No. 18-12

IN THE

Supreme Court of the United States

JOSEPH A. KENNEDY,

Petitioner,

v.

BREMERTON SCHOOL DISTRICT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* ROBERT CLECKLER BOWDEN IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Robert "Bobby" Cleckler Bowden is a legendary college football coach. During a career spanning seven decades, he coached thousands of student-athletes at several public colleges and universities.[1] In his 44 years as a head football coach, Coach Bowden amassed approximately four hundred wins and is the proud patriarch of what is widely considered to be college football's most famous family.

Coach Bowden is also a devout Christian. He has said, "[f]aith is the most important thing in my life.... I was raised with that as the most important thing in the world." Leah Marieann Klett, Legendary Florida State Coach Bobby Bowden on Family, Faith, and The Key to Success, The Gospel Herald (Dec. 5, 2016, 2:39 PM), http://www.gospelherald.com/articles/68570/20161205/legendary-florida-state-coach-bobby-bowden-on-family-faith-and-the-key-to-success-interview.htm. Above all else, he credits his coaching success to his dedication to and freedom to express his religious faith.

Coach Bowden explains the importance of his faith and ability to freely express it in the following terms:

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1. Pursuant to Rule 37(2)(a), undersigned counsel represents that counsel of record received timely notice of Coach Bowden's intent to file an amicus curiae brief, and that counsel for the District has consented to this filing. Pursuant to Rule 37(6), undersigned counsel represents that no counsel for either party has authored any part of this brief, nor has any monetary compensation been provided by a party or anyone else. This brief has been paid for entirely by the *Amicus* and/or his counsel.

> You have to believe, you have to have faith, and you must testify to it without shame. That's what I've tried to do throughout my life. I am not afraid to tell anybody about it. I told my boys to be the same way: never be ashamed of it.

BOBBY BOWDEN, CALLED TO COACH: REFLECTIONS IN LIFE, FAITH, AND FOOTBALL 8 (Howard Books eds., 2010) [hereinafter CALLED TO COACH].

Thus, when Coach Bowden saw that the Bremerton School District (the "District") had forced Petitioner, Coach Joseph Kennedy, to choose between freely exercising his faith and coaching football, Coach Bowden felt led to offer, as *amicus curiae*, his viewpoint to this case and controversy, which will, no doubt, impact the religious rights of thousands of public school coaches. He believes that no coach should have to set down their faith when they pick up a whistle.

To be sure, this is an issue that resonates deeply with Coach Bowden; it brings together three subjects that are the cornerstones of his life: faith, football, and freedom. Coach Bowden has made it a point throughout his career to share his faith with his student-athletes in his role not only as a coach, teacher, and role model, but also as a mentor, counselor, and pseudo-father figure. Coach Bowden has, for many decades, spoken and written about how to be a leader of student-athletes, and firmly believes that observant coaches who live their faith can only be effective coaches when they are free to make their faith and spiritual identity known and available to their student-athletes.

In fact, many former student-athletes under Coach Bowden's charge have credited their post-college-football success to him and the important life lessons he imparted through, among other things, references to his personal beliefs. In Coach Bowden's view, the Circuit Court's opinion jeopardizes an observant coach's ability to impart these life lessons and otherwise strips them of their spiritual identity while in the presence of their student-athletes by categorically eliminating at the public schoolhouse gate their First Amendment rights to engage in any form of religious expression.

SUMMARY OF ARGUMENT

At a fundamental level, this Court should grant the Petition in order to re-establish that no bright-line rule exists that requires observant public school employees to refrain entirely from personal religious expression in the presence of students and to develop the contours of "status" vs "use" in the free exercise context, as discussed in the concurrences to *Trinity Lutheran Church of Columbia, Inc. v. Comer*, -- U.S. --, 137 S.Ct. 2012 (2017). *See Comer*, -- U.S. --, 137 S.Ct. 2012, 2025 (2017) (Thomas, J., concurring in part); *id.* at 2025–26 (Gorsuch, J., concurring, in part). In essence, Coach Kennedy was terminated because the District determined that a 15–30 second silent prayer by an assistant football coach in view of student-athletes constituted state endorsement of religion. This policy, approved of by the Circuit Court, that any such religious expression amounts to the state's establishment of religion, if adopted by this Court, will infringe on observant coaches' free exercise and use of their religion. To be sure, this case thus presents a particularly apt factual circumstance to proscribe (or

eliminate) the boundary between "status" and "use" in the free exercise context, because it pertains to the uniquely personal role of an athletic coach in student-athletes' lives.

Along those lines, the District's policy and the Circuit Court's decision fundamentally transform the student-athlete/coach relationship and effectively eliminate the ability of a religiously observant coach to serve as a mentor, counselor, or pseudo-parental figure to his or her players. Coaches, like Kennedy and Bowden, are active in their student-athletes' lives; student-athletes can count on these coaches for guidance when they can't go to, or don't have, a parent at home. It is in the fulfillment of these unique, personal roles that a coach's faith and spiritual identity is crucial. But the District's policy and Circuit Court's holding strip them of their faith and spiritual identity while in the presence of their players, and jeopardizes their ability to be a mentor, counselor, or pseudo-parental figure and otherwise impart important life lessons to their student-athletes.

When viewed against the intimacies of this student-athlete/coach relationship, no reasonable observer, aware of the history of Coach Kennedy's motivational speeches and personal religious convictions, and context of post-football-game rituals, could possibly confuse Coach Kennedy's silent, religious expression as state sponsored endorsement of religion. In fact, a reasonable observer, especially under these circumstances, would more likely determine that the prohibition of a 15–30 second silent, non-sectarian prayer shows hostility toward religion rather than neutrality.

For these reasons, this Court should grant certiorari and review and reverse the Circuit Court's bright-line

rule that coaches do not possess any First Amendment rights while on the job and in view of students. In so doing, the Court need not draw or re-draw any sort of line between free exercise and establishment of religion; it need only reaffirm the well-established law that coaches most certainly do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

ARGUMENT

I. THE CIRCUIT COURT'S OPINION CATEGORICALLY DENIES RELIGIOUSLY OBSERVANT TEACHERS AND COACHES OF THEIR FIRST AMENDMENT RIGHTS.

A. The District's Treatment of Coach Kennedy Was Facially Violative of His First Amendment Right to Freely Exercise His Religion.

"The development of the law with regard to the Religion Clauses in the decisions of the Supreme Court of the United States illustrates the conflict inherent in the First Amendment, which requires governments to walk a sometimes fine line between laws 'establishing' or 'endorsing' religion, and laws averse or hostile to religion." *Nichol v. ARIN Intermediate Unit 28,* 268 F. Supp. 2d 536, 548 (W.D. Penn. 2003). "A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion, favoring neither one religion over others nor religious adherents collectively over nonadherents." *Bd. of Ed. Of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 695 (1994) (internal quotations and citation omitted).

"The neutrality principle, synthesized from the Free Speech, Free Exercise and Establishment Clauses of the First Amendment, respects the 'crucial distinction between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.'" *Nichol*, 268 F. Supp. 2d at 549 (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 841 (1995)). In other words, the government can no more demonstrate hostility toward religion than it can sponsor religion: neutrality is the key. *Bd. of Ed. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 248 (1990). It is this government neutrality toward religion that "is the hallmark of the Religion Clauses." *ACLU of N.J. v. Black Horse Pike Reg'l Bd. of Ed.*, 84 F.3d 1471, 1488 (3d Cir. 1996).

The Circuit Court's opinion, however, disregards this principle of neutrality and entirely erases the fine line between endorsement of and hostility toward religion in favor of a categorical prohibition on all demonstrative religious expression, no matter how personal or fleeting, by a coach when at work and in front of others. This categorical rule violates the First Amendment rights of observant coaches, like Coach Kennedy, and cannot be reconciled with this Court's precedent or with the decisions from other courts faithfully applying it.

In effect, such a rule would force observant coaches to choose between abiding by public school policy or the basic tenets of their faith; and, stretched to its inevitable conclusion, it would allow the District to, among other things, prevent an observant Muslim from wearing a hijab, an observant Jew from wearing a yarmulke,

or an observant Christian from wearing a cross. The Establishment Clause cannot, however, be stretched this far to "license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." *Mergens*, 496 U.S. at 248 (quoting *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in judgment)).

But the District's policy does just that. Broadly speaking, it prevents any school employee from even acknowledging that they are religiously observant, it prohibits any practice of that religion on school grounds in the presence of others, and it explicitly promotes secularism. More specifically, the policy effectively prevents Coach Kennedy from freely exercising his religion.

Coach Kennedy is "a practicing Christian" whose "sincerely held religious beliefs require [him] to engage in brief, private religious expression at the conclusion of BHS football games." E.R. 144. He "made a commitment to God" to "give thanks through prayer, at the end of each game, for what the players had accomplished and for the opportunity to be part of their lives through the game of football." E.R. 144–45. Coach Kennedy's commitment to his sincerely held religious beliefs is so strong that, although he tried to comply with the District's, and now the Circuit Court's, "no outward displays of religion in front of students" policy, it made him feel "dirty." E.R. 147. That is because his sincerely held religious beliefs made him feel he had broken a sacred commitment to God. *Id.*

Notwithstanding these undisputed facts, the District determined and the Circuit Court held that Coach Kennedy's silent, post-game, 15–30 second prayer is entitled to no First Amendment protection at all simply because it was in view of students. It is difficult to square the District's seemingly profound hostility toward Coach Kennedy's religious expression with the more favorable treatment it afforded to another religiously observant coach whom the District allowed to engage in a Buddhist chant after games. E.R. 146. Presumably, the District allowed this religious activity to continue because, either, it views Buddhism more favorably than Christianity, or because it views audible Buddhist expression as somehow less demonstrably religious than silent Christian prayer. Thus, the District has deemed it is entitled to either promote one religion over another, or make a value judgment that one set of demonstrable religious exercises is more secular than another. Either way, the District's actions offend this Court's Establishment Clause and Free Exercise Clause precedent.

In any event, and notwithstanding the favorable treatment it afforded to the Buddhist coach, the District focuses its entire policy on religious expression through the lens of promoting secularism. E.R. 155. For example, the District permits "[m]usical, artistic and dramatic presentations which have a religious theme," but such must be presented on the basis of "traditional secular usage." *Id.* Indeed, in a letter to Coach Kennedy, the District characterized Coach Kennedy's "motivational, inspirational talks to students" as "very positive and beneficial," but explicitly directed that those talks "remain entirely secular in nature." E.R. 160.

This directive is entirely inappropriate as it expresses a "value judgment that secular motivations" for giving an inspirational talk are more important than "religious motivations." *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999); *accord Nichol,* 268 F. Supp. 2d at 548 (preventing school employees from wearing religious jewelry is openly "averse to religion" because it only punishes "symbolic speech by its employees having religious content or viewpoint, while permitting its employees to wear jewelry containing secular messages"). And, this directive becomes even more egregious when viewed against a neighboring school district's decision to permit its high school football coaches to kneel during the playing of the national anthem prior to the start of their games. Jayda Evans, *Garfield Football Team Takes Knee During National Anthem Prior to Game Friday Night*, SEATTLE TIMES, Sept. 16, 2016, http://www.seattletimes.com/sports/high-school/garfield-football-team-takesknee-prior-to-game-friday-night/. Simply put, the District has violated Coach Kennedy's First Amendment right to freely exercise his religious beliefs by restricting his ability to say a quiet prayer by himself, and it has done so while permitting other public religious expressions and while its neighboring school district allowed coaches to engage in secular political speech at games. *E.g., Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 360 (3d Cir. 1999).

At bottom, the District's policy toward religion generally, and as applied to Coach Kennedy specifically, "is not neutral in effect, and does not pretend to be." *See Nichol*, 268 F. Supp. 2d at 552.

> The effect of [the District's] policy is to prohibit [Coach Kennedy] and other employees of [the District] from publicly displaying and expressing (or exercising) their religious beliefs and affiliations while working. At the same time, employees may publicly display and express other secular messages through jewelry, dress, insignia and emblems while working. There can be no doubt, on the record before the Court, that the effect of the [District's] policy is to prohibit an employee's symbolic religious expression and discipline those who do not comply, while exempting employees' symbolic speech which expresses a non religious message from similar treatment.

Id. Just as an employee's "act of wearing her cross on a necklace outside of her clothing is symbolic speech on a matter of public concern (religion)," so too is Coach Kennedy's act of taking a knee and saying a silent prayer. *See id.*

B. In Holding That Any Religious Expression By A Coach or Teacher While On The Job And In View Of Students Constitutes State Endorsement of Religion, The Circuit Court Opinion Has Stripped Religiously Observant Employees of the Use of Their Religion.

The Circuit Court suggests that its opinion is a narrow one, but that is, most definitely, not the case. By holding that any on-the-job religious expression by a public school employee while on school grounds and in view of others falls within that employee's official employment duties, the

Circuit Court has effectively banned observant employees from making any outward expression of personal religious faith. A short moment of silent prayer or crossing oneself before eating a meal in a cafeteria, or even the wearing of, for example, a religiously expressive piece of jewelry or article of clothing is now potentially problematic.

Indeed, the Circuit Court went to great lengths to justify this overly-expansive holding by stating that Coach Kennedy could give his prayer while in hiding in an empty office, or at the stadium after it has been cleared of all students, parents, or other observers. But rather than hew to this Court's precedent requiring neutrality, and acknowledging that personal freedoms do not end at the schoolhouse door, the Circuit Court established a bright-line rule that any personal religious expression in view of students is forbidden. This type of categorical rule has, however, been rejected time and time again, by this and other courts across the country. *E.g.*, *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 841 (1995); *Mergens*, 496 U.S. at 250 (schools do not endorse everything they fail to censor); *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in judgment); *Warnock v. Archer*, 380 F.3d 1076, 1082 (8th Cir. 2004) (the mere fact that framed psalm is on wall of a teacher's government office does not render it unconstitutional).

Moreover, while the District does not appear to suggest that it is entitled to discriminate on the basis of religious "status" (*i.e.*, that a person holds Christian beliefs), although permitting the Buddhist chant over the silent Christian prayer may well cross that line, the District does argue that it can prevent observant Christians from revealing, even in the most diminutive of

ways, any outward expression or "use" of their religion while on the job. In essence, the District's policy is that Christians may work for the District, so long as no one can ever tell, on school grounds, that the employee is, in fact, a religiously observant Christian. And, the Circuit Court has now enshrined that "status" versus "use" distinction into law.

Such a distinction, however, is completely untenable. As Justice Gorsuch observed:

> Does a religious man say grace before dinner? Or does a man begin his meal in a religious manner? Is it a religious group that built the playground? Or did a group build the playground so it might be used to advance a religious mission? The distinction blurs in much the same way the line between acts and omissions can blur when stared at too long, leaving us to ask (for example) whether the man who drowns by awaiting the incoming tide does so by act (coming upon the sea) or omission (allowing the sea to come upon him).

Comer, -- U.S. --, 137 S.Ct. at 2025–26 (Gorsuch, J., concurring, in part).

These same untenable distinctions are present here: is Coach Kennedy a religious man who silently prays for the well-being of his players, or is Coach Kennedy praying for his students' well-being to "advance a religious mission"? "Often enough the same facts can be described in both ways." *Id*. at 2026.

Indeed, the First Amendment's Free Exercise Clause "guarantees the free exercise of religion, not just the right to inward belief (or status)." *Id.* There is no distinction between a governmental entity prohibiting employment of a Christian and government prohibiting employment of people "who do [Christian] things[.]" *Id.*

This case presents the Court with an opportunity to address this artificial distinction between religious "status" and religious "use" head on and confirm that "the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious. Such absolutism is not only inconsistent with our national traditions, but would tend to promote the kind of social conflict the Establishment Clause seeks to avoid." *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring in judgment).

II. THE CIRCUIT COURT'S OPINION EFFECTIVELY ELIMINATES THE ABILITY OF A RELIGIOUSLY OBSERVANT COACH TO SERVE AS A MENTOR, COUNSELOR, AND PSEUDO-PARENTAL FIGURE TO HIS OR HER PLAYERS.

"The role and purpose of the American public school system were well described by two historians, who stated: '[P]ublic education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.'" *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (quoting C. Beard & M. Beard, New Basic History of the United States

228 (1968)). "In *Ambach v. Norwick*, 441 U.S. 68, 76–77, 99 S.Ct. 1589, 1594, 60 L.Ed.2d 49 (1979), [this Court] echoed the essence of this statement of the objectives of public education as the 'inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system.'" *Id.*

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, (rather) than through any kind of authoritative selection." *Tinker*, 393 U.S. at 512 (internal citations and quotations omitted).

Even more so than the student/teacher relationship, the student-athlete/coach relationship is highly personal, with the coach serving not only as a coach, teacher, and role model, but also as a mentor, a counselor, and with regard to football players in particular, a pseudo-father figure. The best coaches, not just religiously observant ones like Coaches Bowden and Kennedy, feel and are, in fact, obligated by their faith or simply their professional sensibilities to serve as mentors, counselors, and father-figures to their players.

Coach Kennedy explained this special, personal connection with his players in the following way:

> I have never coached at BHS simply for the money. No amount of money can compensate me for losing the ability to mentor and have a positive impact on the lives of my players.

E.R. 149. Coach Bowden has elaborated on this personal connection:

> I tried to make every one of my players feel like they were wanted and loved. . . . They just need someone to give them direction. That's why I always believed my job was to make them better athletes, better students, and better people. It was my hope that when they left me they were going to become better fathers, husbands, and men.

CALLED TO COACH at 149. Coach Bowden explains this concept further:

> I had long ago resolved to treat my players as I would want another coach to treat my sons. It was a decision I made early in my coaching career, when I was old enough to think of players as my sons. . . . As I got older, that approach seemed more and more like the right way to handle things so I stuck with it. . . . They were my boys. My sons. Their well-being had been entrusted to me by their parents.

BOBBY BOWDEN, THE WISDOM OF FAITH 41–42 (B&H Publ'g Grp. eds., 2014).

Just as Coach Bowden did, Coach Kennedy believes his role goes beyond the "coach" and "role model" contemplated by his job description. He, like Coach Bowden, seeks to be active in his student-athletes' lives, to be the person they can count on to help with their problems on and off the field, and to be the person they

can count on for guidance when they can't go to, or don't have, a parent at home. It is in the fulfillment of these unique, personal roles that Coach Kennedy's faith and spiritual identity is crucial.

The importance of the coach's unique role in guiding the life of a student-athlete, although not directly addressed by this Court's precedent, finds support in several of this Court's opinions addressing the focus of public education. As the Court has written, "[t]he process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers—and indeed the older students—demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models." *Fraser,* 478 U.S. at 683.

The *Tinker* Court held that this principle is not only applicable to the classroom, but also to "the playing field." 393 U.S. at 512. And, although the context in *Tinker* was a student's freedom of expression, the same freedoms apply to a student-athlete learning important life lessons from his or her coach. Coaches are in a unique position to impart these important life lessons to student-athletes in their charge, and thus in a unique position to provide, and indeed encourage, "a robust exchange of ideas."

In this regard, Coach Kennedy, just like Coach Bowden, never forced his religion on any student-athlete, but rather used his religious observance to show his players that faith is personal. Coach Bowden explains this philosophy in the following way:

> [] I never used a boy's religious beliefs against him. If he was good enough to play, he was going to play. I coached boys who were Baptist, Methodist, Protestant, and Catholic. I coached boys who were Muslim. I coached boys who were Jewish. On my team I had one Jewish boy whose older brother was a rabbi. I never forced my beliefs on any of them, and I believe they appreciated me for that. Faith is a personal thing, and it's every person's right to believe what they want to believe.

CALLED TO COACH at 143.

Here, where it is undisputed that Coach Kennedy did not mandate participation in his silent prayer, and where it is undisputed that Coach Kennedy's prayer was imbibed with non-sectarian concepts, like competition, comradery, community, and citizenship, it is particularly apt to consider the message Coach Kennedy's actions actually conveyed to the student-athletes he coached. At bottom, the main point conveyed to the student-athlete was not religious, or even one about competition, comradery, community, or citizenship, but an important life lesson that one must have the courage to stand up for one's sincerely held beliefs, religious or otherwise. By taking a knee, Coach Kennedy took a stand.

That is, without question, a message Coach Kennedy was entitled to convey and one his student-athletes were entitled to receive. To hold otherwise, would fundamentally transform the student-athlete/coach relationship and effectively eliminate the ability of a religiously observant coach to serve as a mentor, counselor, or pseudo-parental figure to his or her players.

III. NO REASONABLE OBSERVER COULD HAVE INTERPRETED COACH KENNEDY'S SILENT PRAYER AS STATE/DISTRICT ENDORSEMENT OF RELIGION.

This Court has long held that "the reasonable observer in the endorsement inquiry must be deemed aware of the history and context underlying" challenged conduct. *Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002). Indeed, "[t]he proposition that schools do not endorse everything they fail to censor is not complicated." *Mergens*, 496 U.S. at 250. And yet, the Circuit Court's opinion holds just the opposite: that schools endorse everything said or done by their employees while in the presence of students, regardless of context.

But, a reasonable observer, aware of the history and context underlying Coach Kennedy's silent 15–30 second post-game midfield prayer, would know that Coach Kennedy's message is non-sectarian, mostly addressed to competition, comradery, community, and citizenship, and explicitly not endorsed by the District as religious expression. In the context of student religious speech, this Court has noted that "[w]e think that secondary school students are mature enough to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." *Mergens*, 496 U.S. at 250.

It is hard to fathom why this same reasoning would not be equally applicable to an assistant football coach's private, 15–30 second, silent, non-sectarian prayer. Indeed, numerous courts have found limited personal religious expressions by school employees not to offend

the Establishment Clause because no reasonable observer could determine that such were state-sponsored actions. *E.g., Warnock*, 380 F.3d at 1082 (framed psalm on the wall of a teacher's office "is clearly personal and does not convey the impression that the government is endorsing it"); *Draper v. Logan Cnty. Pub. Library*, 403 F. Supp. 2d 608, 621 (W.D. Ky. 2005) ("permitting public library employee to have "unobtrusive displays of religious adherence . . . could not be interpreted by a reasonable observer as governmental endorsement of religion"); *Nichol,* 268 F. Supp. 2d at 554 ("Given the inconspicuous nature of plaintiff's expression of her religious beliefs by wearing a small cross on a necklace, and the fact that other jewelry with secular messages or no messages is permitted to be worn at school, it is extremely unlikely that even elementary students would perceive Penns Manor or ARIN to be *endorsing* her otherwise unvoiced Christian viewpoint, and defendants certainly presented no evidence to support such a perception. Merely employing an individual, such as plaintiff, who unobtrusively displays her religious adherence is not tantamount to government endorsement of that religion, absent any evidence of endorsement or coercion."); *Freshwater v. Mt. Vernon City Sch. Dist. Bd. of Ed.*, 1 N.E. 3d 335, 354 (Ohio 2013) ("The district does not convey a message that it endorses or promotes Christianity by simply allowing Freshwater to keep a personal Bible on his desk.").

This conclusion is all the more apparent in this context because there are many post-game rituals, practices, and activities involved in high school football games. For example, coaches and players will ordinarily shake hands with the opposing coaches and players, greet their families, and interact with their respective school

communities. Although these are non-religious activities, the point is that the post-game high school football field is, as the District itself recognizes, a public space filled with activity, but none of which would a reasonable observer find the school to have endorsed.[2]

Any objective observer familiar with the full history and context of Coach Kennedy's activities would view Coach Kennedy's actions as one aspect of the broader post-game rituals and not as the District's endorsement of Christianity. *Cf. Lynch v. Donnelly*, 465 U.S. 668, 692–93 (1984) (O'Connor, J., concurring) (observer would not find city's holiday religious display to be promoting religion given the context of a public holiday with "very strong secular components and traditions"). In fact, the District's policies on religious expression have the opposite of their stated intended effect. A reasonable observer, familiar with the history and context of Coach Kennedy's activities, and the District's corresponding positions, would likely conclude that the District is hostile toward religion.

But that need not be so. The District "itself has control over any impressions it gives its students" and could send a clear message that it respects but does not endorse Coach Kennedy's silent prayer. Instead, the District and the Circuit Court have removed all First Amendment

2. The example of coaches greeting their families brings numerous parallel issues to mind. Does the head coach kissing his spouse amount to State endorsement of marriage or that coach's sexuality? Of course not. No reasonable observer could possibly come to such a conclusion, just as no reasonable observer could determine that the State endorses Christianity simply by permitting an assistant football coach's private, 15–30 second, silent, non-sectarian prayer.

protections from high school coaches based on the faulty premise that a reasonable observer with knowledge of Coach Kennedy's post-game activities would presume the District was endorsing both his motivational and religious messages. That is simply not so, and the Court should accept review in order to clarify and amplify the fundamental principle that schools do not endorse everything they fail to censor.

CONCLUSION

For all the foregoing reasons, this Court should grant certiorari and review the Circuit Court's decision.

Respectfully submitted,

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