**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

# APPELLEE'S BRIEF IN OPPOSITION TO REHEARING EN BANC

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## TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**PAGE(S)**

**CASES**

## TABLE OF AUTHORITIES—continued



**CONSTITUTION, STATUTES, AND RULES**

## INTRODUCTION

The questions that Kennedy poses in this appeal (Appellant's Br. 3–5) are purely hypothetical. He asks whether a coach has free-speech rights for brief, silent, solitary prayer. But *his* prayer was a "largely unchanged" eight-year practice of "audibly" praying on the 50-yard line, joined by students from Bremerton High and sometimes from "the opposing team" (2-ER-259). Kennedy asks whether selectively disciplining religious conduct violates the Free Exercise Clause. But the panel fully explained why any nonreligious or nondemonstrative faculty conduct, real or imagined, would be wholly unlike Kennedy's prayer practice and would not raise constitutional concerns for the District. And Kennedy asks whether a school district violates Title VII by not making good-faith efforts to accommodate a coach's religion. But in Kennedy's own words, the superintendent here "work[ed] very hard" to accommodate him (3-ER-367), yet Kennedy refused to consider anything other than the District's complete acquiescence to his demand to continue his practice of on-field prayer with students. SER-515.

Hence, the panel did not indulge Kennedy's hypothetical legal questions. Instead, it quite properly conducted fact-intensive review of what Kennedy actually did, and what he demanded to continue doing. And the panel correctly recognized that Kennedy's refusal even to discuss potential accommodations presented the District with a stark binary choice (*Kennedy*

*v. Bremerton Sch. Dist.*, 991 F.3d 1004, 1012, 1022–23 (9th Cir. 2021)): It could proceed as it did, to protect the safety and religious-freedom rights of the students and their families and to preserve order at school functions. Or it could cede control of its facilities and activities, allow Kennedy to hold prayers "at the conclusion of football games, in the center of the field, with students who felt pressured to join him," and accept the deleterious consequences to student safety, families' religious-freedom rights, and the District's ability to operate school activities *as* school activities rather than as public forums for private expression. *Id*. at 1022–23.

The panel straightforwardly applied settled law to the facts of the case. There is no contrary authority in this Circuit or elsewhere, so en banc review is unnecessary to maintain uniformity of the law. And whatever interesting hypothetical questions Kennedy might have posed about the rights of school staff to engage in genuinely private religious exercise while on the job, they are not actual issues in this case. Simply put, no questions of "exceptional importance" are genuinely presented. Fed. R. App. P. 35(a). The appeal thus falls far short of the "exacting standards" for rehearing en banc. *Kipp v. Davis*, 986 F.3d 1281, 1282 (9th Cir. 2021) (Paez, J., concurring).

## STATEMENT

Over his eight seasons as an assistant coach employed by the District, Kennedy led students in postgame prayers on the fifty-yard line, surrounded by kneeling students. 2-ER-107, 3-ER-356–57, SER-498. He concedes that he did so while on duty and performing his "football coaching functions," which continued "until the last kid leaves." 3-ER-359; *see* 991 F.3d at 1016. The District first learned of the prayer practice in September 2015 (2-ER-104–05; SER-526); and it would discover that some students joined only to avoid having to separate themselves from the team (SER-517, 526). Later, a player's parent complained that his son, who is an atheist, felt compelled to participate for fear of losing playing time. 3-ER-379; 991 F.3d at 1011.

On September 17, Superintendent Aaron Leavell wrote to inform Kennedy that he was "free to engage in religious activity, including prayer, so long as it does not interfere with [his] job responsibilities," instructing that Kennedy's prayers while on duty should be "physically separate from any student activity, and students may not be allowed to join such activity." 2-ER-107–09. The superintendent directed that the prayers "should ***either*** be non-demonstrative (*i.e.*, not outwardly discernible as religious activity) ***if students are also engaged in religious conduct***, ***or*** it should occur while students are not engaging in such conduct." 2-ER-109 (emphasis

added). Acknowledging that these instructions might not cover every potential scenario, the superintendent encouraged Kennedy to raise any questions with his superiors or with the superintendent himself. *Id.*

At the game the next day, Kennedy delivered a postgame speech to the players that was free from religious content. SER-426–27. The day after that, the District learned through a media report that Kennedy had returned to the field to pray after the students and other spectators had departed—which was acceptable to the District and complied with the superintendent's instructions. *Id*. To the District's knowledge, Kennedy continued to comply for approximately a month. SER-430, 432–33; *see* 991 F.3d at 1012.[1] And the players did not visibly pray on the field when Kennedy stopped initiating prayers. SER-517.

On October 14, Kennedy sent the District a demand letter. 2-ER-258–63. He reported that throughout his tenure as a coach, he had the practice of praying "audibly" on the field after games, with students on the team and sometimes the opposing team joining. *Id.* And he insisted that beginning "on October 16, 2015, [he would] continue his practice of saying a private, post-game prayer at the 50-yard line" and asserted that students had the

[1] Kennedy's January 2016 EEOC complaint (3-ER-294) described his actions consistently with the District's understanding. He changed positions in his 2019 deposition, now saying that he prayed midfield immediately after every game except the one on September 18, 2015. 2-ER-217–19.

right to join. *Id.* Asked about the demand, Kennedy testified: "I wasn't going to stop my prayer because there [were] kids around me." 3-ER-363–64; 991 F.3d at 1010, 1012.

Kennedy then made a series of media appearances, announcing his plan to have midfield postgame prayer on October 16. SER-482, 483–88, 516; 991 F.3d at 1012. And that is what he did, surrounded by players bowing their heads for the prayer, along with a crush of spectators, a state legislator, and members of the press, who ran onto the field from the stands to join him. 3-ER-364–65; SER-481, 516. Some students in the school band were knocked over when the crowd rushed the field. SER-516.

The school's head football coach, Nathan Gillam, became concerned about his own safety and that of the players, cheerleaders, and band members, when, among other incidents, a stranger approached and cursed at him after a game. SER-521–22. Gillam would later resign, after eleven years as coach, because of "strangers, and media rushing on to the field after a game to where Mr. Kennedy was going to pray," in an environment so contentious that Gillam feared he might be shot. *Id.*; 991 F.3d at 1013–14.

On October 23, the superintendent again wrote to Kennedy. 2-ER-98–100. He unequivocally declared that Kennedy's religious exercise "can and will be accommodated" as long as it did not interfere with the performance of Kennedy's job duties and would not be perceived as the District's

endorsement of religion. 2-ER-99 He offered Kennedy a variety of accommodations, including "a private location within the school building, athletic facility or press box . . . before and after games"; and he invited Kennedy to contact him to discuss other potential accommodations. 2-ER-100. Principal John Polm told Kennedy that he could also return to the field to pray after students were gone (3-ER-378), as Kennedy had done following the superintendent's September 17 letter (SER-426–27).

Kennedy did not respond directly but instead "inform[ed] the media that the only acceptable outcome would be for [the District] to permit him to pray on the 50-yard line immediately after games" (991 F.3d at 1013), continuing his practice (SER-457–58). On October 26, he knelt in midfield prayer with a group that included two state legislators and two school-aged children. 2-ER-274, 3-ER-368–70, 381; SER-479. Around that time also, a "Satanist" group informed the District that it would "come to the field to pray" after games, demanding the "same access" to the field as Kennedy had. SER-467. The District coordinated with police to provide security at games and informed the school community by robocalls and posted signs that the field was closed to the public. SER-516.

On October 28, the superintendent wrote to Kennedy a third time. 2-ER-277. He noted Kennedy's continued violations of the District's directives and placed Kennedy on paid administrative leave but reiterated that "the

District remains willing to discuss ways of accommodating your private religious exercise"; and he again encouraged Kennedy to "contact me if you wish to discuss the options I have previously identified, or any other options you may have in mind." *Id.* Though Kennedy testified in his deposition that he did not doubt the superintendent's sincerity and understood him to be "working very hard" to develop a suitable accommodation, Kennedy never responded and never suggested any accommodations that he might accept. 3-ER-367; 991 F.3d at 1013. Nor did Kennedy deviate from the demand in his October 14 letter that he be allowed to resume his prior practice of audibly praying with students on the field after games. SER-515.

While on leave, Kennedy attended games as a spectator and knelt to pray with others in the stands; and the District did not say or do anything to stop him. SER-475. No players had postgame prayers on the field once Kennedy was no longer initiating them. SER-517; 991 F.3d at 1013. Nor did students or spectators go onto the field after games, whether for prayer or otherwise. SER-473, 516. When Kennedy's contract expired at the end of the season, he chose not to reapply. SER-532.

Kennedy filed an EEOC complaint in January 2016, in which he described his practice as evolving from silent prayers to "audible" ones joined by a "majority of the team." 3-ER-293. He also alleged that another coach had at some point done a Buddhist chant after a game. 3-ER-295. The

other coach's alleged conduct was silent and nondemonstrative (SER-465); Kennedy himself knew of it only because the other coach told him (3-ER-375); and the superintendent never heard "of any other [District] employee who has allegedly engaged in readily observable demonstrative religious activity, while on-duty in the performance of his or her job, and in the presence of students" (SER-517–18).

## ARGUMENT

Rehearing en banc is a "disfavored" procedure. *United States v. Wylie*, 625 F.2d 1371, 1378 n.10 (9th Cir. 1980). It is to be granted only when "necessary to secure or maintain uniformity of the court's decisions; or [when] the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a). Appeals that turn on the "application of settled legal standards to a set of facts" do not warrant en banc review. *See Kipp*, 986 F.3d at 1285 (Paez, J., concurring). That is the case here.

### A. There is no conflicting or ambiguous legal authority.

There is no intra- or inter-circuit conflict or lack of uniformity to warrant the en banc Court's attention.

The "principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (quoting *Lee v. Weisman*, 505 U.S. 577, 587 (1992)). The Third, Fifth,

and Eleventh Circuits have specifically held that public schools may (and indeed must) prevent their employees from having prayers with students at school sporting events. *See Borden v. Sch. Dist.*, 523 F.3d 153, 174 (3d Cir. 2008); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 406 n.4 (5th Cir. 1995); *Jager v. Douglas Cnty. Sch. Dist.*, 862 F.2d 824, 831 (11th Cir. 1989). No circuit has ever suggested otherwise. The Supreme Court has held that even purely "student-led, student-initiated prayer at football games violates the Establishment Clause" when it either suggests school endorsement of religion or pressures students to participate. *Santa Fe*, 530 U.S. at 301 (2000). And the Supreme Court, this Court, and sister circuits have uniformly held that all public-school officials, be they teachers, coaches, band instructors, or administrators, are forbidden to promote or endorse religion or to act in ways that may pressure students to join in religious activities.[2] To our knowledge, no court has ever held that coaches or

[2] *See, e.g.*, *Lee*, 505 U.S. at 587–88; *Freedom From Religion Found. v. Chino Valley Unified Sch. Dist.*, 896 F.3d 1132, 1137, 1145 (9th Cir. 2018); *Nurre v. Whitehead*, 580 F.3d 1087, 1097 (9th Cir. 2009); *Marchi v. Bd. of Coop. Educ. Servs.*, 173 F.3d 469, 477 (2d Cir. 1999); *Helland v. S. Bend Cmty. Sch. Corp.*, 93 F.3d 327, 329–30 (7th Cir. 1996); *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994); *Roberts v. Madigan*, 921 F.2d 1047, 1057–59 (10th Cir. 1990); *Steele v. Van Buren Pub. Sch. Dist.*, 845 F.2d 1492, 1495–96 (8th Cir. 1988); *Stein v. Plainwell Cmty. Schs.*, 822 F.2d 1406, 1410 (6th Cir. 1987); *see also, e.g.*, *Mellen v. Bunting*, 327 F.3d 355, 371–72 (4th Cir. 2003) (same for pre-meal prayers at public military college).

teachers have a right to pray demonstratively with students at school events.

Reversal of the judgment here would thus *create* a split of authority, not resolve one, making en banc review singularly inappropriate. *See Makaeff v. Trump Univ., LLC*, 736 F.3d 1180, 1180 (9th Cir. 2013) (Wardlaw and Callahan, JJ., concurring).

**B. The panel did not decide questions of exceptional importance but instead applied settled law to the facts.**

For a question to qualify as exceptionally important, it should at least be one "that has been *decided* by a three judge panel or is to be decided by the en banc court." *United States v. Burdeau*, 180 F.3d 1091, 1092 n.1 (9th Cir. 1999) (Tashima, J., concurring). Kennedy's hypothetical questions were not decided by either the district court or the panel. And because they are not genuinely presented by the case, a ruling on them by the en banc Court would be an impermissible advisory opinion.

1. As explained above, Kennedy asked this Court to decide whether his free-speech rights would be violated if the District barred "brief, silent, personal prayers on the football field after games . . . [when] no student players joined his prayers." Appellant's Br. 3–4. Yet in his demand letter, Kennedy expressly described his "verbal" practice of "audibly sp[eaking] a short prayer," "quietly, but audibly, pray[ing]"; he made clear that students

had been joining him for years; and he demanded that he be allowed to "continue [this] practice." 2-ER-259, 263; *see also, e.g.*, SER-481 (showing students bowing heads with Kennedy); 2-ER-271, 3-ER-368–70, 381; SER-479 (showing Kennedy kneeling with adults and two school-aged children); 3-ER-363–64 (Kennedy's testimony that "I wasn't going to stop my prayer because there [were] kids around me"); 991 F.3d at 1012–13. And unwilling students felt compelled to participate. 3-ER-379, SER-517, 526. All of that—not personal, private, silent prayer—was the situation that the District faced and had to address.

Kennedy also asked this Court whether his free-exercise rights would be violated if "others who engaged in similar conduct were not disciplined." Appellant's Br. 4. But the panel recognized that, on the facts, other coaches' conduct was not comparable. Kennedy admits that any Buddhist chant by another coach was silent, nondemonstrative, and unnoticed even by Kennedy himself (3-ER-375; SER-465); and the District did not hear of it until Kennedy's 2016 EEOC complaint (SER-517–18). Kennedy's solicitation of "nationwide attention" was of a "wholly different character." 991 F.3d at 1013–15, 1022–23.

Finally, Kennedy asked the Court whether Title VII (42 U.S.C. § 2000e–2) would be violated if the District failed to make a good-faith effort to accommodate his religion. Appellant's Br. 4–5. But the District

consistently assured Kennedy that his religious activity "can and will be accommodated" as long as his actions were consistent with the Establishment Clause (2-ER-99); it took no issue with his on-field prayers after students departed (SER-426–27); it offered him a variety of accommodations—to which he did not respond (991 F.3d at 1013); and it invited him to propose others that might satisfy him—which he did not do (*id.*; 2-ER-277). Kennedy testified that the District's efforts were sincere. 3-ER-367. Yet through his demand letter, media appearances, and actions he insisted on "continu[ing] his practice" of "verbal," "audibl[e]" post-game prayers "at the 50-yard line," even with students present and participating. 2-ER-258–63; 991 F.3d at 1010–13. And tellingly, once Kennedy stopped having midfield prayer as the coach, the students no longer had the prayers either. SER-517.

Because Kennedy's conduct was official action attributable as a matter of law to the School District (*see Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 966–67 (9th Cir. 2011)), the District faced a stark choice: Regulate that conduct, or violate the Establishment Clause. *See, e.g.*, *id.* at 970–71. Hence, the District's efforts to meet its constitutional obligations did not and could not violate Kennedy's free-exercise or free-speech rights.

*See id.*; *Peloza*, 37 F.3d at 522.[3] And the failure of Kennedy's Title VII claims necessarily follows, because complying with constitutional mandates, respecting students' and their families' religious-freedom rights, avoiding liability for violating those rights, and preventing conversion of school property and activities into a public forum are legitimate, non-discriminatory purposes for official action. *See Berry v. Dep't of Soc. Servs.*, 447 F.3d 642, 655–56 (9th Cir. 2006).

2. As for the concerns that Justice Alito raised when Kennedy sought certiorari on the denial of a preliminary injunction, the "unresolved factual questions" at that time (139 S. Ct. 634, 635 (2019) (statement of Alito, J.)) are unresolved no longer. Kennedy has now testified that he was "on duty at the time in question" (*id.*), "until the last kid leaves" (3-ER-359; *see* 991 F.3d at 1016). And the panel fully considered and determined that

[3] Though the district court and panel deemed avoiding Establishment Clause violations to be "the 'sole reason' BSD limited Kennedy's public actions" (991 F.3d at 1010), the District also properly raised, briefed, and presses that its "interest in maintaining the field as a nonpublic forum is an adequate justification for requiring Kennedy to relocate his demonstrative religious expression" (Appellee's Br. 48–52). The District had the authority to control its athletic field and school events, including preventing its employees from acting in ways that would risk converting the field into a public forum for private expression. *See, e.g.*, *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 966–67 (9th Cir. 1999). It exercised that authority to keep the public off the field, ensure student safety, protect school property, and avoid having school events hijacked by private groups. *See* Appellee's Br. 48–52.

hypothetically "calling home or making a reservation for dinner at a local restaurant" (*Kennedy*, 139 S. Ct. at 636 (statement of Alito, J.)), should it be permissible while coaching, would not be legally comparable to Kennedy's conduct—most obviously because it would not raise Establishment Clause concerns. *See* 991 F.3d at 1021. For whereas students felt pressured to participate in Kennedy's prayers (3-ER-379; SER-517, 526; 991 F.3d at 1011), overhearing a coach making dinner plans is not coercive, religiously or otherwise. And Kennedy's unwillingness to cooperate with the District to find accommodations, his decision instead to "continue engaging in the kind of mid-field religious exercises he had been told not to perform," and his solicitation of "nationwide attention" to support his practice resulted in risks to students' religious freedom and physical safety. 991 F.3d at 1010, 1013–14, 1023; SER-522.

Nor did the panel afford an "excessively broad" reading of Kennedy's job description or suggest that public-school coaches might be required to "refrain from any manifestation of religious faith" (*Kennedy*, 139 S. Ct. at 636–37 (statement of Alito, J.)). The District directed that Kennedy's prayers be ***either*** nondemonstrative ***or*** offered at times when students were not praying (2-ER-107–09); it did not take issue with his midfield prayers after the students had left (SER-426–27); and it repeatedly proposed additional accommodations (*e.g.*, 3-ER-367). The panel considered all the

newly presented evidence and determined that the "facts in the record utterly belie [Kennedy's] contention that the prayer was personal and private." *See* 991 F.3d at 1017–18.

## CONCLUSION

Declining to answer Kennedy's hypothetical questions, the panel instead properly applied settled law to the facts and determined the District's actions to be what they were—an appropriate response to Kennedy's resolute demand to resume audibly praying with students at the center of the field at the end of the games. The decision was correct and does not warrant further review.

Respectfully submitted,

s/ *Richard B. Katskee*

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**CERTIFICATE OF SERVICE**

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s/ *Richard B. Katskee*

Date: May 12, 2021

# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

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