No. 16-35801

In the United States Court of Appeals for the Ninth Circuit

JOSEPH A. KENNEDY,

Plaintiff–Appellant,

v.

BREMERTON SCHOOL DISTRICT

Defendant–Appellee.

On Appeal from the United States District Court for the Western District of Washington, Tacoma Division, Case No. 3:16-CV-05694-RBL

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INTRODUCTION

Appellant Joseph A. Kennedy ("Coach Kennedy"), a popular and well-respected football coach at Bremerton High School ("BHS"), was suspended from his coaching job for kneeling to pray at the conclusion of BHS football games. This case is about Coach Kennedy's First Amendment right to take a knee at midfield after BHS football games and say a silent prayer lasting 15 to 30 seconds.

Defendant Bremerton School District ("BSD" or the "District") has publicly admitted that Coach Kennedy's religious expression is "fleeting," and that no student, parent, or member of the community ever complained about that conduct during his eight years of coaching at BHS. ER 176 (Letter to Coach Kennedy, Oct. 23, 2015); ER 183–84 (BSD Statement and Q&A, Oct. 28, 2015). BSD has further conceded that there is "no evidence" that students have ever been "coerced" to pray with Coach Kennedy, and that he never "actively encouraged, or required, [student] participation" in any religious activity. ER 181 (BSD Statement and Q&A, Oct. 28, 2015); ER 158 (Letter to Coach Kennedy, Sept. 17, 2015).

Despite Coach Kennedy's full "compli[ance]" with BSD's "directives not to intentionally involve students in his on-duty religious activities," BSD changed the rules. ER 182 (BSD Statement and Q&A, Oct. 28, 2015). Instead of abiding by its written policies—and its prior instructions to Coach Kennedy—BSD issued a sweeping new directive that prohibited on-duty BHS employees from engaging in

any "*demonstrative religious activity*" that is "readily observable to . . . students and the attending public." ER 177 (Letter to Coach Kennedy, Oct. 23, 2015) (emphasis added).

When Coach Kennedy engaged in the brief, quiet prayer that is required by his faith after the next BHS football game, BSD suspended him. The District later retaliated against Coach Kennedy by giving him a poor performance evaluation—for the first time in his entire BHS coaching career—and then refusing to rehire him.

BSD's blanket ban on "demonstrative religious activity" by on-duty school employees is baldly unconstitutional. On its face, that rule would prohibit on-duty employees from praying over lunch in the cafeteria, making the sign of the cross, wearing a yarmulke or headscarf, or engaging in *any other visible religious conduct*.

But instead of vindicating Coach Kennedy's First Amendment claims, the district court denied his motion for a preliminary injunction based solely on the likelihood of success on the merits. Specifically, the court held that Coach Kennedy's speech was unprotected by the First Amendment because he was "still on the job" as a "coach" when he knelt at midfield to pray. ER 44. The court further held that BSD's alleged fear of being sued for an Establishment Clause violation justified its adverse employment actions because "a reasonable observer . . . would have seen [Coach Kennedy] as a coach" when he knelt to pray. *Id.*

Both of those holdings are erroneous. Indeed, the First Amendment rule the district court adopted stretches well beyond the bounds of religious expression, stripping constitutional protection from all "on the job" speech. Under the district court's rule, any on-duty public employee can be fired for kneeling to give thanks in prayer, for kneeling in protest during the national anthem, or for engaging in any other form of expressive activity—and *there is no constitutional recourse*.

The decision below therefore strips Coach Kennedy of his "constitutional rights to freedom of speech [and] expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). That is precisely what the First Amendment forbids.

JURISDICTIONAL STATEMENT

The district court exercised jurisdiction under 28 U.S.C. § 1331. It denied Coach Kennedy's motion for a preliminary injunction on September 19, 2016. Coach Kennedy timely filed a notice of appeal on October 3, 2016. This Court has jurisdiction under 28 U.S.C. § 1292(a).

ISSUES PRESENTED

1. Whether Coach Kennedy spoke as a private citizen or a public employee when he took a knee and bowed his head to engage in a brief, quiet prayer lasting 15 to 30 seconds at the conclusion of BHS football games.

2. Whether Coach Kennedy's practice of taking a knee and bowing his head to engage in a brief, quiet prayer lasting 15 to 30 seconds at the conclusion of BHS football games violates the Establishment Clause.

STATEMENT OF THE CASE

I. Coach Kennedy's Sincerely Held Religious Beliefs Require Him to Offer a Brief Prayer of Thanksgiving After BHS Football Games

Coach Kennedy has been employed as a football coach at BHS since 2008. ER 143. He has worked as an assistant coach for the BHS varsity football team and as the head coach for the BHS junior varsity football team. *Id*.

Coach Kennedy is a practicing Christian. *Id.* After watching *Facing the Giants* (2006), a faith-based film about a high school football team, Coach Kennedy made a commitment to God that he would give thanks through prayer, at the end of each game, for what the players had accomplished and for the opportunity to be part of their lives through the game of football. ER 144–45.

Specifically, after the game is over, and after the players and coaches from both teams have met to shake hands at midfield, Coach Kennedy feels called to pause on the playing field to engage in private religious expression. ER 145. He takes a knee at the 50-yard line and offers a silent or quiet prayer of thanksgiving for player safety, sportsmanship, and spirited competition. *Id.* That prayer lasts no more than 30 seconds. *Id.* Because Coach Kennedy's prayer lifts up the players and recognizes

their hard work and sportsmanship during the game, his sincerely held religious beliefs require him to pray on the field where the game was played. *Id.*

Coach Kennedy has engaged in private religious expression at the conclusion of BHS football games since he first started work as a BHS football coach. *Id.* Initially, in 2008, Coach Kennedy prayed quietly and alone. *Id.* After several games where he prayed alone, some BHS players asked what he was doing and whether they could join him. *Id.* Coach Kennedy responded that he was giving thanks and said, "This is a free country. You can do what you want." *Id.* Over time, the number of players who gathered near Coach Kennedy after the game grew to include the majority of the team, although the number of players who participated after any one game varied. *Id.* Sometimes no players gathered, and Coach Kennedy prayed alone. *Id.* Sometimes BHS players invited players from the opposing team to join. *Id.*

Eventually, Coach Kennedy began giving short motivational speeches to the players after the game. ER 146. Although the exact wording would vary from game to game, Coach Kennedy's post-game speeches were similar to the following: "Lord, I lift these guys up for what they just did on the field. They battled for 48 minutes and even though they came here as rivals, they can leave here as friends. It doesn't matter what our beliefs are—we believe in our team and we believe in each other." *Id.* Thus, although Coach Kennedy's post-game speeches typically involved religious content, they were always nonsectarian and nonproselytizing.

Previously, Coach Kennedy sometimes participated in pre- and post-game locker room prayers that the BHS football team engaged in as a matter of school tradition. *Id.* This activity "predated [his] involvement with the program." ER 158 (Letter to Coach Kennedy, Sept. 17, 2015). Coach Kennedy's sincerely held religious beliefs do not require him to lead any prayer, involving students or otherwise. ER 146. He immediately ceased participating in all locker room prayers upon receiving instructions to do so. *Id.*

II. BSD Issues Directives for Coach Kennedy's Religious Expression

BSD learned of Coach Kennedy's post-game religious expression for the first time in fall 2015, when an employee from another high school approached a BHS administrator to compliment Coach Kennedy's ability to bring players from opposing teams together after football games. ER 183–84 (BSD Statement and Q&A, Oct. 28, 2015).

On September 17, 2015, BSD Superintendent Aaron Leavell sent Coach Kennedy a letter announcing that BSD "has been conducting an inquiry into whether District staff have appropriately complied with Board Policy 2340, 'Religious-Related Activities and Practices.'" ER 158 (Letter to Coach Kennedy, Sept. 17, 2015). Board Policy 2340 provides as follows:

> As a matter of individual liberty, a student may of his/her own volition engage in private, non-disruptive prayer at any time not in conflict with learning activities. School staff shall neither encourage nor discourage

> a student from engaging in non-disruptive oral or silent prayer or any other form of devotional activity.

ER 156 (Board Policy 2340, Aug. 13, 1992). Notably, Board Policy 2340 does not prohibit demonstrative religious expression by on-duty school employees.

BSD's September 17, 2015 letter admitted that any student participation in Coach's Kennedy's post-game religious expression was entirely "voluntary," and that Coach Kennedy "ha[d] not actively encouraged, or required, participation" by the students. ER 158 (Letter to Coach Kennedy, Sept. 17, 2015). BSD nevertheless opined that Coach Kennedy's actions "would very likely be found to violate the First Amendment's Establishment Clause." *Id.*

The District went on to prescribe certain guidelines for Coach Kennedy's religious expression, stating that, "[i]n order to avoid the perception of endorsement," his religious expression "should either be non-demonstrative (i.e., not outwardly discernable as religious activity) if students are also engaged in religious conduct, or it should occur while students are not engaging in such conduct." ER 160 (Letter to Coach Kennedy, Sept. 17, 2015).

After receiving BSD's 2015 letter, Coach Kennedy temporarily stopped his practice of engaging in private religious expression immediately after BHS football games. ER 147. At the conclusion of the game on September 18, 2015, Coach Kennedy gave a short motivational speech to the players, but did not offer any words or expression of thanksgiving. *Id.*

On his drive home, Coach Kennedy felt "dirty" because he had broken his commitment to God. *Id.* He turned his car around and went back to the field, where he waited until everyone else had left the stadium. *Id.* Then Coach Kennedy walked to the 50-yard line, where he knelt to pray alone. *Id.*

III. BSD Changes the Rules and Issues a New Ban on All "Demonstrative Religious Activity" by On-Duty Employees

On October 14, 2015, Hiram Sasser, counsel for Coach Kennedy, sent a letter to Superintendent Leavell and the BSD School Board. In that letter, Coach Kennedy informed BSD that he is compelled by his sincerely held religious beliefs—his commitment to God—to pray following each football game. ER 168–73. He also formally requested a religious accommodation under Title VII of the Civil Rights Act of 1964 that would affirm his right to engage in a brief, quiet prayer at midfield at the conclusion of BHS games. *Id.*

After the football game on October 16, 2015, Coach Kennedy walked to midfield for the customary handshake with the opposing team. ER 148. He intentionally waited until the BHS players were walking toward the stands to sing the post-game fight song. *Id.* Then he knelt at the 50-yard line, closed his eyes, and prayed a brief, quiet prayer. *Id.*

While Coach Kennedy was kneeling with his eyes closed, coaches and players from the opposing team, as well as members of the public and media, spontaneously joined him on the field and knelt beside him. *Id.* Coach Kennedy had no knowledge

that players from the opposing team or members of the community would join him on the field, nor did he seek to have anyone join him in his religious expression.

On October 23, 2015, just hours before that night's scheduled football game, Superintendent Leavell sent Coach Kennedy a second letter that "emphasize[d] [his] appreciation for [Coach Kennedy's] efforts to comply with the September 17 directives," and acknowledged that Coach Kennedy's religious expression on October 16 was "fleeting." ER 175–76 (Letter to Coach Kennedy, Oct. 23, 2015).

Nonetheless, BSD denied Coach Kennedy's request for a religious accommodation and asserted that his "overtly religious conduct" was prohibited by the Establishment Clause. ER 176 (Letter to Coach Kennedy, Oct. 23, 2015). For the first time, BSD purported to prohibit Coach Kennedy—and all BHS employees—from engaging in *any* "demonstrative religious activity" that is "readily observable to (if not intended to be observed by) students and the attending public." ER 177 (Letter to Coach Kennedy, Oct. 23, 2015). On its face, BSD's new policy prohibits any and all "demonstrative religious activity" by on-duty BHS employees.

At the conclusion of the BHS football game that night, Coach Kennedy knelt alone at the 50-yard line and bowed his head for a brief, quiet prayer. ER 148.

IV. BSD Retaliates by Subjecting Coach Kennedy to a Series of Adverse Employment Actions

On October 28, 2015, BSD placed Coach Kennedy on paid administrative leave and prohibited him from "participat[ing], in any capacity, in BHS football program activities." ER 179 (Letter to Coach Kennedy, Oct. 28, 2015).

The District's stated reason for these adverse employment actions was that Coach Kennedy had "engag[ed] in overt, public and demonstrative religious conduct while still on duty as an assistant football coach." *Id.* Specifically, BSD stated that it was suspending Coach Kennedy for "*kneel[ing] on the field and pray[ing]* immediately following the . . . game"—even though his prayer occurred when BHS players were engaged in other "post-game traditions." *Id.* (emphasis added).

In a public document entitled "Bremerton School District Q&A Regarding Assistant Football Coach Joe Kennedy," the District stated that Coach Kennedy "will not participate, in any capacity, in BHS football program activities" until he "affirms his intention to comply with the District's directives." ER 181 (BSD Statement and Q&A, Oct. 28, 2015). BSD conceded that Coach Kennedy "has complied with [its] directives not to intentionally involve students in his on-duty religious activities," but stated that "he has continued a practice of engaging in a public religious display immediately following games, while he is still on duty." ER 182 (BSD Statement and Q&A, Oct. 28, 2015).

In November 2015, BSD further retaliated against Coach Kennedy by giving him a poor performance evaluation for the first time in his BHS coaching career. ER 265–66 (BSD Coaching Evaluation Form, Nov. 20, 2015).[1] The evaluation recommended that Coach Kennedy not be rehired because he allegedly "failed to follow district policy" regarding religious expression and "failed to supervise student-athletes after games." ER 266. Subsequently, Coach Kennedy was not rehired for the following year. ER 149.[2]

V. The District Court Denies Coach Kennedy's Motion for a Preliminary Injunction Because He Was "On the Job" as a "Coach" When He Knelt to Pray at Midfield

Coach Kennedy filed suit in the Western District of Washington on August 9, 2016, alleging violations of his rights under the First Amendment and Title VII of the Civil Rights Act of 1964.[3] On August 24, 2016, Coach Kennedy moved for a

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[1] Prior to fall 2015, Coach Kennedy received overwhelmingly positive performance evaluations, which confirm that he "d[id] an excellent job mentoring players and building character in them," that "[h]is work with our players . . . is a great asset to our community," and that "[h]is enthusiasm and positive attitude is great for team [morale]." ER 188–98 (BSD Coaching Evaluation Forms). Each of Coach Kennedy's prior evaluations recommended rehiring him for the following year. ER 144.

[2] Although BHS Assistant Coach David Boynton engaged in a Buddhist chant near the 50-yard line at the conclusion of many BHS football games—and continued to do so after the October 23, 2015 letter was issued—BSD did not take adverse employment action against Coach Boynton. ER 146.

[3] Coach Kennedy filed a complaint of religious discrimination with the Equal Employment Opportunity Commission on December 15, 2015, and a right-to-sue letter issued on June 27, 2016. ER 111. Coach Kennedy's motion for preliminary

preliminary injunction that would order BSD to cease discriminating against him in violation of the First Amendment, reinstate him as a BHS football coach, and allow him to take a knee at midfield at the conclusion of BHS football games and "say a silent prayer that lasts 15–30 seconds." ER 140.

In his motion for preliminary injunction, Coach Kennedy argued that he was likely to succeed on the merits of his First Amendment claims because BSD's blanket ban on "demonstrative religious activity" by on-duty school employees is baldly unconstitutional. Coach Kennedy further explained that, under the "five-step" framework laid out in *Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009), *see infra* at 18, his speech is fully protected by the First Amendment, and BSD has no adequate justification for discriminating against him.

The district court heard oral argument on the motion for preliminary injunction on September 19, 2016. At the conclusion of the hearing, the court orally denied the motion. ER 331 (denying preliminary injunction "for the reasons orally stated on the record").

From the bench, the district court announced that three of the five *Eng* factors cut in Coach Kennedy's favor: Coach Kennedy spoke on a matter of "public concern" (step one), his speech was a "substantial or motivating factor" in the

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injunction related only to his First Amendment claims. Only those claims are at issue in this appeal.

adverse employment actions (step three), and BSD would not have taken the adverse employment actions absent the protected speech (step five). ER 43.

But the district court also held—at step two of the *Eng* analysis—that Coach Kennedy spoke only "as a public employee," not as a private citizen, when he knelt at midfield to offer a brief, quiet prayer. *Id.* The court declared that "[i]t is not a debatable point, from my perspective" that Coach Kennedy spoke as a public employee, because he "was still in charge" and "still on the job" at the time of his religious expression. ER 44; *see also id.* ("He was on the job, as he would have wanted to be.").

The district court also held that BSD had an adequate justification for its adverse employment actions (*Eng* step four), because "a reasonable observer, in my judgment, would have seen him as a coach" when he knelt to pray. *Id.* The court opined that "those things . . . can't be happening on public property in this climate under the law." ER 43.

The district court did not base its decision on the nature of the requested relief or address the other factors of the preliminary injunction analysis.[4] The court

[4] "To warrant injunctive relief, a plaintiff must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Klein v. City of San Clemente*, 584 F.3d 1196, 1199 (9th Cir. 2009) (internal quotation marks omitted).

concluded by stating that it was "just focusing on *Coach Kennedy's role as coach* as determinative of this issue." ER 44 (emphasis added).

SUMMARY OF THE ARGUMENT

The district court made two errors of law when it denied Coach Kennedy's motion for a preliminary injunction. Both relate to the merits of Coach Kennedy's First Amendment claims.

First, the district court erred when it held that Coach Kennedy spoke "as a public employee," not a private citizen, because he was "on the job" as a football coach when he knelt to pray at midfield. ER 44.

That holding violates the Supreme Court's unanimous decision in *Lane v. Franks*, 134 S. Ct. 2369 (2014), which held that the "critical question" in evaluating a public employee's speech is "whether the speech at issue is itself *ordinarily within the scope of an employee's duties*." *Id.* at 2379 (emphasis added). It likewise ignores this Court's en banc opinion in *Dahlia v. Rodriguez*, 735 F.3d 1060 (9th Cir. 2013), which explained that courts must conduct a "practical" inquiry into the "the scope of an employee's duties"—and that "various easy heuristics" are "insufficient" to determine whether speech is protected. *Id.* at 1069.

Under the proper standard—as set forth in *Lane* and *Dahlia*—it is clear that Coach Kennedy spoke only as a private citizen when he knelt at midfield to pray. All of Coach Kennedy's "ordinary job responsibilities" are obviously unrelated to

his brief, private religious expression. Thus, Coach Kennedy spoke "as a citizen," and his speech "lies at the heart of the First Amendment." *Lane*, 134 S. Ct. at 2377–78. The district court's contrary holding was error.

Second, the district court erred in holding that BSD's alleged fear of violating the Establishment Clause justified its adverse employment actions against Coach Kennedy. This holding, which is based on a wildly overbroad reading of the Establishment Clause, also violates controlling precedent.

The ultimate question under the Establishment Clause is whether an "objective observer" would perceive Coach Kennedy's brief, quiet prayer as "a state endorsement of prayer in public schools." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000). Because no reasonable observer would view the act of kneeling on the playing field for 15 to 30 seconds as a school-sponsored prayer, Coach Kennedy's religious expression does not violate the Establishment Clause.

Indeed, no other federal court has embraced so extreme a view of the Establishment Clause. The district court's holding would convert *any* religious expression, however fleeting—silently praying over lunch in the cafeteria, making the sign of the cross, wearing a yarmulke or headscarf—into an unconstitutional state endorsement of religion. That rule cannot be squared with this Court's common-sense instruction that "[s]chools . . . do not endorse everything they fail to censor."

Hills v. Scottsdale Unified Sch. Dist. No. 48, 329 F.3d 1044, 1055 (9th Cir. 2003) (quoting *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion)).

This Court should reverse and remand for the district court to consider the remaining prongs of the preliminary injunction standard.

STANDARD OF REVIEW

On an appeal from the denial of a preliminary injunction, this Court generally "review[s] the district court's legal conclusions de novo, and its application of the preliminary injunction factors for abuse of discretion." *Leigh v. Salazar*, 677 F.3d 892, 896 (9th Cir. 2012) (citing *Stormans, Inc. v. Selecky,* 586 F.3d 1109, 1119 (9th Cir. 2009)); *see also Sanders Cty. Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 744 (9th Cir. 2012) ("where the essential issues are matters of law, we review the district court's conclusions de novo"); *Paramount Land Co. LP v. California Pistachio Comm'n*, 491 F.3d 1003, 1008 (9th Cir. 2007) ("Our review of underlying legal issues is *de novo*, and review of underlying fact findings is for clear error."). A district court necessarily "abuses its discretion . . . if it applies an incorrect legal standard." *Vivid Entm't, LLC v. Fielding*, 774 F.3d 566, 573 (9th Cir. 2014).

Where, as here, "a district court denies a preliminary injunction because there is no likelihood of success on the merits," this Court "review[s] [that] decision de novo." *Inland Empire Public Lands Council v. Schultz*, 992 F.2d 977, 980 (9th Cir. 1993); *see also Nickler v. Cty. of Clark*, 648 F. App'x 601, 603 (9th Cir. 2016)

(same). "The determination of whether public employee speech is protected under the First Amendment is a question of constitutional law" that this Court "review[s] de novo." *Tucker v. State of Cal. Dep't of Educ.*, 97 F.3d 1204, 1209 (9th Cir. 1996).

Where the district court errs in denying a preliminary injunction based on the likelihood of success on the merits, this Court generally elects to remand for the district court to consider the other preliminary injunction factors. *Cf. Klein*, 584 F.3d at 1207–08 (granting preliminary injunction in First Amendment case, while noting that it is also appropriate to "remand to allow the district court to assess the likelihood of irreparable injury and to balance the equities").

ARGUMENT

It is well established that public school employees do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969); *see also Morse v. Frederick*, 551 U.S. 393, 403 (2007) ("First Amendment rights, applied in light of the special characteristics of the school environment, are available *to teachers* and students") (quoting *Tinker*, 393 U.S. at 506) (emphasis added). Thus, the government "may not abuse its position as employer to stifle 'the First Amendment rights' [of] its employees." *Eng*, 552 F.3d at 1070 (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)).

To determine whether a government employer has violated a public employee's First Amendment rights, this Court has refined the familiar *Pickering* test into a "sequential five-step" analysis:

> (1) whether the plaintiff spoke on a matter of public concern;
> (2) whether the plaintiff spoke as a private citizen or public employee;
> (3) whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action;
> (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and
> (5) whether the state would have taken the adverse employment action even absent the protected speech.

Eng, 552 F.3d at 1070.

A public employee states a prima facie First Amendment violation by showing—on the "first three steps"—that he "engaged in protected speech activities," and that his "protected speech was a substantial or motivating factor" in the adverse employment action. *Karl v. City of Mountlake Terrace*, 678 F.3d 1062, 1068 (9th Cir. 2012). The burden then shifts to the government to try to "escape liability" on the final two prongs. *Id.*

The district court made two independent legal errors in denying Coach Kennedy's motion for a preliminary injunction. First, the court erred at *Eng* step two when it concluded that Coach Kennedy spoke only "as a public employee," not as a private citizen, due to his "role as coach." Second, the court erred at *Eng* step

four when it held that BSD had an adequate justification under the Establishment Clause for discriminating against Coach Kennedy.

Both errors are grounds for reversal and remand.

I. The District Court Violated Controlling Precedent When It Held That Coach Kennedy Spoke Only "As a Public Employee" Because He Was "On the Job" at the Time of His Brief, Quiet Prayer

The first—and most glaring—flaw in the decision below relates to the district court's conclusion that Coach Kennedy spoke "as a public employee," not as a private citizen, because he was "still on the job" when he knelt at midfield to offer a brief, quiet prayer at the conclusion of BHS football games.

That holding contravenes both the Supreme Court's decision in *Lane* and this Court's en banc decision in *Dahlia*. It also threatens to undo a half-century of precedent confirming that public employees—including public school teachers and coaches—have First Amendment rights too.

A. Speech That Is "Outside the Scope" of an Employee's "Ordinary Job Responsibilities" Is Speech as a Private Citizen

"[P]ublic employees do not renounce their citizenship when they accept employment." *Lane*, 134 S. Ct. at 2377. The First Amendment therefore "protects a public employee's right" to speak "as a citizen" on matters of public concern. *Coomes v. Edmonds Sch. Dist. No. 15*, 816 F.3d 1255, 1259 (9th Cir. 2016) (citing *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006)). The Supreme Court "has cautioned

time and again that public employers may not condition employment on the relinquishment of constitutional rights." *Lane*, 134 S. Ct. at 2377 (collecting cases).

The distinction between speech "as a citizen" and speech "as an employee" is a crucial one. "Speech by citizens on matters of public concern lies at the heart of the First Amendment." *Id.* But there is "no First Amendment cause of action based on . . . [the] employer's reaction" to speech "as an employee." *Garcetti*, 547 U.S. at 418. Thus, the line between speech "as a citizen" and speech "as an employee" is the line between First Amendment protection and none at all.

In *Lane v. Franks*, the Supreme Court unanimously held that the "critical question" to determine whether a public employee's speech is protected "is whether the speech at issue is itself *ordinarily within the scope of an employee's duties*." 134 S. Ct. at 2379 (emphasis added). This Court has expressly adopted *Lane*'s "critical question" test in analyzing public employee speech. *Coomes*, 816 F.3d at 1260; *see also Hunter v. Town of Mocksville*, 789 F.3d 389, 397 (4th Cir. 2015) (same); *Graziosi v. City of Greenville*, 775 F.3d 731, 737 (5th Cir. 2015) (same); *Dougherty v. Sch. Dist. of Philadelphia*, 772 F.3d 979, 990 (3d Cir. 2014) (same).

Under *Lane* and its progeny, speech that is "outside the scope of [an employee's] ordinary job duties is speech as a citizen for First Amendment purposes." 134 S. Ct. at 2378.

Importantly, the mere fact that an employee expresses her views *while at work* is not dispositive of the inquiry. The Supreme Court has repeatedly made clear that public employees "may receive First Amendment protection for expressions made at work." *Garcetti*, 547 U.S. at 420 (citing *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 414 (1979)).

In *Dahlia v. Rodriguez*, 735 F.3d 1060 (9th Cir. 2013) (en banc), this Court cautioned that "various easy heuristics are insufficient" to determine whether a public employee spoke "as a citizen" or "as an employee." *Id.* at 1069. For example, the mere fact that an employee "expressed his views inside the office, rather than publicly," is "not dispositive." *Id.* (quoting *Garcetti*, 547 U.S. at 420). Similarly, the fact that the speech "concern[s] the subject matter of [the] employment" is not enough, because "[t]he First Amendment protects some expressions related to the speaker's job." *Id.* (quoting *Garcetti*, 547 U.S. at 421).

Rather than applying a bright-line test, courts are to evaluate public employee speech by conducting a "practical" inquiry into "the scope of an employee's professional duties." *Id.* at 1071. Speech that is "outside the scope" of those ordinary job duties is "speech as a citizen for First Amendment purposes." *Lane*, 134 S. Ct. at 2378.[5]

[5] The speech "as a citizen" inquiry is a mixed question of law and fact. *See Dahlia*, 735 F.3d at 1072. The "scope and content of [a public employee's] job responsibilities is a question of fact." *Id.* This factual inquiry is a "practical"

B. The District Court Erred as a Matter of Law by Inventing a Bright-Line Temporal Test That Strips First Amendment Protections from "On the Job" Public Employees

The district court made no attempt to answer the "critical question" whether Coach Kennedy's speech is "ordinarily within the scope" of his employment duties. *Lane*, 134 S. Ct. at 2379. Instead, the court held that Coach Kennedy spoke "as an employee" because he was "still on the job" when he knelt to pray at midfield. That holding violates both *Lane* and *Dahlia*—and eviscerates First Amendment protections for all public employees while they are "on the job."

The district court's oral ruling leaves little doubt that it fundamentally misapprehended the relevant test. The court declared that "[i]t is not a debatable point, from my perspective" whether Coach Kennedy "was a private citizen[] as opposed to a public employee" because he "was still in charge" and "still on the job" when he knelt at midfield to offer a brief, quiet prayer. ER 44; *see also id.* ("He was on the job, as he would have wanted to be."). The court further emphasized that Coach Kennedy was "dressed in school colors," "[u]nder the lights," and "on public property." ER 43–44.

But those facts demonstrate, at most, that Coach Kennedy was temporally and physically "on the job." They do not establish that "the speech at issue"—Coach

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one, and is "not limited to a formalistic review of [Coach Kennedy's] job description." *Coomes*, 816 F.3d at 1260. The legal question, which this Court reviews *de novo*, is "the ultimate constitutional significance of those facts." *Id*.

Kennedy's brief, quiet prayer—"is itself ordinarily within the scope of [his] duties." *Lane*, 134 S. Ct. at 2379. The court failed to make that critical distinction, instead summarily concluding that "Coach Kennedy's *role as coach*" was "determinative of this issue." ER 44 (emphasis added).

The same basic confusion was evident throughout the proceedings. The district court repeatedly emphasized its view that Coach Kennedy's status as "a coach" was "outcome determinative." ER 24 (The Court: "[H]e is a coach. He is 'Coach.'"); *see also* ER 32 (The Court: "[H]e is a teacher. He is a coach."). In another colloquy, the court opined that "[m]y dad coached baseball, basketball, football. He wouldn't recognize the limitations that you're arguing, that Coach Kennedy is not a coach at that moment." ER 5. He then inquired: "How do you persuade people, who know the education mission of all public schools, that Mr. Kennedy is off duty?" *Id.*[6]

The relevant question, of course, is not whether Coach Kennedy is still a "coach" at the time of his religious expression. Indeed, this Court has expressly

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[6] Where, as here, the district court's reasoning is contained only in its oral ruling, it is appropriate to examine the colloquies in the transcript in order to gain a "sufficient understanding of the issues without a remand for further findings." *Valdez v. Neuman*, 365 F. App'x 854, 855 (9th Cir. 2010) (quoting *Societe Generale de Banque v. Touche Ross & Co.*, 729 F.2d 628, 630 (9th Cir. 1984)); *see also ACLU of Nevada v. Lomax*, 471 F.3d 1010, 1018–19 (9th Cir. 2006) (reviewing "transcripts of the preliminary injunction hearing" to determine whether the district court engaged in the appropriate legal inquiry).

held that "speech by a public employee, even a teacher, does not always represent, or even appear to represent, the views of the State." *Tucker*, 97 F.3d at 1213.

Instead, the relevant question is whether Coach Kennedy's *speech* is "ordinarily within the scope of [his] duties," such that he spoke as a public employee rather than a private citizen. *Lane*, 134 S. Ct. at 2379. That is the "critical" inquiry under controlling Supreme Court and Ninth Circuit precedent—and the district court simply ignored it.[7]

At bottom, the district court treated the fact that Coach Kennedy was "on the job" as a "coach" as dispositive of the *Eng* step two inquiry. That is exactly the sort of "easy heuristic[]" that *Dahlia* condemned. 735 F.3d at 1069. And the "heuristic[]" the district court adopted—"on the job" vs. "off the job"—would categorically exclude speech by on-duty public employees from the ambit of the First Amendment, thereby turning *Tinker* on its head.[8]

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[7] At one point, the district court intimated that if *Lane* was "a religious speech case, I would follow it." ER 34. But the court supplied no authority—because there is none—for the proposition that whether a public employee speaks "as a citizen" somehow turns on the content of the speech. Indeed, courts have routinely rejected the suggestion that *Lane* is inapplicable to cases involving particular types of expression. *See, e.g.*, *Dougherty*, 772 F.3d at 990 ("While *Lane* focused on speech in the context of compelled testimony, Appellants' argument that its holding is limited to that context is misguided.") (citation omitted).

[8] Consider, for example, the high school football coaches who recently knelt on the field during the playing of the national anthem prior to the start of their games. *See, e.g.*, Jayda Evans, "Garfield Football Team Takes Knee During National Anthem Prior to Game Friday Night," *Seattle Times*, Sept. 16, 2016,

C. Coach Kennedy Spoke as a Private Citizen, Not a Public Employee, When He Knelt at Midfield to Offer a Brief, Quiet Prayer After BHS Football Games

The undisputed facts make clear that Coach Kennedy spoke "as a private citizen," not a public employee, when he offered his brief, quiet prayer at the conclusion of BHS football games.

1. Coach Kennedy's religious expression takes place "[a]fter the game is over, and after the players and coaches from both teams have met to shake hands at midfield." ER 145. Coach Kennedy then "take[s] a knee at the 50-yard line and offer[s] a brief, quiet prayer of thanksgiving" that "lasts approximately 30 seconds." *Id*.

Nothing about Coach Kennedy's "ordinary job responsibilities" requires him to pause at midfield, at the end of each game, to "give thanks through prayer." ER 144; *see also* ER 251 (Coach and Volunteer Coach Agreement). The only job

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http://www.seattletimes.com/sports/high-school/garfield-football-team-takes-knee-prior-to-game-friday-night/; *see also* Kurt Voigt, "National Anthem Protests Trickling Down to High School Level," *Associated Press*, Sept. 14, 2016, http://bigstory.ap.org/article/d43a5c457eb340a89746480492f2f61f/national-anthem-protests-trickling-down-high-school-level (coach knelt during national anthem to "call attention to social injustices and economic disparities" in his community).

There is no doubt that the coaches who participated in these protests were engaged in expressive speech on matters of public concern. But it is equally clear that they are "coaches" who are "still in charge" and "still on the job" at the time of their expression. Under the district court's rule, those coaches spoke only "as employees"—leaving that speech wholly unprotected by the First Amendment.

duties BSD identified below—supervising players, caring for injuries, securing equipment, and "maintaining order," *see* ER 228—are obviously unrelated to Coach Kennedy's "fleeting" religious expression.[9]

So this is not a case where a "public employee raise[d] complaints or concerns up the chain of command at [her] workplace about [her] job duties." *Coomes*, 816 F.3d at 1262 (quoting *Dahlia*, 735 F.3d at 1074). Nor is this a case about work product that was prepared in the ordinary course of employment. *Garcetti*, 547 U.S. at 422. Here—as in *Lane* itself—Coach Kennedy's speech was entirely "outside the scope . . . of [his] ordinary job responsibilities." *Lane*, 134 S. Ct. at 2378.

BSD has effectively admitted as much, both in its district court filings and its correspondence with Coach Kennedy. The District argued below that Coach Kennedy's speech was unprotected because "[t]here is no term of his contract . . . that gives him the authority to step *outside of his duties* at the time and place of his choosing." ER 230 (emphasis added). That argument betrays a basic misunderstanding of the law—the core holding of *Pickering* is that a contract is *not*

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[9] The fact that Coach Kennedy is "dressed in school colors" when he takes a knee at the 50-yard line does not change the fact that his speech is protected. ER 43. Even if that apparel identified him as a BHS football coach—and it does not, *see* ER 144—merely "identifying oneself as a public employee does not forfeit one's ability to claim First Amendment protections." *Graziosi*, 775 F.3d at 737; *see also Pickering*, 391 U.S. at 574, 576 (letter to the editor that identified signatory as a "teach[er] at the high school" was protected speech).

required to secure a public employee's First Amendment rights. But BSD's statement also reflects an important concession: Coach Kennedy's brief, quiet prayer is "outside of his duties" as a BHS football coach.

BSD's correspondence with Coach Kennedy makes the same point. The District prohibited Coach Kennedy from engaging in "demonstrative religious conduct" while he was on duty—and then suspended him when he failed to comply. ER 177 (Letter to Coach Kennedy, Oct. 23, 2015); ER 179 (Letter to Coach Kennedy, Oct. 28, 2015). As this Court recognized in *Dahlia*, "the fact that an employee is threatened or harassed by his superiors for engaging in a particular type of speech provides strong evidence that the act of speech was not, as a 'practical' matter, within the employee's job duties." 735 F.3d at 1075. So too here.

Because Coach Kennedy's religious expression is clearly outside the "scope of h[is] employment duties," he spoke "as a citizen," not a public employee, when he offered his brief, quiet prayer at the conclusion of BHS football games. *Coomes*, 816 F.3d at 1260.

2. Even those cases that uphold restrictions on teacher speech underscore the conclusion that Coach Kennedy spoke only as a private citizen. In its briefing below, BSD went so far as to suggest that Coach Kennedy "necessarily" spoke as a public employee under this Court's decision in *Johnson v. Poway Unified School District*, 658 F.3d 954 (9th Cir. 2011). ER 229. Far from it.

Poway held that a high school math teacher spoke as an employee, not as a citizen, when he displayed large banners with religious messages in his classroom. In reaching that conclusion, the Court made clear that the "scope and content of [Johnson's] job responsibilities" included "speaking to his class in his classroom during class hours." *Poway*, 658 F.3d at 967.

The religious banners at issue—"each about seven-feet-wide and two-feet-tall"—were displayed on the classroom walls under a "long-standing . . . District policy, practice, and custom, of permitting teachers to decorate their classrooms subject to specific limitations." *Id*. at 958, 967. When confronted by the school principal, who "recalled being overwhelmed by the size of the banners," Johnson reportedly dismissed concerns that a student of a different faith would feel "not welcome" in his classroom, saying, "sometimes, that's necessary." *Id.* at 958–59. In holding that Johnson spoke "as an employee," the Court emphasized that he "took advantage of his position to press his particular views upon the impressionable and 'captive' minds before him." *Id.* at 968.

Nothing of the sort happened here. Coach Kennedy's religious expression—far from being a permanent fixture on a classroom wall—is a "fleeting" prayer that lasts no more than 30 seconds. It occurs after the game, at a time when "[p]arents, fans, and members of the community frequently walk[] onto the field to congratulate players and socialize." ER 146. Coach Kennedy has no "captive" audience. And

BSD has repeatedly conceded that Coach Kennedy never took advantage of his position to "coerce," "require," or even "actively encourage" students to participate in any religious activity. ER 181 (BSD Statement and Q&A, Oct. 28, 2015); ER 158 (Letter to Coach Kennedy, Sept. 17, 2015).

Thus, *Poway* does not support the district court's holding that *all speech* by an on-duty coach is unprotected by the First Amendment. *Cf.* ER 44 (finding "Coach Kennedy's role as coach as determinative of this issue"). Indeed, it would be particularly inappropriate to read *Poway* as a bright-line rule for all coaches (or, indeed, all teachers) given this Court's clear instruction that "the scope and content of a plaintiff's job responsibilities" is a fact-specific—and therefore case-specific—inquiry. *Dahlia*, 735 F.3d at 1072.[10]

* * *

Because Coach Kennedy's brief, quiet prayer is far afield from his coaching duties—and because the district court failed to properly analyze those duties under the fact-intensive inquiry that *Dahlia* and *Lane* demand—the district court's conclusion that Coach Kennedy spoke as a public employee must be reversed.

[10] To the extent BSD's overbroad reading of *Poway* turns on the "owes its existence" inquiry, *see* ER 229, it bears noting that the lower court in *Lane* relied on that same dicta from *Garcetti*—and the Supreme Court unanimously reversed, chiding the court below for reading *Garcetti* "far too broadly." 134 S. Ct. at 2376, 2379.

II. The District Court Erred as a Matter of Law in Holding that BSD Had an Adequate Justification for Its Discrimination Against Coach Kennedy

The decision below also contains a second defect: The district court held that BSD had an adequate justification for taking adverse employment actions against Coach Kennedy. But the only justification BSD has put forward is its alleged fear of violating the Establishment Clause. And that fear, even if genuine, is based on a fatally overbroad reading of the Establishment Clause.

The key question under the Establishment Clause is whether an "objective observer" would perceive Coach Kennedy's brief, quiet prayer as "a state endorsement of prayer in public schools." *Santa Fe*, 530 U.S. at 308. Because no reasonable observer would view the act of kneeling on the playing field for 15 to 30 seconds as a school-sponsored prayer, Coach Kennedy's religious expression does not violate the Establishment Clause. Accordingly, BSD has no adequate justification for its discriminatory actions.

A. BSD Bears the Burden at *Eng* Step Four to Justify Its Discriminatory Actions

As explained above, *see supra* at 18, once a public employee states a prima facie First Amendment violation—by showing that he "engaged in protected speech activities," and that his "protected speech was a substantial or motivating factor" in the adverse employment action—the burden shifts to the government. *Karl*, 678

F.3d at 1068; *see also Robinson v. York*, 566 F.3d 817, 822 (9th Cir. 2009) ("[I]f the plaintiff has satisfied the first three steps, the burden shifts to the government.").

At step four of the *Eng* inquiry, the government bears the burden to provide an "adequate justification" for its adverse actions. *Eng*, 552 F.3d at 1070. The government may "escape liability" by establishing that "the state's legitimate administrative interests outweigh the employee's First Amendment rights." *Karl*, 678 F.3d at 1068.[11]

The government bears a "greater" burden where, as here, it "seek[s] to justify a broad deterrent on speech that affects an entire group of its employees." *Tucker*, 97 F.3d at 1210 (internal quotation marks omitted). Indeed, the government must meet the "exacting standard" of showing that "the interests of . . . a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's necessary impact on the actual operation of the Government." *Id.* at 1211 (internal quotation marks omitted).

[11] Although the government may also "escape liability" by showing—at step five of the *Eng* inquiry—that it "would have taken the adverse employment action even absent the protected speech," the district court correctly held that Coach Kennedy was suspended because of his speech. ER 43 ("This is the reason Coach Kennedy is no longer coaching for Bremerton."). Accordingly, only step four is at issue here.

B. BSD Must Show an Actual Violation of the Establishment Clause to Justify Its Discrimination Against Coach Kennedy

The only justification BSD has put forward is that its alleged interest in "avoiding an Establishment Clause *lawsuit*" justifies its adverse employment actions. ER 231–32.[12]

But Supreme Court precedent makes clear that BSD cannot abridge constitutionally protected speech merely because it *fears* an Establishment Clause violation—only an *actual* violation is sufficient. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001) (rejecting school district's religious speech restriction because it was not "required to avoid violating the Establishment Clause"); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993) (rejecting school district's ban on religious speech because permitting the speech at issue "would not have been an establishment of religion"); *Widmar v. Vincent*, 454 U.S. 263, 271–72 (1981) (same).

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[12] BSD wisely abandoned any argument that it took adverse employment action against Coach Kennedy based on his alleged failure to supervise students after games. Any justification based on Coach Kennedy's supervisory obligations is therefore waived. *See Barrientos v. 1801-1825 Morton LLC*, 583 F.3d 1197, 1217 (9th Cir. 2009) ("[A]s a general rule, [this Court does] not consider an issue not passed upon below") (internal quotation marks omitted). In any event, the District has never formally or informally assigned any post-game supervisory obligations that would prohibit Coach Kennedy from engaging in a "fleeting" prayer that lasts no more than 30 seconds—a shorter period of time than would be required for a trip to the bathroom.

This Court has similarly recognized that, in order to justify a restriction on protected speech, the government must "demonstrate that the Establishment Clause *would be violated*" absent the restriction. *Hills*, 329 F.3d at 1053 (emphasis added). Other courts are in accord. *See, e.g.*, *Child Evangelism Fellowship v. Montgomery Cnty. Pub. Schs.*, 373 F.3d 589, 594 (4th Cir. 2004) (allowing group to distribute flyers "would not be likely to violate the Establishment Clause"); *Wigg v. Sioux Falls Sch. Dist.*, 382 F.3d 807, 812–13 (8th Cir. 2004) (school district "has no valid Establishment Clause interest that justifies its restriction of its employees' private speech"); *Seidman v. Paradise Valley Unified Sch. Dist. No. 69*, 327 F. Supp. 2d 1098, 1114 (D. Ariz. 2004) (school district's "interest in avoiding an Establishment Clause violation was not compelling enough to justify exclusion of . . . [religious] messages").

In short, to justify its actions BSD must show that allowing Coach Kennedy to engage in his "fleeting" religious expression would constitute an actual violation of the Establishment Clause. It cannot.

C. The Establishment Clause Does Not Forbid Coach Kennedy from Kneeling at Midfield to Pray Silently for 15 to 30 Seconds

The Supreme Court's decision in *Santa Fe* lays out the relevant framework for determining whether and when religious speech in the school context comports with the Establishment Clause. The key question under *Santa Fe* is whether an "objective observer" would view the speech at issue as "a state endorsement of

prayer in public schools." 530 U.S. at 308. And under *Santa Fe* and its progeny, no reasonable observer would view Coach Kennedy's practice of kneeling at midfield to engage in a brief, quiet or silent prayer as state sponsorship of religion. *See* ER 140 (requesting preliminary injunction requiring BSD "to allow Coach Kennedy to take a knee at the 50-yard line . . . and say a silent prayer that lasts 15–30 seconds"). The district court's contrary holding was error.

1. The Supreme Court has repeatedly reaffirmed the basic principle that "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Santa Fe*, 530 U.S. at 302 (quoting *Mergens*, 496 U.S. at 250 (1990) (plurality opinion)).

In *Santa Fe*, the Supreme Court concluded that a school-sponsored, student-led invocation prayer before football games was government speech rather than constitutionally protected private speech. 530 U.S. at 309–10. Critical to the Court's holding was the fact that the school "board *ha[d] chosen to permit* students to deliver a brief invocation and/or message" in order to "solemnize the event." *Id.* at 298 n.6, 306. Because the school policy "approv[ed] of only one specific kind of message, an 'invocation,'" the Court concluded that "the District ha[d] failed to divorce itself from the religious content in the invocations." *Id.* at 305, 309.

"Thus, *Santa Fe* does not obliterate the distinction between State speech and private speech in the school context." *Chandler v. Siegelman*, 230 F.3d 1313, 1316 (11th Cir. 2000). Instead, "[w]hat the Court condemned in *Santa Fe* was not private speech endorsing religion, but the delivery of a school-sponsored prayer." *Id.*; *see Santa Fe*, 530 U.S. at 305 (the "degree of school involvement" made clear that the pregame prayers "bear the imprint of the State"). "Private speech endorsing religion is constitutionally protected—even in school." *Chandler*, 230 F.3d at 1317.

After *Santa Fe*, the relevant inquiry remains "whether an objective observer, acquainted with the text, legislative history, and implementation of the [policy], would perceive it as a state endorsement of prayer in public schools." *Santa Fe*, 530 U.S. at 308 (internal citation omitted).

2. In this case, no "objective observer"—particularly one who is "acquainted with" the relevant facts and history—would confuse Coach Kennedy's brief, quiet prayer with a prayer that is endorsed by the State. *Id.*

At the conclusion of BHS football games, Coach Kennedy takes a knee at midfield and offers a brief, quiet prayer of thanksgiving for player safety, sportsmanship, and spirited competition. ER 145. The District has no involvement in regulating "the topic and the content" of Coach Kennedy's religious expression. *Doe ex rel. Doe v. Sch. Dist. of Norfolk*, 340 F.3d 605, 612 (8th Cir. 2003). Nor is Coach Kennedy's prayer "the product of any school policy" that "actively or

surreptitiously encourages" religious expression. *Chandler*, 230 F.3d at 1317. Indeed, the District was *not even aware* of Coach Kennedy's religious expression for the first eight years of his tenure at BHS. *Cf. Doe*, 340 F.3d at 612 (no state sponsorship where "there is no evidence that any representative of the School District had any knowledge of [the speaker's] intentions").

"The *complete absence of any involvement*" by the District in determining "whether" Coach Kennedy would speak, as well as "the complete autonomy afforded to [Coach Kennedy] in determining the content" of his speech, "indicates a lack of state-sponsorship." *Id.*; *see also Adler v. Duval Cnty. Sch. Bd.*, 250 F.3d 1330, 1342 (11th Cir. 2001) (en banc) (same). Because there is no "school involvement" in Coach Kennedy's religious expression, his prayers do not "bear the imprint of the State." *Santa Fe*, 530 U.S. at 305 (internal quotation marks omitted).

The fact that Coach Kennedy offers his brief, quiet prayer on the playing field does not alter this result. Coach Kennedy's "fleeting" religious expression takes place after the football game, when "[p]arents, fans, and members of the community frequently walk[] onto the field to congratulate players and socialize." ER 146. Indeed, BHS Athletic Director Jeff Barton has described the BHS football field as a "public space" that cannot be closed to members of the community after football games. ER 147; *see also* ER 166 ("[W]hen the community comes down onto the field tonight after the game, we will not be able to prevent that from happening.").

There is no "captive" audience here, as in a classroom or at a graduation ceremony. *See, e.g.*, *Poway*, 658 F.3d at 957 (classroom); *Nurre v. Whitehead*, 580 F.3d 1087, 1095 (9th Cir. 2009) (graduation); *see also Hills*, 329 F.3d at 1054 n.8 ("graduation exercise" is a "decidedly different context . . . in which the possibility that the speech bears the imprimatur of the school is heightened"). Nor are Coach Kennedy's prayers "broadcast over the school's public address system." *Santa Fe*, 530 U.S. at 307. Instead, Coach Kennedy offers his brief, silent prayer at a time when BSD has allowed "unrestricted public access to the football field." ER 146.

Thus, nothing about Coach Kennedy's conduct is "likely to cause a reasonable person to believe that the state is speaking or supports his views." *Tucker*, 97 F.3d at 1213; *see also id.* ("Allowing [public employees] to discuss whatever subject they choose at work, be it religion or football, may incidentally benefit religion (or football), but it would not give the appearance of a state endorsement.").

3. The district court offered a single, muddled sentence in support of its conclusion that BSD had an adequate justification for its adverse employment actions. After holding that Coach Kennedy spoke "as an employee" because he was "on the job," the district court stated: "[A] reasonable observer, in my judgment,

would have seen him as a coach, participating, in fact leading an orchestrated session of faith, of thanks, of fellowship." ER 44.[13]

The district court's analysis is riddled with errors.

First, the district court's reference to the "reasonable observer" appears to derive from the language of *Santa Fe*. But the question under *Santa Fe* is not whether the "reasonable observer . . . would have seen [Coach Kennedy] *as a coach*." ER 44 (emphasis added). The question under *Santa Fe* is whether the reasonable observer—when "acquainted with" the relevant "history"—would perceive Coach Kennedy's prayer "as a *state endorsement of prayer* in public schools." *Santa Fe*, 530 U.S. at 308 (emphasis added).

For purposes of the Establishment Clause, the fact that Coach Kennedy is identifiable "as a coach" is beside the point. Indeed, if simply identifying an individual engaged in religious expression as a public employee were enough to make out an Establishment Clause violation, all religious expression by public employees would be categorically prohibited. That is not the law.

What matters instead is whether the "objective observer" would view Coach Kennedy's brief, quiet prayer at midfield as "prayer sponsored by the school." *Id.*

[13] The district court did not acknowledge that BSD had the burden of proof on steps four and five, or that proof of an actual Establishment Clause violation was required to establish an adequate justification for its adverse actions.

at 308–09. To the extent the district court's holding rests on a determination that the "reasonable observer" would see anything less than a "state endorsement of prayer," that holding contravenes *Santa Fe* and warrants reversal.[14]

Second, even assuming that the district court properly understood the *Santa Fe* standard, the court's apparent holding that BSD satisfied *Eng* step four because Coach Kennedy was "leading an orchestrated session of faith" is clearly erroneous. ER 44. BSD's own correspondence makes clear that the only conduct at issue—and the sole reason for its adverse employment actions—is Coach Kennedy's brief, private prayer at midfield.

Coach Kennedy's commitment to God is simply that he will "give thanks through prayer, at the end of each game." ER 144. Nothing about Coach Kennedy's sincerely held religious beliefs requires him to lead any prayer, involving students or otherwise, at the conclusion of BHS football games. ER 146. BSD has publicly admitted that students were never "coerced," "required," or "actively encouraged"

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[14] Alternatively, to the extent the district court intended its "reasonable observer" analysis to support its holding at that Coach Kennedy spoke "as an employee," it erred in conflating standards for *Eng* steps two and four. At step two, the court evaluates the "ultimate constitutional significance" of the facts to determine whether Coach Kennedy spoke "as a citizen" or "as a public employee." *Coomes*, 816 F.3d at 1260. The "reasonable observer" is relevant only to the Establishment Clause inquiry at step four. Conflating the two—particularly when this Court has emphasized the "sequential" nature of the five steps, *see Eng*, 552 F.3d at 1070—is legal error. *See Vivid Entm't*, 774 F.3d at 573 (use of incorrect standard is legal error).

to participate in any religious activity. ER 181 (BSD Statement and Q&A, Oct. 28, 2015); ER 158 (Letter to Coach Kennedy, Sept. 17, 2015).

Thus, it is no surprise that Coach Kennedy fully complied with the District's directives not to involve students in his religious expression. But BSD suspended him anyway, explaining as follows:

> To the District's knowledge, Mr. Kennedy has complied with those directives not to intentionally involve students in his on-duty religious activities. However, he has continued a practice of engaging in public religious display immediately following games, while he is still on duty.

ER 182 (BSD Statement and Q&A, Oct. 28, 2015).

BSD's correspondence with Coach Kennedy was even more explicit about the reason for the suspension. On October 28, 2015, BSD informed Coach Kennedy that he was being placed on administrative leave because he had "violated [BSD] directives by engaging in overt, public and demonstrative religious conduct while still on duty as an assistant coach." ER 179 (Letter to Coach Kennedy, Oct. 28, 2015). Specifically, BSD announced that it was suspending Coach Kennedy for "*kneel[ing] on the field and pray[ing]* immediately following the . . . game"—at a time when the BHS players were "still engaging in post-game traditions." *Id.* (emphasis added).

Thus, BSD's own correspondence makes clear that Coach Kennedy was not subjected to adverse employment actions for "leading" or "orchestrat[ing]" any

religious expression involving students. ER 44. Instead, he was suspended—notwithstanding his full "compli[ance] with [BSD's] directives not to intentionally involve students" in his religious expression—for simply "kneel[ing] on the field and pray[ing]" after the game. ER 182 (BSD Statement and Q&A, Oct. 28, 2015); ER 179 (Letter to Coach Kennedy, Oct. 28, 2015).

That conduct, which did "not . . . involve students," ER 182, was what allegedly "necessitated" Coach Kennedy's suspension. ER 181. Thus, the district court erred in holding that BSD's actions were justified by pointing to earlier conduct that indisputably *was not at issue* in the adverse employment actions. Indeed, given BSD's admission that it took action against Coach Kennedy for "kneel[ing] on the field and pray[ing]" by himself, any claim that BSD's adverse actions were based on Coach Kennedy's prior conduct would be purely pretextual. *See, e.g.*, *Settlegoode v. Portland Pub. Sch.*, 371 F.3d 503, 512 (9th Cir. 2004) (school district failed to prove it "*would* have taken the same action even in the absence of the protected conduct," even though it "*could* have chosen" to act for independent reasons).[15]

[15] During the preliminary injunction hearing, BSD pointed to a single picture of Coach Kennedy kneeling on the field after the game on October 16, 2015, surrounded by coaches, players, and other members of the public. ER 39–40. What BSD failed to mention is that the coaches and players in the October 16 photo are *from the opposing team*. By the District's own admission, Coach Kennedy *waited* to pray after the October 16 game until the BHS players were "engaged in the traditional singing of the school fight song to the audience." ER

4. BSD offered no authority—because there is none—for the proposition that a reasonable observer would view the act of kneeling on the playing field for 15 to 30 seconds as a school-sponsored prayer. Instead, BSD cited cases where school employees "manifest[ed] approval and solidarity with student religious exercises." *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 406 n.4 (5th Cir. 1995); *see Borden v. Sch. Dist. E. Brunswick*, 523 F.3d 153, 178 (3d Cir. 2008) (same). BSD then asserted—with scant explanation—that a reasonable observer of Coach Kennedy's prayer would divine a state endorsement from the "necessary historical context." ER 234.

The reasonable observer is not so dense. True, an understanding of the relevant "history" and "implementation" would include the knowledge that BHS players had sometimes joined Coach Kennedy's religious expression on prior occasions. *Santa Fe*, 530 U.S. at 308. But a reasonable observer would also be fully aware that students were never "coerced," "required," or "actively encouraged" to participate in any religious activity—and that Coach Kennedy fully "complied" with the District's subsequent "directives not to intentionally involve students in his on-duty religious activities." ER 181(BSD Statement and Q&A, Oct. 28, 2015); ER

175 (Letter to Coach Kennedy, Oct. 23, 2015). The coaches and players who joined him from the opposing team did so in a spontaneous act of solidarity that was not planned or invited by Coach Kennedy.

158 (Letter to Coach Kennedy, Sept. 17, 2015). A reasonable observer would likewise understand that Coach Kennedy's prayer is not "the product of any school policy" that "actively or surreptitiously encourages" religion, *Chandler*, 230 F.3d at 1317, and that BSD has no involvement in regulating the "topic" or the "content" of his prayer. *Doe*, 340 F.3d at 612.

The reasonable observer would thus see Coach Kennedy kneel at midfield and—at most—conclude that he is engaged in a personal moment of silence. The Establishment Clause does not forbid that practice.

D. The Remedy for Any "Mistaken Inference of Endorsement" Is to Educate the Audience, Not Squelch the Speech

What the district court—and BSD—fail to understand is the basic Establishment Clause principle that "[s]chools . . . do not endorse everything they fail to censor." *Hills*, 329 F.3d at 1055 (quoting *Mergens*, 496 U.S. at 250).

That is especially true because schools can dispel any "mistaken inference of endorsement" by making 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). As this Court has held, "the desirable approach is not for schools to throw up their hands because of the possible misconceptions about endorsement of religion." *Hills*, 329 F.3d at 1055. Instead, it is:

> [f]ar better to teach [students] about the [F]irst [A]mendment, about the difference between private and public action, about why we tolerate divergent views. . . . *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. If pupils do not comprehend so simple a lesson, then one wonders whether the [ ] schools can teach anything at all. Free speech, free exercise, and the ban on establishment are quite compatible when the government remains neutral and educates the public about the reasons.

Id. (emphasis added) (quoting *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1299–1300 (7th Cir. 1993)).

BSD is quite capable of "educat[ing] the public about the reasons" for its non-endorsement of Coach Kennedy's speech. Indeed, the District's statements to the public about Coach Kennedy do just that. ER 158–66 (Letter to Coach Kennedy, Sept. 17, 2015); ER 181–84 (BSD Statement and Q&A, Oct. 28, 2015). Because BSD has ample tools to "explain that [it] [does] not endorse speech by *permitting* it," its sole justification for "squelch[ing]" Coach Kennedy's speech fails. *Hills*, 329 F.3d at 1055 (quoting *Hedges*, 9 F.3d at 1299-1300) (emphasis added).

* * *

In sum, "[p]rivate speech endorsing religion is constitutionally protected—even in school." *Chandler*, 230 F.3d at 1317. Because Coach Kennedy's brief, quiet prayer is purely private speech, the district court erred in holding that there was an adequate justification for BSD's discrimination against him.

CONCLUSION

This Court should reverse and remand for the district court to consider the remaining prongs of the preliminary injunction standard.

Dated: October 31, 2016

Respectfully submitted,

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STATEMENT OF RELATED CASES

Appellant is not aware of any related cases.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,883 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2016 with 14 point, Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that, on October 31, 2016, a true and correct copy of the foregoing brief was served via the Court's CM/ECF system on all counsel of record.

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