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* LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. *ET AL.* IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE*

Amici Curiae are Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal"), the Human Rights Campaign ("HRC"), COLAGE, Family Equality, GLSEN, Keshet, PFLAG, and Equality California ("EQCA"), national and statewide organizations advocating to reduce discrimination and to increase safety, acceptance, and inclusion of lesbian, gay, bisexual, transgender, and queer ("LGBTQ") people and their families, especially including students and other young people. *Amicus* People For the American Way ("PFAW") is a national organization that shares these objectives as well as related concerns about preventing discrimination and promoting religious liberty.

Amicus Lambda Legal is the Nation's oldest and largest legal organization advocating for full recognition of the civil rights of LGBTQ people and everyone living with HIV, through impact litigation, education, and policy advocacy. Lambda Legal has participated as party counsel or *amicus curiae* in many cases navigating issues of religious liberties and rights to freedom from discrimination. *See, e.g.*, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021); *Masterpiece Cakeshop v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719 (2018); *EEOC v. Abercrombie & Fitch Stores*, 575 U.S. 768 (2015); *Obergefell v. Hodges*, 576 U.S. 644 (2015); *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez*, 561 U.S. 661 (2010); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996).

The Human Rights Campaign ("HRC"), representing more than three million members and supporters, strives to end discrimination against LGBTQ people and realize a world in which LGBTQ people are ensured of their basic equal rights and can be open, honest, and safe at home, at work, in school, and in every community.

COLAGE is the only national organization expressly dedicated to supporting people with one or more LGBTQ parents or other caregivers, uniting them for more than thirty years into a network of peers and supporting them as they nurture and empower each other to be skilled, self-confident, and just leaders in their communities.

Family Equality is a national organization committed to ensuring legal and lived equality for LGBTQ families, and for those who wish to form them, through building community, changing hearts and minds, and driving policy change. For over 40 years, Family Equality has cultivated connections between LGBTQ family members, parents, children, grandparents, and grandchildren, reaching across the country and raising voices toward fairness for all families. The organization is committed to changing attitudes and policies to ensure that all families are respected, loved, and celebrated. Family Equality's work includes a focus on supporting and empowering LGBTQ families in schools, by developing and distributing school-related resources, building community amongst LGBTQ families, and advancing legal protections to make schools safer for LGBTQ families nationwide.

GLSEN was founded by a group of teachers in 1990 who knew that educators play key roles in creating affirming learning environments for LGBTQ youth. Today, GLSEN's national network comprises students, families, educators, and education advocates working to create safe schools to ensure that LGBTQ students can learn and grow in school environments free from bullying and harassment. GLSEN conducts extensive, original research to inform evidence-based policies and developmentally appropriate resources for protecting LGBTQ students and all students of marginalized identities.

Keshet is a national organization working for a world in which all LGBTQ Jews and their families can live with full equality, justice, and dignity. By strengthening Jewish communities and equipping Jewish organizations with the skills and knowledge to make all LGBTQ Jews feel welcome, Keshet seeks to ensure the full equality of all LGBTQ Jews and their families in Jewish life, including by advocating for LGBTQ civil rights nationwide. With particular relevance to this case, Keshet prioritizes creation of spaces in which all queer Jewish youth feel seen and valued and can develop their leadership, training Jewish educators to prevent anti-LGBTQ bullying, and mobilizing Jewish communities to protect LGBTQ civil rights while celebrating LGBTQ Jewish identity.

PFLAG was founded in 1973 after the simple act of a mother publicly supporting her gay son. It now is the nation's largest organization for LGBTQ people, their parents and families, and allies. With nearly 400 chapters and 250,000 members and supporters crossing multiple generations of families

in major urban centers, small cities, and rural areas across America, PFLAG is committed to creating a world where diversity is celebrated and all people are respected, valued, and affirmed.

Founded in 1999, EQCA is the nation's largest statewide LGBTQ civil rights organization. It brings the voices of LGBTQ people and allies to institutions of power in California and across the United States, striving to create a world that is healthy, just, and fully equal for all LGBTQ people. EQCA advances civil rights and social justice by inspiring, advocating, and mobilizing through an inclusive movement that works tirelessly on behalf of those it serves, such as by participating frequently in litigation in support of the rights of LGBTQ persons, including the organization's members in California and across the United States.

PFAW is a nonpartisan civic organization established to promote and protect civil and constitutional rights and values, including religious liberty and freedom from discrimination. Founded in 1981 by a group of civic, educational, and religious leaders, PFAW now has 1.5 million members and supporters nationwide. Over its history, PFAW has conducted extensive education, outreach, litigation, and other activities to promote these values. PFAW strongly supports LGBTQ rights and the principle that public schools should be open and welcoming to all students without regard to LGBTQ status or religious beliefs.

Amici submit this brief in support of Respondent.[1]

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than *amici curiae* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. The parties have filed blanket consents to the filing of *amicus curiae* briefs. *See* Sup. Ct. R. 37.3.

SUMMARY OF THE ARGUMENT

Public schools bring together young people from various backgrounds and traditions, including some LGBTQ students who are religious, some who may not be, and some who are still figuring out their spirituality or identity. This Court has long scrutinized the involvement of school officials in prayer on school grounds—not only to reach a careful balance among First Amendment equities—but also to avoid enmeshing the government in inter-denominational disputes or exacerbating sectarian conflict in schools. Historically, this proved to be a serious concern, for example in the so-called Philadelphia "prayer riots" of 1844. To this day, public schools play a critical role in our pluralistic society and during a formative (and often susceptible) period in the lives of students.

The Court should be equally attentive to these values in the case at bar. Prayer practices—like Petitioner's—on public school grounds by public school employees in their official capacity contravene the Establishment Clause's mandates that government neither insert itself into religious debate nor create an impression that particular religious beliefs and communities receive preferential treatment. Allowing public religious practices like Petitioner's sends the unmistakable message that only those who conform and participate will enjoy full advantage of all the benefits that the public school offers.

Such practices not only erode Establishment Clause values, but also are likely to burden the Free

Exercise rights of people with different religious beliefs and traditions, specifically including many LGBTQ people of various faiths, as well as people who do not identify as religious, all of whom must be free to believe as they wish, without government-endorsed pressure or interference.

ARGUMENT

I. PETITIONER'S CHOICE OF PUBLIC RELIGIOUS CONDUCT WHILE IN HIS PUBLIC SCHOOL ROLE WAS INCONSISTENT WITH THE ESTABLISHMENT CLAUSE AND CREATED A PARTICULAR LIKELIHOOD OF HARMFUL IMPACTS ON LGBTQ STUDENTS.

Amici write to provide a voice for LGBTQ students, and students with LGBTQ family members and other family members, impacted by particular forms of religious speech at public schools. Their perspective is critical to this matter because these students are at particular risk of suffering from the insider-outsider dynamic propagated by school-sanctioned public prayer. *See, e.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000). Historically, many LGBTQ students and their families have both struggled with their painful rejection by certain religious denominations and yet experienced spiritual fulfillment in the religious journey they charted. Because of this history, many LGBTQ people are especially alert and wary of situations in which the government appears to endorse particular religious exercise or where

circumstances indicate religious coercion in a government-controlled context.

Students who identify as LGBTQ and their families have directly felt the impact of 75 years of Supreme Court precedent interpreting the Establishment Clause to require "governmental neutrality between religion and religion, and between religion and nonreligion." *McCreary Cnty. v. Am. Civ. Liberties Union*, 545 U.S. 844, 860 (2005) (internal citations omitted); *see also Engel v. Vitale*, 370 U.S. 421, 429 (1962) (the Founders knew "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 or one particular form of religious services."). Our Nation's history provides many examples of the Founders' wisdom on this point.[2] Accordingly, the Establishment Clause "preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred."

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[2] The Philadelphia "prayer riots," which refers to the wave of anti-Catholic and nativist violence which erupted from an inter-denominational dispute about which version of the Bible to read for Catholic versus Protestant students, is but one of the early cautionary examples. *See generally* Zachary M. Schrag, *Nativist Riots of 1844*, THE ENCYCLOPEDIA OF GREATER PHILA., https://philadelphiaencyclopedia.org/essays/nativist-riots-of-1844/ (last visited March 29, 2022); *see also Interethnic Relations, Nativism, Primary Sources*, THE HIST. SOC'Y OF PA., https://web.archive.org/web/20061004181326/http://www.hsp.org/default.aspx?id=394 (last visited March 29, 2022); *Philadelphia Riots*, VILL. UNIV. FALVEY MEM'L LIB., https://digital.library.villanova.edu/Item/vudl:255898 (last visited March 29, 2022).

Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring); *see also Lee v. Weisman*, 505 U.S. 577, 587 (1992) ("[A]t a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise.").

This Court is "particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools" because of the "great authority and coercive power" the state exerts on students. *Edwards v. Aguillard*, 482 U.S. 578, 583–84 (1987); *Lee*, 505 U.S. at 593–94.[3] Specifically, this Court has been concerned that public prayer on school grounds by school officials creates *an insider-outsider dynamic* among the student body, faculty, and school staff, where the religious majority may receive, or be perceived to receive, benefits that nonconforming religious minorities do not. *Santa Fe*, 530 U.S. at 309. The clear hierarchy of authority (*i.e.*, between coaches and teachers, on the one hand, and students, on the other) and need for peer acceptance among children and adolescents reinforces and amplifies this dynamic in schools. As a result, this Court has been unpersuaded by overly formalistic arguments that student participation in prayer is "voluntary" and non-coercive when led by school leaders during school-sponsored events. *See Santa Fe*, 530 U.S. at 312.

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[3] This Court has further recognized that "[r]esearch in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention." *Lee*, 505 U.S. at 593 (citing studies).

Beyond the perilous dilemma between coercion and exclusion, LGBTQ students, whatever their own faith beliefs, often see their identity, existence, and place in particular religious worldviews debated fiercely among religious sects that disagree vehemently about how LGBTQ persons are to be treated.[4] Whether they take place in religious spaces or the community as a whole, these disagreements create anxiety if not fear for many LGBTQ young people. But when the government appears to endorse religious beliefs that fault or exclude LGBTQ people, it is both gravely problematic and unconstitutional. *Accord Santa Fe*, 530 U.S. at 311 (explaining that "divisiveness along religious lines in a public school setting" is "a result at odds with the Establishment clause"); *Lee*, 505 U.S. at 589 ("The design of the Constitution is that preservation and transmission of

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[4] Perceptions and treatment of LGBTQ persons and their families have certainly improved, but by no means universally. As an example, some faiths allow LGBTQ persons to serve as leaders of congregations. *See, e.g.*, HRC Foundation, *Stances of Faiths on LGBTQ Issues: Evangelical Lutheran Church in America*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/stances-of-faiths-on-lgbt-issues-evangelical-lutheran-church-in-america (last visited Mar. 29, 2022) (The Evangelical Lutheran Church in America has ordained "LGBTQ ministers . . . since 2010"); HRC Foundation, *Stances of Faiths on LGBTQ Issues: Presbyterian Church*, HUM. RTS. CAMPAIGN https://www.hrc.org/resources/stances-of-faiths-on-lgbt-issues-presbyterian-church-usa (last visited Mar. 29, 2022) ("In 2010 the [Presbyterian Church (USA)] approved an amendment that allows ordination of openly LGBTQ ministers."). Others, however, do not. *See generally* HRC Foundation, *Faith Positions* HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/faith-positions (last visited Mar. 29, 2022).

religious beliefs and worship is a responsibility and a choice committed to the private sphere.").[5]

This Court applies two tests to determine whether an Establishment Clause violation has occurred: (1) the Endorsement Test, and (2) the Coercion Test. Either test is sufficient to prove a violation. *Borden v. Sch. Dist. of Twp. of East Brunswick*, 523 F.3d 153, 175 (3d Cir. 2008). Petitioner's religious conduct here is impermissible under both of them.

A. Petitioner's Public Conduct Created the Appearance That Respondent Unconstitutionally Endorsed His Prayers.

The Endorsement Test "preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." *Wallace*, 472 U.S. at 70 (O'Connor, J., concurring). Under the test, if an objective observer, with "knowledge of the history and context of the display," "would perceive it as a state endorsement of prayer in public schools," then the prayer violates the Establishment Clause. *Borden*, 523 F.3d at 177–78; *Wallace*, 472 U.S. at 76. The Endorsement Test analysis is thus factually driven and highly dependent on context, and the purported

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[5] *See also Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020) ("State interference in that sphere [*i.e.*, religion] would obviously violate the free exercise of religion.").

intention of the government actor to conduct a private prayer is not dispositive.

In this case, Petitioner chose to pray on the 50-yard line immediately following public school-sponsored games during which he had played a key adult leadership role, while still wearing the school insignia and surrounded by public school students. Pet. App-245–46. The timing and location of Petitioner's conduct is particularly important because it highlights the public nature of Petitioner's worship and the likelihood that Respondent would be perceived as endorsing this conduct if Respondent allowed it to continue given the nexus between Petitioner's prayers and his role as a football coach. *See* Pet. App-20 ("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.").

Petitioner chose to pray at the 50-yard line—not only hallowed ground on the gridiron but also the most prominent location in the stadium. Before every game, players meet and shake hands at the 50-yard line in a show of sportsmanship, and referees conduct a coin toss for kickoff at this prominent location. At many stadiums, including Bremerton High School, the 50-yard line depicts the school insignia signifying that this is the home team's domain.[6] Reprisals may

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[6] *See* Picture of Bremerton School District Football Field, BREMERTONSCHOOLS.ORG, https://www.bremertonschools.org/cms/lib/WA01001541/Centricity/Domain/4/Turf%20Dedication%20Promo.jpg (last visited March 29, 2022).

occur over an opposing team's disrespect to a home team's emblem on the 50-yard line.[7] And in the 2022 Super Bowl (as in many others), the national anthem was performed in front of the American flag on the 50-yard line, which further underscores the centrality of the location to players and spectators alike.[8]

Had Petitioner truly desired to "say[] a brief, quiet prayer by himself" (Pet. i), he obviously could have chosen a less conspicuous place, including any of the reasonable accommodations offered by Respondent, without involving student-athletes and other participants at the most prominent and symbolic place to do so (*i.e.*, the 50-yard line immediately after the game). Instead, the timing and location selected for the prayer was "clothed in the traditional indicia of school sporting events" that the *Santa Fe* Court held to create "[t]he actual or perceived endorsement of the message." 530 U.S. at

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[7] The experiences of National Football League wide receivers Terrell Owens and JuJu Smith Schuster are infamous examples of this phenomenon. *See Terrell Owens Celebrates on Dallas Star and Gets HIT*, YOUTUBE (Nov. 13, 2017), https://m.youtube.com/watch?v=cshHg_sWyVo (showing an angry reaction to Owens's touchdown celebration on opposing team's logo on the 50-yard line); Meredith Cash, *JuJu Smith-Schuster Got Beat Up and Bullied by the Bengals to 'Let Him Know Where He Stands' After He Danced on Their Logo for TikTok*, INSIDER (Dec. 22, 2020), https://news.yahoo.com/juju-smith-schuster-got-beat-190803166.html (discussing angry responses of Smith-Schuster's opponents to his "disrespectful" practice of dancing on rival teams' logos, including those on the 50-yard line).

[8] *See Mickey Guyton Sings the National Anthem at Super Bowl LVI*, YOUTUBE (Feb. 13, 2022), https://www.youtube.com/watch?v=ucr-OJo0Iig.

307. "School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are non-adherents 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. Accordingly, the timing and location of Petitioner's conspicuous religious conduct would lead any objective and reasonable observer to conclude that the school district endorsed Petitioner's religious beliefs at the expense of persons who hold other religious beliefs and who identify as nonreligious.[9]

For many students who identify as LGBTQ or who have LGBTQ family members, such perceived endorsement creates particular risks of adding to their sense of marginalization and alienation from the larger public school community. More specifically, the perceived or real government endorsement of religious practices that include religious rejection of minority sexual or gender identities is likely to have the effect of making these students feel like outsiders who are not entitled to the full privileges of true members of their school communities.[10] Such feelings

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[9] In fact, reasonable observers did believe the school district endorsed Petitioner's on-field prayers. *See, e.g.*, JA 229 (Transcript Excerpts from July 12, 2019, Deposition of J. Polm) (testifying that an opposing coach told him that "it was pretty cool how [the District] would allow our coaches [*i.e.*, Petitioner] to go ahead and invite other teams' coaches and players to pray after a game.").

[10] *See, e.g.*, RELIGIOUS EXEMPTION ACCOUNTABILITY PROJECT, THE LGBTQ STUDENT DIVIDE: THE STATE OF SEXUAL AND GENDER MINORITY STUDENTS AT TAXPAYER-FUNDED CHRISTIAN COLLEGES 2–4 (2021), https://www.thereap.org/_files/ugd/

of marginalization or alienation in turn can lead to negative scholastic outcomes.[11]

Although many LGBTQ people of all ages are religious,[12] some large and influential religious denominations still exclude individuals who acknowledge their LGBTQ identity. While religious institutions of course are free to make their own theological and doctrinal determinations, that fact brightly spotlights the importance of the Establishment Clause's promise to prevent both the actuality and the appearance of government endorsement of religious doctrines on these subjects. For all people of faith who hold their own beliefs as precious and core to their identity, feeling pressured

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0ae2d2_9b01481f670f45819315aac806b14336.pdf (noting, among other things, that "[s]exual and gender minority students are 15 times more likely to report that their sexuality or gender identity has prevented them from feeling accepted by others on their college campus compared to their peers").

[11] *See*, *e.g.*, JOSEPH G. KOSCIW ET AL., GLSEN, THE 2019 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, TRANS-GENDER, AND QUEER YOUTH IN OUR NATION'S SCHOOLS 46–47 (2019), https://www.glsen.org/sites/default/files/2021-04/NSCS19-FullReport-032421-Web_0.pdf (discussing survey results and related research about LGBTQ students who indicated they may not complete high school due to alienating conditions in their schools).

[12] *See id.* 11 tbl. M.1 (finding approximately one third of survey participants identified with a religion); ILAN H. MEYER ET AL., LGBTQ PEOPLE IN THE US: SELECT FINDINGS FROM THE GENERATIONS AND TRANSPOP STUDIES 3, 16–17 (2021), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Generations-TransPop-Toplines-Jun-2021.pdf (reporting approximately 55% of LGBTQ adults "identified with some religion").

to accept and participate in a public religious practice that appears to have government endorsement easily can run against not only their own religious beliefs, but also their deeply-held perception of themselves. For LGBTQ students in particular, many of whom already feel themselves to be on the outskirts of their community, such pressure to conform and participate in religious activity may cause them to feel doubly ostracized if their own public school is permitted to lend its official imprimatur to sectarian beliefs and worship practices. This result is unacceptable, no matter the apparent intent behind the religious expression at issue. *See Santa Fe*, 530 U.S. at 307–09.

Even if Petitioner's prayers steered clear of sensitive social issues, they still offend the Establishment Clause. According to Petitioner, his postgame ritual was a prayer of "thanks," "thanksgiving," or "gratitude" (Br. for Pet. at 1, 4, 8. 12, 14, 21, 27); specifically, it was a "prayer of thanksgiving for player safety, sportsmanship, and spirited competition." *Id.* at 4. This seeming attempt to depict the prayers as harmless expressions of gratitude is unavailing. Religious creeds have profoundly different perspectives on which occurrences are and are not the work of God. One of the great chasms that exists along the vast spectrum of religious traditions is the extent to which humans are understood to have free will to control all or some aspects of their destiny, or whether a divine being has predetermined or will determine each event. People of different faiths on a team—or even within a coaching staff—might well disagree strongly about whether gratitude should be expressed about the

number and severity of injuries suffered by each of the competing teams, whether particular scores were due to skill, effort, luck, or a Divine assist, and the quality of cohesion and sportsmanship each of the teams displayed. As such, a public postgame prayer cannot be endorsed by the government without violating the Establishment clause.

B. Petitioner's Role as a Football Coach Amplified the Unconstitutionally Coercive Impact of His Public Prayer, With a Particular Likelihood of Harmful Coercive Impacts on LGBTQ Students.

The other applicable test is the Coercion Test. This Court has long recognized that "public pressure, as well as peer pressure . . . though subtle and indirect, can be as real as any overt compulsion" and that "for the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow, the injury is no less real." *Lee*, 505 U.S. at 593–94; *see also Edwards*, 482 U.S. at 583–84 (noting that in the public school context, this Court has been "particularly vigilant" about coercion concerns because "the classroom [may] not purposely be used to advance religious views" yet "[s]tudents in such institutions are impressionable and their attendance is involuntary."); *see also Town of Greece v. Galloway*, 572 U.S. 565, 590 (2014) (recognizing that young people are "readily susceptible to religious indoctrination or peer pressure" in ways that mature adults are not.). Under the Coercion Test, "the State may not, consistent with the Establishment Clause,

place primary and secondary school children" in the dilemma of "participating, with all that implies, or protesting" a religious exercise at public school. *Lee*, 505 U.S. at 593–94.

The story of Jessamyn Morales, an active participant in the programs of *Amicus* COLAGE, encapsulates the concerns at the heart of this Court's public school Establishment Clause decisions.[13] Ms. Morales was raised in Midland, Texas. She grew up the daughter of not one, but two gay couples after both of her parents came out as LGBTQ and entered into same-sex relationships. When she attended elementary school, her school district required a minute of silent prayer each morning. Ms. Morales's decision not to participate in these prayers had a tangible, negative effect on her time in school. Her teachers informed her that her non-participation was disrespectful, punished her for her choice not to participate, and, giving effect to their personal anti-LGBTQ views, encouraged her to use this prayer to counteract the ill effects of her parents' sexual orientation. Her peers, following the lead of these teachers, isolated her from social activities.

Ms. Morales endured similar difficulties in high school, where the adult leaders of her swim team required students to participate in prayers before competitions. In response to Ms. Morales's decision not to participate in these prayers, her coaches threatened to remove her from the swim team. Her

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[13] Ms. Morales's experiences described here are among those detailed in a forthcoming COLAGE publication addressing the challenges facing and providing guidance for families with LGBTQ family members.

peers, acting on the example set by the authority figures at the school, again ostracized her. These events not only made her life as an adolescent more difficult, but also placed burdens on her own spiritual growth. Only years later did she understand how harmful the religious coercion she experienced during her formative years had been to her ability to develop the deep faith she now nurtures.

Here, Petitioner's decision to engage in religious activity on the 50-yard line, in his official garb as one of the school's football coaches, and often surrounded by student-athletes, implicates the coercion—"subtle and indirect" or otherwise—warned of by this Court and suffered by Ms. Morales. *See Lee*, 505 U.S. at 593; *Edwards*, 482 U.S. at 584 ("The 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."). Petitioner's status as a coach, not to mention his publicity campaign, further amplifies the classic concerns regarding coercion at a public school due to the unique, powerful relationship between student-athletes and their coaches. *See Borden*, 523 F.3d at 182 (McKee, J., concurring) ("Given the uproar this issue visited on the community, the players must have known how important prayer was to their coach—and no high school athlete would want to disappoint the coach . . . .").

Indeed, Petitioner and his counsel embraced the substantial mentoring component of his coaching role. Petitioner stated that he was "helping these kids be better people." JA 69–74. He also recognized that

"for some kids, the coach might even be the most important person they encounter in their overall life." JA 323. And his counsel emphasized to the district court: "[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." JA 368; *see also* Pet. App-14 (noting Petitioner's testimony that coaches are "one of those especially respected persons chosen to teach on the field, in the locker room, and at the stadium.") (internal citations omitted). The coercive power of Petitioner's conduct does not stop with his team. High school football games serve as a touchstone of many schools' and local communities' cultural lives. As a result, many students feel compelled to participate in these events "as part of a complete educational experience." *Santa Fe*, 539 U.S. at 311 (noting further that students other than athletes "such as cheerleaders [and] members of the band" are required to attend).

In short, the authority and influence that school officials, and coaches in particular, wield is powerful and easily can lead students "to seek ways to ingratiate themselves" to that authority, *Berry v. Dep't of Soc. Servs.*, 447 F.3d 642, 650–51 (9th Cir. 2006), even if it means conflict with and betrayal of the students' own deeply held beliefs concerning identity, religion, or spirituality. Accordingly, given the public nature of his religious exercise and its nexus to the authority of his role as a football coach, Petitioner's prayer practice cannot be considered free

of coercion, no matter his intentions.[14] It is neither right nor constitutional under the decisions of this Court to force upon students—especially those LGBTQ students who may have had to grapple with religious disapproval of their identity while developing their own personal relationships with religion and spirituality—the choice between conforming to the religious practice of a public school authority figure who is the adult leader of their team, or holding tightly to their own identities and values at the risk of further marginalization.[15]

CONCLUSION

For students in their formative years, who are in the midst of discovering their religious and sexual identities, school-sponsored religious activity engaged

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[14] Indeed, multiple parents confirmed that their children participated due to such social pressure ranging from fear of reprisal to a wish not to be separated from or at odds with their teammates. *See* JA 234 (Transcript Excerpts from July 12, 2019, Deposition of J. Polm) (testifying regarding a parent whose son, a student-athlete on the football team, "felt compelled to participate" in Petitioner's prayers because he "felt he wouldn't get to play as much if he didn't"); JA 356 (Decl. of A. Leavell in Support of Motion for Summary Judgment, *Kennedy v. Bremerton Sch. Dist.*, No. 16-cv-05694 (W.D. Wash. Nov. 13, 2019)) (describing communications from parents who informed Respondent that their children "participated in the team prayers only because they did not wish to separate themselves from the team").

[15] *See*, *e.g.*, KOSCIW ET AL., *supra* n.11, 18 (over 70% of LGBTQ students surveyed reported avoiding school functions and extracurricular activities to some extent, and over 25% avoided them often, due to concerns about personal safety or social rejection); *id.* 46–47 (discussing adverse impacts on LGBTQ students resulting from alienating conditions in their schools).

in by their role models and peers in the public school setting can create coercive pressure to conform to the religious majority, especially if such religious practices are in conflict with their own religious identity and commitments, or their identity as a nonbeliever. Such coercive pressures can weigh particularly heavily on LGTBQ students and students with LGBTQ family members, given the intensity of current debates among many faiths and denominations about LGBTQ people and their place within faith communities. Because public schools are not the appropriate forum for divisive religious debates, and young people seeking public education must be protected from dilemmas requiring them to pick between conformity with their peers and instructors, on the one hand, and honoring their deeply held beliefs, on the other, it has been well-settled that school-sanctioned religious activity is unconstitutional.

The Court should apply longstanding precedent and affirm the decision of the Court of Appeals.

Dated: March 31, 2022

Respectfully Submitted,

/s/ Thomas A. Zaccaro
Thomas A. Zaccaro