

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH A. KENNEDY,)
)
 Petitioner,)
)
 v.) No. 21-418
)
 BREMERTON SCHOOL DISTRICT,)
)
 Respondent.)

Pages: 1 through 113
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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: We'll -- we'll hear argument first this morning in Case 21-418, Kennedy versus Bremerton School District.

Mr. Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF THE PETITIONER

MR. CLEMENT: Mr. Chief Justice, and may it please the Court:

When Coach Kennedy took a knee at midfield after games to say a brief prayer of thanks, his expression was entirely his own. That private religious expression was doubly protected by the Free Exercise and Free Speech Clauses.

When the School District fired him for that fleeting religious exercise out of endorsement concerns, it not only violated the First Amendment, but it -- it ignored a veritable wall of this Court's precedents that make clear that a school does not endorse private religious speech just because it fails to censor it.

As much as the District would like to

1 change the subject, the record is clear that
2 Coach Kennedy was fired for that midfield
3 prayer, not for any earlier practices. And the
4 record is equally clear that the District's sole
5 reason for its actions was out of endorsement
6 concerns, not concerns for band members' safety
7 or how many players joined the coach in the
8 prayer.

9 In fact, Coach Kennedy was disciplined
10 for events at two games in particular,
11 October 23 and October 26. At the first of
12 those games, it is undisputed that no one joined
13 the coach in his prayer. Nonetheless, that solo
14 prayer was Exhibit A in his firing.

15 Exhibit B was the October 26 game,
16 when no players joined him in the prayer. Yet,
17 nonetheless, the District, throughout this case,
18 both contemporaneously and to the EEOC and in
19 deposition, has confirmed that the sole driving
20 force behind its actions has been avoiding
21 endorsement.

22 The Ninth Circuit held that the
23 District's actions not only comply with the
24 First Amendment but are compelled by it. That
25 decision is flatly inconsistent with this

1 Court's precedents. The Ninth Circuit's
2 government speech holding ignores this Court's
3 statement in Garcetti that -- that -- to avoid
4 overly broad job descriptions. And the Ninth
5 Circuit's Establishment Clause holding fails to
6 grasp a basic teaching of this Court's cases
7 that has been said over and over again and is
8 simple enough for even young students to
9 understand, that the government does not endorse
10 all private religious speech just because it
11 takes place on the school side of the gates.

12 I welcome the Court's questions.

13 JUSTICE THOMAS: Mr. Clement, just so
14 I'm clear, are you pursuing -- below, you had a
15 free exercise claim and you had a free speech
16 claim. Which are you pursuing? Are you
17 pursuing both now, or are you pursuing them
18 separately, or is this a -- sort of a hybrid
19 claim argument you're making?

20 MR. CLEMENT: So, Justice Thomas, we
21 are pursuing them both. They're both fully
22 preserved in this Court, but I do think you're
23 right in the sense that this is a hybrid-type
24 case in which the Free Speech Clause and the
25 Free Exercise Clause reinforce each other, and I

1 think it directly enforces how -- it reinforces
2 how the Court should approach the case because,
3 when a government acts not because it's trying
4 to maintain discipline in the school or maintain
5 order or avoid disruption, but it's taking
6 action precisely because the speech is religious
7 and the school fears endorsement concerns,
8 that's a case where strict scrutiny applies, and
9 it's not just a case for ordinary Pickering
10 balancing.

11 JUSTICE THOMAS: So where does
12 Garcetti fit in? It seems as though that's
13 muddying the water a little bit because you
14 would not normally think of a free exercise
15 claim as being amenable to Garcetti.

16 MR. CLEMENT: Well, I think that's a
17 fair point, Justice Thomas. I guess, if the --
18 if the -- if the statement really is the
19 government's own speech, then I don't think
20 you'd have the basis for either a free speech
21 claim or a free exercise claim.

22 It may be, though, that in deciding
23 whether or not the coach's speech is his own
24 speech or the government's speech, you might
25 apply a slightly different test in the free

1 exercise context than you would in the free
2 speech case. But either way, I think we are
3 comfortably on the private side of the Garcetti
4 inquiry because the Garcetti inquiry asks
5 whether this is part of the coach's jobs -- job
6 duties.

7 JUSTICE THOMAS: Well, we know it's
8 not a part of his job, especially since the
9 School District didn't know anything about it
10 initially and it objected to it. So it can't be
11 a part of his job.

12 MR. CLEMENT: Well, that's music to my
13 ears, Justice Thomas. And I would say, even
14 beyond that, we know it's not part of his job
15 duties for at least two other reasons.

16 First of all, his job duty was not
17 some all-encompassing responsibility for the
18 players after the final whistle blew because the
19 record is clear that he was able to have a
20 private conversation, greet a spouse, and do
21 things like that --

22 JUSTICE THOMAS: But how could you
23 make a free exercise claim and say it's a part
24 of his job?

25 MR. CLEMENT: We're not. So we're --

1 we're saying this isn't part of his job, so it's
2 private speech, and, therefore, under free
3 speech principles, it's subject to -- in our
4 view, ultimately, because the government's
5 action is religiously based, it's subject to
6 strict scrutiny. But we'd also say, because
7 it's not part of his job, it's private religious
8 activity that's protected by the Free Exercise
9 Clause.

10 JUSTICE SOTOMAYOR: Mr. Clement, I --
11 I -- I have been trying to parse this out in a
12 similar way to Justice Thomas, but let me just
13 give you a certain number of hypotheticals, and
14 tell me what's -- when it becomes private and
15 when it's still public.

16 A teacher begins each of her classes
17 with a silent prayer and an audible prayer.
18 Now, when I say "begin," the bell rings,
19 students are coming in, they sit down, teacher
20 says the prayer privately or publicly. Is that
21 within her duties as a teacher?

22 MR. CLEMENT: I -- I would think so,
23 Justice Sotomayor.

24 JUSTICE SOTOMAYOR: Why?

25 MR. CLEMENT: Because it's -- it's

1 during instructional time. It's during a time
2 where she has instructional duties --

3 JUSTICE SOTOMAYOR: How about before
4 the bell rings?

5 MR. CLEMENT: So the --

6 JUSTICE SOTOMAYOR: Students are
7 coming in. She's reading the Bible. She's
8 reading it out loud before the bell. Is it the
9 bell that makes it within the time or not within
10 the time?

11 MR. CLEMENT: Well, I would say the
12 bell is what makes your first hypothetical a
13 relatively straightforward one.

14 As to your second hypotheticals,
15 because I think there's two things there, I
16 think, if the -- if the -- if the teacher were,
17 before the bell, reading her Bible at her desk
18 either silently or barely audibly, that would be
19 private speech. That would be protected.

20 If before the bell but while the
21 students are all there she's reading out loud to
22 the class, I think that's -- that's kind of the
23 -- the edge case, because there --

24 JUSTICE SOTOMAYOR: So let's take it
25 to the end of the class. Class -- the students

1 are getting up. It is part of everyday life
2 that as students leave they stop and they talk
3 to the teacher. She gives them some answers to
4 their questions about the lesson.

5 But, instead of doing that, instead of
6 waiting for those questions, she decides, I'm
7 going to say a prayer. Is that within her
8 duties to -- to -- is that personal, or is that
9 still something that will be perceived as part
10 of her work there?

11 MR. CLEMENT: So, Justice Sotomayor, I
12 think that's closer to the edge case, and I
13 think what it would -- it would depend on,
14 again, first of all, if, after the bell rings,
15 she's reading the -- the Bible, because she's
16 free to do whatever she wants, and she chooses
17 to read the Bible and she does it either
18 silently --

19 JUSTICE SOTOMAYOR: But she's not free
20 to do everything she wants. She's required as
21 part of her duties to be available to the
22 students and answer their questions.

23 MR. CLEMENT: Well, then it might be a
24 situation where the -- in -- in that
25 hypothetical, where she is essentially supposed

1 to be continuing to have some instructional
2 obligations to the kids and she's not free to
3 text her spouse --

4 JUSTICE SOTOMAYOR: Well, then --

5 MR. CLEMENT: -- check her email --

6 JUSTICE SOTOMAYOR: -- let's take
7 that, okay? She's not free to do that because
8 it's personal, she could do it, but it's
9 personal speech, not religious speech, to text
10 her husband or to check the Internet.

11 Could she be fired for texting her
12 husband during school hours?

13 MR. CLEMENT: Well, I -- I -- I think,
14 if I'm understanding the hypo right, if it's a
15 neutral rule, doesn't single out religious
16 expression --

17 JUSTICE SOTOMAYOR: No -- no neutral
18 rule. This is, if she does something that's
19 private on office hours, this is her employer,
20 her employer says to her, don't do private
21 things when you're working, and she does it
22 anyway, can she be fired?

23 MR. CLEMENT: So that is a neutral
24 rule as you're explaining it to me. I think
25 that's important to my answer.

1 JUSTICE SOTOMAYOR: Any rule.

2 MR. CLEMENT: So I just want to --

3 JUSTICE SOTOMAYOR: But -- but --

4 MR. CLEMENT: -- I just want to make
5 sure that's common ground. It's a neutral rule
6 that you can't do anything private.

7 JUSTICE SOTOMAYOR: But why does it
8 have to be a neutral rule? Meaning -- and --
9 and this is why I'm getting to this example.
10 She's on duty. She's on duty in the classroom.
11 And the duty is not from the beginning of the
12 bell to the end of the bell. The duty is while
13 she's in the classroom.

14 So why can't an employer tell an
15 employee what they're permitted to do, personal
16 or otherwise, during that time?

17 And I ask this question because I'm
18 analogizing it to this situation. I found it
19 odd in your brief that you just kept saying the
20 coach wasn't on the field during the game. But
21 I have a dozen or more statements by your coach
22 telling and admitting that his duties as coach
23 didn't -- weren't just during the game.

24 He had an obligation to remain behind
25 for two hours after the game finished. That was

1 part of his duties. He had a duty to make sure
2 that he escorted all the players off the field.
3 He had a duty to make sure the other team got
4 off the field. He had a duty to do a post-game
5 wrap-up both with the players and the coach. He
6 had a duty to clean up and to make sure that the
7 gym was left in good order.

8 So I guess what I'm asking is, if he
9 had all these duties and your employer says to
10 you, these are the duties that you have and
11 that's all I want you to do, why can't it choose
12 to say, and the one duty I don't want you to do
13 is to do this one because you are an example to
14 your players? You admit that that's part of
15 your duties.

16 If it's not part of his duties to set
17 the example the school wants, why can't the
18 school fire a coach who decides to put a Nazi
19 swastika on their arm and go to the middle of
20 the field and pray? If someone comes up and
21 says, that's part of my religion, could the
22 school say no to them?

23 MR. CLEMENT: So, Justice Sotomayor, I
24 think there were maybe three different
25 hypotheticals there, and I'm going to try to

1 deal with them as best I can.

2 If somebody wants to have sort of a
3 Nazi emblem, but it's not religious, and --

4 JUSTICE SOTOMAYOR: Assume it's
5 religious.

6 MR. CLEMENT: But, if it's not
7 religious --

8 JUSTICE SOTOMAYOR: Assume it's
9 religious.

10 MR. CLEMENT: I'm happy to assume it's
11 religious. If it's religious, that might be --
12 if it's claimed to be religious, that might be
13 one of the rare cases where you question the
14 sincerity of the religious belief because I'm
15 not really aware of that religion myself, but
16 assuming it's a sincere religious belief,
17 there's no basis to discriminate on the basis of
18 religion, and so the -- the -- the -- the -- the
19 school might have to address that through a
20 neutral policy, avoiding disruption, and if it's
21 a neutral policy and doesn't single it out
22 because it's religious, then that's something
23 that would be evaluated under Pickering.

24 JUSTICE KAGAN: Mr. Clement --

25 CHIEF JUSTICE ROBERTS: Mr. --

1 JUSTICE KAGAN: -- can I --

2 CHIEF JUSTICE ROBERTS: -- Mr.
3 Clement, what if the -- the activity on the
4 field did not consist of this kneeling down
5 briefly but something more extensive, standing
6 up on the 50-yard line, you know, arms
7 outstretched, engaging in audible prayer?

8 Is -- is your analysis and answer
9 still the same?

10 MR. CLEMENT: It's not exactly the
11 same, Mr. Chief Justice. I think the -- the
12 difficulty with the sort of audible prayers or
13 some of the practices that the coach candidly
14 admitted he engaged in previously, where he's
15 holding up the helmets for both teams and sort
16 of talking to the players, is there's an
17 instructional component to that that I think
18 that a -- that a school district could say that
19 -- that since you're engaged in instructional
20 activity, and that's what the core of what
21 coaches and teachers do, we're going to -- we're
22 going to treat that as government speech.

23 I think that --

24 CHIEF JUSTICE ROBERTS: Well, he's not
25 speaking to the players as in the, you know,

1 example you gave, but he's praying to God.

2 MR. CLEMENT: So, if -- if he's not --
3 if there's not an instructional component too,
4 if the players are -- are -- are, you know,
5 doing their own thing in the end zone, for
6 example, then I think it really becomes what --
7 the school is -- is -- is able to have a neutral
8 rule.

9 And this was part of my answer to
10 another component of Justice Sotomayor's
11 question, which is the -- the school has a fair
12 amount of flexibility to determine what the
13 duties of the coach are.

14 Here, they did not say that his duties
15 were an all-encompassing supervisory role. And
16 I suppose, if the school district had one coach
17 whose whole job was to watch those kids after
18 the bell like a hawk and make sure they didn't
19 get into any trouble, even a brief religious
20 exercise by that individual might be
21 inconsistent with their neutral job duties and a
22 basis for the school to do something.

23 But, here, it's -- it's in the record
24 and I think undisputed that the -- that the
25 coach could do other things, other private

1 things of a comparable amount of time because
2 this is a fleeting religious exercise. Even the
3 School District described it as fleeting. So --

4 JUSTICE BARRETT: But would Pickering
5 apply, Mr. Clement, if, in the Chief Justice's
6 hypothetical, let's say he says the Our Father
7 with arms outstretched and it starts causing a
8 lot of havoc in the stands, a lot of the things
9 that, you know, your opponents, your friends on
10 the other side say that happened, that, you
11 know, the band members were being rushed, the
12 head coach feared for his life.

13 If his prayer of the Our Father caused
14 that kind of chaos, would Pickering apply, if
15 they said for reasons of efficiency and school
16 safety we just can't have this?

17 MR. CLEMENT: So, if -- if -- if they
18 came up with a neutral policy that tried to deal
19 with that situation, I think you would test the
20 neutral policy based on Pickering.

21 JUSTICE BREYER: All right. Well --

22 MR. CLEMENT: I think, if they tried
23 to adopt the neutral policy for the sole reason
24 of stopping the Our Father, I think that's a
25 case where you'd say, no, that's pretextual and

1 that's still going to be subject --

2 JUSTICE BREYER: Is this what --

3 MR. CLEMENT: -- to strict scrutiny,
4 but I -- but -- but, if I could just get it on
5 the table, but I also think, if -- if what -- if
6 the hypothetical is that kind of audible prayer,
7 you -- you do have the -- the argument at least
8 that that would be instructional and might be a
9 different case.

10 I'm sorry, Justice Breyer.

11 JUSTICE BREYER: One of my problems in
12 this case was the parties seem to have different
13 views of the facts, so I'd like to get the --
14 this may be a case about facts and not really
15 much about law, and that's why I wanted to try
16 this.

17 I'll list six facts that I got out of
18 the record, and just tell me if they're right or
19 wrong. That's all. If you want to say they're
20 wrong, I'll go back to it. If you want to say
21 they're right, good, I don't have to go back to
22 it. Right? Okay.

23 One, for a long time, Kennedy would go
24 after the game, Coach Kennedy would go to the
25 50-yard line and he spoke out loud a prayer of

1 thanksgiving and he allowed students to join
2 him.

3 Two, when the District learned about
4 that, it wrote to him or told him: You are free
5 to engage in religious activity, including
6 prayer, but it has to be physically separate
7 from student activity and it has to be
8 non-demonstrative, okay, if they're involved, if
9 the students are nearby.

10 Three, his lawyers, Kennedy's lawyers,
11 then sent him a letter that seemed less
12 accommodating. It said, beginning on
13 October 16, Kennedy will continue his practice
14 of saying audibly just after the game by himself
15 at the 50-yard line an audible, verbal prayer,
16 and students could come. And Kennedy said, I'm
17 not going to stop my prayer because kids are
18 around me.

19 Four --

20 MR. CLEMENT: So am I supposed to stop
21 you when something's not quite right in my --

22 JUSTICE BREYER: Yeah. Yeah.

23 MR. CLEMENT: So on --

24 JUSTICE BREYER: Just make -- note
25 that.

1 MR. CLEMENT: I think it's important
2 if you look at the demand letter that was sent
3 on October 14 --

4 JUSTICE BREYER: I'm about to do that.

5 MR. CLEMENT: No, no. That's what you
6 were just talking about.

7 JUSTICE BREYER: No, no, I'm not.
8 This is -- this is before, I'm saying -- oh,
9 correct, you're right.

10 MR. CLEMENT: So, in that October 14
11 letter --

12 JUSTICE BREYER: Yeah.

13 MR. CLEMENT: -- it didn't say that we
14 want to pray with students around. It
15 specifically said that the coach shouldn't have
16 to flee from students if they --

17 JUSTICE BREYER: Yeah.

18 MR. CLEMENT: -- independently and
19 voluntarily come near him because the students
20 also have First Amendment rights.

21 JUSTICE BREYER: Correct. But Kennedy
22 in his letter said, I am not going to -- in his
23 deposition, I will not stop my prayer because
24 there was kids around me.

25 MR. CLEMENT: Yes.

1 JUSTICE BREYER: Okay.

2 MR. CLEMENT: He said -- that's Joint
3 Appendix --

4 JUSTICE BREYER: Okay.

5 MR. CLEMENT: -- page 295, I'm not
6 going to stop my prayer --

7 JUSTICE BREYER: Exactly.

8 MR. CLEMENT: -- mid-prayer that I
9 start by myself --

10 JUSTICE BREYER: All -- all right.
11 I'll --

12 MR. CLEMENT: -- just because --

13 JUSTICE BREYER: -- read -- go back
14 and read that. I'll check it because I'm going
15 to go back and read it.

16 Four, he then advertised his plan to
17 pray at the 50-yard line at the October 16 game,
18 and the media all found out about it and made a
19 big deal about it, and he was surrounded by
20 players and a large number of spectators who
21 rushed to the field.

22 MR. CLEMENT: Well, and -- and the
23 important --

24 JUSTICE BREYER: That's on October 16.

25 MR. CLEMENT: October 16, important to

1 note that the only players that joined him on
2 October 16 were players from the opposing team.

3 JUSTICE BREYER: Okay. So opposing
4 team, got it.

5 Five, afterwards, the District said to
6 Kennedy: Well, you cannot engage in
7 demonstrative religious conduct while you are on
8 duty for the District. Okay? But, if it's not
9 going to be perceived as District endorsement,
10 we'll accommodate it. For example, pray
11 privately or inside the school building or on
12 the athletic facility somewhere or in the press
13 box, and you can do that before or after games.
14 And the development of accommodation is an
15 ongoing process, and we will discuss further
16 accommodations.

17 And the final thing, six, is Kennedy
18 never answered that letter.

19 Okay. You've got the six.

20 MR. CLEMENT: So should I --

21 JUSTICE BREYER: Have you taken --

22 MR. CLEMENT: -- correct you on six?

23 JUSTICE BREYER: -- them in? Because
24 there are a lot of them, and I'm sorry about
25 that. But are they basically right with your

1 exceptions that you see?

2 MR. CLEMENT: Well, and -- and I was
3 just about to add Exception 6 --

4 JUSTICE BREYER: Yeah.

5 MR. CLEMENT: -- which is --

6 JUSTICE BREYER: Seven.

7 MR. CLEMENT: Well, no, no, but, on --
8 on 6, the -- the -- the record -- it's not in
9 the record because these kind of interactions
10 wouldn't necessarily be in the record, but there
11 were efforts by Kennedy's lawyer to negotiate
12 with the School District, and they would not
13 respond. And we pointed that out in a footnote
14 in -- in a reply at the cert stage.

15 So this is not a situation where there
16 is some asymmetry here that, you know, they were
17 wonderfully accommodating and -- and we just
18 refused to deal with them.

19 There are lots of other facts that are
20 in the record that I think are highly relevant
21 here, including that no student joined him on
22 the field on October 23, even though that's one
23 of two specific incidents for which he was
24 disciplined, that no players joined him on the
25 26th, which is the other game where he was

1 specifically sort of signaled out for his being
2 fired.

3 It's also, I think, important to
4 recognize that after the game on the 16th, the
5 letter was sent on the 23rd, didn't say anything
6 about safety concerns, band member safety. It
7 talked eight times about endorsement. And then,
8 at the next home game, the only other home game
9 in the record here, the 23rd, because the School
10 District made clear that there weren't supposed
11 to be people on the field, they didn't have a
12 replication of the events on the 16th. It's
13 also true and --

14 JUSTICE KAGAN: Mr. Clement --

15 MR. CLEMENT: -- I think important --

16 JUSTICE KAGAN: -- I want to -- I
17 mean, finish your sentence, but --

18 MR. CLEMENT: Sure. I just had one
19 more thing, which is that there were a number of
20 these games, you know, contemporaneously right
21 before then where the record is clear that he
22 did engage in these kind of prayers when the --
23 when the players were singing in the end zone,
24 and many of them were at away games, and there
25 was no rushing the field, no circus, no

1 incidents.

2 JUSTICE KAGAN: I -- I take it from
3 your earlier answers that you're not contesting
4 the right of the School District to discipline
5 Coach Kennedy if he had been praying during the
6 official, if you will, post-game talk?

7 MR. CLEMENT: I think that's right.
8 We don't -- I mean --

9 JUSTICE KAGAN: Correct?

10 MR. CLEMENT: -- we don't take an
11 issue with that --

12 JUSTICE KAGAN: So -- so that's
13 like --

14 MR. CLEMENT: -- he discontinued that
15 practice.

16 JUSTICE KAGAN: -- if he were praying
17 -- if he were a math teacher and he prayed in
18 math class, same? If he's a coach and he prays
19 during the post-game talk, that the school can
20 discipline him for?

21 MR. CLEMENT: That's right because --

22 JUSTICE KAGAN: And -- and --

23 MR. CLEMENT: -- it would be
24 government speech.

25 JUSTICE KAGAN: -- just briefly, why?

1 MR. CLEMENT: Because it would be
2 government speech.

3 JUSTICE KAGAN: Well, how -- I don't
4 really quite know why that's the -- the
5 operative question. I mean, really, why? Why
6 can the school discipline him? And I'm going to
7 just sort of suggest and -- and -- and find out
8 whether you agree that if you look at our prayer
9 cases, the idea of why the school can discipline
10 him is that that puts a kind of undue pressure,
11 a kind of coercion on students to participate in
12 religious activities when they may not wish to,
13 when their religion is different or when they
14 have no religion.

15 Is that correct?

16 MR. CLEMENT: So, look, I think it's
17 simpler than that, quite frankly. I think it --

18 JUSTICE KAGAN: You see, I think a lot
19 of this Garcetti stuff is not -- is -- is just
20 not getting to the heart of what we care about,
21 what our cases have long cared about in thinking
22 about these questions, which is coercion on
23 students and having students feel that they have
24 to join religious activities that they do not
25 wish to join, that their parents do not wish

1 them to join.

2 MR. CLEMENT: So I -- I do think it's
3 -- it really is as simple as the government
4 speech, but I also want to be clear, again, as
5 we're talking about the record here, this is not
6 a case where the government took action because
7 of coercion concerns. The record is
8 crystal-clear that they were concerned about
9 endorsement and --

10 JUSTICE KAGAN: Yeah, I -- I mean,
11 endorsement, coercion, I mean, you're requiring
12 a lot of a school board to try to figure out
13 exactly which box in the Establishment Clause to
14 put this in.

15 MR. CLEMENT: I -- I -- with all due
16 respect, I don't think it's asking that much for
17 a school district to understand what this Court
18 has said repeatedly and said that even young
19 students will understand --

20 JUSTICE KAGAN: Okay. Assume that the
21 School District had said the right things. They
22 had said, we don't really like this because it
23 is a form of pressure, a form of coercion.
24 We're worried that the -- that students will
25 feel -- he gets to put me into a football game

1 or not. He gets to, you know, give me an A in
2 math class or not. And this is a kind of
3 coercion that's improper for 16-year-olds.

4 MR. CLEMENT: So, Justice Kagan, in
5 the hypothetical where the coach is giving the
6 post-game talk, I think those kinds of concerns
7 about real coercion may well be well placed.

8 But, when the coach is by himself at
9 the midfield giving a 15-second fleeting prayer,
10 those kinds -- if you -- if you call that
11 coercion, you are making an important category
12 mistake.

13 JUSTICE KAGAN: I -- I see that point.
14 So let me give you a hypothetical.

15 So the hypothetical is you have a
16 coach and he has historically been giving
17 prayers in his post-game talk. And then the
18 school says don't do that. And let's say that
19 the school uses the right words and says don't
20 do that because we think it poses a coercion
21 problem. And he says, okay, I won't do that.
22 And -- but instead he says, you know what, I'm
23 going to start the post-game talk a minute later
24 than I usually do, and in the meantime, I'm
25 going to pray, and, please, you know, join me if

1 -- if -- if -- if you are so moved.

2 What's a student to think at that
3 point?

4 MR. CLEMENT: I think, in that
5 hypothetical, there well may be a coercion
6 concern, but if instead the coach says, all
7 right, I'm going to go to midfield, I'm going to
8 do this at 15 seconds, I'm going to try to pick
9 a time when most of the players are in the end
10 zone doing something else, and if anybody asks
11 whether they can join, I'm going to tell them
12 it's a free country, you don't have to, but do
13 what you want, that's this case.

14 And that's not coercion that counts
15 under the Establishment Clause.

16 JUSTICE KAGAN: So is -- is -- is that
17 the question of this case, whether the facts are
18 my facts or your facts?

19 MR. CLEMENT: That's one of the
20 questions in this case, but why it matters --
21 and, honestly, I think the record's
22 crystal-clear on this. I mean, we have a record
23 this time around. I don't think the Joint
24 Appendix and the rest of the record is ambiguous
25 on this point.

1 But the reason the factual difference
2 is important is because, if you don't
3 distinguish between the two situations, then
4 you're leaving teachers and coaches in a
5 position where there's no material room for
6 their free exercise of religion or their free
7 speech, and that's exactly what this Court said
8 is not the case in Tinker.

9 And so -- and -- and, again, the
10 concerns -- the reason it gets back to
11 government speech at least in my view is because
12 one technique that the Ninth Circuit used to
13 approve this is one of these excessively broad
14 job descriptions.

15 And I think, with all due respect to
16 Justice Sotomayor, her hypothetical built in
17 this idea. If -- if you say the job description
18 of teachers and coaches is to be mentors, and if
19 the mentors are religious, the students who
20 depend on them for playing time and grades and
21 all of the rest are going to want to curry favor
22 and they're going to engage in their own
23 religious practices or conform or at least feel
24 pressure to do so.

25 JUSTICE SOTOMAYOR: Mr. Clement --

1 MR. CLEMENT: That's a recipe for no
2 free speech rights at all.

3 JUSTICE SOTOMAYOR: -- I -- I do
4 understand a claim that how adults respond to
5 things is not often relevant. We don't have a
6 heckler's veto in our First Amendment
7 jurisprudence, but we have had it in our school
8 prayers under the recognition of what Justice
9 Kagan talked about, the fact that 16-year-olds
10 can't be expected to be adults.

11 What do I do with the fact that
12 parents complain that their children wouldn't
13 follow their directives not because they wanted
14 to pray but because they felt pressure to pray?
15 What do I do with the fact that when the coach
16 was -- the school explicitly said students don't
17 have to come if they don't want, many of them
18 didn't? Some still did, but many of them
19 didn't. And what do we do with the fact that a
20 coach from another team was the one who brought
21 this to the school's attention because your
22 client asked him and his players to join in the
23 prayers?

24 Does -- don't those facts suggest the
25 very coercion that Justice Kagan was talking

1 about?

2 MR. CLEMENT: So, Justice Sotomayor,
3 to the extent they suggest any coercion, it's
4 only vis-à-vis the pre-September 17th practices
5 that were discontinued as soon as there was a
6 candid discussion between the coach and the
7 School District. And --

8 JUSTICE SOTOMAYOR: But, Mr. Clement
9 --

10 MR. CLEMENT: -- I think it's --

11 JUSTICE SOTOMAYOR: -- the problem I
12 have is your client is the one who publicized
13 this debate. He had a right to. But, once he
14 did and it created the disruption it did, why is
15 the school estopped from saying this activity on
16 the center field of the 50-yard line has created
17 a problem where people believe that our
18 continuing to do this -- students believe
19 permitting you to do this is interfering with
20 our work as a school?

21 I don't understand why a school can't
22 do that.

23 MR. CLEMENT: Well, a school can't do
24 that because it sounds like -- awful lot like
25 they would be sort of either retaliating against

1 his protected speech --

2 JUSTICE SOTOMAYOR: No, they were --

3 MR. CLEMENT: -- or at least saying --

4 JUSTICE SOTOMAYOR: -- willing to let
5 him speak -- pray anywhere he wanted in the
6 school. After the game, come back. He's the
7 one who chose to publicize his prayer by doing
8 it on the 50-yard line. He didn't do it on the
9 side. He didn't just bow his head. He got on a
10 knee at the very center of the field.

11 I -- I don't know of any other
12 religion that requires you to get at the 50-yard
13 line, the place where post-game victory speeches
14 are given. What religion requires you to do it
15 at that spot?

16 MR. CLEMENT: So the coach's religion,
17 and he felt -- and -- and nobody's questioned
18 the sincerity of his religious beliefs --

19 JUSTICE SOTOMAYOR: That he had to
20 thank God. But why there?

21 CHIEF JUSTICE ROBERTS: Briefly, Mr.
22 Clement.

23 MR. CLEMENT: His -- his religious
24 beliefs, he felt compelled to -- to -- to make
25 his prayer there. And I don't think there's

1 anything unusual about that. I mean, if a -- if
2 a soccer player scores a goal, the soccer player
3 will do a religious exercise, or Tim Tebow
4 scores a -- a touchdown, they do the religious
5 exercise there.

6 There -- there are spectators watching
7 it, but that doesn't -- that's not what's
8 driving the religious exercise. What's driving
9 the religious exercise is that's where the event
10 that the religious adherent is thankful for took
11 place.

12 CHIEF JUSTICE ROBERTS: Thank you.

13 Justice Thomas, anything further?

14 JUSTICE THOMAS: No.

15 CHIEF JUSTICE ROBERTS: Justice
16 Breyer?

17 JUSTICE BREYER: One quick question, I
18 think, from prior cases. The -- the problem of
19 prayer in school has been the fact that -- that
20 there are 54 different religions in the United
21 States now, and so what -- going back to the
22 18th Century, 17th Century, what we're worried
23 about is maybe it's -- here, it was the
24 Satanists, but, I mean, it could be, you know,
25 the Catholics, Protestants, Jews, Shintos,

1 Mohammedans, and one group thinks why this group
2 is being favored by the school, the other one
3 thinks what about this one and so forth. So we
4 have a kind of neutrality.

5 Now it's the same question. Right
6 after the game, right before the bell rings in
7 the morning, the teacher, the coach, says let us
8 pray, prays out loud, and students join.

9 And, indeed, this one told all the
10 press, so there were going to be a lot of people
11 there. But leaving that out, this doesn't seem
12 like a new problem. It just seems like a
13 line-drawing problem about 50-yard line just
14 after the game when the school said don't do it
15 on the 50-yard line, do it 10 minutes later, and
16 -- and do you see what's bothering me? And am I
17 right about how to see the case?

18 MR. CLEMENT: So I -- I -- I see
19 what's bothering you, but I don't think you're
20 right to perceive the case through that lens.
21 There is a big difference between a teacher
22 leading students in prayer out loud and allowing
23 a benevolent neutrality and tolerance for a
24 variety of views.

25 Obviously, the school district says

1 it's fine to take a knee after the game, but
2 it's not fine to turn to Mecca. Or the student
3 that's -- the Muslim student that scored and
4 bowed towards Mecca is going to be disciplined
5 but not the Christian student that took a knee
6 after scoring a touchdown.

7 Those are problems. That's
8 discrimination. But to allow individual
9 religious exercise in the normal places -- if
10 you tell a kid that is about to kick the
11 potential game-winning field goal that they
12 can't cross themselves on the field in front of
13 50,000 or a thousand, but what they can do,
14 don't worry, you can -- you can go in, you could
15 rush up to the press box, we'll put the whole
16 thing on hold, you can do it in our prayer
17 booth, where nobody can see you, and then you
18 can come down and kick the field goal. Nobody
19 thinks that's sensible.

20 And the one thing I would point out is
21 the very fact that the accommodations that were
22 offered by the School District were to leave the
23 field and go somewhere else and do your prayer
24 and come back demonstrates beyond all doubt that
25 he did not have all-encompassing supervisory

1 responsibilities after the game.

2 Sure, he was on duty in a loose sense,
3 but he was not on duty in a real sense or they
4 would not have given him those accommodations.

5 CHIEF JUSTICE ROBERTS: Justice Alito?

6 Justice Sotomayor, anything further?

7 Justice Kagan?

8 Justice Gorsuch?

9 JUSTICE GORSUCH: Mr. Clement, one of
10 the difficulties of this case is getting one's
11 hands around the District's rationale, and as I
12 understood, it was based on kind of our Lemon
13 endorsement test.

14 And you're arguing, as I -- as I hear
15 you, that that's -- that was a mistaken test and
16 a mistaken way to think about what the
17 Establishment Clause requires.

18 You had a colloquy about coercion as
19 an alternative, and I'd -- I'd just like your
20 thoughts on that subject generally.

21 MR. CLEMENT: I -- I -- I appreciate
22 the question. I don't think -- I mean, you
23 know, people are trying to dispute this record.
24 I think it is very clear on what motivated the
25 District, and it was endorsement, endorsement,

1 endorsement, endorsement again. If you --

2 JUSTICE GORSUCH: Not -- not coercion?

3 MR. CLEMENT: Not coercion. If you
4 look at their first letter after the
5 October 16th game, Joint Appendix page 90 to 95,
6 there are eight references to endorsement or
7 endorsing, zero references to either coercion or
8 player safety.

9 If you look at their letter to the
10 EEOC, which is around Joint Appendix page 130,
11 there are again eight references to endorsement,
12 endorsing, no references to coercion. So it is
13 clear what motivated their policy.

14 As to what the right concern would be,
15 I mean, I -- I do think real coercion from
16 government action is something that this Court
17 has historically looked to in the context of
18 Establishment Clause cases, but, as Justice
19 Scalia pointed out in his Good News concurrence
20 and in other opinions, it's very important to
21 distinguish between real coercion coming from
22 the government and the kind of peer pressure, if
23 you will, that comes from private individuals
24 being able to engage in speech.

25 And I think the record is clear here

1 that we only have the latter going on here and
2 not the former. It's certainly not what
3 motivated the District because, in --
4 contemporaneously, when they put out a
5 newsletter to their -- their constituents, they
6 said there's no evidence that any student was
7 coerced here.

8 JUSTICE GORSUCH: So what do we do
9 about that, though? Many school districts and
10 municipalities around the country continue to
11 operate on this endorsement idea, and there are
12 certainly some strains of it in our case law, as
13 you're familiar, dating back to Lemon.

14 MR. CLEMENT: So I -- I -- I think the
15 fact that school districts continue to make this
16 mistake even though you have said over and over
17 and over again that tolerating private religious
18 speech is not endorsement is an excellent,
19 excellent reason to be as emphatic as possible
20 in overruling endorsement cases. If it requires
21 formally overruling Lemon and the endorsement
22 tests that come from that, I think that would be
23 very helpful.

24 But what -- what continues to happen
25 is that there is overt discrimination on the

1 basis of religion, as is evidenced in the record
2 here, by school districts, who aren't evil.
3 It's just they're doing it out of misguided
4 endorsement concerns.

5 And I think the time has come to be as
6 clear as possible to make clear that that's not
7 a proper part of Establishment Clause analysis.

8 CHIEF JUSTICE ROBERTS: Justice Kagan?

9 JUSTICE KAGAN: Do you want to --

10 CHIEF JUSTICE ROBERTS: No?

11 Justice --

12 JUSTICE KAGAN: If -- if -- if you
13 would go back to the coercion part of your
14 answer to Justice Gorsuch, if I understood you
15 correctly, you were saying, well, real coercion
16 is where the government does it. And I -- I
17 want to understand that.

18 Are -- are you suggesting that a
19 teacher in a classroom can say: Well, you can't
20 charge me with coercion because he separates
21 himself from the School District?

22 MR. CLEMENT: That's where I think the
23 Garcetti line comes in because, if it's the
24 individual -- if it's government speech,
25 instructional role, then that -- no matter what

1 they say to try to distance themselves, the
2 teacher and the coach can still be a source of
3 coercion.

4 But, if it's really private speech --
5 JUSTICE KAGAN: Okay. Even though he
6 says, you know, this isn't the School District's
7 speech and even though everybody knows that,
8 actually, I mean, there must be countless times
9 when a coach in the post-game talk or a teacher
10 in math class, where people would totally
11 believe them if they said, I'm doing this as --
12 as just me, I'm not doing this because the
13 school district says it, but, for me, this is
14 super-important to me, this prayer, and I hope
15 you'll join me.

16 Now that seems to me to be coercive of
17 16-year-olds regardless if they know that it's
18 him and not the school district. He's the one
19 who's going to give me an A or not.

20 MR. CLEMENT: I -- I guess it just
21 depends -- I mean, if -- if you're saying this
22 -- that this happens in the middle of class, I
23 might believe you. But, if you're just
24 saying -- I mean, look, take a familiar example.
25 It's Ash Wednesday. A teacher goes to morning

1 mass, comes in with a big black mark on his or
2 her forehead. Is that coercive?

3 JUSTICE KAGAN: No, because nobody's
4 asking the students to participate at that
5 point. They don't have a choice of
6 participating at that point.

7 MR. CLEMENT: But it's a very popular
8 teacher, and they're going to have that -- that
9 teacher in the afternoon's class, and there's a
10 noon mass that they might be able to get to and
11 get their own black mark, and then they'll be
12 favored students, and that teacher is the one --

13 JUSTICE KAGAN: I --

14 MR. CLEMENT: -- they put a
15 recommendation for --

16 JUSTICE KAGAN: -- I think we can draw
17 lines like that, you know?

18 MR. CLEMENT: What's that?

19 JUSTICE KAGAN: I think we can draw
20 lines like that and know the difference between
21 those two things, but know the difference when a
22 teacher who has historically tried to bring
23 prayer into a classroom setting says, you know
24 what, you know, I -- I understand that there are
25 all these Supreme Court cases against me, so

1 what we're going to do is we're going to have a
2 little bit of a break, five minutes of a break,
3 so we can all regroup, and -- and I'll be
4 praying during that time.

5 MR. CLEMENT: So, Justice Kagan,
6 obviously, there's going to be room in the
7 jurisprudence for pretext going both ways.

8 And I also think there ought to be
9 room for understanding that in this area, given
10 the current state of this Court's jurisprudence,
11 there are -- there's room for -- for mistakes on
12 both parts.

13 So I think it would be profoundly
14 mistaken to say, well, another coach, Coach
15 Kennedy prime, he could engage in this exact
16 same religious exercise, but because he engaged
17 in this previous exercise and candidly
18 cooperated with the District, we're going to say
19 that there's some sort of like a taint of prior
20 practice, and he can't engage in the religious
21 exercise. So I --

22 CHIEF JUSTICE ROBERTS: Justice
23 Kavanaugh?

24 JUSTICE KAVANAUGH: I want to pick up
25 on Justice Kagan's and Justice Gorsuch's

1 questions. The District said the sole reason it
2 was doing this was to avoid Establishment Clause
3 problems, correct?

4 MR. CLEMENT: Correct. And was
5 specific to endorsement.

6 JUSTICE KAVANAUGH: Okay. And then,
7 to pick up on Justice Gorsuch, the Lemon
8 endorsement test, that has not been applied by
9 this Court in several decades in cases like Van
10 Orden, Town of Greece, American Legion. At
11 least I've said I don't think there is such a
12 test in our case law anymore, the Lemon
13 endorsement test, correct?

14 MR. CLEMENT: Sure, but it's a -- it
15 -- it's a stubborn -- it's a stubborn fruit, and
16 I don't think just pushing a pencil through it
17 has done the trick. I mean, you really have to
18 slice it in half and make clear to everybody --

19 JUSTICE KAVANAUGH: Right. There have
20 been individual opinions, but let's -- we
21 haven't applied it in the cases. I take your
22 point, but -- but I think Justice Kagan's point
23 is there's a whole separate body of cases
24 involving schools, and so Engel, Lee versus
25 Weisman, and Santa Fe. And Santa Fe is the

1 football case, and so that's the most relevant
2 one here, I think.

3 And the question here, I think, is
4 what's different about this from an
5 Establishment Clause perspective than the prayer
6 over the loudspeaker, which I think was a key
7 fact, in Santa Fe? How would we distinguish
8 Santa Fe from this case?

9 MR. CLEMENT: So Santa Fe is readily
10 distinguishable. It is an endorsement case. So
11 you might want to be clear that at least to that
12 extent, it's no longer good law, but, here --
13 it's distinguishable. The loudspeaker is a huge
14 part of it.

15 But, if you'll remember the Santa Fe
16 case, I mean, one of the issues is the school
17 district argued, hey, this is a facial challenge
18 to our policy, and under the policy, it's
19 possible for the student to give a non-religious
20 solemnization, and so this can't possibly be
21 invalid on its face.

22 And the Court's response to that
23 argument was to focus on the state action, the
24 government's own involvement in a majoritarian
25 election for the opportunity to give the prayer

1 over the loudspeaker. So, as I reread Santa Fe,
2 I was struck by how much of the Court's analysis
3 turned on the election aspect of the school's
4 policy, which has no analogue here whatsoever.

5 But, to -- to -- to give a concrete
6 example, I do think, if -- if -- if the coach
7 goes to the loudspeaker after the game, there's
8 a much stronger argument that that's government
9 speech. And --

10 JUSTICE KAVANAUGH: And -- and, also,
11 there's -- just to pick up on Justice Kagan's
12 point, then you have the captive audience that
13 seems to be at the heart of Engel, Lee versus
14 Weisman, and Santa Fe, and the question really
15 is, what's different here? You can answer that
16 in any way you want, but just --

17 MR. CLEMENT: Yeah, but -- but -- but
18 I think that, you know, the loudspeaker sort of
19 ties this audience back to the government speech
20 and ties it all together. I think, you know,
21 when -- when Mohamed Salah, you know, has a
22 religious exercise after a goal at Anfield, the
23 fact that the crowd is there is incidental.
24 It's not a captive audience in that sense. It's
25 not -- it's not he who brought them there. So I

1 think it kind of comes back to government speech
2 in that respect.

3 And I think, when the coach takes this
4 15-second fleeting prayer at the end of the game
5 with no loudspeaker, barely audible, it's
6 radically different from the use of the
7 loudspeaker and is much similar to Mohamed
8 Salah, Tim Tebow, all of those things.

9 Or think about what happens when a
10 player gets injured on the field. I mean, it's
11 common practice at all levels of the game,
12 public school, private school, you take a knee.
13 The coach takes a knee. The players take a
14 knee. Many of them presumably are praying for
15 the player's health. Some of them are not.
16 Some of them are -- have their own religious
17 traditions. But none of that is coercion, not
18 in a real sense, and none of it violates the
19 Establishment Clause.

20 JUSTICE KAVANAUGH: What about the
21 player who thinks, if I don't participate in
22 this, I won't start next week, or the player who
23 thinks, if I do participate in this, I will
24 start next week, and the player's, like -- wants
25 to start?

1 MR. CLEMENT: So that's -- that's
2 where I think making a clear message that that's
3 inappropriate, that this doesn't matter for
4 those purposes, that's -- that's how you deal
5 with those problems.

6 And if there is a coach or a
7 teacher --

8 JUSTICE KAVANAUGH: But how -- how
9 will you -- how will you ferret that out?
10 Because every player's trying to get on the good
11 side of the coach, and every parent is worried
12 about the coach exercising favoritism in terms
13 of the starting lineup, playing time,
14 recommendations for colleges, et cetera.

15 MR. CLEMENT: I -- I -- I think the
16 school district, if it has that concern, and I'm
17 not saying it's not a legitimate concern, just
18 makes it as clear that it's school policy that
19 nothing turns on that.

20 But that concern, although legitimate,
21 isn't even specific to religion. I mean, if --
22 if --

23 JUSTICE KAVANAUGH: I agree with that.

24 MR. CLEMENT: -- I mean, if -- if the
25 coach is always wearing a Packers jersey, I

1 mean, there's -- there's -- there's an incentive
2 for the -- for the -- for the players to follow
3 on.

4 And it's not just coaches because, for
5 most kids, frankly, the teacher is going to be
6 the -- the -- the avenue towards collegiate
7 success, not -- not the coach. It's both, but
8 -- but -- but that's why if you take that -- if
9 instead saying the way to deal with that is you
10 punish -- if any -- if any coach or teacher does
11 it, shame on them and they should be punished.
12 And you make clear that that's not supposed to
13 happen and can't happen in this school.

14 JUSTICE KAVANAUGH: And I -- I guess
15 the -- the problem at the heart of is it you're
16 not going to know because the coach is probably
17 not going to say anything, like the reason I'm
18 starting you is that you were -- you knelt at
19 the 50-yard line. You're never going to know,
20 and that -- that leads to the suspicions by
21 parents, I think -- I'm just playing out what
22 the other side is saying here -- the suspicion
23 by parents that the reason Johnny's starting and
24 you're not is he was part of the prayer circle.

25 And, you know, that suspicion I don't

1 think you can get around. That's a real thing
2 out there, and, you know, that's going to be a
3 real thing in situations like this. I don't
4 know how to deal with that, frankly, though.

5 MR. CLEMENT: Well, if it's a real
6 thing, then there's really -- as I see it,
7 there's sort of two alternatives, right? You
8 can work really hard to dispel it.

9 JUSTICE KAVANAUGH: Mm-hmm.

10 MR. CLEMENT: Or you can say, well,
11 that's a possibility. It's not limited to
12 coaches, it's not limited to religion. So we're
13 going to effectively overrule Tinker and say
14 that, you know, if you're a teacher, you can't
15 do anything sufficiently expressive that
16 students could try to mimic it in a way that
17 curries favor.

18 JUSTICE KAVANAUGH: One last question,
19 and you -- you mentioned this. It's not just
20 religious speech that would trigger issues; it's
21 others. So, to your argument that this is
22 private speech and therefore Garcetti, how do
23 you handle the hypothetical again of the coach
24 who goes out and wants to unfurl the political
25 banner at the 50-yard line --

1 MR. CLEMENT: Well --

2 JUSTICE KAVANAUGH: -- or wants to put
3 on a political message at the 50-yard line after
4 the game?

5 MR. CLEMENT: So -- so, if it's -- if
6 the reason that the school district is acting is
7 because of disruptive or even just because it's
8 political speech and it wants to take action,
9 that's Pickering. They can do that. So that --
10 those are sort of an easy case.

11 I also think, like, flags are kind of
12 -- I know they're -- they're fun hypos, but
13 they're easy cases because those are -- there's
14 kind of no reason to unfurl a flag other than to
15 communicate with your message -- your -- your
16 audience, and that's not true of this kind of --
17 of prayer.

18 It may be very important to somebody
19 to do it in the place where the activities took
20 place. It may be that incidentally there's an
21 audience there, but it's nothing inherent in the
22 event for it to be sort of shown off to the
23 audience. And I don't think you can really say
24 that about unfurling a flag.

25 JUSTICE KAVANAUGH: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Barrett?

3 JUSTICE BARRETT: Let me pick up on
4 that, Mr. Clement.

5 This is, as Justice Thomas asked you
6 at the beginning, both a free exercise and free
7 speech claim. Who is he communicating to? God?
8 Like, where is the -- the speech?

9 MR. CLEMENT: I -- I -- I think he is
10 communicating to God.

11 JUSTICE BARRETT: And so that would
12 trigger the First Amendment protection?

13 MR. CLEMENT: Under both --

14 JUSTICE BARRETT: He doesn't have to
15 be --

16 MR. CLEMENT: -- the Free Speech
17 Clause and the Free Exercise Clause, in our
18 view.

19 JUSTICE BARRETT: Well, I understand
20 the free exercise part of it, but, you know,
21 even if he's not communicating to an audience,
22 so he's completely silent, he just takes the
23 knee, that's protected speech even if he's not
24 trying to communicate to anyone around him, just
25 to the Almighty?

1 MR. CLEMENT: Absolutely.

2 JUSTICE BARRETT: Okay.

3 MR. CLEMENT: It's expressive conduct,
4 it's -- or speech.

5 JUSTICE BARRETT: Second question is
6 to this coercion point. Let's imagine that
7 Coach Kennedy runs a Young Life group and he has
8 many players, you know, and many other kids in
9 the school, but many of his players, because
10 they really admire Coach Kennedy, come to his
11 home for these Young Life meetings.

12 And many of the concerns that Justice
13 Kavanaugh is identifying are present. You know,
14 a lot of the players come because they think
15 they're going to get more playing time if they
16 -- if they come and show up and participate in
17 this Christian youth group.

18 I take it your position would be that
19 that's entirely private speech, and even if
20 there's a coercive component to it, that the
21 school can have nothing to say?

22 MR. CLEMENT: Well, I -- I think that
23 if the school has a concern about that kind of
24 activity, after-school activity, wholly off the
25 school grounds, I mean, I think the way, if it

1 really had a concern with that, it could try to
2 deal with it through some kind of neutral
3 policy. If it said, well, we're sufficiently
4 concerned about that, we're not going to let any
5 teachers have any kind of outside events at
6 their house or something, then I think that --
7 that would be a neutral policy.

8 Somebody could try to test whether
9 that's consistent with Smith or whether Smith's
10 good law, but -- but those are all different
11 issues. But I think, you know, another way that
12 the school can deal with these kind of issues,
13 if it's not pretextual and just designed to root
14 out religion, is to have neutral rules that say,
15 okay, like, we get it, there are some concerns.

16 But the one thing I think that's clear
17 from this Court's cases is that you can't have a
18 prophylactic rule that says, you know, there
19 might be some problems, and so the way we're
20 going to solve the problem is to forbid a lot of
21 protected speech.

22 I mean, Ashcroft against Free Speech
23 Coalition, among -- among other cases, says that
24 that's verboten.

25 JUSTICE BARRETT: And I -- I guess I'm

1 gathering from your response that you would
2 treat that Young Life example as basically
3 subject to the same kind of analysis as Justice
4 Kagan's examples of, you know, a disclaimer
5 before class, this isn't instructional -- or
6 maybe it's before the bell, like Justice
7 Sotomayor asked you before, purely private
8 speech, not endorsement, nobody could mistake it
9 for government speech, and any coercion would
10 be -- you know, maybe it's there, maybe it's
11 not, just as, in the Young Life group, maybe
12 it's there, maybe it's not?

13 MR. CLEMENT: I -- I -- I think that's
14 right. And, again, if there's a lingering
15 concern, the option, I think, that's still on
16 the table is a neutral rule that sort of avoids
17 those situations because, again, I mean, it --
18 it really, as -- as -- as you sort of articulate
19 it, if -- if there's a concern, it really isn't
20 a concern that's specific to religion in any
21 way, shape, or form.

22 I mean, you could have the same thing
23 for any after-school activity if the idea is,
24 well, you know, people are going to kind of
25 curry favor with the teacher and participate in

1 that, then maybe you have a rule about it, but,
2 of course, you know, you can have that already,
3 right? I mean, you know, think you're going to
4 get a better math grade if you go out for the
5 math team.

6 So, at a certain point, the
7 responsibilities of the school is to teach the
8 important lesson that private speech is
9 protected even for teachers and coaches.

10 JUSTICE BARRETT: Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Mr. Katskee.

14 ORAL ARGUMENT OF RICHARD B. KATSKEE
15 ON BEHALF OF THE RESPONDENT

16 MR. KATSKEE: Mr. Chief Justice, and
17 may it please the Court:

18 No one doubts that public school
19 employees can have quiet prayers by themselves
20 at work even if students can see. If that were
21 the issue, there wouldn't be a case here because
22 the District allowed that.

23 But that wasn't good enough for Mr.
24 Kennedy. He insisted on audible prayers at the
25 50-yard line with students. He announced in the

1 press that those prayers are how he helps these
2 kids be better people.

3 And after the District closed the
4 field to the public, he expressly permitted
5 legislators and others to join him. Under
6 Garcetti, those are the functions of a coach,
7 not a private citizen.

8 But even if not, under Pickering,
9 Kennedy's rights would still have to be balanced
10 against the District's interest in controlling
11 its events and messages, protecting the
12 religious freedom rights of the students and
13 their parents, and managing the workplace.

14 Some of these kids were just 14 years
15 old. Mr. Kennedy's actions pressured them to
16 pray and also divided the coaching staff,
17 sparked vitriol against -- against school
18 officials, and led to the field being stormed
19 and students getting knocked down.

20 When Mr. Kennedy repeatedly ignored
21 sincere efforts to accommodate personal prayers,
22 what was the District to do? If a math teacher
23 knelt and said -- said audible prayers in class
24 just before the bell, the School District could
25 act.

1 Coaches have far more power and
2 influence, especially at the time and place of
3 those traditional post-game speeches. To win,
4 Mr. Kennedy would need this Court to whittle
5 Garcetti to nothing and toss Pickering aside and
6 disregard students' rights and ignore the need
7 to maintain control over school events.

8 Doing any of that on Kennedy's
9 hypothetical facts would be ill-advised. To do
10 all of it would be extraordinary.

11 I welcome the Court's questions.

12 JUSTICE THOMAS: Counsel, would -- if
13 the coach, instead of taking a knee for prayer,
14 took a knee during the National Anthem because
15 of moral opposition to racism, would -- how
16 would your school district respond? Would that
17 be a Garcetti -- would that be government
18 speech?

19 MR. KATSKEE: Well -- well, Justice
20 Thomas, if, for instance, the Court -- the coach
21 goes to the center of the field in front of
22 everyone during the National Anthem, absolutely,
23 that is government speech. But, on -- but, on
24 Mr. Kennedy's theory, it's private speech and
25 more than that --

1 JUSTICE THOMAS: How is that
2 government speech? Would you explain that to
3 me?

4 MR. KATSKEE: Sure. In -- in
5 Garcetti, this Court made clear that the test
6 for government speech is a functional test, not
7 a formalistic one, to determine whether the
8 speech is pursuant to one's job. That has to
9 entail looking at the manner, the time, and the
10 place of the speech, and how reasonable
11 observers would see it, whether they would view
12 that as -- as speech as a government employee.

13 And so, in the hypothetical that --
14 that you just gave, that's the sort of thing
15 given the -- given that moment during the
16 National Anthem in the center of the field and
17 making -- making this public act and public
18 statement, that would be regulable, but under --
19 but -- excuse me.

20 JUSTICE THOMAS: But what if the
21 School District, as it did here, objected to
22 that conduct before it took place? How could
23 that be government speech?

24 I'm -- normally, when I think of
25 government speech, the government has a message

1 and someone is communicating that message. How
2 would it be government speech if, as it's
3 happened in this case, the government objected
4 beforehand?

5 MR. KATSKEE: A -- a -- a couple of
6 responses, Your Honor.

7 The first is that what the government
8 speech test gets at is -- is the recognition
9 that school districts and other governmental
10 entities have to be able to control their
11 programs, and when they hire somebody to run
12 that program, they have to make sure that it is
13 their message that's being communicated.

14 And -- and under Mr. Kennedy's test,
15 not only would so many things qualify as
16 private, just because the -- just because the
17 job description doesn't say, gee, if you go out
18 to the center of the field during the National
19 Anthem, you're not -- you are allowed or are not
20 allowed to -- to make political speeches, that
21 becomes private, and it gets even worse for this
22 reason.

23 On Mr. Kennedy's theory, if the
24 motivation for -- for that act, that act of
25 protest against police misconduct is to -- is

1 political, then it's subject to Pickering
2 balancing and yet, if it is -- the motivation is
3 religious, it gets strict scrutiny.

4 That make no -- makes no sense, and it
5 is also inconsistent with this Court's
6 consistent holdings that -- that political and
7 religious speech have to be treated the same
8 way.

9 Political speech gets strict scrutiny
10 in other -- in other contexts, but government
11 employees are different. There -- there has to
12 be a balancing, and to have a different rule for
13 -- for religious speech would be impermissible
14 viewpoint discrimination.

15 JUSTICE THOMAS: Thank you.

16 MR. KATSKEE: The --

17 CHIEF JUSTICE ROBERTS: Counsel, here
18 -- here this morning your opening argument and
19 in your brief as well, you focused a lot on the
20 facts, Coach Kennedy publicizing the dispute,
21 announcing in advance his plans, some of the
22 consequences that came from that, the -- the --
23 what -- what if all that were off the table?
24 It's simply the coach going out to midfield,
25 kneeling -- taking a knee, and that's it? No

1 dispute about who's responsible for cutting off
2 the negotiations. Take out the media stuff.
3 Would the school have any problem in that case?
4 Or would the case be just the same?

5 MR. KATSKEE: Well, Your Honor, that
6 is -- that is certainly a closer question if
7 there's no history, no practice, no expectations
8 of the students, but given -- if it is -- if the
9 prayer is still going on at the time and in the
10 place of those -- those critical post-game
11 speeches, then, at that moment, we think that's
12 government speech.

13 Now, if I'm wrong about that, then --
14 then there has to be Pickering balancing, and
15 then the question is -- is taking really
16 seriously Mr. Kennedy's, in that case, if it's
17 private, free speech and free exercise rights,
18 but also bearing in mind how this affects the --
19 the religious freedom rights of the students and
20 their parents --

21 CHIEF JUSTICE ROBERTS: Well, what --
22 I gather that's --

23 MR. KATSKEE: -- and --

24 CHIEF JUSTICE ROBERTS: I'm sorry, go
25 ahead.

1 MR. KATSKEE: Oh, excuse me. I was
2 going to say and -- and all the other concerns,
3 like the question whether this could be
4 disruptive of the event, could it cause a
5 stampede or not.

6 All those things have to figure in.
7 And that's why both Garcetti and Pickering are
8 practical tests, they're functional tests that
9 deal with the realities that school
10 administrators and governmental entities have to
11 face every day in dealing with potentially
12 complicated problems.

13 CHIEF JUSTICE ROBERTS: I guess my
14 question is trying to focus on the legal
15 argument. If those facts were not the case, if
16 nobody had complained, if there was no press
17 conferences, there was no dispute, would your
18 position be the same, or would it be different?

19 MR. KATSKEE: Well, if --

20 CHIEF JUSTICE ROBERTS: Both with
21 respect to Garcetti and with respect to the
22 Establishment Clause concern.

23 MR. KATSKEE: Well, if -- if, for
24 instance, the coach is kneeling on the sideline
25 or if the coach is -- is going to that place in

1 the center of the field when the students are
2 heading back to the -- to the locker room or the
3 bus, like he did for a month after the
4 District's September 17 letter, then -- then
5 that wouldn't be reasonably perceived as -- as
6 government speech, and the District wouldn't
7 have substantial interests in regulating it.

8 But -- but the -- but the situation
9 here directly implicates the power and authority
10 of the coach, which is -- which is awesome. The
11 coach determines who makes varsity, who gets
12 playing time, who gets recommended for college
13 scholarships. The students know you have to
14 stay in the good graces of the coach if that's
15 -- if you have those aspirations.

16 And so coaches, even when coaches say,
17 oh, there's an optional -- an optional workout
18 on Monday, Tuesday, and Wednesday afternoons
19 after school, you can bet that, to the students,
20 that's not really optional and especially not if
21 the -- if the coach has gone to the media and
22 said: Having daily workout -- daily optional
23 workouts is how I make these kids better players
24 or better people.

25 JUSTICE KAVANAUGH: Counsel, I -- I

1 appreciate a lot of what you just said there,
2 but we have to analyze our Establishment Clause
3 precedents first because I think the district
4 court said that the District's sole reason for
5 doing this was to avoid an Establishment Clause
6 violation, right?

7 MR. KATSKEE: That is what the
8 district court said. That was incorrect, Your
9 Honor. But also --

10 JUSTICE KAVANAUGH: But let me just
11 take it there --

12 MR. KATSKEE: Yes.

13 JUSTICE KAVANAUGH: -- for a second.
14 On the Establishment Clause point, the Lemon
15 endorsement test, we haven't applied -- I don't
16 think that is a test anymore. We haven't
17 applied that in two decades, and so I don't
18 think that helps on the Establishment Clause
19 side.

20 On the schools cases, Santa Fe
21 ultimately, I think, is the case. And Mr.
22 Clement was saying this goes beyond Santa Fe in
23 terms of extending the Establishment Clause
24 because it's not over the public address system,
25 it's not the same facts situation that we had in

1 Santa Fe, where it was to everyone in the crowd
2 by the school over the public address system.

3 So we shouldn't, I think he's saying,
4 shouldn't extend Santa Fe, which itself extended
5 Lee versus Weisman, which extended Engel. We
6 shouldn't extend it further to this situation.

7 Can you respond to that?

8 MR. KATSKEE: Certainly, Justice
9 Kavanaugh.

10 In the first instance, yes, this
11 situation is different because this is the
12 coach. That was a student speaker in Santa Fe,
13 and that has to make all the difference in the
14 world. It's not -- it doesn't mean that there
15 -- that the -- that a coach has no free speech
16 or free exercise rights, but it does mean that
17 the -- the pressure to conform at that moment of
18 those critical post-game speeches --

19 JUSTICE KAVANAUGH: But I think --

20 MR. KATSKEE: -- and with a seven-year
21 -- excuse me.

22 JUSTICE KAVANAUGH: Wouldn't those
23 cases suggest, though, that there's a difference
24 between the coach in the locker room? I got it
25 there. The coach in the huddle? I got it there

1 as well. But, when the players are dispersing
2 after the game, I guess I'm not sure how it's
3 that much different from Establishment Clause
4 perspective than Justice Barrett's hypothetical
5 about the coach who has the -- has -- is part of
6 a group that has meetings off campus.

7 I guess I'm not sure from
8 Establishment Clause purposes how those two
9 things are distinct.

10 MR. KATSKEE: Well, in -- in the first
11 instance, this wasn't after the students were
12 dispersing. Those were -- that was when Mr.
13 Kennedy had prayers from September 17 through
14 his letter, his demand letter, on October 14.

15 And what that demand letter said is, I
16 have a -- I've had a practice that didn't
17 substantially change for seven years, and I want
18 to continue that. And he spent what's a page
19 and a half in the Joint Appendix in that letter
20 saying: And students have to be able to join
21 there too.

22 Take the 10/26, the last game, as an
23 example. And we don't even have to go to
24 homecoming, where the crowd stormed the field.
25 But Mr. Kennedy there went out --

1 JUSTICE KAVANAUGH: This wasn't --

2 MR. KATSKEE: -- occupied --

3 JUSTICE KAVANAUGH: -- this -- I'm
4 sorry to interrupt. This wasn't, you know,
5 "huddle up, team," you know, which is a common
6 coach phrase. That wasn't this, right?

7 MR. KATSKEE: No, but does the coach
8 have to say that for the students to miss that?
9 And there's something else going on too, which
10 gets back in part to government speech and in
11 part to -- and in part to the religion clause
12 concerns, is that what Mr. Kennedy did at that
13 -- at that October 26th game is he -- he, in a
14 -- ahead of time, gave special permission to two
15 legislators and some other people to come onto
16 the field to have a prayer circle with him on
17 the 50-yard line. Students -- it was fully
18 visible to students. And then, as part of the
19 arrangement, was to turn around and have one of
20 those state legislators address the team, which
21 he did.

22 JUSTICE ALITO: Mr. Katskee, let me
23 ask you to give me your analysis of the
24 following set of facts. Forget about all of the
25 complicated facts in this case.

1 A football game ends. The coach is
2 not required at that point to go to the locker
3 room with his students. It's not part of his
4 duties at that time. He is allowed to remain on
5 the field for a period of time. He is allowed
6 to walk onto the field. He does that by
7 himself. He goes to the 50-yard line. He
8 kneels down and he prays. He doesn't invite
9 anybody to go with him, but he also doesn't tell
10 people who are also permitted on the field to go
11 away. And all of this is visible to people in
12 the stands.

13 Is that a violation of the -- can he
14 be fired for engaging in those activities?

15 MR. KATSKEE: Well, Your Honor, it's
16 necessary to start with the question whether
17 that's government speech. And it would -- it
18 would seem, given the -- given the -- the facts
19 that you gave, Justice Alito, not to be
20 government speech.

21 So then the question is the -- the
22 question comes under Pickering balancing, and if
23 -- and if the team, for instance, is not there
24 so that there's not a -- there's not a fear of
25 coercion and if it doesn't cause material

1 disruptions, then the District doesn't have a
2 substantial --

3 JUSTICE ALITO: Those are the only --

4 MR. KATSKEE: -- interest in
5 regulating it.

6 JUSTICE ALITO: -- those are the only
7 facts, okay? So --

8 MR. KATSKEE: Yes.

9 JUSTICE ALITO: -- under those
10 circumstances, there would not be a violation of
11 the First Amendment.

12 Now you're talking about this in
13 relation to the Free Speech Clause, but the
14 Petitioner also has a Free Exercise Clause
15 claim. So if, on that set of facts, the school
16 district were to say you can go out to the
17 center of the field and you can kneel down to
18 protest the Russian invasion of Ukraine or make
19 a statement about climate change or about racial
20 justice or any other issue that is of interest
21 to you, but you can't pray, would that be
22 consistent with the Free Exercise Clause?

23 MR. KATSKEE: The school district --
24 not -- not -- the school district doesn't have a
25 substantial interest in discriminating. But it

1 is also the case that the school district gets
2 to script its event. So the question has to be
3 whether he is -- has to start with whether he's
4 acting as a -- as a government official or not.

5 I take it from the example that --
6 that you gave, Justice -- Justice Alito, that
7 the -- the players aren't around, there's not a
8 concern about pressure. But it is the case that
9 if -- if the players were, for instance, the
10 School District has ample authority, whether
11 it's religious coercion or political coercion or
12 social coercion, to adopt any particular view.
13 The School District has a legitimate interest --

14 JUSTICE ALITO: And I -- I take it
15 your answer to that question is they couldn't
16 discriminate based on the religious or secular
17 motivation of what the coach did?

18 MR. KATSKEE: Correct. But what's
19 interesting about that is Mr. Kennedy's test
20 requires different treatment for religious and
21 secular speech, and that just as a practical
22 matter doesn't make any sense.

23 JUSTICE ALITO: Well, you know, this
24 is an employment -- you've -- you've talked
25 about all sorts of facts, and it is complicated.

1 Coach Kennedy did a lot of things over a period
2 of time. The School District said a lot of
3 things over a period of time.

4 But it's an employment discrimination
5 case. And what do we do in an employment
6 discrimination case where the employee says, I
7 was unlawfully fired? We look at the employer's
8 reason for the action that was taken.

9 And if the reason that is given is an
10 unlawful reason, then the employee wins. We
11 don't say, well, you know, he did all sorts of
12 other things before the event that the school
13 district or whatever the employer is said was
14 the reason for the termination. He did all
15 sorts of other things. He could have been fired
16 for all of that, all sorts of other things.

17 We look at the reason that was given.
18 What was the reason that you gave here?

19 MR. KATSKEE: The -- although the
20 reason in the last letter was about religion --
21 was about religion concerns, it isn't the case
22 that the Court looks only at the -- only at the
23 given reason.

24 In fact, it's quite the opposite.
25 This Court made clear in St. Mary's against

1 Hicks and Reeves against Sanderson that it's
2 necessary to look at the whole record to
3 determine whether -- whether a -- an employment
4 action was improper and that that goes for both
5 the employer and the employee.

6 And, here, there was -- there was an
7 enormous pile of evidence that the school
8 district acted on other concerns: safety of the
9 students, control of its program and message,
10 and the worry about the storming of the field.

11 Let me list just five -- five places
12 in the Joint Appendix for that as examples.
13 It's in the Joint Appendix pages 50 -- page 51,
14 pages 92 and 93 --

15 JUSTICE ALITO: I know that you want
16 to make this very complicated, but, seriously,
17 it's your argument that if the -- if the
18 employer gives an unlawful reason that the
19 employer can nevertheless -- nevertheless win
20 because the employer could have given all sorts
21 of other lawful reasons for the -- for the
22 action.

23 MR. KATSKEE: We don't -- we don't at
24 all think that it was -- this was an unlawful
25 reason under the Establishment Clause. We think

1 that it was required. We think that at the very
2 least the District had the discretion to take
3 those concerns into account.

4 But there are lots of reasons that a
5 -- that a -- that an employment action letter
6 might not include all the reasons that the
7 District acted. For example, here, the District
8 over and over again in every one of its letters
9 said, come talk to us, we'd like to work this
10 out, tell us what you want.

11 And the District might have -- might
12 well or a -- an employer might well think: I
13 don't want to pile on because we really want to
14 find a solution to this problem, and a solution
15 to the -- to the problem of religious coercion
16 would also solve all of the other issues.

17 And, by the way, that gets to the --
18 that gets to the -- the fact that the District
19 did have specific -- did specifically name
20 coercion concerns, which gets to questions that
21 Justice Gorsuch and Justice Kavanaugh said.

22 JUSTICE BREYER: There are a lot of
23 reasons. Why are you shying away from -- or
24 maybe you're not -- the simple reason of
25 establishment?

1 MR. KATSKEE: Yes.

2 JUSTICE BREYER: I mean, suppose --
3 isn't it -- isn't it -- I think this is true,
4 but tell me if it's not. A teacher is given a
5 notice from 5 to 9, until 9:15 every morning, we
6 want a current affairs event where the students
7 can discuss anything, and they can discuss
8 religion too. There's nothing wrong with
9 discussing religion or its history or what it's
10 about. But one thing you cannot do is actually
11 pray, all right?

12 And the teacher prays purposely,
13 deliberately. It's nothing wrong with prayer.
14 It might be a great thing. It is.

15 But the District doesn't want prayer
16 between 9 and 9:15 is all, though every other
17 thing can be discussed.

18 Does that violate something in the
19 Constitution or the law? And why not?

20 MR. KATSKEE: Absolutely not.

21 JUSTICE BREYER: It does not
22 violate -- it does not violate anything. All
23 right. Why not?

24 MR. KATSKEE: Well, for -- for a
25 couple of reasons. I will -- I will start with

1 -- I will start with the Establishment Clause,
2 but I want to work backwards to the issue of
3 government speech as well.

4 JUSTICE BREYER: I mean, it's -- I
5 mean, in other words, you have no -- no -- no
6 reason not to turn to the Establishment Clause.
7 And the cases that you would cite would be what?

8 MR. KATSKEE: Well, starting with
9 Engel, Engel against Vitale, and, by the way,
10 Pierce against Society of Sisters as well
11 because the -- the Court made clear there and
12 consistently since then that the -- that -- that
13 parents have the right to determine the
14 religious upbringing of their children, and
15 government officials can't interpose themselves
16 and interfere with that.

17 JUSTICE BREYER: Okay. So one of your
18 points is we don't have to reach all these
19 complicated issues either.

20 MR. KATSKEE: Correct.

21 JUSTICE BREYER: We can simply say the
22 question is whether, just after the game, on the
23 50-yard line, the coach praying is sufficiently
24 like the teacher praying between 9 and 9:15 in
25 the morning that there is an Establishment

1 Clause problem and that is a legitimate reason
2 for bringing in discipline when it's not
3 followed.

4 Now, if we don't agree with that,
5 you're going to go to 10 other things. Okay,
6 I've got this right?

7 MR. KATSKEE: Yes, and -- and, Justice
8 Breyer, this was in the particular context of
9 that long history of his conduct and the
10 expectation and the pressure on students.

11 JUSTICE KAVANAUGH: But it's not --
12 it's not audible to all the players. And so
13 you're relying on, I think, being visible here,
14 correct?

15 MR. KATSKEE: Audible, also, Your
16 Honor. The -- the --

17 JUSTICE KAVANAUGH: Not to all the
18 players because they don't -- they're not all
19 there. They don't have to be there. It's not a
20 team event in terms of a huddle, locker room
21 situation. You're relying on it being visible.

22 And then the question is, how far does
23 that go? The coach does the sign of the cross
24 right before the game. Is that -- could a
25 school fire the coach for the sign of the cross

1 right before the game?

2 MR. KATSKEE: If -- if the coach is
3 doing it while not making himself the center of
4 attention at the center of the field, it's
5 perfectly fine. If he was instead --

6 JUSTICE KAVANAUGH: Well, the coach is
7 standing -- standing. The team is out there for
8 the -- for let's say a basketball game or let's
9 stick with football -- football game, everyone
10 -- teams are out there and the coach is visible
11 to everyone and very publicly makes the sign of
12 the cross.

13 Can the school fire the coach for
14 that?

15 MR. KATSKEE: If the coach is -- is
16 addressing the team and that's the way he starts
17 it, the District can act, but districts don't
18 have an interest in --

19 JUSTICE KAVANAUGH: No, no.

20 MR. KATSKEE: -- firing people
21 willy-nilly.

22 JUSTICE KAVANAUGH: Addressing the
23 team loads the -- the hypothetical. He is
24 visible to everyone in the crowd and to the
25 players, standing a little bit on the field from

1 the sideline, as coaches do, and very visibly
2 does the sign of the cross.

3 MR. KATSKEE: The -- the reason that
4 both Garcetti and Pickering involve -- involve
5 flexibility is to take account of the
6 line-drawing here. And that one doesn't --
7 doesn't seem so hard if it is -- if it is the
8 coach not making himself the center of
9 attention, not -- not addressing the team.

10 JUSTICE KAVANAUGH: I don't know --
11 sorry.

12 MR. KATSKEE: Then it would be -- then
13 it would be -- then it would be permissible and
14 it's -- and it's protected if it's not
15 government speech.

16 JUSTICE KAVANAUGH: I don't know how
17 we could write an opinion that would draw a line
18 based on not making yourself the center of
19 attention as the head coach of a game.

20 MR. KATSKEE: What -- what this Court
21 has said, what this Court has made clear about
22 government speech actually gives that line,
23 which the Court said -- the Court has made clear
24 that the functional analysis requires --
25 requires looking at the manner, the place, the

1 time of the speech and how a reasonable observer
2 would perceive it.

3 And, yes, that is -- that's -- that's
4 not a categorical absolute but for good reason,
5 because the real practical problems on the
6 ground that -- that school districts and other
7 government employers have to deal with don't
8 lend themselves to -- to absolutes.

9 And they certainly don't lend
10 themselves to absolutes where this -- the very
11 same conduct by an employee can be either
12 subject to -- either subject to -- either
13 government speech or subject to balancing if it
14 is -- if it's political but is -- is sort of
15 categorically private and -- and protected by
16 strict scrutiny if it's religious. Nobody's
17 saying you can't --

18 JUSTICE BARRETT: So why would
19 Pickering apply to Justice Kavanaugh's crossing
20 himself example? Your -- I -- I guess let's
21 imagine it's just a free exercise claim. Have
22 we ever applied Pickering balancing?

23 I don't think anybody -- let's just
24 posit that in Justice Kavanaugh's example, the
25 coach visibly crosses himself, visible to

1 everyone, but that no one would mistake that for
2 government speech. It's quite clearly just the
3 private devotional practice of the coach.

4 Why would Pickering apply? Have we
5 ever applied Pickering just to straight-up free
6 exercise claims?

7 MR. KATSKEE: No, but this Court has
8 -- has made clear that that's the mode of
9 analysis for all First Amendment claims. It's
10 done it not just with the Free Speech Clause but
11 also with the Petition Clause by way of example.
12 And to -- to draw a different line would yield
13 bizarre, impossible results.

14 Let me give a couple of examples of
15 what that might mean. You know, suppose that an
16 assistant district attorney objects to the --
17 the DA's request for the death penalty in a case
18 and so writes a letter to the editor -- a letter
19 to the editor complaining and calling the
20 district -- district attorney out for that.

21 Now, on Mr. Kennedy's test, that would
22 be a classic Pickering example if it's a
23 political view or a social view, but it would be
24 subject to strict scrutiny if the motivation for
25 that same letter is -- is religious.

1 JUSTICE ALITO: Suppose that
2 everything about this case is exactly the same
3 as it was in reality, with this one difference:
4 When Coach Kennedy went out to the center of the
5 field on these two occasions, all he did was to
6 wave a Ukrainian flag.

7 Would you have fired him?

8 MR. KATSKEE: It's -- it's not a
9 question of firing, and, in fact, he was put on
10 paid leave.

11 JUSTICE ALITO: Would you have done to
12 him --

13 MR. KATSKEE: But the question is
14 whether --

15 JUSTICE ALITO: -- what you -- would
16 you have done to him what you did to him here?

17 MR. KATSKEE: Then --

18 JUSTICE ALITO: Would you have treated
19 that case differently?

20 MR. KATSKEE: That's absolutely
21 something that can and should be disciplined
22 because the School District doesn't -- doesn't
23 want its event taken over for political speech.

24 JUSTICE ALITO: Where is the -- a
25 School District rule that says that?

1 MR. KATSKEE: The -- the School
2 District has to be able to manage its activities
3 and events. And that's clear under this Court's
4 jurisprudence.

5 JUSTICE ALITO: What -- what reason is
6 there to believe that you would have treated
7 that case the same way?

8 MR. KATSKEE: There -- there's --
9 there's -- not only is there nothing to suggest
10 that it wouldn't have, but it would be -- it
11 would be absurd to think that -- that a -- a
12 teacher or coach could take over the biggest
13 school event of the year and, in front of the
14 students, be pumping for a political -- for a
15 political cause or agenda.

16 The School District has to be able to
17 say --

18 JUSTICE ALITO: Well, what is there in
19 your explanation for the adverse action that you
20 took that would support doing whatever you did
21 to Mr. Kennedy in that situation?

22 MR. KATSKEE: Well, there was -- there
23 was an entire course of conduct here, right?
24 The -- the -- the School District sent Mr.
25 Kennedy a letter on September 17 saying you can

1 pray, including where it's visible to students;
2 just don't pray with and to the students.

3 For a month, he was having prayers at
4 the games and it wasn't a problem. Then he sent
5 the letter on the 14th demanding to go back and
6 do what I was doing before, which is audible
7 prayers. Students have to be able to join. The
8 -- and then -- and then he went to the press and
9 he said, this is how I make these kids better
10 people, and then came the game on the -- on the
11 16th.

12 The idea that the School District
13 couldn't do something when a zoo was created on
14 the field is -- is unimaginable --

15 JUSTICE ALITO: Can the school --

16 MR. KATSKEE: -- that it doesn't need
17 a --

18 JUSTICE ALITO: -- can a school -- can
19 a school district take adverse action against a
20 coach or a teacher because the coach or the
21 teacher, on purely private time, not on school
22 premises, not when the coach or teacher is
23 discharging any official duties, is very, very
24 visibly religious, posts all sorts of religious
25 messages on YouTube? Maybe this coach is -- is

1 an ordained minister and preaches. And the
2 school district says this goes too far, this is
3 not the kind of mentor we want for our students.

4 Can they -- can the district do that?

5 MR. KATSKEE: Usually, no, but it's
6 not an absolute, and that's why Pickering is
7 flexible. Let me give an example for why that
8 would be the case, because, look, students don't
9 -- students' views of what is official and what
10 is compulsory --

11 JUSTICE ALITO: I mean, your district
12 came really close to -- the Ninth Circuit --

13 MR. KATSKEE: Pardon?

14 JUSTICE ALITO: -- in its earlier
15 opinion thought that that was a justification
16 for what the School District did.

17 MR. KATSKEE: What the --

18 JUSTICE ALITO: Kennedy's not a good
19 mentor for the students.

20 MR. KATSKEE: -- what the Ninth
21 Circuit -- the Ninth Circuit clarified in its
22 second opinion what it meant in its first. But
23 the real point is that, to students, whether the
24 coach is acting as a coach doesn't turn on the
25 niceties of government speech doctrine. Suppose

1 that the coach, on his personal Facebook page,
2 says, in my 20 years as a coach, I have never
3 had a student do well or make varsity who
4 doesn't pray with the team before every game.

5 That's a situation that it's -- it's
6 surely private, but it's also surely coercive.
7 It raises Establishment Clause concerns --

8 JUSTICE ALITO: Well, that's a
9 different --

10 MR. KATSKEE: -- and all sorts of
11 other concerns.

12 JUSTICE ALITO: -- that's different
13 from -- that's different from my example.

14 MR. KATSKEE: Pardon?

15 JUSTICE ALITO: That's different from
16 my example, because there, there's quite an
17 express statement that you better -- you better
18 pray and -- and -- and agree with my religious
19 beliefs or you're not going to get a starting
20 position on the team.

21 MR. KATSKEE: What -- what that shows,
22 though, is that there certainly can be -- can be
23 private speech that -- that -- that puts -- puts
24 improper pressure on students to conform
25 religiously or otherwise, and also -- and -- and

1 that's why the -- the test has to be practical
2 and functional. There can't be this categorical
3 -- on Mr. Kennedy's view, there would be --
4 that's -- that's not just private, but there's
5 also strict scrutiny, and that would make an
6 impossible standard for school districts to deal
7 with these real problems.

8 JUSTICE ALITO: Well, I don't really
9 understand --

10 MR. KATSKEE: The answer --

11 JUSTICE ALITO: -- your answer.

12 Suppose the coach has got all sorts of political
13 signs on the front lawn of the coach's house.

14 Can they fire him for that reason?

15 MR. KATSKEE: No, but no one would --
16 no one would view that as government speech,
17 number one, and no one would view that as a
18 message being conveyed to students, something
19 that they're -- that they might benefit from or
20 are supposed to go along with.

21 JUSTICE ALITO: No? No student could
22 -- no student could think that? No student
23 could think that if -- boy, if I don't agree
24 with -- if I don't say things in class, write
25 things in my papers that agree with the coach or

1 if I -- the teacher or I say something that's
2 contrary to what this teacher feels really
3 strongly, that's going to hurt me.

4 MR. KATSKEE: The question would be --

5 JUSTICE ALITO: No -- no -- no student
6 could think that?

7 MR. KATSKEE: The question isn't
8 whether no student can think it. It -- the
9 question is whether -- whether a reasonable
10 observer should think it. It's an objective
11 test.

12 And compare that situation with, for
13 example, the teacher putting up those signs in
14 the classroom. That -- that shows that that --
15 the -- the school district could certainly be
16 concerned about that -- that pressure on the
17 students, that they feel like if they don't
18 voice the opinion that's up on the wall there,
19 that they might be penalized for it, and the
20 district can make the decision that it -- that
21 it is going to regulate that, which -- which
22 will require, on the one hand, if -- if that is
23 private, recognizing the -- the very serious
24 First Amendment interests of the employee, but
25 also recognizing the need to -- not to have

1 material disruptions in class, the need to avoid
2 coercing the -- coercing students to adopt a
3 particular political or social view or
4 interjecting the dissension in the school that
5 that may cause.

6 CHIEF JUSTICE ROBERTS: Justice
7 Thomas, anything further?

8 JUSTICE THOMAS: Just a -- a minor
9 question. Initially, I asked you about
10 someone -- the coach taking a knee during the
11 National Anthem, and you said that, of course,
12 that could be regulated.

13 Do you have any examples where, in
14 fact, that has been done in your school
15 district?

16 MR. KATSKEE: That situation has never
17 arisen, Justice Thomas. And that gets to the
18 attempt to call this -- to call this religious
19 discrimination because the particular act that
20 the School District had to deal with happened to
21 involve -- happened to involve religious
22 expression.

23 JUSTICE THOMAS: Actually, what I'm
24 talking about is the --

25 MR. KATSKEE: But --

1 JUSTICE THOMAS: I'm interested in
2 something that we agree --

3 MR. KATSKEE: Yes.

4 JUSTICE THOMAS: -- could be regulated
5 --

6 MR. KATSKEE: Yes.

7 JUSTICE THOMAS: -- and whether or not
8 there has been disciplinary actions.

9 MR. KATSKEE: So far as I'm aware, the
10 situation -- that situation hasn't presented
11 itself. But it is also --

12 JUSTICE THOMAS: It hasn't presented
13 itself or it hasn't been addressed?

14 MR. KATSKEE: No, hasn't presented
15 itself, Your Honor. There are certainly
16 situations in any school district where there
17 are things that warrant -- that warrant
18 discipline, but -- but there -- there was
19 nothing so far as I am aware and certainly
20 nothing in the record to suggest that anything
21 like that ever happened here.

22 CHIEF JUSTICE ROBERTS: Justice
23 Breyer, anything?

24 Justice Alito?

25 Justice Sotomayor?

1 Justice Kagan?

2 Justice Gorsuch?

3 JUSTICE GORSUCH: Counsel, I just want
4 to make sure I understand the -- the school
5 policy. A minor point, but on Joint Appendix
6 28, it appears that teachers are forbidden from
7 either encouraging or discouraging private
8 student prayer. Is that right?

9 MR. KATSKEE: Yes, Justice Gorsuch.

10 JUSTICE GORSUCH: So the coach was
11 forbidden from discouraging private student
12 prayer?

13 MR. KATSKEE: Absolutely.

14 JUSTICE GORSUCH: Okay. And then
15 suppose -- do you -- well, let me just ask you
16 this on the Establishment Clause. Do you think
17 the right question that we're supposed to ask is
18 whether the activity was coercive of students?

19 MR. KATSKEE: The --

20 JUSTICE GORSUCH: You've mentioned
21 coercion many times in these remarks.

22 MR. KATSKEE: Yes, both -- both
23 coercion and endorsement have mattered since
24 Engel. But let me give some of the places that
25 -- that show coercion in the record.

1 JUSTICE GORSUCH: Well, if you think
2 -- I -- I -- I understand you think the --

3 MR. KATSKEE: Or, excuse me, the
4 District expressing concerns about coercion.
5 But please. I'm sorry.

6 JUSTICE GORSUCH: Let me ask you a
7 hypothetical then --

8 MR. KATSKEE: Yes.

9 JUSTICE GORSUCH: If you think both
10 are relevant.

11 MR. KATSKEE: Yes.

12 JUSTICE GORSUCH: Let's say this Court
13 in a case saw evidence that the School District
14 was focused solely on Lemon and the endorsement
15 test and not coercion, and suppose the Court
16 thought that Lemon had been buried.

17 What -- what then should we do if we
18 thought coercion were the appropriate test but
19 hadn't been applied by the School District or by
20 the court below?

21 MR. KATSKEE: Remand for the lower
22 courts to decide that question. And, here,
23 there would be plenty of basis to show the
24 School District's contemporaneous and expressed
25 concerns for coercion. That would not be a

1 basis to decide for Mr. Kennedy.

2 This was on summary judgment. It
3 would be -- there -- then there would be fact
4 questions for -- for -- presumably for trial
5 about what the coercion was.

6 JUSTICE GORSUCH: Why -- why is it
7 that the School District so emphasized Lemon? I
8 understand your point that it -- there might be
9 -- it's in the record otherwise, but, as Justice
10 Kavanaugh has pointed out, this Court for
11 decades now has resisted attempts to rely on
12 Lemon in cases like this.

13 And it does seem like there's an awful
14 lot of record suggesting reliance on Lemon.

15 MR. KATSKEE: Well, this -- this --
16 the School District was -- was following the --
17 the precedents of this Court that -- that
18 continue to be precedents and haven't changed.
19 But -- but, again, it very much had in mind --
20 and, for instance, in its September 17 letter at
21 JA 44, it specifically mentions that the talks
22 needed to be to the -- to -- needed to be
23 secular "to avoid alienation of any team
24 member."

25 That's talking about coercion. The

1 School District referred to indirect coercion as
2 well in the question-and-answer document and in
3 the earlier statement to the community at the
4 times -- at the times of the September 17 letter
5 to Mr. Kennedy and the September -- October 28th
6 letter.

7 JUSTICE GORSUCH: Well, in the
8 October 22nd letter, for example, it does speak
9 about how a reasonable observer might perceive
10 government endorsement of religion, even though
11 it had pretty clearly disavowed Mr. Kennedy's
12 activities by that point.

13 What do we do about that?

14 MR. KATSKEE: Well, in -- in the first
15 instance, as I said earlier, this Court has made
16 clear that in employment cases one never just
17 looks -- one has to look at the whole record.

18 JUSTICE GORSUCH: I'm -- I'm talking
19 about in the Establishment Clause, counsel.

20 MR. KATSKEE: Yes. And -- and the
21 District had and expressed other Establishment
22 Clause concerns as well of all -- as all of its
23 other -- other concerns, and those were
24 substantial.

25 The coach is an amazingly powerful

1 figure with immense -- with immense coercive
2 authority.

3 JUSTICE GORSUCH: I think we
4 appreciate that, as all teachers do. And -- and
5 we're concerned about implicit coercion as well
6 as explicit coercion for lots of things.

7 To get a good grade, you maybe feel
8 like you have to participate in after-school
9 activities or -- or write an essay in a way that
10 you think will appeal to the teacher's
11 sensibilities or even politics sometimes. But
12 that's not really my question.

13 My question is, if we thought that the
14 School District misunderstood the Establishment
15 Clause teachings of this Court, what should we
16 do?

17 MR. KATSKEE: Well, we -- we still
18 think that -- that -- that -- that two things
19 should -- that the case at that point should be
20 remanded because of the -- of the
21 contemporaneous evidence of coercion and also
22 all the other reasons that the District acted.

23 JUSTICE GORSUCH: If we think the
24 other reasons the District acted are post hoc
25 rationalizations that weren't presented below or

1 at least the district court found the sole
2 reason was this Establishment Clause reason,
3 what do we do about that?

4 MR. KATSKEE: Well, this was on
5 summary judgment. The district court made what
6 Mr. Kennedy's reply brief calls a factual
7 finding at a time when a factual finding is
8 improper.

9 There was -- there was plenty of
10 record evidence of all the other reasons that
11 the district acted and -- and -- and expressions
12 either to Mr. Kennedy or to the community of
13 concerns.

14 And, really, how could a district not
15 be concerned about the zoo that was created on
16 the field and students getting knocked over --
17 over on the 16th or having -- or having an
18 organized prayer circle with state legislators
19 who were addressing the kids on the -- on the
20 26th. These are the things that the -- the
21 superintendent's amicus brief describes all the
22 concerns that school administrators have to deal
23 with in the school context.

24 JUSTICE GORSUCH: So the district
25 court that ruled --

1 MR. KATSKEE: -- and that has to be --

2 JUSTICE GORSUCH: -- ruled in the
3 District's favor is -- was mistaken when --
4 when the district court found it was the sole
5 reason?

6 MR. KATSKEE: It wasn't mistaken for
7 this reason. The -- the -- the Establishment
8 Clause concerns and the way that the district
9 court found, ruled in favor of the District, was
10 correct. If this Court disagrees, then -- then
11 it isn't a basis to grant summary judgment for
12 Mr. Kennedy because, at that point, all factual
13 inferences on summary judgment have to be drawn
14 in the favor of the School District, which means
15 it certainly isn't possible to just ignore all
16 the record evidence. That's what would create
17 fact questions requiring a trial.

18 JUSTICE GORSUCH: Thank you.

19 JUSTICE BREYER: Is Lemon in this
20 case? I mean, do we have to decide Lemon? The
21 reason I ask, honestly, is because, if you see
22 Lemon, despite its imperfections, as an effort
23 to take from other cases, and the first part of
24 the First Amendment, establishment is there
25 first, an effort to prevent the country from

1 becoming more divisive, certainly an effort that
2 remains valid, to prevent it from being more
3 divisive there on the basis of religion.

4 Now, if that's reconsidered, I mean,
5 you're -- you've read a lot on this, how many
6 cases will we be calling into question if that
7 part of it is reconsidered?

8 MR. KATSKEE: That -- that would seem
9 to -- that would seem not only to call into
10 question -- I -- I don't even know how many
11 cases since Lemon but also the cases before.

12 JUSTICE BREYER: Not since Lemon. I'm
13 thinking --

14 MR. KATSKEE: Before.

15 JUSTICE BREYER: -- before and after
16 --

17 MR. KATSKEE: Yes.

18 JUSTICE BREYER: -- on the theme --

19 MR. KATSKEE: Yes.

20 JUSTICE BREYER: -- of preventing
21 division on the basis of religion.

22 MR. KATSKEE: Yes. That -- that would
23 -- that would certainly apply to, I think, all
24 the -- at least all the school cases that the
25 Court has had.

1 And -- and I want to say some -- I --
2 I -- I think that that's particularly pertinent
3 because, if the Court looks, for instance, at
4 the amicus brief of the members of the Bremerton
5 community and what dissension it caused there,
6 or look at the amicus brief of the -- of the
7 East Brunswick School District personnel for the
8 immense horrible divisions and attacks that were
9 caused there, or look at the footnote in Santa
10 Fe, where the Court described the -- the need of
11 the district court to -- to order people to stop
12 trying to find out what -- who the -- who the --
13 the Catholic and Mormon families in that case
14 who were pseudonymous plaintiffs to figure out
15 who they are because of the -- because of the
16 harassment risks. So all those things matter.

17 And I think it factors into every
18 case, not to the same degree, but in schools, it
19 figures overwhelmingly both in this Court's
20 cases and in the lower court's cases.

21 JUSTICE GORSUCH: Would it be
22 overruling Lemon not to apply it since we
23 haven't applied it in, I don't know, 20 or 30
24 years?

25 MR. KATSKEE: It -- it --

1 JUSTICE GORSUCH: We've been asked to
2 many times and we haven't done it in 20 or 30
3 years.

4 MR. KATSKEE: It -- it wouldn't be
5 overruling --

6 JUSTICE GORSUCH: It would be doing
7 exactly what we've been doing, right?

8 MR. KATSKEE: Yes, but, here, what
9 that -- what -- what -- what then that would
10 mean is that the Court should still be looking
11 at -- at coercion --

12 JUSTICE GORSUCH: At coercion, right.
13 We --

14 MR. KATSKEE: -- and we think
15 endorsement also.

16 JUSTICE GORSUCH: -- we agree on that.
17 We agree on that. All right.

18 CHIEF JUSTICE ROBERTS: Justice
19 Kavanaugh?

20 JUSTICE KAVANAUGH: Just to follow up
21 on that, my understanding of what you're saying
22 here is that the Establishment Clause rationale
23 was based on two distinct concerns, one
24 endorsement, the other coercion.

25 Is that accurate?

1 MR. KATSKEE: Yes, although they're --
2 they are related, but yes.

3 JUSTICE KAVANAUGH: Okay. And on
4 endorsement, as Justice Gorsuch says, we have
5 not used endorsement in Van Orden, Town of
6 Greece, American Legion, in a long time. So
7 let's put that to the side for the moment and I
8 take your arguments about that.

9 But, on coercion, and just to follow
10 up on the endorsement point, we did not apply
11 Lemon in Lee versus Weisman, for example, the
12 schools case that extended Engel to graduation
13 prayer, so that didn't happen there.

14 On the coercion side, there are
15 different forms of coercion, as you've been
16 talking about. There's actual you are compelled
17 to be -- to say the prayer. That's not
18 happening here. You're compelled to be present
19 at an event where prayer will be spoken. That
20 is Engel. That is Lee versus Weisman. That is
21 Santa Fe.

22 But I think you're not saying that
23 here either. You're saying there's kind of an
24 implicit peer pressure, subtle coercion,
25 implicit coercion. If I'm wrong about that,

1 tell me. But that seems a different concern
2 than the Lee versus Weisman, Engel, Santa Fe
3 concern and seems to run into the line-drawing
4 problems that you and I were discussing earlier.

5 So whatever you want to say in
6 response to all that.

7 MR. KATSKEE: This Court in -- the
8 term that this Court used in Engel was "indirect
9 coercion." And this Court very much said that
10 in the public schools, indirect coercion matters
11 to -- indirect coercion of students, I believe
12 it said, of -- of members of minority faiths to
13 -- to conform to a religious practice is an
14 Establishment Clause violation.

15 That was not -- that was not, if you
16 don't join the prayer, you'll be off the team.
17 That was -- that was the sort of situation where
18 students can reasonably understand, and, here,
19 very much students and parents understood that
20 you have to go along to get along. That's what
21 it means to play football.

22 To -- to determine otherwise, to say
23 that that isn't coercion would -- would require
24 getting rid of cases all the way back to Engel
25 and Schempp, and it would also --

1 JUSTICE KAVANAUGH: I guess I -- I
2 guess I --

3 MR. KATSKEE: -- cast serious doubt
4 on --

5 JUSTICE KAVANAUGH: I'm going to stop
6 you there and challenge you on that. I don't
7 see why the Court couldn't say -- and I'm not
8 saying this is what we should do, just as -- but
9 on the line-drawing -- Engel, Lee versus
10 Weisman, Santa Fe all remain in place. And
11 Santa Fe applies, you know, logically to locker
12 room or huddle speech, but we're not going to
13 extend Santa Fe to something beyond that really
14 for the line-drawing reasons. The sign of the
15 cross example, you had -- we had a discussion
16 about that and there would be many other
17 hypotheticals. We just can't have center of the
18 attention be the line for Establishment Clause
19 purposes, for example.

20 MR. KATSKEE: The -- the -- the
21 line -- the line that this Court drew in
22 Garcetti for government speech would solve the
23 problem completely without any need to get to
24 any of these questions because this was
25 government speech.

1 Otherwise, it shouldn't be necessary
2 to -- to decide conclusively an Establishment
3 Clause question, though we think it is easy and
4 clear under Santa Fe and Lee and Engel and
5 Schempp and Pierce against Society of Sisters,
6 as a free exercise case pointing in the same
7 direction, because of the fact that in -- under
8 Pickering, the analysis takes very seriously the
9 employee's free speech and free exercise rights,
10 but it also takes account of everyone else's
11 free exercise and -- everyone else's free
12 exercise rights, the students' and their
13 parents', and all the necessary concerns about
14 managing an event and everything else.

15 On Mr. Kennedy's test, the -- the
16 Court would ignore all of that. Nobody's --
17 nobody's religious freedom rights count except
18 for -- except for the employee's. That's an
19 exceedingly peculiar result for a context that
20 is a government employee who was hired to and
21 charged with -- with teaching and educating
22 students.

23 JUSTICE KAVANAUGH: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Barrett?

1 JUSTICE BARRETT: I just want to
2 clarify one thing about your argument related to
3 that last point. If we disagree with you that
4 this was government speech, so if we think this
5 was private speech, we don't even get into the
6 Establishment Clause because there's no state
7 action, right?

8 So we're not asking these questions
9 about coercion for purposes of discerning
10 whether there was an Establishment Clause
11 violation, but we would be merely doing the
12 Pickering analysis, which arguably might bring
13 in things that -- you know, Justice Gorsuch said
14 let's assume we think some of those were post
15 hoc rationalizations. We would need to get into
16 all of that because we wouldn't be doing a
17 straight-up Establishment Clause coercive
18 analysis.

19 MR. KATSKEE: Well, the -- the place
20 to start is -- is -- certainly, the right frame
21 of analysis is Pickering. But -- but it is not
22 -- but it isn't and we think can't be correct
23 that there's no situation in which -- in which
24 conduct that is deemed private under Garcetti by
25 a school official is -- is not an Establishment

1 Clause violation like the example that I gave
2 to -- I believe it was Justice Alito, about the
3 coach who posts on the Facebook I've never seen
4 anybody who makes --

5 JUSTICE BARRETT: That's state action?

6 MR. KATSKEE: No, I'm saying that it
7 isn't, and yet it still poses an Establishment
8 Clause problem of coercion.

9 JUSTICE BARRETT: Because it would be
10 government speech?

11 MR. KATSKEE: No, I -- no.

12 JUSTICE BARRETT: But where's the
13 state action? I mean, I see that there's
14 coercion, but you could have coercion in all --
15 from all kinds of private sources.

16 MR. KATSKEE: There --

17 JUSTICE BARRETT: Where's the state
18 action there?

19 MR. KATSKEE: There -- there -- there
20 shouldn't need to be state action for an
21 Establishment Clause violation even though it --
22 it would be rare when one would have a violation
23 without state action. There is -- here, of
24 course, there is state action not only because
25 he's a public employee performing his duties in

1 a place and time where only he can and in a way
2 that the students expected that to be, but also
3 the School District has conferred authority on
4 him which everybody there knows.

5 All that being said, though, we think
6 the real point is that not only does it not need
7 to be -- not necessarily have to be functioning
8 as a -- as a government employee at the time of
9 the speech for it to raise Establishment Clause
10 concerns, but it also raises all sorts of other
11 concerns that, under Pickering, the School
12 District has to be --

13 JUSTICE BARRETT: I get --

14 MR. SKATSKEE: -- able to address
15 also. Yes?

16 JUSTICE BARRETT: -- I get your
17 Pickering argument. I just --

18 MR. KATSKEE: I'm sorry.

19 JUSTICE BARRETT: -- didn't understand
20 how there could be the Establishment Clause
21 violation absent state action. But thank you.
22 You answered.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 MR. KATSKEE: Thank you, Your Honor.

1 CHIEF JUSTICE ROBERTS: Rebuttal, Mr.
2 Clement?

3 REBUTTAL ARGUMENT OF PAUL D. CLEMENT
4 ON BEHALF OF THE PETITIONER

5 MR. CLEMENT: Thank you, Mr. Chief
6 Justice. Just a few points in rebuttal.

7 First, in terms of the correct test, I
8 don't think the correct test when the government
9 explicitly discriminates on the basis of
10 religion is Pickering. Religion is different.

11 In the context of free speech, we're
12 used to saying, well, if you just spoke over
13 there, you had alternative methods of
14 communication, time, place, and manner, there's
15 some flexibility on that. That doesn't happen
16 in religion because it's a compelled, sincere
17 religious belief. If you tell a Muslim if they
18 could just reorient themselves in the other
19 direction, you're denying them their religious
20 exercise. So you need a test that is fit for
21 religion cases, and strict scrutiny provides
22 that.

23 If you want to give courts and
24 district courts -- rather, school districts
25 guidance, the last thing you should do is

1 replace jurisprudence that's becoming clearer
2 and could be made clearer in this case about
3 discrimination against religion and the
4 Establishment Clause and replace it with
5 Pickering. A balancing test doesn't provide
6 guidance.

7 The only thing worse than Pickering, I
8 suppose, would be a center of attention test.
9 And that doesn't actually capture the real world
10 examples anyways. Right after Mohamed Salah
11 scores the goal, he is, of course, the center of
12 attention and he engages in a religious
13 exercise. Right after Tim Tebow scores the
14 touchdown, he's absolute the center of
15 attention. Yet, he engages in a religious
16 exercise. It's private, it's permissible, and
17 the government can't stop it.

18 Second, in terms of Santa Fe, we've
19 discussed this a bunch, but my friend on the
20 other side does say, well, wait, this is worse,
21 this is coach speech, not student speech. But
22 you can't strip away all the context of Santa
23 Fe. If everything else were the same, sure, the
24 fact that it was coach speech would be worse.
25 But it's not all the same.

1 That case, the student was using the
2 loudspeaker as the winner of a majoritarian
3 election to be the designated spokesperson for
4 the school. This case, it's the coach engaged
5 in his private religious exercise. He happens
6 to pick that point at the -- the center of the
7 field. He's actually not the center of
8 attention if you look at the videos, which are
9 in the record, but -- because there's lots of
10 other activity going on, but that's his
11 religious exercise. It's protected.

12 Now, third, the record here -- I mean,
13 the -- people seem like they dispute everything,
14 but the record speaks for itself on this case.
15 There are three games that are particularly
16 relevant. The 16th, the homecoming game, that's
17 what my friends describe as the circus, the
18 media circus, people coming onto the field.

19 Well, there was a letter sent in
20 response to that game in particular. It's at
21 Joint Appendix pages 90 to 95. It uses the
22 phrase "endorse and endorsing" and raises
23 endorsement concerns eight times. It talks
24 about safety concerns zero times. It talks
25 about coercion concerns zero times. That's the

1 16th.

2 Then, by the 23rd, that's a game that
3 is one of the two games on which the actual
4 discipline turns. That's a prayer where no one
5 -- no one joins the coach in his prayer.

6 The 26th is then the next home game.
7 They have a much better security system that
8 time. They've addressed that pretextual
9 problem, and there's a prayer. No prayer -- no
10 player joins it from either team on the 26th.

11 Yet, the 23rd and the 26th are the
12 prayers where he's disciplined. He was not
13 disciplined for having a state legislator on the
14 field. That's simply not what happened in this
15 case.

16 And, again, the record speaks for
17 itself not just contemporaneously. As I said,
18 the score in the letter sent after the 16th game
19 is 8 to 0. Endorsement, 8; other concerns, 0.

20 But then, when they lawyer up and have
21 their lawyer send a letter to the EEOC at pages
22 Joint Appendix 132 to 142, what concern did they
23 express as their stated sole driving
24 consideration? It is, again, endorsement, 8 to
25 0. Eight mentions of endorsement. Nothing else

1 is mentioned.

2 So I'll finish with this point.

3 Please do not remand to the Ninth Circuit for an
4 application of the coercion test. There's no
5 evidence of coercion contemporaneously. Joint
6 Appendix 105, the school itself stressed no
7 evidence of actual coercion.

8 The only evidence that showed up later
9 was a couple of parents complaining about their
10 students who had to turn their back on the team
11 or separate themselves from team activity,
12 obviously directed at the pre-September 17th
13 activity that's no longer at issue in the case.
14 There's no evidence of coercion in this record.

15 But, worse still, I mean, my client
16 has already waited six years to get his job
17 back. And if you imagine the parallel for this
18 is a race case where the lower courts, both
19 lower courts, said the sole reason the
20 government acted was because of race, but yet we
21 think it's okay because there's this compelling
22 interest. If this Court took that case up and
23 said there's nothing to the compelling interest,
24 it wouldn't send it back down to see if there
25 was some other reason when the courts had

1 already found the sole basis for the action was
2 on the basis of race.

3 Here, the record is clear. Two courts
4 that didn't agree with much of what we said said
5 the sole basis for the government's reaction --
6 actions here were religion.

7 That is not something that should
8 stand. Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel. The case is submitted.

11 (Whereupon, at 11:48 a.m., the case
12 was submitted.)

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