Case No. 20-35222

UNITED STATES COURT OF APPEALS
FOR THE NINTH DISTRICT

JOSEPH A. KENNEDY,
Plaintiff-Appellant,

vs.

BREMERTON SCHOOL DISTRICT,
Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Washington
Honorable Judge Ronald B. Leighton
Case No. 3:16-cv-05694-RBL

BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION, ASSOCIATION OF ALASKA SCHOOL BOARDS, ARIZONA SCHOOL BOARDS ASSOCIATION, CALIFORNIA SCHOOL BOARDS ASSOCIATION, NEVADA ASSOCIATION OF SCHOOL BOARDS, AND WASHINGTON STATE SCHOOL DIRECTORS' ASSOCIATION IN SUPPORT OF APPELLEE BREMERTON SCHOOL DISTRICT

(All Parties Have Consented; FED. R. APP. P. 29(a)(2) & 9th Cir. R. 29-3)

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CORPORATE DISCLOSURE STATEMENT

Amici Curiae National School Boards Association, Association of Alaska School Boards, Arizona School Boards Association, California School Boards Association, Nevada Association of School Boards, and Washington State School Directors' Association certify that they have no parent corporations. They have no stock and, therefore, no publicly held company owns 10% or more of their stock.

CONSENT OF THE PARTIES TO FILE BRIEF

Pursuant to Rule 29 of the Federal Rule of Appellate Procedure, all parties have consented to filing of this brief, respectfully submitted in support of Appellee Bremerton School District by *Amici Curiae* National School Boards Association, Association of Alaska School Boards, Arizona School Boards Association, California School Boards' Association, Nevada Association of School Boards, and the Washington State School Directors' Association ("*Amici*").

INTEREST OF *AMICI CURIAE*

The National School Boards Association's ("NSBA") mission is to work with and through its member State Associations to advocate for equity and excellence in public education through school board governance. Through its member state associations, NSBA represents over 90,000 school board members who govern approximately 13,600 school districts serving nearly 50 million public school students. NSBA regularly represents its members' interests before Congress and federal courts, and has participated as *amicus curiae* in many cases involving all aspects of public education.

The Association of Alaska School Boards ("AASB") is a not-for-profit membership organization consisting of 50 of the 53 Alaska school districts. AASB advocates for children and youth by assisting school boards in providing a quality public education, focused on student achievement, through effective local governance. Resolutions enacted by AASB's Delegate Assembly guide legal advocacy efforts to protect the ability of AASB's members to provide an equitable and affordable education to every child, every day. The AASB Board of Directors has determined that the issues before this Court in this matter have implications for school districts across Alaska.

The Arizona School Boards Association ("ASBA") is a private, non-profit, nonpartisan organization that provides training, leadership, and essential services

to public school governing boards statewide. More than 240 governing boards, representing nearly 1 million Arizona students, are members of ASBA. ASBA believes local school district governing boards, elected by the communities they serve, should be charged with broad authority to ensure all students get a quality education.

The California School Boards Association ("CSBA") is a California non-profit corporation duly formed and validly existing under the laws of the State of California. CSBA is a member-driven association composed of the governing boards of nearly 900 school districts and county offices of education. CSBA's Education Legal Alliance ("ELA") is composed of nearly 700 CSBA members and is dedicated to addressing public education legal issues of statewide concern to school districts and county offices of education. One purpose of the ELA is to ensure that local school boards retain the authority to exercise fully the responsibilities vested in them by law and to make appropriate policy decisions for their local agencies.

Established in 1963, the Nevada Association of School Boards ("NASB") is a nonprofit corporation dedicated to strengthening public schools through local citizen control. All 17 school districts in Nevada are members of the association giving a common voice for public education. NASB focuses upon three primary

strategies to accomplish its mission—Advocacy, Boardsmanship, and Communication.

The Washington State School Directors' Association ("WSSDA") is a state agency created to coordinate programs and procedures pertaining to policy making by, and management of, school districts. WSSDA's membership is comprised of all 1,477 school board of director members from Washington State's 295 school districts, which collectively serve more than one million students. WSSDA is an advocate for student achievement, public education, and serves as a unified voice for local school leaders.

STATEMENT OF AUTHORSHIP

Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, *Amici* state that: (1) no party's counsel authored this Brief in whole or in part; (2) no party or a party's counsel contributed money that was intended to fund preparing or submitting this Brief; and (3) no person—other than the *Amici*, its members, or its counsel—contributed money that was intended to fund preparing or submitting this Brief.

INTRODUCTION

This case strikes at the heart of the long-standing discretion and authority of public school districts to limit controversial demonstrative or spoken expression by its employees while they perform their public school functions and duties. This interest is paramount when the expression at issue takes place before the captive audience of public school students, and is communicated before and to them by teachers and coaches—individuals whom the public school system encourages students to emulate, and in whom it places trust to carry out its educational mission. With unique roles inherent to the public school mission in mind, courts have long afforded school officials authority to limit expression that can be attributable to the school district, when that expression conflicts with the school district's mission, or would make a reasonable student feel pressured or ostracized.

Here, Appellee Bremerton School District (the "Appellee" or "District") acted consistently with this Court's well-established precedent, as well as that of its sister circuits, when it sought to limit Coach Kennedy's public religious expression, through kneeling, prayers, and speeches before and with his students, and in the glare of the field lights at the school's public interscholastic football competitions. The District reiterated on more than one occasion that Coach Kennedy could pray *in private* before or after the games.

In ruling for the Appellee, this Court need do nothing that risks in any fashion foreclosing avenues for Coach Kennedy's or other public employees' truly private expression. *Amici* fully acknowledge that public employees retain their First Amendment free speech rights when speaking as private citizens. This legal rule and practical necessity is reflected in the policies and practices of school districts throughout this Circuit and the nation. The Court's ruling on the facts before it does not portend broader implications for public employee expression, let alone risk infringement upon that expression which is truly private, but legally reserved for times away from the classroom or the playing field, or when the expression cannot be imputed to the school district. Based upon the discussion below of factors unique to the context of public education, this Court should affirm the District Court, along with the ability of public school district employers to regulate expression that can be imputed to the school district.

ARGUMENT

I. TEACHERS AND COACHES, IN THEIR OFFICIAL CAPACITY AT SCHOOL FUNCTIONS AND IN THE PRESENCE OF STUDENTS, HOLD POSITIONS OF TRUST AND AUTHORITY, AND INTERACT WITH A CAPTIVE AUDIENCE OF "IMPRESSIONABLE YOUNG MINDS."

Of particular importance in this case to school districts across the Ninth Circuit is the large and time-tested body of law recognizing that a public school teacher, coach, counselor, or other employee who works closely with students acts as a public employee when speaking before students at school or a school event.[1]

Teachers and coaches in the nation's public schools hold an extremely important and unique position of trust and authority; how they comport themselves in those roles has significant consequences for the students they teach, coach, and mentor, as well as for the school districts that employ them. They stand as the school district's representative in the everyday work of schools—as academic and life lessons are imparted in classrooms, on athletic fields, in debate forums, and more. Their interactions with students within the classroom or at school sponsored

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[11] This Court applies the framework from *Garcetti v. Ceballos*, 547 U.S. 410 (2006) with a 5-part test. That test asks whether: (1) the plaintiff spoke on a matter of public concern; (2) the plaintiff spoke as a private citizen or public employee; (3) the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action; (4) the state had an adequate justification for treating the employee differently from other members of the general public; and (5) the state would have taken the adverse employment action even absent the protected speech. *See Eng v. Cooley*, 552 F.3d 1062, 1070-71 (9th Cir. 2009).

events are inescapably official acts condoned by the public school systems which employ them, as they act as real or perceived mouthpieces for their school districts.

A. The Court Must Evaluate the Speech Issues in this Case with the Recognition that in the Public School Context, Students are a Captive Audience with Impressionable Young Minds.

When weighing a public school employee's expression rights in the workplace against the right of schools to enforce speech rules, courts allow reasonable restriction of the employee's speech in part because students are a "captive audience." *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 968 (9th Cir. 1999); *Fowler v. Bd. of Educ. of Lincoln Cnty.*, 819 F.2d 657, 668 (6th Cir. 1987) (Peck, J., concurring). Indeed, compulsory attendance laws require minor children to be in school,[2] and the overwhelming majority of those children attend public schools. Time and again, courts point to the unique role of teachers and coaches vis-a-vis students when determining the proper confines of expressive rights in the educational context, including free exercise rights.

Dating back to the 1950s and 1960s, the United States Supreme Court has taken this special relationship into account: "A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in

[2] *See, e.g.*, ALASKA STAT. § 14.30.010; ARIZ. REV. STAT. § 15-802; CAL. EDUC. CODE § 48200; HAW. REV. STAT. § 302A-1132; IDAHO CODE ANN. § 33-202; MONT. CODE ANN. § 20-5-103; NEV. REV. STAT. § 392.040; OR. REV. STAT. § 339.010; WASH. REV. CODE § 28A.225.010.

which they live. In this, the state has a vital concern." *Shelton v. Tucker*, 364 U.S. 479, 485 (1960) (quoting *Adler v. Bd. of Educ.*, 342 U.S. 485, 493, 385 (1952)). Stated more fully and more recently by the Court in *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987):

> [f]amilies entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. *Students in such institutions are impressionable and their attendance is involuntary . . . . The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure* . . . . Furthermore, "[t]he public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools[.]

Id. at 584 (emphasis added & citations omitted).

This Court's decision in *Johnson v. Poway Unified School District*, 658 F.3d 954 (9th Cir. 2011), correctly highlighted this "captive audience" concept when it found that the very nature of a teacher's (or coach's) roles is to be the face and voice of the school: "because of the position of trust and authority they hold and the impressionable young minds with which they interact, teachers necessarily act as teachers . . . when at school or a school function, in the general presence of students, in a capacity one might reasonably view as official." *Id.* at 968; *see also Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1048 (9th Cir. 2020)

("A proper constitutional analysis must give substantial weight to the critical fact that we are dealing with 'young impressionable children whose school attendance is statutorily compelled.'") (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 307 (1963) (Goldberg, J., concurring)).

Moreover, *Johnson* and corresponding United States Supreme Court precedent does not stand alone. Courts across the country have recognized—in a variety of speech contexts—that students at public school events are captive audiences, and school officials who interact with them hold specialized roles of trust and authority. *See, e.g.*, *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986) (recognizing unique sensitivity and concerns which arise with students as "captive audience"); *Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 475 (3d Cir. 2015) ("[T]he job of a public school educator implicates a rather special set of circumstances and responsibilities. ''Plaintiff worked in a school, where students 'are impressionable and their attendance is involuntary.'"") (citations omitted); *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 480-81 (7th Cir. 2007), *cert. denied* 128 S.Ct. 160 (2007) ("The Constitution does not entitle teachers to present personal views to captive audiences against the instructions of elected officials."); *Berger v. Rensselaer Cent. Sch. Corp.*, 982 F.2d 1160, 1169 (7th Cir. 1993) ("Many cases have focused on the impressionability of students in elementary and secondary schools and the pressure they feel from teachers,

administrators and peers.") (citation omitted); *see also Craig v. Rich Twp. High Sch. Dist. 227*, 736 F.3d 1110, 1119 (7th Cir. 2013) ("The fact that Craig works closely with students at a public school as a counselor confers upon him an inordinate amount of trust and authority."); *Melzer v. Bd. of Educ. of the City Sch. Dist. of the City of New York*, 336 F.3d 185, 198 (2d Cir. 2003) ("[W]e note that we conduct our evaluation of appellant's rights versus governmental interest bearing in mind his position as a teacher in a public school. This position by its very nature requires a degree of public trust not found in many other positions of public employment."); *United Teachers of New Orleans v. Orleans Parish Sch. Bd. Through Holmes*, 142 F.3d 853, 856 (5th Cir. 1998) ("Teachers are entrusted with this nation's most precious asset—its children . . . . [T]he role model function of teachers, coaches, and others to whom we give this responsibility adds heavy weight to the state interest side of the ledger . . .").

Among the array of cases in this area, the Sixth Circuit perhaps put it best when describing the role and influence of public school teachers and administrators—a rationale equally applicable to public school coaches:

> Indeed, teachers occupy a singularly critical and unique role in our society in that for a great portion of a child's life, they occupy a position of immense direct influence on a child, with the potential for both good and bad. Teachers and administrators are not simply role models for children (although we would certainly hope they would be that). Through their own conduct and daily direct interaction with children, they influence and mold the perceptions, and thoughts and values of children. Teachers and administrators

> are not some distant societal role models, as in the case of . . . political candidates . . . ; rather, on a daily basis, there is a direct nexus between the jobs of teachers and administrators and the influence they exert upon the children who are in their charge. Indeed, directly influencing children is their job.

Knox Cnty. Educ. Assn. v. Knox Cnty. Bd. of Educ., 158 F.3d 361, 375 (6th Cir. 1998).

Here, the Court must account for the special relationship between Coach Kennedy and his student athletes and the captive audience that those student athletes represent when under his supervision on the football field, with his "coach's hat" firmly in place (not to mention the other students in the stands). When parents expressed appreciation for the District's directive that Coach Kennedy cease praying after games, some noted that their children had participated in the prayers to avoid being separated from the rest of the team or to ensure playing time. This Court should thus recognize the practical and legal significance of Coach Kennedy's position as a public school coach in this case. That unique role is central to the existing legal standard permitting public schools to develop and impose reasonable limitations on the conduct of teachers, coaches, and like employees when they enjoy the captive audience of public school students eager to or otherwise compelled to listen to, learn from, and emulate them.

B. School Districts Have an Adequate Justification in Restricting an Employee's On-Duty Expression to Avoid the Appearance that it is School Sponsored and to Avoid a Collision with the Establishment Clause.

In light of the special concerns raised by the authority and influence teachers and coaches hold over a captive audience of impressionable students, public school districts have a strong interest in regulating their speech, whether demonstrative or spoken. This interest is especially acute when a public school teacher or coach is performing their public school functions and duties, as they are the actual or perceived mouthpiece for the schools and school districts which employ them.

First, it is critical that a school district have the authority and discretion to dissociate clearly from expression that is not its own, but is instead private speech of a public school employee. Where the on-field speech of a coach or "the in-class speech of a teacher is concerned, the school has an interest not only in preventing interference with the day-to-day operation of its classrooms . . . , but also in scrutinizing expressions that 'the public might reasonably perceive to bear [its] imprimatur[.]'" *Bishop v. Aronov*, 926 F.2d 1066, 1073 (11th Cir. 1991) (quoting *Roberts v. Madigan*, 921 F.2d 1047, 1057 (10th Cir. 1990)); *cf. Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988) ("A school must also retain the authority to refuse to . . . associate the school with any position other than neutrality on matters of political controversy.").

Second, with public schools' unique educational mission constantly in mind, public schools balance daily their duty under the Free Exercise Clause to accommodate the religious beliefs of both students and employees, and their obligation under the Establishment Clause not to endorse or promote a specific religion. Similarly, they balance the importance of exposing evolving young minds to various points of view on controversial political topics with the need to remain neutral on those same topics. *See Planned Parenthood of S. Nevada, Inc. v. Clark Cnty. Sch. Dist.*, 941 F.2d 817, 829 (9th Cir. 1991) ("In light of the nature of the school environment, educators must have the ability to consider the 'emotional maturity of the intended audience' as well as the authority to refuse to 'associate the school with any position other than neutrality on matters of political controversy.'") (quoting *Hazelwood Sch. Dist.*, 484 U.S. at 272). In the context of religion, public schools have not just the authority, but the legal obligation, to restrict employees from proselytizing students. This Court captured public school districts' concerns in this regard in *Peloza v. Capistrano Unified School District*, 37 F.3d 517 (9th Cir. 1994), holding that a school district may direct its employees to refrain from discussing religious beliefs with students: Teachers' "expressions of opinion are all the more believable because [the employee] is a teacher" and the "likelihood of the high school students equating [the employee's] views with those of the school is substantial." *Id.* at 522. This Court rested its decision in *Johnson*

v. Poway Unified School District, *supra*, on similar rationale, finding a California school district did not violate a high school teacher's free speech rights when the school's principal ordered the teacher to remove banners containing religious references displayed in his classroom. *Johnson*, 658 F.3d at 964.

Put simply, the risk of Establishment Clause violation posed by a public school coach initiating and leading prayer, at a school event, with his student team members at hand, does not present a close call, in or outside of the Ninth Circuit. *See, e.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000); *Marchi v. Bd. of Coop. Educ. Services of Albany*, 173 F.3d 469, 474-77 (2d Cir. 1999) (that school employee's speech may constitute Establishment Clause violation is sound rationale for preventing such expression); *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004, 1007-08 (7th Cir. 1990) (same); *see also Lee v. Weisman*, 505 U.S. 577, 592-93 (1992) (analyzing inherent pressure of public school prayer activities on students and others); *Kennedy v. Bremerton Sch. Dist.*, 869 F.3d 813, 827-28 (9th Cir. 2017) (finding Coach Kennedy unlikely to prevail on the merits due to the factual context at issue in the case and his role as public school coach).

This Court must account for these considerations to reach the proper outcome in this case, affirming the District Court, and upholding school districts' critical ability to remain neutral on issues of religion and politics.

II. SCHOOL DISTRICT EMPLOYERS' LONGSTANDING LEGAL AUTHORITY TO REGULATE EMPLOYEE SPEECH OCCURRING DURING OR AS PART OF THEIR OFFICIAL DUTIES ENABLES THEM TO FULFILL THEIR EDUCATIONAL MISSION.

It is well-settled law that a public school employer may regulate an employee's speech occurring during the performance of the employee's official duties. *See Garcetti*, 547 U.S. at 421-22; *Eng*, 552 F.3d at 1070-71; *see also Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968). While public school employees do not shed their First Amendment rights at the schoolhouse gate (*see Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)), by becoming public employees, they do become subject to the *Garcetti* framework.[3]

As the District Court understood, and the Appellee District has emphasized, the facts here are akin to those in *Johnson v. Poway Unified School District*, *supra*, in which this Court determined that the teacher's speech ***owed its existence to his***

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[3] On this point, specifically with respect to religion, *Amicus Curiae* NSBA has provided a clear statement that is consistent with the law:

> NSBA supports an individual student's constitutional right to engage in religious activity. However, in accordance with the U.S. Constitution, school officials, when acting in their official capacity, should not solicit, encourage, or discourage religious activity.

NSBA, Beliefs and Policies, art. IV, § 3.12, *available at* https://www.nsba.org/-/media/NSBA/File/nsba-beliefs-and-policies-adopted-march-29-2019.pdf?la=en&hash=5C505E29FEADE4FA1803892AA5D92D77E9D10DB2.

position as a public school teacher, as the speech occurred in the teacher's classroom, and only the teacher may post banners in the classroom. Thus he spoke as a public employee. *Johnson*, 658 F.3d at 959.

Coach Kennedy's kneeling prayer, at the 50-yard line of the school's football field, mere minutes following games, after he had led them through until the final whistle, with student athletes still in their school uniforms surrounding him, under the school's football field lights, and before parents, classmates, friends, and community members in attendance to watch an official interscholastic sports event, puts this case on all fours with *Johnson*. *See id.* at 968 (teachers, or coaches, necessarily act as such when (1) at school or a school function, (2) in the general presence of students, and (3) in a capacity one might reasonably view as official); *see also Bremerton Sch. Dist.*, 869 F.3d at 825. ***The expression at issue owes its existence to Coach Kennedy's position as a public school coach***.

School districts within the Ninth Circuit must continue to have the discretion and authority to regulate and limit their employee's controversial or religious expression when it is conducted within the scope of the employee's role as a teacher or coach of public school students. Coach Kennedy's mid-field prayers under the "Friday night lights" fall clearly within that scope, as the experience of high school football is closely and inescapably intertwined with school, students,

and school coaches.[4] The Court's opinion here can and should be tailored to facts at issue, and restrained by analogous scenarios: a public school coach with this players on the field, or a public school teacher in the classroom. These scenarios undoubtedly arise daily in the nation's public schools.

Buttressing the proper outcome in this case are decisions from this Court's sister circuits and district courts recognizing the ability of school district employers to limit their employees' expression when the employees' speech reasonably could be perceived to bear the school's imprimatur. *See, e.g.*, *Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 465-80 (3d Cir. 2015); *Mpoy v. Rhee*, 758 F.3d 285, 290-94 (D.C. Cir. 2014); *Fox v. Traverse City Area Pub. Sch. Bd. of Educ.*, 605 F.3d 345, 348-51 (6th Cir. 2010); *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689,

[4] *See* SHAREAMERICA, FOOTBALL: A FALL TRADITION IN SCHOOLS ACROSS AMERICA (Oct. 13, 2017), *available at* https://share.america.gov/football-a-fall-tradition-in-schools-across-america/ ("It's Friday night in the United States, and all across the country a fall ritual is unfolding. Cheerleaders ready their pompoms. Marching band members warm up their musical instruments. Teenage boys gather in field houses to pull on protective gear, cinch up their cleats and get ready to charge into packed stadiums lit by enormous lights. It's secondary school — or high school — football season, and for many Americans this is the best season of all . . . . [¶] Football — not to be confused with the 90-minute, feet-only game Americans call soccer — is less about the game itself than everything else it inspires. *For players, it's about working hard as a team to accomplish something no one person could ever do. Coaches use the sport as a metaphor for life, with lessons on overcoming obstacles.* Fans love the sense of community the sport creates, with cheerleaders, dance teams and band members all there to keep the excitement levels high.") (emphasis added). ShareAmerica is a website "managed by the Bureau of Global Public Affairs within the U.S. Department of State."

694 (5th Cir. 2007) (athletic director and head football coach's "memoranda [on handling of athletic funds] to the office manager and principal . . . were written in the course of performing his job as Athletic Director; thus, the speech contained therein is not protected by the First Amendment" and thus subject to regulation); *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 478-80 (7th Cir. 2007); *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 722-24 (2d Cir. 1994); *Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993) ("[I]t is well-settled that public schools may limit classroom speech to promote educational goals . . . . Courts have long recognized the need for public school officials to assure that their students 'learn whatever lessons [an] activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.'") (citations omitted); *Roberts v. Madigan*, 921 F.2d 1047, 1059 (10th Cir. 1990) ("As for Mr. Roberts' free speech and academic freedom arguments, we conclude that the district's removal of two Christian books from the classroom shelves and its directive ordering Mr. Roberts to cease his silent Bible reading in the classroom did not violate the first amendment. Mr. Roberts' conduct, in the context of a fifth-grade class full of impressionable children, had the purpose and effect of communicating a message of endorsement of religion in a manner that might reasonably be perceived to bear the imprimatur of the school.");

Kluge v. Brownsburg Cmty. Sch., 432 F.Supp.3d 823, 836-41 (S.D. Ind. 2020) (teacher's refusal to comply with district policy requiring him to address transgender students by their preferred names and pronouns not protected speech); *Calef v. Budden*, 361 F.Supp.2d 493, 499-501 (D.S.C. 2005) (teacher's classroom expression of views hostile to president and military policy not protected speech).

As sister circuit precedent makes clear, courts widely recognize the authority of public school employers in this area. If school districts are not permitted to draw the reasonable line between a teacher or coach's role in the public school system—imbued with a district's imprimatur and aimed at serving the school district's public education goals and mission—and an employee's private views and expression during times when they are not directly engaged with a district's student population, the result will be unwieldy at best, and lead to increased litigation against school districts at worst.

III. BY AFFIRMING, THIS COURT WILL NOT EXPOSE TO REGULATION TRULY PRIVATE EXPRESSION BY SCHOOL DISTRICT TEACHERS, COACHES, AND OTHER EMPLOYEES.

This Court can rule in this case consistently with the above body of law without issuing a broad ruling that would unnecessarily cover a wide variety of truly private and protected demonstrative or spoken expression by public school employees. Affirming the Appellee District's actions here would not, for example, subject to regulation a public school employee's private prayer in the lunchroom,

religious expression on their personal social media account, or participation in or attendance at Bible clubs, church, or other religious observances outside of the time they are reasonably perceived to be serving in their position of public school employment. Indeed, Appellee District invited Coach Kennedy to conduct his prayer in a private setting or on the field once students had left.

Amici recognize that proper application of the *Garcetti* (and *Pickering*) framework does not permit public school employers to regulate and prohibit broadly *any* expression of public school teachers and coaches, regardless of its content and context. *Garcetti* itself explains that when public employees speak as citizens, not public employees, their speech rights have more weight:

> The Court's decisions, then, have sought both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions . . . . Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government.

Garcetti, 547 U.S. at 423.

Applying *Garcetti* as interpreted by this Court easily results in a conclusion that Coach Kennedy's actions at the 50-yard line constitute expression in his public employee capacity—one where he is a role model to a captive audience of public school athletes, their parents, and the community at large. Nor does this Court's adherence to *Garcetti* under the facts of this case lead to a scenario where public

school employers could convert speech as a private citizen into speech as a public employee by creating excessively broad job descriptions that would permit employer regulation of private expression during periods when they are teaching, coaching, or otherwise fulfilling their duties as public school educators.

A survey of current school district policies within the Ninth Circuit regarding political and religious expression by employees shows how schools carefully regulate speech by employees as such, without burdening their speech as private citizens, consistent with sound public policy and the mission of public education:

School District Policies: Political Expression

Excerpt from Kenai Peninsula School District (Alaska), Board Policy 4119.25 Political Activities of Employees (Feb. 7, 2005):

> District employees have an obligation to prevent the improper use of school time, materials or facilities for political campaign purposes. The Superintendent shall regulate political activities on school property.
>
> The Board respects the right of school employees to engage in political activities on their own time. When engaging in political activities, employees shall make it clear that they are acting as individuals and not as representatives of the District.[5]

[5] *Available at* https://go.boarddocs.com/ak/kpbsd/Board.nsf/Public#.

Excerpt from Tucson Unified School District (Arizona), Policy Code GBI - Staff Participation in Political Activities (revised Mar. 10, 2020):

A. No employee while on duty shall engage in political activities upon district property.

B. Campaigning and other election activities must be done in off-duty hours, when not working in an official capacity or representing the district, and without the participation of district employees or students acting in the capacity of district or school representatives.

C. An employee acting as an agent of or working in an official capacity for the district must not give pupils written materials to influence the outcome of an election or to advocate support for or opposition to pending or proposed legislation.

D. The discussion and study of politics and political issues, when such discussion and study are appropriate to classroom studies, are not precluded under the provisions of this policy.

E. Employees must not use the authority of their positions to influence the vote or political activities of another employee or student.[6]

Excerpt from Fresno Unified School District (California), Administrative Regulation 4119.25 - Political Activities of Employees (reviewed Dec. 2014):

District employees shall not:

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[6] *Available at* https://go.boarddocs.com/ak/kpbsd/Board.nsf/Public#.

9. Present viewpoints on particular candidates or ballot measures in the classroom without giving equal time to the presentation of opposing views

(cf. 6144 - Controversial Issues)

10. Wear buttons or articles of clothing that express political opinions on ballot measures or candidates during instructional time

However, teachers shall not be prohibited from wearing political buttons during non-instructional time, such as Back-to-School Night.[7]

Excerpt from Cascade School District No. 422 (Idaho), Policy 5290 (revised Feb. 13, 2013):

District shall not restrict constitutionally protected political speech of employees during non-instructional times in non-student contact settings, such as during duty-free periods in faculty break rooms and lounges during the school day or during afterschool events.[8]

Excerpt from Bozeman Public Schools (Montana), Policy 5224 - Political Activity - Staff Participation (revised Jan. 1, 2020):

The Bozeman Public Schools recognizes its individual employees full rights of citizenship, including but not limited to, engaging in political activities; in accordance with and subject to 13-35-226 and 2-2-121 M.C.A., as amended.

An employee of School District No. 7 may seek an elective office provided that the staff member does not campaign on school property during working hours, and provided all other

[7] *Available at* https://bp.fresnounified.org/4000-personnel/.
[8] *Available at* https://cascadeschools.org/cms/One.aspx?portalId=12341469&pageId=12550961.

legal requirements are met. The District assumes no obligation beyond making such opportunities available.[9]

Excerpt from Washoe County School District (Nevada), Policy 1310 - Political Activity in Schools (revised Mar. 10, 2020):

4. Permissible Activities

b. Instructional discussion of current events, which includes historical and current political races, elections, and candidates is permissible when used for instructional purposes and delivered in a fair, unbiased fashion and in alignment with the Nevada Academic Content Standards and other District policies.[10]

Excerpt from Dallas School District 2 (Oregon), Policy Code GBG (adopted Nov. 10, 2003):

All district employees are privileged within the limitations imposed by state and federal laws and regulations to choose any side of a particular issue and to support their viewpoints as they desire by vote, discussion or persuading others.

Such discussion and persuasion, however, will not be carried on during the performance of district duties, except in open discussion during classroom lessons that consider various candidates for a particular office or various sides of a particular political or civil issue.

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[9] *Available at* https://www.bsd7.org/our_district/policies.

[10] *Available at* https://www.washoeschools.net/Domain/81#:~:text=The%20Washoe%20County%20School%20District,the%20Washoe%20County%20School%20District.

> On all controversial issues, employees must designate that the viewpoints they represent on the issues are personal and are not to be interpreted as the district's official viewpoint.[11]

School District Policies: Religious Expression

Excerpt from Fairbanks North Star Borough School District (Alaska), Administrative Regulation 1013:

> Prayer initiated or led by coaches, parents, or other non-students prior to, during, or after athletic contests and other extra-curricular events are prohibited.[12]

Excerpt from Flowing Wells Unified School District (Arizona), Employee Ethics Policy Code GBEA:

> The school employee . . . Refrains from using school contacts and privileges to promote partisan politics, sectarian religious views, or selfish propaganda of any kind.[13]

Excerpt from *Amici* CSBA's (California), Model Board Policy 6141.2 - Recognition of Religious Beliefs and Customs:

> As part of their official duties, staff shall not lead students in prayer or other religious activities.[14]

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[11] *Available at* https://policy.osba.org/dallas/G/index.asp.

[12] *Available at* https://go.boarddocs.com/ak/fbns/Board.nsf/goto?open&id=ADZU647A78FF#.

[13] *Available at* https://policy.azsba.org/asba/browse/flowingwells/flowingwells/GBEA.

[14] *See, e.g.*, Newport-Mesa Unified School District Board Policy 6141.2, *available at* http://www.gamutonline.net/district/newportmesa/DisplayPolicy/597441/, and Poway Unified School District Board Policy 6141.2, *available at* https://powayusd.com/PUSD/media/Board-Images/BoardPolicy/6000/BP-6141-2-Recognition-of-Religious-Beliefs-and-Customs.pdf.

Excerpt from Hawaii Board of Education (Hawaii), Policy 2230:

> Prayer and other religious observances shall not be organized or sponsored by schools and the administrative and support units of the public school system, especially where students are in attendance or can observe the activities.[15]

Excerpt from Bonneville Joint School District (Idaho), Policy 2350:

> District officials may not organize or agree to student requests for prayer at assemblies and other school-sponsored events.[16]

Excerpt from Billings School District (Montana), Policy 2332:

> Staff members are representatives of the District and must 'navigate the narrow channel between impairing intellectual inquiry and propagating a religious creed.' They may not encourage, discourage, persuade, dissuade, sponsor, participate in, or discriminate against a religious activity or an activity because of its religious content. They must remain officially neutral toward religious expression.[17]

Excerpt from Clark County School District (Nevada), Policy 6113.2:

> School officials may not mandate or organize prayer at graduation or other extracurricular activities or select speakers for such events in a manner that favors religious speech such as prayer.[18]

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[15] *Available at* http://boe.hawaii.gov/policies/2200series/Pages/2230.aspx.
[16] *Available at* https://lff.d93.k12.id.us/WebLink/ElectronicFile.aspx?docid=6024&dbid=0.
[17] *Available at* https://resources.finalsite.net/images/v1523035135/billingsschoolsorg/y7c7d732wbfy4uyo3zu2/2332_religion_and_religious_activities.pdf.
[18] *Available at* https://www.ccsd.net/district/policies-regulations/pdf/6113.2_R.pdf.

Excerpt from Kent School District (Washington), Policy 2340P:

> District schools must be free from sectarian control or influence during school-conducted or school-sponsored activities for students who are under the district's supervision and control . . . . School staff shall neither encourage nor discourage a student from engaging in non-disruptive oral prayer, silent prayer, or any other form of non-disruptive devotional activity.[19]

In each of these examples, public school districts carefully draw the distinction between their employees' protected speech as private citizens and regulated expression when they are acting as public employees. This Court's approval of the Appellee District's actions in this case, in an opinion tethered to the facts at hand, will merely reinforce long-standing judicial precedent underpinning school district policies. Such legal precedent authorizes public school employers to take reasonable steps to ensure their teachers, coaches and other critical public school staff who are duty-bound to the education of the nation's youth do not use their position of public school employment as an opportunity to advocate and broadcast their private religious or political interests and beliefs, where such conduct reasonably could be perceived as the expression of the public school district employer.

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[19] *Available at* https://go.boarddocs.com/wa/ksdwa/Board.nsf/files/BERU3K7A1846/$file/2340P%20Religious%20Related%20Activities%20Or%20Practices.pdf.

CONCLUSION

Based on the foregoing reasons, *Amici* respectfully request that this Court affirm the order of the District Court.

Dated: September 28, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that:

Pursuant to Rule 29(a)(5) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 32-1, the attached Brief of *Amici Curiae* is proportionately spaced, has a typeface of 14 points or more, and contains 6,339 words.

Dated: September 28, 2020

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 28, 2020.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: September 28, 2020 Respectfully submitted,

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