

No. 21-418

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In The  
**Supreme Court of the United States**

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JOSEPH E. KENNEDY,

*Petitioner,*

v.

BREMERTON SCHOOL DISTRICT,

*Respondent.*

—◆—  
**On Writ Of Certiorari To The  
United States Court Of Appeals  
For The Ninth Circuit**

—◆—  
**BRIEF FOR THE AMERICA FIRST  
POLICY INSTITUTE AS *AMICUS CURIAE*  
IN SUPPORT OF PETITIONER**

—◆—  
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**INTERESTS OF *AMICUS CURIAE***

The America First Policy Institute (“AFPI”) is a non-profit, non-partisan research institute that exists to conduct research and develop policies that put the American people first.<sup>1</sup> Our guiding principles are liberty, free enterprise, national greatness, American military superiority, foreign-policy engagement in the American interest, and the primacy of American workers, families, and communities in all we do.

Coach Lou Holtz serves as the Chair of the Center for 1776 at AFPI. Holtz is considered one of the most successful college football coaches of all time. In college, Holtz enrolled in the Army ROTC and later served as an Officer in the United States Army Reserve. He played linebacker at Kent State for two seasons before an injury ended his career. In addition to his extensive career as head football coach for several universities, including Notre Dame, William & Mary, Minnesota, Arkansas, and North Carolina State, he was the head coach of the NFL’s New York Jets. He later was a college football studio analyst on ESPN and is currently in his second year with SiriusXM Radio as a co-host for two sports programs. On December 3, 2020, Coach Holtz was awarded the Presidential

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<sup>1</sup> Pursuant to Rule 37(3)(a), blanket consent by all parties for the filing of *amicus* briefs in support of Coach Kennedy were filed on January 21, 2022. Pursuant to Rule 37(6), undersigned counsel represents further that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Further, no person other than the *amicus curiae* made a monetary contribution to its preparation or submission.

Medal of Freedom for his contributions to our society by President Donald Trump.

Mr. Jack Brewer serves as the Chair of the Center for Opportunity Now, and Vice-Chair of the Center for 1776 at AFPI. Mr. Brewer is a White House appointee on the Congressional Commission for the Social Status of Black Men and Boys and is currently a Professor at Fordham Gabelli School of Business, where he has created curriculum tailored for transitioning athletes and prisoners. Mr. Brewer was a team captain for the NFL's Minnesota Vikings, New York Giants and Philadelphia Eagles. As a young man, Mr. Brewer's involvement in sports prevented him from making some of the bad decisions that were made by his peers. Brewer went on to attend Southern Methodist University where he was a two-sport athlete, breaking the Disney World Classic record in triple jump, and was an All-American candidate as a wide receiver in football. He later transferred to the University of Minnesota, where he continued as an All-Big Ten athlete in track and football and served as a vocal team captain. He earned both his bachelor's and master's degrees from the University of Minnesota by the age of 22. Mr. Brewer is an ordained minister, and his humanitarian work, including at AFPI, is focused heavily on the crisis of fatherlessness in the country.

As citizens, athletes, coaches, policy experts, and civic leaders, *amicus* interest in this case comes from their deep concern for the loss of First Amendment religious liberty rights of coaches and athletes in public schools to express their faith and what the loss of such



coaches will mean for the next generation of at-risk Americans. *Amicus* seeks to bring their experience and expertise to bear in assisting this Court to resolve the question before it: Whether a public school must prohibit a public-school employee who says a brief, quiet, prayer by himself while at school and visible to students.



### SUMMARY OF THE ARGUMENT

Joseph Kennedy is a high-school football coach and devout Christian who feels compelled to kneel and say a brief, quiet prayer of gratitude at the 50-yard line after each game – conduct that is not constitutionally prohibited under any fair reading of this Court’s jurisprudence. While the lower court’s opinion addressed issues of free speech and free exercise, its analysis ultimately turned on its incorrect interpretation of Establishment Clause precedent, such as *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315, 120 S. Ct. 2266, 147 L. Ed. 2d 295 (2000). *Kennedy v. Bremerton Sch. Dist.*, No. 20-35222, 2021 U.S. App. LEXIS 21253, at \*11 (9th Cir. July 19, 2021). Although the lower court spent several pages addressing the free speech rights of government employees (and Petitioner persuasively refutes the lower court’s reasoning in regards to such speech and free exercise), it concluded by admitting that “even if [Coach Kennedy] spoke as a private citizen, [Bremerton School District (“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.” *Kennedy*, 2021 U.S. App. LEXIS 21253, at \*25. A close analysis of the Court’s recent pronouncements on the Establishment Clause show that the lower court fundamentally misapplied the precedent in this case by ignoring “longstanding” historical practice of expressions of faith in sport in America far more overt than Coach Kennedy’s brief, quiet kneel.

Beyond this failed precedential analysis, the policy cost of an ahistorical separation of sport and faith in the public square will be profound. Decades of social science research – and the lived experience of Coach Holtz and Mr. Brewer – makes clear the importance of sports mentorship on the lives of at-risk youth. Depriving coaches of faith from the opportunity to exercise that faith in any visible way when they traverse the schoolhouse transom will drive faithful coaches from public schools and deprive those they would otherwise mentor of critical opportunities for growth.



## ARGUMENT

### **I. Visible Expressions of Faith in Sports Cannot Be Unconstitutional When Overt Expressions of Faith in Sports are a “Longstanding” American Practice Whose Historical Lineage Shows No Establishment Clause Violation.**

Prayer in sports has a “longstanding” heritage critical to the constitutional inquiry, but unaddressed in the lower court’s decision. In *American Legion v. American Humanist Association*, the Court rejected the use of the *Lemon* test’s Establishment Clause analysis and instead moved “toward application of a *presumption of constitutionality* for longstanding monuments, symbols, and *practices*.” *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2081-82, 204 L. Ed. 2d 452, 467-68 (2019) (emphases added). The *American Legion* Court spoke favorably of rulings such as *Marsh v. Chambers*, 463 U.S. 783 (1983), in which the “Court upheld the Nebraska Legislature’s practice of beginning each session with a prayer by an official chaplain,” finding it “highly persuasive that Congress for more than 200 years had opened its sessions with a prayer and that many state legislatures had followed suit.” *Id.* at 2087, 204 L. Ed. 2d at 473-74.

Longstanding, accepted religious practice, far from providing an exception to Establishment Clause violations, shows the Court that there is no such violation present. In *Town of Greece v. Galloway*, the Court underscored as much: “*Marsh* must not be understood as permitting a practice that would amount

to a constitutional violation if not for its historical foundation. The case teaches instead that the Establishment Clause *must be interpreted by reference to historical practices and understandings.*” *Town of Greece v. Galloway*, 572 U.S. 565, 576, 134 S. Ct. 1811, 1819, 188 L. Ed. 2d 835, 846 (2014) (internal citations and quotation marks omitted) (emphasis added). In *Town of Greece*, the Court upheld a town’s practice of prayer by volunteer chaplains before legislative sessions against Establishment Clause challenge. *Id.*

The Court is well-aware of the overwhelming historical evidence of public and official invocations of prayer broadly. In *McCreary County v. American Civil Liberties Union of Kentucky*, Justice Scalia laid out a litany of such official and quasi-official sanctioned prayers,

including the First Congress’s beginning of the tradition of legislative prayer to God, its appointment of congressional chaplains, its legislative proposal of a Thanksgiving Proclamation, and its reenactment of the Northwest Territory Ordinance; our first President’s issuance of a Thanksgiving Proclamation; and invocation of God at the opening of sessions of the Supreme Court . . . Washington’s prayer at the opening of his Presidency and his Farewell Address, President John Adams’ letter to the Massachusetts Militia, and Jefferson’s and Madison’s inaugural addresses.

*McCreary Cnty. v. ACLU*, 545 U.S. 844, 895, 125 S. Ct. 2722, 2754, 162 L. Ed. 2d 729, 769 (2005) (Scalia, J.,

dissenting). The longstanding historical practice of these completely acceptable, overt, governmental prayers applies no less to protect Coach Kennedy's visible, silent, after-game prayer on a public school football field.

Similarly, public expressions of faith in sports *specifically* have long been accepted as part of our Nation's "historical practices and understandings." "Historians and anthropologists have mapped a relationship between religion and sport that spans approximately three thousand years" to our intellectual forebears in Ancient Greece. NICK J. WATSON, ET AL., *SPORTS AND CHRISTIANITY: HISTORICAL AND CONTEMPORARY PERSPECTIVES* 9 (2013) [hereinafter *SPORTS AND CHRISTIANITY*]. Even Odysseus (whose Sirens were cited in the opening line of the lower court's denial of rehearing en banc) prayed before the athletic competition of a footrace in Homer's *Iliad*. *Kennedy*, U.S. App. LEXIS 21253, at \*9; HOMER, *THE ILIAD*, BOOK 23 available at <https://www.theoi.com/Text/HomerIliad23.html>.

As sports became popularized in American and British culture in the 1800s, a strong association between athletic and Christian virtues developed. This relationship between faith and sports can be characterized by "fair play, respect (both for oneself and others), strength (physical and emotional), perseverance, deference, subordination, obedience, discipline, loyalty, cooperation, self-control, self-sacrifice [and], endurance." *SPORTS AND CHRISTIANITY* at 28 (internal citation omitted). These ideas became associated with the increasingly popular sports of rugby and cricket in

England, and the idea of cultivating high school aged men into “good Christian gentlemen.” SPORTS AND CHRISTIANITY at 19; *See, e.g.*, THOMAS HUGHES, TOM BROWN’S SCHOOLDAYS (1857). The doctrine “quickly gained acceptance in America, in particular through the Young Men’s Christian Association (YMCA) and the ministry of D.L. Moody.

This concept rose to prominence at the same time as American football’s ascendance in the late 1880s in the Ivy League and the two shared an “ethos”:

That ethos was on full display in 1893, when journalist Richard Harding Davis published an account of the Yale/Princeton Thanksgiving Day game in Harper’s Weekly. He concluded his essay with a glimpse of the victorious Princeton locker room. . . . Davis wrote, “the eleven men who had won the championship sang the doxology from the beginning to the end . . . ”

Paul Putz, *Football and the Political Act of Prayer*, RELIGION & POLITICS, Aug. 28, 2018 available at <https://religionandpolitics.org/2018/08/28/football-and-the-political-act-of-prayer/>. Princeton even erected a statue that depicted one of its storied football captains to exemplify these values and titled it “The Christian Student.” *Id.*

This intertwining of public expressions of faith in sports continued unabated into the 1920s, taking on special significance for Catholics at Notre Dame at a

time of anti-Catholic “hostility.” *Id.* “Notre Dame players received communion and a saint medal that had been blessed by the campus chaplain, Father John O’Hara. These religious rituals were publicized, ensuring that Catholics and non-Catholics alike would see, as O’Hara put it in 1929, that ‘Notre Dame football is a spiritual service.’” *Id.*

In the 1950s and 1960s, as “sports occupied an increasingly significant role” in American society, athletic ministries such as the Fellowship of Christian Athletes and Athletes in Action sprang up that were committed to the expression of faith in college and professional sports. SPORTS AND CHRISTIANITY at 139. Football players like Bill Glass and coaches like Tom Landry became popular exemplars of faith. *Id.* at 140. Storied baseball players like Bobby Richardson formed groups of believers into Baseball Chapels before games. *Id.* at 142.

In our own era, athletes at every level continue to exhibit their faith in public. “The extent of prayer and/or spiritual rituals before, during and after sporting contests permeates today’s prep, collegiate, club, and professional sports.” Daniel R. Czech, et al., *The Experience of Christian Prayer in Sport: An Existential Phenomenological Investigation*, 23 *Journal of Psychology and Christianity* 3, 3-11 (Jan. 2004). Studies have found that a majority of male and female high school athletes surveyed “prayed in association with athletic events.” *Id.* Football quarterback Tim Tebow’s famous gesture of kneeling in silent, visible prayer

after each touchdown led to a public copying of this act in many different contexts. Patton Dodd, *God's Quarterback*, THE WALL STREET JOURNAL, Dec. 10, 2011 available at <https://www.wsj.com/articles/SB10001424052970203413304577084770973155282>. The creator of a website that captured such acts, [tebowing.com](http://tebowing.com), said, "It has made prayer in public something to not be ashamed of," he says. "I think that crosses all religious boundaries." *Id.*

Such "longstanding" and widespread historical practice such as prayer in sports deserves the "presumption of constitutionality" promised in *American Legion*. Put another way,

when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down. Such a venerable and accepted tradition is not to be laid on the examining table and scrutinized for its conformity to some abstract principle of First Amendment adjudication devised by this Court. To the contrary, such traditions are themselves the stuff out of which the Court's principles are to be formed. They are, in these uncertain areas, the very points of reference by which the legitimacy or illegitimacy of other practices is to be figured out. When it appears that the latest "rule," or "three-part test," or "balancing test" devised by the Court has placed us on a collision course with such a landmark practice, it is the former that



must be recalculated by us, and not the latter that must be abandoned by our citizens.

*Rutan v. Republican Party*, 497 U.S. 62, 95-96, 110 S. Ct. 2729, 2748, 111 L. Ed. 2d 52, 80 (1990) (Scalia, J., dissenting). Instead of recognizing this, the lower court opinion failed to even attempt to address the historical practice regarding expressions of faith in sports.

As Petitioner rightly points out, *Santa Fe* involved a different set of facts – spoken prayer over school loudspeakers before a game that the Court determined was public and school sponsored as opposed to silent, private prayer that all knew was not supported by the school district. But the overwhelming evidence of historical practice of more overt acts of faith in the sports setting in public, as well as the instructions of *American Legion* regarding such longstanding traditions, makes obvious the constitutionality of Coach Kennedy’s religious expression.

## **II. Prohibiting Coaches from Engaging in Visible, Private Prayer at Public Schools Will Discourage Faithful Coaches and Teachers from Mentoring and Guiding At-Risk Youth with Disastrous Consequences.**

The Court has long recognized the dimension of moral development involved in education. “The role and purpose of the American public school system [is to] prepare pupils for citizenship in the Republic . . . inculcate the habits and manners of civility as values

in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.” *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 681, 106 S. Ct. 3159, 3163, 92 L. Ed. 2d 549, 557 (1986) (internal citation omitted). The Court recently pointed out that the very Congress that passed the Establishment Clause explicitly recognized the critical relationship between religion, morality, and public-school instruction. *Am. Legion*, 139 S. Ct. at 2087 (“The prevalence of this philosophy at the time of the founding is reflected in other prominent actions taken by the First Congress . . . it reenacted the Northwest Territory Ordinance, which provided 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.’”).

Many have recognized sports as a means of inculcating such values. In 1945, Pope Pius XII noted,

Sport, properly directed, develops character, makes a person courageous, a generous loser, and a gracious victor; it refines the senses, gives intellectual penetration, and steels the will to endurance . . . sport is an occupation of the whole person, and while perfecting the body is an instrument of the mind, it also makes the mind itself a more refined instrument for the search and communication of truth.

SPORTS AND CHRISTIANITY at 257.

Athleticism alone, however, does not good character make: the headlines are replete with the moral shortcomings of gifted athletes. Indeed, some studies have even shown a correlation between participation in sports and involvement in aggressive behavior. *See, e.g.,* Jodi M. Burton and Dr. Lisa A Marshall, *Protective Factors for Youth Considered At Risk of Criminal Behaviour: Does Participation in Extracurricular Activities Help?*, 15 *Criminal Behaviour and Mental Health* 46-64 (Mar. 2005).

Instead, the nature of the sports environment cultivated by coaches, mentors, and teammates is critical to positive outcomes. Peter Arnold, *Sport, Moral Development, and the Role of the Teacher: Implications for Research and Moral Education*, 53 *Quest*. 135-150 (2001). A 2017 study of adolescents at risk of juvenile delinquency evaluated exactly what kind of sports-based programs had the greatest success in reducing delinquency.

More precisely, higher quality of the coach-athlete relationships, better sociomoral atmosphere within the team, higher level of fair play attitudes by the coaches and the athletes, and more relational support of the coach were all related to lower levels of antisocial behavior and higher levels of prosocial behavior.

...

The findings that coach behaviors and the sociomoral climate at the sports club predicted intervention success were in line with expectations that arose from previous studies

on the relation between sports participation and youth development. . . . Positive educational behaviors of the coach may directly reduce antisocial tendencies and reinforce prosocial behavior, and contribute to the quality of the sports environment. Coaches for at-risk youths should . . . be reflective of their own behaviors as a role model to maximize the potential of sports-based interventions. The positive skills, virtues, and relationships that are developed in the sports environment can then be used into the broader life domains, improving risk and protective factors, and preventing juvenile delinquency.

Anouk Spruit, et al., *Predictors of Intervention Success in a Sports-Based Program for Adolescents at Risk of Juvenile Delinquency*, 62 *International Journal of Offender Therapy and Comparative Criminology*, 1535-1555 available at <https://journals.sagepub.com/doi/full/10.1177/0306624X17698055> (internal citations omitted).

The positive effect of the cultivation of a “socio-moral atmosphere” aligns with significant academic research on the power of religion broadly in improving the lives of at-risk youth. In fact, youth participation in religious activities has an inverse relationship with criminal delinquency in youth populations. “There is [] increasing evidence that religious involvement may lower the risks of a broad range of delinquent behaviors, including both minor and serious forms of criminal behavior.” BRYAN JOHNSON & CURTIS SCHROEDER, *RELIGION, CRIME, & CRIMINAL JUSTICE*

(2014) available at <http://www.baylorisr.org/wp-content/uploads/ReligionCrime-and-Criminal-Justice.pdf>; see also David Evans et al., *Religion, Social Bonds, and Delinquency*, 17 *Deviant Behavior* 43-70 (1996). In fact, of 109 studies on the relationship between criminal delinquency and religious adherence “the vast majority of the studies report[ed] a beneficial relationship between measures of religion or religious commitment and various crime and delinquency measures or outcomes.” *Id.* Of the 109 studied, 97 found a beneficial and inverse relationship between religion and criminality. *Id.* These findings should cause the Court great pause in doing anything to discourage the religious expression of Coach Kennedy.

The effect on specific segments of at-risk youth are even more pronounced. Specific to low-income neighborhoods, researchers have found that church attendance made “young black males from high-poverty neighborhoods substantially more likely to ‘escape’ poverty, crime and other social ills.” DAVID LARSON & BYRON JOHNSON, *RELIGION: THE FORGOTTEN FACTOR IN CUTTING YOUTH CRIME AND SAVING AT-RISK URBAN YOUTH* (1998) available at <https://www.manhattan-institute.org/html/religion-forgotten-factor-cutting-youth-crime-and-saving-risk-urban-youth-5880.html>; see also Richard Freeman, *Who Escapes? The Relation of Church-Going and Other Background Factors to the Socio-Economic Performance of Black Male Youths From Inner-City Poverty Tracts*, National Bureau of Economic Research, Cambridge, MA (1985) available at <https://www.nber.org/papers/w1656>.

Mr. Brewer has dedicated his life to battling fatherlessness in America. “According to many social scientists and theologians, we live in a ‘fatherless generation’ that is characterized by family breakdown and dysfunction and is leading to social and moral fragmentation.” SPORTS AND CHRISTIANITY at 36. One in four children in the United States grows up without a father, “the highest rate of children living in single-parent households of any nation in the world.” Jack Brewer, *Fatherlessness and its Effects on American Society*, America First Policy Institute, Feb. 15, 2022 available at [https://americafirstpolicy.com/assets/uploads/files/Fatherhood\\_Research\\_Paper\\_V2.pdf](https://americafirstpolicy.com/assets/uploads/files/Fatherhood_Research_Paper_V2.pdf). Children without fathers fare “far worse” in nearly every metric.

90 percent of all homeless and runaway children (Research and Statistics), 63 percent of teen suicides, and 85 percent of children and teens with behavioral disorders come from fatherless homes (Martinez, 2011). Similarly, fatherless families are 25 percent more likely to raise children in poverty (U.S. Census Bureau, 2020). Children without fathers are also 10 times more likely to abuse chemical substances, and 71 percent of all children who abuse substances come from fatherless homes (National Center for Fathering).

*Id.*

However, at-risk youth with a mentor in their life “are 46 percent less likely to use drugs and 81 percent

more likely to participate in sports or other forms of extracurricular activities.” *Id.* Researchers in this area are exploring how sport can be used as a vehicle to father and mentor youth and “inculcate desirable character attributes and practices for healthy civil engagement.” *See, e.g.*, TESS KAY, *FATHERING THROUGH SPORT AND LEISURE* (2009).

Coach Holtz’s and Mr. Brewer’s life stories validate the scientific findings. Sports, mentorship, and faith played a vital role in Mr. Brewer’s escape from a difficult upbringing. Mr. Brewer grew up in poverty in Grapevine, Texas, and when he was 11 years old he had to help his own father with reading. His mother’s rich faith had a lifelong impact on him, and the skills of discipline and teamwork that he learned on the football field helped drive him forward. This, alone, was not enough, and Mr. Brewer stumbled in his faith until a friend’s encounter with death led to a re-commitment to Christ that catalyzed his life and made him a national champion for fatherhood and mentorship of at-risk youth.

Similarly, faith shaped the life of Coach Lou Holtz. Coach Holtz grew up in Depression-era West Virginia, but turned to his faith to overcome the challenges he faced growing up, in the military, on the field, and in the coaching profession. “Don’t lose your faith. I don’t know how people get along without faith,” he said. “I can’t begin to tell you how many times I prayed when Michigan was on our 2-yard line. . . . Have faith in God, because God won’t make your life easier but he will always be there with you.” Lucas Masin-Moyer, *Lou*

*Holtz Discusses Importance of Faith, Purpose*, THE OBSERVER, Feb. 12, 2018, available at <https://ndsmcobserver.com/2018/02/holtz-faith-purpose/>. “We are born basically to serve our Lord and help other people.” *Id.*

Mr. Brewer and Coach Holtz are not alone. A wide body of biography exists on the impact that prayer and faith have had in the transformation of the lives of athletes and coaches. SPORTS AND CHRISTIANITY at 144 (“A seemingly limitless market for biographies of Christian athletes and coaches is fed by some of the most popular Christian publishing houses.”). Indeed, Super Bowl coach Tony Dungy, who publicly integrated faith in his NFL coaching career, wrote a memoir emphasizing the power of faith in his life: “People look at me and see a calm, cool guy on the sidelines, and I want them to know that my Christian faith affects my coaching and everything I do.” Kevin Jackson, *Super Bowl Coach Dungy Emphasizes God as Priority in Memoir*, CHRISTIAN POST, Jul. 11, 2007 available at <https://www.christianpost.com/news/super-bowl-coach-dungy-emphasizes-god-as-priority-in-memoir.html>.

Strong coaches with strong faith can exhibit prosocial behavior, provide guidance and motivation, and make all the difference in the lives of at-risk youth, but they will not choose to work in public schools if forced to shed their constitutional rights at the schoolhouse gate. The lower court’s denial of rehearing en banc argued that “[a]n integral part of Kennedy’s job was serving as a mentor and role model to students” and that Coach Kennedy described himself this way in depositions. *Kennedy*, 2021 U.S. App. LEXIS 21253, at \*39.



But the lower court's ruling would discourage coaches of faith like Coach Kennedy, who also testified that to stop saying a brief and silent prayer of thanks after the games would be a violation of his conscience. Stamping the Court's approval on Coach Kennedy's firing by the school district would send a message to government employees of any religious faith that they are not welcome to coach or mentor in public schools when our society needs them most. Social science predicts the folly of such an approach. We owe vulnerable American children better.

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## CONCLUSION

Prohibiting faithful coaches from silent, visible prayer on public school grounds is neither required by this Court's jurisprudence nor wise as a matter of policy. For the foregoing reasons, the decision of the Ninth Circuit should be reversed.

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