FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH A. KENNEDY, *Plaintiff-Appellant*, v. BREMERTON SCHOOL DISTRICT, *Defendant-Appellee.*	No. 20-35222 D.C. No. 3:16-cv-05694-RBL ORDER

Filed July 19, 2021

Before: DOROTHY W. NELSON, MILAN D. SMITH, JR., and MORGAN CHRISTEN, Circuit Judges.

Order;
Concurrence by Judge Milan D. Smith, Jr.;
Concurrence by Judge Christen;
Statement by Judge O'Scannlain;
Statement by Judges O'Scannlain and Bea;
Statements by Judge O'Scannlain;
Statement by Judge Bea
Dissent by Judge Ikuta;
Dissent by Judge R. Nelson;
Dissent by Judge Collins

SUMMARY*

Civil Rights

The panel issued an order denying on behalf of the court a sua sponte request for rehearing en banc, in a case in which the panel affirmed the district court's summary judgment in favor of Bremerton School District in an action brought by Joseph Kennedy, BSD's former high school football coach, who alleged that his rights were violated under the First Amendment and Title VII of the Civil Rights Act of 1964 when BSD prohibited him from praying at the conclusion of football games, in the center of the field, potentially surrounded by Bremerton students and members of the community.

Concurring in the denial of rehearing en banc, Judge M. Smith first addressed Judge O'Scannlain's statements, and wrote that Kennedy was never disciplined for offering silent, private prayers, and that BSD disciplined him only after Kennedy demanded the right to pray in the middle of the high school field immediately after the conclusion of games while the players were on the field and the crowd was still in the stands. He wrote that the panel's opinion specifically identified BSD's potential allowance of Kennedy's religious activity as the state action that would have violated the Establishment Clause. BSD's decision to limit Kennedy's religious expression was thus backed by a compelling interest. The real threat of an Establishment Clause violation justified Kennedy's suspension. BSD's possible option to

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

provide a disclaimer – that Kennedy's religious activities did not carry the school's endorsement – was insufficient in coercive contexts, such as this instance.

Judge M. Smith next addressed Judge R. Nelson's dissent from the denial of rehearing en banc. He wrote that this court was not at liberty to change the Supreme Court's guidance in *Sante Fe Independent School District v. Doe*, 530 U.S. 290 (2000); and strongly disagreed with the suggestion that the panel applied *Sante Fe*'s test incorrectly.

Judge M. Smith wrote further that the actual facts of this case left no question that Kennedy did not carry his burden to show that he spoke as a private citizen, which was an independent basis to affirm the district court. Judge O'Scannlain's contention – that the panel opinion misapplied *Garcetti v. Cellalos*, 547 U.S. 410 (2006) – was wrong on the current law.

Concurring in the denial of rehearing en banc, Judge Christen, joined by Judge D.W. Nelson, wrote that the panel's opinion affirmed the district court's summary judgment ruling because Kennedy spoke as a public employee, because BSD did not demonstrate a hint of hostility or bias toward religion or non-religion, and because BSD had a compelling interest in avoiding an Establishment Clause violation. The outcome of this appeal was driven by the particular facts and circumstances of Kennedy's post-game, on-field prayers. She further wrote that the dissenting statements concerning the denial of rehearing en banc painted an inaccurate picture of the dilemma that Kennedy created. The dissents' suggestion that BSD could have issued a public disclaimer was not a realistic option.

Respecting the denial of rehearing en banc, Judge O'Scannlain, joined in full by Judges Callahan, Bea, R. Nelson, Collins, and Lee, joined by Judge Bumatay as to Part III, and joined by Judge VanDyke as to all parts except Part II-B, wrote that the panel's opinion obliterated First Amendment protections by announcing a new rule that any speech by a public school teacher or coach, while on the clock and in earshot of others, was subject to plenary control by the government. He wrote further that the panel opinion weaponized the Establishment Clause to defeat the Free Exercise claim of Kennedy, who prayed as a private person. He wrote that the panel opinion was in clear conflict with *Garcetti* and decades of Supreme Court cases affirming the principle that the First Amendment safeguards – not banishes – private, voluntary religious activity by public employees. He wrote that a proper application of *Garcetti* and its progenitors dictates that Kennedy's prayer was his private speech, not that of the government. Consequently, Kennedy's Free Speech rights were implicated, and the government's stated justifications for its censorship must face constitutional scrutiny.

Judge O'Scannlain wrote that a faithful reading of the Supreme Court's religion clauses jurisprudence makes clear that BSD's unfounded fears of Establishment Clause liability did not justify BSD's incursions on either Kennedy's Free Speech rights or his Free Exercise rights. Because there was no Establishment Clause violation without state action, BSD's sole stated interest in avoiding Establishment Clause liability could not justify suppressing the Free Exercise rights of its coach. Because strict scrutiny limits courts to considering state interests that are genuine, not hypothesized, it necessarily followed that BSD had no compelling interest in punishing Kennedy's prayer. He wrote further that even if an observer could mistake

Kennedy's private speech for that of the school, it was still erroneous for the panel to assume that BSD's sole constitutional option was to suspend Kennedy. Instead, the panel should have considered the accommodation proposed by Kennedy's counsel: a simple disclaimer, clarifying Kennedy's prayer was his own private speech, not that of BSD.

Respecting the denial of rehearing en banc, Judges O'Scannlain and Bea agreed with the views expressed by Judge Ikuta in her dissent from rehearing en banc.

Respecting the denial of rehearing en banc, Judge O'Scannlain agreed with the views expressed by Judge R. Nelson in his dissent from denial of rehearing en banc.

Respecting the denial of rehearing en banc, Judge O'Scannlain agreed with the views expressed by Judge Collins in his dissent from denial of rehearing en banc.

Respecting the denial of rehearing en banc, Judge Bea agreed with the views expressed by Judge Collins in his dissent from denial of rehearing en banc.

Dissenting from the denial of rehearing en banc, Judge Ikuta, joined by Judges Callahan, R. Nelson, Bade, Forrest, and Bumatay, wrote that, given the circumstances of this case, no objective observer would think that BSD was endorsing Kennedy's prayers. BSD's concern that Kennedy's religious activities would be attributed to BSD was simply not plausible. Applying the objective observer test from *Sante Fe*, there was no Establishment Clause violation here. Judge Ikuta wrote that en banc consideration of this case would raise an opportunity for the court to develop a framework for evaluating how a public employer

can protect its employee's religious expression without becoming vulnerable to an Establishment Clause claim.

Dissenting from the denial of rehearing en banc, Judge R. Nelson, joined in full by Judges Callahan, Bumatay, and VanDyke, and joined by Judge Ikuta, as to Part I, wrote that the panel misapplied Supreme Court precedent since none of BSD's actions would have come close to an endorsement of religion or coercion. He wrote further that the panel's reliance of *Sante Fe* was inapt as there would not have been an endorsement of religion by allowing Kennedy to pray. Moreover, *Sante Fe* should not have been extended by the panel as it stemmed from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which the Supreme Court has effectively killed. Judge R. Nelson also wrote that the panel's analysis went far afield from the original meaning of an established religion, especially in light of *American Legion v. Humanist Ass'n*, 139 S. Ct. 2067 (2019). Under existing Supreme Court precedent, there was no Establishment Clause violation here.

Dissenting from the denial of rehearing en banc, Judge Collins wrote he dissented for the reasons in Judge O'Scannlain's statement, which he joined. He also wrote to underscore one irreducible aspect of the panel's opinion. The panel's holding – that allowing any publicly observable prayer behavior by the coach in these circumstances, even silent prayer while kneeling, would violate the Establishment Clause – was indefensible under Supreme Court caselaw.

COUNSEL

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ORDER

A judge of this court sua sponte requested a vote on whether to rehear this case en banc. A vote was taken and the matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. *See* Fed. R. App. P. 35(f). Rehearing en banc is **DENIED**.

Judge Bress did not participate in the deliberations or vote in this case.

M. SMITH, Circuit Judge, concurring in the denial of rehearing en banc:

Unlike Odysseus, who was able to resist the seductive song of the Sirens by being tied to a mast and having his shipmates stop their ears with bees' wax, our colleague, Judge O'Scannlain, appears to have succumbed to the Siren song of a deceitful narrative of this case spun by counsel for Appellant, to the effect that Joseph Kennedy, a Bremerton High School (BHS) football coach, was disciplined for holding silent, private prayers. That narrative is false. Although I discuss the events in greater detail below, the reader should know the following basic truth *ab initio*: Kennedy was *never* disciplined by BHS for offering silent, private prayers. In fact, the record shows clearly that Kennedy initially offered silent, private prayers while on the job from the time he began working at BHS, but added an increasingly public and audible element to his prayers over the next *approximately seven years* before the Bremerton School District (BSD) leadership became aware that he had invited the players and a coach from another school to join him and his players in prayer at the fifty-yard line after the conclusion of a football game. He was disciplined only after BSD tried in vain to reach an accommodation with him after

he (in a letter from his counsel) demanded the right to pray in the middle of the football field immediately after the conclusion of games while the players were on the field, and the crowd was still in the stands. He advertised in the area's largest newspaper, and local and national TV stations, that he intended to defy BSD's instructions not to publicly pray with his players while still on duty even though he said he might lose his job as a result. As he said he would, Kennedy prayed out loud in the middle of the football field immediately after the conclusion of the first game after his lawyer's letter was sent, surrounded by players, members of the opposing team, parents, a local politician, and members of the news media with television cameras recording the event, all of whom had been advised of Kennedy's intended actions through the local news and social media.

In his statement, Judge O'Scannlain omits most of the key facts in this case, reorders the chronology of events, and ignores pertinent Establishment Clause law, much of which has been in place for more than half a century.

I.

When Joseph Kennedy was hired by BSD in 2008, his post-game prayers were initially silent and private. *Kennedy v. Bremerton Sch. Dist. (Kennedy III)*, 991 F.3d 1004, 1010 (9th Cir. 2021). Over the ensuing years, however, Kennedy made it his mission to intertwine religion with football. Eventually, he led the team in prayer in the locker room before each game, and some players began to join him for his post-game prayer, too, where his practice ultimately evolved to include full-blown religious speeches to, and prayers with, players from both teams after the game, conducted while the players were still on the field and while fans remained in the stands. *Id.*

When BSD's Athletic Director heard about Kennedy's practices, he told Kennedy that he should not be conducting prayers with his players. *Id.* Kennedy then wrote on his Facebook page that he thought he might have been fired for praying. *Id.* at 1011. According to Principal John Polm's deposition, that post resulted in "thousands of people saying they were going to attend and storm the field with [Kennedy] after the game." In addition, Superintendent Aaron Leavell wrote in his declaration that "[o]nce the topic arose, the District was flooded with thousands of emails, letters, and phone calls from around the country, many of which were hateful or threatening." *Kennedy III*, 991 F.3d at 1011. Clearly, from that time forward, the public was watching to see whether BSD would permit Kennedy to continue his demonstrative religious practices while he was on the job. The public's interest was neither surprising nor unintended; during the course of these events, Kennedy gave numerous media interviews describing his practice of praying mid-field at the conclusion of BHS's games, and of his intention to defy BSD in so doing.

Having learned of Kennedy's on-duty religious practice, BSD concluded that it needed to make certain the coaching staff clearly understood the parameters of what was expected of them regarding religious activities while on the job. *Id.* BSD told the coaching staff that they could and should continue giving inspirational talks to their players but that "[t]hey must remain entirely secular in nature, so as to avoid alienation of any team member." *Id.* BSD also advised that "[s]tudent religious activity must be entirely and genuinely student-initiated, and may not be suggested, encouraged (or discouraged), or supervised by any District staff." *Id.* BSD further counseled that "[i]f students engage in religious activity, school staff may not take any action likely to be perceived by a reasonable observer, who is aware of the

history and context of such activity at BHS, as endorsement of that activity." *Id.* Last, BSD stressed that Kennedy personally was

> free to engage in religious activity, including prayer, so long as it does not interfere with job responsibilities. Such activity must be physically separate from any student activity, and students may not be allowed to join such activity. In order to avoid the perception of endorsement discussed above, such activity should either be non-demonstrative (*i.e.*, not outwardly discernible as religious activity) if students are also engaged in religious conduct, or it should occur while students are not engaging in such conduct.

Id.

Kennedy initially followed BSD's instructions, ceasing both his pre-game and post-game prayers, but he eventually commenced a very public campaign against BSD focused only on the post-game activity. Quoting from our opinion:

> Kennedy's increasingly direct challenge to BSD escalated when he wrote BSD through his lawyer on October 14, 2015. The letter announced that Kennedy would resume praying on the fifty-yard line immediately after the conclusion of the October 16, 2015 game. Kennedy testified in his deposition that he intended the October 14 letter to communicate to the district that he "wasn't going to stop [his] prayer because there was [sic] kids around [him]." In other words, Kennedy was planning to pray on the fifty-

> yard line immediately after the game, and he would allow students to join him in that religious activity if they wished to do so. The lawyer's letter also demanded that BSD rescind the directive in its September 17 letter that Kennedy cease his post-game prayers at the fifty-yard line immediately after the game.
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> Kennedy's intention to pray on the field following the October 16 game was widely publicized through Kennedy and his representatives' "numerous appearances and announcements [on] various forms of media." For example, the Seattle Times published an article on October 14 (the same day as the lawyer's letter was sent to BSD), entitled "Bremerton football coach vows to pray after game despite district order. A Bremerton High School football coach said he will pray at the 50-yard line after Friday's homecoming game, disobeying the school district's orders and placing his job at risk."[1]
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> In an attempt to secure the field from public access, BSD "made arrangements with the Bremerton Police Department for security, had signs made and posted, had 'robo calls' made to District parents, and otherwise put

[1] The Seattle Times has the twenty-third largest circulation of any newspaper in the country, with an average Sunday circulation of 364,454. *See Circulation numbers for the 25 largest newspapers*, Seattle Times (May 1, 2012), https://bit.ly/2OGgYX5.

> the word out to the public that there would be no access to the field." A Satanist religious group contacted BSD in advance of the game to notify them that "it intended to conduct ceremonies on the field after football games if others were allowed to."
>
> On the day of the game, the District had not yet responded to Kennedy's letter. Kennedy nonetheless proceeded as he indicated he would. The Satanist group was present at the game, but "they did not enter the stands or go on to the field after learning that the field would be secured." But Kennedy had access to the field by virtue of his position as a public-school employee. Once the final whistle blew, Kennedy knelt on the fifty-yard line, bowed his head, closed his eyes, "and prayed a brief, silent prayer." According to Kennedy, while he was kneeling with his eyes closed, "coaches and players from the opposing team, as well as members of the general public and media, spontaneously joined [him] on the field and knelt beside [him]." Kennedy's claim that the large gathering around him of coaches, players, a state elected official, and other members of the public who had been made aware of Kennedy's intentions because of the significant amount of publicity advertising what Kennedy was about to do, was "spontaneous" is self-evidently [false]. Moreover, Kennedy's counsel acknowledged in his October 14, 2015 letter that Kennedy's prayers were "verbal" and "audible," flatly

contradicting Kennedy's own recounting. BSD stated that this demonstration of support for Kennedy involved "people jumping the fence" to access the field, and BSD received complaints from parents of students who had been knocked down in the stampede. Principal John Polm said that he "saw people fall[.]" Principal Polm testified that "when the public went out onto the field, we could not supervise effectively," resulting in "an inability to keep kids safe." A photo of this scene is in the record, and it depicts approximately twenty players in uniform kneeling around Kennedy with their eyes closed, a large group of what appear to be adults standing outside the ring of praying

players, and several television cameras photographing the scene.[2]

In the days after the game, similar pictures were "published in various media." Kennedy also made numerous media appearances in connection with the October 16 game, to, in his words, "spread[ ] the word of what was going on in Bremerton." For example, on October 18, 2015, CNN featured an article entitled "Despite orders, Washington HS coach prays on field after game."

On October 23, 2015, BSD sent Kennedy a letter explaining that his conduct at the October 16 game violated BSD's policy. BSD reiterated that it "can and will"

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Post-game ritual on the field, October 16, 2015

> accommodate "religious exercise that would not be perceived as District endorsement, and which does not otherwise interfere with the performance of job duties." To that end, it suggested that "a private location within the school building, athletic facility or press box could be made available to [Kennedy] for brief religious exercise before and after games." Kennedy, of course, could also pray on the fifty-yard line after the stadium had emptied, as he did on September 18. Because the "[d]evelopment of accommodations is an interactive process," the District invited Kennedy to offer his own suggestions. Kennedy and his attorneys' only response in the record to BSD's invitation was informing the media that the only acceptable outcome would be for BSD to permit Kennedy to pray on the fifty-yard line immediately after games.
>
> Kennedy engaged in the same behavior in violation of BSD's directive on October 23, 2015 and October 26, 2015. A photo taken after the October 23 game shows Kennedy kneeling alone on the field while players and other individuals mill about. A photo taken after the October 26 game shows at least six individuals, some of whom appear to be school-age children, kneeling around Kennedy.
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> . . . .
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> During this time, other BSD employees testified that they suffered repercussions due

> to the "attention given to Mr. Kennedy's issue and the way he chose to address the situation." For example, Nathan Gillam, BHS's head football coach, testified that during the controversy, "an adult who [he] had never seen before came up to [his] face and cursed [him] in a vile manner." Gillam further stated that he was concerned for his physical safety. He testified, "One of the assistant football coaches was also a police officer and, as we headed down to the field for one game, I obliquely asked him what he thought about whether we could be shot from the crowd." As a result of these concerns, Gillam "decided that [he] would resign" from the coaching position he had held for eleven years.
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> After the season wound down, BSD began its annual process of providing its coaches with performance reviews. Gillam recommended that Kennedy not be rehired because Kennedy "failed to follow district policy," "his actions demonstrated a lack of cooperation with administration," he "contributed to negative relations between parents, students, community members, coaches and the school district," and he "failed to supervise student-athletes after games due to his interactions with [the] media and [the] community." Kennedy did not apply for a 2016 coaching position.

Kennedy III, 991 F.3d at 1012–14.

When Kennedy sought injunctive relief from the Supreme Court after we decided *Kennedy v. Bremerton School District (Kennedy I)*, 869 F.3d 813 (9th Cir. 2017), Justice Alito noted that "important unresolved factual questions would make it very difficult if not impossible at this stage to decide the free speech question that the petition asks us to review." *Kennedy v. Bremerton Sch. Dist. (Kennedy II)*, 139 S. Ct. 634, 635 (2019) (mem.) (Alito, J., concurring in denial of certiorari). Specifically, Justice Alito believed that the Court was unable to review our decision until the record was clear about "the basis for the school's action" against Kennedy. *Id.* But after the case was remanded to the district court and discovery was completed, *the district court ruled that "the risk of constitutional liability associated with Kennedy's religious conduct was the 'sole reason' the District ultimately suspended him."* *Kennedy III*, 991 F.3d at 1010 (emphasis added).

Judge O'Scannlain recounts only the facts that he claims are "constitutionally relevant." While our panel—like the Supreme Court—"refuse[s] to turn a blind eye to the context in which" an Establishment Clause violation would arise, *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 315 (2000), many of the facts that Judge O'Scannlain selectively deems "constitutionally relevant" in his statement are unmoored from the record. For the reader's convenience, I here provide each material unmoored statement below, along with the accurate version, as reflected in the record.

The unmoored claim	What the record actually shows
"[S]tudents and coaches began to join Kennedy in prayer of their own accord."	There is no support for the suggestion that players could have avoided

Statement at 46 (O'Scannlain, J., statement regarding denial of rehearing en banc).	Kennedy's pre-game locker room prayers or post-game on-field prayers. At least one atheistic student athlete only participated in the post-game prayers because he feared he would get less playing time if he declined. No students prayed on the field without Kennedy when Kennedy paused his practice of doing so.
"Kennedy's prayer—no matter how personal, private, brief, or quiet—was *wholly unprotected* by the First Amendment." Statement at 52 (O'Scannlain, J., statement regarding denial of rehearing en banc).	Kennedy's prayer was public, audible, and created a scene that included students being knocked down in the rush to jump over the fence to join Kennedy on the field.
"Kennedy essentially asked his employer to *do nothing*—simply to tolerate the brief, quiet prayer of one man." Statement at 64 (O'Scannlain, J., statement regarding denial of rehearing en banc).	Kennedy engaged in private prayer for several years. But when BSD learned that he had begun leading students in pre-game locker room prayers and giving overtly religious speeches on the field post-game, it directed him to stop that practice. Kennedy demanded that his employer allow him to

	engage in a public religious demonstration surrounded by school-age children in front of a large crowd, in an area he could only access because he was a public employee.
The panel relied "simply on the existence of a District policy that coaches should 'exhibit sportsmanlike conduct at all times'" to determine Kennedy's job duties. Statement at 52 (O'Scannlain, J., statement regarding denial of rehearing en banc).	The panel relied on numerous facts in the record, including BSD's direction that Kennedy engage in motivational speech to students of a secular nature at the end of each game. The panel also relied on Kennedy's own characterization of his duties as a role model and mentor, and his agreement to "maintain positive media relations," "obey all the Rules of Conduct before players and public," and "serve[] as a personal example." Kennedy "plainly understood that demonstrative communication fell within the compass of his professional obligations." *Kennedy I*, 869 F.3d at 826.
"[O]n the panel's view, a school can restrict any	A school can guide the content of demonstrative

speech for any reason so long as it instructs its employees to demonstrate good behavior in the presence of others." Statement at 54 (O'Scannlain, J., statement regarding denial of rehearing en banc).	speech to students during times when the employee's job duties require that speech. *Kennedy III*, 991 F.3d at 1015.
The panel held "that prayer was one of Kennedy's job duties when his employer maintained a policy banning it[.]" Statement at 58 (O'Scannlain, J., statement regarding denial of rehearing en banc).	The panel held that speech and demonstrative conduct after football games was one of Kennedy's job duties, and therefore, his carrying out of those duties was speech as a public employee. *Kennedy I*, 869 F.3d at 826. This is quintessential regulable government employee speech.
"Only by ignoring everything the District said and did could an observer (mistakenly) think the school was endorsing Kennedy's [prayer]." Statement at 67 (O'Scannlain, J., statement regarding denial of rehearing en banc).	Given Kennedy's media campaign, if BSD had dropped its opposition to Kennedy's prayer instead of suspending him, an objective observer would believe that BSD now agreed that Kennedy was allowed to publicly pray surrounded by his players as a demonstration for the crowd. BSD's prior

	objection to the practice, followed by its accession, would magnify, not diminish, BSD's stamp of approval.
"[T]he panel neglects other, more narrowly tailored remedies." Statement at 68 (O'Scannlain, J., statement regarding denial of rehearing en banc).	Kennedy rejected any compromise and demanded that he be allowed to pray on the field surrounded by his players and in front of all the game's attendees.
"[T]he district could have disclaimed Kennedy's prayer." Statement at 69 (O'Scannlain, J., statement regarding denial of rehearing en banc).	A disclaimer would have no effect on the proven coercive effect Kennedy's prayers had on his players. This coercive effect is documented in the record.

II.

With the *real* facts in mind, let us next consider the relevant law. Kennedy alleged BSD's actions violated his First Amendment Free Speech rights. We consider "a sequential five-step series of questions" when evaluating Free Speech claims brought by public employees. *Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009). *Eng*'s second and fourth questions are at issue in this case: whether Kennedy spoke as a private citizen or as a public employee, and whether BSD had adequate justification for treating Kennedy differently from other members of the public. BSD argued Kennedy's Free Speech claim failed because he spoke as a public employee and, even if he spoke as a private

citizen, BSD had adequate justification for treating Kennedy as it did because BSD would have violated the Establishment Clause if it had permitted Kennedy to continue his religious practices on the field.

I begin my legal analysis where Judge O'Scannlain ended: with the Establishment Clause.

> By the time of the adoption of thef Constitution, our history shows that there was a widespread awareness among many Americans of the dangers of a union of Church and State. These people knew, some of them from bitter personal experience, that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer[.]

Engel v. Vitale, 370 U.S. 421, 429 (1962). For that reason, the Court in *Engel* held that a New York school district violated the Establishment Clause by having students recite a prescribed non-denominational prayer at the beginning of each school day. *Id.* at 436. Following *Engel*, Establishment Clause doctrine evolved to take special care when challenged religious endorsement occurred in schools. *See Lee v. Weisman*, 505 U.S. 577, 592 (1992) ("[T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."). In *Lee*, the Court held that it was unconstitutional for a Providence, Rhode Island high school to include a prayer by a clergyman in its graduation ceremony. *Id.* at 599. When discussing the graduation prayer, the Court was guided by "the lesson of history that was and is the inspiration for the Establishment Clause, the

lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce." *Id.* at 591–92. Religious expression that bears "the imprint of the State" results in "grave risk [to] that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed." *Id.* at 590, 592. And in *Abington Township*, the Court ruled that optional morning readings from the Bible in public schools were unconstitutional, writing, "[W]e cannot accept that the concept of neutrality, which does not permit a State to require a religious exercise even with the consent of the majority of those affected, collides with the majority's right to free exercise of religion." *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 225–26 (1963). The Court continued, "While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs." *Id.* at 226. This brief review of the treatment of prayer in schools brings us to Kennedy's claim that he should have been allowed to use his access to the BSD's football field, its sports program, and the attention of BSD's spectators, to practice his beliefs.

If allowing Kennedy to continue his religious practice would have violated the Establishment Clause, BSD's restriction had "an adequate justification" for *Pickering*/*Eng* purposes, and its action was thus constitutional. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001) (holding that "a state interest in avoiding an Establishment Clause violation 'may be characterized as compelling,'" and justify restricting other First Amendment rights).

Judge O'Scannlain contends that the panel failed to identify the state action that constitutes an Establishment

Clause violation. That is a curious misreading of our opinion. We explained that Kennedy's media appearances and refusal to comply with BSD directives had created a public controversy, and, understanding how Kennedy's religious practice had evolved, we specifically identified "BSD's allowance of [Kennedy's religious] activity" as the state action that would have violated the Establishment Clause. *Kennedy III*, 991 F.3d at 1017; *see Santa Fe*, 530 U.S. at 305–06 (holding that a school's choice to permit student religious activity is enough to make student-led "pregame prayers bear the imprint of the State" (internal quotation marks omitted)). In writing that "private religious speech on public school property does not constitute state action and therefore does not run afoul of the Establishment Clause," Statement at 63 (O'Scannlain, J., statement regarding denial of rehearing en banc), Judge O'Scannlain puts the cart before the horse and ignores the controlling rule from *Santa Fe*. In reality, religious speech uttered by an individual on school property *can* violate the Establishment Clause if an objective observer would view the speech as stamped with the school's seal of approval. For example, in *Collins v. Chandler Unified School District*, we held that the school's practice of permitting students to say a prayer of their choosing at the beginning of student assemblies violated the Establishment Clause. 644 F.2d 759, 760–61 (9th Cir. 1981). The Student Council (not the school itself) selected the individual who would give the prayer and noted the event on the assembly agenda. *Id.* Like in *Kennedy*, the prayer in *Collins* was the independent choice of private individuals. Merely by allowing the prayer to take place, the school violated the Establishment Clause. The same would

be true here if BSD had allowed Kennedy's prayers to continue.[3]

Judge O'Scannlain's statement misses the crucial point that becomes clear when the events are viewed in the order in which they actually occurred. The panel was required to address the choice BSD confronted: impose some limits on Kennedy's First Amendment expression, or violate the Establishment Clause. It is only through this analysis that we could determine whether BSD's decision to limit Kennedy's religious expression was backed by a compelling interest.

As the Supreme Court made clear in *Santa Fe*, the context in which religious expression occurs is the touchstone for the Establishment Clause analysis. *Santa Fe*, 530 U.S. at 303–08. The Court instructed us to ask "whether an objective observer, acquainted with the text, [ ] history, and implementation of [the policy], would perceive it as a state endorsement of prayer in public schools." *Id.* at 308 (citation omitted). For this reason, we examined the context in which Kennedy's prayers occurred, including his publicity-seeking activities leading up to the games on October 16, 23, and 26 (after which he was suspended), the Coach's historical practice that resulted in players feeling pressure to pray with him, and his insistence that the prayer take place before the football players left the field or the fans left the stands. (As noted, BSD offered Kennedy multiple accommodations, including one—which he accepted for a

[3] Incidentally, in rejecting another prayer-in-schools Establishment Clause claim, Judge O'Scannlain attempted to distinguish *Collins*. *Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832, 836 (9th Cir. 1998). But his opinion was vacated upon en banc rehearing, and the en banc court decided the case on different grounds. 177 F.3d 789 (9th Cir. 1999).

time—that allowed him to wait until students had left the field to say his mid-field prayer.) And like the Court in *Santa Fe*, we concluded that if BSD had allowed Kennedy to continue his activities rather than suspending him, an objective observer would have been left with no doubt that BSD endorsed the integration of prayer into the football games.

Still, Judge O'Scannlain maintains, our examination "drain[ed]" the Establishment Clause case law of "the factors animating [its] logic," which our colleague lists as "the school policy, the degree of control over employee speech, neutrality toward religion, or the possibility of coercion." In fact, these considerations featured prominently in *Kennedy III*: as stated previously, "the school policy" is set out in our opinion, and the question was whether BSD could allow Kennedy's religious expression directed at students. As for the degree of control over Kennedy's speech, BSD personnel specifically instructed Kennedy "(1) that he should speak to players post-game and (2) what the speeches should be about[.]" *Kennedy III*, 991 F.3d at 1016. With respect to neutrality toward religion, allowing Kennedy to pray in the manner he demanded would have forced BSD either to open the field to all religious practices or forgo neutrality. As we explained, "[a] Satanist religious group contacted BSD in advance of the [October 16] game to notify them that 'it intended to conduct ceremonies on the field after football games if others were allowed to.'" *Id.* at 1012. And as for the possibility of coercion, *Kennedy III* extensively discussed the uncontroverted direct and circumstantial evidence in the record that some of the players felt coerced to pray with Coach Kennedy, and that he intended to continue that practice. *Id.* at 1018 ("Over time, little by little, his players began to join him in this activity—at least one out of a fear

that declining to do so would negatively impact his playing time."); *id.* at 1012 ("Kennedy testified in his deposition that he intended the October 14 letter to communicate to the district that he 'wasn't going to stop [his] prayer because there was [sic] kids around [him].'"); *id.* at 1013 ("When Kennedy was on leave, and during the time he temporarily ceased performing on-field prayers, BHS players did not initiate their own post-game prayer."). We addressed every factor Judge O'Scannlain says we ignored, and each supported our disposition. Given Kennedy's own statement that he would pray with students if allowed to remain at his post, *id.* at 1012, the (very real) threat of an Establishment Clause violation justified his suspension.

Judge O'Scannlain's final assertion is that we overlooked BSD's option to provide a disclaimer that Kennedy's religious activity did not carry the school's endorsement. But this resolution would not dispel the pressure that players on the team felt to join in their coach's prayer circle out of fear that their playing time would suffer if they opted out. Disclaimers are insufficient in "coercive" contexts, *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 984–85 (9th Cir. 2003); our colleague's statement conveniently omits the uncontested evidence that Kennedy's conduct left some of his players feeling pressure to participate in mid-field prayers after the game. In addition, the record also shows that no players prayed on the field when Kennedy was not there, which speaks to the coercive effect of Kennedy's religious practices.

I must not neglect to mention the dissent of a second colleague who believes our opinion should have been reheard en banc, Judge Ryan Nelson. Judge R. Nelson's dissent to the denial of rehearing en banc appears to be based on two claims: (1) *Santa Fe* should not be extended because

it is "ahistorical"; and (2) we applied *Santa Fe*'s test incorrectly. Cabining Supreme Court precedent is a job for the Supreme Court—not a three-judge *or* en banc panel of our court—and I suspect Judge R. Nelson is fully aware of that fact. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("[T]he Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions."). Likewise, Judge Ikuta's suggestion that we should have taken this case en banc to develop a "framework for evaluating how a public employer can protect its employee's religious expression without becoming vulnerable to an Establishment Clause claim" would ostensibly conflict with the Supreme Court's decisions that already prescribe how courts should evaluate prayer in schools. We are not at liberty to make such a change.

As for the second of Judge R. Nelson's concerns, I strongly disagree. Initially, Judge R. Nelson prejudges the issue by claiming that the panel's reliance on *Santa Fe* was "inapt" because permitting Kennedy's prayer would not have been an endorsement of religion. Dissent at 75 (R. Nelson, J., dissenting from denial of en banc rehearing). However, the *Santa Fe* test is *how we are required to determine* whether a particular state action unconstitutionally establishes religion. For that reason, the panel did not "extend" *Santa Fe*—we applied the relevant law to the facts in the record. Moreover, there are substantive problems with Judge R. Nelson's contention that players were not coerced into joining Kennedy's prayers. Most importantly, Judge R. Nelson gives short shrift to the clear line the Supreme Court has drawn between adults and children in discussing Establishment Clause coercion. In *Town of Greece*, the case upon which Judge R. Nelson relies for his coercion argument, the Court in fact distinguished "an

unconstitutional imposition as to mature adults, who 'presumably' are 'not readily susceptible to religious indoctrination or peer pressure,'" from high school students at a school-sponsored event. *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 590 (2014) (citation omitted). Unlike in adult environments, taking into account "students' emulation of teachers as role models and the children's susceptibility to peer pressure," "[t]he Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Edwards v. Aguillard*, 482 U.S. 578, 583–84 (1987). Judge R. Nelson's coercion argument falls flat because it treats children as adults, in contravention of the Supreme Court's instruction that the two are different for purposes of determining the danger of coercion.

Additionally, Judge R. Nelson minimizes the experience of the student athlete who prayed with Kennedy in contravention of his own religious beliefs because he felt that declining to do so would decrease his playing time. Dissent at 80, (R. Nelson, J., dissenting from denial of rehearing en banc). This student's experience—which is undisputed in the record—perfectly illustrates the importance of the difference between teens and adults that the Court set forth in *Town of Greece*. Why is this student's right to be free from coercive pressure to violate his own religious beliefs inferior to Kennedy's right to practice his in such a public and demonstrative way? Judge R. Nelson's outright dismissal of this student's actual participation in a religious exercise that violated his beliefs is surprising. It implies that religious freedom is reserved for sectarian Christians, but not necessarily for those who are Jewish, Muslim, Buddhist, atheist, or who hold to other creeds. That approach, of course, flies in the face of current Supreme Court law.

Finally, Judge R. Nelson conflates the coercion inquiry with the *Santa Fe* inquiry, which perhaps contributes to his mistaken perspective on this issue. *See* Dissent at 80 n.5 (R. Nelson, J., dissenting from denial of rehearing en banc). Kennedy's publicity campaign was relevant not because it coerced the public to storm the field, but because it was essential to consider the *context* of Kennedy's religious activity in determining whether BSD's dropping its objection to Kennedy's behavior would cause an objective observer to view the activity as stamped with the school's seal of approval. In contrast, the coercive effect of Kennedy's religious activity is apparent from the record of events *before* BSD instructed Kennedy to stop leading students in prayer. By the same token, this evidence shows that it is also likely that players would feel pressured to join Kennedy's prayer *in the future* if BSD gave Kennedy back his religious bully pulpit.

Several of our dissenting colleagues also suggest that the conflict between Kennedy and BSD made clear that BSD did not endorse Kennedy's religious activity. As stated above, the operative fact in this hypothetical would be BSD *dropping* its opposition to the activity—the very outcome Kennedy sought. Dropping opposition to the practice is different in kind from publicly opposing it. But more broadly, adopting a rule that rewards an employee's ability to garner public support and media coverage of a dispute with his employer would come with perverse incentives. Let us assume for a moment that an employer will act more forcefully to curb a more egregious potential Establishment Clause violation. Under a rule that uses the force of the employer's response to decide whether there ever was an Establishment Clause violation in the first place, the worst violations that receive the strongest responses would no longer be considered violations. That approach simply

makes no sense, and conflicts sharply with current Supreme Court law.

III.

The actual facts of the case also leave no question that Kennedy did not carry his burden to show that he spoke as a private citizen, which is an independent basis to affirm the district court.[4] In reaching the opposite conclusion, Judge O'Scannlain sets aside the context of Kennedy's audible prayers as well as Kennedy's acknowledgment that he was on duty while on the field with his players, and contends that our panel misapplied *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the central Supreme Court precedent for determining whether a government employee speaks as a private citizen or as a public official.

Judge O'Scannlain's contention that our opinion misapplied *Garcetti* is simply wrong on the current law. In *Garcetti*, the Court wrote that "[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." 547 U.S. at 418. One reason for this is that government employees "often occupy trusted positions in society," *id.* at 419, (such as a

[4] Judge O'Scannlain appears to disapprove of the fact that our opinion included alternative holdings on prongs two and four of the *Eng* test. Statement at 59 (O'Scannlain, J., statement regarding denial of rehearing en banc). The practice of including alternative holdings or *arguendo* assumptions is quite common, familiar to, and used by Judge O'Scannlain, and does not connote a court's lack of confidence in the first alternative holding. *See Ctr. for Biological Diversity v. Lohn*, 511 F.3d 960, 965 (9th Cir. 2007) (O'Scannlain, J.); *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1069 (9th Cir. 1998) (O'Scannlain, J.); *Huffman v. Cnty. of L.A.*, 147 F.3d 1054, 1060 (9th Cir. 1998) (O'Scannlain, J.); *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1307 (9th Cir. 1997) (O'Scannlain, J.).

mentor to high school students, as Kennedy was). When a person in a trusted position "speak[s] out, they can express views that contravene governmental policies or impair the proper performance of governmental functions." *Id.* At bottom, "[u]nderlying [the Court's] cases has been the premise that while the First Amendment invests public employees with certain rights, it does not empower them to 'constitutionalize the employee grievance.'" *Id.* at 420 (quoting *Connick v. Thompson*, 461 U.S. 138, 154 (1983)). *Garcetti* considered several factors: whether the employee speech was expressed internally or publicly, whether the speech concerned the subject matter of the employee's job, and—most importantly—whether the speech was "made pursuant to his duties" as a public employee. *Id.* at 420–22. In subsequent cases, our circuit alternately phrased this last inquiry as whether "the speech at issue owes its existence to" the speaker's government employment. *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 970 (9th Cir. 2011), *cert. denied*, 566 U.S. 906 (Mar. 26, 2012). [5]

An integral part of Kennedy's job was serving as a mentor and role model to students.[6] BSD recognized that

[5] Judge O'Scannlain's statement also relies heavily on the minority statement regarding denial of certiorari the last time this case was before the Supreme Court. It bears repeating that the relevant justices acknowledged they did not have the benefit of factual development in this case when the statement was made, and that four justices do not represent the opinion of the Court.

[6] It was also Kennedy's stated intent that his behavior set an example for children watching. Kennedy testified during his deposition that his behavior in the presence of students was "*always* setting some kind of an example to the kids . . . to do what is right." (Emphasis added.) In an interview published on May 3, 2019, Kennedy affirmed that he viewed his religious activity as setting an example, stating "[A]s a Marine, I knew I had to fight. I always told the young men whom I coached to

one of the ways in which he carried out this duty was by giving post-game motivational speeches to his players on the field after football games. Kennedy's employer requested that he engage in such expressions. In BSD's September 17 letter to Kennedy, Superintendent Aaron Leavell wrote, "You may continue to provide motivational inspirational talks to students before, during and after games and other team activity, focusing on appropriate themes . . . that have long characterized your very positive and beneficial talks with students." Leavell later wrote to Kennedy that he "values very highly" Kennedy's "positive contributions to the BHS football program and in particular," his "motivational and inspirational talks to players" after games. Leavell "encourage[d] continuation of" the practice of post-game secular motivational speeches to students.

Applying *Garcetti* to this fact pattern, the record leaves no doubt that Kennedy's prayers were speech in his capacity as a public employee. Kennedy insisted on expressing his religious speech publicly (indeed, he refused to wait until the audience had left the stadium so his prayers could be observed by all those on the field and in the stadium); the record shows he would not have had access to the field if he had not been working as a coach; he admitted he was on duty when he prayed on the field; and the prayers were uttered in violation of his employer's instructions as part of the post-game motivational speeches his employer had encouraged him to continue providing for the players. Given these facts, there can be no genuine dispute that this speech was within

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stand up when adversity came their way. I had to be a leader to them and live up to what I said. So I wasn't going to back down[.]" *See Kennedy III*, 991 F.3d at 1017 n.2. Clearly, Kennedy himself viewed persisting in his public prayers as part of his service as a role model to students in fulfillment of his job duties.

Kennedy's job description, and I reject the notion that our conclusion somehow improperly broadens Kennedy's duties in a way that contravenes *Garcetti*.

* * *

In sum, based on the actual facts of the case, our conclusion in *Kennedy III* faithfully applies the relevant current law. I hope as this case proceeds that the truth of what actually happened will prevail, but whether it does or not, I personally find it more than a little ironic that Kennedy's "everybody watch me pray" staged public prayers (that spawned this multi-year litigation) so clearly flout the instructions found in the Sermon on the Mount on the appropriate way to pray.[7] I concur in our court's denial of rehearing this case en banc.

[7] 5 And when thou prayest, thou shalt not be as the hypocrites are: for they love to pray standing in the synagogues and in the corners of the streets, that they may be seen of men. Verily I say unto you, They have their reward.

6 But thou, when thou prayest, enter into thy closet, and when thou hast shut thy door, pray to thy Father which is in secret; and thy Father which seeth in secret shall reward thee openly. Matt 6:5–6 (King James).

CHRISTEN, Circuit Judge, joined by D.W. NELSON, Senior Circuit Judge, concurring in the denial of rehearing en banc:

I do not typically publish my views concerning our court's decisions to grant or deny rehearing en banc, but I make an exception here because the salient facts that compelled our three-judge panel's decision to affirm the district court's summary judgment ruling may be obscured by the spirited statements dissenting from our court's denial of rehearing en banc. Our three-judge panel unanimously affirmed the district court's summary judgment ruling because Coach Kennedy spoke as a public employee, because Bremerton School District (BSD) did not demonstrate a hint of hostility or bias toward religion or non-religion, and because BSD had a compelling interest in avoiding an Establishment Clause violation. *Kennedy v. Bremerton Sch. Dist.* (*Kennedy III*), 991 F.3d 1004, 1014–21 (9th Cir. 2021) (citing *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 113–14 (2001)). The outcome of this appeal was driven by the particular facts and circumstances of Coach Kennedy's post-game, on-field prayers, *see id.* at 1010–14, so it is critically important that we not stray from the facts that are supported by the record.

To begin, given the record presented to the district court, there is no genuine dispute that Coach Kennedy spoke as a public employee. Recognizing the Supreme Court's caution that job descriptions must not be read too broadly, *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006), the proper inquiry to determine whether a task is within the scope of a public employee's professional duties is a practical one, *id.* Here, the practical inquiry into the duties of a high school football coach must acknowledge that football coaches occupy a significant leadership role in their high school communities

and wield undeniable—perhaps unparalleled—influence where their players are concerned.[1] *Kennedy III*, 991 F.3d at 1015–16, 1025. Contrary to our dissenting colleagues' suggestions, the parties did not consider this point to be controversial. Indeed, Coach Kennedy agreed that "for some kids, the coach might even be the most important person they encounter in their overall life," and that "the scope of what a coach has to do with some of the kids . . . is much more than what any teacher in a classroom has to do." *Id.* at 1025.

Second, regardless of Coach Kennedy's subjective intent, there was uncontroverted evidence that Coach Kennedy's prayerful speech had a coercive effect on his players. At least one student felt compelled to join Coach Kennedy's post-game prayers, contrary to the player's own beliefs, because he feared he would get less playing time if he did not participate. The record also shows that the players did not initiate their own post-game prayer when Coach Kennedy temporarily ceased his practice, nor after Coach Kennedy had been suspended. The conscientious district judge assigned to this case appropriately factored these practical considerations into his description of Coach Kennedy's job duties, and recognized that, in addition to teaching students how to play the game, *i.e.*, teaching players how to block and tackle, Coach Kennedy's job required him to motivate and mentor students, set a good example, and

[1] *See* Brief of Amicus Curiae Former Professional Football Players Steve Largent and Chad Hennings at 1–2, *Kennedy v. Bremerton*, 869 F.3d 813 (9th Cir. 2017) (No. 16-35801), 2016 WL 6649979 at *1 (Pro Football Hall of Famer Steve Largent "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," and College Football Hall of Famer Chad Hennings "attributes much of his success to lessons imparted to him by the men who coached him throughout his scholastic and professional athletic endeavors.").

strive to "create good athletes and good human beings." *See id.* at 1010.

Third, our three-judge panel did not suggest that a coach or teacher necessarily speaks as a public employee every time he or she prays within eyeshot of students. Indeed, we illustrated that point by including a few examples where educators might engage in brief on-duty prayer that would be plainly private and pose no risk of violating the Establishment Clause. *Id.* at 1015–16, 1025. We explained that a teacher tasked with supervising a high school cafeteria would not risk an Establishment Clause violation if she took a moment to give thanks before eating her meal, and that the Establishment Clause "can surely accommodate high school students observing a teacher giving thanks for an 'all clear' announcement in the wake of a safety scare." *Id.* at 1015, 1025. We had no reason to explore or define the permissible limits of such speech in a school setting because Coach Kennedy's prayer so clearly crossed the line by purposefully sending a very public message. Coach Kennedy's prayers occurred on the fifty-yard line, immediately following the team's games, before the players left the field, under the stadium lights, and while spectators remained in the stands. *Kennedy III*, 991 F.3d at 1010, 1024. To be clear, Coach Kennedy insisted that he pray *immediately* after the games, not while the players were on their way back to the locker room. The players had not yet left the field and were sometimes still shaking the hands of the opposing players or singing the school fight song when Coach Kennedy knelt and audibly prayed. Although he initially agreed to one of BSD's suggested accommodations and prayed after the players and fans left the stadium, *see id.* at 1011–12, it is important to recognize that by the time the parties' dispute came to a head, Coach Kennedy had refused all BSD's accommodations and insisted that he be allowed to worship

at his chosen time and place: at midfield, with players and fans present. Our conclusion that Coach Kennedy spoke as a public employee when he prayed at midfield following the team's games rested on the facts in the record.

Respectfully, our colleagues' dissenting statements concerning the denial of rehearing en banc take sound bites from the record out of sequence and paint an inaccurate picture of the dilemma Coach Kennedy created. Though his prayers may have started as personal and private, they evolved into post-game motivational speeches to the majority of his players, and Kennedy admitted his speeches likely constituted prayers. *Id.* at 1011. After an opposing coach informed BSD that Coach Kennedy invited the opposing team to participate in post-game prayer, BSD directed Coach Kennedy not to pray with the students. But BSD encouraged Coach Kennedy to continue delivering secular post-game motivational messages. *Id.* at 1011. The district court correctly concluded that, at all times relevant to Coach Kennedy's claims, he spoke as a public employee when he prayed on the field immediately following games. Despite our dissenting colleague's protests, the record does not support the notion that he engaged in private personal prayer.

A few other points bear repeating: (1) BSD never sanctioned Coach Kennedy for engaging in private prayer; (2) as we describe at some length, Coach Kennedy's post-game prayers were anything but private, *id.* at 1011–14, 1025; (3) nowhere did our panel suggest that a school district will be subject to a viable Establishment Clause claim any time a school employee engages in private prayer; (4) Coach Kennedy rejected several accommodations BSD offered that would have allowed him to pray privately, instead demanding that he be permitted to pray on the fifty-yard line

immediately following games, while players, spectators, and media looked on, *id.* at 1013, 1022. To borrow an analogy from the district court, the venue Kennedy chose for his post-game prayers was akin to a drama teacher taking center stage to pray after a school play. An objective observer would interpret a teacher's speech, delivered from that location and directed to a school audience, as "an extension of the school-sanctioned speech just before it." There is no genuine question that Coach Kennedy's prayers sent a very public message.

Contrary to the statement of one of our colleagues, Coach Kennedy was not in the position of asking BSD to "do nothing" or "tolerate the brief, quiet prayer of one man." Coach Kennedy launched a national media campaign that magnified the public nature of his post-game prayers and painted BSD into a corner. As Judge Ikuta aptly described the situation:

> Joseph Kennedy's highly public demonstrations of his religious convictions put [BSD] in a no-win situation. BSD wanted to respect Kennedy's right "to engage in religious activity, including prayer," but it feared that allowing Kennedy to engage in such highly public activity on the field after football games would create a perception that BSD was endorsing religion, in violation of the Establishment Clause.

Following Kennedy's multiple media interviews, he was joined on the field by his own players, players from opposing teams, members of the public—including a state representative—and the media. *Kennedy III*, 991 F.3d at 1010. Our three-judge panel described BSD's unsuccessful efforts to keep people off the football field and

maintain a safe environment, *id.* at 1012, but those efforts were in vain. As spectators rushed to join Coach Kennedy in on-field prayer, band members were knocked over, and one of BSD's coaches questioned whether he could be shot from the crowd. Had BSD abandoned its opposition to Coach Kennedy's on-field prayers after his multiple interviews with local and national media, an objective observer would have perceived that BSD endorsed his speech. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000).

Our dissenting colleagues suggest that BSD could have issued a public disclaimer, but that was not a realistic option; a public disclaimer in the wake of Coach Kennedy's media campaign would have only called more attention to his very public worship. Moreover, "the 'First Amendment mandates governmental neutrality between religion and religion.'" *McCreary Cnty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). Thus, BSD could not simply distance itself from Kennedy's Christian prayer and allow Kennedy to continue; rather, BSD would have had to permit access by other religious faiths, including the Satanist group that had notified BSD it "intended to conduct ceremonies on the field after football games if others were allowed to." *Kennedy III*, 991 F.3d at 1012. The suggestion that BSD could have issued a public disclaimer is untenable; BSD opened its forum for a football game, not for religious worship by all comers.

This case concerns prayer in a public school, not a town square. *See Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2092–93 (2019) (Kavanaugh, J., concurring) (identifying "religious expression in public schools" as a "categor[y] of Establishment Clause cases" distinct from

"regulation of private religious speech in public forums"); *Lee v. Weisman*, 505 U.S. 577, 592 (1992) (recognizing "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools"). The touchstone of the Court's concern in this type of case is the risk of coercion. *See Lee*, 505 U.S. at 587; *Santa Fe*, 530 U.S. at 310–13. The district court found no genuine dispute that Coach Kennedy's prayers were public, not private, and that Coach Kennedy occupied a "powerful position in his players' lives." The record includes unrebutted evidence that at least one student felt compelled to participate in Coach Kennedy's post-game prayers, contrary to the student's own religious beliefs, because he feared he would not get as much playing time if he did not. As such, the uncontested facts support the district court's conclusion that Coach Kennedy's prayers had a coercive effect.

In the future, we may be presented with close cases in which our court will have an opportunity to address the important issues raised by a public school's response to an employee's private prayer. But this is not such a case. The actual record presented in the district court bears little resemblance to the hypothetical scenarios posited by Coach Kennedy, and our decision faithfully applied existing Supreme Court precedent to the particular facts presented. Accordingly, I concur in our court's denial of rehearing en banc.

O'SCANNLAIN, Circuit Judge,[1] with whom Judges CALLAHAN, BEA, R. NELSON, COLLINS, and LEE join, with whom Judge BUMATAY joins as to Part III, and with whom Judge VANDYKE joins as to all parts except Part II-B, respecting the denial of rehearing en banc:

It is axiomatic that teachers do not "shed" their First Amendment[2] protections "at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).[3] Yet the opinion in this case obliterates such constitutional protections by announcing a new rule that *any* speech by a public school teacher or coach, while on the clock and in earshot of others, is subject to plenary control by the government. Indeed, we are told that, from the moment public high school football coach Joseph Kennedy arrives at work until the very last of his players has gone home after a game, the Free Speech Clause simply doesn't apply to him.

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[1] As a judge of this court in senior status, I no longer have the power to vote on calls for rehearing cases en banc or formally to join a dissent from failure to rehear en banc. *See* 28 U.S.C. § 46(c); Fed. R. App. P. 35(a). Following our court's general orders, however, I may participate in discussions of en banc proceedings. *See* Ninth Circuit General Order 5.5(a).

[2] U.S. Const. amend. I. References throughout this Statement will be made to the Free Speech Clause, *id.* cl. 3 ("Congress shall make no law . . . abridging the freedom of speech . . . ."), the Free Exercise Clause, *id.* cl. 2 ("Congress shall make no law . . . prohibiting the free exercise []of [religion] . . . ."), and the Establishment Clause, *id.* cl. 1 ("Congress shall make no law respecting an establishment of religion . . . .").

[3] Indeed, the Supreme Court reaffirmed this principle just a few days ago. *See Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. __, 2021 WL 2557069, at *4 (June 23, 2021) (citing *Tinker*, 393 U.S. at 506).

Kennedy lost his coaching job because he refused to abandon his practice of kneeling on the field and uttering a prayer after each football game. In 2017, the three-judge panel decided that Kennedy's prayer was wholly unprotected by the Free Speech Clause. *Kennedy v. Bremerton Sch. Dist.*, 869 F.3d 813 (9th Cir. 2017) (*Kennedy I*). In an extraordinary filing, four Justices of the Supreme Court chastised the panel for its "highly tendentious" reading of *Garcetti v. Ceballos*, 547 U.S. 410 (2006). *Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 636 (2019) (statement of Alito, J.) (*Kennedy II*).

Rather than heed the extremely rare interlocutory guidance of four Justices, the panel has doubled down on its "troubling" view. *Id.* (statement of Alito, J.). The panel now declares not only that the school district was *permitted* to suspend Kennedy, but also that it was *constitutionally required* to do so. *Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004, 1016–19 (9th Cir. 2021) (*Kennedy III*). That is strange indeed, given that this is not an action brought by a student or parent who alleges the government coerced his or her participation in a state-sponsored prayer service. No matter, the opinion here weaponizes the Establishment Clause to defeat the Free Exercise claim of one man who prayed "as a private citizen." *Id.* at 1016.

Our circuit now lies in clear conflict with *Garcetti* and decades of Supreme Court cases affirming the principle that the First Amendment *safeguards*—not banishes—private, voluntary religious activity by public employees. A decision at odds with Free Speech, Free Exercise, and Establishment Clause jurisprudence all at once, this case certainly warranted a rehearing en banc. It is unfortunate that our court has declined the opportunity to do so.

I

A

First, the facts—more specifically, the *constitutionally relevant* facts.[4] Joseph Kennedy was a football coach of Bremerton High School from 2008 to 2015. *Kennedy III*, 991 F.3d at 1010. A devout Christian, Kennedy sincerely believes that he is obliged to give thanks to God through prayer after each football game. *Id.* From the time he started coaching, Kennedy would "kneel at the 50-yard line and offer a brief, quiet prayer of thanksgiving for player safety, sportsmanship, and spirited competition." *Id.* His prayer "usually lasted about thirty seconds." *Id.*

Over the years, students and coaches began to join Kennedy in prayer of their own accord. *Id.* Sometimes Kennedy prayed quietly by himself; sometimes he combined his prayers with religious references in motivational speeches to his players. Kennedy "never coerced, required, or asked any student to pray."

In September 2015, Bremerton School District administrators learned of Kennedy's prayers. *Id.* at 1011. After an investigation, the District determined that Kennedy

[4] That is, as Kennedy's brief points out, the facts relevant to the dispute over the constitutional right Kennedy *actually asserted*—and the District *actually denied*—in this case: a "right to engage in brief, personal prayer *by himself* on the field at the conclusion of football games." *But see Kennedy III*, 991 F.3d at 1017–19 (panel dwelling at length on instances when students joined Kennedy in prayer, despite his never asserting a right to pray *with students*). *See also Kennedy II*, 139 S. Ct. at 636 (statement of Alito, J.) (criticizing panel for colorfully "recount[ing] all of [Kennedy's] prayer-related activities" over the course of several years, "[i]nstead of attempting to pinpoint" the facts actually relevant to his constitutional claim).

had violated District policy, which stated that "[s]chool staff shall [not] encourage" a student to pray. *Id*. The District directed Kennedy that his prayer must "be physically separate from any student activity" and later asked that he pray in "a private location." *Id.* at 1011–13. Moreover, if students chose to pray at the same time as Kennedy, the District ordered him not to pray in any way "outwardly discernible as religious activity"—i.e., he could not kneel or say his prayers aloud. *Id.* at 1011.

Through counsel, Kennedy expressed to the District that he was within his constitutional rights to continue saying a "short, private, personal, prayer at midfield." Kennedy proposed that he or another school official could provide a disclaimer to alleviate any concerns that his prayers would be somehow attributed to the school. Kennedy then continued to pray privately after games. 991 F.3d at 1012. After media attention to the controversy gained steam, a crowd of players, coaches, media, and members of the public gathered around Kennedy when he prayed after the October 16, 2015, game. *Id.* at 1012–13. The District responded with a sweeping directive to Coach Kennedy that made no distinction for whether he prayed alone or with students, silently or out loud: "While on duty for the District as an assistant coach, you may not engage in demonstrative religious activity, readily observable to (if not intended to be observed by) students and the attending public." When Kennedy continued to pray at the conclusion of each of the next two games, the District suspended him. *Id.* at 1013. He was never rehired. *Id.* at 1014.

B

Kennedy filed this suit under 42 U.S.C. § 1983, alleging violations of his First Amendment rights to Free Speech and Free Exercise, and under Title VII of the Civil Rights Act of

1964, 42 U.S.C. §§ 2000e-2, 2000e-3, alleging employment discrimination on the basis of religion as well as various other violations of Title VII, including retaliation. Kennedy then moved for a preliminary injunction on Free Speech grounds, which the district court denied. The three-judge panel here affirmed the denial of a preliminary injunction. *Kennedy I*, 869 F.3d at 831. Kennedy petitioned for a writ of certiorari, which the Supreme Court denied in a one-line order. *Kennedy II*, 139 S. Ct. at 634. But four Justices,[5] in the very same order, took the extraordinary step of adding a three-page statement explaining that while an under-developed factual record would have rendered Supreme Court review premature, the denial of certiorari should *not* be taken to "signify" that the Court "agree[d] with the decision (much less the opinion) below." *Id.* at 635 (statement of Alito, J.). Quite the contrary, the four Justices took the opportunity to criticize the panel opinion's "troubling" and "highly tendentious" misreading of *Garcetti*, the Court's leading case on the limits of the government's power to regulate the speech of public employees. *Id.* at 636–37 (statement of Alito, J.).

Upon subsequent remand of the case, the district court considered the remainder of Kennedy's claims. The district court found that "the risk of constitutional liability associated with Kennedy's religious conduct was the sole reason the District ultimately suspended him." *Kennedy v. Bremerton Sch. Dist.*, 443 F. Supp. 3d 1223, 1231 (W.D. Wash. 2020) (internal quotation marks omitted). Concluding that the Establishment Clause indeed required Kennedy's suspension, the district court granted summary judgment for

[5] *See Kennedy II*, 139 S. Ct. at 635–37 ("Statement of Justice ALITO, with whom Justice THOMAS, Justice GORSUCH, and Justice KAVANAUGH join, respecting the denial of certiorari.").

the District on Kennedy's Free Speech, Free Exercise, and Title VII claims. *Id.* at 1245. On appeal, the same panel of our court agreed. *Kennedy III*, 991 F.3d at 1022–23. A judge *sua sponte* called for rehearing en banc, but the matter failed to receive a majority of the votes of the non-recused active judges in favor of en banc consideration. Accordingly, rehearing en banc was denied in the order to which this statement is added. *Ante*, __ F.3d __ (9th Cir. 2021).

II

A

While the panel's opinion, in my view, runs afoul of controlling Supreme Court precedents on the Free Speech, Free Exercise, *and* Establishment Clauses, it does so most egregiously with respect to the Free Speech Clause. Let us therefore begin with the background principles animating the Court's jurisprudence on public employees' speech rights:

> Though it is well established that "the government as employer . . . has far broader powers than does the government as sovereign," *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality op.), it is equally well established that "a citizen who works for the government is nonetheless a citizen," whose rights do not simply vanish in the workplace. *Garcetti*, 547 U.S. at 419. Thus, when public employees speak "as citizens about matters of public concern," they may be subjected "only [to] those speech restrictions that are necessary for their employers to operate efficiently and effectively." *Id*.

In other words, a public employer's special latitude to control its employees' speech extends only to speech "the employer itself has commissioned" or otherwise

functionally "created." *Id.* at 422. But when public employees' expression falls *outside* their official job duties, we must "unequivocally reject[]" any suggestion that they "may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). Thus, our task in any public-employee speech case is to delineate whether the employee spoke "pursuant to [his or her] official duties" (in which case the First Amendment provides no protection) or, instead, in his or her capacity as a "private citizen" (in which we must subject the government to First Amendment scrutiny). *Garcetti*, 547 U.S. at 421–22.

Garcetti v. Ceballos provides the critical guideposts for this task. There, the Court analyzed what now serves as the paradigmatic example of "official" employee speech: a deputy prosecutor's internal memoranda to his supervisor, expressing his concerns with a pending case and recommending its dismissal. *Id.* at 414. The Court reasoned that because the memoranda in question arose directly from the very "tasks [Ceballos] was paid to perform"—namely, the core "practical" responsibility of a deputy prosecutor "to advise his supervisor about how best to proceed with . . . pending case[s]"—they could not be characterized as his private speech at all. *Id.* at 421–22, 424–25. Rather, they constituted speech that the *government* had "commissioned or created" (and therefore had power to control). *Id*. at 422.

The Court took pains, however, to admonish "that employers can [not] restrict employees' rights by creating excessively broad job descriptions." *Id.* at 424. Tellingly, the Court offered this admonition in direct response to Justice Souter's concern that "the government may well try to limit the English teacher's options," for example, "by the simple expedient of defining teachers' job responsibilities

expansively, investing them with a general obligation to ensure sound administration of the school." *Id.* at 431 n.2 (Souter, J., dissenting). To guard against such concerns, the Court explained that the "proper inquiry" into a public employee's official job duties "is a practical one," and that "the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes." *Id.* at 424–25.

B

The opinion in *Kennedy III* has run far, far afield of the "practical" inquiry dictated by *Garcetti*. *Cf.* 547 U.S. 424. It arrives at the bizarre conclusion that Kennedy's prayer was speech pursuant to his official duties "as a government employee," *Kennedy III*, 991 F.3d at 1015—which, make no mistake, is to say that praying is somehow a football coach's responsibility in the same way that drafting memoranda on pending prosecutions is a deputy prosecutor's responsibility. Worse still, the panel's latest misapplication of *Garcetti* directly contravenes the guidance offered by four Supreme Court Justices *in this very case*. *Compare Kennedy II*, 139 S. Ct. at 636 (statement of Alito, J.) ("The Ninth Circuit's opinion [in *Kennedy I*] applies our decision in *Garcetti* . . . to public school teachers and coaches in a highly tendentious way."); *with Kennedy III*, 991 F.3d at 1015 ("Our holding [from *Kennedy I*] has not changed.").

According to the opinion, a coach is "clothed with the mantle of one who imparts knowledge and wisdom," so Kennedy's prayer "on the field—a location that he only had access to because of his employment—during a time when he was generally tasked with communicating with students, was speech as a government employee." *Kennedy III*,

991 F.3d at 1015 (quoting *Kennedy I*, 869 F.3d at 826). Thus, by the opinion's sweeping logic, Kennedy's prayer—no matter how personal, private, brief, or quiet—was *wholly unprotected* by the First Amendment.

1

The fundamental flaw with the opinion's conclusion is that it relies on precisely the kind of "excessively broad job description[]" that *Garcetti* plainly precludes. 547 U.S. at 424. In adopting the reasoning of *Kennedy I*, which was more thorough but no less troubling, the *Kennedy III* panel repeats its original mistake. Relying simply on the existence of a District policy that coaches should "exhibit sportsmanlike conduct at all times," the panel leapt to this grandiosely broad characterization of Kennedy's job duties: "communicating the District's perspective on appropriate behavior" whenever "in the presence of students and spectators." *Kennedy I*, 869 F.3d at 825–27. This epitomizes the sort of reasoning *Garcetti* forbids. Moreover, the panel inferred its startling conclusion from an even more startlingly simplistic syllogism: Because Kennedy's job involved "demonstrative speech" and prayer can at times be "demonstrative speech," then (by the opinion's tortured logic) Kennedy's prayer necessarily "fulfill[ed] his professional responsibility to communicate demonstratively." *Id.* at 828. The opinion's flawed reasoning—at odds with Supreme Court precedent and common sense—lumps together obvious examples of football coaching, calling plays and the like, with any speech that can be overheard by someone else, no matter how personal or private it may be.

If *Garcetti* were as simplistic as the panel made it out to be, it could have been decided in just a few sentences. All the *Garcetti* Court would have needed to say—on the panel's

misguided reading—was that Ceballos was an attorney, that an attorney's job involves the written word, and that *any writing* by Ceballos accordingly would constitute speech pursuant to his official duties. Therefore, by the *Kennedy III* opinion's logic, the Supreme Court was only wasting ink when it delved into the content of Ceballos's memos, the precise duties of a calendar deputy in the district attorney's office, and the comparison to civilian analogues, because Ceballos could be disciplined with impunity *whenever he put pen to paper*.

2

Garcetti and basic logical coherence are not the only victims of the opinion's Free Speech analysis. By assuming that teachers always act as teachers between the first and last bell of the school day (or that coaches always act as coaches from the time they arrive for work at the school's athletic office to the moment the stadium lights go out on the end of a game), the opinion also places itself in irreconcilable contradiction with the most basic, "unmistakable" axiom of the past century of school-speech jurisprudence: that, as noted above, teachers do not "shed their constitutional rights . . . at the schoolhouse gate." *Tinker*, 393 U.S. at 506; *see also, e.g.*, *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 688 (1986) (Brennan, J., concurring) (noting the Court's repeated "reaffirm[ance]" of this "unimpeachable proposition" of *Tinker*). For if, as the opinion declares, all "demonstrative communication" in the presence of students were unprotected, there would be little left of the First Amendment—let alone *Tinker*'s landmark holding—for public school employees. Likewise, the *Pickering* balancing test would cease to provide refuge for large swaths of school speech, religious or not. That cannot be right. For as

Kennedy rightly observes in his brief, "*Garcetti* applied *Pickering*; it did not overrule it."

3

And yet, on the panel's view, a school can restrict any speech for any reason so long as it instructs its employees to demonstrate good behavior in the presence of others. *See Kennedy I*, 869 F.3d at 825–26. Despite the panel's tepid assurance that its opinion does not establish "any bright-line rule," *id.* at 830 n.11, four Justices share my doubt:

> According to the Ninth Circuit, public school teachers and coaches may be fired if they engage in any expression that the school does not like while they are on duty, and the Ninth Circuit appears to regard teachers and coaches as being on duty at all times from the moment they report for work to the moment they depart, provided that they are within the eyesight of students.

Kennedy II, 139 S. Ct. at 636 (statement of Alito, J.).

To illustrate, Justice Alito asked whether a teacher in the Ninth Circuit still has the right to pray before eating in the cafeteria where a student might notice. *Id. Kennedy I*'s answer appeared to be no. 869 F.3d at 829 ("Kennedy can pray in his office . . . ."). To be sure, *Kennedy III* attempts to distinguish the hypothetical on the ground that a cafeteria prayer "is of a wholly different character" than one on the football field. 991 F.3d at 1015. But the panel fails to identify any principled distinction between the two that would actually impact its analysis. Rather, its opinion simply describes the instant case: Kennedy prayed "while players stood next to him, fans watched from the stands, and he

stood at the center of the football field. Moreover, Kennedy . . . was a mentor, motivational speaker, and role model to students specifically at the conclusion of a game." *Id.* at 1015 (emphasis omitted).

True enough, but none of these facts does anything to distinguish the cafeteria scenario (or innumerable others). If Kennedy prayed in the cafeteria, "a location that he only had access to because of his employment," at a time when he was on duty, "generally tasked with communicating with students," the panel's opinion would dictate that he spoke in his official capacity as a public employee in doing so. *Id.* at 1015. The opinion's *ipse dixit* exception for mealtime prayer defies its own logic and will surely not be taken seriously by litigants or courts attempting to apply this sweeping rule to many scenarios yet to come.[6]

Suppose, for example, a teacher receives bad news about a family member while teaching and utters a brief, quiet prayer, or suppose a coach makes the sign of the cross upon

[6] Indeed, several other courts have acknowledged the far-reaching scope of *Kennedy I*'s rule, which *Kennedy III* now entrenches. *See, e.g.*, *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2265 (2020) (Thomas, J., concurring) (criticizing *Kennedy I* for failing to protect even off-duty religious speech); *Kennedy II*, 139 S. Ct. at 636–37 (statement of Alito, J.) ("[*Kennedy I*] regard[s] teachers and coaches as being on duty at all times . . . within the eyesight of students."); *Greisen v. Hanken*, 925 F.3d 1097, 1112 (9th Cir. 2019) (interpreting *Kennedy I* to apply whenever employees who teach and serve as role models act in an official capacity in the presence of others); *Barone v. City of Springfield*, 902 F.3d 1091, 1100–01 (9th Cir. 2018) (same); *Naini v. King Cty. Pub. Hosp. Dist. No. 2*, No. C19-0886-JCC, 2020 WL 290927, at *13–14 (W.D. Wash. Jan. 21, 2020) (same); *Kountze Indep. Sch. Dist. v. Matthews ex rel. Matthews*, No. 09-13-00251-CV, 2017 WL 4319908, at *4 (Tex. App. Sept. 28, 2017) (noting *Kennedy I*'s broad reliance on the coach's "responsibility to communicate demonstratively").

seeing a player suffer an injury. Imagine a coach who kneels during the national anthem in protest or a teacher whose car parked on school property bears a bumper sticker for a presidential campaign. Even if the opinion's one-off exception for mealtime prayer were taken at face value, these citizens would now stand to be censored, disciplined, or even fired by their public employer for any or no reason at all.

Relegating such speech to an empty office, or perhaps to the teacher's lounge, is an insult to the First Amendment, which "extends to private *as well as public* expression." *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415 n.4 (1979) (emphasis added). More fundamentally, doing so corrodes the civic virtues that *underlie* the First Amendment: We ask "teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens . . . . They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them." *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring).

C

Tellingly, and perhaps unsurprisingly, it would have required far less intellectual gymnastics for an en banc court to apply *Garcetti* properly than for the panel to misapply *Garcetti* as it did.

1

To determine whether Kennedy prayed within the ambit of his official duties as a government employee, we must ask what tasks he was paid to perform. *Garcetti*, 547 U.S. at 422; *see also Dahlia v. Rodriguez*, 735 F.3d 1060, 1075 (9th Cir. 2013) (en banc) ("As part of a 'practical' inquiry, a trier of fact must consider what [the employee] was actually told to

do."). Some of a football coach's speech—calling a play, addressing the players at halftime, or teaching how to block and how to tackle—undoubtedly accomplishes official tasks required of him. Yet a coach might speak instead for purely personal reasons, such as chatting about the weather with a spectator or calling his family to let them know the game is over. Both sets of examples take place on the job, on school property, and in earshot of students, but only the former can be fairly called speech the government paid to create.

Indeed, if we heed *Garcetti*'s instruction to inspect the functional *content* of an employee's speech, it is easy to see the distinction between private speech and official public speech in the context of football coaching. Private speech is "the kind of activity engaged in by citizens who do not work for the government," such as "writing a letter to a local newspaper" or "discussing politics with a co-worker." *Garcetti*, 547 U.S. at 423. This makes perfect sense. By contrast, where a public employee speaks in his or her capacity as a public employee, "there is no relevant analogue to speech by citizens who are not government employees"—and accordingly, the government is more likely to be correct that the speech is really its to control. *Id.* at 424.

Writing a recommendation to the district attorney on how to handle a case has no civilian analogue, and thus, the speech in *Garcetti* was distinctly governmental in nature (and in turn, subject to governmental control). But if the attorney used the same medium in the same setting to communicate a message unrelated to work, say, an invitation to a birthday party, he would not speak as a public official. *See also Coomes v. Edmonds Sch. Dist. No. 15*, 816 F.3d 1255, 1264 (9th Cir. 2016) ("[E]ven if Coomes's duties . . . included speaking to parents regarding their children's

participation in [a] program, she could have gone outside her duties in speaking to parents about other matters.").

So too here: Kennedy might use on-field speech to instruct the team's defense, or he might kneel on the field to pray quietly to God. The former is public because only coaches call plays. Such speech "owes its existence to a public employee's professional responsibilities." *Garcetti*, 547 U.S. at 421. But the latter is private because there is a clear civilian analogue: Millions of Americans give thanks to God, a practice that has nothing to do with coaching a sport.

2

Perhaps the most obvious evidence that prayer fell outside of Kennedy's football-coaching duties was his employer's explicit and repeated opposition to such prayer—culminating in Kennedy's suspension. The District demanded that coaching staff comply with a policy entitled "Religious-Related Activities and Practices," which the District interpreted to prohibit Kennedy's post-game prayer. *Kennedy III*, 991 F.3d at 1011–13. How can the panel hold that prayer was one of Kennedy's job duties when his employer maintained a policy banning it? Further heightening the contradiction, the District told Kennedy that his prayer "interfere[d] with the performance of job duties." *Id.* at 1013.[7] How can it be that Kennedy's prayer "interfere[d] with" his job duties if, as the District and panel

[7] To be clear, notwithstanding this statement from the District to Kennedy, it remains undisputed that "the risk of constitutional liability associated with Kennedy's religious conduct"—rather than any concern that Kennedy was being inattentive to his players—"was the '*sole reason*' the District ultimately suspended him." *Kennedy III*, 991 F.3d at 1014 (quoting *Kennedy*, 443 F. Supp. 3d at 1231) (emphasis added).

maintain, it was simultaneously *pursuant to* such duties? *Cf. id.* Rather than straining to square this circle, a truly practical inquiry would have recognized that Kennedy's employer excluded prayer from his duties—both as a matter of general policy and as applied to him specifically.

In sum: A proper application of *Garcetti* and its progenitors dictates that Kennedy's prayer was his private speech, not that of the government. Consequently, his Free Speech rights are indeed implicated, and the government's stated justifications for its censorship must face constitutional scrutiny. *See Pickering*, 391 U.S. at 568.

III

The opinion's attempts to recast Kennedy's private speech as official government speech are strange enough. But it then wanders even further afield. Perhaps belying its own doubts, the panel does not rest on its (ostensibly dispositive) conclusion that Kennedy's prayer was official speech unprotected by the Free Speech Clause and therefore properly subject to discipline.

Instead, the panel proceeds to announce the alternative holding that, even if Kennedy's speech *were* private (and therefore triggered First Amendment scrutiny), the District would have a compelling interest in censoring it. *See Kennedy III*, 991 F.3d at 1016–19. That putatively "compelling interest" is the District's stated fear that, unless it fired Kennedy, it would be committing an Establishment Clause violation by creating the perception that it "endorsed" Kennedy's Christian religious beliefs. *See id*. Consequently, the opinion reaches the troubling conclusion that the Constitution not only permitted, but *required*, the District to punish Kennedy's private prayer. In so doing, the opinion defies the principle that "the state interest . . . in achieving

. . . separation of church and State" is "*limited by the Free Exercise Clause*," *Widmar v. Vincent*, 454 U.S. 263, 276 (1981) (emphasis added)—and not the other way around. More fundamentally, the opinion subverts the entire thrust of the Establishment Clause, transforming a *shield* for individual religious liberty into a *sword* for governments to *defeat* individuals' claims to Free Exercise. The panel's holding, which thereby misinterprets *both* of the First Amendment's religion clauses, simply cannot be squared with decades of Supreme Court precedent to the contrary.

Indeed, upon a more faithful examination of such precedents, they reveal a deep irony in the panel's Establishment Clause analysis: What the District puts forth (and the panel accepts) as a justification to *extinguish* Kennedy's Free Speech claim actually has quite the opposite effect. Namely, it imparts credence and urgency to his Free Exercise claim, which might otherwise have been dubious. *See Kennedy II*, 139 S. Ct. at 637 (statement of Alito, J.) (expressing doubt—prior to the District's subsequent concession, noted in the *Kennedy III* opinion, that District administrators' motivation for disciplining Kennedy was "not [religiously] neutral," 991 F.3d at 1020—as to whether Kennedy's Free Exercise claim might not pass muster under existing law).[8] Moreover, a faithful reading of the Court's

[8] At the preliminary-injunction stage (*i.e.*, in the record that was before the Supreme Court Justices in *Kennedy II*), the District had advanced the dubious claim that its motivation for punishing Kennedy's prayer was that it "drew [him] away from [his] work." *Kennedy I*, 869 F.3d 819. Accordingly, the Justices could not at that stage rule out the possibility that the District's "reason" for suspending Kennedy was that "he was supposed to have been actively supervising the players after they had left the field but instead left them unsupervised while he prayed on his own." *Kennedy II*, 139 S. Ct. at 635. Were that the case, the District's punishment of Kennedy presumably would have constituted a

religion clauses jurisprudence makes clear that the District's (unfounded) fears of Establishment Clause liability could justify its incursions on *neither* Kennedy's Free Speech rights *nor* his Free Exercise rights.

A

In crediting the District's Establishment Clause rationale, the panel backed itself into the corner of conceding that the District had targeted Kennedy's conduct "*because* the conduct is religious." *Kennedy III*, 991 F.3d at 1020 (emphasis in original). The unmistakable upshot of this concession is to trigger a Free Exercise problem and to increase the credibility of Kennedy's alternative claim. For the most basic lesson of the Supreme Court's Free Exercise jurisprudence teaches that when government actions "target the religious for 'special disabilities' based on their 'religious status,'" they trigger "the strictest scrutiny." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012, 2021 (2017) (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993)). That is, such targeted incursions on religious rights "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Lukumi Babalu Aye*, 508 U.S. at 531–32 (1993).

"generally applicable, religion-neutral" action that merely had the "*effect* of burdening [Kennedy's] particular religious practice," which, under *Smith*, would "need not be justified by a compelling governmental interest." *Emp't Div., Dep't of Hum. Res. v. Smith*, 494 U.S. 872, 886 n.3 (1990). This appears to be the uncertainty to which Justice Alito was referring when he alluded to the possibility that Kennedy's Free Exercise claim might—on the basis of the record then before the Court—be precluded by *Smith*. *Kennedy II*, 139 S. Ct. at 637 (statement of Alito, J.) (citing *Smith*, 494 U.S. 872).

B

Consequently, Kennedy's suspension must survive strict scrutiny, and the only way the District wins is if its fears were valid—*i.e.*, if Kennedy could not privately pray on the field after football games without the District's violating the Establishment Clause and if suspending (then declining to re-hire) Kennedy were the *only way* the District could remedy such putative Establishment Clause problem. Even a cursory review of the Supreme Court's Establishment Clause jurisprudence should have assuaged the District's paranoia. But instead, the panel has chosen to exemplify the "brooding omnipresence" of the "modern understanding of the Establishment Clause . . . ever ready to be used to justify the government's infringement on religious freedom." *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2263 (2020) (Thomas, J., concurring) (quoting *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting)).

1

a

Most fundamentally, the opinion takes the rare—indeed, unprecedented—step of perceiving an Establishment Clause violation without first locating any state action to *constitute* such a violation. In so doing, the opinion contravenes the axiomatic principle that "an Establishment Clause violation must be moored in government action." *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring); *see also Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019) (explaining, in the Free Speech context, that "the First Amendment *constrains governmental actors* and *protects private actors*") (emphasis added). Indeed, the opinion contravenes the very text of the Establishment Clause, which

announces a constraint on the *State*, rather than non-state actors.

In case after case, the Supreme Court has determined that private religious speech on public school property does not constitute state action and therefore does not run afoul of the Establishment Clause. For example, a private organization can use classrooms for religious instruction after school, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112–19 (2001); a Christian student newspaper can receive university funding, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 837–46 (1995); a church can screen religious films on public school premises, *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394–95 (1993); students can form a religious club with a faculty monitor, *Bd. of Educ. of Westside Cmty. Schs. v. Mergens ex rel. Mergens*, 496 U.S. 226, 249–53 (1990) (plurality op.); and student groups can use university facilities for worship, *Widmar v. Vincent*, 454 U.S. 263, 270–75 (1981). In short, the Supreme Court "ha[s] never extended [its] Establishment Clause jurisprudence to foreclose private religious conduct during nonschool hours merely because it takes place on school premises where . . . children may be present." *Good News*, 533 U.S. at 115; *see also Capitol Square*, 515 U.S. at 764 (plurality op.) ("The test petitioners propose, which would attribute to a neutrally behaving government *private* religious expression, has no antecedent in our jurisprudence . . . .") (emphasis in original).

Underlying these holdings are decades of Supreme Court caselaw drawing a sharp 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." *Mergens*, 496 U.S. 226 at 250 (plurality op.) (emphasis in original).

The District, then, had no reason to worry about liability from Kennedy's private religious conduct, because—and this bears repeating—"an Establishment Clause violation must be moored in government action." *Capitol Square*, 515 U.S. at 779 (O'Connor, J., concurring).

Here, by contrast, Kennedy never asked the school to take any action endorsing or facilitating his religious practice. Quite the contrary, Kennedy essentially asked his employer to *do nothing*—simply to tolerate the brief, quiet prayer of one man (which is exactly what the District had done for years prior, without anyone ever raising an Establishment Clause claim against it).

b

Consequently, this case bears no resemblance to the kinds of institutional entanglements with religion—often described as "coercive"—which may give rise to an Establishment Clause violation. *Cf. Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290, 305–06, 309 (2000) (school policy once titled "Prayer at Football Games" promoted prayer over the school P.A. system); *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (school both sponsored and directed a graduation prayer); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 205 (1963) (state law required daily Bible reading at school); *Engel v. Vitale*, 370 U.S. 421 (1962) (school required prayer to start each day).

Yet rather than abide the lessons of this line of complex Establishment Clause jurisprudence, the panel reduces it to one simplistic question: Would an objective observer have viewed Kennedy's prayer as "stamped" with the "school's seal of approval"? *Kennedy III*, 991 F.3d at 1017 (quoting *Santa Fe*, 530 U.S. at 308). If the answer is "yes," then, says the panel, the District *must* punish Kennedy for privately and

independently engaging in such conduct. In other words, because someone *might* mistakenly attribute Kennedy's prayer to the District (notwithstanding its well-publicized opposition), the panel declares that the school not only was free, but indeed *obliged*, to discipline him in ways that would otherwise violate his Free Speech and Free Exercise rights.

Lacking a single Supreme Court case that supports its implicit assumption that a private individual can commit an Establishment Clause violation, the panel gestures desperately toward Establishment Clause cases merely *involving* school employees' endorsement of religion. But the panel's opinion drains such cases of the factors driving their logic—the school policy, the degree of control over employee speech, neutrality toward religion, or the possibility of coercion. *See, e.g.*, *Santa Fe*, 530 U.S. at 301–03, 306–12; *Weisman*, 505 U.S. at 593.

Critically, every case cited in the opinion's Establishment Clause analysis involved government speech, not private speech. *See McCreary County. v. Am. C.L. Union of Ky.*, 545 U.S. 844, 860 (2005) (courthouse displays of the Ten Commandments); *Santa Fe*, 530 U.S. at 315 (school policy "implemented with the purpose of endorsing school prayer"); *Weisman*, 505 U.S. 577, 587 (1992) ("state-sponsored and state-directed . . . formal religious observance"); *Edwards v. Aguillard*, 482 U.S. 578, 585–94 (1987) (statewide ban on teaching evolution without creationism); *Wallace v. Jaffree*, 472 U.S. 38, 59 (1985) (statewide school prayer statute). It strikes me as specious to conclude that such authorities should apply equally to Kennedy's speech merely because he worked for a public employer. Especially so where the Supreme Court and our court have expressly declined to find Establishment Clause violations in the context of private religious activity—

authorities the opinion conveniently ignores. *Cf. Mergens*, 496 U.S. 226 at 250 (plurality op.) ("The proposition that schools do not endorse everything they fail to censor is not complicated."); *Hills v. Scottsdale Unified Sch. Dist. No. 48*, 329 F.3d 1044, 1055–56 (9th Cir. 2003) (same); *Tucker v. Calif. Dep't of Educ.*, 97 F.3d 1204, 1213 (9th Cir. 1996) ("[S]peech by a public employee, even a teacher, does not always represent, or even appear to represent, the views of the state.").

Likewise, the assumption that Kennedy spoke as a private citizen—which the opinion *expressly* adopts for the limited purpose of its in-the-alternative Establishment Clause analysis, *Kennedy III*, 991 F.3d at 1016, contrary to its earlier holding that Kennedy spoke "as a public employee," *id.* at 1015—forecloses the opinion's application of *Santa Fe Independent School District v. Doe*, the *only* Supreme Court case that bears even remote factual resemblance to ours. *Cf.* 530 U.S. at 310, 312 (holding, where student's prayer was "deliver[ed] . . . over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourage[d] public prayer," that school policy had coerced attendees into participation in prayer).

If the panel had engaged in a fair comparison between the facts of Kennedy's case and the facts of the Establishment Clause cases upon which it relies, it could have reached only one conclusion: The District made its disavowal of Kennedy's religious speech crystal clear to any reasonable observer. For one, the District, as mentioned above, had a pre-existing policy restricting any religious speech that might "encourage" a student to pray. *Kennedy III*, 991 F.3d at 1011. The superintendent then sent Kennedy

two letters detailing the policy and ordering him to stop praying. *Id.* at 1011–13. Finally, the District published a letter addressed to parents and staff explaining its policy opposing prayer.

Given such facts, how could anyone be mistaken about the school's position—let alone "view [Kennedy's private prayer] as [the District's] endorsement of a particular faith"? *Id.* at 1019. The District vehemently opposed Kennedy's prayer, and the local community got the message loud and clear. *See id.* at 1012 ("[T]he Seattle Times published an article . . . entitled 'Bremerton football coach vows to pray after game *despite district order*.'" (emphasis added)). Only by ignoring everything the District said and did could an observer (mistakenly) think the school was endorsing Kennedy's. But the mere possibility of such a mistake does not turn private speech into endorsement, "at least where . . . the government has not fostered or encouraged the mistake." *Capitol Square*, 515 U.S. at 766 (plurality op.); *see also Good News*, 533 U.S. at 119 ("We cannot operate . . . under the assumption that *any risk* . . . [of] perceive[d] endorsement should counsel in favor of excluding . . . religious activity. We decline to employ Establishment Clause jurisprudence using a modified heckler's veto . . . .") (emphasis added). A reasonable observer would have known of the District's actions prior to Kennedy's suspension, yet the opinion maintains that every ounce of discipline—including suspension—was required to comply with the Establishment Clause.

At bottom, because there can be no Establishment Clause violation without state action, the District's sole stated interest in avoiding Establishment Clause liability cannot justify suppressing the Free Exercise rights of its coach. And because strict scrutiny limits us to considering state interests

that are "genuine, not hypothesized," *cf. United States v. Virginia*, 518 U.S. 515, 533 (1996) (imposing this requirement in the context of intermediate scrutiny, such that it applies *a fortiori* in the strict-scrutiny context), it necessarily follows that the District had *no* compelling interest in punishing Kennedy's prayer.

2

The errors of the panel's Establishment Clause analysis do not stop with its stubborn refusal to recognize the distinction between state and private action. For even if an observer *could* mistake Kennedy's private speech for that of the school, it was *still* erroneous for the panel to assume that the District's sole constitutional option was to suspend Kennedy. In creating a false dichotomy between the District's chosen course and "allowing Kennedy free rein," *Kennedy III*, 991 F.3d at 1018, the panel neglects other, more narrowly tailored remedies and hastily announces that "there was no other way" to handle the situation, *id.* at 1020. Instead, the panel should have considered the accommodation Kennedy's counsel proposed: a simple disclaimer, clarifying that Kennedy's prayer was his own private speech, not that of the District.

A school does not violate the Establishment Clause where it "can dispel any 'mistaken inference of endorsement' by making it clear to students that . . . private speech is not the speech of the school." *Prince v. Jacoby*, 303 F.3d 1074, 1094 (9th Cir. 2002) (quoting *Mergens*, 496 U.S. at 251); *see also Hills*, 329 F.3d at 1054–56. A disclaimer communicates that the school's permission "evinces neutrality toward, rather than endorsement of, religious speech." *Mergens*, 496 U.S. at 251. Our court has found a disclaimer to be inadequate only once—in the "coercive" context of a graduation speech. *Lassonde v.*

Pleasanton Unified Sch. Dist., 320 F.3d 979, 983–85 (9th Cir. 2003).

If the school could have disclaimed Kennedy's prayer in a statement or at each game, then firing him was not necessary to comply with the Establishment Clause, and the violation of his Free Exercise rights was not narrowly tailored. As we have long recognized, the District could have more productively addressed its fear of confused observers while still protecting Kennedy's fundamental rights. Indeed, as our court has observed:

> The school's proper response is to educate the audience rather than squelch the speaker. Schools may explain that they do not endorse speech by permitting it. . . . Free speech, free exercise, and the ban on establishment are quite compatible when the government remains neutral and educates the public about the reasons.

Hills, 329 F.3d at 1055 (quoting *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1299–1300 (7th Cir. 1993)). By holding that any demonstrative prayer in public would necessarily (and unconstitutionally) be imputed to the District, the panel leaves no room for schools "to educate the audience." *Id.* (quoting *Hedges*, 9 F.3d at 1299). Rather, on the panel's view, the District had no choice but to issue a warning, a directive, and, ultimately, a suspension. At the very least because the District could have disclaimed Kennedy's prayer, the panel is mistaken. Under binding precedents of the Supreme Court, schools can and must do more to protect the First Amendment liberties of coaches and teachers.

IV

The opinion has forced our circuit into clear conflict with the Supreme Court's instruction in *Garcetti*—despite the published guidance of four Justices in this very case. And the opinion compounds the error by commanding public schools throughout the nine states and two federal territories of the Ninth Circuit to search for and to eliminate private religious speech or else face liability under the Establishment Clause. The First Amendment does not demand that we "purge from the public sphere all that in any way partakes of the religious," *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring in the judgment), but unfortunately, the Ninth Circuit does.

For the foregoing reasons, it is most regrettable that our court has failed to rehear this case en banc.

O'SCANNLAIN and BEA, Circuit Judges, respecting the denial of rehearing en banc:

We agree with the views expressed by Judge Ikuta in her dissent from denial of rehearing en banc.

O'SCANNLAIN, Circuit Judge, respecting the denial of rehearing en banc:

I agree with the views expressed by Judge R. Nelson in his dissent from denial of rehearing en banc.

O'SCANNLAIN, Circuit Judge, respecting the denial of rehearing en banc:

I agree with the views expressed by Judge Collins in his dissent from denial of rehearing en banc.

BEA, Senior Circuit Judge, respecting the denial of rehearing en banc:

I agree with the views expressed by Judge Collins in his dissent from denial of rehearing en banc.

IKUTA, Circuit Judge, with whom CALLAHAN, R. NELSON, BADE, FORREST, and BUMATAY, Circuit Judges, join, dissenting from the denial of rehearing en banc:

I write separately to express a different perspective.

A

Joseph Kennedy's highly public demonstrations of his religious convictions put Bremerton School District (BSD) in a no-win situation. BSD wanted to respect Kennedy's right "to engage in religious activity, including prayer," but it feared that allowing Kennedy to engage in such highly public activity on the field after football games would create a perception that BSD was endorsing religion, in violation of the Establishment Clause. *Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004, 1011 (9th Cir. 2021).

To avoid such a violation, BSD repeatedly told Kennedy to stop praying on the field after the football games. *Id.*

at 1011–13. BSD sent Kennedy letters "explaining that his conduct . . . violated BSD's [religious activities] policy," *id.* at 1013, and advised him that his post-game talks "must remain entirely secular in nature," *id.* at 1011.

Kennedy was defiant. He told BSD, through his lawyer, that he intended to resume praying at the fifty-yard line at the next game notwithstanding BSD's orders. *Id.* at 1012. His unyielding stance was "widely publicized through Kennedy and his representatives' numerous appearances and announcements on various forms of media." *Id.* (cleaned up). The *Seattle Times* published an article with the headline "Bremerton football coach vows to pray after game despite district order," and explaining that "[a] Bremerton High School football coach said he will pray at the 50-yard line after Friday's homecoming game, disobeying the school district's orders and placing his job at risk." *Id.*

Under these well-publicized circumstances, no objective observer (assuming we apply the "objective observer" test) would think BSD was endorsing Kennedy's prayers. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (holding that in determining whether there is an Establishment Clause violation, "one of the relevant questions is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools" (cleaned up)). Rather, BSD took "pains to disassociate itself from the private speech involved in this case." *See Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 841 (1995); *Kennedy*, 991 F.3d at 1011, 1013. A "reasonable observer" who is "deemed aware of the history and context of the community and forum in which the religious speech takes place," *see Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001) (cleaned

up), would know that Kennedy's prayer was not "stamped with [BSD's] seal of approval," *see Santa Fe*, 530 U.S. at 308. Clearly "there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed." *See Good News Club*, 533 U.S. at 113 (quoting *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993)). BSD's concern that Kennedy's religious activities would be attributed to BSD is simply not plausible. *See Rosenberger*, 515 U.S. at 841. Applying the objective observer test from *Santa Fe*, there is no Establishment Clause violation here.

Therefore, even assuming (as the panel majority does) that Kennedy spoke as a private citizen, BSD could not successfully justify any content-based discrimination against Kennedy on the ground that it needed to do so to avoid an Establishment Clause violation.

B

By holding that BSD could be subject to an Establishment Clause claim under the circumstances of this case, the majority missed an opportunity to address the tension between the Free Exercise Clause and Establishment Clause in the public employment context. The Supreme Court has recognized that public employers are caught between "countervailing constitutional concerns" of respecting the free exercise rights of their employees while at the same time avoiding giving offense to the public by appearing to endorse religious activity. *Good News Club*, 533 U.S. at 119. The majority's holding that BSD was reasonable to fear liability for an Establishment Clause violation is dangerous because it signals that public employers who merely fail to act with sufficient force to squelch an employee's publicly observable religious activity may be liable for such a claim. This raises the risk that

public employers will feel compelled (or encouraged) to silence their employee's religious activities, even in moments of private prayer, so long as they can be seen by students. *Cf. Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 636 (2019) (Alito, J., statement respecting denial of certiorari).

We should address this issue directly. Just as the Supreme Court provided guidance to public employers for balancing their employees' free speech rights with the requirements of a particular job, *see Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006), we need a parallel framework for evaluating how a public employer can protect its employee's religious expression without becoming vulnerable to an Establishment Clause claim. Because this case raises an opportunity to develop such a framework, I respectfully dissent from denial of rehearing this case en banc.

R. NELSON, Circuit Judge, joined by CALLAHAN, BUMATAY, and VANDYKE, Circuit Judges, and by IKUTA, Circuit Judge, as to Part I, dissenting from the denial of rehearing en banc:

The way to stop hostility to religion is to stop being hostile to religion. The panel held that merely allowing high school football coaches and players to pray on the field "unquestionably" violates the Establishment Clause. *Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004, 1017 (9th Cir. 2021). Not so fast.

First, the panel misapplied Supreme Court precedent since none of the School District's actions would have come close to an endorsement of religion or coercion. Instead, the panel went beyond precedent, assuming a hypothetical

Establishment Clause violation where there was none. This extension is especially erroneous given that the panel's reliance on *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), is inapt as there would not have been an endorsement of religion by allowing Coach Kennedy to pray. Moreover, *Santa Fe* should not be extended as it stems from *Lemon v. Kurtzman*, 403 U.S. 602 (1971)—an ahistorical, atextual, and failed attempt to define Establishment Clause violations. *See Freedom From Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 910 F.3d 1297, 1305–06 (9th Cir. 2018) (R. Nelson, J., dissenting from denial of rehearing en banc). And given the Supreme Court has effectively killed *Lemon*, *see generally Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019), the panel should not have extended *Santa Fe*'s holding.

Second, the panel's analysis goes far afield from the original meaning of an established religion. *American Legion* demonstrated how critical historical practice and understanding is in the Establishment Clause context. The panel missed that cue. And because of that mistake, the panel allowed an ahistorical and expansive view of the Establishment Clause "to justify the [School District]'s infringement on [Coach Kennedy's] religious freedom." *See Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2263 (2020) (Thomas, J., concurring). Yet the Establishment Clause was originally intended "to secure religious liberty," not purge it from the public square. *See Santa Fe*, 530 U.S. at 313. And make no mistake, favoring secularism over religion is not neutrality. *Ante*, at 28–29 (M. Smith, J., concurring in denial of rehearing en banc).

Thus, the panel not only misapplied Supreme Court precedent; it also failed to analyze the Establishment Clause

issue in light of *American Legion* and to realign our jurisprudence with the Establishment Clause's original meaning. Respectfully, I dissent.[1]

I

The Constitution forbids Congress from making a "law respecting an establishment of religion." U.S. Const. amend. 1; *see also Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947) (incorporating Establishment Clause to the states). Under existing Supreme Court precedent, there was no Establishment Clause violation here. What is more, the panel extended that precedent to reach a conclusion far beyond the original meaning of the Establishment Clause.

A

Under the Establishment Clause, that Congress cannot "formally establish[a] church is straightforward." *Am. Legion*, 139 S. Ct. at 2080. But "pinning down the meaning of 'a law respecting an establishment of religion' has proven to be a vexing problem." *Id.* In *Lemon*, the Supreme Court attempted to create a "grand unified theory" of Establishment Clause violations, focusing on a law's purpose, effects, and entanglement with religion. *Id.* at 2087; *see Lemon*, 403 U.S. at 612–13. That effort fell flat, and *Lemon* was slowly replaced by a kaleidoscope of other

[1] Judge O'Scannlain argues the Establishment Clause was not implicated for want of state action. *Ante*, at 62–63. That point has merit. For purposes of my analysis, however, I assume the School District's allowance of Coach Kennedy's mid-field prayers would have been state action. Even then, there would have been no Establishment Clause violation.

tests.[2] *Lemon*'s juice was finally wrung dry in 2019 when a majority of the Justices yet again "personally dr[ove] pencils through the creature's heart."[3] *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment). But despite

[2] *See, e.g.*, *Hunt v. McNair*, 413 U.S. 734, 741 (1973); *Lee v. Weisman*, 505 U.S. 577 (1992); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Van Orden v. Perry*, 545 U.S. 677 (2005); *Town of Greece v. Galloway*, 572 U.S. 565 (2014); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

[3] Writing for a plurality, Justice Alito criticized *Lemon* for its widespread shortcomings and noted its demise, *Am. Legion*, 139 S. Ct. at 2080–82, instead relying on "a more modest approach that focuses on the particular issue at hand and looks to history for guidance," *id.* at 2087. Concurring Justices reached similar conclusions. Justice Kavanaugh underscored that "this Court no longer applies the old test articulated in *Lemon v. Kurtzman*." *Id.* at 2092. Justice Thomas would "overrule the *Lemon* test in all contexts." *Id.* at 2097. Justice Gorsuch rejected the "misadventure" that was *Lemon*. *Id.* at 2101. And Justice Breyer analyzed the issue without relying on *Lemon*. *Id.* at 2090–91.

Since *American Legion*, the Supreme Court continues to ignore *Lemon*. *See Espinoza*, 140 S. Ct. at 2254. And other courts around the country have recognized *Lemon*'s demise and wisely left it dead. *See, e.g.*, *Woodring v. Jackson County*, 986 F.3d 979, 981 (7th Cir. 2021); *Perrier-Bilbo v. United States*, 954 F.3d 413, 425 (1st Cir. 2020); *Kondrat'yev v. City of Pensacola*, 949 F.3d 1319, 1321 (11th Cir. 2020); *Freedom From Religion Found., Inc. v. County of Lehigh*, 933 F.3d 275, 280–81 (3d Cir. 2019); *Williams v. Kingdom Hall of Jehovah's Witnesses*, No. 20190422, 2021 WL 2251819, at *4 (Utah June 3, 2021); *see also Brown v. Collier*, 929 F.3d 218, 246–48 (5th Cir. 2019) (rejecting *Lemon*'s application without recognizing its demise). Though not formally overruled, *see Georgia v. Pub. Res. Org., Inc.*, 140 S. Ct. 1498, 1520 n.6 (2020) (Thomas, J., dissenting), *Lemon* is effectively (and fortunately) dead.

Lemon's demise, we are left to sort through the continued application of its progeny.

Here, the panel primarily relied on *Santa Fe*, a test focused on what the "objective observer" would view as an endorsement of religion. *Kennedy*, 991 F.3d at 1017 (citing *Santa Fe*, 530 U.S. at 308). Given this test stems from *Lemon*'s atextual and ahistorical purpose and effects prongs, *see Lynch*, 465 U.S. 668, 688–90 (1984) (O'Connor, J., concurring), the endorsement test is equally suspect. *See infra* Part I.B. Even applying that test, however, the panel was wrong. In *Santa Fe*, a school's formal policy authorized religious prayer before all football games, excluded minority viewpoints, and controlled the invocation's content. 530 U.S. at 302–08. The school also provided access to its public address system and "clothed [the pregame prayer ceremony] in the traditional indicia of school sporting events." *Id.* at 307–08. Here, however, the School District's "degree of . . . involvement" in Coach Kennedy's private prayers or the players' voluntary participation is zero. *See id.* at 305. In fact, nothing in *Santa Fe* is remotely analogous to Coach Kennedy's case. Had the School District allowed him to pray, that would not have been an endorsement either, as I explain in the next section.

The Supreme Court has also directed us to look at whether a school's practices coerce students into religious practices or beliefs. *See generally Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Lee*, 505 U.S. 577. Coercion does not mean peer-pressure or offense when encountering a religious practice. *Town of Greece*, 572 U.S. at 589 (plurality op.) ("Offense, however, does not equate to coercion."); *id.* at 609 (Thomas, J., concurrence in part) (the Establishment Clause is not violated "whenever the reasonable observer feels subtle pressure" (internal

quotation marks omitted)). As James Madison explained, the Establishment Clause was designed to stop Congress from "establish[ing] a religion, and enforc[ing] the legal observation of it by law, []or compel[ling] men to worship God in any manner contrary to their conscience." Debates on the Amendments to the Constitution (Aug. 15, 1789), 1 Annals of Congress 758 (1834). Instead, coercion in the school context only occurs when a school sponsors religion or leverages mandatory attendance requirements. *See Good News Club*, 533 U.S. at 116; *see also Santa Fe*, 530 U.S. at 313 (voluntary prayer is allowed in public schools so long as the State does not "affirmatively sponsor[] the particular religious practice of prayer").

Nothing here suggests coercion. If anything, the School District vehemently opposed, not sponsored, Coach Kennedy's activities. *Ante*, at 66–67 (statement of O'Scannlain, J.); *ante*, at 72–73 (Ikuta, J., dissenting). The record also contains no evidence that participation in Coach Kennedy's mid-field prayers were mandatory. In fact, he made sure players knew that they did not need to join in. When players asked to participate, Coach Kennedy replied, "This is a free country[.] . . . You can do what you want." *Kennedy*, 911 F.3d at 1010. And because players, coaches, and others on a football field could join "as a result of their own genuine and independent private choice," there was no coercion and thus no establishment. *See Zelman*, 536 U.S. at 652. Those choices were "reasonably attributable to the individual" not the school.[4] *Id.* According to Coach

[4] The panel noted that the "players did not initiate their own post-game prayer" once Coach Kennedy was placed on administrative leave. *Kennedy*, 991 F.3d at 1013; *see also ante*, at 29 (M. Smith, J., concurring in denial of rehearing en banc); *ante*, at 38 (Christen, J., concurring in denial of rehearing en banc). But that does not mean the players were

Kennedy, while he "was kneeling with his eyes closed, coaches and players from the opposing team, as well as members of the general public and media, spontaneously[5] joined him on the field and knelt beside him." *Kennedy*, 991 F.3d at 1012–13 (alterations adopted) (internal quotation marks omitted).

One player expressed "fear" that not joining Coach Kennedy's mid-field prayer "would negatively impact his playing time." *Kennedy*, 991 F.3d at 1018. But a colorable coercion claim requires evidence of actual benefits or burdens discriminatorily allocated based on religious beliefs. *Town of Greece*, 572 U.S. at 589 (plurality op.). Though one player expressed fear of mistreatment, there was no hint of actual evidence that Coach Kennedy ever disfavored players based on their religious participation. And that is key, since by all accounts Coach Kennedy had engaged in religious expression for years without one allegation of unequal

previously coerced into joining Coach Kennedy when he did pray. If anything, it is more reasonable to assume that the players avoided doing exactly what their coach had just been punished for. Fear of engaging in religious expression is not evidence of past coercion. To the contrary, it undermines any Establishment Clause violation by the School.

[5] The panel disagreed that the public response to Coach Kennedy's prayer was spontaneous. *Kennedy*, 991 F.3d at 1013. But Coach Kennedy's "publicity advertising" is beside the point for a coercion inquiry. *See id.* Whether the public felt inspired to join Coach Kennedy's efforts because of his publicity or joined in the moment, there is no evidence that Coach Kennedy's media appearances somehow coerced coaches, players, spectators, and others to join him. More fundamentally, the School District did the opposite of compelling participation—it attempted to dissuade the public from joining Coach Kennedy by fielding "robo calls" and restricting access to the field. *See id.* at 1012. Those who joined Coach Kennedy, whether spontaneously or not, did so voluntarily.

treatment. Without more, this single statement from one player experiencing "subtle pressure" is hardly enough. *See Town of Greece*, 572 U.S. at 609 (Thomas, J., concurrence in part).[6] Courts must "distinguish between real threat" of an establishment "and mere shadow." *Am. Legion*, 139 S. Ct. at 2091 (Breyer, J., concurring) (citation omitted). Since neither the School District nor Coach Kennedy imposed consequences based on participation, there was no coercion. And the individual players' and coaches' choice to engage in religious expression would not have been an establishment.[7]

[6] To be sure, the Supreme Court has recognized that elementary and secondary students can be more impressionable and thus more susceptible to coercion. *See Kennedy*, 991 F.3d at 1017 (quoting *Edwards v. Aguillard*, 482 U.S. 578, 583–84 (1987)). Contrary to Judge M. Smith's assertion, I do not ignore this distinction. *Ante*, at 30–31 (M. Smith, J., concurring in denial of rehearing en banc). This case is not like those where a school requires students to say a non-denominational prayer, appoints a clergy to pray over a graduation ceremony, or offers optional morning Bible readings. *See id.* at 24–25. Because here the School District "[i]s not actually advancing religion, the impressionability of students" is not "relevant to the Establishment Clause issue." *Good News Club*, 533 U.S. at 116. And though teachers and coaches are role-models, the Supreme Court has yet to factor that consideration into its Establishment Clause analysis. *See id.*

[7] The panel thought that allowing Coach Kennedy to pray would have subjected the School District and spectators to a parade of horribles, including (alarmingly) letting anyone onto the field like the Satanists waiting in the stands. *See Kennedy*, 991 F.3d at 1012; *see also ante*, at 28–29 (M. Smith, J., concurring in denial of rehearing en banc); *ante*, at 43 (Christen, J., concurring in denial of rehearing en banc). This reasoning is incorrect. Nothing would have required the School District to open the field to the public. Instead, it would have had to allow the religious exercise of those with access to the field without discriminating between beliefs or practices. *See Trump v. Hawaii*, 138 S. Ct. at 2417

Despite there being neither endorsement nor coercion, the panel still thought allowing Coach Kennedy to pray would have "unquestionably" violated the Establishment Clause. *Kennedy*, 991 F.3d at 1017. That conclusion erroneously went beyond Supreme Court precedent and therefore should have been corrected.[8]

B

The panel's analysis was wrong for a more fundamental reason: it leaps beyond the Establishment Clause's original meaning to the detriment of free exercise rights. Generally, we rely on the plain meaning of the Constitution because the Framers "employed words in their natural sense, and . . . intended what they have said." *Gibbons v. Ogden*, 22 U.S. (1 Wheat.) 1, 188 (1824). And "contemporary history, and contemporary interpretation" help us capture how the

("[The] clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

If nearly all players had joined Coach Kennedy, that would not have been an establishment either. To be clear, these religious protections apply equally to all creeds. *See ante*, at 31 (M. Smith, concurring in denial of rehearing en banc). But when "nearly all" of those engaging in voluntary religious exercise "turn[] out to be" members of the same faith, allowing those homogenous exercises would "not reflect an aversion or bias . . . against minority faiths." *Town of Greece*, 572 U.S. at 585. So long as individuals, as here, retain a "genuine and independent private choice," the frequency of a religious belief or practice should not factor into an Establishment Clause analysis. *See Zelman*, 536 U.S. at 652.

[8] Were *Santa Fe* controlling, we clearly would need to apply Supreme Court precedent. *See ante*, at 29–30 (M. Smith, J., concurring in denial of rehearing en banc). But *Santa Fe* is not controlling, and we should not extend inapt precedent (as the panel did here), especially when the Supreme Court has recently taken a different tack in Establishment Clause cases. *See generally Am. Legion*, 139 S. Ct. 2067.

Constitution's text would have been understood by the ordinary voter at the time of its ratification. 3 Joseph Story, Commentaries on the Constitution of the United States § 405 (1833); *see also District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (cleaned up) ("the Constitution was written to be understood by the voters" at the time it was ratified). This inquiry is critical as "a practice consistent with our nation's traditions is just as permissible whether undertaken today" or 230 years ago. *Am. Legion*, 139 S. Ct. at 2102 (Gorsuch, J., concurring in the judgment); *cf. Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1896 (2021) (Alito, J., concurring in the judgment) (words in the Free Exercise Clause "had essentially the same meaning in 1791 as they do today"). Thus, the plain meaning of the Establishment Clause's text informed by historical practice should guide our interpretation of that Clause.

The Supreme Court has already interpretated the Establishment Clause under a historical test in many contexts. To name a few, the *Van Orden* plurality jettisoned *Lemon* to analyze a monument's nature and "our Nation's history." 545 U.S. at 686; *see also id.* at 699 (Breyer, J., concurring) (rejecting a single test, but recognizing the Court's reliance on historical practices in some contexts). In *Marsh v. Chambers*, 463 U.S. 783, 787–89 (1983), and *Town of Greece*, 572 U.S. at 575–76, the Court looked to historical practices and understandings to determine the constitutionality of legislative prayer. And recently in *American Legion*, the Court continued its trend with a majority of the Justices analyzing the "particular issue at hand" and relying on "history for guidance." 139 S. Ct. at 2067 (plurality op.); *see also id.* at 2096 (Thomas, J., concurring in the judgment); *id.* at 2102 (Gorsuch, J., concurring in the judgment). Even *Everson* relied on "the background and environment of the period in which [the

Establishment Clause's] constitutional language was fashioned and adopted" in the school context. 330 U.S. at 8. This history-based test is not *a* way to approach Establishment Clause cases, *see Am. Legion*, 139 S. Ct. at 2092 (Kavanaugh, J., concurring)—it should be *the* way.

For judges, originalism provides a powerful check against injecting our own policy preferences into the Constitution; but sticking to the Establishment Clause's original public meaning is especially critical. The Bill of Rights generally sets a floor, allowing federal, state, and local governments to further protect those rights. Hence Congress and many states enacted legislation to keep protecting religious freedoms after the Supreme Court artificially limited the Free Exercise Clause. *See Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872 (1990); *Holt v. Hobbs*, 574 U.S. 352, 357 (2015); National Conference of State Legislatures, *State Religious Freedom Restoration Acts* (May 4, 2017), https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx. In contrast, the Establishment Clause is more of a ceiling. It was ratified to ensure the free exercise of religion without government interference. *Santa Fe*, 530 U.S. at 313 ("Indeed, the common purpose of the Religion Clauses is to *secure* religious liberty." (emphasis added) (internal quotation marks and citation omitted)); *see also* James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), *reprinted in* The Founders' Constitution 82–84 (Philip B. Kurland & Ralph Kurland & Lerner eds., 1986). But by expanding the Establishment Clause beyond its original scope, we frustrate its purpose and inhibit personal religious exercise in the public square.

The panel's analysis is a perfect example. Under the panel's ahistorical view of the Establishment Clause, the

School District *had* to let Coach Kennedy go since simply allowing him to pray on the field would have "unquestionably" violated the Establishment Clause. *See Kennedy*, 991 F.3d at 1017. Or as Judge M. Smith reiterated, "[m]erely by allowing the prayer to take place," the School District would have "violated the Establishment Clause" *even if* the prayer "was the independent choice of private individuals." *Ante*, at 26 (M. Smith, J., concurring from denial of rehearing en banc). That conclusion could not be further from the original meaning of an established religion. Yet the panel expanded the Establishment Clause beyond its original scope, and even beyond our precedent, in a way that would allow the School District to violate the free exercise rights of an employee engaged in private prayer. *See id.* at 1019–21.

Historical practice shows that allowing religion in the public square was never understood to be an establishment. *See* 3 Story, *supra*, § 405. "There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch*, 465 U.S. at 674. George Washington as his "first official act" gave "fervent supplications to that Almighty Being who rules over the universe," for "[n]o people can be bound to acknowledge and adore the Invisible Hand, which conducts the affairs of men more than those of the United States." First Inaugural Address (Apr. 30, 1789), *reprinted in* 1 Inaugural Addresses of the Presidents of the United States 7 (2000). Only days after the Establishment Clause was ratified, Congress "enacted legislation providing for paid chaplains for the House and Senate." *Lynch*, 465 U.S. at 674. Thanksgiving began as a day of gratitude "to the Great Lord and Ruler of Nations," and eventually became a national holiday one century later. *Id.* at 677–78 & n.2 (citations omitted). Be it executive or legislative

practices, the Pledge of Allegiance, or deific references on our coinage, these overtly religious practices are constitutional today not just because of tradition; they did not violate the Establishment Clause then and certainly do not now. *See Am. Legion*, 139 S. Ct. at 2102 (Gorsuch, J., concurring in the judgment).

In schools specifically, allowing religious exercise never caused heartburn. In our nation's early days, clergy oversaw education and often intermixed religious training. Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J. L. & Pub. Pol'y 657, 663 (1998); *see also* Alexis de Tocqueville, 1 Democracy in America 314 n.f (2d ed. 1900) ("Almost all education is entrusted to the clergy."). Massachusetts' constitution also affirmed that "the happiness of a people, and the good order and preservation of civil government essentially depend upon piety, religion and morality" attained through "public worship of God and . . . public instructions." Mass. Const. of 1780 pt. I, art. III. Pennsylvania's constitution similarly considered "religious societies" as perfectly situated "for the advancement of religion or learning." Pa. Const. of 1776, §§ 44–45.

The First Congress allowed religion in schools as well. Those for and against a federal constitution agreed that the new Congress had no authority to establish a religion. *See* Amar, *supra*, at 36; The Federalist No. 45 (James Madison) ("The powers delegated by the proposed Constitution to the federal government are few and defined."); 3 Story, *supra*, § 1873 ("Thus, the whole power over the subject of religion is left exclusively to the state governments . . . ."). Still, the First Congress had authority to reenact the Northwest Ordinance of 1787, which declared that "[r]eligion, morality, and knowledge, being necessary to good government and the

happiness of mankind, schools and the means of education shall forever be encouraged." Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 52. Congress could not have passed that law if doing so would have impermissibly encroached into the religious sphere.

Tellingly, a recent analysis of founding-era corpora found no evidence that prayers or religious practices in schools were considered an establishment of religion at the time of the Establishment Clause's ratification. Stephanie H. Barclay et al., *Original Meaning and the Establishment Clause: A Corpus Linguistics Analysis*, 61 Ariz. L. Rev. 505, 555 (2019). The only potential Establishment Clause violation occurred when parents and students could not choose between already religious schools. *Id.* at 555 n.311.

Decades later, the relationship between schools and religion began to shift. Newly minted public schools called for "strict religious neutrality" and the "entire exclusion of religious teaching." Viteritti, *supra*, at 666. But in reality, these policies aimed to weaken Catholic parochial schools and strengthen Protestant dominance in educational settings. *Id.* at 666–68. It worked. And sadly, this religious infighting laid the groundwork for the Supreme Court's separationist jurisprudence (like *Lemon*) and today's anti-religious demands in all public contexts. Eventually, it became culturally apropos to declare that "[t]he First Amendment has erected a wall between church and state" that "must be kept high and impregnable." *Everson*, 330 U.S. at 18. But that wall was not laid in 1791; it was laid brick by brick in the centuries that followed.[9]

[9] *Everson* relies, in part, on a letter from Thomas Jefferson to the Danbury Baptist Association, explaining that the Religion Clauses were

Applying the Establishment Clause's historical bounds to Coach Kennedy's case, the panel got it wrong. Merely allowing a coach or teacher to pray on the football field would not have been an establishment in 1791 and thus is not an establishment now. "The Religion Clauses of the First Amendment . . . [b]y no means . . . impose a prohibition on all religious activity in our public schools." *Santa Fe*, 530 U.S. at 313. Again, en banc review would have allowed our court to correct the panel's ahistorical analysis.

II

One last thought. If we accept a historical approach to Establishment Clause cases (as *American Legion* requires), what do we do with the litany of other tests created over the years? It makes little sense to kill *Lemon* but keep its progeny. Thus, tests stemming from *Lemon*'s purpose, effects, or entanglement prongs are inherently suspect. That

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"intended to erect 'a wall of separation between Church and State.'" 330 U.S. at 16; *see also* Thomas Jefferson, Letter to the Danbury Baptist Association (Jan. 1, 1802), *reprinted in* The Founders' Constitution, *supra*, at 96. Separationists have relied on this statement for decades. But Jefferson was not present during the framing and ratification of the Bill of Rights and is thus "a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment." *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting); *see id.* ("It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history."). More importantly, Jefferson thought the Establishment Clause disallowed Congress from passing religiously focused legislation, but not the states (which retained the authority to enact such legislation). *Amar*, *supra*, at 34–35. This explains Jefferson's unwillingness to declare a day of Thanksgiving while president, but allowance of religious endorsements as Virginia's governor so long as dissenters retained their freedom of conscience. *Id.* Against this backdrop, it makes no sense to superimpose Jefferson's views of federal limits on state and local governments.

said, if a test accurately captures the Establishment Clause's historical bounds without narrowing or expanding those bounds, there is no need to jettison the test.

The panel's "objective observer" test far exceeds the original bounds of the Establishment Clause. *See Kennedy*, 991 F.3d at 1017 (quoting *Santa Fe*, 530 U.S. at 308). The test is already suspect since it stems from *Lemon*, *see Lynch*, 465 U.S. at 688–90 (O'Connor, J., concurring), and its overbroad sweep confirms that suspicion. First, "endorsement" is too opaque. As this case demonstrates, "endorsement" can sweep wide enough to forbid the School District from merely allowing personal prayer on a football field (a practice that historically was never an establishment).

Second, the test turns on the objective observer. But who is that? The panel did not have someone from 1791 in mind. No, the panel relied on whether a modern-day observer—infused with today's more recent separationist mentality—would view the School District's allowance of Coach Kennedy's prayer as an establishment. After all, only that modern mentality drove the School District to ask Coach Kennedy to pray in a "private location" off the field or non-visibly on the field. *See Kennedy*, 991 F.3d at 1013. Only that mentality allowed the district court to find the School District's actions were justified by the Establishment Clause. And only that mentality compelled the panel to praise the School District's "efforts to avoid violating the Constitution" yet disparage Coach Kennedy's efforts to

personally exercise his beliefs in a public space and defend his free exercise rights.[10] *E.g.*, *Kennedy*, 991 F.3d at 1010.

Put simply, relying on the modern-day observer allows governments and the courts to expand the Establishment Clause's prohibitions beyond its original bounds and inhibit free exercise. But the Establishment Clause as originally understood makes clear there is "no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). So just as *Lemon* has been deemed largely illegitimate, so is an equally illegitimate and ahistorical endorsement test based on the modern-day objective observer. *See Town of Greece*, 572 U.S. at 609–10 (Thomas, J., concurring in part).

III

The Establishment Clause was designed to keep government out of personal religious exercise, not purge religion from the public square. Not only did the panel's

[10] The main opinion repeatedly criticized Coach Kennedy for publicly defending his rights and refusing to hide his religious beliefs—"pugilistic," to put it in a word. *Kennedy*, 991 F.3d at 1017. But would we ever pejoratively refer to members of various civil rights movements as "pugilistic" when they publicly, peacefully, and vocally tried to vindicate their rights? Absolutely not. *See, e.g.*, *Masterpiece Cakeshop Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1727 (2018) (gay individuals and couples "cannot be treated as social outcasts or as inferior in dignity or worth," and "[t]he exercise of their freedom on terms equal to others must be given great weight and respect by the courts"). The position "that religious beliefs cannot legitimately be carried into the public sphere . . . implying that . . . religious persons are less than fully welcome" is hostility toward religion, not neutrality. *Id.* at 1729.

analysis miss the mark, but it expanded a dangerous misunderstanding of the Establishment Clause that infringes, not protects, religious rights. There may be situations in which a school's sponsorship or mandatory attendance policies lead to actual coercion. But merely allowing religion to be independently expressed in a school setting was never and is not an establishment of religion.

Without a distorted view of the Establishment Clause to hide behind (whether analyzed under existing Supreme Court specifically or a historical analysis generally), the School District violated Coach Kennedy's free exercise rights. Religion was the "sole reason" it acted against Coach Kennedy, triggering the strictest scrutiny. *Kennedy*, 991 F.3d at 1010; *Espinoza*, 140 S. Ct. at 2255. The School District also had no compelling interest other than an erroneous understanding of the Establishment Clause. In other words, at least Coach Kennedy's Free Exercise claim would have "unquestionably" succeeded.

We are left with yet another decision untethered from history and grounded in hostility toward religion of more recent vintage. But from this nation's beginning, when government "guarantee[d] the freedom to worship as one chooses," "ma[d]e room for [a] wide variety of beliefs and creeds," "show[ed] no partiality to any one group," and "let[] each flourish," it "follow[ed] the best of our traditions." *Zorach*, 343 U.S. at 313–14. With history as our guide, we can better follow the First Congress's "example of respect and tolerance for differing views, an honest endeavor to achieve inclusivity and nondiscrimination, and a recognition of the important role that religion plays in the lives of many Americans." *Am. Legion*, 139 S. Ct. at 2089. I dissent.

COLLINS, Circuit Judge, dissenting from the denial of rehearing en banc:

For the reasons set forth by Judge O'Scannlain, whose statement I join, I dissent from the denial of rehearing en banc in this case. I have little to add to the much that has already been said about this case, but I do think that it is worthwhile to underscore one irreducible aspect of the panel's opinion.

In concluding that Bremerton School District employed the least restrictive means of accomplishing its assertedly compelling interest in avoiding an Establishment Clause violation, the panel relied on the premise that "*allowing* Kennedy" to "pray[] on the fifty-yard line immediately following the game in full view of students and spectators" "*would* constitute an Establishment Clause violation." *Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004, 1022 (9th Cir. 2021) (emphasis added). Thus, according to the panel, allowing any publicly observable prayer behavior by the coach in those circumstances—even silent prayer while kneeling—would violate the Establishment Clause. *See id.* (describing "pray[ing] on the fifty-yard line immediately following the game" as "a practice that violated the Establishment Clause"). Whatever else might be said about what occurred at the various games at issue in this case, *that* holding is indefensible under current Supreme Court caselaw, as Judge O'Scannlain amply demonstrates.