No. 20-35222

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 United States District Court
for the Western District of Washington, Tacoma Division
No. 3:16-cv-05694-RBL
Hon. Ronald B. Leighton

APPELLANT JOSEPH A. KENNEDY'S REPLY BRIEF

Hiram Sasser
Michael Berry
Stephanie N. Taub
FIRST LIBERTY INSTITUTE
2001 West Plano Pkwy, Suite 1600
Plano, TX 75075
(972) 941-6162
hsasser@firstliberty.org

Devin S. Anderson
Emily Merki Long
Elizabeth Hedges
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 389-5000
devin.anderson@kirkland.com

Additional Counsel Listed on Next Page

Anthony J. Ferate
SPENCER FANE LLP
9400 Broadway Ext, Suite 600
Oklahoma City, OK 73114
(405) 753-5939
AJFerate@spencerfane.com

Jeffrey Paul Helsdon
THE HELSDON LAW FIRM, PLLC
1201 Pacific Ave., Suite 600
Tacoma, WA 98402
(253) 564-1856
jhelsdon@thehelsdonlawfirm.com

Attorneys for Appellant
Joseph A. Kennedy

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

INTRODUCTION

This case presents fundamental questions about whether teachers and coaches shed their constitutional rights to freedom of speech and free exercise of religion at the schoolhouse gate. After Bremerton High School football games concluded and as spectators were departing, with players and coaches milling about, Coach Kennedy paused on the field of play, knelt, and said a personal prayer of thanks that lasted around 15 seconds. He then stood up and rejoined the team. The District suspended Coach Kennedy based on its view that permitting this type of religious expression by a football coach would violate the Establishment Clause. The District is wrong: the Constitution does not forbid an assistant football coach from engaging in fleeting, personal religious expression while at work—it expressly protects such activity.

Rather than engage on this important question for public employees and employers alike, however, the District's brief indulges in revisionist history. To begin, the District claims this case is somehow about school employees praying with students or conducting "prayer circles." That is incorrect. Coach Kennedy told the District that he wished to continue a practice of saying a "short, private, personal prayer"

at midfield, which is exactly what he did for the remainder of the 2015 season until the District banned him from coaching. ER.262. And Coach Kennedy did not invite anybody to join him. The District's contemporaneous correspondence—both internal and public—recognized that the issue was not "leading prayer with student athletes" but instead a "personal, private prayer" on the field. ER.267. The District thus knew the dispute was over a coach's right to say a brief, personal prayer, and its attempt to play dumb five years later is not credible.

The District also seriously mischaracterizes the context of Coach Kennedy's personal prayer, claiming that he sought to take center stage during the "closing ceremonies." But this wasn't the Olympics. As is evident from photographic and video evidence of the October 23 and 26 North Mason games that precipitated the District's action, the school-sponsored event had concluded and spectators, students, players, and coaches engaged in different activities after the final whistle.

The District also claims it took action against Coach Kennedy because of some perceived need to maintain the football field as a non-public forum. This assertion directly contradicts what the District told the federal government and testified to in this case, which was that it

acted *solely* because of its belief that allowing Coach Kennedy to engage in his brief, personal prayer would violate the Establishment Clause. The District's argument is also wrong on the merits: the schoolhouse gate does not cordon off a First Amendment-free zone.

The District's position boils down to this: schoolteachers and coaches may not engage in brief, personal acts of devotion while in view of students, because everything a coach or teacher does while in the presence of students is school speech subject to plenary school control. There can be no doubt that the government has greater leeway to regulate speech on school grounds. But the District's categorical rule would permit schools to prohibit even unobtrusive expressions of private religious devotion, such as praying before a meal, making the sign of the cross, or wearing religious apparel. That kind of government curtailment cannot be squared with the fundamental principle of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), or basic First Amendment values. This Court should reverse the judgment of the district court and order entry of judgment for Coach Kennedy.

ARGUMENT

I. The District Violated Coach Kennedy's Free Speech Rights

A. Coach Kennedy Spoke As A Private Citizen

Coach Kennedy spoke as a private citizen under the second factor from *Eng v. Cooley*, 552 F.3d 1062 (9th Cir. 2009), because "the speech at issue" was not "ordinarily within the scope of" his "duties," *Lane v. Franks*, 573 U.S. 228, 240 (2014). Coach Kennedy knelt for "fleeting" moments, away from students, to offer a personal prayer to God. ER.99. These prayers took place apart from BHS players, while players, spectators, and coaches engaged in various extemporaneous, unofficial activities around the field. ER.81–82; ER.114; ER.138–41. As the District admitted, Coach Kennedy was "attempting to abide by the directives of the District in the sense that he was not leading student-led prayer." ER.185. As the District also admitted, it did not discipline coaches for engaging in similarly brief, personal activities like making a phone call, engaging in conversation with friends, or tying a shoe. ER.154–56; ER.180–81; ER.188–89. Under these circumstances, no reasonable person would have perceived that Coach Kennedy was acting in his official capacity as he prayed.

In claiming otherwise (at 31), the District seriously mischaracterizes the record and then advocates for a sweeping categorical rule that all "expressions and behaviors" Coach Kennedy "displays while on duty in the presence of students are part of the communication of ideas that he has contracted to deliver on behalf of BSD." That is not the law.

1. Coach Kennedy Engaged In Brief, Personal Expression After Football Games Had Concluded

The District misrepresents the relevant conduct in multiple ways. ***First***, the District suggests (at 2, 10–11, 19) that Coach Kennedy was disciplined for praying with students. That is false. The District already admitted that Coach Kennedy never "intentionally involve[d] students" in his prayers after the District's September 17 direction, ER.103, and "was not leading student-led prayer" after that date, ER.185. As Superintendent Leavell recognized in two emails on October 20 and 21, Coach Kennedy had "moved on from leading prayer with kids, to taking a silent prayer at the 50 yard line," ER.39, and the "issue ... has shifted from leading prayer with student athletes, to a coaches right to conduct a personal, private prayer ... on the 50-yard line." ER.267. These "personal, private prayer[s]" are the conduct at issue in this case.

In claiming otherwise, the District (at 13, 18) points to the October 16 game against Centralia, during which some players from that team and members of the public joined Coach Kennedy without being invited. But the District's contemporaneous statements reflect that Coach Kennedy did not "intentionally involve students," ER.103, and there is no evidence that Bremerton players were involved. Moreover, the games and conduct that actually led to Coach Kennedy's suspension were the October 23 and October 26 games against North Mason, and the District acknowledged that no BHS players joined Coach Kennedy after those games. ER.82; ER.138; ER.186–87. The District (at 18, 25–26) points to the appearance of "two school-age children" in a group that walked to Coach Kennedy while he was praying after the October 26 game. As the video shows, however, these were not BHS students, nor has the District identified them as such. ER.274.

Because Coach Kennedy did not involve students in his prayers, it is irrelevant that he said he would not cut his prayer short if students came by. Coach Kennedy did what he could to avoid that risk by selecting a time and place that was consistent with his religious beliefs and that removed him from the immediate vicinity of students—for example, by

praying while they sang the fight song. ER.363. Measured by the District's own directive, Coach Kennedy's post-September 2015 conduct was fully compliant with the guidelines the District had laid out for exercise of his free speech: he did not pray with BHS players; he did not invite others to join him; and he took all reasonable measures to separate himself from students while he prayed. ER.103.

Second, the District argues (at 13, 18) that Coach Kennedy conducted a "prayer circle" after the October 16 and October 26 games. That is highly misleading. What actually happened at the October 16 Centralia game, as described in Coach Kennedy's opening brief (at 10), was that he knelt away from the players, closed his eyes, and began to pray silently. Only after he finished his prayer did he see that others had gathered around him—none of whom were invited to do so. ER.116. Similarly, after the October 26 game against North Mason, Coach Kennedy knelt to pray alone, but a small, uninvited group gathered around him for the final few seconds of his prayer. The video shows what

occurred, and it is plain that Coach Kennedy did not lead a "prayer circle."[1] ER.274.

Third, the District repeatedly claims that Coach Kennedy prayed during the "closing ceremonies" of the football game. But as anyone who has attended a high school sporting event knows, there is nothing ceremonious about the impromptu hive of activity following a varsity or junior varsity football game. Other than the school fight song, which the October 26 video shows took place on a different part of the field from Coach Kennedy's brief prayer, it is not even clear to what the District's self-serving term "ceremonies" might refer. The District's own correspondence at the time never referred to any "ceremonies." Far from a centralized, organized post-game sequence, the period after the game concluded was extemporaneous, un-choreographed, and somewhat chaotic. While students moved to one part of the field to perform the fight

---

[1] Relatedly, the District suggests (at 23–24) that it is not clear whether Coach Kennedy's prayers were "silent" or "audible." But the District itself called Coach Kennedy's prayers "silent" in an email exchange following Coach Kennedy's October 14 letter. ER.39. The distinction is ultimately irrelevant because the District did not prohibit Coach Kennedy's prayers based on whether they were audible; the District prohibited Coach Kennedy's prayers solely based on their being "demonstrative" and "observable" to students. ER.80; ER.100.

song, "[p]arents, fans, and members of the community frequently walk[ed] onto the field to congratulate players and socialize." ER.114; ER.154–55; ER.180–81; ER.188–89. Meanwhile, coaches puttered about, talking to spectators and family members in similar instances of brief, personal conduct.

The District cannot justify its mischaracterizations of the record by claiming that this Court's prior ruling is law of the case. As discussed in Coach Kennedy's opening brief (at 32–36, 46–47), this Court's preliminary-injunction-stage opinion relied on a set of factual assumptions drawn from a limited record. Over the course of discovery, those factual assumptions have been disproved, and this Court should "apply [the] law to the facts anew with consideration of the evidence presented in the merits phase." *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. USDA*, 499 F.3d 1108, 1114 (9th Cir. 2007). Here, each of the core factual assumptions that drove this Court's earlier opinion—and which the district court improperly repeated despite the evidence obtained in discovery—was refuted by undisputed evidence showing that coaches were not considered to be acting within the scope of their duties at all times following the game; Coach Kennedy did not

pray from a "prominent" location; Coach Kennedy was not communicating with students when he prayed; and Coach Kennedy did not have unique access to the fifty-yard line. *Kennedy v. Bremerton Sch. Dist.*, 869 F.3d 813, 827 (9th Cir. 2017) (*Kennedy I*).

2. Coach Kennedy's Brief, Personal Expression Was Outside The Scope Of His Job Responsibilities

In claiming that Coach Kennedy spoke as a public employee, the District relies exclusively on *Johnson v. Poway Unified School District*, 658 F.3d 954, 958 (9th Cir. 2011). But the conduct in *Johnson* differs in every way that matters from what Coach Kennedy did. The high school math teacher in *Johnson* hung banners in his classroom with excerpts of religious language from historical texts. *Id.* at 959. When the principal told him that she thought the banners might make some students uncomfortable, he replied, "sometimes that's necessary." *Id.* Later, he explained that he was "trying to highlight the religious heritage and nature of our nation" to the students. *Id.* at 960. This Court understandably held that the plaintiff's display of religious sentiment directed at students in class, during class hours, "owe[d] its existence to Johnson's position as a teacher" for purposes of *Eng*. *Id.* at 970. By contrast, Coach Kennedy's conduct was not directed at anyone. Far from

attempting to educate students about religion, he separated himself from them and sought to pray alone. The District's analogies to *Johnson* thus cannot withstand scrutiny.

First, the District (at 6, 32–34) points to Coach Kennedy's admitted responsibility to be a mentor and a role model to the student athletes with whom he worked. Coach Kennedy fully embraced and fulfilled that responsibility. ER.128–29; ER.147; ER.153. But the District claims that being a role model means that anything and everything a coach (or teacher) does in view of students is unprotected public employee speech. That remarkable proposition is not the law: the Supreme Court has squarely "reject[ed]" the "suggestion that employers can restrict employees' rights by creating excessively broad job descriptions." *Garcetti v. Ceballos*, 547 U.S. 410, 421, 424 (2006). It follows that a government employer may not insert the words "mentor" or "role model" in the job description and assume plenary control over employees' speech. Instead, the line between private and employer-sponsored speech is defined by a "practical" inquiry into "the duties an employee actually is expected to perform." *Id.* at 424–25.

It is worth pausing on the perniciousness of the District's view that Coach Kennedy cannot exercise his religious beliefs for fear students might notice, suggesting that "a coach's duty to serve as a good role model requires the coach to refrain from any manifestation of religious faith." *Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 637 (2019) (*Kennedy II*) (Alito, J., concurring in denial of certiorari). The District's amici offer the same view, arguing that the greater the public trust placed in a school employee, the more his speech may be regulated, *see* Nat'l Sch. Bds. Ass'n Br. 12–13, and that Coach Kennedy's prayers could be banned because he was expected to "instill[] values in the team," Religious & Civil-Rights Orgs. Br. 7. But if mere status as a teacher or coach eviscerated rights of personal religious expression, *Tinker* would be a dead letter. That is why the Supreme Court "has never read *Garcetti*" to allow schools to bar "any 'demonstrative' conduct of a religious nature" while teachers are visible to students. *Kennedy II*, 139 S. Ct. at 636 (Alito, J. concurring).

The District argues (at 37) that it permissibly banned Coach Kennedy's speech to keep *the District*'s own "message" from being "garbled or distorted." But the District does not identify what message it believes was being obscured, just as it fails to explain what "post-game

ceremonies" were being interrupted. Again, the contrast with *Johnson* underscores this point. There, the "message" was a math teacher's explanation of a state-selected curriculum to students. 658 F.3d at 957. Here, Coach Kennedy was not and did not intend to speak to students when he prayed.

The District concedes that Coach Kennedy did not have the "intention" to communicate with players, yet insists (at 36) that his intent is irrelevant. Once again, that is not the law. This Court's cases make clear that the intended audience matters a great deal. *See Dahlia v. Rodriguez*, 735 F.3d 1060, 1073–74 (9th Cir. 2013) (en banc); *Anthoine v. N. Cent. Cntys. Consortium*, 605 F.3d 740, 750 (9th Cir. 2010); *Alaska v. EEOC*, 564 F.3d 1062, 1070–71 (9th Cir. 2009) (en banc); *Freitag v. Ayers*, 468 F.3d 528, 545–46 (9th Cir. 2006).

Second, the District emphasizes (at 33) that Coach Kennedy "remained responsible for the players" after the game. This fact, which Coach Kennedy does not dispute, does not affect the *Garcetti* analysis at all. Other coaches were "on duty" when they engaged in private conversations or took calls after games, all of which the District permitted. A proper inquiry into the scope of an employee's job

responsibilities must consider not whether the employee was "on duty" in some formal sense, but what he was "actually told to do." *Dahlia*, 735 F.3d at 1075.

In fact, the District itself acknowledged that the on duty / off duty distinction is not dispositive when it told Coach Kennedy on October 23 that "the District does not prohibit prayer or other religious exercise by employees while on the job." ER.98; ER.255. As four Justices observed in this case, a Free Speech claim has "far greater weight" if Coach Kennedy "was on duty only in the sense that his workday had not ended and that his prayer took place at a time when it would have been permissible for him to engage briefly in other private conduct, say, calling home or making a reservation for dinner at a local restaurant." *Kennedy II*, 139 S. Ct. at 635–36 (Alito, J., concurring).

Third, the District cites (at 32) the location of Coach Kennedy's prayers, suggesting that he had "special access" to the field. In addition to being incorrect as a factual matter, *see infra* §I.B.3, this rationale once again conflicts with the entire thrust of *Garcetti*, which make clear that "it would not serve the goal of treating public employees like 'any member of the general public[]' to hold that all speech within the office is

automatically exposed to restriction." 547 U.S. at 420–21; *see also Dahlia*, 735 F.3d at 1069. To the contrary, *Tinker* cemented the "unmistakable" principle that school employees maintain their rights within "the schoolhouse gate." 393 U.S. at 506.

The remaining trio of cases the District cites are inapposite. In *Peloza v. Capistrano Unified School District*, the plaintiff asserted a First Amendment right to "talk with students about religion during the school day." 37 F.3d 517, 522 (9th Cir. 1994). Here, there is no dispute that Coach Kennedy never tried to pray with students after September 17, and he did not ask to be allowed to involve students in the future. For this reason, the District's next case, *Grossman v. South Shore Public School District*, 507 F.3d 1097, 1100 (7th Cir. 2007), also has no application to Coach Kennedy's prayers: there, the plaintiff initiated prayer *with students*. And as Coach Kennedy's opening brief already explained, *Doe v. Duncanville Independent School District*, 70 F.3d 402, 406 (5th Cir. 1995) is distinguishable because it involved school staff "participating in student-initiated prayers." The court upheld an injunction that forbade coaches to "lead, encourage, promote or

participate in prayers with students." *Id.* at 405–06. Clearly, and by the District's own admission, that is not what happened in this case.[2]

B. The District Had No Adequate Justification For Depriving Coach Kennedy Of His First Amendment Rights

Under the fourth *Eng* factor, the District has not articulated any justification for depriving Coach Kennedy of his right to freedom of speech. The District's only contemporaneous justification for suspending Coach Kennedy was to avoid a potential Establishment Clause violation. And no matter which Establishment Clause test is applied, allowing Coach Kennedy's brief, silent, personal prayers would not violate the First Amendment. It is therefore unsurprising that the District tries to manufacture a new justification for its action—a purported need to ensure the football field remained a non-public forum—but that late-breaking justification fails.

---

[2] The District's final case, *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 479 (7th Cir. 2007), did not involve religious speech at all. There, the plaintiff "concede[d] that the current-events session" during which she sought to expound her political views "was part of her official duties." *Id.* at 479.

1. The District Must Show An Actual Violation Of The Establishment Clause

The District asserts that it need prove only the possibility of an Establishment Clause violation to show a compelling interest. That is incorrect. *See, e.g.*, *Hills v. Scottsdale Unified Sch. Dist. No. 48*, 329 F.3d 1044, 1052 (9th Cir. 2003); Kennedy Br. 40–41. And even then, the Supreme Court has stated only that "a state interest in avoiding an Establishment Clause violation '*may* be characterized as compelling'" in some cases. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001) (emphasis added)*; Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2265 (2020). This is not such a case.

2. Coach Kennedy's Brief, Personal Prayers Did Not Violate The Establishment Clause

Coercion Test. The coercion test is the proper Establishment Clause test to apply with respect to school employee conduct. While acknowledging that Coach Kennedy's prayers were not directly coercive, the District insists (at 45) that his prayers were nonetheless "subt[ly]" coercive in that they imposed "unspoken pressure on players" to join in. This claim is simply false.

To begin, the District once again conflates Coach Kennedy's pre-September 2015 practice—in which players occasionally joined him

midfield—with the conduct for which he sought accommodation post-September 2015, saying a brief, personal prayer. *See supra* §I.A.1; Kennedy Br. 22–25. As the District repeatedly admitted, Coach Kennedy's post-September 2015 conduct did not solicit student participation, did not encourage students to pray, and did not involve Bremerton students in prayer. ER.39; ER.103; ER.185; ER.267.

Unsurprisingly, there is no evidence that Bremerton students felt any pressure to participate in the brief, personal prayers Coach Kennedy resumed following the District's directive. The District cites (at 45) only two declarations that it prepared for its summary judgment filings in this case post-discovery. ER.517, ER.526. Those declarations refer generally to student and parent discomfort with Coach Kennedy's "practice," but do not specify whether that discomfort stemmed from the pre-September 2015 practice in which students sometimes participated, or the private post-September 2015 practice that is actually at issue.

Coach Kennedy's brief, personal prayer thus bears no resemblance to school-organized, school-sponsored activity in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), and *Lee v. Weisman*, 505 U.S. 577 (1992). In *Sante Fe*, the pre-game prayer was organized by the

school, regulated by school *policy*, and broadcast on the school's public address system. 530 U.S. at 316 n.23. Similarly, in *Lee*, the graduation-ceremony invocation was regulated by school policy and delivered to a seated, captive audience. 505 U.S. at 586–87. Coach Kennedy's brief, personal, silent prayers (as the District described them), by contrast, bore none of those hallmarks of coercion. *See, e.g.*, *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1103 (9th Cir. 2000) (graduation speech was coercive "[b]ecause District approval of the content of student speech was required" under school policy); *Doe ex. rel Doe v. Sch. Dist. of the City of Norfolk*, 340 F.3d 605, 612 (8th Cir. 2013) (similar).

Endorsement Test. The District's efforts to find an Establishment Clause violation fare no better under the so-called endorsement test. The District argues at (41 n.6) that endorsement, not coercion, is the right test because the Ninth Circuit has declined to apply *Town of Greece v. Galloway*, 572 U.S. 565 (2014), which rejected the endorsement test, to school prayer. *See Freedom from Religion Found. v. Chino Valley Unified Sch. Dist.*, 896 F.3d 1132, 1148 (9th Cir. 2018). But *Chino Valley* did not take issue with *Galloway*'s critique of the endorsement test. It merely distinguished *Galloway* on the grounds that the practice of praying

collectively at Board meetings was "not within the legislative-prayer tradition that allows certain types of prayer to open legislative sessions." *Id.* at 1142. *Chino Valley* then applied the *Lemon* test, not the endorsement test. *Id.* at 1142–43, 1148–49.

Using the endorsement test to assess Coach Kennedy's conduct makes no difference, because no reasonable, objective student observer would have perceived the District as endorsing his personal prayers. The District's arguments to the contrary are incorrect. ***First***, the District argues (at 43) that "BSD remained responsible for the content of the ceremony conducted by its employee while on its property." But there was no "ceremony" that Coach Kennedy "conducted"—he merely sought to kneel and say a 15-second, personal prayer after the event was over. And to the extent the District is claiming that conduct by a school employee on school property is automatically endorsed by the government, that is plainly incorrect. *See Tinker*, 393 U.S. 503; *Kennedy II*, 139 S. Ct. at 636 (Alito, J., concurring).

Second, the District refers (at 2, 13, 18) to Coach Kennedy's practice of kneeling at the 50-yard line as a "prayer circle." For the reasons above, *supra* at 7, that depiction is incorrect. Coach Kennedy's

unrebutted testimony was that he never invited anyone to join him, including the state legislators. ER.214–15; ER.369. All of this is ultimately irrelevant, moreover, because Coach Kennedy testified that others joining him was immaterial to his beliefs, and he had no issue with the District restricting access to prevent others from being near him while he prayed—an accommodation the District never explored. ER.211–12.

Third, the District argues (at 42) that the "history" of Coach Kennedy's religious practice would lead a reasonable observer to perceive his prayer as being endorsed by the District. Again, the District confuses the practice at issue. The "history" here is that Coach Kennedy ceased praying with students following the September 17 directive, and the District subsequently took active, public steps to distance itself from him "to avoid the perception of endorsement." ER.109; ER.251–56. The District nevertheless claims (at 43) that a disclaimer was not enough, since Coach Kennedy was a school employee on school property. But this brings the argument back full circle to the District's absolutist view, which is in direct conflict with *Tinker*.

Lemon Test. Even the disfavored *Lemon* test does not bar Coach Kennedy's conduct. As a judge on this Court recently observed, "the list of situations in which the Supreme Court has effectively repudiated the *Lemon* test, either by 'expressly declining to apply the test or simply ignoring it,' has grown quite long." *Cal. Parents for the Equalization of Educ. Materials v. Torlakson*, 973 F.3d 1010, 1022 (9th Cir. 2020) (Bress, J., concurring). In all events, Coach Kennedy's conduct is not the kind that would violate the three-pronged *Lemon* test because he was not speaking on behalf of the government at all; his speech was private conduct. *See, e.g.*, *Bowen v. Kendrick*, 487 U.S. 589, 622 (1988). The out-of-circuit case the District cites (at 46) concerns pregame-invocation practices and is distinguishable for the same reasons as *Santa Fe*—it involved conduct that was school-organized and school-sponsored, whereas Coach Kennedy's private post-game prayers were not. *See Jager v. Douglas Cnty. Sch. Dist.*, 862 F.2d 824, 840 (11th Cir. 1989).

Washington Constitution. Although the District's contemporaneous communications to Coach Kennedy about the Establishment Clause primarily relied on federal precedent, the District now claims that the Washington constitution independently justifies the

District's restriction of Coach Kennedy's federal Free Speech rights. To state the argument is to refute it: "[w]hen there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964); *see also Garnett By & Through Smith v. Renton Sch. Dist. No. 403*, 987 F.2d 641, 646 (9th Cir. 1993) (school district could not prohibit meeting of religious club on school grounds because the federal Equal Access Act preempted the Washington constitution).

Setting aside the Supremacy Clause, the question is not whether Washington's constitution is stricter than the federal Constitution in a general sense, but whether the Washington constitution would proscribe Coach Kennedy's fleeting, personal prayers. The District cites no case to suggest it would. Each of the cases it cites involves religious instruction at schools. *See Witters v. State Comm'n for the Blind*, 771 P.2d 1119, 1121–22 (Wash. 1989) (en banc); *Locke v. Davey*, 540 U.S. 712, 719 (2004); *Perry v. Sch. Dist. No. 81*, 344 P.2d 1036, 1043 (Wash. 1959) (en banc); *State v. Showalter*, 293 P. 1000, 1001 (Wash. 1930). The Washington constitution thus does not provide the District with an adequate

justification for curtailing Coach Kennedy's federal First Amendment rights.

3. The District's "Forum" Justification Fails

The District's brief (at 37) posits an alternative justification for its action against Coach Kennedy. Yet that justification is simply not borne out on the record. Not once in any contemporaneous statement did the District cite the need to preserve a non-public or even limited public forum as a reason for restricting Coach Kennedy's religious expression after football games. Instead, the District repeatedly stated—to Coach Kennedy, to the public, and to the EEOC—that its restriction of Coach Kennedy's prayers had "been driven *solely* by concern that [Coach Kennedy's] [prayers] might violate the constitutional rights of students and other community members" via the Establishment Clause, "thereby subjecting the District to significant potential liability." ER.193; ER.342 (emphasis added); *see also* ER.102–05; ER.343. Nor as a factual matter did the District restrict access to the football field to create a non-public forum. Members of the public accessed the field before, during, and after Coach Kennedy's prayers at the October 23 and October 26 North Mason

games. ER.271; ER.274. And other evidence suggests that public access was the rule, not the exception. ER.114.

The two cases the District invokes are not on point. In *DiLoreto v. Downey Unified School District Board of Education*, 196 F.3d 958, 969–70 (9th Cir. 1999), this Court acknowledged that the government could exclude speech by a member of the public based on its intention to create a limited non-public forum with reasonable restrictions on access tied to the purpose for which the forum was dedicated, or could close the forum altogether. Nowhere did *DiLoreto* recognize the government's right to single out a brief, personal expression of devotion by one of its own employees. The District's reliance on *Berry v. Department of Social Services*, 447 F.3d 642 (9th Cir. 2006), is similarly misplaced. *Berry* involved an attempt by a school employee to use a conference room for a group prayer, and this Court noted that the employer excluded not only the prayer but also all other "nonbusiness-related" purposes. *Id.* at 654.

II. The District Violated Coach Kennedy's Free Exercise Rights

The District's arguments as to Coach Kennedy's Free Exercise claim fare no better. The applicable standard comes from *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993), as

the district court recognized. ER.24. In claiming otherwise, the District cites *Berry*, where this Court merged a Free Exercise claim with a Free Speech claim because the affected government employee expressly sought to merge his religious exercise with official duties by discussing his religion with clients, undermining the government's interest "in promoting the efficiency of the public services it performs through its employees." 447 F.3d at 648. That rationale does not apply here, where Coach Kennedy neither entangles his brief, silent prayer with his duties as a coach, nor seeks to convey any message to those around him. ER.361. Evaluated under *Lukumi*'s more "stringent" standard, which requires "the strictest scrutiny," *Espinoza*, 140 S. Ct. at 2257, the District's suspension of Coach Kennedy does not hold up.

First, the District's policy was not neutral. Policy 2340, titled "Religious-Related Activities and Practices," targeted *religious* conduct, although the policy on its terms did not actually restrict Coach Kennedy's personal prayers—it precluded only prayer with students. ER.107. Nevertheless, the District's application of this policy singled out Coach Kennedy's personal religious expression at a time when other private conduct was permitted.

Second, the District still has not articulated a compelling interest in restricting Coach Kennedy's expression. The District articulates three potential interests, but they all fail. The District first claims (at 52) that any post-game speech is its own, not Coach Kennedy's, and it has an interest in regulating its own speech. That is wrong for the reasons above—namely, discovery has shown that Coach Kennedy was not speaking on behalf of the District when he knelt and offered a brief, personal prayer. *See supra* §I.A.1.[3] The District next claims (at 53) an interest "in meeting its obligations under the Establishment Clauses of the U.S. and Washington Constitutions," but since there is no Establishment Clause violation, there is no justification for restricting Coach Kennedy's free expression. *Supra* at 17–24. Finally, the District cites (at 53) an interest in preserving the post-game field as a non-public forum. For the reasons already provided, this post hoc justification does

[3] The District is also raising this argument for the first time. This Court "will not ordinarily consider matters on appeal that are not specifically and distinctly raised and argued in appellant's opening brief," and should disregard these belated arguments. *Padgett v. Wright*, 587 F.3d 983, 986 n.2 (9th Cir. 2009).

not hold water and certainly cannot establish the compelling interest necessary to satisfy *Lukumi*. *Supra* at 24–25.

Third, the District's response was not narrowly tailored. The District argues (at 53) that it tailored its restrictions, but to the exact time and place of Coach Kennedy's prayer. *Id.* ("BSD's requirements were narrowly focused on the very small time (10–15 minutes) and place (football field) of BSD's post-game ceremonies"). The District has offered no reason why the 10–15 minutes after a game have any magic to them, other than that is the period in which Coach Kennedy sought to speak and express his religious beliefs. Additionally, it is not true that the District barred only prayer in this window. Rather, the District told Coach Kennedy that he "may not engage in" *any* "demonstrative religious activity, readily observable to (if not intended to be observed by) students and the attending public." ER.100. For these reasons, the District's arguments do not pass muster under *Lukumi*, and Coach Kennedy is entitled to summary judgment on his Free Exercise claim.

III. The District Violated Coach Kennedy's Title VII Rights

A. The District Failed to Accommodate Coach Kennedy's Sincerely Held Religious Beliefs

As the district court recognized, Coach Kennedy carried his burden to establish a prima facie case of failure to accommodate. ER.30. The District (at 55), however, once again pretends it did not know what Coach Kennedy's "sincerely-held beliefs required." As discussed, that is not a credible statement. The District knew then and knows now what the dispute is about. Coach Kennedy told the District that he intended to continue a "short, private, personal prayer" at midfield, ER.262, which is exactly what Superintendent Leavell—the "sole decisionmaker," ER.169; ER.284—understood the request to be, ER.267 ("a coaches right to conduct a personal, private prayer … on the 50 yard line"). Moreover, an employer should not "delve into the religious practices of an employee in order to determine whether religion mandates the employee's adherence;" to avoid doing so, a "sensible approach would require only enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirements." *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993).

The District's only offer to accommodate Coach Kennedy's sincere beliefs insisted he abandon those beliefs by praying elsewhere. ER.100. It is undisputed that Coach Kennedy's beliefs require him to pray shortly after the game on the field, consistent with his faith-promoting experiences and military service. ER.112–13. As Coach Kennedy's testimony made clear, he was open to an accommodation where he would wait a few more minutes after the game until the team was heading to the locker room and then pray (the District never offered this, as explained in Coach Kennedy's opening brief (at 57–58)). ER.206–08. Remarkably, the District (at 55) tries to claim its failure to explore this option with Coach Kennedy is somehow Coach Kennedy's problem. That is wrong. Title VII places the burden squarely on employers—not employees—to make reasonable offers. *See, e.g.*, *Anderson v. Gen. Dynamics Convair Aerospace Div.*, 589 F.2d 397, 401 (9th Cir. 1978).[4]

---

[4] The District (at 25) argues that it did not know Coach Kennedy's beliefs required him to pray shortly after the game ended, despite his explicit "request [for] an accommodation" to continue his "private religious activity whereby *at the conclusion* of each football game …." ER.258 (emphasis added). The District's argument that he should have labeled this request "sincerely-held religious beliefs," when he already used that phrase several times, ER.258–59, is meritless.

Because Coach Kennedy clearly communicated—and the District clearly understood—his bona fide religious beliefs and the District nevertheless took adverse action against Coach Kennedy as a result of those beliefs without offering a reasonable accommodation, the District must identify an undue hardship. *See Opuku-Boateng v. California*, 95 F.3d 1461, 1467 (9th Cir. 1996). The District simply repeats its Establishment Clause argument, which fails for the reasons discussed above.

B. The District Failed to Rehire Coach Kennedy Because Of His Religion

The District cannot credibly dispute that it failed to rehire Coach Kennedy because of the religious nature of his speech. Its representations to the federal government and Superintendent Leavell's testimony in this case were that the District's actions were driven "solely" by its belief that Coach Kennedy was creating an Establishment Clause violation. ER.191–93; ER.342. The District now claims (at 58) that Coach Kennedy's "religion" was not the problem; instead, the problem was merely the "time and place" where he chose to be religious. That is an entirely artificial distinction. The District has never disputed that Coach Kennedy's sincere religious beliefs compel him to offer his brief,

personal prayer of gratitude to God on the field after the football game concludes. ER.112–13. As already mentioned, moreover, the District may not "delve into" Coach Kennedy's "religious practices" to determine which aspects are essential. *Heller*, 8 F.3d 1439. Finally, it was precisely the exercise of Coach Kennedy's religious beliefs that was the but-for cause of the District's action. ER.70–71. Title VII requires no more. *See* 42 U.S.C. § 2000e-2(m).[5]

C. The District Treated Coach Kennedy Differently From Similarly Situated Individuals

The District's only response (at 57) to Coach Kennedy's disparate impact claim is that his prayers—unlike other coaches' personal conduct that was not subject to adverse action—would "convert the closing ceremonies into an open public forum" and that Coach Kennedy's prayers were "highly public and demonstrative." As discussed above, there is no such thing as "closing ceremonies" after Bremerton football games, and

---

[5] The District argues (at 3, 18 n.3) that Coach Kennedy "chose not to" re-apply and quibbles with the use of the word "terminated." The law is clear, however, that Coach Kennedy was not required to re-apply if doing so would be futile. *See Bouman v. Block*, 940 F.2d 1211, 1222 (9th Cir. 1991). Coach Kennedy understood—as the District made clear—that he would not be permitted to coach as long as he continued praying. ER.70–71; ER.222.

Coach Kennedy sought to offer a personal prayer, not a public one, as Superintendent Leavell himself noted at the time. Moreover, any "publicity" surrounding Coach Kennedy was generated by the District's refusal to accommodate, not by Coach Kennedy's prayers. After all, as the District's own brief notes (at 7), nobody noticed Coach Kennedy's personal prayers before September 2015, nor did anybody notice when Coach Kennedy resumed a personal prayer until his attorneys informed the District of that fact. Coach Kennedy's personal conduct is thus on par with other coaches' activity, such as Coach Boynton's personal Buddhist chant. ER.114.

It does not matter that other coaches' activities did not appear exactly the same as Coach Kennedy's; the "similarly situated inquiry" does not require "near one-to-one mapping between employees." *Earl v. Nielsen Media Research, Inc.*, 658 F.3d 1108, 1115 (9th Cir. 2011). What matters is that these other employees also engaged in brief, personal activities after the game, while the students were singing the fight song, and Coach Kennedy was punished while they were not. This differential treatment, solely because of the observably Christian content of his speech, violates Title VII.

D. The District Retaliated Against Coach Kennedy Because Of His Religion

The District does not deny that Coach Kennedy had the right to oppose the District's directive, but it asserts (at 59) that his opposition was not "reasonable," citing an Eleventh Circuit decision. *See Rollins v. Fla. Dep't of Law Enf't*, 868 F.2d 397, 401 (11th Cir. 1989). Beyond that out-of-circuit decision, however, the District cannot dispute that Coach Kennedy has satisfied all three elements of a prima facie case: "to make out a prima facie case of retaliation under Title VII, [the plaintiff] must put forth evidence sufficient to show that (1) she engaged in a protected activity, (2) she suffered an adverse employment action, and (3) there was a causal link between her activity and the employment decision." *Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1197 (9th Cir. 2003); *see also Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 965 (9th Cir. 2004); *Stegall v. Citadel Broad. Co.*, 350 F.3d 1061, 1065 (9th Cir. 2003).

And to the extent "reasonableness" is a required element, Coach Kennedy has made that showing. In claiming otherwise (at 60), the District simply repeats its misrepresentations, such that Coach Kennedy "[d]isrupt[ed] the post-game ceremonies" (those do not exist), and that

Coach Kennedy "invit[ed] politicians to pray on the field with him" (the unrebutted testimony is that Coach Kennedy did not invite anyone to pray with him). Nor did Coach Kennedy violate any rules by praying (other than the District's directive not to pray at work, which infringed his constitutional rights). And to the extent the District is claiming Coach Kennedy behaved unreasonably by speaking to the media, the District cites no authority for such a claim. Such a position adds yet another act of First Amendment-related retaliation to the pile. At the end of the day, the District failed to rehire Coach Kennedy because he exercised his religious beliefs and then stood up for his right to do so. That is a classic case of retaliation under Title VII.

CONCLUSION

For the foregoing reasons, Coach Kennedy requests that this Court reverse the district court's grant of summary judgment to Bremerton School District on his Free Speech, Free Exercise, and Title VII claims and enter judgment for Coach Kennedy on all claims.

Date: October 13, 2020

Respectfully submitted,

/s/ Devin S. Anderson

Hiram Sasser
Michael Berry
Stephanie N. Taub
FIRST LIBERTY INSTITUTE
2001 West Plano Pkwy, Suite 1600
Plano, TX 75075
(972) 941-6162
hsasser@firstliberty.org

Devin S. Anderson
Emily Merki Long
Elizabeth Hedges
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 389-5000
devin.anderson@kirkland.com

Anthony J. Ferate
SPENCER FANE LLP
9400 Broadway Ext, Suite 600
Oklahoma City, OK 73114
(405) 753-5939
AJFerate@spencerfane.com

Jeffrey Paul Helsdon
THE HELSDON LAW FIRM, PLLC
1201 Pacific Ave., Suite 600
Tacoma, WA 98402
(253) 564-1856
jhelsdon@thehelsdonlawfirm.com

Attorneys for Appellant
Joseph A. Kennedy

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Circuit R. 32-1 because this brief contains 6,993 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2016 Century Schoolbook 14-point font.

Date: October 13, 2020

/s/ Devin S. Anderson

Devin S. Anderson

Attorney for Appellant
Joseph A. Kennedy

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2020, 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.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: October 13, 2020

/s/ Devin S. Anderson

Devin S. Anderson

Attorney for Appellant
Joseph A. Kennedy

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 20-35222

I am the attorney or self-represented party.

This brief contains 6,993 **words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- [x] complies with the word limit of Cir. R. 32-1.
- [ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- [ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- [ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- [ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one):*
  - [ ] it is a joint brief submitted by separately represented parties;
  - [ ] a party or parties are filing a single brief in response to multiple briefs; or
  - [ ] a party or parties are filing a single brief in response to a longer joint brief.
- [ ] complies with the length limit designated by court order dated _____.
- [ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ Devin S. Anderson **Date** 10/13/2020

(use "s/[typed name]" to sign electronically-filed documents)

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov