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 BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY, AMERICAN JEWISH COMMITTEE, EVANGELICAL LUTHERAN CHURCH IN AMERICA, AND GENERAL SYNOD OF THE UNITED CHURCH OF CHRIST AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICI*[1]

The **Baptist Joint Committee for Religious Liberty** (BJC) serves sixteen supporting organizations, including state and national Baptist conventions and conferences, and has vigorously supported both the free exercise of religion and freedom from religious establishments for all of its eighty years. BJC addresses only religious liberty and church-state separation issues, and believes that strong enforcement of both Religion Clauses is essential to religious liberty for all Americans.

In cases involving public schools, BJC and counsel Professor Douglas Laycock have long defended both sides of the constitutional line that properly separates individual religious speech from government religious speech. They vigorously support freedom of religious speech, and they have repeatedly urged the Court to defend the right to religious speech in public places against attempts to recharacterize that speech as governmental.[2] They have also repeatedly urged the

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[1] This brief was prepared and funded entirely by *amici* and their counsel. No other person contributed financially or otherwise. All parties have consented in writing to this brief.

[2] *See* Brief of National Council of Churches *et al*. (including Baptist Joint Committee) as *Amici Curiae* in Support of Petitioners, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (No. 99-2036); Brief of Douglas Laycock as *Amicus Curiae* in Support of Petitioners, *Good News Club*, 533 U.S. 98 (No. 99-2036); Brief of Christian Legal Society *et al.* as *Amici Curiae* in Support of Petitioners, *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (No. 94-329) (Douglas Laycock, Counsel of Record); Brief of Baptist Joint Committee *et al.* as *Amici Curiae* in Support of Respondents, *Bd. of Educ. v. Mergens*, 496 U.S. 226 (No. 88-1597)

Court to protect citizens, and especially students in public schools, from the press of government religious speech that government actors have attempted to re-characterize as private.[3]

The **American Jewish Committee** is an organization of American Jews founded in 1906. It has long insisted both on the right of private religious expression in the schools and the imperative for public schools and school officials to remain scrupulously religiously neutral.

The **Evangelical Lutheran Church in America (ELCA)** is the largest Lutheran denomination in North America. The **General Synod of the United Church of Christ** is the representative body of the United Church of Christ (UCC), formed from a union of the Evangelical and Reformed Church and The General Council of the Congregational Christian Churches of the United States. Both religious bodies and their predecessor organizations have longstanding and deep

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(Douglas Laycock, Counsel of Record); Brief of Baptist Joint Committee as *Amicus Curiae* in support of Respondents, *Widmar v. Vincent*, 454 U.S. 263 (1981) (No. 80-689); *see generally* Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U.L. REV. 1 (1986).

[3] *See* Brief of Respondents, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (No. 99-62) (Douglas Laycock, Counsel of Record); Brief of Baptist Joint Committee *et al.* as *Amicus Curiae* in Support of Respondents, *Santa Fe*, 530 U.S. 290 (No. 99-62); Brief of the American Jewish Congress *et al.* (including Baptist Joint Committee) as *Amici Curiae* in Support of Respondents, *Lee v. Weisman*, 505 U.S. 577 (1992) (No. 90-1014) (Douglas Laycock, Counsel of Record).

commitments to the free exercise of religion and the separation of religion from government. More specifically, the two organizations are committed to the general prohibition on government-sponsored religious speech, as reflected in their endorsement of *Religion in the Public Schools: A Joint Statement of Current Law* (1995).[4]

SUMMARY OF ARGUMENT

The critical issue in this case is whether Petitioner's on-field prayers are government speech restricted by the Establishment Clause or private speech protected by the Free Speech and Free Exercise Clauses. This distinction is deeply rooted in precedent and constitutional text, and few litigants openly reject it. Instead, litigants attempt to evade the distinction by manipulating the line between private speech and governmental speech. This Court has diligently resisted those efforts, particularly in the context of the public schools. Petitioner's speech was governmental, and the Court should reject his expansive claim that he spoke only in his private capacity.

I. Petitioner was a government employee, who prayed on the fifty-yard line—who, in fact, had free access to the fifty-yard line only because of his job. While the Free Exercise and Free Speech Clauses protect his religious speech and exercise in a variety of ways, the Establishment Clause does not allow him to use his

[4] *See infra* note 10.

position in ways that compel, pressure, persuade, or influence his students to engage in religious activity. The record and the findings below are clear that this is what he was doing here.

II. Petitioner offers no limiting principle to his theory that his speech is private and protected by "the most demanding form of constitutional scrutiny." Pet. Br. 36. His theory would enable public-school teachers and coaches to push their views (religious, anti-religious, and otherwise) on their students in a wide variety of situations. A classroom teacher could disclaim school sponsorship and then harangue his students to convert to his religion. Petitioner's claims are at odds with decades of settled case law, executive branch guidance on religion in the public schools, and an Act of Congress specifically designed to protect religious expression in the public schools. Petitioner's theory is novel and unpersuasive, and it should be rejected.

ARGUMENT

The critical issue in this case is whether Petitioner's on-field prayers are "government speech endorsing religion, which the Establishment Clause forbids," or whether they are "private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion). Given its solid foundation in precedent and constitutional text, few these

days openly reject this distinction. But attempts at evasion—where both sides try to win by manipulating the line between private speech and governmental speech—are common. This Court has diligently resisted those efforts, particularly in the context of the public schools. The Court should likewise reject Petitioner's misguided effort in this case.

In a series of cases going back more than forty years, this Court has seen through efforts to cast private speech as governmental. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Mergens, supra*; *Widmar v. Vincent*, 454 U.S. 263 (1981). And it has resisted equally misbegotten efforts to cast governmental speech as private. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992); *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd mem.*, 455 U.S. 913 (1982).

Lead amicus Baptist Joint Committee and its frequent counsel Douglas Laycock have long encouraged the Court to defend both sides of this line, because doing so properly reflects the way the Religion Clauses work together to protect religious liberty. They have vigorously supported freedom of religious speech, and have repeatedly urged the Court to defend the right to religious speech in public places against attempts to recharacterize that speech as governmental. They have also repeatedly urged the Court to protect

citizens, and especially students in the public schools, from the press of government religious speech that government actors tried to recharacterize as private.[5]

This case presents the second of these two situations. Petitioner claims that his prayers are private speech. But these prayers must be understood as governmental, because they present all the dangers of government religious speech to an audience of students in public schools. Parents are entitled to send their children to the public schools, and allow them to participate in extracurricular activities, without having any concern that teachers or coaches will induce their children to become more or less religious—or religious in a different way from what is taught at home. This is why government religious speech is tightly restricted in the public schools, and this is why Petitioner's prayers must be understood as governmental.

I. Petitioner's Speech Is Government Speech.

This case so far has mostly been framed as a *Pickering*-style free speech case, with the central question being whether Petitioner was "act[ing] as a citizen" when he prayed, or whether he was "act[ing] as a government employee." *Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006). While this inquiry generally corresponds with the private/governmental distinction in the Religion Clauses, there are two significant differences.

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[5] *See supra* notes 2-3 (providing citations to the relevant briefs).

First, the *Pickering* cases grow out of "the right of citizens to participate in *political affairs*," *Connick v. Myers*, 461 U.S. 138, 145 (1983) (emphasis added), so they protect speech only if it addresses matters of public concern. *See Garcetti*, 547 U.S. at 418. But the Free Speech and Free Exercise Clauses, read together and in light of each other, offer independent protections for religious speech and religious exercise that are in some ways broader than those of the Free Speech Clause alone.

Private religious speech is protected by the Constitution whether or not it addresses a matter of public concern. A Muslim woman who wears a veil to work at a government job is protected by the Constitution, regardless of whether she wears the veil to make a statement on an issue of public concern—regardless, in fact, of whether she wears the veil to make a statement at all. Petitioner's prayers clearly did not address matters of public concern, and so far as *amici* are aware, no one has claimed otherwise.

More crucially for this case, *Pickering* had no occasion to consider the change in values on the employer's side when religious speech is involved. "[T]he Establishment Clause," after all, "is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions." *Lee*, 505 U.S. at 591. The focus in *Pickering* was on whether the employer could restrict the employee's private speech. But here, Petitioner's speech was governmental, and the Constitution restricts that speech whether his

employer chooses to prohibit it or permit it, restrict it or encourage it.

The Establishment Clause puts limits on government speech. Governments "must not press religious observances upon their citizens." *Van Orden v. Perry*, 545 U.S. 677, 683 (2005). "Government may not mandate a civic religion" or "prescribe a religious orthodoxy." *Town of Greece v. Galloway*, 572 U.S. 565, 581 (2014).

This Court has sometimes relaxed these rules in contexts involving "mature adults, who presumably are not readily susceptible to religious indoctrination or peer pressure." *Id.* at 590. But the public schools have always been different.

School-sponsored prayer has long been recognized as unconstitutional. *See Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962). "The State exerts great authority and coercive power through mandatory attendance requirements." *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987). Parents, including those who would prefer a private religious education if it were available to them, "entrust public schools with the education of their children but condition their trust on the understanding" that the school "will not purposely be used to advance religious views [in] conflict with [their own] beliefs." *Id*. So when it comes to religious exercises sponsored by the public schools, the Court has been understandably and unmistakably firm: "No holding by this Court suggests

that a school can persuade or compel a student to participate in a religious exercise." *Lee*, 505 U.S. at 599.

Yet because the government can act only through the human beings who are its agents, the Establishment Clause means nothing unless it binds people acting on the government's behalf. Petitioner says that "public-school teachers, *no less than students*" retain their "constitutional rights to freedom of speech or expression" inside the school. Pet. Br. at 1 (emphasis added) *see also* Pet. Br. at 30 (same language). But the italicized portion of that statement cannot be right.

Students and teachers both have significant rights of religious free speech and free exercise, but they differ in a fundamental respect. While the role of students is typically private, teachers stand in two sets of shoes at once. Vis a vis their governmental employer, a public-school teacher is both an agent and a private person, and as a private person, endowed with rights under the Free Speech and Free Exercise Clauses. But vis a vis their students, a public-school teacher *is* the government, bound by the strictures of the Establishment Clause. Both interests must be taken seriously—these cases require courts to strike a balance between the teacher's constitutional rights and the teacher's constitutional obligations.

Ordinary state-action principles help show why Petitioner was a state actor. Petitioner was a government employee, and "[s]tate employment is generally sufficient to render the defendant a state actor." *West*

v. Atkins, 487 U.S. 42, 49 (1988).[6] Petitioner here had not left work. He was still on the field. If he had returned to the locker room and spoken to his players, or gone to the sidelines and spoken with reporters, he would have done so as a state actor. Petitioner had free access to the field here only because of his governmental position, Pet. App. 8, meaning that his actions were "possible only because [he was] clothed with [governmental] authority." *United States v. Classic*, 313 U.S. 299, 326 (1941).

Petitioner admitted that he was on duty at least until his players leave. Jt. App. 275-76. When he prayed, he was still responsible for his players, who had not yet dressed in street clothes and left the school's premises. He was still very much in a position of authority over them, not only with respect to any disciplinary incident that might arise in the aftermath of the game, but also with respect to playing time in the next game.

And he was still very much in his role as coach, leading, reviewing, and motivating players. Suppose Petitioner had crossed the field and launched a racist tirade against minority players on the other team, and that some sort of litigation ensued against the Respondent school district. Respondent could hardly

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[6] *Amici* note that the word "generally" appears in this formulation only because of this Court's earlier encounter with public defenders, who find themselves in the strange position of working simultaneously both *for* and *against* the government—a situation totally inapplicable here. *See Polk County v. Dodson*, 454 U.S. 312 (1981).

defend on the ground that Petitioner was speaking only in his personal capacity and not as an employee of the school. It might have other meritorious defenses, but not that one.

Calling this a "zero-tolerance policy for religious speech," Petitioner fears a world where teachers and coaches are barred from "wearing a yarmulke in the classroom, making the sign of the cross before eating a meal in the cafeteria, or performing midday salah in a visible location." Pet. Br. at 30. *Amici* fear such a world as well. But few of the things Petitioner describes are constitutionally problematic, for multiple reasons.

First, they are no part of the teacher's job and are in no way entangled with the teacher's duties. They are not aimed at a student audience. Nor do they pressure or significantly influence students. They do not "persuade or compel" students to engage in religious exercise. *Lee*, 505 U.S. at 599.

Students rarely notice (let alone care) what the teacher is silently reading at her desk—whether it is the Bible, Shakespeare, or Time magazine. A teacher eating in the cafeteria is not instructing students at the time, or moments before or after in that place, and saying grace over a meal is a widely understood religious practice. Students are likely to recognize it as an individual practice, just something that some people do. Students may notice it when a Christian teacher wears a cross or a Jewish teacher wears a yarmulke. But again, the social context creates little pressure on students to act similarly.

Salah is more analogous to the facts here, and would clearly be problematic if a teacher prostrated himself for prayer in his classroom, in front of his own students, moments before or after addressing them in his role as teacher. The school of course must normally accommodate a Muslim teacher by providing time and place for salah, 42 U.S.C. §§ 2000e(j), 2000e-2(a), but that place should not be in the immediate presence of students.

To be sure, the Establishment Clause does not require that influence on students be zero—a goal that is probably unachievable. Non-Muslim children are unlikely to start wearing hijabs simply because their beloved Muslim science teacher does so. If her wearing a veil at school creates any influence or pressure on them at all, it is only incrementally greater than the influence that exists simply from knowing she is a Muslim or seeing her veiled in the grocery store on Saturday.

Some might nevertheless retort that her veiling will, at the margins, create at least *some* influence on the students to act similarly. That brings us to second reason why the Establishment Clause nevertheless allows some of these practices.

The second and more fundamental explanation lies in the asymmetry of the burdens involved. For if the Muslim teacher is allowed to wear the veil, she will exert the tiniest amount of pressure on her students to become Muslim. But if she is not allowed to wear the veil, she will lose her government job because of her faith.

In the name of reducing the pressure on students from nearly nothing to absolutely nothing, a rule forbidding religious headwear would make observant Muslim women categorically ineligible to work in an entire field of public employment. This would not strike a balance between free exercise values and disestablishment values. It would subordinate the Free Exercise Clause to the Establishment Clause.

But this case presents the reverse danger. Here also the burdens are asymmetric, but in the other direction. Petitioner does not propose a balance between free exercise values and disestablishment values; he would subordinate the Establishment Clause to the Free Exercise Clause.

First, Petitioner's actions put genuine religious pressure on his students. Whether or not he intended to pressure his students, he clearly did so. This is not wild speculation; nor is it just a matter of obvious logical inference. These are simply the facts that the trial court found and that the record shows. Multiple parents complained that their sons felt compelled to participate in Petitioner's prayer even though they didn't want to or the parents didn't want them to. Resp. Br. 13 (citing record). One parent specified "that his son felt compelled to participate in [Petitioner's] religious activity, even though he was an atheist, because he felt he wouldn't get to play as much if he didn't participate." Pet. App. 4. That fear is entirely reasonable. The group of players joining Petitioner after the game had grown "to include the majority of the team." *Id.* But no players prayed on the field after Petitioner quit

making a display of modeling and encouraging prayer for them. Pet. App. 11.

Football coaches are often beloved by their players; players will want to do what their coach does. Football coaches also have incredible power and influence over their players; they can summarily end any boy's dream of making it on the field, becoming a star player known in the school cafeteria, or playing in college or beyond.[7] Few things matter more to student athletes than playing time; they cannot risk offending the coach, and some no doubt feel that they cannot pass up a chance to cater to the coach's preferences.

Petitioner claims that he would not retaliate against those few who refuse to pray in public, but other coaches might and the students can never know for sure. Atheists, agnostics, religious minorities, and even fellow Christians whose views differ from Petitioner's, will be driven to pray with him anyway. Some of them will be driven to engage in religious conduct that they would prefer to avoid, or prefer to engage in on their own at a different time and place. And some will be pressured to "engage in conduct that seriously violates their religious beliefs." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 720 (2014).

Of course, the students have an option. They could outwardly seem to pray, but still hold their dissenting

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[7] It is difficult to understate the importance of high school football for much of America—it is "a boy's last dream and a man's first loss." Jason Isbell, *Speed Trap Town*, *in* SOMETHING MORE THAN FREE (2015).

religious beliefs inwardly and secretly. But the Constitution "protects not only the right to hold unpopular religious beliefs inwardly and secretly. It protects the right to live out those beliefs publicly in the performance of (or abstention from) physical acts." *Dr. A. v. Hochul*, 142 S. Ct. 552, 555 (2021) (Gorsuch, J., and Alito, J., dissenting from the denial of application for injunctive relief) (citations and quotations omitted). This case, just as much as *Dr. A.*, is about the rights of religious dissenters to live out their beliefs by abstaining from physical acts. This is the core of the Establishment Clause.

A religious tradition that honors martyrs who went to the lions rather than go through the motions of pretending to pray to a false god is in no position to dispute the feelings of players who refuse to feign prayer while secretly dissenting, or who unhappily join the coach's prayer for fear of the coach's power over playing time.

Second, on the other side of the balance, Petitioner has ample ways to avoid putting that religious pressure on his students. *Amici* respect Petitioner's religious obligation to pray after the game. But Petitioner can satisfy that obligation without involving his students. Most obviously, he can simply wait until the students leave, and then pray by himself. After the September 18th game, for example, Petitioner left the stadium without praying. But feeling like he "had broken his commitment to God," he turned his car around, went back to the field, and "waited ten to fifteen minutes until everyone else had left the stadium so

that he could have a moment alone with God to pray at the fifty-yard line." Pet. App. 6-7. Petitioner describes these steps as solving his problem, but they simultaneously resolve all the Establishment Clause concerns as well.

To be sure, *amici* are not asking Petitioner to leave the stadium and then come back. All *amici* want Petitioner to do is pray in a way that clearly separates his private from his governmental capacity—that does not unite his government role with his private religious exercise, and that does not explicitly or implicitly invite his students to join him.

He could delay the prayer at the fifty-yard line. Or kneel to pray in some secluded location near the field, or while the students are otherwise occupied, as he did for several weeks after September 18. Jt. App. 340-42. Or he could pray unobtrusively on the sidelines, as a Buddhist coach did, Jt. App. 336, without the public display inherent in kneeling or walking to the fifty-yard line or both. In short, he need only change the time, place, or manner of his prayer to avoid influencing or coercing his students.

Changing the time worked for Petitioner before, and it enables him to fulfill his religious obligations without imposing on his students. *Amici* would consider that a win-win.

* * *

Even if Petitioner's speech were private, Respondent had ample reason to prohibit it under the *Pickering*

balancing test. That argument is well developed in Respondent's brief and need not be elaborated here. But Petitioner's argument ignores any balancing test, and makes free-speech claims that have no limit. We now turn to Petitioner's claim to essentially unlimited free speech.

II. Petitioner's Contrary Theory Is Unpersuasive.

Amici have explained in Part I what speech is properly considered private and what is properly considered governmental. *Amici* now turn to Petitioner's vision, which would have far-reaching consequences for the lives of public-school students, contradict the basis of this Court's decision in *Mergens*, 496 U.S. at 250 (plurality opinion), and seriously undermine the heretofore unquestioned school-sponsored prayer decisions in *Sch. Dist. of Abington Twp.*, 374 U.S. 203, and *Engel*, 370 U.S. 421.

A. Petitioner's Theory Has No Limits.

Throughout his brief, Petitioner tries to make his claim seem modest—he says he wants only the right to "say a brief, quiet prayer." Pet. Br. at 1. That claim is deeply inconsistent with the record, as Respondent's brief details. Resp. Br. 3-18.

But even if it were true, it would not cabin Petitioner's legal theory. If the Free Speech Clause protects, with "the most demanding form of constitutional

scrutiny," Pet. Br. 36, private prayers by a coach that are brief and quiet, then it equally protects a coach's private prayers that are long and loud. If this speech is private and protected as Petitioner claims, then "government has no power to restrict [it] because of its message, its ideas, its subject matter, or its content." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 791 (2011). A coach's prayer could attack the President or the local school board; it could encourage people to renounce their sinful ways and give their lives to Christ; it could denounce Muslims, Catholics, or atheists.

In all the cases before this one, this Court did not really need to worry about these troubling hypotheticals. When the Court relaxed some of the limits on government religious speech, it always retained the power to set limits—more permissive limits that allowed some measure of freedom to government speakers, but limits nonetheless. The Court could still draw a line excluding prayers that went too far, like those that "chastised dissenters" or "attempted lengthy disquisition on religious dogma." *Town of Greece*, 572 U.S. at 589-90; *see also Lee*, 505 U.S. at 641 (Scalia, J., dissenting) (advocating restrictions on prayers that take positions on "the divinity of Christ"). But those limits were possible only because the speech in those cases was assumed to be *government* speech. That assumption is why the Establishment Clause applied in those cases at all, and why governments or the Court could impose and enforce outer limits.

Yet if Petitioner is correct that this is fully protected *private* speech, then it is beyond the power of

either Respondent or this Court to set limits short of the few outer limits on private speech, such as defamation or incitement to imminent violence. Petitioner need not be praying at all; he could speak on any topic, even in ways that "demean[] on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground." *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017). If Petitioner is right, Respondent could not stop him from rolling out the Confederate flag on the fifty-yard line right after the game in front of all of Petitioner's players, their parents, the team's fans, and the opposing team and its fans. Respondent could not stop him from bringing his own microphone or amplifier and delivering a racist or homophobic rant, like the protected speech in *Snyder v. Phelps*, 562 U.S. 443 (2011). Petitioner cannot be right.

Petitioner's theory ignores the privilege, power, and influence that comes as a result of the teacher's position. And it goes far beyond just coaches praying at football games. Petitioner would protect prayers by teachers and coaches with their students during athletic events, before and after school—or even during the regular school day.

A classroom teacher could begin by saying that she wanted to speak to the students personally, as an individual and not as their teacher. She could say that the students were free to listen to her or to quietly ignore her. She could say that class would not begin for two minutes, or five minutes, and that students were free to wait outside in the hall (as in *Sch. Dist. of Abington Twp.*). And she could say that the school really

wouldn't want her to be saying these things to students—few introductions would be better calculated to grab student attention than this attempt to emphasize her private capacity. Petitioner's theory assumes that the privilege, power, and influence that teachers have by virtue of their position would disappear with these magic words.

Having established herself as a private speaker, the teacher could lead the students in prayer, urge them to accept Jesus as their personal Lord and Savior, or denounce the Pope as the anti-Christ. She could explain that there is no God but Allah and Muhammad is his prophet, that all religions are lies made up out of whole cloth to control the people, or deliver any other religious or anti-religious speech she chose.

If Petitioner can pray in the immediate presence of his students—students whom he is still responsible for supervising—and if he can let his students freely join in his prayer, simply by declaring himself to be speaking in his personal capacity, then so can any other teacher. And the school-sponsored prayer cases would become dead letters in many school districts. Petitioner's argument ignores this Court's foundational decisions that protect the religious liberty of students and their parents by prohibiting government-sponsored prayer in schools.

Some teachers would use their "private" speech to promote their religion in their classrooms, in violation of the Establishment Clause. Others would use their "private" speech to promote other things that violated

school policy, whether critical race theory, or transgenderism, or hostility to transgender students, or partisan politics on either side. And if it could be cast as private speech notwithstanding the immediate presence of students, the school would have almost no ability to control it.

If Petitioner's theory is right, then a school's only hope of limiting inappropriate speech lies in the compelling-interest test. But compelling government interests in censoring private speech on the basis of content are extraordinarily difficult to show, and have largely coalesced into a few defined exceptions, such as true threats and incitement of imminent violence.

Petitioner's theory would lead to rampant violations of the Establishment Clause. To avoid those violations, the Court has to recognize that speech in the presence of one's students, while on duty, cannot be truly private speech.

Petitioner emphasizes his version of the facts of this case, but his argument is not so limited. "While Kennedy used prayer or religious content in some [earlier] activities"—namely his halftime talks, pre-game speeches, and post-game speeches, all addressed to students—he claims that "that is not what this case is about." Pet. Br. at 27. But that *is* what this case is about, for Petitioner cannot explain why these things could be forbidden if his prayer on the fifty-yard line cannot be.

Each of Petitioner's attempts to minimize the breadth of his claim collapses on examination.

Petitioner says his prayers were private because they did not interfere with "the tasks he was paid to perform." Pet. Br. at 26. But that is no real limit. A teacher can pray with her students while still doing a perfect job teaching them reading, writing, and arithmetic—indeed, that happens all the time in private religious schools.

At another point, Petitioner says his prayers were private because Respondent did not want him to pray. *See* Pet. Br. at 29 (arguing that the fact that "[t]he district took issue" with Kennedy's actions "confirms that Kennedy's religious exercise was not the district's own speech"). But this is the starting premise in every *Pickering* case, and it too offers no limit. Indeed, it licenses anarchy. A rogue teacher could now say literally anything about religion (or anything else); any school district that tries to stop him would thereby render his speech private and beyond the school's control.

In an earlier iteration of this case, Justice Alito suggested that courts look to whether Petitioner would have been allowed to engage "in some other private activity at the time"—Petitioner's prayers should be considered private speech, he reasoned, if they "took place at a time when it would have been permissible for him to engage briefly in other private conduct, say, calling home or making a reservation for dinner." *Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 635-36 (2019) (Alito, J., respecting the denial of certiorari).

This logic draws on some powerful intuitions, but it cannot be maintained. It relies on the principle of

content neutrality: if Petitioner could order dinner, he could pray. But that principle applies only to private speech. As applied to private speech, content neutrality is a fundamental safeguard.

The Establishment Clause is a content-based limit—indeed, a viewpoint-based limit—on government speech. The Constitution restricts government speech about religion to better protect private choice and private commitments about religion—to insulate those choices and commitments from government influence and pressure.

The First Amendment requires the government to be content-neutral when it regulates or otherwise deals with private speech—government cannot treat private religious speech better than or worse than other high-value private speech.[8] *See*, *e.g.*, *Rosenberger*, 515 U.S. at 828 ("In the realm of private speech or expression, government regulation may not favor one speaker over another."); *Capitol Square Review & Advisory Bd.*, 515 U.S. at 766 (Scalia, J., plurality opinion) ("Of course, giving sectarian religious speech preferential [treatment] would violate the Establishment Clause as well as the Free Speech Clause, since it would involve content discrimination."); *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 653 (1981) ("nonreligious organizations seeking support for their activities are entitled to rights equal to those

[8] Some private speech, such as sexually explicit speech, gets lower levels of protection. *See*, *e.g.*, *Young v. Am. Mini Theatres, Inc.*, 477 U.S. 50, 70 (1976) (plurality opinion).

of religious groups to enter a public forum and spread their views").

But the First Amendment does not require the government to be content neutral with respect to *its own* speech. Government can and regularly does take positions on contested secular issues. Even in dealing with students in public schools, government can and does try to instill patriotism, respect for law, tolerance for individual difference, and other widely shared values that may not be unanimously shared. That is, public schools teach certain *viewpoints*.

And government speech is also subject to formal and informal viewpoint restrictions. Public schools do not try to install loyalty to a political party, because parents supporting other parties wouldn't stand for it, and because doing so on a large scale would threaten free political competition and free government in the next generation. *Cf. Bd. of Educ. v. Pico*, 457 U.S. 853, 870-71 (1982) (public school's "discretion may not be exercised in a narrowly partisan or political manner") (plurality opinion). Whether or not legally enforceable, this is a viewpoint restriction on government speech.

And as already noted, the Establishment Clause is itself a viewpoint-based restriction on government speech. When this Court says that "government speech must comport with the Establishment Clause," *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009), the Court is saying that the Establishment Clause regulates what government agents can say. And that regulation is content- and viewpoint-based.

Thus, the invocation of content neutrality simply returns us to where we started: Petitioner's prayers are impermissible if considered governmental, and protected if considered private. And crucially, content neutrality gives us no way to distinguish between what is private and what is governmental. Content neutrality comes into play only *after* we have decided what is private and what is governmental; it cannot help us draw that line.

One sees the problem well enough if one flips Justice Alito's point around. Justice Alito suggested that Petitioner's prayers should be considered private if Petitioner could have used that time to engage in other kinds of private speech. But if Petitioner could also have taken that time to engage in some official duty, that same logic would suggest that Petitioner's prayers are really governmental. Neither argument works.

Under this theory, a lot of speech could be classified as both private and governmental at the same time, or as either private or governmental. After all, there are a lot of times throughout the school day where teachers and coaches could do their jobs or take a short break from those jobs. If that flexibility makes it all private speech, then the Establishment Clause's restraints on governmental promotion of religion will fall to the ground like sand through open fingers.

Instead of checking their phone, a teacher could instead take that time to explain why Mormons are an evil non-Christian cult. Instead of grabbing a cup of coffee, teachers could lead their classes in prayer.

Instead of standing around in the hallways between classes, teachers could pass out Bibles. These fears are not exaggerated hypotheticals. This Court and its precedents are all that keep the country from these kinds of scenarios.[9] By enabling teachers and coaches to toggle back and forth between their private and governmental roles, Petitioner's argument would make the Establishment Clause an empty shell.

B. Petitioner's Claims Are Inconsistent with a Broad and Longstanding Consensus About Religion in Public Schools.

Petitioner not only mischaracterizes the facts when he claims to want only to pray briefly and quietly in a private capacity. His claims also rest on a false portrayal of the law as hostile toward religion in the public schools. In fact, much private religious activity occurs in and about public schools within long-established constitutional bounds. In this case, for instance, Petitioner admits that he was offered an

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[9] *See*, *e.g.*, *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 810 (5th Cir. 1999) (teacher advertised Baptist revival meeting in classroom, and gave "a diatribe about the non-Christian, cult-like nature of Mormonism, and its general evils"), *aff'd*, 530 U.S. 290 (2000); *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981) (teachers authorized to volunteer to lead class in prayer if no student volunteered to do so), *aff'd mem.*, 455 U.S. 913 (1982); *M.B. ex rel. Bedi v. Rankin Cty. Sch. Dist*., No. 3:13CV241-CWR-FKB, 2015 WL 5023115, at *1-2 (S.D. Miss. July 10, 2015) (school conducted "Christian assemblies" that proselytized for Christianity, and principal ordered teachers to assist with distribution of Bibles).

accommodation that would allow him to pray after games away from his players. Nor is there any dispute that football players are free to pray on their own, individually or in a group. Such religious expression is common and well-established.

Beginning in the 1990s, a broad array of religious and civil-liberties groups negotiated guidelines concerning religion in the public schools to help educate parents, students, and public school officials. These guidelines were drafted as good-faith efforts among diverse groups to clarify the law and reduce conflicts. They recognized private rights to prayer and religious expression, and they recognized limitations on religious expression by the school and its employees.

In 1995, this coalition produced *Religion in the Public Schools: Joint Statement of Current Law*, which was endorsed by dozens of organizations from diverse faith perspectives including Muslims, Jews, Humanists, liberal and conservative Christians, and secular civil-liberties organizations.[10] More specific joint statements were published and endorsed in the following decades and have been used to train school teachers and administrators to respect religious liberty and avoid conflicts throughout the country.

These privately negotiated guidelines were substantially incorporated into presidential guidelines and guidelines from the Department of Education.

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[10] *See Religion in the Public Schools: A Joint Statement of Current Law* (1995), https://bjconline.org/wp-content/uploads/2014/05/Religion-in-public-schools-joint-statement.pdf.

This consensus recognizes the distinct roles of students and teachers. The dichotomy, which is solidly grounded in this Court's decisions, is absolutely necessary to protect religious liberty in the public schools. It reflects the understanding that teachers are not merely private citizens that happen to be on school grounds. Teachers, coaches, and school administrators are agents of the state. This understanding has continued under the Clinton, Bush, Obama, and Trump Administrations. It has not been changed by the Biden Administration, and there is no reason to think that it will be.

Specifically, since 1995, the Department of Education has provided guidance at least four times on religious expression in public schools.[11] Each version differentiates between students and teachers and limits a teacher's religious exercise in order to protect the religious freedom of students. For example, see the most recent Trump Guidance: "Teachers, however, may

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[11] U.S. Department of Education, *Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools* (Jan. 21, 2020), https://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html ("Trump Guidance"); U.S. Department of Education, *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools* (Feb. 7, 2003), https://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance-2003.html ("Bush Guidance"); U.S. Department of Education, *Guidelines on Religious Expression in Public Schools* (June 1998), https://files.eric.ed.gov/fulltext/ED416591.pdf ("Clinton II Guidance"); Office of the Federal Register, National Archives and Records Administration, *Memorandum on Religious Expression in Public Schools*, https://www.govinfo.gov/content/pkg/PPP-1995-book2/pdf/PPP-1995-book2-doc-pg1083.pdf (July 12, 1995) ("Clinton Guidance").

take part in religious activities where the overall context makes clear that they are not participating in their official capacities . . . Before school or during lunch, teachers may engage with other teachers for prayer. . . ."[12] Certainly here, "the overall context" does not "make[ ] clear" that Petitioner was not still acting in his official capacity.

And see the Clinton Guidance: "Teachers and school administrators, when acting in those capacities, are representatives of the state and are prohibited by the establishment clause from soliciting or encouraging religious activity, and from participating in such activity with students."[13] Once the students began to join Petitioner in prayer, he was "participating in such activity with students."

In many of the privately endorsed joint statements that have long been used to teach about religion in the public schools, consistent with Supreme Court standards, the guidance is more explicit. For example, in *A Teacher's Guide to Religion in the Public Schools*, the signing organizations explained that teachers do not have the right to pray with or in the presence of students on school grounds or at school functions. These guidelines have been widely endorsed by education groups, such as National Association of Secondary School Principals and National School Board Association, and by religious groups, such as Christian Legal

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[12] Trump Guidance, *supra* note 10.

[13] Clinton Guidance and Clinton Guidance II, *supra* note 10.

Society, National Association of Evangelicals, and Union of Orthodox Jewish Congregations in America.[14]

C. Petitioner's Theory Is at Odds with Both Congress's View and This Court's View of the Equal Access Act.

Petitioner's argument also runs counter to the considered judgments of both Congress and this Court with respect to the Equal Access Act, 20 U.S.C. §§ 4071-4074. Congress passed the Act in 1984, requiring secondary schools to treat student religious groups on equal terms with other student groups. Congress rejected the idea that a private *student* group's religious speech is attributable to the school, and this Court agreed with that judgment when it interpreted the Act broadly and then upheld it, explaining that "schools do not endorse everything they fail to censor." *Mergens*, 496 U.S. at 250 (plurality opinion). Petitioner repeatedly quotes this phrase as if *Mergens* supports his claims. *See* Pet. Br. at 2, 38, 44. But the truth is that *Mergens* undermines those claims.[15]

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[14] *See A Teacher's Guide to Religion in the Public Schools*, *reprinted in* FINDING COMMON GROUND: A FIRST AMENDMENT GUIDE TO RELIGION AND PUBLIC EDUCATION (Charles C. Haynes & Oliver Thomas eds., 2007), https://www.freedomforuminstitute.org/wp-content/uploads/2016/10/FCGcomplete.pdf.

[15] The Establishment Clause section of the *Mergens* opinion is a plurality opinion by Justice O'Connor on behalf of herself, Chief Justice Rehnquist, and Justices White and Blackmun. Justices Kennedy and Scalia, from one direction, and Justices Marshall and Blackmun from the other, concurred separately. Neither concurring opinion took any explicit issue with the points in the

The Equal Access Act draws precisely the line that *amici* propose here. The Act distinguishes private actors (*students* and *student groups*) from governmental actors (*the school* and *its agents*). Most crucially, the Equal Access Act puts school employees—like teachers and coaches—on the government side of the line.

The Act does this explicitly, and does it twice. First, the Act says that there can be "no sponsorship of the meeting by the school, the government, *or its agents or employees*." 20 U.S.C. § 4071(c)(2) (emphasis added). And second, it says that "employees or agents of the school or government [can be] present at religious meetings only in a *nonparticipatory* capacity." *Id.* § 4071(c)(3) (emphasis added).

Mergens understood and relied on these restrictions. "[T]he Act expressly limits participation by school officials at meetings of student religious groups." 496 U.S. at 251 (plurality opinion). The Court elaborated: "[T]he Act prohibits school 'sponsorship' of any religious meetings, which means that school officials may not promote, lead, or participate in any such meeting." *Id*. at 253.[16]

Moreover, *Mergens* did not see these limitations as bad things but as good things. It was on the basis of

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plurality opinion cited here. All the passages from *Mergens* that Petitioner cites are also from the plurality opinion.

[16] To be sure, the Act permits "the assignment of a teacher, administrator, or other school employee to the meeting for custodial purposes," but only "to ensure order and good behavior." *Mergens*, 496 U.S. at 253 (plurality opinion).

these limitations that the Court upheld the Act against Establishment Clause challenge—it was precisely because "no school officials actively participate" that there was "little if any risk of official state endorsement or coercion" despite the very real "possibility of student peer pressure." *Id*. at 251.

Petitioner's theory is thus at odds with Congress's decision in the Equal Access Act and this Court's decision in *Mergens*, as well as this Court's Establishment Clause decisions in the school-sponsored prayer and Bible-reading cases. If Petitioner has a constitutional right to pray with students at the fifty-yard line right after the game ends, then Petitioner would have a constitutional right to pray with those same students before or after school, contrary to the restrictions in the Equal Access Act. And if Petitioner has a right to pray with students immediately after the game and before and after school, he has a right to pray with students in his private capacity during the school day, thus creating an easy way around this Court's school-sponsored prayer cases.

Petitioner's theory would take a wrecking ball to Establishment Clause protections in public schools. This Court should reject it.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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