

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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JOSEPH A. KENNEDY, )  
 )  
Petitioner, )  
 )  
v. ) No. 21-418  
BREMERTON SCHOOL DISTRICT, )  
 )  
Respondent. )  
- - - - -

Pages: 1 through 113  
Place: Washington, D.C.  
Date: April 25, 2022

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3   JOSEPH A. KENNEDY,                                 )  
4                                 Petitioner,                         )  
5                                 v.                                     ) No. 21-418  
6   BREMERTON SCHOOL DISTRICT,                     )  
7                                 Respondent.                         )  
8   - - - - -

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10                                 Washington, D.C.  
11                                 Monday, April 25, 2022

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14                                 The above-entitled matter came on for  
15   oral argument before the Supreme Court of the  
16   United States at 10:00 a.m.

17  
18   APPEARANCES:  
19  
20   PAUL D. CLEMENT, ESQUIRE, Washington, D.C.; on behalf  
21                                 of the Petitioner.  
22   RICHARD B. KATSKEE, ESQUIRE, Washington, D.C.; on  
23                                 behalf of the Respondent.

24  
25

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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: We'll -- we'll hear argument first this morning in Case 21-418, Kennedy versus Bremerton School District.

Mr. Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF THE PETITIONER

MR. CLEMENT: Mr. Chief Justice, and may it please the Court:

When Coach Kennedy took a knee at midfield after games to say a brief prayer of thanks, his expression was entirely his own. That private religious expression was doubly protected by the Free Exercise and Free Speech Clauses.

When the School District fired him for that fleeting religious exercise out of endorsement concerns, it not only violated the First Amendment, but it -- it ignored a veritable wall of this Court's precedents that make clear that a school does not endorse private religious speech just because it fails to censure it.

As much as the District would like to

1 change the subject, the record is clear that  
2 Coach Kennedy was fired for that midfield  
3 prayer, not for any earlier practices. And the  
4 record is equally clear that the District's sole  
5 reason for its actions was out of endorsement  
6 concerns, not concerns for band members' safety  
7 or how many players joined the coach in the  
8 prayer.

9 In fact, Coach Kennedy was disciplined  
10 for events at two games in particular,  
11 October 23 and October 26. At the first of  
12 those games, it is undisputed that no one joined  
13 the coach in his prayer. Nonetheless, that solo  
14 prayer was Exhibit A in his firing.

15 Exhibit B was the October 26 game,  
16 when no players joined him in the prayer. Yet,  
17 nonetheless, the District, throughout this case,  
18 both contemporaneously and to the EEOC and in  
19 deposition, has confirmed that the sole driving  
20 force behind its actions has been avoiding  
21 endorsement.

22 The Ninth Circuit held that the  
23 District's actions not only comply with the  
24 First Amendment but are compelled by it. That  
25 decision is flatly inconsistent with this

1 Court's precedents. The Ninth Circuit's  
2 government speech holding ignores this Court's  
3 statement in Garcetti that -- that -- to avoid  
4 overly broad job descriptions. And the Ninth  
5 Circuit's Establishment Clause holding fails to  
6 grasp a basic teaching of this Court's cases  
7 that has been said over and over again and is  
8 simple enough for even young students to  
9 understand, that the government does not endorse  
10 all private religious speech just because it  
11 takes place on the school side of the gates.

12 I welcome the Court's questions.

13 JUSTICE THOMAS: Mr. Clement, just so  
14 I'm clear, are you pursuing -- below, you had a  
15 free exercise claim and you had a free speech  
16 claim. Which are you pursuing? Are you  
17 pursuing both now, or are you pursuing them  
18 separately, or is this sort of a hybrid claim  
19 argument you're making?

20 MR. CLEMENT: So, Justice Thomas, we  
21 are pursuing them both. They're both fully  
22 preserved in this Court, but I do think you're  
23 right in the sense that this is a hybrid-type  
24 case in which the Free Speech Clause and the  
25 Free Exercise Clause reinforce each other, and I

1 think it directly enforces how -- it reinforces  
2 how the Court should approach the case because,  
3 when a government acts not because it's trying  
4 to maintain discipline in the school or maintain  
5 order or avoid disruption, but it's taking  
6 action precisely because the speech is religious  
7 and the school fears endorsement concerns,  
8 that's a case where strict scrutiny applies, and  
9 it's not just a case for ordinary Pickering  
10 balancing.

11 JUSTICE THOMAS: So where does  
12 Garcetti fit in? I mean, it seems as though  
13 that's muddying the water a little bit because  
14 you would not normally think of a free exercise  
15 claim as being amenable to Garcetti.

16 MR. CLEMENT: Well, I think that's a  
17 fair point, Justice Thomas. I guess, if the --  
18 if the -- if the statement really is the  
19 government's own speech, then I don't think  
20 you'd have the basis for either a free speech  
21 claim or a free exercise claim.

22 It may be, though, that in deciding  
23 whether or not the coach's speech is his own  
24 speech or the government's speech, you might  
25 apply a slightly different test in the free

1 exercise context than you would in the free  
2 speech case. But either way, I think we are  
3 comfortably on the private side of the Garcetti  
4 inquiry because the Garcetti inquiry asks  
5 whether this is part of the coach's jobs due --  
6 job duties.

7 JUSTICE THOMAS: Well, we know it's  
8 not a part of his job, especially since the  
9 school district didn't know anything about it  
10 initially and it objected to it. So it can't be  
11 a part of his job.

12 MR. CLEMENT: Well, that's music to my  
13 ears, Justice Thomas. And I would say, even  
14 beyond that, we know it's not part of his job  
15 duties for at least two other reasons.

16 First of all, his job duty was not  
17 some all-encompassing responsibility for the  
18 players after the final whistle blew because the  
19 record is clear that he was able to have a  
20 private conversation, greet a spouse, and do  
21 things like that --

22 JUSTICE THOMAS: But how could you  
23 make a free exercise claim and say it's a part  
24 of his job?

25 MR. CLEMENT: We're not. So we're --



1 we're saying this isn't part of his job, so it's  
2 private speech, and, therefore, under free  
3 speech principles, it's subject to -- in our  
4 view, ultimately, because the government's  
5 action is religiously based, it's subject to  
6 strict scrutiny. But we'd also say, because  
7 it's not part of his job, it's private religious  
8 activity that's protected by the Free Exercise  
9 Clause.

10 JUSTICE SOTOMAYOR: Mr. Clement, I --  
11 I -- I have been trying to parse this out in a  
12 similar way to Justice Thomas, but let me just  
13 give you a certain number of hypotheticals, and  
14 tell me what's -- when it becomes private and  
15 when it's still public.

16 A teacher begins each of her classes  
17 with a silent prayer and an audible prayer.  
18 Now, when I say "begin," the bell rings,  
19 students are coming in, they sit down, teacher  
20 says the prayer privately or publicly. Is that  
21 within her duties as a teacher?

22 MR. CLEMENT: I -- I would think so,  
23 Justice Sotomayor.

24 JUSTICE SOTOMAYOR: Why?

25 MR. CLEMENT: Because it's -- it's

1 during instructional time. It's during a time  
2 where she has instructional duties --

3 JUSTICE SOTOMAYOR: How about before  
4 the bell rings?

5 MR. CLEMENT: So --

6 JUSTICE SOTOMAYOR: Students are  
7 coming in. She's reading the Bible. She's  
8 reading it out loud before the bell. Is it the  
9 bell that makes it within the time or not within  
10 the time?

11 MR. CLEMENT: Well, I would say the  
12 bell is what makes your first hypothetical a  
13 relatively straightforward one.

14 As to your second hypotheticals,  
15 because I think there's two things there, I  
16 think, if the -- if the -- if the teacher were,  
17 before the bell, reading her Bible at her desk  
18 either silently or barely audibly, that would be  
19 private speech. That would be protected.

20 If, before the bell but while the  
21 students are all there she's reading out loud to  
22 the class, I think that's -- that's kind of the  
23 -- the edge case, because there --

24 JUSTICE SOTOMAYOR: So let's take it  
25 to the end of the class. The class -- the

1 students are getting up. It is part of everyday  
2 life that as students leave they stop and they  
3 talk to the teacher. She gives them some  
4 answers to their questions about the lesson.

5 But, instead of doing that, instead of  
6 waiting for those questions, she decides, I'm  
7 going to say a prayer. Is that within her  
8 duties to -- to -- is that personal, or is that  
9 still something that will be perceived as part  
10 of her work there?

11 MR. CLEMENT: So, Justice Sotomayor, I  
12 think that's closer to the edge case, and I  
13 think what it would -- it would depend on,  
14 again, first of all, if, after the bell rings,  
15 she's reading the -- the Bible, because she's  
16 free to do whatever she wants and she chooses to  
17 read the Bible and she does it either silently  
18 --

19 JUSTICE SOTOMAYOR: But she's not free  
20 to do everything she wants. She's required as  
21 part of her duties to be available to the  
22 students and answer their questions.

23 MR. CLEMENT: Well, then it might be a  
24 situation where the -- in -- in that  
25 hypothetical, where she is essentially supposed

1 to be continuing to have some instructional  
2 obligations to the kids and she's not free to  
3 text her spouse --

4 JUSTICE SOTOMAYOR: Well, then --

5 MR. CLEMENT: -- check her email --

6 JUSTICE SOTOMAYOR: -- let's take  
7 that, okay? She's not free to do that because  
8 it's personal, she could do it, but it's  
9 personal speech, not religious speech, to text  
10 her husband or to check the Internet.

11 Could she be fired for texting her  
12 husband during school hours?

13 MR. CLEMENT: Well, I -- I -- I think,  
14 if I'm understanding the hypo right, if it's a  
15 neutral rule, doesn't single out religious  
16 expression --

17 JUSTICE SOTOMAYOR: No -- no neutral  
18 rule. This is, if she does something that's  
19 private on office hours, this is her employer,  
20 her employer says to her, don't do private  
21 things when you're working, and she does it  
22 anyway, can she be fired?

23 MR. CLEMENT: So that is a neutral  
24 rule as you're explaining it to me. I think  
25 that's important to my answer.

1 JUSTICE SOTOMAYOR: Any rule.

2 MR. CLEMENT: So I just want to --

3 JUSTICE SOTOMAYOR: But -- but --

4 MR. CLEMENT: -- I just want to make  
5 sure that's common ground. It's a neutral rule  
6 that you can't do anything private.

7 JUSTICE SOTOMAYOR: But why does it  
8 have to be a neutral rule? Meaning -- and --  
9 and this is why I'm getting to this example.  
10 She's on duty. She's on duty in the classroom.  
11 And the duty is not from the beginning of the  
12 bell to the end of the bell. The duty is while  
13 she's in the classroom.

14 So why can't an employer tell an  
15 employee what they're permitted to do, personal  
16 or otherwise, during that time?

17 And I ask this question because I'm  
18 analogizing it to this situation. I found it  
19 odd in your brief that you just kept saying the  
20 coach wasn't on the field during the game. But  
21 I have a dozen or more statements by your coach  
22 telling and admitting that his duties as coach  
23 didn't -- weren't just during the game.

24 He had an obligation to remain behind  
25 for two hours after the game finished. That was

1 part of his duties. He had a duty to make sure  
2 that he escorted all the players off the field.  
3 He had a duty to make sure the other team got  
4 off the field. He had a duty to do a post-game  
5 wrap-up both with the players and the coach. He  
6 had a duty to clean up and to make sure that the  
7 gym was left in good order.

8           So I guess what I'm asking is, if he  
9 had all these duties and your employer says to  
10 you, these are the duties that you have and  
11 that's all I want you to do, why can't it choose  
12 to say, and the one duty I don't want you to do  
13 is to do this one because you are an example to  
14 your players? You admit that that's part of  
15 your duties.

16           If it's not part of his duties to set  
17 the example the school wants, why can't the  
18 school fire a coach who decides to put a Nazi  
19 swastika on their arm and go to the middle of  
20 the field and pray? If someone comes up and  
21 says, that's part of my religion, could the  
22 school say no to them?

23           MR. CLEMENT: So, Justice Sotomayor, I  
24 think there were maybe three different  
25 hypotheticals there, and I'm going to try to

1 deal with them as best I can.

2 If somebody wants to have sort of a  
3 Nazi emblem, but it's not religious, and --

4 JUSTICE SOTOMAYOR: Assume it's  
5 religious.

6 MR. CLEMENT: But, if it's not  
7 religious --

8 JUSTICE SOTOMAYOR: Assume it's  
9 religious.

10 MR. CLEMENT: I'm happy to assume it's  
11 religious. If it's religious, that might be --  
12 if it's claimed to be religious, that might be  
13 one of the rare cases where you question the  
14 sincerity of the religious belief because I'm  
15 not really aware of that religion myself, but  
16 assuming it's a sincere religious belief,  
17 there's no basis to discriminate on the basis of  
18 religion, and so the -- the -- the -- the -- the  
19 school might have to address that through a  
20 neutral policy, avoiding disruption, and if it's  
21 a neutral policy and doesn't single it out  
22 because it's religious, then that's something  
23 that would be evaluated under Pickering.

24 JUSTICE KAGAN: Mr. Clement --

25 CHIEF JUSTICE ROBERTS: Mr. --

1 JUSTICE KAGAN: -- can I --

2 CHIEF JUSTICE ROBERTS: -- Mr.  
3 Clement, what if the -- the activity on the  
4 field did not consist of this kneeling down  
5 briefly but something more extensive, standing  
6 up on the 50-yard line, you know, arms  
7 outstretched, engaging in audible prayer?

8 Is -- is your analysis and answer  
9 still the same?

10 MR. CLEMENT: It's not exactly the  
11 same, Mr. Chief Justice. I think the -- the  
12 difficulty with the sort of audible prayers or  
13 some of the practices that the coach candidly  
14 admitted he engaged in previously, where he's  
15 holding up the helmets for both teams and sort  
16 of talking to the players, is there's an  
17 instructional component to that that I think  
18 that a -- that a school district could say that  
19 -- that sincere engagement in instructional  
20 activity, and that's what the core of what  
21 coaches and teachers do, we're going to -- we're  
22 going to treat that as government speech.

23 I think that --

24 CHIEF JUSTICE ROBERTS: Well, he's not  
25 speaking to the players as in the, you know,



1 example you gave, but he's praying to God.

2 MR. CLEMENT: So, if -- if he's not --  
3 if there's not an instructional component to it,  
4 the players are -- are -- are, you know, doing  
5 their own thing in the end zone, for example,  
6 then I think it really becomes what -- the  
7 school is -- is -- is able to have a neutral  
8 rule.

9 And this was part of my answer to  
10 another component of Justice Sotomayor's  
11 question, which is the -- the school has a fair  
12 amount of flexibility to determine what the  
13 duties of the coach are.

14 Here, they did not say that his duties  
15 were an all-encompassing supervisory role. And  
16 I suppose, if the school district had one coach  
17 whose whole job was to watch those kids after  
18 the bell like a hawk and make sure they didn't  
19 get into any trouble, even a brief religious  
20 exercise by that individual might be  
21 inconsistent with their neutral job duties and a  
22 basis for the school to do something.

23 But, here, it's -- it's in the record  
24 and I think undisputed that the -- that the  
25 coach could do other things, other private

1 things of a comparable amount of time because  
2 this is a fleeting religious exercise. Even the  
3 school district described it as fleeting.

4 JUSTICE BARRETT: But would Pickering  
5 apply, Mr. Clement, if, in the Chief Justice's  
6 hypothetical, let's say he says the Our Father  
7 with arms outstretched and it starts causing a  
8 lot of havoc in the stands, a lot of the things  
9 that, you know, your opponents, your friends on  
10 the other side say that happened, that, you  
11 know, the band members were being rushed, the  
12 head coach feared for his life.

13 If his prayer of the Our Father caused  
14 that kind of chaos, would Pickering apply? If  
15 they said for reasons of efficiency and school  
16 safety we just can't have this?

17 MR. CLEMENT: So, if -- if -- if they  
18 came up with a neutral policy that tried to deal  
19 with that situation, I think you would test the  
20 neutral policy based on Pickering.

21 JUSTICE BREYER: All right. Well --

22 MR. CLEMENT: I think, if they tried  
23 to adopt the neutral policy for the sole reason  
24 of stopping the Our Father, I think that's a  
25 case where you'd say, no, that's pretextual and

1 that's still going to be subject --

2 JUSTICE BREYER: Is this what --

3 MR. CLEMENT: -- to strict scrutiny,  
4 but I -- but -- but, if I could just get it on  
5 the table, but I also think if -- if what -- if  
6 the hypothetical is that kind of audible prayer,  
7 you -- you do have the -- the argument at least  
8 that that would be instructional and might be a  
9 different case.

10 I'm sorry, Justice Breyer.

11 JUSTICE BREYER: One of my problems in  
12 this case is the parties seem to have different  
13 views of the facts, so I'd like to get the --  
14 this may be a case about facts and not really  
15 much about law, and that's why I wanted to try  
16 this.

17 I'll list six facts that I got out of  
18 the record, and just tell me if they're right or  
19 wrong. That's all. If you want to say they're  
20 wrong, I'll go back to it. If you want to say  
21 they're right, good, I don't have to go back to  
22 it. Right? Okay.

23 One, for a long time, Kennedy would go  
24 after the game, Coach Kennedy would go to the  
25 50-yard line and he spoke out loud a prayer of

1     thanksgiving and he allowed students to join  
2     him.

3                 Two, when the District learned about  
4     that, it wrote to him or told him: You are free  
5     to engage in religious activity, including  
6     prayer, but it has to be physically separate  
7     from student activity and it has to be  
8     non-demonstrative, okay, if they're involved, if  
9     the students are nearby.

10                Three, his lawyers, Kennedy's lawyers,  
11     then sent him a letter that seemed less  
12     accommodating. It said, beginning on  
13     October 16, Kennedy will continue his practice  
14     of saying audibly just after the game by himself  
15     at the 50-yard line an audible, verbal prayer,  
16     and students could come. And Kennedy said, I'm  
17     not going to stop my prayer because kids are  
18     around me.

19                Four --

20                MR. CLEMENT: So am I supposed to stop  
21     you when something's not quite right in my --

22                JUSTICE BREYER: Yeah. Yeah.

23                MR. CLEMENT: So on --

24                JUSTICE BREYER: Just make note of  
25     that.

1 MR. CLEMENT: I think it's important  
2 if you look at the demand letter that was sent  
3 on October 14 --

4 JUSTICE BREYER: I'm about to do that.

5 MR. CLEMENT: No, no. That's what you  
6 were just talking about.

7 JUSTICE BREYER: No, no, I'm not.  
8 This is -- this is before, I'm saying -- oh,  
9 correct, you're right.

10 MR. CLEMENT: So, in that October 14  
11 letter --

12 JUSTICE BREYER: Yeah.

13 MR. CLEMENT: -- it didn't say that we  
14 want to pray with students around. It  
15 specifically said that the coach shouldn't have  
16 to flee from students if they --

17 JUSTICE BREYER: Yeah.

18 MR. CLEMENT: -- independently and  
19 voluntarily come near him because the students  
20 also have First Amendment rights.

21 JUSTICE BREYER: Correct. But Kennedy  
22 in his letter said, I am not going to -- in his  
23 deposition, I will not stop my prayer because  
24 there was kids around me.

25 MR. CLEMENT: Yes, he said -- that's

1 joint Appendix page 295, I'm not going to stop  
2 my prayer --

3 JUSTICE BREYER: Exactly.

4 MR. CLEMENT: -- mid-prayer that I  
5 start by myself --

6 JUSTICE BREYER: All -- all right.  
7 I'll --

8 MR. CLEMENT: -- that's --

9 JUSTICE BREYER: -- read -- go back  
10 and read that. I'll check it because I'm going  
11 to go back and read.

12 Four, he then advertised his plan to  
13 pray at the 50-yard line at the October 16 game,  
14 and the media all found out about it and made a  
15 big deal about it, and he was surrounded by  
16 players and a large number of spectators who  
17 rushed to the field.

18 MR. CLEMENT: Well, and -- and the  
19 important --

20 JUSTICE BREYER: That's on October 16.

21 MR. CLEMENT: October 16, important to  
22 note that the only players that joined him on  
23 October 16 were players from the opposing team.

24 JUSTICE BREYER: Okay. So opposing  
25 team, got it.

1                   Five, afterwards, the District said to  
2 Kennedy: Well, you cannot engage in  
3 demonstrative religious conduct while you are on  
4 duty for the District. Okay? But, if it's not  
5 going to be perceived as District endorsement --  
6 endorsement, we'll accommodate it. For example,  
7 pray privately or inside the school building or  
8 on the athletic facility somewhere or in the  
9 press box. And you can do that before or after  
10 games. And the development of accommodation is  
11 an ongoing process, and we will discuss further  
12 accommodations.

13                   And the final thing, six, is Kennedy  
14 never answered that letter.

15                   Okay. You've got the six.

16                   MR. CLEMENT: So should I --

17                   JUSTICE BREYER: Have you taken --

18                   MR. CLEMENT: -- correct you on six?

19                   JUSTICE BREYER: -- them in? Because  
20 there are a lot of them. And I'm sorry about  
21 that. But are they basically right with your  
22 exceptions that you --

23                   MR. CLEMENT: Well, and -- and I was  
24 just about to add Exception 6 --

25                   JUSTICE BREYER: Yeah.

1 MR. CLEMENT: -- which is --

2 JUSTICE BREYER: Seven.

3 MR. CLEMENT: Well, no, no, but, on --  
4 on 6, the -- the -- the record -- it's not in  
5 the record because these kind of interactions  
6 wouldn't necessarily be in the record, but there  
7 were efforts by Kennedy's lawyer to negotiate  
8 with the school district, and they would not  
9 respond. And we pointed that out in a footnote  
10 in -- in reply at the cert stage.

11 So this is not a situation where there  
12 is some asymmetry here that, you know, they were  
13 wonderfully accommodating and -- and we just  
14 refused to deal with them.

15 There are lots of other facts that are  
16 in the record that I think are highly relevant  
17 here, including that no student joined him on  
18 the field on October 23, even though that's one  
19 of two specific incidents for which he was  
20 disciplined, that no players joined him on the  
21 26th, which is the other game where he was  
22 specifically sort of signaled out for his being  
23 fired.

24 It's also, I think, important to  
25 recognize that after the game on the 16th, the



1 letter was sent on the 23rd, didn't say anything  
2 about safety concerns, band members' safety. It  
3 talked eight times about endorsement. And then,  
4 at the next home game, the only other home game  
5 in the record here, the 23rd, because the school  
6 district made clear that there weren't supposed  
7 to be people on the field, they didn't have a  
8 replication of the events on the 16th. It's  
9 also true and --

10 JUSTICE KAGAN: Mr. Clement --

11 MR. CLEMENT: -- I think important --

12 JUSTICE KAGAN: -- I want to -- I  
13 mean, finish your sentence, but --

14 MR. CLEMENT: Sure. I just had one  
15 more thing, which is that there were a number of  
16 these games, you know, contemporaneously right  
17 before then where the record is clear that he  
18 did engage in these kind of prayers when the --  
19 when the players were singing in the end zone,  
20 and many of them were at away games, and there  
21 was no rushing the field, no circus, no  
22 incidents.

23 JUSTICE KAGAN: I -- I take it from  
24 your earlier answers that you're not contesting  
25 the right of the school district to discipline

1 Coach Kennedy if he had been praying during the  
2 official, if you will, post-game talk?

3 MR. CLEMENT: I think that's right.

4 We don't -- I mean --

5 JUSTICE KAGAN: Correct?

6 MR. CLEMENT: -- we don't take an  
7 issue that --

8 JUSTICE KAGAN: So -- so that's  
9 like --

10 MR. CLEMENT: -- he discontinued that  
11 practice.

12 JUSTICE KAGAN: -- if he were praying  
13 -- if he were a math teacher and he prayed in  
14 math class, same? If he's a coach and he prays  
15 during the post-game talk, that the school can  
16 discipline him for?

17 MR. CLEMENT: That's right --

18 JUSTICE KAGAN: And -- and --

19 MR. CLEMENT: -- because it would be  
20 government speech.

21 JUSTICE KAGAN: -- just briefly, why?

22 MR. CLEMENT: Because it would be  
23 government speech.

24 JUSTICE KAGAN: Well, how -- I don't  
25 really quite know why that's the -- the

1 operative question. I mean, really, why? Why  
2 can the school discipline him? And I'm going to  
3 just sort of suggest and -- and -- and find out  
4 whether you agree, that if you look at our  
5 prayer cases, the idea of why the school can  
6 discipline him is that that puts a kind of undue  
7 pressure, a kind of coercion on students to  
8 participate in religious activities when they  
9 may not wish to, when their religion is  
10 different or when they have no religion.

11 Is that correct?

12 MR. CLEMENT: So, look, I think it's  
13 simpler than that, quite frankly. I think --

14 JUSTICE KAGAN: You see, I think a lot  
15 of this Garcetti stuff is not -- is -- is just  
16 not getting to the heart of what we care about,  
17 what our cases have long cared about in thinking  
18 about these questions, which is coercion on  
19 students and having students feel that they have  
20 to join religious activities that they do not  
21 wish to join, that their parents do not wish  
22 them to join.

23 MR. CLEMENT: So I -- I do think it's  
24 -- it really is as simple as the government  
25 speech, but I also want to be clear, again, as

1 we're talking about the record here, this is not  
2 a case where the government took action because  
3 of coercion concerns. The record is  
4 crystal-clear that they were concerned about  
5 endorsement and --

6 JUSTICE KAGAN: Yeah, I mean,  
7 endorsement, coercion, I mean, you're requiring  
8 a lot of a school board to try to figure out  
9 exactly which box in the Establishment Clause to  
10 put this in.

11 MR. CLEMENT: I -- I -- with all due  
12 respect, I don't think it's asking that much for  
13 a school district to understand what this Court  
14 has said repeatedly and said that even young  
15 students will understand --

16 JUSTICE KAGAN: Okay. Assume that the  
17 school district had said the right things. They  
18 had said, we don't really like this because it  
19 is a form of pressure, a form of coercion.  
20 We're worried that the -- that the students will  
21 feel he gets to put me into a football game or  
22 not. He gets to, you know, give me an A in math  
23 class or not. And this is a kind of coercion  
24 that's improper for 16-year-olds.

25 MR. CLEMENT: So, Justice Kagan, in

1 the hypothetical where the coach is giving the  
2 post-game talk, I think those kinds of concerns  
3 about real coercion may well be well placed.

4 But, when the coach is by himself at  
5 the midfield giving a 15-second fleeting prayer,  
6 those kinds -- if you -- if you call that  
7 coercion, you are making an important category  
8 mistake.

9 JUSTICE KAGAN: I -- I see that point.  
10 So let me give you a hypothetical.

11 So the hypothetical is you have a  
12 coach and he has historically been giving  
13 prayers in his post-game talk. And then the  
14 school says don't do that. And let's say that  
15 the school uses the right words and says don't  
16 do that because we think it poses a coercion  
17 problem. And he says, okay, I won't do that.  
18 And -- but instead he says, you know what, I'm  
19 going to start the post-game talk a minute later  
20 than I usually do, and in the meantime, I'm  
21 going to pray, and, please, you know, join me if  
22 -- if -- if -- if you're so moved.

23 What's a student to think at that  
24 point?

25 MR. CLEMENT: I think, in that

1 hypothetical, the -- there well may be a  
2 coercion concern, but if instead the coach says,  
3 all right, I'm going to go to midfield, I'm  
4 going to do this at 15 seconds, I'm going to try  
5 to pick a time when most of the players are in  
6 the end zone doing something else, and if  
7 anybody asks whether they can join, I'm going to  
8 tell them it's a free country, you don't have  
9 to, but do what you want, that's this case.

10           And that's not coercion that counts  
11 under the Establishment Clause.

12           JUSTICE KAGAN: So is -- is -- is that  
13 the question of this case, whether the facts are  
14 my facts or your facts?

15           MR. CLEMENT: That's one of the  
16 questions in this case, but why it matters --  
17 and, honestly, I think the record's  
18 crystal-clear on this. I mean, we have a record  
19 this time around. I don't think the Joint  
20 Appendix and the rest of the record is ambiguous  
21 on this point.

22           But the reason the factual difference  
23 is important is because, if you don't  
24 distinguish between the two situations, then  
25 you're leaving teachers and coaches in a

1 position where there's no material room for  
2 their free exercise of religion or their free  
3 speech, and that's exactly what this Court said  
4 is not the case in Tinker.

5           And so -- and -- and, again, the  
6 concerns -- the reason it gets back to  
7 government speech at least in my view is because  
8 one technique that the Ninth Circuit used to  
9 approve this is one of these excessively broad  
10 job descriptions. And I think, with all due  
11 respect to Justice Sotomayor, her hypothetical  
12 built in this idea. If -- if you say the job  
13 description of teachers and coaches is to be  
14 mentors, and if the mentors are religious, the  
15 students who depend on them for playing time and  
16 grades and all of the rest are going to want to  
17 curry favor and they're going to engage in their  
18 own religious practices or conform or at least  
19 feel pressure to do so.

20           JUSTICE SOTOMAYOR: Mr. Clement --

21           MR. CLEMENT: That's a recipe for no  
22 free speech rights at all.

23           JUSTICE SOTOMAYOR: -- I -- I do  
24 understand a claim that how adults respond to  
25 things is not often relevant. We don't have a

1     hecker -- heckler's veto in our First Amendment  
2     jurisprudence, but we have had it in our school  
3     prayers under the recognition of what Justice  
4     Kagan talked about, the fact that 16-year-olds  
5     can't be expected to be adults.

6             What do I do with the fact that  
7     parents complain that their children wouldn't  
8     follow their directives not because they wanted  
9     to pray but because they felt pressure to pray?  
10    What do I do with the fact that when the coach  
11    was -- the school explicitly said students don't  
12    have to come if they don't want, many of them  
13    didn't? Some still did, but many of them  
14    didn't. And what do we do with the fact that a  
15    coach from another team was the one who brought  
16    this to the school's attention because your  
17    client asked him and his players to join in the  
18    prayers?

19            Does -- don't those facts suggest the  
20    very coercion that Justice Kagan was talking  
21    about?

22            MR. CLEMENT: So, Justice Sotomayor,  
23    to the extent they suggest any coercion, it's  
24    only vis-à-vis the pre-September 17 practices  
25    that were discontinued as soon as there was a



1 candid discussion between the coach and the  
2 school district. And --

3 JUSTICE SOTOMAYOR: But, Mr. Clement  
4 --

5 MR. CLEMENT: -- I think it's  
6 important --

7 JUSTICE SOTOMAYOR: -- the problem I  
8 have is your client is the one who publicized  
9 this debate. He had a right to. But, once he  
10 did and it created the disruption it did, why is  
11 the school estopped from saying this activity on  
12 the center field of the 50-yard line has created  
13 a problem where people believe that our  
14 continuing to do this -- students believe  
15 permitting you to do this is interfering with  
16 our work as a school?

17 I don't understand why a school can't  
18 do that.

19 MR. CLEMENT: Well, a school can't do  
20 that because it sounds like -- awful lot like  
21 they would be sort of either retaliating against  
22 his protected speech --

23 JUSTICE SOTOMAYOR: No, they were --

24 MR. CLEMENT: -- or at least saying --

25 JUSTICE SOTOMAYOR: -- willing to let

1 him speak -- pray anywhere he wanted in the  
2 school. After the game, come back. He's the  
3 one who chose to publicize his prayer by doing  
4 it on the 50-yard line. He didn't do it on the  
5 side. He didn't just bow his head. He got on a  
6 knee at the very center of the field.

7 I -- I don't know of any other  
8 religion that requires you to get at the 50-yard  
9 line, the place where post-game victory speeches  
10 are given. What religion requires you to do it  
11 at that spot?

12 MR. CLEMENT: So the coach's religion,  
13 and he felt -- and -- and nobody's questioned  
14 the sincerity of his religious beliefs --

15 JUSTICE SOTOMAYOR: That he had to  
16 thank God. But why there?

17 CHIEF JUSTICE ROBERTS: Briefly, Mr.  
18 Clement.

19 MR. CLEMENT: His -- his religious  
20 beliefs, he felt compelled to -- to -- to make  
21 his prayer there. And I don't think there's  
22 anything unusual about that. I mean, if a -- if  
23 a soccer player scores a goal, the soccer player  
24 will do a religious exercise, or Tim Tebow  
25 scores a -- a touchdown, they do the religious

1 exercise there.

2           There -- there are spectators watching  
3 it, but that doesn't -- that's not what's  
4 driving the religious exercise. What's driving  
5 the religious exercise is that's where the event  
6 that the religious adherent is thankful for took  
7 place.

8           CHIEF JUSTICE ROBERTS: Thank you.

9           Justice Thomas, anything further?

10          JUSTICE THOMAS: No.

11          CHIEF JUSTICE ROBERTS: Justice  
12 Breyer?

13          JUSTICE BREYER: One quick question.  
14 I think -- from prior cases. The -- the problem  
15 of prayer in school has been the fact that --  
16 that there are 54 different religions in the  
17 United States now, and so what -- going back to  
18 the 18th Century, 17th Century, what we're  
19 worried about is maybe it's -- here, it was the  
20 satanists, but, I mean, it could be, you know,  
21 the Catholics, Protestants, Jews, Shintos,  
22 Mohammedans, and one group thinks why this group  
23 is being favored by the school, the other one  
24 thinks what about this one and so forth. So we  
25 have a kind of neutrality.

1                   Now it's the same question. Right  
2 after the game, right before the bell rings in  
3 the morning, the teacher, the coach, says let us  
4 pray, prays out loud, and students join.

5                   And, indeed, this one told all the  
6 press, so there were going to be a lot of people  
7 there, but leaving that out, this doesn't seem  
8 like a new problem. It just seems like a  
9 line-drawing problem about the 50-yard line just  
10 after the game when the school said don't do it  
11 on the 50-yard line, do it 10 minutes later, and  
12 -- and do you see what's bothering me? And am I  
13 right about how to see the case?

14                  MR. CLEMENT: So I -- I -- I see  
15 what's bothering you, but I don't think you're  
16 right to perceive the case through that lens.  
17 There is a big difference between a teacher  
18 leading students in prayer out loud and allowing  
19 a benevolent neutrality and tolerance for a  
20 variety of views.

21                  Obviously, the school district says  
22 it's fine to take a knee after the game, but  
23 it's not fine to turn to Mecca. Or the student  
24 that's -- the Muslim student that scored and  
25 bowed towards Mecca is going to be disciplined

1 but not the Christian student that took a knee  
2 after scoring a touchdown.

3           Those are problems. That's  
4 discrimination. But to allow individual  
5 religious exercise in the normal places -- if  
6 you tell a kid that is about to kick the  
7 potential game-winning field goal that they  
8 can't cross themselves on the field in front of  
9 50,000 or a thousand, but what they can do,  
10 don't worry, you can -- you can go in, you could  
11 rush up to the press box, we'll put the whole  
12 thing on hold, you can do it in our prayer booth  
13 where nobody can see you, and then you can come  
14 down and kick the field goal. Nobody thinks  
15 that's sensible.

16           And the one thing I would point out is  
17 the very fact that the accommodations that were  
18 offered by the school district were to leave the  
19 field and go somewhere else and do your prayer  
20 and come back demonstrates beyond all doubt that  
21 he did not have all-encompassing supervisory  
22 responsibilities after the game.

23           Sure, he was on duty in a loose sense,  
24 but he was not on duty in a real sense or they  
25 would not have given him those accommodations.

1 CHIEF JUSTICE ROBERTS: Justice Alito?  
2 Justice Sotomayor, anything further?  
3 Justice Kagan?  
4 Justice Gorsuch?

5 JUSTICE GORSUCH: Mr. Clement, one of  
6 the difficulties of this case is getting one's  
7 hands around the District's rationale, and as I  
8 understood, it was based on kind of our Lemon  
9 endorsement test.

10 And you're arguing, as I -- as I hear  
11 you, that that's -- that was a mistaken test and  
12 a mistaken way to think about what the  
13 Establishment Clause requires.

14 You had a colloquy about coercion as  
15 an alternative, and I'd -- I'd just like your  
16 thoughts on that subject generally.

17 MR. CLEMENT: I -- I -- I appreciate  
18 the question. I don't think -- I mean, you  
19 know, people are trying to dispute this record.  
20 I think it is very clear on what motivated the  
21 District, and it was endorsement, endorsement,  
22 endorsement, endorsement again.

23 JUSTICE GORSUCH: Not -- not coercion?

24 MR. CLEMENT: Not coercion. If you  
25 look at their first letter after the October 16

1 game, Joint Appendix page 90 to 95, there are  
2 eight references to endorsement or endorsing,  
3 zero references to either coercion or player  
4 safety.

5           If you look at their letter to the  
6 EEOC, which is around Joint Appendix page 130,  
7 there are again eight references to endorsement,  
8 endorsing, no references to coercion. So it is  
9 clear what motivated their policy.

10           As to what the right concern would be,  
11 I mean, I -- I do think real coercion from  
12 government action is something that this Court  
13 has historically looked to in the context of  
14 Establishment Clause cases, but, as Justice  
15 Scalia pointed out in his Good News concurrence  
16 and in other opinions, it's very important to  
17 distinguish between real coercion coming from  
18 the government and the kind of peer pressure, if  
19 you will, that comes from private individuals  
20 being able to engage in speech.

21           And I think the record is clear here  
22 that we only have the latter going on here and  
23 not the former. It's certainly not what  
24 motivated the District because, in  
25 contemporaneously, when they put out a

1 newsletter to their -- their constituents, they  
2 said there's no evidence that any student was  
3 coerced here.

4 JUSTICE GORSUCH: So what do we do  
5 about that, though? Many school districts and  
6 municipalities around the country continue to  
7 operate on this endorsement idea, and there are  
8 certainly some strains of it in our case law, as  
9 you're familiar, dating back to Lemon.

10 MR. CLEMENT: So I -- I -- I think the  
11 fact that school districts continue to make this  
12 mistake even though you have said over and over  
13 and over again that tolerating private religious  
14 speech is not endorsement is an excellent,  
15 excellent reason to be as emphatic as possible  
16 in overruling endorsement cases. If it requires  
17 formally overruling Lemon and the endorsement  
18 tests that come from that, I think that would be  
19 very helpful.

20 But what -- what continues to happen  
21 is that there is overt discrimination on the  
22 basis of religion, as is evidenced in the record  
23 here, by school districts who aren't evil. It's  
24 just they're doing it out of misguided  
25 endorsement concerns.



1           And I think the time has come to be as  
2 clear as possible to make clear that that's not  
3 a proper part of Establishment Clause analysis.

4           CHIEF JUSTICE ROBERTS: Justice Kagan?

5           JUSTICE KAGAN: Do you want to --

6           CHIEF JUSTICE ROBERTS: No?

7 Justice --

8           JUSTICE KAGAN: If -- if -- if you  
9 would go back to the coercion part of your  
10 answer to Justice Gorsuch, if I understood you  
11 correctly, you were saying, well, real coercion  
12 is where the government does it. And I -- I  
13 want to understand that.

14           Are -- are you suggesting that a  
15 teacher in a classroom can say: Well, you can't  
16 charge me with coercion because he separates  
17 himself from the school district?

18           MR. CLEMENT: That's where I think the  
19 Garcetti line comes in because, if it's the  
20 individual -- if it's government speech,  
21 instructional role, then that -- no matter what  
22 they say to try to distance themselves, the  
23 teacher and the coach can still be a source of  
24 coercion.

25           But, if it's really private speech --

1 JUSTICE KAGAN: Okay. Even though he  
2 says, you know, this isn't the school district's  
3 speech and even though everybody knows that,  
4 actually, I mean, there must be countless times  
5 when a coach in the post-game talk or a teacher  
6 in math class, where people would totally  
7 believe them if they said I'm doing this as --  
8 as just me, I'm not doing this because the  
9 school district says it, but, for me, this is  
10 super-important to me, this prayer, and I hope  
11 you'll join me.

12 Now that seems to me to be coercive of  
13 16-year-olds regardless if they know that it's  
14 him and not the school district. He's the one  
15 who's going to give me an A or not.

16 MR. CLEMENT: I -- I guess it just  
17 depends -- I mean, if -- if you're saying this  
18 -- that this happens in the middle of class, I  
19 might believe you. But, if you're just  
20 saying -- I mean, look, take a familiar example.  
21 It's Ash Wednesday. A teacher goes to morning  
22 mass, comes in with a big black mark on his or  
23 her forehead. Is that coercive?

24 JUSTICE KAGAN: No, because nobody's  
25 asking the students to participate at that

1 point. They don't have a choice of  
2 participating at that point.

3 MR. CLEMENT: But it's a very popular  
4 teacher, and they're going to have that -- that  
5 teacher in the afternoon's class, and there's a  
6 noon mass that they might be able to get to and  
7 get their own black mark, and then they'll be  
8 favored students, and that teacher is the one --

9 JUSTICE KAGAN: I --

10 MR. CLEMENT: -- they put a  
11 recommendation for --

12 JUSTICE KAGAN: -- I think we can draw  
13 lines like that, you know?

14 MR. CLEMENT: What's that?

15 JUSTICE KAGAN: I think we can draw  
16 lines like that and know the difference between  
17 those two things, but know the difference when a  
18 teacher who has historically tried to bring  
19 prayer into a classroom setting says, you know  
20 what, you know, I -- I understand that there are  
21 all these Supreme Court cases against me, so  
22 what we're going to do is we're going to have a  
23 little bit of a break, five minutes of a break,  
24 so we can all regroup, and -- and I'll be  
25 praying during that time.

1           MR. CLEMENT: So, Justice Kagan,  
2 obviously, there's going to be room in the  
3 jurisprudence for pretext going both ways. And  
4 I also think there ought to be room for  
5 understanding that in this area, given the  
6 current state of this Court's jurisprudence,  
7 there are -- there's room for -- for mistakes on  
8 both parts.

9           So I think it would be profoundly  
10 mistaken to say, well, another coach, Coach  
11 Kennedy prime, he could engage in this exact  
12 same religious exercise, but because he engaged  
13 in this previous exercise and candidly  
14 cooperated with the District, we're going to say  
15 that there's some sort of like a taint of prior  
16 practice, and he can't engage in the religious  
17 exercise.

18           CHIEF JUSTICE ROBERTS: Justice  
19 Kavanaugh?

20           JUSTICE KAVANAUGH: I want to pick up  
21 on Justice Kagan's and Justice Gorsuch's  
22 questions. The District said the sole reason it  
23 was doing this was to avoid Establishment Clause  
24 problems, correct?

25           MR. CLEMENT: Correct. And was

1 specific to endorsement.

2 JUSTICE KAVANAUGH: Okay. And then,  
3 to pick up on Justice Gorsuch, the Lemon  
4 endorsement test, that has not been applied by  
5 this Court in several decades in cases like Van  
6 Orden, Town of Greece, American Legion. At  
7 least I've said I don't think there is such a  
8 test in our case law anymore, the Lemon  
9 endorsement test, correct?

10 MR. CLEMENT: Sure, but it's a -- it  
11 -- it's a stubborn -- it's a stubborn fruit, and  
12 I don't think just pushing a pencil through it  
13 has done the trick. I mean, you really have to  
14 slice it in half and make clear to everybody --

15 JUSTICE KAVANAUGH: Right. There have  
16 been individual opinions, but let's -- we  
17 haven't applied it in the cases. I take your  
18 point, but -- but I think Justice Kagan's point  
19 is there's a whole separate body of cases  
20 involving schools, and so Engle, Lee versus  
21 Weisman, and Santa Fe. And Santa Fe is the  
22 football case, and so that's the most relevant  
23 one here, I think.

24 And the question here, I think, is  
25 what's different about this from an

1 Establishment Clause perspective than the prayer  
2 over the loudspeaker, which I think was a key  
3 fact, in Santa Fe? How would we distinguish  
4 Santa Fe from this case?

5 MR. CLEMENT: So Santa Fe is readily  
6 distinguishable. It is an endorsement case. So  
7 you might want to be clear that at least to that  
8 extent, it's no longer good law, but, here --  
9 it's distinguishable. The loudspeaker is a huge  
10 part of it.

11 But, if you'll remember the Santa Fe  
12 case, I mean, one of the issues is the school  
13 district argued, hey, this is a facial challenge  
14 to our policy, and under the policy, it's  
15 possible for the student to give a non-religious  
16 solemnization, and so this can't possibly be  
17 invalid on its face.

18 And the Court's response to that  
19 argument was to focus on the state action, the  
20 government's own involvement in a majoritarian  
21 election for the opportunity to give the prayer  
22 over the loudspeaker. So, as I reread Santa Fe,  
23 I was struck by how much of the Court's analysis  
24 turned on the election aspect of the school's  
25 policy, which has no analogue here whatsoever.

1           But, to -- to -- to give a concrete  
2     example, I do think, if -- if -- if the coach  
3     goes to the loudspeaker after the game, there's  
4     a much stronger argument that that's government  
5     speech. And --

6           JUSTICE KAVANAUGH: And -- and, also,  
7     there's -- just to pick up on Justice Kagan's  
8     point, then you have the captive audience that  
9     seems to be at the heart of Engel, Lee versus  
10    Weisman, and Santa Fe, and the question really  
11    is, what's different here? You can answer that  
12    in any way you want, but just --

13           MR. CLEMENT: Yeah, but -- but -- but  
14    I think that, you know, the loudspeaker sort of  
15    ties this audience back to the government speech  
16    and ties it all together. I think, you know,  
17    when -- when Mohamed Salah, you know, has a  
18    religious exercise after a goal at Anfield, the  
19    fact that the crowd is there is incidental.  
20    It's not a captive audience in that sense. It's  
21    not -- it's not he who brought them there. So I  
22    think it kind of comes back to government speech  
23    in that respect.

24           And I think, when the coach takes this  
25    15-second fleeting prayer at the end of the game

1 with no loudspeaker, barely audible, it's  
2 radically different from the use of the  
3 loudspeaker and is much similar to Mohamed  
4 Salah, Tim Tebow, all of those things.

5 Or think about what happens when a  
6 player gets injured on the field. I mean, it's  
7 common practice at all levels of the game,  
8 public school, private school, you take a knee.  
9 The coach takes a knee. The players take a  
10 knee. Many of them presumably are praying for  
11 the player's health. Some of them are not.  
12 Some of them are -- have their own religious  
13 traditions. But none of that is coercion, not  
14 in a real sense, and none of it violates the  
15 Establishment Clause.

16 JUSTICE KAVANAUGH: What about the  
17 player who thinks, if I don't participate in  
18 this, I won't start next week, or the player who  
19 thinks, if I do participate in this, I will  
20 start next week, and the player, like, wants to  
21 start?

22 MR. CLEMENT: So that's -- that's  
23 where I think making a clear message that that's  
24 inappropriate, that this doesn't matter for  
25 those purposes, that's -- that's how you deal



1 with those problems.

2 And if there is a coach or a  
3 teacher --

4 JUSTICE KAVANAUGH: Then how -- how  
5 will you -- how will you ferret that out?  
6 Because every player's trying to get on the good  
7 side of the coach. And every parent is worried  
8 about the coach exercising favoritism in terms  
9 of the starting lineup, playing time,  
10 recommendations for colleges, et cetera.

11 MR. CLEMENT: I -- I -- I think the  
12 school district, if it has that concern, and I'm  
13 not saying it's not a legitimate concern, just  
14 makes it as clear that it's school policy that  
15 nothing turns on that.

16 But that concern, although legitimate,  
17 isn't even specific to religion. I mean, if --  
18 if --

19 JUSTICE KAVANAUGH: I agree with that.

20 MR. CLEMENT: -- I mean, if -- if the  
21 coach is always wearing a Packers jersey, I  
22 mean, there's -- there's -- there's an incentive  
23 for the -- for the -- for the players to follow  
24 on.

25 And it's not just coaches, because,

1 for most kids, frankly, the teacher is going to  
2 be the -- the -- the avenue towards collegiate  
3 success, not -- not the coach. It's both, but  
4 -- but -- but that's why if you take that -- if  
5 instead saying the way to deal with that is you  
6 punish -- if any -- if any coach or teacher does  
7 it, shame on them and they should be punished.  
8 And you make clear that that's not supposed to  
9 happen and can't happen in this school.

10 JUSTICE KAVANAUGH: And I -- I guess  
11 the -- the problem at the heart of is it you're  
12 not going to know because the coach is probably  
13 not going to say anything, like the reason I'm  
14 starting you is that you were -- you knelt at  
15 the 50-yard line. You're never going to know,  
16 and that -- that leads to the suspicions by  
17 parents, I think -- I'm just playing out what  
18 the other side is saying here -- the suspicion  
19 by parents that the reason Johnny's starting and  
20 you're not is he was part of the prayer circle.

21 And, you know, that suspicion I don't  
22 think you can get around. That's a real thing  
23 out there, and, you know, that's going to be a  
24 real thing in situations like this. I don't  
25 know how to deal with that, frankly, though.

1           MR. CLEMENT: Well, if it's a real  
2 thing, then there's really -- as I see it,  
3 there's sort of two alternatives, right? You  
4 can work really hard to dispel it.

5           JUSTICE KAVANAUGH: Mm-hmm.

6           MR. CLEMENT: Or you can say, well,  
7 that's a possibility, it's not limited to  
8 coaches, it's not limited to religion. So we're  
9 going to effectively overrule Tinker and say  
10 that, you know, if you're a teacher, you can't  
11 do anything sufficiently expressive that  
12 students could try to mimic it in a way that  
13 curries favor.

14           JUSTICE KAVANAUGH: One last question.  
15 And you -- you mentioned this. It's not just  
16 religious speech that would trigger issues; it's  
17 others. So, to your argument that this is  
18 private speech and therefore Garcetti, how do  
19 you handle the hypothetical again of the coach  
20 who goes out and wants to unfurl the political  
21 banner at the 50-yard line --

22           MR. CLEMENT: Well --

23           JUSTICE KAVANAUGH: -- or wants to put  
24 on a political message at the 50-yard line after  
25 the game?

1           MR. CLEMENT: So -- so, if it's -- if  
2 the reason that the school district is acting is  
3 because of disruptive or even just because it's  
4 political speech and it wants to take action,  
5 that's Pickering. They can do that.

6           So that -- those are sort of an easy  
7 case. I also think, like, flags are kind of --  
8 I know they're -- they're fun hypos, but they're  
9 easy cases because those are -- there's kind of  
10 no reason to unfurl a flag other than to  
11 communicate with your message -- your -- your  
12 audience, and that's not true of this kind of --  
13 of prayer.

14           It may be very important to somebody  
15 to do it in the place where the activities took  
16 place. It may be that incidentally there's an  
17 audience there, but it's nothing inherent in the  
18 event for it to be sort of shown off to the  
19 audience. And I don't think you can really say  
20 that about unfurling a flag.

21           JUSTICE KAVANAUGH: Thank you.

22           CHIEF JUSTICE ROBERTS: Justice  
23 Barrett?

24           JUSTICE BARRETT: Let me pick up on  
25 that, Mr. Clement.

1                   This is, as Justice Thomas asked you  
2 at the beginning, both a free exercise and free  
3 speech claim. Who is he communicating to? God?  
4 Like, where is the -- the speech?

5                   MR. CLEMENT: I -- I -- I think he is  
6 communicating to God.

7                   JUSTICE BARRETT: And so that would  
8 trigger the First Amendment protection.

9                   MR. CLEMENT: Under both --

10                  JUSTICE BARRETT: He doesn't have to  
11 be --

12                  MR. CLEMENT: -- the Free Speech  
13 Clause and the Free Exercise Clause, it would be  
14 --

15                  JUSTICE BARRETT: Well, I understand  
16 the free exercise part of it, but, you know,  
17 even if he's not communicating to an audience,  
18 so he's completely silent, he just takes the  
19 knee, that's protected speech even if he's not  
20 trying to communicate to anyone around him, just  
21 to the Almighty?

22                  MR. CLEMENT: Absolutely.

23                  JUSTICE BARRETT: Okay.

24                  MR. CLEMENT: It's expressive conduct,  
25 it's -- or speech.

1 JUSTICE BARRETT: Second question is  
2 to this coercion point. Let's imagine that  
3 Coach Kennedy runs a Young Life group and he has  
4 many players, you know, and many other kids in  
5 the school, but many of his players, because  
6 they really admire Coach Kennedy, come to his  
7 home for these Young Life meetings.

8 And many of the concerns that Justice  
9 Kavanaugh is identifying are present. You know,  
10 a lot of the players come because they think  
11 they're going to get more playing time if they  
12 -- if they come and show up and participate in  
13 this Christian youth group.

14 I take it your position would be that  
15 that's entirely private speech, and even if  
16 there's a coercive component to it, that the  
17 school can have nothing to say?

18 MR. CLEMENT: Well, I -- I think that  
19 if the school has a concern about that kind of  
20 activity, after-school activity, wholly off the  
21 school grounds, I mean, I think the way, if it  
22 really had a concern with that, it could try to  
23 deal with it through some kind of neutral  
24 policy.

25 If it could say, well, we're

1 sufficiently concerned about that, we're not  
2 going to let any teachers have any kind of  
3 outside events at their house or something, then  
4 I think that -- that would be a neutral policy.

5           Somebody could try to test whether  
6 that's consistent with Smith or whether Smith's  
7 good law, but -- but those are all different  
8 issues. But I think, you know, another way that  
9 the school can deal with these kind of issues,  
10 if it's not pretextual and just designed to root  
11 out religion is to have neutral rules that say,  
12 okay, like, we get it, there are some concerns.

13           But the one thing I think that's clear  
14 from this Court's cases is that you can't have a  
15 prophylactic rule that says, you know, there  
16 might be some problems and so the way we're  
17 going to solve the problem is to forbid a lot of  
18 protected speech.

19           I mean, Ashcroft against Free Speech  
20 Coalition, among -- among other cases, says that  
21 that's verboten.

22           JUSTICE BARRETT: And I -- I guess I'm  
23 gathering from your response that you would  
24 treat that Young Life example as basically  
25 subject to the same kind of analysis as Justice

1 Kagan's examples of, you know, a disclaimer  
2 before class, this is an instructional -- or  
3 maybe it's before the bell, like Justice  
4 Sotomayor asked you before, purely private  
5 speech, not endorsement, nobody could mistake it  
6 for government speech, and any coercion would  
7 be -- you know, maybe it's there, maybe it's  
8 not, just as, in the Young Life group, maybe  
9 it's there, maybe it's not?

10 MR. CLEMENT: I -- I -- I think that's  
11 right. And, again, if there's a lingering  
12 concern, the option, I think, that's still on  
13 the table is a neutral rule that sort of avoids  
14 those situations because, again, I mean, it --  
15 it really, as -- as -- as you sort of articulate  
16 it, if -- if there's a concern, it really isn't  
17 a concern that's specific to religion in any  
18 way, shape, or form.

19 I mean, you could have the same thing  
20 for any after-school activity if the idea is,  
21 well, you know, people are going to kind of  
22 curry favor with the teacher and participate in  
23 that, then maybe you have a rule about it, but,  
24 of course, you know, you can have that already,  
25 right? I mean, you know, think you're going to



1 get a better math grade if you go out for the  
2 math team.

3 So, at a certain point, the  
4 responsibility of the school is to teach the  
5 important lesson that private speech is  
6 protected even for teachers and coaches.

7 JUSTICE BARRETT: Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,  
9 counsel.

10 Mr. Katskee.

11 ORAL ARGUMENT OF RICHARD B. KATSKEE

12 ON BEHALF OF THE RESPONDENT

13 MR. KATSKEE: Mr. Chief Justice, and  
14 may it please the Court:

15 No one doubts that public school  
16 employees can have quiet prayers by themselves  
17 at work even if students can see. If that were  
18 the issue, there wouldn't be a case here because  
19 the District allowed that.

20 But that wasn't good enough for Mr.  
21 Kennedy. He insisted on audible prayers at the  
22 50-yard line with students. He announced in the  
23 press that those prayers are how he helps these  
24 kids be better people.

25 And after the District closed the

1 field to the public, he expressly permitted  
2 legislators and others to join him. Under  
3 Garcetti, those are the functions of a coach,  
4 not a private citizen.

5 But even if not, under Pickering,  
6 Kennedy's rights would still have to be balanced  
7 against the District's interest in controlling  
8 its events and messages, protecting the  
9 religious freedom rights of the students and  
10 their parents, and managing the workplace.

11 Some of these kids were just 14 years  
12 old. Mr. Kennedy's actions pressured them to  
13 pray and also divided the coaching staff,  
14 sparked vitriol against -- against school  
15 officials, and led to the field being stormed  
16 and students getting knocked down.

17 When Mr. Kennedy repeatedly ignored  
18 sincere efforts to accommodate personal prayers,  
19 what was the District to do? If a math teacher  
20 knelt and said -- said audible prayers in class  
21 just before the bell, the school district could  
22 act.

23 Coaches have far more power and  
24 influence, especially at the time and place of  
25 those traditional post-game speeches. To win,

1 Mr. Kennedy would need this Court to whittle  
2 Garcetti to nothing and toss Pickering aside and  
3 disregard students' rights and ignore the need  
4 to maintain control over school events.

5 Doing any of that on Kennedy's  
6 hypothetical facts would be ill-advised. To do  
7 all of it would be extraordinary.

8 I welcome the Court's questions.

9 JUSTICE THOMAS: Counsel, would -- if  
10 the coach, instead of taking a knee for prayer,  
11 took a knee during the National Anthem because  
12 of moral opposition to racism, would -- how  
13 would your school district respond? Would that  
14 be a Garcetti -- would that be government  
15 speech?

16 MR. KATSKEE: Well -- well, Justice  
17 Thomas, if, for instance, the Court -- the coach  
18 goes to the center of the field in front of  
19 everyone during the National Anthem, absolutely,  
20 that is government speech. But, on -- but, on  
21 Mr. Kennedy's theory, it's private speech and  
22 more than that --

23 JUSTICE THOMAS: How is that  
24 government speech? Would you explain that to  
25 me?

1           MR. KATSKEE: Sure. In -- in  
2     Garcetti, this Court made clear that the test  
3     for government speech is a functional test, not  
4     a formalistic one, to determine whether the  
5     speech is pursuant to one's job.

6           That has to entail looking at the  
7     manner, the time, and the place of the speech,  
8     and how reasonable observers would see it,  
9     whether they would view that as -- as speech as  
10    a government employee.

11           And so, in the hypothetical that --  
12    that you just gave, that's the sort of thing  
13    given the -- given that moment during the  
14    National Anthem in the center of the field and  
15    making -- making this public act and public  
16    statement, that would be regulable, but under --

17           JUSTICE THOMAS: But what if the  
18    school district, as it did here, objected to  
19    that conduct before it took place? How could  
20    that be government speech?

21           I'm -- normally, when I think of  
22    government speech, the government has a message  
23    and someone is communicating that message. How  
24    would it be government speech if, as it happened  
25    in this case, the government objected

1       beforehand?

2                   MR. KATSKEE:  A -- a couple of  
3       responses, Your Honor.

4                   The first is that what the government  
5       speech test gets at is -- is the recognition  
6       that school districts and other governmental  
7       entities have to be able to control their  
8       programs, and when they hire somebody to run  
9       that program, they have to make sure that it is  
10      their message that's being communicated.

11                  And -- and under Mr. Kennedy's test,  
12      not only would so many things qualify as  
13      private, just because the -- just because the  
14      job description doesn't say, gee, if you go out  
15      to the center of the field during the National  
16      Anthem, you're not -- you are allowed or are not  
17      allowed to -- to make political speeches, that  
18      becomes private, and it gets even worse for this  
19      reason.

20                  On Mr. Kennedy's theory, if the  
21      motivation for -- for that act, that act of  
22      protest against police misconduct is to -- is  
23      political, then it's subject to Pickering  
24      balancing and yet, if it is -- the motivation is  
25      religious, it gets strict scrutiny.

1           That make no -- makes no sense, and it  
2 is also inconsistent with this Court's  
3 consistent holdings that -- that political and  
4 religious speech have to be treated the same  
5 way.

6           Political speech gets strict scrutiny  
7 in other con- -- in other contexts, but  
8 government employees are different. There --  
9 there has to be a balancing, and to have a  
10 different rule for -- for religious speech would  
11 be impermissible viewpoint discrimination.

12           JUSTICE THOMAS: Thank you.

13           MR. KATSKEE: The --

14           CHIEF JUSTICE ROBERTS: Counsel, here  
15 -- here this morning in your opening argument  
16 and in your brief as well, you focused a lot on  
17 the facts, Coach Kennedy publicizing the  
18 dispute, announcing in advance his plans, some  
19 of the consequences that came from that, the --  
20 the students.

21           What -- what if all that were off the  
22 table? It's simply the coach going out to  
23 midfield, kneeling -- taking a knee, and that's  
24 it? No dispute about who's responsible for  
25 cutting off the negotiations. Take out the

1 media stuff. Would the school have any problem  
2 in that case? Or would the case be just the  
3 same?

4 MR. KATSKEE: Well, Your Honor, that  
5 is -- that is certainly a closer question if  
6 there's no history, no practice, no expectations  
7 of the students, but given -- if it is -- if the  
8 prayer is still going on at the time and in the  
9 place of those -- those critical post-game  
10 speeches, then, at that moment, we think that's  
11 government speech.

12 Now, if I'm wrong about that, then --  
13 then there has to be Pickering balancing, and  
14 then the question is -- is taking serious --  
15 really seriously Mr. Kennedy's, in that case, if  
16 it's private, free speech and free exercise  
17 rights, but also bearing in mind how this  
18 affects the -- the religious freedom rights of  
19 the students and their parents --

20 CHIEF JUSTICE ROBERTS: Well, what --  
21 I gather that's --

22 MR. KATSKEE: -- and --

23 CHIEF JUSTICE ROBERTS: I'm sorry, go  
24 ahead.

25 MR. KATSKEE: Oh, excuse me. I was

1 going to say and -- and all the other concerns  
2 like the question whether this could be  
3 disruptive of the event, could it cause a  
4 stampede or not.

5 All those things have to figure in.  
6 And that's why both Garcetti and Pickering are  
7 practical tests, they're functional tests that  
8 deal with the realities that school  
9 administrators and governmental entities have to  
10 face every day in dealing with potentially  
11 complicated problems.

12 CHIEF JUSTICE ROBERTS: I guess my  
13 question is trying to focus on the legal  
14 argument. If those facts were not the case, if  
15 nobody had complained, if there was no press  
16 conferences, there was no dispute, would your  
17 position be the same, or would it be different?

18 MR. KATSKEE: Well, if --

19 CHIEF JUSTICE ROBERTS: Both with  
20 respect to Garcetti and with respect to the  
21 Establishment Clause concern.

22 MR. KATSKEE: Well, if -- if, for  
23 instance, the coach is kneeling on the sideline  
24 or if the coach is -- is going to that place in  
25 the center of the field when the students are



1 heading back to the -- to the locker room or the  
2 bus, like he did for a month after the  
3 District's September 17 letter, then -- then  
4 that wouldn't be reasonably perceived as -- as  
5 government speech, and the District wouldn't  
6 have substantial interests in regulating it.

7           But -- but the -- but the situation  
8 here directly implicates the power and authority  
9 of the coach, which is -- which is awesome. The  
10 coach determines who makes varsity, who gets  
11 playing time, who gets recommend -- recommended  
12 for college scholarships. The students know you  
13 have to stay in the good graces of the coach if  
14 that's -- if you have those aspirations. And so  
15 coaches, even when coaches say, oh, there's an  
16 optional -- an optional workout on Monday,  
17 Tuesday, and Wednesday afternoons after school,  
18 you can bet that, to the students, that's not  
19 really optional and especially not if the -- if  
20 the coach has gone to the media and said:  
21 Having daily workout -- daily optional workouts  
22 is how I make these kids better players or  
23 better people.

24           JUSTICE KAVANAUGH: Counsel, I -- I  
25 appreciate a lot of what you just said there,

1 but we have to analyze our Establishment Clause  
2 precedents first because I think the district  
3 court said that the District's sole reason for  
4 doing this was to avoid an Establishment Clause  
5 violation, right?

6 MR. KATSKEE: That is what the  
7 district court said. That was incorrect, Your  
8 Honor. But also --

9 JUSTICE KAVANAUGH: But let me just  
10 take it there --

11 MR. KATSKEE: Yes.

12 JUSTICE KAVANAUGH: -- for a second.  
13 On the Establishment Clause point, the Lemon  
14 endorsement test, we haven't applied -- I don't  
15 think that is a test anymore. We haven't  
16 applied that in two decades, and so I don't  
17 think that helps on the Establishment Clause  
18 side.

19 On the schools cases, Santa Fe  
20 ultimately, I think, is the case. And Mr.  
21 Clement was saying this goes beyond Santa Fe in  
22 terms of extending the Establishment Clause  
23 because it's not over the public address system,  
24 it's not the same fact situation that we had in  
25 Santa Fe, where it was to everyone in the crowd

1 by the school over the public address system.

2 So we shouldn't, I think he's saying,  
3 shouldn't extend Santa Fe, which itself extended  
4 Lee versus Weisman, which extended Engel. We  
5 shouldn't extend it further to this situation.

6 Can you respond to that?

7 MR. KATSKEE: Certainly, Justice  
8 Kavanaugh.

9 In the first instance, yes, this  
10 situation is different because this is the  
11 coach. That was a student speaker in Santa Fe,  
12 and that has to make all the difference in the  
13 world. It's not -- it doesn't mean that there  
14 -- that the -- that a coach has no free speech  
15 or free exercise rights, but it does mean that  
16 the -- the pressure to conform at that moment of  
17 those critical post-game speeches --

18 JUSTICE KAVANAUGH: Would that be --

19 MR. KATSKEE: -- and with a seven-year  
20 -- excuse me.

21 JUSTICE KAVANAUGH: Wouldn't those  
22 cases suggest, though, that there's a difference  
23 between the coach in the locker room? I got it  
24 there. The coach in the huddle? I got it there  
25 as well. But, when the players are disbursing

1 after the game, I guess I'm not sure how it's  
2 that much different from Establishment Clause  
3 perspective than Justice Barrett's hypothetical  
4 about the coach who has the -- has -- is part of  
5 a group that has meetings off campus.

6 I guess I'm not sure from  
7 Establishment Clause purposes how those two  
8 things are distinct.

9 MR. KATSKEE: Well, in -- in the first  
10 instance, this wasn't after the students were  
11 disbursing. Those were -- that was when Mr.  
12 Kennedy had prayers from September 17 through  
13 his letter, his demand letter, on October 14.

14 And what that demand letter said is, I  
15 have a -- I've had a practice that didn't  
16 substantially change for seven years, and I want  
17 to continue that. And he spent what's a page  
18 and a half in the Joint Appendix in that letter  
19 saying: And students have to be able to join  
20 there too.

21 Take the 10/26, the last game, as an  
22 example. And we don't even have to go to  
23 homecoming, where the crowd stormed the field.  
24 But Mr. Kennedy there went out --

25 JUSTICE KAVANAUGH: This wasn't --

1 MR. KATSKEE: -- and occupied --

2 JUSTICE KAVANAUGH: -- this -- I'm  
3 sorry to interrupt. This wasn't, you know,  
4 huddle up, team, you know, which is a common  
5 coach phrase. That wasn't this, right?

6 MR. KATSKEE: No, but does the coach  
7 have to say that for the students to miss that?  
8 And there's something else going on too, which  
9 gets back in part to government speech and in  
10 part to an -- and in part to the religion clause  
11 concerns, is that what Mr. Kennedy did at that  
12 -- at that October 26 game is he -- he, in a --  
13 ahead of time, gave special permission to two  
14 legislators and some other people to come onto  
15 the field to have a prayer circle with him on  
16 the 50-yard line. Students -- it was fully  
17 visible to students. And then, as part of the  
18 arrangement, was to turn around and have one of  
19 those state legislators address the team, which  
20 he did.

21 JUSTICE ALITO: Mr. Katskee, let me  
22 ask you to give me your analysis of the  
23 following set of facts. Forget about all of the  
24 complicated facts in this case.

25 A football game ends. The coach is

1 not required at that point to go to the locker  
2 room with his students. It's not part of his  
3 duties at that time. He is allowed to remain on  
4 the field for a period of time. He is allowed  
5 to walk onto the field. He does that by  
6 himself. He goes to the 50-yard line. He  
7 kneels down and he prays. He doesn't invite  
8 anybody to go with him, but he also doesn't tell  
9 people who are also permitted on the field to go  
10 away. And all of this is visible to people in  
11 the stands.

12 Is that a violation of the -- can he  
13 be fired for engaging in those activities?

14 MR. KATSKEE: Well, Your Honor, it's  
15 necessary to start with the question whether  
16 that's government speech. And it would -- it  
17 would seem, given the -- given the -- the facts  
18 that you gave, Justice Alito, not to be  
19 government speech.

20 So then the question is the -- the  
21 question comes under Pickering balancing, and if  
22 -- and if the team, for instance, is not there  
23 so that there's not a -- there's not a fear of  
24 coercion and if it doesn't cause material  
25 disruptions, then the District doesn't have a

1 substantial --

2 JUSTICE ALITO: Those are the only --

3 MR. KATSKEE: -- interest in  
4 regulating it.

5 JUSTICE ALITO: -- those are the only  
6 facts, okay? So --

7 MR. KATSKEE: Yes.

8 JUSTICE ALITO: -- under those  
9 circumstances, there would not be a violation of  
10 the First Amendment.

11 Now you're talking about this in  
12 relation to the Free Speech Clause, but the  
13 Petitioner also has a Free Exercise Clause  
14 claim. So if, on that set of facts, the school  
15 district were to say you can go out to the  
16 center of the field and you can kneel down to  
17 protest the Russian invasion of Ukraine or make  
18 a statement about climate change or about racial  
19 justice or any other issue that is of interest  
20 to you, but you can't pray, would that be  
21 consistent with the Free Exercise Clause?

22 MR. KATSKEE: The school district --  
23 not -- not -- the school district doesn't have a  
24 substantial interest in discriminating. But it  
25 is also the case that the school district gets

1 to script its event. So the question has to be  
2 whether he is -- has to start with whether he's  
3 acting as a -- as a government official or not.

4 I take it from the example that --  
5 that you gave, Justice -- Justice Alito, that  
6 the -- the players aren't around, there's not a  
7 concern about pressure. But it is the case that  
8 if -- if the players were, for instance, the  
9 school district has ample authority, whether  
10 it's religious coercion or political coercion or  
11 social coercion, to adopt any particular view.  
12 The school district has a legitimate interest --

13 JUSTICE ALITO: And I -- I take it  
14 your answer to that question is they couldn't  
15 discriminate based on the religious or secular  
16 motivation of what the coach did?

17 MR. KATSKEE: Correct. But what's  
18 interesting about that is Mr. Kennedy's test  
19 requires different treatment for religious and  
20 secular speech, and that just as a practical  
21 matter doesn't make any sense.

22 JUSTICE ALITO: Well, you know, this  
23 is an employment -- you've -- you've talked  
24 about all sorts of facts and it is complicated.  
25 Coach Kennedy did a lot of things over a period



1 of time. The school district said a lot of  
2 things over a period of time.

3 But it's an employment discrimination  
4 case. And what do we do in an employment  
5 discrimination case where the employee says, I  
6 was unlawfully fired? We look at the employer's  
7 reason for the action that was taken.

8 And if the reason that is given is an  
9 unlawful reason, then the employee wins. We  
10 don't say, well, you know, he did all sorts of  
11 other things before the event that the school  
12 district or whatever the employer is said was  
13 the reason for the termination. He did all  
14 sorts of other things. He could have been fired  
15 for all of that, all sorts of other things.

16 We look at the reason that was given.  
17 What was the reason that you gave here?

18 MR. KATSKEE: The -- although the  
19 reason in the last letter was -- was about  
20 religion -- was about religion concerns, it  
21 isn't the case that the Court looks only at the  
22 -- only at the given reason.

23 In fact, it's quite the opposite.  
24 This Court made clear in Saint Mary's against  
25 Hicks and Reeves against Sanderson that it's

1 necessary to look at the whole record to  
2 determine whether -- whether a -- an employment  
3 action was improper and that that goes for both  
4 the employer and the employee.

5 And, here, there was -- there was an  
6 enormous pile of evidence that the school  
7 district acted on other concerns: safety of the  
8 students, control of its program and message,  
9 and the worry about the storming of the field.

10 Let me list just five -- five places  
11 in the Joint Appendix for that as examples.  
12 It's in the Joint Appendix pages 50 -- page 51,  
13 pages 92 and ninety --

14 JUSTICE ALITO: I know that you want  
15 to make this very complicated, but, seriously,  
16 it's your argument that if the -- if the  
17 employer gives an unlawful reason that the  
18 employer can nevertheless -- nevertheless win  
19 because the employer could have given all sorts  
20 of other lawful reasons for the -- for the  
21 action.

22 MR. KATSKEE: We don't -- we don't at  
23 all think that it was -- this was an unlawful  
24 reason under the Establishment Clause. We think  
25 that it was required. We think that at the very

1 least the District had the discretion to take  
2 those concerns into account.

3 But there are lots of reasons that a  
4 -- that a -- that an employment action letter  
5 might not include all the reasons that the  
6 District acted. For example, here, the District  
7 over and over again in every one of its letters  
8 said, come talk to us, we'd like to work this  
9 out, tell us what you want.

10 And the District might have -- might  
11 well or an employer might well think: I don't  
12 want to pile on because we really want to find a  
13 solution to this problem, and a solution to the  
14 -- to the problem of religious coercion would  
15 also solve all of the other issues.

16 And, by the way, that gets to the --  
17 that gets to the -- the fact that the District  
18 did have specific -- did specifically name  
19 coercion concerns, which gets to questions that  
20 Justice Gorsuch and Justice Kavanaugh said.

21 JUSTICE BREYER: There are a lot of  
22 reasons. Why are you shying away from -- or  
23 maybe you're not -- the simple reason of  
24 establishment?

25 MR. KATSKEE: Yes.

1                   JUSTICE BREYER: I mean, suppose --  
2    isn't it -- isn't it -- I think this is true,  
3    but tell me if it's not. A teacher is given a  
4    notice from 5 to 9, until 9:15 every morning, we  
5    want a current affairs event where the students  
6    can discuss anything, and they can discuss  
7    religion too. There's nothing wrong with  
8    discussing religion or its history or what it's  
9    about. But one thing you cannot do is actually  
10   pray, all right?

11                   And the teacher prays purposely,  
12   deliberately. It's nothing wrong with prayer.  
13   It might be a great thing. It is.

14                   But the District doesn't want prayer  
15   between 9 and 9:15 is all, though every other  
16   thing can be discussed.

17                   Does that violate something in the  
18   Constitution or the law? And why not?

19                   MR. KATSKEE: Absolutely not.

20                   JUSTICE BREYER: It does not  
21   violate -- it does not violate anything. All  
22   right. Why not?

23                   MR. KATSKEE: Well, for -- for a  
24   couple of reasons. I will -- I will start with  
25   -- I will start with the Establishment Clause,

1 but I want to work backwards to the issue of  
2 government speech as well.

3 JUSTICE BREYER: Really? I mean, in  
4 other words, you have no -- no -- no reason not  
5 to turn to the Establishment Clause. And the  
6 cases that you would cite would be what?

7 MR. KATSKEE: Well, starting with  
8 Engel, Engel against Vitale. And, by the way,  
9 Pierce against Society of Sisters as well  
10 because the -- the Court made clear there and  
11 consistently since then that the -- that -- that  
12 parents have the right to determine the  
13 religious upbringing of their children, and  
14 government officials can't interpose themselves  
15 and interfere with that.

16 JUSTICE BREYER: Okay. So one of your  
17 points is we don't have to reach all these  
18 complicated issues either.

19 MR. KATSKEE: Correct.

20 JUSTICE BREYER: We can simply say the  
21 question is whether, just after the game, on the  
22 50-yard line, the coach praying is sufficiently  
23 like the teacher praying between 9 and 9:15 in  
24 the morning that there is an Establishment  
25 Clause problem and that is a legitimate reason

1 for bringing in discipline when it's not  
2 followed.

3 Now, if we don't agree with that,  
4 you're going to go to 10 other things. Okay,  
5 I've got this right?

6 MR. KATSKEE: Yes, and -- and, Justice  
7 Breyer, this was in the particular context of  
8 that long history of his conduct and the  
9 expectation and the pressure on the students.

10 JUSTICE KAVANAUGH: But it's not --  
11 it's not audible to all the players. And so  
12 you're relying on, I think, being visible here,  
13 correct?

14 MR. KATSKEE: Audible, also, Your  
15 Honor. The -- the --

16 JUSTICE KAVANAUGH: Not to all the  
17 players because they don't -- they're not all  
18 there. They don't have to be there. It's not a  
19 team event in terms of a huddle, locker room  
20 situation. You're relying on it being visible.

21 And then the question is, how far does  
22 that go? The coach does the sign of the cross  
23 right before the game. Is that -- could a  
24 school fire the coach for the sign of the cross  
25 right before the game?

1                   MR. KATSKEE:  If -- if the coach is  
2                   doing it while not making himself the center of  
3                   attention at the center of the field, it's  
4                   perfectly fine.  If he was dead --

5                   JUSTICE KAVANAUGH:  Well, the coach is  
6                   standing -- standing.  The team is out there for  
7                   the -- for let's say a basketball game or foot  
8                   -- let's stick with football, a football game,  
9                   everyone, the teams are out there and the coach  
10                  is visible to everyone and very publicly makes  
11                  the sign of the cross.

12                  Can the school fire the coach for  
13                  that?

14                  MR. KATSKEE:  If the coach is -- is  
15                  addressing the team and that's the way he starts  
16                  it, the District can act, but districts don't  
17                  have an interest in --

18                  JUSTICE KAVANAUGH:  No, no.

19                  MR. KATSKEE:  -- firing people  
20                  willy-nilly.

21                  JUSTICE KAVANAUGH:  He's addressing  
22                  the team loads the -- the hypothetical.  He is  
23                  visible to everyone in the crowd and to the  
24                  players, standing a little bit on the field from  
25                  the sideline, as coaches do, and very visibly

1 does the sign of the cross.

2 MR. CLEMENT: The -- the reason that  
3 both Garcetti and Pickering involve -- involve  
4 flexibility is to take account of the  
5 line-drawing here. And that one doesn't --  
6 doesn't seem so hard if it is -- if it is the  
7 coach not making himself the center of  
8 attention, not -- not addressing the team.

9 JUSTICE KAVANAUGH: I don't know --  
10 sorry.

11 MR. KATSKEE: Then it would be -- then  
12 it would be -- then it would be permissible and  
13 it's -- and it's protected if it's not  
14 government speech.

15 JUSTICE KAVANAUGH: I don't know how  
16 we could write an opinion that would draw a line  
17 based on not making yourself the center of  
18 attention as the head coach of a game.

19 MR. KATSKEE: What -- what this Court  
20 has said, what this Court has made clear about  
21 government speech actually gives that line,  
22 which the Court said -- the Court has made clear  
23 that the functional analysis requires --  
24 requires looking at the manner, the place, the  
25 time of the speech and how a reasonable observer



1 would perceive it.

2           And, yes, that is -- that's -- that's  
3 not a categorical absolute but for good reason,  
4 because the real practical problems on the  
5 ground that -- that school districts and other  
6 government employers have to deal with don't  
7 lend themselves to -- to absolutes.

8           And they certainly don't lend  
9 themselves to absolutes where this -- the very  
10 same conduct by an employee can be either  
11 subject to -- either subject to -- either  
12 government speech or subject to balancing if it  
13 is -- if it's political but is -- is sort of  
14 categorically private and -- and protected by  
15 strict scrutiny if it's religious.

16           JUSTICE BARRETT: So why would  
17 Pickering apply to Justice Kavanaugh's crossing  
18 himself example? Your -- I -- I guess let's  
19 imagine it's just a free exercise claim. Have  
20 we ever applied Pickering balancing?

21           I don't think anybody -- let's just  
22 posit that in Justice Kavanaugh's example, the  
23 coach visibly crosses himself, visible to  
24 everyone, but that no one would mistake that for  
25 government speech. It's quite clearly just the

1 private devotional practice of the coach.

2           Why would Pickering apply? Have we  
3 ever applied Pickering just to straight-up free  
4 exercise claims?

5           MR. KATSKEE: No, but this Court has  
6 -- has made clear that that's the mode of  
7 analysis -- analysis for all First Amendment  
8 claims. It's done it not just with the Free  
9 Speech Clause but also with the Petition Clause  
10 by way of example. And to -- to draw a  
11 different line would yield bizarre impossible  
12 results.

13           Let me give a couple of examples of  
14 what that might mean. You know, suppose that an  
15 assistant district attorney objects to the --  
16 the DA's request for the death penalty in a case  
17 and so writes a letter to the editor -- a letter  
18 to the editor complaining and calling the  
19 district -- district attorney out for that.

20           Now, on Mr. Kennedy's test, that would  
21 be a classic Pickering example if it's a  
22 political view or a social view, but it would be  
23 subject to strict scrutiny if the motivation for  
24 that same letter is -- is religious.

25           JUSTICE ALITO: Suppose that

1 everything about this case is exactly the same  
2 as it was in reality, with this one difference:  
3 When Coach Kennedy went out to the center of the  
4 field on these two occasions, all he did was to  
5 wave a Ukrainian flag.

6 Would you have fired him?

7 MR. KATSKEE: It's -- it's not a  
8 question of firing, and, in fact, he was put on  
9 paid leave.

10 JUSTICE ALITO: Would you have done to  
11 him --

12 MR. KATSKEE: But the question is  
13 whether --

14 JUSTICE ALITO: -- what you -- would  
15 you have done to him what you did to him here?

16 MR. KATSKEE: Then --

17 JUSTICE ALITO: Would you have treated  
18 that case differently?

19 MR. KATSKEE: That's absolutely  
20 something that can and should be disciplined  
21 because the school district doesn't -- doesn't  
22 want its event taken over for political speech.

23 JUSTICE ALITO: Where is the school  
24 district rule that says that?

25 MR. KATSKEE: The -- the school

1 district has to be able to manage its activities  
2 and events. And that's clear under this  
3 Court's --

4 JUSTICE ALITO: What -- what reason is  
5 there to believe that you would have treated  
6 that case the same way?

7 MR. KATSKEE: There -- there's --  
8 there's -- not only is there nothing to suggest  
9 that it wouldn't have, but it would be -- it  
10 would be absurd to think that -- that a -- a  
11 teacher or coach could take over the biggest  
12 school event of the year and, in front of the  
13 students, be pumping for a political -- for a  
14 political cause or agenda.

15 The school district has to be able to  
16 say --

17 JUSTICE ALITO: Well, what is there in  
18 your explanation for the adverse action that you  
19 took that would support doing whatever you did  
20 to Mr. Kennedy in that situation?

21 MR. KATSKEE: Well, there was -- there  
22 was an entire course of conduct here, right?  
23 The -- the -- the school district sent Mr.  
24 Kennedy a letter on September 17 saying you can  
25 pray, including where it's visible to students;

1 just don't pray with and to the students.

2           For a month, he was having prayers at  
3 the games and it wasn't a problem. Then he sent  
4 the letter on the 14th demanding to go back and  
5 do what I was doing before, which is audible  
6 prayers. Students have to be able to join. The  
7 -- and then -- and then he went to the press and  
8 he said this is how I make these kids better  
9 people and then came the game on the -- on the  
10 16.

11           The idea that the school district  
12 couldn't do something when a zoo was created on  
13 the field is -- is unimaginable --

14           JUSTICE ALITO: Can a school --

15           MR. KATSKEE: -- that it doesn't need  
16 a --

17           JUSTICE ALITO: -- can a school -- can  
18 a school district take adverse action against a  
19 coach or a teacher because the coach or the  
20 teacher, on purely private time, not on school  
21 premises, not when the coach or teacher is  
22 discharging any official duties, is very, very  
23 visibly religious, posts all sorts of religious  
24 messages on YouTube? Maybe this coach is -- is  
25 an ordained minister and preaches. And the

1 school district says this goes too far, this is  
2 not the kind of mentor we want for our students.

3 Can they -- can the District do that?

4 MR. KATSKEE: Usually, no, but it's  
5 not an absolute, and that's why Pickering is  
6 flexible. Let me give an example for why that  
7 would be the case, because, look, students don't  
8 -- students' views of what is official and what  
9 is compulsory --

10 JUSTICE ALITO: I mean, your district  
11 came really close to -- the Ninth Circuit --

12 MR. KATSKEE: Pardon?

13 JUSTICE ALITO: -- in its earlier  
14 opinion thought that that was a justification  
15 for what the school district did.

16 MR. KATSKEE: What the --

17 JUSTICE ALITO: Kennedy's not a good  
18 mentor for the students.

19 MR. KATSKEE: -- what the Ninth  
20 Circuit -- the Ninth Circuit clarified in its  
21 second opinion what it meant in its first. But  
22 the real point is that, to students, whether the  
23 coach is acting as a coach doesn't turn on the  
24 niceties of government speech doctrine. Suppose  
25 that the coach, on his personal Facebook page,

1 says, in my 20 years as a coach, I have never  
2 had a student do well or make varsity who  
3 doesn't pray with the team before every game.

4 That's a situation that it's -- it's  
5 surely private, but it's also surely coercive.  
6 It raises Establishment Clause concerns --

7 JUSTICE ALITO: Well, that's a  
8 different --

9 MR. KATSKEE: -- and all sorts of  
10 other concerns.

11 JUSTICE ALITO: -- that's different  
12 from -- that's different from my example.

13 MR. KATSKEE: Pardon?

14 JUSTICE ALITO: That's different from  
15 my example, because there, there's quite an  
16 express statement that you better -- you better  
17 pray and -- and -- and agree with my religious  
18 beliefs or you're not going to get a starting  
19 position on the team.

20 MR. KATSKEE: What -- what that shows,  
21 though, is that there certainly can be -- can be  
22 private speech that -- that -- that puts -- puts  
23 improper pressure on students to conform  
24 religiously or otherwise, and also -- and -- and  
25 that's why the -- the test has to be practical

1 and functional. There can't be this categorical  
2 -- on Mr. Kennedy's view, there would be --  
3 that's -- that's not just private, but there's  
4 also strict scrutiny, and that would make an  
5 impossible standard for school districts to deal  
6 with these real problems.

7 JUSTICE ALITO: Well, I don't really  
8 understand --

9 MR. KATSKEE: The answer --

10 JUSTICE ALITO: -- your answer.

11 Suppose the coach has got all sorts of political  
12 signs on the front lawn of the coach's house.

13 Can they fire him for that reason?

14 MR. KATSKEE: No, but no one would --  
15 no one would view that as government speech,  
16 number one, and no one would view that as a  
17 message being conveyed to students, something  
18 that they're -- that they might benefit from or  
19 are supposed to go along with.

20 JUSTICE ALITO: No? No student could  
21 -- no student could think that? No student  
22 could think that if -- boy, if I don't agree  
23 with -- if I don't say things in class, write  
24 things in my papers, that agree with the coach  
25 or if I -- the teacher or I say something that's



1 contrary to what this teacher feels really  
2 strongly, that's going to hurt me.

3 MR. KATSKEE: The question would be --

4 JUSTICE ALITO: No -- no -- no student  
5 could think that?

6 MR. KATSKEE: The question isn't  
7 whether no student can think it. It -- the  
8 question is whether -- whether a reasonable  
9 observer should think it. It's an objective  
10 test.

11 And compare that situation with, for  
12 example, the teacher putting up those signs in  
13 the classroom. That -- that shows that that --  
14 the school district could certainly be concerned  
15 about that -- that pressure on the students,  
16 that they feel like if they don't voice the  
17 opinion that's up on the wall there, that they  
18 might be penalized for it, and the District can  
19 make the decision that it -- that it is going to  
20 regulate that, which -- which will require, on  
21 the one hand, if -- if that is private,  
22 recognizing the -- the very serious First  
23 Amendment interests of the employee, but also  
24 recognizing the need to -- not to have material  
25 disruptions in class, the need to avoid coercing

1 the -- coercing students to adopt a particular  
2 political or social view or interjecting the  
3 dissension in the school that that may cause.

4 CHIEF JUSTICE ROBERTS: Justice  
5 Thomas, anything further?

6 JUSTICE THOMAS: Just a -- a minor  
7 question. Initially, I asked you about  
8 someone -- the coach taking a knee during the  
9 National Anthem, and you said that, of course,  
10 that could be regulated.

11 Do you have any examples where, in  
12 fact, that has been done in your school  
13 district?

14 MR. KATSKEE: That situation has never  
15 arisen, Justice Thomas. And that gets to the  
16 attempt to call this -- to call this religious  
17 discrimination because the particular act that  
18 the school district had to deal with happened to  
19 involve religion -- happened to involve  
20 religious expression.

21 JUSTICE THOMAS: Actually, what I'm  
22 talking about is the --

23 MR. KATSKEE: But --

24 JUSTICE THOMAS: I'm interested in  
25 something that we agree --

1 MR. KATSKEE: Yes.

2 JUSTICE THOMAS: -- could be regulated

3 --

4 MR. KATSKEE: Yes.

5 JUSTICE THOMAS: -- and whether or not  
6 there have been disciplinary actions.

7 MR. KATSKEE: So far as I'm aware, the  
8 situation -- that situation hasn't presented  
9 itself. But it is also --

10 JUSTICE THOMAS: It hasn't presented  
11 itself or it hasn't been addressed?

12 MR. KATSKEE: No, hasn't presented  
13 itself, Your Honor. There are certainly  
14 situations in any school district where there  
15 are things that warrant -- that warrant  
16 discipline, but -- but there is -- there was  
17 nothing so far as I am aware and certainly  
18 nothing in the record to suggest that anything  
19 like that ever happened here.

20 CHIEF JUSTICE ROBERTS: Justice  
21 Breyer, anything?

22 Justice Alito?

23 Justice Sotomayor?

24 Justice Kagan?

25 Justice Gorsuch?

1 JUSTICE GORSUCH: Counsel, I just want  
2 to make sure I understand the -- the school  
3 policy. A minor point, but on Joint Appendix  
4 28, it appears that teachers are forbidden from  
5 either encouraging or discouraging private  
6 student prayer. Is that right?

7 MR. KATSKEE: Yes, Justice Gorsuch.

8 JUSTICE GORSUCH: So the coach was  
9 forbidden from discouraging private student  
10 prayer?

11 MR. KATSKEE: Absolutely.

12 JUSTICE GORSUCH: Okay. And then  
13 suppose -- do you -- well, let me just ask you  
14 this on the Establishment Clause. Do you think  
15 the right question that we're supposed to ask is  
16 whether the activity was coercive of students?

17 MR. KATSKEE: The --

18 JUSTICE GORSUCH: You've mentioned  
19 coercion many times in your argument.

20 MR. KATSKEE: Yes, both -- both  
21 coercion and endorsement have mattered since  
22 Engel. But let me give some of the places that  
23 -- that show coercion in the record.

24 JUSTICE GORSUCH: Well, if you could  
25 -- I -- I -- I understand you think the --

1                   MR. KATSKEE: Or, excuse me, the  
2 District expressing coercion -- concerns about  
3 coercion. But please. I'm sorry.

4                   JUSTICE GORSUCH: Let me ask you a  
5 hypothetical, then, if you think both are  
6 relevant.

7                   MR. KATSKEE: Yes.

8                   JUSTICE GORSUCH: Let's say this Court  
9 in a case saw evidence that the School District  
10 was focused solely on Lemon and then the  
11 endorsement test and not coercion. And suppose  
12 the Court thought that Lemon had been buried.

13                   What -- what then should we do if we  
14 thought coercion were the appropriate test but  
15 hadn't been applied by the School District or by  
16 the court below?

17                   MR. KATSKEE: Remand for the lower  
18 courts to decide that question. And here there  
19 would be plenty of basis to show the School  
20 District's contemporaneous and expressed  
21 concerns for coercion. That would not be a  
22 basis to decide for Mr. Kennedy.

23                   This was on summary judgment. It  
24 would be -- there -- then there would be fact  
25 questions for -- for -- presumably for trial

1 about what the coercion was.

2 JUSTICE GORSUCH: Why -- why is it  
3 that the School District so emphasized Lemon? I  
4 understand your point that it -- there might be  
5 -- it's in the record otherwise, but, as Justice  
6 Kavanaugh has pointed out, this Court for  
7 decades now has resisted attempts to rely on  
8 Lemon in cases like this.

9 And it does seem like there's an awful  
10 lot of record suggesting reliance on Lemon.

11 MR. KATSKEE: Well, this -- this --  
12 the School District was -- was following the --  
13 the precedents of this Court that -- that  
14 continue to be precedents and haven't changed.  
15 But, again, it very much had in mind -- and, for  
16 instance, in its September 17th letter at JA 44,  
17 it specifically mentions that the talks needed  
18 to be to the -- to -- needed to be secular to  
19 avoid alienation of any team member.

20 That's talking about coercion. The  
21 School District referred to indirect coercion as  
22 well in the question and answer document and in  
23 the earlier statement to the community at the  
24 times -- at the times of the September 17 letter  
25 to Mr. Kennedy and the September -- October 28th

1 letter.

2 JUSTICE GORSUCH: Well, in the October  
3 22nd letter, for example, it does speak about  
4 how a reasonable observer might perceive  
5 government endorsement of religion, even though  
6 it had pretty clearly disavowed Mr. Kennedy's  
7 activities by that point.

8 What do we do about that?

9 MR. KATSKEE: Well, in -- in the first  
10 instance, as -- as I said earlier, this Court  
11 has made clear that in employment cases one  
12 never just looks -- one has to look at the whole  
13 record.

14 JUSTICE GORSUCH: I'm talking about in  
15 the Establishment Clause, counsel.

16 MR. KATSKEE: Yes. And -- and the  
17 District had and expressed other Establishment  
18 Clause concerns as well of all -- as all of its  
19 other -- other concerns. And those were  
20 substantial.

21 The coach is an amazingly powerful  
22 figure with immense -- with immense coercive  
23 authority.

24 JUSTICE GORSUCH: I think we  
25 appreciate that, as all teachers do. And -- and

1 we're concerned about implicit coercion as well  
2 as explicit coercion for lots of things.

3 To get a good grade, you maybe feel  
4 like you have to participate in after-school  
5 activities or write an essay in a way that you  
6 think will appeal to the teacher's sensibilities  
7 or even politics sometimes, but that's not  
8 really my question.

9 My question is, if we thought that the  
10 School District misunderstood the Establishment  
11 Clause teachings of this Court, what should we  
12 do?

13 MR. KATSKEE: Well, we -- we still  
14 think that -- that -- that -- that two things  
15 should happen, that the case -- and at that  
16 point should be remanded because of the -- of  
17 the contemporaneous evidence of coercion and  
18 also all the other reasons that the District  
19 acted.

20 JUSTICE GORSUCH: If we think the  
21 other reasons the District acted are post hoc  
22 rationalizations that weren't presented below,  
23 or at least the district court found the sole  
24 reason was this Establishment Clause reason,  
25 what do we do about that?



1           MR. KATSKEE: Well, this was on  
2 summary judgment. The district court made what  
3 Mr. Kennedy's reply brief calls a factual  
4 finding at a time when a factual finding is  
5 improper.

6           There was -- there was plenty of  
7 record evidence of all the other reasons that  
8 the district acted and -- and -- and expressions  
9 either to Mr. Kennedy or to the community of  
10 concerns.

11           And really how could a district not be  
12 concerned about the zoo that was created on the  
13 field and students getting knocked over -- over  
14 on the 16th or having -- or having an organized  
15 prayer circle with state legislators who were  
16 addressing the kids on the -- on the 26th.

17           These are the things that the -- the  
18 superintendent's amicus brief describes all the  
19 concerns that school administrators have to deal  
20 with in the school context.

21           JUSTICE GORSUCH: So the district  
22 court that ruled --

23           MR. KATSKEE: -- and that has to be --

24           JUSTICE GORSUCH: -- ruled in the  
25 District's favor is -- was mistaken when --

1 when the district court found it was the sole  
2 reason?

3 MR. KATSKEE: It wasn't mistaken for  
4 this reason. The -- the -- the Establishment  
5 Clause concerns and the way that the district  
6 court found, ruled in favor of the District, was  
7 correct. If this Court disagrees, then -- then  
8 it isn't a basis to grant summary judgment for  
9 Mr. Kennedy because at that point all factual  
10 inferences on summary judgment have to be drawn  
11 in the favor of the School District, which means  
12 that it certainly isn't possible to just ignore  
13 all the record evidence. That's what would  
14 create fact questions requiring trial.

15 JUSTICE GORSUCH: Thank you.

16 JUSTICE BREYER: Is Lemon in this  
17 case? I mean, do we have to decide Lemon? The  
18 reason I ask, honestly, is because if you see  
19 Lemon, despite its imperfections, as an effort  
20 to take from other cases, and the first part of  
21 the First Amendment, establishment is there  
22 first, an effort to prevent the country from  
23 becoming more divisive, certainly an effort that  
24 remains valid, to prevent it from being more  
25 divisive there on the basis of religion.

1                   Now, if that's reconsidered, you're --  
2                   you have read a lot on this, how many cases will  
3                   we be calling into question if that part of it  
4                   is reconsidered?

5                   MR. KATSKEE: That -- that would seem  
6                   to -- that would seem not only to call into  
7                   question -- I -- I don't even know how many  
8                   cases since Lemon, but also the cases before.

9                   JUSTICE BREYER: Not since Lemon. I'm  
10                  thinking --

11                  MR. KATSKEE: Before.

12                  JUSTICE BREYER: -- before and after  
13                  --

14                  MR. KATSKEE: Yes.

15                  JUSTICE BREYER: -- on the theme --

16                  MR. KATSKEE: Yes.

17                  JUSTICE BREYER: -- of preventing  
18                  division on the basis of religion.

19                  MR. KATSKEE: Yes. That -- that would  
20                  -- that would certainly apply to, I think, all  
21                  the -- at least all the school cases that the  
22                  Court has had.

23                  And -- and I want to say some -- I --  
24                  I -- I think that that's particularly pertinent  
25                  because if the Court looks, for instance, at the

1 amicus brief of the members of the Bremerton  
2 community and what dissension it caused there,  
3 or look at the amicus brief of the -- of the  
4 East Brunswick School District personnel for the  
5 immense horrible divisions and attacks that were  
6 caused there, or look at the footnote in Santa  
7 Fe where the Court described the -- the need of  
8 the district court to -- to order people to stop  
9 trying to find out what -- who the -- who the --  
10 the Catholic and Mormon families in that case  
11 who were pseudonymous plaintiffs to figure out  
12 who they are because of the -- because of the  
13 harassment risks, so all those things matter.

14 And I think it factors into every  
15 case, not to the same degree, but in schools it  
16 figures overwhelmingly both in this Court's  
17 cases and in the lower courts cases.

18 JUSTICE GORSUCH: Would it be  
19 overruling Lemon not to apply it since we  
20 haven't applied it in, I don't know, 20 or 30  
21 years?

22 MR. KATSKEE: It -- it --

23 JUSTICE GORSUCH: We've been asked to  
24 many times and we haven't done it in 20 or 30  
25 years.

1 MR. KATSKEE: It -- it wouldn't be  
2 overruling --

3 JUSTICE GORSUCH: It would be doing  
4 exactly what we've been doing, right?

5 MR. KATSKEE: Yes, but here what that  
6 -- what -- what -- what then that would mean is  
7 that the Court should still be looking at -- at  
8 coercion.

9 JUSTICE GORSUCH: At coercion, right.

10 MR. KATSKEE: And we think coercion  
11 also.

12 JUSTICE GORSUCH: We agree on that.  
13 We agree on that. All right.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Kavanaugh?

16 JUSTICE KAVANAUGH: Just to follow up  
17 on that. My understanding of what you're saying  
18 here is that the Establishment Clause rationale  
19 was based on two distinct concerns: One  
20 endorsement. The other coercion.

21 Is that accurate?

22 MR. KATSKEE: Yes, although they --  
23 they are related, but yes.

24 JUSTICE KAVANAUGH: And on  
25 endorsement, as Justice Gorsuch says, we have

1 not used endorsement in Van Orden, Town of  
2 Greece, American Legion, in a long time. So  
3 let's put that to the side for the moment and I  
4 take your arguments about that.

5 But on coercion, and -- and just to  
6 follow up on the endorsement point, we did not  
7 apply Lemon in Lee versus Weisman, for example,  
8 the school's case that extended Engel to  
9 graduation prayer, so that didn't happen there.

10 On the coercion side, there are  
11 different forms of coercion, as you have been  
12 talking about. There's actual you are compelled  
13 to be -- to say the prayer. That's not  
14 happening here. You're compelled to be present  
15 at an event where prayer will be spoken. That  
16 is Engel. That is Lee versus Weisman. That is  
17 Santa Fe.

18 But I think you're not saying that  
19 here either. You're saying there is kind of an  
20 implicit peer pressure, subtle coercion,  
21 implicit coercion. If I'm wrong about that,  
22 tell me. But that seems a different concern  
23 than the Lee versus Weisman, Engel, Santa Fe  
24 concern and seems to run into the line drawing  
25 problems that you and I were discussing earlier.

1           So whatever you want to say in  
2     response to all that.

3           MR. KATSKEE:  The term that this Court  
4     used in Engel was indirect coercion.  And this  
5     Court very much said that in the public schools,  
6     indirect coercion matters to -- indirect  
7     coercion of students, I believe it said, of --  
8     of members of minority faiths to -- to conform  
9     to a religious practice is an Establishment  
10    Clause violation.

11           That was not -- that was not if you  
12    don't join the prayer, you'll be off the team.  
13    That was -- that was the sort of situation where  
14    students can reasonably understand, and here  
15    very much students and parents understood, that  
16    you have to go along to get along.  That's what  
17    it means to play football.

18           To -- to determine otherwise, to say  
19    that that isn't coercion, would -- would require  
20    getting rid of cases all the way back to Engel  
21    and Schempp, and it would also --

22           JUSTICE KAVANAUGH:  I guess -- I guess  
23    I --

24           MR. KATSKEE:  -- cast serious doubt  
25    on --

1 JUSTICE KAVANAUGH: I'm going to stop  
2 you there and challenge you on that. I don't  
3 see why the Court couldn't say -- and I'm not  
4 saying this is what we should do, just as -- but  
5 on the line drawing -- Engel, Lee versus  
6 Weisman, Santa Fe all remain in place. And  
7 Santa Fe applies, you know, logically to locker  
8 room or huddle speech, but we're not going to  
9 extend Santa Fe to something beyond that, really  
10 for the line drawing reasons. The sign of the  
11 cross example, you had -- we had a discussion  
12 about that and there would be many other  
13 hypotheticals. We just can't have center of the  
14 attention be the line for Establishment Clause  
15 purposes, for example.

16 MR. KATSKEE: The -- the -- the  
17 line -- the line that this Court drew in  
18 Garcetti for government speech would solve the  
19 problem completely without any need to get to  
20 any of these questions because this was  
21 government speech.

22 Otherwise, it shouldn't be necessary  
23 to -- to decide conclusively an Establishment  
24 Clause question, though we think it is easy and  
25 clear under Santa Fe and Lee and Engel and



1 Schempp and Pierce against Society of Sisters,  
2 as a free exercise case pointing in the same  
3 direction, because of the fact that in -- under  
4 Pickering, the analysis takes very seriously the  
5 employee's free speech and free exercise rights,  
6 but it also takes account of everyone else's  
7 free exercise and -- everyone else's free  
8 exercise rights, the students' and their  
9 parents', and all the necessary concerns about  
10 managing an event and everything else.

11 On Mr. Kennedy's test, the -- the  
12 Court would ignore all of that, nobody's --  
13 nobody's religious freedom rights count except  
14 for -- except for the employee's. That's an  
15 exceedingly peculiar result for a context that  
16 is a government employee who was hired to and  
17 charged with -- with teaching and educating  
18 students.

19 JUSTICE KAVANAUGH: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice  
21 Barrett?

22 JUSTICE BARRETT: I just want to  
23 clarify one thing about your argument related to  
24 that last point. If we disagree with you that  
25 this was government speech, so if we think this

1 was private speech, we don't even get into the  
2 Establishment Clause because there's no state  
3 action, right? So we're not asking these  
4 questions about coercion for purposes of  
5 discerning whether there was an Establishment  
6 Clause violation, but we would be merely doing  
7 the Pickering analysis, which arguably might  
8 bring in things that -- you know, Justice  
9 Gorsuch said let's assume we think some of those  
10 were post hoc rationalizations. We would need  
11 to get into all of that because we wouldn't be  
12 doing a straight up Establishment Clause  
13 coercive analysis.

14 MR. KATSKEE: Well, the -- the place  
15 to start is -- is -- certainly the right frame  
16 of analysis is Pickering. But -- but it is not  
17 -- but it isn't and we think can't be correct  
18 that there's no situation in which -- in which  
19 conduct that is deemed private under Garcetti by  
20 a school official is -- is not an Establishment  
21 Clause violation like the example that I gave  
22 to -- I believe it was Justice Alito, about the  
23 coach who posts on the Facebook I've never seen  
24 anybody who makes --

25 JUSTICE BARRETT: That's state action?

1                   MR. KATSKEE: No, I'm saying that it  
2 isn't, and yet it's still poses an Establishment  
3 Clause problem of coercion.

4                   JUSTICE BARRETT: Because it would be  
5 government speech?

6                   MR. KATSKEE: No, I -- no.

7                   JUSTICE BARRETT: But where's the  
8 state action? I mean, I see that there's  
9 coercion, but you could have coercion in all --  
10 from all kinds of private sources.

11                   MR. KATSKEE: There --

12                   JUSTICE BARRETT: Where's the state  
13 action there?

14                   MR. KATSKEE: There -- there -- there  
15 shouldn't need to be state action for an  
16 Establishment Clause violation even though it  
17 would -- it would be rare when one would have a  
18 violation without state action. There is --  
19 here, of course, there is state action not only  
20 because he's a public employee performing his  
21 duties in a place and time where only he can and  
22 in a way that the students expected that to be,  
23 but also the school district has conferred  
24 authority on him which everybody there knows.

25                   All that being said, though, we think

1 the real point is that not only does it not need  
2 to be -- not necessarily have to be functioning  
3 as a -- as a government employee at the time of  
4 the speech for it to raise Establishment Clause  
5 concerns, but it also raises all sorts of other  
6 concerns that, under Pickering, the school  
7 district has to be --

8 JUSTICE BARRETT: I get --

9 MR. SKATSKEE: -- able to address  
10 also.

11 Yes?

12 JUSTICE BARRETT: I get your Pickering  
13 argument. I just --

14 MR. KATSKEE: I'm sorry.

15 JUSTICE BARRETT: -- didn't understand  
16 how there could be the Establishment Clause  
17 violation absent state action. But thank you.  
18 You answered.

19 CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel.

21 MR. KATSKEE: Thank you, Your Honor.

22 CHIEF JUSTICE ROBERTS: Rebuttal, Mr.  
23 Clement?

24

25

1 REBUTTAL ARGUMENT OF PAUL D. CLEMENT  
2 ON BEHALF OF THE PETITIONER

3 MR. CLEMENT: Thank you, Mr. Chief  
4 Justice. Just a few points in rebuttal.

5 First, in terms of the correct test, I  
6 don't think the correct test when the government  
7 explicitly discriminates on the basis of  
8 religion is Pickering. Religion is different.  
9 In the context of free speech, we're used to  
10 saying, well, if you just spoke over there, you  
11 had alternative methods of communication, time,  
12 place, and manner, there's some flexibility on  
13 that. That doesn't happen in religion because  
14 it's a compelled, sincere religious belief. If  
15 you tell a Muslim if they could just reorient  
16 themselves in the other direction, you're  
17 denying them their religious exercise. So you  
18 need a test that is fit for religion cases, and  
19 strict scrutiny provides that.

20 If you want to give courts and  
21 district courts -- rather, school districts  
22 guidance, the last thing you should do is  
23 replace jurisprudence that's becoming clearer  
24 and could be made clearer in this case about  
25 discrimination against religion and the

1 Establishment Clause and replace it with  
2 Pickering. Balancing test doesn't provide  
3 guidance.

4           The only thing worse than Pickering, I  
5 suppose, would be a center of attention test.  
6 And that doesn't actually capture the real world  
7 examples anyways. Right after Mohamed Salah  
8 scores the goal, he is of course the center of  
9 attention and he engages in a religious  
10 exercise. Right after Tim Tebow scores the  
11 touch down, he's absolutely the center of  
12 attention. Yet, he engages in religious  
13 exercise. It's private, it's permissible, and  
14 the government can't stop it.

15           Second, in terms of Santa Fe, we've  
16 discussed this a bunch, but my friend on the  
17 other side does say, well, wait, this is worse,  
18 this is coach speech, not student speech. But  
19 you can't strip away all the context of Santa  
20 Fe. If everything else were the same, sure, the  
21 fact that it was coach speech would be worse.  
22 But it's not all the same.

23           That case, the student was using the  
24 loudspeaker as the winner of a majoritarian  
25 election to be the designated spokesperson for

1 the school. This case, it's the coach engaged  
2 in his private religious exercise. He happens  
3 to pick that point at the -- the center of the  
4 field. He's actually not the center of  
5 attention, if you look at the videos, which are  
6 in the record, but -- because there's lots of  
7 other activity going on, but that's his  
8 religious exercise. It's protected.

9 Now, third, the record here -- I mean,  
10 the -- people seem like they dispute everything,  
11 but the record speaks for itself on this case.  
12 There are three games that are particularly  
13 relevant. The 16th, the homecoming game.  
14 That's what my friends describe as the circus,  
15 media circus, people coming onto the field.

16 Well, there was a letter sent in  
17 response to that game in particular. It's at  
18 Joint Appendix pages 90 to 95. It uses the  
19 phrase "endorse and endorsing" and raises  
20 endorsement concerns eight times. It talks  
21 about safety concerns zero times. It talks  
22 about coercion concerns zero times. That's the  
23 16th.

24 Then, by the 23rd, that's a game that  
25 is one of the two games on which the actual

1 discipline turns. That's a prayer where no one,  
2 no one, joins the coach in his prayer.

3 The 26th is then the next home game.  
4 They have a much better security system that  
5 time. They've addressed that pretextual  
6 problem, and there's a prayer. No prayer -- no  
7 player joins it from either time on the 26th.

8 Yet, the 23rd and the 26th are the  
9 prayers where he's disciplined. He was not  
10 disciplined for having a state legislator on the  
11 field. That's simply not what happened in this  
12 case.

13 And, again, the record speaks for  
14 itself, not just contemporaneously. As I said,  
15 the score in the letter sent after the 16th game  
16 is 8 to 0. Endorsement, 8; other concerns, 0.

17 But then, when they layer up and have  
18 their lawyer send a letter to the EEOC at pages  
19 Joint Appendix 132 to 142, what concern did they  
20 express as their stated, sole driving  
21 consideration? It is, again, endorsement, 8 to  
22 0. Eight mentions of endorsement. Nothing else  
23 is mentioned.

24 So I'll finish with this point.  
25 Please do not remand to the Ninth Circuit for an



1 application of the coercion test. There's no  
2 evidence of coercion contemporaneously. Joint  
3 Appendix 105, the school itself stressed no  
4 evidence of actual coercion.

5 The only evidence that showed up later  
6 was a couple of parents complaining about their  
7 students who had to turn their back on the team  
8 or separate themselves from team activity,  
9 obviously directed at the pre-September 17th  
10 activity that's no longer at issue in the case.  
11 There's no evidence of coercion in this record.

12 But, worse still, my client has  
13 already waited six years to get his job back.  
14 And if you imagine the parallel for this is a  
15 race case where the lower courts, both lower  
16 courts, said the sole reason the government  
17 acted was because of race. But yet we think  
18 it's okay because there's this compelling  
19 interest. If this Court took that case up and  
20 said there's nothing to the compelling interest,  
21 it wouldn't send it back down to see if there  
22 was some other reason when the courts had  
23 already found the sole basis for the action was  
24 on the basis of race.

25 Here the record is clear, two courts

1 that didn't agree with much of what we said,  
2 said the sole basis for the government's  
3 reactions -- actions here were religion.

4 That is not something that should  
5 stand. Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you,  
7 counsel.

8 The case is submitted.

9 (Whereupon, at 11:48 a.m., the case  
10 was submitted.)

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