No. 20-35222

# In the United States Court of Appeals for the Ninth Circuit

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JOSEPH A. KENNEDY,

*Plaintiff-Appellant*

v.

BREMERTON SCHOOL DISTRICT

*Defendant-Appellee*

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On Appeal from the United States District Court for the Western District of Washington, Tacoma Division, Case No. 3:16-CV-05694-RBL

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**BRIEF OF APPELLEE**

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## INTRODUCTION

Appellant Joseph Kennedy ("Kennedy") seeks to establish a right for a football coach to demand the use of the field for a highly publicized demonstration of religion while supervising players at a game. Appellee Bremerton School District ("BSD" or "District") is entitled to summary judgment on all claims because no federal appellate court has held that public school teachers or coaches have a First Amendment right to engage in demonstrative prayer while teaching or supervising students, and many cases have held that no such right exists.

Kennedy had an eight-year practice of leading his football team in prayer in the locker room prior to games, and in the center of the field after games. When BSD learned of Kennedy's practice, it informed Kennedy of its concerns under the Establishment Clause and instructed him not to demonstratively pray with or in front of students, while affirming Kennedy could engage in demonstrative prayer so long as it was separate from student activity.

BSD did not oppose Kennedy's prayer, but only its location and timing in the middle of BSD's post-game ceremonies. Football games and their pre-game and post-game ceremonies are organized District events during which the football field is reserved for the presentation of BSD's activities. The post-game field is not an open public forum. BSD denied use of the field to all others who sought to present post-game speech or expression.

BSD proposed several alternatives to allow Kennedy to pray after games, and for a time he accepted the option of returning to the field and praying after the players had left. BSD also offered the use of a room in the press box or a school building so Kennedy could pray immediately after the game. BSD offered to explore other alternatives with Kennedy.

After Kennedy halted his prayers for several weeks, he wrote BSD and held news conferences announcing he would resume audibly praying at the 50-yard line immediately after the next game, even if students joined him. He asserted his "official coaching duties… ceased" when the game was over (ER 259) and that BSD had no authority to prevent his actions. In defiance of BSD's directions, Kennedy prayed at the 50-yard line following the next game in a highly publicized spectacle in front of news cameras, surrounded by a kneeling crowd of students, spectators and a state legislator.

At BSD's next two games, Kennedy continued using the center of the field for his demonstrative prayer. In the final instance, Kennedy conducted a prayer circle at midfield with two school-age children and about ten adults including two state representatives. He then had the state representatives address the team at the 50-yard line.

After his last violation, BSD put Kennedy on paid administrative leave for the rest of the season. Kennedy refused to take part in his professional evaluation after

the season and was one of four coaches who chose not to apply for jobs the next season.

In granting summary judgment to BSD, the District Court correctly held that "Kennedy's prayers at the center of the field, under the bright lights, in front of the bleachers, at a time when the general public could not access the field," directed messages to students in his capacity as a coach and thus were speech as a public employee and not as a private citizen. ER 17. Consequently, his speech was not protected by the First Amendment. The Court also correctly held that Kennedy's prayer violated the Establishment Clause and was not protected as free exercise of religion. The Court also ruled that Kennedy's Title VII claims must yield to the Establishment Clause. This Court should affirm the District Court decision.

## JURISDICTIONAL STATEMENT

The District agrees with Kennedy's Jurisdictional Statement.

## ISSUES PRESENTED

1. When Kennedy demonstratively prayed in the presence of students, before the audience in the stands, at the center of the football field, clad in school colors, in the midst of his coaching duties, during the post-game ceremonies, with all other speakers excluded from the field, was he speaking as a public employee?

2. Did BSD's obligation to avoid a violation of the Establishment Clause

of the U.S. Constitution create an adequate justification for BSD to relocate the time or place of Kennedy's post-game prayer?

3. Did BSD's obligation to avoid a violation of the Establishment Clauses[1] of the Washington Constitution create an adequate justification for BSD to relocate the time or place of Kennedy's post-game prayer?

4. Did BSD's decision not to turn the closing ceremonies of football games into an open public forum create an adequate justification for BSD to relocate the time or place of Kennedy's post-game prayer?

5. Was BSD's decision not to turn the closing ceremonies of football games into an open public forum a neutral rule of general application to all prospective speakers, and if not, were BSD's obligations under the Establishment Clauses of the U.S. and Washington Constitutions compelling governmental interests that justified its decision?

6. Did Kennedy establish a prima facie case under Title VII, and if so, were BSD's interests in avoiding violations of the Establishment Clauses of the U.S. and Washington Constitutions and in avoiding creation of an open public forum legitimate non-discriminatory reasons for relocating the time or place of his post-game prayer?

[1] The Washington Constitution has two Establishment Clauses: Article I § 11 and Article IX § 4.

## STATEMENT OF THE CASE

### A. Kennedy had broad responsibilities as a coach.

BSD enrolls approximately 5,000 students, has approximately 365 teachers and 400 non-teaching personnel. ER 512. BSD employed Kennedy as a football coach from 2008 until the 2015 season. ER 338. In 2015 he worked as an assistant coach at Bremerton High School under Head Coach Nathan Gillam pursuant to a one-season contract with a stipend of $4,498. ER 531.

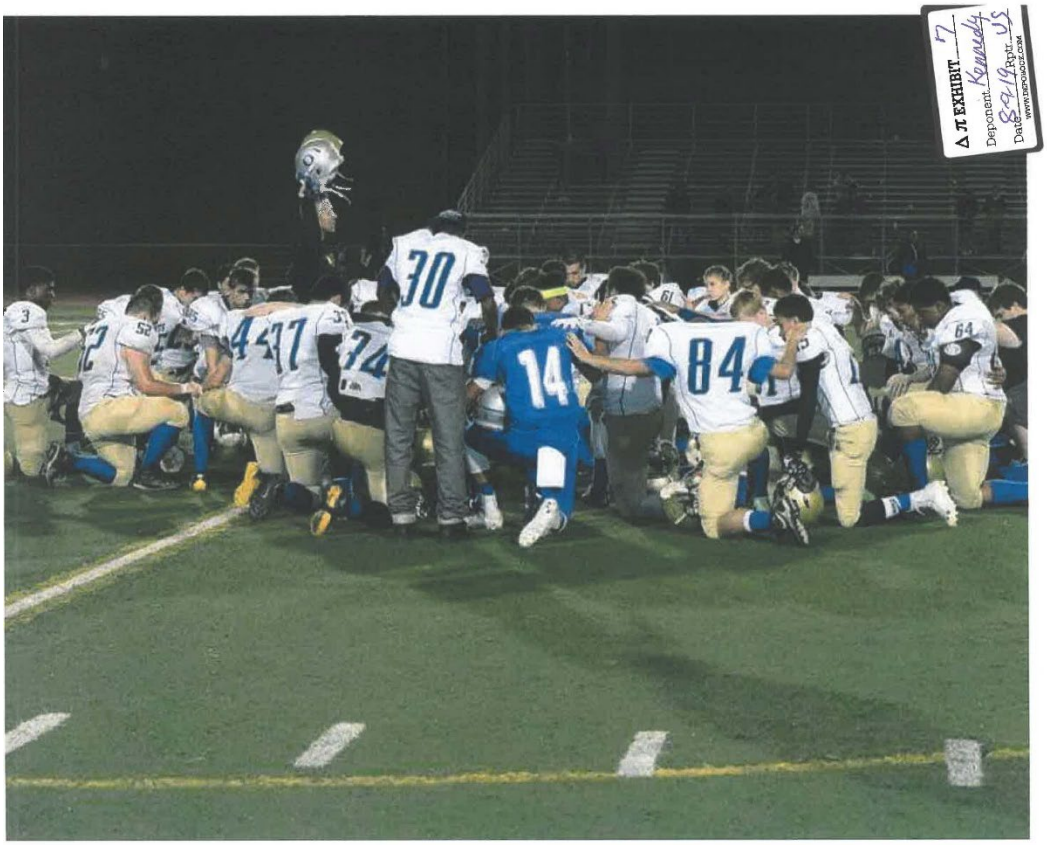
Superintendent Aaron Leavell was well acquainted with Kennedy. He had known him for about five years and Kennedy's wife was the BSD Supervisor of Human Resources and a member of the nine-person District Leadership Team. ER 512. Superintendent Leavell had no animus toward Kennedy about his religion, or that he wanted to pray at work, or any other religious matter. *Id*. Leavell's only issue with Kennedy was based on the Superintendent's need to comply with BSD's constitutional obligations. *Id*.

Kennedy and BSD mutually understood that BSD coaches had extensive responsibilities, including being a mentor and role model, and being a more important figure in some students' lives than anyone else at school, including teachers. ER 372-73, 512-13. Kennedy's understanding of his job responsibilities included the knowledge that he was always being watched and was always setting an example when he was around the players, even if he was conducting his private

business. *Id*. This broad scope of responsibility was reflected in Kennedy's coaching contract and in the job description for his position. The coaching contract provided that BSD "entrusted" Kennedy "to be a coach, mentor and role model for the student athletes." ER 347. Kennedy agreed to "exhibit sportsmanlike conduct at all times," and acknowledged that, as a football coach, he was "constantly being observed by others." *Id*. Kennedy's formal job description required him to assist the head coach with "supervisory responsibilities," "[a]dhere to Bremerton School District policies and administrative regulations," "communicate effectively" with parents, "maintain positive media relations," and "[o]bey all the Rules of Conduct before players and the public as expected of a Head Coach," including the requirement to "use proper conduct before the public and players at all times." ER 347-50. Consistent with his responsibility to serve as a role model, Kennedy's contract required that, "[a]bove all," Kennedy would endeavor not only "to create good athletes," but also "good human beings." ER 347.

**B. BSD and Kennedy discuss his practice of praying with football players.**

Prior to 2015, Kennedy had a practice of praying with football players in the locker room prior to games, and again at the center of the field during the post-game ceremonies, sometimes joined by players from the opposing team. ER 107. Kennedy's prayers with the teams during the post-game ceremonies were sometimes delivered from a standing position while holding up helmets from each team.




ER 498, 356-57.

BSD administrators did not learn of Kennedy's 8-year practice of praying with students until September 2015. ER 104-05. Following an inquiry into the practice, Superintendent Leavell met with Kennedy and, on September 17, sent Kennedy a letter citing several cases on the Establishment Clause of the U.S. Constitution and directing Kennedy to avoid demonstrative religious activity around the students.

> You and all district staff are free to engage in religious activity, including prayer, so long as it does not interfere with your job responsibilities. Such activity must be physically separate from any student activity, and students may not be allowed to join such activity. In order to avoid the perception of endorsement discussed above, such activity should either be non-demonstrative (*i.e.* not outwardly discernable as religious activity) if students

> are also engaged in religious conduct, or it should occur while students are not engaging in such conduct.

ER 109. The letter acknowledged that its "parameters may not address every possible scenario," encouraged Kennedy to "raise any questions" he might have and invited Kennedy "to address such questions directly" with Leavell. *Id*. At the time, Kennedy agreed to cease his post-game prayers. ER 358.

The day after BSD's September 17 letter, Bremerton High School played a football game. After that game Kennedy appeared to comply with the BSD directives. During the closing ceremonies, BSD had an administrator listen to Kennedy's post-game address to the players. The observer determined that Kennedy's speech was secular in nature and positive. ER 426.

On September 19, a news article reported Kennedy's secular talk and described how, following the game, Kennedy returned to the field and prayed after the players and fans had left. ER 452-54. Kennedy acknowledges he followed this practice on at least one occasion. ER 358-359. After seeing the news report, Leavell believed BSD and Kennedy were in agreement and that Kennedy understood and was following BSD's directions. ER 426-27. Leavell had no issue with Kennedy returning to the field to pray. *Id.* Leavell believed the issue had been resolved and did not ask any administrators to further monitor Kennedy's behavior. *Id.* Kennedy appeared to comply with BSD's directives for several weeks, as the Superintendent

did not receive any further reports of Kennedy kneeling and praying on the field after games. ER 514.

Kennedy now claims that, in the weeks after BSD's September 17 letter, he continued to pray at the 50-yard line after the teams had shaken hands and while the Bremerton team was on the sideline singing the fight song. However, this is a new factual allegation that did not surface until Kennedy's deposition. In fact, neither Superintendent Leavell, Principal Polm, nor Athletic Director Barton testified in their depositions that they were aware of Kennedy praying immediately after games between September 18 and October 16, and they submitted declarations stating they believed Kennedy had entirely ceased his prayers immediately after games during that period. ER 425-26, 429-430, 432-33. Kennedy's new claims also contradict his original rendition of the facts to the EEOC.

> After I received BSD's September 17 letter, I temporarily stopped praying immediately after BHS football games until I could obtain legal counsel to advise me of my legal rights and obligations. I did not pray again until after the October 16, 2015 football game.

ER 294.

The topic of Kennedy's prayers generated substantial publicity, social media commentary, and thousands of emails, letters and phone calls to BSD, many of them hateful or threatening. ER 513-14. Because of this attention, BSD was concerned that possibly large numbers of people would come on to the field immediately following the game scheduled for September 18, some of them with the intention of

praying with Kennedy and football players. BSD had not made preparations for that type of crowd control situation. *Id*. Up to 1,000 spectators attended games. ER 443. Consequently, in an email on September 18, Leavell told other administrators that "we will not be able to prevent that from happening" and that "we will not create a scene at this event." ER 496. This statement was directed only at BSD's preparations for crowd control. BSD always had the authority to control its field and other facilities and had no intention of turning a football game into an open public forum. ER 513-14.

On October 2, Kennedy emailed Leavell stating he disagreed that his prayers on the field with the team violated the Establishment Clause, and that he was looking into challenging the letter of direction but would continue to follow BSD's directions. ER 491.

On October 14, Kennedy's lawyer wrote BSD acknowledging that BSD's September 17 letter had directed Kennedy to "cease his post-game personal prayer" at the 50-yard line, referring to it as "an outright ban on Coach Kennedy's private religious expression" – Kennedy clearly understood he was not allowed to pray by himself on the field immediately after games. ER 30-31, 258, 263. Kennedy's letter requested a religious accommodation (1) to "rescind the directive in" the September 17 letter that he cease praying at the 50-yard line, (2) to allow him to continue audibly "saying a private, post-game prayer at the 50-yard line," and (3) to allow

him to join with students in his prayer. ER 262-63. Kennedy agrees it was his intention to continue praying even if students gathered around him. ER 363-64.

Although Kennedy now alleges his prayers were silent, his October 14 letter unequivocally states his prayers were verbal and audible, and that he intended to resume his prior practice. ER 259 ("audibly spoke," "quietly, but audibly, prayed," "prayers are verbal"). Prior to filing this lawsuit, neither Kennedy nor his lawyers ever informed BSD that his prayers were anything other than audible. The October 14 letter also maintained that Kennedy's prayers occurred "after his official duties as a coach have ceased." [2] ER 259.

On October 16 BSD wrote to Kennedy's lawyer in response to Kennedy's October 14 letter. ER 253-56. In its letter, BSD explained that Kennedy was not allowed to use the football field for demonstrative religious expression while BSD was using it for presentation of the District football event, including the post-game ceremonies. *Id*. BSD instructed Kennedy that he remained in an on-duty capacity as a District employee until the completion of BSD's event, which did not conclude until the players returned to the locker room. BSD instructed Kennedy that the post-game ceremonies were an important part of the District event, and that Kennedy was required to follow instructions from the District during the post-game period.

[2] Kennedy now agrees his duties as a coach continued after the final whistle and that the coaches remained responsible for the players until the players left the locker room. ER.359, 361-62.

> The more important factual inaccuracy in your letter and analysis is your repeated characterization of Mr. Kennedy's post-game prayers (prior to September 17) or talks (following that date) as occurring "on his own time," after his duties as a District employee had ceased. In fact, these talks occur immediately following completion of the football game… Critically, at that time, Mr. Kennedy *remains on duty*… After all, the District activity is *not merely an athletic contest*. The event encompasses all of the pre-game preparation and post-game activities attendant to and which are, as much as the game itself, reasons for school district athletic programs.
> …
> …During such times, Mr. Kennedy must continue to comply with the guidelines that have been provided to him.

ER 254 (emphasis in original). BSD instructed Kennedy that, if and when he wished to use District facilities for private religious activities, he needed to follow BSD's directions concerning the use of its property.

> On the other hand, once Mr. Kennedy is truly no longer on duty… he is free to engage in such activities as he chooses, so long as they are consistent with District policies regarding private use of District facilities – which do not prohibit religious activities. For example, one recent media report states: "Nearly an hour after the game, Kennedy told KING 5 he waited until the lights were out and he was the only person left in the stadium. Then, he walked to the 50-yard line, alone, and bowed his head in prayer." The District has absolutely no concern with this conduct…

ER 255.

### C. Kennedy seeks publicity and resumes his prayers in defiance of BSD's directions.

In conjunction with the October 14 letter, Kennedy made media appearances and gave interviews announcing his intention to pray at the next game, which was the Bremerton homecoming game on October 16. ER 482, 483-88, 516. Kennedy

made the media appearances because he "wanted to spread the word" about what he was doing. ER 365.

On October 16, without receiving the requested permission from BSD, Kennedy led a prayer circle at the 50-yard line immediately following the game, surrounded by kneeling players, kneeling spectators, and news cameras. ER 516-17. In unsafe and unsupervised circumstances, large numbers of people jumped the fence and otherwise came on to the field, tripping over obstacles. ER 139-40. BSD received complaints from parents that band members were knocked down as the crowd rushed the field. *Id.*; ER 516. Kneeling immediately next to Kennedy in the prayer group was a member of the Washington Legislature, Representative Jesse Young. ER 364-65, 481. Kennedy had spoken with Representative Young "a dozen times" prior to the game, told him he intended to pray, and had spoken with him during the game on the sidelines. *Id*.

ER 481. Kennedy admits that the concept of praying at the 50-yard line while the team was singing the fight song was a plan he made with his lawyers, that it had never been set forth in writing, and that BSD had never agreed to it. ER 362-64.

BSD took steps to increase crowd control following the field-rushing incident of October 16 by making arrangements with the Bremerton Police Department for security, having signs made that the field was open only to authorized personnel, sending "robocalls" to parents, and otherwise notifying the public that the field was closed. ER 516.

On October 23, BSD wrote to Kennedy again, reminding him he was still on duty as a coach immediately after the conclusion of games, that he had violated BSD

guidelines at the October 16 game, and that the football field was not an open public forum.

> Thus, when you engaged in religious exercise immediately following the game on October 16, you were still on duty for the District. You were at the event, and on the field, under the game lights, in BHS-logoed attire, in front of an audience of event attendees, solely by virtue of your employment by the District. The field is not an open forum to which members of the public are invited following completion of games; but even if it were, you continued to have job responsibilities, including the supervision of the players… [A]ny reasonable observer saw a District employee, on the field only by virtue of his employment with the District, still on duty, under the bright lights of the stadium, engaged in what was clearly, given your prior public conduct, overtly religious conduct.…

ER 99. Kennedy recognized BSD had the right to control the use of the field and that he had been directed not to invite members of the public onto the field after games. ER 366.

The open public forum issue was particularly sensitive for BSD because, as the controversy developed, multiple groups and individuals had asked for an equal right to use the field for expressive speech immediately after games in the same circumstances Kennedy did. ER 105, 427. Leavell highlighted this issue in his communications to the school board.

> …Secondly, the Satanist group from Seattle has vowed to come to the field to pray Thursday after the game, since they view our strategy with the coach as inaction, and want the same access to the field to pray that Joe does. We do not allow folks access to the field post-games, and have purchased signs to put up stating so, and will make several announcements during the game saying so. However, we have not been able to stop the hundreds of folks who

> have rushed the fields in the two home games where folks came out to support Joe. This issue of equity is exactly the door we were worried about opening to all groups with Joe establishing his ritual of prayer after games…

ER 467. On October 30, the Satanist group appeared at the stadium dressed in their regalia but did not actually go onto the field when they learned it was closed. ER 473, 516.

BSD's October 23 letter pointed out that BSD was subject to both the Establishment Clause of the U.S. Constitution and the stricter Establishment Clauses of the Washington Constitution.

> In addition, Washington courts have held that Article IX Section 4 of the Washington Constitution, which provides that public schools "shall be forever free from sectarian control or influence," imposes an even more strict prohibition on public agency endorsement of religion.

ER 99.

BSD's October 23 letter also proposed alternative locations for Kennedy's post-game prayer, including a school building or a press box, and stated that BSD was willing to confer with Kennedy and discuss other suggestions for accommodations that would allow him to pray. ER 99-100. Additionally, High School Principal John Polm told Kennedy he could return to the field and pray after his post-game duties were completed. ER 378.

Kennedy ignored BSD's October 23 letter and, that same evening, proceeded to pray at the 50-yard line and did so again at the game on October 26. At the October

23 game, people were near Kennedy when he knelt at the 50-yard line, but it did not appear that anyone knelt with him. ER 457-58. At the October 26 game, despite the BSD directive that the field was closed after games, Kennedy knelt at the 50-yard line while several others knelt with him, including Representative Jesse Young once again, another state legislator whose name Kennedy does not recall, several other adults, and two school-age children. ER 271, 368-70, 381, 479.


ER. 479.

Kennedy had invited Representative Young and the other legislator onto the field and asked them to address the team, which they did at midfield immediately

following the prayer circle. ER 271, 369. Notwithstanding his assertions to the contrary (Appellant Br. 8, 23, 46), Kennedy admitted in his deposition that there were two school-age children in the prayer circle. ER 368-70. The video of the event shows the prayer circle taking place at midfield, in the middle of the post-game ceremonies, preceded by the handshake line and followed by the team gathering at midfield for a conference. ER 271. Kennedy agrees that, when he prayed on the field on October 23 and 26, he knew he was violating the directions from BSD. ER 368, 370-71.

On October 28 Leavell wrote Kennedy repeating his conclusion that Kennedy had violated BSD directives on October 16, October 23, and October 26, and placed him on *paid* administrative leave.[3] ER 277. Kennedy was still allowed to attend BSD events as a member of the public and, after going on administrative leave, he attended at least one game and prayed in the stands with others and news cameras. ER 475, 517.

**D. Kennedy refuses to discuss possible accommodations.**

In the October 28 letter, Leavell repeated his prior invitations to Kennedy to discuss accommodations.

> I regret the necessity of this action. Please know that the District remains willing to discuss ways of accommodating your private religious exercise. Please contact me if you wish to discuss the options I have previously identified, or any other options you may have in mind.

[3] Kennedy incorrectly states he was "terminated." Appellant Br. 41.

ER 277. Kennedy believed Leavell was sincerely "working very hard" to accommodate his prayer practice. ER 366-67, 371. Nonetheless, Kennedy never responded to Leavell's invitation to discuss accommodations, or to any of BSD's earlier invitations to do so. ER 514-15. Throughout the controversy, Kennedy's lawyers maintained that the only acceptable accommodation would be the terms of Kennedy's October 14 letter, which stated Kennedy was resuming his practice of praying audibly and with students. ER 103, 371, 514-15. However, Kennedy has now testified that other accommodations might have been possible, such as allowing him to return to the field to pray after the team had gone to the locker room or bus. ER 360. Although Principal Polm had raised the possibility of Kennedy returning to the field to pray after his locker-room duties had been completed, which Kennedy did at least once, neither Kennedy nor his representatives ever told BSD it might be a basis for an accommodation acceptable to Kennedy. ER 514-15.

**E. BSD was aware of the coercive effects of Kennedy's prayers.**

After the issue with Kennedy arose, BSD received input from some students and parents complaining that some players had participated in the team prayers only because they did not wish to separate themselves from the team. ER 379-80, 461, 517, 526. BSD also observed that, in the period when Kennedy ceased praying on the field, players were not observed praying on the field on their own initiative. ER 517. A BSD publication specifically pointed out how coercion can occur.

> There is indeed no evidence that students have been *directly* coerced to pray with Kennedy. But that isn't the standard… While attending games may be voluntary for most students, students required to be present by virtue of their participation in football or cheerleading will *necessarily* suffer a degree of coercion to participate in religious activity when their coaches lead or endorse it.

ER 102 (emphasis added). Even published news stories reported concerns about coercion, with one article describing Kennedy as saying "one of the team captains does not believe in God and does not have to participate." ER 454. The situation of the team captain illustrates the pressure on some school athletes, who were forced to choose between staying close to their teammates during the post-game celebrations or separating themselves from their teammates to honor their own religious beliefs.

**F. Kennedy refuses to participate in his job evaluation.**

Evaluations of assistant coaches start with a written evaluation by the head coach, and then by the Athletic Director, after which the assistant coach meets with the Athletic Director to go over the evaluation. ER 531. If the coach is unsatisfied with the evaluation, he or she can request involvement by the building principal and human resources personnel from the District office. *Id*. Kennedy did not participate in the evaluation process in 2015. Head Coach Gillam filled out an evaluation form, dated November 12, and Athletic Director Jeff Barton also filled one out, which he signed December 16. ER 470-71, 535-36. However, despite several requests, Barton was unable to get Kennedy to come in for a conference. ER 526, 536. Kennedy also

never proceeded to the next step because he never requested involvement by the building principal or personnel from the BSD office. ER 531.

The evaluation by Head Coach Gillam gave Kennedy high marks in many categories and lower marks in "Commitment to Team," "Character," "Manageability," and "Relationship with Coaches." ER 470-71. In his comments regarding Character and Manageability, Gillam wrote "Coach Kennedy put himself before the team many times this season." *Id*. In his comments regarding Relationship with Coaches, Gillam wrote "Coach Kennedy's actions this season drove a wedge in our coaching staff. He created an uneasy environment due to his legal battle." *Id*. The marks Gillam gave Kennedy in the above categories related to the manner in which Kennedy chose to handle his dispute with BSD. ER 522-23. Assistant Coach Derrick Saulsberry also criticized Kennedy for putting himself before the team and for missing practices. ER 461-62.

Following the 2015 season, Gillam resigned from the head coach position. ER 521-22. BSD then opened all seven of the football coaching positions for applications. ER 536. BSD filled the head coach position first so that the new head coach could participate in the selection of assistant coaches. *Id*. It then filled all the assistant coach positions with people who had applied for the jobs. *Id*. Of the seven coaches from the 2015 season, four coaches, including Kennedy, chose not to apply

for positions in 2016. *Id*. Kennedy's wife was in charge of the process of filling the coaching positions. *Id*.

One assistant coach who chose not to return was David Boynton. *Id*. Boynton is an ex-school board member, has been known to Superintendent Leavell for at least 10 years, and is a friend of Kennedy's. ER 517-18. The first notice BSD ever had about an alleged "Buddhist chant" by Boynton was when it appeared in Kennedy's EEOC complaint in January 2016. *Id*. On the occasion where Boynton "chanted," he stood silently on the field staring at the scoreboard. ER 465. Kennedy agrees that, if Boynton had not told him he was engaging in an inner chant, Kennedy would not have known it was occurring, and Kennedy does not know of anyone else who observed the "chanting." ER 374-75.

**G. Kennedy never specifically defined his "sincerely-held religious beliefs."**

BSD never knew which of Kennedy's practices were based on sincerely-held religious beliefs. ER 514-16. The only instance where Kennedy identified any aspect of his "sincerely-held religious beliefs" was the letter from his lawyer of October 14, requesting a religious accommodation. *Id*.; ER 258-63. The letter described his "sincerely-held religious beliefs" in general terms that left out several particular aspects of either his past prayer practices or intended future practices, some of which aspects he now alleges were essential. The letter's description of Kennedy's sincerely-held religious beliefs only stated a general desire to pray in an undefined

manner at some unspecified time and place after football games. The letter mentioned sincerely-held religious beliefs only four times. The first description was:

> Coach Kennedy is motivated by his sincerely-held religious beliefs to pray following each football game.

ER 258. The second mention was:

> After watching the film, Coach Kennedy felt compelled by his religious faith, and his sincerely-held religious beliefs, to begin thanking God for the young men he is privileged to coach.

ER 259. The next reference was:

> Coach Kennedy's sole intent, as motivated by his sincerely-held religious beliefs, is to say a brief prayer of thanksgiving and then move on.

*Id*. In a final reference, the letter stated that, under Title VII, BSD "must accommodate his sincerely-held religious beliefs." ER 262.

BSD was never able to determine the exact parameters of what Kennedy's beliefs directed him to do because Kennedy refused to engage with BSD to work on an accommodation. ER 514-16. Some of the unspecified aspects of his prayers are as follows.

Pray audibly or pray silently? The letter requesting an accommodation describes Kennedy's prayers as being verbal or audible. ER 259 ("audibly spoke," "quietly, but audibly, prayed," "prayers are verbal"). Despite telling BSD his prayers had been and would continue to be audible, Kennedy now repeatedly contends he

wanted his prayers to be silent. Either way, Kennedy never stated that his sincerely-held beliefs applied to whether his prayers were verbal or silent.

Pray standing or pray kneeling? Prior to BSD's investigation of his prayer activities, Kennedy's prayers with the football team were delivered from a standing position. ER 356-57, 498. His letter requesting an accommodation made no mention of changing his prayers to a kneeling posture. His letter stated a desire to resume his prior practice, but did not specify that his sincerely-held religious beliefs required a standing position, a kneeling position on one knee, a kneeling position on two knees, or any other details such as hands clasped, head bowed or arms outstretched. ER 259. Kennedy never identified whether his sincerely-held beliefs required kneeling prayers or standing prayers, or whether his prayers had to be demonstrative in any way at all.

Pray on-duty or pray off-duty? Kennedy's apparent intent was to pray after his coaching duties had ceased. Kennedy's letter emphasized that he wanted his prayers to occur when he was off duty. ER 259 ("after the game ended and his official coaching duties have ceased," "during non-instructional hours, after his official duties as a coach have ceased"); ER 261 ("permits one of its coaches, on his own time, to say a short personal prayer"). Although Kennedy stated an intent to pray while off duty, he did not identify that feature as being part of his sincerely-

held religious beliefs, and he certainly never took the opposite position – that his sincerely-held beliefs required him to pray while on duty.

Pray during the closing ceremonies or pray after the stadium was empty? Kennedy's letter does not specify that his sincerely-held beliefs required his prayers to take place at any particular time, other than at some point after games. ER 258 ("post-game personal prayer" and "pray following each football game"); ER 262 ("waits until the game is over and the players have left the field"); ER 263 ("a private, post-game prayer"). BSD had seen the news reports of Kennedy returning to pray after the stadium was empty and Kennedy's letter never says it was unacceptable for him to return to the field to pray. The letter never identifies a specific time frame in which his prayer had to occur and never states that his sincerely-held religious beliefs required him to demonstratively pray while the closing ceremonies of the football game were underway. ER 179, 258. It was not until after the start of litigation that Kennedy contended he had to pray *immediately* after the final whistle. Nonetheless, Kennedy now admits that returning to the field after the players had gone to the locker room or buses might have been acceptable. ER 360.

Pray with students and others or pray alone? Kennedy's letter specifically asks that he be allowed to pray with students but does not link the request to his sincerely-held beliefs. ER 262. Kennedy's prior practice was to pray audibly with

players from both teams, and the October 14 letter states that, "beginning on October 16, 2015," he intended to resume his prior practice. ER 263. At games after the October 14 letter, he prayed with spectators, students, players from other teams, and state legislators who he invited onto the field. ER 271, 368-70, 381, 479, 481. He now maintains "[t]his case has never been about prayers with students" (Appellant Br. 23), but he agrees it was his intention to continue kneeling in prayer even if students gathered around him. ER 363-64. Kennedy never once told BSD he intended to cease praying with students and his lawyers insisted the only acceptable outcome would be the terms of his October 14 letter. ER 371, 514-15.

Pray on the field or pray near the field? Although Kennedy now contends his sincerely-held beliefs required prayer at the 50-yard line (Appellant Br. 64), his letter requesting an accommodation only describes the midfield location as one feature of his past practices. ER 258. Kennedy's letter never states his sincerely-held beliefs required him to pray in the middle of the field, on the sideline, in the locker room, or any other specific location. In this respect, the location of Kennedy's prayer is a variable feature of his prayers and not a specific requirement – much like whether his prayers are audible or silent, standing or kneeling, with students or without, immediately after the final whistle or 30 minutes later, etc.

## SUMMARY OF THE ARGUMENT

Kennedy's free speech claim fails because, under *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 961 (9th Cir. 2011),[4] a teacher speaks as a public employee for purposes of a free speech analysis 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. Kennedy's speech met all three criteria. He spoke at one of the biggest events a high school can present, in front of hundreds of students, players and spectators, while he was clothed in his school coaching gear and on duty in charge of his players. The official capacity of his speech was emphasized by its location in the center of the field and its timing in the middle of the post-game ceremonies – a

[4] This Court applied the *Johnson* principle earlier in this case when it held that Kennedy spoke as a public employee, not a private citizen, and affirmed the District Court's denial of Kennedy's motion for a preliminary injunction. *Kennedy v. Bremerton School District*, 869 F.3d 813, 830 (9th Cir. 2018). The Ninth Circuit's fully considered ruling on this issue has become the law of the case. *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Amer. v. USDA*, 499 F.3d 1108, 1114 (9th Cir. 2007); *Humanitarian Law Project v. U.S. Dept. of Justice*, 352 F.3d 382, 392-93 (9th Cir. 2003); *Sherley v. Sebelius*, 689 F.3d 776, 781-83 (D.C. Cir. 2012); *This That and The Other Gift and Tobacco, Inc. v. Cobb County, Georgia*, 439 F.3d 1275, 1284-85 (11th Cir. 2006). Kennedy argues that the earlier rulings should be ignored because of the development of new facts. Appellant Br. 34. However, the only material change in the facts produced by discovery is the admission that Kennedy entirely endorses BSD's description of the scope and content of his job responsibilities (ER 372-73) and therefore agrees with the factual premise underlying the Ninth Circuit's ruling – that Kennedy was "responsible for communicating the District's perspective on appropriate behavior through the example set by his own conduct." *Kennedy*, 869 F.3d at 827. Kennedy's claim thus fails at *Pickering* step two.

non-public forum from which all other speakers were excluded. Since he spoke as a public employee, his speech was not protected under the First Amendment.

Even if Kennedy's prayers were viewed as private-capacity speech, BSD's regulation of the time and place of his prayers was justified by its compelling interest in avoiding a violation of the Establishment Clauses of the U.S. and Washington Constitutions (*Borden v. Sch. Dist. of Twp. of East Brunswick*, 523 F.3d 153, 174 (3d Cir. 2008) (school district's "educational interest in avoiding Establishment Clause violations" is what Supreme Court has held to be "sufficiently compelling to justify content-based restrictions on speech") (quoting *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761-62 (1995))), and its need to maintain the post-game football field as a non-public forum. BSD's fears of an Establishment Clause violation were well-founded because the circumstances of Kennedy's speech created strong indicia of government endorsement of religion and because BSD was aware that Kennedy's prayers had a coercive, albeit unintended effect on students and players.

Kennedy's free exercise claim fails because BSD's prohibition against private speech during its closing ceremonies does not warrant strict scrutiny since it is a neutral rule of general application that restricts speech on political, social and other topics as well as religion. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). The prohibition is also narrowly tailored as it applies only to

the football field immediately after games while students are present. Even if strict scrutiny were to apply, BSD's compelling interests justify the restriction. *Id.* at 531-32.

Kennedy cannot maintain his Title VII claims because BSD had no discriminatory motive. As the District Court held, "there is no evidence that the District's actions were motivated by anything other than a desire to avoid constitutional violations." ER 25.

## STANDARD OF REVIEW

BSD agrees with Kennedy's description of the standard of review, except to add that this Court can affirm the decision of the District Court on any ground supported by the record, even if this Court's reasoning differs from the District Court's. *Preminger v. Principi*, 422 F.3d 815, 820 (9th Cir. 2005). This Court can therefore address BSD's arguments regarding the Washington Constitution and BSD's designation of the football field as a non-public forum. While the District Court did not rule on these arguments, BSD clearly raised them in its pleadings. ER 505-10, 528-29.

## ARGUMENT

### I. BSD did not violate Kennedy's free speech rights.

Under *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968), the right of a government employee to speak on a matter of public concern is balanced against the government's need to manage its workplace. The test was modified in *Garcetti v. Ceballos*, 547 U.S. 410, 421-22 (2006), to include an analysis of whether the speech occurred in the employee's role as a private citizen or in her role as a government employee. The *Garcetti* court held that, when making "statements pursuant to their official duties, [public] employees are not speaking as citizens for First Amendment purposes." *Id.* at 421. The modified *Pickering* test consists of a five-step analysis:

> (1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action; (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and (5) whether the state would have taken the adverse employment action even absent the protected speech.

*Johnson*, 658 F.3d at 961. A plaintiff's failure to satisfy a single step is fatal to the claim. *Coomes v. Edmonds School Dist.*, 816 F.3d 1255, 1260 (9th Cir. 2016). The analysis in this case turns on steps two and four.

#### A. *Pickering* Step Two: Kennedy spoke as a public employee, not as a private citizen.

Determining whether an employee speaks as a private citizen or public employee requires closely connected inquiries of fact and law, divided into two

stages. *First*, "a factual determination must be made as to the scope and content of a plaintiff's job responsibilities." *Second*, "the ultimate constitutional significance of those facts must be determined as a matter of law." *Eng v. Cooley*, 552 F.3d 1062, 1071 (9th Cir. 2009). The inquiry is not limited to a simple reading of "formal job descriptions," but requires a "practical" examination of an employee's job functions and responsibilities. *Dahlia v. Rodriguez*, 735 F.3d 1060, 1069-71 (9th Cir. 2013). A plaintiff bears the burden of proving she spoke as a private citizen. *Coomes*, 816 F.3d at 1261.

**1. Kennedy's ordinary job duties included communicating ideas and modeling behavior during post-game ceremonies.**

A practical inquiry into the factual extent of Kennedy's job responsibilities demonstrates that the expressions and behaviors he 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. *See*, *Peloza v. Capistrano Unified School Dist.*, 37 F.3d 517, 522 (9th Cir. 1994) (teacher ordered to cease discussing religion with students at school); *Mayer v. Monroe County Community School Corp.*, 474 F.3d 477, 479 (7th Cir. 2007) (teacher did not speak as private citizen when advocating anti-war position in her classroom); *Grossman v. South Shore Public School Dist.*, 507 F.3d 1097, 1100 (7th Cir. 2007) (school counselor not allowed to pray with students); *Doe v. Duncanville Independent School Dist.*, 70 F.3d 402, 405 (5th Cir. 1995) (coaches cannot participate in prayers with players at sporting events).

In *Johnson*, the Ninth Circuit analyzed the scope of a teacher's duties and found they were extensive enough to include a teacher's religious speech in front of students. The speech consisted of Johnson hanging banners in his classroom such as "In God we trust," "All men are created equal, they are endowed by their Creator," and "One nation under God." *Johnson*, 658 F.3d at 958.

The court's "practical" factual inquiry into the "scope and content" of Johnson's job responsibilities considered several relevant facts. *Id*. at 966. (1) The context in which Johnson's speech occurred was "squarely within the scope of his position." *Id*. at 967. (2) Johnson's access to the location of his speech was not available to private citizens since "an ordinary citizen could not have walked into Johnson's classroom and decorated the walls as he or she saw fit." *Id.* at 968. (3) Teaching is broad in its scope, extending "beyond the narrow scope of curricular instruction" and does not halt "each time the bell rings." *Id*. (4) Teachers hold positions of "trust and authority" in dealing with "impressionable young minds." *Id*. (5) The core of a teacher's job responsibilities is the expression of ideas – "[e]xpression is a teacher's stock in trade, the commodity she sells to her employer in exchange for a salary." *Id.* at 967. The court concluded that "as a practical matter… beyond possibility for fairminded dispute," the "scope and content" of Johnson's job responsibilities included his expressions to his class during class hours. *Id*.

The factual circumstances of Kennedy's demonstrative prayers are parallel to *Johnson*.

1. The time and place of Kennedy's speech was "squarely within the scope of his position." *Id*.

*2.* Kennedy's employment gave him special access to the location of his speech. Neither ordinary citizens nor other school employees were allowed to present their individually selected demonstrative speech on the football field after games. Kennedy was present only as a public employee participating in BSD's chosen program of post-game ceremonies. Indeed, the location and timing of Kennedy's speech was BSD's only concern. BSD did not ask Kennedy to cease praying but asked him only to relocate his prayer from the center of BSD's post-game ceremonies.

3. Kennedy's job did not cease at the final whistle. He remained responsible for the players until they were released from the locker room.

4. Kennedy held a position of "trust and authority" in dealing with "impressionable young minds." *Id.* at 968. He was "one of those especially respected persons chosen to teach" on the field, in the locker room, and at the stadium. *Kennedy v. Bremerton School District*, 869 F.3d 813, 826 (9th Cir. 2018).

5. Kennedy was hired to express BSD's ideas to students – it was his stock in trade. Kennedy's employment contract doesn't simply "retain" him as a coach.

Instead, he is "entrusted" with the care of the students. ER 347. He is expected to do more than just teach football plays and techniques. He is expected to be a "mentor and role model for the student athletes." *Id*. His modeling of behavior is nonstop when he is in the presence of students, in an official capacity, at school events. His position as a role model requires him to "exhibit sportsmanlike conduct at all times" and to be aware he is "constantly being observed by others." *Id*. Kennedy's actions in view of the public are part of his job, requiring him to "use proper conduct before the public and players at all times." ER 501.

Kennedy met the three *Johnson* criteria of (1) being in the presence of students, (2) at a school football event, (3) while working in his official capacity as a coach. The District Court correctly held that Kennedy's words and actions created communications with and set examples for the students – the core mission of BSD and the function for which Kennedy was hired. The factual inquiry into Kennedy's job responsibilities produces the same conclusion reached by the Ninth Circuit in *Johnson*. The scope and content of Kennedy's ordinary job duties include his conduct during the post-game ceremonies. Kennedy's demonstrative prayer in the center of a stage from which private citizens were excluded, clad in coaching attire, at an official BSD event, created a communication to the players who had been entrusted to his care, as well as to the other students in the audience, and communication was the core of his ordinary job duties.

Kennedy seeks reversal of the District Court's ruling by mischaracterizing it as a restriction on demonstrative religious behavior in *any* situation where teachers are in view of students (Appellant Br. 2-3, 30-31).[5] However, the District Court opinion and this Court's ruling earlier in this case both emphasize that the analysis applies only when all three *Johnson* factors are present. ER 14, 16-17.

Kennedy also argues that, since he was not specifically instructed to pray in the middle of the field, and was directing his prayer to God, he must not have been performing duties as a coach at the moment of his prayer. His argument has at least two defects.

*First*, Kennedy's deposition testimony contradicts his argument. Kennedy and BSD mutually understood that high school coaches had extensive responsibilities, including being a mentor and role model, and being a more important figure in some students' lives than anyone else at school, including teachers. ER 372-73, 512-13. Kennedy testified that, even when he was conducting a private phone call in earshot of the students, he was required to be careful about his behavior. ER 372-73. He testified he "was always setting some kind of example to the kids" at games or practices *Id*. He understood he was always being watched. ER 373. Kennedy's arguments thus fail to acknowledge his own understanding of the multi-faceted and

[5] Kennedy also mistakenly contends that teachers "are almost always in view of students." Appellant Br. 30. In fact, schools have private locations for teachers and scheduled time without students present.

impactful role a coach plays in the life of a player, and the importance BSD placed on his speech and conduct around students. Kennedy's communications were just as important as a classroom teacher's – for a student on the team, likely even more so.

*Second*, Kennedy's focus on his subjective intention to say a personal prayer misses the point. The relevant job-related aspect is not his intent to communicate with God, but that his actions also sent a message to players, cheerleaders, students in the stands and others. Regardless of his intent, Kennedy created an instance of demonstrative speech that was delivered to the students and public – the very function for which he was hired. It cannot reasonably be denied that an example is set by a coach's actions at the center of the field while supervising the team during post-game ceremonies.

**2. The constitutional significance of Kennedy's job duties is that his speech during post-game ceremonies is not protected by the First Amendment.**

The *Johnson* court held that "teachers *necessarily* act as teachers for purposes of a *Pickering* inquiry" if three elements are satisfied: (1) when teachers are at school or a school function; (2) where teachers are in the general presence of students; and (3) while teachers are acting in a capacity one might reasonably view as official. *Johnson*, 658 F.3d at 968 (emphasis in original). The court concluded that (1) Johnson spoke as a public employee and not as a private citizen, (2) his speech was not protected by the First Amendment, and (3) "the school district is free to 'take

legitimate and appropriate steps to ensure that its message is neither garbled nor distorted.'" *Id.* at 957 (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995).

The factual circumstances of Kennedy's speech and job duties are parallel to those in *Johnson*, as is "the ultimate constitutional significance of those facts," which a court determines "as a matter of law." *Johnson*, 658 F.3d at 966. Kennedy was (1) at a school function, (2) in the presence of students, and (3) serving in a capacity one might reasonably view as official. *Id*.

> In sum, when Kennedy kneeled and prayed on the fifty-yard line immediately after games while in view of students and parents, he spoke as a public employee, not as a private citizen, and his speech therefore was constitutionally unprotected.

*Kennedy*, 869 F.3d at 830.

### B. *Pickering* Step Four: BSD was justified in regulating Kennedy's prayers while coaching in order to avoid violating constitutional rights of students and others.

Kennedy acknowledges that BSD placed him on paid administrative leave in order to protect "the federal and state constitutional rights of students and others" (Appellant Br. 15), but he incorrectly limits the endangered rights of others to those solely arising from the Establishment Clause of the U.S Constitution. BSD also was concerned about the forum-access rights of others that would be violated if Kennedy was allowed to continue to present his demonstration of prayer in the midst of BSD's post-game ceremonies while others were excluded. BSD also was legally bound to

protect the rights of others arising under the Washington Constitution, which "imposes an even more strict prohibition on public agency endorsement of religion." ER 99.

### 1. BSD must show a well-founded risk of an Establishment Clause violation, but not necessarily an actual violation.

As a matter of law, the conduct of a teacher or coach at a public school is the conduct of the school district. *See, e.g.*, *Duncanville*, 70 F.3d at 406 (public-school coaches who are "present" at sporting events are "representatives of the school and their actions are representative of [district] policies"); *Bishop v. Aronov*, 926 F.2d 1066, 1073 (11th Cir. 1991) ("a teacher's [religious] speech can be taken as directly and deliberately representative of the school"). Because BSD "has a compelling interest in not committing actual Establishment Clause violations," it necessarily has the authority – not to mention the constitutional duty – to ensure that its teachers and coaches do not commit such violations of the students' rights. *Locke v. Davey*, 540 U.S. 712, 730 n.2 (2004) (Scalia, J., dissenting) (emphasis omitted); *see, e.g.*, *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993); *Widmar v. Vincent*, 454 U.S. 263, 271 (1981); *Borden*, 523 F.3d at 174 (school district's "educational interest in avoiding Establishment Clause violations" is what Supreme Court has held to be "'sufficiently compelling to justify content-based restrictions on speech'") (quoting *Capitol Square,* 515 U.S. at 761-62).

Thus, even if public-school employees had the speech rights in the performance of their job duties that Kennedy claims (which they do not) (*see Borden*, 523 F.3d at 174 (high-school coach had no First Amendment right to take a knee for team prayer, meaning that school district needed only a legitimate educational interest to prohibit his conduct)), and even if school districts did not otherwise have broad authority to regulate their coaches' on-field conduct as part of the normal process of running the public schools (which they do), BSD still had an absolute duty to prevent any Establishment Clause violations by its employees.

Indeed, avoiding Establishment Clause suits brought by parents or others is itself a legitimate governmental interest that, as a matter of law, justifies restrictions on school employees' speech and conduct—and that is so even if a court might not ultimately find the employee's conduct transgresses Establishment Clause limitations. *See, e.g.*, *Lamb's Chapel*, 508 U.S. at 394; *Widmar*, 454 U.S. at 271; *Duncanville*, 994 F.2d at 166. School districts are accorded some leeway in evaluating the likelihood of an Establishment Clause violation. Because BSD has a "legitimate interest…in avoiding litigation by those contending that an employee's desire to exercise his freedom of religion has propelled his employer into an Establishment Clause violation," it "must be accorded some breathing space to regulate in this difficult context." *Marchi v. Bd. of Coop. Educ. Servs.*, 173 F.3d 469, 475-77 (2d Cir. 1999). "School officials who exercise judgment based on their

expertise and authority should be afforded leeway in making choices designed to foster an appropriate learning environment and further the educational process." *Walz ex rel. Walz v. Egg Harbor Twp. Bd. of Educ.*, 342 F.3d 271, 277 (3d Cir. 2003). A "school district's interest in avoiding an Establishment Clause violation trump[s] the teacher's right" to engage in religious conduct that implicates potential constitutional concerns, because a school district cannot be required precisely to "navigate[] between the Scylla of not respecting its employee's right to the free exercise of his religion and the Charybdis of violating the Establishment Clause of the First Amendment by appearing to endorse religion." *Berry v. Dep't of Soc. Servs.*, 447 F.3d 642, 646, 650 (9th Cir. 2006).

The pertinent question here is not whether BSD was able to predict precisely how appellate courts might rule on the Establishment Clause issue. The rulings thus far in this case, even if eventually modified on appeal, affirm that BSD reasonably foresaw a likely constitutional violation and therefore had adequate justification for its response to Kennedy's demonstrative speech.

**2. Kennedy's prayers violated the Establishment Clause of the U.S. Constitution.**

The Establishment Clause violation at issue here concerns Kennedy's resumption of his prayer practice under the terms described in his lawyer's letter (ER 258) and as additionally observed by BSD. Kennedy told BSD he intended to resume his prior practice, that his prayers were audible and that he intended to pray with

students. BSD further observed that Kennedy invited others to join him on the field and prayed with some students, spectators and players from opposing teams. To the extent Kennedy argues that BSD theoretically might broadly restrict other actions by other employees, those restrictions have never occurred (ER 427), and any concern about an overly broad approach by BSD will "be cured through case-by-case analysis of the fact situations" that might arise in the future. *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973).

**Endorsement Test.**[6]

Official action unconstitutionally endorses religion when it "convey[s] or attempt[s] to convey a message that religion or a particular religious belief is favored or preferred." *County of Allegheny v. ACLU*, 492 U.S. 573, 593 (1989). "School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'" *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10, (2000). Hence, the principal constitutional question here is not what Kennedy intended to accomplish, but what

[6] Kennedy's argument that the endorsement test has been eliminated by *Town of Greece v. Galloway*, 572 U.S. 565 (2014) is mistaken. This Court has declined to apply *Galloway* to school board meetings much less extend its holding to school prayer in general. *Freedom from Religion Foundation v. Chino Valley Unified School District,* 896 F.3d 1132, 1148 (9th Cir. (2018).

message Kennedy's resumption of his prayer practice would convey to a reasonable, objective student observer on the football squad or in the stands. *See Id*. at 308 (prayers at high school football games evaluated from perspective of objective student observer familiar with "'implementation of'" pregame-prayer practice); *Cf. Borden*, 523 F.3d at 178 (legal question is "whether a reasonable observer would perceive [coach's] actions as endorsing religion, not whether [coach] intends to endorse religion.").

Students witnessing Kennedy's demonstrative religious exercise on the field (ER 479, 481) would perceive the message that the District was endorsing the prayer. *See Borden*, 523 F.3d at 178 ("a reasonable observer would conclude that [coach] is showing not merely respect when he bows his head and takes a knee with his team and is instead endorsing religion"); *Duncanville,* 70 F.3d at 406 n.4 ("if while acting in their official capacities, [school] employees join hands in a prayer circle or otherwise manifest approval and solidarity with student religious exercises, they cross the line between respect for religion and endorsement of religion."). The message is even more evident when viewed in its necessary historical context because, under the endorsement test, the hypothetical student observer would be presumed to know and consider "all of [Kennedy's] prior prayer activities with his team." *Borden*, 523 F.3d at 176, 178-79 (coach's former leading of prayer meant that students would understand taking a knee for student prayer to be continuation

of past unconstitutional endorsement of religion); *see also Santa Fe*, 530 U.S. at 308-09 (given evolution of school's policy, "and in light of the school's history of regular delivery of a student-led prayer at athletic events, it is reasonable [for an objective student] to infer that the specific purpose of the policy was to preserve a popular 'state-sponsored religious practice.'"). A mere disclaimer would not cure the Establishment Clause violation because BSD remained responsible for the content of the ceremony conducted by its employee while on duty on its property. *ACLU of New Jersey v. Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471, 1482 (3d Cir. 1996).

The message of government endorsement is particularly emphatic here due to Kennedy's joinder with state legislators in his public prayer demonstration just prior to having the legislators address the players. The clear message is that those who adhere to Kennedy's religious practice are political insiders with special status and prominent roles on the biggest stage the District has to offer.

**Coercion Test.**

Although official conduct need not be coercive to violate the Establishment Clause (*Sch. Dist. Of Abington Twp. v. Schempp,* 374 U.S. 203, 221, 223 (1963)), even subtle, inadvertent religious coercion of students by a public-school official suffices to invalidate a prayer practice (*Lee v. Weisman*, 505 U.S. 577, 592-93, 599 (1992)). Recognizing that "there are heightened concerns with protecting freedom

of conscience from subtle coercive pressure," including peer pressure, "in the elementary and secondary public schools," the Supreme Court in *Lee v. Weisman* struck down prayer at public-school graduations because "prayer exercises in public schools carry a particular risk of indirect coercion." 505 U.S. at 592, 595. Although the graduation ceremonies in *Lee* were voluntary, the Court recognized that, "[t]o say that a student must remain apart from the ceremony at the opening invocation and closing benediction is to risk compelling conformity in an environment… where… the risk of compulsion is especially high." *Id*. at 596.

In *Santa Fe*, the Supreme Court went further, holding that even "student-led, student-initiated prayer at football games violates the Establishment Clause." 530 U.S. at 311. As the Court explained: "There are some students," including "the team members themselves, for whom seasonal commitments mandate their attendance." *Id*. at 311. And even for those students who are not required by the school to attend: "To assert that high school students do not feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football is 'formalistic in the extreme.'" *Id*. (quoting *Lee*, 505 U.S. at 595). "[G]iven our social conventions, a reasonable dissenter [at a school football game] could believe that the group exercise" of standing or remaining silent during the prayer "signified her own participation or approval of it." *Lee*, 505 U.S. 593. That is unconstitutional religious coercion to engage in prayer. Hence, because the students

in *Santa Fe* were faced with the choice of (a) participating in unwanted prayer, (b) singling themselves out to coaches, teachers, and peers as religious dissenters, or (c) having to avoid the football games altogether, the Court held that even the student-initiated, student-led prayers "ha[d] the improper effect of coercing those present to participate in an act of religious worship." *Id*. at 312. The Establishment Clause does not permit teachers, coaches, or other school officials "to exact religious conformity from a student as the price of joining her classmates at a varsity football game" — or any other traditional gathering of a school community. *Id*. at 312. Team members know the coach decides "who plays and for how long, placing a disincentive on any debate with the coach's ideas." *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1190 (6th Cir. 1995).

Kennedy's demonstrative prayers produced just as much coercive influence as any of the other practices that have been barred. The unspoken pressure on players is shown in the complaints BSD received about players participating in Kennedy's prayers only because they did not want to separate themselves from the team, and in BSD's observation that players demonstratively prayed only when Kennedy did. ER 517, 526. His practice therefore fails the coercion test.

***Lemon* Test.**

"To withstand an Establishment Clause challenge," school officials' conduct "(1) must have a secular purpose" and it also "(2) must, as its primary effect, neither advance nor inhibit religion…." *Peloza*, 37 F.3d at 520 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)). For all the reasons that Kennedy's conduct violated the endorsement and coercion tests, and more, Kennedy's conduct would violate both the secular-purpose and secular-effect requirements of the *Lemon* test. Whatever the purposes for prayer generally, the primary purpose for the practice of delivering prayers audibly to the team, on the 50-yard line, immediately after the games, while wearing the coach's uniform and supervising the students, can only reasonably be thought to be to advance religion as a school coach. And the primary purpose of adopting that practice after having been ordered to stop delivering pregame team prayers and post-game religious speeches can only be thought to be to continue to advance religion. *See, e.g.*, *Jager v. Douglas Cnty. Sch. Dist.*, 862 F.2d 824, 830 (11th Cir. 1989) (holding that because school district refused to adopt modified pregame-invocation practice that would still have accomplished district's asserted secular aims, "it is clear that the School District was most interested in the fourth purpose served by the invocations," namely, "the School District wanted to

have invocations that publicly express support for Protestant Christianity" in violation of Establishment Clause).

Similarly, the effect of Kennedy's prayer practice was official advancement of religion by the school. The students on the team are taught to look up to the coaches, obey them, and tailor their conduct to the coaches' wishes and preferences. Thus, not only would Bremerton students reasonably view Kennedy's prayer practice as endorsing and advancing religion, but the players on the team would, for the reasons already explained, feel pressure to conform. That would undeniably run afoul of the secular-effect requirement of the *Lemon* test.

### 3. Kennedy's prayers violated the Establishment Clauses of the Washington Constitution.

The Washington Supreme Court and the U.S. Supreme Court both recognize that the Washington Constitution restricts the endorsement of religion by state agencies and public schools more than does the U.S. Constitution. *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481, 483-490 (1986) (recognizing the "far stricter" dictates of the Washington Constitution); *Witters v. State Com'n for the Blind*, 112 Wn.2d 363, 368-370 (1989), *cert. denied*, 493 U.S. 850 (1989) (finding establishment clause violation under Washington Constitution even though none existed under U.S. Constitution); *Locke*, 540 U.S. at 722 (Washington Constitution "draws a more stringent line" than U.S. Constitution).

Even if this Court finds that Kennedy's actions did not violate the U.S. Constitution, it should nonetheless find his actions did violate the Washington Constitution and created a compelling reason for BSD to require that Kennedy modify the time or place of his demonstration of prayer. *See Perry v. School Dist. No. 81, Spokane*, 54 Wn.2d 886 (1959) (public school's early release program for off-campus religious education was unconstitutional); *State v. Showalter*, 159 Wash. 519 (1930) (compulsory daily reading and instruction in the Bible in public school system was unconstitutional); *State v. Frazier*, 102 Wash. 369 (1918) (public school board policy allowing class credits for Bible study was unconstitutional); Washington Constitution Article I § 11, Article IX § 4.

#### 4. BSD's interest in maintaining the post-game football field as a nonpublic forum outweighed Kennedy's interests in free speech or religious expression.

The law recognizes several classes of forums for speech and expression. One class consists of traditional public forums such as "streets and parks which have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Education Association v. Perry Local Educators' Association, et al.,* 460 U.S. 37, 45 (1983) (school email system was not a designated public forum). Another class consists of public facilities which the state voluntarily has opened to public use for expressive activity, and which it can close

or regulate. *Id.* at 45-46. In other situations, where the government property, event or medium of communication "is not a traditional public forum and the government has not chosen to create a designated public forum, the property is either a nonpublic forum or not a forum at all." *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 678 (1998) (televised debate among candidates was a nonpublic forum). The "first amendment does not guarantee access to property [to provide for free expression] simply because it is owned or controlled by the government." *United States Postal Service v. Council of Greenburgh Civic Associations,* 453 U.S. 114, 129 (1981). "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderley v. Florida*, 385 U.S. 39, 47 (1966). "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 802 (1985). "Government's decision to restrict access to a nonpublic forum need only be *reasonable;* it need not be the most reasonable or the only reasonable limitation." *Id*. at 808 (emphasis in original). A school district has an "inherent right" to close a designated forum to avoid involvement with controversy over religion. *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 970 (9th Cir. 1999) (district could cease all advertising on baseball field fences in order to avoid controversy of posting an advertisement

containing the Ten Commandments). A government employer that designates a portion of its property as a nonpublic forum and restricts its use accordingly does not violate the free speech or free religious expression rights of its employees. *Berry*, 447 F.3d at 652-54.

In *Berry*, a county government agency restricted three aspects of an employee's behavior: (1) discussing religion with clients of the department, (2) displaying religious items in the cubicle where he interviewed clients, and (3) using a conference room for prayer meetings. *Berry*, 447 F.3d at 648. The court separately analyzed each aspect of Berry's conduct under the *Pickering* test. It held that, with respect to discussing religion with clients of the department and displaying religious items in the cubicle where Berry interviewed clients, "the Department's need to avoid possible violations of the Establishment Clause" outweighed the restrictions on Berry's on-the-job speech. *Id.* at 651-652. With respect to use of the conference room for prayer meetings, the court held that the government's interest in maintaining the conference room as a nonpublic forum outweighed the restriction on Berry's free exercise of religion at work. *Id.* at 646.

Kennedy gains nothing by alleging his prayers – whether denominated free speech or free exercise of religion – were the actions of a private citizen, because private-citizen expressions during the closing ceremonies were blocked by BSD's forum-access rules. ER 105. BSD emphasized to Kennedy that the field was not a

public forum and took well-publicized measures to restrict public access once the issue over Kennedy's prayers arose. ER 513-14, 516. Kennedy recognized BSD had the right to control the use of the field and that he had been directed not to invite members of the public onto the field after games. ER 366. The field is exclusively dedicated to BSD's event until the closing ceremonies are over and the team has left. Private citizens cannot come on the field immediately after games and wave campaign signs for political contests, demonstrate regarding social issues, conduct religious ceremonies, or engage in any other expressive activities.

BSD does not doubt that Kennedy sincerely wished to give thanks for his opportunity to coach, but Kennedy's beliefs do not require the District to surrender control of its events or property. "Orderly school administration" (*Pickering*, 391 U.S. at 569) would suffer if each devout teacher could decide when and where to give thanks for school assemblies, band performances, classroom lessons or a myriad of other school events.

If BSD allowed Kennedy's demonstrative religious expression on the post-game football field during the closing ceremonies, it would convert the post-game field and ceremonies into a public forum. If such a forum were created and BSD refused equal access to other groups – such as the Satanists and others who contacted BSD seeking to use the field (ER 427) – BSD would be denying those citizens their First Amendment rights. *Rosenberger,* 515 U.S. at 828.

BSD's interest in maintaining the field as a nonpublic forum is an adequate justification for requiring Kennedy to relocate his demonstrative religious expression – it merely applied the same rules to him that applied to everyone else.

## II. BSD did not violate Kennedy's free exercise rights.

In *Berry* the Ninth Circuit joined other circuits in applying the *Pickering* balancing test to the analysis of religious expression by government employees. *Berry,* 447 F.3d at 649, n. 5 (Rejecting the strict scrutiny standard of *Lukumi*); *Walden v. Centers for Disease Control & Prevention*, 669 F.3d 1277, 1286 (11th Cir. 2012); *Brown v. Polk Cnty., Iowa*, 61 F.3d 650, 658 (8th Cir. 1995); *See also Waters v. Churchill*, 511 U.S. 661, 675 (1994) (government's interests are elevated when it acts as an employer as opposed to a sovereign). Holding that *Berry* did not apply, the District Court analyzed the free exercise claim under the strict scrutiny standard of *Lukumi.* ER 12. BSD believes *Berry* should control here and the application of the *Pickering* test to the free speech issue should likewise resolve the free exercise question. Nonetheless, even under the *Lukumi* analysis, BSD's actions did not infringe upon the Free Exercise Clause.

Under *Lukumi*, a court asks whether the challenged rule is neutral and of general application and, if not, whether it is justified by a compelling governmental interest. *Lukumi*, 508 U.S. at 531. This analysis comes down in BSD's favor. *First*, the speech in the closing ceremonies of the game is BSD's, not Kennedy's (*Johnson*,

658 F.3d at 975 ("Johnson had no individual right to speak for the government")) and BSD can regulate its own speech as it chooses. *Rosenberger*, 515 U.S. at 833. *Second*, BSD's requirements were narrowly focused on the very small time (10-15 minutes) and place (football field) of BSD's post-game ceremonies. Kennedy was free to pray off the field – a large swath of real estate – during the ceremonies, or on the field after the team left – a large span of time. *Third*, BSD's restrictions were not directed solely at religious conduct. The post-game field was not an open forum and no person or group was allowed access for political speech, social protest or any other type of expression. Kennedy complains that BSD's rules were not general enough to prevent coaches from tying their shoes or making a quick phone call, but those are not comparable instances of expressive speech on a "matter of public concern." *Johnson*, 658 F.3d at 961. *Fourth*, BSD had a compelling interest in avoiding the creation of a public forum that it would have to make available to others. *Fifth*, BSD had a compelling interest in meeting its obligations under the Establishment Clauses of the U.S. and Washington Constitutions.

## III. BSD did not violate Title VII.

Under Title VII, it is unlawful for an employer to discriminate against an employee "because of" sex, race or any other protected characteristic. 42 U.S.C. § 2000e–2(a)(1). At summary judgment, courts analyze Title VII claims through the burden-shifting framework of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792

(1973). Under this analysis, plaintiffs must first establish a prima facie case of employment discrimination. *Noyes v. Kelly Servs.,* 488 F.3d 1163, 1168 (9th Cir. 2007). If a plaintiff establishes a prima facie case, "[t]he burden of production, but not persuasion, then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the challenged action." *Chuang v. Univ. of Cal. Davis, Bd. of Trs.,* 225 F.3d 1115, 1123–24 (9th Cir. 2000). If a defendant meets this burden, a plaintiff must then raise a triable issue of material fact as to whether the defendant's proffered reasons for the action are mere pretexts for unlawful discrimination. *Noyes,* 488 F.3d at 1168. Plaintiffs must go beyond a prima facie case and introduce "specific, substantial evidence of pretext." *Wallis v. J.R. Simplot Co*., 26 F.3d 885, 890 (9th Cir. 1994).

Kennedy brings Title VII claims for (1) failure to accommodate, (2) failure to rehire (protected characteristic as a motivating factor),[7] (3) disparate treatment and (4) retaliation. On each of his claims, Kennedy fails to make a prima facie case and, even if he could, BSD's actions are justified by its legitimate nondiscriminatory interests in avoiding an Establishment Clause violation and in maintaining the field as a nonpublic forum. BSD consequently could not allow Kennedy's midfield prayer circles without undue hardship. *Berry*, 447 F.3d at 655-56 (allowing an

[7] The District Court correctly combined Kennedy's claims for failure to rehire and protected characteristic as a motivating factor into one analysis. ER 24-26.

Establishment Clause violation and the transformation of a workplace into a public forum were undue hardships and their avoidance was a legitimate nondiscriminatory reason for employer's actions).[8] Kennedy cannot show these interests are a pretext for some other motive, since he admits BSD was motivated solely by its intent to avoid constitutional violations.

**A. Failure to accommodate claim.**

A plaintiff must set forth a prima facie case that (1) he had a bona fide religious belief, the practice of which conflicts with an employment duty; (2) he informed his employer of the belief and conflict; and (3) the employer discharged, threatened, or otherwise subjected him to an adverse employment action because of his inability to fulfill the job requirement. *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 606 (9th Cir. 2004). Once a prima facie case has been made, the burden shifts to the employer to show that it made a good faith attempt to accommodate the employee's religious practices or that it could not reasonably accommodate the employee without undue hardship. *Berry*, 447 F.3d at 655. An undue hardship exists if an accommodation requires a government employer to allow a practice that violates the Establishment Clause. *Id.* (citing *Knight v. Conn. Dept. of Public Health*, 275 F.3d 156, 168 (2d Cir. 2001) ("Permitting appellants to evangelize while

[8] Kennedy questions whether a de minimis burden can constitute an undue hardship (Appellant Br. 62 n.6), but that question does not arise here because allowing constitutional violations goes far beyond a de minimis level.

providing services to clients would jeopardize the state's ability to provide services in a religion-neutral matter.")).

Kennedy's claim fails because he never informed BSD that his sincerely-held beliefs required the details that he now claims were essential. The only statement of his beliefs that he ever made was his letter of October 14, which simply stated a general desire to pray with students after football games. ER 258. The letter nowhere requires that Kennedy pray immediately after games, or pray on the field, much less at its center. BSD proposed accommodations that reasonably responded to Kennedy's limited statement of sincerely-held beliefs by offering to provide alternative locations for post-game prayer immediately after the game, by offering to allow him to pray on the field after the students left, and by soliciting further suggestions from Kennedy. Although he now agrees that returning to the field after students had departed might have been an acceptable accommodation, Kennedy never responded to invitations to explore possible solutions. Since he never communicated his essential beliefs, he cannot make a prima facie showing.

### B. Disparate treatment claim.

Establishing a prima facie case of disparate treatment requires a plaintiff to show "(1) he is a member of a protected class; (2) he was qualified for his position; (3) he experienced an adverse employment action; and (4) similarly situated individuals outside his protected class were treated more favorably." *Berry*, 447 F.3d at 656.

Kennedy cannot establish there are similarly situated employees. Nobody else has used the closing ceremonies as a platform for demonstrative speech and certainly not for demonstrative prayers. Tying one's shoes or making a phone call do not constitute speech on matters of public concern that would convert the closing ceremonies into an open public forum. The closest parallel Kennedy can offer is that Assistant Coach Boynton stood and silently chanted to himself after a game. However, Kennedy admits he never would have been able to tell that Boynton was chanting to himself unless Boynton had told him so, and BSD never knew of Boynton's inner chanting until Kennedy raised it in his EEOC complaint. ER 517-18. Boynton's unobservable practice bears no similarity to Kennedy's highly public and demonstrative actions.

### C. Protected characteristic claim.

An employer violates Title VII if a protected characteristic is a "motivating factor" in the employment action; it need not be the only factor. 42 § 2000e–2(m). More specifically, "an unlawful employment practice" encompasses any situation in which a protected characteristic was "a motivating factor" in an employment action, even if there were other motives. *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 848 (9th Cir. 2002), *aff'd,* 539 U.S. 90 (2003). A plaintiff must establish a violation through a preponderance of evidence that a protected characteristic played "a motivating factor." *Costa*, 299 F.3d 838, 853–54. Even under the *McDonnell Douglas* burden shifting analysis, the ultimate burden of persuasion always remains on the plaintiff to prove the employer's actions were motivated by a protected characteristic of the plaintiff. *Costa*, 299 F.3d at 855.

That a controversy *involves* religious behavior does not automatically make religion a "motivating factor." School districts are required to regulate religious activity around students and are required to regulate the use of their property as a public forum. The evidence is uncontroverted that BSD did not care about what religion Kennedy was, how religious he was, or that he wanted to pray at work—it only cared about the time and place he chose. Kennedy admits BSD was motivated

solely by its intent to avoid constitutional violations, which is not a discriminatory motive. Appellant Br. 15.

**D. Retaliation claim.**

A prima facie case of retaliation requires an employee to show (1) he engaged in a protected activity; (2) his employer subjected him to an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action. *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000). A causal link can be inferred from close proximity of the protected activity and the adverse action. *Thomas v. City of Beaverton*, 379 F.3d 802, 812 (9th Cir. 2004). If the protected activity consists of opposing the employer's allegedly discriminatory policies, the manner in which the employee expresses opposition must be reasonable, as determined by balancing the need to protect individuals asserting their rights against an employer's legitimate interests in loyalty, cooperation and a productive work environment. *Rollins v. Fla. Dept. of Law Enforcement,* 868 F.2d 397, 401 (11th Cir. 1989). Once a plaintiff asserts a prima facie claim, the burden shifts to the defendant to articulate a legitimate nondiscriminatory reason for its decision. *Ray*, 217 F.3d at 1240. If the defendant articulates a reason, the plaintiff bears the ultimate burden of demonstrating the reason was merely a pretext for a discriminatory motive. *Id.*

Kennedy was entitled to ask for an accommodation, but his disregard of BSD's instructions was not reasonable. Disrupting the post-game ceremonies, inviting politicians to pray on the field with him, using public property in direct contravention of BSD rules, and distracting attention from the student participants, all in the glare of his self-generated publicity, stands apart from reasonable opposition. Even if Kennedy's actions were found to be protected opposition activity, BSD's interests in avoiding an Establishment Clause violation and maintaining the post-game field as a nonpublic forum were legitimate nondiscriminatory reasons for its actions. Kennedy cannot show BSD's interests are mere pretexts for a discriminatory motive.

## CONCLUSION

This Court should affirm the District Court's decision.

## 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 13,966 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Date: September 21, 2020

*/s/ Michael B. Tierney*

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## CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2020, I electronically filed the forgoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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Date: September 21, 2020

*/s/ Michael B. Tierney*

Michael B. Tierney
*Attorney for Appellee*
*Bremerton School District*

# ADDENDUM

Pursuant to Circuit Rule 28-2.7, this addendum includes pertinent constitutional and statutory provisions, reproduced verbatim:

**U.S. Const. Amend. I.**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**Wash. Const. art. I, § 11. Religious Freedom.**

Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment: PROVIDED, HOWEVER, That this article shall not be so construed as to forbid the employment by the state of a chaplain for such of the state custodial, correctional, and mental institutions, or by a county's or public hospital district's hospital, health care facility, or hospice, as in the discretion of the legislature may seem justified. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.

**Wash. Const. art. IX, § 4. Sectarian Control Or Influence Prohibited.**

All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence.

**42 U.S.C. § 2000e-2(a). Employer practices**

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

**42 U.S.C. § 2000e-2(m). Impermissible consideration of race, color, religion, sex, or national origin in employment practices**

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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