No. 16-35801

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOSEPH A. KENNEDY,

Plaintiff and Appellant,

v.

BREMERTON SCHOOL DISTRICT,

Defendant and Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
HONORABLE RONALD B. LEIGHTON, DISTRICT JUDGE
CASE NO. 3:16-CV-05694-RBL

BRIEF *AMICUS CURIAE* OF FORMER PROFESSIONAL FOOTBALL PLAYERS STEVE LARGENT AND CHAD HENNINGS IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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INTEREST OF *AMICI CURIAE*

Steve Largent represented the First District of Oklahoma in the United States House of Representatives from 1994 to 2002. Before his service in Congress, Mr. Largent played professional football for the Seattle Seahawks, and is a member of the Pro Football Hall of Fame.

As a citizen, a former member of Congress, and a former professional football player, Mr. Largent has a deep interest in ensuring appropriate protection for free expression by educators in our public schools, and in fostering open dialogue between players and coaches at all levels of play. Mr. Largent, whose father left his family when Mr. Largent was only six years old, credits his successes on and off the field in large part to the positive influence of the men who coached him in his own youth. Thus, while Mr. Largent does not have an interest in the particular dispute between these litigants, he is deeply concerned about judicial decisions affecting the scope of free speech and religious expression for coaches in particular.

Chad Hennings was a defensive tackle for the Dallas Cowboys from 1992 to 2000, during which period he and his team won three Super Bowls. Before joining the NFL, Mr. Hennings played football for the U.S. Air Force Academy, where he was a unanimous first-team All-American and a recipient of the Outland Trophy. For his play there, he was later inducted into the College Football Hall of Fame. After graduating but before joining the Cowboys, Mr. Hennings served for

several years as a pilot in the U.S. Air Force, flying 45 missions in the Persian Gulf and separating from active duty with the rank of captain. Mr. Hennings continued to serve in the Air Force Reserve while playing for the Cowboys.

Like Mr. Largent, Mr. Hennings attributes much of his success to lessons imparted to him by the men who coached him throughout his scholastic and professional athletic endeavors, and who encouraged his dreams to serve his country and to play professional football. He thus shares Mr. Largent's concern about judicial decisions that may impair a coach's ability to speak freely and abide by his or her conscience and religious convictions.

In *amici*'s view, the District Court here was wrong to hold that Coach Joseph Kennedy's observation of a silent moment of prayer at the 50-yard line after the end of a football game was not protected conduct, but instead amounted to school-sponsored conduct that the school district could lawfully censor. *Amici* believe that Coach Joseph Kennedy was and is entitled to the injunction he seeks that would restore him to his position as the coach of the Bremerton High football team.

It is important not just to *amici*, but to civic society as a whole, that this Court correct the District Court's cramped view of what a coach may freely say and do in view of his players. To present their views on why it is essential that this Court reject the District Court's and the school district's rule, *amici* submit this brief.

STATEMENT OF COMPLIANCE WITH RULE 29(c)(5)

This brief is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure with the consent of all of the parties.

No party or party's counsel authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief. No person, other than *amici curiae* or their counsel contributed money intended to fund preparation or submission of this brief.

SUMMARY OF ARGUMENT

In denying Joseph Kennedy's motion for a preliminary injunction, the District Court erred in two ways pertinent to *amici*'s interest here.

First, the District Court's decision all but erases the line between public and private expression in the realm of public school employment. In the District Court's view, virtually every action and statement by a high school football coach is tantamount to expression by the school itself. So long as the coach is at a school event or wearing his school football gear, he is never "off the clock" and never a private citizen for speech purposes. That view of public-employee speech conflicts with almost a century of precedent and sharply departs from the Supreme Court's guidance in *Lane v. Franks*, 134 S. Ct. 2369, 2379 (2014). At a practical level, moreover, by forcing educators to shed their free speech rights at the schoolhouse door, the District Court's view of the law also undermines a coach's capacity to serve meaningfully as a mentor for students. Rigid adherence to the District Court's rule will chill educators from giving candid advice on virtually any non-scholastic topic—from college choices to personal struggles with relationships, harassment, or substance abuse—lest their statements run afoul of a school district's speech limitations, as Coach Kennedy's apparently did here.

Second, by equating Coach Kennedy's private, fleeting, and quiet prayer with school-sponsored expression, the District Court's decision

ignored what anyone who has watched an athletic contest easily perceives—an athlete's or coach's personal expressive conduct around a playing field is quintessentially *personal* speech expressing the views and emotions of the *individual*, not of the team. Athletes at all levels of play can be found praying in end zones, pointing to the heavens, kneeling during the national anthem, wearing colorful adornments to raise awareness for certain illnesses or causes, and speaking their minds about salient political and social issues. No reasonable observer would mistake those actions as having been made on behalf of the team or the larger institution. Nor would any observer conclude that Coach Kennedy's personal and quiet postgame prayer constituted school-endorsed speech.

The District Court's decision should be reversed, and Coach Kennedy should be restored to his position.

ARGUMENT

I. The District Court's Unprecedented Expansion of the Scope of Public Employee Speech Will Impair Coaches' Ability to Serve as Role Models and Mentors for Students.

The District Court and the Bremerton School District contend that all speech by school-district employees, while on duty, is—by definition—speech as a public employee under the second factor of the so-called *Eng* test. *See Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009) (setting forth five-part test for government-employer restrictions

of employee speech, the second of which concerns "whether the plaintiff spoke as a private citizen or public employee"). Such a rule conflicts with controlling law and with the practical realities of coach's role in the lives of his or her players. This Court should not adopt it.

The Constitution does not clock out when a coach clocks in. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."). Recently, the Supreme Court clarified the rule regarding public employee speech in *Lane v. Franks*, 134 S. Ct. 2369 (2014). There, the Court unanimously warned lower courts against an overly broad reading of its earlier decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006). According to *Lane*, the "critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties." *Id.* Speech "outside the scope of [an employee's] ordinary job responsibilities is speech as a citizen for First Amendment purposes." *Id.* at 2378. This Court has expressly adopted *Lane*'s "critical question" test in analyzing public employee speech. *See, e.g.*, *Coomes v. Edmonds Sch. Dist. No. 15*, 816 F.3d 1255, 1260 (9th Cir. 2016) (quoting *Lane*, 134 S. Ct. at 2379).

Disregarding that controlling law, the Bremerton School District has advanced—and the District Court has adopted—a rule that makes no distinction about whether the speech is "ordinarily within the scope

of an employee's duties," but instead focuses solely on the temporal aspect of the speech—*i.e.*, that any statement made while a stadium's lights are on is necessarily part of a coach's official "duties," regardless of whether the coach is actually coaching, and is, therefore, public-employee speech that is wholly unprotected by the First Amendment.

The District Court's reasoning is not cabined to religious expression. Any expressive conduct by an educator or coach is equally fair game for school-district censorship, including support for political candidates, thoughts on social movements like Black Lives Matter, and views on any number of other salient topics that may arise during an academic year. As long as an educator is at school because of a school function, the District Court's rule allows the school to limit or outright ban the educator's personal speech.

These restrictions on personal speech and religious expression raise obvious, and fundamental, constitutional concerns. Although those concerns are of clear importance, *amici* are particularly focused on how the District Court's rule will affect students. Before becoming a household name in the Northwest, for instance, *amicus* Largent came from what some would call a broken home, in Oklahoma City, Oklahoma. Mr. Largent's parents divorced when he was only six years old. His father moved away, and practically fell out of Mr. Largent's life. Mr. Largent's mother eventually remarried, but to a chronic alcoholic. Home life was not a stable or protective environment. Still only a boy,

Mr. Largent would often have to physically separate his mother from his step-father in an effort to protect her.

Like all children, and like the other *amicus*, Mr. Largent needed role models. And *amici* found role models in the men who coached their football teams. *Amici* both respected their coaches and—at the same time—expected them to be their own people. *Amici*'s experience with football has always been that players are individuals, with individual viewpoints and beliefs, as well as members of the team. In *amici*'s experience, the same is true of coaches.

The district court suggested that coaches should be subjected to even higher scrutiny—and therefore entitled to *less* First Amendment protection—because of the nature of their relationship with their athletes. *See, e.g.*, ER 33 ("The coach is more important to the athlete than the principal."). The court provided no support for that distinction—because there is none.

Perversely, the district court's rule would undermine coaches' ability to be effective as mentors and role models. To be an effective role model, a person must be seen as more than a mouthpiece of the state. To respond effectively to the important personal quandaries that every young person faces, but nevertheless are not part of any classroom exercise or practice drill, a coach must be free to serve as a personal example. When a player approaches their coach to seek personal advice, it is imperative that the coach be able to respond in a

meaningful way. The last thing a teenager looking for help needs is for another adult to say "I'm not allowed to talk about that. Go away."

Students may seek guidance from their coaches and teachers on any number of issues. A player may be struggling with her parents' divorce or a family member's death, grappling with incidents of harassment or abuse, inquiring about her religious and personal identity, struggling with alcohol or substance abuse, or simply deliberating about whether and where to attend college. In the case of Mr. Hennings, his high school football coach was instrumental in helping him achieve his dreams of serving in the Air Force and in attending the Air Force Academy. Aside from being a singular source of wisdom, his high school coach believed in Mr. Hennings so deeply that, when it seemed that Mr. Hennings's performance at a small school in rural Iowa might be overlooked, the coach took it upon himself to drive more than 900 miles to Colorado Springs to personally deliver a 16-millimeter game tape to the recruiting coach at the Air Force Academy and to vouch for Mr. Hennings's character. Mr. Hennings received the last recruiting visit for that year and subsequently went on to receive his congressional nomination.

No classroom curricula exist for the sorts of guidance that *amici*'s coaches dispensed. Instead, teachers and coaches are the ones who often aid their students in navigating these complex quandaries—and they often do so while they are still "on the job" as teachers or coaches. But

coaches cannot serve as effective mentors if they fear that they will face professional repercussions simply for answering their players' questions on topics that the district has forbidden. Nor would a teenager who worked up the courage to seek an adult's help meaningfully be served by a coach who is forced to respond "I can't talk about that." The moment would be lost, and the relationship impaired.

That, however, is just the sort of backwards result that the District Court's misreading of *Lane v. Franks* encourages. Coaches and teachers must suppress their personal religious, political, social, and economic views, and spurn players or students who inquire about them. The District Court's rule is as unworkable as it is unsupported by the law, and it should be rejected.

II. No Reasonable Observer Could Misapprehend the Individualized Nature of Expressions on a Sports Field.

The District Court's conclusion that Coach Kennedy's private, fleeting, and quiet prayer was, in fact, censorable government speech is also at odds with a truth obvious to any reasonable spectator. That is, coaches and players often engage in expressive conduct around the athletic field, which all observers understand as the expressive conduct of the *individual*, and not of that person's team organization. *See, e.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 305, 308 (2000) (holding that relevant inquiry under the Establishment Clause is "whether an objective observer, acquainted with" the relevant context, "would

perceive [the challenged conduct] as a state endorsement of prayer in public schools.").

Examples of expressive conduct during athletic events abound, running the gamut from religious to political and commercial speech. Wade Boggs, for instance, famously used to draw a *chai*, the Hebrew symbol for life, in the batter's box dirt before each at bat.[1] Likewise, Ivan "Pudge" Rodriguez was known for making the sign of the cross before taking a pitch.[2] Heisman Trophy winner and erstwhile professional football and baseball player Tim Tebow prominently displayed bible verses—alternatively, Philippians 4:13, John 3:16, and Hebrews 12:1-2—on the black strips he wore under his eyes for much of his college football career.[3]

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[1] *See* Kevin Dupont, *Boggs of Red Sox Setting the Standard for Hitting*, N.Y. TIMES, Aug. 12, 1985, http://www.nytimes.com/1985/08/12/sports/boggs-of-red-sox-setting-the-standard-for-hitting.html.

[2] *See* Dave Caldwell, *Jesus Is the Coach for Many Latin Baseball Players*, DALLAS MORNING NEWS, Aug. 17, 1996, http://articles.sun-sentinel.com/1996-08-17/lifestyle/9608150372_1_latin-players-blesses-juan-gonzalez.

[3] *See* John Branch & Mary Pilon, *Tebow, a Careful Evangelical*, N.Y. TIMES, Mar. 27, 2012, http://www.nytimes.com/2012/03/28/sports/football/tebow-professes-his-evangelical-faith-carefully.html.

Tebow also became known for his expression upon scoring a touchdown, which was to kneel and pray silently in the end zone.[4] While countless other football players have struck the same pose in the past, Tebow's particular exhibition of the gesture spawned a widespread cultural phenomenon—"Tebowing"—in which people make a point to take pictures of themselves kneeling in silence against any manner of backdrops.[5] And there is no shortage of athletes and coaches who can be found pointing to the sky, kissing a crucifix, or otherwise ostensibly offering words of praise or gratitude to a deity for their on-field successes.[6] Innumerable post-game interviews begin by some offering of thanksgiving.

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[4] *See* Greg Bishop, *In Tebow Debate, a Clash of Faith and Football*, N.Y. TIMES, Nov. 7, 2011, http://www.nytimes.com/2011/11/08/sports/football/in-tebow-debate-a-clash-of-faith-and-football.html

[5] *See id.*; *see also* Tebowing, http://tebowing.com (defining *Tebowing* as "to get down on a knee and start praying, even if everyone else around you is doing something completely different").

[6] Athletes' tendency toward religiosity is so engrained that it has long been the subject of satire, with one of the most notable examples being the shrine built to the fictitious voodoo deity Jobu in the movies *Major League* and *Major League II*, which shrine several members of the present-day Cleveland Indians have actually recreated this season as part of their World Series run. *See* Paul Hoynes, *Mike Napoli, Jason Kipnis Bring Jobu Back to Cleveland Indians' Clubhouse*, CLEVELAND.COM, June 21, 2016, http://www.cleveland.com/tribe/index.ssf/2016/06/post_451.html.

Athletes' expressions also tend toward the political. San Francisco 49ers' quarterback Colin Kaepernick has attracted immense attention in recent months for his decision to kneel on the sidelines during the pre-game playing of the national anthem, to draw attention to what he sees as a nationwide epidemic of police brutality against people of color.[7] His protest has now been replicated by athletes and coaches in virtually every sport and at every level of play around the country, including in high schools and middle schools.[8]

Of course, Mr. Kaepernick was not the first athlete to use the playing field to speak politically. Tommie Smith and John Carlos topped the international news when they raised their black-gloved fists during a medal ceremony at the 1968 Mexico City Olympics in solidarity with the black power movement.[9] In 2014, LeBron James, Derrick Rose,

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[7] *See* Christine Hauser, *Why Colin Kaepernick Didn't Stand for the National Anthem*, N.Y. TIMES, Aug. 27, 2016, http://www.nytimes.com/2016/08/28/sports/football/colin-kaepernick-national-anthem-49ers-stand.html.

[8] *See* Phil Anastasia, *Woodrow Wilson High Coaches and Players Take a Knee During Anthem*, PHILA. INQUIRER, Sept. 10, 2016, http://www.philly.com/philly/sports/high_school/new_jersey/20160911_Woodrow_Wilson_High_coaches_and_players_take_a_knee_during_anthem.html.

[9] *See, e.g.*, Claire Barthelemy, *1968: Black Power Protest at the Olympics*, INT'L HERALD TRIB., Oct. 23, 2013, http://iht-retrospective.blogs.nytimes.com/2013/10/23/1968-black-power-protest-at-the-olympics.

Kobe Bryant, and other basketball players wore shirts emblazoned with the words "I Can't Breathe" during pre-game warm-ups, in reference to the death of Eric Garner, an unarmed black man who died after a police officer placed him in a chokehold.[10] Knox College basketball player Ariyana Smith made headlines for her pre-game protest that same year, when she walked on to the court during the national anthem with her hands raised, and then laid prostrate on the floor for four-and-one-half minutes to protest the death of Michael Brown, whose body had lain in the street in Ferguson, Missouri, for four-and-one-half hours.[11] These examples more easily come to mind because they involve widely known individuals. But any attendee of sporting events knows that players and coaches of all ages make, and have long made, their own *personal* statements. And everyone knows that, when players or coaches engage in this type of expressive conduct, they speak for themselves and not for the teams or institutions they represent.

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[10] *See* Marissa Payne, *President Obama Endorses LeBron James's 'I Can't Breathe' Shirt*, WASH. POST., Dec. 19, 2014, https://www.washingtonpost.com/news/early-lead/wp/2014/12/19/president-obama-endorses-lebron-jamess-i-cant-breathe-shirt.

[11] Dave Zirin, *Interview with Ariyana Smith, the First Athlete Activist for #BlackLivesMatter*, THE NATION, Dec. 19, 2014, https://www.thenation.com/article/interview-ariyana-smith-first-athlete-activist-blacklivesmatter.

Football fans are also familiar with a far less celebratory sight: that of a player who has been injured during play.[12] Fortunately, most injuries are not grave or life-threatening. But some are. In those circumstances, when there is little to be done besides wait for medical personnel, fans, coaches, and players often do what little they can do: they pray. No reasonable observer who watches a coach take a knee and bow his head while one of his players lay injured on the field would think that the state was endorsing any religion. Nor would any students feel coerced to join. A reasonable observer instead would see what was plain to all—a person pausing to pray for another's well-being.

Athletes also make statements to support their commercial and charitable interests. It is no secret that Steph Curry, reigning NBA MVP point guard for the Golden State Warriors, endorses Under Armour shoes, which he wears on the court,[13] in keeping with similar arrangements made by other athletes. Likewise, athletes often promote various charitable causes through their conduct on the field, either by

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[12] Like practically all football players, *amicus* Largent suffered numerous injuries during his career. Some caused on-lookers quite a bit of concern. *See, e.g.*, Football Feud: Steve Largent vs. Mike Harden, NFL Films, available at https://www.youtube.com/watch?v=xSOPrwb-mQc.

[13] *See, e.g.*, Joe Nocera, *In Sneaker Wars, It's Also Curry (Under Armour) vs. James (Nike)*, N.Y. TIMES, June 17, 2016, http://www.nytimes.com/2016/06/18/sports/basketball/under-armour-shoes-nike-stephen-curry-lebron-james.html.

wearing a distinctive piece of clothing,[14] or by tying their on-field performance to off-field donations, such as Malcolm Jenkins's widely publicized pledge to donate a set amount of money to a youth sports safety organization for each interception he recorded.[15]

The expressions above and other and found throughout the sporting world range from the serious to the farcical, but no one who observes them is confused about who is doing the speaking. No one, for instance, mistakenly believes that Mr. Tebow's team ascribes to his particular interpretation of the Bible, or that Mr. Kaepernick espouses the entire 49ers team's views on police brutality and race relationships, or that an entire sports organization endorses a product worn by one player. Nor would a reasonable observer conclude that Nike endorses

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[14] *See, e.g.*, Ilan Mochari, *Beats, the NFL, and Guerrilla Marketing*, SLATE, Oct. 15, 2014, http://www.slate.com/blogs/moneybox/2014/10/15/guerrilla_marketing_colin_kaepernick_wears_beats_headphones_after_49ers.html (reporting on Colin Kaepernick's decision to wear pink Beats headphones to support breast cancer awareness month); Doug Padilla, *Green Shoes for Brandon Marshall*, ESPN.com, Oct. 9, 2013, http://www.espn.com/chicago/nfl/story/_ /id/9793121/brandon-marshall-chicago-bears-wear-green-shoes-game-new-york-giants (reporting that Chicago Bears wide receiver Brandon Marshall would wear green shoes during a game to support National Mental Health Awareness Month); and Kaepernick wearing pink Beats headphones to support breast cancer awareness month (for which he was fined $10,000).

[15] *See* Malcolm Jenkins Foundation, *No PHLY Zone Challenge – Interceptions for Youth Sports Safety*, Oct. 2, 2015, http://themalcolmjenkinsfoundation.org/index.php/no-phly-zone-challenge-interceptions-for-youth-sports-safety.

everything done on the field by a member of the football programs of the University of Washington or Washington State, even though a "Swoosh" appears on practically every article of equipment in those schools' athletic programs.

Here, Coach Kennedy's 50-yard-line knee is in line with these other expressions. Certainly, no reasonable observer would conclude that his quiet, prayerful post-game observation was school-endorsed speech by a public employee, rising to the level of a state establishment of religion. Indeed, it is undisputed that Coach Kennedy never coerced or compelled any students to join him in his prayers—he explicitly told students, when they asked to join him, "[i]t's a free country," ER 145. The Bremerton School District's rule in this case nevertheless goes far beyond what would be needed to prevent coercion, and categorically prohibits any and all "demonstrative religious activity" by on-the-clock school employees, ER 179, without any regard to whether the employee may be engaged in conduct that is outside the scope their normal duties. Under the District Court's reasoning and the school district's rules, the school is free to forbid teachers and coaches from wearing yarmulkes, crosses, or religious head coverings; reading a Bible or Quran alone during recess; or praying quickly and quietly before eating lunch or at football games. The District Court's unworkable and unrealistic view of the First Amendment should be corrected.

CONCLUSION

For all the foregoing reasons, this Court should decline to adopt the District Court's view of the law, and it should reverse and remand for the District Court to enter an injunction restoring Coach Kennedy to his position at Bremerton High.

Respectfully submitted,

Dated: November 7, 2016

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 29(b)(5) and 32(a)(7)(C) of the Federal Rules of Appellate Procedure, and Ninth Circuit Rule 32-1, I certify that the attached *amicus curiae* brief is in 14-point proportionally spaced Century Schoolbook font, and contains 3,807 words, as counted by my word processing program, exclusive of the portions of the brief excepted by Rule 32(a)(7)(B)(iii).

Dated: November 7, 2016

s/ Gerald Russello
Gerald Russello

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 7, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Gerald Russello
Gerald Russello