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 BREMERTON COMMUNITY MEMBERS—BHS FOOTBALL TEAM ALUMNUS, PARENTS, COMMUNITY LEADERS, AND EDUCATORS—AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici—a group of eight parents, athletes, community leaders, and taxpayers in Bremerton—write to provide context about how Petitioner placed his rights above their own, in a public forum, at the heart of their community. Each Friday evening in the fall, these individuals gathered under the bright lights of the Bremerton High School football field to champion their beloved team, echo the fight songs of their cheerleaders, applaud the marching band's half-time performance, and support the youth who make up their community's future. Though not the reigning state champions, the Bremerton football team was a symbol of the comradery that once lived in their small city, a community united in their differences. Where Bremerton High School is the arena, its football field is the stage.

Amici understand that a community is an ensemble cast; not a one man show. It is a troupe of folks from all walks of life, brought together by their own unique faiths and beliefs. When Petitioner chose to center his own rights at mid-field of this once-celebrated community gathering, *amici's* community united quickly became a community divided.

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[1] The parties have consented to the filing of this brief. Consistent with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission.

Football Player ("F.P.")[2] played on Bremerton High's team and "[f]or four years [he] knelt for [Petitioner] in solidarity as he prayed so there would be no objection to [him] playing football."[3] He shares the story of his senior year homecoming game that Petitioner turned into a media circus: "I felt attention was shifted from our football team and focused towards Kennedy's prayer circle. To this day, I don't remember who we played or if we even won[,] . . . all I remember is the aftermath of that game." F.P. recalls the sound of the horn ending the game and, before the two teams had the opportunity to shake hands, over 500 people "storm[ing] the football field . . . from both sides, hopping the fences and rushing to the field to be close to Kennedy before he started his prayer. . . . [He] felt so uncomfortable and unsafe." Petitioner's group prayers did not only deprive F.P. of his free exercise rights, but of his love for football, lasting friendships with his teammates, and the respect he otherwise earned from his coaches.

Retired public servant **Jane Rebelowski** spent years interacting with the Bremerton community as a public inspector and as an organizer. She watched as her usually quiet street behind the high school filled with outsiders in 2015, bringing turmoil to her

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[2] For reasons made clear below, *see infra* Sections I.C, II, F.P. wishes to remain anonymous.

[3] The quoted statements by *amici* were supplied to undersigned counsel for preparation of this brief and are contained in interviews and statements provided by *amici*, on file with *amici's* counsel of record.

community and to the school her grandson attended. She has lived—and paid taxes—in Bremerton for over twenty years and is devastated that the Bremerton School District ("the District") has had to divert its already-scarce resources to fight something that she believes was so clearly in violation of the law.

Paul Peterson is an engineer that worked alongside Petitioner in the shipyard for nearly fifteen years. Despite their good relationship, Mr. Peterson felt "compelled to speak out as a parent of children who attended the Bremerton public schools in the past, as a grandparent whose grandchildren may attend in the future, and as a concerned member and resident of the community." Mr. Peterson attended countless Bremerton High football games, singing the fight song along with his children in the marching band and cheering for his son that played football under Petitioner's watch. In his perspective, when parents enroll their children in Bremerton public schools, they "entrust the care, education, mentoring, and nurturing of [them] to the employees of the public schools," but Petitioner—"a man of high integrity" co-opted by outside interests—broke that trust.

As a Bremerton High School employee and former "band mom," newly-elected community leader **Jennifer Chamberlin** spent many Friday nights collecting tickets at the stadium gates and watching students pour into the stands of her hometown's field, unaware that their once safe city would soon become embroiled in controversy: "[My child] just wanted to be in marching band and have a normal year, but it did not shape

out to be that." Ms. Chamberlin's story sheds light on the vitriol and hate suffered by anyone who spoke out in favor of the District.

Amber Kost, a high school teacher whose son was to enter Bremerton High School the year following Petitioner's actions, described how she has "tried very hard to keep [her] teaching career and [her] connections with" her chosen belief system "separate for fear of retribution." She is an organizer of two social support organizations: the Kitsap Atheists and Agnostics and Kitsap County Skeptics. "It has been grating to see [Kennedy] openly promoting Christianity . . . when I don't feel I have the same rights."[4]

Rabbi Sarah Newmark—a former educator—was the leader of the local synagogue when the facts of this case unfolded. She explains how Petitioner's religiously-motivated political stance infringed on community members' right to free exercise: "I always thought America was where we escaped from forced prayer." She discussed how Petitioner's actions exacerbated the "othering" her Jewish congregants had experienced in Bremerton.

Wife of a retired U.S. Navy Chief, **Gayla Hight-Breach** moved her family back to Bremerton twelve years ago because it was a diverse and accepting community where she wanted to raise her four kids. With a child attending Bremerton High School at the time,

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[4] *Amici* submit this brief in their capacities as private citizens. A mention of an *Amicus*'s employer does not constitute the employer's endorsement of the brief or any portion of its content.

she had a front row seat to Petitioner's "predatory" actions, and she was "appalled" by his efforts to convert high-school football into a religiously political platform. With her grandchild soon entering the District, Ms. Hight-Breach feels that she has too great a stake in the outcome of this case to sit idly by.

Janice McLemore is a 45-year resident of Bremerton, lifelong Methodist and minister's wife, and mother of two who believes that part of being a Christian is respecting who people are and what they believe, not forcing one's religion on others. Her 35 years as a teacher and experience in Bremerton schools informs her opinion that the District did the right thing to "look after their students."

This community has stood by and watched as Petitioner's misguided ventures caused a rift in the once common ground upon which they stood. Still, they remain united in a shared interest to present their perspectives to the Court—despite the considerable risk of harassment for doing so—so that it may better understand how Petitioner's purported First Amendment rights have stripped them of their own.

SUMMARY OF THE ARGUMENT

Amici understand that the District's actions gracefully balanced the Free Exercise and Establishment Clauses. *See Locke v. Davey*, 540 U.S. 712, 719–20 (2004). Together, the First Amendment is not just about one man's right to practice his beliefs; rather, it

is the protection of a community—and society as a whole—to be free from the forced adaptation of one man's personal views. The notion that "Congress shall make no law . . . prohibiting the free exercise" of religion, or "respecting an establishment" of the same is designed to afford *all* citizens—not one man—the right to believe and practice as they deem fit. U.S. Const. amend. I.

Bremerton School District's actions to protect the community's interests were born from the concern that Petitioner's prayer—with a team of football players at the 50-yard line or in the school's locker room—would be viewed as an endorsement of Petitioner's private behavior. This was a valid concern: "The school's name is [ ] written in large print across the field and on banners and flags. The crowd . . . include[d] many who display the school colors and insignia on their school T-shirts, jackets, or hats and who may also be waving signs displaying the school name." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000). In such a situation, "[r]egardless of the listener's support for, or objection to" the prayer, a reasonable observer would "unquestionably perceive the inevitable [ ] prayer as stamped with her school's seal of approval." *Id.* at 308; *see also Wallace v. Jaffree*, 472 U.S. 38, 78 (1985) (O'Connor, J., concurring) ("[I]t also seems likely that the message actually conveyed to objective observers . . . is approval of the child who selects prayer over other alternatives. . . ."). Petitioner, shrouded in blue and white with a "Knights" emblem on his chest, standing on the school's logo for all to see, carelessly infringed on the

impressionable minds of Bremerton's youth for his own gain. In doing so, he stole from their parents the right to raise their children in a way that comports with their own belief systems.

Amici's accounts make clear that Petitioner's claim that his prayer was a private act is one far removed from the story's true setting. As a player, F.P. "always thought [Petitioner's] purpose on the team was to offer religious support [to the team] before and after games." Indeed, Petitioner was in his role as an employee of the District at all times that his prayers occurred. F.P. explains that the Bremerton coaches did not go home immediately after the games ended, and the players were not free to leave at that point. After the final whistle, Petitioner would "hold up a helmet to rally students to mid-field," and players were directed to attend "the coach's prayer thing" at midfield, then proceed to the locker room as a team before they could go home. Until every player left, Petitioner was liable to ensuring all team members' rights were respected. It was on this public stage, surrounded by players that "always . . . did as [they] were told," that Petitioner carefully chose to pray. To the public, there was no obvious distinction between leading a team in prayer and private conduct. And to the players, there was no obvious choice. As F.P. explains, participation in Petitioner's prayer was "expected."

By seizing the field for his own private speech, Petitioner and his cortège infringed upon the free exercise rights of the Bremerton Community, creating outcasts of anyone who did not give him their

unwavering support. *Amici* address this Court out of concern for their own personal freedom of conscience and for their youths' right to choose their own path without fear of being ostracized. Because Bremerton is a proud Navy town, it is the home of "families moving in and out from all over the world, it is a community of all different faiths." But despite differences in beliefs, *Amici* are representative of a community that is united in celebrating their youth and protecting their right to experience the joy of being young and curious as they develop their sense of self. That right is squandered when public-school mentors, like Petitioner, impose their own faith onto students. Indeed, our uniquely American system "secures the right to proselytize religious, political, and ideological causes [but] must also guarantee the concomitant right to decline to foster such concepts. [These are] complementary components of the broader concept of individual freedom of mind." *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

The very divisiveness that Petitioner has created in this once tranquil community is precisely what the First Amendment was designed to prevent. By diverting the focus from the football players, cheerleaders, and band members to himself, Petitioner cast himself as the lead actor in a play that was never meant to be about him. Fueled by the current political landscape, Petitioner's actions have shifted limited public resources and attention from the students of Bremerton to his own agenda. But the First Amendment does not protect a cast of one; it protects the company of all.

ARGUMENT

I. The Bremerton High School Football Field Is the Stage Where the Establishment and Free Exercise Clauses Meet.

The public setting in which Petitioner chose to pray is a forum prohibited by the First Amendment. "The constitutional command will not permit the District 'to exact religious conformity from a student as the price' of joining her classmates at a varsity football game." *Santa Fe*, 530 U.S. at 312. As this Court has recognized, there is "room for play in the joints" between the Free Exercise Clause and the Establishment Clause that "permit[s] religious exercise to exist without sponsorship and without interference." *Walz v. Tax Comm'n of City of N.Y.*, 397 U.S. 664, 669 (1970). In this case, the District's actions were not only appropriate, but they were necessary to protect the free exercise rights of the community members who were forced to view—or participate in—Petitioner's performance.

A. Petitioner's Soliloquy Placed His Own Free Exercise Rights Above Those of the Community.

Amici's stories vindicate the District's decision to prevent Petitioner from using the public-school stage as a scene to infringe on the free exercise rights of the community members. The First Amendment does not protect the rights of one person at the peril of a community. *See Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 226 (1963) ("While the Free Exercise

Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs.").

For example, it is the historical context of the Jewish people's oppression that illustrates why Rabbi Newmark felt that Petitioner's prayer in the center of the football field infringed on her and her congregants' free exercise rights:

> Because of the long history of being forced to "convert or die" in the Jewish faith, the type of proselytizing Kennedy engaged in was especially triggering for us. Jews tend to recoil from Christian prayer in the public sphere partly because when we refrain from taking part, we fear an antisemitic backlash. In fact, many of us refuse to wear our sacred *Magen David* (מָגֵן דָּוִד, "Shield of David") because it no longer feels safe to do so.

When Rabbi Newmark sees group-led prayer in public spaces, she deeply fears it could result in the forced compliance of Bremerton's Jewish community members and takes exception with what she views as "Christians acting as though they have a corner on the religious market." Petitioner's spectacle was also provocative to *amici* of faith because it trivialized the importance of prayer and its sacred relationship with God.

Members of the Christian faith were similarly dismayed by Petitioner's actions. The Kitsap Interfaith Network—of which Rabbi Newmark was a member at

the time of Petitioner's actions—includes spiritual leaders from, among other faith groups, Methodist Churches, the Church of Latter-Day Saints, the Episcopalian Church, and the Unitarian Church, as well as a local mosque. Many of the Christian clergy in Bremerton disagreed with Kennedy's actions and believed it could lead to their own marginalization. According to Ms. McLemore, the Methodist faith, in accordance with Matthew 6:6 of the Bible, requires non-demonstrative prayer. Pressuring students to pray publicly on the field violated their own belief that Christians should not perform "acts of righteousness" in public, and should not pray "like the hypocrites, for they love to pray standing [] and on the street corners to be seen by men."

Petitioner's conduct "also disadvantage[d] adherents of religions that do not worship a Supreme Being." *Welsh v. United States*, 398 U.S. 333, 357–58 (1970) (Harlan, J., concurring). For example, although F.P. understood that prayer was part of some of his teammates' lives, it was not a part of his. Yet he was forced to sit with his discomfort and kneel in prayer before and after every game.

Similarly, non-religious *amici* parents are concerned about the "slippery slope"—or "mudslide"—that may occur if this Court were to allow Petitioner to lead prayer on the 50-yard line. Ms. Chamberlin discussed how the forced viewing of open prayer was disrespectful of her child's freedom to develop their own faith. Like many others, her child was a member of the band and required to attend every football game. For Ms.

Hight-Breach, despite baptizing her children in the Lutheran church to honor her grandmother, she did not intend to raise her children in a religious way. But as high school students during Petitioner's prayer services, they were subject to the pressure of his actions. "Everyone should be respected for their beliefs and our children need to be protected from proselytizing." Indeed, Petitioner's prayer encroached on their right, as parents, to direct their child's religious upbringing. *See Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535–36 (1925).

"It is cardinal with [this Court] that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (citation omitted). *Amici* trusted Bremerton schools to provide their children with critical-thinking skills, not to "indoctrinate [their] children into any religion or religious practice." *Cf. Edwards v. Aguillard*, 482 U.S. 578, 583–84 (1987) ("Families entrust public schools with the education of their children, but condition their trust on the understanding that [they] will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family."). While acknowledging Petitioner's rights, Mr. Peterson was disturbed that Petitioner's personal religious practice "neglected concern for the belief or non-belief" of students and their parents. As a parent of students in the District, he said that he and "[m]any [other] parents would be uncomfortable with the knowledge someone was leading their children in

prayers or proselytizing their children into a religion," particularly because this "team activity" was occurring "without the consent or knowledge of the parents of the students."

The educators among *amici* understand how to respect the due process and free exercise rights of students and their families while maintaining their own religious beliefs. Ms. McLemore's lifelong "goal has been to see God in all people and to share the love of God with others," but she understands that praying out loud "is not to be done with students in public schools supported by taxpayers." *Cf. People of State of Ill. ex rel. McCollum v. Bd. of Educ. of Sch. Dist. No. 71, Champaign Cnty., Ill.*, 333 U.S. 203, 217 (1948). She would "take moments of prayer all the time" in the hall or at her desk, but "it did not need to be out loud when students were there." She explained that colleagues also chose to say grace before meals, but in appropriate ways that went unnoticed by students. Ms. Kost similarly recognizes the influence she has as an educator:

> As a teacher now in a full-time, contracted position, I recognize the kind of power that I have over students. . . . I am careful never to impose my non-religious beliefs on students and I'm careful to make sure non-religious students don't degrade or diminish the faith of religious ones. It is precisely my influence over my students as a teacher that make me extra careful.

B. Petitioner's Prayer Crossed the Line to Coerce and Indoctrinate an Audience of Impressionable Youth.

Amici support the District's decision to strike a balance between Petitioner's personal religious rights and the rights of the Bremerton community to ensure students are free in their own religious exercise. As Paul Peterson described:

> I believe that the Bremerton School District did right by Mr. Kennedy to offer a private opportunity for private reflection in prayer, outside of the leadership position for which he was being fiscally compensated. It has always been the stated goal of the school district to ensure a safe and welcoming place for all students, and I believe that their action reflected their commitment to these principles, toward the betterment of the Bremerton community as a whole.

Likewise, F.P.'s story highlights the Establishment Clause's goal of protecting the free exercise rights of youth. "[T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in . . . public schools." *Lee v. Weisman*, 505 U.S. 577, 592 (1992) (citations omitted). Prayer associated with public-school activity "carr[ies] a particular risk of indirect coercion," and F.P.'s narrative is emblematic of "the inspiration for the Establishment Clause, the lesson that in the hands of government what might begin as a tolerant expression of religious views may

end in a policy to indoctrinate and coerce." *Id.* at 591–92.

> I always listened and did as I was told. I wanted to play football and treated [Petitioner's] prayer time as any other order from a coach such as to exercise, attend study hall, or execute a play. In respect[,] I always took a knee but never bowed my head. For four years I knelt for [Petitioner] in solidarity as he prayed so there would be no objection to me playing football.

F.P. described his experience in the days following the chaos that unfolded after Petitioner's homecoming game prayer demonstration: "I felt overwhelmed, I missed a day of school and football practice the following week. I was punished, not allowed to play a quarter in the next game despite being a starter on all sides of the ball." Looking back, F.P. does not "think of [his] time on the Bremerton High Football as a fond experience." F.P. abided by Petitioner's prayer decree because F.P. "was a leader, not a person to argue with authority[.]" *Cf. Lee*, 505 U.S. at 590 ("[S]chool officials['] . . . effort to monitor prayer will be perceived by the students as inducing a participation they might otherwise reject."). F.P.'s story demonstrates how Petitioner's public pressure, however "subtle and indirect" as Petitioner may claim, "can be as real as any overt compulsion" for an adolescent. *Id.* at 593.

As F.P. confirms, there was no freedom of choice for the team members: "The only time a choice was given on the matter of praying with . . . Kennedy at the end

of football games was at a team meeting Thursday the day before the game where the media attended and fans stormed the field." Prior to that conversation, the "prayer circle . . . was something that was expected." Petitioner even relied on students to recruit others: "Kennedy . . . encouraged players on our team to ask the other teams' coaches and players to join us [in prayer]."

Like F.P., many students on the team had devoted significant time, energy, and money over the course of their lives to play varsity football, and they intended to use the sport as a launching pad for a college scholarship. *See also Lee*, 505 U.S. at 594–95 ("Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself . . . for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years."). F.P. believed he had to make a choice between maintaining his rank as a starting player and keeping alive his chances of college recruitment or bowing out of prayer. Indeed, when religious adherence becomes "relevant to a person's standing in the . . . community," like F.P., "the religious liberty protected by" the First Amendment "is infringed." *Wallace*, 472 U.S. at 69 (O'Connor, J., concurring).

The parents and educators among *amici* share F.P.'s concerns for their own children and grandchildren. "To assert that high school students do not feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is

American high school football is 'formalistic in the extreme.'" *Santa Fe*, 530 U.S. at 311 (citing *Lee*, 505 U.S. at 595); *see also id.* at 312 ("For many [students], the choice between attending these games and avoiding personally offensive religious rituals is in no practical sense an easy one. The Constitution, moreover, demands that the school may not force this difficult choice upon these students."). They, too, understand that when students are in uniform, either in a huddle in the locker room or with hundreds of community members watching from the sidelines, they cannot be expected to opt out of Petitioner's worship. As Mr. Peterson explained:

> Mr. Kennedy's post-game prayers, replete with Christian religious overtones, were delivered by a leader, mentor, and coach to whom the children looked to for advice, training, and counsel. . . . [A]s a parent I believe that these prayers would be viewed by the students as coercive in nature, regardless of whether they were explicitly coerced to participate, as any players who chose not to attend would be looked upon by their teammates (and potentially by the coaches themselves) as non-team players.

Ms. Kost verified that "[n]on-religious students felt compelled to join in prayer on the field after games. . . . This is simply wrong. No student should feel pressured or coerced to join in worship with a team. . . . [I]t should never be the goal of educators to promote conformity of belief."

Several *amici* explained that while, perhaps, an adult would have been more comfortable declining to participate in the highly public team prayer, students who are "easily susceptible to shame," would not. *See Lee*, 550 U.S. at 593. Ms. McLemore understands from her 35 years of teaching that

> young people want to respect the adults in their lives and follow their examples. They also want to be accepted by their peers. When an adult pushes a student to do something, such as praying in front of a grandstand of people on their school football field while in school uniforms, it shames and embarrasses those who do not want to participate

In the end, F.P. was persecuted for mustering the courage not to conform. The coaches were unfriendly towards him and only "tolerated [him] because [he] was a good player and had the respect of [his] team." "When a person is required to submit to some religious rite or instruction or is deprived or threatened with deprivation of his freedom for resisting such unconstitutional requirement[,] [w]e may then set him free or enjoin his prosecution." *McCollum*, 333 U.S. at 232 (Jackson, J., concurring). A ruling in Petitioner's favor would enjoin the prosecution of F.P. for his refusal to "perform a compulsory ritual which offended his convictions." *Id.* As Mr. Peterson stated:

> The students of our public schools should be made to feel safe as individuals, without any fear of coercion or rejection within the greater societal groups to which they belong. I believe

> that Mr. Kennedy's practice of post-game prayer neglected concern for the belief or non-belief of all students. . . . People of many faiths, and no faith at all, live in the Bremerton community and send their children to the Bremerton public schools; the schools must be welcoming and inclusive to all.

Six years later, F.P. remains traumatized and believes additional players have declined to come forward with their stories because, like him, "they would rather forget about that time of their life." "Coach Kennedy has crippled [his] love for the sport of football." Petitioner's conduct has also deprived F.P. of the lifelong friendships team sports are designed to encourage: "My relationship with [my former] teammate[s] . . . is forever fractured[.] [W]hatever sense of legacy, love, pride, and enjoyment we felt playing together is left behind in Joe K. and his tireless tirade to prove he is right in continuing to pray among children."

C. Petitioner's Self-Interest Demoted Community Members and Students from Stars to Understudies.

A significant concern of all *amici* is that Petitioner's evangelizing—and this Court's possible endorsement of it—relegates many community members to an underclass. *Cf.* Sigmund Freud, *Group Psychology and the Analysis of the Ego* 51 (1922) ("[A] religion, even if it calls itself the religion of love, must be hard and unloving to those who do not belong to it."). James Madison—in drafting the First Amendment—understood

that coercive state support of religion "degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority." James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785); *see also Lee*, 505 U.S. at 622 (Souter, J., concurring) ("Madison saw that . . . an official endorsement of religion can impair religious liberty.").

This sense of "otherness" parallels the religious persecution enshrined in our nation's history. Rabbi Newmark recalls one emblematic incident of being a religious minority that "paints the backdrop of why her community is more sensitive" to the risks of othering created by Petitioner:

> A congregant told me that he took his kids to a local family antique auction. They were greeted by a huge Nazi banner behind the auction stand and realized the items being sold were Nazi and Confederate memorabilia. . . . His twelve-year old shared what happened in our [religion class]. I then suspended the lesson that was planned for that day to have a discussion about antisemitism. I was shocked to learn that *all* the students had experienced antisemitism in Bremerton. Students in elementary and middle school had pennies thrown at them while walking down the hall, others said they had been yelled at in school for "killing Jesus," and were called overt slurs. Even a kindergarten student said she had a friend in class tell her that

> his mom said he couldn't play with her because she was Jewish.

This experience is why Rabbi Newmark finds it "alarming that this case has been accepted by the Supreme Court," because she is "concerned that we're headed backwards on the progress that has been made on the boundaries between church and state[.]" From her perspective, "if a Jewish student were to choose not to participate in prayer, with the current political climate, he could be attacked." There is a long history of Jewish parents in America instructing their children to participate in Christian prayer in publicly-funded settings—because declining to participate creates the risk of being cast as a second-class citizen or ostracized by the majority. Moreover, with the existence of social media, "there is now so many more ways to ostracize a child."

Because of students' susceptibility to peer pressure, there is a likelihood of being "othered" if they decline to participate in the activity of a majority, chilling their free exercise rights. Ms. Kost and other members of her social support groups also had concerns about the ostracization of their own children if they spoke out against Petitioner's group prayer:

> As a matter of course, I was extremely worried that if I were seen on television or on the internet, that my likeness would be connected with my son who was entering Bremerton High School the next year, and he would subsequently be bullied the way that [other] member's children and other atheist students

> at Bremerton High School were bullied. The vitriol seen on [comments on] the Kitsap Sun Facebook page as well as their website was frightening.

Indeed, "the thought of . . . threats being communicated to [her] son or him being danger was unbearable. [She] did not feel that [she] could adequately defend [her] strong belief in the separation of church and state as long as [her] job or [her] son were in danger." *See Lee*, 550 U.S. at 597–98 ("We know too that sometimes to endure social isolation or even anger may be the price of conscience or nonconformity."). As Mr. Peterson shared, "The biggest nightmare for a parent" is that his children will be treated as an outcast—a risk that ran high because of Petitioner's conduct.

Had the District allowed Petitioner's actions to continue, it would reinforce the fears of *amici* because it would have "sen[t] a message to nonadherents that they [were] outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). The fears of *amici* were indeed reasonable.

When Ms. Chamberlin took a public stance in support of the District—her employer—she became "a social pariah." The situation "forced [her] to come out as atheist," something she hadn't previously done because she was afraid of being ostracized, and resulted in "one of the most difficult times in her life[.]" Her son

also suffered and was "constantly having to defend" his mother from classmates and community members. The District's disapproval of Petitioner's conduct while accommodating his personal beliefs was a message to *amici* that they, too, were valued members of the community. *See Lynch*, 465 U.S. at 688.

Amici believe that "school football games should be an opportunity to come together," but Petitioner's group-led prayer instead cultivated "a feeling of separatism" that "sharpen[ed] the consciousness of religious differences at least among some of the children committed to [his] care." *McCollum*, 333 U.S. at 228. The feelings of "othering" that Petitioner's actions fostered "are precisely the consequences against which the Constitution was directed when it prohibited the Government . . . from becoming embroiled, however innocently, in the destructive religious conflicts of which the history of even this country records some dark pages." *Id.*; *see also id.* at n.19 (acknowledging that the "divergent views" expressed by a variety of *amici* religious organizations "suggest[ed] that the movement ha[d] been a divisive . . . influence in the community").

II. Petitioner's Efforts to Steal the Spotlight Created the Very Divisiveness Establishment Clause Jurisprudence Counsels Against.

A fundamental role of the Establishment Clause is to protect communities from the divisive conflicts Petitioner created. *McCollum*, 333 U.S. at 216–17 (holding that because the public school was "[d]esigned to

serve as the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects"). Petitioner usurped Bremerton schools from its community peace-keeping function. *See also id.* at 231 ("In no activity of the State is it more vital to keep out divisive forces than in its schools[.]").

Prior to the fall of 2015, *Amici* admit they "didn't feel the polarization that much of the country was experiencing." Ms. Hight-Breach returned to Bremerton in 2010 for that reason. Ms. Chamberlin explained that despite having left her hometown of Bremerton in high school, she "moved back there as soon as she could" because it was a community where she "felt safe, everyone got along, and people accepted everyone's differences." That changed when the "Joe Kennedy situation" arose.

Petitioner's "grandstanding" invited media attention and "outsiders"—people with no interest in the school district and who were only interested in the division and fear broiling in the community sparked by Petitioner's flame. *Amici* maintain that "most people in Bremerton understood that the school district did the right thing." As Ms. Rebelowski explained, it was clear to the community that the issue was not about Bremerton High School, but rather a political group that had "found their perfect poster boy" to bring a case to this Court. The divisiveness was indeed exacerbated by political interest groups "pumping money into the issue."

Compare Peter O'Cain, *Football coach won't be fired; can't participate in post-game prayers*, Kitsap Daily News (Sept. 18, 2015) (quoting Petitioner as stating that he "was unaware of the amount of legislation [and Supreme court precedent] regarding student athletics and religion" and that he would "never want to jeopardize that")[5] *with* Christine Clarridge, *Crowd prays with coach as he defies school district*, Seattle Times (Oct. 16, 2015) ("Kennedy initially agreed to stop his postgame prayers, but earlier this week said he changed his mind after the Texas-based Liberty Institute took up his cause.").[6] Mr. Peterson feels that the First Liberty Institute is using his former colleague and has ridden on the coat tails of the 2015 high school football season to take Petitioner "on a national media blitz" for the past seven years.

Ms. Rebelowski said that once "Joe started campaigning," people from outside of Bremerton began parking in front of her house, waving signs and prayer flags supporting Petitioner, and erupting the town in chaos.

> Politicians and organizations started fundraising in Kennedy's name the minute this all started. First Liberty started a "Support Joe" Facebook page with one fundraising post after the next. I wonder where all this money is going. Politicians that don't even represent this

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[5] https://www.kitsapdailynews.com/news/football-coach-wont-be-fired-cant-participate-in-post-game-prayers/.

[6] https://www.seattletimes.com/seattle-news/education/scores-join-coach-in-postgame-prayer/.

> community came to grandstand about supporting Kennedy just to get more votes in their own—more religious—districts. Satanists came in to make a point, too. It's unsettling how quickly it all became so divisive. And there was just no need for it, he was able to pray without involving students in the middle of our public football field.

Ms. Hight-Breach similarly recalls that she had planned to attend the homecoming game in fall of 2015, but when she pulled into the parking lot she saw "a complete circus." The Satanists—in from Seattle—were on one side of the fence; on the other, students were yelling, throwing rocks and water bottles, and screaming "F*ck you, Jesus Loves you." Fearing the inevitable escalation, she returned to the safety of her home.

During the homecoming game, "the school district office was 'phone bombed' by supporters of school prayer, thus tying up all the phone lines."[7] Those fielding calls were called the "spawn of Satan." Ms. Chamberlin, who, like many people, spoke out about the divisiveness online, was falsely accused of being responsible for Petitioner's firing. She decided to write a letter to the editor of the local paper in support of the District because she saw "something [was] bubbling" that "detracted from the compassionate and

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[7] Chris Tucker, *Satanists' presence riles up crowd at Bremerton football game*, Kitsap Daily News (Oct. 30, 2015) https://www.kitsapdailynews.com/news/satanists-presence-riles-up-crowd-at-bremerton-football-game/.

community building culture surrounding Bremerton High School."[8] Soon thereafter she began receiving threatening letters, public attacks, and escalating online harassment, including comments like "I'll pray for your house to burn down. I'll pray for the brakes to be cut on your car" and "atheists should be rounded up and killed." She received a letter on Ku Klux Klan letterhead from a self-described "God fearing white supremacist" warning her to stop her activism: "[B]e very careful of the trail of horsesh*t you are treading on because it is very . . . dangerous. One might give very strong thought to abandon such bullsh*t." As she recalls, "Within a couple weeks, everyone knew my name. It was a lot, and very scary." Ms. Kost stated that the fear of similar violence resulted in suppression of voices from Bremerton's non-theist advocacy groups.

The broader polarization in the country continues to fuel the divisiveness in Bremerton sparked by Petitioner's actions. As this Court has observed, "the potential for seriously divisive political consequences . . . is certainly a 'warning signal' not to be ignored." *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 798 (1973) (citation omitted). Thirty years ago, this Court believed that the " 'fears and political problems' that gave rise to the Religion Clauses in the 18th century [were] of far less concern," *Lynch*, 465 U.S. at

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[8] Jennifer Chamberlin, *My Turn: Schools without pressure to pray*, Kitsap Sun (Oct. 21, 2015), https://archive.kitsapsun.com/opinion/my-turn—schools-without-pressure-to-pray-ep-1283814315-354461301.html/.

686 (citation omitted), but such "fears and political problems" have returned.

"[T]oday, as many have noted, our nation is more polarized than it has been at any time since the Civil War." Judge Thomas B. Griffith, *The Degradation of Civic Charity*, 134 Harv. L. Rev. F. 119, 121 (2020) (internal quotation marks omitted). Religion is a central component of the polarity. Samuel L. Perry, *American Religion in the Era of Increasing Polarization*, Ann. Rev. of Soc., Vol. 48 (Forthcoming July 2022). While "[o]rdinarily political debate and division . . . are normal and healthy manifestations of our democratic system of government, . . . political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971).

Rabbi Newmark is concerned that given this increased polarization—and a national rise of antisemitism—a decision favoring Petitioner could embolden hate groups that have traditionally targeted her faith: "Anytime the rights of someone of a minority religion feel compromised, when their First Amendment rights are chipped way, it gives power to those who are looking for ways to promote hateful agendas. I think a ruling in favor of Kennedy would make antisemitism in this nation worse." She rightfully fears for her congregants' safety:

> We know what happens when people who are hate-filled are given oxygen, the flame gets bigger. Even though the act in this case seems

> small, if Kennedy is allowed to infringe on the rights of our community, those that revel in decreasing our rights will feel empowered to ask for more—to push the limit further. Hate is very contagious. Anything that promotes one religion over another—instead of promoting tolerance and understanding of boundaries—gives fuel to this very ugly time in our country.

See also Van Orden v. Perry, 545 U.S. 677, 703 (2005) (Breyer, J., concurring in the judgment) (plurality opinion) ("And, in today's world, in a Nation of so many different religious and comparable nonreligious fundamental beliefs, a more contemporary state effort to focus attention [on prayer] is certainly likely to prove divisive[.]").

"When the government puts its imprimatur on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored beliefs." *Lee*, 505 U.S. at 606 (Blackmun, J., concurring) ("Only '[a]nguish, hardship and bitter strife' result 'when zealous religious groups struggl[e] with one another to obtain the Government's stamp of approval.' " (Quoting *Engel v. Vitale*, 370 U.S. 421, 429 (1962))). Such a struggle can "strain a political system to the breaking point." *Walz*, 397 U.S. at 694. Indeed, *amici* now fear "the can of worms" that would be opened by a ruling in Kennedy's favor, and do not believe Bremerton "can afford" to deal with further political division as a result of such a ruling.

CONCLUSION

"Our constitutional system" is designed so that "unities among our people [are] stronger than our diversities." *McCollum*, 333 U.S. at 231. In his self-proclaimed search for personal spiritual enlightenment, Petitioner disregarded the rights of his fellow community members in favor of his own. In the words of one of the players Petitioner was paid to lead: "Kennedy has used the Bremerton Knights Football for seven years to push his own religious agenda and lie to the American Public that he did so privately . . . and [for] four years I knelt for him in solidarity as he prayed so there would be no objection to me playing football." A ruling in Petitioner's favor would send a message to community members that their rights are secondary to his, and it would condone the mistreatment of those who do not conform with Petitioner's personal views. This is the very result that the First Amendment was designed to prevent. *Lee*, 505 U.S. at 592 ("[I]f citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people."). Members of the Bremerton community respectfully ask that this Court affirm the Ruling of the Ninth Circuit and uphold that "the delivery of a [postgame] prayer has the improper effect of

coercing those present to participate in an act of religious worship." *Santa Fe*, 530 U.S. at 312.

Respectfully submitted,

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