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

BRIEF FOR THE STATES OF ALASKA, TEXAS, ALABAMA, ARIZONA, ARKANSAS, GEORGIA, IDAHO, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MONTANA, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF APPELLANT

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Interest of Amici Curiae

Amici Curiae are the States of Alaska, Texas, Alabama, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, and West Virginia. The States and their local governments employ multitudes of Americans as attorneys, civic planners, nurses, park rangers, police officers, and professors—to name just a few examples. These Americans do not abandon their religious liberty at the doors of their workplaces. Amici States are interested in protecting the rights of all public employees—in their States and elsewhere—from the sort of heavy-handed government control that pushes skilled employees out of public service and deters highly qualified applicants from entering it in the first place. Government employers can avoid violating the Establishment Clause without trampling on the religious liberty of their employees.

Introduction

Coach Joseph Kennedy views the opportunity to coach the Bremerton High School football team as a great honor and privilege. In appreciation for that opportunity, his sincere religious beliefs require him to offer a short, silent prayer on the football field after the clock runs out on each game. In the past, he also participated in team prayers before games and sometimes included religious themes in post-game inspirational speeches to his players. All of this took place for many years without public incident. When the Bremerton School District ("the District") learned of Coach Kennedy's religious practices, it instructed him that praying with

students could expose the District to liability under the First Amendment's Establishment Clause. Kennedy immediately stopped praying with students, continuing only his individual, silent prayers after each game. Prayers involving students are not at issue here.

But then the District moved the goalposts, ordering Kennedy that he could not even pray alone because of, it said, the public attention caused by the District's own treatment of Kennedy's religious expression. That is no constitutionally adequate justification for this infringement on religious exercise, since no reasonable observer would infer District endorsement of Kennedy's silent post-game prayers. And the District's evident hostility toward religion is itself improper under the Establishment Clause. What's more, the District's unwarranted fear of Establishment Clause liability could have been eased by clearly stating to the community that Kennedy's prayers are individual religious exercise, not government endorsement of religion—a distinction that the public and students can easily understand. Instead, it suspended Kennedy from coaching unless he agreed to abandon his religious exercise. That act was neither supported by a compelling government interest nor narrowly tailored to that interest. Worse, the standard applied by the District Court threatens to trample *students*' rights to free exercise of religion.

Overbroad application of the Establishment Clause is detrimental not only to individual educators like Kennedy, but also to government employers across the nation. The District Court's overreaching application threatens to push skilled educators and other valuable public employees out of public service by chilling their individual expression—all to the detriment of governments and the citizenry they

serve. Limited to its proper scope, the Establishment Clause guards against such damage to the public interest by requiring only those limitations on employees' individual liberty that are essential to avoiding government endorsement of or hostility toward religion.

Argument

I. The District Court's Decision Rests on a Faulty Understanding of the Establishment Clause.

A government employer like the Bremerton School District can avoid violating the Establishment Clause while continuing to respect its employees' right to free exercise of religion. Respecting the proper balance ensures not only that individual constitutional rights are not infringed, but also protects government employers from the distasteful duty of policing their employees' every word and deed.

The First Amendment's Establishment Clause—applicable to the States through the Fourteenth Amendment—means that:

> Government . . . must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.

Epperson v. Arkansas, 393 U.S. 97, 103–04 (1968). The District Court erred in perceiving government endorsement of religion in Kennedy's individual religious exercise—actions the District could (and did) disclaim as its own. Instead of acting with the required neutrality, the District treated Kennedy's religious expression with impermissible hostility.

The District admits that the only reason it ordered Coach Kennedy to stop his practice of post-game prayer was that it feared liability for an Establishment Clause violation. Because the District targeted Coach Kennedy's post-game prayers due to their religious nature, its actions must be "justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993). Kennedy's prayers come nowhere near exposing the District to Establishment Clause liability. The District therefore cannot overcome strict scrutiny.

A. The District cannot justify its actions under the Establishment Clause.

Preventing Establishment Clause liability may qualify as a compelling government interest, but "achieving greater separation of church and State than is already ensured under the Establishment Clause" never does. *Widmar v. Vincent*, 454 U.S. 263, 276 (1981); *see also Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112–13 (2001); *Hills v. Scottsdale Unified Sch. Dist. No. 48*, 329 F.3d 1044, 1053 (9th Cir. 2003) (per curiam). So the District cannot justify its actions as a prophylaxis. The District must show a true Establishment Clause violation, and that it cannot do.

1. On two occasions after the District targeted Kennedy's religious exercise, spectators came onto the field after the final whistle to kneel in prayer beside Kennedy. The District Court placed significant weight on these occurrences, reasoning that "when Kennedy is joined by students or adults to create a group of worshippers in a place the school controls access to," it "conveys [school]

sanction." ER.21.[1] Even if that were accurate, the District cannot justify infringing Kennedy's religious liberty by pointing to a disruption caused by the District itself. *See Lynch v. Donnelly*, 465 U.S. 668, 684–85 (1984).

Conflict arising from the legal dispute at issue cannot be used to show an Establishment Clause violation. After all, "[a] litigant cannot, by the very act of commencing a lawsuit . . . create the appearance of divisiveness and then exploit it as evidence" that the challenged action violates the Establishment Clause. *Id.* (discussing litigation conduct in the context of "entanglement" with religion); *see also Green v. Haskell County Bd. of Comm'rs*, 574 F.3d 1235, 1239 (10th Cir. 2009) (Kelly, J., dissenting from denial of rehearing en banc) (same as to "endorsement" of religion). Here, the record makes clear that public attention and any disruption at the stadium was not the natural result of Kennedy's silent prayer—it was precipitated by the District's actions. Kennedy's religious exercise did not draw such attention until the District targeted it for censure.

Whether Kennedy's prayers violate the Establishment Clause must therefore be considered in light of Kennedy's desired (and his original) religious practice—saying a "private, post-game prayer," ER.311—not in light of the public attention caused

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[1] The preliminary-injunction panel and the District Court both emphasized the idea that "an ordinary citizen could not have prayed on the fifty-yard line immediately after games, as Kennedy did, because Kennedy had special access to the field by virtue of his position as a coach." *Kennedy v. Bremerton Sch. Dist.*, 869 F.3d 813, 827 (9th Cir. 2017); ER.21. As the record now shows, however, the District did not restrict access to the field after the end of playing time until well into this controversy. So ordinary citizens *could* walk onto the field to pray after the clock stopped—and many did—just as they could to congratulate the players or celebrate.

by the District's censure. Kennedy prayed on the field for years without incident. His religious beliefs require him to pray somewhere on the field shortly after the end of a game, but he does not seek to make his prayer the center of attention—or even to be noticed at all. Rather, he testified that it "would be preferable" if "nobody were around," ER.210–11, and explained he could wait to pray until after the students began making their way to the locker room, ER.206–08; *see, e.g.*, ER.219.

Absent the public concern arising from the District's censure, Kennedy could have prayed individually without drawing attention. Indeed, that is what happened following the District's initial directive on September 17. The District cannot exploit its own litigation conduct—and the public attention it created—to conjure an Establishment Clause violation. *See Lynch*, 465 U.S. at 684–85.

2. The District claims it had to prohibit Kennedy's prayer because the public would think a coach kneeling to pray was government endorsement of religion. *See* ER.98–100. As Kennedy has explained, *see* Appellant's Br. at 42–52, no reasonable observer would think that. Nor is Kennedy's religious exercise coercive. *See* Appellant's Br. 41–47. Nothing about Kennedy's individual, silent prayer creates a situation that "in effect require[s student] participation in a religious exercise." *Lee v. Weisman*, 505 U.S. 577, 594 (1992).

The absence of endorsement is particularly obvious once the District-caused public attention is set aside—the reasonable observer can recognize a "private, post-game prayer" as an individual's religious exercise, not government-sponsored

religion.[2] High school students can tell the difference between individual religious exercise and school-sponsored prayer. *Bd. of Educ. of Westside Cmty. Sch. v. Mergens ex rel. Mergens*, 496 U.S. 226, 250–51 (1990).

Moreover, precedent makes clear that "schools do not endorse everything they fail to censor," and a school "has control over any impressions it gives its students." *Id.* at 250, 251. So the District's "fear of a mistaken inference of endorsement is largely self-imposed." *Id.* at 251. The District could have insured against Establishment Clause liability by stating clearly that Kennedy's post-game prayers were not school-sponsored, but individual religious exercise. *See id.*; *Hills*, 329 F.3d at 1055; *see also, e.g.*, *Doe ex rel. Doe v. Sch. Dist. of Norfolk*, 340 F.3d 605, 607–08, 611–12 (8th Cir. 2003). That would "convey[] a message of accommodation, not endorsement." *Freshwater v. Mt. Vernon City Sch. Dist. Bd. of Educ.*, 1 N.E.3d 335, 354 (Ohio 2013).

The District in fact conveyed that message, loud and clear. When it placed Kennedy on administrative leave, the District issued a formal statement explaining

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[2] The District Court considered Kennedy's individual prayers part of his responsibility to "serve as a role model and mentor on the field," ER.14, and therefore controlled by the District. But a public employer cannot subject private religious expression to government control "by creating excessively broad job descriptions." *Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 636–37 (2019) (statement of Alito, J., respecting the denial of certiorari) (quotation omitted). If "role model and mentor" defined Kennedy's job duties for purposes of the First Amendment, then literally anything he does—on- or off-duty—could be subject to government control. That would be an unprecedented, "remarkable" reading of the Establishment Clause. *Id.* at 637.

its actions and emphasizing that the District intended to avoid endorsement of religion. ER.102–05. No doubt could remain that the District did not sponsor Kennedy's prayer practice.

And instead of suspending Kennedy, the District should have taken the opportunity to "convey[] a message of accommodation." *Freshwater*, 1 N.E.3d at 354. After all, schools are well positioned "to teach . . . about the first amendment, about the difference between private and public action, about why we tolerate divergent views." *Hills*, 329 F.3d at 1055. To the extent the District thinks it did not sufficiently distance the school from Kennedy's private religious exercise, that failure was "self-imposed." *Mergens*, 496 U.S. at 251. The District's refusal to allow Kennedy to pray after football games violated his religious liberty.

3. Far from preventing an Establishment Clause violation, the District's actions reflect a constitutionally impermissible hostility towards religion. The First Amendment prohibits that hostility just as much as it prohibits government advancement of religion. *See, e.g.*, *Good News Club*, 533 U.S. at 118; *Epperson*, 393 U.S. at 103–04. And the Establishment Clause "does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring).

The District's actions reflect impermissible hostility. On top of its refusal to simply explain that Kennedy's religious exercise is not school-endorsed, *see supra* at 7, the District's shifting demands on Kennedy suggest it was determined to prohibit his religious exercise—regardless of whether that exercise really violated the

Establishment Clause. *Cf. Nall v. BNSF Ry. Co.*, 917 F.3d 335, 347 (5th Cir. 2019) (explaining that "moving the goalposts" "in order to produce [employer's] desired outcome of disqualifying [an employee]" is evidence of mal intent); *Cleveland v. Home Shopping Network, Inc.*, 369 F.3d 1189, 1194 (11th Cir. 2004) (explaining an employer's "shifting reasons" undermine its credibility, giving rise to an inference of improper intent); *Appelbaum v. Milwaukee Metro. Sewerage Dist.*, 340 F.3d 573, 579 (7th Cir. 2003) (similar).

On September 17, the District instructed Kennedy not to lead team prayers or include religious messages in post-game speeches to students due to Establishment Clause concerns. ER.107–09. Kennedy has no objection to complying with that directive and there is no dispute that he immediately did so. ER.99; ER.216. Kennedy offered only individual, silent prayers, and did so while students were elsewhere.

In that directive, the District told Kennedy his personal religious exercise would comply with District policy under either of two conditions: (1) "if students are also engaged in religious conduct," staff religious exercise could be "non-demonstrative (i.e., not outwardly discernable as religious activity)," or (2) the staff member's religious exercise could "occur while students are not engaging in [religious] conduct." ER.108. In compliance with the second condition, Kennedy's post-September 17 prayers occurred while students were not engaged in "religious conduct" themselves. ER.108. One would think such prayers complied with the District's second condition for appropriate religious exercise by school staff. And this more than sufficed to prevent any potential Establishment Clause liability for the District.

But after Kennedy complied with the District's original instructions, it moved the goalposts. On October 23, the District declared that "[w]hile on duty for the District as an assistant coach," Kennedy could "not engage in demonstrative religious activity" that is "readily observable to (if not intended to be observed by) students and the attending public." ER.100. In other words, "demonstrative" religious conduct was now declared improper even if "students were not engaged in [religious] conduct," contrary to the District's September 17 instructions. *See* ER.108. The same silent post-game prayers that had complied with the District's September 17 directive were declared impermissible, and Kennedy was suspended for praying silently on the field. ER.192–93; ER.318. Such hostility towards religion could itself violate the Establishment clause. *Cf. Kennedy*, 139 S. Ct. at 636 (statement of Alito, J.) ("The suggestion that even while off duty, a teacher or coach cannot engage in any outward manifestation of religious faith is remarkable.").

B. The District's demands on Kennedy were not narrowly tailored to its purported government interest.

Even if Coach Kennedy's post-game prayers violated the Establishment Clause—although they did not—the District did not narrowly tailor its response. By suspending Kennedy for praying alone on the field, the District went beyond what was necessary to avoid an Establishment Clause violation.

The District cannot justify prohibiting Kennedy's silent, individual post-game prayers by arguing his past practices of including religious messages in post-game inspirational speeches and praying with the team would violate the Establishment Clause. To be sure, teacher-led prayer can violate the Establishment Clause. *See*

Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 311–12 (2000), *Engel v. Vitale*, 370 U.S. 421, 430 (1962). But the District could (and did) prevent that without prohibiting Kennedy from individual prayer. Any perceived link to earlier prayers involving students could easily be severed by a clear statement from the District explaining that Kennedy's private prayer is not government endorsement of religion, but individual exercise of religious liberty. *See supra* at 7. So the District cannot justify an overbroad prohibition on Kennedy's individual, silent prayer—conduct that is at the core of the Free Exercise Clause—out of an unfounded fear it might be perceived as endorsing religion.

Not only did the District Court prohibit more conduct than the Establishment Clause requires, it also required conduct the Establishment Clause prohibits. The District Court faulted Kennedy for not "tak[ing] reliable steps to prevent students from joining him in prayer" and for "admit[ing] that he would not have stopped them if they had." ER.23; *see also* ER.21 ("At no time did Kennedy . . . ensure that others would not amplify his religious message on the field."). Far from requiring Kennedy to prevent students from praying, the Establishment Clause would prohibit it. Kennedy could not have infringed on students' First Amendment rights by ordering them not to pray. *See Santa Fe*, 530 U.S. at 313 ("[N]othing in the Constitution . . . prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday."); *cf. Sause v. Bauer*, 138 S. Ct. 2561, 2562 (2018) (per curiam) (although a police officer "may lawfully prevent a person from praying at a particular time and place," it must be justified by a legitimate law-enforcement purpose). Requiring Kennedy to violate students' free-exercise rights

is not a remedy narrowly tailored to preventing an Establishment Clause violation. And creating a rule that requires government employers to do so itself exposes them to Establishment Clause liability.

II. Curtailing Religious Liberty is Harmful to Public Employees and Government Employers Alike.

Attracting the most qualified candidates for public service benefits society at large. But that recruitment effort will be undermined if potential public servants face oppressive restrictions on their right to express their deeply held convictions. Although the government, as employer, may regulate religious exercise within reasonable bounds, public employees should not be required to divest themselves of their individuality and unique viewpoints when stepping into a public school or government office. This Court should prevent schools and other government entities from enforcing a rigid orthodoxy that stifles self-expression.

A. Educators and other public employees perform vital functions in our society.

Even excluding the Armed Forces, the United States government employed more than 1,800,000 people as of September 2017.[3] State and local governments employ many more. For example, Texas agencies and institutions of higher learning

[3] *See* Office of Pers. Mgmt., *Federal Civilian Employment*, https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/reports-publications/federal-civilian-employment (accessed July 28, 2020).

employed more than 300,000 people in fiscal year 2019,[4] and Texas public schools employed more than 365,000 teachers during the 2018-2019 school year.[5] Despite being one of smallest States by population, Alaska had over 60,000 public employees in June 2020, along with 8,000 public school teachers.[6]

The public sector is therefore a significant part of the economy. And there are "occupations for which the government is a major (or the only) source of employment, such as social workers, elementary school teachers, and prison guards." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 77 (1990). "A state job is valuable," and "denial of a state job is a serious privation." *Id.*

Educators "occupy a singularly critical and unique role in our society in that for a great portion of a child's life, they occupy a position of immense direct influence on a child, with the potential for both good and bad." *Knox Cty. Educ. Ass'n v. Knox Cty. Bd. of Educ.*, 158 F.3d 361, 375 (6th Cir. 1998); *see also* Alaska Stat. § 14.03.015 ("[T]he purpose of education is to help ensure that all students will succeed in their

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[4] *See* Texas State Auditor's Office, *A Summary Report on Full-time Equivalent State Employees for Fiscal Year 2019*, http://www.sao.texas.gov/SAOReports/ReportNumber?id=20-702 (accessed July 28, 2020)

[5] *See* Texas Educ. Agency, *Employed Teacher Demographics 2014-15 through 2018-19*, https://tea.texas.gov/sites/default/files/Employed%20Teacher%20Demographics%202014-15%20through%202018-19.pdf (accessed July 28, 2020)

[6] *See* Alaska Dep't of Labor & Workforce Dev., *Monthly Employment Statistics: 2020*, https://live.laborstats.alaska.gov/ces/ces.cfm (accessed July 28, 2020); Alaska Dep't of Educ. & Early Dev., *Quick Facts*, https://education.alaska.gov/stats/facts (accessed July 28, 2020).

education and work, shape worthwhile and satisfying lives for themselves, exemplify the best values of society, and be effective in improving the character and quality of the world about them."). Because education plays such a pivotal role in the lives of young people, it is especially important that States recruit, train, and support high-quality educators. *See, e.g.*, Tex. Educ. Code § 4.001(b) ("Qualified and highly effective personnel will be recruited, developed, and retained."); Alaska Stat. § 14.25.001 ("The purpose of this chapter is to encourage qualified teachers to enter and remain in service . . . ."). In pursuit of those goals, for example, the Texas Legislature has directed state officials "to identify talented students and recruit those students . . . into the teaching profession" and "to develop recruiting programs designed to attract and retain capable teachers." Tex. Educ. Code § 21.004(a), (d).

B. Chilling First Amendment exercise is contrary to the public interest.

A competitive salary, excellent health insurance, and the highest honor will not induce qualified candidates to pursue public employment if accepting the position means compromising their dearest and most personal convictions. For most Americans—indeed, for most people across centuries and cultures—those convictions include religious commitments. *See Zorach v. Clauson*, 343 U.S. 306, 313 (1952) ("We are a religious people whose institutions presuppose a Supreme Being."); *Nat'l Mining Ass'n v. Zinke*, 877 F.3d 845, 874 (9th Cir. 2017) (acknowledging "the central role of religion in human societies" (quotation omitted)). If government employers (or the courts) place unnecessary and overbroad

restrictions on the ability of employees to express their religious convictions in the workplace, legitimate religious expression will be chilled. And that chilling effect will, in turn, deter highly qualified candidates who desire to work in an environment that allows them to preserve their personal integrity. Finally, the lack of these highly qualified candidates in government employ, particularly in public schools, will hurt society in general and students in particular.

Chilling occurs when the government unduly discourages the exercise of a constitutional right. This can happen when a law is overbroad and prohibits constitutionally protected activity. *See Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 944 (9th Cir. 2011) (en banc) ("The overbreadth doctrine exists 'out of concern that the threat of enforcement of an overbroad law may deter or "chill" constitutionally protected speech.'" (quoting *Virginia v. Hicks*, 539 U.S. 113, 119 (2003))). It can also happen when "an official's acts would chill or silence a person of ordinary firmness from future First Amendment activities." *Lacey v. Maricopa County*, 693 F.3d 896, 916 (9th Cir. 2012) (quoting *Mendocino Envtl. Ctr. v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999)). Chilling is particularly invidious when it affects a large class of people. *See Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 438 (1963) ("Broad prophylactic rules in the area of free expression are suspect.").

Discussions of unconstitutional chilling most often arise when a person's free-speech rights are implicated. *See, e.g.*, *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 468 (1995) (discussing the government's increased burden when it "chills potential speech before it happens"). But "the concept of a 'chilling effect'

logically embraces every situation in which people are deterred from engaging in conduct, especially constitutionally protected conduct, by fear of prosecution." Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 Yale L.J. 853, 861 n.48 (1991); *accord* David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. Rev. 1333, 1353 (2005) ("[T]he chilling effect move . . . logically applies to all constitutional protections of an individual's right to engage in conduct.").

When Coach Kennedy's case was last before this Court, the panel suggested Kennedy's religious expression was a "commodity he sold to his employer for a salary." *Kennedy*, 869 F.3d at 828. According to the Court, the school district owned Coach Kennedy's expression whenever he was "acting in an official capacity in the presence of students and spectators." *Id.* at 827. For the reasons discussed above, *see supra* Part I, that interpretation impermissibly constrains Kennedy's religious liberty. And that interpretation threatens to chill the expression of constitutional rights wherever it is applied.

Government employees, including teachers, are people, not automatons. No one wants to abandon individuality at the school gate and become the government's puppet. Nor is it in the public's interest to require such uniformity of its employees. Fostering diverse viewpoints in schools furthers the mission of education. *See Grutter v. Bollinger*, 539 U.S. 306, 328 (2003); Chris Chambers Goodman, *Retaining Diversity in the Classroom: Strategies for Maximizing the Benefits That Flow from A Diverse Student Body*, 35 Pepp. L. Rev. 663, 669 (2008) (noting that "[d]eveloping tolerance" is a "benefit of diversity in education" and recommending "[s]eeking empathy" "when we are talking about racial, ethnic, gender, economic and religious

diversity"). "[T]he constitutional restrictions in the educational arena, which are created by the state with support from the courts, ultimately undermine the outcomes that society hopes the constraints will produce." Amanda Harmon Cooley, *Controlling Students and Teachers: The Increasing Constriction of Constitutional Rights in Public Education*, 66 Baylor L. Rev. 235, 240 (2014). And diversity benefits all workplaces, beyond classrooms. "How well an enterprise works—how productive and successful it is in a highly competitive global economy—depends on whether it has the best people and people who are comfortable working across lines of race, class, religion, and background." Steven A. Ramirez, *Diversity and the Boardroom*, 6 Stan. J.L. Bus. & Fin. 85, 120 n.203 (2000).

If the Court denies Kennedy and other public employees the right to engage in such benign and transitory religious expression as kneeling and silently praying for less than a minute, it will threaten diversity by ensuring that the only people in government employment are those willing to accept a radical curtailment of their religious liberty by those wielding political or judicial power. *See* Cooley, *supra*, at 290 (noting that curtailing educators' constitutional rights "has broader implications for . . . the nature of dissent and autonomy for groups that have less power than those bodies making rules to which they must conform"). As a result, public employees will be either those willing to hide their religious beliefs entirely or those who hold no religious beliefs at all. Qualified candidates who would otherwise become public servants will be diverted to the private sector, and the religious diversity of schools and government offices will diminish. *See McDaniel*, 435 U.S. at 641 (Brennan, J., concurring).

* * *

Coach Kennedy desires to honor his sincerely held religious beliefs by offering a short, silent prayer on the football field after the final whistle. The District cannot use the attention it drew by censuring Kennedy as an excuse to prohibit his religious exercise. And an unfounded fear that the District might be seen as endorsing religion is no justification for such an overbroad, untailored prohibition on conduct at the core of the Free Exercise Clause. Religious expression and public service can and must coexist.

Conclusion

Amici urge the Court to reverse and render judgment in favor of Appellant.

Respectfully submitted.

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Certificate of Compliance

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On July 29, 2020, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court.

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