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 FOR STATES OF NEW YORK, CALIFORNIA, DELAWARE, HAWAI'I, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEW JERSEY, NEW MEXICO, AND OREGON, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTERESTS OF AMICI STATES

Amici are the States of New York, California, Delaware, Hawai‘i, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, and Oregon, and the District of Columbia. Amici have an interest in this case as public employers that are governed by the First Amendment with respect to their management of employees, and as regulators of elementary, secondary, and postsecondary public-school systems. Collectively, amici employ more than 2 million people and oversee the education of more than 17.5 million children and more than 5.8 million college and graduate students.

Amici are proud of the extensive religious diversity in our communities. Amici have adopted multiple legislative, regulatory, and policy-based measures to ensure that employees and students who engage in religious observance are able to fully participate in their workplaces and schools without fear of discrimination. At the same time, amici have an obligation to ensure that schools and workplaces operate safely and effectively and that no religious views are prioritized above others. Accordingly, amici have developed accommodation procedures that respect the religious views of public-school students and government employees without undermining or interfering with the operation of schools and workplaces that serve millions of people daily. Amici have developed these practices in substantial reliance on this Court's precedents holding that the First Amendment permits great latitude to state and local governments in creating workforce-management and school-administration policies.

A ruling in favor of petitioner would undermine amici's interests in multiple ways. First, petitioner asks

this Court to strip governmental employers of the ability to rely on an objective evaluation of an employee's speech in relation to his or her job duties when considering what constitutes government rather than private speech. Petitioner offers no alternative legal standard on which employers and courts can rely to distinguish between private and governmental speech and therefore introduces substantial uncertainty in an important and frequently litigated area of the law.

Second, petitioner seeks a ruling that would harm amici's interests in promoting religious freedom in public education. Petitioner asks this Court to permit a public-school employee to incorporate prayer into a public-school event. Such a ruling creates a substantial risk that students who hold different religious views would feel either chilled from participation in the event or coerced into expressing the same religious views. Petitioner acknowledges that governments have an important interest in avoiding coercion and concedes that at least one student felt pressured into participating in petitioner's religious speech. Yet petitioner offers no legal standard or limiting principle that would effectively address the substantial risk of coercion. Moreover, allowing a public-school employee to use prayer in a school event risks shaming, alienating, or angering family members and other members of the community who do not share the same religious beliefs. The purpose of the First Amendment is to protect rather than undermine religious pluralism.

Finally, petitioner seeks to restrict the ability of amici and other public employers to discipline employees engaged in disruptive conduct on school property. Amici often place reasonable restrictions on access to and use of spaces like high school football fields to prevent crowding, disorder, or other public disruptions.

Petitioner repeatedly acknowledges that he was "pugilistic" in his efforts to engage in publicly visible and audible religious speech on a high school football field and celebrates the "pugilistic response" from the community to his behavior, which among other things included a melee on the field that threatened the safety of students. A ruling in petitioner's favor would unduly prioritize a particular individual's demand to express religious speech in exactly the manner that he wants over amici's interests in protecting the safety of other staff, students, families, and members of the public.

STATEMENT

A. State and Local Governments Employ and Educate Millions of People with Diverse Religious Views.

State and local governments employ approximately 19.5 million people, or more than 13% of the American nonfarm workforce.[1] More than half of state and local government employees (approximately 10.6 million people) work in elementary, secondary, or postsecondary educational settings.[2]

All States have compulsory education laws mandating school attendance for children, typically from the ages of 6 to 18.[3] Approximately 49.4 million children in the United States attend public elementary

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[1] U.S. Dep't of Labor, Bureau of Lab. Statistics, *The Employment Situation—February 2022*, tbl. B-1 (Mar. 4, 2022) (internet).

[2] *Id.*

[3] National Ctr. for Educ. Statistics, *State Education Practices,* tbl. 1.2 (2017) (internet).

or secondary schools; this figure represents approximately 90% of school-aged children.[4] States and local governments also educate over 70% of college and graduate students in the United States: approximately 14 million students attend public colleges and universities.[5]

The composition of American public schools and public workforces reflects the demographic characteristics of the communities in which these schools and workforces are located. Overall, the United States contains an astounding diversity of religious views: recent surveys show that among U.S. adults, 43% identify as Protestant, 26% identify as atheist, agnostic, or as "nothing in particular," 20% identify as Catholic, 2% each identify as Mormon or Jewish, and 1% each identify as Muslim, Buddhist, and Hindu, with another approximately 4% of adults identifying with another Christian or non-Christian faith.[6] Religious diversity is especially stark among Americans under the age of 50.[7]

Amici States are home to communities with even greater religious diversity: nine of the ten most religiously diverse counties in the country are located in amici States, with four of the most diverse counties located in New York, 2 counties located in Maryland,

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[4] National Ctr. for Educ. Statistics, *Fast Facts: Back-to-school statistics* (2021) (internet).

[5] *Id.*

[6] *See* Pew Research Ctr., *In U.S., Decline of Christianity Continues at Rapid Pace* (2019) (internet).

[7] *See* Public Religion Research Inst., *The 2020 Census of American Religion* ("*PRRI Census*") 11 (2021) (internet); *see also* Pew Research Ctr., *Religious Landscape Study* (2014) (Age Distribution) (internet).

and 1 county located in each of California, Hawai'i and New Jersey.[8] Each of New York's 62 counties has greater religious diversity than the national average, as is true in 8 other amici States as well as the District of Columbia.[9] For example, among adults in Kings County (i.e., Brooklyn) in New York, approximately 35% are Protestant or identify with another non-Catholic Christian faith, 27% identify with no religious affiliation, 19% are Catholic, 12% are Jewish, 4% are Muslim, and 1% each are Hindu and Buddhist.[10] Similarly broad ranges of religious diversity can be found in communities across the country including Los Angeles, Detroit, Minneapolis, and the District of Columbia.[11]

B. States Offer Substantial Religious Accommodations in Schools and Workplaces.

Amici States are proud of the religious diversity in our communities and have taken extensive measures to protect our residents from religious discrimination in the workplace and in schools. For example, the New York State Human Rights Law prohibits all employers (including public employers) from discriminating against employees based on their religious practices and observances, including discrimination based on clothing or facial hair worn in accordance with an employee's religion. N.Y. Exec. Law § 296(10). Other amici likewise

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[8] *PRRI Census*, *supra*, at 21-23.

[9] *Id.*

[10] *Id.* (detailed maps).

[11] *See, e.g.*, Pew Research Ctr., *Religious Landscape Study* (2014) (Geography) (internet).

provide protections against workplace discrimination based on religion.[12]

Amici also protect students from discrimination by educational institutions based on religion. For example, Minnesota prohibits discrimination "in the full utilization of or benefit from any educational institution" based on religion. *See* Minn. Stat. Ann. § 363A.13(1). The District of Columbia Public Schools Anti-Discrimination Policy prohibits discrimination based on "[a] person's actual or perceived shared ancestry or ethnic characteristics, including membership in a religion that may be perceived to exhibit such characteristics (such as Hindu, Jewish, Muslim, and Sikh individuals)."[13] New York's Education Law protects public school students who are required to miss classes, assignments, or tests due to religious observance as well as students who are harassed or bullied because of religious practices. *See, e.g.*, N.Y. Educ. Law §§ 12(1), 224-a, 342-a(1), 809(4), 3210(b). Amici have enacted various other state laws to protect students from religious discrimination in school settings. *See, e.g.*, D.C. Code § 2-1402.41; N.Y. Exec. Law § 296(4).

While amici are committed to protecting religious freedoms, it is also the case that state and local governments perform numerous crucial functions and

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[12] *See, e.g.*, Cal. Gov't Code § 12940; 19 Del. Code Ann. § 711; D.C. Code § 2-1401.11(a); Haw. Rev. Stat. § 378-2; 775 Ill. Comp. Stat. 5/2-102; Me. Rev. Stat. Ann. tit. 5, § 4572; Md. State Gov't Code Ann. § 20-606; Mass. Gen. Laws, ch. 151B, § 4; Mich. Comp. Laws § 37.2202; Minn. Stat. Ann. § 363A.08; N.J. Stat. Ann. § 10:5-12; N.M. Stat. Ann. § 28-1-7; Or. Rev. Stat. § 659a.030.

[13] D.C. Pub. Schs., Anti-Discrimination Policy: Students 5 (Oct. 2021) (internet).

must be available to serve the interests of their constituents. To that end, amici's antidiscrimination laws generally provide that both private and public employers may balance the interests of their employees in religious observance with the interests of their workplaces. For example, New York's Human Rights Law provides that an employer must make a "bona fide effort" to grant an employee's request for a religious accommodation, but it permits the employer to deny such a request or to offer an alternative accommodation if the requested accommodation would cause an undue hardship. N.Y. Exec. Law § 296(10)(a), (d). And under New York's law, an accommodation necessarily constitutes an undue hardship if it significantly interferes with the safe and efficient operation of the workplace or leaves the employee unable to perform the essential functions of the position in which he or she is employed. *Id.* Other amici have similarly structured laws. *See, e.g.*, Cal. Gov't Code § 12926(u); N.J. Stat. Ann. § 10:5-12; Or. Rev. Stat. § 659A.033.

Through their many years of experience with managing a diverse workforce, amici have developed comprehensive accommodation policies that respect the religious views and practices of individual employees while ensuring that governments can continue to provide crucial public services and conform with their constitutional obligation not to endorse any particular religion. Effective accommodation policies require collaboration, flexibility, and respect for the unique considerations applicable to government employment. Reasonable accommodations should be tailored to the nature of the underlying request and may include scheduling changes, exceptions to dress codes, or the designation

of a specific work location for private prayer.[14] In amici's experience, government employers have been able to accommodate their employees' religious practices without sacrificing effective government operations by working with employees to come up with nondisruptive but meaningful accommodations.

Formal accommodations policies also provide detailed processes and procedures which help both employers and employees carefully approach sensitive discussions. For example, several of amici's policies for their employees provide that certain requests for routine accommodations can be made and granted informally, set forth procedures and timelines for written accommodation requests of a more complicated nature, and notify employees of available remedies if they are dissatisfied with the employer's decision to deny or modify an accommodation request.[15]

SUMMARY OF ARGUMENT

In the First Amendment context, "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering v. Board of Educ. of*

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[14] *See, e.g.*, N.Y. Att'y Gen., Civil Rights Bureau, Religious Rights in the Workplace (2020) (internet); Haw. Code R. § 12-46-155; *see also* U.S. Dep't of Labor, Off. of the Ass't Sec'y for Admin. & Mgmt., *Religious Discrimination and Accommodation in the Federal Workplace* (n.d.) (internet).

[15] *See, e.g.*, N.Y. Governor's Office of Emp. Relations, Procedures for Implementing Reasonable Accommodation of Religious Observance or Practices for Applicants and Employees (Oct. 2020) (internet); D.C. Dep't of Human Res., *Reasonable Accommodation of Religious Observance or Practices* (Mar. 22, 2022) (internet).

Twp. High Sch. Dist. 205, Will Cnty., 391 U.S. 563, 568 (1968). Accordingly, it is well settled that the First Amendment does not bar governmental employers from disciplining public employees for statements the employees make pursuant to their official duties. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). Here, the court of appeals correctly found that petitioner Joseph Kennedy, a high school football coach, was speaking while carrying out his job duties when he prayed on the field surrounded by students immediately following games. Kennedy's arguments to the contrary are based on strawmen analogies and make a hash out of the straightforward *Garcetti* standard.

Even if Kennedy were speaking as a private citizen subject to First Amendment protections, "courts must apply the First Amendment 'in light of the special characteristics of the school environment.'" *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2044 (2021) (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988)). "[T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *Lee v. Weisman*, 505 U.S. 577, 592 (1992). In this case, allowing Kennedy to hold a public prayer as part of a school event would risk chilling participation in the underlying event by students whose religious views differed from Kennedy's, and could cause students to feel compelled to partake in the religious speech as a perceived condition of participation on the football team: issues that the record shows had actually occurred in the past, with respect to one student who felt "compelled to participate" in Kennedy's prayers because he feared that he otherwise "wouldn't get to play as much." (J.A. 234; *see* Pet. App. 21.)

Finally, state and local governments have an obligation to "maintain[] discipline, health, and safety" in school settings. *Board of Educ. of Ind. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 830 (2002). Respondent Bremerton School District offered Kennedy several accommodations that would permit his religious observance without creating a disorderly public spectacle. Kennedy categorically refused the accommodations and instead engaged in disruptive on-field conduct that resulted in a melee on at least one occasion. The First Amendment does not require public employers to set aside their legitimate public safety interests in favor of an employee's desired form of speech.

ARGUMENT

I. The First Amendment Affords State and Local Governments Substantial Latitude in Managing Their Workforces.

This Court has long recognized that governmental entities have a significant interest in avoiding disruptions in government workplaces and therefore are entitled to considerable constitutional leeway when acting as employers as opposed to sovereigns. *See, e.g., Borough of Duryea v. Guarnieri*, 564 U.S. 379, 386 (2011); *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 598-600 (2008); *Garcetti*, 547 U.S. at 417-20; *Waters v. Churchill*, 511 U.S. 661, 671-75 (1994) (plurality op.) (discussing additional examples). "Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Garcetti*, 547 U.S. at 418; *see also Connick v. Myers*, 461 U.S. 138, 142 (1983).

In *Garcetti*, this Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." 547 U.S. at 421. *See also Janus v. American Fed. of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2474 (2018) ("[W]hen public employees are performing their job duties, their speech may be controlled by their employer.").

Garcetti created a straightforward test: if a government employee is speaking "pursuant to his duties" or as "part of what he, as a [government employee] was employed to do," the First Amendment does not apply, and the government employer retains full discretion to discipline the employee as it deems appropriate. 547 U.S. at 421.

Although individual applications of *Garcetti* are typically fact-bound, courts have developed readily administrable legal standards that give both employers and employees sufficient clarity when determining whether speech is pursuant to a public employee's duties. Courts generally look to "the nature of the plaintiff's job responsibilities, the nature of the speech, and the relationship between the two" as well as "[o]ther contextual factors." *Ross v. Breslin*, 693 F.3d 300, 306 (2d Cir. 2012). "The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." *Lane v. Franks*, 573 U.S. 228, 240 (2014).

Speech is pursuant to a public employee's official job duties when it is "undertaken in the course of performing one's job," *Williams v. Dallas Indep. Sch. Dist.*,

480 F.3d 689, 694 (5th Cir. 2007); aids in the fulfillment of official responsibilities, *Renken v. Gregory*, 541 F.3d 769, 773 (7th Cir. 2008); or is part and parcel of carrying out job requirements, *Weintraub v. Board of Educ. of City Sch. Dist. of City of N.Y.*, 593 F.3d 196, 202 (2d Cir. 2010). Because "a public employee's duties are not limited only to those tasks that are specifically designated," *Phillips v. City of Dawsonville*, 499 F.3d 1239, 1242 (11th Cir. 2007), speech can be pursuant to official responsibilities "even though it is not required by, or included in, the employee's job description, or in response to a request by the employer," *Weintraub*, 593 F.3d at 203. The inquiry turns on whether the challenged speech "owes its existence to a public employee's professional responsibilities." *Garcetti*, 547 U.S. at 421.

The court of appeals' decision in this case is a clear-cut application of *Garcetti* and its progeny. The parties did not dispute that Kennedy's official duties as a football coach "encompassed his post-game speeches to students on the field" and Kennedy himself conceded that he remained on duty at the conclusion of football games until players were released from the locker room. (Pet. App. 15-17; *see also* Pet. App. 32 (op. of Christen, J.).) Kennedy's prayer therefore constituted "expression on the field—a location that he only had access to because of his employment—during a time when he was generally tasked with communicating with students." (Pet. App. 15.) Contrary to Kennedy's assertion (Br. for Pet. at 34), the court did not hold that every word uttered by a public-school employee while on duty constitutes government speech under *Garcetti*. Rather, the court concluded, based on undisputed facts, that Kennedy's postgame prayers were delivered in the course of his job responsibilities.

Kennedy's arguments to this Court turn *Garcetti*'s objective inquiry on its head. While Kennedy concedes that he was employed by the school district "to engage in some forms of speech on the field, such as calling plays, communicating with referees, and giving motivational talks," he contends that his prayer was intended to be purely private conduct akin to "calling home or making a reservation for dinner at a local restaurant." Br. for Pet. ("Pet. Br.") 28-29 (quotation marks omitted). By no stretch of the imagination was Kennedy's speech private: as the court of appeals observed below, "Kennedy insisted that his speech occur while players stood next to him, fans watched from the stands, and he stood at the center of the football field." (Pet. App. 15.) Although Kennedy insists that his proximity to students "make[s] little difference" to whether his speech was part of his official duties (Pet. Br. 33), a football coach's job duties must be defined at least in part by his relationship with athletes. Even the most casual observer of sports (or sports movies, for that matter) would understand that Kennedy's postgame speeches to players are "part and parcel" of his job duties, *see Ross*, 693 F.3d at 305, while phone calls to his home or a local restaurant might not be. While Kennedy denies that this case is about "employ[ing] prayer or religious content during a post-game speech to students on the field" (Pet. Br. 31), that is in fact the very conduct in which Kennedy engaged and the specific conduct for which he was disciplined (Pet. App. 22). Simply put, Kennedy's midfield prayers with players immediately following football games were undertaken while he was discharging his responsibilities as a football coach. The form of Kennedy's speech "owes its existence" to his official job duties and

is not protected by the First Amendment. *See Garcetti*, 547 U.S. at 421.

If accepted, Kennedy's contrary position would frustrate the efficiency and effectiveness of government employers by dramatically expanding the scope of their potential First Amendment liability. Kennedy offers no functional test by which an employer or a court can evaluate whether an employee is speaking pursuant to his official capacities. Instead, Kennedy argues that the factors on which the court of appeals relied are insufficient. Pet. Br. 29-35. But these factors—namely, Kennedy's job duties and responsibilities as a coach (Pet. App. 14-15), the temporal context in which Kennedy's speech occurred (Pet. App. 16-17), and the fact that he was surrounded by students when engaging in audible prayer (Pet. App. 15-16)—are exactly the kinds of objective factors that an employer and court should examine to determine whether speech is private or public under well-settled law. Kennedy offers no alternative factors or legal standards that would preserve the important distinction drawn by *Garcetti* or offer any meaningful clarity to governmental employers making managerial and disciplinary decisions.

As an alternative to a legal standard, Kennedy appears to argue that prayer is by necessity private speech irrespective of the context in which it is delivered. *See* Pet. Br. 29-35. Such a rule simply jettisons *Garcetti*'s chief holding that speech by government employees is different from speech by private citizens, and it circumvents the requirement that courts first determine whether an employee was speaking in a public or private capacity before engaging in First Amendment analysis. The fact that religious speech might be protected in other contexts is irrelevant to the inquiry of whether the expressions of a government

employee in particular circumstances constitute public or private speech.

A blanket exception to *Garcetti* for what Kennedy terms "private prayer" is also unworkable in practice because it offers employers no standard by which they can distinguish purportedly private religious observance from state-sponsored prayer led by government officials, the latter of which is unquestionably barred by the Establishment Clause. *See Lee*, 505 U.S. at 587-89. As the Bremerton School District notes (Br. for Resp. at 22-23), Kennedy's subjective characterization of his prayer as "brief" and "private" does not accord with an objective view of the undisputed record evidence of his actual behavior. Among other things, the record contains Kennedy's admissions to the Equal Employment Opportunity Commission that his prayers were "audible" and that the number of players that joined in the prayers "grew to include a majority of the team" (J.A. 126), as well as several photographs of Kennedy praying in the middle of the field while surrounded by many students (J.A. 82, 97-98). If the application of the First Amendment in employment settings turns on an employee's subjective beliefs rather than objective fact, government employers may be restricted in limiting many categories of problematic conduct, such as a teacher who engages in audible but purportedly private prayers while students are in the classroom or a school librarian who sits in the middle of a room surrounded by children while reading Bible stories aloud in a way that she (but not others) perceives as private. The distinction between private and public speech rightfully rests on objective criteria about an employee's duties, and not on the subjective views of the speaker.

II. State and Local Governments Should Not Be Compelled to Incorporate Religious Speech in School Events.

A. Allowing a Public-School Employee to Engage in Religious Speech During School Events Creates a Substantial Risk of Coercion.

State and local governments have a strong "interest in facilitating education of the highest quality for all children within [their] boundaries." *Mueller v. Allen*, 463 U.S. 388, 395 (1983) (quotation marks omitted). As discussed above (at 3-5), the United States has considerable religious diversity, and public schools often serve students from many different religious backgrounds. The government's ability to protect the right of every student "to choose his own creed" and "to refrain from accepting the creed established by the majority" is integral to the state interest in public education. *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985). Public schools cannot protect religious diversity if they must permit their employees to subject students to religious speech as an explicit or implied condition of participation in school activities—whether a class, a sport, a dance, a recital, or a yearbook club.

Prayers that "are authorized by a government policy and take place on government property at government-sponsored school-related events" raise substantial concerns regarding religious coercion. *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290, 303 (2000) (holding that policy permitting prayer at the beginning of football games violates the Establishment Clause). The unique nature of the public-school setting—including state-mandated attendance, the age of students, and the *in loco parentis* role that schools often play—means that

"the line between voluntary and coerced participation may be difficult to draw." *Board of Educ. of Westside Cmty. Schs. (Dist. 66) v. Mergens*, 496 U.S. 226, 261-62 (1990) (Kennedy, J., concurring in part). Accordingly, the incorporation of prayer or other forms of religious speech in school events has long been understood to place students in the impermissible position of choosing between attending and participating in school activities, or not attending to avoid religious rituals to which they object. *See, e.g.*, *Lee*, 505 U.S. at 593; *Santa Fe*, 530 U.S. at 311-12.

Concerns about coercion are increased when school officials and employees direct or participate in the religious speech. *See Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) (noting that "students emulate[e] teachers as role models"). When a teacher or coach prays while interacting with students at a school event, there is "public pressure, as well as peer pressure, on attending students" to participate in that prayer. *Lee*, 505 U.S. at 593. *See also Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 165 (5th Cir. 1993) (holding that the Establishment Clause prohibits middle school basketball coach from holding postgame prayers with students). Students who hold different religious views are placed "in the dilemma of participating, with all that implies, or protesting" and exposing themselves to the risk of opprobrium from school officials and peers. *Lee*, 505 U.S. at 593. *See also School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 289-90 (1963) (Brennan, J., concurring).

Although considerations of coercion are prevalent in elementary and secondary school settings generally, they are especially potent in athletics. The ability to participate in high school sports is extremely important for many students. Participation in athletics can be a

crucial path to economic mobility and is associated with many positive economic and educational outcomes, including higher graduation rates, higher college attendance rates, and higher future wages.[16] Participation in sports also has many social, physical, and mental health benefits, including increased confidence and self-esteem and the development of teamwork, leadership, and discipline skills.[17] At the same time, coaches play a powerful and influential role over a student-athlete's development, including control over playing time and assistance in college recruitment and future professional sport or nonsports careers.[18] It is not difficult to see how a student's understandably strong desire to participate in sports combined with the

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[16] *See, e.g.*, Kelly P. Troutman & Mikaela J. Dufur, *From High School Jocks to College Grads: Assessing the Long-Term Effects of High School Sport Participation on Females' Educational Attainment*, 38 Youth & Soc'y 443 (2007); John M. Barron et al., *The Effects of High School Athletic Participation on Education and Labor Market Outcomes*, 82 Rev. of Econ. & Stat. 409 (2000); Donald Sabo et al., *High School Athletic Participation and Postsecondary Educational and Occupational Mobility: A Focus on Race and Gender*, 10 Socio. of Sport J. 44 (1993).

[17] *See, e.g.*, Nicholas Holt et al., *Benefits and Challenges Associated with Sport Participation by Children and Parents from Low-Income Families*, 12 Psychol. of Sport & Exercise 490 (2011); Sarah J. Donaldson & Kevin R. Ronan, *The Effects of Sports Participation on Young Adolescents' Emotional Well-Being*, 41 Adolescence 369 (2006); Sara Pedersen & Edward Seidman, *Team Sports Achievement and Self-Esteem Development Among Urban Adolescent Girls*, 28 Psychol. of Women Q. 412 (2004).

[18] *See* Kris Bryant, *Take a Knee: Applying the First Amendment to Locker Room Prayers and Religion in College Sports*, 36 J. Coll. & Univ. L. 329, 355-56 (2009); Jean M. Williams et al., *Factor Structure of the Coaching Behavior Questionnaire and Its Relationship to Athlete Variables*, 17 Sport Psychol. 16, 16 (2003) (describing coach as "the most important person in determining the quality and success of an athlete's sport experience").

unique relationship between a coach and student-athlete can create an atmosphere of extreme susceptibility to coercion.

Religious coercion harms students in many ways. For example, students (or their parents) who object to the religious speech of a teacher or coach may decide not to participate in a class or activity simply to avoid the speech. Such a decision would unfairly deprive objecting students of access to educational or extracurricular opportunities, including programs associated with college scholarships, job and skills training, and social development. Other participants in these classes and activities would likewise be deprived of the unique perspectives and contributions of the objecting students. Alternatively, and often much more likely, students who object to the religious speech of a particular teacher or coach may find themselves implicitly or explicitly pressured to participate in the religious activity. For example, the record here shows that at least one student in fact felt coerced into participation in Kennedy's prayers because of a fear about reduced playing time. (Pet. App. 21; J.A. 234.) Even if the participation of students in any given event or class theoretically could be characterized as voluntary, the incorporation of school-sanctioned prayer in that event "has the improper effect of coercing those present to participate in an act of religious worship." *Santa Fe*, 530 U.S. at 312.

B. The Use of Prayer in School Settings Undermines Religious Freedom.

"[T]he individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all." *Wallace*, 472 U.S. at 53. "When the government puts its *imprimatur* on a

particular religion, it conveys a message of exclusion to all those who do not adhere to the favored beliefs." *Lee*, 505 U.S. at 606 (Blackmun, J., concurring).

The introduction of prayer in school events erodes key constitutional protections because "[w]hen 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." *Engel v. Vitale*, 370 U.S. 421, 431 (1962). Religious speech at school events also undermines the public's faith in the integrity of the public school system because families "condition their trust [in public schools] on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family." *Edwards*, 482 U.S. at 584. Absent the presence of competing state concerns about health and safety, children have the right to exercise their own religion and parents have the right to give their children their own preferred religious training (or no religious training at all). *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

Petitioner characterizes his requested relief as merely a demand for religious tolerance. Pet. Br. 23. Amici strongly support the values of religious tolerance in schools and workplaces. See *supra* at 5-6. But, as this Court has noted, "what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce" and "[w]hat to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy." *Lee*, 505 U.S. at 592.

It is undisputed that Kennedy's prayers evolved over time to include students, opposing coaches and players, and even members of the community. (Pet. App. 20-21.) On at least one occasion, Kennedy "actively sought support from the community in a manner that encouraged individuals to rush the field to join him and resulted in a conspicuous prayer circle that included students." (Pet. App. 21.) The court of appeals correctly concluded that the school district's acceptance of such conduct could easily be construed as state endorsement of Kennedy's particular brand of religious speech, and that this understanding would be evident to both those persons who share Kennedy's views and those who do not. (Pet. App. 22-23.)

Petitioner's amici suggest that a school district can avoid giving the impression of endorsement by "explaining that tolerance of religious views and practices does not constitute endorsement." Br. for Twenty-Seven States as Amici 14-15. But it is difficult to see how this solution could work in practice. It would hardly promote mutual respect for diverse religious views if the school district distributed flyers or made announcements on the loudspeaker at every football game disclaiming association with Kennedy's postgame prayers. Indeed, attempts at distancing the school from religious speech may result in threats to government officials and other school staff—and the record shows such threats did occur in this case—which exacerbate rather than reduce the harm caused by such speech. Amici's proposed solution would only further entangle a public school with religious speech in direct contravention of the First Amendment. *See Illinois ex rel. McCollum v. Board of Educ. of Sch. Dist. No. 71, Champaign Cnty., Ill.*, 333 U.S. 203, 216-17 (1948) (op. of Frankfurter, J.).

C. Public Employers Must Retain Authority to Address Disruptive Conduct on School Property.

This Court has recognized in a variety of different contexts that the government's substantial interest in maintaining discipline in the classroom and on school grounds requires flexibility in the application of constitutional principles. *New Jersey v. T.L.O.*, 469 U.S. 325, 339-40 (1985). "[D]ue to the special features of the school environment, school officials must have greater authority to intervene before speech leads to violence" and disruption. *Morse v. Frederick*, 551 U.S. 393, 425 (2007) (Alito, J., concurring). Thus, speech and expressive acts in high schools, whether undertaken by students or by others, are subject to restrictions greater than those that the First Amendment normally permits, precisely because of the paramount governmental interests in promoting order and discipline. *Shanley v. Northeast Indep. Sch. Dist., Bexar Cnty.*, 462 F.2d 960, 969 (5th Cir. 1972).

In this case, the Bremerton School District was justified in disciplining Kennedy because his conduct grew increasingly disruptive and threatened the safety and well-being of students, staff members, and district officials. Kennedy's social media posts and media appearances about the district's request that he stop engaging in public midfield prayer after football games resulted in the school district being "flooded with thousands of emails, letters, and phone calls from around the country . . . many of which were hateful or threatening." (Pet. App. 5 (quotation marks omitted).) Certain school employees felt physically threatened (Pet. App. 2), including another football coach who did not reapply for a coaching position because of the unsafe situation

that Kennedy's actions had created for staff and students (J.A. 347).

In late October 2015, Kennedy's actions escalated when he gave numerous media interviews about his intent to pray after the next scheduled football game notwithstanding the school's directive. The school district became so alarmed about public reaction to Kennedy's media appearances (including an announcement from a Satanist group that it intended to conduct a ceremony on the field at the same time) that the district arranged for security with the Bremerton Police Department, made and posted signs restricting access to the field, and made robocalls to parents advising them that postgame access to the field would be restricted. Despite these precautionary measures, Kennedy's prayer at the conclusion of the next game triggered a crush of spectators jumping the fence to join Kennedy on the field. The melee resulted in several students being knocked over and the principal later testified that the school was unable to keep pupils safe during this event. (Pet. App. 7-9.)

Kennedy's refusal to participate in a good-faith accommodations process further justified the district's remedial actions. As described above (at 6-8), amici have extensive experience crafting accommodations that allow employees to engage in religious observance without interfering with or undermining the safe operation of the workplace. Here, the Bremerton School District offered Kennedy several such accommodations, including private locations for prayer within the school building, athletic facility or press box, or the ability to return to the field to pray after students had left the field; the district also invited Kennedy to suggest other accommodations. (J.A. 94, 306-307.) Kennedy instead demanded to continue his desired practice of praying at

midfield immediately after games. (J.A. 307.) But the risk to public safety would not have ceased even if the school district had acceded to Kennedy's demands, because, among other things, additional religious groups (such as the Satanist organization) were reasonably likely to demand to conduct similar religious exercises on school property. Such requests would likely have stoked even more public attention, anger, and concern.

The events that occurred in this case are not surprising; courts have long understood that "overt religious exercise in a secondary school environment" is divisive by its nature. *Lee*, 505 U.S. at 588; *see also McCollum*, 333 U.S. at 227-28, 231 (op. of Frankfurter, J.). Indeed, Kennedy emphatically endorses his "pugilistic" response to the school district's efforts to manage the disruptive conduct of a public-school employee and asserts that all school districts "should expect a pugilistic response" when seeking to restrict religious speech on school property. Pet. Br. 42; *see id.* at 23. In essence, Kennedy argues that school districts are powerless to restrict religious speech on school property no matter the capacity of such speech to incite disruption and disorder. But nothing in this Court's First Amendment jurisprudence requires state and local governments to set aside their interests in public safety to elevate an employee's demand to express religious speech in a particular way. To the contrary, this Court has repeatedly held that the interest in safety and discipline in school settings trumps an inflexible application of constitutional doctrines.

In sum, a rule that requires public employers to accept any and all demands by their employees for religious expression, regardless of corresponding risks to safety and workplace operations, would substantially jeopardize the ability of government to properly

function and would threaten public welfare. Such a rule would be especially dangerous in public school settings, where religious speech is always a matter of substantial public attention and concern, and where the student population is particularly young and vulnerable.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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