**No. 16-35801**

**IN THE**

**SUPREME COURT OF THE UNITED STATES**

Fall 2018

**JOSEPH A. KENNEDY**

Petitioner,

v.

**BREMERTON SCHOOL DISTRICT**,

Respondent.

On Writ of Certiorari to the

United States Court of Appeals for the Ninth Circuit

**BRIEF FOR PETITIONER**

103P

*Counsel for Petitioner*

**Oral Argument Requested**

# **QUESTION PRESENTED FOR REVIEW**

Whether public school employees such as teachers and coaches are able to exercise their First Amendment rights when they are in the workplace and “in the general presence of” students.

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The decision of the United States Appellate Court for the Ninth Circuit affirming the District Court’s decision to deny Petitioner’s preliminary injunction appears at *Kennedy v. Bremerton Sch. Dist.*, 869 F. 3d 813 (9th Cir. 2017).

**STATEMENT OF JURISDICTION**

Pursuant to Rule 24.1(e) of the Dean Fred F. Herzog Moot Court Competition, the Jurisdictional Statement has been waived.

# **CONSTITUTIONAL AND STATUTORY PROVISIONS**

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.

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# **STATEMENT OF THE CASE**

1. **STATEMENT OF THE FACTS**

On August 2008, Bremerton High School (Respondent) employed Joseph A. Kennedy (Petitioner) as a football coach. R. 7, 36. Kennedy worked as an assistant coach for the Bremerton High School varsity football team and also as the head coach for the junior varsity football team. R. 7. Throughout his time as a football coach at Bremerton High School, Kennedy received positive performance evaluations. R. 8. According to the performance evaluations, Kennedy’s work with the football team had been a great asset to the Bremerton High School Community. R. 59.

Kennedy is a practicing Christian. R. 8. He made a covenant with God that after the conclusion of each game, he would give thanks though prayer for the team’s accomplishments, and for being in the team player’s lives. R. 8. Since he began coaching at Bremerton High School, at the end of each football game, Kennedy would engage in private religious expression by taking a knee at the 50-yard line and praying for approximately thirty seconds. R. 8.In his prayers, he would thank God for player safety, sportsmanship and, spirited competition. R. 8.

Kennedy would pray alone. *R.* 8. After several games, some Bremerton High School players asked Kennedy if they could join him in prayer. R. 8. Kennedy told them that “this is a free country” and that they can do what they want. R. 8. Kennedy would sometimes be accompanied by the majority of the team and opposing team players. R. 8. After the conclusion of the football games, Kennedy would also give brief motivational speeches which often included religious content. R. 75.Kennedy participated in pre-and-post game locker prayers that the football team engaged in as a matter of school tradition. R. 75. Kennedy immediately stopped participating in locker prayers as instructed by the school. R. 75. His religious beliefs do not require him to lead students in prayer. R. 75. According to the team players, they did not felt pressured by Kennedy to pray with him, Kenney did not encourage or require the team players to join him. R. 8, 75.

On September 17, 2015, the Bremerton School District Superintendent after being informed of Kennedy’s religious expression, sent him a letter. R. 28. In the letter, the District expressed its concerns that Kennedy’s actions might violate the First Amendment Establishment Clause and recommended guidelines for religious expression that avoid the perception of endorsement. R. 76. The letter also mentioned that the district recognizes that “its employees possess fundamental free exercise and free expression rights of their own under the First Amendment.” R. 33. According to the Bremerton Policy and Legal References document, school employee’s free exercise rights must “yield” to the District’s “need” to avoid an Establishment Clause violation in order to “school endorsement of religious activities.” On September 18, 2015, Kennedy did not pray in the football field at the conclusion of the game and felt “dirty” for breaking his covenant with God. R. 76.

On October 23, 2015, Kennedy received a second letter from the District thanking him for his compliance and acknowledge that his religious expression after the October 16 football game was fleeting. R. 77. The letter also suggested that Kennedy should pray in a private location such as inside the school or the press box. R. 13. On October 28, 2015, Bremerton High School placed Kennedy on paid administrative leave and terminated his participation in Bremerton High School football program activities. R. 78. The district’s reason for its decision was that Kennedy engaged in “overt, public religious displays on the football filed while on duty as a coach.” R. 78. On November 2015, Kennedy received a poor performance evaluation that recommended that Kennedy not be rehired. R. 78. On January 2016, his contract was not renewed. R. 15.

1. **STATEMENT OF PROCEDURAL HISTORY**

On August 9, 2016, Kennedy filed a lawsuit against Bremerton School District, asserting that his rights under the First Amendment and Title VII of the Civil Rights of 1964 were violated.[[1]](#footnote-1) *Kennedy v. Bremerton School District*, 869 F.3d 813, 820 (9th Cir. 2017). On August 24, 2016, Kennedy moved for a preliminary injunction. In is preliminary injunction motion, Kennedy argued that he would succeed on the merits of his claim that the Bremerton School District retaliated against him for exercising his First Amendment right to free speech. *Kennedy* at 820-21. Kennedy sought an injunction ordering Bremerton School District to (1) stop discriminating against him in violation of the First Amendment, (2) rehire him as a Bremerton High School football coach, (3) allowing him to kneel and pray on the fifty-yard line at the end of Bremerton High School football games. *Kennedy* at 821.

On September 19, 2016, the district court denied Kennedy’s preliminary injunction request. *Kennedy* at 821. The district court after applying the five-step framework in *Eng v. Cooley*, 552 F.3d 1062 (9th Cir. 2009) held that Kennedy was unlikely to prevail on the merits of his First Amendment retaliation claim because he spoke as a public employee and Bremerton School District’s conduct was justified in order to not violate the Establishment Clause. *Kennedy* at 821. The district court did not address the remaining preliminary injunction factors. *Id.* at 821. On October 3, 2016, Kennedy filed a notice of appeal to the U.S. Court of Appeals for the Ninth Circuit. *Id.* at 821. The Ninth Circuit held that because Kennedy spoke as a public employee when he kneeled and prayed on the fifty-yard line after the conclusion of Bremerton High School football games, he is not able to demonstrate a likelihood of success on the merits of his First Amendment retaliation claim. *Id.* at 832. The Ninth Circuit affirmed the district court’s order to deny Kennedy’s preliminary injunction motion. *Id.* at 832.

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# **SUMMARY OF THE ARGUMENT**

The Ninth Circuit affirmed the district court’s decision to deny Kennedy’s preliminary injunction motion. *Kennedy v. Bremerton School District*, 869 F.3d 813, 820 (9th Cir. 2017). We ask this Court to reverse the Ninth Circuit decision because it is likely that will succeed on the merits of his First Amendment retaliation claim because when Kennedy would kneel and pray at the fifty-yard line he spoke as a private citizen and therefore, the Bremerton School District violated his right to free exercise under the First Amendment.

In order to obtain a preliminary injunction, the plaintiff is required to show: (1) likelihood of success on the merits, (2) the likelihood of irreparable harm to plaintiff if preliminary relief is denied, (3) a balance of hardships that favor plaintiff, and (4) advancement of public interest. *Sanders County Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 744 (9th Cir. 2012). The only requirement before the Court is the likelihood that plaintiff will succeed on the merits. The District Court and the Ninth Circuit were incorrect in denying Kennedy’s preliminary injunction request because it is likely that Kennedy will succeed on the merits of his First Amendment retaliation claim.

First Amendment retaliation claims in the Ninth Circuit are governed by the five-step framework in *Eng v. Cooley*, 552 F.3d 1062 (9th Cir. 2009). The only factors at issue are whether Kennedy spoke as a private citizen or public employee when he would kneel and pray at the fifty-yard line, and whether Bremerton School District’s restriction on Kennedy from kneeling and praying at the football field was an “adequate justification” for wanting to avoid an Establishment Clause violation. *Id.* at 822. The Ninth Circuit did not address the second issue. *Id.*  822. Under certain circumstances, individual expressions of religious beliefs at public schools are protected by the free exercise clause. *Garcetti* at 417. According to *Capitol Square Review & Advisory Bd. v*. *Pinette*, 515 U.S. 753, 760 (1995), private religious speech is “fully protected under the Free Speech Clause as secular private expression.” Therefore, because Kennedy engaged in private speech when kneeling and praying after the conclusion of each game, the District violated Kennedy’s right to exercise his religion.

As to the second *Eng* factor, when a public employee speaks as a private citizen and not as a public employee, the speech is protected under the First Amendment. *Morris v. Crow*, 142 F. 3d 1379, 1382 (11th Cir. 1988). The Bremerton School District stated that it terminated Kennedy’s participation in Bremerton High School football program activities because he engaged in public religious displays on the football field while on duty as a coach. R. 78. However, Kennedy was not “on duty” as a coach when he would engage in private religious expression by kneeling and praying at the fifty-yard line at the end of the games. R. 8. Kennedy kneeled and prayed not as a coach but as a citizen exercising his religion. Bremerton School District argued that the football field was not a public field and even if it were, it had the authority to regulate the field and to limit Kennedy’s right to free exercise of religion in order avoid an Establishment Clause violation. *Kennedy* at 819. However, players, parents, and members of the community are invited and granted access to the football field. *Kennedy* at 819. Kennedy kneeled and prayed when the football field was open to the public and after his duties as a coach concluded. Therefore, it is likely that Kennedy will prevail in his First Amendment retaliation claim as he satisfies the second *Eng* factor.

As a matter of policy, the Ninth Circuit’s decision should be reversed. Denying Kennedy, the opportunity to establish his First Amendment retaliation claim will have a negative impact not only on him and the Bremerton community but on the American football tradition. Schools should not have broad authority to restrict coaches’ right to free exercise of religion.

# **ARGUMENT**

The Ninth Circuit affirmed the district court’s decision to deny Kennedy’s preliminary injunction motion. *Kennedy v. Bremerton School District*, 869 F.3d 813, 820 (9th Cir. 2017). The Ninth Circuit incorrectly held that Kennedy cannot demonstrate a likelihood of success on the merits of his First Amendment retaliation claim because he spoke as a public employee when he kneeled and prayed on the fifty-yard line after the conclusion of each Bremerton High School football game. *Kennedy* at 832. This Court should reverse the Ninth Circuit’s decision because: first, Kennedy had the right under the First Amendment to exercise his religion as he engaged in private speech, second, when Kennedy kneeled and prayed at the conclusion of the Bremerton High School football games he spoke as private citizen, and third, as a matter of policy in consideration of Kennedy’s religious beliefs and his impact on students and to prevent school districts from restricting all types of religious expression.

# **KENNEDY IS ABLE TO DEMONSTRATE A LIKELIOOD OF SUCCESS ON THE MERITS OF HIS FIRST AMENDMENT RETALIATION CLAIM BECAUSE BREMERTON SCHOOL DISTRICT INFRINGED ON HIS RIGHT TO EXERCISE HIS RELIGION, HE SPOKE AS A PRIVATE CITIZEN WHEN HE KNEELED AND PRAYED AT THE END OF THE FOOTBALL GAMES, AND AS A MATTER OF POLICY THIS COURT SHOULD REVERSE THE NINTH CIRCUIT DECISION**

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In order to obtain a preliminary injunction, the plaintiff is required to show: (1) likelihood of success on the merits, (2) the likelihood of irreparable harm to plaintiff if preliminary relief is denied, (3) a balance of hardships that favor plaintiff, and (4) advancement of public interest. *Sanders County Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 744 (9th Cir. 2012). The only requirement before the Court is the first one: the likelihood that plaintiff will succeed on the merits.[[2]](#footnote-2) A denial of a preliminary injunction is reviewed for abuse of discretion. *Harris v. Bd. of Supervisors*, 366 F.3d 754, 760 (9th Cir. 2004). However, because the district court relied on an erroneous legal premise to conclude that Kennedy was not likely to succeed on the merits of his claim the Ninth Circuit’s review was *de novo*, and this Court’s standard of review is also *de novo. Sanders* at 744.

The District Court and the Ninth Circuit were incorrect in denying Kennedy’s preliminary injunction request because it is likely that Kennedy will succeed on the merits of his First Amendment retaliation claim. According to the Ninth Circuit, First Amendment retaliation claims are governed by the five-step framework in *Eng v. Cooley*, 552 F.3d 1062 (9th Cir. 2009). In order to prevail in a First Amendment retaliation claim, the plaintiff must prove that (1) his or her speech was on a matter of public concern, (2) he or she spoke as a private citizen and not as a public employee, (3) the speech at issue was a substantial or motivating factor in the adverse employment action, (4) the state must prove that it had an adequate justification for treating the plaintiff differently from other members of the general public, or (5) the state would have taken the adverse employment action even if there was no protected speech. *Eng* at 1070-72.

The only contested factors at issue are whether Kennedy spoke as a private citizen or public employee, and whether Bremerton School District’s conduct was “adequately justified” by wanting to avoid an Establishment Clause violation. *Kennedy* at 822. The Ninth Circuit did not address the second issue. *Kennedy* at 822.[[3]](#footnote-3) Kennedy is likely to prevail on the merits of his First Amendment retaliation claim because the Establishment Clause is not violated when a private citizen engages in private expression of his or her religion. Therefore, Kennedy is able to succeed on his claim that the school retaliated against him when he was suspended, given a bad evaluation, and his contract was not renewed for kneeling and praying.

# **The Bremerton school district violated Kennedy’s First Amendment right to Free Exercise when he was not allowed to kneel and pray at the end of the Bremerton High School football games**

The Bremerton School District violated Kennedy’s right to freely exercise his religion when he was not allowed to practice his religion by engaging in private religious expression which consisted of taking a knee at the 50-yard line and praying for approximately thirty seconds. R. 8. The Free Exercise Clause under the First Amendment which is applicable to the states through the Fourteenth Amendment prohibits the infringement of citizen rights to free exercise of religion. *Stormans, Inc v, Wiesman,* 794 F. 3d 1064, 1075 (9th Cir. 2015).According to *Garcetti* v. *Ceballos,* 547 U.S. 410, 417 (2006), public employees do not “surrender all of their First Amendment rights” just because they are working for a school. *See also Tinker v.Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 541 (1969). Under certain circumstances, individual expressions of religious beliefs at public schools are protected by the free exercise clause. *Garcetti* at 417.

Bremerton School District stated on its September 17, 2015 letter to Kennedy that he and all District employees “possess fundamental free exercise rights under the First Amendment.” R.33. Bremerton School District relied on *Borden v. Sch. Dist. of the Twp. of East Brunswich*, 523 F. 3d 153, 179 (3d Cir. 2008) and *Berger* *v.* Rensselaer Cent. Sch. Corp., 982 F. 2d 1160 (7th Cir. 1993) in deciding that its “need to avoid” an Establishment Clause violation trumps the free exercise of school employee’s in order to prevent “school endorsement of religious activities. R. 33. However, there is an important difference between public speech that endorses religion which violates the Establishment Clause, and private speech that endorses religion and is protected by the Free Speech and Free Exercise Clause. *Bd. of Educ. v.* Mergens, 496 U.S. 226, 250 (1990).

According to *Capitol Square Review & Advisory Bd. v*. *Pinette*, 515 U.S. 753, 760 (1995), private religious speech is “fully protected under the Free Speech Clause as secular private expression.” When a public employee’s exercise of religion consists of private speech, the school district is not at “risk” of violating the Establishment Clause. *Wigg v. Sioux Falls Sch. Dist*., 382 F.3d 807, 815 (8th Cir. 2004). Therefore, because Kennedy engaged in private speech when kneeling and praying after the conclusion of each game, Bremerton School District did not have to limit Kennedy’s right to exercise his religion because there was no Establishment Clause violation.

Private speech that endorses religion is “constitutionally protected even in schools.” *Chandler v. Siegelman*, 230 F. 3d 1313, 1317 (11th Cir. 2000). For example, just because private speech occurs in the school it does not mean that the school endorses that speech or that the speech will coerce others. Chandler at 317. Kennedy’s reason to kneel and pray at the fifty-yard after the conclusion of each game is not to encourage students to pray with him or to endorse his religion in the school but to comply with the covenant he made to God. R. 8. Kennedy waits until the end of the game to engage in his exercise of religion by kneeling and praying which only lasts thirty seconds. R. 8. He does not engage in public speech that represents the school, he engages in private speech that consists of a prayer between him and God, there is no intention to represent the school with his speech. Therefore, unlike the speech in *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000) which consisted of a pre-football games “school-led invocation prayer” endorsed by the school and was held by the court to be public speech, Kennedy’s speech is private speech because it is not endorsed by the school, and when he kneels and prays at the football field he is not a public employee but a private citizen.

# **Kennedy acted as a Private Citizen and not as a public employee when he would kneel and pray at the football field after the conclusion of each Bremerton High School football game**

In determining whether a public employer retaliated against a public employee for his or her engagement in protected speech, the Ninth Circuit applies the *Eng* factors. *Candelaria v. City of Tolleson*, 721 F. App’x 588, 590 (9th Cir. 2017). One of the factors that the court consider is whether the plaintiff spoke as a private citizen or as a public employee. *Eng* at 1070. The Ninth Circuit held that Kennedy spoke as a public employee and therefore, denied his preliminary injunction because it is unlikely that he will prevail on the merits of his First Amendment retaliation. *Id.* at 821. However, the Ninth Circuit was incorrect in holding that Kennedy spoke as a public employee when he kneeled and prayed at the football field. Kennedy spoke as a private citizen and therefore, his kneeling and prayers at the fifty-yard line were protected under the First Amendment. According to *Coomes v. Edmonds Sch. Dist No. 15*, 816 F.3d 1255, 1259 (9th Cir. 2016), the First Amendment “protects a public employee’s right to speak as a citizen on matters of public concern.” Being a public employee does not mean that individuals need to lose their citizen rights and First Amendment protection. For example, when a public employee speaks in his or her “role” as a citizen, the speech is protected under the First Amendment. *Morris v. Crow*, 142 F. 3d 1379, 1382 (11th Cir. 1988).

In *Pickering v. Bd. of Educ. of Twp. High School Dist. 205*, 391 U.S. 563, 564-65 (1968), a teacher was terminated by the school district when she wrote a letter to a newspaper criticizing how to school board handled funding proposals. The court held that the teacher spoke as a private citizen, and therefore the school district violated the teacher’s right to free speech. *Pickering* at 574. One of the court’s reasons for holding that the teacher spoke as a citizen and not as a public employee was that writing the letter did not affect his duties as a teacher. *Id.* at 572. Similarly, because Kennedy spoke as a private citizen and not as a public employee, the Bremerton School District violated Kennedy’s First Amendment rights when he was not allowed to kneel and pray at the fifty-yard line. R. 78.

According to *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006), a public employee does not speak as a private citizen when the speech is pursuant to his or her official duties. When a public employee’s speech is within the scope of his or her job duties, the speech is not “entitled to constitutional protection.” *Graziosi v. City of Greenville Miss.*, 775 F. 3d 731, 737 (5th Cir. 2015); *see also Barone v. City of Springfield,* 2018 U.S. App. LEXIS 25156 (9th Cir. Sep. 5, 2018) *(*the court held that plaintiff was not speaking as a public employee and not as private citizen therefore, plaintiff speech was not protected under the First Amendment). The Bremerton School District stated that its reason for placing Kennedy on paid administrative leave and terminating his participation in Bremerton High School football program activities was because Kennedy engaged in “overt, public religious displays on the football field while on duty as a coach.” R. 78. However, Kennedy was not “on duty” as a coach when he would engage in private religious expression by kneeling and praying at the fifty-yard line. R. 8. Kennedy did not pray during the games or led players in prayer, he would wait until the football games ended. R. 8.

In *Borden*, the football coach would bow is head when the players prayed, would take a knee and ask the players to also take a knee, and would lead the players in pre-game locker room prayer. *Borden*, 523 F.3dat 159-60. Borden actions are distinguishable from Kennedy’s because when Kennedy kneels and prays he is not acting as a coach but as a citizen exercising his free exercise of religion. Borden when leading the players in prayer was acting as a public employee because the prayers would take place before the game therefore, he was still on duty.

According to Garcetti, school officials might be able to “instruct public school coaches” on how give motivational speeches because “motivating players is part of a coach’s official duties.” Price, Alison E., Understanding the Free Speech Rights of Public School Coaches, 18 Seton Hall J. Sports & Ent. L. 209 (2008); *see also Nordstrom v. Town of Stettin*, No. 16-cv-616-jdp, 2017 U.S. Dist. LEXIS 73716 (W.D. Wis. May 15, 2017).There was a time when Kennedy gave motivational speeches that included religious content and pre-and-post game locker prayers as a matter of school tradition but immediately stopped as instructed by the school. R. 75. However, when Kennedy kneels and prays at the fifty-yard line he is no longer on duty therefore, the school did not have the authority to instruct him to not engage in kneeling and praying as he was no longer on duty. Kennedy’s duties as a football coach end when the game ends, therefore, he spoke as a citizen when he engaged in “fleeting” religious expression by kneeling and praying because he was no longer on duty. R. 8.

Bremerton School District argued that the football field was not a public field and even if it were, it had the authority to regulate the field for safety concerns and to limit Kennedy’s right to free exercise of religion in order avoid an Establishment Clause violation. *Kennedy* at 819. However, football fields and stadiums are open to the general public during the game. Price at 251. Football fields are distinguishable from other school areas. For example, in *Hazelwood Sch. Dist. v. Kulmeier*, 484 U.S. 260, 262 (1988), a high school principal deleted articles from the school’s newspaper. The principal deleted the articles because they were controversial. *Hazelwood*, 484 U.S. at 262. The members of the school newspaper filed a lawsuit against the school district asserting that their rights were violated under the First Amendment. *Id.* at 262. As part of its analysis, the court addressed whether the school newspaper was a public forum and therefore, cannot be restricted by the “government.” The court held that the school newspaper was a public forum because the school officials did not intent to “evince either by policy or by practice” to open the school newspaper to “indiscriminate use” but instead “reserved the forum” for the purpose to provide journalism students with a learning experience. *Id.* at 270. *See also Perry Educ. Ass’n v. Perry Local Educators’ Ass’n,* 460 U.S. 37, 47 (1983). The court further held that the newspaper member’s First Amendment rights were not protected because the principal was able to regulate the newspaper articles. *Hazelwood* at 270. As this case illustrates school areas, such as the school newspaper are not open forums and are for student purposes only. It makes sense that the school would not invite the public to participate in the school newspaper as its intention is to educate and provide students with the opportunity to enhance their journalism skills. However, it does not make sense to say that a football field is not a public forum. *Kuna v. Ill. State Bd. of Elections*, 821 F. Supp. 2d 1060, 1064. (S.D. Ill. 2011). Players, parents, and members of the community are invited and granted access to the football field. *Kennedy*, 869 F.3dat 819. Kennedy is not praying in the football field on the weekends, he is kneeling and praying when the football field is open to the public and after his duties as a coach have concluded. Therefore, it is likely that Kennedy will prevail in his First Amendment retaliation claim because he satisfies the second Eng factor, Kennedy when kneeling and praying at the football field spoke as a private citizen and not as a public employee.

# **As a matter of policy this Court should reverse the Ninth Circuit’s decision and grant Kennedy’s preliminary injunction request because denying him the opportunity to establish his First Amendment retaliation claim will have a negative impact on him, the team players and the American football tradition**

As a matter of policy, the Ninth Circuit’s decision should be reversed. Kennedy acted as a private citizen when he engaged in private speech by kneeling and praying at the end of the games therefore, the Bremerton School Board violated his first amendment rights when he was not allowed to kneel and pray at the football and was not rehired. Denying Kennedy, the opportunity to establish his First Amendment retaliation claim will have a negative impact not only on him and the Bremerton community but on the American football tradition. According to Billy Graham, “One coach will impact more young people than the average person does in a lifetime.” Sarah Rennicke, Body, Mind and Soul, Fellowship of Christian Athletes Football (Oct. 2014.). Coaches have the “power and influence to mold the minds” of players. Price at 210. Football coaches are important to students because not only do they teach them about how to train and improve as an athlete but also provide them with “life-long” lessons not learned in the classroom. Price at 210. The main goal for coaches is to help players in their football career by training them, mentoring them, and helping them build character. It is important to make sure that coaches’ First Amendment rights are not infringed and that schools do not have broad authority to restrict their right to free exercise of religion. Mike Carter, *Court rejects appeal of ex-Bremerton football coach who prayed after games*, The Seattle Times, January 25, 2018 (available at <https://www.seattletimes.com/seattle-news/crime/court-rejects-appeal-of-ex-bremerton-football->coach-who-prayed-after-games/.) Cases such as *Kennedy* and Borden have triggered concern on coaches across the country. For example, football coaches fear that their employers will prevent them from engaging in all forms of displays of religion such as taking a knee and crossing themselves. Todd Starnes, *Court rules high school football coach cannot pray in the field,* Fox news, August 23, 2017 (available at <https://www.foxnews.com/opinion/court-rules-high-school-football-coach-cannot-pray-on-the-field>)

According to an editor at ESP, football and prayer are inseparable. Bruce Deckert, *Prayer and Football Inseparable,* ESPN (available at <http://www.espn.com/espn/page2/story?page=deckert/051019&num=0>). For many football coaches the act of bowing their heads and taking a knee when praying with the team symbolize “team unity and solidarity” which is crucial for the team’s success. Price at 212.

It is important to take into consideration how limits on coaches’ ability to exercise their religion impacts coaches. For example, in *Borden,* Borden stated that when the school board threatened to fire him for bowing his head, taking a knee, and leading locker room prayers, he never felt so “restricted” and “segregated” in is life. *Borden*, F.3dat 173. In *Kennedy*, the Bremerton School District acknowledged that under the First Amendment Kennedy, had the right to free exercise of religion but in order to avoid violating the Establishment Clause, it had to limit that constitutional right. R. 76. The Bremerton School District offered to accommodate his right to free exercise of religion by allowing to pray in the school building or press box. R. 13. However, this is not the solution. Due to the covenant he made with God to thank him for the opportunity to be in the players’ lives and the team’s accomplishments after the game in the football field, his religious exercise cannot be practice somewhere else. Therefore, the kneeling and the praying needs to take place at the football field. Kennedy has stated that on the day when he did not pray at the football when the game ended, he felt “dirty.” R.76.

Coaches cannot be expected to effectively carry out their duties and lead by example when they and their speech is so restricted. They should not need to fear that they might lose their job and their opportunity to contribute to the growth of young men and women athletes because of their speech. Individual including public employees should ever have to feel “dirty” for not being able to exercise their rights. The first amendment is considered to be one of the biggest rights citizens have. Therefore, it is important not to infringe upon individual’s freedom to exercise their religions. For example, many town council meetings and in legislatures commence the prayer with a brief prayer. This Court in *Town of Greece v. Galloway,* 143 S. Ct. 1811 (2014) held that brief prayers in council meetings do not violate the Establishment Clause. Similarly, Kennedy’s brief quiet prayer at the conclusion of the Bremerton High School’s football games also did not violate the Establishment Clause because he engaged in private speech as a private citizen after his duties as coach ended for the day. Therefore, it is important for this Court to reverse the Ninth Circuit’s decision in order to grant Kennedy his preliminary injunction as it is likely that he will succeed on the merits of his First Amendment Retaliation claim because the District Court should not have restricted his right to exercise his religion as a private citizen. As a matter of policy in consideration of Kennedy’s religious beliefs, his rights as a citizen, and the impact football coaches have on students, Petitioner asks this Court to reverse the Ninth Circuit’s decision and grant Kennedy his preliminary injunction request.

# **CONCLUSION**

WHEREFORE, Petitioner respectfully move this Court to reverse the Ninth Circuit’s decision because when Kennedy would kneel and pray at the fifty-yard line he spoke as a private citizen and therefore, the Bremerton School District violated his right to free exercise under the First Amendment.

Respectfully Submitted,

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Counsel for the Petitioner

1. Only Kennedy’s First Amendment claim is at issue. His title VII claim is not at issue. [↑](#footnote-ref-1)
2. The parties did not brief the other three requirements; they are not before the court. [↑](#footnote-ref-2)
3. The only two contested factors before the court were the second one, whether Kennedy spoke as a public employee or as a private citizen, and the fourth one, whether the school district has adequately justification for treating Kennedy differently from other members of the general public. The Ninth Circuit decision did not address the fourth factor. A discussion of the fourth factor only appears in the concurrence. [↑](#footnote-ref-3)