**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**

119P

*Counsel for Petitioner*

**Oral Argument Requested**

**Question Presented**

Whether Petitioner retains any of his First Amendment Free Exercise rights while he is working in the "general presence" of students when he kneels and gives a brief, silent prayer by himself at the 50-yard line of the high school's football field.

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**STATEMENT OF JURISDICTION**

The requirement of a formal statement of jurisdiction has been waived pursuant to Rule

2(a)(1) of the Rules and Procedures for the 2018 Dean Fred F. Herzog Moot Court Competition.

**CONSTITUTIONAL AND STATUTORY 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.

**STATEMENT OF THE CASE**

1. **Factual Background**

Joseph Kennedy has been employed by Bremerton High School since 2008 as their football coach. R. 7. Mr. Kennedy is a practicing Christian who, during his time as Bremerton High School football coach, would privately pray to himself after the games conclusion. R. 8. Given Mr. Kennedy's alumni status with the highschool, his veteran status with the United States Navy, as well as numerous experiences as a leader, he was hired to be the school's football coach. R. 7. He also had various other coaching jobs at other local high schools making him extremely qualified for the position. R.7. As a result of his experience he was brought on board, in part, to give many students a mentor. R. 8. After his hiring he received extremely positive feedback in regards to his performance, and each evaluation recommend him to be rehired every year. R. 8.

Focusing on Mr. Kennedy's Christian faith, he started to hold a personal belief for himself to pray at the conclusion of every game after watching the film *Facing the Giants* (2006). Here he would thank God for what each player had accomplished. R. 8. After the end of football games the coaches and players would meet and shake each others hands. After this was performed, Mr. Kennedy would separate himself from the crowd, kneel at the 50-yard line, and give a brief, silent, and private prayer to God. His prayer only would last about 30 seconds. R. 8.

Players have asked Mr. Kennedy in the past if they could join him in his private prayers, to which he said, "it is a free country, you may do as you want." R. 9. Students never felt compelled to join or participate as it was a private action done by Mr. Kennedy. Although students from both teams have joined him in the past. R. 8-9. Mr. Kenney would eventually start giving motivational speeches before and after games in the locker room to his players. R. 9. In the past, when he first began, he held prayers for the team. R. 9. Some students left since they were not obligated, nor pressured to do so. R. 9. However this practice stopped once Mr. Kennedy was ordered to do so. R. 9. Furthermore, Bremerton School District admits that all of these activities were completely voluntary, and that no student ever felt coerced to join in the prayers. R. 9-10.

Christianity is not the only religion expressed by coaches, and the community of the Bremerton School District. R. 10. Assistant Coach David Boynton would often do a Buddhist chat at the 50-yard line, just as Mr. Kennedy would hold his private prayers. R. 10. Coach Boynton has yet to, and has never received any warning or punishment for his religious expressions. R. 10.

Bremerton School District did not become aware of Mr. Kennedy's private prayers until an administrator received a compliment from another school district who had faced Bremerton High School in a game. R. 11. Upon hearing this Bremerton School District Superintendent, Aaron Leavell, sent Coach Kennedy a letter on September 17, 2015. R. 11. In this letter it quoted the district's Board Policy 2340, states as follows:

As a matter of individual liberty, a student may of his/her own volition engage in private, non-disruptive prayer at any time not in conflict with learning activities. School staff shall neither encourage nor discourage a student from engaging in non-disruptive oral or silent prayer or any other form of devotional activity.

The September 17, 2015 letter also stated how no student had been coerced, or compelled in participating in the prayers. R. 11. It stated that these prayers were entirely voluntary, and Coach Kennedy did not encourage students to join, and that his actions were well-intended. R. 11. This letter also gave Coach Kennedy guidelines to follow for his private religious expressions. R. 11. It stated that “you and all District staff are free to engage in religious activity, including prayer, so long as it does not interfere with job responsibilities” and is “physically separate from any student activity.” R. 11. It finally told Coach Kennedy that his prayers "must not be demonstrative if students are also engaged in religious conduct, or it should occur while students are not engaging in such conduct.” R. 11.

Initially, Coach Kennedy felt the District forbade him from his private prayers, and stopped performing them. R. 12. At the end of the September 18, 2015 game Coach Kennedy gave a small motivational speech, absent of any mentions to faith or religion. On his way home Coach Kennedy felt dirty that he broke his covenant with God, and drove back to the field long after everyone else's departure, walked to the 50-yard line, and did his brief prayer. R. 12.

On October 14, 2015, Coach Kennedy, using his attorney, sent a letter to the Bremerton School District stating that he was compelled to privately express his religious beliefs by silently, and privately praying to himself. R. 12. This letter stated that his right was protected under the First Amendment of the United States Constitution, and that under controlling law from the United States Supreme Court, and the Ninth District Court, “there can be no legitimate concern that the District is somehow establishing religion because it merely permits one of its coaches to say a short personal prayer after a football game.” R. 12. He requested that under under Title VII of the Civil Rights Act that would affirm his right to engage in a brief, quiet prayer at the 50-yard line at the conclusion of BHS games, and that following the game on October 16, 2015, he would practice his protected right. R. 12. After the October 16, 2015 game, Coach Kennedy secluded himself while players were returning to the locker rooms to pray, however was seen by several others who also prayed. Unbeknownst to Coach Kennedy, members of both teams, people in the stand, and media decided to follow suit. R. 13.

On October 23, 2015, Bremerton School District replied to Coach Kennedy's October 14 letter. R.13. The letter denied Coach Kennedy's request for religious accommodation because it allegedly violated the Establishment Clause. R. 13. This letter also stated that his post-game ritual drew him away from postgame responsibilities by separating and distracting him from the team, although it never specifically stated any rules or obligations for Coach Kennedy to follow. R. 13. It suggested he instead go to a secluded area in the school immediately after the game to pray. R. 13. After the football game on October 23, 2015, Coach Kennedy performed his private prayer.

On October 28, 2015 the Bremerton School District sent a letter to Coach Kennedy placing him on administrative leave, which prevented him from participating in Bremerton High School football activities. R. 14. The letter told Coach Kennedy his adverse employment actions were because he, "engaged in overt, public and demonstrative religious conduct while still on duty as an assistant football coach." R. 14. This letter also stated Coach Kennedy complied with the school policy not to intentionally involve students in his on-duty religious activities. R. 14.

November 2015, Coach Kennedy received his yearly performance review, which was extremely negative, and suggested he not be rehired because he allegedly “failed to follow district policy” regarding religious expression and allegedly “failed to supervise student-athletes after games.” R. 14. In January of 2016, Coach Kennedy's contract was not renewed. R. 14.

1. **Procedural Background**

Petitioner, Joseph Kennedy, filed a complaint of religious discrimination Equal Employment Opportunity Commission on December 15, 2015. Furthermore, he filed a discrimination charge on January 30, 2016. R. 16. On September 16, 2016, Petitioner filed a motion for preliminary injunction to the United States District Court Western District of Washington. R. 69. This motion was denied on September 19, 2016, and Petitioner appealed to the United States Court of Appeals for the Ninth Circuit on October 3, 2016. R. 203. The Court of Appeals for the Ninth Circuit affirmed the decision, and Petitioner filed Writ of Certiorari on September 5, 2018. R. 204.

**SUMMARY OF THE ARGUMENT**

Petitioner respectfully asks the Court to reverse the decision made by the Ninth Circuit Court of Appeals which found that Petitioner was not a private citizen expressing his First Amendment right to freely practice his religion by praying at the conclusion of high school football games. This Court should find that Petitioner successfully established a motion for preliminary injunction using the test established in *Pickering v. Bd. of Educ*, referred to the *Pickering* test, which is used to determine whether an employer has violated a public employee's First Amendment rights. *Pickering v. Bd. of Educ*., 391 U.S. 563, 568 (1968). The sole contested issue from the *Pickering* test is the second prong: whether the Petitioner spoke as a private citizen or public employee. First, we will ask this Court to find that the termination and school policy preventing Coach Kennedy from silently, and privately performing a brief thirty second prayer after a football games conclusion inhibits his rights to practice his religion. This is a direct violation of the Lemon test, which as a result, violates the Establishment Clause, and the Petitioner's First Amendment rights.

Next the Court should find that the Ninth Circuit Court of Appeals decision that Petitioner spoke as a public employee and not a private citizen was incorrect. Respondent admits in several letters to Petitioner, as well as their reasoning for his termination, that his private prayers were outside the scope of his employment, which is the sole question to answer when dealing with the second prong of the *Pickering* test. Even outside of the *Pickering* test, Coach Kennedy's actions are so trivial, and fleeting it does not amount to merely an exposure to religion, which does not break the wall diving church and state.

As a matter of policy, the Court should support the First Amendment due to its sheer importance in our society. The Freedom of religion is important, and wove into the fabric of our society, and it is a common misconception to believe there is a pure divide between church and state. Affirming the decision made by the Ninth Circuit Court of Appeals grossly inhibits public employees from freely practice their religion, and strips them of their constitutional First Amendment rights.

**ARGUMENT**

1. **Petitioner's First Amendment rights were violated by an unconstitutional school policy because it inhibited his right to freely practice his religious beliefs by firing him for privately praying after football games.**

This court should find that the Petitioner was wrongfully discriminated against because the Bremerton School District tried to stop Petitioner from practicing his religious beliefs, and eventually terminating his employment because of his religious expressions. The Bremerton School District wrongfully and unconstitutionally prevented Petitioner from silently and privately praying, which is a common practice for his religion.

In *Lemon v. Kurtzman* the Supreme Court created the Lemon test. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, finally, the statute must not foster an excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971 U.S.) LEXIS 19, \*18. The Lemon test states that if any one of the requirements are violated by the government, that action is to be deemed unconstitutional under the Establishment Clause of the First Amendment. The only relevant prong in this case is the second: the state action's primary or principal effect must be one that neither advances nor inhibits religion.

1. **Respondent's policy, and firing of Petitioner for silently praying after football games principal and primary effect is to inhibit religion.**

Respondent violated the First Amendment rights of Petitioner by terminating his employment for his expression of his religious beliefs by silently praying after football games at the fifty yard line of the football field. The actions by the Respondent, and the policies it enforces has the primary effect of inhibiting religious practices, and as a result violates the second prong of the Lemon test.

The Lemon test was established in the *Lemon* Supreme Court case. The second prong states that a state's actions primary or principal purpose must neither be one to advance, nor must it inhibit religion. According to the Lemon test, if one prong is violated by a state's action, then that action is to be deemed unconstitutional under the Establishment Clause of the First Amendment of the Constitution. The Supreme Court has deemed the actions done by a public school those of an actor of the state since they are funded by the government. *Rendell-Baker v. Kohn*, 457 U.S. 830, 840, (1982 U.S.) LEXIS 43, \*18. Since the Bremerton School District is funded by the government, and is a public school, it is an actor of the state.

In *Lynch* a city had a Christmas display which had various figures associated with the holiday, including a creche which was the primary issue. The ACLU filed a suit arguing the display pushed for and endorsed a religion. The city was permanently enjoined from displaying the creche. On appeal to the United States Supreme Court the decision was reversed. No significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government. It has never been thought either possible or desirable to enforce a regime of total separation. Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. Anything less would require the "callous indifference" we have said was never intended by the Establishment Clause. *Lynch v. Donnelly*, 465 U.S. 668, 673, (1984 U.S.) LEXIS 37, \*11-12, 52 U.S.L.W. 4317.

The United States District Court for Nebraska paid a chaplain to give a prayer at the beginning of each legislative session in order to give aid to those who were going through the judicial system that day. For more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To ask for Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an establishment of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country. The court utilizing the Lemon test stated that there was not an issue in regards to the Establishment Clause. *Marsh v. Chambers*, 463 U.S. 783, 792, (1983 U.S.) LEXIS 107, \*17, 51 U.S.L.W. 5162.

Public school employees, and even students, are not stripped of their constitutional right to freedom of speech and expression by being employed by the state. *Tinker v. Des Moines Indep. Cmty. Sch. Dist*., 393 U.S. 503, 506, (1969 U.S.) LEXIS 2443, \*6, 49 Ohio Op. 2d 222; *Morse v. Frederick*, 551 U.S. 393, 403 (2007 U.S.) LEXIS 8514. This is a constitutional right, and the government is not allowed to infringe or "abuse its position as employer to stifle ‘the First Amendment rights of its employees." *Eng v. Cooley*, 552 F.3d 1062, 1070, (2009 U.S. App.) LEXIS 577. In the classroom the pledge of allegiance has been made volunteer only because of the Lemon test for several reasons involving the second prong. The Pledge's statement that our "nation, under God" is not a mere reference to the fact that many Americans believe in a higher power, or to the historical significance of religion in the founding of the country. The Supreme Court recognized that the reciting of the Pledge of Allegiance is to declare a belief or an attitude of mind, and ot require students to perform would violate the Establishment Clause. On the same coin it would be an inhibitor to religion to prevent students from voluntarily performing this action. *Freedom from Religion Found. v. Hanover Sch. Dist*., 626 F.3d 1, 9, (2010 U.S. App.) LEXIS 23487, \*18-19.

Coach Kennedy after every game had a covenant with God and decided to pray kneeling at the 50-yard line of the football field. R. 8. These prayers lasted about 30 seconds, were done silently, and Coach Kennedy started these prayers privately. R. 8. The Bremerton School District admits that these prayers were "fleeting" in length. R. 13. The school district also agrees that these prayers were done without coercion against the students, and if students felt compelled to join it was voluntary, R. 11. The school claims that this was a violation of the Establishment Clause due to it favoring Christianity, and given the signs of an established religion.

According to the *Lynch* case it was held that no institution or society can function without an exposure to different ideas and cultures. Another assistant coach for the Bremerton High School after games does a similar practice. He does a Buddhist chant on the field, and he was never disciplined or told to stop by the Respondent. R. 10. Preventing this exposure would inhibit the practice of religion violating the second prong of the Lemon test. Coach Kennedy's prayer is simply an exposure to a Christian practice. It is stipulated that the length in time is fleeting, and no more than thirty seconds in length. A religion cannot be established or favored by an individual's brief, silent and private 30 second prayer. Preventing this would inhibit the practice of the Christian faith.

This can be taken one step further when observing the *Marsh* case. The members of the Nebraska District Court hired a chaplain to give a small prayer everyday before the day began to bless those who entered. The Supreme Court held that this practice is engraved in the fabric of our society, and that the wall between church and state is mistook all together. A mere acknowledgment or practice of a faith does establish one. Whenever this particular chaplain could not attend, they would bring in another one, sometimes of a different denomination. Both Coach Kennedy, and Coach Boynton privately express their religious beliefs. This is merely an exposure to religion, which is a part of our society. Preventing this exposure would violate the second prong of the Lemon test, and inhibit the practice of religion.

Because Coach Kennedy's practice was private preventing him from performing a small prayer after games would inhibit the practice of the Christian faith under the second prong of the Lemon test. Coach Kennedy is not stripped of his constitutional right to practice his religion in a private and respectful manner.

1. **The Ninth Circuit Court was Incorrect Because Petitioner was acting as a private citizen by him privately praying silently at the 50-yard line of the football field, and therefore is constitutionally protected.**

Petitioner was a private citizen who privately practiced his faith. Coach Kennedy spoke as a private citizen, and not a public employee when he performed his brief, and private prayer at the end of Bremerton High School football games, and therefor, his actions are protected under the First Amendment of the Constitution.

Merely being an employee of a public entity does not strip the individual of the right to freely express themself. *Tinker* 393 U.S. at 503, 506. The First Amendment of the Constitution protects a public employees rights to speak freely so long as it is a matter of public concern, however, if that speech is made within the scope of their employment it is not protected by the First Amendment as a private citizen. *Coomes v. Edmonds Sch. Dist. No. 15*, 816 F.3d 1255, 1260, (2016 U.S. App.) LEXIS 5372, \*9, 99. If the employee's speech his based on their position as a teacher, then they spoke as a public employee, not as a citizen. *Garcetti v. Ceballos*, 547 U.S. 410, 421, (2006 U.S.) LEXIS 4341, \*20, 74. Determining whether the expression was made within the defined duties of their job is the critical factor. *Lane v. Franks*, 134 S. Ct. 2369, 2378, 189 L. Ed. 2d 312, 323, (2014 U.S.) LEXIS 4302, \*16. Essentially the issue is whether or not the speech was done in the scope of their employment. *Coomes*, 816 F.3d at 1260.

Coach Kennedy's private prayers are the actions of a private citizen and are not the actions of a public state actor. Coach Kennedy separates himself from the crowd to pray after the game is over, and when players and coaches are leaving the field. R. 99. There is no requirement in Coach Kenney's scope of employment where he must pause to give thanks after a game. This is clear because the school's repeated letters requesting him to stop from "demonstrative religious conduct" after a games conclusion. R. 44. As a result there is no dispute that his private prayers are made outside the scope of his employment.

Coach Kennedy separates himself from the crowd, and privately conducts his brief prayer. R. 99. Coach Kennedy's termination sheds light on the matter. Coach Kennedy was terminated for two reasons: First, "Mr. Kennedy failed to follow district policy and his actions demonstrated a lack of cooperation with administration. The subsequent situations contributed to negative relations between parents, students, community members, coaches and the school district"; and two, "Mr. Kennedy failed to supervise student-athletes after games due to his interactions with media and community. Prior to his public defiance of district directions, Mr. Kennedy had assisted in student supervision. However, most of the season he did not supervise student athletes after games." R. 66. Addressing the first reason, the Bremerton School District's account is flawed. Coach Kennedy has never received a complaint for his religious expressions by a parent, or a member of the community. R. 5. Furthermore, Coach Kennedy has never received a complaint about the matter by opposing teams, and his practice was only brought attention to the school district from a compliment made to the superintendent by a team the high school previously played. R. 11. If anything Coach Kenney's behavior has built a stronger community.

Turning to Coach Kennedy's second reason for termination there is another lack of consistency from the Respondent. "Mr. Kennedy failed to supervise student-athletes after games due to his interactions with media and community. Prior to his public defiance of district directions, Mr. Kennedy had assisted in student supervision. However, most of the season he did not supervise student athletes after games." R. 66. First, the school district already stipulated that the prayer length is fleeting. A quick 30 second prayer would certainly not detract anymore from his duty than a bathroom break. By stating Coach Kennedy failed to supervise his students, it is implied those actions were outside the scope of his employment, and thus, making his prayer protected.

The next issue falls in his job duty and their prior remedy for the situation. The school already knew his prayer was outside the scope of his employment. Already establishing the impossibility of Coach Kennedy failing to look after his kids due to his proximity, the school suggested something more drastic in their letter to Petitioner on October 23, 2015. Bremerton School District stated that his post-game ritual drew him away from postgame responsibilities by separating and distracting him from the team, although it never specifically stated any rules or obligations for Coach Kennedy to follow. R. 13. It suggested he instead go to a secluded area in the school, like a classroom, or an office, immediately after the game to pray. R. 13. The Respondent clearly does not believe the prayer detracts from Coach Kennedy's players because if him praying on the 50-yard line while his players are in proximity is him failing to supervise, then based on their suggestion, Coach Kennedy going to a private area in the school would be doing just the same. The prayer is outside of the scope of the employment of Coach Kennedy, and the Respondent admits to it in their October 23, 2015 letter.

Even the notion that Coach Kennedy was dressed wearing Bremerton High School attire is unfound. R. 44. The clothing on his back does not change that he was still using protective speech. Both parents and students wear Bremerton High School apparel to games. Wearing a shirt with the school's logo does not make you an employee. More importantly even being identified as a public employee does not forfeit your constitutionally protected rights of expression. *Graziosi v. City of Greenville Miss*., 775 F.3d 731, 737, 2015 (U.S. App.) LEXIS 370, \*11, 39. Furthermore public employees receive First Amendment protections for expressions made at work, nor are they these protections watered down. *Dahlia v. Rodriguez*, 735 F.3d 1060, 1070-1071, (2013 U.S. App.) LEXIS 17489, \*25-29.

Coach Kennedy's actions are simply an exposure to religious conduct, and his efforts to do it alone and private are clear. No only are they clear, but they are stipulated by both parties. Bremerton School District admits that Coach Kennedy's prayers are not coercive. R. 49. The students never felt obligated to participate. R. 49. Respondent even stipulates these prayers were fleeting in length. R. 159. Simply because Coach Kennedy is working does not forbade his ability to practice his religion to himself. Another Coach for Bremerton High School, Coach Boynton, engages in a Buddhist chat around the same time as Coach Kennedy. R. 10. Coach Boynton was never disciplined or told to stop his actions. R. 10. School employees are not stripped of their rights to privately express their constitutional rights. This a mere exposure to religion, as it was stated in the *Lynch* case. A society cannot function with a complete wall between church and state, and that is a common misconception to the phrase. *Lynch* 465 U.S. at 668, 670.

Coach Kennedy spoke as a private citizen when he performed his post-game prayer. His actions were done outside the scope of his employment, which is the critical question to determine when analysing public versus private citizen speech. The post-game prayer being outside the scope of his employment is even implied to be acknowledged by the Respondent due to their suggestions for remedies, and reasons for termination. For these reasons this Court should find Coach Kennedy spoke as a private citizen.

1. **As a matter of policy the First Amendment is important and integral to the fabric of American society, and ruling in favor of Respondent diminishes the value and importance of the First Amendment and the ability to freely practice a religion.**

As a matter of policy, it is important to maintain the Free Exercise Clause of the First Amendment of the Constitution. Affirming the decision of the Ninth Circuit Court of Appeals greatly damages the right of public employees to freely practice their religion, and strips them of their First Amendment rights. Merely being an employee of a public entity does not strip the individual of the right to freely express themself. *Tinker* 393 U.S. at 503, 506. No segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government. It has never been thought either possible or desirable to enforce a regime of total separation. The Constitution does not require complete separation of church and state; it requires accommodation, not merely tolerance, of all religions, and forbids hostility toward any. Anything less would require the "callous indifference" we have said was never intended by the Establishment Clause. *Lynch* 465 U.S. at 668, 673. Preventing students and faculty from voluntarily performing the Pledge of Allegiance simply because it says "God" would simply be an inhibitor to religion. *Freedom from Religion Found.* 626 F.3d at 1, 9.

As it was stated in the *Marsh* case the concept of religion is imbedded in the fabric of American society. The *Lynch* case illustrates how the idea of perfect separation is fundamentally flawed when you observe our First Amendment rights. Separation in and of itself is suppressive in nature because it strips those who must abide of their ability to freely practice their religious beliefs. The termination of Coach Kennedy was unfound and unconstitutional. Coach Kennedy spoke as a private citizen during his work hours, and was punished for respectfully expressing his religious beliefs after the conclusion of a football game by giving thanks to God. R. 10. This Coach Kennedy did not speak, and was silent during his prayer. R. 8. He removes himself from the crowds of people, and is alone. R. 8. He does not ask students or others to participate. R. 8. Both parties even stipulate that the prayer is fleeting in length- only about 30 seconds at a maximum. R. 8. Many Christians pray before they eat, this precedent could prevent Christians, or other religious denominations, from silently saying prayers simply because they are employed by the state, on-shift, and on school grounds. Coach Kennedy's actions were both private, and brief. R. 8. No one heard Coach Kennedy saying a prayer since it was silent. R. 73. Despite it being demonstrative, Coach Kennedy went to every reasonable length possible to be both respectful, and private with his religious conduct.

Terminating Coach Kennedy's employment, and preventing him from performing a brief, and silent prayer directly violates the second prong of the Lemon test, and thus, grossly inhibiting individual's ability to practice religion. In order to protect the validity and integrating of the First Amendment of the Constitution, this court should find Coach Kennedy did not violate the Establishment Clause, and spoke as a private citizen.

This Court should reverse the decision of the Ninth Circuit Court of Appeals ruling that Coach Kennedy was in violation of the Establishment Clause. Using the *Lemon* test, a test where if only one prong is violated causes the policy and state action to be deemed unconstitutional, this Court should find that the second prong was violated by the Respondent. The Bremerton School District's initial attempts to prevent Coach Kennedy from silently praying to himself after games, and invietable termination for it, inhibits an individual's ability to freely practice religion. As a result this Court should find that the Respondent's actions violated Coach Kennedy's First Amendment Constitutional rights, and his termination was unconstitutional and discriminatory in nature.

Observing the behavior of Coach Kennedy, as well as how the school district handled the situation, Coach Kennedy's actions were those of a private citizen, and were not done within the scope of his employment. In the letter from the school district on October 23, 2015, the school stated Coach Kennedy should go to a private room immediately after the games conclusion to pray. R. 13. One of the two reasons Coach Kennedy was terminated was because he failed to supervise the althest at the game's conclusion because of his prayer at the 50-yard line. R. 66. This is a clear acknowledgement by the school district that Coach Kennedy's post-game prayer was done outside the scope of his employment because their suggestion to further remove himself from the situation only makes his duty to observe post-game activities more difficult, if not impossible. Given Coach Kennedy removing himself from the crowd in a silent and respectful manner, including the prayer only being fleeting in length, this is nothing more than a quick practice of his religion, and is outside the scope of his employment.

**CONCLUSION**

Wherefore, for the reasons set out above, Petitioner requests that this Court reverses the decision of the Ninth Circuit Court of Appeals denying his Motion for a Preliminary Injunction which would require the Respondent, Bremerton School District

Respectfully submitted,

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Counsel for Petitioner