# No. 16-35801

**IN THE**

**SUPREME COURT OF THE UNITED STATES**

Fall Term 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 RESPONDENT

124R

*Counsel for Respondent*

# Oral Argument Requested

# QUESTION PRESENTED

1. Whether speaking as a public employee in violation of the Establishment Clause bars Petitioner from establishing a First Amendment retaliation claim after he repeatedly conducted religious activities in the presence of students during the performance of employment duties.

# TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

[OPINIONS BELOW v](#_TOC_250008)

[STATEMENT OF JURISDICTION v](#_TOC_250007)

STATUTORY PROVISIONS v

STATEMENT OF THE CASE v

* 1. [STATEMENT OF THE FACTS v](#_TOC_250006)
  2. PROCEEDINGS HISTORY…………………………………………………. ix

[SUMMARY OF THE ARGUMENT ix](#_TOC_250005)

[ARGUMENT 1](#_TOC_250004)

1. [THE PETITIONER DOES NOT HAVE A LIKELIHOOD OF SUCCESS ON THE MERITS BECAUSE THERE WAS NO RETALIATION IN VIOLATION OF THE FIRST AMENDMENT WHEN THE PETITIONER SPOKE AS A PUBLIC EMPLOYEE 1](#_TOC_250003)
2. [IN ANY CASE, THE DISTRICT HAD ADEQUATE JUSTIFICATION TO TREAT PETITIONER DIFFERENTLY FROM THE PUBLIC TO DETER VIOLATION OF THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT 6](#_TOC_250002)
3. [AS A MATTER OF POLICY, PUBLIC EMPLOYEES SHOULD BE HELD TO THE STANDARDS SET FORTH IN THE ESTABLISHMENT CLAUSE TO DETER RELIGIOUS OPPRESSION BY THE GOVERNMENT](#_TOC_250001)

[CONCLUSION 9](#_TOC_250000)

**TABLE OF AUTHORITIES UNITED STATES SUPREME COURT CASES:**

*Edwards v. Aguillard*,

482 U.S. 578 (1987)............……………………………………………………………….6

*Engel v. Vitale*,

370 U.S. 421 (1962).

………………………………………………….…………………...6

*Epperson v. Ark*,

393 U.S. 97 (1968)………………………………..……………………………………….5

*Good News Club v. Milford Cent. Sch*.,

533 U.S. 98 (2001) ……………………………………………………………………. 2-3

*McCreary Cty., Ky. v. Am. Civil. Liberties Union of Ky*.,

545 U.S. 844 (2005)…………………………...……………………………………….….5

*Pickering v. Bd. of Educ*.,

391 U.S. 563 (1968) …………………………………………………………………. 1-2

*Santa Fe Indep. Sch. Dist. v. Doe*,

530 U.S. 290 (2000) …………………………………………………………………....2, 6

**UNITED STATES CIRCUIT COURT CASES:**

*Eng v. Cooley*,

552 F.3d 1062 (9th Cir. 2009)………………………………………………...………...1-2

*Johnson v. Poway Unified Sch. Dist*.,

658 F.3d 954 (9th Cir. 2011)………..………………………………..…………...…….2-4

*Kennedy v. Bremerton Sch. Dist*.,

869 F.3d 813 (9th Cir. 2017)………..……………………………….………………….1-2

*Sanders Cty. Republican Cent. Comm. v. Bullock*,

698 F.3d 741 (9th Cir. 2012). …………………………………………………………….1

**FEDERAL STATUTES AND REGULATIONS**

42 U.S.C. § 1983 (2012) ………………………………………………………………………….1

**OTHER SOURCES:**

Esbeck, Carl H. *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, B.Y.U.L. Rev. 1385, 1395 (2004) …………………………………..9

Esbeck, Carl H. *The Establishment Clause as a Structural Restraint on Governmental Power*,

84 Iowa L. Rev. 1, 4. (1988)….……………………………………………..…………….9

# OPINIONS BELOW

The United States Court of Appeal for the Ninth Circuit granting appeal is not reported but available reported at No. 3:16-CV-05694-4BL. The United States Supreme Court granted petition for writ of certiorari on September 5, 2018. R. 346.

# STATEMENT OF JURISDICTION

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

# CONSTITUTIONAL AND STATUTORY PROVISIONS

The adjudication of this case involves application of the First Amendment of the United States Constitution. In addition, it requires application of 42 U.S.C. § 1983. The relevant texts of the constitutional provisions and statutes are attached in the Appendices.

# STATEMENT OF CASE

# STATEMENT OF THE FACTS

Bremerton High School (“BHS”) is located in the Bremerton School District (“the District”) which is a municipal corporation. R. 142. There are approximately 5,200 students within the district ranging from elementary school to high-school. R. 142. The District hired Petitioner as an assistant football coach for the BHS varsity football team and head coach for the BHS junior varsity team in 2008. R. 142. Petitioner was employed under a one year contract with the District in which he received one evaluation under each contracted year. R. 142. Every year, employed coaches in the District sign an agreement in which they acknowledge they have read and agreed with the District's polices and procedures. R.142. Under the agreement, head coaches and assistant coaches are responsible for supervising students until students leave for their parents. R. 142 - 143. Students are under the care of both head coaches and assistant coaches

before, during and after games. R. 143.

While serving as assistant coach, the Petitioner had the specific job duties of "assisting head coach with his/her supervisory responsibilities;" "accompanying and directing all games at home or out of town;" and "supervising dressing rooms." R. 143. The Petitioner’s job duties also included "supervising students immediately following the completion of the game." R. 143.

Additionally, the Petitioner was responsible for engaging in post-game discussions with coaches and supervising students in the locker rooms until they have left school property. R. 143. Prior to 2015, the Petitioner received positive feedback on his performance evaluations each year. R. 98.

During the beginning of the 2015 - 2016 school year, the District learned that the Petitioner initiated an invite to an opposing school's football team to join in a Christian prayer after a football game. R. 143. Prior to the 2015 - 2016 school year, the District was not aware of any post-game prayer activity conducted by the Petitioner. R. 143. Upon learning of the Petitioner’s post-game prayer invite to an opposing football team, the District conducted an inquiry into whether his conduct complied with Board Policy 2340, titled "Religious-Related Activities and Practices." R. 143. After the inquiry the District learned that the Petitioner led students and coaches in both pre-game and post-game speeches that included religious references equating to prayer. R. 143.

Upon this finding, the District's Superintendent Leavell wrote and a submitted a letter to Mr. Kennedy on September 17, 2015. The letter explained that the Petitioner’s conduct was most likely to be found to violate the First Amendment's Establishment Clause. R. 143. The letter asked the Petitioner to "omit religious expression" from his speeches with students and District employees. R. 143. Furthermore, the letter detailed that the students "may initiate religious expression cannot be suggest, encouraged, discouraged, or supervised by District staff." R. 143.

The letter also explained that the Petitioner was free "to engage in religious activity, including prayer" as long as his activity was physically "separate from any student activity, and students may not be allowed to join such activity." R. 144.

Following the letter, the Petitioner temporarily stopped engaging in religious post-game activities. R. 101. After the ending of the September 18, 2015 game, the Petitioner gave a speech but did not include any religious references. R. 101. He also did not pray at the 50-yard line. R.

101. Following the game, he went home but felt he had broken his commitment he made to God and felt dirty. R. 101. He then went back to the football stadium and prayed at the 50-yard line after everyone left the premises. R. 101. On October 14, 2015, the Petitioner’s attorney, Hiram Sasser, submitted a letter to the District. R. 144. The letter asked that the District accommodate the Petitioner’s religious practice of praying on the 50-yard line following football games. R.

144. The letter further stated that the District's September 17 letter contained directives that were unnecessary and unlawful and that he would continue praying at the 50-yard line. R. 144.

The Petitioner maintained that his “sincerely held religious beliefs required him to engage in brief private religious expression at the conclusion of BHS football games.” R. 98. The Petitioner further stated that he made a commitment to God to give thanks through prayer following the closing of each football game. R 98. This commitment requires him to kneel at the 50-yard line and pray immediately after the game is over but before students and the game attendees vacate the premises. R. 98 - 99. The Petitioner began his religious activities post game in 2008 where he originally prayed alone. R. 99. Eventually the majority of the football team joined him in prayer after games. R. 99. The Petitioner’s post game speeches included phrases such as, “Lord, I lift these guys up for what they just did on the field.” R. 100. The Petitioner maintained never pressured members of the football to join him in prayer and also said that other

BHS coaches engage in religious expression at the beginning and closing of football games. R.

100. The Petitioner testified that he observed BHS Assistant Coach David Boynton engage in Buddhist chanting near the 50 year line following the closing of games. R. 100. The District stated it did not observe Coach Boynton engaging in Buddhist chanting and that Coach Boynton was not a practicing Buddhist. R. 142 – 156.

At the end of the football game on October 16, 2015, the Petitioner waited until the BHS football team shook the opposing team’s hands and left the field for the fight song to conduct his prayer at the 50-yard line. R. 102. During his prayer, both teams, coaches, members of the general public, and media knelt beside him to pray as well. R. 102, 122. On October 23, 2015, the District's Superintendent submitted a letter to the Petitioner that explained his actions likely violated the First Amendment. R. 144. The letter also explained to the Petitioner that his actions were inconsistent with the directives laid forth in the September 17 letter. R. 144. The letter suggested that the Petitioner would receive an accommodation of employee religious exercise "so long as that exercise did not constitute endorsement or interfere with [his] performance of his job duties." R. 144. The letter also suggested that the Petitioner discuss options for his religious accommodation including creating a private space for religious activity. R. 144. The District proposed options for the Petitioner including using the press box, school building, or locker room as an alternative accommodation. R. 144. The Petitioner did not accept the alternative accommodations proposed by the District. R. 144.

On October 26, 2015, the Petitioner performed his duties as assistant coach during the varsity team's football game. Following the ending of the game, The Petitioner walked to the 50 yard line where he kneeled and prayed. R. 145. The Petitioner was in BHS attire and both students and attendees of the game were present to observe his religious activities. R. 145.

On October 28, 2015, the District sent a letter to the Petitioner stating that his actions on October 26 were "in direct violation of the directives set forth in my October 23 letter." The letter also restated the District would be willing to accommodate the Petitioner’s private religious exercise and asked that he contact the District to discuss options. R. 145. The Petitioner was also placed on paid administrative leave. R. 145. After completion of the football season in November 2015, the Petitioner underwent his annual evaluation conducted by Jeff Barton, District Athletic Director. R. 139 – 140, 145. The evaluation stated that the Petitioner failed to follow the District’s policy, therefore he failed to cooperate with the administration. R. 139 – 140, 145. The evaluation stated that the Petitioner’s failure to cooperate with the administration created negative relationships between the students, coaches, parents and overall community within the district. R. 139 – 140, 145. The evaluation further stated that the Petitioner’s post game activities and media interactions caused him to neglect his duty to supervise student athletes following the closing of games. R. 139 – 140, 145. The evaluation recommended that the Petitioner not be re-hired for the 2016 – 2017 school year. R. 139 – 140, 145. On December 15, 2015, the Petitioner filed a complaint of religious discrimination with the Equal Employment Opportunity Commission (“EEOC”). R. 16. In January 2016, Petitioner’s contract was not renewed with the District. R. 15. On January 30, 2016, the Petitioner filed a discrimination charge against the District. R. 16. On June 27, 2016, the United States Department of Justice issued a right-to-sue letter to the Petitioner. R. 68.

# PROCEDURAL HISTORY

On August 9, 2016, the Petitioner brought suit under 28 U.S.C. § 1331, 42 U.S.C. § 1983 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 seeking injunctive and declaratory relief. The petitioner claimed that the District violated his First Amendment

constitutional and civil rights to engage in the private religious expression that is compelled by his sincerely held religious beliefs. R. 4. The Petitioner claimed that the District violated those rights by taking retaliatory adverse employment action him because of his expression. R. 4. On September 16, 2016, the petitioner filed a motion for a preliminary injunction and supporting memorandum of law. R. 69. The petitioner claimed that he was entitled to a preliminary injunction asserting that he met the legal standards and was likely to succeed on the merits of his First Amendment claims. R. 69. On September 16, 2016, the District filed Oppositions to Plaintiff’s Motion for Preliminary Injunction denying that it discriminated against the Petition, that the petitioner’s conduct violated the Establishment Clause and that the District provided the petitioner with reasonable alternative accommodations. R. 142 – 156.

On September 19, 2016, the United States District Court of the Western District of Washington conducted the Preliminary Injunction hearing. R. 157. The district court denied the petitioner’s motion for preliminary injunction holding that the District did not violate the petitioner’s constitutional right of free speech. R. 200. On October 3, 2016 the petitioner filed a an appeal to the United States Court of Appeals for the Ninth Circuit under 28 U.S.C. § 1292(a)(1) and notice was given to the District. R. 203.

On August 23, 2018, the United States Court of Appeal for the Ninth Circuit affirmed the district court’s decisions finding that the Petitioner could not show a likelihood of success on the merits of his Frist Amendment retaliation claim, thus he was not entitled to a preliminary injunction. *Kennedy v. Bremerton Sch. Dist*., 869 F.3d 813 (2017). On September 5, 2018, this Court granted writ of certiorari to determine whether speaking as a public employee in violation of the Establishment Clause bars Petitioner from establishing a First Amendment retaliation

claim after he repeatedly conducted religious activities in the presence of students during the performance of employment duties.

# SUMMARY OF THE ARGUMENT

The Respondent, Bremerton School District, respectfully asks this Court to affirm decision the United States Court of Appeals for the Ninth Circuit petitioner could not show a likelihood of success on the merits of his First Amendment retaliation claim, thus he was not entitled to a preliminary injunction. First, to receive a preliminary injunction on a First Amendment retaliation claim, the Petitioner must be able to show a likelihood of success on the merits. To show a likelihood of success, the Petitioner had to show there was a First Amendment retaliation violation which requires the Petitioner to show his speech was conduct of a private citizen. The Petitioner will not be able to show a likelihood of success on the merits because the Petitioner spoke as a public employee while conducting religious activities following the conclusions of football games. Therefore, the District did not retaliate against Petitioner in violation of his First Amendment Rights.

In any case, the Petitioner still is not entitled to a preliminary injunction because the District did not have adequate justification to treat him differently from the public. As an employee of BHS, Petitioner conduction religious activities directly after the ending of BHS football games, in front of students, and alongside students. This conduct likely violates the Establishment Clause of the First Amendment and therefore provides the District with adequate justification to deter speech.

# ARGUMENT

# THE PETITIONER DOES NOT HAVE A LIKELIHOOD OF SUCCESS ON THE MERITS BECAUSE THERE WAS NO RETALIATION IN VIOLATION OF THE FIRST AMENDMENT WHEN THE PETITIONER SPOKE AS A PUBLIC EMPLOYEE

The United States Court of Appeals for the Ninth Circuit was correct in holding that Petitioner was not entitled to a preliminary injunction because he spoke as a public employee and therefore cannot show a likelihood of success on the merits of his retaliation in violation of the First Amendment claim. To obtain a preliminary injunction a plaintiff must "establish that (1) he is likely to succeed on the merits of his claim, (2) he is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in his favor, and (4) an injunction is in the public interest." *Sanders Cty. Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 744 (9th Cir. 2012).[1](#_bookmark0)

To establish that there is a likelihood to succeed on the merits of a First Amendment retaliation claim, the petitioner must show there was a First Amendment retaliation violation. To prove a First Amendment retaliation violation five factors are considered: "(1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action; (4) whether the state had an adequate justification for treating the employee differently from other members of the general public." *Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009) (see *Pickering v. Bd. of Educ*., 391 U.S. 563, 568(1968)).

The first and third issues were not contested by the District and the Petitioner and are therefore not at issue. *Kennedy v. Bremerton Sch. Dist*., 869 F.3d 813, 822 (9th Cir. 2017). The only factors at issue are whether the petitioner spoke as a public employee and whether the

1 The Ninth Circuit Court of Appeals did not analyze whether “(2) he is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in his favor, and (4) an injunction is in the public interest." Therefore, the remaining 3 factors are not at issue.

District had adequate justification to treat petitioner differently from members of the general public. *Kennedy*, 869 F.3d at 822.

To determine whether the petitioner spoke as a public citizen, first, “a factual determination must be made as to the "scope and content of a plaintiff’s job responsibilities." J*ohnson v. Poway Unified Sch. Dist*., 658 F.3d 954, 966 (9th Cir. 2011) (see *Eng*, 552 F.3d at 1071). Second, the "ultimate constitutional significance" of those facts must be determined as a matter of law. *Eng*, at 1071.

In *Pickering v. Bd. of Educ*., 391 U.S. 563 (1968), a public school teacher wrote and submitted a letter to the editor of a local newspaper criticizing the school board’s superintendent after a proposal to "increase school taxes was defeated by local voters." *Pickering v. Bd. of Educ*., 391 U.S. 563, 564 (1968). The local newspaper published the letter and the school teacher was subsequently dismissed by the board of education who determined that the letter was "detrimental to the efficient operation and administration of the schools of the district" pursuant to Illinois state statute providing that "interests of the school require[d] [his dismissal]." *Pickering v. Bd. of Educ*., 391 U.S. at 564 - 565. The teacher filed a claim against the school board stating that the dismissal was in violation of her First and Fourteenth Amendment Rights. *Pickering*, 391 U.S. at 565. The Circuit court affirmed the teacher's dismissal finding that the letter was detrimental to the school board's interests and that the finding was "supported by substantial evidence and that the interests of the schools overrode appellant's First Amendment rights." *Id*. at 565. The Supreme Court of Illinois affirmed the finding of the Circuit Court. *Id*.

This Court found that the teacher's First Amendment Rights had been violated and reversed the Illinois Supreme Court's decision. *Id.*

This Court reasoned that the letter contained statements that were not "directed towards any person with whom [the teacher] would normally be in contact in the course of his daily work.” *Id*. at 569-70. Additionally this Court found that the contents of the letter did not appear to have "impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally.” *Id*. at 572-73. This Court found that “the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.” *Id*. at 573. Therefore this Court found that the teacher spoke as a private citizen. *Id*.

In this case, Petitioner’s conduct was directed towards persons he would normally be in contact with during the course of his daily work. The District hired Petitioner as an assistant football coach for the BHS varsity football team and head coach for the BHS junior varsity team.

R. 142. As part of his job description, Petitioner was responsible for supervising students until students left the school’s premises for their parents. R. 142 - 143. Petitioner’s supervisory duties were in action before, during and after football games. R. 143. After the closing of each game, Petitioner would kneel at the 50-yard line and pray before students and the game attendees vacated the premises. R. 98 - 99. Petitioner began his religious activities post game in 2008 where he originally prayed alone. R. 99. By 2015, the majority of the football team joined him in prayer after games. R. 99. By October 16, 2015 both teams, coaches, members of the general public, and media joined Petitioner in prayer. R. 122, 125. The Petitioner’s conduct impeded his ability to perform his duties because following BHS games, the Petitioner would focus on activities and media interactions which in turn meant he had to neglect his duty to supervise student athletes following the closing of games. R. 139 – 140, 145. Furthermore, Petitioner’s

expression of religious activity at the 50-yard line has brought significant media attention to as well as attention from students and the general public. R. 139 – 140, 145. This action of religious expression was therefore directed towards student members of the football team who he would normally be in contact with during the course of his duties. Additionally, other religious groups, such as the Satanists group, have attempted to observe their religious expressions on the field in reaction to Petitioner’s actions. R. 126. As a result of Petitioner’s conduct, the District has experienced an interference with its regular operations.

The second inquiry to make to determine whether Petitioner spoke as a public employee involves determining the "ultimate constitutional significance" of those facts as a matter of law. *Eng*, at 1071. In *Johnson v. Poway Unified Sch. Dist*., 658 F.3d 954 (9th Cir. 2011) a school board ordered a math teacher to take down classroom banners that contained religious speech after receiving a complaint from a student. *Johnson v. Poway Unified Sch. Dist*., 658 F.3d 954, 959 (9th Cir. 2011). The teacher complied with orders and later filed a federal suit alleging that the school board violated his First and Fourteenth Amendment rights seeking declaratory and injunctive relief. *Johnson v. Poway Unified Sch. Dis*t., 658 F.3d at 959. Shortly after, both parties filed cross-motions for summary judgment. *Johnson* 658 F.3d at 960. The district court granted Summary Judgment to the teacher finding that the District “created a limited public forum for teacher speech in its classrooms and had impermissibly limited Johnson's speech based upon his viewpoint.” *Johnson* at. 960. The district court then granted the teacher declaratory and injunctive relief. The District appealed the district court’s decision and the Ninth Circuit Court of Appeals reversed the lower court’s decision finding that District “did not violate the teacher's rights under either the Establishment or Equal Protection clauses of the United States Constitution, as applied by the Fourteenth Amendment.” *Id*. at 957.

In determining constitutional significance, The Ninth Circuit reasoned that “[a]n ordinary citizen could not have walked into Johnson’s classroom and decorated the walls as he or she saw fit, any more than an ordinary citizen could demand that students remain in their seats and listen to whatever idiosyncratic perspective or sectarian viewpoints he or she wished to share.” *Id*. at 968. The Ninth Circuit further reasoned that “Johnson took advantage of his position to press his particular views upon the impressionable and captive minds before him.” *Id*. Additionally, the Ninth Circuit held that “teachers necessarily act as teachers for purposes of a Pickering inquiry when [1] at school or a school function, [2] in the general presence of students, [3] in a capacity one might reasonably view as official.” *Id*. Therefore, the Ninth Circuit found that the District “acted well within constitutional limits in ordering Johnson not to speak in a manner it did not desire.” Id.

In this case, Petitioner kneels at the 50-yard line to pray immediately after the game is over but before students and the game attendees vacate the premises. R. 98 - 99. As a football coach of BHS, the Petitioner had access to the football that was not granted to an ordinary citizen. For example, members of the Satanist religion requested to obtain access to the football field and were subsequently denied because the field is not an open forum. R. 126. The Petitioner has taken advantage of his position as a football coach to conduct his religious activity on the football field while players and the audience are present. The Petitioner’s role as coach puts him in the position to assert his religious views upon the impressionable minds of members of the junior varsity and varsity team. *Id*. Similar to *Johnson,* although Petitioner has not directly coerced students to join him in prayer, he has indirectly coerced players through his position as coach. *Id*. The Petitioner’s capacity could be reasonable viewed as official due to his role as a coach for BHS.

To conclude, in compliance with *Pickering*, this Court should find that as a factual determination, Petitioner spoke as a public employee because his conduct was directed towards students, teachers, and the general public and students are who Petitioner would normally be in contact in the course of his daily work. Furthermore, Petitioner’s conduct both impedes the performance of his duties to supervise student athletes following the closing of BHS football games and interferes with the District’s regular operations. Therefore that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.” *Id*. at 573. Further, this Court should find that the District “acted well within constitutional limits” when it suggested alternative reasonable accommodations to Petitioner and subsequently decided not to re-hire based on his conduct. *Id*. This Court should affirm the Ninth Circuit Court of Appeal’s finding that the Petitioner spoke as a public employee.

# IN ANY CASE, THE DISTRICT HAD ADEQUATE JUSTIFICATION TO TREAT PETITIONER DIFFERENTLY FROM THE PUBLIC TO DETER VIOLATION OF THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

The Ninth Circuit was correct in its concurrence that the District had adequate justification to treat petitioner differently from the public. The Establishment Clause provides that “Congress shall make no law respecting an establishment of religion.” *U.S. Const. amend. I*. The Clause “mandates governmental neutrality between religion and religion, and between religion and nonreligion.” *McCreary Cty., Ky. v. Am. Civil. Liberties Union of Ky*., 545 U.S. 844, 860 (2005) (quoting *Epperson v. Ark*., 393 U.S. 97, 104 (1968)). This court has held that in the public school context, “[t]he State exerts great authority and coercive power through mandatory attendance requirements, and because of the students’ emulation of teachers as role models and the children’s susceptibility to peer pressure.” *Edwards v. Aguillard*, 482 U.S. 578, 583‒84

(1987). It is historically held by this Court that “one of the greatest dangers to the freedom of the individual to worship in his own way lay[s] in the Government’s placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services.” *Engel*

*v. Vitale*, 370 U.S. 421, 429 (1962). “[A] state interest in avoiding an Establishment Clause violation may be characterized as compelling, and therefore may justify content-based discrimination.” *Good News Club v. Milford Cent. Sch*., 533 U.S. 98, 112 (2001).

In *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000), respondents brought a suit claiming its school district violated the Establishment Clause of the First Amendment after Santa Fe High School maintained a practice of allowing students to deliver prayers over the “public address system before each home varsity football game.” *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000). The school changed its policy during the pending law-suit which allowed students to vote whether a prayers would be given at games and who would be allowed to give the actual prayer.” *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. at 301. The District Court found that the policy violated the Establishment Clause and found for the respondents. *Santa Fe Indep. Sch. Dist. v. Doe* at 301.

The petitioners were granted writ of certiorari to determine “whether an objective observer, acquainted with the text, legislative history, and implementation of the [policy], would perceive it as a state endorsement of prayer in public schools” thus violating the Establishment Clause. *Id*. at 308. This Court held that “an objective Santa Fe High School student w[ould] unquestionably perceive the inevitable pregame prayer as stamped with her school’s seal of approval.” *Id*. This Court reasoned that the delivery of the prayer would be to “a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property.” *Id.* at 307. Additionally, during prayer the event would be “clothed in the traditional

indicia of school sporting events, which generally include not just the team, but also cheerleaders and band members dressed in uniforms sporting the school name and mascot.” *Id.* at 308. This Court concluded that this would give the impression that the prayer was “delivered with the approval of the school administration.” *Id*.

This Court also asserted that the school had a “long-established tradition of sanctioning student-led prayer at varsity football games.” *Id*. at 315. Therefore it needed to be included in determining the perception of an objective observer. *Id*. The Court concluded that the tradition of prayer set forth by the school’s policy would enable a student to reasonably “infer that the specific purpose of the policy was to preserve a popular state-sponsored religious practice.” *Id*.

Lastly, the Court held that implementing the policy of prayer would force students to choose “between attending these games and avoiding [a potentially] personally offensive religious ritual.” *Id.* at 312. The Court concluded that “the realities of the situation plainly reveal that [the district’s] policy involves both perceived and actual endorsement of religion” violating the Establishment Clause. *Id.* at 305.

Similar to this case, the Petitioner’s request to pray at the 50-yard line following the conclusion of BHS football games would require the prayer to take place in front of “a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property.” *Id.* at 307. The games are frequently attended by members of the community, students, opposing teams, and their fans. Similar to *Sante Fe Indep. Sch. Dist*., the Petitioner’s prayer would be “clothed in the traditional indicia of school sporting events, which generally include not just the other team, but also cheerleaders and band members dressed in uniforms.” *Id*. Additionally, Petitioner has prayer at the 50-yard line following the conclusion of BHS football games since 2008. R. 99. An objective BHS student could perceive the Petitioner’s tradition of

post-game prayer as a District endorsement of encouraging prayer and religious activities. If the District allowed Petitioner to continue to pray on the 50-yard line, it would have “improper effect of coercing those present to participate in an act of religious worship.” *Id*.

Given the facts of this case, the District has satisfied the fourth factor of the Eng test and had adequate justification to treat petitioner differently from the public to deter violation of the Establishment Clause. Therefore, the Petitioner should not be granted a preliminary injunction.

# AS A MATTER OF POLICY, PUBLIC EMPLOYEES SHOULD BE HELD TO THE STANDARDS SET FORTH IN THE ESTABLISHMENT CLAUSE TO DETER RELIGIOUS OPPRESSION BY THE GOVERNMENT

The First Amendment is one of the most fundamental liberties. The First Amendment protects an individual’s freedom of speech against government action. *U.S. Const. amend. I*. The Establishment Clause of the First Amendment is equally as fundamentally important. The separation of church and state was an important issue during the founding of the United States because prior to the Declaration of Independence, colonies had traditionally been under the rule of the English monarch. Under such a monarch, religious was used to oppress English subjects in a variety of ways. After the establishment of the thirteen colonies, the belief began to shift away from the “conventional argument that material government support for religion and religious institutions was necessary to ensure religion's salutary effect on public morality and civic virtue.” Esbeck, Carl H. *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 B.Y.U.L. Rev. 1385, 1395. On December 15, 1791, the Bill of Rights was ratified where the first of the ten amendments the set forth: “Congress shall make no law respecting an establishment of religion, nor 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.” *U.S. Const. amend. I*. The Establishment Clause therefore was set forth to arguably be “conceptualized as a structural restraint on the

government's power to act on certain matters pertaining to religion.” Esbeck, Carl H. *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 Iowa L. Rev. 1, 4.

The American population is religiously diverse and the Establishment Clause serves to prohibit government from enforcing religious traditions and beliefs on citizens. To enforce religious activities on a citizen would be an act of oppression and a violation of the citizen’s right to religious freedom. This would also be an unconstitutional over-reach into the private life of a citizen. Therefore, government actors and government officials should adhere to the Establishment Clause to deter abuse of and religious oppression.

# CONCLUSION

Wherefore, Respondent, Bremerton School District, requests that this Court affirm the decision of the Ninth Circuit Court of Appeals’ finding that the district court was correct in concluding that Petitioner could not show a likelihood of success on the merits of his First Amendment retaliation claim, thus he was not entitled to a preliminary injunction.

Respectfully submitted,

Counsel for Bremerton School District