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

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND ACLU OF WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE*..... 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. Petitioner's Prayers with Students Were Undertaken Pursuant to His Official Duties and Are Unprotected Under *Garcetti*..... 4

II. Permitting an On-Duty Public School Football Coach to Lead Students in Midfield Prayer Immediately After the Final Play at a School-Sponsored Game Violates the Establishment Clause. 12

A. The Establishment Clause Protects Public School Students from Religious Indoctrination and Pressure. 15

1. Establishment Clause Concerns Are at Their Zenith in Public Schools. 15

2. The Speech of On-Duty School Officials at School-Sponsored Events Bears the Strong Imprimatur of the School. 17

TABLE OF CONTENTS
(continued)

Page

3. The Coercive Pressures Faced by Students Require Vigilance in Enforcing the Establishment Clause in Public Schools. 18

B. Petitioner's On-Duty Prayers with Students Violated the Establishment Clause. 21

C. Schools Are in the Best Position to Determine Whether an Employee's Behavior Poses a Serious Risk of Violating the Establishment Clause. 28

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Berry v. Dept. of Social Services,
447 F.3d 642 (9th Cir. 2006) 30

Board of Educ. of Westside Community Sch. v. Mergens,
496 U.S. 226 (1990) 16, 17, 29

Borden v. Sch. Dist. of Twp. of E. Brunswick,
523 F.3d 153 (3d Cir. 2008)..... 8, 25

Bronx Household of Faith v. Bd. of Educ. of City of New York,
650 F.3d 30 (2d Cir. 2011)..... 29

Capitol Square Review and Advisory Bd. v. Pinette,
515 U.S. 753 (1995) 29

Deal v. Mercer Cty. Bd. of Educ.,
911 F.3d 183 (4th Cir. 2018) 13

Doe v. Duncanville,
70 F.3d 402 (5th Cir. 1995) 21, 25

Edwards v. Aguillard,
482 U.S. 578 (1987) 16, 19

Engel v. Vitale,
370 U.S. 421 (1962) 14, 20, 26

TABLE OF AUTHORITIES
(continued)

Espinoza v. Montana Dept. of Revenue,
140 S. Ct. 2246 (2020) 29

Freedom from Religion Found., Inc. v. Concord Community Sch.,
885 F.3d 1038 (7th Cir. 2018) 20

Garcetti v. Ceballos,
547 U.S. 410 (2006) ..... *passim*

Good News Club v. Milford Central Sch.,
533 U.S. 98 (2001) 28

Hazelwood Sch. Dist. v. Kuhlmeier,
484 U.S. 260 (1988) 6, 17

Lamb's Chapel v. Center Moriches Union Free Sch. Dist.,
508 U.S. 384 (1993) 28

Lee v. Weisman,
505 U.S. 577 (1992) ..... *passim*

Lund v. Rowan Cty., N.C.,
103 F. Supp. 3d 712 (M.D.N.C. 2015), ... 23

Lynch v. Donnelly,
465 U.S. 668 (1984) 13

McCollum v. Board of Education of Sch. Dist. No. 71,
333 U.S. 203 (1948) 17

TABLE OF AUTHORITIES
(continued)

McCreary County v. ACLU of Ky.,
545 U.S. 844 (2005) 12, 22

Mellen v. Bunting,
327 F.3d 355 (4th Cir. 2003) 26

Nurre v. Whitehead,
580 F.3d 1087 (9th Cir. 2009) 30

Peck v. Upshur Cty. Bd. of Ed.,
155 F.3d 274 (4th Cir. 1998) 29

Rosenberger v. Rector and Visitors of Univ. of Va.,
515 U.S. 819 (1995) 28

Santa Fe Indep. Sch. Dist. v. Doe,
530 U.S. 290 (2000) ..... *passim*

Sch. Dist. of Abington Twp. v. Schemmp,
374 U.S 203 (1963) 14, 20

Steele v. Van Buren Pub. Sch. Dist.,
845 F.2d 1492 (8th Cir. 1988) 25

Stone v. Graham,
449 U.S. 39 (1981) 19, 20

Stratechuk v. Bd. of Ed., South Orange-Maplewood Sch. Dist.,
587 F.3d 597 (3d Cir. 2009)..... 30

TABLE OF AUTHORITIES
(continued)

Tinker v. Des Moines Indep. Cmty. Sch. Dist.,
393 U.S. 503 (1969) 18, 19

Van Orden v. Perry,
545 U.S. 677 (2005) 20

Wallace v. Jaffree,
472 U.S. 38 (1985) 14

Widmar v. Vincent,
454 U.S. 263 (1981) 28

OTHER AUTHORITIES

Matt Calkins, *Why Bremerton Coach Joe Kennedy's Stance on Postgame Prayer is Admirable*, Seattle Times (Oct. 15, 2015)..... 26

Josh Farley, *A Home of Their Own: Kitsap Muslims Finally Have Mosque*, Kitsap Sun, (Feb. 18, 2017)..... 23

Steve Gardner, *Survey Finds Kitsap the Seventh Least Religious Area in the nation,* Kitsap Sun (Apr. 13, 2022)..... 23

Kitsap Sikh Temple,
https://www.kitsapsikhtemple.com
(last visited Mar. 31, 2022) 23

INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly two million members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Since its founding in 1920, the ACLU has appeared before this Court in numerous free speech and religious liberty cases, both as direct counsel and as *amicus curiae*. The American Civil Liberties Union of Washington is a state affiliate of the national ACLU. For more than 100 years, the ACLU has been a staunch supporter of the free exercise of religion, free speech, and the Establishment Clause. Most recently, in an amicus brief filed last year with this Court addressing the intersection of these rights, we argued that a city could not deny a Christian group's request to fly a flag depicting a Latin cross, where the city had consistently allowed private parties to temporarily display flags on a city-owned flagpole. *See* Amicus Br. of ACLU, *Shurtleff v. City of Boston*, No. 20-1800 (U.S. Sup. Ct. Nov. 22, 2021). In this case, our interest in ensuring that public schools avoid Establishment Clause violations, including religious coercion of students, coupled with our conclusion that the Petitioner's on-the-job public prayer is not protected under this Court's First Amendment public employee speech doctrine, leads us to urge that the judgment below be affirmed.

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than *amici* and their counsel made a monetary contribution to this brief's preparation and submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

As a football coach at Bremerton High School, Petitioner engaged in a longstanding practice of leading student-athletes on his team in prayer before games in the school's locker room and immediately after games on the field. Respondent (the "District") expressed concern that Petitioner's team prayers violated students' religious liberty, created a safety risk for students and others on the field, and undermined the District's ability to maintain control over District events and messages. Though the District offered various accommodations that would have allowed Petitioner to pray without religiously coercing students, endangering safety, or risking a perception that his religious message bore the school's imprimatur, JA 40, Petitioner continued to lead his student-athletes in virtually identical on-field public prayers after games.

These were not private moments of quiet reflection, but on-the-job prayer convened by a school employee in a position of authority, often at the 50-yard line, under the bright lights of the school stadium, encircled by adolescents under his charge wearing their team uniforms. As Petitioner continued to conduct these team prayers on the job, the District learned that several players felt pressured to participate in the coach-led religious exercise. When Petitioner rejected the District's accommodations and refused to halt his practice, the District placed him on administrative leave. While employees have a right to engage in private prayer in many situations, the First

Amendment did not prohibit the District's response in this case.

Petitioner's challenge fails under *Garcetti v. Ceballos*, 547 U.S. 410 (2006), without regard to the Establishment Clause concerns presented here. Just as the school would have the authority to direct its coach not to display a "Re-elect Joe Biden" placard on the 50-yard line after each game, so, too, may the school direct him not to conduct what amounts to a team prayer in that setting.

The First Amendment does not protect public employees' speech made "pursuant to their official duties." *Id.* at 421. This rule is founded on the government's duty to provide efficient services to the public and its interest in preventing private viewpoints from assuming an official imprimatur. Post-game, on-field speeches to players are undeniably part of what a football coach is paid to do. Only after Petitioner rejected accommodations that would have allowed him to pray in private and insisted on continuing his on-field team prayers did the District discipline him. Petitioner admits he was on the job during these prayers. The First Amendment, therefore, did not shield him from employee discipline where, as here, the school had legitimate concerns about the effect of that conduct on the public and its students. That conclusion is sufficient to uphold the District's actions.

The District's actions were also justified to avoid the Establishment Clause violation that occurs when a coach leads students in midfield prayer while on the job. For decades, this Court has held that, when it

comes to the Establishment Clause, "there are heightened concerns . . . in the elementary and secondary public schools." *Lee v. Weisman*, 505 U.S. 577, 592 (1992). Public school students—a group of young individuals of diverse faiths and beliefs—face inherent risks of coercion from their teachers and coaches, who serve as authority figures and role models, and in the case of a football coach, exercise substantial discretion over their ability to participate in important extracurricular activities. Here, Petitioner crossed the Establishment Clause line: He gathered his team on the football field to lead public prayers in the midst of a media blitz, leaving his players feeling obligated to participate—lest they lose their coach's confidence, their playing time, or their teammates' support.

Amici recognize that difficult questions can arise at the intersection of free speech and free exercise rights and Establishment Clause obligations. But here, the District was clearly within its authority. For years, Petitioner included prayer in his game speeches—which, as he admits, were made pursuant to his official duties and thus without First Amendment protection. The First Amendment imposed no bar on the District's disciplinary action—indeed, the Establishment Clause required it.

ARGUMENT

I. Petitioner's Prayers with Students Were Undertaken Pursuant to His Official Duties and Are Unprotected Under *Garcetti.*

Petitioner casts this case as involving a high school football coach's "brief, quiet prayer by himself

while at school." Pet'r Br. i. The record shows otherwise. In reality, Petitioner had a longstanding practice of leading students, over whom he had authority and significant influence, in prayer, including on the field immediately after games. Pet'r Br. 5; JA 126, 261. During these prayers, Petitioner was on the clock, on the job, and responsible for supervising and leading his team. By his own admission, Petitioner's "football coaching functions" continued "until the last kid leaves" after a game. JA 276. Since a football coach's post-game speeches are plainly part of his official duties, they lack First Amendment protection. Therefore, the District had an entirely independent basis for limiting such speech, separate and apart from its legitimate Establishment Clause concerns.

Indeed, because Petitioner's on-duty speech was not protected, this case can be resolved without addressing the Establishment Clause at all. Imagine a coach who, after each game, huddled his student-athletes together and raised a sign at the 50-yard line saying, "Math Stinks," or "Re-elect Joe Biden." The school would be fully within its authority to direct him not to do so while on the job and in such a public place. Even if the speech raised no Establishment Clause concerns, under this Court's holdings, public employers have authority to direct speech made by public employees pursuant to their official duties.

In *Garcetti*, this Court recognized that when public employees speak "pursuant to their official duties," they do not speak "as citizens" and therefore cannot shield their speech from employer discipline

under the First Amendment. 547 U.S. at 421. *Garcetti* addresses the government's interest in avoiding misattribution by allowing it to control on-duty speech, while providing some measure of protection for off-duty speech. "Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Id.* at 418. The *Garcetti* inquiry is "a practical one"—fact-bound and tailored to the specific circumstances presented in a given case. *Id.* at 424. The rule in *Garcetti* ensures that not every workplace will become, literally, a federal case. *See id.* at 418.[2]

Garcetti also reflects the government's interest in regulating speech disseminated under its auspices and bearing its imprimatur. For similar reasons, public schools have some authority to regulate certain expressive activities, such as school-sponsored publications, "that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988) (addressing high school newspapers). *Garcetti* recognizes a similar principle for public employees' speech in their official

[2] Given the constitutional interests in "academic freedom," the Court in *Garcetti* was careful to note that it did not decide whether its analysis "would apply in the same manner to a case involving speech related to scholarship or teaching," 547 U.S. at 425, which likewise is not at issue in this case.

capacity because "official communications have official consequences." *Garcetti*, 547 U.S. at 422.[3]

Applying *Garcetti*'s "practical" inquiry to the admitted facts of this case, Petitioner acted "pursuant to [his] official duties," *Garcetti*, 547 U.S. at 421, when he incorporated prayers into his post-game speeches to his students—a quintessential responsibility of a football coach. There is no dispute that, between 2008 and 2015, Petitioner led his athletes in post-game prayers at midfield, JA 40, 261, and the District's September 17, 2015 letter identified this "problematic practice[]"—along with Petitioner's pre-game prayers with players in the locker room—as the basis for its conclusion that Petitioner's conduct would "very likely" be found to violate the Establishment Clause. JA 40–41.

Petitioner appears to concede that presenting "post-game speeches" is within his official coaching duties. *See* Pet'r Br. 27; *see also* JA 276 (admitting that Petitioner was on duty during prayers). No one could argue otherwise. Football coaches are expected to address players after games, and since—as Petitioner testified—a football coach is "the most

[3] For these same reasons—the government's interest in the efficient provision of services and its need to control speech issued under its auspices—government restrictions on public employees' religious speech do not violate the Free Exercise Clause when such speech is made pursuant to official job duties. There is no basis to create a new, broad exception to *Garcetti* that would insulate all government employee speech from regulation whenever it can be cast as religious. Additionally, as discussed *infra*, Petitioner's on-duty religious speech in this case implicated the District's obligations under the Establishment Clause.

important person [students] encounter in their overall life," players would not feel free to walk away when their coach begins such a speech. JA 323; *see also* Br. of Former Professional Football Players Obafemdi D. Ayanbadejo, Sr., Christopher J. Kluwe, and Frank T. Lambert, and Various Collegiate Athletes & Coaches as *Amici Curiae* in Supp. of Resp't. at 12–14, 18–23. If writing a memo is part of an attorney's official responsibilities, *see Garcetti*, 547 U.S. at 421, then leading players in a post-game ritual on the 50-yard line is part of a football coach's. *See, e.g.*, *Borden v. Sch. Dist. of Twp. of E. Brunswick*, 523 F.3d 153, 171 n.15 (3d Cir. 2008) (holding that, under *Garcetti*, a high school football coach's pre-game prayer with players "would not be protected because it was made pursuant to his official duties as a coach of the EBHS football team").

Petitioner attempts to distance himself from his years-long practice of delivering prayers to players and limit the case to a handful of games in October 2015. *See* Pet'r Br. 27. But Petitioner's longstanding practice provides the necessary context for understanding the significance of his post-game prayers. After discovering that Petitioner had for years been leading students in prayers in the locker room before games and on the field immediately after games, the District offered him several accommodations—including allowing him to "engage in religious activity" apart from students, App. 6, by praying in a number of private locations on school property, JA 94, or returning to the field to pray after the players had left, JA 224. Petitioner nonetheless pressed forward with his virtually unchanged practice

of leading his student-athletes and staff in public prayers, on the 50-yard line at the close of games.

A simple side-by-side picture demonstrates that, other than the media presence, Petitioner's October 2015 on-field prayers were virtually identical to his longstanding practice of leading post-game prayers with his high school athletes (JA 98, 82):

Pre-Investigation Prayer	October 16, 2015 Homecoming Game
	

On October 23, 2015, the District reminded Petitioner that it had provided him with "directives" specifically in response to his "prior practices involving on-the-job prayer with players . . . on the field immediately following games." JA 90. But Petitioner had nonetheless immediately followed the school's homecoming game with on-field prayer surrounded by players, staff, media, and a state representative—in a scene indistinguishable from the post-game prayers that Petitioner had led in the past. JA 90; *see* JA 93 (noting that, "given your prior public conduct," reasonable observers would find that Petitioner had engaged in "overtly religious conduct" while "still on

duty, under the bright lights of the stadium").[4] Five days later, the District reiterated the same points when it placed Petitioner on administrative leave. JA 102–03.[5] Petitioner cannot divorce his years of on-the-job team prayers, or his refusal to comply with his employer's directive, from the District's October 2015 decision to discipline him.

Petitioner claims he has not "sought" to "resume" the use of prayer in his post-game speeches. Pet'r Br. 31. But Petitioner was disciplined based both on what he had already done, and on what he continued to do after the District directed him to cease: lead his team in mid-field prayers, in which students felt compelled to participate, *see* JA 40.[6]

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[4] Petitioner's reference to the District's October 16, 2015, acknowledgement that he had purportedly "complied with the District's directives" misses the point. JA 77; *see* Pet'r Br. 27. That very same evening, Petitioner reverted to his prior activities, engaging in the same on-field prayer with high school players and staff. *See* JA 82, 90. It was precisely this conduct that led the District to conclude that Petitioner had "*violated* [its] directives." JA 102 (emphasis added); *see* JA 90–95.

[5] The District's October 28, 2015, letter also referred to Petitioner's mid-field prayer at an October 26, 2015, home game, surrounded by school-age children, two state legislators, and other community members. *See* JA 102–03; *see also* JA 97 (photograph of prayer), 312–13.

[6] Petitioner's references to what he has "sought" to do in the future are of limited relevance for the additional reason that, as the District noted, Petitioner has since moved to Florida, such that this case may be moot. *See* Resp't Suggestion of Mootness (Feb. 18, 2022).

Petitioner also focuses on dicta in the court of appeals's ruling, which he reads to construe his "duties" more broadly than necessary under *Garcetti*—for example, in referring to Petitioner as a "mentor" or "role model." App. 15. While this language, in isolation, could raise concerns regarding the "excessively broad job descriptions" against which *Garcetti* warned, 547 U.S. at 424, the court of appeals appropriately cabined those descriptions by reference to the context in which Petitioner prayed—"*specifically at the conclusion of a game*," "at the center of the football field," "while players stood next to him," and while concededly on the job, App. 15.

In sum, this case can be resolved simply by applying *Garcetti*. For years, without approval or knowledge of his employer, Petitioner led his players in prayer before and immediately after high school football games. Petitioner concedes that he was on the job and that these prayers were part of his official duties as a coach. *See* JA 40–41, 276. Less than a month after the District gave Petitioner a directive to cease these activities, Petitioner engaged in virtually identical post-game prayers with his athletes. JA 82; *see also* JA 97. Under *Garcetti*, the District's response to this on-the-job speech provides no basis for a First Amendment claim.

Petitioner could have complied with the District's proposed accommodations, as he did on September 18, when his post-game speech with the team was nonreligious and he later returned to the field to pray after the crowd had departed. JA 53, 364. Or when, during the following month, he took a knee

and prayed after games while the players were otherwise occupied. JA 339–42. In those instances an onlooker would likely understand his was private conduct entitled to protection akin to the teacher "crossing herself before a meal in the lunchroom." Pet.'r Br. 26–27.

Instead, Petitioner insisted that he would continue his "practice of praying with students," JA 295, making abundantly clear that his speech was not private, personal prayer, but rather was carried out as a representative of the school. Petitioner was acting within his duty as the football coach when he led students and staff in prayer in the midfield at the close of games in front of a crowd.

II. Permitting an On-Duty Public School Football Coach to Lead Students in Midfield Prayer Immediately After the Final Play at a School-Sponsored Game Violates the Establishment Clause.

While *Garcetti* provides a sufficient basis for affirmance, the Establishment Clause also supports this result. This Court's jurisprudence prohibits public school staff, acting in their official capacities, from subjecting students to, or leading students in, prayer. "[C]ontext" is key to assessing whether government action violates the Establishment Clause. *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 868 (2005); *see also*, *e.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000) ("We refuse to turn a blind eye to the context in which this policy arose[.]"); *Lee*, 505 U.S. at 597 ("Our Establishment Clause jurisprudence remains a delicate and fact-sensitive

one[.]"); *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984) ("[T]he inquiry calls for line drawing; no fixed, *per se* rule can be framed.").

Few contexts call for closer Establishment Clause scrutiny than public elementary or secondary schools. Such schools have an institutional duty to serve equally students of every religious and non-religious background. Schools must "acknowledge the profound belief of adherents to many faiths" and scrupulously adhere to the "central meaning of the Religion Clauses of the First Amendment, which is that all creeds must be tolerated, and none favored." *Lee*, 505 U.S. at 590.

Students are especially vulnerable to coercion and influence from their teachers and coaches. Public elementary and high school students face unique, subtle, and powerful "pressures" to conform to the expressive conduct of their fellow students and authority figures and often experience practical barriers to "avoid[ing] the fact or appearance of participation." *Lee*, 505 U.S. at 588.

Accordingly, public schools face unique Establishment Clause risks. When on-duty school officials lead students in prayer or otherwise participate in religious activities with students at school-sponsored events, it harms students by alienating and marginalizing those who do not subscribe to the favored faith. *See, e.g.*, *Deal v. Mercer Cty. Bd. of Educ.*, 911 F.3d 183, 188 (4th Cir. 2018) (elementary school student "suffer[ed] from ongoing feelings of marginalization and exclusion" as a result of Bible course operated by public school).

Recognizing the harms that school-sponsored religious practices impose on students, this Court has held for more than half a century that the Establishment Clause forbids public schools and their officials from promoting religious beliefs or organizing, encouraging, or leading prayer among students. *See*, *e.g.*, *Santa Fe*, 530 U.S. at 308–12 (school could not allow prayers to be delivered over the loudspeaker before football games because it sent the message to nonadherents that the school endorsed the prayers and nonadherents were outsiders and coerced students into participating in religious exercise); *Lee*, 505 at 586 (school could not invite rabbi to offer a prayer at a graduation ceremony because the prayer pressured students to participate); *Wallace v. Jaffree,* 472 U.S. 38, 61 (1985) (state could not enforce statute that authorized school moment of silence for meditation or prayer where clear purpose was to encourage students to pray); *Sch. Dist. of Abington Twp. v. Schemmp*, 374 U.S 203, 205 (1963) (state could not require schools to begin each day with Bible readings and the Lord's Prayer); *Engel v. Vitale*, 370 U.S. 421, 436 (1962) (invalidating statute requiring public school students to recite morning prayer).

The District faithfully followed this precedent. The very public setting in which Petitioner delivered his prayers, coupled with his supervisory role in that setting, meant that the prayers bore the strong imprimatur of the school. Moreover, the school had evidence that some students felt coerced to participate in the prayers for fear of separation from the team and the risk of losing playing time if they declined. App. 71; JA 186, 234, 356, 359. This was not, as Petitioner

inaccurately claimed, a "brief, quiet prayer by himself." Pet. i. The District *invited* Petitioner to conduct just such personal prayers. Instead, Petitioner traded on his special access to the school's football field and students to lead his team members and staff in prayer while carrying out his official school duties and representing the school on the football field. Absent the District's intervention, the clear message was that, player discomfort notwithstanding, the school approved the prayers conducted inside its stadium, at some of its highest-profile and best-attended events.

The District correctly determined that Petitioner's prayers to and among his student players—on the center of the school's football field—violated the Establishment Clause. And given that these prayers were delivered in the course of the coach's official duties at a public school event, at the very least, the District's well-founded judgment merits deference. Schools require a measure of discretion if they are not to be constantly at risk of violating either the Establishment Clause or the Free Exercise Clause in their supervision of their employee's on-the-job conduct.

A. The Establishment Clause Protects Public School Students from Religious Indoctrination and Pressure.

1. Establishment Clause Concerns Are at Their Zenith in Public Schools.

This Court has long made clear that there are "heightened concerns with protecting freedom of conscience . . . in the elementary and secondary public

schools." *Lee*, 505 U.S. at 592; *see also, e.g.*, *Board of Educ. of Westside Community Sch. v. Mergens*, 496 U.S. 226, 261–62 (1990) (Kennedy, J., concurring) ("[S]pecial circumstances . . . exist in a secondary school where the line between voluntary and coerced participation may be difficult to draw."). These Establishment Clause concerns stem both from the tendency for speech by school employees at school-sponsored functions to be viewed as bearing the school's imprimatur, and from the "coercive" pressures of "mandatory attendance" and "peer pressure" facing students. *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987). Accordingly, "[t]he Court has been particularly vigilant in monitoring compliance with the Establishment Clause in . . . schools." *Id.* at 583–84.

Faithful adherence to the Establishment Clause ensures that students and their families have the freedom to decide which faith, if any, they will practice—free from governmental intrusion and direct or subtle compulsion. By promoting inclusivity over religious favoritism, public schools also avoid the divisiveness that often occurs when the government plays favorites with matters of faith:

> The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools. . . . The great American principle of eternal separation . . . is one of the vital reliances of our Constitutional system

> for assuring unities among our people stronger than our diversities.

McCollum v. Bd. of Ed. of Sch. Dist. No. 71, 333 U.S. 203, 231 (1948).

2. The Speech of On-Duty School Officials at School-Sponsored Events Bears the Strong Imprimatur of the School.

Public schools must welcome students of all religions and those of none. That obligation is compromised when school officials take it upon themselves to convey (whether intentionally or not) religious messages. Thus, where school officials participate in "a religious activity, one of the relevant questions is whether an objective observer," would "perceive" that activity as the school's "endorsement of prayer." *Santa Fe*, 530 U.S. at 308 (quotation marks omitted). As noted in the context of student speech, schools may exercise "authority" over "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Hazelwood*, 484 U.S. at 271. And with respect to religion specifically, a school must not be "a prime participant" in "religious debate or expression," for the Framers sought to avoid "indoctrinat[ion]" and "deemed religious establishment antithetical to the freedom of all." *Lee*, 505 U.S. at 591–92.

Public schools thus have a constitutional duty to prevent their personnel from engaging in behavior that will place the school's imprimatur on religious doctrine or activity. To be sure, "schools do not endorse everything they fail to censor," *Mergens*, 496 U.S. at

250 (plurality op.), and neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gates," *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Indeed, the District respected this principle when it offered Petitioner several accommodations that would permit him to pray. But it does not follow, as Petitioner suggests, Pet'r. Br. 38–40, that schools must tolerate on-duty religious activity that will be reasonably perceived as approved by the school, and will undermine students' own religious-freedom rights.

Schools' obligation to "accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." *Lee*, 505 U.S. at 587. For while the "Free Exercise Clause embraces a freedom of conscience and worship, . . . the Establishment Clause is a specific prohibition on . . . state intervention in religious affairs." *Id.* at 591. That prohibition is grounded "in the lesson of history that . . . in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce." *Id.* at 592.

3. The Coercive Pressures Faced by Students Require Vigilance in Enforcing the Establishment Clause in Public Schools.

The Establishment Clause also prohibits the government from coercing individuals into taking part in religious practices. *See Lee*, 505 U.S. at 587 ("It is beyond dispute that, at a minimum, the Constitution

guarantees that government may not coerce anyone to support or participate in religion or its exercise . . . .").

High school students are especially vulnerable to this coercion for at least two mutually reinforcing reasons: (1) they are "impressionable" vis-à-vis other students and authority figures like teachers and coaches, and (2) "their attendance" is often "involuntary," either in fact or in effect. *Edwards*, 482 U.S. at 584.

First, it is widely recognized that students tend to "emulat[e] . . . teachers as role models," *id.*, and "[r]esearch in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers toward conformity, and that the influence is strongest in matters of social convention," *Lee*, 505 U.S. at 593 (collecting sources); *see generally e.g.*, Br. for Psychology and Neuroscience Scholars as *Amici Curiae* in Supp. of Resp't.

Second, school events wield "great . . . coercive power," as students—unlike adults in most social situations—often feel forced to hear, see, or actively join in religious expression. *Edwards*, 482 U.S. at 584; *Tinker*, 393 U.S. at 515 (observing that school-age children, "like someone in a captive audience," are deprived of the "full capacity for individual choice which is the presupposition of First Amendment guarantees") (Stewart, J., concurring). As one illustration, this Court struck down a statute requiring that the Ten Commandments be posted on the walls of every public school classroom, where students would have no choice but to be exposed to the display every day, *Stone v. Graham*, 449 U.S. 39

(1981), even though it sanctioned public presentations of the Ten Commandments exhibited in other contexts, *Van Orden v. Perry*, 545 U.S. 677, 681, 690 (2005) (allowing public display of the Commandments on grounds of Texas Capitol and distinguishing *Graham* as involving "the classroom").

Even when attendance is "not . . . required by official decree," this Court has acknowledged the coercive pressures on students to participate with teachers, coaches, and peers in school activities from which they derive "intangible benefits." *Lee*, 505 U.S. at 595; *see also*, *e.g.*, *Abington*, 374 U.S. at 224–25 (ability to opt out of school-sponsored prayer practice does not cure Establishment Clause violation) (citing *Engel*, 370 U.S. at 430). This is true not merely for major milestones like a graduation, *see Lee*, 505 U.S. at 596, but also for "extracurricular event[s]" such as "American high school football" games, *Santa Fe*, 530 U.S. at 311. The "Constitution demands that schools not force on students the difficult choice between attending" school-related functions and "avoiding personally offensive religious rituals." *Santa Fe*, 530 U.S. at 292; *see also*, *e.g.*, *Freedom from Religion Found., Inc. v. Concord Community Sch.*, 885 F.3d 1038, 1048–49 (7th Cir. 2018) (whether a school has a "policy allowing students to opt out of participating" in a given activity "is irrelevant," even when the option has been "invoked," because "a choice to participate or miss out on a significant portion of the [extracurricular activity] is an unconstitutional one").

B. Petitioner's On-Duty Prayers with Students Violated the Establishment Clause.

Under this precedent, the District had a reasonable basis to conclude that allowing Petitioner to lead students in prayer while on duty and exercising supervisory authority over them would violate the Establishment Clause. A number of key contextual factors—implicating both the imprimatur of the school and the coercion of students—properly contribute to that conclusion.

Location. The football field is a coach's classroom, and team members are especially susceptible to the coach's influence. As discussed above, this Court has made clear that "the risk of compulsion is especially high" in the classroom setting, and has recognized this risk translates to "environment[s] analogous to [that] . . . setting." *Lee*, 505 U.S. at 596. That is only more true with respect to team sports. The field is where coaches, as authority figures, lead their teams and represent their schools. And as this Court observed in *Santa Fe*, "school sporting events" generally bear the imprimatur of a school, with "cheerleaders and band members dressed in uniforms sporting the school name and mascot," and a school name "likely written in large print," a crowd that "will certainly include many who display the school colors and insignia on their school T-shirts, jackets, or hats and who may also be waving signs displaying the school name." *Santa Fe*, 530 U.S. at 308; *see also, e.g.*, *Doe v. Duncanville*, 70 F.3d 402, 406 (5th Cir. 1995) (recognizing the stricture that the government may not "supersede the

fundamental limitations imposed by the Establishment Clause" is "particularly true in the instant context of [athletic] practices and games," as "[t]he challenged prayers take place during school-controlled, curriculum-related activities that members of the [sports] team are required to attend" (quotation marks omitted)).

Professional Duties. Petitioner was responsible for his athletes when he led them in prayer on the field. The record is clear that "paid assistant coaches in District athletic programs are responsible for supervision of students not only prior to and during the course of games, but also during the activities following games and until players are released to their parents or otherwise allowed to leave." JA 91–92. The team's head coach "confirmed . . . that for over ten years, all assistant coaches have had assigned duties both before and after each game and have been expected to remain with the team until the last student has left the event." JA 92. And Petitioner concedes that he led these prayers while on duty.

Actual Coercion. The concern for coercion was not abstract here. Students reported that they in fact felt coerced to pray. App. 71; JA 186, 234, 356, 359. One player participated—against his own beliefs—because he feared he would lose playing time if he declined. JA 234. In any event, this Court does not "count heads before enforcing the First Amendment." *McCreary*, 545 U.S. at 884 (O'Connor, J., concurring).

That students felt coerced is no surprise, as the District serves a religiously diverse community. Kitsap County, where Bremerton is located, is home to

Jewish, Muslim, Hindu, Sikh, and Baha'i congregations. *See* Assoc. of Religion Data Archives (ARDA), Kitsap County (2010); www.thearda.com/rcms2010/rcms2010.asp?U=53035&T=county&Y=2010&S=Name (last visited Mar. 28, 2022); Josh Farley, *A Home of Their Own: Kitsap Muslims Finally Have Mosque*, Kitsap Sun, (Feb. 18, 2017); Kitsap Sikh Temple, https://www.kitsapsikhtemple.com (last visited Mar. 31, 2022). And within the Christian faith, there are numerous denominations represented in the region, *see supra*, ARDA, as well as a significant non-religious population. *See* Steve Gardner, *Survey Finds Kitsap the Seventh Least Religious Area in the nation*, Kitsap Sun (Apr. 13, 2022), https://archive.kitsapsun.com/news/local/survey-finds-kitsap-the-seventh-least-religious-area-in-the-nation-ep-416449869-356169571.html.

Press Statements. The District also sensibly recognized that Petitioner's press statements made clear to all that he viewed his prayers not as "an internal act," but as an outward-facing prayer meant "for the benefit of the public." *See, e.g., Lund v. Rowan Cty., N.C.*, 103 F. Supp. 3d 712, 728 (M.D.N.C. 2015), *aff'd*, 863 F.3d 268 (4th Cir. 2017). Given this publicity, the pressure on players to bow to the coach's avowed desires was all the more palpable—particularly because they knew their decision to join or opt out would be captured on video and potentially broadcast to a wide audience. Petitioner also made clear these prayer sessions were aimed at students, stating: "If a kid is wanting to take a knee and a coach comes over and prays with him, that's a powerful thing. That's supporting the kid." JA 54–55.

Petitioner contends that the District punished him for his media blitz. Pet.'r Br. 18–19. Far from it: The District properly "refus[ed] to turn a blind eye to the context in which" Petitioner's prayer arose. *Santa Fe*, 530 U.S. at 315.

Accommodations. Petitioner's refusal to accept any of the accommodations offered by the District underscores that his prayers were neither personal nor private, as he now insists. Indeed, the District explicitly assured Petitioner it would accommodate his desire to pray in a manner that would avoid constitutional problems. In one of its many efforts, a District representative wrote:

> I wish to make it clear that religious exercise that would not be perceived as District endorsement, and which does not otherwise interfere with the performance of job duties, can and will be accommodated. Development of accommodations is an interactive process, and should you wish to continue to engage in private exercise while on the job, the District will be happy to discuss options for that to occur in a manner that will not violate the law.

JA 93–94.

The fact that Petitioner refused any such solution and insisted on praying at the 50-yard line only underscores the reasonableness of the District's concern that his speech would be perceived as endorsed by the school and required for team members.

If an objective high school student "will unquestionably perceive" pregame student-led prayers delivered over the public address system or a graduation invocation given by a rabbi "as stamped with her school's seal of approval[,]" a coach leading his players in prayer on the 50-yard line, while he is still on duty, immediately after a game, will surely result in the same understanding. *See, e.g., Santa Fe*, 530 U.S. at 308; *Lee*, 515 U.S. at 603–04 (Blackmun, J., concurring); *Borden*, 523 F.3d at 166; *Duncanville*, 70 F.3d at 406–07; *Steele v. Van Buren Pub. Sch. Dist.*, 845 F.2d 1492, 1495 (8th Cir. 1988).

Moreover, that Petitioner apparently did not explicitly tell his players that they must pray with him does not change the coercive effect of Petitioner's practice: A high school football player would likely feel pressured (as several explicitly stated) to participate in these prayers. Football team members do not lightly spurn post-game talks and huddles with their coach. Not only do such talks and huddles provide important physical and psychological togetherness, but they involve an authority figure whom the players seek to impress and from whom they seek to learn—a coach who believes that he is, for some students, "the most important person they encounter in their overall life." JA 323; *see generally* Br. of Former Professional Football Players Obafemdi D. Ayanbadejo, Sr., Christopher J. Kluwe, and Frank T. Lambert, and Various Collegiate Athletes & Coaches. And any player hoping for more playing time or an opportunity to play in college would, of course, feel obligated to participate when his coach speaks to the team.

Even absent an express directive to pray, the Establishment Clause prohibits imposing this choice on students. *See, e.g.*, *Engel*, 370 U.S. at 430 ("Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause . . . ."); *Mellen v. Bunting*, 327 F.3d 355, 372 (4th Cir. 2003) (in context of military college, "[t]he *technical* 'voluntariness' of the supper prayer does not save it from its constitutional infirmities," as "[i]n the words of the Supreme Court, 'the government may no more use social pressure to enforce orthodoxy than it may use more direct means'" (quoting *Santa Fe*, 530 U.S. at 312)). Particularly in the team sports setting where "all-for-one" is paramount, forcing upon students the choice of joining in a prayer that does not comport with their personal religious views, or isolating themselves from the coach and team members, plainly sends a "message to members of the audience who are nonadherents that they are outsiders, not full members of the . . . community, and an accompanying message to adherents that they are insiders, favored members of the . . . community." *Santa Fe*, 530 U.S. at 309–10 (quotation marks omitted). As a student on Petitioner's team told reporters the day before the October 16 prayer, commenting on the purpose of Petitioner's prayer: "It's about *unity*." Matt Calkins, *Why Bremerton Coach Joe Kennedy's Stance on Postgame Prayer is Admirable*, Seattle Times (Oct. 15, 2015), https://bit.ly/3Cc9hNl (emphasis added).

To be sure, membership on a high school football team, "unlike showing up for class, is certainly

not required in order to receive a diploma." *Santa Fe*, 530 U.S. at 311. Students could simply choose not to join the team if they wish to avoid Petitioner's prayer practice. But this Court's First Amendment case law "reaches past" that kind of "formalism": "To assert that high school students do not feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football is formalistic in the extreme." *Id.* As this Court has explained, the fact that a school activity "is voluntary in a legal sense does not save the religious exercise." *Lee*, 505 U.S. at 596. "The constitutional command will not permit the District to exact religious conformity from a student as the price of joining her classmates at a varsity football game," and it will not permit the Petitioner or the School District to exact such conformity as the price for playing on the team. *See Santa Fe*, 530 U.S. at 312 (quotation marks omitted).

In sum, a reasonable student, "aware of the history and context" of Petitioner's prayers, *Santa Fe*, 530 U.S. at 317 (citation omitted), would understand that Petitioner used his official position as a coach to lead his team members in prayer during a school-sponsored event, on school grounds, and that some students subjected to this religious practice felt compelled to participate in it. Those indicia of an Establishment Clause violation are more than enough to justify the District's action. Indeed, this persistent series of events *required* the District to take action to comply with the Establishment Clause and protect the religious-freedom rights of students subjected to Petitioner's prayers.

C. Schools Are in the Best Position to Determine Whether an Employee's Behavior Poses a Serious Risk of Violating the Establishment Clause.

Ignoring the facts, Petitioner invokes a line of cases standing for the unremarkable proposition that a government entity "merely tolerating" religious speech—typically, by permitting students or non-school groups to pray on school property as part of a public forum—"does not implicate Establishment Clause concerns." Pet'r. Br. 37. But these cases are inapposite: Not one involved a school *employee* speaking or engaging in religious exercise while *on duty* and *exercising supervisory authority* at a *school-sponsored* event. *See Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001) (private club unaffiliated with school could meet after school on school grounds to teach moral lessons from a religious perspective in program not sponsored by the school); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (university student group that was required to inform all third parties with whom the group dealt that it was completely independent of the university was entitled to receive school funds to support printing of publication with a religious viewpoint); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (private group unaffiliated with school could present after-school films with religious elements on school grounds); *Widmar v. Vincent*, 454 U.S. 263 (1981) (student group could use school facilities for religious discussion); *see also Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (private group—the Ku

Klux Klan—unaffiliated with Ohio state government could erect unattended cross on grounds of Ohio capitol; no mention of schools at all).

Notably, in rejecting an Establishment Clause claim, *Mergens*—a foundation of Petitioner's arguments before this Court—emphasized that it did so because the contact between the student religious group and faculty would be highly limited because the faculty was prohibited from "participat[ing] in any religious meetings," and could not "promote, lead, or participate in any such meeting." 496 U.S. at 253 (plurality op.). No such limitations applied to Petitioner's on-duty, on-field prayers, which Petitioner, a school employee, not only participated in, but also led. App. 70–71.

The Establishment Clause violation in this case is clear. But even if it were not, the District is owed deference in regulating the speech of its employees to avoid potential Establishment Clause violations. While "[m]ere speculation" regarding a potential "violation of the Establishment Clause" is not grounds to restrict speech, *Peck v. Upshur Cty. Bd. of Ed.*, 155 F.3d 274, 287 (4th Cir. 1998) (citation omitted), it is "sufficient if the [school] has a *strong basis* for concern" that the contested activities "would violate the Establishment Clause," *Bronx Household of Faith v. Bd. of Educ. of City of New York*, 650 F.3d 30, 40 (2d Cir. 2011) (emphasis added); *see also*, *e.g.*, *Espinoza v. Montana Dept. of Revenue*, 140 S. Ct. 2246, 2254 (2020) ("We have recognized a play in the joints between what the Establishment Clause permits and the free Exercise Clause compels." (quotation marks

omitted)).[7] Were schools not entitled to act upon reasonable Establishment Clause concerns, they would find themselves on the razor's edge between liability for failing to protect the religious-freedom rights of their students and liability for violating free speech or free exercise rights of school officials.

In any event, here the line was as clear as the 50-yard line where Petitioner insisted on leading his students in prayer. As an employer controlling employee speech, and as a public school district seeking to prevent an Establishment Clause violation, the District did not violate Petitioner's First Amendment rights.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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[7] *See also*, *e.g.*, *Nurre v. Whitehead*, 580 F.3d 1087, 1099 (9th Cir. 2009) ("The District had a legitimate interest in avoiding what it believed *could* cause confrontation with the Establishment Clause." (emphasis added)); *Stratechuk v. Bd. of Ed., South Orange-Maplewood Sch. Dist.*, 587 F.3d 597, 605 (3d Cir. 2009) (similar); *Berry v. Dept. of Social Services*, 447 F.3d 642, 651 (9th Cir. 2006) (similar).

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April 1, 2022