No. 20-35222

In the United States Court of Appeals for the Ninth Circuit

JOSEPH A. KENNEDY,

Plaintiff-Appellant,

v.

BREMERTON SCHOOL DISTRICT,

Defendant-Appellee.

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

APPELLANT JOSEPH A. KENNEDY'S OPENING BRIEF

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INTRODUCTION

When Assistant Bremerton High School (BHS) Football Coach Joseph Kennedy briefly knelt to say a brief, silent, personal prayer of gratitude after a football game was over, he was exercising his rights to free speech and free exercise of religion enshrined in the Constitution. When Bremerton School District punished Coach Kennedy for his personal religious expression, the District violated those constitutional rights as well as Coach Kennedy's rights under Title VII. The Supreme Court has emphasized that students and teachers alike do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). This is not a case about provocative practices, such as a school employee injecting religious views into classroom instruction or involving students in religious exercise. This case instead concerns the rights of public school employees to practice their religion by engaging in brief, personal expression, such as prayer, at a time when it would be permissible to engage in other brief, personal activity.

Two undisputed facts drive the resolution of this case. Fact number one: the practice at issue involved Coach Kennedy kneeling for

approximately 15 seconds after the conclusion of a football game and offering a personal, silent prayer as the players were singing the school fight song in the distance, other coaches were milling about, and the crowd was dispersing. Fact number two: the sole reason for the District's adverse action against Coach Kennedy was its view that allowing him to engage in this practice would violate the Establishment Clause. These undisputed facts, in turn, present two core questions of law relating to Coach Kennedy's claims. Does a football coach speak as a private citizen when the coach says a brief, silent, personal prayer after the school event ends? And does the Establishment Clause prevent a football coach from engaging in that brief, personal religious expression? The answer to the first question is "yes," but the answer to the second is "no."

Discovery has shown that Coach Kennedy's "fleeting" (the District's words, not Coach Kennedy's) personal prayer was directed to God, not others, and did not pose a risk of coercing student involvement in religion. In concluding otherwise, the district court improperly and substantially burdened the ability of public school employees to exercise their constitutional rights simply because they happen to be in view of

students or on school property. In this very case, four justices on the Supreme Court cautioned against such a "remarkable" restriction on the rights of "public school teachers and coaches." *Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 636, 637 (2019) (*Kennedy II*) (Alito, J., concurring in denial of certiorari).

Because the District's actions violated the Constitution as well as Title VII, this Court should reverse the judgment of the district court and grant summary judgment for Coach Kennedy.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331. This appeal is from a final order disposing of all claims, and this Court has jurisdiction under 28 U.S.C. § 1291. Coach Kennedy's notice of appeal filed March 11, 2020, from the district court's judgment dated March 6, 2020, was timely under Federal Rule of Appellate Procedure 4(a).

ISSUES PRESENTED

1. Whether the district court erred in determining that the District's actions against Coach Kennedy did not violate the Free Speech Clause of the First Amendment where Coach Kennedy engaged in brief, silent, personal prayers on the football field after games; he did

not direct the prayers to students or others; no student players joined his prayers; yet the District took disciplinary action solely on the incorrect belief that these brief, silent, personal prayers violated the Establishment Clause.

2. Whether the district court erred in granting summary judgment to the District on Coach Kennedy's Free Exercise claim where the District's disciplinary action was not neutral because others who engaged in similar conduct were not disciplined; the District had no compelling interest in preventing Coach Kennedy from praying because his prayers did not violate the Establishment Clause; and the District's proposed solution was not narrowly tailored.

3. Whether the district court erred in granting summary judgment to the District on Coach Kennedy's Title VII claims where Coach Kennedy informed the District of a conflict between its directive and his sincerely held religious beliefs; the District failed to make good-faith attempts to accommodate his beliefs; accommodating Coach Kennedy would not have imposed an undue hardship on the District; the District failed to rehire Coach Kennedy because of his religious beliefs; the District treated Coach Kennedy differently from similarly

situated individuals and the District had no legitimate, non-discriminatory reason for doing so; and the District engaged in adverse action against Coach Kennedy for opposing its unlawful restrictions on speech and religion.

STATEMENT OF THE CASE

Coach Kennedy was an assistant football coach for Bremerton High School (BHS) between 2008 and 2015. ER.111–12. Fellow coaches described Coach Kennedy as "kid-centered, eager as a coach ... well liked by parents," "honest," "reliable," and "diligent." ER.128–29; ER.147; ER.153.

Coach Kennedy is a practicing Christian whose religious beliefs require him to give thanks through prayer at the conclusion of each football game "for what the players had accomplished and for the opportunity to be part of their lives through the game of football." ER.112–13. Because Coach Kennedy's prayers are dedicated to the players' sportsmanship during the game, his beliefs compel him to pray on the field of competition where the game was played. ER.113. The sincerity of these beliefs is undisputed. Coach Kennedy considers these prayers "personal" as they are a "conversation to God." ER.209–10.

A. Coach Kennedy's Religious Expression Prior To September 2015

Ever since he became a football coach, Coach Kennedy would pause and kneel on the field after the games concluded. ER.113. While he was on a knee, Coach Kennedy would offer a brief, personal prayer lasting between 10 and 30 seconds. ER.113; ER.212; ER.220.

Coach Kennedy started out praying alone. ER.113; ER.199. As time went on, some players noticed and occasionally joined him in kneeling at the fifty-yard line. ER.113; ER.199. Coach Kennedy did "not invite them to … join," ER.200, and he "didn't really pay attention to … who comes out and who doesn't," ER.204. He neither "encourage[d] nor discourage[d] the kids" and did not "tell them no, you can't come out here." ER.213; ER.209–10. For Coach Kennedy, it would have been "preferable" if his "prayer was just all by [himself] with nobody around [him]." ER.211.

Over time and if students joined him, Coach Kennedy would combine his prayer with "short motivational speeches to the players after the game," which involved religious references. ER.114. But his "sincerely held religious beliefs [did] not require [him] to lead any prayer, involving students or otherwise, before or after football games."

Id. For that reason, he "never coerced, required, or asked any student to pray" with him, or "told any student that it was important that they participate in any religious activity." *Id.* "Sometimes there were no players who gathered," and Coach Kennedy "prayed alone." ER.113.

B. The District's September 2015 Investigation

Coach Kennedy's prayers went apparently unnoticed by school officials until the 2015 football season. ER.131–32; ER.172–73; ER.228; ER.233–34. Prior to the September 11 game at Klahowya, Coach Kennedy learned from other assistant coaches that Athletic Director Jeff Barton had decided Coach Kennedy should not be permitted to have a post-game prayer with students. ER.201–203; ER.33–34.

Coach Kennedy remained compelled by his beliefs to offer a prayer of thanksgiving after the game, however, as he had after every other game during his tenure. When he finished, one of his colleagues mouthed the words: "They're going to fire you." ER.203. On the bus ride back to Bremerton that night, Coach Kennedy posted to Facebook, expressing his concern that he "might have been fired for praying." *Id.*

The publicity over Coach Kennedy's Facebook post led the District to conduct a fact-finding investigation "into whether District staff have

appropriately complied with Board Policy 2340, 'Religious-Related Activities and Practices.'" ER.107. In a September 17, 2015 letter, Superintendent Adam Leavell found that student participation in Coach Kennedy's prayers had been "voluntary," and that Coach Kennedy "ha[d] not actively encouraged, or required, participation." *Id*. Leavell informed Coach Kennedy that because District policy prohibited coaches from praying with students, Coach Kennedy was to keep his prayers "physically separate from any student activity" in the future and to ensure that his prayers were "non-demonstrative (i.e., not outwardly discernible as religious activity) if students are also engaged in religious conduct." ER.109. According to the District, the purpose of this restriction was "to avoid the perception of endorsement" of religion. ER.107–08.

C. Coach Kennedy's Religious Expression After The September 17 Directive

In compliance with the District's September 17 directive, Coach Kennedy never again prayed with BHS students. After the September 18 game against Olympic and given the pressure he felt from the prior week's investigation, Coach Kennedy did not pray at all. ER.115; ER.246. But as he drove away from the stadium, Coach Kennedy felt

"dirty" because he had broken his commitment to God to express gratitude on the field of play after the game. ER.112–13, 115. He turned his car around, drove back to the field, and knelt in silent prayer. ER.115.

For the next six games, Coach Kennedy resumed his historic practice of kneeling alone at the game's end to say a silent, personal prayer, lasting "maybe 10 seconds." ER.215–20; ER.184–85; ER.115–16. Those games included the home and away varsity and junior varsity games played on September 21, 25, 28, and October 2, 5, and 7. ER.413[1]; ER.247–50; ER.217–19. Each time he prayed, Coach Kennedy made every effort to ensure he did so at a time when Bremerton students were otherwise occupied. ER.103; ER.189; ER.216–19.

Coach Kennedy also sent a letter to the District reaffirming his right to continue "private, post-game prayer at the 50-yard line," and formally requesting a religious accommodation under Title VII of the Civil Rights Act of 1964. ER.258; ER.263. The District understood

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[1] The Court can take judicial notice of the 2015–2016 BHS Varsity football schedule, attached at ER.413, which is publicly available and "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b), (b)(2); *see Kater v. Churchill Downs Inc.*, 886 F.3d 784, 788 n.3 (9th Cir. 2018).

Coach Kennedy's letter as a request to continue a "short, private, personal, prayer at midfield," and responded that he was "free to engage in religious activity, including prayer, even while on duty, so long as doing so does not interfere with performance of his job duties, and does not constitute District endorsement of religion." ER.255; ER.179. Coach Kennedy's formal request for an accommodation and the District's response generated media coverage ahead of the next home football game against Centralia on October 16. ER.379.

After the Centralia game had ended, Coach Kennedy again knelt in a brief, silent prayer. ER.116. As he prayed, Coach Kennedy sensed that a group of coaches and players had surrounded him. When Coach Kennedy opened his eyes, he realized some Centralia coaches and players—but no Bremerton players—as well as some members of the public and media had come down to the field with him, ER.116; ER.214–15, even though he had not asked anyone to do so, ER.214–15.

A few hours before the next football game, on October 23, the District sent Coach Kennedy a letter in which the District acknowledged that he had "attempted to comply with the District's guidelines," and that his prayer was "fleeting." ER.98–99. As

Superintendent Leavell had repeatedly explained to the School Board and the state superintendent of public instruction that week, Coach Kennedy's ongoing practice of "taking a silent prayer at the 50 yard line" was a different issue from "leading prayer with kids," ER.39, and the issue was really about "a coaches right to conduct a personal, private prayer … on the 50 yard line," ER.267.

The District nevertheless denied Coach Kennedy's request for an accommodation that would allow him to kneel to say a brief, silent, personal prayer on the field after the game concluded and while the players were headed to the stands to sing the fight song and the crowd began to leave. ER.97–100. Leavell explained that, in the District's view, engaging in such conduct "would [be] perceive[d] as government endorsement of religion." ER.98. The District proposed that Coach Kennedy instead pray in a "private location within the school building, athletic facility, or press box." ER.100.

The District also claimed Coach Kennedy's prayers had "dr[awn] [him] away from [his] work" because "until recently, [Coach Kennedy] regularly came to the locker room with the team and other coaches following the game." ER.99. However, and as discussed later in this

section, the District later clarified that its justification for disciplining Coach Kennedy was "solely" to avoid an Establishment Clause violation and rightfully abandoned any claim that Coach Kennedy failed to supervise student athletes, which discovery showed to be false. ER.193; ER.222 (Coach Kennedy "went [to the locker room] and stayed till the last kid left at every single one of the games."); ER.93–94; ER.18 (district court recognizing that "the District's justification for disciplining Kennedy" was "avoiding an Establishment Clause violation").

That evening, at the varsity home game against North Mason, Coach Kennedy knelt on the field following the post-game handshake to say a brief, silent, personal prayer (Coach Kennedy is indicated with the red arrow):

ER.270; ER.271. No one approached Coach Kennedy while he prayed, and the prayer lasted 15 seconds. *See* ER.186–87; ER.138; ER.271. After this game, Superintendent Leavell told the School Board that Coach Kennedy's actions "moved closer to what we want, but are still unconstitutional." EOR.44.

At the junior varsity game three days later, Coach Kennedy again knelt to say a brief, personal, silent prayer:

ER.273; ER.274. A few people came down from the stands, approached Coach Kennedy as he wrapped up his prayer, then stayed and spoke with Coach Kennedy. ER.274. As the BHS principal testified, no students joined either of the prayers on October 23 or 26, nor was there any "spectacle." ER.138.

D. The District Suspends Coach Kennedy Solely Because Of Its Establishment Clause Concerns

Two days later, the District placed Coach Kennedy on administrative leave and barred him from coaching the team. ER.275. The District asserted that Coach Kennedy had violated its "directives

by engaging in overt, public and demonstrative religious conduct while still on duty as an assistant coach." ER.275; ER.190–92. The District publicly acknowledged Coach Kennedy's efforts "not to intentionally involve students in his on-duty religious activities," ER.102–03, and explained that the objectionable conduct was that Coach Kennedy "kneeled on the field and prayed immediately following the game[s]" on October 23 and October 26 "while still on duty," ER.277.

The District was unequivocal as to the basis for its actions: the District believed these prayers "pose[d] a genuine risk that the District will be liable for violating the federal and state constitutional rights of students or others." ER.102. The District likewise told the Equal Employment Opportunity Commission ("EEOC") that "the District's course of action in this matter has been driven *solely* by concern that [Coach Kennedy's] [prayers] might violate the constitutional rights of students and other community members, thereby subjecting the District to significant potential liability." ER.188; ER.342 (emphasis added). School officials were emphatic that Coach Kennedy could not return to coaching "unless and until he agreed to comply with the District's

directive" not to engage in any "overt" religious activity while on duty as a football coach. ER.242; ER.170; ER.190–92.

E. Procedural History

Coach Kennedy filed a complaint seeking to vindicate his constitutional rights under the Free Exercise and Free Speech clauses of the First Amendment, as well as his statutory rights under Title VII of the Civil Rights Act of 1964. ER.394. Based on a limited record, the district court denied Coach Kennedy's motion for a preliminary injunction, which relied only on his Free Speech claims, and this Court affirmed. *See Kennedy v. Bremerton Sch. Dist.*, 869 F.3d 813 (9th Cir. 2017) (*Kennedy I*). Concurring in the Supreme Court's subsequent denial of certiorari, four justices questioned the potential breadth of this Court's opinion, but ultimately concluded that it would be premature to grant certiorari "until the factual question of the likely reason for the school district's conduct is resolved." *Kennedy II*, 139 S. Ct. at 636 (Alito, J., concurring).

Following extensive discovery, Coach Kennedy and the District filed cross-motions for summary judgment. The district court ruled in favor of the District, holding that because Coach Kennedy's prayers

took place at "an expressive focal point"—the "50-yard line of a football field"—such "prominent, habitual prayer is not the kind of private speech beyond school control." ER.15; ER.17. The court further found that the District's justification for restricting Coach Kennedy's Free Speech and Free Exercise rights—avoiding an Establishment Clause violation—was valid because of the "perception of school endorsement" and the "threat posed by Kennedy's prayer … to subtly coerce the behavior of students attending games voluntarily or by requirement." ER.22. Relying on similar reasoning, the District Court ruled that there were no Title VII violations. ER.25.

SUMMARY OF THE ARGUMENT

I. The District violated Coach Kennedy's Free Speech rights by disciplining him for quintessentially private conduct: kneeling for roughly 15 seconds to offer a personal, silent prayer of thanksgiving. The only two issues on appeal with regard to Coach Kennedy's Free Speech claim are whether Coach Kennedy prayed in his capacity as a private citizen and whether allowing his prayers would cause the District to violate the Establishment Clause. Coach Kennedy's brief, silent, personal prayers were not "ordinarily within the scope of" his

"duties" and so were offered in his personal capacity only. *Lane v. Franks*, 573 U.S. 228, 240 (2014). Football coaches and teachers do not lose their First Amendment rights simply because they generally engage in expression as part of their job. In concluding otherwise, the district court erred and did so in a way that effectively precludes observable religious expression by public school teachers and coaches while at school.

The District's erroneous belief that it would violate the Establishment Clause to allow Coach Kennedy to say his prayer is not an adequate justification for its action against him. Those brief, personal prayers were neither coercive, nor did they bear the imprimatur of school endorsement. Indeed, Coach Kennedy knelt and prayed by himself at a time when the District allowed other coaches to engage in brief personal conduct during the hustle and bustle that follows the conclusion of a football game. Given these facts, Coach Kennedy was entitled to summary judgment on his Free Speech claim.

II. When the District disciplined Coach Kennedy because of his personal prayers, it also impermissibly interfered with his Free Exercise right to practice his religion. Any government restriction that

singles out religious conduct, as the District's directive did, must be narrowly tailored to a compelling government interest and must meet the strictest of scrutiny. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). The District's action fails this test because it was neither supported by a compelling interest nor narrowly tailored. The only interest the District relied on was its erroneous belief regarding the Establishment Clause. Because there was no Establishment Clause violation—Coach Kennedy's prayers were purely personal and posed no threat or appearance of student coercion—that justification cannot stand. But even if a valid interest of the District's were at stake, the District's response to Coach Kennedy's conduct still fails strict scrutiny because it was not narrowly tailored to achieve that interest.

III. Similarly, the District violated Coach Kennedy's Title VII rights by treating him differently from other employees because of his religious beliefs, with no valid justification. Nor did the District try in good faith to accommodate Coach Kennedy's beliefs: the only purported accommodation offered by the District would have required Coach Kennedy to *abandon* his sincerely held beliefs.

Because the District's actions violate the Constitution as well as Title VII, the Court should reverse the ruling below and grant summary judgment for Coach Kennedy.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment de novo under the familiar standard of Federal Rule of Civil Procedure 56. *Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1056 (9th Cir. 2013).

ARGUMENT

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

Every Free Speech claim by a public-school employee must be resolved against the backdrop of the Supreme Court's admonition in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), that these these employees do not shed their First Amendment rights "at the schoolhouse gate." *Id.* at 506. To the contrary, the Supreme Court has "unequivocally rejected" the idea that public school employees "may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens." *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cty., Ill.*, 391 U.S. 563, 568 (1968).

When a public employee speaks as a citizen on a matter of public concern, that employee enjoys the same Free Speech protections as every other citizen unless the government has "an adequate justification for treating the employee differently." *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006); *see also Lane*, 573 U.S. at 237, 242. This Court uses a five-part test to evaluate government employees' Free Speech claims:

> (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.

Eng v. Cooley, 552 F.3d 1062, 1070 (9th Cir. 2009). In this case, there is no dispute as to the answers to the first, third, and fifth *Eng* factors (yes, yes, and no, respectively). *See* ER.12–24. The only issues are whether Coach Kennedy spoke as a private citizen when he offered his brief, silent, personal prayers—which he did—and whether the District

had an adequate justification for treating him differently from other members of the general public—which it did not.

A. Coach Kennedy Spoke As A Private Citizen

Coach Kennedy spoke as a private citizen when he offered his brief, personal post-game prayers. The "critical question" in determining whether a public employee spoke as a citizen is whether the "speech at issue is itself ordinarily within the scope of an employee's duties." *Lane*, 573 U.S. at 240. If so, then the employer may regulate the employee's speech; otherwise, "the First Amendment provides protection against discipline." *Garcetti*, 547 U.S. at 421. Here, a brief, silent, personal expression of religious devotion at a time when others were engaging in other brief, personal conduct was not within the scope of Coach Kennedy's duties.

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

The expression at issue in this case is the product of Coach Kennedy's sincerely held religious beliefs, which require him to kneel on the field shortly after games to offer a personal prayer of thanks to God. These prayers had three relevant components. First and foremost, the prayers at issue in this case were personal: Coach Kennedy prayed to

God by himself and expressed his gratitude for the opportunity he had to work with the young men of the BHS football program. ER.112–13; ER.209–10. These prayers were "just between [him] and God" and did not involve other people—Coach Kennedy actually preferred if his "prayer was just all by [himself] with nobody around [him]." ER.211–12.

This case has never been about prayers with students. Although members of the football team would occasionally kneel with Coach Kennedy *prior* to the 2015 football season at issue, it is undisputed that Coach Kennedy did not pray with any Bremerton students *after* receiving the District's September 17 directive that he could not "include religious expression, including prayer" in his "talks with students," "endorse[]" student religious activity, or "suggest[], encourage[] (or discourage[]), or supervise[]" student prayers. ER.109. But that same letter stated that Coach Kennedy was not prohibited from "engag[ing] in religious activity, including prayer, so long as it does not interfere with job responsibilities." *Id.*

The District repeatedly reaffirmed that Coach Kennedy adhered to the direction not to involve students in his prayers:

- Superintendent Leavell wrote to Coach Kennedy: "I wish to emphasize my appreciation for your efforts to comply with the September 17 directives." ER.98.

- In its October 28 letter informing the public of Coach Kennedy's placement on administrative leave, the District wrote that "[t]o the District's knowledge, Mr. Kennedy has complied with those directives not to intentionally involve students in his on-duty religious activities." ER.103.

- Superintendent Leavell testified: "I believe that Mr. Kennedy was at times attempting to abide by the directives of the District in the sense that he was not leading student-led prayer as he previously was." ER.185.

- Superintendent Leavell informed the state superintendent of public instruction that the "issue … has shifted from leading prayer with student athletes, to a coaches right to conduct a personal, private prayer … on the 50 yard line." ER.267.

Second, the prayers were brief. Coach Kennedy's October 14 letter noted that "each post-game prayer lasts approximately 15 to 20 seconds." ER.212; *see also* ER.259. The District's correspondence to Coach Kennedy likewise confirmed that the prayers were "brief," ER.277, and "fleeting," ER.99. And both Superintendent Leavell and BHS Principal John Polm testified that Coach Kennedy's prayers lasted approximately 15 seconds. ER.186; ER.189; ER.142. The video clips of the October 23 and October 26 games further confirm that the prayers were extremely short. ER.271; ER.274.

Third, these prayers took place on the football field after the game had concluded, as players were singing the fight song, and the crowd was already dispersing. ER.189; ER.363. Drawing on his battlefield service as a U.S. Marine and his faith-promoting experiences, Coach Kennedy's beliefs compel him to offer his prayer of thanks for the opportunity he has to coach these athletes on the football field itself. ER.112–13. At the conclusion of football games, the players and coaches line up and shake hands with the opposing team, while spectators are heading home or are otherwise occupied with greeting friends and family. ER.113. The BHS players then head to the sideline to sing the school fight song with some of the other students. ER.116; ER.187. Because Coach Kennedy is usually around midfield as the handshake line wraps up, that is where he pauses briefly to kneel—it has nothing to do with drawing attention to himself. The field is usually a site of commotion at that time, with "[p]arents, fans, and members of the community frequently walk[ing] onto the field to congratulate players and socialize." ER.114.

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

These brief, silent, personal prayers after the school event was over fell outside Coach Kennedy's duties as a coach and are thus protected by the First Amendment. Determining the scope of an employee's duties is a "practical matter," *Garcetti*, 547 U.S. at 424–25, focusing on what the employee was "actually told to do" by his superiors, *Dahlia v. Rodriguez*, 735 F.3d 1060, 1075 (9th Cir. 2013) (en banc). In *Garcetti*, the Supreme Court "reject[ed]" the "suggestion that employers can restrict employees' rights by creating excessively broad job descriptions." 547 U.S. at 424. Courts must therefore avoid "a broad court-created job description applicable to every member of a profession," *Dahlia*, 735 F.3d at 1070, and must instead look beyond the "written job description" to the practical realities of the employee's duties, *Garcetti*, 547 U.S. at 424–25.

A BHS football coach's duties do not encompass brief, personal expression like Coach Kennedy's. Although Coach Kennedy's coaching duties certainly encompassed a variety of expressive activities, the relevant expressive activities were directed at students, parents, District staff, or game officials. For example, under the District's Coach

and Volunteer Coach Agreement, Coach Kennedy agreed to (among other things) "treat *all athletes* with respect," "communicate effectively" with *parents*, "always approach *officials* with composure," and "apply rules consistently to *all athletes*." ER.347 (emphases added).

The "practical" reality of day-to-day coaching, *Garcetti*, 547 U.S. at 424, confirms that brief, personal activities were not considered part of a coach's duties. For example, BHS Assistant Head Football Coach David Boynton testified that it was "common" for him to "see the other assistant coaches … talk to their family and friends" while players sang the fight song after games. ER.154, ER.156. Coach Kennedy's post-game prayers thus involved taking a few moments for brief, personal expression at a time when other brief, personal activities were permissible. Indeed, the District did not dispute that instances of brief, personal conduct immediately following a game were not considered problematic. Superintendent Leavell agreed that it would be acceptable for "an assistant football coach [to be] looking at his phone for 10 seconds immediately following a football game." ER.180–81. Superintendent Leavell also agreed that if "an assistant coach went to go greet a spouse in the stands immediately following a game for 30

seconds to a minute, the District would not take disciplinary action." ER.181.

Coach Kennedy's prayers had other markers of expression that is not within the scope of a coach's responsibilities. For example, Coach Kennedy was not communicating with anyone within the scope of his responsibilities, such as students or other staff. "When a public employee communicates with individuals or entities outside of his chain of command, it is unlikely that he is speaking pursuant to his duties." *Dahlia*, 735 F.3d at 1074; *see also Alaska v. EEOC*, 564 F.3d 1062, 1070 (9th Cir. 2009) (en banc) (employee's press conference was citizen speech because her "official duties didn't require her … to bring … alleged sexual harassment to the public's attention"); *Anthoine v. N. Cent. Ctys. Consortium*, 605 F.3d 740, 750 (9th Cir. 2010) (similar).

Coach Kennedy's prayers were also in "direct contravention" of the District's wishes, another indicator of personal, rather than professional, conduct. *Dahlia*, 735 F.3d at 1075; *see also Ritchie v. Dep't of Pub. Safety*, 761 F. App'x 668, 669 (9th Cir. 2019) ("a supervisor's response to an employee's speech indicates whether that speech was as part of the employee's job duties"); *Heath v. City of Desert Hot Springs*,

618 F. App'x 882, 885 (9th Cir. 2015) (similar). Although the District initially seemed to agree that Coach Kennedy had complied with its September 17 directive, the District's October 23 letter made clear that it considered even his personal, silent prayers to violate District policy because he was still in view of "students or the public." ER.100.[2] The District made that position clear to the public as well. ER.103.

Coach Kennedy's brief, personal prayers were thus private expression, not official communication. They were similar to personal prayers offered "by numerous citizens every day." *Garcetti*, 547 U.S. at 422. They were offered while Coach Kennedy was apart from students, and they were inaudible to students, staff, and spectators. They were directed to God, not others.

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[2] At the preliminary injunction stage, this Court recognized that Coach Kennedy "spoke in contravention of his supervisor's orders" but noted, "that lone consideration is not enough to transform employee speech into citizen speech." *Kennedy I*, 869 F.3d at 828. While not dispositive, it is nonetheless an important indicator of distance between an employee's conduct and his job duties.

3. The District Court Erred In Concluding That Coaches And Teachers Cannot Engage In Personal Religious Expression In View Of Students On School Grounds

In concluding that Coach Kennedy's brief, personal prayers were nevertheless within the scope of his coaching duties and thus within the power of the District to restrict, the district court cited Coach Kennedy's responsibilities as a role model, the presence of students in the vicinity, and the location of his prayers on the football field. ER.15–18. None of those facts—individually or together—transforms Coach Kennedy's brief, personal prayers into speech as a public employee. To hold otherwise would endanger all sorts of private religious expression by public school teachers, who are almost always in view of students and on school grounds.

The district court also felt constrained by this Court's prior opinion on the limited factual record before it. ER.14–18. But "decisions at the preliminary injunction phase do not constitute the law of the case." *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 499 F.3d 1108, 1114 (9th Cir. 2007). That is because preliminary injunctions are usually decided on a very limited record, and new facts often emerge during discovery

that require revisiting the court's earlier assumptions. *See id.* ("The district court must apply this law to the facts anew with consideration of the evidence presented in the merits phase."). Here, the extensive discovery that has taken place following the preliminary injunction proceedings places this Court in a better position than before to engage in the "practical, fact-intensive inquiry into the nature and scope of a plaintiff's job responsibilities" that the second *Eng* factor calls for. *Kennedy I*, 869 F.3d at 830 n.11.

1. For starters, the fact that Coach Kennedy's job responsibilities included being a "mentor and role model for the student athletes" and "exhibit[ing] sportsmanlike conduct at all times," ER.15, does not and cannot mean that any expression by a football coach in view of students is an official act, no matter how brief or personal. Indeed, District officials confirmed that coaches may engage in all sorts of brief, personal conduct following football games. ER.180–81; ER.154–56. Nor should it matter that students were in the vicinity when Coach Kennedy said his personal prayer. *Garcetti* does not stand for the proposition that government employees are "on duty at all times from the moment they report for work to the moment they depart,

provided that they are within the eyesight of students." *Kennedy II*, 139 S. Ct. at 636 (Alito, J., concurring). To hold otherwise would require schools to forbid teachers from bowing their heads in prayer before eating or "reading things that might be spotted by students or saying things that might be overheard." *Id.* There is no basis for such an extreme curtailment of speech (to say nothing of the conflict with the Free Exercise clause).

2. Although the district court stated that some conduct is "so obviously personal" that it may be delivered in a coach's capacity as a private citizen, the court believed that Coach Kennedy's expression differed from other forms of personal religious expression—such as wearing a cross—because Coach Kennedy's prayers occurred at an "expressive focal point from which school-sanctioned communications regularly emanate." ER.16–17. The district court went further, analogizing Coach Kennedy to a "director tak[ing] center stage after a performance." ER.16–17. That is incorrect. There is all the difference in the world between a director basking in applause at center stage and one coach among many scattered around the field, interspersed with "[p]arents, fans, and members of the community" who "frequently walk

onto the field to congratulate players and socialize after" the typical Bremerton game. ER.114.

The record confirms common experience that after the football game concludes, the attention of the players, coaches, and spectators dissolves as everyone goes their own which way. The October 23 game clip shows players trotting off the field as Coach Kennedy briefly kneels, alone, on the grass. Children run back and forth, tossing footballs, and the clamor of cheers draws attention *away* from the center of the field. ER.271. There is no "spectacle," as BHS Principal John Polm acknowledged. ER.140. Similarly, in the October 26 video, Coach Kennedy separates from those around him, drops to a knee, and prays briefly. The BHS players are not even visible. Not long after the prayer concludes, the BHS players perform their cheer—off-camera—then coalesce near Coach Kennedy and some other adults for a standard, post-game pep talk. ER.274. The contrast between Coach Kennedy's prayer and that later group huddle of players and staff shows that Coach Kennedy's prayers were a momentary *departure* from the expression required by his job, not a continuation of it.

For similar reasons, this Court's prior assumption at the preliminary injunction stage that Coach Kennedy intended to communicate with students and others through his prayers was incorrect. *Kennedy I*, 869 F.3d at 826. Discovery has shown that Coach Kennedy actually preferred to pray with "nobody around" him. ER.207–08; ER.211. And while this Court previously emphasized that Coach Kennedy "gave motivational speeches to students and spectators after the games" as reason for believing that he "use[d] his words and expressions to instill[] values in the team," *Kennedy I*, 869 F.3d at 826, discovery showed that Coach Kennedy stopped including religious references in his speeches to students as soon as the District asked, ER.98.

Coach Kennedy's brief, private expression thus bears no resemblance to the conduct at issue in *Johnson v. Poway Unified School District*, 658 F.3d 954 (9th Cir. 2011), the case the district court and this Court in its earlier opinion relied on. That case involved a math teacher who undisputedly directed his expression at students; the plaintiff testified that he was "trying to highlight the religious heritage and nature of our nation" by hanging banners in his classroom

conveying religious messages. *Id.* at 960. By contrast, Coach Kennedy directed his prayers only to God, after football games concluded, and while players were performing the fight song on a different part of the field or socializing with others. Coach Kennedy's "commitment to God"—and that alone—required him "to give thanks through prayer on the playing field at the conclusion of each game." ER.115. The presence of others around him while he prays is irrelevant and does not transform the nature of his religious expression from private to public. ER.204. Coach Kennedy's personal prayer was just one of many activities taking place as the players and spectators dispersed—it was not a focal point or a main event, nor is there such a thing once the football game has ended.

3. The district court also emphasized that Coach Kennedy's access to the field meant that his speech "'owe[d] its existence' to his coaching position." ER.17–18. This Court similarly noted that "an ordinary citizen could not have prayed on the fifty-yard line immediately after games." *Kennedy I*, 869 F.3d at 827. That approach is doubly wrong. First, as anyone who has attended a high-school football game knows, spectators typically stream onto the field to greet

players and friends after the game. Bremerton School District games were no exception. In the October 23 and October 26 videos of the prayers that precipitated Coach Kennedy's suspension, adults and children not wearing BHS uniforms are visible on the field before, during, and after Coach Kennedy's brief prayers. ER.271; ER.274. Though the District may have said "there was no public access to the field," ER.7, this rule was barely enforced, ER.139. Focusing on the location of the prayers also obscures the District's fundamental rationale, which was not that Coach Kennedy's prayers took place in a particular location but that they were *visible*. As the District told Coach Kennedy, "[w]hile on duty for the District as an assistant coach, you may not engage in demonstrative religious activity, readily observable to (if not intended to be observed by) students and the attending public." ER.100.

More fundamentally, the district court's rationale runs headlong into *Tinker*'s core principle: an employee's First Amendment rights may not be restricted simply because the employee happens to speak on government property or may be visible to students. *See Tinker*, 393 U.S. at 506. Such an approach also contravenes *Garcetti*, which

recognizes that "[m]any citizens do much of their talking inside their respective workplaces" and that the "goal" is to "treat[] public employees like any member of the general public." *Garcetti*, 547 U.S. at 420–21. This Court has likewise rejected "various easy heuristics," including the location of speech, as "insufficient for determining whether an employee spoke pursuant to his professional duties." *Dahlia*, 735 F.3d at 1069. If the speech is not within the category of expression ordinarily required by the speaker's job, then it does not matter where the speech was delivered.

4. Finally, the district court erred in holding that Coach Kennedy's speech was official speech because it was "uniquely tied to his job," in that "he was required to pray on school-controlled property about a school-sponsored event." ER.18. If speech "owe[d] its existence to a public employee's professional responsibilities," *Garcetti*, 547 U.S. at 411, every time it was "tied to" his job, ER.18, then any personal prayer a religious person felt compelled to offer at work about something that happened at work would be subject to regulation. That is not the law: speech does not become public-employee speech merely because it "concern[s] the subject matter" of the speaker's employment.

Lane, 573 U.S. at 239–40; *see also Garcetti*, 547 U.S. at 421. As the Seventh Circuit put it, "speech does not 'owe[] its existence to a public employee's professional responsibilities' … simply because public employment provides a factual predicate for the expressive activity." *Chrzanowski v. Bianchi*, 725 F.3d 734, 738 (7th Cir. 2013); *see also Karl v. City of Mountlake Terrace*, 678 F.3d 1062, 1071–72 (9th Cir. 2012) (similar); *Flora v. County of Luzerne*, 776 F.3d 169, 176–78 (3d Cir. 2015) (similar).

In sum, Coach Kennedy did not speak on behalf of the District when he engaged in brief, private prayer. His religious expression—just like the other private expression the District allows—was "outside the scope of his ordinary job duties," and constitutes "speech as a citizen for First Amendment purposes." *Lane*, 573 U.S. at 238.

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

Because Coach Kennedy showed he "engaged in protected speech activities," the burden shifts to the District to show that it had an "adequate justification" for its adverse actions under the fourth *Eng* factor. *Karl*, 678 F.3d at 1068; *see also Robinson v. York*, 566 F.3d 817,

822 (9th Cir. 2009). The government may only "escape liability" by establishing that "the state's legitimate administrative interests outweigh the employee's First Amendment rights." *Karl*, 678 F.3d at 1068. And the government's burden is even "greater" where, as here, it "seek[s] to justify a broad deterrent on speech that affects an entire group of its employees." *Tucker v. State of Cal. Dept. of Educ.*, 97 F.3d 1204, 1210 (9th Cir. 1996) (rejecting ban on employees' religious advocacy and display of religious materials outside cubicles or offices). In such cases, the "Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's necessary impact on the actual operation of the Government." *Id.*; *see also United States v. National Treasury Employees Union*, 513 U.S. 454, 468 (1995).

The District comes nowhere close to clearing that high bar. The District's only justification for disciplining Coach Kennedy was to avoid the risk of an Establishment Clause violation. *See* ER.18; ER.193; ER.343; ER.103. No matter which Establishment Clause test is

applied, allowing Coach Kennedy's brief, silent, personal prayers would not violate the First Amendment.

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

As an initial matter, the District must show an actual Establishment Clause violation to carry its burden. That is because "the *Pickering* balancing test" is about "resolv[ing] … conflicting constitutional rights," not balancing an employee's rights against the hypothetical fears of the employer. *Berry v. Dep't of Social Servs.*, 447 F.3d 642, 657 (9th Cir. 2006). And so to justify a restriction on protected speech, the District must "demonstrate[] that the Establishment Clause *would be violated* if it permitted" the speech at issue. *Hills v. Scottsdale Unified Sch. Dist. No. 48*, 329 F.3d 1044, 1053 (9th Cir. 2003) (emphasis added); *see also Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112–13 (2001) (restriction must be "required to avoid violating the Establishment Clause"); *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1102 (9th Cir. 2000) (asking whether government action "was necessary to avoid an Establishment Clause violation").

What the District did was claim that it terminated Coach Kennedy's employment to avoid the risk of a violation. *E.g.*, ER.106–09. But "undifferentiated fear or apprehension of disturbance is not enough to overcome" constitutional rights. *Tinker*, 393 U.S. at 508; *see also, e.g.*, *Good News Club*, 533 U.S. at 112; *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993); *Widmar v. Vincent*, 454 U.S. 263, 271–73 (1981). For the reasons that follow, Coach Kennedy's conduct did not actually violate the Establishment Clause.

2. Coach Kennedy's Brief, Silent, Personal Prayers Were Not Coercive

In the context of religious expression at schools, the Establishment Clause question is whether "an objective observer, acquainted with the text, legislative history, and implementation of the [policy], would perceive it as a state endorsement of prayer in public schools." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000). The touchstone is coercion: the "critical inquiry under *Santa Fe* … to determine if religious activity at a major public school event constitutes impermissible coercion to participate is whether a reasonable dissenter … could believe that the group exercise signified her own participation or approval of it." *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d

1092, 1104 (9th Cir. 2000); *see also, e.g., Lee v. Weisman*, 505 U.S. 577, 593 (1992). Coach Kennedy's brief, personal prayers after football games did not implicitly or explicitly coerce students—or any other objective observer—to "support or participate in religion." *Lee*, 505 U.S. at 587.

As discussed, *see* §I.A.1, *supra*, the conduct in which Coach Kennedy sought to engage—and the conduct for which he was suspended—was saying a brief, silent, personal prayer in the midst of other post-game activities. The sharp contrast between Coach Kennedy's conduct and that at issue in *Santa Fe* and *Lee* illustrates why there was no Establishment Clause issue here. In *Santa Fe*, the prayers at issue were "broadcast over the school's public address system" to an entire stadium before football games. 530 U.S. at 307. In *Lee*, the prayers were similarly offered in front of the entire crowd at a graduation ceremony. 505 U.S. at 586–87. Coach Kennedy, by contrast, sought to pray not in some central location of authority but in the midst of a hive of unrelated activity: players from both teams, family members, friends, and school personnel all milling about, appearing to take little note of him. ER.271; ER.274. Students,

coaches, and spectators at the games were free to (and did) ignore Coach Kennedy's expression altogether.

For similar reasons, Coach Kennedy did not offer his prayers to a "captive audience." *Johnson*, 658 F.3d at 967–68; *see also, e.g.*, *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 624 F.3d 332, 342 (6th Cir. 2010). Coach Kennedy's prayers were designed neither to capture the attention of students, nor to solicit their participation. ER.107 (the District finding that Coach Kennedy never "actively encouraged, or required, [student] participation" in his prayers). Following the District's September 17 directive and as the District repeatedly acknowledged, Coach Kennedy intentionally separated himself from students before he prayed, and waited until students were already departing the field. ER.217–19; ER.184–85; ER.115–16; ER.267 (Superintendent Leavell informing the state superintendent of public instruction that the "issue … has shifted from leading prayer with student athletes, to a coaches right to conduct a personal, private prayer…"). What is more, his prayers were entirely "silent." ER.116.

None of the other hallmarks of the school-sponsored activities in *Santa Fe*, *Lee*, and other cases finding conduct by a school employee to be coercive were present. *Santa Fe* involved a school *policy* condoning pre-game prayer, broadcast on the school's public address system, under which the school regulated both the identity of the speaker and the content of the speech. It is little wonder that the Supreme Court recognized this as "school-sponsored prayer." 530 U.S. at 316 n.23. Coach Kennedy's prayers, by contrast, were neither "solemniz[ed]" nor "approved" by the District. *Id.* at 298 n.6, 309. Quite the opposite. The only school policy here expressly restricted Coach Kennedy's ability to pray. ER.108. Nor were Coach Kennedy's prayers "broadcast" before football games in a way that a reasonable or objective observer would have perceived Coach Kennedy's prayer to be school-sponsored. *Santa Fe*, 530 U.S. at 307. Coach Kennedy's prayers instead took place amidst the bustle of other post-game activity after each football game.

The only similarity between *Santa Fe* and this case is location—the speech took place at a football game. But it "is not the public context that makes some speech the State's. It is the entanglement with the State." *Chandler v. Siegelman*, 230 F.3d 1313, 1316 (11th Cir.

2000). Private speech does not automatically become "the school's speech even though it may occur in the school," nor is such speech "unconstitutionally coercive even though it may occur before non-believer students." *Id.* at 1317. Other courts—including this one—have agreed that the location alone is not enough to make the speech coercive in the Establishment Clause sense. In *Cole*, this Court found that the speech at issue—a valedictory speech at a high school graduation—was coercive not because of where it took place, but "[b]ecause District approval of the content of student speech was required" under school policy. 228 F.3d at 1103. An observer familiar with that policy would reasonably "perceive that the speech carried the District's seal of approval." *Id.*; *see also Doe ex. rel Doe v. Sch. Dist. of the City of Norfolk*, 340 F.3d 605, 612 (8th Cir. 2003) ("*Santa Fe*, in reaching its conclusion, places significant emphasis on the written policy which subjected the student's speech to specific regulations confining both the topic and the content of the message.").

In concluding otherwise, the district court claimed that Coach Kennedy's "history of engaging in religious activity with players" made his prayers coercive. ER.22. But the district court conflated the

practice at issue here—Coach Kennedy's brief, silent, personal prayer—with a practice that sometimes took place prior to September 2015, in which students occasionally joined Coach Kennedy's prayers. As the District found, Coach Kennedy abandoned the latter practice as soon as he received the District's September 17 directive. ER.107; ER.277. And there is zero evidence that any Bremerton students joined in Coach Kennedy's practice of brief, personal prayer that he restarted in September 2015, let alone that they felt implicitly or explicitly coerced to do so.

Likewise, Judge Smith's concurring opinion in *Kennedy I* rested on assumptions about Coach Kennedy's conduct that discovery showed to be simply not true:

- Coach Kennedy was not "praying in front of a large audience." *Kennedy I*, 869 F.3d at 834 (Smith, J., concurring). He was silent and separated from students when he prayed. ER.39; ER.102–103.

- Nor did he pray "surrounded by a majority of the team." *Kennedy I*, 869 F.3d at 834. The students were otherwise engaged in a post-game fight song or already leaving the field towards the locker room when he knelt in prayer. ER.205–08; ER.217–18.

- The prayer did not occur at a time when he was supervising players. *Kennedy I*, 869 F.3d at 834 (Smith, J., concurring).

Other coaches were permitted to briefly tend to personal matters during this post-game period. ER.181–81; ER.154–56.

- The prayer was not attended by the "traditional indicia of school sporting events." *Kennedy I*, 869 F.3d at 834 (Smith, J., concurring). The sporting event had concluded, the players were heading to the sideline, the coaches were milling about, and the crowd was dispersing. ER.205–12; ER.217–18.

- As for the "relevant history," *Kennedy I*, 869 F.3d at 834 (Smith, J., concurring), discovery clarified the distinction between what Coach Kennedy sought to do, did, and for which he was suspended—a brief, silent, personal prayer by himself—and the occasional pre-September 2015 practice involving prayer with some members of the team—a practice that Coach Kennedy ceased at the District's directive. ER.277; ER.254.

Coach Kennedy's prayers thus bore none of the hallmarks of coercion present in *Santa Fe* and other cases involving prayer in schools. That means the District was incorrect in believing that Coach Kennedy's actions would violate the Establishment Clause, and the District therefore lacked adequate justification for its adverse action against him.

3. The District Court's Application Of The Endorsement Test Was Misplaced

The district court's reliance on cases applying the so-called "endorsement" test to the context of prayer in schools is misplaced. ER.21. The district court invoked *Newdow v. Rio Linda Union School*

District, 597 F.3d 1007 (9th Cir. 2010), as an example of where this Court has applied the endorsement test in the school context. ER.19–21. But *Newdow* dealt with "the teacher-led recitation of the Pledge of Allegiance to the Flag of the United States of America," not personal prayer by school employees. *Newdow*, 597 F.3d at 1012. Nor did *Newdow* offer any guidance on which Establishment Clause "test" was appropriate—*Newdow* simply analyzed classroom recitations of the Pledge under both the endorsement and coercion tests.

To the extent *Newdow* sheds any light on the question of which test applies, it confirms that the endorsement test is improper. *Newdow* recognized that the endorsement test, while first articulated in Justice O'Connor's *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) concurrence, ER.19, was adopted by the majority of the Supreme Court in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 578–79 (1989). *See Newdow*, 597 F.3d at 1037. But *County of Allegheny* was subsequently abrogated by *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565 (2014), for the very good reason that the endorsement test provides a sweeping standard that "likely would condemn a host of traditional practices that recognize the role religion

plays in our society." *Id.* at 579–80. Both *Newdow* and the other, pre-*Galloway*, out-of-circuit authority the district court cited are thus based on outdated precedent. ER.20 (citing *Borden v. Sch. Dist. of the Twp. of East Brunswick*, 523 F.3d 153 (3d Cir. 2008); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 406 (5th Cir. 1995)).[3] What is more, none of these decisions deals with a school employee engaging in personal, silent prayer. For these reasons, the District Court erred in applying the endorsement test.[4]

But even if the endorsement test were the proper framework, the District was still incorrect in its belief that allowing Coach Kennedy to say a brief, personal prayer would violate the Establishment Clause. The endorsement test looks to "whether the challenged governmental action has the purpose or effect of endorsing, favoring, or promoting religion, particularly if it has the effect of endorsing one religion over another." *Newdow*, 597 F.3d at 1037. An objective observer would not

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[3] Neither of these cases is analogous anyway, since they involved a teacher's participation in student-initiated prayers, rather than a coach's brief, personal prayer without students.

[4] *Santa Fe*'s reference to endorsement was only to rebuff the school's claim that prayers were private student speech, not public speech. 530 U.S. at 301–302. As this Court has already recognized, the touchstone for *Santa Fe* is coercion. *See Cole*, 228 F.3d at 1104.

perceive the District as endorsing Coach Kennedy's silent prayers. During the two North Mason games that immediately precipitated his suspension, Coach Kennedy prayed discreetly—ensuring that his prayers were brief, and that they occurred while attention was elsewhere and students were at a distance. ER.205–12; ER.217–18. In the unlikely event that someone were to notice Coach Kennedy's conduct and recognize it as prayer, this Court can presume that "secondary school students are mature enough and are likely to understand that a school does not endorse or support student [or here, employee] speech that it merely permits on a nondiscriminatory basis." *Bd. of Educ. of Westside Cmty. Sch. v. Mergens By and Through Mergens*, 496 U.S. 226, 250 (1990).

The district court focused on the fact that "the school was aware that a 'distinctively Christian prayer' was taking place and had chosen to allow it." ER.21. The school's awareness of religious expression, however, cannot be enough to give rise to endorsement or else there would be little room for private religious expression at all within "the schoolhouse gate." *Tinker*, 393 U.S. at 506. Moreover, any reasonable observer taking into account all of the history around Coach Kennedy's

actions would know the District did not endorse his actions. The District took active, public steps to distance itself from Coach Kennedy and did so "to avoid the perception of endorsement." ER.109; ER.251–56. Coach Kennedy likewise openly and publicly acknowledged that the District did *not* endorse his religious activity. ER.203.

The district court claimed that any efforts by the District to distance itself from Coach Kennedy's conduct were futile because Coach Kennedy was a representative of the District. ER.22. But that rationale sweeps too broadly yet again, because the First Amendment must leave room for school employees to exercise their rights, even while at work. "It is not the public context that makes some speech the State's. It is the entanglement with the State." *Chandler*, 230 F.3d at 1316; *see also Tinker*, 393 U.S. at 506. For this reason, school-sponsored prayers like the ones in *Santa Fe,* 530 U.S. at 301–02, and *Lee*, 505 U.S. at 587, or a teacher's participation in student-initiated prayers like the ones in *Doe*, 70 F.3d at 406, and *Borden*, 523 F.3d at 158–59, differ in every way that matters from the personal expression at issue here.

The district court went even further, however, and suggested that Coach Kennedy had to "ensure that others would not amplify his religious message on the field," either "through words or actions," in order to avoid a violation of the Establishment Clause. ER.21. This statement is remarkable, placing the responsibility on Coach Kennedy to control others' behavior as well as others' perceptions of his behavior. The district court cited no authority for this sweeping imposition on the rights of public school employees. Nor could it. Such a requirement would effectively silence all religious expression made by school employees in the presence of others. The Constitution does not require a football coach to run away and hide anytime the coach desires to say a brief prayer, no more than it requires a Catholic to avoid making the sign of the cross, a Jew to remove a yarmulke, a Muslim to remove a hijab, or a religious person not to pray over a meal. The First Amendment leaves plenty of room for teachers and coaches like Coach Kennedy to engage in brief, personal religious expression, and the district court should have granted summary judgment for Coach Kennedy on his Free Speech claim.

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

A. The District's Directive Was Not Neutral

The District's suspension of Coach Kennedy solely because he said a personal prayer also violated Coach Kennedy's Free Exercise rights. As the district court correctly recognized, the standard for evaluating Coach Kennedy's Free Exercise claim comes from *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). *See* ER.24. Under that test, if "the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, … and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 533. Here, the District undisputedly suspended Coach Kennedy solely because he engaged in religious activity that the District considered to be in violation of its Policy 2340, addressing "Religious-Related Activities and Practices." ER.107. And the District's directive implementing that policy focused only on the religious nature of Coach Kennedy's speech. Such a policy, which "impose[s] burdens only on

conduct motivated by religious belief," cannot be "generally applicable."[5] *Lukumi*, 508 U.S. at 543.

B. The District's Directive Was Not Narrowly Tailored To Serve A Compelling Interest

Because the District's directive was neither neutral nor generally applicable, it must undergo "the strictest scrutiny." *Espinoza v. Mont. Dep't of Revenue*, 2020 WL 3518364, at *7 (U.S. June 30, 2020). That "stringent standard … really means what it says." *Id.* at *10; *see also Lukumi*, 508 U.S. at 546. "To satisfy it," the District must show that its policy serves "interests of the highest order and [is] narrowly tailored in pursuit of those interests." *Espinoza*, 2020 WL 3518364, at *7. This the District cannot do. For all the reasons discussed, there is no legal support for the sole interest the District articulated in restricting Coach

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[5] The district court was correct to apply the *Lukumi* test because the District's policy specifically targeted religion, which makes the test for generally applicable laws that burden religion announced in *Employment Division, Department of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990), not relevant here. To the extent *Smith* might apply, it should be overruled because it "drastically" and improperly "cut back on the protection provided by the Free Exercise Clause." *Kennedy II*, 139 S. Ct. at 637 (Alito, J., concurring). Coach Kennedy reserves the right to challenge any application of *Smith* in this case in the event the Supreme Court does not overrule it in the upcoming term. *See Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020).

Kennedy's speech—avoiding a violation of the Establishment Clause. *See* §I.B, *supra*. Moreover, a "state's interest in achieving greater separation of church and State than is already ensured under the Establishment Clause … is limited by the Free Exercise Clause." *Espinoza*, 2020 WL 3518364, at *10. Because allowing public school employees brief moments of personal religious expression does not violate the Establishment Clause, the right to free exercise of religion must prevail.

But even if the District had shown a compelling interest in avoiding an Establishment Clause violation, its response was not narrowly tailored and so fails strict scrutiny for an independent reason. The only accommodations the District offered to Coach Kennedy were not accommodations at all: they ignored the substance of Coach Kennedy's religious beliefs, which required him to express gratitude to God on the field of play soon after the conclusion of a game. ER.112–15. Because Coach Kennedy had informed the District of what his beliefs required, ER.263, the District knew that requiring Coach Kennedy to pray in "a private location within the school building, athletic facility or press box … before and after games" would violate his beliefs. ER.100.

Nevertheless, the District's only offer of an accommodation after receiving Coach Kennedy's October 14 letter would have required him to do just that. *See* ER.251–56.

The overbreadth of the District's proposed "accommodation" is especially striking given that the District could have dealt with its purported Establishment Clause concerns through a disclaimer:

> The school's proper response is to educate the audience rather than squelch the speaker. Schools may explain that they do not endorse speech by permitting it …. Free speech, free exercise, and the ban on establishment are quite compatible when the government remains neutral and educates the public about the reasons.

Hills, 329 F.3d at 1055. The Supreme Court has endorsed this approach, explaining that when "a school makes clear that its recognition of [religious activity] is not an endorsement of the views of [those participating], ... students will reasonably understand that the school's" decision to permit the conduct "evinces neutrality toward, rather than endorsement of, religious speech." *Mergens*, 496 U.S. at 251. Yet the District refused to even consider Coach Kennedy's suggestion that the District accommodate his beliefs with the sort of disclaimer this Court described in *Hills*. ER.263.

For these reasons, the district court got it backwards when it stated that *Coach Kennedy* failed to "respond to the District's requests for further input." ER.25. Coach Kennedy did respond to the District's September 17 letter, outlining the reasons why the District's proposed solutions—requiring him to pray off-site, or pray long after games ended—were no solution at all. ER.263. He also proposed the alternative of a disclaimer. But the District's response was to tell Coach Kennedy to send "all further communication regarding this matter" to its outside counsel. ER.253. Instead of engaging with Coach Kennedy's reasonable requests to freely exercise his religion while remaining a school employee, the District insisted that its guidelines and directives "must be adhered to." *Id.*

Although the district court suggested that the District offered to allow Coach Kennedy to pray on the field shortly after the students had left it, as they were heading to the locker room—a proposal that was and remains acceptable to Coach Kennedy, ER.206–08,—that is incorrect. The district court cited the testimony of BHS Principal Polm, ER.31, but Polm said only that Coach Kennedy could return to the field *after* he "supervise[d] students off the field to the locker room, ma[de]

sure they got home safely or left the school." ER.378. This accommodation would have been unacceptable and unreasonable because it required Coach Kennedy to give up an aspect of his sincerely held beliefs—offering his prayer of thanksgiving shortly after the event for which he was expressing gratitude to God. In all events, it was Superintendent Leavell, not Polm, who was the "sole decisionmaker," ER.169, and Leavell's only proposal would have required Coach Kennedy to wait until long after the game or to pray in a sequestered location.

In short, the District would have effectively prohibited Coach Kennedy from praying anywhere in public view. But just as the Free Speech clause does not allow employers to prohibit their employees from speaking as citizens, *see* §I.A, *supra*, "[t]he Free Exercise Clause does not permit the State to confine religious speech to whispers or banish it to broom closets. If it did, the exercise of one's religion would not be free at all." *Chandler*, 230 F.3d at 1316. Coach Kennedy is entitled to summary judgment on his Free Exercise claim.

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

In addition to violating Coach Kennedy's First Amendment rights to freedom of speech and religion, the District also violated his rights under Title VII of the Civil Rights Act of 1964. Title VII protects employees from adverse action motivated by a protected characteristic or protected activity. *See Costa v. Desert Palace, Inc.*, 299 F.3d 838, 847–48 (9th Cir. 2002) (en banc). If a plaintiff establishes a prima facie case under any of Title VII's provisions, the burden then shifts to the employer to prove that its action was justified. *See, e.g.*, *Chuang v. Univ. of Cal. Davis, Bd. of Trs.*, 225 F.3d 1115, 1123–24 (9th Cir. 2000). Here, the District violated multiple provisions of Title VII by disciplining Coach Kennedy for protected activity—offering brief, silent, personal prayers. And the District's actions lacked justification because its only rationale was its erroneous belief that allowing Coach Kennedy's prayers would violate the Establishment Clause.

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

First, the District violated Coach Kennedy's rights under Title VII by failing to provide him with an accommodation that would allow him to both coach and continue to exercise his religious beliefs. Under 42

U.S.C. §§ 2000e-2(a) & 2000e(j), a plaintiff establishes a prima facie failure to accommodate claim by showing that (1) "he had a bona fide religious belief, the practice of which conflicted with an employment duty;" (2) "he informed his employer of the belief and conflict;" and (3) the employer treated him differently or took adverse action against him as a result of his inability to fulfill his duties. *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1438 (9th Cir. 1993). The burden then shifts to the employer either to show that it "negotiate[d] with the employee in an effort reasonably to accommodate the employee's religious beliefs" or to prove that accommodation "would cause undue hardship." *Opuku-Boateng v. California*, 95 F.3d 1461, 1467 (9th Cir. 1996).

The district court correctly held that Coach Kennedy established his prima facie case. ER.30. The court erred, however, in determining that the District "initiated good faith efforts to accommodate [Coach Kennedy]'s religious practices," *Heller*, 8 F.3d at 1438, and that Coach Kennedy's requested accommodation would have imposed an undue hardship.

First, because the District's accommodation did not resolve the conflict between Coach Kennedy's sincerely held religious beliefs and

his job requirements, it was not a valid accommodation. *See* §II, *supra*. "Where the negotiations do not produce a proposal by the employer that would eliminate the religious conflict, the employer must either accept the employee's proposal or demonstrate that it would cause undue hardship were it to do so." *Opuku-Boateng*, 95 F.3d at 1467; *see also Baker v. The Home Depot*, 445 F.3d 541, 547–48 (2d Cir. 2006). An employer may not "delve into the religious practices of an employee in order to determine whether religion mandates the employee's adherence." *Heller*, 8 F.3d at 1439; *see also Baker*, 445 F.3d at 547. Parsing Coach Kennedy's beliefs is, however, exactly what the District did when it determined that Coach Kennedy must pray off the field or wait until after everyone has left.

Nor can the District escape liability by arguing that Coach Kennedy's initial proposal was unacceptable, or that Coach Kennedy should have made a counteroffer after receiving the October 23 letter. ER.30–31. Title VII puts the burden on employers, not employees, to make reasonable offers, and employers "cannot excuse their failure to accommodate by pointing to deficiencies, if any there were, in [the plaintiff's] suggested accommodation." *Anderson v. Gen. Dynamics*

Convair Aerospace Div., 589 F.2d 397, 401 (9th Cir. 1978); *see also, e.g.*, *EEOC v. Alamo Rent-A-Car LLC*, 432 F. Supp. 2d 1006, 1014 (D. Ariz. 2006).

Second, because the District failed to negotiate in good faith with Coach Kennedy toward an acceptable accommodation, it is liable under Title VII unless it can prove an undue hardship would have resulted from accepting his proposed accommodation—which it cannot. The District Court identified only one purported undue hardship that would have resulted from accommodating Coach Kennedy: a hypothetical threat of possible Establishment Clause liability. But Coach Kennedy's prayers did not violate the Establishment Clause, *see* §I.B, *supra*, and the District's worries about potential liability are not an undue hardship. "Undue hardship cannot be proved by assumptions nor by opinions based on hypothetical facts." *Anderson*, 589 F.2d at 402; *see also Opuku-Boateng*, 95 F.3d at 1474 (similar).[6]

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[6] To the extent *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977), is read to hold that incurring any more than a "de minimis" cost constitutes undue hardship, that approach is inconsistent with the text of Title VII. *See, e.g.*, *Small v. Memphis Light, Gas & Water*, 952 F.3d 821, 828–29 (6th Cir. 2020) (Thapar, J., concurring), *petition for cert. filed*, June 15, 2020 (No. 19-1388); *see also Kennedy II*, 139 S. Ct.

This case therefore bears little resemblance to the facts at issue in this Court's decision in *Berry*. There, the purported Establishment Clause violation arose from the plaintiff's assertion of a right to share his beliefs with the defendant's clients, in his cubicle, during counseling sessions. 447 F.3d at 651–52. Coach Kennedy did not seek to communicate with students or anyone else, and no reasonable observer would conclude that he was representing the District during his brief, silent, personal prayers. The District therefore failed to either offer reasonable accommodations to Coach Kennedy's sincere beliefs or to show that doing so would result in an undue hardship, and the District violated Coach Kennedy's rights under §§ 2000e-2(a) & 2000e(j).

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

The District also failed to rehire Coach Kennedy because of his religion in violation of § 2000e-2(m). A discharged employee has a claim under Title VII if a protected characteristic "was a motivating factor" in the employer's decision not to rehire him. 42 U.S.C. § 2000e-2(m).

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at 637 (Alito, J., concurring). In any event, accommodating Coach Kennedy—whether through a disclaimer or through allowing him to pray on the field as students headed to the locker room—would have imposed practically no cost at all on the District.

Here, it is undisputed that Coach Kennedy's sincerely held religious beliefs were not just *a* motivating factor in the District's action: they were *the* motivating factor—the but-for cause of the District's actions. ER.69–71.

The district court characterized the District's actions as "good faith efforts to obey the Establishment Clause." ER.27. But as discussed, *see* §I.B, Coach Kennedy's prayers did not violate the Establishment Clause. The district court further claimed that the District acted because of the "time and manner" of Coach Kennedy's expression rather than because of his "religion itself." ER.26. That is a false dichotomy in this case, however, because the time and manner of Coach Kennedy's prayers were part and parcel with his sincerely held beliefs. It is the nature of those beliefs that compels him to pray when and where he prays. ER.112–13. This is not to say that no time or manner restrictions were permissible. To the contrary, Coach Kennedy testified that he would probably have agreed to praying on the field shortly after the student athletes had left it. ER.206–08. That accommodation would have allowed Coach Kennedy to pray on the field of play shortly after the game, as his beliefs required. But prohibiting

Coach Kennedy entirely from saying a brief prayer on the field so long as students and spectators were within view, on the basis of a misreading the Establishment Clause, was equivalent to prohibiting the exercise of his religion. In requiring Coach Kennedy to acquiesce to such a prohibition before he could resume coaching, the District violated Title VII.

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

Coach Kennedy is also entitled to summary judgment on his disparate impact claim. To make a prima facie case under 42 U.S.C. § 2000e-2(a), a disparate impact plaintiff must show that "(1) he belongs to a protected class; (2) he was qualified for the position; (3) he was subject to an adverse employment action; and (4) similarly situated individuals outside his protected class were treated more favorably." *Chuang*, 225 F.3d at 1123. The first three elements are not disputed here.

The District treated similarly situated individuals more favorably than Coach Kennedy by penalizing him while tolerating other coaches' brief, personal conduct after football games. "Other employees are similarly situated to the plaintiff when they have similar jobs and

display similar conduct." *Earl v. Nielsen Media Research, Inc.*, 658 F.3d 1108, 1114 (9th Cir. 2011). As described above, coaches who made personal phone calls, greeted family members, or knelt to tie their shoes on the field would not have been disciplined. ER.154–55; ER.180–81; ER.188–89. Like these other coaches, Coach Kennedy took a few moments after the game to engage in a personal activity that concerned none of his colleagues or players. The only difference between his actions and the other coaches' personal actions is that Coach Kennedy's were religious in nature.

The district court agreed, but "reject[ed] the notion that the District must treat religious expression the same as non-religious expression when there are no constitutional liabilities for the latter." ER.28. The district court cited *Berry*, but *Berry* did not say that personal religious activity may be treated differently from personal non-religious activity. Instead, *Berry* held that an employer could tolerate "business-related social functions, such as employee birthday parties," 447 F.3d at 652, while prohibiting non-business related functions—both

religious *and* non-religious, *see id.* at 653, 656.[7] In all events, the district court's *Berry* analogy relies on a faulty premise that there were "constitutional liabilities" for Coach Kennedy's conduct. ER.28. There was no Establishment Clause violation. And because there was none, the District did not carry its burden of establishing a legitimate, non-discriminatory reason for its action. *See Chuang*, 225 F.3d at 1123–24. Coach Kennedy is therefore entitled to summary judgment on his disparate impact claim.

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

The District also violated Title VII by retaliating against Coach Kennedy for opposing its directives. A Title VII retaliation claim requires the plaintiff to show that "(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.

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[7] The district court also distinguished Coach Kennedy's prayers based on location, characterizing his prayers as occurring at "the center of the field," while other coaches' personal conduct occurred "somewhere else on the field." ER.28. But the evidence simply shows that other coaches were permitted to engage in personal conduct on the field; there is no evidence of restrictions regarding *where* on the field. ER.181; ER.154–56.

2000). Under 42 U.S.C. § 2000e-3(a), a plaintiff engages in protected activity if he "oppose[s] any practice made an unlawful employment practice by this subchapter." Coach Kennedy was not required "to prove that the employment practice at issue was in fact unlawful under Title VII" (although he has done so); he was required only to "show that [he] had a 'reasonable belief' that the employment practice [he] protested was prohibited." *Trent v. Valley Elec. Ass'n Inc.*, 41 F.3d 524, 526 (9th Cir. 1994) (citation omitted). There is no dispute that Coach Kennedy suffered an adverse employment action and that a causal link exists between that action and his decision to engage in protected activity by opposing the District's discriminatory directives.

The district court erred in determining that Coach Kennedy's opposition to the District's directive was unprotected because his "manner of prayer" was "unconstitutional." ER.32. Coach Kennedy's prayers did not violate the Establishment Clause. And the district court was wrong in claiming that the District's action was justified because Coach Kennedy "unilaterally reject[ed]" the District's September 17 directive and "stok[ed] media attention." *Id.* Coach Kennedy did not unilaterally reject the September 17 directive; instead,

he prayed separately from students, as the letter directed. ER.103; ER.216–19. It was only later that the District decided that Coach Kennedy could not even pray in view of students. Nor did simply communicating with the media render Coach Kennedy's otherwise protected activity unprotected—to hold otherwise would be to doubly offend the First Amendment. Finally, the District's action was not justified for the same reason Coach Kennedy's "manner of prayer" was not "unconstitutional": there was no Establishment Clause violation.

CONCLUSION

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

Date: July 22, 2020

Respectfully submitted,

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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 13,282 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Date: July 22, 2020

/s/ Devin S. Anderson

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I hereby certify that on July 22, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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/s/ Devin S. Anderson

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Attorney for Appellant
Joseph A. Kennedy

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.

28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

42 U.S.C. § 2000e. Definitions

For the purposes of this subchapter—

….

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

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.

42 U.S.C. § 2000e-3(a). Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

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FOR THE NINTH CIRCUIT

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