No. 16-35801

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH A. KENNEDY,

Plaintiff-Appellant,

v.

BREMERTON SCHOOL DISTRICT,

Defendant-Appellee.

On Appeal from the Denial of a Preliminary Injunction by the United States District Court for the Western District of Washington
Case No. 3:16-cv-05694, Hon. Ronald B. Leighton

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; THE ANTI-DEFAMATION LEAGUE; CENTRAL CONFERENCE OF AMERICAN RABBIS; DISCIPLES JUSTICE ACTION NETWORK OF THE CHRISTIAN CHURCH (DISCIPLES OF CHRIST); EQUAL PARTNERS IN FAITH; HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA, INC.; HINDU AMERICAN FOUNDATION; THE INTERFAITH ALLIANCE; JEWISH SOCIAL POLICY ACTION NETWORK; PEOPLE FOR THE AMERICAN WAY FOUNDATION; UNION FOR REFORM JUDAISM; AND WOMEN OF REFORM JUDAISM AS *AMICI CURIAE* SUPPORTING APPELLEE AND AFFIRMANCE *(CORRECTED)*

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CORPORATE DISCLOSURE STATEMENT

Amici are all nonprofit organizations. None have parent corporations, and no publicly held corporation owns any portion of any of them.

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INTERESTS OF THE *AMICI CURIAE*[1]

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

When public-school teachers and coaches incorporate prayer or other religious rituals into the performance of their teaching duties, they intrude on the fundamental right of parents, students, and families to decide for themselves what religious instruction and practices to undertake. In doing so, they intrude on free, individual choice in matters of conscience and create grave risks of sectarian division and strife in the school community that may interfere with students' ability to receive an education.

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

Because several *amici* have joined this brief, more detailed descriptions of each appear in the Appendix. The *amici* are:

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

- Americans United for Separation of Church and State.
- The Anti-Defamation League.
- Central Conference of American Rabbis.
- Disciples Justice Action Network of the Christian Church (Disciples of Christ).
- Equal Partners in Faith.
- Hadassah, the Women's Zionist Organization of America, Inc.
- Hindu American Foundation.
- The Interfaith Alliance.
- Jewish Social Policy Action Network.
- People For the American Way Foundation.
- Union for Reform Judaism.
- Women of Reform Judaism.

INTRODUCTION AND SUMMARY OF ARGUMENT

Coaches are authority figures and role models in the school community. They play critical roles in the lives of the students under their supervision. They are also public officials whose actions are fully attributable to the school district that employs them. Their conduct thus conveys a strong message about how the students should act and about what the school district values and prefers.

The fundamental constitutional right to practice one's faith, or not, according to the dictates of one's conscience, applies just as much to public-

school coaches as to everyone else. Nothing about the Bremerton School District's policies or actions or the ruling of the district court suggest otherwise. But when a coach prays on the fifty-yard line at the end of football games, especially after an eight-year history of leading on-field team prayers, the unmistakable message conveyed to the players, cheerleaders, band members, and students in the stands is that they ought to participate—whether or not doing so is consistent with their faith. Nonparticipation may be viewed as disrespecting the coach—not something that players undertake lightly. And it marks nonparticipants as religious dissenters and outsiders who do not share in the life of the school community—making them targets for bullying, harassment, and social ostracism. A coach's prayer practice thus has the effect of encouraging—indeed, compelling—impressionable students to engage in religious practices that may be contrary to their beliefs or their families' convictions.

That is why the Third and Fifth Circuits have held that public-school coaches may not lead, participate in, or encourage team prayer (*see Borden v. Sch. Dist.*, 523 F.3d 153, 178 (3d Cir. 2008); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 404 (5th Cir. 1995)), and why the U.S. Supreme Court has held that even "student-led, student-initiated" prayer at high-school football games violates the students' constitutionally protected

religious freedom (*Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000)).

Because Appellant was a public-school coach, his conduct on the field was legally attributable to the Bremerton School District. His indisputably religious practice—praying on the fifty-yard line at the end of football games—violated the Establishment Clause by impermissibly endorsing prayer and his particular faith, and by unlawfully (even if unintentionally) pressuring students to pray. Indeed, the record reflects that, after observing Appellant's postgame devotional act, students on the team joined in his prayer practice.

The School District thus did what was necessary to (i) conform its conduct to the Establishment Clause's mandates, (ii) protect the "constitutional right to the free exercise of religion" for all students (ER 154), and (iii) prevent dangerous division in the school community along religious lines.

The denial of a preliminary injunction should be affirmed.

ARGUMENT

TO AVOID VIOLATING THE ESTABLISHMENT CLAUSE RIGHTS OF STUDENTS AND PARENTS, THE SCHOOL DISTRICT WAS REQUIRED TO ACT.

When public-school teachers and coaches supervise or instruct students, they act in an official capacity, not as private citizens. *See, e.g.*, *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 968 (9th Cir. 2011) (high-

school teacher acts as government employee "when at school or a school function, in the general presence of students, in a capacity one might reasonably view as official"); *Borden*, 523 F.3d at 172 (high-school football coach "act[s] as a proxy for the School District" when he "teach[es] his players respect and good moral character"); *Duncanville*, 70 F.3d at 406 (at school games, "coaches and other school employees are present as representatives of the school and their actions are representative of [school] policies"). Hence, their actions that have the effect of endorsing, fostering, encouraging, or compelling worship or other religious practices are, as a matter of law, the actions of the school district that employs them. *See, e.g.*, *Johnson*, 658 F.3d at 975 (religious speech by public-school teachers "belongs to the government"); *Borden*, 523 F.3d at 175 ("head football coach . . . bow[ing] his head and tak[ing] a knee while students pray" is "'state participation in a religious activity'") (quoting *Santa Fe*, 530 U.S. at 308); *Bishop v. Aronov*, 926 F.2d 1066, 1073 (11th Cir. 1991) ("[A] teacher's speech can be taken as directly and deliberately representative of the school.").

The question here, therefore, is not whether private citizens have religious-freedom or free-speech rights against a governmental entity such as a school district; it is whether the school district may lawfully regulate ***its own conduct***, which includes the acts of its employees, to respect the religious freedom of the students and their families.

The answer to that question is straightforward: It may. Indeed, it must. The Establishment Clause requires nothing less. The Bremerton School District took steps that were both constitutionally required and pedagogically appropriate to respect the students' religious freedom. And the district court recognized that Appellant's desire to work as a public-school coach who prays on the fifty-yard line while surrounded by students does not trump the School District's constitutional responsibilities. That ruling was manifestly correct and should be affirmed.

A. Public-school coaches are public officials whose actions on the field during school-sponsored activities are not private conduct.

1. Public-school teachers are public officials who wield the power of the State and hence are subject to the Establishment Clause's mandates. *See, e.g.*, *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994). That is no less true for football coaches than for other school officials. *See, e.g.*, *Borden*, 523 F.3d at 175.

But coaches ***are*** special: More than any classroom teacher, they command strict obedience while at the same time serving as role models for the young people on the team. As the district court explained, "the coach is more important to the athlete than the principal." (ER 33.) With that status comes special responsibilities.

Appellant's own *amici* make this point with compelling clarity: They explain how they "found role models in the men who coached their football

teams" and underscore the importance of "coaches' ability to be effective as mentors and role models." Players' *Amicus* Br. 8. Indeed, they "attribute[] much of [their] success to lessons imparted to [them] by the men who coached [them] throughout [their] scholastic and professional athletic endeavors." *Id.* at 2.

As the head coach of the Baltimore Ravens put it: "How many youth and high school coaches serve as a father figure to their players? How many mothers look to the coaches of their son's football team as the last best hope to show their son what it means to become a man—a real man? More than we'll ever know." *See* John Harbaugh, *Why Football Matters*, BALT. RAVENS (Apr. 22, 2015), http://tinyurl.com/kn5fdhh. Serving as role model, moral exemplar, and often proxy parent is perhaps the most critical function of a coach—surely far more important than a high school's win–loss record. That is just what it means to be a coach, and what school districts look to hire when they understand the value of team sports in young people's lives. *See, e.g.*, *Borden*, 523 F.3d at 173 n.15 ("instilling values in the team" is "part of [the coach]'s duties as a public school employee").

2. Appellant has undeniably played that role at Bremerton High. *See, e.g.*, Daily Signal, *Coach Kennedy: How His Faith Ended His Football Career*, YOUTUBE (Jan. 26, 2016), https://youtu.be/XdEKS7tajak (quoting former Bremerton player's statement that Appellant was "parental figure"

to team). Appellant's counsel make the same point—not just generally, but specifically with respect to Appellant's religious conduct—praising "Coach Kennedy's leadership and great example for the team through his prayers." *Coach Kennedy*, FIRST LIBERTY, http://firstliberty.org/cases/coachkennedy/ (last visited Dec. 29, 2016).

3. This special relationship between public-school coaches and students is part of what led the district court to conclude that "a reasonable observer . . . would have seen [Appellant] as a coach" (ER 44), not a private citizen, when after games, dressed in his coach's uniform, he went onto the field for the traditional postgame handshake with the opposing team and its coaches, then went to the most prominent place in the stadium—midfield on the fifty-yard line—and knelt to pray, surrounded by the team.

4. Appellant's *amici* contend that the district court's ruling here will "undermine coaches' ability to be effective as mentors and role models." Players' *Amicus* Br. 8. They explain the value of a coach, describing the wide array of issues about which students may "seek guidance from their coaches and teachers"—including "parents' divorce," "death," "harassment or abuse," "religious and personal identity," "alcohol or substance abuse," and "whether and where to attend college." *Id.* at 9. They then posit that, under the School District's policy, coaches would be barred from counseling,

advising, or supporting the players, and would be forced instead to tell needy students, "I'm not allowed to talk about that. Go away." *Id.*

But this case is not about the limitations on a coach's ability to support students personally or academically. Any school district would surely recognize and encourage the important role that caring coaches and teachers play in students' lives; and there is no hint in the record that the Bremerton School District has ever done otherwise. Rather, this case is about an on-field prayer practice.

B. The prayer practice violates the Establishment Clause.

The First Amendment's Religion Clauses "'seek to assure the fullest possible scope of religious liberty and tolerance for all.'" *Trunk v. City of San Diego*, 629 F.3d 1099, 1110 (9th Cir. 2011) (quoting *Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring in the judgment)). Because students are impressionable and school attendance is compulsory, courts must be "particularly vigilant in monitoring compliance with the Establishment Clause." *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987).

Thus, to fulfill the constitutional mandate to "secure religious liberty" for all students, the Supreme Court has consistently and unambiguously held that public schools must not "sponsor[] the particular religious practice of prayer." *Santa Fe*, 530 U.S. at 313; *see also, e.g.*, *Lee v. Weisman*, 505 U.S. 577, 587 (1992); *Sch. Dist. v. Schempp*, 374 U.S. 203, 223 (1963); *Engel v.*

Vitale, 370 U.S. 421, 424 (1962). Nor, therefore, may a coach, teacher, or other school official act in ways that express approval or endorsement of prayer, for doing so has the effect of pressuring students to conform, while marking religious dissenters as outsiders and disfavored members of the school community. *See Santa Fe*, 530 U.S. at 309–10.

1. Postgame on-field prayer by a public-school coach impermissibly endorses religion.

a. In part "because of the students' emulation of teachers as role models," the Supreme Court has directed that the courts must be "particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Edwards*, 482 U.S. at 583–84. If that is true for classroom teachers, it is doubly so for coaches, given both the unique authority and influence that they have over the physical and moral development of their charges (*see* Section A, *supra*) and the central place that high-school football has in the lives of the players and the entire school community (*see Santa Fe*, 530 U.S. at 312 ("[h]igh school home football games are traditional gatherings of a school community"); *id.* at 311 ("high school students . . . feel immense social pressure . . . to be involved in the extracurricular event that is American high school football"); *Jager v. Douglas Cty. Sch. Dist.*, 862 F.2d 824, 831 (11th Cir. 1989) (noting "'powerful incentive for students to attend'" games) (quoting *Doe v. Aldine Indep. Sch. Dist.*, 563 F. Supp. 883, 887 (S.D. Tex. 1982))).

When, as here, a public-school football coach in his coaching uniform adopts the practice of publicly kneeling in prayer on the fifty-yard line at the end of each game, he sends an unmistakable message to the students, and especially to those on the team, about what he as a coach values, what the school district and the school community value, and therefore what the students should value and how they ought to behave. The reasonable student observer on the team, on the cheerleading squad, in the band, or in the stands would be hard-pressed not to conclude that the prayer is officially favored and preferred. *See Borden*, 523 F.3d at 178; *see also Santa Fe*, 530 U.S. at 308 ("[A]n objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval."); *Jager*, 862 F.2d at 831 (because football games are "'school sponsored and so closely identified with the school program, the fact that the religious activity took place in a nonreligious setting might create in a student's mind the impression that the state's attitude toward religion lacks neutrality'") (quoting *Aldine*, 563 F. Supp. at 887).

b. The official endorsement of religion is even clearer here than in *Santa Fe*, *Borden*, and *Duncanville*, where students, not coaches, conducted the prayers, and school officials merely supported them. *Cf. Santa Fe*, 530 U.S. at 310 (school allowed students to use stadium's loudspeaker); *Borden*, 523 F.3d at 175 (coach knelt for student-led prayer); *Duncanville*, 70 F.3d

at 406 & n.4 (coaches joined students' prayer circles); *cf. also Jager*, 862 F.2d at 827, 830 (holding that school district's equal-access policy of randomly selecting volunteer prayergivers from among students, parents, and staff violated Establishment Clause).

c. Not only did the prayer practice here endorse religion, but it endorsed a particular faith, to the exclusion of other faiths.

Appellant explains that he "is a practicing Christian" (Br. 4.), and his prayers employed the distinctively Christian prayer form of kneeling with hands clasped and head bowed—a pose with deep historical significance and symbolic meaning within Christianity. *See, e.g.*, Oddbjørn Leirvik, *Prostrate and Erect*, 16 STUD. INTERRELIGIOUS DIALOGUE 29, 36 (2006) (kneeling is "part of personal body language in prayer" in "most Christian traditions"); Ori Z. Soltes, *Language and Prayer Within Judaism, Christianity and Islam*, RELIGIONS, no. 2., 2012, at 74, 82 ("falling to the knees in the course of prayer" dates to early Christianity and distinguished Christians from Jews).

But Bremerton is religiously diverse: The students and families in the area practice many different faiths, including Judaism, Islam, the Bahá'í faith, Buddhism, Hinduism, and Zoroastrianism, in addition to numerous Christian traditions. *See Kitsap County, Washington*, ASS'N RELIGION DATA ARCHIVES (2010), http://tinyurl.com/gluwyzh; *In the Works: Mosque*

Planned at Old Kitsap Bank Building, KITSAP SUN (Sept. 2, 2015), http://tinyurl.com/p5s6dnd.

Non-Christian students will readily see that Appellant's on-field prayer looks nothing like the prayer to which they are accustomed. For each faith tradition has its own prayer forms and postures, all replete with symbolic meaning. Jews, for example, stand for prayer and often sway (Joshua Rabin, *Physical Movement in Jewish Prayer*, MYJEWISHLEARNING, http://tinyurl.com/jofjo6s (last visited Dec. 29, 2016)); they do not typically kneel (*see* Baruch S. Davidson, *Do Jews Kneel in Prayer?*, CHABAD.ORG, http://tinyurl.com/h6fm5as (last visited Dec. 29, 2016)). For Muslims, the typical prayer posture is prostration, though prayer also involves standing and bowing. *See* Leirvik, *supra*, at 37. Bahá'í prayer involves kneeling, bowing, and prostration. *See Long Obligatory Prayer*, BAHÁ'Í PRAYERS, http://tinyurl.com/h2dftut (last visited Dec. 29, 2016). And Hindus and Buddhists pray in the seated, cross-legged lotus position, though the faiths employ distinctively different positioning of the hands and arms. *See, e.g.*, *Postures of Prayer in Worship*, REFORMED WORSHIP (July 13, 2015), https://tinyurl.com/z427azc. None of these faiths' characteristic prayer poses looks anything like Christian kneeling. *Compare, e.g.*, *NFL Penalizes Player for Kneeling in Muslim Prayer After Scoring Touchdown*, RT (Sept. 30, 2014, 5:13 PM), https://tinyurl.com/jb5r252 (including photos of

Christian and Muslim football players in prayer), *with* Appellee's Br. 9 (photo of Appellant).

Additionally, many students and families in Bremerton are atheist or agnostic (*see Survey Finds Kitsap the Seventh Least Religious Area in the Nation*, KITSAP SUN (Apr. 13, 2013), http://tinyurl.com/jmtjx95), or do not identify with any particular denomination or mode of worship (*see Kitsap County, Washington*, *supra*). They are likewise excluded by Christian prayer practices at school events.

What is more, though Appellant's prayer pose is recognizably Christian, his practice of public, demonstrative prayer is by no means universally favored by Christians. According to the Gospel of Matthew, Jesus taught that rather than praying where "others may see," believers should "go to your inner room, close the door, and pray to your Father in secret." *Matthew 6:5–6*. Students raised to live by this teaching—as many are—may find public prayer on the fifty-yard line confusing, upsetting, or even sacrilegious.

d. Particularly in a school community with so much religious diversity, school officials who publicly engage in one specific form of prayer show a preference for the faith associated with that form. *Cf. Jager*, 862 F.2d at 831 (where most prayers at football games have been and likely will be delivered by Protestant Christians, prayer practice conveys message that school

endorses Protestant Christianity). The school thereby sends a "message to members of the audience who are nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'" *Santa Fe*, 530 U.S. at 309–10 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)). And the prayer practice forces students to choose between joining in a devotional act that may go against their deeply held beliefs, and marking themselves as outsiders and potential pariahs. *See Borden*, 523 F.3d at 182 (McKee, J., concurring) ("[T]hese players were put in the untenable position of either compromising any opposing beliefs they may have had or . . . opposing their coach and perhaps a majority of their teammates."). "[T]he school may not force this difficult choice upon [its] students . . . ." *Santa Fe*, 530 U.S. at 312.

e. Appellant maintains that the prayer practice is his personal, private devotional act, and therefore that being a coach and having the students' see and join him in the midfield prayer circle is "beside the point." Br. 38–39. But as Appellant's *amici* make clear, coaches' conduct with respect to their students is never merely private and personal. *See* Players' *Amicus* Br. 8. Again, Appellant's counsel underscore the point, celebrating Appellant's "leadership and great example for the team through his prayers." *Coach Kennedy*, *supra*. All of that speaks to how the students are

affected by the postgame prayer practice—which speaks to whether the practice is an impermissible school-sponsored religious exercise.

f. Appellant acknowledges that the appropriate legal inquiry here is what message a reasonable student would glean when observing the prayer practice. Br. 38. But he contends that "no 'objective observer'—particularly one who is 'acquainted with' the relevant facts and history—would confuse [his] brief, quiet prayer with a prayer that is endorsed by the State" (*id.* at 35 (quoting *Santa Fe*, 530 U.S. at 308)). In support, Appellant notes that he, not the School District, chose the content of the prayers, and that the District was initially unaware that the prayers were even occurring. *Id.* at 36.

That argument ignores that Appellant's conduct was as a matter of law the conduct of the School District. *See, e.g.*, *Johnson*, 658 F.3d at 975; *Borden*, 523 F.3d at 172; *Duncanville*, 70 F.3d at 406. Whether the superintendent or school-board members had actual knowledge of the prayers is irrelevant because the prayer was the District's practice regardless. Moreover, on learning of the practice, the District had no choice but to put a stop to it. *See Steele v. Van Buren Pub. Sch. Dist.*, 845 F.2d 1492, 1495–96 (8th Cir. 1988).[2]

[2] Appellant's invocation of "'the distinction between State speech and private speech in the school context'" (Br. 35 (quoting *Chandler v. Siegelman*, 230 F.3d 1313, 1316 (11th Cir. 2000)) likewise overlooks that

Appellant's argument also gets the import of the "relevant facts and history" backwards. What matters under the endorsement test is how a reasonable student observer would view the prayers, armed with knowledge of the entire history of the prayer practice, including how that practice evolved, and why. *See Santa Fe*, 530 U.S. at 308–09; *Borden*, 523 F.3d at 175–77; *see also McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 866 (2005). The test therefore requires taking into account that, in his capacity as coach, Appellant had led the team in pre- and postgame prayer for eight years (Br. 5–6), and that he revised the practice only after being ordered to stop sponsoring team prayer. That history further underscores the violation.

In *Borden*, for example, the coach argued that the prayer was not school-sponsored or -endorsed and therefore did not violate the

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Appellant was, and wishes again to be, a public-school coach—a state official. In *Doe ex rel. Doe v. School District*, 340 F.3d 605, 611 (8th Cir. 2003), which Appellant cites, the challenged graduation prayer was delivered by a ***parent***, albeit one who was also on the school board. The court deemed it "extremely significant" that the school district required that graduation speakers be parents, "and therefore . . . reject[ed] the argument that [the parent] spoke only in his official capacity." *Id.* at 612. Yet the court recognized that the parent's membership on the school board counted in favor of his prayer being government speech. *Id.* Here, by contrast, it is solely because Appellant was a coach that he had special access to the field and players and special opportunity to stake out the fifty-yard line and have the team convene around him. As for *Adler v. Duval County School Board*, 250 F.3d 1330, 1339 (11th Cir. 2001) (en banc), and *Chandler*, 230 F.3d at 1317, the prayers there were delivered by ***students***.

Establishment Clause because he, as coach, was merely taking a knee with the team while the students prayed, so as not to disrespect them. The Third Circuit flatly rejected that argument, not just because kneeling was inherently and manifestly a religious act undertaken in the coach's official capacity, but also because a reasonable student observer would be presumed to know that the coach had originally "led prayers himself" and had "initially resigned from his position as coach of the team rather than continue as coach without engaging in the prayer activities." 523 F.3d at 177. The court held that the "history of [the coach]'s prayers with the football team leads to a reasonable inference that his current requested conduct"—taking a knee while the team prayed—was "meant to preserve a popular state-sponsored religious practice of praying with his team." *Id.* (internal quotation marks omitted) (quoting *Santa Fe*, 530 U.S. at 309). The court regarded the past history of team prayer as strong evidence of the unconstitutionality of the current practice, and therefore of the school district's need to curtail it, notwithstanding that the superintendent and school board had been unaware of the practice for twenty-two years and had acted to end it only when, in year twenty-three, they discovered it. *See id.* at 160, 178–79.

Likewise, the Supreme Court concluded in *Santa Fe* that a reasonable student observer would know that the "student-led, student initiated"

prayers were the product of a school-sponsored vote called after the school district's previous prayer practice had been challenged—in other words, the current practice had evolved as a way to preserve the prayers. 530 U.S. at 301, 309; *see also Jager*, 862 F.2d at 831 (equal-access policy's message of official religious endorsement "becomes even clearer" when school's prior practice of having clergy deliver prayers is taken into account).

What was true in *Borden*, *Santa Fe*, and *Jager* is true here as well. For eight years, Appellant knelt at midfield to pray immediately after each game. His prayers attracted the attention of the players, many of whom joined him; and in time he began offering religious motivational speeches to the students. Now Appellant seeks to be rehired as coach and to continue to pray publicly on the fifty-yard line after each game. The practice is thus "built upon a significant history of . . . prayers" with the team (*Borden*, 523 F.3d at 177). With that history in mind, no reasonable student observer would see the prayers as purely personal and private. Simply put, Appellant's continued "involvement in prayer at [school-sponsored] activities . . . would lead a reasonable observer to conclude that he was endorsing religion." *Id.* at 176. That constitutes an Establishment Clause violation—by the School District—regardless of (i) how Appellant sees himself, (ii) what the District knew, or (iii) how the District feels about the practice.

In short, though Appellant considers his conduct private and personal, that does not change how it appears to students on the field and in the stands. Although his motivations may be entirely personal, his "acts cross the line and constitute an unconstitutional endorsement of religion." *Id.* at 178; *see also id.* at 184 (McKee, J., concurring) ("[T]he laudable intentions of state actors do not control an analysis under the First Amendment.").

g. Finally, Appellant sweepingly asserts that if his prayer practice violates the Establishment Clause, then "all religious expression by public employees would be categorically prohibited." Br. 38. That is incorrect. The School District is not telling Appellant that he is forbidden to pray, privately or publicly. It is telling him that when he acts as a public-school coach, clothed—literally—in the authority of a coach, on school property, at a school activity, where he is in charge of the team, where he has special access to the field and the students, and where he enjoys special status as the center of attention, he represents the school and therefore must not take actions that endorse religion, favor certain religious beliefs or practices, or encourage students to undertake those practices. That is just what it means to be a public-school official.

2. Postgame on-field prayer by a public-school coach impermissibly coerces religious practice.

Though Appellant undoubtedly did not mean to pressure students to participate in prayer, his practice had precisely that effect—thus violating

the Establishment Clause for this reason as well. *See Lee*, 505 U.S. at 587 ("the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise").[3]

"[P]rayer exercises in public schools carry a particular risk of indirect coercion." *Id.* at 592. "[T]he threat of coercion caused by public and peer pressure . . . is heightened in the public high school context because adolescents are more susceptible to such pressure, especially as to issues of social convention." *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1102 n.7 (9th Cir. 2000). Thus, a school district may be liable whether religious coercion comes directly from school officials or indirectly by way of other students: "'the government may no more use social pressure to enforce orthodoxy than it may use more direct means.'" *Santa Fe*, 530 U.S. at 312 (quoting *Lee*, 505 U.S. at 594).

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[3] Appellant maintains that the School District has "admitted" or "conceded" that there was no coercion (Br. 1, 29, 39), pointing to the District's statement that there was "no evidence that students have been ***directly*** coerced to pray" (ER 181 (emphasis added)). But in the same breath, the District explained that "students [are] required to be present [at football games] by virtue of their participation in football or cheerleading" and therefore "will necessarily suffer a degree of coercion to participate in religious activity when their coaches lead or endorse it." ER 181, 184 (pointing to Supreme Court's recognition in *Santa Fe* of "reasonable expectation that students will feel coerced to go along with religious activity that is led or endorsed by their teachers and coaches").

As *Santa Fe* and *Borden* explain, that pressure is present, and may be overwhelming, at high-school football games. Playing time and status depend on meeting coaches' expectations and preferences as well as obeying specific instructions. *See, e.g.*, *Borden*, 523 F.3d at 182 (McKee, J., concurring) (student on team was "'fearful that if he did not go along with what was obviously the coach's desire, he would not get playing time'") (quoting record); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1190 (6th Cir. 1995) ("the coach controls who plays and for how long, placing a disincentive on any debate with the coach's ideas"). So the players anticipate and do what the coach prefers; they follow his lead. Hence, "a non-religious student or one who adheres to a minority religion might feel subtle (albeit unintentional) coercion to participate in the [prayer] despite disagreement or discomfort with it." *Borden*, 523 F.3d at 181 (McKee, J., concurring); *see also Jager*, 862 F.2d at 831 (prayer practice "places those attending football games in the position of participating in a group prayer").

What Judge McKee said of the coach in *Borden* applies equally here: Appellant is "a sincere and remarkably dedicated individual who cares deeply for his players." 523 F.3d at 182. But he appears to have "lost sight of his role as a teacher in a public school." *Id.* "Unfortunately, the coach appears not to have considered the possibility that" his prayer practice "could be troubling for some players and possibly deter others from playing

football at all." *Id*. Even with noble intentions and great respect for students and their families, a coach may nonetheless "fail[] to appreciate that others may not agree with his beliefs or that the religious beliefs that he [holds] dear might be in tension with contrary (but equally valid) beliefs of some of his players. Any player who [holds] opposing beliefs should not have . . . to 'go along to get along' by silently participating in religious observances he disagree[s] with." *Id.* at 183.

Because football is so central to the high-school experience, "the choice between attending these games and avoiding personally offensive religious rituals is in no practical sense an easy one," even for students in the stands. *Santa Fe*, 530 U.S. at 312. Many "feel immense social pressure" to attend (*id.* at 311) and therefore to join in the prayers. *Cf., e.g.*, *Duncanville*, 70 F.3d at 404 (player "participated in the[] prayers" at school basketball games "because she did not wish to single herself out," even though "she preferred not to participate"). Indirect, subtle, and even unintentional pressure to conform is still unconstitutional religious coercion as a matter of law. *See Santa Fe*, 530 U.S. at 312; *Lee*, 505 U.S. at 593 ("[S]ubtle and indirect [pressure] can be as real as any overt compulsion."). That is true for the players, for the cheerleaders and band members who are also required to attend games, and for all members of the school community. *See Santa Fe*, 530 U.S. at 311–12.

3. Official religious practices divide school communities along sectarian lines, often resulting in harassment of minority-faith and nonreligious students.

"[J]ust as religion throughout history has provided spiritual comfort, guidance, and inspiration to many, it can also serve powerfully to divide societies and to exclude those whose beliefs are not in accord with particular religions or sects that have from time to time achieved dominance." *Sch. Dist. v. Ball*, 473 U.S. 373, 382 (1985) (quoted in *Borden*, 523 F.3d at 184 (McKee, J., concurring)), *overruled in part on other grounds by Agostini v. Felton*, 521 U.S. 203, 236 (1997). That is especially true within public schools, which should be safe, welcoming environments for all students regardless of faith or belief. *See, e.g.*, *Lee*, 505 U.S. at 588, 594 (identifying "potential for divisiveness," "isolation[,] and affront" caused by officially sponsored prayer). No one who has attended high school can doubt the real fear of ostracism—and worse—experienced by minority-faith and nonreligious students who would otherwise not conform. *See id.* at 593. School districts have the constitutional duty and moral imperative to shield them from such harm.

a. The history of religion in public schools is replete with "mistreatment, discrimination, violence, and even death." FRANK S. RAVITCH, SCHOOL PRAYER AND DISCRIMINATION 4 (1999).

In 1981, for example, when Joann Bell and Lucille McCord sued to block religious meetings and distribution of Bibles in their children's schools (*see Bell v. Little Axe Indep. Sch. Dist. No. 70*, 766 F.2d 1391 (10th Cir. 1985)), their children were branded as "devil worshipers." ROBERT S. ALLEY, WITHOUT A PRAYER 106 (1996). "An upside-down cross was hung on thirteen-year-old Robert McCord's locker," and the Bells received threatening telephone calls; "[m]ore than once a caller said he . . . was going to break in the house, tie up the children, rape their mother in front of them, and then 'bring her to Jesus.'" *Id.* at 106–08. The threats were far from empty: The Bells' home was burned down. *Id.* at 108; RAVITCH, *supra*, at 13; *see also Bell*, 766 F.2d at 1408.

The plaintiff who challenged the graduation prayers in *Lee* in 1989 likewise received hate mail and death threats. RAVITCH, *supra*, at 16.

In 1995, when the middle-school student in *Duncanville* ultimately stopped participating in her basketball team's prayers, she was subjected to hostile "attention from her fellow students, who asked her 'Aren't you a Christian?' and from one spectator, who called out 'Well, why isn't she praying? Isn't she a Christian?'" 70 F.3d at 404. Even her history teacher publicly denigrated her as "a 'little atheist.'" *Id.*

In the 1996 case of *Herdahl v. Pontotoc County School District*, the plaintiff's children were "exposed . . . to harassment and ridicule, and . . .

accused of being atheists and devil worshippers" after their mother removed them from an unconstitutional Bible class. 933 F. Supp. 582, 592 (N.D. Miss. 1996). The harassment got so bad that one of the children told his mother that "he did not want to be Christian [anymore] because he did not want to be like" his tormenters. RAVITCH, *supra*, at 9. The family received bomb threats and death threats. *Id.*

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

In *Santa Fe*, the district court had to order school officials and members of the community to stop trying to "ferret out the identities of the [anonymous] Plaintiffs" to protect them from "intimidation [and] harassment." 530 U.S. at 294 n.1 (quoting district-court order). A vocal supporter of the plaintiffs received threatening phone calls and was followed home by persons trying to scare her—and her family was ostracized. Kenny

Byrd, *Baptist Family Opposed to Football Prayer Feels Pressure*, BAPTIST STANDARD (June 12, 2000), http://tinyurl.com/hgl4lxo.

In 2005, when several families challenged the inclusion of intelligent design (a form of creationism) in a Pennsylvania high school's science curriculum (*see Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707 (M.D. Pa. 2005)), their children were branded as "ape boy" and "monkey girl" (EDWARD HUMES, MONKEY GIRL 183, 222 (2007)). Two parents, who ran their church's vacation Bible school, were attacked as atheists and publicly taunted for being "not actually Christians." MATTHEW CHAPMAN, 40 DAYS AND 40 NIGHTS 69 (2007). At least two plaintiffs received death threats. *See, e.g.*, LAURI LEBO, THE DEVIL IN DOVER 213–14 (2008) ("'I sure would hate to be in your shoes, or your daughters [sic] shoes. God hates sin. All these young people being killed in auto wrecks look out when your day comes. . . . Watch out for a bullet.'") (quoting anonymous letter) (omission in original).

And in *Borden*, after word got out that some unnamed cheerleaders had complained about the team prayer, the other students incorrectly blamed the two Jewish girls on the cheerleading squad. 523 F.3d at 184 (McKee, J., concurring). The girls were "publicly ridiculed," "taunted, bullied," "harassed[,] and threatened." *Id.* (listing attacks posted on school's electronic bulletin board, including, "'First they crucify Jesus, then they got

Borden fired. . . . Jews gotta learn to stop ruining everything cool.'"; "'d**n jews . . . then you wonder why hitler did what he did back in the day.'"; "'MAYBE if Borden held a gun to the jjjjewwws head and was like b*tch get on ur knees and pray to jesus!! then that might be breaking the law…ehh maybe not! . . . just suck it up if u don't fu*king like whats going on in america then GO THE FU*K BACK TO YOUR COUNTRY AND STAY THERE AND PRAY . . . .'"; "'Heil Hitla! ! ! sieg heill.'") (omissions in original, brackets omitted).[4] The attacks then metastasized into disparagement of students on the basis of race, sex, and sexual orientation as well as religion. *See* J.A. 457–95, *Borden*, 523 F.3d 153 (No. 06-3890).

b. "In no activity of the State is it more vital to keep out [religiously] divisive forces than in its schools." *Edwards*, 482 U.S. at 584 (quoting *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 231 (1948) (opinion of Frankfurter, J.)). Whatever prejudices may exist among students and in communities, in each of the cases just described it was official sponsorship of religion that forced families to defend their religious freedom themselves—and in doing so to mark themselves as outsiders, inviting abuse. *See, e.g.*, RAVITCH, *supra*, at 12 ("Of course, if the religious songs and

[4] *See also, e.g.*, J.A. 457, 470, 472, *Borden*, 523 F.3d 153 (No. 06-3890) ("Madeline Witchell and Debbie Elson…you guys thought u dint have friends to begin with…now ur really f**ked…i will make sure that i make the rest of the year a living hell for both of u"; "lets have a rumble…jews vs. christians"; "F U C K THE JEWS").

performances had never been promoted by the choir teacher in the first place, it is likely that what Rachel [Bauchman] endured would never have happened."); *cf. Kitzmiller*, 400 F. Supp. 2d at 765 (divisive controversy was "the result of the activism of an ill-informed faction on a school board, aided by a national public interest law firm eager to find a constitutional test case," who "adopt[ed] an imprudent and unconstitutional policy" that dragged the community into a "legal maelstrom, with its resulting utter waste of monetary and personal resources").

And for everyone who does speak up, at great personal cost, how many more keep their heads down and "go along to get along"? *Borden*, 523 F.3d at 183 (McKee, J., concurring). After all, who would knowingly "risk incurring the communal wrath that had been visited on the unfortunate cheerleaders" in *Borden*? *Id.* at 182.

No one doubts that Appellant acted with sincere spiritual devotion and good intentions. But officially sponsored religion fragments school communities along religious lines, with truly ugly consequences. The First Amendment safeguards against that ugliness by requiring school officials to remain neutral with respect to religion. *See Van Orden*, 545 U.S. at 698 (Breyer, J., concurring in the judgment) (Religion Clauses "seek to avoid that divisiveness based upon religion that promotes social conflict"). The public schools are charged with protecting the religious freedom of all

students—those who must otherwise speak up and suffer, and those who would suffer silently. Children should not have to be martyrs. The School District here stepped in to make sure that would not happen. Its actions were both necessary and appropriate.

CONCLUSION

The denial of a preliminary injunction should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(g), the undersigned counsel for *amici curiae* certifies that this brief:

(i) complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32-1(a) because it contains 6913 words including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2013 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

/s/ *Richard B. Katskee*

CERTIFICATE OF SERVICE

I certify that on January 4, 2017, the foregoing brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

/s/ *Richard B. Katskee*

APPENDIX OF *AMICI CURIAE*

Americans United for Separation of Church and State

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization that is committed to preserving the constitutional principles of religious freedom and separation of church and state. Since its founding in 1947, Americans United has participated as a party, counsel, or *amicus curiae* in many of the leading church–state cases decided by the United States Supreme Court, this Court, and the other federal Courts of Appeals. Americans United has approximately 120,000 members and supporters nationwide, including many thousands within the jurisdiction of this Court. Americans United and the signatory on this brief were appellate counsel of record to the appellant school district in *Borden v. School District*, 523 F.3d 153 (3d Cir. 2008), *cert. denied*, 555 U.S. 1212 (2009), and were also counsel to the plaintiff-parents in *Kitzmiller v. Dover Area School District*, 400 F. Supp. 2d 707 (M.D. Pa. 2005), and in other cases involving students and parents who were harassed, threatened, and physically attacked for challenging popular but unconstitutional prayer or other religious practices in public schools.

Anti-Defamation League

The Anti-Defamation League was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic, and religious prejudice in the United States. Today, ADL is one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. Among ADL's core beliefs is strict adherence to the separation of church and state. ADL emphatically rejects the notion that the separation principle is inimical to religion, and holds, to the contrary, that a high wall of separation is essential to the continued flourishing of religious practice and belief in America, and to the protection of minority religions and their adherents.

Disciples Justice Action Network of the Christian Church (Disciples of Christ)

Disciples Justice Action Network is a multi-racial, multi-ethnic, multi-generational, and multi-issue network of congregations and individuals within the Christian Church (Disciples of Christ), all working together to promote greater justice, peace, and the celebration of diversity in our church, our society, and our world. DJAN strongly supports the separation of church and state as the best way to guarantee equal freedom to all our churches, as well as the houses of worship of other communities

of faith. This strong support, combined with our equally strong commitment to public education, leads us to oppose the official promotion of prayer and other religious activity in our public schools.

Equal Partners in Faith

Equal Partners in Faith is a multi-faith network committed to ending racism, sexism, homophobia, and religious intolerance. As part of its commitment to religious diversity, EPF opposes all efforts to diminish religious liberty, including government activity that coerces people of all faiths to engage in the religious rituals of any one particular religion. For this reason, EPF is opposed to officially sponsored prayer in public schools.

Hadassah, the Women's Zionist Organization of America, Inc.

Hadassah, the Women's Zionist Organization of America, Inc., founded in 1912, is the largest Jewish and women's membership organization in the United States, with over 330,000 Members, Associates, and supporters nationwide. While traditionally known for its role in developing and supporting healthcare and other initiatives in Israel, Hadassah is a strong supporter of the free exercise of religion and the strict separation of church and state as critical in preserving the religious liberty of all Americans, and especially of religious minorities.

Hindu American Foundation

The Hindu American Foundation is an advocacy organization for the Hindu American community. The Foundation educates the public about Hinduism, speaks out about issues affecting Hindus worldwide, and builds bridges with institutions and individuals whose work aligns with HAF's objectives. HAF focuses on human and civil rights, education, and community building through inter- and intrafaith engagement. Through its advocacy efforts, HAF seeks to cultivate leaders and empower future generations of Hindu Americans. Since its inception, the Hindu American Foundation has made legal advocacy one of its main areas of focus. From issues of religious accommodation and religious discrimination to defending fundamental constitutional rights of free exercise and the separation of church and state, HAF has educated Americans at large and the courts about various aspects of Hindu belief and practice in the context of religious liberty, either as a party to the case or an *amicus curiae*.

The Interfaith Alliance

The Interfaith Alliance is a 501(c)(4) nonpartisan advocacy organization committed to ensuring that America is a nation where religious belief and practice are free and voluntary, and that the government does not favor or discriminate against citizens based on their

religious beliefs or non-belief. TIA promotes the positive and healing role of religion in public life by encouraging civic participation, facilitating community activism, and challenging religious political extremism. TIA is deeply concerned with the danger to freedom of religion posed by coach- and teacher-sponsored prayer in public schools.

Jewish Social Policy Action Network

The Jewish Social Policy Action Network is an organization of American Jews who seek to protect the constitutional liberties and civil rights of all Americans. JSPAN believes that the religion clauses of the First Amendment to the United States Constitution are the bedrock of American freedom, and that without the separation of church and state neither religious freedom nor any other basic freedoms can endure. JSPAN's interest in this matter is in preventing any erosion of that principle. A decision by this Court reversing the trial court would, in our view, be a dangerous step in that direction, because it would authorize public employees to use their positions to endorse particular religious practices and viewpoints. If public schools were not able to regulate the actual and symbolic speech of their employees on school property, school officials would be unable to protect the government's legitimate interest in providing

educational services in an atmosphere where all students are welcomed as equal members of the public-school community.

People For the American Way Foundation

People For the American Way Foundation is a nonpartisan civic organization established to promote and protect civil and constitutional rights, including religious liberty, as well as American values like equality and opportunity for all. Founded in 1981 by a group of civic, educational, and religious leaders, PFAWF now has hundreds of thousands of members nationwide. Over its history, PFAWF has conducted extensive education, outreach, litigation, and other activities to promote these values. PFAWF strongly supports the principle that both the Free Exercise and Establishment Clauses of the First Amendment are important to protect religious freedom, and that students and faculty have a Free Exercise right to pray in private contexts, but that it clearly violates the Establishment Clause and the religious freedom of students for a faculty member to use his official position to promote his own religion with students at school, as has occurred in this case.

Union for Reform Judaism, Central Conference of American Rabbis, and Women of Reform Judaism

The Union for Reform Judaism, whose 900 congregations across North America includes 1.5 million Reform Jews, the Central Conference of American Rabbis, whose membership includes more than 2000 Reform rabbis, and Women of Reform Judaism, which represents more than 65,000 women in nearly 500 women's groups in North America and around the world, come to this issue out of a long-standing commitment to the principle of separation of church and state, believing that the First Amendment to the Constitution is the bulwark of religious freedom and interfaith amity. Public schools, acting as agents of the state, exist to educate children of all faith traditions and of none. No student should ever be directly or indirectly coerced by a school official advocating particular religious practices.