus or a train during the field trip, and while surrounded by students. Indeed, under Jewish law, an observant coach would be obligated to say a special prayer for travelling while on the bus with his students. Under the Ninth Circuit's view, such prayers would be impermissible. If that rule were allowed to stand, then an observant Jewish or Muslim individual would face substantial pressure to either forgo his faith or quit public school employment. The Establishment Clause does not impose that Hobbesian choice.

True enough, the Ninth Circuit took pains to point out that the law does not "require[] 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," 991 F.3d at 1025, and that "a teacher bowing her head in silent prayer before a meal in the school cafeteria [does not] constitute speech as a government

employee," *id.* at 1015. But such carve-outs are wholly insufficient, and oddly enough privileges a Christian mode of praying over that of minority religion. "[B]owing [one's] head in silent prayer before a meal" is a traditionally Christian way of offering thanks. In contrast, three or more Jews enjoyed a substantial meal together, then a short communal and responsive post-meal prayer must be offered.

Other examples abound. For example, the 9th day of the month of Av on the Jewish calendar commemorates the destruction of the two Jewish Temples. Observant Jews observe a number of restrictions on this day. One of such practice is to forgo many worldly comforts and to show visible signs of mourning. Thus, an observant Jewish teacher might lower his chair or sit on a folding chair instead of his usual comfortable chair in order to show a sign of mourning for the temple. Similarly, eating Matzah during Passover is a religious commandment. Under the Ninth Circuit's approach, it is unclear whether a teacher can choose to sit in an uncomfortable chair or eat matzah for lunch on Passover if students might see him engaging in such practices. And even if these practices do pass the Court of Appeals' test (which is by no means clear), one is left wondering whether such a teacher may be permitted to give a religious explanation for his activities were a student to ask about the teacher's seemingly "odd" behavior.

That religiously observant individuals, especially those of minority faiths, can never be sure about the scope of their right to observe commandments of their faith in the school setting is reason enough for this Court to reject the Ninth Circuit's reasoning.

CONCLUSION

This Court should reverse the decision below.

Respectfully submitted,

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