No. 21-418

In the
Supreme Court of the United States

JOSEPH A. KENNEDY,

Petitioner,

v.

BREMERTON SCHOOL DISTRICT,

Respondent.

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

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QUESTIONS PRESENTED

Petitioner Joseph Kennedy lost his job as a football coach at a public high school because he knelt and said a quiet prayer by himself at midfield after the game ended. After considering an interlocutory petition in which Kennedy sought review of the lower courts' refusal to grant him a preliminary injunction, four members of this Court observed that "the Ninth Circuit's understanding of the free speech rights of public school teachers is troubling and may justify review in the future," but concluded that this Court should stay its hand until the lower courts definitively determined the reason for Kennedy's termination. The statement also noted that Kennedy had a then-unaddressed claim under the Free Exercise Clause.

On remand, the lower courts found—and the school district ultimately agreed—that Kennedy lost his job solely because of his religious expression. Yet the Ninth Circuit nevertheless ruled against him again. The court not only doubled down on its "troubling" free-speech reasoning, which transforms virtually all speech by public-school employees into government speech lacking any First Amendment protection, but reached the remarkable conclusion that, even if Kennedy's prayer was *private* expression protected by the Free Speech and Free Exercise Clauses (which it undoubtedly was), the Establishment Clause nevertheless *required* its suppression. The court denied *en banc* review over the objection of 11 judges.

The questions presented are:

1. Whether a public-school employee who says a brief, quiet prayer by himself while at school and

visible to students is engaged in government speech that lacks any First Amendment protection.

2. Whether, assuming that such religious expression is private and protected by the Free Speech and Free Exercise Clauses, the Establishment Clause nevertheless compels public schools to prohibit it.

PARTIES TO THE PROCEEDING

Petitioner Joseph Kennedy was the sole plaintiff and appellant below. Respondent Bremerton School District was the sole defendant and appellee below.

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INTRODUCTION

Joseph Kennedy is a high-school football coach. He is also a devout Christian who feels compelled to kneel and say a brief, quiet prayer of gratitude at the 50-yard line after each game. In a Nation founded on the preservation of freedom of religion and speech, those two things are not remotely incompatible. Yet, remarkably, the school district suspended Kennedy because he refused to move his personal religious observance behind closed doors. Even more remarkably, the Ninth Circuit endorsed the district's actions on the twin grounds that Kennedy's private religious expression was actually government speech, but could be suppressed even if it were properly classified as private speech to avoid the specter of an Establishment Clause violation. That reasoning is incompatible with this Court's precedents and the traditions of religious liberty they embody. Teachers and coaches remain individuals with First Amendment rights on school premises, and the suppression of the individual religious expression of teachers and coaches is not permitted, let alone required, by the First Amendment.

In reality, the First Amendment *protects* Kennedy's prayer twice over. This Court has made clear beyond cavil that both the Free Exercise Clause and the Free Speech Clause protect religious expression like prayer. And it "has been the unmistakable holding of this Court" for more than a century that public-school teachers, no less than students, 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). Public-school employees have no constitutional right to inject prayer or proselytization into their official duties; a school may ensure that a teacher sticks to the subject and that a football coach talks gridiron strategy, rather than trigonometry or the infield-fly rule, during a timeout. But schools cannot define the job duties of teachers and coaches to be so all-encompassing as to deny them all rights to individual expression on school grounds.

The Ninth Circuit's alternative holding that the district could suppress Kennedy's private religious speech to avoid Establishment Clause concerns is even less defensible. The government does not establish a religion by allowing private religious expression. Indeed, if one principle emerges from this Court's precedents with a clarity that both students and school officials can understand, it is that "schools do not endorse everything they fail to censor." *Bd. of Educ. of Westside Cmty. Sch. v. Mergens ex rel. Mergens*, 496 U.S. 226, 250 (1990) (plurality op.). The distinction between government speech endorsing religion and private speech endorsing religion is "critical." *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 841 (1995). It separates what the Establishment Clause forbids from what the Free Speech and Free Exercise Clauses protect. *Id.* It also provides the clear path forward for schools. They need not—and cannot—rid the schools of any private religious speech or religiously observant role models to avoid Establishment Clause violations. To the contrary, such misguided efforts evince the very hostility to religion and religious expression that the Establishment Clause and the rest of the First Amendment forbid.

OPINIONS BELOW

The Ninth Circuit's decisions are reported at 991 F.3d 1004 and 869 F.3d 813 and reproduced at Pet.App.1-39 and Pet.App.214-266. The Ninth Circuit's orders denying rehearing *en banc* are reported at 4 F.4th 910 and 880 F.3d 1097 and reproduced at Pet.App.40-129 and Pet.App.267. The district court's summary-judgment decision is reported at 443 F.Supp.3d 1223 and reproduced at Pet.App.130-170. A transcript of the district court's preliminary-injunction hearing and associated bench ruling are reproduced at Pet.App.268-304.

JURISDICTION

The Ninth Circuit issued its opinion on March 18, 2021, and issued its order denied rehearing *en banc* on July 19, 2021. Pet.App.1, 40. Petitioner timely sought certiorari on September 14, 2021. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First and Fourteenth Amendments to the U.S. Constitution are reproduced below and at Pet.App.305.

U.S. Const. amend. I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. XIV, §1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Factual Background

1. Joseph Kennedy is a devout Christian and a 1988 graduate of Bremerton High School (BHS) in Bremerton, Washington, which is located across the Puget Sound from Seattle. JA167. After two decades of service in the U.S. Marine Corps, Kennedy returned to his alma mater in 2008, where he served as an assistant coach for the school's varsity football team and as a head coach for its junior varsity squad until 2015. JA167; Pet.App.3.

Kennedy's religious beliefs compel him to "give thanks through prayer" at the conclusion of each game "for what the players had accomplished" and "for the opportunity to be part of their lives through football." Pet.App.3; *see* JA168. In particular, "[a]fter the game is over, and after the players and coaches from both teams have met to shake hands at midfield," Kennedy feels called to pause, kneel, and "offer a brief, quiet prayer of thanksgiving for player safety, sportsmanship, and spirited competition." JA148-49;

see Pet.App.3-4. Those prayers typically lasted "thirty seconds" or less. Pet.App.4.

Kennedy engaged in this post-game religious expression since he began working at the school in 2008. Pet.App.4. At first, Kennedy prayed alone. Pet.App.4. Eventually, some players asked whether they could join him. Pet.App.4. Kennedy told them: "This is a free country" and that "[y]ou can do what you want." Pet.App.4. On their own accord, some players chose to gather near Kennedy after games, and the group ultimately grew to include most of the team, although the participants often varied. Pet.App.4; JA169. Sometimes no players gathered, and Kennedy prayed by himself. JA169. Sometimes BHS players invited players from the opposing team to join. JA169.

Over time, Kennedy began giving short motivational speeches to players who gathered after the game. JA170. While Kennedy's post-game speeches often included religious content and a short prayer, he "never coerced, required, or asked any student to pray," and he never "told any student that it was important that they participate in any religious activity." JA170.

Separately, the team sometimes engaged in pre- and post-game locker room prayers "as a matter of school tradition." JA170. That activity "predated" Kennedy's tenure, but after he began coaching at the school in 2008, he sometimes participated in these prayers too. JA170, 41. Kennedy's "sincerely held religious beliefs," however, "do not require [him] to lead any prayer, involving students or otherwise." JA170.

2. For seven years, no one complained to the district about Kennedy's religious exercise or expression. The district did not even learn of Kennedy's midfield, post-game prayers until September 2015, when an employee from another school mentioned them favorably to BHS's principal.[1] Pet.App.5. Another BHS administrator then "expressed disapproval" to Kennedy, prompting him to post on Facebook: "I think I just might have been fired for praying." Pet.App.5. In response, the district "was flooded with thousands of emails, letters, and phone calls from around the country." Pet.App.5.

On September 17, Aaron Leavell, the district's superintendent and ultimate "decisionmaker," sent Kennedy a letter regarding its investigation into whether "District staff have appropriately complied" with the school board's policy on "Religious-Related Activities and Practices." Pet.App.5; JA40, 193. That policy provides that, "[a]s 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." Pet.App.5. The policy states that "[s]chool staff shall neither encourage nor discourage a student from engaging in non-disruptive oral or silent prayer or any other form of devotional activity," Pet.App.5, but it does not purport to prohibit school staff from engaging in religious expression.

The September 17 letter identified what the district deemed to be "two problematic practices":

[1] The events that gave rise to this dispute occurred in the fall of 2015.

Kennedy's use of "overtly religious references" in "inspirational talk[s] at midfield" after games, and "lead[ing] the students and coaching staff in a prayer" "in the locker room" before games. Pet.App.217-18; JA40-41. The district acknowledged that students participated in "[e]ach activity" on a "voluntary" basis; that Kennedy had "not actively encouraged, or required, participation"; that his actions were "likely" the product of not having "been exposed to extensive education and training regarding the admittedly complex constitutional law issues arising in public education"; that "these practices … have been entirely well intentioned"; and that the district "understood" how they had "developed and persisted over time." JA40-41. But the district opined that these two practices "would very likely be found to violate the First Amendment's Establishment Clause." JA41.

The district therefore set forth new guidelines: Kennedy could "engage in religious activity, including prayer, so long as it does not interfere with job responsibilities," the activity is "physically separate from any student activity, and students [are] not … allowed to join such activity." Pet.App.6. Furthermore, "to avoid the perception of endorsement" of religion, the district concluded that "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." Pet.App.6.

That same day, the district sent a letter to "Bremerton School District families, staff and community." JA46. The letter stated that coaches

may not engage in "talks with students" that "include religious expression, including prayer," and that religious activity "may not be suggested, encouraged (or discouraged), or supervised by any District staff." JA46-47. The letter also stated that students may "engage in voluntary, student-initiated religious activity" and that staff may "engage in their own religious activities in a manner that will not run afoul of the United States Constitution." JA50.

After receiving the district's September 17 letter, Kennedy did not participate in any pre-game prayer before the team's next game (or any subsequent one). And after the game ended, Kennedy gave a short motivational talk to the players that made no mention of religion. Pet.App.6. But Kennedy also felt obligated to abandon his practice of saying his own personal post-game prayer, and so did not kneel to give thanks to God. Pet.App.6. On his drive home, however, Kennedy felt upset that he had succumbed to the pressure to break his commitment to God, so he turned his car around and returned to the field. Pet.App.6. By that point, everyone had left the stadium, and he walked to the 50-yard line and knelt to say a brief prayer of thanksgiving. Pet.App.6-7.

3. Soon thereafter, Kennedy retained counsel to advise him of the constitutional landscape. On October 14, through counsel, he sent a letter to Leavell and the school board informing them of his sincerely held religious belief that he is compelled to offer a "private," "personal" prayer at the 50-yard line after each football game. JA62; *see* Pet.App.7. He did not ask to resume either of the two practices that the district had identified as "problematic"—*i.e.*, leading

pre-game prayers in the locker room or giving motivational post-game talks with religious content. But he asserted his constitutional right to "continue his practice of saying a private, post-game prayer at the 50-yard line" (and formally requested a religious accommodation under Title VII to do so). JA62-63, 72. He explained that, while "no reasonable observer" would conclude that a football coach who "walks to mid-field to say a short, private, personal prayer is speaking on behalf of the state," "[a] simple disclaimer that [his] prayers are his private speech will suffice to avoid any constitutional concerns." JA69-71. Kennedy took issue with the district's directive that he must "flee from students if they voluntarily choose to come to a place where he is privately praying," explaining that it was inconsistent with the district's insistence that its policy "permits BHS students to voluntarily engage in prayer." JA70.

Kennedy also began publicly "sharing the word" about the district's efforts to compel him to surrender his First Amendment rights. Pet.App.20. Numerous media outlets seized on the story, leading to a "significant amount of publicity." Pet.App.9.

On October 16, hours before the next game, the district responded, through counsel, to Kennedy's October 14 letter with a letter of its own. JA76. The district acknowledged that Kennedy "ha[d] complied" with its "directives" not to lead students in prayer or use religious content in post-game talks and that Kennedy "is free to engage in religious activity, including prayer, even while on duty." JA77, 80. But it cautioned that Kennedy's religious exercise could "not interfere with performance of his job duties" and

insisted that "any overt actions …, appearing to a reasonable observer to endorse even voluntary, student-initiated prayer, while he is on duty as a District-paid coach, would amount to District endorsement of religion in violation of the Establishment Clause." JA80-81.

After the October 16 game, Kennedy chose to exercise his right to engage in private religious expression. After the customary midfield handshake with the opposing team, and after students began engaging in other conduct physically separate from him—*i.e.*, walking toward the stands to sing the post-game fight song—Kennedy knelt at the 50-yard line, closed his eyes, and said a brief, quiet prayer. Pet.App.220; *see, e.g.*, JA45. As he did so, coaches and players from the opposing team, along with members of the public, chose to join him on the field, and some knelt beside him. Pet.App.220. Kennedy did not ask anyone to join him, and he did not know whether anyone would. *See* JA63. Various state and national media organizations covered these post-game events.

The district spent the next week determining how to respond. During that time, it repeatedly acknowledged that Kennedy sought to engage only in individual religious expression and that he had ceased the group practices that the district had previously identified as problematic. For example, Leavell explained in an October 20 email to the leader of a state association of school administrators that "the coach moved on from leading prayer with kids, to taking a silent prayer at the 50 yard line." JA83. Similarly, on October 21, Leavell explained to the state superintendent that "[t]he issue … has shifted

from leading prayer with student athletes, to a coaches [*sic*] right to conduct a personal, private prayer[] on the 50 yard line." JA88. Nonetheless, in an October 23 letter delivered to Kennedy just hours before that night's game, the district informed him that his request was denied.

The district first "emphasize[d]" its "appreciation" for Kennedy's "efforts to comply with the September 17 directives" regarding coach-led prayer. JA10; *see* JA210. "However," the district continued, "you knelt at midfield and bowed your head in prayer" at the October 16 game "[w]hile most of the BHS players were at that moment engaged in the traditional singing of the school fight song to the audience." JA90. The district claimed that Kennedy's prayer, though "fleeting," "drew [him] away from [his] work" and—"[m]ore importantly"—that "any reasonable observer saw a District employee, on the field only by virtue of his employment with the District, still on duty, under the bright lights of the stadium, engaged in what was clearly, given your prior public conduct, overtly religious conduct." JA93. The district therefore deemed Kennedy's prayer "not consistent" with its demands. JA91.

While the district's September 17 letter, and its October 16 letter reaffirming it, stated that a district employee may engage in religious expression that does not interfere with job duties and remains "physically separate from any student activity," JA45, the October 23 letter set forth a sweeping new ban: It prohibited *any* "demonstrative religious activity, readily observable to (if not intended to be observed by) students and the attending public." JA94. The

district's new policy thus prohibited Kennedy, when on-duty and within eyesight of students or the public, from engaging in any "demonstrative religious activity," either silently or audibly. JA94. Consistent with that strict new policy, the district offered to "accommodate" Kennedy's religious beliefs by permitting him to pray in secret in a "private location within the school building, athletic facility[,] or press box," JA94—locations that "would have taken [Kennedy] away from the team for a greater length of time than … if he had just remained on the field," JA213. The district did not make clear how it would "accommodate" Kennedy at away games where it lacked control over the facilities, but it nonetheless made clear that its prayer-ban extended to all games.

Kennedy declined to comply with that sweeping directive. Instead, after the October 23 football game ended, he knelt at the 50-yard line, where "no one joined him," and bowed his head for a brief, quiet prayer. Pet.App.22. Leavell informed the district's board that, although this brief, solitary prayer "moved closer to what we want," in his view it remained "unconstitutional." JA96. Unwilling to cave to the district's demand that he break his commitment to God, however, Kennedy again knelt alone to offer a brief prayer of thanks when the next game ended on October 26 as the players engaged in other post-game traditions. Pet.App.139-40, 182.

Two days later, the district placed Kennedy on paid administrative leave and prohibited him from "participating in any capacity in the BHS football program." Pet.App.10, 293. The district's articulated reason for doing so was that, at the October 16, 23, and

26 games, Kennedy impermissibly "engag[ed] in overt, public and demonstrative religious conduct while still on duty as an assistant coach," activity that "was in direct violation of [the district's] directives." JA102-03.

The district released a public document titled "Bremerton School District Statement and Q&A Regarding Assistant Football Coach Joe Kennedy," which explained that Kennedy "will not participate, in any capacity, in BHS football program activities" until he "affirms his intention to comply with the District's directives." JA104. The district conceded that Kennedy "ha[d] complied with [its] directives not to intentionally involve students in his on-duty religious activities," but it stated that "he has continued a practice of engaging in a public religious display immediately following games, while he is still on duty." JA105-06. The four-page document included lengthy articulations, complete with citation and discussion of cases, of why the district believed his practice violated the Establishment Clause and that its discipline complied with the First Amendment.

While Kennedy received "uniformly positive evaluations" every other year of his BHS coaching career, after the 2015 season ended in November, the district gave Kennedy a poor performance evaluation. Pet.App.225-26. The evaluation advised against rehiring Kennedy on the grounds that he "failed to follow district policy" regarding religious expression and "failed to supervise student-athletes after games." Pet.App.225. Kennedy did not return for the next season. Pet.App.226.

B. Proceedings Below

1. Kennedy filed suit against the district to vindicate his right "to act in accordance with his sincerely held religious beliefs by offering a brief, private prayer of thanksgiving at the conclusion of BHS football games." JA145. Kennedy alleged violations of his rights under the Free Speech and Free Exercise Clauses of the First Amendment, as well as violations of Title VII. JA160-64. Relying primarily on free-speech principles, Kennedy moved for a preliminary injunction. The district court denied the motion, determining that Kennedy's religious expression lacked First Amendment protection because he offered his prayer "as a public employee": "He was still in charge. He was still on the job. He was still responsible for the conduct of his students …. And a reasonable observer, in my judgment, would have seen him as a coach, participating, in fact leading an orchestrated session of faith." Pet.App.303.

2. The Ninth Circuit affirmed. In an opinion that recounted Kennedy's various prayer-related activities both before and after the time period relevant to his lawsuit—including off-field and off-duty activities such as "media appearances and prayer in the BHS bleachers" after his suspension—the court agreed with the district court that Kennedy's religious expression lacked First Amendment protection. Pet.App.238. Invoking *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the court opined that, "when Kennedy kneeled and prayed on the fifty-yard line immediately after games while in view of students and parents, he spoke as a public employee, not as a private citizen, and his speech therefore was constitutionally unprotected."

Pet.App.247. In the court's view, because "Kennedy's job … involved modeling good behavior while acting in an official capacity in the presence of students and spectators," *any* "demonstrative communication fell within the compass of his professional obligations." Pet.App.237-38.

3. Kennedy sought certiorari, which this Court denied. Justice Alito, joined by Justices Thomas, Gorsuch, and Kavanaugh, issued a statement concurring in the denial, but emphasizing that the denial "does not signify that the Court necessarily agrees with the decision (much less the opinion) below." Pet.App.207. To the contrary, Justice Alito observed that "the Ninth Circuit's understanding of the free speech rights of public school teachers is troubling and may justify review in the future." Pet.App.211. As he explained, the "highly tendentious way" in which the court employed *Garcetti* would seem to let schools forbid teachers from engaging in "any 'demonstrative' conduct of a religious nature," even conduct as innocuous as "folding their hands or bowing their heads in prayer" before lunch. Pet.App.211. Justice Alito further observed that "[w]hat is perhaps most troubling about the Ninth Circuit's opinion is language that can be understood to mean that a coach's duty to serve as a good role model requires the coach to refrain from any manifestation of religious faith," including "when the coach is plainly not on duty." Pet.App.212.

Justice Alito explained that he nevertheless concurred in the denial of certiorari because, "although [Kennedy's] free speech claim may ultimately implicate important constitutional issues,

we cannot reach those issues until the factual question of the likely reason for the school district's conduct is resolved." Pet.App.211. But he cautioned that, "[i]f the Ninth Circuit continues to apply its interpretation of *Garcetti* in future cases involving public school teachers or coaches, review by this Court may be appropriate." Pet.App.212.

4. On remand, the district court resolved the open question Justice Alito had identified by finding that "the risk of constitutional liability associated with Kennedy's religious conduct was the 'sole reason' the District ultimately suspended him." Pet.App.140. That finding was amply supported—indeed, compelled—by the district's repeated concessions to that effect. For example, in a letter to the EEOC, the district stated that its "course of action in this matter has been driven solely by concern that [Kennedy's] conduct might violate the constitutional rights of students and other community members, thereby subjecting the District to significant potential liability." JA138. When asked during a deposition whether that remained the district's position, Leavell answered, "Yes." JA220. And in a contemporaneous October 28 public document, the district opined that its "action was necessitated by Kennedy's refusal to … refrain from engaging in overt, public religious displays," which it believed "poses a genuine risk that the District will be liable for violating the federal and state constitutional rights of students or others." JA104.

Nevertheless, the district court granted summary judgment to the district across the board. Relying on the Ninth Circuit's first decision in the case, the court

held that what it labeled “prominent, habitual prayer” was “not the kind of private speech that is beyond school control.” Pet.App.148. And although the court considered “[t]he fact that Kennedy spoke as an employee … enough to end the … analysis,” it went on to conclude that the district’s interest in “avoiding an Establishment Clause violation” independently sufficed to justify prohibiting Kennedy’s prayer. Pet.App.153.

As to the free-exercise claim, the district court acknowledged that the district did not act in a “neutral or generally applicable” manner when “it specifically targeted Kennedy’s religious conduct.” Pet.App.160. But the court concluded that the district had a compelling interest in prohibiting Kennedy’s prayer because “allowing” it “would have violated the Establishment Clause.” Pet.App.160. The court also found such a prohibition the least restrictive means of furthering that compelling interest because Kennedy did not accept the “accommodations” the district had offered. Pet.App.160-61.

5. The Ninth Circuit affirmed. On the free-speech claim, notwithstanding the concerns raised by four Justices about the breadth of its government-speech ruling, the court explained that “[o]ur holding … has not changed”: Kennedy “was clothed with the mantle of one who imparts knowledge and wisdom,” and his “expression 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.” Pet.App.14-15. Although the court “acknowledge[d]” this Court’s “warning” in *Garcetti* “not to create

'excessively broad job descriptions,'" it opined that "[t]he only conclusion based on this record is that Kennedy's post-game speech on the field was speech as a government employee." Pet.App.15-16. The court tried to distinguish Kennedy's religious expression from "a teacher bowing her head in silent prayer before a meal in the school cafeteria" on the grounds that players and fans could see Kennedy in the middle of the field and that he served as a "mentor, motivational speaker, and role model to students *specifically at the conclusion of a game*." Pet.App.15. The court noted that, while it did "not mean[] to suggest that a teacher or coach 'cannot engage in any outward manifestation of religious faith' while *off duty*," it still considered Kennedy's off-field expression "important" to its analysis because it demonstrated his "intent to send a message." Pet.App.16.

The Ninth Circuit next concluded that, "even if we were to assume, *arguendo*, that Kennedy spoke as a private citizen," its bottom-line judgment would not change because the district had "adequate justification" for taking action against Kennedy under the Establishment Clause. Pet.App.17. In the court's view, "an objective observer, familiar with the history of Kennedy's on-field religious activity, coupled with his pugilistic efforts to generate publicity in order to gain approval of those on-field religious activities, would view [the district's] allowance of that activity as 'stamped with [its] seal of approval.'" Pet.App.19 (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)). The court took particular issue with Kennedy's decision to share his story with the public, labeling it a "media blitz" and "not[ing]," with evident

disproval, "that Kennedy's media appearances continue to the present day." Pet.App.19 & n.2.

Turning to Kennedy's free-exercise claim, the Ninth Circuit acknowledged that the district had "conceded[]" that it did not suspend Kennedy pursuant to a "neutral and generally applicable" policy since it "purport[ed] to restrict [his] religious conduct *because* the conduct is religious." Pet.App.23. Again, however, the court concluded that avoiding the purported Establishment Clause violation justified religious discrimination and trumped Kennedy's rights under the Free Exercise Clause, opining that "there was no other way" for the district to proceed. Pet.App.25.

6. A Ninth Circuit judge *sua sponte* called for a vote on whether to rehear the case *en banc*. The full court ultimately denied rehearing over the dissent of nine active judges and the recorded disagreement of two senior judges.

Judge O'Scannlain, joined by seven of his colleagues, explained that "[o]ur 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." Pet.App.79.

Judge Ikuta, joined by five judges, emphasized that, "[u]nder the[] well-publicized circumstances" of this case, the district's "concern that Kennedy's religious activities would be attributed to [it] is simply not plausible." Pet.App.108. She warned that the panel's holding that the district "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." Pet.App.109.

Judge Ryan Nelson, joined by five judges, found the panel's opinion "especially erroneous" because it relied on precedent stemming from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and "failed to … realign" with this Court's more recent decisions sidelining *Lemon*. Pet.App.110-11.

Judge Collins, joined by two judges, emphasized that it is "indefensible" to conclude that "allowing any publicly observable prayer behavior by the coach in those circumstances—even silent prayer while kneeling—would violate the Establishment Clause." Pet.App.129.

Judge Milan Smith, the author of the panel opinion, wrote separately to defend it. He began by accusing Judge O'Scannlain of having "succumbed to the Siren song of a deceitful narrative of this case spun by counsel for [Kennedy]." Pet.App.41. And he closed by noting that he "personally find[s] it more than a little ironic that Kennedy's 'everybody watch me pray' staged public prayers … so clearly flout the instructions found in the Sermon on the Mount on the appropriate way to pray." Pet.App.69. No other judge joined his opinion.

The panel's two other members, Judges Christen and Dorothy Nelson, issued an opinion explaining why they thought that "Kennedy's prayer so clearly crossed the line." Pet.App.72 (Christen, J.).

SUMMARY OF ARGUMENT

The decision below reached the remarkable conclusion that the Constitution prohibits what it affirmatively protects twice over. That result defies the First Amendment, this Court's precedents, and the commonsense principle that the government does not endorse everything it declines to censor.

When Joseph Kennedy knelt at the 50-yard line to say a brief personal prayer of thanksgiving, he did not do so as a mouthpiece for the school district. His personal religious expression—as opposed to any earlier conduct he discontinued as soon as the district asked him—was about as far removed from government speech as a coach and teacher can get while still on school premises. It was thus doubly safeguarded by the First Amendment, as both protected speech and protected religious exercise.

The Ninth Circuit's contrary conclusion—that Kennedy's personal prayer was actually government speech—is irreconcilable with this Court's precedents. If everything a government employee says while on the premises or "on duty" became government speech, then this Court's government-speech doctrine would be a very different and very dangerous doctrine. In reality, that doctrine embraces a far narrower and more benign test that turns on whether speech is part of a public employee's official duties. When a coach is calling plays, or arguing with a referee, or addressing players at halftime, that is speech owing to his official duties. But when a coach is not engaged in any of those official duties, a school may not lay claim to all of his speech just because he is still on the premises and serves as a role model. Moreover, if there is one

category of expression that is most obviously *not* government speech, it is private religious expression. To conclude otherwise would be to license schools to engage in unbridled censorship and to send a message of hostility to religion all in the name of controlling "government speech." If the only acceptable role models are coaches and teachers that never engage in any visible religious expression, then something has gone seriously awry.

The Ninth Circuit's view that the district could suppress Kennedy's speech, even if it is understood as private speech, to avoid an Establishment Clause violation is even less defensible. This Court has repeatedly emphasized—often in the context of public schools—the "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Mergens*, 496 U.S. at 250. And this Court has repeatedly stressed that even relatively young students can understand that the government does not endorse all the private speech that it fails to censor. *Id.* To the extent the district was concerned that some students or community members might fail to grasp those principles, the answer here, as in most First Amendment contexts, is more speech—educating students and the community about these core principles—not more suppression of religious speech and religious exercise. Indeed, there are few more important lessons for schools to teach.

In the end, then, this case comes down to a simple proposition: A public school does not endorse religion by declining to silence private religious speech on

school grounds, including the private religious speech of teachers and coaches. In a diverse Nation founded on principles of religious liberty, the government can expect that some teachers, coaches, and students will be religious people with a felt need (and constitutional right) to engage in private religious expression. The sensible and constitutional path for government officials is one of tolerance for private religious expression. If the government follows a different path and insists that the only acceptable role models are those without discernible religious beliefs, then it should expect a pugilistic response. The founders fought for religious liberty and protected it as a fundamental right. It remains a liberty worth fighting for.

ARGUMENT

I. The Free Speech And Free Exercise Clauses Doubly Protect Coach Kennedy's Religious Exercise.

A. The First Amendment Robustly Protects the Religious Exercise and Expression of Public-School Employees.

Crafted and ratified by "a religious people," our Constitution "[g]uarantee[s] the freedom to worship as one chooses." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). Indeed, the first three clauses of the first provision of the Bill of Rights all work to protect that fundamental and foundational freedom. *See* U.S. Const. amend. I.

Of course, the most direct protection of freedom to worship comes from the Free Exercise Clause. From the beginning, that clause was understood to protect more than freedom of conscience; it protects the

actions and expressions that constitute religious exercise. *See Espinoza v. Mont. Dep't of Revenue*, 140 S.Ct. 2246, 2276 (2020) (Gorsuch, J., concurring) ("By speaking of a right to 'free exercise,' rather than a right 'of conscience,' an alternative the framers considered and rejected, our Constitution 'extended the broader freedom of action to all believers.'"). "[T]he inclusion of the Establishment Clause in the First Amendment" was animated by the same goal. *Larson v. Valente*, 456 U.S. 228, 244-45 (1982). By prohibiting the official preference of "one religious denomination … over another," the clause "is inextricably connected with the continuing vitality of the Free Exercise Clause." *Id.* And the Free Speech Clause rounds out the protections for religious expression by safeguarding private religious speech in all its forms, whether it be proselytizing, personal prayer, group worship, or simply discussing topics from a religious viewpoint. *See, e.g.*, *Rosenberger*, 515 U.S. at 841; *Widmar v. Vincent*, 454 U.S. 263, 269 & 281 n.6 (1981). Indeed, "in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince." *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (plurality op.).

The intentional and inevitable product of these interlocking protections is that "private religious expression receives *preferential* treatment" under the Constitution relative to "other forms of private speech." *Id.* at 767. The government cannot discriminate *against* private religious speech, even in the name of avoiding Establishment Clause concerns.

Good News Club v. Milford Cent. Sch., 533 U.S. 98, 107 (2001); *see also Rosenberger*, 515 U.S. at 830-32; *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-94 (1993). To the contrary, in some circumstances even a seemingly neutral law must yield to the need to allow religious exercise. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) ("Facial neutrality is not determinative."). And when the government affirmatively accommodates religious speech and religious exercise, "it follows the best of our traditions." *Zorach*, 343 U.S. at 313-14*; accord Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 744 (1994) (Scalia, J., dissenting).

This Court's cases make crystal clear that these mutually reinforcing protections for religious expression do not disappear when someone crosses the threshold of a public school or accepts public employment. Indeed, many of these precedents were established in the public-school context, and it "has been the unmistakable holding of this Court" for more than a century that "[n]either students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506. To the contrary, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

To be sure, that does not mean that *everything* teachers or coaches do or say within public schools is beyond their employer's reach. A school, like other government employers, must retain the ability to "exercise … control over what the employer itself has

commissioned or created," even if that is speech. *Garcetti*, 547 U.S. at 422. But the proposition that teachers do not shed their constitutional freedoms at the schoolhouse gate necessarily assumes that schools neither commission nor create everything a teacher says while at work. Instead, "the critical question" concerning job duties is whether what the school seeks to control is speech "ordinarily within the scope of an employee's duties." *Lane v. Franks*, 573 U.S. 228, 240 (2014). And, as this Court has emphasized, those duties must be defined with sensitivity, because an "excessively broad job description" amounts to an abridgement of free speech. *Garcetti*, 547 U.S. at 424.[2]

When a teacher is explaining a classroom lesson, or a coach is calling plays, that is obviously speech over which the school may exercise some control, just as a district attorney's office may exercise control over the content of a memorandum "about how best to proceed with a pending case." *Id.* at 421-22. But when a teacher or coach is not "perform[ing] the tasks he was paid to perform," *id.*, but rather is simply speaking or engaging in some activity with an expressive component while in the workplace, the school does not get to control that any more than the government may seek ownership (in service of censorship) of the assistant DA's comments at the water cooler or act of crossing herself before a meal in

[2] Even apart from threshold questions concerning job descriptions, considerations of academic freedom may mean that teachers have *more* latitude within the scope of their job descriptions than other government employees, *see, e.g.*, *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985), but those issues are not directly implicated here.

the lunchroom. "The proper inquiry" concerning job duties in both contexts "is a practical one," and there is no basis for a teacher/coach exception based on the notions that teachers are role models or students are incapable of distinguishing between organic chemistry and a personal comment or religious expression by a teacher or coach. *Id.* at 424. Among the many lessons that students should be expected to comprehend are that coaches and teachers are people too, and "the people" have rights protected by the First Amendment.

B. Kennedy's Religious Exercise Was Not the District's Speech.

Applying these principles, the private-versus-government speech analysis here is straightforward. The district did not discipline Coach Kennedy for employing prayer or religious content while calling plays, giving halftime talks, or presenting pre-game or post-game speeches. While Kennedy used prayer or religious content in some of those activities in the past, that is not what this case is about, despite respondents' effort to change the timeline. Kennedy stopped those other activities as soon as the district expressed concern with them, and he never asked to resume them. *See, e.g.*, JA77 (district acknowledging that Kennedy "has complied with the … directives" from September 17). The only practice Kennedy sought to continue, and the only practice for which the district disciplined him, was offering his own "brief, private prayer of thanksgiving at the conclusion of BHS football games." JA145; *see also* JA88 (district acknowledging that "[t]he issue … has shifted from leading prayer with student athletes, to a coaches [*sic*]

right to conduct a personal, private prayer [] on the 50 yard line"). At a time and place when coaches and players were free to talk to family and friends, Kennedy sought to take a moment to talk to God.

To be sure, Kennedy declined the offer to relegate his personal prayers to an outpost where no one could witness his religious exercise or possibly follow suit. Instead, like many religious individuals, he sought to make his personal religious acknowledgement in situ, immediately before or after an undertaking. That should not be disabling, let alone convert his private religious expression into the government's own speech. The private-versus-government speech analysis does not turn on whether speech takes place in a private *setting*. It turns on whether the employee is speaking in his "capacit[y] as [a] *private citizen*[]." *Garcetti*, 547 U.S. at 419 (emphasis added). Even the most public of speech by a government employee can therefore still be "private" for purposes of government-speech analysis, *see, e.g.*, *Pickering v. Bd. of Ed. of Township High Sch. Dist. 205*, 391 U.S. 563 (1968), for whether speech occurs in a public setting does not necessarily dictate whether it is speech of a kind "ordinarily within the scope of [the] employee's duties," *Lane*, 573 U.S. at 240. Moreover, of all forms of speech in a public setting, an expression of personal faith is the most obviously private.

The district may have commissioned Kennedy to engage in some forms of speech on the field, such as calling plays, communicating with referees, and giving motivational talks. But it did not commission him to communicate with students as the school's mouthpiece every moment he remained on the field.

To the contrary, the district readily conceded that it would have had no problem with Kennedy engaging in other visible or audible activities on the field after a game that have nothing to do with coaching football, *e.g.*, "looking at his phone" or "greet[ing] a spouse in the stands." JA205. Nor is there any dispute that Kennedy would have been free to engage in other forms of speech on the field, such as "calling home or making a reservation for dinner at a local restaurant." Pet.App.209-10 (Alito, J.). The district took issue with Kennedy's equally private conduct solely "*because* the conduct is religious." Pet.App.23. That not only underscores that the district engaged in forbidden religious and viewpoint discrimination, *see infra* Part II, but also confirms that Kennedy's religious exercise was not the district's own speech.

The Ninth Circuit's contrary conclusion is even more obviously wrong now, on this fully developed record, than it was back when four Justices found it "troubling." Pet.App.211 (Alito, J.). The court began on the wrong foot by doubling down on its remarkable suggestion that *everything* teachers and coaches say and do is government speech, simply because their jobs entail being a "mentor and role model" who is "constantly being observed by others." Pet.App.3. As the court put it, "Kennedy was one of those especially respected persons chosen to teach on the field, in the locker room, and at the stadium," a figure "clothed with the mantle of one who imparts knowledge and wisdom," whose "expression" was his "stock in trade." Pet.App.14.

That is a prototype of the kind of "excessively broad job description" that distorts the government-

speech analysis and abridges free speech. *Garcetti*, 547 U.S. at 424. It also contradicts this Court's promise that teachers, no less than students, do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506. After all, once coaches and teachers cross the threshold, they are "clothed with authority" and can be "constantly … observed by others," including students who may view them as mentors and role models. If that suffices to convert anything teachers or coaches say or do into government expression, then they really only have First Amendment rights when they steer clear of the schoolhouse gates. In reality, teachers and coaches remain people even on the school grounds, and as private individuals they have political views, sports allegiances, and religious beliefs that do not become the government's just because they are on the clock or on the premises.

The fact that some students will perceive teachers and coaches as mentors or role models does not convert everything they say or do into government speech, let alone justify a zero-tolerance policy for religious speech under the misguided reasoning that tolerating any religious exercise with an expressive component is akin to the school itself "modeling" religious behavior in violation of the Establishment Clause. After all, a teacher can be a positive "mentor and role model" when wearing a yarmulke in the classroom, making the sign of the cross before eating a meal in the cafeteria, or performing midday salah in a visible location. The government may be able to prohibit teachers and coaches from using profanity on the school premises, on the theory that they should be good role models. But that is not because the profanity

becomes government speech, and the school is certainly not free to put religious expression in the same verboten category as profanity when it comes to role models. Doing so exhibits not sensitivity to Establishment Clause concerns, but the precise hostility to religion that both religion clauses and the Free Speech Clause all reject. Those reinforcing protections for private religious expression foreclose the argument that "a coach's duty to serve as a good role model requires the coach to refrain from any manifestation of religious faith." Pet.App.212 (Alito, J.).

The Ninth Circuit "acknowledge[d]" *Garcetti*'s "warning not to create 'excessively broad job descriptions,'" and insisted that its opinion "should not be read to suggest that … a teacher bowing her head in silent prayer before a meal in the school cafeteria would constitute speech as a government employee." Pet.App.15. But that disclaimer is belied by the court's strained effort to distinguish that obviously protected expression from this case. The court posited that Kennedy's prayer was different because "there is simply no dispute that Kennedy's position encompassed … post-game speeches to students on the field." Pet.App.15. That might have mattered if Kennedy had sought to employ prayer or religious content during a post-game speech to students on the field. But Kennedy sought no such thing. By the district's own telling, Kennedy did not claim a right to "lead[] prayer with student athletes" or use religious content in post-game speeches. He claimed only a "right to conduct a personal private, prayer [] on the 50 yard line," JA88, at a time when students were free to engage in activities of their own choosing and

coaches were free to make personal phone calls or talk with family and friends, JA205. In the same way a teacher who had specific supervisory duties in the lunchroom would not lose her right to begin her own lunch in that same lunchroom with a brief private blessing, Coach Kennedy's other duties did not deprive him of a right to engage in a brief private religious expression on the playing field.

The Ninth Circuit emphasized that Kennedy had post-game "access" to the 50-yard line "only … because of his employment." Pet.App.15. That is highly debatable, as attendees can and typically do access the field once games conclude. *See* Pet.App.8; JA239. It also does nothing to distinguish the teacher wearing a yarmulke in the classroom, or eating lunch with students in the cafeteria, or performing salah on school grounds. They are all even more obviously able to access the classroom and the school lunchroom only because of their government employment. None of that makes any difference because the relevant doctrine applies to government speech, not government premises. As *Garcetti* itself made clear, that an employee "expressed his views inside his office … is not dispositive." 547 U.S. at 420. "Many citizens do much of their talking inside their respective workplaces," *id.* at 421-22, and most public employees have "access" to those workplaces "only … because of [their] employment," Pet.App.15. The whole point of the principles set forth in *Garcetti* and *Lane* is to help identify which of their speech is private *notwithstanding* the fact that it occurs in the workplace.

The Ninth Circuit insisted that Kennedy's prayer was "expression … of a wholly different character" because it "occur[ed] while players stood next to him, fans watched from the stands, and he stood at the center of the football field." Pet.App.15. But those contextual factors make little difference as to the critical question whether the speech was Kennedy's or the government's, especially when it comes to something as personal as an individual prayer. If a coach were to kneel at the 50-yard line *after the conclusion of his post-game duties* to propose to his significant other "while players stood next to him" and "fans watched from the stands," the district would not claim the coach's proposal as its own. That is because the critical distinction between speech as a private citizen and speech on behalf of the school does not turn on whether a coach remains "in the center of the football field" surrounded by students. It turns on whether the coach is *actually engaged* in some sort of on-field duty.

Ultimately, the Ninth Circuit's real objection seemed to be that Kennedy "intended to send a message to students and parents about appropriate behavior and what he values as a coach," Pet.App.16—a message some might mistakenly think the district endorsed if it did not prohibit it. That concern is difficult to fathom given the district's repeated and very public efforts to distance itself from Kennedy's prayer. *See* Pet.App.108 (Ikuta, J.); Pet.App.129 (Collins, J.). It is also every bit as legally misplaced for government-speech purposes as it is under Establishment Clause jurisprudence, for merely allowing private speech to occur on school grounds does not convert it into the school's own speech. *See*

infra Part II. Indeed, even affirmatively approving private speech does not necessarily make it the government's—and rightly so, for "[i]f private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints." *Matal v. Tam*, 137 S.Ct. 1744, 1758 (2017).

Nor does the mere risk that someone might *mistake* private speech for government speech justify treating it as if it actually *were* government speech. *Cf. Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002) ("Protected speech does not become unprotected merely because it resembles the latter."). If speech is protected private speech, then any efforts to restrict it "must be the least restrictive means of achieving a compelling state interest." *McCullen v. Coakley*, 573 U.S. 464, 478 (2014). When it comes to concerns about who is actually doing the speaking, the obviously less restrictive alternative is "an adequate disclaimer" clarifying the matter and eliminating the confusion. *Capitol Square*, 515 U.S. at 782 (O'Connor, J., concurring in part). As in most matters implicating the First Amendment, the appropriate solution is more speech, not more suppression.

The implications of the Ninth Circuit's misguided government-speech analysis are nothing short of breathtaking. In its view, public-school coaches and teachers "may be fired if they engage in any expression"—religious or otherwise—"that the school does not like while they are on duty," which by the Ninth Circuit's telling is "at all times from the moment they report for work to the moment they depart,

provided that they are within the eyesight of students." Pet.App.211 (Alito, J.). That would effectively erase the First Amendment from the Constitution for public-school teachers and coaches, giving schools "plenary control" over all of their publicly observable on-duty expression. Pet.App.77-78, 105 (O'Scannlain, J.). It is difficult to imagine a more profound threat to our first freedoms or a worse lesson for students than that the government owns and can censor literally everything that coaches and teachers say. The burden of such a regime will predictably weigh most heavily on religious speech. If everything a teacher says is government speech, and any government speech favoring religion raises Establishment Clause concerns, then there is no room left for any teacher or coach to engage in visible or audible religious exercise, no matter how obviously personal or divorced from their primary job duties. That conception of government speech in the school setting is not just "troubling"; it runs counter to the basic thrust of the three central clauses of the First Amendment.

II. The Establishment Clause Does Not Compel Public Schools To Purge From Public View All Religious Exercise Of Coaches And Teachers.

The Ninth Circuit's alternative holding that the district could suppress Kennedy's religious exercise even as wholly private speech to avoid an Establishment Clause violation is even more obviously contrary to this Court's case law than its government-speech ruling. The notion that the government does not endorse private speech that occurs on the

schoolhouse grounds just because it does not suppress it is not just a straightforward principle that students can understand. It is bedrock constitutional law.

Once it is clear that this case involves Coach Kennedy's *private* prayer, not government speech, there can be no serious doubt that the district's efforts to suppress it trigger the most demanding form of constitutional scrutiny. As the district conceded, the district court found, and the Ninth Circuit affirmed, the district sought to "restrict Kennedy's religious conduct *because* the conduct is religious." Pet.App.23; *accord* Pet.App.140. Indeed, the district freely admitted that it would not have disciplined Kennedy had he engaged in other forms of private expression in the same place at the same time. JA205; *see* Pet.App.209-10 (Alito, J.). The district's actions are therefore subject to "the strictest scrutiny" twice over, as both the Free Exercise Clause and the Free Speech Clause guard against efforts to suppress religious expression *because* it is religious. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012, 2019 (2017); *Good News Club*, 533 U.S. at 107.

As the district also conceded, the district court also found, and the Ninth Circuit also affirmed, the district prohibited Kennedy's religious exercise for one and only one reason: fear that failure to do so would be seen as an endorsement of religion and thus violate the Establishment Clause. *See* Pet.App.140 ("the risk of constitutional liability associated with Kennedy's religious conduct was the 'sole reason' the District ultimately suspended him"); *accord* Pet.App.23. That concern was specious. It should be clear beyond cavil that misguided concerns about phantom

Establishment Clause violations are no excuse for suppressing private religious speech. This Court has reaffirmed that point over and over again, in a wide variety of contexts, sometimes involving the speech of fellow students, sometimes involving the speech of adults, sometimes involving an audience of very young students, and sometimes involving high-school students like those at BHS. It is well past time for schools to get the message that allowing private religious speech on school grounds does not offend the Establishment Clause; "it follows the best of our traditions." *Zorach*, 343 U.S. at 313-14.

A. Declining to Prohibit Private Religious Exercise Does Not Create Establishment Clause Concerns.

While the Ninth Circuit's government-speech holding ignored *Garcetti*'s admonition against overly broad job descriptions, its alternative holding that tolerating Kennedy's private religious speech would raise serious Establishment Clause problems ignores a virtual wall of precedent. Time and again, this Court has reiterated that there is a "critical 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.'" *Rosenberger*, 515 U.S. at 841 (quoting *Mergens*, 496 U.S. at 250). And time and again, the Court has reiterated that merely tolerating the latter does not implicate Establishment Clause concerns that justify the suppression of private religious speech. *See, e.g.*, *Good News Club*, 533 U.S. at 113-19; *Rosenberger*, 515 U.S. at 838-46; *Capitol Square*, 515 U.S. at 761-70; *Lamb's Chapel*, 508 U.S.

at 394-96; *Mergens*, 496 U.S. at 250-53; *Widmar*, 454 U.S. at 270-75. Simply put, the Establishment Clause does not require the government to do what the Free Speech and Free Exercise Clauses forbid or "compel the government to 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). The relevant clauses of the First Amendment are not on a collision course and do not put government officials between a rock and a hard place. To the contrary, there is ample "play in the joints" if the government recognizes private religious speech for what it is: constitutionally protected activity that the government may neither prohibit nor abridge, not an Establishment Clause violation waiting to happen.

Those commonsense principles carry no less force in public schools. Indeed, they were largely developed in the public-school context, where this Court has considered and rejected the notion that students are unable to comprehend the basic distinction between government action (that is generally subjected to constitutional constraints) and private activities (that are often protected by the Constitution). "The proposition that schools do not endorse everything they fail to censor is not complicated" and is certainly not beyond the ken of high-school students or even those considerably younger. *Mergens*, 496 U.S. at 250-51. The lesson appears to be more elusive for school administrators, but a long line of this Court's cases, from *Mergens* to *Lamb's Chapel* to *Widmar* to *Rosenberger* to *Good News Club* and more, all make clear that a school need not fear liability if it simply permits religious exercise or expression on neutral

terms, at times and places where it would permit the speaker to engage in other forms of activity or expression. That is no less true of teachers and coaches when they are engaged in private religious speech. Teachers and coaches may have less scope to engage in private religious speech than students or outside groups given access to the schools during specified times. But when teachers and coaches are engaged in such private religious conduct—whether before a meal, after a game, or in an informal conversation—the foundational principle that the government does not endorse what it fails to censor applies with full force.

That is true even if some observers may mistake neutrality and toleration of private religious expression by teachers and coaches for school endorsement. In reality, the only thing a school is endorsing by *permitting* private religious exercise is our constitutional values of free speech and free exercise. If some cannot distinguish between the school and the private religious expression the school tolerates, the solution is not to squelch the religious expression. It is to do what schools are supposed to do best: educate. "[S]econdary school students are mature enough … to understand that a school does not endorse or support … speech that it merely permits on a nondiscriminatory basis." *Mergens*, 496 U.S. at 250. Indeed, that proposition is central to understanding their *own* constitutional rights at school. And educating students (and, if need be, parents and school officials) about the difference between state action and private conduct and the importance of governmental toleration of a wide variety of diverse religious expressions is a dramatically less restrictive means of

addressing potential confusion than eradicating from the public schools any teacher or coach who engages in "demonstrative religious activity" that is "readily observable" as such. JA94. Thus, even if the district's Establishment Clause concerns had not been repeatedly debunked by this Court, its chosen means of addressing them would still violate the Constitution, for when a school "can achieve its interests in a manner that does not burden religion, it must do so." *Fulton v. City of Philadelphia*, 141 S.Ct. 1868, 1881 (2021).

Particularly in the context of this case, the district's "fear of a mistaken inference of endorsement [wa]s largely self-imposed." *Mergens*, 496 U.S. at 251. Whatever purchase (if any) the "reasonable observer" test may have left at this point, *cf. Am. Legion v. Am. Humanist Ass'n*, 139 S.Ct. 2067, 2082 (2019) (Gorsuch, J., concurring), what has always made such an observer "reasonable" is an understanding of the context known to members of "the community." *Capitol Square*, 515 U.S. at 765 (the reasonable observer is not an "uninformed … outsider[]"); *accord Good News Club,* 533 U.S. at 119; *Lamb's Chapel*, 508 U.S. at 395. Given the lengths to which the district went "to *disassociate* itself from" Kennedy's religious exercise, *Rosenberger*, 515 U.S. at 841—lengths that were well publicized by both the district and the local press, *see* Pet.App.8-9; JA104-11—there was "no realistic danger that the community would think that the District was endorsing religion or any particular creed," *Good News Club*, 533 U.S. at 113, or that it had "adopted some ingenious device with the purpose of aiding a religious cause," *Rosenberger*, 515 U.S. at 840. Quite the opposite: The public correctly perceived the

district's message as one of hostility to religion, not endorsement, which is why many members of the community expressed solidarity with Kennedy. Under these circumstances, any "concern that Kennedy's religious activities would be attributed to the district is simply not plausible." Pet.App.108 (Ikuta, J.); *see also* Pet.App.129 (Collins, J.). The district thus "ha[d] no valid Establishment Clause interest" at all, *Good News Club*, 533 U.S. at 113, let alone one that would justify the draconian measures to which it resorted.

B. The Ninth Circuit's Contrary Conclusion Distorts the Record, This Court's Cases, and the Constitution.

The Ninth Circuit perceived an endorsement problem by insisting that anyone "familiar with the history of Kennedy's on-field religious activity, coupled with his pugilistic efforts to generate publicity in order to gain approval of those on-field religious activities," would "unquestionably" view "allowance" of his religious exercise as "'stamped'" with the district's "'seal of approval.'" Pet.App.1-2, 18-19. That (il)logic is wrong at every turn.

First, far from helping the district's cause, the *full* "history of Kennedy's on-field religious activity," Pet.App.18, confirms that *Kennedy* appreciated and was perfectly willing to respect the "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Mergens*, 496 U.S. at 250. When the district explained to Kennedy its concerns with the use of prayer or other religious content in pre- or post-game speeches to players, he readily acceded

to its requests to cease those practices. *See, e.g.*, JA77; JA88. The only "on-field religious activity" for which he sought "to gain approval," Pet.App.18-19, pugilistically or otherwise, was his practice of saying a "private," "personal" prayer at the 50-yard line after each game, after both he and students were free to engage in other activities. JA62. Anyone acquainted with *all* the history—which the district itself made sure everyone in the community was, JA105-06—thus would readily have understood that Kennedy was not asking for endorsement or "religious favoritism." *Kiryas Joel*, 512 U.S. at 709-10. He just "asked his employer to do *nothing*—simply to tolerate the brief, quiet prayer of one man." Pet.App.99 (O'Scannlain, J.).

Second, the Ninth Circuit's criticism of Kennedy's "pugilistic efforts" is as illogical as it is dangerous. One would think that the pugilistic relationship between Kennedy and the district would all but ensure the *absence* of endorsement. Ali was not endorsing Frazier in Manila. But more fundamentally, pugilism in defense of liberty is no vice. The Constitution (not to mention Title VII) *protects* the right of employees to speak out when the freedoms it secures have been denied. *Perry v. Sindermann*, 408 U.S. 593, 597-98 (1972); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84 (1977). It does not require them to stand idly by as schools try to strip them of the very liberties it guarantees, let alone stand mute for fear their protest will become the justification for their removal. Given the principles on which this Nation was founded, a school district that threatens a football coach's job should expect a pugilistic response. Whatever is true of the kingdom of heaven, the First

Amendment is not reserved for the meek. Treating an employee's efforts to vindicate the right to religious expression as a justification for its suppression not only would create an unprecedented chilling effect, but would turn the First Amendment on its head.

Finally, as this Court has affirmed time after time, mere government "allowance" of *private* religious exercise, Pet.App.18-19, is not forbidden endorsement. To equate mere "allowance" with the kind of official "approval" with which the endorsement test is concerned is to make an error this Court has already corrected multiple times.

The Ninth Circuit seemed to think that *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), compels a different conclusion. But the Ninth Circuit overlooked the critical point that *Santa Fe* involved what this Court deemed to be *government*, not private speech. *Id.* at 296-99.[3] To be sure, the principal defense of Santa Fe's practice was that it involved private student speech, and the proper characterization was highly debatable, to say the least. *See id.* at 324-25 (Rehnquist, C.J., dissenting).

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[3] Not coincidentally, virtually every one of this Court's cases that the Ninth Circuit invoked in its Establishment Clause analysis involved government, not private, speech. *See* Pet.App.17-24 (invoking *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844 (2005) (courthouse displays of the Ten Commandments); *Lee v. Weisman*, 505 U.S. 577, 587 (1992) ("state-sponsored and state-directed … formal religious observance"); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (statewide ban on teaching evolution without creationism); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (statewide school-prayer statute)). The lone exception is *Good News Club*, which *rejected* an effort to treat neutral tolerance of religious expression as forbidden endorsement. *See* 533 U.S. at 113-19.

But far from embracing the proposition that mere "allowance" of *private* religious expression somehow runs afoul of the Establishment Clause, the majority invalidated the school's policy by reiterating the "'crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.'" *Id.* at 302 (quoting *Mergens*, 496 U.S. at 250). It just was "not persuaded that the [speech at issue] should be regarded as 'private speech.'" *Id.*

Here, by contrast, Kennedy's religious exercise was private, *see supra* Part I—a proposition that even the Ninth Circuit "assume[d]" to be true for purposes of its Establishment Clause analysis. Pet.App.17. The relevant rule thus comes not from *Santa Fe*, but from *Mergens* and its extensive progeny: "[S]chools do not endorse everything they fail to censor." *Mergens*, 496 U.S. at 250.

While the Ninth Circuit's opinion rested on a mistaken endorsement rationale that is flatly inconsistent with this Court's precedents, Judge Smith suggested in his separate *en banc* writing that the real problem was "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." Pet.App.61. At the outset, there is a good reason that this analysis appeared in a single-judge *en banc* statement, rather than in the majority opinion. There is zero record evidence that any student felt compelled to join Kennedy in his quiet, personal post-game prayer. The principal recalled hearing concerns from only one parent, JA233-34, and that was regarding the

team prayers in the locker room, JA356, which is a practice that raises different questions, and that Kennedy immediately ceased once the district explained its concerns, JA77; JA88. Moreover, the record is clear that the district's fears of running afoul of the Establishment Clause were grounded in (mistaken) endorsement concerns, not (non-existent) coercion worries. JA41-43; *see* Pet.App.115 (Nelson, R., J.). In all events, if the mere possibility that a student or player would feel coerced by knowing that a teacher is religiously observant (or politically opinionated) were sufficient, that would eviscerate the rule that public-school employees, no less than students, do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506.

At bottom, the Ninth Circuit's decision rests on a perceived tension between the commands of the Establishment Clause and the guarantees of the Free Speech and Free Exercise Clauses. But, in reality, the clauses are mutually reinforcing. After all, the Establishment Clause forbids not only the government establishment of a religion, but governmental hostility to religion. *See Lukumi*, 508 U.S. at 532. And it is hard to understand the view that teachers and coaches should not be seen as religiously observant because they are role models as evincing anything other than hostility to religion.

Moreover, the closest thing to an Establishment Clause violation in this case is the admonition in the pages of the Federal Reporter that Kennedy's effort to publicize the district's unconstitutional actions somehow violated Biblical guidance on the proper way

to pray. Needless to say, in the eyes of the government there is no proper or improper mode of prayer. Once it is recognized that there is room within the job description and workday of teachers and coaches for some private religious exercise, it can be expected that such private religious exercise will take a variety of forms. That is what happens in a religiously diverse and religiously tolerant society. That is far preferable to a government-imposed orthodoxy that allows no room for religious expression from the beginning of the school day to the end of the game.

Ultimately, the real root of the Ninth Circuit's consternation seems to have been that Kennedy's decision to publicize (or, to use its pejorative label, "advertis[e]," Pet.App.9) his situation put the district in a difficult position. But none of that would have happened had the district simply respected the clear teachings of this Court's cases and declared victory once it clarified the difference between the private prayers Kennedy had a right to continue and the use of religious content in team talks or coach-led prayers that Kennedy agreed to stop. Once the district insisted that Kennedy could only continue his individual religious observances behind closed doors, the reaction of Kennedy and the community were entirely predictable and frankly commendable. When the government suppresses private religious speech, it can expect both a pugilistic response from the suppressed citizen and for the community and even the opposing team to rally in solidarity with the victim of such suppression.

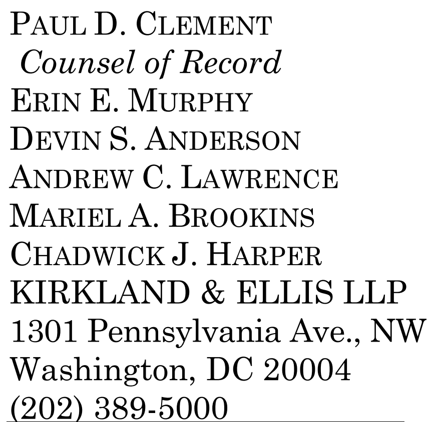
That does not put the district in an impossible position. To the contrary, government neutrality

toward religion and tolerance of private religious expression provides a clear and constitutional path. There is ample room for "play in the joints" as long as the government errs on the side of allowing private religious speech, rather than on the side of abridging speech in the name of phantom Establishment Clause concerns. Pursuing that path may require a school board official to remind a concerned citizen that the government does not establish every religious expression that it fails to censor. But fortunately, this Court's cases arm school officials with a veritable sheaf of precedents that reinforce that message. Thus, school officials are not between a rock and a hard place, but have a clear choice between impermissibly suppressing private religious exercise and "follow[ing] the best of our traditions" by "respect[ing] the religious nature of" their coaches, teachers, and students. *Zorach*, 343 U.S. at 313-14.

CONCLUSION

For the foregoing reasons, this Court should reverse.

Respectfully submitted,



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