No. 18-12

In the Supreme Court of the United States

JOSEPH A. KENNEDY,

Petitioner,

v.

BREMERTON SCHOOL DISTRICT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether public school teachers and coaches retain any First Amendment rights when at work and "in the general presence of" students.

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INTEREST OF *AMICI CURIAE*[1]

Amici are a group of Members of the United States Senate and United States House of Representatives who share a strong interest in upholding Congress's long tradition of protecting religious liberty. *Amici* believe that by obliterating the "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect," *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 302 (2000) (citation and internal quotation marks omitted), the decision below threatens to turn the Establishment Clause into a "command[] impos[ing] a prohibition on all religious activity in our public schools" by teachers and coaches, *id.* at 313.

Amici are:

United States Senators

James Lankford (R-OK)	Roy Blunt (R-MO)
Bill Cassidy, M.D. (R-LA)	John Cornyn (R-TX)
Tom Cotton (R-AR)	Ted Cruz (R-TX)
Steve Daines (R-MT)	Rand Paul (R-KY)
Tim Scott (R-SC)	Roger F. Wicker (R-MS)

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amici curiae* or their counsel made a monetary contribution intended to fund the preparation of this brief. The parties were given timely notice and have consented to this filing.

Members of the House of Representatives

Vicky Hartzler (R-MO)
Steve King (R-IA)
Doug Lamborn (R-CO)
Steve Pearce (R-NM)
Randy Weber (R-TX)

INTRODUCTION AND SUMMARY OF ARGUMENT

The petition compellingly demonstrates why this Court's review is warranted. *Amici* support petitioner Joseph Kennedy's argument that the Ninth Circuit's inflexible rule that *all* religious activity by teachers and coaches at school-related functions that occurs "in the general presence of students" —"no matter how obviously personal and unattributable to the school"—is unprotected by the First Amendment cannot be reconciled with this Court's precedent. Pet. 1. *Amici* offer two additional reasons why this Court should grant review.

First, by concluding that Coach Kennedy's religious activity was constitutionally unprotected simply because it occurred at a school-related event and "in the general presence of students," the Ninth Circuit highlighted the need for this Court to clarify its school prayer cases and, more specifically, the social-coercion test. To the Framers' generation, "[t]he coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*." *Town of Greece* v. *Galloway*, 134 S. Ct. 1811, 1837 (2014) (Thomas, J., concurring) (quoting *Lee* v. *Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting)). The Ninth Circuit's analysis highlights the danger of transforming the social-coercion test—a narrow exception to the legal coercion requirement that this Court applies only when students are subjected to informal coercive pressure to participate in school-sponsored religious activity, see *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530

U.S. 290, 290, 310-12 (2000); *Lee*, 505 U.S. at 592-598—into the default test for evaluating any religious activity that occurs at public schools. Review is necessary to ensure that any further expansion of the social-coercion test accords with the First Amendment, so that the Establishment Clause remains a tool "to *advance* and *protect* religious liberty," Pet. App. 49 (Smith, J., concurring), and not a command to impose "a prohibition on all religious activity in our public schools," *Santa Fe*, 530 U.S. at 313; see also *Lee*, 505 U.S. at 598-99 ("A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution." (citation omitted)). Surely simply engaging in religious practice where students might notice is not "coercion."

Second, the Ninth Circuit's focus on whether Kennedy's religious activity occurred "in the general presence of students" highlights confusion among the lower courts in applying Establishment Clause analysis. "The Establishment Clause does not require the elimination of private speech endorsing religion in public places," *Chandler* v. *Siegelman*, 230 F.3d 1313, 1316 (11th Cir. 2000), nor does it command schools to suppress all religious activity, see, *e.g.*, *Santa Fe*, 530 U.S. at 313. Because the decision below sanctioned the District's attempt to force Kennedy to conduct his prayers at a time and place of the District's choosing, all in an effort to avoid possible misconceptions about endorsement of religion, this case presents an opportunity for this Court to clarify that the Establishment Clause does

not justify a school's attempt to unilaterally decide when and where its teachers and coaches may exercise their First Amendment rights. See *McCurry* v. *Tesch*, 738 F.2d 271, 275 (8th Cir. 1984) ("One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." (quoting *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61, 76-77 (1981) (alteration omitted)).

ARGUMENT

In the decision below, the Ninth Circuit concluded that because petitioner Joseph Kennedy kneeled and prayed on the fifty-yard line after high school football games "in the presence of students in a capacity one might reasonably view as official," he *necessarily* "spoke as a public employee," and thus was not entitled to "the First Amendment's protections for private-citizen speech." See Pet. App. 27, 29-30, 32-33, 35. The Ninth Circuit's analysis of whether Coach Kennedy's prayer constituted private or public speech emphasized Bremerton School District's stated fear that Kennedy's prayers may "lead to a perception of District endorsement of religion." See Pet. App. 5-6, 8-10, 32-33 (internal quotation marks omitted); see also Pet. App. 37, 42-47 (Smith, J., concurring). The Ninth Circuit also recognized the District's purported concern that students might feel coerced to participate in Kennedy's prayers. See Pet. App. 11-12, 14, 26; see also Pet. App. 44-47 (Smith, J., concurring). Thus, as the decision below makes clear, the Ninth Circuit's rigid private-public speech rule, first articulated in *Johnson* v. *Poway Unified School*

District, 658 F.3d 954 (9th Cir. 2011), is an attempt to combine this Court's endorsement and coercion tests under the guise of determining whether a coach is speaking as a public employee or a private citizen, the effect of which is to allow the District to determine where and when Kennedy is allowed to exercise his First Amendment rights.

Kennedy's conduct does not implicate any valid Establishment Clause concerns. In applying the Establishment Clause in the context of public schools, this Court has focused on the risk that unwilling students, parents, or the public would feel obliged to participate in a state-sponsored prayer. See *Santa Fe*, 530 U.S. at 290; *Lee*, 505 U.S. at 587-588. This Court's social-coercion cases involved officially authorized, formal prayers that "bore the imprint of the State and thus put school-age children who objected in an untenable position," *Lee*, 505 U.S. at 590, "of participating, with all that implies, or protesting," *id.* at 593; see also *Santa Fe*, 530 U.S. at 311-312. As this Court has observed, the risk of "indirect coercion" is "most pronounced" in the school setting, *Lee*, 505 U.S. at 592, where "[t]he State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibly to peer pressure," *Johnson*, 658 F.3d at 968 (quoting *Edwards* v. *Aguillard*, 482 U.S. 578, 584 (1987)). In that unique setting, this Court has applied the social-coercion test as a limited exception to the original understanding of the Establishment Clause, and as the decision below demonstrates, the Ninth

Circuit's rigid private-public speech rule relies on these same concerns. See Pet. App. 21, 25, 29 (citing "the position of trust and authority [teachers and coaches] hold and the impressionable young minds with which they interact" as justification for the *Johnson* test (quoting *Johnson*, 658 F.3d at 968)).

Because Coach Kennedy's prayers "bear no resemblance to the coercive state establishments that existed at the founding," *Town of Greece*, 134 S. Ct. at 1811, 1837 (Thomas, J., concurring), and do not implicate the sort of "subtle coercive pressures" that have animated this Court's school prayer cases, *Lee*, 505 U.S. at 588, this case presents this Court with an ideal opportunity to clarify the limits of its social-coercion test.

I. THE NINTH CIRCUIT'S DECISION HIGHLIGHTS THE NEED FOR THIS COURT TO CLARIFY ITS ESTABLISHMENT CLAUSE JURISPRUDENCE IN PUBLIC SCHOOLS

A. Legal Coercion Is the Historic Touchstone of Establishment Clause Analysis

While "[t]he Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools," *Edwards*, 482 U.S. at 583-84, it has been equally clear that religious activity need not cease at the schoolhouse door. See, *e.g.*, *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98 (2001). This Court has also made clear that the application and meaning of the Establishment Clause, even in the

school setting, depends on the original meaning of that constitutional language.

Establishment Clause jurisprudence "is of necessity one of line-drawing," *Lee*, 505 U.S. at 598, and this Court consistently has recognized that the line to be drawn "between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers," *Sch. Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring); accord, *e.g.*, *Lynch* v. *Donnelly*, 465 U.S. 668, 673 (1984) ("The Court's interpretation of the Establishment Clause has comported with what history reveals was the contemporaneous understanding of its guarantees."). Simply put, this Court has "left no doubt that 'the Establishment Clause must be interpreted by reference to historical practices and understandings.'" *Elmbrook Sch. Dist.* v. *Doe*, 134 S. Ct. 2283, 2285 (2014) (Scalia, J., dissenting from the denial of certiorari) (quoting *Town of Greece*, 134 S. Ct. at 1819). It is clear that Coach Kennedy's brief and personal prayer, conducted *after* the event for which the public had gathered and as players and spectators were already leaving, "bear[s] no resemblance to the coercive state establishments," *Town of Greece*, 134 S. Ct. at 1837 (Thomas, J., concurring), which are the "hallmark of historical establishments of religion," *Lee*, 505 U.S. at 640 (Scalia, J., dissenting).

This Court has long understood "coercion" in the context of the Establishment Clause to mean "legal coercion"—*i.e.*, "coercion of religious orthodoxy and of financial support *by force of law and threat of*

penalty." *Lee*, 505 U.S. at 640 (Scalia, J., dissenting). Justice Story, analyzing the limits imposed upon the government by the Virginia Constitution, noted that "the legislature could not create or continue a religious establishment which should have exclusive rights or prerogatives, or compel the citizens to worship under a stipulated form or discipline, or to pay taxes to those whose creed they could not conscientiously believe." *Terrett* v. *Taylor*, 9 U.S. 43, 49 (1815). In *Reynolds* v. *United States*, 98 U.S. 145 (1878), this Court explained that Congress had adopted the First Amendment against the historical background of the colonies and States taxing people, "against their will," to support established churches, and punishing citizens "for a failure to attend upon public worship, and sometimes for entertaining heretical opinions." *Id.* at 162-163. And in the context of schools, this Court historically has viewed the Establishment Clause through the lens of legal coercion. See *Everson* v. *Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 8-16 (1947); accord, *e.g.*, *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 873-874 (1995) (Souter, J., dissenting) (stating that using "the power of the State to compel a student to pay [fees] … and the use of any part of [the fees] for the direct support of religious activity" is "the heart of the prohibition on establishment" (collecting cases)); *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952) (explaining that the Establishment Clause prohibits the government from making "religious observance compulsory" or "coerc[ing] anyone to attend church").

B. The Concept of "Social Coercion" Should not Be Extended to Private Religious Activity

Consistent with this historical background, this Court recently reaffirmed that mere "[o]ffense ... does not equate to coercion." *Town of Greece*, 134 S. Ct. at 1826; see also *Elk Grove Unified Sch. Dist.* v. *Newdow,* 542 U.S. 1, 49 (2004) (Thomas, J., concurring in the judgment) ("Peer pressure, unpleasant as it may be, is not coercion."). *Town of Greece*, however, involved religious activity conducted in the presence of "mature adults," "who presumably are not readily susceptible to religious indoctrination or peer pressure." 134 S. Ct. at 1826-1827 (quotation marks omitted). And in the context of public schools, Establishment Clause jurisprudence has "shift[ed] from original intention to general principles." Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 934 (1985/1986). This shift has led to reliance on "formulaic abstractions that are not derived from, but positively conflict with, our long-accepted constitutional traditions." *Lee*, 505 U.S. at 644 (Scalia, J., dissenting); see also *Elmbrook Sch. Dist.*, 134 S. Ct. at 2283 (Scalia, J., dissenting from the denial of certiorari) (explaining that although "the First Amendment explicitly favors religion," "[c]ertain of this Court's cases … have allowed the aversion to religious displays to be enforced directly *through* the First Amendment").

But even the cases that laid the foundation for the social-coercion test recognized legal coercion as the touchstone of Establishment Clause analysis.

See *Schempp*, 374 U.S. at 217 (reaffirming that the Religion Clauses "forestall[] compulsion by law of the acceptance of any creed or the practice of any form of worship" (quoting *Cantwell* v. *Connecticut*, 310 U.S. 296, 303-04 (1940))); *Engel* v. *Vitale*, 370 U.S. 421, 431 (1962) (explaining that "indirect coercive pressure" is possible only when "the power, prestige and financial support of government" is "placed behind a particular religious belief"); see also *Schempp*, 374 U.S. at 307 (Goldberg, J., concurring) (concluding that religious activity at issue was particularly objectionable because it involved "young impressionable children whose school attendance is statutorily compelled," and utilized "the prestige, power, and influence of school administration, staff, and authority"). These cases reinforce the principle that "compulsion—yes, even persecution—had been an element of the established church as our forefathers knew it." See McConnell, *Coercion*, 27 WM. & MARY L. REV. at 935 (discussing *Engel*, 370 U.S. at 430-432). Thus, "to the extent coercion is relevant to the Establishment Clause analysis, it is actual legal coercion that counts …." *Town of Greece*, 134 S. Ct. at 1838 (Thomas, J., concurring).

The social-coercion test for analyzing Establishment Clause challenges in the public school context achieved its high-water mark with *Lee* and *Santa Fe*. But this test is a limited exception to the historical requirement of legal coercion and should not be extended to a case, such as this one, that lacks the indicia of coercion that "mark and control" such school prayer cases. See *Lee*, 505 U.S. at 586. In holding that prayers offered as part of a

graduation ceremony violated the Establishment Clause, this Court in *Lee* focused on two "dominant facts": (1) "State officials direct[ed] the performance of a formal religious exercise" at graduation ceremonies; and (2) attendance was "in a fair and real sense" mandatory because of the significance of the graduation ceremony. *Ibid.* Noting that there are "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools," *id.* at 592, this Court determined that the school's "supervision and control" of the graduation ceremony placed "public pressure, as well as peer pressure" on students "to stand as a group or, at least, maintain respectful silence during the invocation and benediction," *id.* at 593. This Court explained that "[t]o recognize that the choice imposed by the State [between participating or protesting] constitutes an unacceptable constraint only acknowledges that the government may no more use social pressure to enforce orthodoxy than it may use more direct means." *Id.* at 593-94; see also *Santa Fe*, 530 U.S. at 311-12. Where the particular circumstances that animated application of the concept of "social coercion" are absent, the case should be analyzed through the usual framework of legal compulsion.

Establishment Clause analysis depends on the specific circumstances of each case, see *Santa Fe*, 530 U.S. at 315; *Lee*, 505 U.S. at 593, but three factors inform the social-coercion test, all of them lacking here. *First*, the threat of subtle coercive pressure is strongest when the religious activity is timed to take place immediately before or during an

important school-related function, when attendance is most assured. See *Santa Fe*, 530 U.S. at 307-08, 311-12; *Lee*, 505 U.S. at 583, 593-94. *Second*, students are more susceptible to peer pressure when the religious activity is, by the design of state authorities, both public and formal. See *Lee*, 505 U.S. at 586, 589 (describing the challenged prayer as "a formal religious exercise which students, for all practical purposes, are obliged to attend"); see also *Santa Fe*, 530 U.S. at 302-04, 307-08; *Schempp*, 374 U.S. at 223. *Third*, pervasive school involvement with the content and presentation of prayers can make it clear that those prayers bear "the imprint of the State," giving them a coercive quality (and arguably conveying the state's endorsement). See *Lee*, 505 U.S. 588, 590; see also *Adler* v. *Duval Cty. Sch. Bd.*, 250 F.3d 1330, 1341 (11th Cir. 2001) (en banc) ("What turns private speech into state speech in this context is, above all, the additional element of state control over the content of the message." (citing *Santa Fe*, 530 U.S. at 302-304)). None of these factors are present here.

First, unlike the challenged prayers in *Lee* and *Santa Fe*, Kennedy's religious exercise did not involve "a captive audience." Cf. *Freedom from Religion Found., Inc.* v. *Concord Cmty. Schs.*, 885 F.3d 1038, 1048-1049 (7th Cir. 2018). While the challenged prayers took place "in the general presence of students," Pet. App. 27, the Constitution "does not prohibit prayer aloud or in front of others," and private religious speech is "not unconstitutionally coercive even though it may occur before non-believer students." *Chandler*, 230 F.3d

at 1313, 1316-1317 (citation omitted); see also *Santa Fe*, 530 U.S. at 302 ("Of course, not every message delivered under such circumstances is the government's own."); *Lee*, 505 U.S. at 597 ("We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive."). Rather than pray before games in the confines of a locker room, when the coaches have the players' undivided attention, cf. *Borden* v. *Sch. Dist. Twp. of E. Brunswick*, 523 F.3d 153, 159-160 (3d Cir. 2008), and when players are unlikely to walk out to avoid the prayer, cf. *Newdow* v. *Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1038 (9th Cir. 2010), Kennedy prayed *after* the game. Players, students, and the general public were no longer focused on the events on the field, and generally were leaving the field and the stadium. Pet. App. 3, 7. By praying quietly after games, neither Kennedy nor the District forced students into a situation in which they had "no real alternative" but to participate in the religious activity, cf. *Lee*, 505 U.S. at 587-588; in fact, the only people who were exposed to Kennedy's prayers were those who voluntarily chose to remain behind as others left so they could join him. Pet. App. 3-4, 7. Attendance at the prayer "[wa]s certainly not required in order to receive a diploma." *Santa Fe*, 530 U.S. at 311.

Second, unlike the public and formal invocations at issue in *Lee* and *Santa Fe*, Kennedy's prayer was quiet, personal, and brief. Pet. App. 3, 9-10. Kennedy's prayer was not "broadcast over the school's public address system" *Santa Fe*, 530 U.S. at 307, nor were students and spectators pressured

"to stand … or ... maintain respectful silence" during his prayer, *Lee*, 505 U.S. at 593; see also *Schempp*, 374 U.S. at 223. Instead, Kennedy's religious activity involved "a brief, quiet prayer," usually lasting about thirty seconds, that took place "after the game [wa]s over, and after the players and coaches from both teams ha[d] met to shake hands at midfield …." Pet. App. 3, 7 (alteration omitted). The dissimilarity between Kennedy's prayers and the religious activity in *Lee* and *Santa Fe* is highlighted by the fact that although Kennedy began his post-game prayers in 2008, the District did not even become aware of them until 2015. Pet. App. 3-4. They were so brief, private, and quiet that they were easily overlooked. It is not credible to say that the prayers were in any way "coercive" when they escaped notice for so many years.

Finally, the District's deliberate and public effort to disassociate itself from Kennedy's religious activity eliminated any reasonable risk that the coercive power of the State lay behind his private religious expressions. In school prayer cases, the relevant question is whether an "objective observer" would perceive the conduct at issue as "a state endorsement of prayer in public schools." *Santa Fe*, 530 U.S. at 308 (citation and internal quotation marks omitted); see also *Lee*, 505 U.S. at 592-593. As this Court has explained, "the 'degree of school involvement'" in the prayer can suggest that it bears "the imprint of the State and thus put[s] school-age children who object[] in an untenable position." *Santa Fe*, 530 U.S. at 305 (quoting *Lee*, 505 U.S. at 590); see also *Schempp*, 374 U.S. at 223. But the

objective observer must be seen as "'a personification of a community ideal of reasonable behavior,'" and not one who is "biased, replete with foibles, and prone to mistake." *Am. Atheists, Inc.* v. *Davenport*, 637 F.3d 1095, 1107-1108 (10th Cir. 2010) (Gorsuch, J., dissenting from denial of rehearing en banc) (quoting *Capital Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 779-780 (1995) (O'Connor, J., concurring)). Thus, when a school actively dissociates itself from religious activity, there is no real likelihood that an objective observer would attribute that activity to the school. See *Rosenberger*, 515 U.S. at 841-842 (citing, *inter alia*, *Lee*, 505 U.S. at 587). Stated differently, "[t]he proposition that schools do not endorse everything they fail to censor is not complicated" to understand, even for students. *Bd. of Educ. of Westside Cmty. Schs.* v. *Mergens*, 496 U.S. 226, 250 (1990) (plurality op.); see also *Hedges* v. *Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1299-1300 (7th Cir. 1993). Under the facts of this case, no objective observer would have viewed Kennedy's brief and personal prayer, which was audible only to those nearby, as "being either endorsed or coerced by the State." *Rosenberger*, 515 U.S. at 841-842.

The record makes clear that the District had no involvement with Kennedy's religious exercise, nor did it "foster[] or encourage[] any mistaken impression" that Kennedy spoke for the District when he prayed after games. See *id.* at 841 (citation and internal quotation marks omitted). In fact, "to avoid the perception of endorsement," Pet. App. 5-6, the District went to extreme lengths "to disassociate

itself from the private speech involved in this case." *Rosenberger*, 515 U.S. at 841; cf. *Santa Fe*, 530 U.S. at 305-306 (explaining that the school district failed "to disentangle itself from the religious messages"). As soon as the District became aware of Kennedy's prayers, it warned him that, although he was "free to engage in religious activity, … [s]uch activity must be physically separate from any student activity …." Pet. App. 4-6. When Kennedy continued to pray, the District "reminded" him that he was prohibited from "engag[ing] in demonstrative religious activity, readily observable to (if not intended to be observed by) students and the attending public." Pet. App. 10. When those warnings failed, the District publicly explained its "views regarding the constitutionality of Kennedy's conduct." See Pet. App. 11-12.

As the Eleventh Circuit succinctly explained: "What the Court condemned in *Santa Fe* was not private speech endorsing religion, but the delivery of a school-sponsored prayer. Remove the school sponsorship, and the prayer is private." *Chandler*, 230 F.3d at 1316. In this case, the total absence of the District's involvement in Kennedy's private prayers—as well as its very public efforts to disassociate itself from the challenged prayers—supports the conclusion that Kennedy's speech could not reasonably be considered to be state sponsored. See *Doe ex rel. Doe* v. *Sch. Dist. of City of Norfolk*, 340 F.3d 605, 612-613 (8th Cir. 2003); *Adler*, 250 F.3d at 1342.

Without the "dominant facts" that "mark and control" this Court's school prayer decisions, see *Lee*,

505 U.S. at 586—namely, being held conspicuously before a popular event, public and formal structure, and pervasive school control—the District's purported concern that Coach Kennedy's prayers would coerce unwilling students to participate or would be attributed to the District was "not a plausible fear." *Rosenberger*, 515 U.S. at 841-842. And by concluding that Coach Kennedy's brief and personal prayer constituted government speech, the Ninth Circuit effectively obliterated the "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Santa Fe*, 530 U.S. at 302 (citation and internal quotation marks omitted). The Ninth Circuit's approach cannot be reconciled with this Court's precedent or the Constitution.

* * * *

Perhaps more importantly, unlike *Lee* and *Santa Fe*, this Court need not speculate about whether students felt coerced to participate in the challenged prayers. Nothing in the record suggests that Kennedy directed his players "to participate in the prayers, singled out dissidents for opprobrium, or indicated that [his] decisions might be influenced by a person's acquiescence in the prayer opportunity." *Town of Greece*, 134 S. Ct. at 1826; cf. *Santa Fe*, 530 U.S. at 294 & n.1 (stating that objecting students were intimidated and harassed by school district officials); *Wallace v. Jaffree*, 472 U.S. 38, 42 (1985) (noting that "minor children were exposed to ostracism from their peer group class members if

they did not participate" in prayer services); *Borden*, 523 F.3d at 160 (explaining that high school football player reported to his parents that he felt "uncomfortable" during pre-game prayer and "feared that this coach would select him to say the prayer"). The opposite is true. It is undisputed that Kennedy did not encourage or even invite players to join him in prayer, as the only students who participated were those who voluntarily joined Kennedy. See Pet. App. 3-5. Thus, whatever "risk of indirect coercion" may exist in some school settings, *Lee*, 505 U.S. at 592, was not present here.

II. THE NINTH CIRCUIT'S TEST ALLOWS SCHOOL DISTRICTS TO DICTATE WHEN AND WHERE ITS TEACHERS AND COACHES MAY EXERCISE THEIR FIRST AMENDMENT RIGHTS

The Ninth Circuit concluded that Kennedy spoke as a public employee by applying its rigid private-public speech rule under which "teachers *necessarily* act as teachers for purposes of a *Pickering* inquiry when [1] at school or a school function, [2] in the general presence of students, [3] in a capacity one might reasonably view as official." Pet. App. 27 (quoting *Johnson*, 658 F.3d at 968). The test, ostensibly used to determine whether speech is public or private in nature, is actually based upon concerns central to the Establishment Clause—endorsement and coercion. See *Johnson*, 658 F.3d at 968 (citing, *inter alia*, *Edwards*, 482 U.S. at 584; *Tucker* v. *State of Cal. Dep't of Educ.*, 97 F.3d 1204 (9th Cir. 1996); *Peloza* v. *Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994)). By focusing

its attention on whether conduct occurs "in the general presence of students," and whether an observer might "reasonably view" that conduct as official, the Ninth Circuit has produced an inflexible rule that authorizes schools to improperly limit when and where teachers and coaches are permitted to exercise their First Amendment rights. The effects of that rule are illustrated by this case.

In applying *Johnson* here, the Ninth Circuit rejected Kennedy's argument that "the district court invented a bright-line test that strips First Amendment protections from 'on the job' public employees." Pet. App. 32 (internal quotation marks omitted). To support this claim, the Ninth Circuit relied on certain "accommodations" the District offered to Kennedy. See *ibid.* Reflecting its belief that the District had a legitimate fear that Kennedy's brief and personal prayer would be attributed to the District, see Pet. App. 9-10, the Ninth Circuit endorsed the District's purported "accommodations"—namely, allowing Kennedy to "pray[] on the fifty-yard line after the stadium had emptied," *id*. at 23, or in "a private location within the school building, [such as an] athletic facility or press box," *id*. at 32. As this case illustrates, the Ninth Circuit's rigid test for public school employee speech produces an unnecessarily harsh result: prohibiting a high school football coach from praying in view of students and parents after the game's conclusion, and instead endorsing the school district's attempt to control the exercise of his First Amendment rights.

With private speech, the analysis of whether a restriction on expressive activity under the First Amendment is sufficiently narrowly tailored is necessarily a "fact specific and situation specific inquiry."[2] See *Deegan* v. *City of Ithaca*, 444 F.3d 135, 142 (2d Cir. 2006) (citing *Grayned* v. *City of Rockford*, 408 U.S. 104, 116-117 (1972)). The Ninth Circuit's test avoids this analysis entirely by automatically declaring speech in view of students to be employee speech within the scope of their employment, thus giving governments carte blanche to regulate the time, place, and manner of any religious conduct that might occur "in general presence of students."

The Ninth Circuit's endorsement of the District's control over Coach Kennedy's exercise of his First Amendment rights is inconsistent with the Constitution. As this Court recently reaffirmed, "[t]here can be no doubt that the First Amendment protects the right to pray." *Sause* v. *Bauer*, 138 S. Ct. 2561, 2562 (2018). This principle applies with equal force in public schools. The school setting does not permit the Establishment Clause to be used to "eliminat[e] … private speech endorsing religion," nor does it allow the Free Exercise Clause to be read as "permit[ting] the State to confine religious speech to whispers or banish it to broom closets." *Chandler*, 230 F.3d at 1316. Otherwise put, "the special

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[2] Importantly, time, place, and manner analysis generally is inapplicable where, as here, the government seeks to regulate speech "on the basis of its content." See *Reno* v. *ACLU*, 521 U.S. 844, 879-880 (1997).

characteristics of the school environment," *Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969), do not turn the First Amendment's Religion Clauses into "commands impos[ing] a prohibition on all religious activity in our public schools," *Santa Fe*, 530 U.S. at 313. Accordingly, the District cannot circumscribe Kennedy's exercise of liberty on the grounds that he could exercise his rights in some place more to the liking of his employer. See *McCurry*, 738 F.2d at 271, 275 (quoting *Schad*, 452 U.S. at 76-77).

Over fifty years ago, this Court recognized that

> [t]he place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard.

Schempp, 374 U.S. at 226. More recently, this Court cautioned that "'untutored devotion to the concept of neutrality' must not lead to 'a brooding and pervasive devotion to the secular[.]'" *Town of*

Greece, 134 S. Ct. at 1822 (quoting *Schempp*, 374 U.S. at 306 (Goldberg, J., concurring)). Even in public schools, "[t]he First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Lee*, 505 U.S. at 589.

Free exercise is stripped when government has the authority to dictate the time, place, and posture of a person's private faith expression. The decision below illustrates the danger of such governmental control, as the Ninth Circuit's inflexible rule creates an atmosphere where a teacher may be fired for "donning a hijab or yarmulke or making the sign of the cross before lunch," Pet. 2, and a coach may be punished for praying for an injured player from the sideline. This rule is inconsistent with this Court's precedent and the Constitution. The school setting does not require sterilizing all religious symbols or religious practice. Cf. *Santa Fe*, 530 U.S. at 313; *Lee*, 505 U.S. at 598; *Chandler*, 230 F.3d at 1316. The Religion Clauses serve as a bulwark against governmental attempts to dictate each person's religious practices, and if the government is to respect "the Constitution's guarantee of free exercise, [it] cannot impose regulations that are hostile to the religious beliefs of affected citizens …." *Masterpiece Cakeshop, Ltd.* v. *Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) (citing *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993)). Simply put, "[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution." *Lee*, 505 U.S. at 598 (citing

Schempp, 374 U.S. at 306 (Goldberg, J., concurring)).

CONCLUSION

This Court's decisions in *Lee* and *Santa Fe* did not strip teachers and coaches of their constitutional right to engage in private religious activity simply because the activity occurs at a school-related function and "in the general presence of students." To the contrary, this Court has reaffirmed that, even in schools, "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Santa Fe*, 530 U.S. at 302 (quoting *Mergens*, 496 U.S. at 250).

Yet all too often "[s]chool districts seeking an easy way out try to suppress private speech." *Hedges*, 9 F.3d at 1299. Preventing hurt feelings at school is "decidedly not the job of the Constitution." *Elmbrook Sch. Dist.*, 134 S. Ct. at 2286 (Scalia, J., dissenting from the denial of certiorari). Moreover, as this Court has explained, "[t]he proposition that schools do not endorse everything they fail to censor is not complicated" to understand, even for students. *Mergens*, 496 U.S. at 250. Thus, the Establishment Clause does not require schools to silence private religious speech simply because some members of the community may have misconceptions about endorsement of religion. See *Hedges*, 9 F.3d at 1299. "The school's proper response is to educate the audience rather than squelch the speaker." *Ibid.*

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