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No. 16-35801

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**IN THE**

**SUPREME COURT OF THE UNITED STATES**

FALL 2018

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**JOSEPH A. KENNEDY**,

 Petitioner,

v.

 **BREMERTON SCHOOL DISTRICT,**

Respondent.

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On Writ of Certiorari to the

United States Court of Appeals for the Ninth Circuit

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**BRIEF FOR RESPONDENT**

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*Counsel for Respondent*

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**Oral Argument Requested**

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**QUESTION PRESENTED**

Whether the First Amendment prohibits public school teachers and coaches from participating in overtly demonstrative religious activity where an influential on duty coach— wearing school logoed attire in the presence of impressionable students and their parents— kneels and prays on the football field.

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**OPINIONS BELOW**

The United States Court of Appeals for the Ninth Circuit is reported at *Kennedy v. Bremerton School Dist*., 869 F.3d 813, 813 (9th. Cir. 2016). The United States District Court for the Western District of Washington denied the motion at the hearing en Banc. R. 201. The Writ of Certiorari was granted by this Court on September 5, 2018.R. 204.

**STATEMENT OF JURISDICTION**

Pursuant to Rule 2(a)(1) of the Dean Fred F. Herzog Moot Court Competition, the Jurisdictional Statement has been waived.

**CONSTITIONAL PROVISIONS**

The adjudication of this case involves the application of the First Amendment of the United States Constitution. The relevant portion of the constitutional provision is:

 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.

**STATUTORY PROVISIONS**

The adjudication of this case involves the application of 42 U.S.C. § 1983.

**STATEMENT OF THE CASE**

1. **Factual Background**

In 2008, Petitioner Joseph Kennedy began his employment with Bremerton High School (BHS) as a football coach in Kitsap County, Washington. *Kennedy v, Bremerton School District*, 869 F.3d 813,815 (2017). Petitioner served as an assistant coach for the BHS varsity football team and as the head coach for the BHS junior varsity football team. R. 7;19. A vital part of Petitioner’s role as a coach at BHS required him to “communicate effectively” with parents, “maintain positive media relations” and abide “[b]y the Rules of Conduct before players and the public as expected of a Head Coach.” *Id* at 816. As a part of Petitioner’s contract he acted not only as a coach but was “ entrusted” to serve “[a]s, a mentor and role model for the student athletes.” *Id.* His contract also required that, “[a]bove all” else, he would endeavor not only “to create good athletes,” but also “good human beings.” *Id.* Petitioner’s contract expired at the end of every season. *Id*. at 815.

Respondent Bremerton School District (BSD or the District) is responsible for 5,057 students and has a religiously diverse population as it is home to several different religions including Judaism, Islam, the Bahá’í faith, Buddhism, Hinduism Zoroastrianism and more. *Id.* Petitioner is a practicing Christian. R. 8; 27. He contends his religious beliefs require him to pray on the field where the game was played in order to give thanks. *Kennedy*, 869 F.3d at 816. At the end of every game Petitioner kneels in prayer on the fifty-yard line for approximately thirty seconds of what he refers to as “brief, quiet religious expression” in BHS logoed apparel. *Id*. Petitioner’s prayers are verbal but do not specify a deity. R. 37. Petitioner asserts that his prayers recognize player safety, sportsmanship, and spirited competition. R. 99; 12.

Originally, Petitioner prayed alone but a few games into his first season BHS players requested to join him. *Kennedy*, 869 F.3d at 816. Petitioner’s demonstrative prayers evolved into midfield inspirational talks. *Id.* Petitioner never actively encouraged, or required “student participation” in any religious activity. R. 72. However, in a public school context, this type of illustrative religious behavior very likely contravenes the First Amendment’s Establishment Clause and most certainly violates Board Policy. R. 28.

In further discord with District Policy Petitioner led pre and post-game locker room prayer with the team and coaching staff from 2008-2015. *Kennedy*, 869 F.3d at 816. This practice predated Petitioner’s involvement with the program. R. 9; 23. Petitioner’s religious beliefs do not require him to lead any prayer before or after BHS football games.R. 9; 36*.* BSD was completely unaware of this conduct until 2015 when an employee from a different school notified a BSD administrator. *Id*. Petitioner ceased this conduct immediately. R. 28. However, in order to quash any existing confusion, BSD Superintendent Aaron Leavell wrote Petitioner a letter on September 17, 2015, categorizing two of Petitioner’s practices as being “problematic”, his midfield talks which contained overtly religious content and his locker room prayers. R. 28.

Leavell elucidated the importance of the secularity of Petitioner’s talks to prevent the alienation of any BHS team member, along with avoiding any violation of the law and Board Policy. R. 32. The letter further explained the right of District staff members to freely engage in religious activity “[s]o long as it *does not interfere* with job responsibilities.” R. 30. (emphasis added). In addition, “such activity must be physically separate from any student activity, and students may not be allowed to join such activity.” R. 30. District Policy requires “if students engage in religious activity it must be entirely and genuinely student initiated and may not be suggested, encouraged (or discouraged), or supervised by any District staff member.” R. 30.

Security concerns arose regarding the BHS football field due to “substantial publicity” (including social media commentary), through Petitioner’s own media appearances in light of his midfield prayer. *Kennedy*, 869 F.3d at 817-18.However, at the September 18game, Petitioner’s motivational speech was entirely secular. *Id.* He later prayed alone on the 50-yard line. *Id.* This compliance lasted only a few weeks. *Id* at 818. Petitioner alleged he felt “dirty” after engaging in his religious expression privately. R. 76. On October 14, 2015, Petitioner requested a religious accommodation under the Civil Rights Act of 1964 allowing him to continue “saying a private, post-game prayer at the 50-yard line” directly after the completion of BHS football games. *Kennedy*, 869 F.3d at 818. Petitioner’s letter contended his religious expression took place during “non instructional hours” once the game ended, thus District Policy was unconstitutional and an “[o]outright ban on [Petitioner’s] private religious expression.” R. 40-41.Petitioner recommenced praying on the 50-yard line October 16, 2015. *Kennedy,* 869 F.3d at 818.

Petitioner asserts that while kneeling with his eyes closed BHS players, coaches, and the general public spontaneously joined in. *Id.* The District contends however, that as Petitioner walked to the 50-yard line “[t]here were people jumping the fence and others running among the cheerleaders, band[,] and players.” *Id.* The District received complaints from parents of band members who were shoved during bystanders rush to the field. *Id.* Further, Petitioner’s overt midfield religious expression resulted in representatives of the Satanist religion reaching out to the District stating their intent to conduct ceremonies on the field after games, too. *Id.* Hereinafter, the District arranged for the Bremerton Police Department to secure the field following games. *Id.* BSD communicated to the public that field access was no longer available. *Id.* The BHS field is not an open forum. *Id*. at 819.[[1]](#footnote-1)

On October 23, 2015, Leavell sent Petitioner a second letter emphasizing that as a paid assistant coach, Petitioner was “responsible for supervision of students not only prior to and during the course of games, but also during the activities following games and until players are released to their parents or otherwise allowed to leave”. R. 44. Assistant coach responsibilities include supervision of students even in the dressing rooms. R. 44. The head coach confirmed that for over ten years assistant coaches have been assigned duties before and after every game. R. 44. It was also confirmed that until recently, Petitioner accompanied the team and other coaches into the locker room following the completion of games. R.44. In addition, Petitioner was specifically responsible for player supervision after games. R. 44.

The District offered Petitioner several suggestions for accommodations such as a private location within the school building, athletic facility or the press box after games. R. 45. The District also remained open to discussing other ways to accommodate Petitioner to engage in private religious exercise. R. 47. However, Petitioner was unwilling to cooperate, his legal representation informed the media the only adequate result was authorization to pray midfield immediately after games. *Kennedy*, 869 F.3d at 819. Petitioner kneeled at the varsity game on October 23, 2015 and the junior varsity game October 26, 2015, while on duty as a coach. R. 45. Reluctantly, the District placed Petitioner on administrative leave from his assistant coaching position. R. 47. During Petitioner’s time on leave the players discontinued midfield prayers. *Kennedy*, 869 F.3d at 820.

After the season ended the District conducted its annual performance reviews. *Id.* previously, Petitioner received systematically positive reviews but in 2015 he did not participate. *Id.* The athletic director recommended Petitioner not be rehired because he “failed to follow district policy” and “[f]ailed to supervise student-athletes after games due to his interactions with media and the community.” *Id.* Petitioner did not reapply during the 2016 season. *Id.*

**B. Procedural Background**

 Petitioner filed his complaint in the Western District of Washington on August 9, 2016. *Kennedy*, 869 F.3d 820. On August 25, 2016 Petitioner moved for a preliminary injunction pursuant to 42 U.S.C. § 1983 and Title VII of the Civil Rights Act ordering Respondent Bremerton School District to “(1) cease discriminating against him in violation of the First Amendment, (2) Reinstate him as Bremerton High School football coach and, (3) allow him to kneel and pray on the fifty yard line immediately after BHS football games.” [[2]](#footnote-2)*Id*.at 820-21. The district court denied Petitioner’s request for a preliminary injunction on September 19, 2016. *Id.* at 821. The court emphasized the five-step series of analysis laid out in *Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009). *Eng* explains the importance of identifying whether the plaintiff spoke as a private citizen or a public employee. *Id.* The court reasoned Petitioner could not succeed on the merits of his First Amendment retaliation claim on the basis that he spoke as a public employee and not as a private citizen. *Kennedy*, 869 F.3d 821. Moreover, the court concluded Petitioner’s conduct resulted in “subtle coercion” and that a reasonable observer acquainted with the pertinent context “[w]ould have seen Kennedy as a coach participating, in fact, leading, an orchestrated session of faith.” *Id.* The court further concluded the District’s conduct was justified by its need to avoid violating the Establishment Clause. *Id*.

 On October 3rd, 2016, Petitioner appealed to the Ninth Circuit Court of Appeals which reviewed the case de novo, and affirmed the decision below.[[3]](#footnote-3) *Id*. In this appeal the Court similarly focused on the *Eng* framework, honing in on step two regarding whether Petitioner acted as a public employee or a private citizen. *Id*. The Court concluded Petitioner spoke as a public employee. *Id.* Consequently, the Court refused to analyze *Eng* step four regarding whether the District was justified in restricting Petitioner’s speech to avoid violating the Establishment Clause. *Id.*

 Petitioner further appealed the Ninth Circuit’s decision and was granted a Writ of Certiorari on September 5th, 2018. R. 204. The Court will address the following issue: Whether public school teachers and coached retain any First Amendment rights when at work and “in the general presence of” of students. R. 204.

**SUMMARY OF THE ARGUMENT**

Respondent Bremerton School District respectfully asks this Court to affirm the decision of the Ninth Circuit Court of Appeals for three reasons. First, Petitioner spoke as a public employee while praying midfield immediately after the game, solely by virtue of his employment. Petitioner spoke as a public employee for two reasons. First, Petitioner engaged in demonstrative religious conduct amidst performing his ordinary job duties. Second, Petitioner’s religious expression in BHS logoed attire, on BHS property in front of an event of attendees owed its existence to his position as a BHS football coach. Third, Petitioner’s overtly demonstrative religious conduct on the fifty-yard line while on duty as a coach violated the Supreme Court’s Endorsement Test. Finally, as a matter of policy, coaches should be prohibited from participating in religious conduct while performing the ordinary duties of their job in order to prevent the subtle coercion of young and impressionable minds.

**ARGUMENT**

**THE NINTH CIRCUIT DECISION PRECLUDING DISTRICT ENDORSEMENT OF RELIGION WHERE PETITIONER SPOKE AS A PUBLIC EMPLOYEE WHILE ENGAGING IN OVERTLY RELIGIOUS CONDUCT SHOULD BE AFFIRMED.**

In 1962, this Court held that daily school sponsored prayer violated the Establishment Clause. *Engel v. Vitale*, 370 U.S. 421, 421(1962). The Establishment Cause declares “Congress shall make no law respecting an establishment of religion.” U.S. Const. amend. I; *Borden v. Sch. Dist. of Twp. of E. Brunswick*, 523 F.3d 153, 175 (3d Cir. 2008). This amendment is applicable to the states, including public school systems through the Due Process Clause of the Fourteenth Amendment. *See* *Wallace v. Jaffree*, 472 U.S. 28, 49-50 (2000). Thus, An individual who accepts public employment is bound by certain restrictions on their fundamental rights, including restrictions on free speech as protected under the First Amendment. 16B C.J.S. Constitutional Law § 1060. These government restrictions are substantiated as a result of the unique governmental interest in effective operation, thus calling for broad authority. 16B C.J.S. Constitutional Law § 1060. Additionally, the principle that “government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause.” *Lee v. Weisman*, 505 U.S. 577, 587 (1992). Therefore, the Ninth Circuit Court decision precluding government endorsement of religion should be affirmed.

1. **Petitioner Spoke as a Public Employee While Praying Midfield Immediately After the Game, Solely by Virtue of His Employment.**

The Ninth Circuit was correct when affirming the denial of Petitioner’s First Amendment Retaliation claim because he failed to establish a prima facie First Amendment violation through the required elements laid out in *Eng.* *Karl v. City of Mountlake Terrace*, 678 F.3d 1062, 1068 (9th Cir. 2012). All of the *Eng* "factors are necessary, in the sense that failure to meet any one of them is fatal to the plaintiff's case." *Dahlia v. Rodriguez*, 735 F.3d 1060, 1067(9th Cir. 2013). Petitioner must demonstrate that he (1) “spoke on a matter of public concern; (2) he spoke as a private citizen rather than a public employee; and that (3) the relevant speech was a substantial or motivating factor in the adverse employment action.” *Eng*, 552 F.3d at 1070.Subsequently, Bremerton School District must illustrate it (4) “had an adequate justification for treating Petitioner differently from other members of the general public, and that (5) it would have taken the adverse employment action even absent the protected speech.” *Id.* Here, the parties do not dispute that Petitioner spoke on a matter of public concern (*Eng* factor one). *Kennedy*, 869 F.3d at 822. Nor do they dispute *Eng* factors three or five that the relevant speech was a substantial or motivating factor in the District’s decision to place Petitioner on leave, or, that the District would not have taken the adverse employment action in the absence of the relevant speech. *Id.*

Determining whether Petitioner spoke as a public or private citizen is a mixed question of law and fact. *Johnson v. Poway Unified Sch. Dist*., 658 F.3d 954, 955 (9th Cir. 2011). First, a factual determination must be made regarding the “scope and content of a plaintiff's job responsibilities.” *Eng*, 552 F.3d at 1071. The proper inquiry as to the purview of such duties is “[p]ractical and fact-specific in determining whether the government employee spoke pursuant to his official duties.” *Garcetti v. Ceballos,* 547 U.S. 410, 425 (2006); *Dahlia*, 735 F.3d at1060.Second, the “ultimate constitutional significance” of said facts must be determined as a matter of law. *Eng*, 552 F.3d at1071.

1. **Petitioner Spoke as a Public Employee While he Performed the Ordinary Duties of a Football Coach.**

Petitioner spoke in his capacity as a public employee when he engaged in overt religious expression on the football field amidst executing his duties as an assistant coach. R. 44. Statements are made within the speaker's capacity as a citizen if the speaker “had no official duty” to make the questioned statements, “or if the speech was not the product of “performing the tasks the employee was paid to perform.” *Marable v. Nitchman*, 511 F.3d 924, 932 (9th Cir. 2007); *Freitag v. Ayers*, 468 F.3d 528, 543 (9th Cir. 2006) (quoting *Garcetti*, 547 U.S. at 126). In *Pickering v. Bd. of Educ.,* 391 U.S. 563, 564 (1968) the district wrongfully terminated a teacher for writing and publishing on issues of legitimate public concern regarding additional funding for a school. *Id*. at 546. Whether speech is a matter of public concern depends on the “content, form, and context” of the speech. *Connick v. Myers,* 461 U.S. 138, 147(1983). In *Pickering*, the publication of the letter neither encumbered plaintiff’s job performance , hindered his daily classroom duties, nor interfered with the regular operation of the school. *Id.* at 572. Thus, plaintiff spoke as a private citizen on a matter of public concern. *Id*. at 547. Consequently, the *Pickering* balancing test emerged, balancing the interest of the teacher as a citizen, and the state as an employer. *Id*. at 588. This Court held a public employee's speech is entitled to the *Pickering* balancing test only when the employee speaks “as a citizen upon matters of public concern” and not “as an employee upon matters only of personal interest.” *Connick,* 461 U.S. at 138.

Further, the Ninth Circuit implemented this analysis in *Johnson* holding that the plaintiff’s speech was unquestionably a matter of public concern, nonetheless, “he spoke as an employee” not a citizen. *Johnson*, 658, F.3d 964. In *Johnson*, two large banners emphasizing God served as decorations on a high school math teacher’s wall. *Id*. at 957. Both banners were about seven feet wide and two feet tall. *Id*. One banner read “GOD BLESS AMERICA”; and, “GOD SHED HIS GRACE ON THEE.” *Id.* at 958. The other said “All men are created equal, they are endowed by their CREATOR.” *Id*. The word “creator” was on its own line, and each letter of “creator” was capitalized and nearly twice the size of the other script. *Id.* The Court contended that because teachers are entrusted with the power to shape the impressionable minds of students “[t]eachers act as teachers for purposes of a *Pickering* inquiry when at school or a school function, in the general presence of students, in a capacity one might reasonably view as official.” *Id*. at 968. Therefore, unlike in *Pickering*, when plaintiff spoke as a private citizen, Johnson’s speech occurred while performing a function “squarely within the scope and duty of his position”, therefore, he spoke as an employee. *Id*. at 967.

This Court held in *Garcetti* that “when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.” *Garcetti,* 547 U.S. at 410. *Garcetti* involved a calendar deputy who brought a §1983 complaint against the county and supervisors at the district attorney’s office. *Id*. Plaintiff alleged he was subject to retaliatory adverse employment actions for engaging in protected speech. *Id*. at 415. The plaintiff wrote a disposition memorandum articulating his apprehensions concerning alleged falsities in an affidavit. *Id*. at 413. Plaintiff claimed his supervisors retaliated against him for writing a memorandum that recommended dismissal of the case. *Id.* at 415. This Court determined plaintiff did not speak as a citizen when he wrote the memorandum, hence, his speech was not protected by the First Amendment. *Id.* at 410. This Court further explained that a “[g]overnment entity has broader discretion to restrict speech when it acts in its employer role.” *Id.* at 411. When plaintiff wrote the memo in*,* he was not acting as a citizen but acting as an employee *pursuant* to his *job responsibilities* as a calendar deputy. *Id.* (emphasis added).

Conversely, this Court emphasized the importance of honoring the professionalism and policies of the employer when holding that an off duty police officer, discharged for offering salacious videos of himself on an auction website, was not entitled to First Amendment protection. *City of San Diego, Cal. v. Roe*, 543 U.S. 77, 79 (2004). The Court reasoned that although the activity was outside of the workplace, it had an injurious effect on the mission of plaintiff’s employer and did not touch on a matter of public concern. *Id*. Moreover, plaintiff’s conduct violated specific SDPD policies, including conduct unbecoming of an officer, outside employment, and immoral conduct. *Id.*

In the case at bar, unlike in *Pickering*, Petitioner spoke as an on duty public employee. Similar to the teacher in *Johnson*, Petitioner was fulfilling the ordinary duties of his job when he engaged in unprotected First Amendment speech as a public employee. Although the District acknowledges Petitioner’s religious expression was “fleeting”, it still drew him away from his work. R. 44. As a paid coach, Petitioner remained on duty until every single player left the event. R. 50-51. Although the District does not prohibit its employees from participating in prayer or other religious exercise, it cannot *interfere* with job responsibilities. R. 30. (emphasis added).

 Contrary to Petitioner’s denial of post-game supervisory duties, the head coach confirmed that for over ten years assistant coaches were assigned duties before and after every game. R. 44. Moreover, Petitioner was responsible for supervising the students not only prior to and during the course of games, but also “[d]uring the activities following games and until players were released to their parents or otherwise allowed to leave.” R. 44. Thus, when Petitioner engaged in religious activity on October 16, 2015, immediately after the game, he was still on duty for the District. R. 44. Superintendent Leavell confirmed that until recently Petitioner accompanied BHS players and coaches into the locker room following the completion of the game. R. 44. Further, it is incontrovertible that Petitioner engaged in this religious expression while at a school event, on school property, wearing BHS logoed apparel, while on duty as a supervisor, and under the bright lights of the stadium. R. 44. Consequently, Petitioner was performing his ordinary job duties when he engaged in overtly religious conduct on the 50- yard line, thus he spoke as a public employee.

Moreover, as the Ninth Circuit correctly noted, Petitioner further agreed to “exhibit sportsmanlike conduct at all times,” and he acknowledged that, as a football coach, he was “constantly being observed by others.” *Kennedy*, 869 F.3d at 816. As a coach, Petitioner was contractually obligated to fulfill certain moral obligations. R.44. Therefore, Petitioner’s job consisted of two components, the first requiring his coaching expertise, the second requiring his guidance as a mentor and a role model. Petitioner’s contract explicitly “ entrusted” him to serve “[a]s, a mentor and role model for the student athletes.” *Kennedy*, 869 F.3d at 815. Petitioner’s contract also required him to “[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.” *Id*. at 825. The District hired Petitioner to serve as a “moral exemplar”, thus his conduct was a fundamental component of his duties as a coach and similar to *Johnson*, his speech fell “squarely within the scope and duty of his position”. *Id.* at 826; *Johnson*, 658 F.3d at 967. Furthermore, upon accepting his coaching position, Petitioner agreed that “[a]bove all” else, he would endeavor not only “to create good athletes,” but also “good human beings.” *Id*. at 816. Accordingly, Petitioner’s religious expression occurred amid his professional and contractual obligations as a football coach and fell directly within his job responsibilities as a role model, therefore, he spoke as a public employee.

1. **Petitioner’s Religious Expression in BHS Logoed Attire, on BHS Property in Front of an Event of Attendees Owed its Existence to his Position as a BHS Football Coach.**

Petitioner’s midfield demonstrative expression in BHS logoed attire, on BHS property, in front of an event of attendees, owed its existence to his position as a BHS football coach. R. 44. *Coomes* pronounced that if a plaintiff's speech “[o]wes its existence to [his] position as a teacher, then [he] spoke as a public employee, not as a citizen.” *Coomes v. Edmonds School District*, No. 15, 816 F.3d 1255, 1260 (9th Cir. 2016).

In *Coomes*, the Ninth Circuit held that a school teacher’s communication with administrators about the school district’s failure to create individualized education programs and its mishandling of the emotional-behavioral disorders program (EBD) was not made in plaintiff’s capacity as a private citizen. *Coomes*, 816 F.3d at 1255. In *Coomes*, plaintiff was “put in charge of the EBD program” and “successfully managed the program.” *Id*. at 1262. Moreover, plaintiff’s job description admitted to “[h]aving significant contact with parents, students, and District staff requiring the ability to work collaboratively with a variety of people.” *Id.* Consequently, plaintiff’s discharge for said behavior was not protected by the First Amendment because she spoke as an employee. *Id*. Thus, plaintiff’s First Amendment retaliation claim failed. *Id*.

Similarly, in the present case, Petitioner’s speech owed its existence to his position as a coach. R. 44. The BHS field is not an open forum. R. 44. Members of the public are not invited onto the field after completion of the games. R. 44. Hence, Petitioner attained access to the field solely by virtue of his employment. Petitioner contends the District previously permitted field access to parents and fans following games for social and congratulatory purposes. R. 89. This Court asserted,“[t]he State must respect the lawful boundaries it has itself set.” *Rosenberger v. Rector & Visitors of U. of Va*., 515 U.S. 819, 829–30 (1995); R. 90. Therefore, when the District declared that public access to the field was no longer available to the public, it inarguably became so. *Kennedy*, 869 F.3d at 818. Contrarily, even if it were an open forum, Petitioner was still on duty for the District. R. 44. As aforesaid, while engaging in religious expression Petitioner was on school property, in the presence of students and other event attendees, under the game lights, again, solely by virtue of his employment with BSD. R. 44. Petitioner incorrectly avers that another BHS coach, engaged in a Buddhist chant near the 50-yard line after various BHS football games. R.10. However, the District denies this claim. R. 52. The District embraces its religious diversity, but limits the use of its field uniformly to all members of the public. *Kennedy*, 869 F.3d at 819. The District was concerned with student safety and keeping the field “secure.” *Id.* at 817-18. The District received complaints from parents of band members who were shoved during bystanders rush to the field while Petitioner engaged in midfield prayer. *Id.* at 818. As a matter of safety, the District limited use of the field pertaining to religious content as a whole, not any particular religious viewpoint. This is exemplified by the District’s similar refusal against allowing a Satanists group to conduct ceremonies on the field. *Id.* at 818. Therefore, Petitioner’s prayer at the 50-yard line owed its existence to his position as a football coach. Accordingly, he spoke as a public employee while engaging in religious conduct on the field and is unlikely to prevail on the merits of his First Amendment retaliation claim.

1. **Petitioner’s Overtly Demonstrative Religious Conduct on the Fifty-Yard Line While on Duty as a Coach Violated the Supreme Court’s Endorsement Test.**

Assuming arguendo Petitioner prevailed on the second factor of the *Eng* Test, he cannot establish the fourth because his conduct gave rise to an objective perception of District endorsement of religion. If a school affirmatively sponsors the particular religious practice of prayer, it is in violation of the Establishment Clause. U.S. Const. Amend. 1.; *Borden*, 523 F.3d at 153.

In *Borden*, plaintiff, the head football coach, led his team in prayer at team dinners as well as in the locker room immediately before games. *Id*. at 159. Team dinners were not limited to members of the football team, they also included parents, the cheerleading team and other guests. *Id.* The team participated in this tradition for twenty-three seasons, starting when Borden became a coach. *Id*. at 160. The district’s counsel warned Borden that the school and any representative thereof was constitutionally prohibited from “[l]eading, encouraging, initiating, mandating, or otherwise, coercing, directly or indirectly student prayer at any time in any school sponsored event.” *Id*. at 160-161. (emphasis added). Moreover, the district stressed that students had a “constitutional right to engage in prayer on school property, at school events, even during the course of the school day.” *Id*. at 160. However, the prayer must be“ truly student initiated” and “cannot interfere with the normal operations of the school.” *Id*. at 160. Thus, the Third Circuit held that Borden’s silent act of bowing his head and taking a knee with his team violated the Establishment Clause.  *Id*. at 158. Moreover, the Court also found that Borden’s speech did not address matters of public concern and therefore was not entitled to First Amendment protection. *Id*. at 153.

Coach Borden violated the Establishment Clause under the “Endorsement” test. *Borden*, 523 F.3d at 180. The Endorsement test applies “[i]n cases involving state participation in a religious activity.” *See* *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 308 (2000). The critical inquiry addressed under the Endorsement Test is “whether a reasonable observer familiar with the history and context of the display would perceive the display as a government endorsement of religion.” *Modrovich v. Allegheny Cty., Pa*., 385 F.3d 397, 401 (3d Cir. 2004). Borden describes the content of his conduct as “secular gestures intended to promote solidarity.” *Borden*, 523 F.3d at 170. However, it is imperative to note that it was not Borden’s subjective intent which controlled whether his conduct ran amiss of the Establishment clause. *Id*. at 180. Rather, “[w]hether an objective observer would perceive [the coach] and by extension the School District and therefore the state, as advancing or promoting religious practice.” *Id.* As the Fourth Circuit explained, during games“[c]oaches are present as representatives of the school and their actions are representative of [district] policies.” *Doe v. Duncanville Indep. Sch. Dist*., 70 F.3d 402, 406 (5th Cir. 1995). Consequently, Borden’s enduring practice of engaging in religious conduct with his team contravened the Establishment clause because the reasonable observer would interpret his behavior as state endorsement of religion. *Borden*, 523 F.3d at 180.

Similarly, in *Santa Fe* this Court applied the Endorsement Test to determine whether a school district’s policy permitting, but not requiring, a student to deliver a prayer over the public address system before each varsity football game violated the Establishment Clause. *Santa Fe*, 530 U.S. at 294. The Santa Fe School District had atwo-step student election process. *Id*. at 306. The students were allowed to decide “(1) if a prayer were to be given at the start of the game”, then able to “(2) elect the speaker who would give the invocation.” *Id*. at 306. This Court analyzed whether an objective observer would perceive state endorsement of religion by examining the evolution of the “Prayer at Football Games Policy”, including its name change, the legislative history, purpose, setting and context. *Id*. at 308-09. The stated purpose was to “solemnize the event.” *Id*. at 306. The expressly endorsed text was called an “‘invocation’ —a term that primarily describes an appeal for divine assistance.” *Id.* at 306-07. In fact, Santa Fe School District previously used “invocation” solely to invoke a religious meaning. *Id*. at 307. Therefore, the proclaimed purposes of the policy encouraged the selection of a religious message. *Id*. Further, the setting, the student speaker delivered the speech to a large audience assembled on school property for a school sponsored event. *Id*. at 307. The message was broadcast over the student intercom system which was “subject to the control of school officials.” *Id*. at 307. The context, the pregame ceremony “was clothed in the traditional indicia of the school which generally include not just the team, but also cheerleaders and band members dressed in uniforms sporting the school name and mascot.” *Id*. at 308. Thus, amidst these factors, this Court found that Santa Fe’s policy was a clear violation of the Establishment Clause. *Id*. at 290.

On the contrary, this Court reversed the decision that a school district granting a church access to school grounds to show a film that was rooted in religion would have violated the Establishment Clause. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist*., 508 U.S. 384,384 (1993). Moreover, unlike *Borden* or *Santa Fe*, the showing of the film was neither during school hours or sponsored by the school. *Id.* The event was also open to the entire public. *Id.* In addition, the district’s property was heavily used by other private organizations. *Id.* at 391.

In the instant case, as in *Borden* and *Santa Fe,* Petitioner’s actions were in violation of the Establishment Clause. Both *Borden* and *Santa Fe* advise the Court to look at the surrounding context and facts. *Santa Fe*, 530 U.S. at 308-09; *Borden*, 523 F.3d at 180. Here, Petitioner claims the purpose of his prayer is to recognize player safety, sportsmanship, and spirited competition, however, “subjective intent” is not the test. R. 99; 12. Instead, the Endorsement test requires the perception of the “objective observer familiar with the history and context of the display.” *Modrovich*, 385 F.3d at 401. An objective student observer would witness a prominent public employee, a “moral exemplar”, at a school event, on school property, wearing BHS logoed attire, while on duty as a supervisor and under the bright lights of the stadium, engaging in prayer. R. 44. Moreover, Petitioner’s conduct “generated substantial publicity” and social media commentary, including through his own media appearances. *Kennedy*, 869 F.3d at 817-18. Hence, it was objectively reasonable for a student to believe the District itself was in fact endorsing Petitioner’s religious behavior, and therefore endorsing Christianity. Just as in *Santa Fe*, Petitioner participated in demonstrative religious conduct in front of a large audience. R. 90. Petitioner prayed on the fifty-yard line, the most conspicuous location on the field, to which he acquired access to by virtue of his employment. R. 82. Despite District compliance with Petitioner’s request for a religious accommodation, Petitioner refused private prayer. R. 85. The District provided him with various options that did not interfere with his job responsibilities, such as, “a private location within the school building, athletic facility or press box”. R. 85. However, the District remained open to discussing other ways to accommodate Petitioner’s private religious exercise. R. 47.

In addition, the demonstrative religious activity occurred while Petitioner was responsible for the players. R. 199. The District concedes Petitioner never actively encouraged, or required “student participation” in any religious activity. R. 72. However, in effect, the appearance of District endorsement of said activity inadvertently objectified students to subtle coercion. R. 49. Students present by virtue of their participation, such as, members of the football or cheerleading team were subject to “immense social pressures” to engage in religious conduct. *Santa Fe* ,530 U.S. at 290. The District wants to avoid alienation of any BHS team member. R. 32. The record reflects such subtle coercion where BHS players ceased their participation in midfield prayer in Petitioner’s absence. *Kennedy*, 869 F.3d at 820. Finally, an objective observer would be aware of Petitioner’s eight year long history of leading the team in pre and post-game prayer. *Kennedy*, 869 F.3d at 816. Thus, giving the objective observer valid reason to believe the District endorsed Petitioner’s openly religious conduct. As expressed in *Doe*, Petitioner was present at BHS games as a District representative, hence, his actions denoted District Policy. *Doe*,70 F.3d at 406. Accordingly, Petitioner cannot establish *Eng* factor four and is unlikely to succeed on the merits of his claim.

1. **Coaches Should be Prohibited from Participating in Religious Conduct While Performing the Ordinary Duties of their Job in Order to Prevent the Subtle Coercion of Young and Impressionable Minds.**

As a matter of policy, coaches should be prohibited from participating in religious conduct while performing the ordinary duties of their job in order to avoid the subtle coercion of young and impressionable minds. As the Ninth Circuit correctly stated,“[e]xpression is a teacher's stock in trade, the commodity he sells to his employer in exchange for a salary.” *Johnson*, 658 F.3d at 967. Similar to Petitioner who was “entrusted” to serve “[a]s, a mentor and role model for student athletes”, teachers and coaches as a whole are often viewed as “moral exemplars.” *Kennedy*, 869 F.3d at 815. Consequently, prayer exercises in public schools carry a particular risk of indirect coercion. *Lee*, 505 U.S. at 592 (1992). As a result, there are “[h]eightened concerns with protecting freedom of conscience from subtle coercive pressures in elementary and secondary public schools.” Diane Heckman, *One Nation Under God: Freedom of Religion in Schools and Extracurricular Athletic Events in the Opening Years of the New Millennium*, 28 Whittier L. Rev. 537, 592 (2006). The “coach is more important to the athlete than the principal.” *Kennedy*,869 F.3d at 826. Coaches have special relationships with the members of their teams. *Borden*, 523 F.3d at 173. As such, athletes are susceptible to subtle coercion and immense social pressures. *See* *Santa Fe* ,530 U.S. at 290. Therefore, in the interest of protecting youth from acquiescing to subtle coercion accompanied by school endorsed religion, coaches should be prohibited from participating in religious conduct amid performing their job duties. For the aforementioned reasons, The Ninth Circuit decision precluding District Endorsement of religion where Petitioner spoke as a Public Employee while engaging in overtly religious conduct should be affirmed.

**CONCLUSION**

Wherefore, for the reasons set out above, Respondent requests that this Court affirm the Ninth Circuit holding precluding District Endorsement of religion where Petitioner spoke as a Public Employee while engaging in overtly religious conduct.

Respectfully submitted,

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1. Petitioner alleges another BHS coach was permitted to engage in a Buddhist chant near the 50-yard line after various BHS football games. R.10. The District denies this claim. R. 52. [↑](#footnote-ref-1)
2. Petitioner is seeking a preliminary injunction, therefore he must establish that he is (1) likely to succeed on the merits of his claim, (2) likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in his favor, and (4) an injunction is in the public interest. *Sanders Cty. Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 744 (9th Cir. 2012). [↑](#footnote-ref-2)
3. The Court of appeals reviewed the “[d]enial of the preliminary injunction for abuse of discretion”, using the abuse of discretion standard. *Harris v. Bd. of Supervisors, L.A. Cty*., 366 F.3d 754, 760 (9th Cir. 2004). [↑](#footnote-ref-3)