No. 21-418

IN THE
Supreme Court of the United States

JOSEPH A. KENNEDY,
Petitioner,
v.

BREMERTON SCHOOL DISTRICT,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONER

JOHN EIDSMOE
Counsel of Record
TALMADGE BUTTS
FOUNDATION FOR MORAL LAW
One Dexter Avenue
Montgomery AL 36104
(334) 262-1245
eidsmoeja@juno.com
talmadge@morallaw.com

Counsel for *Amicus Curiae*

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Foundation for Moral Law[1] (the Foundation), is a national public-interest legal organization based in Montgomery, Alabama, dedicated to defending a strict interpretation of the United States Constitution according to the intent of its Framers.

The Foundation believes that freedom of religion and freedom of expression are among the most fundamental rights granted by God and guaranteed by the First Amendment to the United States Constitution. The Foundation is concerned that the respondent school district in this case, like many others across the country, has chosen to sacrifice the fundamental rights of religious expression in a misguided effort to avoid Establishment Clause challenges.

The Foundation also believes that governmental bodies must not communicate a "message of exclusion" to people of faith by selectively banning expressions of faith while freely permitting secular expression.

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[1] Pursuant to Rule 37.3, *Amicus* has provided timely notice all parties. All parties have given blanket consent for *amicus* briefs. Pursuant to Rule 37.6, no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae*, its members or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

On September 17th 2015, the Bremerton School District (BSD) advised Petitioner that he could continue to give inspirational talks to his team but "[t]hey must remain entirely secular in nature, so as to avoid alienation of any team member."

It is hard to imagine a speech restriction that is more blatantly content discrimination and viewpoint discrimination than this. Coach Kennedy can mention almost anything in his inspirational talks to his team. But he must not mention God, even though our national motto is "In God We Trust," our Pledge says we are "one nation under God," and our Declaration of Independence says God is the Source of our unalienable rights. This clear discrimination against religious content and religious viewpoint is unmistakable.

Coach Kennedy's prayer at the 50-yard line after football games was not announced over the loudspeaker, not endorsed by school officials, and not joined by anyone other than those who of their own initiative came out on the field to join him. It does not constitute an establishment of religion in violation of the First Amendment.

Coach Kennedy requested an accommodation of his religious observance and practice pursuant to the Civil Rights Act of 1964, Title VII. The only "hardship" issue raised by the District was their concern about an Establishment Clause violation.

Because Coach Kennedy's prayer did not violate the Establishment Clause, this cannot be an "undue hardship."

The BSD tried to justify this restriction by saying it was "to avoid alienation of any team member." But the BSD seemed to not care in the least that this restriction would alienate those who wanted and needed a religious message. Singling out religious speech for suppression and censorship while allowing other forms of expression, communicates a "message of exclusion" to religious persons and tells them they are not fully part of the community.

This Court should use this case as a vehicle to explain what religious liberty really means.

ARGUMENT

I. Contrary to this decision of the Ninth Circuit, the Constitution and most court decisions strongly support free speech including religious speech in public school settings.

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker,* 364 U.S. 479, 487 (1960). Neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker v. Des Moines Independent Community School District,* 383

U.S. 503, 506 (1969).[2] School officials have a duty to prevent disruption, but "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id* at 737.

In *James v. Board of Educ.*, 461 F.2d 566, 573 (2nd Cir. 1972), the Second Circuit applied the *Tinker* precedent to an eleventh-grade English teacher who wore a black armband on the sleeve of his jacket, "as an expression of [his] religious version to war in any form and as a sign of [his] regret over the loss of life in Vietnam." *Id.* 568. The Court concluded that school authorities may not arbitrarily censor a teacher's speech, especially when the speech "is not coercive and does not arbitrarily inculcate doctrinaire views in the minds of the students." *Id.* 573. The school officials have a duty to prevent disruption, but regulatory policy must be "drawn as narrowly as possible to achieve the social interests that justify it, or whether it exceeds permissible bounds by unduly restricting protected speech to an extent 'greater than is essential to the furtherance of ' those

[2] At least to some extent, the Tinkers' speech was religious or religiously-motivated. The father of the Tinker children was a Methodist clergyman, and they wore their armbands during the Christmas season and fasted on December 16. *Tinker,* Black, J., Dissent at 516.

Nor does *Tinker* suggest that free expression in public schools is limited to students rather than teachers. In fact, Justice Stewart said in his concurring opinion that although he agreed with the Court's conclusion, he could not "share the Court's uncritical assumption that, school discipline aside, the First Amendment rights of children are coextensive with those of adults." Stewart, J., concurring at 515. Justice Stewart seems to suggest that the First Amendment rights of teachers in a public school setting are greater than, not less than, those of students.

interests." *Id.* at 574, quoting *United States v. O'Brien,* 391 U.S. 367, 377 (1968).

In at least one way, Coach Kennedy's position is stronger than that of Mr. James: Kennedy was in the middle of a football field after a game which was not a required school event; no students were required to join him, and others did not have view his actions or hear his words. James was a teacher for a class at which attendance was required.

See also, *Chandler v. Siegelman,* 230 F.3d 1313, 1317 (11th Cir. 2000) ("Permitting students to speak religiously signifies neither state approval nor disapproval of that speech. The speech is not the State's—either by attribution or by adoption."). *See also, Adler v. Duval County School Board,* 250 F.3d 1330 (11th Cir. 2001).

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II. The Bremerton School District wrongfully refused to accommodate Coach Kennedy's free exercise of religion.

A. Coach Kennedy properly and timely requested an accommodation.

Coach Kennedy sent a written request to the District through his attorney on October 14, 2015, requesting a religious accommodation under the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e *et seq.,* allowing him to continue his post-game prayer.

B. The Bremerton School District had a duty to accommodate Coach Kennedy's religious expression unless it could demonstrate that such accommodation would create an "undue hardship" on the conduct of school business.

Whether this case is analyzed conducted under the Establishment Clause, the Free Speech Clause, the Free Exercise Clause, the Equal Protection Clause, or the Civil Rights Act of 1964, Coach Kennedy's claim is entitled to the most stringent analysis known to the law.

The Civil Rights Act of 1964, 42 U.S.C. § 2000e, as amended in 1972, provides in relevant part:

> (j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

The Civil Rights Act of 1964 also created the Equal Employment Opportunity Commission (EEOC). The 1967 EEOC Guidelines on Discrimination Because of Religion provide in part:

> (b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of

> the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business ...
>
> (c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship requires the required accommodations to the religious needs of the employee unreasonable.

29 C.F.R. sec. 1605.1 (1975). Also, one reason Congress enacted the Equal Employment Opportunity Act of 1972 was "in an effort to strengthen the antidiscrimination provisions of Title VII"[3] and to give legal force to the EEOC guidelines.

Section (j) raises three questions: (1) What does "reasonably accommodate" mean? (2) What constitutes an "undue hardship"? and (3) Where does the burden of proof lie? A fourth question, what

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[3] Bradley R. Jardine, *Civil Rights - Religious Discrimination in Employment: Title VII of the Civil Rights Act Requires Reasonable Accommodation of Employee Religious Beliefs by Employer Despite Conflicting Lawful Agency Shop Provision -- Cooper v. General Dynamics,* BYU Law Review 1977 Issue 1:152, 158; Sape and Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972,* 40 Geo. Wash. L. Rev. 824, 824-25 1972).

constitutes "religious observance and practice," is not at issue here because the District does not dispute that Coach Kennedy's prayer is a matter of religious observance and practice.[4]

A "reasonable accommodation" is an accommodation that eliminates the conflict with the employee's religious observance and practice:

> A proposed accommodation is not reasonable if it only eliminates part of the conflict and a full accommodation would not pose an undue hardship. For example, where an individual's religious beliefs prohibit the individual from working from sundown Friday through sundown Saturday, the employer will not satisfy Title VII if it only offers to avoid scheduling the individual for Saturday (but not Friday night shifts.[5]

Although the District has offered accommodations to Coach Kennedy, these are not reasonable accommodations because they do not satisfy the conflict with his religious observance and practice and a full accommodation is possible without undue hardship. The accommodation need not be the exact accommodation the employee requests, but it must

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[4] However, the Ninth Circuit seemingly cast an aspersion on Coach Kennedy's religious devotion by saying (p. 4) that he "began *performing* these prayers when he first started working at BHS." (emphasis added)

[5] Peter T. Shapiro, *Examining the Duty to Provide Religious Accommodations,* Lexis Practice Advisor Journal September 13, 2016, https://www.lexisnexis.com/lexis-practice-advisor/the-journal/b/lpa/archieve/2016/09/13

completely remove the conflict with the employee's religious observance and practice. If it doesn't completely remove the conflict, it will not be a "reasonable accommodation," unless no reasonable accommodation is possible without undue hardship.

The second question is, what constitutes an "undue hardship?" This is difficult to define, but several observations are clear. An accommodation imposes an undue hardship where it imposes on the employer "more than a de minimis cost," 29 C.F.R. sec. 1605.2(e). Coach Kennedy's prayer imposes no cost at all. An accommodation can impose an undue hardship if it causes a disruption for the employee's coworkers. For example, in *Wilson v. U.S.W. Communications,* 58 F.3d 1337 (8th Cir. 1995), the court did not require an employer to accommodate an employee whose religious beliefs required her to wear a graphic anti-abortion pin that made her co-workers upset and caused coworkers' productivity to decline. See *Id.* at 1342, n. 3. Likewise, in *Brener v. Diagnostic Center Hospital,* 671 F.2d 141, 147 (5th Cir. 1982), the court did not require an employer to meet an employee's religious need for work schedule accommodations where the accommodation would require coworkers to cover the employee's shifts , would disrupt work routines, and would result in perceived favored treatment of the religious employee that would negatively affect morale. No such disruption has been shown here except for a few concerns that were raised after this issue gained widespread publicity. Many more people reacted favorably to Coach Kennedy's practice.

Putting the terms "reasonable accommodation" and "undue hardship" together, the employer has a duty to offer to the employee a reasonable accommodation that eliminates the conflict with the employee's religious observance and practice, unless there is no reasonable accommodation that does not cause an undue hardship. As Barbara L. Kramer of the EEOC observed,

> Once an employee or applicant places the employer on notice of her or his need for a religious accommodation, it is the employer's responsibility to find a reasonable accommodation for that individual. In the EEOC's view, an employer satisfies its obligation when it offers all reasonable means of accommodation without causing itself undue hardship. An employer who fails or refuses to offer a reasonable accommodation can avoid liability only by demonstrating that undue hardship would ensue from each possible alternative.[6]

Although the employee has a duty to notify the employer of the conflict with his religious observance

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[6] Barbara L. Kramer, *Reconciling Religious Rights & Responsibilities,* Loyola University Chicago Law Journal, Vol. 30, Issue 3 Spring 1999, 439 at 461. Her conclusion is not at odds with *Trans World Airlines. Inc. v. Hardison,* 432 U.S. 63 (1977), because this Court in *Hardison* concluded that all three possible accommodations worked an undue hardship upon Trans World Airlines. Nor is her conclusion at odds with *Ansonia Board of Education v. Philbrook,* 479 U.S. 60 (1986), because in that case the Court concluded that the accommodation offered by the Board was reasonable.

and practice (Coach Kennedy has done so) and may have a duty to work with the employer to try to resolve the conflict by finding an accommodation (Coach Kennedy has done so), the employee is not obligated to accept any accommodation that does not fully eliminate the conflict with his religious observance and practice.[7]

The third question is, who has the burden of proof? The phrase "unless an employer demonstrates" establishes that the Bremerton School District has the burden of production and persuasion, that is, the burden to assert and prove that it cannot accommodate Coach Kennedy's religious observance and practice without undue hardship. As Dadakis and Russo explain, "The burden of proving undue hardship is placed upon the employer, and the EEOC requires specific evidence that he could not accommodate without undue hardship."[8] As stated in *Kettell v. Johnson & Johnson,* 337 F.Supp. 892, 895 (E.D. Ark. 1972), dissatisfaction or inconvenience is insufficient; "inconvenience is not 'undue hardship."[9]

The District has utterly failed to meet that burden of proof. The only reason the District has given for

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[7] Shapiro, op. cit.

[8] John D. Dadakis and Thomas M. Russo, *Religious Discrimination in Employment: The 1972 Amendment -- A Perspecive,* Fordham Urban Law Journal, Vol. 3, No. 2 (1975), 327 at 341; see also, 29 C.F.R. Sec. 1605.1(c)(1974).

[9] As noted at 29 C.F.R. sec. 1605.2(e) above, for financial costs the employer need only show that its expenses are more than de minimus, but there are no financial costs here. For other hardships, Dadakis and Russo state, "...to sustain a finding of undue hardship there must be a showing by the employer of a substantial burden upon the continued operation of his business." *Id.* at 341.

refusing to grant Coach Kennedy's requested accommodation is that granting the accommodation would violate the Establishment Clause of the First Amendment. This could be an "undue hardship" only if Coach Kennedy's prayer in fact violates the Establishment Clause. If his prayer does not violate the Establishment Clause, then adherence to the Establishment Clause cannot be a compelling interest or an undue hardship.

The Ninth Circuit cited *Good News Club v. Milford Central School,* 533 U.S. 98, 113-14 (2001) (quoting *Widmar v. Vincent,* 454 U.S. 263, 271 (1981), for the proposition that "[A] state interest in avoiding an Establishment Clause violation 'may be characterized as compelling,' and therefore may justify content-based discrimination." Judge Smith then concludes, "the District's September 17 directive was thus motivated by a compelling state interest."

But the Ninth Circuit overlooked the fact that, in both *Good News Club* and *Widmar,* this Court held that the practices at issue -- allowing the Good News Club to use public school facilities in *Good News Club,* and allowing the student group Cornerstone to use university facilities in *Widmar* --did not constitute Establishment Clause violations. Therefore, this Court said, the refusal to allow these groups to use school or university facilities constituted a free speech violation.

Similarly, in *Lamb's Chapel v. Center Moriches Union Free School District,* 508 U.S. 384 (1993), this Court unanimously held that the use of the school auditorium by the church group Lamb's Chapel did

not constitute an Establishment Clause violation, and therefore the school's refusal to allow Lamb's Chapel to use the auditorium was a free speech violation.[10] And in *Rosenberger v. Rector,* 515 U.S. 819 (1995), this Court held that a university subsidy to a student religious group's publication did not violate the Establishment Clause, and therefore denial of that subsidy was a free speech violation.

As these cases make clear, a nonexistent Establishment Clause violation cannot constitute a compelling interest or undue burden that justifies a free speech or free exercise violation.

In his concurring opinion denying rehearing en banc, Second Circuit Judge Smith mentioned one athlete who said he felt pressured to join in Coach Kennedy's prayer because he might not be allowed as much playing time if he did not do so. If this correctly reflects the player's perception, the BSD could easily have corrected this perception by clearly explaining to the player, or by a general announcement, that no one is required to participate, and participation or nonparticipation will in no way affect his playing time on the field or his athletic participation. This is a more narrowly tailored or less restrictive means of accommodating Coach Kennedy's religious convictions. But the BSD did not even consider that accommodation. Rather, the BSD seized upon that statement as an excuse for denying Coach Kennedy (and those who wanted to join him) his First Amendment rights.

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[10] Justice Scalia concurred in the result but criticized the Court's use of the *Lemon* test.

The Ninth Circuit, in its March 18, 2021 opinion and also in its July 19, 2021 concurrence in the denial of rehearing, also cited instances of school officials having to confront angry parents. But Coach Kennedy did not incite these angry parents by his prayers. The BSD incited them by its prohibition. The BSD cannot use the consequences of its own repressive policies as a basis for denying Coach Kennedy his constitutional rights.

C. The Establishment Clause does not forbid the acknowledgement of God even in government speech.

As this Court recognized in *McDaniel v. Paty,* 435 U.S. 618, 641 (1978), "The Establishment Clause, properly understood, is a shield against any attempt to inhibit religion. ... It may not be used as a sword to justify repression of religion or its adherents from any aspect of public life." (Brennan, J. joined by Marshall, J., concurring). They wrote further,

> ...religious ideas, no less than any other, may be the subject of debate which is "uninhibited, robust, and wide-open" ... Government may not interfere with efforts to proselyte or worship in public places. ... It may not seek to shield its citizens from those who would solicit them with their religious beliefs. ... That public debate or religious ideas, like any other, may arouse emotion, may incite, may foment religious divisiveness

> does not rob it of constitutional protection.

Id. 640 (citations omitted).

Human rights are bestowed by God, not by government. The most fundamental document of American law, the Declaration of Independence, which began with an acknowledgement of "the laws of nature and of nature's God," recognizes that all men are "endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness." The Declaration further recognizes that "to secure these rights, Governments are instituted among Men" -- governments do not grant rights; governments only "secure" the rights God has already granted.

Justice Douglas recognized in *Zorach v. Clauson* 343 U.S. 306, 313 (1952), "We are a religious people whose institutions presuppose a Supreme Being." And in his dissenting opinion in *McGowan v. Maryland,* 366 U.S, 420, 562 (1961), he acknowledged the Divine Source of human rights:

> The institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the state is powerless to alter; that the individual possesses rights, conferred by the Creator, which government must respect.

It naturally follows, then, that religious liberty is the first freedom secured by the Bill of Rights. If God is the Source of human rights, those rights must of necessity include the right to acknowledge God.

George Washington, who chaired the Constitutional Convention and was President when the Bill of Rights was adopted, certainly understood this. At the request of Congress, he declared in his October 3, 1789 National Day of Thanksgiving Proclamation, "Whereas it is *the duty of all nations to acknowledge the providence of Almighty God*, to obey His will, to be grateful for his benefits, and humbly to implore His protection and favor...." [emphasis added].

President Lincoln was even more specific on this point. In his March 30, 1863 *Proclamation Appointing a National Fast Day,* he stated:

> Whereas it is *the duty of all nations to acknowledge the providence of Almighty God*, to obey His will, to be grateful for his benefits, and humbly to implore His protection and favor...." [emphasis added]. President Abraham Lincoln's March 30, 1863 *Proclamation Appointing a National Fast Day* stated:
>
> Whereas, the Senate of the United States, devoutly recognizing the Supreme Authority and just Government of Almighty God, in all the affairs of men and of nations, has, by a resolution, requested the President to designate and set apart a day for

National prayer and humiliation:

> And whereas it is the *duty of nations as well as of men, to own their dependence upon the overruling power of God*, to confess their sins and transgressions, in humble sorrow, yet with assured hope that genuine repentance will lead to mercy and pardon; and to recognize the sublime truth, announced in the Holy Scriptures and proven by all history, that those nations only are blessed whose God is the Lord... . (emphasis added)

In 1853, when the constitutionality of the congressional chaplaincy was questioned, the Senate Judiciary Committee undertook an exhaustive study of the background and meaning of the Establishment Clause. The Committee concluded in part:

> The clause speaks of "an establishment of religion." What is meant by that expression? It referred, without doubt, to that establishment which existed in the mother country, its meaning is to be ascertained by ascertaining what that establishment was. It was the connection with the state of a particular religious society, by its endowment, at the public expense, in exclusion of, or in preference to, any other, by giving to its members exclusive political rights, and by compelling the attendance of those who rejected its communion upon its worship, or

religious observances. These three particulars constituted that union of church and state of which our ancestors were so justly jealous, and against which they so wisely and carefully provided. ... Our fathers were true lovers of liberty, and utterly opposed to any constraint upon the rights of conscience. They intended, by this amendment, to prohibit "an establishment of religion" such as the English church presented, or anything like it. But they had no fear or jealousy of religion itself, nor did they wish to see us an irreligious people; *they did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators; they did not intend to send our armies and navies forth to do battle for their country without any national recognition of that God on whom success or failure depends*; they did not intend to spread over all the public authorities and the whole public action of the nation the dead and revolting spectacle of 'atheistical apathy.' Not so had the battles of the revolution been fought, and the deliberations of the revolutionary Congress conducted. On the contrary, all had been done with a continual appeal to the Supreme Ruler of the world, and an habitual reliance upon

> His protection of the righteous cause which they commended to His care. [11]

Washington said the acknowledgement of God is "the duty of nations." Lincoln added that the acknowledgement of God is "the duty of nations as well as of men." The Senate Judiciary Committee said the Establishment Clause does not prohibit "a just expression of religious devotion by the legislators of the nation, even in their public character as legislators." Even if Coach Kennedy's prayer is "government speech," the Establishment Clause permits it as an acknowledgement of God.

D. However, Coach Kennedy's prayers are not government speech.

Based on *Walker v. Texas Division, Sons of Confederate Veterans, Inc.,* 576 U.S. 200, 135 S.Ct. 2239 (2015) and *Pleasant Grove City, Utah v. Summum,* 555 U.S. 460 (2009), *Amicus* suggests that a three-part test applies in determining what constitutes government speech: (1) whether the government has traditionally used the message or conduct at issue to speak to the public; (2) whether the facility is closely identified in the public mind with the governmental unit that owns it; and (3) whether government has effectively controlled the messages in the facility by exercising final approving authority over their selection.

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[11] Senate Rep. No. 32-376 (1853), *The Reports of Committees of the Senate of the United States for the Second Session of the Thirty-Second Congress,* 1852 -53, at 1-4 (Washington, D.C. 1853) (emphasis added). In the same year the House Judiciary Conducted a similar study and came to nearly identical conclusions.

(1) The BSD has not used this format -- the middle of a football field after the game -- to communicate official messages to the general public.

(2) The public does not identify a coach kneeling in prayer in the middle of a football field with government speech. Rather, the public recognizes that, except possibly when delivering official announcements such as the date of the next game, a coach speaks for himself. The reasonable informed observer knows that while some coaches may pray after a game, others may not, and that is a matter of individual choice.

(3) Schools in general, and BSD in particular, do not effectively control the messages delivered by coaches. BSD, like most school districts, has given its coaches completely free rein to say whatever they want to say to their players, except for this one content-based and viewpoint-based censorship of religious speech.

Coach Kennedy, and those who want to join him, simply want to pray publicly before, during, or after an athletic event. Any who wish to join him may do so, but no one is coerced or pressured to participate.

Unlike the situation in *Santa Fe Independent School Dist. v. Doe,* 530 U.S. 290 (2000), the Bremerton School District did not hold an election as to whether to have prayer and who should lead the prayer, nor was the prayer broadcast on the school loudspeaker. Coach Kennedy conducted his prayer quietly and by himself.

Unlike the situation in *Lee v. Weisman,* 505 U.S. 577 (1992), Coach Kennedy's prayer took place at a high-school athletic event, not a middle school graduation. Unlike the rabbi in *Lee v. Weisman,* the school district did not select Coach Kennedy to deliver a prayer; he chose to do so on his own.[12] Unlike *Lee v. Weisman,* the superintendent did not give Coach Kennedy a publication entitled "Guidelines for Civic Occasions" telling him what his prayer should or should not contain. The school district did not announce the prayer to the attendees or ask them to join the prayer, to stand and bow their heads, or even to be silent. The prayer was not carried on the loudspeaker and was audible only to those standing close to Coach Kennedy. Those who chose not to join or observe the prayer were completely free to continue their conversations, sing the school fight song, exit the stadium, or do whatever else they were doing.

If there was any concern about whether Coach Kennedy's prayer was government speech or private speech, that concern could easily be resolved by the District adopting a policy stating that all such

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[12] As Justice Souter, joined by Justices Stevens and O'Connor, said in his concurring opinion: "If the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State." *Lee*, 505 U.S. at 630 n.8 (Souter, J., concurring). In the case at hand, the District hired Coach Kennedy according to wholly secular criteria. He chose to deliver a religious message. This makes it harder to attribute an endorsement of religion to the District.

expressions are private speech, much as Justice Scalia suggested in his dissenting opinion in *Lee v. Weisman,* supra, at 645.

The case is similar to the circumstances in *Chandler v. Siegelman,* 230 F.3d 1313, 1317 (11th Cir. 2000), and *Adler v. Duval County School Board,* 250 F.3d 1330 (11th Cir. 2001). In both of those cases, religious speech was permitted at public school athletic events.

E. The Ninth Circuit erred in its use/misuse of the endorsement test.

The so-called "endorsement test" set forth in *Capitol Square v. Pinette,* 515 US. 753, 779-80 (1995), is foreign to the plain language of the Establishment Clause, to the history and circumstances surrounding its adoption, and to its use in early American history.

Furthermore, the endorsement test is unworkable because it involves entirely subjective speculation as to what some fictitious reasonable (informed) observer might or might not perceive as government endorsement of religion. The problems with the endorsement test were clearly set forth in the dissenting opinion of Judge Kelly, joined by Judge O'Brien, Judge Tymkovich, and Judge (now U.S. Supreme Court Justice) Gorsuch in *American Atheists v. Duncan,* 637 F.3d 1095, 1103-05) (2010); note especially Part B of their opinion, "The Unreasonable 'Reasonable Observer.'" And possibly the best example of the misuse of this unworkable and inapplicable test is the Ninth Circuit's

mischaracterization of the "reasonable observer" as one who only sees Coach Kennedy praying and is unaware that other coaches do not pray, that the District has not ordered him to pray, and that the First Amendment speaks explicitly about religious liberty.

The endorsement test is further stretched to suggest that a public prayer could send a "message of exclusion" to those who do not want to pray. Such subjective speculation is nothing but what Justice Scalia called "psychology practiced by amateurs;" Scalia dissent, *Weisman,* supra, at 636. And once a court has embarked upon such a subjective "psycho-journey" (Scalia, *id.* at 643), nothing prevents the court from applying a double standard, such as the Ninth Circuit's concern for "exclusion" allegedly felt by the person who does not want to pray coupled with the Circuit's utter lack of concern for those who want to pray but are prohibited from doing so.

F. The adoption of an appropriately-worded school district policy would alleviate any possible Establishment Clause coercion or endorsement concern.

In *Lee v. Weisman,* 505 U.S. 577 (1992), this Court in a 5-4 decision held that a middle-school graduation prayer by a Jewish rabbi violated the Establishment Clause.[13] But as Justice Scalia noted:

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[13] *Weisman* can be distinguished from the case at hand because the prayer was by an invited speaker, all were expected to stand and bow their heads during the prayer, the words of the prayer were audible to the whole audience, and a school official gave the rabbi a publication entitled "Guidelines for Civic

> All that is seemingly needed is an announcement, or perhaps a written insertion at the beginning of the graduation Program, to the effect that, while all are asked to rise for the invocation and benediction, none is compelled to join in them, nor will be assumed by rising, to have done so. That obvious fact recited, the graduates and their parents may proceed to thank God, as Americans have always done, for the blessings He has generously bestowed on them and on their country.

505 U.S. at 645 (Scalia, J., dissenting). If this accommodation was not suggested or considered during the negotiations or in the lower courts, that should not matter because Justice Scalia already suggested it in his *Weisman* dissent.

Any concern about coercion or endorsement in regard to Coach Kennedy's prayer can easily be resolved by the adoption of a school board policy, perhaps coupled with a public notice, to the effect that all statements and other forms of expression at school athletic events by coaches, teachers, officials, players, or other students are the personal private expressions of those making the statements and do not constitute the speech of the school or have the official endorsement of the school district.

Occasions" telling him what his prayer should and should not contain. None of those factors are present in this case.

Although such a simple announcement would resolve this case, the Foundation does not believe one is needed. Because other coaches and officials do not pray in like manner, any reasonable observer who saw Coach Kennedy praying on the field would know that his personal expression was not that of the team or of the school. The District Court mischaracterized the issue, saying "a reasonable observer, in my judgment would have seen him as a coach" when he knelt to pray. Pet. App. 89. The issue is not whether a reasonable observer would have seen Kennedy as a coach, but whether a reasonable observer would have seen him as speaking (praying) as an official expression of the school district. The reasonable observer, as explained by Justices O'Connor, Souter, and Breyer in their concurring opinion in *Capitol Square v. Pinnette,* 515 U.S. 753, 779-80 (1995), is an informed observer who is familiar with the history and circumstances surrounding the expression:

> ...the applicable observer is similar to the "reasonable person" in tort law, who "is not to be identified with any ordinary individual, who might occasionally do unreasonable things," but is "rather a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 175 (5th ed. 1984). Thus, "we do not ask whether there is *any* person who could find an endorsement of religion, whether *some* people may be offended by the display, or whether *some* reasonable

> person *might* think [the State] endorses religion." *Americans United,* 980 F. 2d, at 1544. Saying that the endorsement inquiry should be conducted from the perspective of a hypothetical observer who is presumed to possess a certain level of information that all citizens might not share neither chooses the perceptions of the majority over those of a "reasonable non-adherent," cf. L. Tribe, American Constitutional Law 1293 (2d ed. 1988), nor invites disregard for the values the Establishment Clause was intended to protect. It simply recognizes the fundamental difficulty inherent in focusing on actual people: There is always *someone* who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion. A State has not made religion relevant to standing in the political community simply because a particular viewer of a display might feel uncomfortable.
>
> It is for this reason that the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears.

That reasonable and informed observer would be aware that although Coach Kennedy prays, other coaches do not pray. The observer would also be aware of the First Amendment and its limitations on

religious establishment. The reasonable and informed observer would also be aware of school policies and public disclaimers concerning speech at athletic events. The reasonable and informed observer would therefore conclude that Coach Kennedy's prayer is his personal expression and not that of the school district or the state.

The Foundation does not believe the endorsement test is appropriate for this case, because we do not believe it is consistent with the intent of the Framers of the First Amendment. We argue here not for the use of the endorsement test but rather against the misuse of that test by the Ninth Circuit.

III. Refusing to allow Coach Kennedy to pray while allowing other forms of expression is censorship of religion and discrimination against religion.

A. The Bremerton School District policy has the primary effect of inhibiting religion.

The principal or primary effect of a school policy that prohibits coaches from praying on the athletic field after games is to inhibit religion.

The policy singles out religious expression—and only religious expression—for censorship and suppression. If Coach Kennedy wanted to quote from Socrates or Plato, from Chaucer or Shakespeare, from Washington or Lincoln, from Mark Twain or Will Rogers, or any other source, he would be free to do so. If he wanted to stand and salute the American flag,

he would be free to do so. But because his expression is religious, it has been prohibited. By overtly and expressly discriminating against religious expression, the Bremerton policy has the primary effect of inhibiting religion.

B. The policy communicates a message of exclusion, telling religious persons that they are not welcome in the public arena.

This Court has expressed concern that endorsing or coercing certain practices, or discouraging or prohibiting others, sends a "message of exclusion to all those who do not adhere to the favored beliefs." *Lee,* 505 U.S. at 606 (Blackmun, J., concurring) *See also Wallace v. Jaffree,* 472 U.S. 38, 69 (1985) (O'Connor, J., concurring).

One way the state can send a "message of exclusion" is by coercing unwilling persons to engage in religious or other expression to which they object. But another way is to prohibit religious persons from engaging in religious expression while nonreligious expression is permitted. By targeting religious expression for censorship and prohibition, the Bremerton School District has clearly told Coach Kennedy and those who share his beliefs that "they are outsiders, not full members of the political community." *Jaffree,* 472 U.S. at 69 (O'Connor, J., concurring).

Most recently, in *Masterpiece Cakeshop, Ltd., v. Colorado Civil Rights Comm'n,* 138 S.Ct. 1719, 1729 (2018), this Court noted that the Colorado

"commissioners endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado's business community." The Court added:

> The Free Exercise Clause bars even "subtle departures from neutrality" on matters of religion. [*Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 534 (1993)]. Here, that means the Commission was obliged under the Free Exercise Clause to proceed in a manner neutral toward and tolerant of Phillips' religious beliefs. The Constitution "commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures." *Id.* at 547.

Masterpiece Cakeshop, slip op. at 17.

By crafting an accommodation policy by which religious persons are free to express themselves without subjecting others to coercion or endorsement, the Bremerton School District could have used this situation as an opportunity to teach students the true meaning of religious liberty and religious tolerance. Instead, the District chose to treat Coach Kennedy as a second-class citizen, suppressing his right to free exercise and free speech.

CONCLUSION

For far too long, many school officials have assumed that the easiest way to achieve religious neutrality is to prohibit religious expression. But this approach to Establishment Clause issues establishes "a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.'" *School District of Abington Township v. Schempp,* 374 U.S. 203, 225 (1963) (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)). By censoring Coach Kennedy's speech and denying him the right to pray after the game, the BSD also denies his players, their parents, and others the right to view and hear his prayers and to join with them if they so choose.

This case affords the Court an opportunity to correct an injustice and to strike a proper balance on the subject of religious expression in the public arena.

The Foundation urges the Court to reverse the Ninth Circuit and recognize Coach Kennedy's right to pray.

Respectfully submitted,

JOHN EIDSMOE
Counsel of Record
FOUNDATION FOR MORAL LAW
One Dexter Avenue
Montgomery AL 36104

(334) 262-1245
eidsmoeja@juno.com

February 23, 2022