

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

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JOSEPH A. KENNEDY, )

Petitioner, )

v. ) No. 21-418

BREMERTON SCHOOL DISTRICT, )

Respondent. )

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Washington, D.C.

Monday, April 25, 2022

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

APPEARANCES:

PAUL D. CLEMENT, ESQUIRE, Washington, D.C.; on behalf of the Petitioner.

RICHARD B. KATSKEE, ESQUIRE, Washington, D.C.; on behalf of the Respondent.

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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 the --

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  
17 to read the Bible and she does it either  
18 silently --

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 if the players are -- are -- are, you know,  
5 doing their own thing in the end zone, for  
6 example, then I think it really becomes what --  
7 the 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. So --

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 was 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  
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.

1 JUSTICE BREYER: Okay.

2 MR. CLEMENT: He said -- that's Joint  
3 Appendix --

4 JUSTICE BREYER: Okay.

5 MR. CLEMENT: -- page 295, I'm not  
6 going to stop my prayer --

7 JUSTICE BREYER: Exactly.

8 MR. CLEMENT: -- mid-prayer that I  
9 start by myself --

10 JUSTICE BREYER: All -- all right.  
11 I'll --

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

13 JUSTICE BREYER: -- read -- go back  
14 and read that. I'll check it because I'm going  
15 to go back and read.

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

22 MR. CLEMENT: Well, and -- and the  
23 important --

24 JUSTICE BREYER: That's on October 16.

25 MR. CLEMENT: October 16, important to

1 note that the only players that joined him on  
2 October 16 were players from the opposing team.

3 JUSTICE BREYER: Okay. So opposing  
4 team, got it.

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

17 And the final thing, six, is Kennedy  
18 never answered that letter.

19 Okay. You've got the six.

20 MR. CLEMENT: So should I --

21 JUSTICE BREYER: Have you taken --

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

23 JUSTICE BREYER: -- them in? Because  
24 there are a lot of them, and I'm sorry about  
25 that. But are they basically right with your

1 exceptions that you --

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

4 JUSTICE BREYER: Yeah.

5 MR. CLEMENT: -- which is --

6 JUSTICE BREYER: Seven.

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

15 So this is not a situation where there  
16 is some asymmetry here that, you know, they were  
17 wonderfully accommodating and -- and we just  
18 refused to deal with them.

19 There are lots of other facts that are  
20 in the record that I think are highly relevant  
21 here, including that no student joined him on  
22 the field on October 23, even though that's one  
23 of two specific incidents for which he was  
24 disciplined, that no players joined him on the  
25 26th, which is the other game where he was



1 specifically sort of signaled out for his being  
2 fired.

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

14           JUSTICE KAGAN: Mr. Clement --

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

16           JUSTICE KAGAN: -- I want to -- I  
17 mean, finish your sentence, but --

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

1 incidents.

2 JUSTICE KAGAN: I -- I take it from  
3 your earlier answers that you're not contesting  
4 the right of the school district to discipline  
5 Coach Kennedy if he had been praying during the  
6 official, if you will, post-game talk?

7 MR. CLEMENT: I think that's right.  
8 We don't -- I mean --

9 JUSTICE KAGAN: Correct?

10 MR. CLEMENT: -- we don't take an  
11 issue that --

12 JUSTICE KAGAN: So -- so that's  
13 like --

14 MR. CLEMENT: -- he discontinued that  
15 practice.

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

21 MR. CLEMENT: That's right because --

22 JUSTICE KAGAN: And -- and --

23 MR. CLEMENT: -- it would be  
24 government speech.

25 JUSTICE KAGAN: -- just briefly, why?

1                   MR. CLEMENT: Because it would be  
2 government speech.

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

15                   Is that correct?

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

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

1       them to join.

2                   MR. CLEMENT:  So I -- I do think it's  
3       -- it really is as simple as the government  
4       speech, but I also want to be clear, again, as  
5       we're talking about the record here, this is not  
6       a case where the government took action because  
7       of coercion concerns.  The record is  
8       crystal-clear that they were concerned about  
9       endorsement and --

10                   JUSTICE KAGAN:  Yeah, I -- I mean,  
11       endorsement, coercion, I mean, you're requiring  
12       a lot of a school board to try to figure out  
13       exactly which box in the Establishment Clause to  
14       put this in.

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

20                   JUSTICE KAGAN:  Okay.  Assume that the  
21       School District had said the right things.  They  
22       had said, we don't really like this because it  
23       is a form of pressure, a form of coercion.  
24       We're worried that the -- that the students will  
25       feel he gets to put me into a football game or

1 not. He gets to, you know, give me an A in math  
2 class or not. And this is a kind of coercion  
3 that's improper for 16-year-olds.

4 MR. CLEMENT: So, Justice Kagan, in  
5 the hypothetical where the coach is giving the  
6 post-game talk, I think those kinds of concerns  
7 about real coercion may well be well placed.

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

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

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

1 -- if -- if -- if you are so moved.

2 What's a student to think at that  
3 point?

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

14 And that's not coercion that counts  
15 under the Establishment Clause.

16 JUSTICE KAGAN: So is -- is -- is that  
17 the question of this case, whether the facts are  
18 my facts or your facts?

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

1           But the reason the factual difference  
2 is important is because, if you don't  
3 distinguish between the two situations, then  
4 you're leaving teachers and coaches in a  
5 position where there's no material room for  
6 their free exercise of religion or their free  
7 speech, and that's exactly what this Court said  
8 is not the case in Tinker.

9           And so -- and -- and, again, the  
10 concerns -- the reason it gets back to  
11 government speech at least in my view is because  
12 one technique that the Ninth Circuit used to  
13 approve this is one of these excessively broad  
14 job descriptions.

15           And I think, with all due respect to  
16 Justice Sotomayor, her hypothetical built in  
17 this idea. If -- if you say the job description  
18 of teachers and coaches is to be mentors, and if  
19 the mentors are religious, the students who  
20 depend on them for playing time and grades and  
21 all of the rest are going to want to curry favor  
22 and they're going to engage in their own  
23 religious practices or conform or at least feel  
24 pressure to do so.

25           JUSTICE SOTOMAYOR: Mr. Clement --

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

3           JUSTICE SOTOMAYOR: -- I -- I do  
4 understand a claim that how adults respond to  
5 things is not often relevant. We don't have a  
6 heckler -- heckler's veto in our First Amendment  
7 jurisprudence, but we have had it in our school  
8 prayers under the recognition of what Justice  
9 Kagan talked about, the fact that 16-year-olds  
10 can't be expected to be adults.

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

24           Does -- don't those facts suggest the  
25 very coercion that Justice Kagan was talking



1 about?

2 MR. CLEMENT: So, Justice Sotomayor,  
3 to the extent they suggest any coercion, it's  
4 only vis-à-vis the pre-September 17 practices  
5 that were discontinued as soon as there was a  
6 candid discussion between the coach and the  
7 School District. And --

8 JUSTICE SOTOMAYOR: But, Mr. Clement  
9 --

10 MR. CLEMENT: -- I think it's  
11 important --

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

22 I don't understand why a school can't  
23 do that.

24 MR. CLEMENT: Well, a school can't do  
25 that because it sounds like -- awful lot like

1 they would be sort of either retaliating against  
2 his protected speech --

3 JUSTICE SOTOMAYOR: No, they were --

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

5 JUSTICE SOTOMAYOR: -- willing to let  
6 him speak -- pray anywhere he wanted in the  
7 school. After the game, come back. He's the  
8 one who chose to publicize his prayer by doing  
9 it on the 50-yard line. He didn't do it on the  
10 side. He didn't just bow his head. He got on a  
11 knee at the very center of the field.

12 I -- I don't know of any other  
13 religion that requires you to get at the 50-yard  
14 line, the place where post-game victory speeches  
15 are given. What religion requires you to do it  
16 at that spot?

17 MR. CLEMENT: So the coach's religion,  
18 and he felt -- and -- and nobody's questioned  
19 the sincerity of his religious beliefs --

20 JUSTICE SOTOMAYOR: That he had to  
21 thank God. But why there?

22 CHIEF JUSTICE ROBERTS: Briefly, Mr.  
23 Clement.

24 MR. CLEMENT: His -- his religious  
25 beliefs, he felt compelled to -- to -- to make

1 his prayer there. And I don't think there's  
2 anything unusual about that. I mean, if a -- if  
3 a soccer player scores a goal, the soccer player  
4 will do a religious exercise, or Tim Tebow  
5 scores a -- a touchdown, they do the religious  
6 exercise there.

7           There -- there are spectators watching  
8 it, but that doesn't -- that's not what's  
9 driving the religious exercise. What's driving  
10 the religious exercise is that's where the event  
11 that the religious adherent is thankful for took  
12 place.

13           CHIEF JUSTICE ROBERTS: Thank you.

14           Justice Thomas, anything further?

15           JUSTICE THOMAS: No.

16           CHIEF JUSTICE ROBERTS: Justice  
17 Breyer?

18           JUSTICE BREYER: One quick question, I  
19 think, from prior cases. The -- the problem of  
20 prayer in school has been the fact that -- that  
21 there are 54 different religions in the United  
22 States now, and so what -- going back to the  
23 18th Century, 17th Century, what we're worried  
24 about is maybe it's -- here, it was the  
25 satanists, but, I mean, it could be, you know,

1 the Catholics, Protestants, Jews, Shintos,  
2 Mohammedans, and one group thinks why this group  
3 is being favored by the school, the other one  
4 thinks what about this one and so forth. So we  
5 have a kind of neutrality.

6 Now it's the same question. Right  
7 after the game, right before the bell rings in  
8 the morning, the teacher, the coach, says let us  
9 pray, prays out loud, and students join.

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

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

1                    Obviously, the school district says  
2                    it's fine to take a knee after the game, but  
3                    it's not fine to turn to Mecca. Or the student  
4                    that's -- the Muslim student that scored and  
5                    bowed towards Mecca is going to be disciplined  
6                    but not the Christian student that took a knee  
7                    after scoring a touchdown.

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

21                    And the one thing I would point out is  
22                    the very fact that the accommodations that were  
23                    offered by the School District were to leave the  
24                    field and go somewhere else and do your prayer  
25                    and come back demonstrates beyond all doubt that

1 he did not have all-encompassing supervisory  
2 responsibilities after the game.

3 Sure, he was on duty in a loose sense,  
4 but he was not on duty in a real sense or they  
5 would not have given him those accommodations.

6 CHIEF JUSTICE ROBERTS: Justice Alito?  
7 Justice Sotomayor, anything further?  
8 Justice Kagan?  
9 Justice Gorsuch?

10 JUSTICE GORSUCH: Mr. Clement, one of  
11 the difficulties of this case is getting one's  
12 hands around the District's rationale, and as I  
13 understood, it was based on kind of our Lemon  
14 endorsement test.

15 And you're arguing, as I -- as I hear  
16 you, that that's -- that was a mistaken test and  
17 a mistaken way to think about what the  
18 Establishment Clause requires.

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

22 MR. CLEMENT: I -- I -- I appreciate  
23 the question. I don't think -- I mean, you  
24 know, people are trying to dispute this record.  
25 I think it is very clear on what motivated the

1 District, and it was endorsement, endorsement,  
2 endorsement, endorsement again.

3 JUSTICE GORSUCH: Not -- not coercion?

4 MR. CLEMENT: Not coercion. If you  
5 look at their first letter after the October 16  
6 game, Joint Appendix page 90 to 95, there are  
7 eight references to endorsement or endorsing,  
8 zero references to either coercion or player  
9 safety.

10 If you look at their letter to the  
11 EEOC, which is around Joint Appendix page 130,  
12 there are again eight references to endorsement,  
13 endorsing, no references to coercion. So it is  
14 clear what motivated their policy.

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

1                   And I think the record is clear here  
2                   that we only have the latter going on here and  
3                   not the former. It's certainly not what  
4                   motivated the District because, in --  
5                   contemporaneously, when they put out a  
6                   newsletter to their -- their constituents, they  
7                   said there's no evidence that any student was  
8                   coerced here.

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

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

25                  But what -- what continues to happen



1 is that there is overt discrimination on the  
2 basis of religion, as is evidenced in the record  
3 here, by school districts, who aren't evil.  
4 It's just they're doing it out of misguided  
5 endorsement concerns.

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

9 CHIEF JUSTICE ROBERTS: Justice Kagan?

10 JUSTICE KAGAN: Do you want to --

11 CHIEF JUSTICE ROBERTS: No?

12 Justice --

13 JUSTICE KAGAN: If -- if -- if you  
14 would go back to the coercion part of your  
15 answer to Justice Gorsuch, if I understood you  
16 correctly, you were saying, well, real coercion  
17 is where the government does it. And I -- I  
18 want to understand that.

19 Are -- are you suggesting that a  
20 teacher in a classroom can say: Well, you can't  
21 charge me with coercion because he separates  
22 himself from the school district?

23 MR. CLEMENT: That's where I think the  
24 Garcetti line comes in because, if it's the  
25 individual -- if it's government speech,

1 instructional role, then that -- no matter what  
2 they say to try to distance themselves, the  
3 teacher and the coach can still be a source of  
4 coercion.

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

17 Now that seems to me to be coercive of  
18 16-year-olds regardless if they know that it's  
19 him and not the school district. He's the one  
20 who's going to give me an A or not.

21 MR. CLEMENT: I -- I guess it just  
22 depends -- I mean, if -- if you're saying this  
23 -- that this happens in the middle of class, I  
24 might believe you. But, if you're just  
25 saying -- I mean, look, take a familiar example.

1 It's Ash Wednesday. A teacher goes to morning  
2 mass, comes in with a big black mark on his or  
3 her forehead. Is that coercive?

4 JUSTICE KAGAN: No, because nobody's  
5 asking the students to participate at that  
6 point. They don't have a choice of  
7 participating at that point.

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

14 JUSTICE KAGAN: I --

15 MR. CLEMENT: -- they put a  
16 recommendation for --

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

19 MR. CLEMENT: What's that?

20 JUSTICE KAGAN: I think we can draw  
21 lines like that and know the difference between  
22 those two things, but know the difference when a  
23 teacher who has historically tried to bring  
24 prayer into a classroom setting says, you know  
25 what, you know, I -- I understand that there are

1 all these Supreme Court cases against me, so  
2 what we're going to do is we're going to have a  
3 little bit of a break, five minutes of a break,  
4 so we can all regroup, and -- and I'll be  
5 praying during that time.

6 MR. CLEMENT: So, Justice Kagan,  
7 obviously, there's going to be room in the  
8 jurisprudence for pretext going both ways.

9 And I also think there ought to be  
10 room for understanding that in this area, given  
11 the current state of this Court's jurisprudence,  
12 there are -- there's room for -- for mistakes on  
13 both parts.

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

23 CHIEF JUSTICE ROBERTS: Justice  
24 Kavanaugh?

25 JUSTICE KAVANAUGH: I want to pick up

1 on Justice Kagan's and Justice Gorsuch's  
2 questions. The District said the sole reason it  
3 was doing this was to avoid Establishment Clause  
4 problems, correct?

5 MR. CLEMENT: Correct. And was  
6 specific to endorsement.

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

15 MR. CLEMENT: Sure, but it's a -- it  
16 -- it's a stubborn -- it's a stubborn fruit, and  
17 I don't think just pushing a pencil through it  
18 has done the trick. I mean, you really have to  
19 slice it in half and make clear to everybody --

20 JUSTICE KAVANAUGH: Right. There have  
21 been individual opinions, but let's -- we  
22 haven't applied it in the cases. I take your  
23 point, but -- but I think Justice Kagan's point  
24 is there's a whole separate body of cases  
25 involving schools, and so Engel, Lee versus

1 Weisman, and Santa Fe. And Santa Fe is the  
2 football case, and so that's the most relevant  
3 one here, I think.

4 And the question here, I think, is  
5 what's different about this from an  
6 Establishment Clause perspective than the prayer  
7 over the loudspeaker, which I think was a key  
8 fact, in Santa Fe? How would we distinguish  
9 Santa Fe from this case?

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

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

23 And the Court's response to that  
24 argument was to focus on the state action, the  
25 government's own involvement in a majoritarian

1 election for the opportunity to give the prayer  
2 over the loudspeaker. So, as I reread Santa Fe,  
3 I was struck by how much of the Court's analysis  
4 turned on the election aspect of the school's  
5 policy, which has no analogue here whatsoever.

6 But, to -- to -- to give a concrete  
7 example, I do think, if -- if -- if the coach  
8 goes to the loudspeaker after the game, there's  
9 a much stronger argument that that's government  
10 speech. And --

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

18 MR. CLEMENT: Yeah, but -- but -- but  
19 I think that, you know, the loudspeaker sort of  
20 ties this audience back to the government speech  
21 and ties it all together. I think, you know,  
22 when -- when Mohamed Salah, you know, has a  
23 religious exercise after a goal at Anfield, the  
24 fact that the crowd is there is incidental.  
25 It's not a captive audience in that sense. It's

1 not -- it's not he who brought them there. So I  
2 think it kind of comes back to government speech  
3 in that respect.

4           And I think, when the coach takes this  
5 15-second fleeting prayer at the end of the game  
6 with no loudspeaker, barely audible, it's  
7 radically different from the use of the  
8 loudspeaker and is much similar to Mohamed  
9 Salah, Tim Tebow, all of those things.

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

21           JUSTICE KAVANAUGH: What about the  
22 player who thinks, if I don't participate in  
23 this, I won't start next week, or the player who  
24 thinks, if I do participate in this, I will  
25 start next week, and the player, like, wants to



1 start?

2 MR. CLEMENT: So that's -- that's  
3 where I think making a clear message that that's  
4 inappropriate, that this doesn't matter for  
5 those purposes, that's -- that's how you deal  
6 with those problems.

7 And if there is a coach or a  
8 teacher --

9 JUSTICE KAVANAUGH: But how -- how  
10 will you -- how will you ferret that out?  
11 Because every player's trying to get on the good  
12 side of the coach, and every parent is worried  
13 about the coach exercising favoritism in terms  
14 of the starting lineup, playing time,  
15 recommendations for colleges, et cetera.

16 MR. CLEMENT: I -- I -- I think the  
17 school district, if it has that concern, and I'm  
18 not saying it's not a legitimate concern, just  
19 makes it as clear that it's school policy that  
20 nothing turns on that.

21 But that concern, although legitimate,  
22 isn't even specific to religion. I mean, if --  
23 if --

24 JUSTICE KAVANAUGH: I agree with that.

25 MR. CLEMENT: -- I mean, if -- if the

1 coach is always wearing a Packers jersey, I  
2 mean, there's -- there's -- there's an incentive  
3 for the -- for the -- for the players to follow  
4 on.

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

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

1           And, you know, that suspicion I don't  
2 think you can get around. That's a real thing  
3 out there, and, you know, that's going to be a  
4 real thing in situations like this. I don't  
5 know how to deal with that, frankly, though.

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

10          JUSTICE KAVANAUGH: Mm-hmm.

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

19          JUSTICE KAVANAUGH: One last question,  
20 and you -- you mentioned this. It's not just  
21 religious speech that would trigger issues; it's  
22 others. So, to your argument that this is  
23 private speech and therefore Garcetti, how do  
24 you handle the hypothetical again of the coach  
25 who goes out and wants to unfurl the political

1 banner at the 50-yard line --

2 MR. CLEMENT: Well --

3 JUSTICE KAVANAUGH: -- or wants to put  
4 on a political message at the 50-yard line after  
5 the game?

6 MR. CLEMENT: So -- so, if it's -- if  
7 the reason that the school district is acting is  
8 because of disruptive or even just because it's  
9 political speech and it wants to take action,  
10 that's Pickering. They can do that. So that --  
11 those are sort of an easy case.

12 I also think, like, flags are kind of  
13 -- I know they're -- they're fun hypos, but  
14 they're easy cases because those are -- there's  
15 kind of no reason to unfurl a flag other than to  
16 communicate with your message -- your -- your  
17 audience, and that's not true of this kind of --  
18 of prayer.

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

1 JUSTICE KAVANAUGH: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Barrett?

4 JUSTICE BARRETT: Let me pick up on  
5 that, Mr. Clement.

6 This is, as Justice Thomas asked you  
7 at the beginning, both a free exercise and free  
8 speech claim. Who is he communicating to? God?  
9 Like, where is the -- the speech?

10 MR. CLEMENT: I -- I -- I think he is  
11 communicating to God.

12 JUSTICE BARRETT: And so that would  
13 trigger the First Amendment protection?

14 MR. CLEMENT: Under both --

15 JUSTICE BARRETT: He doesn't have to  
16 be --

17 MR. CLEMENT: -- the Free Speech  
18 Clause and the Free Exercise Clause, it would be  
19 --

20 JUSTICE BARRETT: Well, I understand  
21 the free exercise part of it, but, you know,  
22 even if he's not communicating to an audience,  
23 so he's completely silent, he just takes the  
24 knee, that's protected speech even if he's not  
25 trying to communicate to anyone around him, just

1 to the Almighty?

2 MR. CLEMENT: Absolutely.

3 JUSTICE BARRETT: Okay.

4 MR. CLEMENT: It's expressive conduct,  
5 it's -- or speech.

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

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

19 I take it your position would be that  
20 that's entirely private speech, and even if  
21 there's a coercive component to it, that the  
22 school can have nothing to say?

23 MR. CLEMENT: Well, I -- I think that  
24 if the school has a concern about that kind of  
25 activity, after-school activity, wholly off the

1 school grounds, I mean, I think the way, if it  
2 really had a concern with that, it could try to  
3 deal with it through some kind of neutral  
4 policy. If it could say, well, we're  
5 sufficiently concerned about that, we're not  
6 going to let any teachers have any kind of  
7 outside events at their house or something, then  
8 I think that -- that would be a neutral policy.

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

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

23           I mean, Ashcroft against Free Speech  
24 Coalition, among -- among other cases, says that  
25 that's verboten.

1                   JUSTICE BARRETT:  And I -- I guess I'm  
2     gathering from your response that you would  
3     treat that Young Life example as basically  
4     subject to the same kind of analysis as Justice  
5     Kagan's examples of, you know, a disclaimer  
6     before class, this is an instructional -- or  
7     maybe it's before the bell, like Justice  
8     Sotomayor asked you before, purely private  
9     speech, not endorsement, nobody could mistake it  
10    for government speech, and any coercion would  
11    be -- you know, maybe it's there, maybe it's  
12    not, just as, in the Young Life group, maybe  
13    it's there, maybe it's not?

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

23                   I mean, you could have the same thing  
24    for any after-school activity if the idea is,  
25    well, you know, people are going to kind of



1     curry favor with the teacher and participate in  
2     that, then maybe you have a rule about it, but,  
3     of course, you know, you can have that already,  
4     right? I mean, you know, think you're going to  
5     get a better math grade if you go out for the  
6     math team.

7                     So, at a certain point, the  
8     responsibility of the school is to teach the  
9     important lesson that private speech is  
10    protected even for teachers and coaches.

11                    JUSTICE BARRETT: Thank you.

12                    CHIEF JUSTICE ROBERTS: Thank you,  
13    counsel.

14                    Mr. Katskee.

15                    ORAL ARGUMENT OF RICHARD B. KATSKEE  
16                    ON BEHALF OF THE RESPONDENT

17                    MR. KATSKEE: Mr. Chief Justice, and  
18    may it please the Court:

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

24                    But that wasn't good enough for Mr.  
25    Kennedy. He insisted on audible prayers at the

1 50-yard line with students. He announced in the  
2 press that those prayers are how he helps these  
3 kids be better people.

4 And after the District closed the  
5 field to the public, he expressly permitted  
6 legislators and others to join him. Under  
7 Garcetti, those are the functions of a coach,  
8 not a private citizen.

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

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

21 When Mr. Kennedy repeatedly ignored  
22 sincere efforts to accommodate personal prayers,  
23 what was the District to do? If a math teacher  
24 knelt and said -- said audible prayers in class  
25 just before the bell, the School District could

1 act.

2 Coaches have far more power and  
3 influence, especially at the time and place of  
4 those traditional post-game speeches. To win,  
5 Mr. Kennedy would need this Court to whittle  
6 Garcetti to nothing and toss Pickering aside and  
7 disregard students' rights and ignore the need  
8 to maintain control over school events.

9 Doing any of that on Kennedy's  
10 hypothetical facts would be ill-advised. To do  
11 all of it would be extraordinary.

12 I welcome the Court's questions.

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

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

1 more than that --

2 JUSTICE THOMAS: How is that  
3 government speech? Would you explain that to  
4 me?

5 MR. KATSKEE: Sure. In -- in  
6 Garcetti, this Court made clear that the test  
7 for government speech is a functional test, not  
8 a formalistic one, to determine whether the  
9 speech is pursuant to one's job. That has to  
10 entail looking at the manner, the time, and the  
11 place of the speech, and how reasonable  
12 observers would see it, whether they would view  
13 that as -- as speech as a government employee.

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

20 JUSTICE THOMAS: But what if the  
21 School District, as it did here, objected to  
22 that conduct before it took place? How could  
23 that be government speech?

24 I'm -- normally, when I think of  
25 government speech, the government has a message

1 and someone is communicating that message. How  
2 would it be government speech if, as it happened  
3 in this case, the government objected  
4 beforehand?

5 MR. KATSKEE: A -- a -- a couple of  
6 responses, Your Honor.

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

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

23 On Mr. Kennedy's theory, if the  
24 motivation for -- for that act, that act of  
25 protest against police misconduct is to -- is

1 political, then it's subject to Pickering  
2 balancing and yet, if it is -- the motivation is  
3 religious, it gets strict scrutiny.

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

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

15 JUSTICE THOMAS: Thank you.

16 MR. KATSKEE: The --

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

24 What -- what if all that were off the  
25 table? It's simply the coach going out to

1     midfield, kneeling -- taking a knee, and that's  
2     it? No dispute about who's responsible for  
3     cutting off the negotiations. Take out the  
4     media stuff. Would the school have any problem  
5     in that case? Or would the case be just the  
6     same?

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

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

23                   CHIEF JUSTICE ROBERTS: Well, what --  
24    I gather that's --

25                   MR. KATSKEE: -- and --

1 CHIEF JUSTICE ROBERTS: I'm sorry, go  
2 ahead.

3 MR. KATSKEE: Oh, excuse me. I was  
4 going to say and -- and all the other concerns,  
5 like the question whether this could be  
6 disruptive of the event, could it cause a  
7 stampede or not.

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

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

21 MR. KATSKEE: Well, if --

22 CHIEF JUSTICE ROBERTS: Both with  
23 respect to Garcetti and with respect to the  
24 Establishment Clause concern.

25 MR. KATSKEE: Well, if -- if, for



1 instance, the coach is kneeling on the sideline  
2 or if the coach is -- is going to that place in  
3 the center of the field when the students are  
4 heading back to the -- to the locker room or the  
5 bus, like he did for a month after the  
6 District's September 17 letter, then -- then  
7 that wouldn't be reasonably perceived as -- as  
8 government speech, and the District wouldn't  
9 have substantial interests in regulating it.

10 But -- but the -- but the situation  
11 here directly implicates the power and authority  
12 of the coach, which is -- which is awesome. The  
13 coach determines who makes varsity, who gets  
14 playing time, who gets recommend -- recommended  
15 for college scholarships. The students know you  
16 have to stay in the good graces of the coach if  
17 that's -- if you have those aspirations.

18 And so coaches, even when coaches say,  
19 oh, there's an optional -- an optional workout  
20 on Monday, Tuesday, and Wednesday afternoons  
21 after school, you can bet that, to the students,  
22 that's not really optional and especially not if  
23 the -- if the coach has gone to the media and  
24 said: Having daily workout -- daily optional  
25 workouts is how I make these kids better players

1 or better people.

2 JUSTICE KAVANAUGH: Counsel, I -- I  
3 appreciate a lot of what you just said there,  
4 but we have to analyze our Establishment Clause  
5 precedents first because I think the district  
6 court said that the District's sole reason for  
7 doing this was to avoid an Establishment Clause  
8 violation, right?

9 MR. KATSKEE: That is what the  
10 district court said. That was incorrect, Your  
11 Honor. But also --

12 JUSTICE KAVANAUGH: But let me just  
13 take it there --

14 MR. KATSKEE: Yes.

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

22 On the schools cases, Santa Fe  
23 ultimately, I think, is the case. And Mr.  
24 Clement was saying this goes beyond Santa Fe in  
25 terms of extending the Establishment Clause

1 because it's not over the public address system,  
2 it's not the same fact situation that we had in  
3 Santa Fe, where it was to everyone in the crowd  
4 by the school over the public address system.

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

9 Can you respond to that?

10 MR. KATSKEE: Certainly, Justice  
11 Kavanaugh.

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

21 JUSTICE KAVANAUGH: Would that be --

22 MR. KATSKEE: -- and with a seven-year  
23 -- excuse me.

24 JUSTICE KAVANAUGH: Wouldn't those  
25 cases suggest, though, that there's a difference

1 between the coach in the locker room? I got it  
2 there. The coach in the huddle? I got it there  
3 as well. But, when the players are dispersing  
4 after the game, I guess I'm not sure how it's  
5 that much different from Establishment Clause  
6 perspective than Justice Barrett's hypothetical  
7 about the coach who has the -- has -- is part of  
8 a group that has meetings off campus.

9 I guess I'm not sure from  
10 Establishment Clause purposes how those two  
11 things are distinct.

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

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

24 Take the 10/26, the last game, as an  
25 example. And we don't even have to go to

1 homecoming, where the crowd stormed the field.

2 But Mr. Kennedy there went out --

3 JUSTICE KAVANAUGH: This wasn't --

4 MR. KATSKEE: -- and occupied --

5 JUSTICE KAVANAUGH: -- this -- I'm

6 sorry to interrupt. This wasn't, you know,

7 "huddle up, team," you know, which is a common

8 coach phrase. That wasn't this, right?

9 MR. KATSKEE: No, but does the coach

10 have to say that for the students to miss that?

11 And there's something else going on too, which

12 gets back in part to government speech and in

13 part to an -- and in part to the religion clause

14 concerns, is that what Mr. Kennedy did at that

15 -- at that October 26 game is he -- he, in a --

16 ahead of time, gave special permission to two

17 legislators and some other people to come onto

18 the field to have a prayer circle with him on

19 the 50-yard line. Students -- it was fully

20 visible to students. And then, as part of the

21 arrangement, was to turn around and have one of

22 those state legislators address the team, which

23 he did.

24 JUSTICE ALITO: Mr. Katskee, let me

25 ask you to give me your analysis of the

1 following set of facts. Forget about all of the  
2 complicated facts in this case.

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

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

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

23 So then the question is the -- the  
24 question comes under Pickering balancing, and if  
25 -- and if the team, for instance, is not there

1 so that there's not a -- there's not a fear of  
2 coercion and if it doesn't cause material  
3 disruptions, then the District doesn't have a  
4 substantial --

5 JUSTICE ALITO: Those are the only --

6 MR. KATSKEE: -- interest in  
7 regulating it.

8 JUSTICE ALITO: -- those are the only  
9 facts, okay? So --

10 MR. KATSKEE: Yes.

11 JUSTICE ALITO: -- under those  
12 circumstances, there would not be a violation of  
13 the First Amendment.

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

25 MR. KATSKEE: The school district --

1 not -- not -- the school district doesn't have a  
2 substantial interest in discriminating. But it  
3 is also the case that the school district gets  
4 to script its event. So the question has to be  
5 whether he is -- has to start with whether he's  
6 acting as a -- as a government official or not.

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

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

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

25 JUSTICE ALITO: Well, you know, this



1 is an employment -- you've -- you've talked  
2 about all sorts of facts, and it is complicated.  
3 Coach Kennedy did a lot of things over a period  
4 of time. The school district said a lot of  
5 things over a period of time.

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

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

19 We look at the reason that was given.  
20 What was the reason that you gave here?

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

1           In fact, it's quite the opposite.  
2       This Court made clear in Saint Mary's against  
3       Hicks and Reeves against Sanderson that it's  
4       necessary to look at the whole record to  
5       determine whether -- whether a -- an employment  
6       action was improper and that that goes for both  
7       the employer and the employee.

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

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

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

25           MR. KATSKEE: We don't -- we don't at

1 all think that it was -- this was an unlawful  
2 reason under the Establishment Clause. We think  
3 that it was required. We think that at the very  
4 least the District had the discretion to take  
5 those concerns into account.

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

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

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

24 JUSTICE BREYER: There are a lot of  
25 reasons. Why are you shying away from -- or

1 maybe you're not -- the simple reason of  
2 establishment?

3 MR. KATSKEE: Yes.

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

14 And the teacher prays purposely,  
15 deliberately. It's nothing wrong with prayer.  
16 It might be a great thing. It is.

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

20 Does that violate something in the  
21 Constitution or the law? And why not?

22 MR. KATSKEE: Absolutely not.

23 JUSTICE BREYER: It does not  
24 violate -- it does not violate anything. All  
25 right. Why not?

1           MR. KATSKEE: Well, for -- for a  
2 couple of reasons. I will -- I will start with  
3 -- I will start with the Establishment Clause,  
4 but I want to work backwards to the issue of  
5 government speech as well.

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

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

19          JUSTICE BREYER: Okay. So one of your  
20 points is we don't have to reach all these  
21 complicated issues either.

22          MR. KATSKEE: Correct.

23          JUSTICE BREYER: We can simply say the  
24 question is whether, just after the game, on the  
25 50-yard line, the coach praying is sufficiently

1 like the teacher praying between 9 and 9:15 in  
2 the morning that there is an Establishment  
3 Clause problem and that is a legitimate reason  
4 for bringing in discipline when it's not  
5 followed.

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

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

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

17 MR. KATSKEE: Audible, also, Your  
18 Honor. The -- the --

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

24 And then the question is, how far does  
25 that go? The coach does the sign of the cross

1 right before the game. Is that -- could a  
2 school fire the coach for the sign of the cross  
3 right before the game?

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

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

15 Can the school fire the coach for  
16 that?

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

21 JUSTICE KAVANAUGH: No, no.

22 MR. KATSKEE: -- firing people  
23 willy-nilly.

24 JUSTICE KAVANAUGH: He's addressing  
25 the team loads the -- the hypothetical. He is

1 visible to everyone in the crowd and to the  
2 players, standing a little bit on the field from  
3 the sideline, as coaches do, and very visibly  
4 does the sign of the cross.

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

12 JUSTICE KAVANAUGH: I don't know --  
13 sorry.

14 MR. KATSKEE: Then it would be -- then  
15 it would be -- then it would be permissible and  
16 it's -- and it's protected if it's not  
17 government speech.

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

22 MR. KATSKEE: What -- what this Court  
23 has said, what this Court has made clear about  
24 government speech actually gives that line,  
25 which the Court said -- the Court has made clear



1 that the functional analysis requires --  
2 requires looking at the manner, the place, the  
3 time of the speech and how a reasonable observer  
4 would perceive it.

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

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

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

24 I don't think anybody -- let's just  
25 posit that in Justice Kavanaugh's example, the

1 coach visibly crosses himself, visible to  
2 everyone, but that no one would mistake that for  
3 government speech. It's quite clearly just the  
4 private devotional practice of the coach.

5 Why would Pickering apply? Have we  
6 ever applied Pickering just to straight-up free  
7 exercise claims?

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

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

23 Now, on Mr. Kennedy's test, that would  
24 be a classic Pickering example if it's a  
25 political view or a social view, but it would be

1 subject to strict scrutiny if the motivation for  
2 that same letter is -- is religious.

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

9 Would you have fired him?

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

13 JUSTICE ALITO: Would you have done to  
14 him --

15 MR. KATSKEE: But the question is  
16 whether --

17 JUSTICE ALITO: -- what you -- would  
18 you have done to him what you did to him here?

19 MR. KATSKEE: Then --

20 JUSTICE ALITO: Would you have treated  
21 that case differently?

22 MR. KATSKEE: That's absolutely  
23 something that can and should be disciplined  
24 because the School District doesn't -- doesn't  
25 want its event taken over for political speech.

1 JUSTICE ALITO: Where is the School  
2 District rule that says that?

3 MR. KATSKEE: The -- the School  
4 District has to be able to manage its activities  
5 and events. And that's clear under this Court's  
6 jurisprudence.

7 JUSTICE ALITO: What -- what reason is  
8 there to believe that you would have treated  
9 that case the same way?

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

18 The school district has to be able to  
19 say --

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

24 MR. KATSKEE: Well, there was -- there  
25 was an entire course of conduct here, right?

1 The -- the -- the school district sent Mr.  
2 Kennedy a letter on September 17 saying you can  
3 pray, including where it's visible to students;  
4 just don't pray with and to the students.

5 For a month, he was having prayers at  
6 the games and it wasn't a problem. Then he sent  
7 the letter on the 14th demanding to go back and  
8 do what I was doing before, which is audible  
9 prayers. Students have to be able to join. The  
10 -- and then -- and then he went to the press and  
11 he said, this is how I make these kids better  
12 people, and then came the game on the -- on the  
13 16.

14 The idea that the school district  
15 couldn't do something when a zoo was created on  
16 the field is -- is unimaginable --

17 JUSTICE ALITO: Can a school --

18 MR. KATSKEE: -- that it doesn't need  
19 a --

20 JUSTICE ALITO: -- can a school -- can  
21 a school district take adverse action against a  
22 coach or a teacher because the coach or the  
23 teacher, on purely private time, not on school  
24 premises, not when the coach or teacher is  
25 discharging any official duties, is very, very

1 visibly religious, posts all sorts of religious  
2 messages on YouTube? Maybe this coach is -- is  
3 an ordained minister and preaches. And the  
4 school district says this goes too far, this is  
5 not the kind of mentor we want for our students.

6 Can they -- can the District do that?

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

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

15 MR. KATSKEE: Pardon?

16 JUSTICE ALITO: -- in its earlier  
17 opinion thought that that was a justification  
18 for what the School District did.

19 MR. KATSKEE: What the --

20 JUSTICE ALITO: Kennedy's not a good  
21 mentor for the students.

22 MR. KATSKEE: -- what the Ninth  
23 Circuit -- the Ninth Circuit clarified in its  
24 second opinion what it meant in its first. But  
25 the real point is that, to students, whether the

1 coach is acting as a coach doesn't turn on the  
2 niceties of government speech doctrine. Suppose  
3 that the coach, on his personal Facebook page,  
4 says, in my 20 years as a coach, I have never  
5 had a student do well or make varsity who  
6 doesn't pray with the team before every game.

7 That's a situation that it's -- it's  
8 surely private, but it's also surely coercive.  
9 It raises Establishment Clause concerns --

10 JUSTICE ALITO: Well, that's a  
11 different --

12 MR. KATSKEE: -- and all sorts of  
13 other concerns.

14 JUSTICE ALITO: -- that's different  
15 from -- that's different from my example.

16 MR. KATSKEE: Pardon?

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

23 MR. KATSKEE: What -- what that shows,  
24 though, is that there certainly can be -- can be  
25 private speech that -- that -- that puts -- puts

1 improper pressure on students to conform  
2 religiously or otherwise, and also -- and -- and  
3 that's why the -- the test has to be practical  
4 and functional. There can't be this categorical  
5 -- on Mr. Kennedy's view, there would be --  
6 that's -- that's not just private, but there's  
7 also strict scrutiny, and that would make an  
8 impossible standard for school districts to deal  
9 with these real problems.

10 JUSTICE ALITO: Well, I don't really  
11 understand --

12 MR. KATSKEE: The answer --

13 JUSTICE ALITO: -- your answer.

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

16 Can they fire him for that reason?

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

23 JUSTICE ALITO: No? No student could  
24 -- no student could think that? No student  
25 could think that if -- boy, if I don't agree



1 with -- if I don't say things in class, write  
2 things in my papers that agree with the coach or  
3 if I -- the teacher or I say something that's  
4 contrary to what this teacher feels really  
5 strongly, that's going to hurt me.

6 MR. KATSKEE: The question would be --

7 JUSTICE ALITO: No -- no -- no student  
8 could think that?

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

14 And compare that situation with, for  
15 example, the teacher putting up those signs in  
16 the classroom. That -- that shows that that --  
17 the -- the School District could certainly be  
18 concerned about that -- that pressure on the  
19 students, that they feel like if they don't  
20 voice the opinion that's up on the wall there,  
21 that they might be penalized for it, and the  
22 District can make the decision that it -- that  
23 it is going to regulate that, which -- which  
24 will require, on the one hand, if -- if that is  
25 private, recognizing the -- the very serious

1 First Amendment interests of the employee, but  
2 also recognizing the need to -- not to have  
3 material disruptions in class, the need to avoid  
4 coercing the -- coercing students to adopt a  
5 particular political or social view or  
6 interjecting the dissension in the school that  
7 that may cause.

8 CHIEF JUSTICE ROBERTS: Justice  
9 Thomas, anything further?

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

15 Do you have any examples where, in  
16 fact, that has been done in your school  
17 district?

18 MR. KATSKEE: That situation has never  
19 arisen, Justice Thomas. And that gets to the  
20 attempt to call this -- to call this religious  
21 discrimination because the particular act that  
22 the School District had to deal with happened to  
23 involve religion -- happened to involve  
24 religious expression.

25 JUSTICE THOMAS: Actually, what I'm

1 talking about is the --

2 MR. KATSKEE: But --

3 JUSTICE THOMAS: I'm interested in  
4 something that we agree --

5 MR. KATSKEE: Yes.

6 JUSTICE THOMAS: -- could be regulated  
7 --

8 MR. KATSKEE: Yes.

9 JUSTICE THOMAS: -- and whether or not  
10 there have been disciplinary actions.

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

14 JUSTICE THOMAS: It hasn't presented  
15 itself or it hasn't been addressed?

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

24 CHIEF JUSTICE ROBERTS: Justice  
25 Breyer, anything?

1 Justice Alito?

2 Justice Sotomayor?

3 Justice Kagan?

4 Justice Gorsuch?

5 JUSTICE GORSUCH: Counsel, I just want  
6 to make sure I understand the -- the school  
7 policy. A minor point, but on Joint Appendix  
8 28, it appears that teachers are forbidden from  
9 either encouraging or discouraging private  
10 student prayer. Is that right?

11 MR. KATSKEE: Yes, Justice Gorsuch.

12 JUSTICE GORSUCH: So the coach was  
13 forbidden from discouraging private student  
14 prayer?

15 MR. KATSKEE: Absolutely.

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

21 MR. KATSKEE: The --

22 JUSTICE GORSUCH: You've mentioned  
23 coercion many times in your argument.

24 MR. KATSKEE: Yes, both -- both  
25 coercion and endorsement have mattered since

1 Engel. But let me give some of the places that  
2 -- that show coercion in the record.

3 JUSTICE GORSUCH: Well, if you think  
4 -- I -- I -- I understand you think the --

5 MR. KATSKEE: Or, excuse me, the  
6 District expressing coercion -- concerns about  
7 coercion. But please. I'm sorry.

8 JUSTICE GORSUCH: Let me ask you a  
9 hypothetical then --

10 MR. KATSKEE: Yes.

11 JUSTICE GORSUCH: If you think both  
12 are relevant.

13 MR. KATSKEE: Yes.

14 JUSTICE GORSUCH: Let's say this Court  
15 in a case saw evidence that the School District  
16 was focused solely on Lemon and in the  
17 endorsement test and not coercion, and suppose  
18 the Court thought that Lemon had been buried.

19 What -- what then should we do if we  
20 thought coercion were the appropriate test but  
21 hadn't been applied by the School District or by  
22 the court below?

23 MR. KATSKEE: Remand for the lower  
24 courts to decide that question. And, here,  
25 there would be plenty of basis to show the

1 School District's contemporaneous and expressed  
2 concerns for coercion. That would not be a  
3 basis to decide for Mr. Kennedy.

4 This was on summary judgment. It  
5 would be -- there -- then there would be fact  
6 questions for -- for -- presumably for trial  
7 about what the coercion was.

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

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

17 MR. KATSKEE: Well, this -- this --  
18 the School District was -- was following the --  
19 the precedents of this Court that -- that  
20 continue to be precedents and haven't changed.  
21 But -- but, again, it very much had in mind --  
22 and, for instance, in its September 17 letter at  
23 JA 44, it specifically mentions that the talks  
24 needed to be to the -- to -- needed to be  
25 secular to avoid alienation of any team member.

1                   That's talking about coercion. The  
2 School District referred to indirect coercion as  
3 well in the question-and-answer document and in  
4 the earlier statement to the community at the  
5 times -- at the times of the September 17 letter  
6 to Mr. Kennedy and the September -- October 28  
7 letter.

8                   JUSTICE GORSUCH: Well, in the  
9 October 22 letter, for example, it does speak  
10 about how a reasonable observer might perceive  
11 government endorsement of religion, even though  
12 it had pretty clearly disavowed Mr. Kennedy's  
13 activities by that point.

14                   What do we do about that?

15                   MR. KATSKEE: Well, in -- in the first  
16 instance, as I said earlier, this Court has made  
17 clear that in employment cases one never just  
18 looks -- one has to look at the whole record.

19                   JUSTICE GORSUCH: I'm -- I'm talking  
20 about in the Establishment Clause, counsel.

21                   MR. KATSKEE: Yes. And -- and the  
22 District had and expressed other Establishment  
23 Clause concerns as well of all -- as all of its  
24 other -- other concerns, and those were  
25 substantial.

1           The coach is an amazingly powerful  
2 figure with immense -- with immense coercive  
3 authority.

4           JUSTICE GORSUCH: I think we  
5 appreciate that, as all teachers do. And -- and  
6 we're concerned about implicit coercion as well  
7 as explicit coercion for lots of things.

8           To get a good grade, you maybe feel  
9 like you have to participate in after-school  
10 activities or -- or write an essay in a way that  
11 you think will appeal to the teacher's  
12 sensibilities or even politics sometimes. But  
13 that's not really my question.

14           My question is, if we thought that the  
15 School District misunderstood the Establishment  
16 Clause teachings of this Court, what should we  
17 do?

18           MR. KATSKEE: Well, we -- we still  
19 think that -- that -- that -- that two things  
20 should happen -- that the case at that point  
21 should be remanded because of the -- of the  
22 contemporaneous evidence of coercion and also  
23 all the other reasons that the District acted.

24           JUSTICE GORSUCH: If we think the  
25 other reasons the District acted are post hoc



1 rationalizations that weren't presented below or  
2 at least the district court found the sole  
3 reason was this Establishment Clause reason,  
4 what do we do about that?

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

10 There was -- there was plenty of  
11 record evidence of all the other reasons that  
12 the district acted and -- and -- and expressions  
13 either to Mr. Kennedy or to the community of  
14 concerns.

15 And, really, how could a district not  
16 be concerned about the zoo that was created on  
17 the field and students getting knocked over --  
18 over on the 16th or having -- or having an  
19 organized prayer circle with state legislators  
20 who were addressing the kids on the -- on the  
21 26th. These are the things that the -- the  
22 superintendent's amicus brief describes all the  
23 concerns that school administrators have to deal  
24 with in the school context.

25 JUSTICE GORSUCH: So the district

1 court that ruled --

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

3 JUSTICE GORSUCH: -- ruled in the  
4 District's favor is -- was mistaken when --  
5 when the district court found it was the sole  
6 reason?

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

19 JUSTICE GORSUCH: Thank you.

20 JUSTICE BREYER: Is Lemon in this  
21 case? I mean, do we have to decide Lemon? The  
22 reason I ask, honestly, is because, if you see  
23 Lemon, despite its imperfections, as an effort  
24 to take from other cases, and the first part of  
25 the First Amendment, establishment is there

1 first, an effort to prevent the country from  
2 becoming more divisive, certainly an effort that  
3 remains valid, to prevent it from being more  
4 divisive there on the basis of religion.

5 Now, if that's reconsidered, I mean,  
6 you're -- you've read a lot on this, how many  
7 cases will we be calling into question if that  
8 part of it is reconsidered?

9 MR. KATSKEE: That -- that would seem  
10 to -- that would seem not only to call into  
11 question -- I -- I don't even know how many  
12 cases since Lemon but also the cases before.

13 JUSTICE BREYER: Not since Lemon. I'm  
14 thinking --

15 MR. KATSKEE: Before.

16 JUSTICE BREYER: -- before and after  
17 --

18 MR. KATSKEE: Yes.

19 JUSTICE BREYER: -- on the theme --

20 MR. KATSKEE: Yes.

21 JUSTICE BREYER: -- of preventing  
22 division on the basis of religion.

23 MR. KATSKEE: Yes. That -- that would  
24 -- that would certainly apply to, I think, all  
25 the -- at least all the school cases that the

1 Court has had.

2 And -- and I want to say some -- I --  
3 I -- I think that that's particularly pertinent  
4 because, if the Court looks, for instance, at  
5 the amicus brief of the members of the Bremerton  
6 community and what dissension it caused there,  
7 or look at the amicus brief of the -- of the  
8 East Brunswick School District personnel for the  
9 immense horrible divisions and attacks that were  
10 caused there, or look at the footnote in Santa  
11 Fe, where the Court described the -- the need of  
12 the district court to -- to order people to stop  
13 trying to find out what -- who the -- who the --  
14 the Catholic and Mormon families in that case  
15 who were pseudonymous plaintiffs to figure out  
16 who they are because of the -- because of the  
17 harassment risks. So all those things matter.

18 And I think it factors into every  
19 case, not to the same degree, but in schools, it  
20 figures overwhelmingly both in this Court's  
21 cases and in the lower court's cases.

22 JUSTICE GORSUCH: Would it be  
23 overruling Lemon not to apply it since we  
24 haven't applied it in, I don't know, 20 or 30  
25 years?

1 MR. KATSKEE: It -- it --

2 JUSTICE GORSUCH: We've been asked to  
3 many times and we haven't done it in 20 or 30  
4 years.

5 MR. KATSKEE: It -- it wouldn't be  
6 overruling --

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

9 MR. KATSKEE: Yes, but, here, what  
10 that -- what -- what -- what then that would  
11 mean is that the Court should still be looking  
12 at -- at coercion --

13 JUSTICE GORSUCH: At coercion, right.  
14 We --

15 MR. KATSKEE: -- and we think coercion  
16 also.

17 JUSTICE GORSUCH: -- we agree on that.  
18 We agree on that. All right.

19 CHIEF JUSTICE ROBERTS: Justice  
20 Kavanaugh?

21 JUSTICE KAVANAUGH: Just to follow up  
22 on that, my understanding of what you're saying  
23 here is that the Establishment Clause rationale  
24 was based on two distinct concerns, one  
25 endorsement, the other coercion.

1                   Is that accurate?

2                   MR. KATSKEE: Yes, although they --  
3 they are related, but yes.

4                   JUSTICE KAVANAUGH: Okay. And on  
5 endorsement, as Justice Gorsuch says, we have  
6 not used endorsement in Van Orden, Town of  
7 Greece, American Legion, in a long time. So  
8 let's put that to the side for the moment and I  
9 take your arguments about that.

10                   But, on coercion, and just to follow  
11 up on the endorsement point, we did not apply  
12 Lemon in Lee versus Weisman, for example, the  
13 schools case that extended Engel to graduation  
14 prayer, so that didn't happen there.

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

23                   But I think you're not saying that  
24 here either. You're saying there's kind of an  
25 implicit peer pressure, subtle coercion,

1 implicit coercion. If I'm wrong about that,  
2 tell me. But that seems a different concern  
3 than the Lee versus Weisman, Engel, Santa Fe  
4 concern and seems to run into the line-drawing  
5 problems that you and I were discussing earlier.

6 So whatever you want to say in  
7 response to all that.

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

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

23 To -- to determine otherwise, to say  
24 that that isn't coercion would -- would require  
25 getting rid of cases all the way back to Engel

1 and Schempp, and it would also --

2 JUSTICE KAVANAUGH: I guess I -- I  
3 guess I --

4 MR. KATSKEE: -- cast serious doubt  
5 on --

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

21 MR. KATSKEE: The -- the -- the  
22 line -- the line that this Court drew in  
23 Garcetti for government speech would solve the  
24 problem completely without any need to get to  
25 any of these questions because this was



1 government speech.

2           Otherwise, it shouldn't be necessary  
3 to -- to decide conclusively an Establishment  
4 Clause question, though we think it is easy and  
5 clear under Santa Fe and Lee and Engel and  
6 Schempp and Pierce against Society of Sisters,  
7 as a free exercise case pointing in the same  
8 direction, because of the fact that in -- under  
9 Pickering, the analysis takes very seriously the  
10 employee's free speech and free exercise rights,  
11 but it also takes account of everyone else's  
12 free exercise and -- everyone else's free  
13 exercise rights, the students' and their  
14 parents', and all the necessary concerns about  
15 managing an event and everything else.

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

24           JUSTICE KAVANAUGH: Thank you.

25           CHIEF JUSTICE ROBERTS: Justice

1 Barrett?

2 JUSTICE BARRETT: I just want to  
3 clarify one thing about your argument related to  
4 that last point. If we disagree with you that  
5 this was government speech, so if we think this  
6 was private speech, we don't even get into the  
7 Establishment Clause because there's no state  
8 action, right?

9 So we're not asking these questions  
10 about coercion for purposes of discerning  
11 whether there was an Establishment Clause  
12 violation, but we would be merely doing the  
13 Pickering analysis, which arguably might bring  
14 in things that -- you know, Justice Gorsuch said  
15 let's assume we think some of those were post  
16 hoc rationalizations. We would need to get into  
17 all of that because we wouldn't be doing a  
18 straight-up Establishment Clause coercive  
19 analysis.

20 MR. KATSKEE: Well, the -- the place  
21 to start is -- is -- certainly, the right frame  
22 of analysis is Pickering. But -- but it is not  
23 -- but it isn't and we think can't be correct  
24 that there's no situation in which -- in which  
25 conduct that is deemed private under Garcetti by

1 a school official is -- is not an Establishment  
2 Clause violation like the example that I gave  
3 to -- I believe it was Justice Alito, about the  
4 coach who posts on the Facebook I've never seen  
5 anybody who makes --

6 JUSTICE BARRETT: That's state action?

7 MR. KATSKEE: No, I'm saying that it  
8 isn't, and yet it still poses an Establishment  
9 Clause problem of coercion.

10 JUSTICE BARRETT: Because it would be  
11 government speech?

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

13 JUSTICE BARRETT: But where's the  
14 state action? I mean, I see that there's  
15 coercion, but you could have coercion in all --  
16 from all kinds of private sources.

17 MR. KATSKEE: There --

18 JUSTICE BARRETT: Where's the state  
19 action there?

20 MR. KATSKEE: There -- there -- there  
21 shouldn't need to be state action for an  
22 Establishment Clause violation even though it --  
23 it would be rare when one would have a violation  
24 without state action. There is -- here, of  
25 course, there is state action not only because

1 he's a public employee performing his duties in  
2 a place and time where only he can and in a way  
3 that the students expected that to be, but also  
4 the School District has conferred authority on  
5 him which everybody there knows.

6 All that being said, though, we think  
7 the real point is that not only does it not need  
8 to be -- not necessarily have to be functioning  
9 as a -- as a government employee at the time of  
10 the speech for it to raise Establishment Clause  
11 concerns, but it also raises all sorts of other  
12 concerns that, under Pickering, the School  
13 District has to be --

14 JUSTICE BARRETT: I get --

15 MR. SKATSKEE: -- able to address  
16 also. Yes?

17 JUSTICE BARRETT: -- I get your  
18 Pickering argument. I just --

19 MR. KATSKEE: I'm sorry.

20 JUSTICE BARRETT: -- didn't understand  
21 how there could be the Establishment Clause  
22 violation absent state action. But thank you.  
23 You answered.

24 CHIEF JUSTICE ROBERTS: Thank you,  
25 counsel.

1 MR. KATSKEE: Thank you, Your Honor.

2 CHIEF JUSTICE ROBERTS: Rebuttal, Mr.  
3 Clement?

4 REBUTTAL ARGUMENT OF PAUL D. CLEMENT  
5 ON BEHALF OF THE PETITIONER

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

8 First, in terms of the correct test, I  
9 don't think the correct test when the government  
10 explicitly discriminates on the basis of  
11 religion is Pickering. Religion is different.

12 In the context of free speech, we're  
13 used to saying, well, if you just spoke over  
14 there, you had alternative methods of  
15 communication, time, place, and manner, there's  
16 some flexibility on that. That doesn't happen  
17 in religion because it's a compelled, sincere  
18 religious belief. If you tell a Muslim if they  
19 could just reorient themselves in the other  
20 direction, you're denying them their religious  
21 exercise. So you need a test that is fit for  
22 religion cases, and strict scrutiny provides  
23 that.

24 If you want to give courts and  
25 district courts -- rather, school districts

1 guidance, the last thing you should do is  
2 replace jurisprudence that's becoming clearer  
3 and could be made clearer in this case about  
4 discrimination against religion and the  
5 Establishment Clause and replace it with  
6 Pickering. A balancing test doesn't provide  
7 guidance.

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

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

1 But it's not all the same.

2           That case, the student was using the  
3 loudspeaker as the winner of a majoritarian  
4 election to be the designated spokesperson for  
5 the school. This case, it's the coach engaged  
6 in his private religious exercise. He happens  
7 to pick that point at the -- the center of the  
8 field. He's actually not the center of  
9 attention if you look at the videos, which are  
10 in the record, but -- because there's lots of  
11 other activity going on, but that's his  
12 religious exercise. It's protected.

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

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

1 about coercion concerns zero times. That's the  
2 16th.

3 Then, by the 23rd, that's a game that  
4 is one of the two games on which the actual  
5 discipline turns. That's a prayer where no one  
6 -- no one joins the coach in his prayer.

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

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

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

21 But then, when they lawyer up and have  
22 their lawyer send a letter to the EEOC at pages  
23 Joint Appendix 132 to 142, what concern did they  
24 express as their stated sole driving  
25 consideration? It is, again, endorsement, 8 to



1 0. Eight mentions of endorsement. Nothing else  
2 is mentioned.

3 So I'll finish with this point.

4 Please do not remand to the Ninth Circuit for an  
5 application of the coercion test. There's no  
6 evidence of coercion contemporaneously. Joint  
7 Appendix 105, the school itself stressed no  
8 evidence of actual coercion.

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

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

1 was some other reason when the courts had  
2 already found the sole basis for the action was  
3 on the basis of race.

4 Here, the record is clear. Two courts  
5 that didn't agree with much of what we said said  
6 the sole basis for the government's reaction --  
7 actions here were religion.

8 That is not something that should  
9 stand. Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,  
11 counsel. The case is submitted.

12 (Whereupon, at 11:48 a.m., the case  
13 was submitted.)

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