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 RESPONDENT

176R

*Counsel for Respondent*

**Oral Argument Requested**

**QUESTION PRESENTED FOR REVIEW**

1. Whether public school teachers and coaches surrender their First Amendment rights guaranteed to private citizens when they engage in demonstrative speech when still on the job and “in general presence of” students.

**TABLE OF CONTENTS**

QUESTION PRESENTED FOR REVIEW…..……………………………………………………i

TABLE OF AUTHORITIES.….……………………………………………………………….....ii

OPINIONS BELOW…………………………………………………………………………...…vi

STATEMENT OF JURISDICTION……………………………………………………………...vi

CONSTITUTIONAL AND STATUTORY PROVISIONS……………………………….……..vi

STANDARD OF REVIEW………………………………………………………………………vi

STATEMENT OF THE CASE…………………………………………………………………..vi

1. STATEMENT OF THE FACTS……………………………………………………..vi
2. PROCEDURAL HISTORY…………………………………………………………..x

SUMMARY OF THE ARGUMENT………………………………………………………….....xi

ARGUMENT…………………………………………………………………………………..….1

COACH KENNEDY IS NOT ENTITLED TO PROTECTION UNDER THE FIRST AMENDMENT BECAUSE HE SPOKE AS A PUBLIC EMPLOYEE WHEN HE KNEELED AND PRAYED ON THE FIFTY-YARD LINE IMMEDIATELY AFTER THE FOOTBALL GAMES “IN THE GENERAL PRESENCE OF” STUDENTS………1

1. Coach Kennedy’s Demonstrative Speech Is Not Protected Under The First Amendment Because Coach Kennedy Still Acted In His Official Capacity As A Coach When He Kneeled And Prayed Immediately After The Football Games………………………..2
2. Coach Kennedy’s Demonstrative Speech Is Not Protected Under The First Amendment Because It Fell Within The Scope Of His Professional Duties And Did Not Seize Once Football Games Were Over……………………………………………………………4
3. Coach Kennedy’s Demonstrative Speech Is Not Protected Under The First Amendment Because By Virtue Of His Position As a Coach, Coach Kennedy Took Advantage To Instill His Religious Views Into Students’ Minds…………………………………….7
4. As A Matter Of Public Policy, It Is Critical To Draw The Line Between A Protected Speech Of Citizens And An Unprotected Speech Of Public Employees To Avoid Violating The Establishment Clause Of The First Amendment………………………10

CONCLUSION…………………………………………………………………………………..13

**TABLE OF AUTHORITIES**

**UNITED STATES SUPREME COURT CASES:**

*Borough of Duryea v. Guarnieri*,

564 U.S. 379 (2011)…………………………………………………………………...…..2

*Connick v. Myers*,

461 U.S. 138 (1983)…………………………………………………………………*passim*

*Garcetti v. Ceballos*,

547 U.S. 563 (1968)……………………………………………………………….passim

*Janus v. AFSCME, Council 31*,

138 S. Ct. 2448 (2018)……………………………………………………………….……2

*Lynch v. Donnelly*,

465 U.S. 688 (1984)…………………………………………………………….………..11

…

*Perry v. Sindermann*,

408 U.S. 593 (1972)…………………………………………………………….…………4

*Pickering v. Bd. Of Educ.*,

391 U.S. 563 (1968)…………………………………………………………………...…10

*Thornhill v. Alabama*,

310 U.S. 88 (1940)……………………………………………………………..……….…1

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

530 U.S. 290 (2000)……………………………………………………………….……..11

*Waters v. Churchill*,

511 U.S. 661 (1994)……………………………………………………………………….1

*Widmar v. Vincent*,

454 U.S. 263 (1981)………..……………………………………………………………….……10

**UNITES STATES COURT OF APPEALS CASES:**

*Borden v. Sch. Dist. of Tp. of E. Brunswick*,

523 F.3d 153 (3rd Cir. 2008)…………………..………………………………………….8

*Brown v. Armenti*,

247 F.3d 69 (3rd Cir. 2001)………………..……………………………………………..9

*Chavez-Rodriguez v. City of Santa Fe*,

596 F.3d 708 (10th Cir. 2010)…………………………………………………….………2

*Chrzanowski v. Bianchi*,

725 F.3d 734 (7th Cir. 2013)……………………………………………………..……….5

*Coomes v. Edmonds Sch. Dist. No. 15*,

816 F.3d 1255 (9th Cir. 2016)………………………………………………….……….…4

*Dahlia v. Rodriguez*,

735 F.3d 1060 (9th Cir. 2013)………………….……………………………………….…2

*Decotiis v. Whittemore*,

635 F.3d 22 (1st Cir. 2011)…………………...……………………………………….…..5

*Eng v. Cooley*,

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

*Frietag v. Ayers*,

468 F.3d 528 (9th Cir. 2006)……………………….………………………………….…..2

*Graziosi v. City of Greemville*,

775 F.3d 731 (5th Cir. 2015)………………………..…………………………………….5

*Grossman v. S. Shor Pub. Sch. Dist.*,

507 F.3d 1097 (7th Cir. 2007)……………………………………………….……………8

*Hunter v. Town of Mocksville*,

789 F.3d 389 (4th Cir. 2015)…………………………………………….………………..5

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

658 F.3d 954 (9th Cir. 2011)…………………………………….…………………………6

*Kennedy v. Bremerton Sch. Dist.*,

869 F.3d 813 (9th Cir. 2017)……………………………………………………..……….5

*Knopf v. Williams*,

2018 WL 1178346 (10th Cir. 2018)………………………………………………..……..5

*Marble v. Nitchman*,

511 F.3d 924 (9th Cir. 2007)………………………………………………………..…….5

*Peloza v. Capistrano Unified Sch. Dist.*,

37 F.3d 517 (9th Cir. 1994)…………………………………………………………*passim*

*Posey v. Lake Pend Oreille Sch. Dist. No. 84*,

546 F.3d 1121 (9th Cir. 2008)…………………………………….………………………2

*Tucker v. State of Cal. Dep’t. of Educ.*,

97 F.3d 1204 (9th Cir. 1996)………………………………………………………..……10

*Voigt v. Savell*,

70 F.3d 1552 (9th Cir. 1995)…………………………………………………………….10

**UNITED STATES DISTRICT COURT CASES:**

*Freshman v. Mt. Vernon City School District Board of Education*,

212 WL 7143921(Ctt. App. 2012)……………………………………………………….12

*McAauliffe v. Mayor of New Bedford*,

29 N.E. 517 (Mass. 1892)………………………………………………………………..12

*Toney v. Young*,

238 F.Supp.3d 1234 (E.D. 2017)…………………………………………………………7

**CONSTITUTIONAL AND STATUTORY AUTHIRITIES:**

U.S. CONST. amend. I……………………………………………………………..…………vi, 1

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

**SECONDARY AUTHORITIES:**

Diamond Modern Federal Jury Instructions-Civil 10.6 (2018)…………………………….……..1

13 Dorsaneo, Texas Litigation Guide § 203A.84 (2018)………………………………………1

Article: Section 1983, The First Amendment, And Public Employee Speech; Section 1983: Shaping The Right to Fit The Remedy (And Vice Versa), 35 Ga. L. Rev. 939……......1

Michael W. Austin, Ph. d., Coaches Should Be Role Models,

<https://www.psychologytoday.com/us/blog/ethics-everyone/201711/coaches-should-be-role-models>.............................................................................................................................................8

**OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Ninth Circuit is published at *Kennedy v. Bremerton Sch. Dist.*, 869 F.3d 813 (9th Cir. 2017).

**STATEMENT OF JURISDICTION**

Pursuant to Rule 2(a) 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. The First Amendment provision provides: “Congress shall make no law respecting an establishment of religion […]; or abridging the freedom of speech […].” U.S. CONST. amend. I. In addition, it requires application of 42 U.S.C. § 1983 that states as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding […].

42 U.S.C. § 1983.

**STANDARD OF REVIEW**

This Court reviews the Ninth’s Circuit of Appeal’s legal determination of the First Amendment claim *de novo* because the constitutional significance and application of this doctrine is a question of law. *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 966 (9th Cir. 2011).

**STATEMENT OF THE CASE**

1. **STATEMENT OF THE FACTS**

The Bremerton School District (“District”) is a municipal corporation. R. 142. The District

enrolls approximately 5,057 students, 332 teachers, and 400 non-teaching personnel. R. 150.

The District employed Joseph A. Kennedy (“Coach Kennedy”) as a football coach since 2008. R. 97. Coach Kennedy served as an assistant coach for the varsity football team and the head coach for the junior varsity football team. R. 97. The District employed Coach Kennedy under a “one-season contract” that expired at the conclusion of the football season. R. 154. Upon expiration of the contract both the Head Coach and the Athletic Director evaluated the performance of Coach Kennedy and provided recommendations. R. 154. Prior to fall 2015, Coach Kennedy received positive performance evaluations and the Athletic Director recommended that Coach Kennedy be rehired. R. 57-63. On October 5, 2015, the District sighed a “one-season contract” with Coach Kennedy that expired at the conclusion of the football season. R. 128-30. By signing the contract, Coach Kennedy acknowledged that “the athletics program is an integral part of the total educational process” and agreed “to create good athletes and good human beings.” R. 128. Coach Kennedy also acknowledged that he had read and understood “all policies and procedures” and that “a violation of [those] policies may result in a disciplinary action.” R. 128.

Coach Kennedy is a practicing Christian. R. 98. His religious beliefs require him to take a knee at the fifty-yard line and pray for “approximately 30 seconds” immediately following the football games. R. 99. Coach Kennedy has engaged in a “private religious expression” at the conclusion of football games since 2008. R. 99. Initially, he prayed alone. R.99. Later, a group of students asked if they could join Coach Kennedy, and Coach Kennedy agreed. R. 99. Subsequently, the number of students who joined Coach Kennedy grew to include the majority of the team. R. 99-100. Coach Kennedy began giving motivational speeches to the students at the midfield following the completion of the games. R. 100. During his motivational speeches, Coach Kennedy would say, “Lord, I lift these guys for what they just did on the field.” R. 100.

On September 17, 2015, the District’s Superintendent Aaron Leavell (“Mr. Leavell”) sent a letter to Coach Kennedy and provided Coach Kennedy with guidance regarding the Board Policy 2340 (“Religious-Related Activities and Practices”). R. 28. Mr. Leavell clarified that “school staff may not indirectly encourage students to engage in religious activity” that is likely to be perceived by as endorsement of religious expression. R. 29. Mr. Leavell further emphasized that Coach Kennedy’s practices of leading the prayers in the locker rooms and at the midfield after the football games were problematic under the Establishment Clause. R. 28. According to the Board Policy 2340, a religious expression “should be either non-demonstrative if students were also engaged in religious activity […] or it should occur while students are not engaging in the religious conduct.” R. 30. Mr. Leavell confirmed that Coach Kennedy was “free to engage in religious activity, including prayers, so long as it does not interfere with job responsibilities.” R. 30. After the receipt of Mr. Leavell’s September 17th, 2015 letter regarding the Board Policy 2340, Coach Kennedy complied and stopped his religious expression for a while. R. 101. During this time, students also stopped praying on the field. R. 151.

On October 14, 2015, Hiram Sasser (“Mr. Sasser”), Coach Kennedy’s attorney sent a letter to Mr. Leavell and member of the District requesting a religious accommodation for Coach Kennedy to engage in a brief, quiet prayer at the 50-yard line at the conclusion of the games. R. 101. Subsequently, at the conclusion of the football game on October 16, 2015, Coach Kennedy “knelt at the 50-yard lines, closed his eyes, and prayed.” R. 102. “While he was kneeling with his eyes closed, students from opposing team, members of general public joined him on the field and knelt beside him.” R. 102. A large number of people came on to the field. R. 151. “Some people were jumping the fence, others running among the cheerleaders, band, and players.” R. 151. Coach Kennedy’s prayers immediately following the games generated substantial publicity. R. 150. The District received complaints from parents of band members who “were knocked over in the rush of spectators to the field.” R 151. The District also received notification from a Satanist group that it intended to conduct ceremonies on the field after the football games. R. 151.

On October 16, 2015, Mr. Leavell sent another letter to Coach Kennedy emphasizing that Coach Kennedy “may not repeat [his] conduct of October 16, 2015.” R. 45. Mr. Leavell reiterated that Coach Kennedy may not engage in “demonstrative religious activity, readily observable to […] students and attending public” while on duty for the District as assistant coach. R. 45. Mr. Leavell warned that further violations of the District policy would be “grounds for discipline, including discharge from employment.” R. 45. Mr. Leavell offered private locations for Coach Kennedy to pray in the school building, athletic facility or press box. R. 45. Furthermore, Mr. Leavell stated that he was open to discuss options suggested by Coach Kennedy to accommodate his private religion expression before and after the games while still at work. R. 45.

On October 23, 2015 and October 26, 2015, Coach Kennedy continued his practice of engaging in religious expression in presence of students and general public immediately following the games, while still on duty. R. 47. Finally, on October 28, 2015, Mr. Leavell informed Coach Kennedy that he was placed on administrative leave from his position as an assistance coach for failure to comply with District Policy and in violation of directives set forth in October 23, 2015 letter. R. 45. Again, Mr. Leavell offered to discuss the options to accommodate Coach Kennedy’s religious expression after the football games. R. 47.

During the evaluation process, the Head Coach filled out the evaluation form dated November 12, 2015 in which he stated that Coach Kennedy “put himself before the team many times this season.” R. 140. Subsequently, Athletic Director completed evaluation of Coach Kennedy. R. 65-66. The evaluation recommended that Coach Kennedy not be rehired because he “failed to follow district policy” and also failed to supervise players after games “due to his interactions with media and community.” R. 65-66. By its terms, Coach Kennedy’s contract was “one-season contact” which expired at the conclusion of the football season. R. 154. Coach Kennedy chose not to reapply for his position. R. 154.

**PROCEDURAL HISTORY**

On August 9, 2015, the Petitioner, Coach Kennedy, filed a complaint in the United States District Court Western District of Washington at Tacoma against Bremerton School District (“District”). R. 4-21. Coach Kennedy asserted that the District violated his First Amendment rights to free speech, as well as his rights under Title VII of the Civil Rights Act of 1964. R. 6.

On August 24, Coach Kennedy sought preliminary injunction claiming that he would likely succeed on the merits of his First Amendment claims. R. 79. Specifically, Coach Kennedy sought an injunction ordering the District to (1) cease discriminating against him; (2) reinstate him to a football coaching position; and (3) allow Coach Kennedy to take a knee and pray at the fifty-yard line at the conclusion of football games. R. 95.

On September 19, 2016, the District Court denied Coach Kennedy’s motion for preliminary injunction holding that Coach Kennedy would not likely prevail on the merits of his First Amendment claim because he spoke as a public employee, not as a citizen. R. 199-201. Coach Kennedy appealed. R. 203.

The Court of Appeals for the Ninth Circuit affirmed the District Court’s order denying Coach Kennedy’s motion for a preliminary injunction. *Kennedy v. Bremerton Sch. Dist.*, 869 F.3d 813, 832 (9th Cir. 2017). The Ninth Circuit held that because Coach Kennedy spoke as a public employee when he kneeled and prayed on the fifty-yard line immediately after games in the presence of students, Coach Kennedy is not likely to prevail on the merits of his First Amendment Complaint. *Id*.

On September 5, 2018, this Court granted certiorari in regard to the issue of whether public school teachers and coaches retain any First Amendment rights when at work and “in general presence of” students. R. 204.

The District requests that this Court affirm the ruling of the Ninth Circuit and find that Coach Kennedy surrendered his First Amendment rights because Coach Kennedy spoke as a public employee while still on the job and in “general presence of” students.

**SUMMARY OF THE ARGUMENT**

First, the first to free speech is the most fundamental right guaranteed by the First Amendment of the United States Constitution. This is the right guaranteed to private citizens and not necessarily public employees speak pursuant to their official capacity. Although the First Amendment prohibits government from abridging the freedom of speech, it does not give an affirmative right to public employees and coaches to use the state funds for their expression. Coach Kennedy spoke as public employee, not as a private citizen, because his ritual of kneeling and praying immediately following the conclusion of football games owed its existence to his position as an assistant coach. Because Coach Kennedy spoke as a public employee in his official capacity as a coach when he kneeled and prayed on the fifty-yard line immediately after the games, Coach Kennedy is not entitled to protection of the First Amendment. Therefore, Coach Kennedy cannot use the First Amendment in total disregard of the District Policy regarding religious related activities.

Second, Coach Kennedy’s speech was the product of his contractual obligations with the District and fell within the scope of his duties. At the conclusion of football games, students joined Coach Kennedy in his prayers that included the name of the “Lord.” Subsequently, students from opposing team and general public started to join Coach Kennedy. Coach Kennedy was still on the field, still dressed in the school logoed attire, and still on duty when he administered the prayer. Because Coach Kennedy’s speech owed its existence to his professional duties when he was still acting as a coach and responsible for the conduct of his students, Coach Kennedy is not entitled to the protection of the First Amendment.

Third, by virtue of their position, coaches have a significant influence on students who like to please and impress their coaches. Coaches are role models and have a responsibility to have a positive influence on the students. Coach Kennedy knew he was a role model for the students. Moreover, by signing his contract with the District, Coach Kennedy agreed to “to create good athletes and good human beings.” Nevertheless, Coach Kennedy insisted upon offering his brief prayer immediately after the football games in the presence of students and disregarded the District’s instructions to refrain from his demonstrative speech in the presence of students. Clearly, it was important for Coach Kennedy to conduct his religious prayers in the presence of students. Because by virtue of his position Coach Kennedy took advantage to convey his religious message and permitted the students to join him, Coach Kennedy is not entitled to protection under the First Amendment.

Finally, as a matter of public policy it is critical to draw the line between a protected speech of citizens and an unprotected speech of public employees to avoid violating the Establishment Clause of the First Amendment. In addition, the emphasis should be put on terms of the contract and contractual nature of the employment relationship. Coach Kennedy signed a contract with the District that expired at the end of each season. The District had a policy in place that prohibited their employees from engaging in the demonstrative speech while in the presence of students. Because Coach Kennedy refused to abide by the District Policy, as well he as Coach Kennedy refused to consider the locations offered by the District to accommodate his religious expression, the District did not have to tolerate the disruption and insubordination of Coach Kennedy.

Accordingly, the District requests that this Court affirms the decision of the Ninth Circuit that that Coach Kennedy is not entitled to protection of the First Amendment because he spoke as a public employee when still on the job and in the “general presence of” students.

**ARGUMENT**

**COACH KENNEDY IS NOT ENTITLED TO PROTECTION UNDER THE FIRST AMENDMENT BECAUSE HE SPOKE AS A PUBLIC EMPLOYEE, NOT A PRIVATE CITIZEN, WHEN HE KNEELED AND PRAYED ON THE FIFTY-YARD LINE IMMEDIATELY AFTER THE FOOTBALL GAMES IN THE PRESENCE OF STUDENTS**

The right to free speech is one of the most fundamental rights guaranteed by the Bill of Rights. *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940). The First Amendment protects individuals against abridgment of their freedom of speech. U.S. CONST. amend. I. Whether the defendant acted “under color of law” is an essential element of the First Amendment claim. 42 U.S.C. § 1983; Diamond Modern Federal Jury Instructions-Civil 10.6 (2018). The statutory vehicle to bring the First Amendment claim against the government entity is 42 U.S.C. § 1983. Article. Section 1983, the First Amendment, and Public Employee Speech Shaping The Right To Fit The Remedy (And Vice Versa), 35 Ga. L. Rev. 939.

Although the First Amendment prohibits government from abridging the freedom of speech, it does not “confer an affirmative right to use government payroll mechanisms for the purpose of obtaining funds for expression.” 13 Dorsaneo, Texas Litigation Guide § 203A.84 (2018). “When a citizen enters government service, the citizen by its necessity must accept certain limitations on his or her freedom.” *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) (citing *Waters v. Churchill*, 511 U.S. 661, 671 (1994)). In sum, the government can control what its employee said on the job. *Connick v. Myers*, 461 U.S. 138, 143 (1983). Without the control over their employees’ words and actions, the government would not be able to function effectively because every employment decision would be challenged under the First Amendment. *Id*. By signing the contract with the District, Coach Kennedy acknowledged that he had read and understood “all policies and procedures” and that “a violation of [those] policies may result in a disciplinary action.” Therefore, Coach Kennedy is not entitled to protection under the First Amendment because he spoke public employee and not as a private citizen when he prayed on the fifty-yard intermediately after the games.

1. **Coach Kennedy’s Demonstrative Speech Is Not Protected Under The First Amendment Because Coach Kennedy Still Acted In His Official Capacity As A Coach When He Kneeled And Prayed Immediately After The Football Games**

Coach Kennedy demonstrative speech is not protected by the First Amendment because

Coach Kennedy was acting in his official capacity as a football coach when he kneeled and prayed immediately after the football games. In general, the First Amendment guarantee applies when public employees speak as citizens on the matters of public concern. *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 386 (2011) (citing *Connick*, at 147). However, the speech of a public employee is not afforded the First Amendment protection if the employee acts in his official capacity as a teacher or a coach. *Garcetti*, at 421; see also, *Dahlia v. Rodriguez*, 735 F.3d 1060, 1068 (9th Cir. 2013); see also, *Chavez-Rodriguez v. City of Santa Fe*, 596 F.3d 708, 716 (10th Cir. 2010). Thus, when public employees are acting in their official capacities, their speech may be regulated by their employer. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2474 (2018). Because Coach Kennedy was still acting in his official capacity as coach when Coach Kennedy kneeled and prayed on the fifty-yard line immediately after the games in the school-logoed attire in the presence of students, Coach Kennedy is not entitled to protection under the First Amendment.

In contrast, "[s]tatements are made in the speaker's capacity as citizen if the speaker 'had no official duty' to make the questioned statements, or if the speech was not the product of 'performing the tasks the employee was paid to perform.” *Eng v. Cooley*, 552 F.3d 1062, 1071 (9th Cir. 2009) (quoting *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1127 (9th Cir. 2008); see also *Marble v. Nitchman*, 511 F.3d 924, 932-33 (9th Cir. 2007); see also *Frietag v. Ayers*, 468 F.3d 528, 544 (9th Cir. 2006)). Here, Coach Kennedy spoke as public employee because he was at the school sponsored event dressed in the school-logoed attire.

In *Connick v. Myers*, 461 U.S. 138, 143-49 (1983), the Supreme Court by Justice O’Conner recognized that when “a public employee speaks not as a citizen on the matters of public concern, but instead as an employee upon matters only of personal interest,” the employee’s discharge does not offend the First Amendment. In *Connick*, the respondent was employed as Assistant District Attorney. The respondent was transferred to prosecute cases in the different section of criminal court. *Id*. at 140. In the strong opposition, the respondent prepared questionnaire and distributed it to the 15 Assistant District Attorneys. *Id*. at 141. The Supreme Court held that the respondent’s discharge did not violate the First Amendment. *Id*. at 154. The Court reasoned that because the respondent did not speak as a private citizen and her target was undermining authority, disrupting the office, and destroying the working relationship, her speech was not protected under the First Amendment. *Id*. Thus, the employer was justified in discharging the respondent. *Id*.

Similar to respondent in *Connick* who was acting in her official capacity and solicited views of the staff members, Coach Kennedy used his official capacity to press his religious views on the student when he demonstratively kneeled and prayed at the fifty-yard line immediately after the game. Clearly, his demonstrative speech was viewed by the students as a post-game ceremony which they were part of. Even though Coach Kennedy never coerced students to join him, Coach Kennedy should have known that that students would likely join him to get an endorsement of from Coach Kennedy who student viewed as a role model. Thus, similar to respondent in *Connick*, Coach Kennedy indirectly solicited views of his students. Because Coach Kennedy acted in his official capacity as a coach and knew that he was a significant influence on the students, Coach Kennedy’s demonstrative speech is not protected under the First Amendment.

In contrast, in *Perry v. Sindermann*, 408 U.S. 593, 598 (1972), the Supreme Court reversed the summary judgment against the state college professor and held that the professor’s speech may be protected by the First Amendment. *Id*. The professor wrote an article for the newspaper where he publicly criticized policies of the public administration. *Id*. at 595. The Supreme Court held that because the professor’s criticism was on the matter of public concern and any citizen might do it, the professor was entitled to protection by the First Amendment. *Id*. at 598.

Unlike professor in *Sindermann*, Coach Kennedy’s speech is different from the professor’s speech because Coach Kennedy spoke as a public employee, not as a private citizen. In addition, Coach Kennedy did not publicly criticize the District Policy as a private citizen might. Coach Kennedy refused to follow the District Policy that prohibited the non-demonstrative conduct. Because the Coach Kennedy Coach Kennedy spoke in his official capacity as a coach at the school sponsored football games and in the presence of students, his demonstrative speech is not protected by the First Amendment. Therefore, the District requests that this Court affirms the decision of the Ninth Circuit that that Coach Kennedy is not entitled to protection of the First Amendment because Coach Kennedy spoke as a public employee when still on the job and in the “general presence of” students.

1. **Coach Kennedy’s Demonstrative Speech Is Not Protected Under The First Amendment Because It Fell Within The Scope Of His Professional Obligations And Did Not Seize Once The Games Were Over**

Coach Kennedy’s demonstrative speech is not protected under the First Amendment

because it falls within the scope of his professional obligations. First Amendment protects speech of an employee who speaks as a citizen on public matters. *Coomes v. Edmonds Sch. Dist. No.15*, 816 F.3d 1255, 1259 (9th Cir. 2016). Thus, the critical issue is “whether the speech is within the scope of the citizen’s duties as a public employee or merely concerns those duties.” *Lane v. Franks*, 134 S. Ct. 2369, 2379 (2014); see also *Graziosi v. City of Greemville*, 775 F.3d 731, 737 (5th Cir. 2015); see also *Hunter v. Town of Mocksville*, 789 F.3d 389, 396-97 (4th Cir. 2015). The scope of employment responsibilities include, but not limited to, (1) whether an employee spoke at the place of employment; (2) whether the speech gave objective observer the impression that the employee represented the employer when speaking. *Decotiis v. Whittemore*, 635 F.3d 22, 32 (1st Cir. 2011). Thus, the speech cannot receive the First Amendment protection if the employee’s speech was the work product that the government paid for. *Knopf v. Williams*, 2018 WL 1178346 (10th Cir. 2018); see also, *Dahlia*, 735 F.3d at 1068; see also *Chrzanowski v. Bianchi*, 725 F.3d 734, 740 (7th Cir. 2013), *cert. denied*. Here, because Coach Kennedy’s speech was the product of his contractual obligations with the District and because the District paid Coach Kennedy to supervise students immediately following the football games, Coach Kennedy’s demonstrative speech is not protected by the First Amendment.

In *Garcetti*, the Supreme Court held that speech made “pursuant to … official duties” receives no constitutional protection. *Garcetti*, at 416-17. In *Garcetti*, a deputy district attorney wrote a memorandum that addressed the proper disposition of a pending criminal case. *Id*. at 414. Subsequently, the deputy district attorney was reassigned from his position and transferred to another courthouse. *Id*. at 415. The Supreme Court reasoned that because the deputy district attorney wrote his memorandum acting in his official capacity while carrying out his job duties, his speech was not protected by the First Amendment. *Id*. at 416-17.

Similar to *Garcetti*, Coach Kennedy spoke to students through his demonstrative religious

conduct when he kneeled and prayed at the midfield immediately after the football games. As a part of his job responsibilities, Coach Kennedy had to supervise students not only prior or during the games, but also after the conclusion of the games until the students were dismissed to their parents. Even though Coach Kennedy never encouraged or required participation in his religious conduct, students felt indirectly coerced to join him because the prayer happened immediately after the conclusion of the games. When the students were engaged in the post games activities, Coach Kennedy was on the field with the students, dressed in the school logoed attire, and still on duty. Because Coach Kennedy’s speech owed its existence to his professional duties when he was speaking as a coach and responsible for the conduct of his students, Coach Kennedy is not entitled to the protection of the First Amendment.

Because of the position of trust and authority, “teachers do not cease acting as teachers each time the bell rings.” *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d at 522. Teachers continue to act as teachers when “at school or school function, in general presence of students, and in capacity one might view as official.” *Johnson v. Poway*, 658 F.3d 954, 968 (9th Cir. 2011) (citing *Peloza*, as 522). In *Johnson*, the court held that *Johnson*’s speech was not protected under the First Amendment because Johnson’s speech belonged to the government. *Id*. at 975. In *Johnson*, the calculus teacher displayed two large banners on the wall that contained the religious message. *Id*. at 958. “The court reasoned that the speech that an ordinary citizen could not have walked into Johnson's classroom and decorated the walls as he or she saw fit, anymore 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*.

Similar to the teacher in *Johnson*, Coach Kennedy spoke to students through his demonstrative religious conduct at the conclusion of the football game and students felt indirectly coerced to join him. When Coach Kennedy did not pray, students did not pray also. Because Coach Kennedy demonstrative speech clearly fell within the scope of his official duties, Coach Kennedy’s speech is not protected by the First Amendment.

In *Toney v. Atterberry*, 238 F.Supp.3d 1234, 1240 (E.D. Cal. 2017), the court held that a high school supervisor spoke as a public employee and therefore, she was not entitled to the protection of the First Amendment. The supervisor told students to videotape the “police brutality” during a school incident on the parking lot. *Id*. at 1236. The court reasoned that because the supervisor was carrying out her duties by “patrolling the campus,” “responding to calls,” and “communicating with students,” the supervisor spoke as a public employee. *Id*. at 1240.

Similar to the high school supervisor in *Toney*, Coach Kennedy’s speech occurred only because of his position as a Coach. Like the supervisor in *Toney*, Coach Kennedy placed in the position of trust and authority over students and students would not likely follow Coach Kennedy order if Coach Kennedy spoke as a private citizen. In addition, by virtue of his position, Coach Kennedy had special access to the field at the conclusion of the games. For instance, general public was not allowed on the field to send their religious messages to the students. Moreover, Satanist organization were not allowed on the field also.

Because Coach Kennedy acted with the scope of his professional duties when he kneeled and prayed immediately after the football games, his demonstrative speech is not protected under the First Amendment. Therefore, the District requests that this Court affirms the decision of the Ninth Circuit that that Coach Kennedy is not entitled to the protection of the First Amendment because Coach Kennedy spoke as a public employee when still on the job and in the “general presence of” students.

1. **Coach Kennedy’s Demonstrative Speech Is Not Protected Under The First Amendment Because By Virtue Of His Position As a Coach, Coach Kennedy Took Advantage To Convey His Views That Contained Religious Message To Students**

Coach Kennedy’s demonstrative speech is not protected under the First Amendment because by virtue of his position and trust, Coach Kennedy took advantage to convey his views that contained religious message to students. A teacher is not an ordinary citizen. *Peloza*, 37 F.3d at 522. A teacher is the one “instills values in the team.” *Borden v. Sch. Dist. of Tp. of Brunswick*, 523 F.3d 153, 173 (3rd Cir. 2008). Staff that interacts with students play similar role to a teacher. *Grossman v. S. Shore Pub. Sch. Dist.*, 507 F.3d 1097, 1100 (7th Cir. 2007). By signing a contract on October 5, 2015, Coach Kennedy agreed to be a role model and “create good athletes and good human beings.” Coach Kennedy knew about the District Policy in regard to “non-demonstrative” speech. Nevertheless, Coach Kennedy put his religious views above the District Policy and students who felt that they had to join Coach Kennedy in his prayer as the post-game ceremony. Because Coach Kennedy used his position as a coach to instill his particular views upon the students immediately after the games, Coach Kennedy’s demonstrative speech is not protected under the First Amendment.

A teacher is “clothed with mantle of one who imparts knowledge and wisdom.” *Peloza*, 37 F.3d at 522. There is much likelihood that the students equate their teacher’s views with those of the school. 37 F.3d 517, 522 (9th Cir. 1994). Furthermore, “Coaches have a significant influence on the young athletes that they coach.” <https://www.psychologytoday.com/us/blog/ethics-everyone/201711/coaches-should-be-role-models>. Therefore, coaches have a “moral responsibility to have a positive influence on their players.” *Id*.

In *Borden*, the head football coach brought a declaratory judgment against the East Brunswick School District prohibiting faculty members to join in the student-initiated prayer. *Id*. 158-159. The court held that the School District did not violate the coach’s First Amendment right. *Id*. at 179. In addition, the court held that the School District had a right to adopt the guidelines prohibiting the prayer to avoid Establishment Clause violations. *Id*. 179. The coach led the pre-game prayer in the locker room.” *Id*. at 159. The prayer started, “Dear Lord…” *Id*. The coach bowed his head and took a knee with his team while they prayed. *Id*. 168. After the district received complaints from the parents, the district prohibited the coach from “encouraging, leading, initiating or coercing, directly or indirectly, student prayer at any time in any school-sponsored setting, including practices, team meetings, or athletic events.” *Id*. at 160-61. The court reasoned that a “teacher is acting as a school ‘proxy’, not an individual teacher and therefore, [the school] has a final determination how to teach students.” *Id*. at 172. (citing *Brown v. Armenti*, 247 F.3d 69, 74-75 (3rd Cir. 2001).

Similar to coach in *Borden*, Coach Kennedy also led prayers in the locker rooms and immediately following the games until the district prohibited him from doing that. Like the coach in *Borden*, Coach Kennedy prayers started with the word “Lord.” In contrast, Coach Kennedy did not require the students to join him when Coach Kennedy took a knee at the midfield in the presence of students. Coach Kennedy agreed to be an exemplar, the model when he signed the contract with the District on October 5, 2015. He nevertheless put his religious views above the District policy and the students who joined him in the post-game prayer.

Because Coach Kennedy exhibited model appropriate behavior with religious message when he kneeled and prayed immediately after the football games, his demonstrative speech is not protected under the First Amendment. Therefore, the District requests that this Court affirms the decision of the Ninth Circuit that that Coach Kennedy is not entitled to the protection of the First Amendment because Coach Kennedy spoke as a public employee when still on the job and in the “general presence of” students.

1. **As A Matter Of Public Policy, It Is Critical To Draw The Line Between A Protected Speech Of Citizens And An Unprotected Speech Of Public Employees To Avoid The Consequences For Violating The Establishment Clause Of The First Amendment**

The First Amendment provides that “Congress shall make no law respecting an establishment of religion […]; or abridging the freedom of speech […].” U.S. CONST. amend. I. As a general matter, teachers speak for the state when they teach. *Tucker v. State of Cal. Dep’t of Educ*., 97 F3d 1204, 1213 (9th Cir.). Thus, the District is not required to tolerate speech that reasonably believes to cause disruption. *Voigt v. Savell*, 70 F.3d 1552, 1561 (9th Cir. 1995). The interest of the state in complying with constitutional obligations may be a compelling one. *Widmar v. Vincent*, 454 U.S. 263, 271 (1981). Here the District’s Policy was tailored to comply with the constitutional obligations and avoid violating the Establishment Clause. After Coach Kennedy’s speech generated a significant amount of publicity and raised safety concerns, the District offered Coach Kennedy to discuss accommodations for his demonstrative speech. Because Coach Kennedy disregarded the District Policy and refused to consider alternative locations for his religious expression, the District had a compelling interest to justify their decision to put Coach Kennedy on administrative paid leave and not to rehire him.

In determining a public employee’s right of free speech under the First Amendment, the court must consider the “balance between the interest of the employee as a citizen, in commenting on matters of public concern, outweighs the employer's interest in promoting the efficiency of the public services it performs through its employees.” *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). In *Pickering* the high school teacher sent a letter to the editor of the local newspaper school financial policies. *Id*. at 564. The Court held that the speech criticizing school financial policies was protected under the First Amendment. *Id*. at 568. The court reasoned that “absent the false statement made by the teacher, the teacher could speak on the public matter.” *Id*. at 574.

Unlike teacher in *Pickering* who wrote a letter to local newspaper complaining about administration as an ordinary citizen, Coach Kennedy did not complain about the District religious policy. Instead, Coach Kennedy demanded the accommodation for his demonstrative speech as the public employee immediately following the football games.

In *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000), the Court held that the student-led prayer before each varsity school game violated the Establishment Clause. In *Santa Fe*, the district was responsible for approximately 4,000 students. *Id*. at 294. The school policy permitted prayer initiated by students. *Id*. The Court reasoned because the district was involved in establishing and overseeing the prayer, the prayer bore the “imprint of the state.” *Id*. at 305. The Court further reasoned that prayer on the government property during the sponsored school events was impermissible because “it sends the ancillary message to members of the audience who are non-adherants ‘that they are outsiders, not full members of the political community, and an accompanying message to adherants that they are insiders, favored members of the political community.” *Id*. at 309-310. In sum, the school sponsorship of a religious message would violate the Establishment Clause of the First Amendment. *Lynch v. Donnelly*, 465 U.S. 688, 714 (1984).

Similar to students in *Santa Fe*, here students were free to choose whether to participate in the prayer or not. Coach Kennedy did not require students to participate in the prayer. However, because the prayer took immediately following the football games and was led by Coach Kennedy, students assumed that the District was endorsing it and therefore, the students were indirectly coerced to participate in it. Therefore, the District had a compelling interest and was justified in abridging Coach Kennedy’s speech to avoid violating the Establishment Clause of the First Amendment.

In *Peloza*, the court dismissed a biology high school teacher’s First Amendment claim because the teacher’s speech violated the Establishment Clause. *Peloza*, 37 F.3d at 522. In *Peloza*, a biology teacher refused to teach “evolutionism” because this theory was contrary to his particular views. *Id*. at 519. The school district prohibited the teacher to discuss his religious beliefs with the students and the teacher filed the lawsuit against the school district. *Id*. The court reasoned that because the interest of school in avoiding an Establishment Clause was a compelling one, the school was justified in restricting the teacher’s speech. *Id*. at 522.

Similar to the teacher in *Peloza*, Coach Kennedy’s kneeling and praying with students immediately following the games violated the Establishment Clause. Here, Coach Kennedy refused to follow the District Policy to refrain from demonstrative speech. Coach Kennedy was entrusted with giving motivational speeches to students to promote sportsmanship and spirited competition. Coach Kennedy’s motivational speech conveyed his particular views with the mention of “Lord.” Despite the District disapproval of Coach Kennedy’s demonstrative speech and violation of the District Policy, Coach Kennedy insisted that the District necessarily permit Coach Kennedy to offer a short prayer immediately after the games in the presence of students. Because the District had a compelling interest to restrict Coach Kennedy’s speech to avoid violating the Establishment Clause of the First Amendment, Coach Kennedy is not entitled to protection by the First Amendment.

In addition, “good and just cause” supporting termination of a public teacher's contract includes “insubordination.” *Freshman v. Mt. Vernon City Sch. Dist. Bd. of Educ.*, 2012-Ohio-889, P.17 (Ctt. App. 2012). Thus, the emphasis of the employee’s termination should be put on terms of the Contract and contractual nature of the employment relationship. *McAauliffe v. Mayor of New Bedford*, 29 N.E. 517 (Mass. 1892). In *McAauliffe*, the city terminated the police after he publicly criticized the management of the police department. The Massachusetts Supreme Court held that “the petitioner may have constitutional right to talk politics, but he has no constitutional right to be a policeman.” *Id*. The Court reasoned that an employee cannot complaint because he “takes the employment on the teams that are offer to him.” Id. 517-18. Similar to employee in *McAauliffe*, Coach Kennedy and the District had a contractual relationship that expired at the end of the season. After Coach Kennedy’s contract expired, he never reapplied to his position as a coach.

Here, the District has attempted to disentangle itself from the religious messages by sending a September 17, 2015 letter to Coach Kennedy clarifying the policy’s guidelines. In addition, the District offered alternative options to accommodate Coach Kennedy’s religious expression. As a matter of public policy, it is critical to draw the line between a protected private speech of a citizen and an unprotected public speech of employee to avoid violating the Establishment Clause of the First Amendment. Therefore, the District requests that this Court affirms the decision of the Ninth Circuit that that Coach Kennedy is not entitled to the protection of the First Amendment because Coach Kennedy spoke as a public employee when still on the job and in the “general presence of” students.

**CONCLUSION**

WHEREFORE, the Respondent, Bremerton School District, respectfully moves this Court to affirm the decision of the Ninth Circuit that Coach Kennedy spoke as a public employee when still on the job and “in general presence of” students.

Respectfully submitted,

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Veronika Vino, Counsel for Respondent