NO. 16-35801

**IN THE**

**SUPREME COURT OF THE UNITED STATES**

FALL TERM 2018

**JOSEPH A. KENNEDY,** in his personal capacity

Petitioner,

v.

**BREMERTON SCHOOL DISTRICT,**

Respondent.

On Writ of Certiorari to

the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT

I.D: 190R

Counsel for Respondent

**ORAL ARGUMENT REQUESTED**

**QUESTION PRESENTED**

Whether Bremerton School District may protect the rights of their students by limiting the scope of when and where public-school teacher and coaches exercise their First Amendment rights while at work and in the general presence of students.

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**OPINIONS AND ORDER BELOW**

The United States District Court for the Western District of Washington denied Petitioner Joseph A. Kennedy’s motion. *Kennedy* v. *Bremerton School District* 869, F.3d 813 (9th Cir. 2017). Kennedy’s order for writ of certiorari was granted. The opinion of the United States Court of Appeals of the Ninth Circuit is published at *Kennedy* v. *Bremerton School District* 869, F.3d 813 (9th Cir. 2017).

**STATEMENT OF JURISDICTION**

The jurisdictional statement is required by the United States Supreme Court Rule 24.1(e) is waived pursuant to Herzog Moot Court Competition rule 2(a)(1).

**CONSTITUTIONAL PROVISION**

**Establishment Clause, U.S. Cont. Amend I:**

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

**STATEMENT OF THE CASE**

1. **Statement of the Facts**

Bremerton School District (BSD) recognized that Petitioner possess fundamental free exercise and free expression rights under the First Amendment. R. 29. The Board acknowledged that views and opinions regarding the relationship of the schools and religion are diverse. R. 24. The school district must avoid school endorsement of religious activities. R. 29. First Amendment’s Establishment clause, in the public-school context, schools and employees may not directly prohibit students from participating in religious activities. R. 29. It is equally clear that schools and their employees may not indirectly encourage students to engage in religious activity. R. 29. Nor may school staff engage in action that is likely to be perceived as endorsing (or opposing) religion or religious activity. R. 29. BSD’s policy for its staff is to remain neutral. R. 29.

On the athletic field BSD may not allow prayers to be read over the public address system such as football games. R. 29. BSD may not allow coaches to initiate, lead, or supervise student prayer. R. 29. May not allow coaches to appear to endorse religious activity that is entirely student-initiated. R. 29. BSD has asked Petitioner to cease his postgame prayer on the field while on duty. R. 28. Petitioner’s right to religious expression was ceased only during times around other students and still on duty. R. 30. BSD polices include for school staff to neither encourage nor discourage a student from engaging in non-disruptive oral or silent prayer or any other form of devotional activity. R. 29.

BSD’s policy allows for Petitioner to continue to provide motivational, inspirational talks to students before, during and after games. R. 30. These talks should focus on appropriate themes such as unity, teamwork, responsibility, safety, endeavor and the like. R. 30. BSD does not allow Petitioner’s talks to include religious expression, including prayer. R. 30. BSD allows students to be free to initiate and engage in religious activity. R. 30. If students engage in religious activity school staff may not take any action likely to be perceived by a reasonable observer as endorsing that activity. R. 30. District staff are free to engage in religious activity, including prayer. R. 30. The religious activity must not interfere with job responsibilities. R. 30. When participating in religious expression it must be physically separate from any student activity, and students may not be allowed to join such activity. R. 30. To avoid the perception of endorsement BSD asks for the activity to be non-demonstrative if students are also engaged in religious conduct, or it should occur while students are not engaging in such conduct. R. 30.

BSD became aware of Petitioner’s religious expression on the filed after an employee of another district mentioned the post-game prayers to a District administrator. R. 51. BSD recognized the clear legal issues presented by these activities and took action to control the situation. R. 52. On September 17, 2015 BSD sent Petitioner a letter addressing guidelines and accommodations for Petitioner’s private religious expression. R. 28. The letter reinstated BSD’s policies of staff employees’ religious expression while on duty. R. 28. BSD was concerned of violating the students’ rights if it allowed Petitioner to continue this practice. R. 50. Petitioner temporarily stopped engaging in religious expression immediately after football games. R. 101.

On October 16, 2015, after Petitioner received the letter from BSD offering several possible means of accommodating his private prayer, Petitioner walked to midfield and prayed at the 50-yard line while students were still on the field. R. 102. On October 23, 2015, Petitioner, while still on duty, knelt on the field and prayed immediately following the varsity football game. R. 47. On October 26, 2015, while still on duty Petitioner again knelt down on the field and prayed while the students were engaging in post-game traditions. R. 47. Petitioner was aware that he was still on duty during this time. R. 44.

The prayer was widely publicized. R. 43. Petitioner had his own media appearances. R. 43. The content of comments on social media led the District to have concerns about people joining Petitioner for prayer. R. 150. Pictures were published in various media of Petitioner’s post-game prayers. R. 151. The photograph of Petitioner in the center of a group of players, members of the public, and news media personnel immediately after the game on October 16, 2015. R. 151. Petitioner is also seen in the stands praying with others. R. 151. The District was not prepared for the substantial amount of effort it would take to secure the field in an orderly manner. R. 150. There were people jumping the fence and others running among the cheerleaders, band and players. R. 151. The District received complaints from parents of band members who were knocked over in the ruse of spectators on to the field. R. 151.

Petitioner while still on duty, under the bright lights of the stadium engaged in overtly religious conduct. R. 44. As paid assistant coach, Petitioner’s responsibilities for supervision of students not only prior to and during the course of games. R. 44. Petitioner’s responsibilities continue during the activities following the games and until players are released to their parents or otherwise allowed to leave. R. 44. Petitioner has been aware of his responsibility that he remains on duty following games until the last student has left the event. R. 44. Petitioner’s responsibilities included to adhere to BSD policies and administrative regulations. R. 136.

Because of Petitioner’s noncompliance BSD placed him on paid administrative leave as an assistant coach with the Bremerton High School football program. R.47. BSD did not fire Petitioner. R. 49. Petitioner remained employed by the District and was paid as such throughout the remainder of his contract term. R. 49. BSD wanted confirmation from Petitioner that he intends to comply with the District’s directives. R. 49. BSD did not prohibit Petitioner from praying on his own. R. 50. BSD has offered to accommodate Petitioner’s religious exercise by providing him with a private location to use for prayer that does not interfere with his performance of his duties. R. 50. Players were observed to be praying with Petitioner when he did so after games in 2015. R.151. No players appeared to be praying after games during the time Petitioner temporarily ceased his practice or after he was placed on administration leave. R. 151. BSD has allowed Petitioner to offer his own suggestions for ways he desires to engage in private prayer without subjecting BSD to liability for violating the Establishment Clause. R. 50.

BSD does not prohibit prayer or other religious exercise by its employees. R. 44. BSD prohibits any conduct by employees that would serves as District endorsement of religion. R. 44. The District had received notification from a group identified itself as a Satanist religion that it intended to conduct ceremonies on the field after football games if others were allowed to. R. 151. BSD offers accommodations that would allow Petitioner to continue to engage in private exercise while on the job. R. 44. It is common for schools to provide an employee whose faith requires a particular form of exercise with a private location to engage in during the work day. R. 45. These accommodations are allowed so long as it does not interfere with performance of job responsibilities. R. 45. BSD encourages motivational and inspirational talks that are secular. R. 45.

1. **Procedural History**

On August 9, 2016, Petitioner Joseph A. Kennedy in his personal capacity filed a seven-count complaint against Respondent Bremerton School District. R. 16. Petitioner brought a claim pursuant to 42 U.S.C. § 1983. R. 16. Acting under the color of state law Petitioner alleges Bremerton School District (BSD) deprived him of his First Amendment Right to from the government “abridging the freedom of speech.” R. 16. Petitioner contends by BSD’s own admission, Petitioner’s protected religious expression was a driving factor in its decision to take adverse employment action against Petitioner. R. 16. BSD’s ban on any demonstrative religious expression by Petitioner violates the First Amendment, as does its decision to take adverse employment action against him because of such expression. R. 17.

Count two of Petitioner’s complaint alleges BSD a violation of the First Amendment Right to free exercise pursuant to 42 U.S.C. § 1983. R. 17. Petitioner, Mr. Kennedy, brought his claim against BSD for acting under color of state law to deprive him of rights secured by the U.S. Constitution. R. 17. BSD’s blanket ban on any demonstrative religious expression by Petitioner violates the First Amendment, as does its decision to take adverse employment action against him because of such expression. R. 17.

Petitioner brought count three under Title VII of the Civil Rights Act of 1964 alleging direct discrimination by BSD on the basis of his religion. R. 17. The District’s conduct constitutes discrimination on the basis of religion under 42 U.S.C. § 2000e-2(a). R.17. Under Title VII of the Civil Rights Act of 1964 Petitioner brings a claim for disparate treatment alleging BSD’s decision to enforce its apparent policy banning all private, demonstrative religious expression by employees on duty against only Petitioner- and not other similarly situated employees who also engaged in private demonstrative religious expression-constitutes disparate treatment. R. 17. Petitioner seeks an injunction reinstating him as an assistant coach for the BHS varsity football team and the head coach of the BHS junior varsity football team under 42 U.S.C. § 2000e-5(g). R. 18.

Count four of Petitioner’s complaint alleging Petitioner’s protected religious expression was a motivating factor behind BSD’s decision to take adverse employment action against Petitioner violating 42 U.S.C. § 2000e-2(m) of the District’s conduct. R. 18. Count five, BSD failed to accommodate Under Title VII not offering Petitioner a reasonable accommodation that would allow him to exercise his sincerely held religious beliefs. R. 18.

Count six was brought under Title VII of the Civil Rights Act of 1964. R. 18. BSD retaliated against Petitioner as prohibited by Title VII when it took adverse employment action against him on the basis of his opposition to a prohibited employment action: that is, discrimination against him based on his religious beliefs. R. 18. Count seven was also brought under Title VII of the Civil Rights Act of 1964 alleging BSD discriminated against Petitioner for failure to re-hire him on the basis of his religious belief. R. 19.

On August 24, 2016 Petitioner filed motion for a preliminary injunction and supporting memorandum of law. R. 69. On August 30, 2016 Respondent answers to Petitioner’s motion. R. 107. On September 19, 2016, the United States District Court of Washington in Tacoma denied Petitioner’s motion for a preliminary injunction. R. 200. On October 3, 2016 Petitioner appeals to the United States Court of Appeals for the Ninth Circuit under 28 U.S.C. § 1292(a)(1). R. 203.

On June 12, 2017, United States Court of Appeals for the Ninth Circuit affirmed the district court’s order denying Petitioner’s motion for a preliminary injunction. *Kennedy* v. *Bremerton School District* 869, F.3d 813 (9th Cir. 2017). On September 5, 2018, The Court of Appeals for the Ninth Circuit granted Petitioner’s petition for writ of certiorari and orders the parties to address the following issue: “Whether public school teachers and coaches retain any First Amendment rights when at work and ‘in the general presence of’ students.” R. 204.

1. **Standard of Review**

The court engaged in de novo review is not confined to the administrative record, but may pursue whatever further inquiry it finds necessary or proper to the exercise of court's independent judgment. *Doe* v*. United States*, 261 U.S. App. D.C. 206, 821 F.2d 694, 698 (1987). It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case. *United States* v*. Resendiz-Ponce*, 549 U.S. 102, 104 (2007).

**SUMMARY OF ARGUMENT**

Respondent, Bremerton School District, has a Constitutional right to protect itself from violation of Establishment Clause. When “in the general presence” of students and still performing job responsibilities Petitioner’s, Joseph A. Kennedy, First Amendment rights are limited. When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom, or else there would be little chance for the efficient provision of public services. *Johnson* v. *Poway Unified School District*, 658 F.3d 954, 957 (9th Cir. 2011). Petitioner was acting as a public employee when he would go to the fifty-yard line at the end of the football game to pray.

The Ninth Circuit Court of Appeals held that a public employer’s interests in avoiding such Establishment Clause violations “outweigh the resulting limitations on [an employee’s] free exercise of his religion at work. *Berry* v. *Department of Social Services*, 447 F.3d 642 (9th Cir. 2006). In order for BSD to avoid liability for violating the rights of its students Petitioner’s free exercise must be exercised only in a way that will not result in such violation. Therefore, because Petitioner was acting as a school employee and not as a private citizen he retains limited First Amendment rights when at work and “in the general presence of” students.

**ARGUMENT**

**PUBLIC SCHOOLS MUST MAINTAIN A NEUTRAL RELIGIOUS ENVIRONMENT THAT IS SECULAR IN NATURE TO PREVENT A VIOLATION OF THE ESTABLISHMENT CLAUSE THAT INFRINGES ON STUDENTS FIRST AMENDMENT RIGHTS EVEN IF SCHOOL EMPLOYEE’S RIGHTS ARE SUBJECT TO LIMITATIONS**

Respondent, Bremerton School District (BSD), prevented a violation of students rights of the First Amendment Establishment Clause when ceasing Petitioner, Joseph A. Kennedy’s, private religious expression while still performing his job responsibilities. When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom, or else there would be little chance for the efficient provision of public services. *Johnson* 658 F.3d at. 957 Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. *Id*. It simply reflects the exercise of employer control over what the employer itself has commissioned or created. *Id*.

BSD, as an attempt to avoid endorsement of religious activity, has asked Petitioner to cease walking up to the fifty-yard line to do a private prayer while students and the public were still on the field. R. 28. Petitioner disregarded the District’s policies and guidelines and continued to pray at the fifty-yard line while still working as a public employee. R. 47. BSD has offered Petitioner to meet to discuss alternatives to accommodate Petitioner’s private religious expressions. R. 102. BSD put Petitioner on paid administrative leave until he complied with its policies. R. 49. BSD has not infringed on Petitioner’s liberties because of Petitioner’s status as a public employee during the time he would lead in prayer.

1. **Bremerton School District Must Ensure its School Employees are Not Expressing Their Private Religious View to Remain Free of District Endorsement**

In cases involving state participation in a religious activity, one of the relevant questions is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools. *Santa Fe Independent School District* v. *Doe*, 530 U.S. 290, 294 (2000).

1. **Petitioner Spoke as a School Employee Not as a Private Citizen When Petitioner Would go to the Fifty-Yard Line to Pray After Finishing a Football Game.**

Petitioner was acting as a school employee when going to the fifty-yard line immediately after the game to pray. Petitioner was still wearing his coaching uniform, he was in the presence of his athletes, and still considered to be performing his job responsibilities. When a high school teacher goes to work and performs the duties he is paid to perform, he speaks not as an individual, but as a public employee, and the school district is free to take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted. *Johnson*, 658 F.3d at.957. Teachers do not cease acting as teachers each time the bell rings or the conversation moves beyond the narrow topic of curricular instruction. *Id*.

In *Johnson*, School employee spent more than 30 years teaching math to students. He displayed a banner and stated in large block type: “IN GOD WE TRUST”; “ONE NATIO UNDER GOD”; “GOD BLESS AMERICA”; and, “GOD SHED HIS GRACE ON THEE.” *Id*. at. 958 The other stated: “All men are created equal, they are endowed by their CREATOR.” *Id*. The principal was brought to her attention about these banners by another faculty member and requested he remove the banners or make the letters in the context of the historical artifact or document from which they were pulled. *Id*. The school district offered different alternatives so the school employee will be able to keep the banners up. *Id*. Because he had the banners in some form or another since 1982, he refused to comply with the districts guidelines. *Id*.

The school employee reasoned that they simply contained patriotic phrases, and that he considers it his “right to have them up.” *Id*. at. 959. The District board approved the decision to order Johnson to remove the banners and to review its procedure. *Id*. at. 959. The district had a requirement for teachers “follow the requirements on prohibited instruction as contained in the California Education Code.” *Id*. The Court determined using the Pickering test was appropriate to balance between the interests of the teacher, as a citizen, and the interest of the State. *Id*. After applying this standard, it held for the school district. Id. at. Like in *Johnson*, here, there is sufficient evidence to apply the Pickering-based analysis and out-weigh Petitioner’s interest as a citizen.

At the case in hand, it was brought to BSD’s attention of Petitioner’s prayer by an employer of an opposing team. R. 51. BSD sent a letter to Petitioner stating the Districts policies and guidelines for when and where he can expression his religious activity. R. 28. Petitioner complied for about a month and then continued to pray at the fifty-yard line to pray right after the game ended. R. 28. BSD has offered Petitioner accommodations so he does not have to completely cease his prayer. R. 28. Petitioner never sought out accommodations from the District. R. 28.

The Ninth Circuit distilled the evolution of the Pickering test into a sequential five step inquiry:

(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;

and (5) whether the state would have taken the adverse employment

action even absent the protected speech. *Johnson*, at 957.

Under the circumstances of this case, step two is at issue. To establish whether Petitioner spoke as a private citizen or public employee this Court has looked at the two-step inquiry established in *Eng* v. *Cooley*, 552 F.3d 1062 (9th Cir. 2009). Under Eng v. *Cooley*, a plaintiff must first demonstrate that his speech touched upon a matter of public concern. *Johnson*, at. 957. This inquiry is one of law, not fact. *Id*. The second *Eng* v. *Cooley* step requires a plaintiff to show that he spoke as a private citizen, not as a public employee. *Id*. at. 957. As established in *Eng*, a factually determination must be made first to scope the content of a plaintiff’s job responsibilities. *Eng*, 552 F.3d at. 1063. Second, the ultimate constitutional significance of those facts must be determined as a matter of law. *Id*. Here, Petitioner’s job description specified that Petitioner’s job as a coach was to be a mentor and role model to the students. *Kennedy*, 869, F.3d 813. As the Court explained, Petitioner’s job as a football coach was also akin to being a teacher. *Id*. “While at the high school” he was “not just any ordinary citizen.” *Peloza* v. *Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994). Petitioner took on the responsibility to be a role model and a mentor. It was Petitioner’s duty to “instill values in the team.” *Borden* v. *School District*, 523 F.3d 153 (3d Cir. 2008). Petitioner was able to provide motivational, inspirational talks to students before, during and after games and other team activity, focusing on appropriate themes. R. 30. These talks were not to include religious expression including prayer. R. 30. Petitioner’s job description were “practical, fact-specific inquiry.” Petitioner’s duties included speaking demonstratively to spectators at the stadium after the game through his conduct. *Kennedy* at. 22. Looking at Petitioner’s job description from a practical standpoint it is clear he was acting as a public employee not a private citizen. The Court of Appeals determined when Petitioner went to kneel and pray on the fifty-yard line immediately after games while in view of students and parents, Petitioner was sending a message about what he values as a coach, what the District considers appropriate behavior and what students should believe, or how they ought to behave. *Id*. at. 28. This demonstrative communication fell within the scope of Petitioner’s professional obligations. Id. We agree. The Court concluded Petitioner spoke as a public employee and not as a private citizen, and his speech was therefore unprotected. *Id*. at 28. As held in *Santa Fe Independent School* District, 530 U.S. at. 294, the delivery of such a message, over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer, is not properly characterized as private speech. This Court has held that when public employees are performing their official duties, their speech does not receive the same First Amendment protections as does the speech of private citizens. *Garcetti* v. *Ceballos*, 547 U.S. 410, 413 (2006). In *Garcetti*, employee wrote a disposition memorandum explaining his concerns in alleged inaccuracies in affidavit. *Id*. The employee alleged that his supervisors retaliated against him based on his memo. *Id*. The Court determined that the employee’s allegation of unconstitutional retaliation failed because he was not speaking as a citizen for First Amendment purposes since he made the statements pursuant to his official duties. *Id*. Under his job description, Petitioner remained responsible for the students on the team until they left the stadium and were returned to their parents’ custody. *Kennedy*, at. 17-18. Petitioner would exercise his private prayer when students were still on the field practicing their post-game traditions. R. 51. Petitioner was still fulfilling his job responsibilities during this time. Petitioner contends that BSD had no authority to place any restrictions on his “quiet prayer by himself” when he is within the sight of students. Petitioner’s “quiet prayer to himself” was widely publicized. R. 43. Petitioner had his own media appearances. R. 43. The content of comments on social media led the District to have concerns about people joining Petitioner for prayer. R. 150. Pictures were published in various media of Petitioner’s post-game prayers. R. 151. The photograph of Petitioner in the center of a group of players, members of the public, and news media personnel immediately after the game on October 16, 2015. R. 151. Petitioner is also seen in the stands praying with others. R. 151. Petitioner’s speech constituted speech as a school employee. Petitioner was still surrounded by the students and on the field wearing the coaching attire assuming to be still on the job as a school employee. Petitioner was well aware of the continuance of his job responsibilities and what they consisted of. Instead of following BSD’s policies and guidelines he continued to express his religious views on the field. Petitioner rejected a series of offered religious accommodations that he would be able to conduct his “private personal prayer.” Petitioner relies on *Lane* v*. Franks*, 573 U.S. 228 (2014) to apply the scope of Petitioner’s job responsibilities during which his action took place. Under Lane, the question to determine whether an individual speaks as a citizen or as an employee is whether the speech falls within the ordinary scope of his job responsibilities. *Id*. As the Court has determined already and explained above Petitioner was conducting his religious practice when still acting as a coach. This case differs than *Wigg* v. *Sioux Falls School District 49-5*, 382 F.3d 807 (8th Cir. 2004). In *Wigg,* a school employee, acting pursuant to board policy granted a God News Club (Club), sponsored by Child Evangelism Fellowship, permission to conduct meetings at a school in the district. *Id*. The meetings took place after school. *Id*. The students had left the school other than those who were with school employees or taking part in Club meetings. *Id*. The Club’s purpose is to “evangelize boys and girls with the Gospel of the Lord Jesus Christ and establish (disciple) them in the Word of God and in the local church for Christian living.” *Id*. In order to be able to participate in Club meetings, students needed to submit signed permission slips from their parents. *Id*. The court held that the district had no valid Establishment Clause interest that justifies its restriction of its employees’ private speech. *Id*. at 813. Here, Petitioner conducted his religious expression immediately after the game would finish while students and onlookers were still on the field participating in their post-game traditions. Petitioner did not attempt to follow BSD’s policies instead he insisted on creating his own policies of when and where he may pray. Furthermore, unlike in *Wiggs*, the players had the ability to feel pressured to join the prayer after watching the other teammates participate. Therefore, applying the *Pickering* analysis and the *Eng* test Petitioner spoke as a school employee not as a private citizen when he would go to the fifty-yard line to pray immediately after the ends. BSD has offered Petitioner accommodations for him to continue his “private prayer by himself.” Petitioner chose to disregard BSD’s guidelines and insist on praying when still conducting his job responsibilities.

1. **Bremerton School District was Respecting Students Constitutional Rights and Avoiding Violation of the Establishment Clause When Telling Petitioner to Cease His Prayer at the End of a Football Game**.

In order to respect the students constitutional rights and refrain violating the Establishment Clause, BSD requested Petitioner to cease his prayer at the fifty-yard line. BSD offered Petitioner the chance for the District to accommodate Petitioner to not violate the Establishment Clause. Petitioner chose not to. Generally, if a school official is engaging in student prayer to the extent that they are leading it, initiating it, or requiring it, the school official, and thus the school district, is violating the Establishment Clause. *Borden* 523 F.3d, at.158. Compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech. *Id*.

It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which establishes a state religion or religious faith, or tends to do so. *Santa Fe Independent School District*, 530 U.S. at. 294 In *Santa Fe*, students brought an action against the school district alleging a violation of the Establishment Clause for the district’s policy of student led prayer prior to school football games. *Id*. The Court affirmed, holding that the appellate court properly determined that the district’s policies violated the Establishment Clause. *Id*. Because the football game messages were public speech authorized by a government policy and taking place on government property at government sponsored school-related events, and because the realities of the district’s policy involved both perceived and actual government endorsement of the delivery of prayer at important school events it was held to violate the Establishment Clause. *Id*.

Similarly, here, Petitioner’s action of going to the fifty-yard line to party would have been looked at as an endorsement by BSD. Immediately after the game Petitioner is seen huddling and praying with the athletes and other members at the end of the football game in front of the media. R. 122; 124. Although Petitioner may not have intended to endorse a religious speech *Santa Fe* held, the question whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools. R. 30. Because of the context and facts of this situation a reasonable observer would have perceived it as a state endorsement of prayer in public schools.

The Establishment Clause is designed to advance and protect religious liberty, not to injure those who have religious faith. *Kennedy*, at. 48. *Engel v. Vitale*, 370 U.S. 421, 429 (1962) held, one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services. Here, if BSD allows for Petitioner to continue his private prayer it would be as if placing an “official stamp” accepting his private religious expression and violating the rights of students and others. With the “official stamp” BSD fears of the reasonable perception of endorsing Petitioner’s religious expression and violating the students’ constitutional rights. The Districts compelling interest of avoiding liability of Establishment Clause outweighs Petitioner’s First Amendment rights as a school employee. *Berry*, 447 F.3d at. 645.

When public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the United States Constitution does not insulate their communications from employer discipline.” *Garcetti*, U.S. at, 413.These restrictions do not infringe any liberties the employee might have enjoyed as a private citizen” but “simply reflect the exercise of employer control over what the employer itself commissioned.” *Id*. In this case and under these facts, Petitioner’s speech was unprotected.

This case differs than *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969). In *Tinker*, it held that neither students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. *Id*. at. 504. BSD did not ask Petitioner to shed his constitutional rights. Instead the District offered him accommodations for continue his private prayer to himself without BSD fearing a violation of Establishment Clause. Petitioner chose not to attend the meetings to discuss how the school district can accommodate his private prayer. R. 50.

Therefore, allowing petitioner’s conduct to continue would have violated students constitutional rights confirms that the School District had good reason to be concerned about the risk of liability and to act accordingly. Federal case law established that the District cannot allow an employee, while still on duty, to engage in religious conduct or display that a reasonable observer, aware of the context, would perceive as District endorsement of religion. R. 146.

1. **School Districts Must Protect its School from Coercing Students to Follow Petitioner’s Lead When He Engages in Prayer on the Field**

Allowing school officials to partake in their own religious prayers while participating in school related activities is not only a violation of the Establishment Clause, but also poses significant policy concerns on behalf of the school. More specifically, permitting faculty to participate in religious expression in public schools is a matter of concern as it relates to the impression of the students. For example, in *Doe v. Duncanville Independent School District*, 70 F.3d 402 (5th Cir. 1995), the Court found that allowing coaches to lead or endorse religious activity at football games, could lead to students feeling a degree of coercion to participate in that same religious activity.

From a policy standpoint, it is crucial to not only protect students’ constitutional rights, but to also ensure that they are not indirectly feeling pressured to participate in certain religious activities. 13 Stan. L. & Pol'y Rev 267. Further, psychological studies provide that although students are not required to partake in the prayer or religious expression, there can be a sense of indirect coercion and peer pressure, which is a violation of the Establishment Clause. *Id*. Lastly, another important fact to consider is the perception of the public school. *Id*. When a school-sponsored event, such as a football game is being conducted on school property, and takes place in front of a large audience, permitting a football coach, who is a representative of the school, to openly express his religious beliefs, can indirectly associate the school with a particular religion. *Id*.

**CONCLUSION**

WHEREFORE, Respondent, Bremerton School District, respectfully requests this Court affirm the Ninth Circuit Court of Appeals decision denying Petitioner’s Motion for a Preliminary Injunction.

Respectfully Submitted,

I.D: 190R

Counsel for Respondent

Bremerton School District