No. 20-35222

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH A. KENNEDY,

Plaintiff-Appellant,

v.

BREMERTON SCHOOL DISTRICT,

Defendant-Appellee.

On Appeal from a Final Judgment of the
United States District Court for the Western District of Washington
Case No. 3:16-cv-5694, Hon. Ronald B. Leighton

BRIEF OF RELIGIOUS AND CIVIL-RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF APPELLEE AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Amici are nonprofit organizations. They have no parent corporations, and no publicly held corporation owns any portion of any of them.

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INTERESTS OF THE *AMICI CURIAE*[1]

Amici are religious and civil-rights organizations that represent diverse faiths and beliefs but share firm commitments that religious education of children is a matter best left to their families and houses of worship, and that public schools should be open and welcoming to all students without regard to religion or belief.

When public-school teachers or coaches incorporate prayer into their teaching, they infringe the fundamental right of students and families to decide for themselves what religious instruction and practices to undertake. In doing so, they intrude on free, individual choice in matters of conscience and create grave risks of sectarian division and strife in the school community.

Amici submit this brief to explain why the Bremerton School District's actions were required by the Establishment Clause and appropriate to respect the students' religious freedom.

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

The *amici* are:

- Americans United for Separation of Church and State.
- ADL (Anti-Defamation League).
- Baptist Joint Committee for Religious Liberty.
- Central Conference of American Rabbis.
- Freedom From Religion Foundation.
- Hadassah, The Women's Zionist Organization of America, Inc.
- Hindu American Foundation.
- Interfaith Alliance Foundation.
- Jewish Social Policy Action Network.
- Men of Reform Judaism.
- National Council of the Churches of Christ in the USA.
- Northern California Nevada Conference of the United Church of Christ.
- People for the American Way Foundation.
- Reconstructing Judaism.
- Reconstructionist Rabbinical Association.
- Southwest Conference of the United Church of Christ.
- Union for Reform Judaism.
- Women of Reform Judaism.

INTRODUCTION AND SUMMARY OF ARGUMENT

"[G]overnment action . . . taken on account of an honest interest in ensuring [religious] neutrality generally passes constitutional muster." *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 973 n.24 (9th Cir. 2011). The district court thus properly concluded that the Bremerton School District did not violate Kennedy's rights under the First Amendment or Title VII, ruling for the district previously on Kennedy's motion for a preliminary injunction—a ruling affirmed by this Court (*see Kennedy v. Bremerton Sch. Dist.*, 869 F.3d 813 (9th Cir. 2017))—and now granting summary judgment to the District.

Public-school administrators, teachers, and coaches are public employees whose official acts are attributable to their school district as a matter of law. Hence, though the right to worship in accordance with one's beliefs is a value of the highest order, it does not license school officials to signal governmental approval and endorsement of religion, nor does it authorize conduct that has the effect of pressuring students to participate in religious exercises. When a school employee strays from these strict Establishment Clause safeguards, the school impermissibly intrudes on the religious freedom of students and their families.

The danger is particularly great with public-school coaches, who have special authority and influence over the lives of student athletes. Their

actions at "home football games[, which] are traditional gatherings of a school community" (*Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000)), send a strong message about what the school values and what it expects from students. That is why the Third and Fifth Circuits have held that public-school coaches may not lead, participate in, or encourage team prayer (*see Borden v. Sch. Dist.*, 523 F.3d 153, 178 (3d Cir. 2008); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 406 (5th Cir. 1995)) and why the Supreme Court has held that even "student-led, student-initiated" prayer delivered at high-school football games violates students' constitutionally protected religious freedom (*Santa Fe*, 530 U.S. at 301).

Though Kennedy's intent was undoubtedly benign, his practice of praying on the 50-yard line immediately after games, reinforced by his eight-year history of leading team prayers and giving on-field religious speeches, sent an unmistakable message to the players and other students that they ought to participate. For those who did not join risked being marked as outsiders who do not fully share in the life of the school community, making them potential targets for bullying, harassment, and social ostracism. *See Santa Fe*, 530 U.S. at 309–10. The School District's actions to end the practice were constitutionally required and pedagogically appropriate.

Because the Establishment Clause required the District to take the measures that it did, and because the prayer practice was government speech, not private speech, Kennedy has no colorable free-exercise claim. Even if he did, the District's actions would satisfy any possible standard of review, because they were narrowly tailored to the District's compelling interest in complying with its constitutional obligations. For essentially the same reason, Kennedy's Title VII claims likewise fail.

ARGUMENT

The "Establishment Clause [is] a good friend and protector, and not . . . an enemy" of religious freedom. *Kennedy*, 869 F.3d at 839 (Smith, J., specially concurring). It protects the religious freedom of all students—those who would speak out against religious pressure and suffer, and those who would suffer silently. The District's actions were not just constitutionally required but especially appropriate to respect the beliefs and rights of students and their families.

I. THE DISTRICT'S ACTIONS WERE REQUIRED BY THE ESTABLISHMENT CLAUSE.

The First Amendment's Religion Clauses "seek to assure the fullest possible scope of religious liberty and tolerance for all." *Trunk v. City of San Diego*, 629 F.3d 1099, 1110 (9th Cir. 2011) (quoting *Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring in the judgment)). Because

students are impressionable and school attendance is compulsory, courts must be "particularly vigilant in monitoring compliance with the Establishment Clause" in the public schools. *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987); *accord Freedom From Religion Found. v. Chino Valley Unified Sch. Dist.*, 896 F.3d 1132, 1137, 1145 (9th Cir. 2018). Hence, to "secure religious liberty" for all students, the Supreme Court has consistently held that public schools must not "sponsor[ ] the particular religious practice of prayer." *Santa Fe*, 530 U.S. 313; *see also Lee v. Weisman*, 505 U.S. 577, 587 (1992); *Sch. Dist. v. Schempp*, 374 U.S. 203, 223 (1963); *Engel v. Vitale*, 370 U.S. 421, 424 (1962).

When teachers and coaches are performing their jobs or are likely to be viewed that way by students, their speech and actions are attributable to their school district as a matter of law. *See Johnson*, 658 F.3d at 975, 966–70 (religious speech by public-school teachers "belongs to the government"); *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994) (while "at the high school, whether he is in the classroom or outside of it during contract time, [a teacher] is not just any ordinary citizen" because "students [may] equat[e] his views with those of the school"). Hence, the legal question here is whether the District has the lawful authority to regulate its own speech and conduct to respect the religious freedom of its students. The answer is straightforward: The

District not only ***may*** do so—it ***must***. *See Borden*, 523 F.3d at 175 (a "football coach . . . bow[ing] his head and tak[ing] a knee while students pray" is unconstitutional "'state participation in a religious activity'" (quoting *Santa Fe*, 530 U.S. at 308)).

A. Kennedy's midfield prayers were official conduct of the School District.

1. Just as "teachers do not cease acting as teachers each time the bell rings or the conversation moves beyond the narrow topic of curricular instruction" (*Johnson*, 658 F.3d at 967–68), coaches do not cease acting as coaches or stop being responsible for students when the game clock reaches zero. That is especially true because "instilling values in the team" is "part of [a coach's] duties as a public school employee." *Borden*, 523 F.3d at 173 n.15. Thus, the assertion that Kennedy's midfield prayers were "personal expression" unrelated to his coaching (Br. 26–29) is incorrect. The District hired and assigned him to be a leader, educator, mentor, and role model for student athletes after as well as before the final whistle. ER 147. Those functions were core aspects of his job. *See Borden*, 523 F.3d at 172 (coaching methods that teach "players respect and good moral character" are "pedagogic" and undertaken "as a proxy for the School District").

2. Kennedy's demonstrative prayer occurred at the center of the field, where he was surrounded by the team (ER 217–18, 270, 273, 479, 481),

clothed in the trappings and authority of a coach (ER 80), and responsible for the players (ER 180). Students were expected to, and did, look to his actions as exemplifying conduct that they should emulate. Thus, players began joining Kennedy in the prayers, and in time a majority of the team did so. ER 113–16. They were sometimes joined also by players and coaches from opposing teams. ER 133–34, 299, 498. Kennedy had previously delivered pre- and postgame prayers and religious speeches on the field. ER 114. And after the District learned about and attempted to curtail the demonstrative prayer, Kennedy publicized his intention to continue, underscoring the link to his past practices. ER 236, 364, 426.

This "history and context . . . bolster[ ] the conclusion that an objective observer would perceive the school to be encouraging prayer." *Kennedy*, 869 F.3d at 833 (Smith, J., specially concurring); *see also Santa Fe*, 530 U.S. at 315; *Borden*, 523 F.3d at 174. "[I]n light of [his] history of regular delivery of . . . prayer at athletic events," a reasonable observer would "infer that [Kennedy's] specific purpose" for not following the District's directives "was to preserve a . . . 'state-sponsored religious practice.'" *Santa Fe*, 530 U.S. at 309 (*quoting Lee*, 505 U.S. at 596).

3. Because speech by a public-school coach "can be taken as directly and deliberately representative of the school" (*Bishop v. Aronov*, 926 F.2d 1066, 1073 (11th Cir. 1991)), a "school district is free to take . . . steps to

ensure that its message is neither garbled nor distorted" (*Johnson*, 658 F.3d at 957 (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995)). That is just what the District did here. Given Kennedy's responsibilities as coach and the nature, significance, and history of the prayer practice, the prayers cannot be characterized as private, off-duty conduct. For though Kennedy may view the prayers as private, a reasonable student observer would conclude that his "actions are representative of [school] policies," putting the District in legal jeopardy for any violations of students' rights. *Duncanville*, 70 F.3d at 406; *see Borden*, 523 F.3d at 177; *Bishop*, 926 F.2d at 1077; *see also Santa Fe*, 530 U.S. at 308; *Johnson*, 658 F.3d at 974; *Peloza*, 37 F.3d at 522; *Steele v. Van Buren Pub. Sch. Dist.*, 845 F.2d 1492, 1495–96 (8th Cir. 1988).

B. The prayers impermissibly advanced and endorsed religion.

1. The Supreme Court "has been unwavering in its position that the Establishment Clause prohibits public schools from sponsoring an official prayer." *Mellen v. Bunting*, 327 F.3d 355, 368 (4th Cir. 2003); *see, e.g.*, *Lee*, 505 U.S. at 587. When a public school or its employee sponsors or signals endorsement of prayer, it "sends the ancillary message to members of the audience who are nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to the adherents

that they are insiders, favored members of the political community.'" *Santa Fe*, 530 U.S. at 309–10 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).

2. As an initial matter, Kennedy mistakenly contends (at Br. 48–49) that *Town of Greece v. Galloway*, 572 U.S. 565 (2014), bars application of the endorsement test. *Galloway* is limited to the historical "legislative-prayer tradition." *Chino Valley*, 896 F.3d at 1143. Thus, this Court has held that *Galloway* does not apply even to invocations at school-board meetings—much less to prayer at school functions for students. *See id.* at 1143–48. That is in keeping with the Supreme Court's directive to be "particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools," where the likelihood of religious indoctrination is particularly high "because of the students' emulation of teachers as role models." *Edwards*, 482 U.S. at 583–84; *accord Chino Valley*, 896 F.3d at 1137.

3. And again, what is true for all public-school teachers is especially true for coaches, given the unique authority and influence that they have over the physical and moral development of their charges (*see Kennedy*, 869 F.3d at 827 (coach's job "entailed both teaching and serving as a role model and moral exemplar"); *Borden*, 523 F.3d at 173 n.15 (a coach "instill[s] values in the team as part of his duties as a public school employee")), and

the central place that football has in the school community (*see Santa Fe*, 530 U.S. at 311 ("high school students . . . feel immense social pressure . . . to be involved in the extracurricular event that is American high school football"); *Jager v. Douglas Cty. Sch. Dist.*, 862 F.2d 824, 831 (11th Cir. 1989) (noting "powerful incentive for students to attend" games (internal quotation marks omitted)). Thus, there can be no doubt that the District has the duty to regulate coaches' conduct to protect students' and their families' religious freedom. *See, e.g.*, *Santa Fe*, 530 U.S. at 312.

4. Unconstitutional endorsement of religion is unmistakable when a public-school coach has the practice of kneeling in prayer in the center of the field, surrounded by the team, at the end of games. *See Borden*, 523 F.3d at 178; *Jager*, 862 F.2d at 830–31. *See generally Santa Fe*, 530 U.S. at 308 ("[A]n objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval."). Hence, the question "is not whether [Kennedy] intend[ed] to endorse religion, but whether a reasonable observer, with knowledge of the history and context of the display, would conclude that he [was] endorsing religion." *Borden*, 523 F.3d at 177–78. As Judge Smith explained in the previous appeal, "an objective BHS student familiar with the history and context of Kennedy's conduct would perceive his practice . . . as District

endorsement of religion or encouragement of prayer." *Kennedy*, 869 F.3d at 834 (Smith, J., specially concurring).

Indeed, the message that prayer was officially favored and preferred is clearer than in *Santa Fe*, *Borden*, and *Duncanville*, because here it is the coach's prayers, whereas in those cases students led the prayers and school employees merely supported them. *Cf. Santa Fe*, 530 U.S. at 310 (school allowed students to use stadium loudspeaker); *Borden*, 523 F.3d at 175 (coach knelt for student-led prayer); *Duncanville*, 70 F.3d at 406 n.4 (coaches joined students' prayer circles). And because governmental endorsement of religion is prohibited regardless of whether the message is verbal, it matters not whether Kennedy's prayers were audible. *See, e.g.*, *Roberts v. Madigan*, 921 F.2d 1047, 1059 (10th Cir. 1990) (school properly ordered teacher to cease "silent Bible reading in the classroom" because it "communicat[ed] a message of endorsement of religion in a manner that might reasonably be perceived to bear the imprimatur of the school").

What is more, the prayer practice that Kennedy seeks to preserve would be a continuation in revised form of his eight-year history of leading prayers and delivering religious speeches to the team. ER 107, 114. Kennedy's insistence that the district court "conflated the practice at issue here" with his prior practices (Br. 45–46) is mistaken, because the pertinent legal test is whether a reasonable, objective student observer familiar with

the history of those past practices would see what Kennedy wished to do as an effort to "preserve the practice of prayer [at] football games." *Santa Fe*, 530 U.S. at 309; *accord Borden*, 523 F.3d at 174–79 (coach's former practices informed students' understanding that his taking a knee was continuation of unconstitutional promotion of religion); *see Nurre v. Whitehead*, 580 F.3d 1087, 1097 (9th Cir. 2009) (public-school choir's prior performances of religious music informed how reasonable observer would interpret subsequent performance of piece with religious title).[2]

C. The prayers impermissibly coerced religious practice and afforded a denominational preference.

1. The "Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise." *Lee*, 505 U.S. at 587. And "prayer exercises in public schools carry a particular risk of indirect coercion." *Id.* at 592; *see also Mellen*, 327 F.3d at 371 ("In the context of school prayer," a court "must give special consideration . . . to whether a state has coerced religious worship."); *Berger v. Rensselaer Cent. Sch. Corp.*,

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[2] Kennedy worries (at Br. 30–38) that the district court's holding endangers "private religious expression by public school teachers" because teachers are often in view of students. *But cf. Peloza*, 37 F.3d at 522 (teacher may not discuss religious beliefs with students "whether he is in the classroom or outside of it during contract time"). This Court need not decide under what circumstances Kennedy would have a right to engage in private prayer elsewhere or under different circumstances, for the District offered to accommodate his prayer in the school building or press box and invited him to suggest other alternatives, but he declined. ER 74–80, 378.

982 F.2d 1160, 1168 (7th Cir. 1993) (It is "wrong as a matter of law that the . . . interest in free expression automatically trumps the . . . prohibition on state-sponsored religious activity. The reverse is true in the coercive context of public schools.").

As this Court has recognized, the "threat of coercion caused by public and peer pressure . . . is heightened in the public high school context because adolescents are more susceptible to such pressure." *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1102 n.7 (9th Cir. 2000). That is because the "State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models." *Edwards*, 482 U.S. at 584; *accord Chino Valley*, 896 F.3d at 1146.

Thus, a school district may be liable whether religious coercion is direct or indirect: "the government may no more use social pressure to enforce orthodoxy than it may use more direct means." *Santa Fe*, 530 U.S. at 312 (quoting *Lee*, 505 U.S. at 594); *see also Mellen*, 327 F.3d at 372 ("technical 'voluntariness'" of school's prayer practice "does not save it from its constitutional infirmities").

As *Santa Fe* and *Borden* hold, coercive pressure is present, and may be overwhelming, at high-school football games. Playing time and status depend on meeting coaches' expectations and preferences. *See, e.g.*, *Borden*,

523 F.3d at 182 (McKee, J., concurring) (student athlete was "fearful that if he did not go along with what was obviously the coach's desire, he would not get playing time" (quoting record)); *see also Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1190 (6th Cir. 1995) ("the coach controls who plays and for how long, placing a disincentive on any debate with the coach's ideas"). The players recognize what the coach prefers, and they follow his lead. So students of minority faiths and nonbelievers "might feel subtle (albeit unintentional) coercion to participate in the [prayer] despite disagreement or discomfort with it." *Borden*, 523 F.3d at 181 (McKee, J., concurring). Sadly, that happened here: At least one parent reported that his son on the team felt compelled to participate in the prayers, despite a religious objection, in order to get playing time. ER 379–80, 517.

And because football is so central to the high-school experience, "the choice between attending these games and avoiding personally offensive religious rituals is in no practical sense an easy one" for cheerleaders, band members, and spectators in the stands, as well as for players on the team. *Santa Fe*, 530 U.S. at 312. "Expecting a student troubled by religious exercise to object . . . is unrealistic." *Berger*, 982 F.2d at 1169–70. Thus, even if prayers are "truly voluntary, the First Amendment prohibits" school officials "from requiring religious objectors to alienate themselves from the

[school] community in order to avoid a religious practice." *Mellen*, 327 F.3d at 372 n.9.

2. What Judge McKee said of the coach in *Borden* applies equally here: *Amici* have no doubt that Kennedy is "a sincere and remarkably dedicated individual who cares deeply for his players" (523 F.3d at 182). But as Judge Smith explained previously in this case, the Establishment Clause applies even to conduct that is "well-intentioned and flow[s] from sincerely-held . . . religious beliefs." *Kennedy*, 869 F.3d at 837 (Smith, J., specially concurring). Though his intentions were kindly, Kennedy's prayer practice "could be troubling for some players and possibly deter others from playing football at all" (*Borden*, 523 F.3d at 182 (McKee, J., concurring)).

Even the most caring coach may sometimes "fail[ ] to appreciate that others may not agree with his beliefs or that the religious beliefs that he [holds] dear might be in tension with contrary (but equally valid) beliefs of some of his players. Any player who [holds] opposing beliefs should not have . . . to 'go along to get along' by silently participating in religious observances he disagree[s] with." *Id.*

3. Beyond all of that, the prayers here consistently employed the Christian prayer form of kneeling with heads bowed. *See* ER 273; *Kennedy*, 869 F.3d at 835 (Smith, J., specially concurring) (midfield prayer used "distinctively Christian prayer form in the most prominent location on the

field, despite the community's religious diversity" (citation omitted)). That pose has deep historical significance and symbolic meaning within Christianity. *See, e.g.*, Ori Z. Soltes, *Language and Prayer Within Judaism, Christianity and Islam*, 2 RELIGIONS 74, 78 (2012) ("falling to the knees in the course of prayer" distinguished early Christians from Jews).

Bremerton, however, is religiously diverse: Students and families in the community and its public schools adhere to many different faiths. *See Kitsap Cty., Washington*, ASS'N RELIGION DATA ARCHIVES (2010), http://bit.ly/306hmkS. It would be readily apparent to non-Christian students that Kennedy's prayer looks nothing like their own modes of worship, with their own forms and postures. For example, there is no kneeling in rabbinic Judaism; and while "Muslims bow, kneel, and prostrate themselves" in prayer, it looks nothing like the kneeling in Christian prayer. *See* Reuven Firestone, *Similarities, Influences, and Processes of Differentiation*, *in* A HISTORY OF JEWISH-MUSLIM RELATIONS 701, 706 (Abdelwahab Meddeb & Benjamin Stora eds., 2013). Still other distinct forms of "bowings and prostrations . . . are part of the customary and recommended Buddhist discipline." Oddbjørn Leirvik, *Prostrate and Erect: Some Christian-Muslim Reflections on Religious Body Language*, 16 STUD. INTERRELIGIOUS DIALOGUE 30 (2006). The nonreligious are likewise excluded by Christian kneeling. *See Chino Valley*, 896 F.3d at 1150

("Neither the purpose of respecting religious diversity nor the means of doing so via prayer acknowledges or respects the beliefs of nonreligious citizens."). And many Christians view demonstrative prayer in a context involving governmental sponsorship as improper expropriation of their faith. *See*, *e.g.*, *Matthew* 6:5–6 (teaching that, rather than praying where "others may see," believers should "go to your inner room, close the door, and pray to your Father").

While even "inclusive and nondenominational" forms of prayer may reflect specific "values and conventions of worship" (*Mellen*, 327 F.3d at 374 n.12), the prayers here went further, invoking Christianity expressly. In religiously diverse communities, school officials who publicly engage in one specific form of prayer at school events show an impermissible preference for the faith associated with that form, to the exclusion of other faiths. *See Jager*, 862 F.2d at 831 (where most prayers at football games have been delivered by Protestant Christians, prayer practice conveyed school endorsement of Protestant Christianity). That sort of denominational preference receives strict scrutiny and cannot stand. *See Larson v. Valente*, 456 U.S. 228 (1982).

* * *

The prayer practice here pressured students either to join a devotional act that contradicts their faith or to mark themselves as outsiders and

potential pariahs. The "players were put in the untenable position of either compromising any opposing beliefs . . . [or] opposing their coach and perhaps a majority of their teammates." *Borden*, 523 F.3d at 182 (McKee, J., concurring). The "school may not force this difficult choice upon these students . . . ." *Santa Fe*, 530 U.S. at 312.[3]

II. THERE IS NO COLORABLE FREE-EXERCISE CLAIM.

The Free Exercise Clause prohibits governmental regulation of private beliefs, but it does not license public employees to perform official acts in accordance with those beliefs. *See Ermold v. Davis*, 936 F.3d 429, 437 (6th Cir. 2019) (there is "nothing to suggest that government officials may flout the Constitution . . . to accommodate their own beliefs"), *petition for cert. filed*, 936 F.3d 429 (U.S. Jan. 24, 2020) (No.19-926). For at least three reasons, Kennedy's free-exercise challenge was properly rejected: First, the Free Exercise Clause does not apply to government speech. Second, it cannot require what the Establishment Clause forbids. And third, the District's actions would satisfy any conceivable standard of review—even strict scrutiny.

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[3] For all the reasons just explained, the District's actions were also required by the Washington Constitution's "sweeping and comprehensive" provisions barring "religious influences in schools" (*Malyon v. Pierce Cnty.*, 131 Wash. 2d 779, 794 (1997) (citation omitted)), which draw "a more stringent line than does the Federal Constitution" (*Locke v. Davey*, 540 U.S. 712, 713 (2004)).

A. The Free Exercise Clause does not apply to government speech.

A teacher's or coach's expression at "a school function, in the general presence of students . . . belongs to the government," not to the instructor individually. *Johnson*, 658 F.3d at 968–70. And "the Free Exercise Clause does not apply" to government speech. *Fields v. Speaker of Pa. House of Representatives*, 936 F.3d 142, 160 (3d Cir. 2019); *accord, e.g.*, *Simpson v. Chesterfield Cnty. Bd. of Supervisors*, 404 F.3d 276, 288 (4th Cir. 2005). The Free Exercise Clause safeguards Kennedy's freedom "to pray on his own behalf, in ***nongovernmental*** endeavors." *Turner v. City Council*, 534 F.3d 352, 356 (4th Cir. 2008) (emphasis added). As a matter of law, it does not apply when, as here, a public employee "was given the chance to [speak] on behalf of the government . . . [but] was unwilling to do so in the manner that the government had pr[e]scribed." *Id.*; *see Johnson*, 658 F.3d at 975.[4]

B. The Free Exercise Clause cannot require what the Establishment Clause forbids.

Even if that were not the case, "the principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." *Santa Fe*, 530 U.S. at 302 (quoting *Lee*, 505 U.S. at 587); *accord Duncanville*, 70 F.3d

[4] For the same reason, Kennedy's free-speech claim fails as a matter of law. *See Johnson*, 658 F.3d at 970; *Simpson*, 404 F.3d at 287–88.

at 406. Hence, because the Establishment Clause forbids coaches to hold midfield postgame prayers, there can be no colorable free-exercise claim. *See Borden*, 523 F.3d at 176; *Duncanville*, 70 F.3d at 406.

C. The restrictions would satisfy any standard of review.

All else aside, Kennedy's free-exercise claim would fail on its own terms. Most free-exercise claims are subject to rational-basis review only (*see Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1075–79 (9th Cir. 2015)); heightened scrutiny applies only when "one religious denomination [is] officially preferred over another" (*Larson*, 456 U.S. at 244–46) or "the object of a law is to infringe upon or restrict practices because of their religious motivation" (*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993)). Regardless of which standard applies here, the claim fails, both because the District's actions would satisfy even a compelling-interest test, and because this Court's "precedent demonstrates [that] government action—especially the curtailment of its own speech—taken on account of an honest interest in ensuring [religious] neutrality generally passes constitutional muster" regardless of the level of judicial scrutiny. *Johnson*, 658 F.3d at 973 n.24.

1. The District has compelling interests in avoiding Establishment Clause violations and protecting students' constitutional rights.

"Avoiding an Establishment Clause violation is . . . a sufficiently compelling interest to justify any burden the District officials' decisions had upon [Kennedy's] right to the free exercise of religion." *Cole*, 228 F.3d at 1104 n.9; *see also, e.g.*, *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 761–62 (1995) ("compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech"); *Chino Valley*, 896 F.3d at 1151 (same).

Here, the District's interests were both legal and pedagogical, because the Establishment Clause requires what responsible public-school officials want anyway: to ensure that the schools are open to and welcoming of all students equally, regardless of their faith or religious beliefs. *See, e.g.*, *Lee*, 505 U.S. at 588, 594 (Establishment Clause avoids "potential for divisiveness," "isolation[,] and affront" that arises when school sponsors or favors religion). The District took the actions needed to avoid violating (and being in legal jeopardy for violating) the constitutional religious-freedom rights of the students and their families. ER 193. Those interests are compelling.

The "requirement that religion be left to the private sphere is the product of a well-documented and turbulent history." *Cole*, 228 F.3d at 1104.

For while "religion throughout history has provided spiritual comfort, guidance, and inspiration to many, it can also serve powerfully to divide societies and to exclude those whose beliefs are not in accord with particular religions." *Sch. Dist. v. Ball*, 473 U.S. 373, 382 (1985) (quoted in *Borden*, 523 F.3d at 184 (McKee, J., concurring)), *overruled in part on other grounds by Agostini v. Felton*, 521 U.S. 203, 236 (1997). And tragically, the history of religion in public schools is replete with "mistreatment, discrimination, violence, and even death." FRANK S. RAVITCH, SCHOOL PRAYER AND DISCRIMINATION 4 (1999); *see also* Benjamin J. Edwards, *When Fear Rules in Law's Place: Pseudonymous Litigation as a Response to Systematic Intimidation*, 20 VA. J. SOC. POL'Y & L. 437, 455–465 (2013).

When Joann Bell and Lucille McCord sued to block religious meetings in their children's schools, for example, the children were branded as "devil worshipers." *Bell v. Little Axe Indep. Sch. Dist.*, 766 F.2d 1391, 1396–98, 1408 (10th Cir. 1985). An "upside-down cross was hung on Robert McCord's locker," and the plaintiffs received "numerous threatening telephone calls and letters." *Id.* The threats were far from empty: The Bells' home was burned down. *Id.*; RAVITCH, *supra*, at 13.

When the student in *Duncanville* stopped participating in her basketball team's prayers, she was subjected to hostile "attention from her fellow students, who asked her 'Aren't you a Christian?' and from one

spectator, who called out 'Well, why isn't she praying? Isn't she a Christian?'" 70 F.3d at 404. Even her history teacher publicly denigrated her as "a 'little atheist.'" *Id.*

In *Herdahl v. Pontotoc County School District*, the plaintiff's children were "exposed . . . to harassment and ridicule, and . . . accused of being atheists and devil worshipers" after their mother removed them from an unconstitutional Bible class. 933 F. Supp. 582, 592 (N.D. Miss. 1996). The harassment became so bad that one child told his mother that "he did not want to be Christian [anymore] because he did not want to be like" his tormentors. RAVITCH, *supra*, at 9. The family received bomb threats and death threats. *Id.*

In *Bauchman ex rel. Bauchman v. West High School*, a Jewish choir student who objected to singing "Christian devotional music" suffered "'public ridicule and humiliation,'" including "'racial and religious epithets from her fellow students.'" 132 F.3d 542, 553 (10th Cir. 1997) (quoting complaint). Though the student obtained an injunction (*id.* at 546 n.4), others in the choir and the audience sang the religious songs at graduation anyway (*id.*; RAVITCH, *supra*, at 12). When the student left in tears, she and her mother were jeered at and spat upon. RAVITCH, *supra*, at 12.

In *Santa Fe*, school administrators, teachers, parents, and others in the community sought to "ferret out the identities of the [anonymous] Plaintiffs," requiring the district court to threaten the "harshest possible contempt sanctions," including criminal liability, for further attempts to interfere through "intimidation [and] harassment" with fair adjudication of the parties' legal rights. 530 U.S. at 294 n.1 (quoting district-court order).

In *Borden*, after word got out that unnamed cheerleaders had complained about the team prayer, the other students incorrectly blamed the two Jewish cheerleaders, who were then "publicly ridiculed," "taunted, bullied," "harassed[,] and threatened." 523 F.3d at 184 (McKee, J., concurring) (listing just a few of the attacks and slurs posted on school's electronic bulletin board). The attacks then metastasized into disparagement of students on the basis of race, sex, and sexual orientation as well as religion, further fracturing and injecting fear into the school community. *See* J.A. 457–95, *Borden*, 523 F.3d 153 (No. 06-3890).

When eleven parents challenged the inclusion of intelligent-design creationism in a Pennsylvania high school's science curriculum in *Kitzmiller v. Dover Area School District*, 400 F. Supp. 2d 707 (M.D. Pa.

2005), they and their children were harassed and received death threats (*see, e.g.*, LAURI LEBO, THE DEVIL IN DOVER 213–14 (2008) ("'I sure would hate to be in your shoes, or your daughters [sic] shoes. God hates sin. All these young people being killed in auto wrecks look out when your day comes. . . . Watch out for a bullet.'" (quoting anonymous letter, omission in original))). Even the district judge and his family needed special protection because of death threats. *See* Edwards, *When Fear Rules*, 20 VA. J. SOC. POL'Y & L. at 462, 465.

In the end, no one can seriously doubt the risks of ostracism, harassment, and worse for students who are forced to mark themselves as outsiders by not participating in popular school-sponsored religious exercises. *See Lee*, 505 U.S. at 593. That is not a safe, healthy, or lawful learning environment. Hence, "[i]n no activity of the State is it more vital to keep out [religiously] divisive forces than in its schools." *Edwards*, 482 U.S. at 584 (quoting *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 231 (1948) (opinion of Frankfurter, J.)).

School districts, then, have no choice—practically or legally—but to regulate their employees' conduct to prevent school sponsorship, endorsement, and coercion of religious exercises. *See, e.g.*, *Kitzmiller*, 400 F. Supp. 2d at 765. Indeed, so serious are the risks to students that "when

government endeavors to police itself and its employees in an effort to avoid transgressing Establishment Clause limits, it must be accorded some leeway . . . [or] breathing space to regulate in this difficult context." *Marchi v. Bd. of Coop. Educ. Serv.*, 173 F.3d 469, 476 (2d Cir. 1999). Schools "cannot be expected to resolve so precisely the inevitable tensions between the Establishment Clause and the Free Exercise Clause that they . . . must tolerate all employee conduct that, if prohibited as to ***non***-employees, would violate the Free Exercise Clause." *Id.* (emphasis added).

Again, *amici* do not doubt that Kennedy undertook his midfield prayers and religious speeches to the team with sincere devotion, and with absolutely no desire to foment religious division or strife. But coach-sponsored prayer fragments school communities along religious lines, regardless of intent. And as the prayers and the dispute over them became increasingly publicized, others, including people with no connection to the school, began rushing the field after games, injecting additional religious intolerance and division, and creating risks of physical harm to students. ER 521–23. The District had compelling interests in forestalling all of that. *E.g.*, *Cole*, 228 F.3d at 1104 n.9.

2. The District's actions were appropriately tailored.

If narrow tailoring to serve those interests were required, the District's actions would pass muster. For governmental action is narrowly tailored if "proposed alternatives will not be as effective" in achieving the government's objective. *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004). Here, there were no less restrictive alternatives—not just because the only practicable way for a school district to avoid constitutional violations by its employees is to prevent the violations, but also because Kennedy rejected all efforts to accommodate (or even to talk through options) that might have afforded him more latitude while still complying with constitutional mandates.

In that regard, when the superintendent and school board learned of Kennedy's practices, they sought to provide accommodations that would allow him freedom to pray at school without crossing the line to impermissible official promotion of religion. *See* ER 74–80, 109, 477. The superintendent informed him, for example, that he was "free to engage in religious activity, including prayer," that was "physically separate from any student activity," did not present students with the opportunity to join, and was either "non-demonstrative" or did not occur while students themselves were engaged in religious exercise. ER 109. But Kennedy continued his public prayer practice unaltered. *See* ER 98–100, 477. The District then

offered Kennedy additional options, including having other coaches supervise the team while he prayed nonpublicly. *See id*. The District also encouraged Kennedy to propose other accommodations that would not violate the Establishment Clause. ER 103. Kennedy was committed, however, to continuing his previous practice; nothing else was acceptable to him. ER 477.

The District was thus left with a binary choice: acquiesce and violate the Establishment Clause and students' rights, or curtail the unconstitutional practice. Only the latter option was tenable. When Kennedy rejected the attempts to accommodate him within the law, placing him on administrative leave was "the least restrictive means of furthering the compelling governmental interest in avoiding the unconstitutional interjection of religion into" the school (*Helland v. South Bend Cmty. Sch. Dist.*, 93 F.3d 327, 332 n.2 (7th Cir. 1996)).

III. THERE IS NO COLORABLE TITLE VII CLAIM.

Kennedy argues four theories under Title VII: failure to accommodate his religious beliefs, disparate treatment, failure to rehire motivated by a protected characteristic, and retaliation. All share a common difficulty: Title VII cannot, and hence does not, require what the Establishment Clause forbids. *See, e.g.*, *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 945 (9th Cir. 1999) (acknowledging "First Amendment restrictions on Title

VII"). Thus, while Title VII undeniably prohibits employers from discriminating against employees because of their religion, actions that a governmental entity takes to avoid violating the Establishment Clause are legitimate, nondiscriminatory reasons for adverse employment actions. *See, e.g.*, *Berry v. Dep't of Soc. Servs.*, 447 F.3d 642, 655 (9th Cir. 2006); *Helland*, 93 F.3d at 330.

Failure to accommodate: When a *prima facie* case for religious accommodation is made, the employer must show that it "initiated good faith efforts to accommodate reasonably the employee's religious practices" or that it could not do so without undue hardship. *Berry*, 447 F.3d at 655. In *Berry*, an employee of a county social-services department displayed religious objects in his workspace. 447 F.3d at 648. This Court held that "it would be an undue hardship for the Department to accept, or have to rebut, the inherent suggestion of Department sponsorship that would arise from allowing the display of religious items [where the plaintiff] interviews clients." *Id.* at 655. That same conclusion follows here—and with even more force, given the heightened Establishment Clause concerns in public schools and the fact that Kennedy was unwilling to consider any accommodation other than continuing his prayer practice unmodified.[5]

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[5] Kennedy questions whether the settled "undue hardship" standard ought to be revised. (Br. 62 n.6.) But because the only accommodation acceptable

Disparate treatment: A disparate-treatment claim requires showing that "similarly situated individuals outside [the claimant's] protected class were treated more favorably," or that other circumstances support an inference of discrimination. *See Berry*, 447 F.3d at 656. Kennedy's only examples of supposed disparate treatment are "coaches who made personal phone calls, greeted family members, or knelt to tie their shoes on the field" (Br. 66). Those actions were religiously neutral and did not implicate the Establishment Clause, so the coaches were not similarly situated. *See Berry*, 447 F.3d at 656 (rejecting disparate-treatment claim alleging that county allowed secular but not religious meetings in conference room).

Failure to rehire: Kennedy acknowledges that "the sole reason for the District's adverse action against [him] was its view that allowing him to engage in this practice would violate the Establishment Clause." Br. 2; *see also id.* at 14. The district court thus correctly held that there could be no claim for failure to rehire because there "is no evidence that Kennedy's religion itself"—i.e., his membership in a protected class—"rather than the unconstitutional time and manner he expressed it, motivated the District's actions." ER 26; *see Helland*, 93 F.3d at 330 ("admonitions to . . . stop

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to him would be a constitutional violation for the District, there would be undue hardship under any conceivable standard. There is no need to consider "the outer limits of 'undue hardship'" where the Establishment Clause is dispositive. *Berry*, 447 F.3d at 655.

interjecting religion into the classrooms" established that school district "did not unlawfully remove [teacher] . . . because of his religion itself"). And the District's extensive efforts to accommodate (*e.g.*, ER 74–80; ER 378) underscore the absence of discriminatory intent.

Retaliation: Retaliation claims require a causal link between a ***protected*** activity and an adverse employment action. *E.g.*, *Cheatham v. City of Phoenix*, 699 F. App'x 647, 648 (9th Cir. 2017). The district court thus correctly held that "the fact that Kennedy's prayers on the 50-yard line violated the Establishment Clause is fatal" to his retaliation claim (ER 32), because Establishment Clause violations are not protected activities.

CONCLUSION

The district court's decision should be affirmed.

Respectfully submitted,

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I hereby certify that, on September 27, 2020, the foregoing was electronically filed with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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